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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: 27 June 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 27 June 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON THE DEFENCE MOTIONS FOR
CERTIFICATION TO APPEAL THE DECISIONS ON THE
PROSECUTION MOTION FOR JUDICIAL NOTICE OF
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 requesting that the Chamber (i) take judicial notice of 2,883 proposed adjudicated facts (“Proposed Facts”), presented in three thematically divided annexes, and (ii) accept the Prosecution’s proposed procedure for introducing potential rebuttal evidence where the Defence has offered evidence challenging an adjudicated fact (“Prosecution Motion”).¹ On 1 February 2012, the Defence responded to the Prosecution Motion (“Defence Response”).² On 28 February 2012, the Chamber issued a decision on the Prosecution Motion concerning the Proposed Facts from Annex A (Municipalities) (“First Decision”), wherein it specified, *inter alia*, that each of the annexes to the Prosecution Motion would be covered by an individual decision.³ On 21 March 2012, the Chamber issued a decision concerning the Proposed Facts from Annex B (Srebrenica) (“Second Decision”), which was followed, on 13 April 2012, by a decision dealing with the Proposed Facts from Annex C (Sarajevo) (“Third Decision”).⁴ On 2 May 2012, the Chamber issued a decision concerning the approach towards potential rebuttal evidence (“Fourth Decision”).⁵ Altogether, the Chamber has, upon reformulating some of them, taken judicial notice of 1,974 Proposed Facts (hereinafter “Judicially Noticed Facts”).

2. On 14 and 28 March, and on 20 April 2012, the Defence filed motions requesting certification to appeal the First, Second, and Third Decisions, respectively (“First Certification Motion”, “Second Certification Motion”, “Third Certification Motion”, together “Certification Motions”).⁶ On 28 March, 11 April, and 4 May 2012, the Prosecution responded to the respective Certification Motions (“First Prosecution Response”, “Second Prosecution Response”, “Third Prosecution Response”), requesting in respect of each Certification Motion that it be declared premature or, in the alternative, that a decision on the merits be deferred until the Fourth Decision had been issued.⁷

¹ Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 December 2011; Corrigendum to Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 December 2011.

² Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts filed 9 December 2012, 1 February 2012. The Chamber had granted an extended deadline for submission of the Defence Response on 20 December 2011 as recorded in the First Decision, *infra*, note 3, para. 2.

³ First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 February 2012, para. 9.

⁴ Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 21 March 2012; Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 13 April 2012.

⁵ Fourth Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Concerning The Rebuttal Evidence Procedure, 2 May 2012.

⁶ Defence Motion for Certification to Appeal the First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 March 2012; Defence Motion for Certification to Appeal the Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 March 2012; Defence Motion for Certification to Appeal the Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 20 April 2012.

⁷ Prosecution Response to Defence Motion for Certification to Appeal the First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 March 2012, paras 1, 7-9; Prosecution Response to Defence Motion

3. On 5 and 18 April 2012, the Defence requested leave to file a reply to the First and Second Prosecution Response, respectively, attaching the replies as annexes.⁸ The Chamber granted leave to reply on 11 and 23 April 2012, respectively and decided to consider the attached replies.⁹ On 9 May 2012, the Defence requested leave to file a reply to the Third Prosecution Response.¹⁰ The Chamber denied the request on 24 May 2012.¹¹

II. SUBMISSIONS OF THE PARTIES

4. With regard to the filing of the First Certification Motion more than a week after the filing of the First Decision, the Defence submits that the First Decision constituted only a part of the Chamber's decision on the Prosecution Motion, and that it should therefore not be bound by the seven-day limit under Rule 73 (C) of the Tribunal's Rules of Procedure and Evidence ("Rules").¹²

5. The Defence further submits that the Chamber has erred i) in its decision to reformulate certain Proposed Facts, ii) in consideration of Proposed Facts challenged as going to the acts, conduct or mental state of the Accused, his alleged subordinates or groups of which he may have been a part, and iii) by taking judicial notice, subject to reformulations indicated in the Second Decision, of Proposed Facts from the *Prosecutor v. Vujadin Popović et al.* ("*Popović et al.*") trial judgement, regarding which an appeal is pending.¹³

1. Reformulation of Proposed Facts by the Chamber

6. The Defence submits that, instead of reformulating certain Proposed Facts as set out in Section H of the First, Second, and Third Decisions (together "Impugned Decisions"), the Chamber should have dismissed them as unfit for judicial notice.¹⁴ The Defence argues that the Chamber's reformulation has changed the meaning of the Proposed Facts concerned and/or

for Certification to Appeal the Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 11 April 2012, paras 1, 5-6, 11; Prosecution Response to Defence Motion for Certification to Appeal the Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 4 May 2012, paras 1, 6-7.

⁸ Defence Request to File Reply in Support of Defence Motion for Certification to Appeal the First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 April 2012, Annex A; Defence Request to File Reply in Support of Defence Motion for Certification to Appeal the Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 18 April 2012, Annex A.

⁹ The decisions were notified through an informal communication to the parties on the respective dates and are hereby put on the record.

¹⁰ Defence Request to File Reply in Support of Defence Motion for Certification to Appeal the Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 May 2012.

¹¹ The decision was notified through an informal communication to the parties on the same date and is hereby put on the record.

¹² First Certification Motion, para. 4.

¹³ First Certification Motion, paras 1, 5-6, 10-11; Second Certification Motion, paras 6-7, 12; Third Certification Motion, paras 4, 7-12.

¹⁴ First Certification Motion, paras 1, 5, 10-11; Second Certification Motion, paras 4, 12, 14; Third Certification Motion, paras 4, 9-11.

divorced them from the context of the original judgements.¹⁵ In respect of the Third Decision, the Defence also objects to the Chamber's decision to take judicial notice of certain Proposed Facts in spite of the Chamber's finding that they contained time-references inconsistent with the text of the original judgments.¹⁶ The Defence further argues that the Chamber, by reformulating Proposed Facts before judicially noticing them, has put on the Defence an additional burden of their rebuttal, thus affecting the fairness and expeditious conduct of the proceedings.¹⁷ Lastly, the Defence submits that an immediate resolution of the matter by the Appeals Chamber would materially advance the proceedings by providing the Chamber and the parties with a clear standard for possible future motions on adjudicated facts.¹⁸

7. The Prosecution does not oppose the Defence request for certification concerning the Chamber's reformulation of certain Proposed Facts.¹⁹ It submits that the issue potentially affects the fair and expeditious conduct or the outcome of the trial to the extent that the parties will present evidence in reliance upon Judicially Noticed Facts.²⁰ It further submits that in case such reformulated facts would be successfully challenged on appeal, the safety of the proceedings²¹ would be jeopardised to the extent that a party may have relied on the reformulated facts to their detriment.²² It concludes that the parties' reliance on Judicially Noticed Facts will influence and potentially even limit the witnesses and evidence to be adduced during the trial, and that an immediate decision by the Appeals Chamber may, therefore, materially advance the proceedings.²³

2. Judicially Noticed Facts allegedly going to acts, conduct, or mental state of the Accused

8. The Defence submits that the Impugned Decisions present a lack of analysis of the Proposed Facts which the Defence has specifically challenged as going to the alleged acts and conduct of the Accused, his alleged subordinates or groups of which he may have been a part.²⁴ The Defence argues that through these Judicially Noticed Facts which require the Defence to

¹⁵ First Certification Motion, paras 5, 10-11, Second Certification Motion, paras 4, 6, 13; Third Certification Motion, paras 4, 7.

¹⁶ Third Certification Motion, para. 12.

¹⁷ First Certification Motion, para. 12; Second Certification Motion, paras 4, 6, 12; Third Certification Motion, paras 4, 11.

¹⁸ First Certification Motion, para. 13; Second Certification Motion, para. 15; Third Certification Motion, para. 13.

¹⁹ First Prosecution Response, paras 1, 12; Second Prosecution Response, paras 1, 10; Third Prosecution Response, paras 1, 10.

²⁰ First Prosecution Response, para. 13; Second Prosecution Response, para. 10; Third Prosecution Response, para. 10.

²¹ The Chamber understands the term "safety as the proceedings" to refer to the integrity of the proceedings, as used in the Tribunal's Rules and jurisprudence.

²² Ibid.

²³ Ibid.

rebut them, the Chamber has shifted the burden of proof to the Defence on issues central to the Prosecution's case, which significantly affects the fairness of the proceedings.²⁵ The Defence also argues that the Judicially Noticed Facts will "affect all other evidence to come in once the actual trial starts and, therefore, form the core of the deliberations that will occur throughout the entirety of the trial", thereby substantially impacting its eventual outcome.²⁶ It further submits that an immediate resolution of the matter by the Appeals Chamber would materially advance the proceedings, as it would "dictate a standard" for further motions on adjudicated facts.²⁷ It also submits that an early identification of the Chamber's possible errors would facilitate their remedy.²⁸

9. The Prosecution argues that the Chamber applied the proper standard and that the Defence has failed to show how a further analysis by the Chamber of its findings could reasonably affect the fair and expeditious conduct of the proceedings or the outcome of the trial.²⁹

3. Judicially Noticed Facts from *Popović et al.*

10. The Defence submits that certain Judicially Noticed Facts are "presently contested on appeal" in the *Popović et al.* case.³⁰ It argues that if a judgement is contested on fair trial grounds, according to the Tribunal's jurisprudence, other Trial Chambers cannot take judicial notice of facts adjudicated therein until the appellate proceedings have been concluded on the merits.³¹ The Prosecution submits that none of the Judicially Noticed Facts is subject to the appeal pending in the *Popović et al.* case.³² It contends that the Defence has incorrectly cited the Tribunal's jurisprudence and failed to identify any appellants challenging the judgement on the grounds of irregularity of the conduct of trial.³³ In its Second Reply, the Defence submits that, contrary to the Prosecution's argument, it identified individual appellants in the Defence Response.³⁴

²⁴ First Certification Motion, paras 1, 5-6; Second Certification Motion, paras 4, 8-11; Third Certification Motion, paras 4, 7-8.

²⁵ First Certification Motion, paras 5-6, 8; Second Certification Motion, paras 4, 6; Third Certification Motion, paras 4, 8.

²⁶ First Certification Motion, para. 8; Second Certification Motion, paras 4, 6; Third Certification Motion, para. 4.

²⁷ First Certification Motion, para. 9; Second Certification Motion, para. 4; Third Certification Motion, paras 4, 8.

²⁸ First Reply, paras 12-14; Second Reply, paras 13-14.

²⁹ First Prosecution Response, para. 11; Second Prosecution Response, para. 9; Third Prosecution Response, para. 9.

³⁰ Second Certification Motion, para. 7.

³¹ Ibid.

³² Second Prosecution Response, para. 8.

³³ Second Prosecution Response, para. 7.

³⁴ Second Reply, paras 9-10.

III. APPLICABLE LAW

11. The relevant parts of Rule 73 of the Rules provide:

- (B) Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;
- (C) Requests for certification shall be filed within seven days of the filing of the impugned decision (...).

12. Rules 126 *bis* and 127 (A) (ii) provide for a seven-day limit to file, with leave of the Chamber, a reply to a response, and allow the Chamber to recognize as valid acts done after the expiration of a time prescribed, if the moving party shows good cause, and on such terms as is thought just. In *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, the Appeals Chamber admitted an appeal filed after the deadline in the interest of justice because of “substantial importance of the Appeal for the rights of the Appellants” and “in spite of the (...) failure to set forth (...) good cause”.³⁵

IV. DISCUSSION

13. The Chamber will deal with the Certification Motions jointly. Taking into account that all Proposed Facts have been decided upon, the Chamber will not further discuss the parties’ submissions concerning the allegedly premature filing of the Certification Motions.

14. The Chamber notes that the First Certification Motion was filed 15 days after the issuance of the First Decision. It considers that the submissions contained in all the Certification Motions are intertwined and address, *inter alia*, the approach adopted by the Chamber in the Impugned Decisions to the Proposed Facts, which is of substantial importance to the trial proceedings and the rights of the Accused. Consequently, in the event of granting certification to appeal the other two Certification Motions, this could result in the Appeals Chamber’s decision also touching upon the First Certification Motion without the latter being properly before it. The Chamber also notes that the Prosecution has not objected to the First Certification Motion on the grounds of it having been filed late. The Chamber therefore considers it to be in the interest of justice to recognize the First Certification Motion as validly filed despite the Defence having failed to show good cause.

³⁵ *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.3, Decision on Ljube Bošković’s Interlocutory Appeal on Second Motion for Provisional Release, 28 August 2006, para. 9.

15. The Chamber emphasizes that certification is not concerned with whether the impugned decision was correctly reasoned or not, which is a matter for appeal.³⁶ The parties' submissions also to an extent touch upon the actual grounds of appeal for which certification is being sought and as such will not be considered here.

16. The Chamber recalls that taking judicial notice of adjudicated facts establishes a well-founded presumption of the accuracy of such facts which remains, unless rebutted with evidence by the responding party at trial.³⁷ The parties take judicially noticed facts into consideration when preparing their case presentation. In view of the presumption resulting from these facts, they may refrain from presenting evidence on them, or present evidence to rebut that same presumption. Judicially Noticed Facts are thus likely to affect the scope of evidence that the parties will decide to adduce at trial. Furthermore, the number of Judicially Noticed Facts in the present case justifies an assessment that this effect may be significant. The Impugned Decisions thus involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Accordingly, the first prong of the test under Rule 73 (B) has been met.

17. With regard to the second prong of the test, the Chamber takes into consideration the early stage of the proceedings and finds that a decision by the Appeals Chamber could materially advance the proceedings by clarifying the basis from which the parties will adduce their evidence. The second prong of the test has therefore also been met.

V. DISPOSITION

18. For the foregoing reasons, pursuant to Rule 73 (B) and Rule 127 (A), the Chamber

RECOGNIZES the First Certification Motion as validly filed; and

GRANTS the Certification Motions, namely certification to appeal the Chamber's decision to

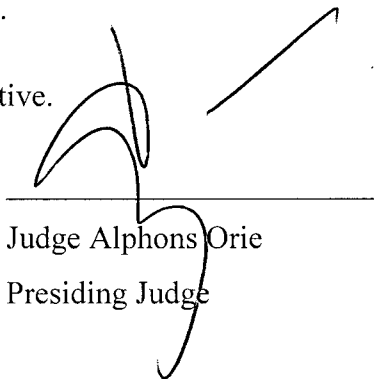
- i) reformulate certain Proposed Facts and take judicial notice of those and of certain other Proposed Facts in spite of time-references found inconsistent with the text of the original judgement;

³⁶ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69 PT, Decision on Defence Request for Certification to Appeal the Trial Chamber's "Decision on Defence Request for Extension of Time to Respond to Second Prosecution Motion for Judicial Notice of Judicial Facts", 20 May 2009, para. 2.

³⁷ *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, paras 42, 49.

- ii) take judicial notice, subject to changes indicated in the respective decisions, of certain Proposed Facts, challenged by the Defence as going to acts, conduct or mental state of the Accused, his subordinates or groups of which he may have been a part; and
- iii) to take judicial notice, subject to changes indicated in the Second Decision, of Proposed Facts from the *Popović et al.* Trial Judgement.

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



Judge Alphons Orié
Presiding Judge

Dated this Twenty-seventh of June 2012

At The Hague

The Netherlands

[Seal of the Tribunal]