UNITED NATIONS

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: 26 August 2010

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **26 August 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON "PROSECUTION RESPONSE TO KARADZIC'S SUBMISSION OF AGREED FACTS AND MOTION FOR RECONSIDERATION"

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby 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 "Prosecution Response to Karadzic's [*sic*] Submission of Agreed Facts and Motion for Reconsideration with Appendices A and B", filed on 22 July 2010 ("Response and Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. During the testimony of Robert Donia ("Witness") on 7 June 2010, the Accused referred to a document which he stated contained "a set of facts about which we could reach an agreement" and provided copies to the Witness, the Office of the Prosecutor ("Prosecution"), and the Chamber.[1] He requested the Witness to study the document and later identify those parts with which he agreed. The presiding Judge noted at this time that the Prosecution may be best placed to state whether or not it agreed with any facts proposed by the Accused, separately from the Witness.[2]

2. On 9 June 2010, the Prosecution indicated that it was continuing to study the document prepared by the Accused and would respond in writing in relation to those proposed facts it considered to be relevant to the case, while noting that many of them would appear not to be relevant.[3] The following day, the Witness was asked whether there were, indeed, any of the proposed facts with which he could agree, and he referred to a few by number.[4]

3. On 15 June 2010, the presiding Judge noted that, in order for the Witness's evidence in relation to those of the proposed facts which he affirmed to be comprehensible, the document would need to be placed on the record in some way.[5] He further stated his position that the issue of relevance with regard to agreed facts was different from that with regard to the admission of evidence, or taking judicial notice of adjudicated facts, and encouraged the parties to seek agreement on as many "background matters" as possible. He then indicated that the Prosecution should make a written submission on those of the facts proposed by the Accused with which it

[1] Hearing, T.3367 (7 June 2010).
[2] Hearing, T.3368 (7 June 2010).
[3] Hearing, T.3597–3598 (9 June 2010).
[4] Hearing, T.3729–3731 (10 June 2010).
[5] Hearing, T.3735 (15 June 2010).

could agree.[6] Finally, he instructed the Registry to file the Accused's document containing the proposed facts on the record.[7]

4. The Response and Motion was filed by the Prosecution in response to the presiding Judge's request, after it had conducted a full review and analysis of all the facts proposed by the Accused for agreement. The Prosecution states, firstly, that many of the proposed facts are "problematic" because of their nature and/or the lack of clarity as to their source.[8] However, it sets out, in Appendix B, its response to each fact and states that it "conditionally agrees" with parts of 30 of them.[9] The condition upon which this agreement is based appears to be the success of a request contained within the Motion for the Chamber to reconsider its earlier decisions on the admission of evidence from Milan Babić pursuant to Rule 92 *quater*, and on judicial notice of adjudicated facts.[10] Specifically, the Prosecution notes that the Chamber found in these earlier decisions that certain evidence or facts concerning events in Slovenia and Croatia, which are not the subject of the Third Amended Indictment, are irrelevant to the present proceedings. The Prosecution argues that the Chamber cannot or should not find those facts proposed by the Accused for agreement, which also relate to events in Slovenia and Croatia, now to be relevant to the proceedings and requests that, if it does, it reconsider its earlier decisions on the Babić evidence and on judicial notice of adjudicated facts related to these background issues.[11]

5. The Accused has not made any further written submissions in relation to the proposed agreed facts, nor with regard to the Prosecution's request for reconsideration contained in the Response and Motion.

II. Applicable Law

6. The only provision of the Tribunal's Rules of Procedure and Evidence ("Rules") that refers to agreement between the parties is Rule 65 *ter* (H), which states that "the pre-trial Judge shall record the points of agreement and disagreement on matters of fact and law." While this provision is connected to the pre-trial stage of the proceedings, setting out the tasks of the pre-

[6] Hearing, T.3736 (15 June 2010).
[7] Hearing, T.3737 (15 June 2010).
[8] Response and Motion, para. 1.
[9] Response and Motion, para. 10.
[10] Response and Motion, paras. 11–17, referring to Decision on Prosecution's Motion for the Admission of the Evidence of KDZ172 (Milan Babić) pursuant to Rule 92 *quater*, 13 April 2010; Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 October 2009; Decision on Prosecution Request for Reconsideration of Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 25 November 2009.
[11] Response and Motion, paras. 11–17.

trial Judge, Rule 65 *ter* (M) makes clear that the Trial Chamber may exercise any of the functions of the pre-trial Judge. Thus, at the trial phase of the proceedings, the Trial Chamber may choose to note on the record any matters of fact or law which are agreed between the parties.

7. There is no provision in the Rules for requests for reconsideration, which are a product of the Tribunal's jurisprudence, and are permissible only under certain conditions.[12] However, the Appeals Chamber has definitively articulated the legal standard for reconsideration of a decision as follows: "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'"[13] Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.[14]

III. Discussion

8. It is readily apparent from Rule 65 *ter* (H), and indeed as a matter of common sense, that the Trial Chamber must be satisfied that there is indeed agreement between the parties before any fact can be noted as agreed. Agreement between one of the parties and a witness, even an expert brought by the opposing party, on a particular matter does not make that matter agreed between the parties themselves. Rather, where a party puts a particular proposition to a witness, and the witness agrees or disagrees with it, the witness's response is evidence in the case, to be considered by the Chamber alongside all the other evidence brought. Thus, it is simply evidence in this case that the Witness agreed or affirmed certain facts proposed by the Accused. Following his evidence in this regard, the Chamber instructed the Registry to file the document prepared by the Accused containing those facts solely in order to render his answers in relation to them comprehensible.

9. At the same time, however, the Chamber encouraged the Prosecution and the Accused to seek agreement on the facts contained in the document prepared by the Accused, if possible.

[12] *Prosecutor v. Prlić et al*., Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.

[13] *Prosecutor v. Milošević*, Case No. IT-02-54-AR108*bis*.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.

[14] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2. *See also Prosecutor v. Popović et al*., Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, p. 3.

This does not, however, suggest that the Chamber had already reviewed the proposed facts and found any or all of them to be relevant to the current proceedings. Were the parties indeed to agree on certain facts, the Chamber could then record that agreement. The Prosecution asserts that the Chamber "must" accept such recorded agreed facts as evidence under Rule 89(C), requiring a finding of relevance and probative value. However, while some other Trial Chambers have previously noted that the effect of recording points of agreement between the parties at trial is to accept those points of agreement as evidence pursuant to Rule 89, this Chamber respectfully differs from that proposition.[15] It considers that the admission of evidence, or indeed the taking of judicial notice of adjudicated facts or facts of common knowledge pursuant to Rule 94(B), is an entirely different process from a simple recording that the parties have agreed on certain facts. In the former case, it is clearly necessary for a Chamber to be satisfied as to relevance before admitting testimony or a piece of documentary evidence, or before taking judicial notice. However, agreement between the parties is primarily a matter for the parties themselves, and they may choose to agree on any number of matters which the Chamber may, ultimately, consider have no bearing on the case. It is clear that it is not an effective use of time or resources for the parties to make efforts to agree on matters which are not relevant to the current proceedings, but it is for the parties themselves to decide how to manage these aspects of their cases, Therefore, it is the view of the Chamber that where the parties do agree on matters of fact, and this agreement is recorded by the Chamber or pre-trial Judge, it does not render those facts evidence, but rather simply makes them facts in support of which no evidence needs be brought and upon which the Chamber may rely, should it so choose, in its final judgement.

10. The Trial Chamber has not suggested that the relevance requirement for the admission of evidence set out in Rule 89(C) is a variable one, depending on the particular Rule through which that evidence is sought to be tendered. Indeed, the Chamber has applied the same standard of relevance in all of its decisions on the admission of evidence, as well as on judicial notice of adjudicated facts. If, in the course of the testimony of a particular witness, either party considers that the opposing party is seeking to elicit evidence which has no relevance to the current proceedings, that party is entitled to raise the matter immediately with the Chamber, which will

[15] *See Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision in Respect of Joint Submission of Agreed Facts Proposed by the Defence, 29 June 2010, p.2; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 10 April 2007, para. 37; *Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on Motion Concerning Further Agreed Facts, 25 July 2005, p.2. The Chamber notes that in none of these decisions is it explained why the recording of points of agreement converts those points into admitted evidence rather than into facts in relation to which no further evidence need be brought.

then issue its decision. This did not occur during the testimony of the Witness. However, if, upon its review and analysis of the Witness's evidence, the Chamber considers that certain answers given by him to questions put by either party are not relevant to the present case, it will simply give no regard to those answers in reaching its final conclusions in the case.

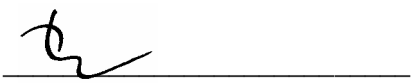
11. For these reasons, and in particular because the Chamber has not made any finding of relevance in relation to the facts proposed for agreement by the Accused, which seems to be the basis of the Prosecution's request for reconsideration, the Chamber finds that request for reconsideration of its earlier decisions to be misplaced. As it has failed to demonstrate any error of reasoning on the part of the Chamber, or indeed to demonstrate that reconsideration is necessary to prevent an injustice, that request will be denied.

12. The Prosecution appears to have agreed to certain aspects of some of the facts proposed by the Accused on the condition that its request for reconsideration is granted. As that is not the case, the Chamber cannot be satisfied at this stage that there is indeed agreement between the parties on any of the proposed facts and cannot, therefore, record any points of agreement. However, the Chamber encourages the Prosecution to take into consideration the clarification provided by this decision on the nature of agreed facts, and to make a further written submission as soon as possible on whether it does agree to any of the facts proposed by the Accused, or indeed whether there is any agreement between the parties in relation to any other background matters. The facts upon which agreement has been reached, if any, should be identified in the form of a list of *only* those facts in relation to which the parties have had discussions and reached a clear agreement. The Chamber notes that it is in the interests of justice, and of the parties themselves, to reach agreement on as many such matters as possible, in order to avoid the expenditure of valuable time in the courtroom bringing evidence to support facts that are not in dispute.

IV. Disposition

13. Accordingly, the Trial Chamber, pursuant to Rules 54 and 65 *ter* of the Rules, hereby **DENIES** the request for reconsideration contained in the Response and Motion, **NOTES** that there are at the present time no matters of fact agreed between the parties, and **ENCOURAGES** the parties to make continued efforts to reach such agreement.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-sixth day of August 2010
At The Hague
The Netherlands

[Seal of the Tribunal]