



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-98-32/1-T
Date: 22 August 2008
Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Christine Van den Wyngaert
Judge Pedro David

Registrar: Mr. Hans Holthuis

Decision of: 22 August 2008

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR
JUDICIAL NOTICE OF ADJUDICATED FACTS**

The Office of the Prosecutor

Mr. Dermot Groome
Mr. Frédéric Ossogo
Ms. Laurie Sartorio
Mr. Stevan Cole
Ms. Francesca Mazzocco

Counsel for the Accused

Mr. Jason Alarid for Milan Lukić
Mr. Đuro Čepić and Mr. Jens Dieckmann for Sredoje Lukić

TRIAL CHAMBER III (“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’s Motion for Judicial Notice of Adjudicated Facts” filed on 28 February 2008 (“Motion”).

1. Procedural history

1. The Prosecution requests pursuant to Rule 94(B) of the Rules of Evidence and Procedure (“Rules”) that the Trial Chamber take judicial notice of 79 facts (“Proposed Facts”) which were adjudicated in the case of *Prosecutor v. Mitar Vasiljević*.

2. On 10 March 2008, the Defence for Sredoje Lukić responded to the Motion (“Sredoje Lukić Response”).¹ During the status conference held on 12 March 2008, the Chamber granted an oral application by the Prosecution for leave to reply to the Sredoje Lukić Response and an extension of time within which to do so.² On 20 March 2008, the Prosecution replied to the Sredoje Lukić Response (“Prosecution Reply to Sredoje Lukić Response”).³

3. On 28 March 2008, the Defence for Milan Lukić responded to the Motion.⁴ On 4 April 2008, the Prosecution filed a request for leave to reply thereto, with proposed reply (“Prosecution Reply to Milan Lukić Response”).⁵ Leave is hereby granted.

2. Arguments of the parties

(a) Motion

4. Seventy-five of the 79 Proposed Facts listed in Annex A to the Motion, were extracted from the trial judgement delivered in the *Vasiljević* case,⁶ with a number being additionally referenced from the appeal judgement also rendered in that case.⁷ The remaining four of the 79 Proposed Facts – specifically, facts 45 to 48 – were derived from the “Decision on referral of case pursuant to Rule 11 *bis* with confidential Annex A and Annex B” delivered on 5 April 2007 by the Referral Bench in the present case (“Referral Decision”).

¹ “Sredoje Lukić’s response to ‘Prosecution’s motion for judicial notice of adjudicated facts with public Annex A’”, 10 March 2008.

² Status conference, 12 March 2008, T. 157.

³ “Prosecution’s reply to ‘Sredoje Lukić’s response to ‘Prosecution’s motion for notice of adjudicated facts with public Annex A’”, 20 March 2008 (“Prosecution’s Reply to Sredoje Lukić’s Response”).

⁴ “Milan Lukić’s response to ‘Prosecution’s motion for judicial notice of adjudicated facts with public Annex A’”, 20 March 2008. At the status conference on 12 March 2008, the Defence for Milan Lukić was granted an extension of time to respond, *id.*, T. 157.

⁵ “Prosecution’s reply to ‘Milan Lukić’s response to ‘Prosecution’s motion for notice of adjudicated facts with public Annex A’”, 4 April 2008 (“Prosecution Reply to Milan Lukić Response”), paras 4-6.

5. The Prosecution cites judicial economy as one of the reasons favouring the granting of its Motion. It notes that “by making it possible for the Prosecution to avoid the introduction of evidence intended to prove the Proposed Facts”,⁸ a favourable finding on the Motion would:

- (1) facilitate a more efficient and expeditious trial of both Accused;
- (2) obviate the need for witnesses whose testimony had already been found reliable, from having to return to the Tribunal to repeat their evidence and,
- (3) by expediting the trial of these particular Accused, “reduce the length of trials at the Tribunal generally and permit the trials of other accused awaiting trial to begin as soon as possible”.⁹

6. The Prosecution submits that the Proposed Facts in Annex A to its Motion satisfy all of the necessary criteria laid down in the Tribunal’s jurisprudence and concludes that it would be “entirely appropriate under the Rules and the jurisprudence of this Tribunal” for the Trial Chamber to take judicial notice of them.¹⁰ With regard to a number of the Proposed Facts which pertain to a time frame before the period relevant to the Second Amended Indictment,¹¹ the Prosecution argues that these particular facts, which it describes as “relevant to the general allegations and additional facts” included in the indictment,¹² would be admissible under Rule 93(A) as evidence of a consistent pattern of conduct relevant to the proceedings against both Accused.

(b) Defence Responses

7. Both Defence Responses submit that judicial notice of the Proposed Facts would:

- (1) compromise the Accused’s right to a fair trial;¹³
- (2) infringe on the Accused’s right to the presumption of innocence under Article 21(3) of the Statute of the Tribunal, given that many of the Proposed Facts contain descriptions of alleged criminal acts, which give “the impression as if the Accused had been involved in all those criminal acts described”;¹⁴ and
- (3) have the prejudicial effect of limiting or “curtailing” the Accused’s Defence.

⁶ *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-29-T, Judgment, 29 November 2002.

⁷ *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-29-A, Judgement, 25 February 2004.

⁸ Motion, para. 2.

⁹ *Ibid.*, para. 6.

¹⁰ *Ibid.*, para. 21.

¹¹ Proposed Facts 2-19, span the period 1990 to May 1992.

¹² Motion, para. 19.

¹³ Milan Lukić Response, para. 12; Sredoje Lukić Response, para. 11.

¹⁴ Milan Lukić Response, para. 18; Sredoje Lukić Response, para. 11.

Both Defence thus argue that the prejudicial effect of granting the Motion would outweigh the benefits of shortening the length of the trial proceedings.¹⁵

8. Noting that Proposed Facts 4-8 and 12-28 concern events pre-dating the indictment period, the Defence for Sredoje Lukić contends that they are irrelevant to the matters at issue in the current proceedings against the Accused.¹⁶ Proposed facts 49-61 are likewise impugned as being irrelevant to the proceedings against Sredoje Lukić on the basis that they concern incidents¹⁷ in respect of which Sredoje Lukić is not charged under the Indictment.¹⁸

9. The Defence for Milan Lukić also asserts the irrelevance of Proposed Facts 4-8, 12-28 and 49-61. In addition, it argues that Proposed Facts 62-64 “do not appear to relate to matters at issue in the current proceedings”.¹⁹

10. The Defence for Sredoje Lukić challenges Proposed Facts 29-31 on the premise that they constitute “legal findings which are elements of the laws or customs of war and/or a crime against humanity”.²⁰ The Defence for Sredoje Lukić submits that the Prosecution has an obligation to prove the existence of these elements and that the Trial Chamber is obliged to “reach a legal finding only after having considered the evidence adduced by the parties on a case by case basis”.²¹ The Milan Lukić Defence concurs with this argument.²²

11. With regard to Proposed Facts 32-33 and 35-48, the Defence for Sredoje Lukić argues that judicial notice of these facts would adversely impact the Accused’s right to a fair trial; however, how this would be the case is not explained.²³ In respect of Proposed Facts 45-48, the Defence for Sredoje Lukić submits that these facts, which classify Milan Lukić as a significant paramilitary leader who played a prominent role during the conflict in the former Yugoslavia, constitute legal characterisations which are excluded from the scope of Rule 94(B). It further submits that Proposed Facts 45-48 do not truly constitute adjudicated facts as defined in the Tribunal’s jurisprudence, arguing that “these facts taken from a mere decision of the Court are not capable of admission under Rule 94(B)”.²⁴ The Defence for Milan Lukić adopts the position taken in the Sredoje Lukić

¹⁵ *Ibid.*

¹⁶ Sredoje Lukić Response, para. 12.

¹⁷ Proposed facts 49-60 address the killings of five Bosnian Muslim men on the bank of the Drina River, an event for which only Milan Lukić stands accused.

¹⁸ Sredoje Lukić Response, para. 15.

¹⁹ Milan Lukić Response, para. 23.

²⁰ Sredoje Lukić Response, para. 13.

²¹ Sredoje Lukić Response, para. 13.

²² Milan Lukić Response, para. 20.

²³ Sredoje Lukić Response, para. 14.

²⁴ *Ibid.*

Response in respect of Proposed Facts 32-33 and 35-48.²⁵ It adds with particular regard to Proposed Facts 45-48 that Milan Lukić's name "is too intertwined" with these facts, which "are clearly offered directly for the truth of criminal culpability of the Accused, otherwise thinly disguised as relevant but neutral facts".²⁶

12. The Defence for Sredoje Lukić argues that the acts outlined in Proposed Facts 62-79 could not be judicially noticed because they go to the criminal responsibility of the Accused.²⁷ It also argues with reference to Proposed Facts 67 and 70 that while Sredoje Lukić's name was redacted from these facts as they appear in Annex A to the Motion, the Accused's name was expressly mentioned in paragraphs of the *Vasiljević* trial judgement from which these Proposed Facts have been extracted.²⁸ The Defence for Sredoje Lukić argues that judicial notice of these facts would compromise the Accused's right to a fair trial, especially in light of the fact that "these facts are subject to reasonable dispute between the Parties, since the Accused pleaded not guilty to all charges".²⁹ The Defence for Milan Lukić, with regard to those Proposed Facts that contain Milan Lukić's name in the original text, in essence concurs with the position taken by the Defence for Sredoje Lukić.³⁰

13. The Defence of Sredoje Lukić accepts Proposed Facts 1-3 and 34 as being suitable in their entirety for admission under Rule 94(B).³¹ The Defence for Sredoje Lukić submits that Proposed Facts 9, 10 and 11 "are only partly appropriate for judicial notice", noting that the facts could not be eligible for judicial notice unless modified according to a formulation suggested in its submissions.³² The Defence for Milan Lukić indicates that it is "not in a sufficient position of familiarity or confidence with the underlying facts to concede any facts at this time" but notes that the acceptance of the Defence for Sredoje Lukić of Proposed Facts 1-3 and 34 in their entirety, as well as its modified formulation of Proposed Facts 9, 10 and 11, "appear logical".³³

(c) Prosecution Reply

14. In dealing with Proposed Facts 4-8 and 12-28, the Prosecution reiterates their role in laying out the historical, political and military background of the case against the Accused and submits

²⁵ Milan Lukić Response, paras 21-22.

²⁶ *Ibid.* para. 22.

²⁷ Sredoje Lukić Response, para. 16.

²⁸ *Ibid.*

²⁹ Sredoje Lukić Response, para. 16.

³⁰ Milan Lukić Response, para. 24.

³¹ *Ibid.* para. 18.

³² Sredoje Lukić Response, para. 17.

³³ Milan Lukić Response, para. 25.

that it is “consistent practice before international courts to take judicial notice of previously adjudicated historical facts”.³⁴

15. In response to the Defences’ submissions concerning Proposed Facts 29-31,³⁵ the Prosecution submits that “[i]t is true that ‘widespread and systematic attack against a civilian population’ and ‘armed conflict not of an international character’ are phrases with legal meaning, but they nonetheless describe factual situations”.³⁶ The Prosecution also submits that, the question is “not whether a proposition is put in legal [...] terms [but] whether the proposition can be reasonably disputed”.³⁷ In this respect, the Prosecution contends that “[i]t is not relevant that these facts constitute elements of some of the crimes charged and that such elements must ordinarily be proven by the Prosecution”.³⁸

16. With respect to Proposed Facts 32-33 and 35-48, the Prosecution observes that while the Defence for both Accused contest the admissibility of these facts under Rule 94(B) on the basis that they would materially prejudice the Accused’s right to a fair trial, they fail to provide reasons as to exactly how that might prove to be the case.

17. Regarding the Defences’ submission that Proposed Facts 45-48 contain legal characterisations, the Prosecution emphasises that the determination as to whether such facts do constitute findings of an essentially legal nature must be made on a case by case basis. It also argues that “findings related to the *actus reus* or the *mens rea* of a crime are deemed to be factual findings”.³⁹ The Prosecution further submits that although these facts are drawn from a referral decision, such decisions “although not making findings on the direct criminal responsibility of the Accused – have authority and hence fall within the scope of Rule 94(B)”.⁴⁰

18. In response to the submission of the Defence for Sredoje Lukić that Proposed Facts 49-61 should be excluded because they pertain to events with which Sredoje Lukić is not charged, the Prosecution argues that that circumstance “is not a basis for disqualification of the adjudication of

³⁴ Prosecution’s Reply to “Sredoje Lukić’s Response to ‘Prosecution’s Motion for Notice of Adjudicated Facts with Public Annex A’”, 20 March 2008 (“Prosecution Reply to Sredoje Lukić Response”), para. 10; Prosecution Reply to Milan Lukić Response para. 17.

³⁵ *Prosecutor v. Eduoard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-AR73(C), “Decision on Prosecutor’s interlocutory appeal of decision on judicial notice”, 16 June 2006 (“*Karemera* Appeal Decision”).

³⁶ *Karemera* Appeal Decision, para. 29, as cited in Prosecution Reply to Sredoje Lukić Response, para. 11; Prosecution Reply to Milan Lukić Response, para. 18. .

³⁷ *Karemera* Appeal Decision, para. 29, as cited in Prosecution Reply to Sredoje Lukić Response, para. 11; Prosecution Reply to Milan Lukić Response, para. 18.

³⁸ *Karemera* Appeal Decision, para. 30, as cited in Prosecution Reply to Sredoje Lukić Response, para. 11; Prosecution Reply to Milan Lukić Response, para. 18.

³⁹ Prosecution Reply to Sredoje Lukić Response, para. 13; Prosecution Reply to Milan Lukić Response, para. 20.

⁴⁰ *Ibid.*

these facts [...] in relation to the Accused Milan Lukić”.⁴¹ Regarding the Defence for Milan Lukić’s argument that Proposed Facts 49-64 are of no relevance to the proceedings against the Milan Lukić, the Prosecution submits that in view of the fact that Milan Lukić is charged with crimes stemming from the events outlined in facts 49-61, those facts would be of clear relevance to the case against him.⁴²

19. In countering the Defences’ submissions regarding Proposed Facts 62-79, the Prosecution argues that the Appeals Chamber in *Karemera* found that judicial notice may be taken of facts bearing on the criminal responsibility of an accused, albeit not on the acts and conduct of the accused.⁴³ Finally, with regard to Proposed Facts 9-11 the Prosecution notes that as the Defence have provided no reason as to why these facts should be only be partially and not wholly judicially noticed, there is no bar to them being so noticed by the Trial Chamber.⁴⁴

3. Applicable law

20. Rule 94(B) provides that a Trial Chamber may, either *proprio motu* or at the request of a party, “decide to take notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings”. Rule 94(B) is regarded as conferring discretion upon the Trial Chamber to determine which adjudicated facts are eligible for judicial notice.⁴⁵ In exercising its discretion under Rule 94(B), the Trial Chamber must assess: (1) whether each adjudicated fact satisfies the various requirements enumerated in the Tribunal’s case law for judicial notice, and (2) whether a fact, despite having satisfied the aforementioned requirements, should be excluded on the basis that judicial notice of it would not be in the interests of justice.⁴⁶ The requirements for admissibility under Rule 94(B) are as follows:

- (a) The fact must be relevant the current proceedings;⁴⁷
- (b) The fact must be distinct, concrete and identifiable;⁴⁸
- (c) The fact must as formulated by the moving party, must not differ in any substantial way from the formulation of the original judgment;⁴⁹

⁴¹ Prosecution Reply to Sredoje Lukić Response, para. 14.

⁴² Prosecution Reply to Milan Lukić Response, para. 21.

⁴³ Prosecution Reply to Sredoje Lukić Response, para. 14 and Prosecution Reply to Milan Lukić Response, para. 21.

⁴⁴ Prosecution Reply to Sredoje Lukić Response, para. 16; Prosecution Reply to Milan Lukić Response, para. 22.

⁴⁵ *Karemera* Appeals Decision, para. 41.

⁴⁶ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Popović’s Motion for Judicial Notice of Adjudicated Facts with Annex, 2 June 2008 (“*Popović* Decision”), para. 6; *Prosecutor v. Dragomir Milošević*, Decision on Prosecution’s Motion for Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff, IT-98-29/1-T, 10 April 2007 (“*Dragomir Milošević* Trial Chamber Decision”), para. 28.

⁴⁷ *Prosecutor v. Momčilo Perišić*, IT-04-81-PT, Decision on Prosecution’s motion for judicial notice of adjudicated facts concerning Sarajevo, 26 June 2008 (“*Perišić* Decision”), para. 16; *Popović* Decision, para. 6; *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Decision on appellant’s motion for judicial notice, 1 April 2005 (“*Nikolić* Appeal Decision”), para. 52.

⁴⁸ *Perišić* Decision, para. 16; *Popović* Decision, para. 6.

- (d) The fact must not be unclear or misleading in the context in which it is placed in the moving party's motion,⁵⁰ in addition, the fact must be denied judicial notice "if it will become unclear or misleading because one or more of the surrounding purported facts will be denied judicial notice";⁵¹
- (e) The fact must be identified with adequate precision by the moving party;⁵²
- (f) The fact must not contain characterisations or findings of an essentially legal nature;⁵³
- (g) The fact must not be based on an agreement between the parties to the original proceedings;⁵⁴
- (h) The fact must not relate to the acts, conduct or mental state of the accused;⁵⁵ and
- (i) The fact must clearly not be subject to pending appeal or review.⁵⁶

21. With regard to requirement (f), the Tribunal's case law emphasises that "judicial notice pursuant to Rule 94(B) is not designed for the importing of legal conclusions from past proceedings"⁵⁷ and instructs that the determination as to whether a Proposed Fact truly constitutes a factual finding is to be determined on a case by case basis.⁵⁸

22. Regarding requirement (h), the Tribunal's jurisprudence indicates that a clear distinction is to be drawn between Proposed Facts which go to the acts, conduct and mental state of an accused and those which refer to the criminal responsibility of an accused. In the *Karemera* Appeal Decision, the Appeals Chamber held that while "judicial notice under Rule 94(B) is in fact only for adjudicated facts that bear, at least in some respect on the criminal responsibility of an accused",⁵⁹ judicial notice "should not be taken of adjudicated facts relating to the acts, conduct, and mental state of the accused."⁶⁰

4. Discussion

23. The Trial Chamber considers that Proposed Facts 1-21 and 23-28, in outlining, *inter alia*, the political and military events leading up to the indictment period, assist in providing background

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Popović* Decision, para. 10.

⁵² *Perišić* Decision, para. 16; *Popović* Decision, para. 6.

⁵³ *Perišić* Decision, para. 16; *Popović* Decision, para. 6; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-AR73.1, Decision on interlocutory appeals against Trial Chamber's decision on Prosecution's motion for judicial notice of adjudicated facts and Prosecution's catalogue of agreed facts, 26 June 2007 ("*Dragomir Milošević* Appeal Decision"), paras 19-22.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Dragomir Milošević* Appeal Decision, para. 22.

⁵⁸ *Dragomir Milošević* Appeal Decision, para. 22; *Prosecutor v. Momčilo Krajišnik*, IT-00-39-T, Decision on third and fourth Prosecution motions for judicial notice of adjudicated facts, 24 March 2005, para. 15.

⁵⁹ *Karemera* Appeal Decision, paras 48.

⁶⁰ *Ibid.* para. 50.

and context to the incidents with which the indictment is concerned and as such are relevant to the proceedings against the Accused. The Trial Chamber therefore finds that these facts, having satisfied the remaining criteria for judicial notice, are admissible under Rule 94(B). Proposed Fact 22, however, speaks directly to the acts and conduct of Milan Lukić and, therefore, will not be judicially noticed.

24. Proposed Facts 29-31 were impugned in the Defences' submissions as containing findings of an essentially legal nature. As previously noted, both Prosecution replies cited certain findings made in the *Karemera* Appeal Decision. It should be observed however, that those Appeals Chamber findings were made in respect of an application for judicial notice of facts of common knowledge under Rule 94(A) – a process distinct in nature, having its own individual set of admissibility criteria, from that of judicial notice under Rule 94(B). The Prosecution in the present instance has not applied for Proposed Facts 29-31 to be treated as facts of common knowledge under Rule 94(A). The Trial Chamber must therefore determine whether these proposed facts satisfy the particular admissibility requirements for judicial notice under Rule 94(B).

25. The Trial Chamber finds that these Proposed Facts are in essence an assessment by the *Vasiljević* Trial Chamber as to whether the various general requirements for reaching a conviction under Articles 3 and 5 of the Statute had been met. Indeed, in the original text of the trial judgement, these findings appear under the general caption "Conclusions relevant to the general requirements of Article 3 and Article 5 of the Statute". The Trial Chamber thus finds that Proposed Facts 29 and 30 do amount to findings of an essentially legal nature and will therefore not be judicially noticed in this case. Proposed Fact 31 outlines the factual premises upon which the findings of law in Proposed Facts 29 and 30 were made. Thus, while it is not classifiable as a finding of an essentially legal nature, when divorced from facts 29 and 30, it is divested of context. As a result, Proposed Fact 31 will be denied judicial notice.

26. The Trial Chamber finds that Proposed Fact 32, which speaks to the acts and conduct of Milan Lukić, is ineligible for judicial notice. Given that Proposed Fact 33 derived its context from Proposed Fact 32, the latter having been rejected, Proposed Fact 33 must also be denied judicial notice.

27. The Trial Chamber finds that Proposed Facts 34 and 35 qualify for judicial notice. Proposed Fact 36 seems, in part, to speak indirectly to the acts and conduct of the Accused regarding his alleged leadership of the paramilitary group in question. The Trial Chamber therefore determines that in the interests of justice and with a view to removing any potential for prejudice to Milan Lukić, Proposed Fact 36 should, as a condition to being judicially noticed, be restructured as

follows:

Mitar Vasiljević was acquainted with many members of the group prior to the events of 1992 and that [...] [Mitar Vasiljević] was a ready source of local information for the group about the location of Muslims in the area of Višegrad, and he gave that information to the group with the full realisation that it would be used to persecute Muslims.

28. The Trial Chamber regards Proposed Fact 37 as being in the nature of an assessment of Mitar Vasiljević's credibility as a witness in the *Vasiljević* case, as opposed to a finding of fact. In the opinion of the Trial Chamber, Proposed Fact 37 does not truly constitute an adjudicated fact and therefore fails to meet the most basic prerequisite for judicial notice under Rule 94(B). It follows that Proposed Facts 38 and 39, which indicate the factors that the Trial Chamber in the *Vasiljević* Case took into account in arriving at the credibility assessment noted in Proposed Fact 37, lose their context by virtue of becoming unclear in fact 37's absence. They are thus also disqualified for judicial notice.

29. The Trial Chamber finds that Proposed Fact 40 as presented by the Prosecution lacks context and will therefore be denied judicial notice. Proposed Fact 41 repeats the substance of Proposed Fact 34, which makes it redundant. It is therefore excluded. Proposed Facts 42-43, 49-51, 53, 55, 57, 67 and 70, owing to the similar admissibility considerations shared by these facts, will be discussed collectively at a later juncture.

30. The Trial Chamber finds Proposed Fact 44 inadmissible under Rule 94(B), as it speaks to the acts and conduct of Milan Lukić. With regard to Proposed Facts 45 to 48, the Trial Chamber finds merit in the Defence submissions in respect of these facts and notes the following finding of the Trial Chamber in *Prosecutor v. Casimir Bizimungu et al.*,⁶¹ cited with approval by the Appeals Chamber in its "Decision on Appellant's Motion for Judicial Notice" delivered on 1 April 2005 in *Momir Nikolić v. Prosecutor*:

[...] to be taken judicial notice of, the facts must be adjudicated facts, meaning facts upon which, on a previous occasion, *in another case*, this Tribunal in any of its several Chambers has deliberated and made a decision.⁶²

31. As an initial point of observation, the Trial Chamber holds that Proposed Facts 45 to 48 do not derive from "another case" – that is a separate set of proceedings, against different accused. These facts were instead extracted from the above-mentioned Referral Decision made in respect of one of the Accused in the current case. As a second point, the Trial Chamber considers that implicit in the concept of 'adjudication' is the notion that there must have been a trial on the merits of the

⁶¹ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosecution's motion for judicial notice pursuant to Rules 73, 89 and 94, 2 December 2003 ("*Bizimungu* Trial Decision").

⁶² *Nikolić* Appeal Decision, para. 45, citing with approval *Bizimungu* Trial Decision, para. 34. Emphasis inserted.

case in question.⁶³ Findings of fact, in order to qualify as adjudicated facts under Rule 94(B), must therefore be the conclusive products of a trial – in which the evidence providing the foundation for those findings would have been thoroughly scrutinised and assessed, *inter alia*, as to relevance, credibility and probative value, and which evidence would have been weighed in an assessment of the guilt or innocence of an accused.⁶⁴ The Trial Chamber therefore declines to take judicial notice of Proposed Facts drawn from a referral decision under Rule 11 *bis*.

32. The Trial Chamber will now discuss Proposed Facts 42-43, 49-51, 53, 55, 57, 67 and 70. The original findings in the *Vasiljević* trial judgement – from which Proposed Facts 42-43, 49-51, 53, 55 and 57 were extracted – speak directly to the acts and conduct of Milan Lukić, either acting alone or alongside others. The original findings of fact from which Proposed Facts 67 and 70 were derived, likewise make direct reference to the acts and conduct of both Milan Lukić and Sredoje Lukić. In formulating the Proposed Facts drawn from these original findings of fact, the Prosecution has redacted the Accused's names. The Trial Chamber considers that these Proposed Facts nonetheless contain underlying references to the acts and conduct of the Accused.

33. In addition, it may also be noted that the original findings of fact by the *Vasiljević* Trial Chamber so emphasise the significance of the part played by the Accused in the events which they address – and additionally, in Milan Lukić's particular circumstances, regarding his alleged leadership of the White Eagles paramilitary group – that the redaction of the Accuseds' names in the Prosecution's formulation of the Proposed Facts, has the effect of substantially altering the essence of the Trial Chamber's findings. The result is that the Proposed Facts as formulated change the context of the Trial Chamber's actual findings so that they become misleading and, as such, inadmissible under Rule 94(B).

34. Finally, the Trial Chamber, in the exercise of its discretion, finds that judicial notice of Proposed Facts 42-43, 49-51, 53, 55, 57, 67 and 70 would be unduly prejudicial to the Accused and would not serve the interests of justice.

35. Proposed Facts 52, 54, 56 and 58-60 outline a number of the factual circumstances surrounding the Drina River killings, with which Milan Lukić is charged in the indictment. As such, they are relevant to issues raised in the indictment. The Trial Chamber takes note of the submission by the Defence of Sredoje Lukić that these facts ought to be excluded because they pertain to events with which Sredoje Lukić is not charged in the indictment. While there are indeed some charges in

⁶³ Thus in the *Karemera* Appeal Decision, para. 40, the Appeals Chamber stated that adjudicated facts "[...] [a]re facts that have been established in a proceeding between other parties on the basis of the evidence the parties to that proceeding chose to introduce, in the particular context of that proceeding".

the indictment which do not relate to Sredoje Lukić, nevertheless both he and Milan Lukić are Accused in a joint trial – one and the same proceedings. Thus, the Trial Chamber may take notice of a fact, even where one of the Accused in the proceedings is not also charged in respect of the events canvassed by that fact. These Proposed Facts having therefore satisfied the various criteria for admission under Rule 94(B), they will be judicially noticed by the Trial Chamber.

36. Proposed Fact 61, as it speaks to the acts and conduct of Milan Lukić, will be denied judicial notice. This is so despite the fact that the acts and conduct referred to in Proposed Fact 61 apparently pre-date the incidents charged in the Indictment.⁶⁵

37. Finally, with regard to Proposed Facts 62-66, 68-69 and 71-79, the Trial Chamber finds that they address a number of the events surrounding the Pionirska Street killings in respect of which both Accused are charged and that they are therefore relevant to the proceedings against the Accused. Also, contrary to the Defence's submissions, there is no requirement in the Tribunal's case law that adjudicated facts be beyond reasonable dispute.⁶⁶ In addition, the Tribunal's case law provides that these facts, given that they refer to the criminal responsibility of the Accused and not to their acts and conduct, are eligible for judicial notice under Rule 94(B). Therefore, the Trial Chamber takes judicial notice of these Proposed Facts.

⁶⁴ The *Nikolić* Appeal Decision, para. 45, notes that when contested on appeal, such findings made during trial proceedings may be considered adjudicated facts only where upheld by the Appeals Chamber.

⁶⁵ Proposed Fact 61 states that "[o]n the afternoon of 7 June 1992" the witness in question had been informed by someone else that Milan Lukić had on several occasions mistreated or killed persons at the Varda Factory. Given that the Indictment period starts at 7 June 1992, this Proposed Fact would seem to refer to pre-Indictment period events.

⁶⁶ *Karemera* Appeal Decision, para. 40.

5. Disposition

The Trial Chamber, pursuant to Rule 94(B) of the Rules, **GRANTS** the Motion **IN PART** and decides as follows:

- (1) to take judicial notice of the following Proposed Facts:
 - (a) 1-21, 23-28, 34-35, 52, 54, 56, 58-60, 62-66, 68-69 and 71-79; and
 - (b) 36 subject to the amendments noted in paragraph 27 above.
- (2) not to take judicial notice of the remaining Proposed Facts.

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



Judge Patrick Robinson
Presiding

Dated this twenty-second day of August 2008
At The Hague
The Netherlands

[Seal of the Tribunal]