

**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-T
Date: 12 January 2010
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 12 January 2010

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

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

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Defence

Mr. Novak Lukić
Mr. Gregor 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 “Third Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base, With Annex” (“Motion”), publicly filed on 15 December 2009. The Trial Chamber hereby renders its Decision.

A. Submissions

1. Prosecution

1. In its Motion, the Prosecution requests the Trial Chamber to take judicial notice, pursuant to Rules 89(C) and 94(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), of 113 facts listed in the Annex to the Motion (“Proposed Facts”), which were adjudicated in the *Dragomir Milošević* Trial and Appeal Judgements.¹

2. The Prosecution submits that the Proposed Facts meet the criteria for admissibility under Rule 94(B).² In particular, the Prosecution argues that the Proposed Facts are findings underlying the conviction of Dragomir Milošević, who was commander of the Sarajevo Romanija Corps (“SRK”) of the Army of the Republika Srpska (“VRS”).³

3. The Prosecution argues that the admission of the Proposed Facts would not prejudice the right of Momčilo Perišić (“Accused”) to a fair trial, as the Prosecution will still bear the burden to prove the Accused’s guilt and the Defence will retain its ability to challenge this evidence.⁴ The Prosecution adds that judicial notice of the Proposed Facts would ensure the consistency of the Tribunal’s jurisprudence and facilitate the expediency of the proceedings.⁵

2. Defence

4. On 29 December 2009, the Defence publicly filed its “Response to Prosecution Third Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base” (“Response”), wherein it objects to the Motion being filed at this stage of the proceedings, virtually at the end of the Prosecution’s case-in-chief.⁶ The Defence submits that several Prosecution witnesses have already

¹ Motion, para. 1. See *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Judgement, 12 December 2007 (“*Milosević* Trial Judgement”); *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Judgement, 12 November 2009 (“*Milosević* Appeal Judgement”).

² Motion, paras 5-21.

³ Motion, paras 1, 15.

⁴ Motion, paras 16-17.

⁵ Motion, paras 18-20.

⁶ Response, paras 4, 6.

testified about the facts that the Prosecution seeks to admit in its Motion, thereby rendering the addition of these factual findings “redundant, and against the principle of judicial economy”.⁷

5. Further, the Defence asserts that the Prosecution “neglected or chose not to elicit testimony on many issues it now submits as adjudicated facts”.⁸ The Defence argues that, as a result, it was improperly deprived of the opportunity to cross-examine the Prosecution witnesses on these issues.⁹ The Defence contends that the Prosecution’s untimely submission of adjudicated facts is actually a tactic seeking to “remedy the defects” in the Prosecution’s case-in-chief.¹⁰ According to the Defence, should the Trial Chamber take judicial notice of the Proposed Facts, the Defence would have no choice but to present affirmative evidence in rebuttal during its case, as it was allegedly precluded from cross-examining Prosecution witnesses regarding these facts.¹¹ The Defence submits that accepting the Prosecution’s Proposed Facts would consequently shift the burden of proof and violate the Accused’s right to a fair trial.¹²

6. The Defence adds that, even if the requisite factors for judicial notice were satisfied, the Trial Chamber should decline to take judicial notice since this would not serve the interest of justice but rather undermine the Accused’s right to a fair and expeditious trial.¹³

7. Moreover, the Defence argues that the Prosecution had an obligation to include, in its list of Proposed Facts, four “scheduled incidents” for which Dragomir Milošević was acquitted.¹⁴ The Defence argues that, should the Trial Chamber grant the Motion, it should also take judicial notice of this potentially exculpatory evidence.¹⁵

8. Finally, the Defence makes a substantive objection to the admission of Proposed Facts number 63, 93, 102, 110, 111 and 113, on the ground that these facts are of an essentially legal nature.¹⁶

B. Applicable Law

9. Rule 94(B) provides that:

⁷ Response, para. 6.

⁸ Response, para. 8.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Response, para. 9.

¹⁴ Response, para. 10, referring to Schedules A-4, A-7, B-7, and B-12.

¹⁵ Response, paras 10, 12-b.

¹⁶ Response, paras 10, 12-c.

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.

10. 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 2008.¹⁷

C. Discussion

1. Preliminary Issues

11. At the outset, the Trial Chamber will address the Defence’s objection to the Motion being filed near the end of the Prosecution’s case-in-chief. The Trial Chamber notes that neither the Statute of the Tribunal (“Statute”) nor the Rules preclude a party from submitting a motion for judicial notice at a late stage of its case. Nor does there appear to be any precedent to support that proposition.¹⁸ Rather, Rule 85 specifies that the Prosecution may submit evidence during its case-in-chief or in rebuttal, while the Accused may submit evidence during the Defence case or in rejoinder.

12. In addition, the Trial Chamber recalls that “[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)”.¹⁹ The Trial Chamber therefore notes that any motion for judicial notice of adjudicated facts relating to the *Dragomir Milošević* case could not have been considered at a much earlier stage of the proceedings in light of the fact that the *Dragomir Milošević* Appeal Judgement was rendered on 12 November 2009. In this regard, the Trial Chamber finds that the Motion was timely filed, slightly over a month after the Appeals Chamber rendered its Judgement.

13. The Trial Chamber disagrees with the Defence’s claim that the delayed filing of the Motion violated the Accused’s right to a fair trial by precluding the Defence from cross-examining

¹⁷ See *Prosecutor v. Momčilo Perišić*, IT-04-81-PT, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008 (“Decision on Adjudicated Facts Concerning Sarajevo”).

¹⁸ To the contrary, the Trial Chamber in *Haždihasanović* considered a motion for judicial notice on the merits after both the Prosecution and Defence had finished presenting their cases. See *Prosecutor v. Enver Hadžihasanović et al.*, IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005, 14 April 2005.

¹⁹ *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. See also *Prosecutor v. Momčilo Krajišnik*, IT-00-39-T, Decision on Third and Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 24 March 2005 (“*Krajišnik*

Prosecution witnesses who had already testified regarding the events in question. The Trial Chamber recalls that the right to cross-examination is not absolute²⁰ and further notes that the Defence has not explained which substantive factual issues contained in the Proposed Facts could have been contested on cross-examination, had these facts been elicited through a witness. Hence, the Defence has failed to substantiate its claim that taking judicial notice of the Proposed Facts would violate the Accused's right to a fair trial due to the late filing of the Motion

14. The Trial Chamber also recalls that it is firmly established in the jurisprudence of the Tribunal that taking judicial notice of certain facts under Rule 94 (B) does not shift the burden of proof, as "the effect [of this procedure] is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into question by introducing reliable and credible evidence to the contrary".²¹ The ultimate burden of persuasion also remains with the Prosecution.²² Accordingly, the Trial Chamber will consider the Motion on the merits notwithstanding the fact that the Prosecution filed it near the end of its case-in-chief.

15. Moreover, the Trial Chamber declines at this stage to decide on the Defence's request to admit the adjudicated facts under the four "scheduled incidents" for which Dragomir Milošević was acquitted. If the Defence wishes the Trial Chamber to take judicial notice of certain facts, it should follow the appropriate procedure and file a motion for judicial notice of adjudicated facts arguing how these additional facts meet the admissibility criteria under Rule 94(B). In addition, the Trial Chamber notes that, while the Prosecution has an obligation to *disclose* potentially exculpatory evidence in its possession, it has no obligation to *tender* into evidence adjudicated facts from a Tribunal judgement that is publicly filed and available to the Defence.

16. The Trial Chamber will now consider whether the following criteria for judicial notice of adjudicated facts are satisfied.

2. The Proposed Fact Must Be Distinct, Concrete and Identifiable

17. A fact of which judicial notice is sought should be distinct, concrete and identifiable in the original findings.²³ In particular, all proposed adjudicated facts should be understood in the context

Decision"), para. 14; *Prosecutor v. Jadranko 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. Decision"), paras 12, 15.

²⁰ *Prosecutor v. Milan Martić*, IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, paras 12-13.

²¹ *Prosecutor v. Edouard 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. Decision"), para. 42.

²² *Ibid.*

²³ *Krajišnik* Decision, para. 14. See also *Prlić et al.* Decision, para. 12; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, para. 16.

of the judgement “with specific reference to the place referred to in the judgement and to the indictment period of that case”.²⁴ 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.²⁵ If a proposed fact contains only a minor inaccuracy or ambiguity, a Trial Chamber may, in its discretion, correct the inaccuracy or ambiguity.²⁶

18. The Trial Chamber finds that all Proposed Facts satisfy these requirements.²⁷

3. The Proposed Fact Must Be Pertinent and Relevant to the Case

19. The proposed fact 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 general Rules governing the admissibility of evidence and litter the record with matters which would not be admitted otherwise”.²⁸

20. The “Second Amended Indictment” of 5 February 2008 (“Indictment”) alleges that Dragomir Milošević was a subordinate of the Accused, and that Milošević orchestrated a campaign of shelling and sniping against civilian areas of Sarajevo between 10 August 1994 and November 1995.²⁹ Thus, the Trial Chamber is satisfied that all Proposed Facts are relevant to the charges against the Accused concerning the alleged crimes in Sarajevo.

4. The Proposed Fact Must Not Contain Findings or Characterisations of an Essentially Legal Nature

21. 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.³⁰ In general, findings related to the *actus reus* or the *mens rea* of the perpetrator of a crime are deemed to be factual findings.³¹ 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

²⁴ *Krajišnik* Decision, para. 14, fn. 44.

²⁵ *Ibid.*

²⁶ *Prosecutor v. Vujadin 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.

²⁷ The Trial Chamber notes a typographical error in the reference to Proposed Fact 89, which should cite paragraph 803, not 802, of the *Milošević* Trial Judgement.

²⁸ *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Decision on Appellant’s Motion for Judicial Notice, 1 April 2005, para. 17.

²⁹ See Indictment, paras 39-d, 41-43.

³⁰ *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, paras 19-22; *Krajišnik* Decision, para. 15.

³¹ *Krajišnik* Decision, para. 15.

proposed fact contains findings or characterisations that are of an essentially legal nature and which must, therefore, be excluded”.³²

22. The Defence opposes the admission of Proposed Facts 63, 93, 102, 110, 111 and 113 on the ground that these facts are of an essentially legal nature, without further elaboration.³³

23. Proposed Fact 63 states: “Derviša Selmanović was a civilian”.³⁴ The Trial Chamber finds that this is an admissible factual assertion on its face. However, the Trial Chamber will consider the admissibility of this Proposed Fact below, in light of the discussion that preceded this conclusion in the *Milošević* Trial Judgement.

24. Proposed Fact 93 reads as follows: “Dragomir Milošević was the superior of the SRK troops, including snipers, from 10 August 1994 through 21 November 1995 and had effective control over them”.³⁵ The Trial Chamber finds that the notion of “effective control” over troops is primarily a legal characterisation, and therefore redacts Proposed Fact 93 as follows: “Dragomir Milošević was the superior of the SRK troops, including snipers, from 10 August 1994 through 21 November 1995”.

25. Proposed Fact 110 states: “Dragomir Milošević was in command and control of his troops who carried out a campaign of sniping and shelling”.³⁶ The Trial Chamber considers that Proposed Fact 110 satisfies the requisite standard.

26. Proposed Fact 102 posits: “The SRK military police did not investigate allegations of war crimes committed by the SRK forces”.³⁷ The Trial Chamber disagrees with the Defence’s objection and finds that Proposed Fact 102 is admissible.

27. Finally, Proposed Facts 111 and 113 respectively state “The shelling of Sarajevo was indiscriminate, and aimed at causing the maximum amount of casualties”,³⁸ and “There was a pattern of shelling and sniping contemplated and implemented by Dragomir Milošević during his tenure as Commander of the SRK”.³⁹ The Trial Chamber finds that these facts are admissible, as

³² *Ibid.*

³³ Response, paras 10, 12-c.

³⁴ Motion Annex, citing *Milošević* Trial Judgement, para. 366, *Milosević* Appeal Judgement, para. 199.

³⁵ Motion Annex, citing *Milošević* Appeal Judgement, para. 281.

³⁶ Motion Annex, citing *Milošević* Trial Judgement, para. 966.

³⁷ Motion Annex, citing *Milošević* Trial Judgement, para. 865.

³⁸ Motion Annex, citing *Milošević* Appeal Judgement, para. 971.

³⁹ Motion Annex, citing *Milošević* Appeal Judgement, para. 978.

facts related to the *actus reus* or the *mens rea* of the alleged perpetrator of a crime are generally deemed to be factual findings.⁴⁰

28. The Trial Chamber considers that all remaining Proposed Facts meet the requisite standard.

5. The Proposed Fact Must Not Be Based on an Agreement Between the Parties to the Original Proceedings

29. The proposed facts must be “adjudicated” and not based on an agreement between the parties in 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).⁴¹ The Trial Chamber finds that this requirement is satisfied.

6. The Proposed Fact Must Not be Subject to Pending Appellate Review

30. “Only 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).”⁴² The Proposed Facts were not overturned on appeal and satisfy this requirement.

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

31. 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*”.⁴³ Second, “there is reason to be particularly skeptical 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”.⁴⁴ 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.⁴⁵

32. The Trial Chamber finds that all Proposed Facts satisfy this standard.

⁴⁰ *Krajišnik* Decision, para. 15.

⁴¹ *Popović et al.* Decision, para. 11; Decision on Adjudicated Facts Concerning Sarajevo, para. 27.

⁴² *Kupreškić et al.* Decision, para. 6; *Krajišnik* Decision, para. 14; *Prlić et al.* Decision, paras 12, 15.

⁴³ *Karemera et al.* Decision, para. 51.

⁴⁴ *Ibid.*

⁴⁵ See *Karemera et al.* Decision, paras 48, 52.

8. The Formulation of a Proposed Fact Must Not Differ Substantially From the Formulation in the Original Judgement

33. Proposed adjudicated facts 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.⁴⁶ A Trial Chamber must decline to take judicial notice of facts that are characterised in a misleading or otherwise inaccurate manner.⁴⁷

34. Proposed Fact 11 reads as follows: “From 10 August 1994 through 21 November 1995, the people living in the area of Sarajevo within the confrontation lines were continuously shelled and sniped”.⁴⁸ The Prosecution has copied part of this sentence verbatim from the *Milošević* Trial Judgement, although the Trial Chamber finds it appropriate to complete this sentence by including the italicised segment to clarify the factual findings: “. . . the people living in the area of Sarajevo within the confrontation lines were continuously shelled and sniped, *although some witnesses noted that the level of intensity varied, particularly with regard to shelling*”.⁴⁹ The remaining Proposed Facts fulfil the applicable standard.

9. Trial Chamber’s Residual Discretion

35. The Trial Chamber has the residual discretion to assess whether taking judicial notice of certain facts would advance judicial economy and safeguard the rights of the Accused.

36. In reference to Proposed Fact 63 mentioned above, which states that “Derviša Selmanović was a civilian”,⁵⁰ the Trial Chamber notes that Derviša Selmanović was a 49 year-old woman employed as a cook assistant in the Armed Forces of the Republic of Bosnia and Herzegovina (“ABiH”).⁵¹ The *Milošević* Trial Chamber found that, on 10 December 1994, “Derviša Selmanović was shot with a machinegun and seriously wounded in her leg when she was in the backyard of a house in Sedrenik”, and that “the shots were fired by a member of the SRK”.⁵² She was collecting firewood in the backyard, unarmed, and wearing civilian clothes, as she never wore a military uniform.⁵³ For these reasons, the *Milošević* Trial Chamber concluded: “Derviša Selmanović, as an unarmed cook, would fall under Article 4A(4) of the Third Geneva Convention, and thus is to be

⁴⁶ *Krajišnik* Decision, para. 14; *Prlić et al.* Decision, para. 12.

⁴⁷ *Karemera et al.* Decision, para. 55; *Popović et al.* Decision, para. 8.

⁴⁸ Motion Annex, citing *Milošević* Trial Judgement, para. 195.

⁴⁹ *Milošević* Trial Judgement, para. 195 (emphasis added).

⁵⁰ Motion Annex, citing *Milošević* Trial Judgement, para. 366, *Milosević* Appeal Judgement, para. 199.

⁵¹ *Milošević* Trial Judgement, paras 361-362.

⁵² *Milošević* Trial Judgement, para. 366.

⁵³ *Milošević* Trial Judgement, para. 365.

considered a civilian, according to Article 50 of Additional Protocol I".⁵⁴ The Appeals Chamber affirmed this conclusion.⁵⁵

37. The Trial Chamber considers that, read in the context of the *Milošević* Trial Judgement, this Proposed Fact is primarily a legal conclusion. Accordingly, the Trial Chamber exercises its discretion to reject Proposed Fact 63.

38. The Trial Chamber finds that admitting the remaining Proposed Facts would serve the interest of justice and comport with the right of the Accused to a fair trial.

D. Disposition

39. For these reasons and pursuant to Rules 54 and 94(B), the Trial Chamber

GRANTS the Motion in part and takes judicial notice of the following Proffered Facts:

- a) 1-10, 12-62, 64-92, 94-113;
- b) 11 and 93 subject to the changes indicated in the present decision.

DECLINES to take judicial notice of Proposed Fact 63.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twelfth of January 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

⁵⁴ *Milošević* Trial Judgement, para. 366.

⁵⁵ *Milošević* Trial Judgement, paras 198-200.