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30 January 2014

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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 the
Former Yugoslavia since 1991

Case No. IT-09-92-T
Date: 30 January 2014
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 30 January 2014

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION PURSUANT TO THE
APPEALS CHAMBER'S DECISION ON ADJUDICATED
FACTS**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 9 December 2011, the Prosecution filed a motion (“First Motion”), requesting that the Chamber take judicial notice of certain adjudicated facts.¹ On 19 January 2012, the Chamber informed the parties that it would issue separate decisions on the First Motion, each addressing one of the three Annexes of the proposed adjudicated facts.² On 28 February 2012, the Chamber issued its first decision on the First Motion, addressing the proposed adjudicated facts contained in Annex A (“First Decision”).³ On 21 March 2012, the Chamber issued its second decision on the First Motion, addressing the proposed adjudicated facts contained in Annex B (“Second Decision”).⁴ On 13 April 2012, the Chamber issued its third decision on the First Motion, addressing the proposed adjudicated facts contained in Annex C (“Third Decision”).⁵ For the full procedural history, the Chamber refers to paragraphs 1 through 3 of the First Decision.

2. On 4 July 2012, the Defence filed an Interlocutory Appeal against the Chamber’s First, Second, and Third Decision.⁶ On 12 November 2013, the Appeals Chamber rendered its Decision on the Defence’s Appeal against the Trial Chamber’s Decisions (“Appeal Decision”), directing the Chamber to remove from the record 61 Impugned Adjudicated Facts.⁷ On 13 November 2013, the Chamber withdrew its judicial notice accordingly.⁸ On 19 November 2013, the Prosecution filed the instant Motion Pursuant to the Appeals Chamber’s Decision on Adjudicated Facts (“Second Motion”).⁹ The Defence did not respond to the Second Motion.

II. SUBMISSIONS

3. The Prosecution requests that the Chamber take judicial notice of 24 of the 61 Adjudicated Facts (“Proposed Facts”).¹⁰ They are listed in Annex B of the Second Motion. The Prosecution submits that it has reformulated some of these facts in accordance with the Appeal Decision

¹ Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 December 2011.

² T. 171.

³ First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 February 2012.

⁴ Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 21 March 2012.

⁵ Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 13 April 2012.

⁶ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.1, Defense Interlocutory Appeal Brief Against the Trial Chamber Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 4 July 2012.

⁷ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.1, Decision on Ratko Mladić’s Appeal Against the Trial Chamber’s Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 12 November 2013.

⁸ T. 19228.

⁹ Prosecution Motion Pursuant to the Appeals Chamber’s Decision on Adjudicated Facts, 19 November 2013.

¹⁰ Second Motion, paras 2, 8, Annex B.

while others are tendered in their original wording. It further considered the Chamber's observations in its previous decisions in order to meet all requirements of Rule 94(B).¹¹

III. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law governing requests for judicial notice of adjudicated facts pursuant to Rule 94 (B) of the Rules of Procedure and Evidence ("Rules") as set out in the First Decision.¹²

IV. DISCUSSION

A. Preliminary Remarks

5. The Chamber observes that the Proposed Facts are similar to the facts proffered in the First Motion. Recalling its discussion in the First, Second, and Third Decisions, the Chamber confirms that the Proposed Facts satisfy the following requirements for judicial notice of adjudicated facts: (i) they are relevant to the matters at issue in the current proceedings, (ii) they do not include findings or characterizations that are of an essentially legal nature, (iii) they are not based on a plea agreement, (iv) they have not been contested on appeal, or, if they have, the facts have been settled on appeal, and (v) they do not relate to the acts, conduct, or mental state of the accused.¹³

6. The Chamber will thus limit itself to analysing whether the deficiencies as previously identified by the Chamber in its First, Second, and Third Decisions in relation to the Proposed Facts have been remedied.

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

Proposed Facts 136, 288, 308, 557, 721, 929, 1097, 1146, 1171, and 1402

7. In its First and Second Decisions, the Chamber concluded that Proposed Facts 136, 288, 557, 721, 929, 1097, 1146, 1171, and 1402 were not sufficiently clear, distinct, and identifiable in their previous form, lacking time or place references.¹⁴ Proposed Fact 288 contained, in addition to factual findings, essentially subjective qualifications made by the original Trial Chamber. Furthermore, the Chamber found Proposed Fact 308 to be overly broad and vague.¹⁵

¹¹ Second Motion, paras 2, 4.

¹² First Decision, paras 6-8.

¹³ First Decision, paras 34-46; Second Decision, paras 23-34; Third Decision, paras 27-35.

¹⁴ First Decision, para. 33; Second Decision, para. 19.

¹⁵ First Decision, para. 33.

Instead of rejecting them in their entirety, the Chamber reformulated or redacted these facts.¹⁶ The Appeals Chamber found that the Chamber exceeded its discretion by adding information from the original judgement.¹⁷

8. With respect to Proposed Fact 136, the Appeals Chamber held that the Chamber erred in its discretion by adding the date of “early April 1994” whereas the original judgment refers to “March and early April 1992”.¹⁸ The Prosecution addresses the issue by including the reference “March and early April 1992” in its reformulation of Proposed Fact 136.¹⁹ The Chamber considers reformulated Fact 136 in its present form to be sufficiently clear, distinct, and identifiable. Similarly, the reformulation of Proposed Fact 1171 remedies the previous shortcoming as identified by the Chamber in its First Decision.²⁰ Proposed Fact 288, in accordance with the Appeal Decision,²¹ no longer contains information which is not supported by the original judgement.²² Furthermore, the Prosecution has taken into account some of the Chamber’s suggestions for modification as set out in its First Decision.²³ The Chamber therefore considers reformulated Proposed Facts 288 and 1171 to comply with the requirements for recognition of adjudicated facts.

9. As regards Proposed Fact 1097, the Appeals Chamber was unable to locate the source for the time-reference added by the Chamber and was thus unable to assess whether the additions were consistent with the original judgement. The Appeals Chamber therefore considered the Chamber to be in excess of its discretion.²⁴ The Prosecution addresses the Appeals Chamber’s concern and re-submits the original formulation of Proposed Fact 1097 without a specific time-reference.²⁵ In Annex A of its Second Motion, the Prosecution clarifies that the time-reference as proposed by the Chamber has already been addressed by Adjudicated Fact 1083, providing the date of the attack in Kozaruša. Reiterating its finding in the First Decision that facts may be read in conjunction with other facts²⁶ and considering that the Proposed Fact in question contains additional information going beyond the scope of Adjudicated Fact 1083, the Chamber is satisfied that Proposed Fact 1097 in its present form fulfils the necessary requirements.

¹⁶ First Decision, Annex A; Second Decision, Annex B.

¹⁷ Appeal Decision, paras 37, 40, 43-44, 48-49, 51-52, 56.

¹⁸ Appeal Decision, para. 37.

¹⁹ Second Motion, Annex B.

²⁰ First Decision, Annex A; Second Motion, Annex B.

²¹ Appeal Decision, para. 43.

²² *Prosecutor v. Duško Tadić a/k/a/ "Dule"*, Case No. IT-94-1-T, Judgement, 7 May 1997, para. 593.

²³ First Decision, Annex A; Second Motion, Annexes A and B.

²⁴ Appeal Decision, paras 32, 37.

²⁵ Second Motion, Annex B.

²⁶ First Decision, para. 10.

10. Similarly, relying on its conclusions from the First Decision²⁷ and after considering the Prosecution's elaborations in Annex A of the Second Motion, the Chamber is satisfied that Proposed Fact 1402, although not entailing a specific time-frame, is sufficiently distinct, concrete, and identifiable if read in conjunction with Adjudicated Facts 1401 and 1403.

11. Furthermore, the Prosecution submits a reformulated version of Proposed Fact 308, giving due regard to the Chamber's finding in its First Decision concerning the fact's overly broad and vague nature. The Chamber finds that the present formulation of Proposed Fact 308 has sufficiently remedied the previous shortcoming and complies with the requirements for recognition of adjudicated facts.

12. The Prosecution also re-proffers Proposed Facts 721, 929, and 1146, taking into account the reformulations as suggested by the Chamber in its First Decision.²⁸ All reformulations are consistent with the text of the original judgements.²⁹ The Chamber is therefore satisfied that these Proposed Facts comply with all requirements for taking judicial notice.

13. With regard to Proposed Fact 557, the Appeals Chamber rejected the Chamber's reformulations as it was unable to locate the source for the names added in the original judgement.³⁰ The Prosecution subsequently re-submitted the original formulation of the Proposed Fact.³¹ In its First Decision, the Chamber found this original formulation to be insufficiently distinct, concrete and identifiable.³² Since the Prosecution fails to give any further explanations or arguments as to why the Chamber's previous finding cannot stand, the Chamber reiterates and confirms its finding in the First Decision, holding that the Proposed Fact in question in its present form is not sufficiently distinct, concrete, and identifiable.

14. In light of the foregoing, the Chamber concludes that Proposed Facts 136, 288, 308, 721, 929, 1097, 1146, 1171, and 1402 are sufficiently distinct, concrete and identifiable for taking judicial notice of adjudicated facts. The Chamber notes that Proposed Fact 557, however, remains ineligible according to the requirements for taking judicial notice of a fact.

²⁷ First Decision, para. 10.

²⁸ First Decision, para.33, Annex A.

²⁹ For Proposed Fact no. 721, see *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002, para. 33; for Proposed Fact no. 929, see *Prosecutor v. Duško Tadić a/k/a/ "Dule"*, Case No. IT-94-1-T, Judgement, 7 May 1997, para. 150; for Proposed Fact no. 1146, see *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, para 102.

³⁰ Appeal Decision, para 37.

³¹ Second Motion, Annexes A and B.

³² First Decision, para. 33.

C. The Proposed Fact as Formulated by the Moving Party Must not Differ in any Substantial Way from the Facts Actually Adjudicated in the Original Judgement

1. Proposed Facts 214, 421, and 1128

15. In its First Decision, the Chamber considered that Proposed Facts 214, 421, and 1128 were misleading in their submitted form or did not accurately reflect the text of the original judgement.³³ The Chamber subsequently reformulated them.³⁴ The Appeals Chamber reversed the Chamber's decision, holding that the Chamber's reformulations substantially altered the content of the Proposed Facts by adding additional information and that the changes therefore fell outside the Chamber's discretion.³⁵ In the Second Motion, the Prosecution submits reformulations of the above-mentioned Proposed Facts, including the additional information as previously proposed by the Chamber in its First Decision.³⁶ All Proposed Facts in question are consistent with the text of the original judgements.³⁷ The previous concerns as articulated by the Chamber and the Appeals Chamber have, therefore, been adequately addressed and the Chamber considers the reformulated Proposed Facts to satisfy the requirements for recognition of adjudicated facts.

2. Proposed Facts 1735, 1835, 1854, 1927, 1938, 1940, 1955-1957, 1961, and 1967

16. In its Third Decision, the Chamber further noted that a number of Proposed Facts were not consistent with the text of the original judgments, in that they contained time-references, which did not flow directly from the text of those original judgments.³⁸ After examining the Proposed Facts in the context of the judgments they originated from, the Chamber adopted the time-references as proposed by the Prosecution.³⁹ The Appeals Chamber reversed the Chamber's decision, holding that by adopting time-references which are not supported by an explicit factual finding in the original judgement, the Trial Chamber exceeded its discretion.⁴⁰ The Prosecution addressed the Appeals Chamber's concern, removing the time-references from all but two of the Proposed Facts in question.⁴¹

³³ First Decision, para. 50.

³⁴ First Decision, Annex A.

³⁵ Appeal Decision, paras 42, 46, 50.

³⁶ Second Motion, Annexes A and B.

³⁷ For Proposed Fact no. 214, see *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006, para. 157; for Proposed Fact no. 421, see *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, para 196; for Proposed Fact no. 1128, see *Krajišnik*, para. 678.

³⁸ Proposed Facts nos 1735, 1835, 1927, 1938, 1940, 1955, 1956, 1957, 1967.

³⁹ Third Decision, para. 37.

⁴⁰ Appeal Decision, para. 72.

⁴¹ Second Motion, Annexes A and B.

17. The Chamber notes that the Prosecution removed the time-references in Proposed Facts 1735, 1835, 1927, 1938, 1940, 1955-1957, and 1967. However, without these time-references these facts are rendered insufficiently concrete as to be eligible for judicial notice. As a result, the Chamber denies taking judicial notice of Proposed Facts 1735, 1835, 1927, 1938, 1940, 1955-1957, and 1967.

18. With regard to Proposed Fact 1854, the Prosecution submits that the time-reference "December 1994 to May 1995" is indeed contained in the original text of the trial judgement indicated as the source of the Proposed Fact⁴² and, contrary to the Appeals Chamber's assumption, was not added by the Chamber.⁴³ After having reviewed the original text of the judgement on which the Proposed Fact is based, the Chamber is of the view that while the time and place-references are indeed contained in the judgement, they do not form part of a finding of the Chamber, but are a mere recitation of witness evidence. Furthermore, the "finding" in relation to Dragomir Milošević's awareness of crimes merely states that "It is reasonable to infer that [...]".⁴⁴ The Chamber, having again reviewed this Proposed Fact, finds that this does not clearly qualify as a factual finding of the Trial Chamber. The remainder of the proposed fact is rendered insufficiently concrete as to be eligible for judicial notice. The Chamber therefore denies taking judicial notice of Proposed Fact 1854.

19. Proposed Fact no. 1961 refers to a time-period which is not contained in the relevant paragraph of the original judgment indicated as the source by the Prosecution.⁴⁵ The Chamber therefore denies taking judicial notice of Proposed Fact no. 1961.

20. In light of the foregoing, the Chamber finds Proposed Facts 214, 421, and 1128 to comply with the requirements for taking judicial notice of adjudicated facts. The Chamber considers, however, Proposed Facts 1735, 1835, 1854, 1927, 1938, 1940, 1955-1957, 1961, and 1967 to fall short of these requirements.

⁴² First Motion, Annex C; Second Motion, Annexes A and B.

⁴³ Appeal Decision, para. 72.

⁴⁴ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgement, 12 December 2007, para. 845.

⁴⁵ First Motion, Annex C; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment, 5 December 2003, para. 291.

V. DISPOSITION

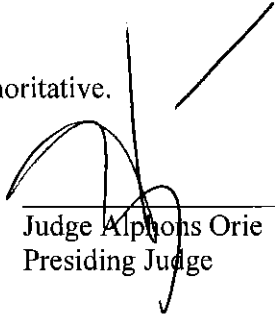
21. Based on the above and pursuant to Rule 94 (B) of the Rules, the Chamber

GRANTS the Second Motion **IN PART** and takes judicial notice of Proposed Facts 136, 214, 288, 308, 421, 721, 929, 1097, 1128, 1146, 1171, and 1402;

DENIES the remainder of the Second Motion; and

INSTRUCTS the Prosecution, with reference to its oral submission of 25 November 2013⁴⁶, to file any evidentiary motion as a result of this decision within seven days.

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



Judge Alphons Orié
Presiding Judge

Dated this thirtieth day of January 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴⁶ T. 19802-19803.