

The impact of using adjudicated facts on ensuring a fair and expeditious trial at the International Criminal Tribunal for the Former Yugoslavia

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Abstract: At the International Criminal Tribunal for the Former Yugoslavia, the taking of judicial notice of facts that have been previously adjudicated in other proceedings is designed to ensure the trial is conducted in a way that is both fair and expeditious. In contemporary times, the use of the rule has increased. It is now important to reexamine how this rule operates in practice, and how it impacts on the management of the trial for all parties.

Key words: *Adjudicated Facts; International Criminal Procedure; International Criminal Tribunal for the Former Yugoslavia*

An accused in an international criminal trial has a right to a trial that is both fair and expeditious.² In addition to being a fundamental procedural right, the principles of fairness and expediency also aim to provide appropriate justice to other stakeholders in the trial, such as victims; and to enhance judicial economy. Rules of international criminal procedure, then, attempt to regulate the trial so as to meet these overarching principles. The International Criminal Tribunal for the Former Yugoslavia (ICTY) is in a unique moment in its institutional history, being near to the end of its mandate, and this moment gives the Tribunal two distinctive features: an established trial record, and a freshly pressing need to complete its ongoing proceedings. This means that the Tribunal is placed as it never has been before, to either be hamstrung by its established trial record – or to use this to a procedural advantage. In order to ensure expeditious trials, the ICTY must benefit from its history, rather than allow trials to be overwhelmed and encumbered by past jurisprudence.

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² See for example: *Rome Statute of the International Criminal Court*, Article 64; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, Article 21.

One procedural tool which allows trials to be expedited is taking judicial notice of facts which have been previously adjudicated in other proceedings, as provided for in Rule 94(B) of the Rules of Procedure and Evidence of the ICTY. This allows a Chamber to enter facts into the evidentiary record, without actual evidence being brought on that contested fact. The evidential burden then shifts to the non-moving party, to bring evidence to rebut the adjudicated fact.³

Because many cases at the ICTY consider the same events, similar or identical evidence is often brought in consecutive trials, which is inconsistent with judicial economy and preserving limited court resources. The use of Rule 94(B) reduces the repetition of testimony and exhibits in successive cases, thereby speeding up trials.⁴ It is particularly helpful for crime base evidence: in cases involving higher-level accused, the main areas of contention will usually be issues of linkage and authority, and the use of adjudicated facts to establish the crime base will narrow the scope of the litigation to issues that are particularly in dispute. In theory, then, the Rule uses the history of the tribunal to its advantage, and also ensures that successive Chambers are consistent in their rulings.

In recent trials, the application of Rule 94(B) has grown, for three main reasons: an increased judicial comfort with the rule; an increased number of cases where final judgement has been rendered; and as a result of the more pressing need to complete trials. In light of this increased use of Rule 94(B), it is necessary to reexamine how this rule operates in practice, and how it impacts on the management of the trial for all parties.

The use of adjudicated facts can be examined in two contemporary cases at the ICTY: *The Prosecutor v Radovan Karadžić*, and *The Prosecutor v. Mico Stanišić and Stojan Župljanin*. These cases reveal several problems with the

³ *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, "Decision on Prosecution Motions of Judicial Notices of Adjudicated Facts and for Admission of Written Statements of Witnesses pursuant to Rule 92bis," 28 February 2003; *The Prosecutor v. Slobodan Milošević*, Case No.: IT-02-54-AR73.5, "Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", 28 October 2003.

⁴ Kwon, O-Gon. "The Challenge of an International Criminal Trial as Seen from the Bench", *Journal of International Criminal Justice* 5 (2007), 360-376, at page 369.

present-day use of adjudicated facts: a significant shifting in the evidential burden to the accused; an inconsistent approach across Trial Chambers; and an inconsistent approach within Trial Chambers. It must therefore be asked: does the use of adjudicated facts achieve its purpose, namely to streamline trials and make trials more expeditious? Or in reality, does the use of adjudicated facts bring the opposite result – a trial that is unpredictable and unwieldy?

The *Karadžić* case is one of the largest cases in the history of international criminal law. In an attempt to expedite and streamline the complicated proceedings, the Prosecution applied for judicial notice to be taken of prior adjudicated facts. Five motions were filed between 27 October 2008 and 14 December 2009, proposing that the Trial Chamber take judicial notice of 2607 prior adjudicated facts.⁵ In its decisions, the Trial Chamber granted judicial notice of the majority of the proposed facts, and approximately 2300 prior adjudicated facts were entered into the trial record before the case began.⁶ This widespread admission of prior adjudicated facts in the *Karadžić* case, however, raises two issues: first, does the large number of adjudicated facts impact the burden of proof? Second, what happens when adjudicated facts are accepted by one Trial Chamber, but rejected by another?

The issue of the extent to which the admission of prior adjudicated facts impacts on the burden of proof has been relevant in the *Karadžić* case, due to the volume of facts admitted to the evidential record before the trial commenced. On 1 April 2010, Karadžić filed a *Motion For Stay of Proceedings: Violation of Burden of Proof and Presumption of Innocence*.⁷ This motion was filed before all the Prosecution Motions for Adjudicated Facts

⁵ *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, “First Prosecution Motion for Judicial Notice of Adjudicated Facts”, 27 October 2008; “Second Prosecution Motion for Judicial Notice of Adjudicated Facts and *Corrigendum* to First Prosecution Motion of Judicial Notice of Adjudicated Facts”, 16 March 2009; “Third Prosecution Motion for Judicial Notice of Adjudicated Facts”, 6 April 2009; Case No. IT-95-5/18-T, “Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts”, 25 August 2009; “Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts”, 14 December 2009.

⁶ United Nations Security Council, UN Doc. S/2010/588, “Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May 2010 to 15 November 2010”, 19 November 2010, at paragraph 33.

⁷ *The Prosecutor v. Radovan Karadžić*, Case IT-95-05/18-T, “Motion For Stay of Proceedings: Violation of Burden of Proof and Presumption of Innocence,” 1 April 2010.

had been ruled on, and at the time Karadžić filed this motion, judicial notice had been taken of 1500 facts.⁸ Karadžić submitted that the cumulative effect of the large number of adjudicated facts that had been judicially noted, in addition to the admission of prior statements from witnesses, would require the accused to “mount a massive case to rebut the adjudicated facts and assertions of facts in prior statements and testimony”.⁹ In his submission, this violates the rights of the accused to a presumption of innocence and reverses the burden of proof resting on the Prosecution.¹⁰ Karadžić submitted that the “massive use” of the devices of judicial notice and admission of prior statements and testimony “has tipped the scales to where a fair trial is no longer possible.”¹¹

The Trial Chamber denied the Motion.¹² The Chamber noted that in admitting the prior adjudicated facts, they had “made every effort to ensure that the fair trial rights of the Accused are protected.”¹³ The Chamber was “unconvinced by any of the Accused’s submissions [...] concerning the effect of judicial notice of adjudicating facts”.¹⁴ The Chamber noted that the Accused “will have ample opportunity to bring evidence to rebut those adjudicated facts which are the subject of judicial notice”.¹⁵

Because the admission of an adjudicated fact creates a presumption of the truth of that fact, to be rebutted by the non-moving party, judicial notice of facts pursuant to Rule 94(B) is an evidential reversal of the onus of proof. This does not reverse the presumption of innocence or reverse the onus of ultimate proof: the standard remains that the Prosecution must establish their case beyond a reasonable doubt. However, an evidential shift as large as 2300 facts – which the Defence must then rebut, or invest resources into considering whether to rebut – represents a significant and disconcerting onus

⁸ Ibid., at para. 2.

⁹ Ibid., at para. 17

¹⁰ Ibid.

¹¹ Ibid., at para. 19

¹² *The Prosecutor v. Radovan Karadžić*, Case IT-95-05/18-T, “Decision on Motion for Stay of Proceedings”, 8 April 2010.

¹³ Ibid., at para. 5

¹⁴ Ibid.

¹⁵ Ibid., at para. 6

on the accused. While the Trial Chamber was correct in their view that the accused has “ample opportunity to bring evidence to rebut those adjudicated facts”, this is concerning for two reasons: first, an evidential burden on the accused as large as those established in the *Karadžić* case will have a significant impact on the principle of equality of arms, particularly where the accused is self-represented, as here. Second, it is questionable whether the use of adjudicated facts will in fact speed up the trial: if the accused avails himself of the right to bring evidence to rebut all – or even a number of – the 2300 adjudicated facts, it is difficult to see how using Rule 94(B) will actually expedite trials or ensure a streamlining of evidence. What it will do is shift a burden to the self-represented accused, without necessarily any significant advantages gained in terms of trial expediency. Indeed, *Karadžić* has filed for an additional 300 hours to be added to his Defence case, in order to rebut the adjudicated facts that have been judicially noticed.¹⁶

A second issue with the modern regime of adjudicated facts at the ICTY has been raised by the *Karadžić* case: an inconsistent application of facts between Trial Chambers. As the *Karadžić* case has progressed and concurrent cases at the Tribunal have also been the subject of decisions on the topic of adjudicated facts, *Karadžić* has moved for reconsideration of a number of facts that have been previously found to be adjudicated. *Karadžić* has, to date, filed five motions for reconsideration of facts previously judicially noticed by the Trial Chamber.¹⁷ In these motions, he has challenged approximately 443 facts that had already been judicially noticed by the *Karadžić* Trial Chamber, but were subsequently rejected by other Trial Chambers in the cases of *Tolimir*, *Stanišić and Župljanin*, and *Mladić*.

In particular, the *Mladić* Trial Chamber has declined to take judicial notice of a total of 332 facts that the *Karadžić* Trial Chamber had previously noticed.

¹⁶ *The Prosecutor v. Radovan Karadžić*, Case IT-95-05/18-T, “Defence Submission Pursuant to Rule 65 *ter* and Related Motions”, 27 August 2012.

¹⁷ *The Prosecutor v. Radovan Karadžić*, Case IT-95-05/18-T, “Motion for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts”, 4 March 2010; “Second Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts”, 26 April 2010; “Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts”, 12 March 2012; “Fourth Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts”, 26 March 2012; and “Fifth Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts”, 17 April 2012.

These facts were the subject of Karadžić's Third, Fourth, and Fifth Motions for Reconsideration of Judicial Notice of Adjudicated Facts.¹⁸ In a decision of 4 May 2012, the Trial Chamber denied these three motions in large part, but granted the motion in respect of 17 facts that had previously been judicially noticed.¹⁹ The fact that there are over 300 facts that were ruled by one Trial Chamber to be inadmissible but were perfectly acceptable to another Trial Chamber shows a significant uncertainty with the application of the Rule itself. There are now two accused at the ICTY – Karadžić and Mladić – whose cases are so similar that their indictments were initially joined (and where there was continued discussion of a joint trial as recently as 2011),²⁰ but who now face different trials in respect of the facts admitted to their evidential record.

The trial of Mico Stanišić and Stojan Župljanin²¹ is another contemporary case where the use of adjudicated facts has proved problematic. This trial began on 14 September 2009. In preparation for the commencement of trial, from August 2006 the Prosecution filed numerous motions for judicial notice of adjudicated facts.²² At first instance, on 14 December 2007, the Trial Chamber judicially noticed 752 previously adjudicated facts which had been proposed by the Prosecution, and also admitted another 84 facts under Rule 65ter(H) as facts agreed between the parties.²³ Between January 2008 and

¹⁸ *The Prosecutor v. Radovan Karadžić*, Case IT-95-05/18-T, "Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts", 12 March 2012; "Fourth Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts", 26 March 2012; and "Fifth Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts", 17 April 2012.

¹⁹ *The Prosecutor v. Radovan Karadžić*, Case IT-95-05/18-T, "Decision on Accused's Three Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts", 4 May 2012.

²⁰ International Criminal Tribunal for the Former Yugoslavia, "Weekly Press Briefing – 22 June 2011", available: <http://www.icty.org/sid/10710/en>, published: 22 June 2011, accessed: 10 September 2011; see also Balkan Insight, "Serge Brammertz: Mladic Arrest Not Too Late", available: <http://www.balkaninsight.com/en/article/serge-brammertz-mladic-arrest-not-too-late>, published: 2 June 2011, accessed: 10 September 2012.

²¹ *The Prosecutor v. Mico Stanišić and Stojan Župljanin*, Case No. IT-08-91.

²² *The Prosecutor v. Mico Stanišić*, Case No. IT-04-79-PT, "Prosecution's motion for judicial notice of facts of common knowledge and adjudicated facts, with annex", 31 August 2006; "Prosecution's second motion for judicial notice of adjudicated facts, with revised and consolidated annex", 10 May 2007; "Prosecution's third motion for judicial notice of adjudicated facts, with annex", 25 January 2008; "Prosecution's fourth motion for judicial notice of adjudicated facts, with annex", 24 April 2008; *The Prosecutor v. Mico Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, "Prosecution's fifth motion for judicial notice of adjudicated facts, with annex" filed on 21 August 2009; and "Prosecution's sixth motion for judicial notice of adjudicated facts, with annex", 2 February 2010.

²³ *The Prosecutor v. Mico Stanišić*, Case No. IT-04-79-PT, "Decision on Judicial Notice", 14 December 2007. This Decision was in response to the following Motions: "Prosecution's motion for judicial notice of facts of common knowledge and adjudicated facts, with annex", 31 August 2006; "Defence motion for judicial notice of adjudicated

February 2010, the Prosecution filed a further four Motions requesting the Chamber take judicial notice of facts.²⁴ In reliance on these pending motions and the facts proposed in them, the Prosecution filed their witness list with reduced numbers of witnesses, assuming that they would not be put to proof on those facts proposed to be judicially noticed.

However, it was not until 1 April 2010 – almost seven months after trial commenced, and nearing what was meant to be the end of the Prosecution case – that the Trial Chamber handed down its *Decision Granting in Part The Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)*.²⁵ Here, the Trial Chamber took judicial notice of 1086 adjudicated facts, but declined to take judicial notice of 239 facts. Of these, 233 of the facts the Trial Chamber declined to take judicial notice of had been previously accepted under its 14 December Decision.²⁶

This Decision therefore had the affect of opening areas to litigation which the parties had, for the first seven months of trial, viewed as not in contention. Because the use of adjudicated facts creates the rebuttable presumption of their truth, the Prosecution will no longer need to bring evidence on the fact, or witnesses to testify to such events, conditions, or facts. The very aim of taking judicial notice of prior adjudicated facts is to streamline the case for trial, reduce the scope of the case, and delineate the boundaries of what is contested. It is for these reasons that Mark Harmon noted that decisions on motions for adjudicated facts should be made “well before the Pre-Trial Conference in order to permit the parties and the pre-trial Judge to determine

facts with annex", 1 February 2007; and "Prosecution's second motion for judicial notice of adjudicated facts, with revised and consolidated annex", 10 May 2007.

²⁴ "Prosecution's third motion for judicial notice of adjudicated facts, with annex", 25 January 2008; "Prosecution's fourth motion for judicial notice of adjudicated facts, with annex", 24 April 2008; "Prosecution's fifth motion for judicial notice of adjudicated facts, with annex" filed on 21 August 2009; and "Prosecution's sixth motion for judicial notice of adjudicated facts, with annex", 2 February 2010.

²⁵ *The Prosecutor v. Mico Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, *Decision Granting in Part The Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)*, 1 April 2010 ("Decision").

²⁶ *Ibid.*

the scale of the case and to allow the parties to take appropriate witness-related decisions”.²⁷

In contrast, due to the Chambers late and inconsistent ruling on adjudicated facts, the experience of the parties in the *Stanišić and Župljanin* case was one of confusion and incoherence. The scope of the trial was placed back in flux at a late stage. The Prosecution was not able to set out its case in a structured and sequential way from the beginning of trial – and nor could the defence adequately respond to such a case. While the Decision to reject the adjudicated facts was made in large part due to concerns of fairness of trial and particularly for the accused,²⁸ being mindful of the possibility of a “significant burden” being placed on the accused to rebut the facts, the lateness of the Decision caused problems of clarity of case for both the Prosecution and the Defence.

On 26 May 2010, the Prosecution applied to the Trial Chamber to add a further 53 witnesses to its witness list “in order to fill evidentiary gaps left by the denied adjudicated facts”.²⁹ The Trial Chamber ordered that 44 of these extra witnesses could testify, and should do so *viva voce*.³⁰ As such, the Prosecution estimated that they would need 47 ¼ hours for examination-in-chief of 23 *viva voce* witnesses.³¹ In addition, 15 witnesses had been intended to be brought pursuant to Rule 92*bis*, but should the Trial Chamber

²⁷ Harmon, Mark B. “The Pre-Trial Process at the ICTY as a Means of Ensuring Expeditious Trials: A Potential Unrealised”, *Journal of International Criminal Justice* 5 (2007), 377-393, at page 382.

²⁸ Decision, paragraph 45.

²⁹ *The Prosecutor v. Mico Stanišić and Stojan Župljanin*, Case No. IT-08-91, “Prosecution’s Motion to Amend its Rule 65ter Witness List as a Result of the Trial Chamber’s 1 April 2010 Granting in Part Prosecution’s Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), with Confidential Annex”, 26 May 2010. See Addendum, where the Prosecution notes they are seeking to add a total of 53 witnesses rather than a total of 57, as first stated in their *Motion* (“Addendum to Prosecution’s Motion to Amend its Rule 65ter Witness List as a Result of the Trial Chamber’s 1 April 2010 Granting in Part Prosecution’s Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), with Confidential Annex”, 16 June 2010).

³⁰ *The Prosecutor v. Mico Stanišić and Stojan Župljanin*, Case No. IT-08-91, “Decision Granting in Part Prosecution’s Motion to Amend its 65ter Witness List as a Result of The Trial Chamber’s 1 April 2010 Decision Concerning Judicial Notice of Adjudicated Facts”, 14 July 2010.

³¹ *The Prosecutor v. Mico Stanišić and Stojan Župljanin*, Case No. IT-08-91, “Prosecution’s Notice Pursuant to the Trial Chamber’s Decision Granting in Part Prosecution’s Motion to Amend its 65ter Witness List, with Confidential Annex”, 21 July 2010.

prefer them to be heard live, the Prosecution would require an extra 26.5 hours for their evidence.³² This added three months to the proceedings.³³

These additional court hours again mitigated the intended benefits of taking judicial notices of adjudicated facts. While there would still have been court hours saved by the taking of judicial notices of 1068 facts, the flux caused by granting and then dismissing facts added a significant amount of time to the Prosecution case, while simultaneously causing uncertainty in the evidential record.

In the twilight years of the ICTY, taking judicial notice of previously adjudicated facts is a practice that is gaining momentum. Unfortunately, as that momentum builds, the practice has become difficult to control. The cases of *Karadžić* and *Stanišić and Župljanin* demonstrate a variety of problems with the use of adjudicated facts at the ICTY in modern times. In particular, these cases reveal a significant shifting in the evidential burden to the accused; an inconsistent approach across Trial Chambers; and an inconsistent approach within Trial Chambers. These are not small problems. They fundamentally affect the fairness of proceedings for all parties. At their core, these issues make the relationships between the parties unpredictable. Judicial notice of prior adjudicated facts was envisaged as a trial management tool and a rule of judicial convenience, intended to expedite and streamline proceedings. Unfortunately, the modern experience at the ICTY – as highlighted by the *Karadžić* and *Stanišić and Župljanin* cases – suggests that the rule has manifested as having the opposite impact, and implies a worrying reality for the conduct of international criminal trials.

³² *The Prosecutor v. Mico Stanišić and Stojan Župljanin*, Case No. IT-08-91, “Prosecution’s Notice of Timings for Rule 92bis Witnesses with Confidential Annexes A and B”, 19 August 2010.

³³ United Nations Security Council, UN Doc. S/2010/588, “Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May 2010 to 15 November 2010”, 19 November 2010, at paragraph 28.