

**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: 15 October 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: 15 October 2010

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR
RECONSIDERATION OF THE TRIAL CHAMBER'S
DECISION OF 4 MAY 2010 CONCERNING
ADJUDICATED FACTS**

The Office of the Prosecutor

Mr. Mark Harmon

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 Reconsideration of Trial Chamber Decision of 4 May 2010, on Defence Motion for Adjudicated Facts, or in the Alternative, Motion for Leave to Amend 65 *ter* Witness List, with Public Annex A” filed publicly on 30 August 2010 (“Motion”), and hereby renders its Decision.

I. PROCEDURAL BACKGROUND

1. On 4 May 2010, the Trial Chamber issued its “Decision on Defence Motion for Judicial Notice of Adjudicated Facts” (“Decision of 4 May 2010”) denying, *inter alia*, taking judicial notice of Proposed Facts 39, 41 and 53.

2. On 30 August 2010, the Defence filed the Motion seeking reconsideration of the Decision of 4 May 2010 in relation to Proposed Facts 39, 41 and 53 or, in the alternative to taking judicial notice of Proposed Fact 53, for leave to amend its 65 *ter* witness list for the purpose of adding one 92 *bis* witness.¹ On 14 September 2010, the Prosecution filed publicly its “Response to Defence Motion for Reconsideration of 31 August 2010” (“Response”).

II. SUBMISSIONS

A. Proposed Facts 39 and 41

3. The Defence argues that Proposed Facts 39 and 41 meet the applicable standard for adjudicated facts and therefore the Trial Chamber committed an error of reasoning in not taking judicial notice of these two facts.²

4. Proposed Fact 39 states: “Based on crater analysis and fragments found on the scene, the BiH police concluded that two 76mm shells were fired from a gun or cannon.”³ Proposed Fact 41 states: “On the basis of the shrapnel fragments shown to him, Maj. Hammerton concluded that two 82mm mortar shells had been fired, although he could not establish the range.”⁴

5. The Defence contends that nothing in the requirements for taking judicial notice prohibits a Trial Chamber from taking judicial notice of two competing factual findings, as long as each factual

¹ Motion, para. 31.

² Motion, para. 11.

³ This proposed fact is from paragraph 469 of the Trial Judgement in the case of *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1, 12 December 2007 (“*Milošević* Trial Judgement”).

⁴ This proposed fact is from paragraph 469 of the *Milošević* Trial Judgement.

finding individually meets the applicable threshold.⁵ The Defence submits that Proposed Facts 39 and 41 are conclusions based on evidence conducted by two separate and independent investigations.⁶ The Defence further emphasises that both Proposed Facts 39 and 41 are indeed adjudicated facts, and both meet all the requirements for judicial notice.⁷

6. The Prosecution submits that the Trial Chamber committed no error in its reasoning in denying taking judicial notice of Proposed Facts 39 and 41.⁸ The Prosecution notes the Trial Chamber has a discretionary power in determining which facts to take judicial notice of and the Trial Chamber has acted within the scope of its discretion.⁹

7. The Prosecution further argues the Defence has not demonstrated why the Trial Chamber has committed an error of reasoning, nor why reconsideration is necessary in order to avoid a miscarriage of justice.¹⁰ Therefore, the Prosecution submits that the Defence's request for reconsideration is without foundation and should be denied.¹¹

B. Proposed Fact 53

8. The Defence disputes the Trial Chamber's conclusion related to Proposed Fact 53 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."¹²

9. Proposed Fact 53 reads: "On the basis of the evidence in its totality, the [*Milošević*] Trial Chamber is unable to conclude that this mortar shell was fired from the territory under the control of the SRK [...] In the circumstances therefore, the [*Milošević*] Trial Chamber is not satisfied that the mortar was launched from SRK-held territory."¹³

10. The Defence submits that the practice of taking judicial notice of adjudicated facts should pertain to negative findings as well as positive findings and the Trial Chamber should not adopt a different analysis for each type of finding.¹⁴ The Defence further notes that taking judicial notice

⁵ Motion, para. 13.

⁶ Motion, para. 14.

⁷ Motion, para. 14.

⁸ Response, para. 6.

⁹ Response, para. 9.

¹⁰ Response, para. 9.

¹¹ Response, para. 10.

¹² Motion, para. 19.

¹³ This Proposed Fact is based on paragraph 579 of the *Milošević* Trial Judgement.

¹⁴ Motion, para. 20.

only creates a rebuttable presumption that can then be challenged by presenting additional evidence at trial.¹⁵ The Defence stresses the need to carefully consider “the accused’s right to a fair and expeditious trial”¹⁶ and thus requests the Trial Chamber to take judicial notice of Proposed Fact 53.¹⁷

11. The Prosecution argues that the Trial Chamber denied taking judicial notice of Proposed Fact 53 not because it was a negative finding but because it was not a statement of fact that met the requirements for judicial notice.¹⁸ The Prosecution emphasises again the discretion of the Trial Chamber in making its decision and therefore submits that the Defence’s request for reconsideration be denied.¹⁹

C. Amendment of the Rule 65 *ter* Witness List

12. The Defence submits, in the alternative, if the Trial Chamber rejects its motion for reconsideration in its part regarding Proposed Fact 53, to allow the Defence to amend its Rule 65 *ter* witness list to include Captain Thomas Hansen as a Rule 92 *bis* witness.²⁰

13. The Defence submits that Mr Hansen’s testimony relates directly to Scheduled Incident A-7 of the Indictment and the Prosecution has introduced evidence that relates directly to the issue to be discussed by Mr Hansen.²¹ The Defence admits that the reason for amending its witness list at this late stage of the trial is due to an inadvertent oversight during the summer recess period.²² At the same time, however, it submits that the Prosecution has been aware of Mr Hansen’s evidence since 9 September 1995²³ and the Defence’s position on the Scheduled Incident A-7 since 21 January 2009.²⁴

14. In its Response, the Prosecution submits that it does not oppose the addition of Mr Hansen to the Rule 65 *ter* witness list.²⁵ However, the Prosecution argues that the Motion contains neither a sufficient showing of how factors listed in Rule 92 *bis*(A) are applicable to Mr Hansen’s evidence

¹⁵ Motion, para. 19.

¹⁶ Motion, para. 20.

¹⁷ Motion, para. 31.

¹⁸ Response, para. 13.

¹⁹ Response, para. 14.

²⁰ Motion, para. 23.

²¹ Motion, para. 25.

²² Motion, para. 28.

²³ Motion, para. 27.

²⁴ Motion, para. 29.

²⁵ Response, para. 16.

nor a declaration under Rule 92 *bis*(B).²⁶ The Prosecution therefore submits that it can properly respond to this issue only once the Defence submits a proper Rule 92 *bis* application.²⁷

III. APPLICABLE LAW

15. According to the jurisprudence of the Tribunal, the Trial Chamber has inherent discretionary power to reconsider a previous decision if there has been a clear error of reasoning or if particular circumstances exist that justify reconsideration in order to prevent an injustice.²⁸

IV. DISCUSSION

A. Proposed Facts 39 and 41

16. In its Decision of 4 May 2010, the Trial Chamber reasoned that “Proposed Facts 39 and 41 reflect differing conclusions [...] that portray discrepancies in the analysis of the calibre of the shells fired.”²⁹ The Trial Chamber concluded that “the Milošević Trial Chamber accept[ed] that there [was a] discrepancy in the evidence, without explicitly resolving the matter. Therefore [...] Proposed Facts 39 and 41 are not statements of fact attaining the threshold required.”³⁰ For that reason, the Trial Chamber refused to take judicial notice of Proposed Facts 39 and 41.

17. The Trial Chamber notes that Proposed Facts 39 and 41 are not findings by the Trial Chamber but instead are conclusions reached by investigators and admitted into evidence by the *Milošević* Trial Chamber. The Defence misconstrues the Trial Chamber’s conclusion that Facts 39 and 41 do not attain the threshold for judicial notice as being based on a discrepancy in the determination of the calibre of the shell. The Trial Chamber clarifies that its conclusion is based on the fact that the *Milošević* Trial Chamber did not make any finding as to the calibre of shells fired.³¹ By “without explicitly resolving the matter” the Trial Chamber therefore meant that the *Milošević* Trial Chamber did not make any determination. Hence, Proposed Facts 39 and 41 cannot be adjudicated in keeping with the applicable standard under Rule 94(B).

²⁶ Response, para. 17.

²⁷ Response, para. 17.

²⁸ See *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Decision on Motion for Reconsideration of Oral Decision Issued on 29 February 2008, 10 March 2008 para. 5; *Prosecutor v. Slobodan 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, 6 April 2006, para. 25, fn. 40; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Reconsideration of Oral Decision Dated 24 April 2007 Regarding Evidence of Zoran Lilić, 27 April 2007, para. 4.

²⁹ Decision of 4 May 2010, para. 31.

³⁰ Decision of 4 May 2010, para. 31.

³¹ *Milošević* Trial Judgement, para. 473.

18. Consequently, the Trial Chamber finds it has made no error of reasoning with respect to Proposed Facts 39 and 41. It thereby affirms its original decision and dismisses the Defence's Motion in relation to these facts.

B. Proposed Fact 53

19. Turning to Proposed Fact 53, the Trial Chamber notes its previous decision that "negatively formulated conclusions based specifically on a Chamber's consideration of the evidence before it is not sufficient for judicial notice."³² The Trial Chamber concurs with the Defence's argument about negative findings requiring the same type of analysis as positive findings but rejects its argument that the Trial Chamber applied a different standard of analysis for Proposed Fact 53.³³ The Trial Chamber notes that the *Milošević* Trial Chamber stated it is "unable to conclude that this mortar shell was fired from the territory under the control of the SRK." [...] In the circumstances therefore, the [*Milošević*] Trial Chamber is not satisfied that the mortar was launched from SRK-held territory."³⁴

20. The first part of Proposed Fact 53 is thus not a finding of fact but instead an articulation of the Trial Chamber's inability to make a finding. The Trial Chamber however agrees with the Defence that the second part contains a finding on the issue of the origin of the shell which meets the requirements under Rule 94(B). Therefore the Trial Chamber partially reconsiders its Decision of 4 May 2010 and takes judicial notice of the second part of Proposed Fact 53.³⁵

C. Amendment of the Rule 65 ter Witness List

21. Considering that the Trial Chamber decided to reconsider its Decision of 4 May 2010 insofar it concerns the adjudication of Proposed Fact 53, the Trial Chamber will not discuss the request of the Defence to amend its Rule 65 *ter* witness list to include Captain Thomas Hansen as a Rule 92 *bis* witness.

V. DISPOSITION

22. For the foregoing reasons and pursuant to Rules 54, 65 *ter* and 94(B) the Trial Chamber, hereby:

³² Decision of 4 May 2010, para. 21.

³³ Motion, para. 20.

³⁴ *Milošević* Trial Judgement, para. 579.

³⁵ Proposed Fact 53 will therefore read: "On the basis of the evidence in its totality [as admitted in the *Milošević* case] the [*Milošević*] Trial Chamber is not satisfied that the mortar was launched from SRK-held territory."

GRANTS the Motion in part and takes judicial notice of Proposed Fact 53 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.



Judge Bakone Justice Moloto
Presiding Judge

Dated this fifteen day of October 2010

At The Hague

The Netherlands

[Seal of the Tribunal]