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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: 4 May 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: **4 May 2010**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

DECISION ON DEFENCE MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

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 "Defence Motion for Judicial Notice of Adjudicated Facts, with Public Annex A," filed publicly on 24 March 2010 ("Motion"), and hereby renders its Decision.

I. SUBMISSIONS

A. Motion

1. In the Motion, the Defence requests the Trial Chamber to take judicial notice, pursuant to Rule 94(B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), of 53 facts listed in Annex A to the Motion ("Proposed Facts"). The Proposed Facts were adjudicated in the cases of *Prosecutor v. Blagojević and Jokić*;[1] *Prosecutor v. Krstić*;[2] *Prosecutor v. Galić*;[3] *Prosecutor v. Martić*;[4] and *Prosecutor v. Dragomir Milošević*.[5]

2. The Defence generally submits that taking judicial notice of the Proposed Facts will reduce the length and support the efficiency of the trial, allowing the Defence to eschew introducing evidence to prove the facts in question and the parties and Trial Chamber to focus on the contentious issues.[6] The Defence further argues that granting the Motion will preserve consistency and harmonise the judgments of the Tribunal, noting that there is significant factual overlap between the case against Momčilo Perišić ("Accused") and a number of cases previously adjudged at the Tribunal.[7] The Defence contends that adjudicated facts "carry an imprimatur of reliability" making judicial notice of such facts a fair and efficient manner to streamline the cases before the Tribunal.[8]

3. The Defence submits that all of the Proposed Facts meet the requirements for taking judicial notice of adjudicated facts as enumerated in the jurisprudence of the Tribunal, while recognizing that the Trial Chamber may exercise its discretionary power to withhold taking judicial notice

[1] *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005.
[2] *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 August 2001.
[3] *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, 5 December 2003 ("*Galić* Trial Judgment").
[4] *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, 12 June 2006; and Case No. IT-95-11-A, Judgment, 8 October 2008 ("*Martić* Appeals Judgment").
[5] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgment, 12 December 2007 ("*Milošević* Trial Judgment"); and Case No. IT-98-29/1-A, Judgment, 12 November 2009 ("*Milošević* Appeals Judgment").
[6] Motion, para. 5.
[7] Motion, para. 6.
[8] Motion, para. 7.

regardless of the fulfilment of the criteria if such notice would be contrary to the interests of justice.[9]

B. Response

4. The Prosecution in its "Response to Defense Motion for Judicial Notice of Adjudicated Facts", filed publicly on 8 April 2010 ("Response"), specifically objects to 33 of the Proposed Facts for the reasons elaborated upon below.[10] The Prosecution also informs the Trial Chamber and the Defence that it is abandoning Scheduled Incidents B7 and B12.[11]

5. The Prosecution points out that Rule 94(B) 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."[12] The Prosecution further argues that submissions of the parties in separate cases before the Tribunal do not represent adjudicated facts and are therefore not admissible under Rule 94(B).[13]

C. Reply

6. On 15 April 2010, the Defence publicly filed its "Request for Leave to File Reply and Reply to Prosecution Response to Defence Motion for Judicial Notice of Adjudicated Facts" ("Reply"). Therein, the Defence withdraws Proposed Facts 21 through 36 in light of the Prosecution dropping Scheduled Incidents B7 and B12, rendering the related Proposed Facts irrelevant for the case.[14]

7. The Defence reiterates that it is submitting adjudicated facts for the purpose of expediting the trial and points out that many of the Proposed Facts are based on Prosecution evidence.[15]

8. In addition, the Defence refers specifically to the Prosecution argument that submissions of parties are not adjudicated facts and thus not admissible under Rule 94(B), arguing that this ground for objection is not based in the enumerated requirements for admission as found in the jurisprudence of the Tribunal with respect to adjudicated facts and that no other legal reasoning has been provided to support this objection.[16] The Defence submits that objecting to a number of the

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[9] Motion, paras 10-11.
[10] Response, para. 1. The Prosecution objects to the admission of Proposed Facts 11, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 53. The Trial Chamber notes that in part IX of its Response, the Prosecution additionally objects to Proposed Facts 38, 39 and 40, though these are not listed at the outset.
[11] Response, para. 10(c).
[12] Response, para. 3.
[13] Response, para. 5.
[14] Reply, para. 5.
[15] Reply, para. 7.
[16] Reply, para. 8; *Supra* note 13.

Proposed Facts for this reason contradicts submissions previously made by the Prosecution and accepted by this Trial Chamber.[17]

9. The Defence finally contends that the Rules do not limit admissible adjudicated facts to findings by a Trial Chamber but instead "support the proposition that the facts upon which a finding is made are permissible as adjudicated facts, provided of course that the other criteria are met."[18]

II. APPLICABLE LAW

10. Rule 94(B) provides as follows:

> 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.

11. The Trial Chamber recalls that it has previously discussed at length the settled jurisprudence of the Tribunal with respect to the judicial notice of adjudicated facts,[19] which the Trial Chamber fully incorporates here by reference.

III. DISCUSSION

A. Withdrawal of Scheduled Incidents

12. At the outset, the Trial Chamber notes that 16 Proposed Facts[20] which pertain to Scheduled Incidents B-7 and B-12 from the Indictment have been withdrawn by the Defence following the indication from the Prosecution that it no longer intends to rely on those Scheduled Incidents. The Motion insofar as it relates to these Proposed Facts is therefore moot.

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

13. The Trial Chamber notes that if the fact proposed for notice contains only a minor inaccuracy or ambiguity as a result of its abstraction from the context of the original judgement, a Trial Chamber may, in its discretion, correct the inaccuracy or ambiguity.[21] The Trial Chamber has therefore typographically corrected Proposed Fact 10 by replacing the phrase "the city" with

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[17] Reply, para. 10.
[18] Reply, para. 11.
[19] Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008 ("26 June 2008 Decision"), paras 13-17, 18, 22, 25, 27-30 and 32.
[20] Proposed Facts 21-36.
[21] *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.

"Sarajevo"[22] in order to render the fact consistent with the meaning intended in the original Judgment.

14. Proposed Fact 40 reads: "No stabilising fin was found embedded in the crater to suggest that the projectile was a mortar shell."[23] The Prosecution objects to this Proposed Fact because it is a discussion of Prosecution and Defence evidence instead of a factual finding of the Milošević Trial Chamber. The Trial Chamber does not find this reasoning convincing with respect to Proposed Fact 40, which it deems to be a factual assertion. However, the second half of the statement, qualified by the term "to suggest", is formulated speculatively and detracts from the overall clarity of the sentence. For these reasons, the Trial Chamber takes judicial notice of Proposed Fact 40, though subject to redaction.[24]

15. The second half of Proposed Fact 49 states: "an analysis of the charge *could have* determined with greater precision the position where the shell was fired from."[25] The phrase "could have" is speculative, and therefore the formulation of the statement is not sufficiently factual. The Trial Chamber finds that it would be inappropriate to take judicial notice of a statement that is formulated as a supposition as opposed to a fact.

16. The remainder of the Proposed Facts fulfil the applicable standard.

C. The Proposed Fact Must Be Relevant to the Case

17. The Prosecution does not object to any of the Proposed Facts on this ground. The Trial Chamber notes that all of the Proposed Facts deal either with the factual background of the crime bases under consideration in this case or with specific scheduled incidents contained in the Indictment.[26] As such, the Trial Chamber is satisfied that all of the Proposed Facts meet this requirement.

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[22] Proposed Fact 10 should read as follows: "Confrontation lines encircling the portions of Sarajevo under ABiH forces were in place by 10 September 1992, when General Galić took up his duties as SRK commander."
[23] Motion Annex, citing *Milošević* Trial Judgment, para. 469.
[24] Proposed Fact 40 should read: "No stabilising fin was found embedded in the crater."
[25] Motion Annex, citing *Milošević* Appeals Judgment, para. 230 (emphasis added).
[26] *See* Motion, paras 15-17.

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

18. The Prosecution opposes the admission of Proposed Facts 20, 51 and 53 on the ground that these facts are of an essentially legal nature. [27]

19. Proposed Fact 20 states: "Given the abundant evidence on which the Trial Chamber relied, it was reasonable for the Trial Chamber to conclude beyond reasonable doubt that Martić himself had admitted to ordering the shelling of Zagreb."[28] The Trial Chamber finds that this is an admissible factual assertion as it refers to an admission of ordering as opposed to a finding on the ordering itself as a mode of liability, which differentiates a factual conclusion from a legal finding. However, the Trial Chamber finds that formulation of the given sentence taken out of its original context is confusing, and therefore redacts Proposed Fact 20 as follows: "Martić himself had admitted to ordering the shelling of Zagreb."

20. Proposed Fact 51 posits: "Whereas the evidence presented was sufficient to establish the *direction* of the fire, it was insufficient to establish beyond reasonable doubt its *origin*, taking into account the positions of the warring parties at the time of the incident."[29] This finding of the Milošević Appeals Chamber is explicitly based on a consideration of the evidence presented in that case. In addition, the Proposed Fact is formulated negatively, stating that the evidence on record in the *Milošević* case was insufficient to establish the origin of fire of the shells which exploded at the Baščaršija flea market.[30] The Trial Chamber notes that specific evidence under consideration is not necessarily the same from case to case, and therefore finds that it would be inappropriate to take judicial notice of a Proposed Fact which is a factual conclusion based on the insufficiency of evidence presented in a different case. For these reasons, the statement is deemed not to be of an essentially legal nature, but the Trial Chamber, exercising its residual discretion, declines to take judicial notice of Proposed Fact 51.

21. The formulation of Proposed Fact 53[31] is similar to that of Proposed Fact 51 in that the Milošević Trial Chamber negatively articulates its findings based on the evidence presented in the case: "On the basis of the evidence in its totality, the Trial Chamber is unable to conclude that this mortar shell was fired from the territory under the control of the SRK (...) In the circumstances,

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[27] Response, paras 10(b), 10(i) and 10(j), respectively. Proposed Fact 53 is also objected to as being a review of conflicting evidence instead of a statement of fact.
[28] Motion Annex, citing *Martić* Appeals Judgment, para. 231.
[29] Motion Annex, citing *Milošević* Appeals Judmgent, para. 230 (emphasis in original).
[30] Referring to Scheduled Incident A4 of the Indictment in the present case.
[31] The Chamber notes that Proposed Fact 53 relates to Scheduled Incident A7 in the Indictment, not A8 as stated in the Motion.

therefore, the Trial Chamber is not satisfied that the mortar was launched from SRK-held territory."[32] The rest of Proposed Fact 53 is comprised of a consideration of discrepancies in the evidence, which according to the Defence "form the basis for the ultimate factual determination on that count."[33] The finding provided in this Proposed Fact is qualified by an acknowledgement of the Milošević Trial Chamber of the evidentiary circumstances, namely the disparities presented in the evidence in that case. Again, the Trial Chamber, in light of its residual discretion, finds that a negatively formulated conclusion based specifically on a Chamber's consideration of the evidence before it is not sufficient for judicial notice in the present case. Such a formulation is not a statement of fact but rather a qualified declaration of doubt inextricably linked to the conditions of a particular case.

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

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

23. The Trial Chamber is satisfied that all of the Proposed Facts submitted satisfy this requirement. The Trial Chamber also notes that none of the Proposed Facts was objected to by the Prosecution on this ground.

F. The Proposed Fact Must Not Be Subject to Pending Appellate Review

24. The Trial Chamber notes that Proposed Facts were not overturned on appeal and finds that they satisfy this requirement. In addition, the Prosecution has not opposed any of the Proposed Facts based on this criterion.

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

25. The Trial Chamber finds that all Proposed Facts concern crime base evidence and satisfy this standard. Furthermore, none of the Proposed Facts has been objected to on this ground.

H. The Formulation of a Proposed Fact Must Not Differ Substantially From the Formulation in the Original Judgment

26. The Trial Chamber recalls that 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

[32] Motion Annex, citing *Milošević* Trial Judgment, para. 579.
[33] Reply, para. 29.

in the original judgement.[34] A Trial Chamber must decline to take judicial notice of facts that are characterised in a misleading or otherwise inaccurate manner.[35]

27. The Prosecution objects to a number of the Proposed Facts as arising from a discussion of the evidence on record as opposed to being factual findings of the Chambers.[36] The Trial Chamber considers this ground for objection as having to do with whether the facts are characterised accurately and are not misleading, and as such will evaluate in this section the facts for which the Prosecution submits the aforementioned argument. The Defence counters that the Prosecution has provided no cogent reasoning or support for the basis of this objection and that the Proposed Facts all meet the criteria enumerated in the jurisprudence of the Tribunal.[37]

28. The Trial Chamber finds that a statement from a judgment which arises from a discussion of the evidence presented during the course of a trial is not necessarily inadmissible as an adjudicated fact. An assessment of the admissibility of a Proposed Fact must be made on a case-by-case basis, taking into account such factors as the overall context of the Proposed Fact in question as well as whether or not the ultimate findings of the Trial Chamber dispute the veracity of the evidence under discussion. The Trial Chamber notes that a statement arising from a discussion of evidence is sometimes presented in a judgment as a statement of fact. Such a statement, however, can also be invoked in a judgment to provide context for a Chamber's decision-making and can eventually be refuted by the findings of the Chamber.

29. Proposed Fact 11 posits:

> "According to Michael Rose, the British general who commanded UNPROFOR forces in Bosnia-Herzegovina from January 1994 to January 1995, what "was certain is that the Bosnian Government forces would, from time to time, fire at the Serbs, at particular moments of political importance, in order to draw back fire on to Sarajevo so that the Bosnian government could demonstrate the continuing plight of the people in Sarajevo."[38]

Although this Proposed Fact is taken verbatim from the *Galić* Trial Judgment, it is removed from the context in which it was originally included, which is as part of a broader summary of evidence in which the Galić Trial Chamber juxtaposed this fact with other evidentiary statements regarding the siege of Sarajevo. Extracting the statement from its original context imbues it with a meaning and significance not originally intended. Therefore, the Trial Chamber rejects Proposed Fact 11.

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[34] *Krajišnik* Decision, para. 14; *Prlić et al.* Decision, para. 12.
[35] *Karemera et al.* Decision, para. 55; *Popović et al.* Decision, para. 8.
[36] Response, paras 10(a), 10(d), 10(e), 10(g) and 10(h). This argument pertains to Proposed Facts 11, 38-44 and 46-50. Proposed Fact 40 is dealt with in a previous section. Proposed Fact 53 is opposed by the Prosecution as containing both legal findings and a discussion of evidence, and is covered in section D above.
[37] Reply, paras 8-12, 17-18 and 19-20.
[38] Motion Annex, citing *Galić* Trial Judgment, para. 211.

30. Proposed facts 37 through 51 relate to Scheduled Incident A4 of the Indictment. The Trial Chamber is satisfied that Proposed Facts 38, 46-48 and 50 are factual statements that do not differ from the formulations in the original judgment and otherwise meet the criteria for judicial notice.

31. Proposed Facts 39 and 41 reflect differing conclusions as to the calibre of shells fired based on separate analyses. Neither of these Proposed Facts differs from the original formulation in the judgment, yet they portray discrepancies in the analysis of the calibre of the shells fired. In paragraph 473 of the Trial Judgment, the Milošević Trial Chamber accepts that there is discrepancy in the evidence, without explicitly resolving the matter. Therefore, the Trial Chamber concludes that Proposed Facts 39 and 41 are not statements of fact attaining the threshold required for judicial notice.

32. Proposed Facts 42 and 44 both refer to separate analyses regarding the direction of fire of the shelling. Proposed Fact 42 posits: "The KDZ calculated the azimuth as 159 degrees, a south-easterly direction, that is, from Mount Trebević 'where the enemy positions are located'."[39] However, the Milošević Appeal Chamber noted that Trebević was the location of both ABiH-held territory and SRK-held territory.[40] As such, the last part of Proposed Fact 42 is, on its own, misleading and subjective and should be redacted accordingly.[41] Proposed Fact 44 states: "The UNMO report concurred with the KDZ on the direction of fire, determining that the direction of fire was 160 degrees, which was south, south-east of the impact site."[42] While certainly a discussion of evidence as contended by the Prosecution, these two statements are thereafter explicitly validated in the Milošević Trial Chamber's findings.[43] The Trial Chamber therefore finds that these two Proposed Facts meet the requirements for judicial notice.

33. Proposed Fact 43 relates to the investigation carried out by the KDZ as referenced in Proposed Fact 42, and provides: "The investigative team did not calculate the distance from which the shell was fired or the angle of descent."[44] The Trial Chamber is satisfied that this is a factual statement, but due to the number of independent investigations carried out, the Trial Chamber finds that the investigative team from the statement must explicitly be identified as that from the KDZ.[45]

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[39] Motion Annex, citing *Milošević* Trial Judgment, para. 470.
[40] *Milošević* Appeals Judgment, para. 229.
[41] Proposed Fact 42 should read: "The KDZ calculated the azimuth as 159 degrees, a south-easterly direction, that is, from Mount Trebević."
[42] *Ibid.*
[43] *Milošević* Trial Judgment, para. 473 ("The Trial Chamber is satisfied, on the basis of the investigations carried out by both the BiH police and the UNMOs, that the direction of fire was south-east, that is, from Mount Trebević.").
[44] Motion Annex, citing *Milošević* Trial Judgment, para. 470.
[45] Proposed Fact 43 should therefore read: "The KDZ investigative team did not calculate the distance from which the shell was fired of the angle of dissent."

34. Proposed Fact 45 reads as follows: "The alleged victims of the incident were not found at the scene of the shelling, even though the BiH police arrived within 15 minutes of the shelling."[46] The Trial Chamber notes that the first part of the sentence as found in the judgment, which identifies the statement as having been submitted by the Milošević Defence in its final brief, has been removed from the formulation of the Proposed Fact. Furthermore, in the findings section, the Milošević Trial Chamber expressly addressed the Milošević Defence submission, recalling that "evidence was presented in respect of this incident, as well as others, that after a shelling the wounded and bodies of the dead were removed from the scene as quickly as possible."[47] As such, the Defence formulation of this Proposed Fact leaves out relevant contextual information and the Proposed Fact is therefore categorized in a misleading and inaccurate manner. The Trial Chamber finds that Proposed Fact 45 fails to meet the requirements for judicial notice.

35. The Trial Chamber finds that Proposed Facts 11, 39, 41 and 45 fail to meet this requirement and therefore declines to take judicial notice of these Proposed Facts. The Trial Chamber considers that all remaining Proposed Facts fulfil the applicable standard.

IV. DISPOSITION

36. On the basis of the reasoning set forth above and pursuant to Rules 54, 94(B) and 126 *bis*, the Trial Chamber hereby

GRANTS leave to file a Reply;

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

a) 1-9, 12-19, 37-38, 44, 46-48 and 52

b) 10, 20, 40, 42 and 43 subject to the changes indicated in the present decision;

DISMISSES the remainder of the Motion.

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

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[46] Motion Annex, citing *Milošević* Trial Judgment, para. 471.
[47] *Milošević* Trial Judgment, para. 474.

Judge Bakone Justice Moloto
Presiding Judge

Dated this fourth day of May 2010
At The Hague
The Netherlands

[Seal of the Tribunal]