



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: 17 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: 17 September 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON SECOND MOTION FOR JUDICIAL
NOTICE OF FACTS RELEVANT TO THE SARAJEVO
CRIME BASE**

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 seised of the Prosecution’s “Second Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base, With Annex” (“Motion”), filed publicly by the Prosecution on 10 July 2008, and hereby renders its Decision.

A. Submissions

1. In the 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 26 facts listed in Annex A to the Motion (“Proposed Facts”), which were adjudicated in the *Galić* trial judgement.¹ The Prosecution submits that taking judicial notice of the additional Proposed Facts would enable the Prosecution to further reduce the number of witnesses, and contribute to a fair and expeditious trial.²

2. The Prosecution submits that the Proposed Facts meet the criteria for admissibility under Rule 94(B).³ In particular, the Prosecution argues that the Proposed Facts pertain to the factual findings underlying the conviction of General Stanislav Galić, who the “Second Amended Indictment” of 5 February 2008 (“Indictment”) alleges to have been a subordinate of Momčilo Perišić (“Accused”), for ordering the campaign of shelling and sniping against civilian areas of Sarajevo between 10 September 1992 and 10 August 1994.⁴

3. The Prosecution further submits that the admission of the Proposed Facts would not prejudice the right of the Accused to a fair trial, and particularly would not impact on his presumption of innocence, as the Prosecution must still prove beyond reasonable doubt the linkage between General Galić and the Accused, as well as the *actus reus* and *mens rea* requirements for the crimes for which the Accused is alleged to have criminal responsibility.⁵ Finally, the Prosecution submits that the admission of the Proposed Facts would meet the interests of judicial economy by reducing the time to re-prove issues from earlier proceedings and allowing both parties to focus on issues in dispute.⁶

4. On 11 August 2008, the Prosecution and the Defence publicly filed a “Parties Joint Submission in Respect of Facts Relevant to the Sarajevo Crime Base with Amended Annex” (“Joint

¹ *Prosecutor v. Galić*, Case No. IT-98-29-T, judgement, 5 December 2003 (“*Galić* trial judgement”).

² Motion, para. 4.

³ Motion, paras 11-19.

⁴ Motion, para. 14.

⁵ Motion, paras 20-24.

⁶ Motion, paras 25-27.

Submission”), in which the Prosecution amends Annex A to include two additional facts and to amend the language of one other fact in the new Amended Annex. The Defence does not oppose the taking of judicial notice of all Proposed Facts as amended.⁷

B. Applicable Law

5. 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.

6. 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 2008.⁸

C. Discussion

7. At the outset, the Trial Chamber notes that the Defence does not oppose judicial notice being taken of the Proposed Facts.⁹ 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.

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

8. A fact of which judicial notice is sought should be distinct, concrete and identifiable in the original findings.¹⁰ 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”.¹¹ 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.¹²

⁷ Joint Submission, para. 2.

⁸ Decision on Adjudicated Facts Concerning Sarajevo, paras 13-17.

⁹ Joint Submission, para. 2.

¹⁰ *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, para. 16.

¹¹ *Krajišnik* Decision, para. 14, fn. 44.

¹² *Ibid.*

9. The Trial Chamber finds that Proposed Facts 8 and 20 falls short of these requirements. The statement in Proposed Fact 8 that General Galić “gave the impression” that he was in control of the situation in Sarajevo is not sufficiently concrete or clear. The same holds true for the statement in Proposed Fact 20 that direct or indiscriminate fire upon civilians “was ordered by the chain of command”. Therefore, The Trial Chamber will not take judicial notice of Proposed Facts 8 and 20.

10. 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.¹³ The Trial Chamber has therefore typographically corrected three Proposed Facts in order to render these facts consistent with the meaning plainly intended in the *Galić* Trial Judgement: in Proposed Facts 9, 10 and 13, the date “10 August 1994” should be substituted for “10 August 1992” in order to accurately reflect the indictment period in the *Galić* case.¹⁴

11. Finally, the Trial Chamber notes that Proposed Facts 23 and 24 contain essentially the same information. In order to avoid repetition, the Trial Chamber will not take judicial notice of Proposed Fact 24.

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

12. 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.”¹⁵

13. The Prosecution submits that “the Proposed Facts are directly relevant to the allegations regarding Galić’s role in relation to the Sarajevo crime-base in the first half of the Indictment period”.¹⁶ General Galić is alleged to have been a subordinate of the Accused. The Trial Chamber is satisfied that all Proposed Facts are relevant to the parts of the case against the Accused as specified by the Prosecution.

¹³ *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.

¹⁴ Proposed Fact 9 will read as follows: “General Galić was present on the battlefield of Sarajevo throughout the period 10 September 1992 to 10 August 1994, in close proximity to the confrontation lines.” Proposed Fact 10 will read as follows: “The confrontation lines remained relatively static during the period 10 September 1992 to 10 August 1994.” Proposed Fact 13 will read as follows: “Sarajevo Romanija Corps reporting and monitoring systems were functioning normally during the period 10 September 1992 to 10 August 1994.”

¹⁵ *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; *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Decision on Appellant’s Motion for Judicial Notice, 1 April 2005 (“*Nikolić* Appeal Decision”), para. 52.

¹⁶ Motion, para. 14.

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

14. 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.¹⁷ In general, findings related to the *actus reus* or the *mens rea* of the perpetrator of a crime are deemed to be factual findings.¹⁸ In determining whether a proposed fact is truly a factual finding, it has been observed 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 whether the proposed fact contains findings or characterizations that are of an essentially legal nature and which must, therefore, be excluded”.¹⁹

15. The Trial Chamber notes that Proposed Facts 3, 15, 16, 18-20 and 22-28 contain legal characterisations related to the *actus reus* or *mens rea* of the crimes which formed the basis for General Galić’s conviction. The Trial Chamber further notes that these Proposed Facts also convey factual information. In accordance with settled jurisprudence, the Trial Chamber has therefore assessed on a case-by-case basis whether these facts are of an *essentially* legal nature. The Trial Chamber has already found that Proposed Facts 20 and 24 do not meet the requirements for judicial notice and will discuss Proposed Fact 28 in section 6. below. Based on its evaluation, the Trial Chamber finds, in accordance with the position taken by the Defence not to object to any of the Proposed Facts, that the importance of the factual content prevails in the other Proposed Facts in question. Therefore, they meet the necessary standard.

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

16. The proposed facts must not be based on an agreement between the parties in the original proceedings. In the original context, Proposed Facts 1-4 are preceded by the introductory remark that there is “no dispute between the parties” as to accuracy of the facts. However, the Trial Chamber notes that the requirement applicable to the Proposed Facts is whether these facts are “adjudicated”, that is 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).²⁰ Whether the facts are based on an agreement in

¹⁷ *Prosecutor v. Dragomir Milošević*, 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.

¹⁸ *Krajišnik* Decision, para. 16.

¹⁹ *Krajišnik* Decision, para. 19. See also *Dragomir Milošević* Appeal Decision, paras 19-22.

²⁰ Decision on Adjudicated Facts Concerning Sarajevo, para. 27.

that sense becomes clear where the relevant footnote in the original judgement cites the agreed facts between the parties as a primary source of authority.²¹

17. In applying this requirement, 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

18. 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)”²²

19. The Proposed Facts from the *Galić* trial judgement were not overturned on appeal. The Trial Chamber finds therefore that all Proposed Facts satisfy this requirement.

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

20. 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*”.²³ 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”.²⁴ 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.²⁵

21. The Prosecution submits that the Proposed Facts “relate to acts carried out by Galić, an alleged subordinate of the Accused, and do not relate to the acts, conduct or mental state of the Accused himself”.²⁶ The Trial Chamber notes, however, that Proposed Fact 28 refers to the “goals

²¹ *Popović et al.* Decision, para. 11.

²² *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, para. 6; *Krajišnik* Decision, para. 14; *Prlić et al.* Pre-Trial Decision, paras 12, 15.

²³ *Karemera et al.* 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. 51.

²⁴ *Karemera et al.* Appeal Decision, para. 51.

²⁵ *Karemera et al.* Appeal Decision, para. 48.

²⁶ Motion, para. 17.

of [Galić's] superiors". As the Accused is allegedly one of Galić's superiors, this fact does not meet the requirement and will not be admitted. The Trial Chamber finds that all other Proposed Facts satisfy the necessary standard.

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

22. 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.²⁷ Furthermore, a Trial Chamber can and indeed must decline to take judicial notice of 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.²⁸ 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.²⁹

23. The Trial Chamber notes that legal classifications in the original judgement have been omitted from Proposed Facts 16, 19, 25 and 26.³⁰ While these changes cannot alter the potentially legal nature of the original findings, the consequences of which have been discussed above, the Trial Chamber must consider if they substantially differ from the Trial Judgment. The Trial Chamber is satisfied that the formulation does not substantially change the original finding. Therefore, the Trial Chamber finds that these Proposed Facts meet the requirement in exam.

8. Trial Chamber's Residual Discretion

24. 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 recalls that the Defence does not object to any of the Proposed Facts. The Trial Chamber also notes that it has already excluded facts that might run counter the interests of justice because of their unclear formulation or relationship to the Accused.

²⁷ *Krajišnik* Decision, para. 14; *Prlić et al.* Pre-Trial Decision, para. 21.

²⁸ *Karemera et al.* Appeal Decision, para. 55; *Popović et al.* Decision, para. 8.

²⁹ See *Popović et al.*, para. 8.

³⁰ The word “unlawful” has been deleted from the original sentence in Proposed Facts 16 and 19. In the original version, Proposed Fact 25 included the word “illegal” and Proposed Fact 26 the classification “by direct or indiscriminate fire”, both of which have not been retained in the Proposed Facts.

25. Furthermore, the Trial Chamber wishes to emphasise that the taking of judicial notice will only go to proving factual findings in relation to criminal conduct in Sarajevo. During the course of the trial, the Prosecution will have to establish the link between these crimes and the Accused and prove the necessary requirements of Articles 7(1) and 7(3) of the Statute in order to establish the Accused's alleged criminal responsibility for these crimes.

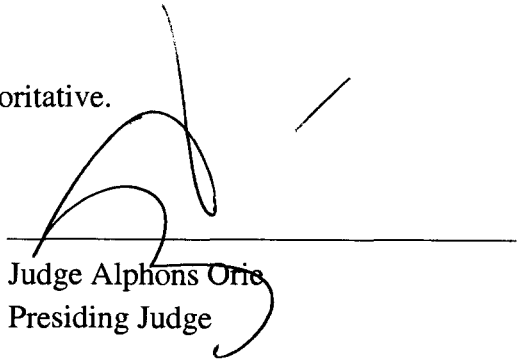
D. Disposition

26. For these reasons and pursuant to Rules 54 and 94(B), the Trial Chamber **GRANTS** the Motion in part and will take judicial notice of the following Proposed Facts as contained in the Amended Annex to the Joint Submission:

- 1) Proposed Facts 1-7, 11-12, 14-19, 21-23, 25-27; and
- 2) Proposed Facts 9, 10, 13, subject to the changes indicated in paragraph 10 above.

27. The Trial Chamber will not take judicial notice of Proposed Facts 8, 20, 24, 28.

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



Judge Alphons Orie
Presiding Judge

Dated this seventeenth day of September 2008
At The Hague
The Netherlands

[Seal of the Tribunal]