

**UNITED  
NATIONS**



International Tribunal for the Prosecution of  
Persons Responsible for Serious Violations of  
International Humanitarian Law Committed in  
the Territory of Former Yugoslavia since 1991

Case No. IT-04-81-PT

Date: 02 September 2008

Original: English

**IN TRIAL CHAMBER I**

**Before:** Judge Alphons Orie, Presiding Judge  
Judge Christine Van Den Wyngaert  
Judge Bakone Justice Moloto

**Registrar:** Mr. Hans Holthuis

**Decision of:** 02 September 2008

**PROSECUTOR**

**v.**

**MOMČILO PERIŠIĆ**

***PUBLIC***

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**DECISION ON PROSECUTION'S MOTION FOR  
JUDICIAL NOTICE OF FACTS AND DOCUMENTS  
RELEVANT TO THE ZAGREB CRIME BASE**

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**The Office of the Prosecutor**

Mr. Mark Harmon

**Counsel for the Defence**

Mr. Novak Lukić  
Mr. Jim Castle  
Mr. Gregory Guy-Smith

**TRIAL CHAMBER I** (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seized of the Prosecution’s “Motion for Judicial Notice of Facts and Documents Relevant to the Zagreb Crime Base” (“Motion”), filed publicly with confidential annexes on 27 June 2008, and hereby renders its Decision.

## I. PROCEDURAL HISTORY AND SUBMISSIONS

1. In its Motion, the Prosecution requests the Trial Chamber to take judicial notice pursuant to Rule 94(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) of (i) 63 facts listed in Confidential Annex A to the Motion (“Proposed Facts”), which it asserts were adjudicated in the *Martić* Trial Judgment<sup>1</sup> and of (ii) 353 documents listed in Confidential Annex B (“Proposed Documents”), “which were introduced, authenticated and admitted into evidence by the Trial Chamber in the *Martić* case and upon which the Trial Chamber relied in rendering its judgement in that case”.<sup>2</sup>

2. The Prosecution submits that the Proposed Facts and the Proposed Documents meet all the requirements for admissibility under Rule 94(B).<sup>3</sup> The Prosecution also submits that the admission of the Proposed Facts and Proposed Documents will not prejudice the right of the Momčilo Perišić (“Accused”) to a fair trial since the ultimate burden to prove beyond reasonable doubt the guilt of the Accused always remains with the Prosecution.<sup>4</sup> Moreover, the Prosecution asserts that the facts and documents relate to specific aspects of particular incidents and cannot be said to be broad and tendentious.<sup>5</sup> Finally, the Prosecution submits that the taking of judicial notice of the Proposed Facts and Documents would obviate the need to call eight witnesses in relation to the crime base in Zagreb and will contribute to a fair and expeditious trial.<sup>6</sup>

3. On 10 July 2008, the Defence confidentially filed its “Defense Objection to Prosecution’s Motion For Judicial Notice of Facts and Documents Relevant to the Zagreb Crime Base, With Confidential Annexes” (“First Response”), originally objecting to the Proposed Facts. The Defence contends that the Proposed Facts do not meet the necessary criteria for admission and that any

<sup>1</sup> *Prosecutor v. Milan Martić*, IT-95-11-T, Judgement, 12 June 2007 (“*Martić* case”).

<sup>2</sup> Motion, para. 2.

<sup>3</sup> Motion, paras 14-27.

<sup>4</sup> Motion, paras 28-29.

<sup>5</sup> Motion, para. 30.

<sup>6</sup> Motion, paras 33-35.

negligible gain in terms of trial expediency would be far outweighed by damage to the Accused's right to a fair trial.<sup>7</sup>

4. On 10 July 2008, the Defence publicly filed a "Request to Exceed Word Limit and Addendum to Defence Objection to Prosecution's Motion for Judicial Notice of Facts and Documents Relevant to the Zagreb Crime Base, With Confidential Annexes" ("Request and Addendum"). The Trial Chamber denied the Request and Addendum because the Defence had not shown good cause.<sup>8</sup>

5. On 17 July 2008, the Prosecution publicly filed a "Request for Leave to Reply to (1) Defence Response to Prosecution Motion for Judicial Notice of Facts and Documents Relevant to the Zagreb Crime Base and (2) Defence Request to Exceed Word Limit and Addendum" ("Request for Leave to Reply").

6. On 22 July 2008, the Prosecution and Defence publicly filed, with a confidential annex, a "Parties Joint Submission in Respect of Facts Relevant to the Zagreb Crime Base With Amended Confidential Annex A" ("Joint Submission"), in which the Prosecution amends the Confidential Annex A of the Motion to include two additional facts ("Amended Confidential Annex A") and the Defence does not oppose judicial notice being taken of all Proposed Facts as amended.<sup>9</sup>

7. On 28 July 2008, the Defence confidentially filed its "Defence Objection to Documents Relevant to the Zagreb Crime Base" ("Second Response") in which it takes issue with two of the 353 Proposed Documents but does not object to the taking of judicial notice of the remaining Proposed Documents in the interest of judicial economy.<sup>10</sup> The Defence objects to the taking of judicial notice of Proposed Documents 351 and 352, which it asserts are expert documents.<sup>11</sup>

## II. APPLICABLE LAW

8. Rule 94(B) of the Rules provides that:

At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

<sup>7</sup> First Response, paras 4, 12-15.

<sup>8</sup> Decision on Defence Request to Exceed Word Limit and Addendum to Defence Objection to Prosecution's Motion for Judicial Notice of Facts and Documents Relevant to the Zagreb Crime Base, With Confidential Annexes, 24 July 2008.

<sup>9</sup> Joint Submission, para. 2.

<sup>10</sup> Second Response, para. 2.

<sup>11</sup> Second Response, para. 3.

### A. Adjudicated Facts

9. The Trial Chamber has set out at length the settled jurisprudence of the Tribunal with regard to the judicial notice of adjudicated facts in its recent “Decision of Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo” (“Decision on Adjudicated Facts Concerning Sarajevo”) issued on 26 June 2008.<sup>12</sup>

### B. Documentary Evidence

10. The rationale behind Rule 94(B) with respect to documentary evidence is that judicial economy is served by not having to recreate findings in relation to a document’s reliability, which has already been made by a prior Chamber.<sup>13</sup> Rule 94(B) aims at “achieving judicial economy and harmonising judgements of the Tribunal by conferring the Trial Chamber with the discretionary power to take judicial notice of facts or documents from other proceedings and that this power has to be exercised on the basis of a careful consideration of the right of the accused to a fair and expeditious trial, that is in keeping with the principle of a fair trial enshrined in Articles 20 and 21 of the Statute”.<sup>14</sup>

11. The legal effect of judicial notice of documentary evidence is that “documents will be admitted into evidence and used precisely for their contents, and not merely for their existence and authenticity”.<sup>15</sup> By taking judicial notice of a document, the moving party is relieved of its duty to seek admission into evidence of the document as relevant and of probative value. It further establishes a well-founded presumption of authenticity, which may be challenged at trial. Although admission in the other trial, especially if the prior Chamber relied on the document for the establishment of relevant facts, may assist the Trial Chamber in weighing the probative value of the document as to its contents, the Trial Chamber emphasises that it is for the Bench in the current proceedings to finally make determinations in this respect, in view of the totality of the evidence before it.

12. The party seeking judicial notice must establish that the document (i) was admitted into evidence in a previous trial and (ii) relates to matters at issue in the current proceedings.<sup>16</sup> With

<sup>12</sup> Decision on Adjudicated Facts Concerning Sarajevo, paras 13-17.

<sup>13</sup> *Prosecutor v. Milan Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006 (“*Milutinović et al.* Decision”), para. 30.

<sup>14</sup> *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Prosecution’s Motion for Admission of Documentary Evidence Pursuant to Rule 94(B), 9 July 2007 (“*Delić Pre-Trial Decision*”), p. 3. See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (“*Karemera et al.* Appeal Decision”), para. 41.

<sup>15</sup> *Milutinović et al.* Decision, para. 31.

<sup>16</sup> *Delić Pre-Trial Decision*, p. 4; *Milutinović et al.* Decision, para. 16. See also *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant’s Motion for Judicial Notice, 1 April 2005 (“*Nikolić Appeal Decision*”), para. 11.

respect to the second requirement, the fact that a document was deemed relevant in another trial does not mean that it is automatically relevant to the present case and that the Trial Chamber must still find that each document is relevant to matters at issue in the current proceedings.<sup>17</sup> As a consequence, the moving party must discharge its burden with regard to relevance as though it were offering the evidence in the usual manner under Rule 89(C).<sup>18</sup> More specifically, the moving party must ensure that the documents have more than a merely remote connection to the current proceedings, and the imperative factor will be identifying the precise portions of documents for which a party seeks judicial notice with clarity and specificity as well as proving their particular relevance to the current proceedings.<sup>19</sup>

13. Whether to finally take judicial notice of documentary evidence is under the discretionary power of the Trial Chamber. Although judicial economy may be served by taking judicial notice of documentary evidence, it should not affect the fairness of the trial, which is a fundamental right of the accused.<sup>20</sup>

### III. DISCUSSION

14. At the outset, the Trial Chamber notes that the Defence does not oppose judicial notice being taken of the Proposed Facts and Documents, with the exception of two Proposed Documents.<sup>21</sup> Therefore, the Trial Chamber will exercise its discretionary power in a manner most conducive to the fair and expeditious conduct of the proceedings, as manifested in the Joint Submission.

15. Moreover, the Trial Chamber notes that the Joint Submission has rendered the Defence objections contained in its First Response moot. Consequently, the submissions contained in the Prosecution's Request for Leave have become moot as well. Therefore, they need not be addressed further in this Decision.

<sup>17</sup> *Delić* Pre-Trial Decision, p. 4; *Milutinović et al.* Decision, paras 30, 32.

<sup>18</sup> *Delić* Pre-Trial Decision, p. 4, quoting *Milutinović et al.* Decision, para. 30.

<sup>19</sup> *Delić* Pre-Trial Decision, p. 4; *Milutinović et al.* Decision, para. 16. See also *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts Rule 94(B) of the Rules of Procedure and Evidence, 10 December 2004 ("*Bizimungu et al.* Decision"), para. 11. The Appeals Chamber in *Nikolić* held that "the mere reference to whole sections or paragraphs of "documentary evidence" of a previous judgment is insufficient to trigger the exercise of the Chamber's discretion under Rule 94(B) of the Rules", *Nikolić* Appeal Decision, para. 47.

<sup>20</sup> See *Delić* Pre-Trial Decision, p. 4.

<sup>21</sup> Joint Submission, para. 2; Second Response, paras 2-3.

## A. Proposed Facts

### 1. The Proposed Fact Must be Distinct, Concrete and Identifiable

16. A fact of which judicial notice is sought should be distinct, concrete and identifiable in the findings of the original judgement.<sup>22</sup> In particular, all proposed adjudicated facts should be understood in the context of the judgement “with specific reference to the place referred to in the judgement and to the indictment period of that case”.<sup>23</sup> It follows that when adjudicated facts proposed for admission are insufficiently clear even in their original context, the Trial Chamber should not take judicial notice of them.<sup>24</sup>

17. The Trial Chamber finds that Proposed Fact 40 does not meet the requirement in exam as it is not clear whether Luka Skračić is one of the two people who were killed in the attack mentioned.<sup>25</sup> Moreover, the Trial Chamber notes that most of the information contained in Proposed Fact 40 is repeated in Proposed Fact 58.<sup>26</sup> Proposed Fact 40 should therefore not be admitted.

18. The Trial Chamber notes that Proposed Fact 58 contains a grammatical mistake. In this context, the Trial Chamber notes that if a proposed fact contains only a minor inaccuracy or ambiguity, a Trial Chamber may, in its discretion, correct the inaccuracy or ambiguity.<sup>27</sup> The Trial Chamber therefore corrects Proposed Fact 58 by deleting the word “that” before the words “54 people” which was used in the grammatical context of the original sentence.<sup>28</sup>

19. In order to avoid ambiguity, the Trial Chamber clarifies Proposed Fact 8 by replacing the words “the city” with the word “Zagreb”.<sup>29</sup>

20. The Trial Chamber also notes that Proposed Facts 19, 22, 24, 28, 29, 35, 51 contain language indicating the existence of medical conditions that had resulted from the attacks on the

<sup>22</sup> *Prosecutor v. Krajišnik*, IT-00-39-T, Decision on Third and Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 24 March 2005 (“*Krajišnik Decision*”), para. 14. See also *Prosecutor v. Prlić et al.*, IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 14 March 2006, (“*Prlić et al. Pre-Trial Decision*”), para. 21; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, para. 16.

<sup>23</sup> *Krajišnik Decision*, para. 14, fn. 44.

<sup>24</sup> *Ibid.*

<sup>25</sup> Proposed Fact 40 reads as follows: “Two people were killed in this attack. Luka Skračić was injured on 3 May 1995 and died in hospital on 6 June 1995.”

<sup>26</sup> Proposed Fact 58 reads as follows: “Luka Skračić and Ivan Markulin were killed and that [*sic*] 54 people were injured as a result of the shelling on Zagreb on 3 May 1995.”

<sup>27</sup> *Delić Pre-Trial Decision*, para. 21. See also *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 (“*Popović et al. Decision*”), para. 7.

<sup>28</sup> Corrected Proposed Fact 58 will read as follows: “Luka Skračić and Ivan Markulin were killed and 54 people were injured as a result of the shelling on Zagreb on 3 May 1995.”

<sup>29</sup> Corrected Proposed Fact 8 will read as follows: “Rockets struck the centre of Zagreb, including: Strossmayer Square, Matica Hrvatska Street, Petrinjska Street, Boskovićeva Street and Mrazovićeva Street as well as Draškovićeva Street,

City of Zagreb on 2 and 3 May 1995 and persisted to the time of the *Martić* Trial Judgement.<sup>30</sup> While the language taken from the *Martić* Judgement suggests that these medical conditions persisted after the *Martić* Trial Judgement was delivered, this does not affect the distinct, concrete or identifiable nature of the Proposed Facts in question. For the sake of clarity, the Trial Chamber underlines that these Proposed Facts can only reflect the situation up till the date of the *Martić* Trial Judgement.

## 2. The Proposed Fact Must be Pertinent and Relevant to the Case

21. The proposed facts must be relevant to a matter at issue in the current proceedings. As the Appeals Chamber has noted, “Rule 94 of the Rules is not a mechanism that may be employed to circumvent the ordinary requirement of relevance and thereby clutter the record with matters that would not otherwise be admitted.”<sup>31</sup> The Prosecution submits that the Proposed Facts “pertain to the factual findings adjudicated in the *Martić* case in relation to the shelling of the city of Zagreb on 2 and 3 May 1995, ordered by Milan Martić and Milan Čeleketić, with which the accused is charged and which is described in paragraphs 47 to 51 and Schedule C of the Second Amended Indictment (“Indictment”).”<sup>32</sup>

22. The Trial Chamber finds that all Proposed Facts are sufficiently pertinent and relevant for the crimes with which the Accused is charged in relation to Zagreb in Counts 5 to 8.

## 3. The Proposed Fact Must not Contain any Findings or Characterisations That are of an Essentially Legal Nature

23. The proposed facts must not contain any findings or characterisations that are of an essentially legal nature. In other words, they must represent *factual findings* of a Trial Chamber or Appeals Chamber.<sup>33</sup> In general, findings related to the *actus reus* or the *mens rea* of the perpetrator of a crime are deemed to be factual findings.<sup>34</sup> In determining whether a proposed fact is truly a factual finding, the jurisprudence has held that “many findings have a legal aspect, if one is to construe this expression broadly. It is therefore necessary to determine on a case-by-case basis

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the intersection of Vlaška and Draškovićeve Streets and a school building in Križanićeve Street, the village of Plešo near Zagreb/Plešo airport, and the airport itself.”

<sup>30</sup> These facts include formulations such as “still suffer from the injury sustained on that day”, “still has pieces of shrapnel in her liver”, “had received approximately twelve pieces of shrapnel, six of which still remain in her body”, “still has over 45 pieces of shrapnel in her leg”, “still suffers constant pain”, “some of the shrapnel remains to this day” and “still spends three weeks of every year in rehabilitation”.

<sup>31</sup> *Prosecutor v. Semanza*, ICTR-97-20-I, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000, para. 24; *Nikolić* Appeal Decision, para. 52.

<sup>32</sup> Motion, para. 17.

<sup>33</sup> *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals against Trial Chamber’s Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts, 26 June 2007 (“*Dragomir Milošević* Appeal Decision”), paras 19-22; *Krajišnik* Decision, para. 15.

whether the proposed fact contains findings or characterizations that are of an essentially legal nature and which must, therefore, be excluded”.<sup>35</sup>

24. The Trial Chamber is satisfied that all Proposed Facts meet the standard required.

4. The Proposed Facts Must not be Based on an Agreement Between the Parties to the Original Proceedings

25. The proposed facts must be truly adjudicated in that they were not based on an agreement between the parties to the original proceedings, such as a plea agreement under Rules 62 *bis* and 62 *ter*, or an agreement between the parties on matters of fact in accordance with Rule 65 *ter* (H).<sup>36</sup> Whether the facts are based on an agreement between the parties, as noted in the jurisprudence, is clear where the structure of the relevant footnote in the original judgement cites the agreed facts between the parties as a primary source of authority.<sup>37</sup>

26. In applying this requirement, it becomes clear that the *Martić* Trial Chamber adjudicated the facts based on their evaluation of witness testimony and documentary evidence before it. Therefore, the Trial Chamber does not find that any of the Proposed Facts are based on an agreement between the parties.

5. The Proposed Fact Must not be Subject to Pending Appeal or Review

27. The proposed facts must not be contested on appeal. Thus, “[o]nly facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed “adjudicated facts” within the meaning of Rule 94(B)”.<sup>38</sup> Proposed facts forming part of a judgement which is under appeal still fulfil this requirement if they fall “within issues which are not in dispute on appeal”.<sup>39</sup> The Prosecution submits that, while the *Martić* case is currently on appeal, none of the Proposed Facts are at issue in that appeal.<sup>40</sup>

<sup>34</sup> *Krajišnik* Decision, para. 16.

<sup>35</sup> *Krajišnik* Decision, para. 19. See also *Dragomir Milošević* Appeal Decision, paras 19-22.

<sup>36</sup> Decision on Adjudicated Facts Concerning Sarajevo, para. 27.

<sup>37</sup> *Popović et al.* Decision, para. 11.

<sup>38</sup> See *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Decision on the Motions of Drago Jospović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice Taken Pursuant to Rule 94(B), 8 May 2001, (“*Kupreškić et al.* Decision”), para. 6; *Krajišnik* Decision, para. 14; *Prlić et al.* Pre-Trial Decision, paras 12, 15.

<sup>39</sup> *Krajišnik* Decision, para. 15.

<sup>40</sup> Motion, para. 20.



28. Having reviewed the submissions of the parties on appeal, the Trial Chamber finds that the factual basis contained in the Proposed Facts is not subject to dispute by the parties in the appeal.<sup>41</sup>

6. The Proposed Fact Must not Relate to Acts, Conduct, or Mental State of the Accused

29. A Trial Chamber must withhold judicial notice of any alleged adjudicated fact relating to the acts, conduct and mental state of the accused. Two factors warrant this “complete exclusion”. First, to strike a “balance between the procedural rights of the Accused and the interest of expediency that is consistent with the one expressly struck in Rule 92 *bis*”.<sup>42</sup> Second, “there is reason to be particularly sceptical of facts adjudicated in other cases when they bear specifically on the actions, omissions, or mental state of an individual not on trial in those cases [as] the defendants in those other cases would have had significantly less incentive to contest those facts than they would facts related to their own actions; indeed, in some cases such defendants might affirmatively choose to allow blame to fall on another”.<sup>43</sup> This requirement does not, however, apply to the conduct of other persons for whose criminal acts and omissions the accused is alleged to be responsible through one or more of the forms of liability in Article 7(1) or (3) of the Statute.<sup>44</sup>

30. The Trial Chamber notes that the Proposed Facts refer to conduct of Milan Martić and Milan Čeleketić and to consequences of that conduct. Both individuals are not accused persons in this case. As such, the judicial notice of the Proposed Facts only concerns crimes physically perpetrated by persons other than the Accused and for which the Accused is indicted for his alleged responsibility as a superior pursuant to Article 7(3) of the Statute. In order to establish the Accused’s responsibility, the Prosecution still bears the burden to prove the existence of the requirements under Article 7(3) of the Statute. Therefore, the Trial Chamber finds that the Proposed Facts do not relate to acts, conduct or the mental state of the Accused.

7. The Formulation of a Proposed Fact Must not Differ Substantially From the Formulation in the Original Judgement

31. The facts of which judicial notice is sought must be formulated by the moving party in the same way – or at least in a substantially similar way – as the formulation used in the original judgement.<sup>45</sup> Furthermore, a Trial Chamber can and indeed must decline to take judicial notice of

<sup>41</sup> See *Prosecutor v. Milan Martić*, IT-95-11-A, Prosecution’s Appeal Brief, 25 September 2007; *Prosecutor v. Milan Martić*, IT-95-11-A, Public Redacted Version Appellant’s Brief, 5 May 2008.

<sup>42</sup> *Karemera et al.* Appeal Decision, para. 42. See also *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 (“*Popović et al.* Decision”), para. 51.

<sup>43</sup> *Karemera et al.* Appeal Decision, para. 51.

<sup>44</sup> *Ibid.*, para. 48.

<sup>45</sup> *Krajišnik* Decision, para. 14; *Prlić et al.* Pre-Trial Decision, para. 21.

facts which are “out of the context” if it considers that the way they are formulated – abstracted from the context in the judgement from where they came – is misleading or inconsistent with the facts actually adjudicated in the cases in question.<sup>46</sup> Finally, a proposed fact also has to be examined in the context of the other proposed facts submitted. It follows that the Trial Chamber must deny judicial notice if the proposed fact is either unclear in that context or has become unclear because one or more of the surrounding purported facts will be denied judicial notice.<sup>47</sup>

32. The Trial Chamber has already found Proposed Fact 40, which is unclear when taken out of context, to fall short of the requirements for judicial notice. The Trial Chamber finds that all other Proposed Facts do not substantially differ from the *Martić* Trial Judgment and are sufficiently clear in the context of the other Proposed Facts.

### 8. Trial Chamber’s Residual Discretion

33. Besides the application of these requirements, in exercising its discretion the Trial Chamber has carefully assessed whether the admission of the Proposed Facts would advance judicial economy while still safeguarding the rights of the Accused. The Trial Chamber notes that the Defence does not object to any of the Proposed Facts.<sup>48</sup> In this context, the Trial Chamber wishes to reiterate that the taking of judicial notice of these Proposed Facts will not shift the ultimate burden of persuasion, which remains with the Prosecution.<sup>49</sup> Moreover, the Proposed Facts will only go to prove the existence of crimes committed in Zagreb in the course of two days.<sup>50</sup>

34. For the foregoing reasons, the Trial Chamber finds that the taking of judicial notice of the Proposed Facts that do not fall short of the necessary requirements will further the interests of justice and expedite the proceedings while guaranteeing the rights of the Accused to a fair trial.

## B. Proposed Documents

### 1. The Proposed Document Must Have Been Admitted Into Evidence in a Previous Trial

35. According to the jurisprudence, the moving party must only show that the document it seeks judicial notice of was tendered and received as evidence in other proceedings.<sup>51</sup> The Appeals Chamber held that the word “adjudicated” in Rule 94(B) only relates to “facts”, not to “documentary evidence.” Thus, “documents do not need to be ‘adjudicated’ i.e. the Chamber in

<sup>46</sup> *Karemera et al.* Appeal Decision, para. 55; *Popović et al.* Decision, para. 8.

<sup>47</sup> *See Popović et al.*, para. 8.

<sup>48</sup> Joint Submission, para. 2.

<sup>49</sup> *Dragomir Milošević* Appeal Decision, para. 16.

<sup>50</sup> *See Motion*, para. 30.

<sup>51</sup> *Multinovic et al.* Decision, para. 16; *Delić* Pre-Trial Decision, p. 4

other proceedings does not need to have pronounced a specific and unchallenged or unchallengeable decision on the admissibility of the document”.<sup>52</sup>

36. The Prosecution has indicated in Confidential Annex B to the Motion exhibit numbers under which the documents were admitted in the *Martić* case as well as the evidence registration numbers (“ERN”) the Prosecution had previously assigned to them. The Trial Chamber notes, however, that Proposed Documents 330-335 do not correspond to the information provided in Confidential Annex B to the Motion.<sup>53</sup> Therefore, the Trial Chamber finds that the Prosecution has not adequately shown that Proposed Documents 330-335 have been tendered and admitted in the *Martić* case and will not take judicial notice of them.

## 2. The Proposed Document Must Relate to Matters in the Current Proceedings

37. The documents of which judicial notice is sought must have more than a merely remote connection to the current proceedings.<sup>54</sup> The Prosecution submits that all Proposed Documents are relevant to the attack on Zagreb of 2 and 3 May 1995, as alleged in paragraphs 49-50 and Schedule C to the Indictment.<sup>55</sup> The Prosecution further explains that the Proposed Documents relate to the damage caused by the rocket attacks, related sites and reports as well as to killings and injuries of victims of the attacks.<sup>56</sup>

38. The Trial Chamber is satisfied that all Proposed Documents are sufficiently related to matters at issue in the current proceedings.

39. The case-law holds that, moreover, it is imperative for the moving party to identify the specific portions of the documents for which judicial notice is sought.<sup>57</sup> This does not exclude the possibility to seek judicial notice of a whole document, provided it is relevant in its entirety. The Trial Chamber notes in this context that some Proposed Facts are repetitive in that the Prosecution sometimes requested taking judicial notice of an entire exhibit from the *Martić* Trial on the one hand, and on the other, it submitted various pages thereof. These single pages, taken together, cover the entire document.<sup>58</sup>

<sup>52</sup> *Nikolić* Appeal Decision, para. 45 citing *Bizimungu et al.* Decision, para. 35.

<sup>53</sup> According to Confidential Annex B to the Motion, Proposed Documents 330-335 correspond to exhibits 39-44 in the *Martić* case, respectively. However, said exhibits contain different written documents and not photographs, as described in Annex B. A CD provided by the Prosecution and containing the six Proposed Documents in question indicates that they had been marked as exhibits 39-44 for the purposes of the hearing in the Rule 61 proceedings.

<sup>54</sup> *Multinović et al.* Decision, para. 16; *Delić* Pre-Trial Decision, p. 4.

<sup>55</sup> Motion, para. 26.

<sup>56</sup> Motion, paras 26-27.

<sup>57</sup> *Multinović et al.* Decision, para. 16; *Delić* Pre-Trial Decision, p. 4.

<sup>58</sup> For instance, Proposed Document 1 is a photograph album contained in exhibit 807 with the ERN 0031-2120 to 0031-2161. Proposed Documents 8-43 are single pages of exhibit 807 containing mostly two photographs each. These

40. The Trial Chamber further notes that the Prosecution has not organised and specified a number of other documents with the required diligence and accuracy. In some instances, the description of the Proposed Documents is incomplete, inaccurate or refers to the wrong Proposed Document.<sup>59</sup>

41. The Trial Chamber notes with regret the lack of coherence in the organisation of the Proposed Documents and believes the Prosecution should have exercised greater care in the selection of documents more carefully by avoiding duplicity, by specifying the relevant pages of some large documents and by organising them in a more coherent way. Nonetheless, the Trial Chamber is satisfied that the relevance of the pertinent portions of the documents is generally sufficiently clear to be taken judicial notice of. In order to avoid repetitive evidence, the Trial Chamber will not take judicial notice of Proposed Documents 8-43, 44-88, 89-100, 178-188, 189-291, 292-295, 296-329. Furthermore, the Trial Chamber will take judicial notice of Proposed Documents 101-177 and 339 as one single document corresponding to exhibit 386 in the *Martić* trial.

### 3. Trial Chamber's Residual Discretion

42. Besides the application of these requirements, in exercising its discretion the Trial Chamber has carefully assessed whether the admission of the Proposed Facts would advance judicial economy while still safeguarding the rights of the Accused. In particular, the Trial Chamber has considered whether, when taken together, the Proposed Documents will result in too large a number so as to compromise the principle of fair and expeditious trial or whether they are too broad, too tendentious, not sufficiently significant, too detailed, too numerous or repetitive of other evidence already admitted by the Chamber, or not sufficiently relevant to the case. Having identified and

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36 documents contain together all 71 photographs that form part of exhibit 807. The same holds true for Proposed Document 2, which is an entire exhibit, and Proposed Documents 44-48, which are single pages; Proposed Document 3 and Proposed Documents 89-100; Proposed Document 5 and Proposed Documents 178-188; Proposed Document 6 and Proposed Documents 292-295; Proposed Document 7 and Proposed Documents 296-329; as well as Proposed Document 340 and Proposed Documents 189-291.

<sup>59</sup> The specification in the short description of Proposed Document 71, which refers to page 31 (ERN 0031-2194) of exhibit 808, reads "Photos F-56-57". The correct reference, however, should read "Photos F55-F67". Furthermore, the short descriptions of Proposed Documents 189-291 are identical and lack specification of the photos contained therein. The Trial Chamber also notes that while Proposed Documents 101-177 and 339 taken together contain all photographs pertaining to exhibit 386, the presentation of the Proposed Documents is rather confusing. Proposed Document 339, the description of which reads "Photos F1-F2", refers to ERN 0031-2307 to 0031-2386, thus covering the 80-page range of the entire exhibit 386 and not only the indicated page. Proposed Document 101 with the description "Photos F3-F4" refers to ERN 0031-2310, which contain the pictures of the previous page, *i.e.*, Photos F1-F2. This incongruity persists through Proposed Document 116 and is adjusted by Proposed Document 117, which does not contain any specification of the photographs in its short description. Finally, in Proposed Document 4, the Prosecution is seeking judicial notice of the full album contained in exhibit 385 but has not listed the single pages as distinct Proposed Documents, as it did in the case of all other photograph albums.

discarded repetitive evidence, the Trial Chamber finds that the remaining Proposed Documents are neither too numerous nor could otherwise infringe the rights of the Accused.

43. The Defence objects to Proposed Documents 351 and 352 on the grounds that they contain expert evidence, which should not be admitted without giving the Defence the opportunity to cross-examine the expert witnesses.<sup>60</sup> Proposed Document 351 is a report compiled by the headquarters of the United Nations military observers concerning the indiscriminate shelling of Zagreb. Proposed Document 352 is a report on the characteristics of the "ORKAN" multi-barrel rocket system prepared by the Forensic Science Centre, Ministry of the Interior of the Republic of Croatia. The Trial Chamber agrees with the Defence and finds that it is in the interests of justice not to take judicial notice of Proposed Documents 351 and 352.

#### IV. DISPOSITION

44. Based on the reasoning set forth above and pursuant to Rules 54 and 94(B) of the Rules, the Trial Chamber **GRANTS** the Motion in part and will take judicial notice of the following Proposed Facts as set forth in Amended Confidential Annex A to the Joint Submission and the following Proposed Documents:

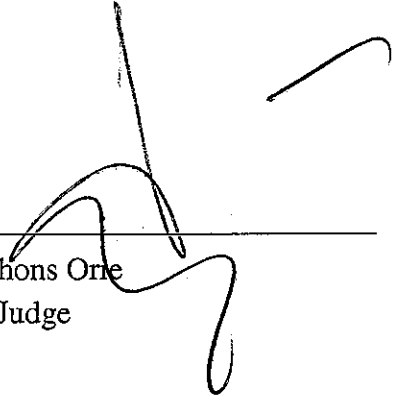
- 1) Proposed Facts 1-7, 9-18, 20, 21, 23, 25-27, 30-34, 36-39, 41-50, 52-57, 59-65;
- 2) Proposed Facts 8, 58 subject to the changes indicated in paragraphs 18 and 19 above;
- 3) Proposed Facts 19, 22, 24, 28, 29, 35, 51 subject to the qualification outlined in paragraph 20 above;
- 4) Proposed Documents 1-7, 336-338, 340-350, 353; and
- 5) Proposed Documents 101-177, 339 in one single document as indicated in paragraph 41 above.

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<sup>60</sup> Second Response, para. 3.

45. The Trial Chamber will not take judicial notice of Proposed Fact 40 and Proposed Documents 8-100, 178-335, 351, 352.

Done in English and French, the English version being authoritative.



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Judge Alphons Orie  
Presiding Judge

Dated this second day of September 2008

At The Hague  
The Netherlands

**[Seal of the Tribunal]**