



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

Case No.: IT-95-5/18-T
Date: 31 March 2010
Original: English

IN THE TRIAL CHAMBER III

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 31 March 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO PRECLUDE EVIDENCE
OR TO WITHDRAW ADJUDICATED FACTS**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

THIS 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 Accused’s “Motion to Preclude Evidence or to Withdraw Adjudicated Facts”, filed on 2 March 2010 (“Motion”), and hereby renders its decision thereon.

I. Submissions of Parties

1. On 17 March 2009, the Office of the Prosecutor (“Prosecution”) filed the “Second Prosecution Motion for Judicial Notice of Adjudicated Facts and *Corrigendum* to First Prosecution Motion for Judicial Notice of Adjudicated Facts” (“Second Adjudicated Facts Motion”), requesting the Chamber to exercise its power under Rule 94(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) to take judicial notice of 1,049 facts set out in Appendix A, which had been adjudicated by Trial and Appeals Chambers in several cases, including the *Brđanin* case.¹

2. On 9 October 2009, the Chamber rendered its “Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts” (“Second Decision on Adjudicated Facts”), granting the Second Adjudicated Facts Motion in part, and taking judicial notice of 739 facts proposed by the Prosecution in its Second Adjudicated Facts Motion.

3. In the present Motion, the Accused requests the Chamber to preclude the Prosecution from leading evidence in relation to those facts which the Chamber has already judicially noticed, or, alternatively, to “withdraw” judicial notice of those facts for which the Prosecution will lead evidence.² While the Accused makes this request in broad terms, he specifically refers to adjudicated facts connected to the expected evidence of the first witness scheduled to testify for the Prosecution, Ahmed Zulić, who previously testified in the *Brđanin* case. He explains that the Chamber has taken judicial notice of facts adjudicated in *Brđanin*, and that the footnotes to the corresponding paragraphs of the judgement indicate that the sources of the Trial Chamber’s finding included Zulić’s testimony.³ He then notes that Zulić’s written statement, sought to be admitted in the present case pursuant to Rule 92 *ter*, repeats the “very same allegations which have already been subject of judicial notice”.⁴ For this reason, the Accused concludes, Zulić’s evidence on

¹ See *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004.

² Motion, para. 1.

³ Motion, paras. 2–4.

⁴ Motion, para. 5. See also Motion, paras. 6–8.

events which are the subject of adjudicated facts should be excluded. Otherwise, the adjudicated facts should be withdrawn.⁵

4. To support his claim, the Accused argues that “if the purpose of taking judicial notice of adjudicated facts is judicial economy, that economy is not achieved if the prosecution is allowed to introduce evidence during its case concerning those same facts. Adjudicated facts must be *in lieu* of evidence, not *in addition* to evidence.”⁶ The Accused adds that in a situation where the Prosecution introduces evidence on the same facts as those which are the subject of judicial notice, it not only frustrates the purpose of judicial notice, but unfairly benefits from the presumption which attaches to judicially noticed facts. Thus, the Prosecution should rely on the adjudicated facts *or* on the witness’s testimony, but “it should not be allowed to bolster the credibility of the witness by the adjudicated facts.”⁷ The Accused finally states that this situation is likely to repeat itself with numerous witnesses in this trial, and that the Chamber should address it in the context of Ahmed Zulić’s evidence, in order to set forth the principles to be applied during the course of the proceedings.⁸

5. On 16 March 2010, the Prosecution filed the “Prosecution’s Response to Accused’s Motion to Preclude Evidence or to Withdraw Adjudicated Facts” (“Response”) opposing the Motion as unfounded.⁹ The Prosecution argues that the law does not compel a choice between adjudicated facts and evidence as mutually exclusive methods of proof, and that the Accused fails to identify any provision in the Rules or jurisprudence to substantiate his claim.¹⁰ In fact, the Prosecution adds, “the exclusionary rule relied on by [the Accused] is contradictory to the Tribunal’s jurisprudence”, as evidence about the subject-matter of judicially noticed adjudicated facts may be admitted in a variety of circumstances. Thus, the admissibility of evidence must be assessed on a case-by-case basis.¹¹

6. With regard to Ahmed Zulić in particular, the Prosecution argues that his evidence about events which are the subject of adjudicated facts satisfies the requirements for admission, and forms an integral part of his written statement, which is relevant to and probative of issues in the Indictment.¹² According to the Prosecution, one aspect of Zulić’s evidence is to provide greater

⁵ Motion, para. 13.

⁶ Motion, para. 10.

⁷ Motion, para. 11.

⁸ Motion, para. 9.

⁹ Response, paras. 1, 14.

¹⁰ Response, paras. 1–2.

¹¹ Response, para. 3.

¹² Response, paras. 1, 4.

detail than what is included in the adjudicated facts within the framework of the Prosecution's case against the Accused.¹³ Furthermore, given that Zulić is a victim, his evidence is relevant in establishing the impact of crimes upon him personally, and is thus "qualitatively different" than the adjudicated facts.¹⁴ According to the Prosecution, to arbitrarily "parse out" events from Zulić's evidence, because his account happens to overlap with adjudicated facts, "would create a disjointed narrative and reduce the probative value of his evidence to issues in the Indictment".¹⁵

7. The Prosecution further adds that the benefit to the Chamber of hearing Ahmed Zulić's account in full outweighs any minimal saving in court resources by excluding the evidence on events which are the subject of adjudicated facts.¹⁶ Specifically, it states that the admission of such evidence would not impact on the Accused's right to a fair trial, and that the Accused has not demonstrated the real and substantial impact of such evidence on judicial economy.¹⁷ Additionally, the Prosecution states that if the Accused intends to challenge the adjudicated facts in this case, his claim that the evidence frustrates the purpose of judicial notice is illusory.¹⁸ Under these circumstances, judicial notice of the adjudicated facts continues to be in the interest of justice.¹⁹

8. The Prosecution finally states that the Accused's request for withdrawal of adjudicated facts requires a reconsideration of the Chamber's Second Decision on Adjudicated Facts, and that he has not satisfied the test for reconsideration by not having alleged a clear error in reasoning by the Chamber, and by failing to demonstrate that reconsideration is necessary to prevent an injustice.²⁰

II. Discussion

9. 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.

10. The Chamber has outlined the law applicable to motions made pursuant to Rule 94(B) in the three decisions it has issued to date on judicial notice of adjudicated facts, including the Second

¹³ Response, paras. 1, 6.

¹⁴ Response, para. 6.

¹⁵ Response, para. 7.

¹⁶ Response, para. 11.

¹⁷ Response, paras. 8–9.

¹⁸ Response, para. 9.

¹⁹ Response, para. 13.

²⁰ Response, para. 12.

Decision on Adjudicated Facts. It will not discuss the applicable law again here, but refers to the relevant paragraphs of the Second Decision on Adjudicated Facts.²¹

11. The Appeals Chamber has held that, by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which does not have to be proven again at trial.²² However, judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution. This means that the Prosecution is only relieved of its initial burden to produce evidence on the point, but the Accused may then put the point into question by introducing reliable and credible evidence to the contrary.²³

12. Pursuant to Rule 89(C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. At the end of the trial, the Chamber is obliged to assess all of the evidence presented to it, and attribute weight appropriately. Any facts that have been judicially-noticed in the case at hand will be taken into consideration in this process of assessment. Thus, the Chamber may base its final conclusions as to the individual criminal responsibility of the Accused on the evidence presented to it along with any adjudicated facts from prior proceedings which have been the subject of judicial notice. This will not mean, however, that witness evidence led at trial is to be considered corroborated by adjudicated facts from prior proceedings which are based on evidence from the same witness.

13. In the Motion, the Accused has made arguments specifically pertaining to precluding Ahmed Zulić from testifying on the basis of a number adjudicated facts judicially-noticed by the Chamber, and arguments that more generally concern the rationale for adjudicated facts where live testimony relating to the same or similar matters is also presented.

14. With particular regard to the Accused's specific submissions, the Chamber has reviewed the proposed evidence contained in Ahmed Zulić's written statement, and it is of the view that the proposed evidence goes well beyond the content of the adjudicated facts in the Chamber's Second Decision on Adjudicated Facts. As such, to preclude the Prosecution from leading Zulić would result in that additional evidence being lost, or, alternatively, may result in the Prosecution seeking to add further witnesses to its witness list who could speak to the same events. As noted by the Prosecution, to permit Zulić to give evidence only on those issues which are not covered by the

²¹ Second Decision on Adjudicated Facts, paras. 13–16.

²² *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4.

²³ *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, para. 42.

adjudicated facts would create a “disjointed narrative” which would have a detrimental effect on the coherence of that evidence. The Chamber is also not satisfied that the Accused has demonstrated how the admission of Zulić’s evidence, in addition to the relevant adjudicated facts, will impact on his right to a fair trial. The Chamber is mindful that adjudicated facts based on evidence from a witness may not be considered corroborative of that witness’s evidence, and thus it is not convinced that the Prosecution will unfairly benefit from the admission of evidence which may be supported by adjudicated facts.

15. With regard to the Accused’s more general submissions, the Chamber notes first that the fact that some witnesses’ live testimony will deal with matters also addressed by particular adjudicated facts does not undermine or nullify the purpose served by judicially-noticing adjudicated facts, that is, judicial economy. Quite to the contrary, the Chamber’s decisions on judicial notice of adjudicated facts to date have led the Prosecution to reduce the number of witnesses it intends to call at trial and rather place them in “reserve”,²⁴ saving valuable time.

16. Furthermore, the Accused’s pre-trial brief addresses mainly legal issues, and does not identify the specific matters in the Prosecution’s pre-trial brief with which he takes issue, despite the urging of the Pre-trial Judge to do so and the concerns raised by the Prosecution.²⁵ As a consequence, the Prosecution is not in possession of specific information as to those aspects of its case, or what particular evidence the Accused intends to rebut. It is worthwhile noting that the Chamber has earlier accepted that the Prosecution may be entitled to certain relief as a result:

if, during the trial, the Accused makes a specific challenge to factual allegations in the Prosecution’s pre-trial brief, which was not heralded in his pre-trial brief and which could not have been reasonably anticipated by the Prosecution, the Chamber may view sympathetically an application by the Prosecution to introduce evidence it had not anticipated presenting, for example, by recalling a witness. This is particularly so in relation to adjudicated facts of which judicial notice had been taken prior to the submission of the Accused’s pre-trial brief.²⁶

17. The Chamber further notes that it is open to the Accused to challenge any or all of the judicially-noticed facts in this case and, indeed, in light of the Accused’s assertions that he intends

²⁴ Approximately 27 witnesses fall under this category; see Prosecution’s Submission on Withdrawal of Seventeen Witnesses Contained in the Prosecution’s Fourth Rule 92 *bis* Motion, 25 June 2009; Prosecution’s Submission on Withdrawal of Nine Witnesses Contained in the Prosecution’s Fifth Rule 92 *bis* Motion and One Witness Contained in the Prosecution’s Seventh Rule 92 *bis* Motion, 24 July 2009.

²⁵ Karadzic Pre-Trial Brief, 29 June 2009. See Status Conference, T. 271, 273–277 (3 June 2009); Status Conference, T. 332–333 (1 July 2009); Status Conference, T. 390–395 (23 July 2009); Order Regarding the Accused’s Pre-Trial Brief, 5 June 2009; Decision Regarding the Accused’s Pre-Trial Brief, 30 July 2009.

²⁶ Decision Regarding the Accused’s Pre-Trial Brief, 30 July 2009, para. 5.

to refute all aspects of the Prosecution's case,²⁷ and his refusal to identify particular areas of the Prosecution's case with which he takes issue, it may reasonably be assumed that he will attempt to do so. In this context, the Chamber considers that precluding the Prosecution from bringing evidence that may overlap with adjudicated facts at this stage of the case may bring with it the possibility that the Prosecution would consider it necessary to file an application to present substantial amounts of evidence in rebuttal, following the hearing of the defence case. This would be directly contrary to the purpose of judicially-noticing adjudicated facts, leading as it would to a potentially considerable extension in the length of the case. Therefore, while the Chamber encourages the Prosecution to ensure that it avoids tendering or leading evidence that merely supports the content of specific adjudicated facts, it is not convinced that witness evidence should be precluded simply on the basis that it overlaps with one or more adjudicated facts.

18. For these reasons, the Chamber does not consider it to be in the interests of justice to preclude the Prosecution, either in general or with regard to Ahmed Zulić in particular, from bringing witnesses to give evidence that overlaps with the content of adjudicated facts that have been the subject of judicial notice in this case.

19. The Accused's alternative request to withdraw some of the facts taken judicial notice of by the Chamber in the Second Decision on Adjudicated Facts can be denied for similar reasons. This request is essentially one for reconsideration of the Second Decision on Adjudicated Facts. As such, a clear error of reasoning must be demonstrated by the Accused, or he must satisfy the Chamber that it is necessary to reconsider its earlier decision so as to prevent injustice.²⁸ For the reasons stated above, the Accused has not met this requirement.

²⁷ See, *inter alia*, Status Conference, T. 180 (2 April 2009); Response to First Prosecution Motion for Judicial Notice of Adjudicated Facts, 30 March 2009, paras. 6–9; Response to Third Prosecution Motion for Judicial Notice of Adjudicated Facts and Motion for List of Witnesses to be Eliminated, 29 May 2009, paras. 2, 4; Response to Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 22 July 2009, para. 2.

²⁸ *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

III. Disposition

20. Accordingly, the Trial Chamber, pursuant to Rules 54 and 94(B) of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this thirty-first day of March 2010
At The Hague
The Netherlands

[Seal of the Tribunal]