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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-PT

Date: 2 May 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: **2 May 2012**

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

FOURTH DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS CONCERNING THE REBUTTAL EVIDENCE PROCEDURE

Office of the Prosecutor
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Mr Peter McCloskey

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Mr Branko Lukić
Mr Miodrag Stojanović

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I. PROCEDURAL BACKGROUND

1. On 9 December 2011, the Prosecution filed a motion for judicial notice of adjudicated facts pursuant to Rule 94 (B) of the Tribunal's Rules of Procedure and Evidence ("Motion" and "Rules", respectively).[1] In the Motion, the Prosecution also requested that the Chamber accept its proposed procedure for potential rebuttal evidence where the Defence has, in the presentation of its case, offered evidence challenging an adjudicated fact ("Rebuttal Evidence Procedure").[2] On 1 February 2012, the Defence responded to the Motion ("Response").[3]

2. On 28 February 2012, the Chamber issued its first decision on the Motion, addressing the Proposed Facts contained in Annex A ("First Decision").[4] The Chamber instructed the Prosecution to file an amendment to its Rule 65 *ter* (E) (ii) list of witnesses ("Witness List") within two weeks of the filing of the decision in relation to time estimates for witnesses whose evidence is to be adjusted, and to indicate which witnesses will be withdrawn.[5]

3. On 13 March 2012, the Prosecution submitted that it was not in a position to amend its Witness List, and that it would defer any decision in this regard until the Chamber issues a decision on the Rebuttal Evidence Procedure.[6] At the status conference of 29 March 2012, the Chamber informed the parties that it accepted the approach proposed by the Prosecution with respect to the amendments to its Witness List.[7] It underlined, however, that the Prosecution would not be given more than one week, after the filing of the Chamber's decision on the Rebuttal Evidence Procedure, to determine how its witness list needs to be amended.[8]

4. On 21 March and 13 April 2012, the Chamber issued its second and third decisions on the Motion, addressing the Proposed Facts contained in Annexes B and C ("Second Decision" and "Third Decision", respectively).[9]

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1 Prosecution Motion for Judicial Notice of Adjudicated Facts with Annexes A-C, 9 December 2011.

2 Motion, paras 25-27.

3 Defence Response to "Prosecution Motion for Judicial Notice of Adjudicated Facts" Filed 9 December 2011, 1 February 2012. The Chamber granted the Defence Urgent Motion to Enlarge Time and Word Count for Response to Adjudicated Facts, 19 December 2011, on 20 December 2011 (through informal communications) and extended the deadline to 1 February 2012.

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

5 First Decision, para. 51.

6 Prosecution's Submissions on Amendment to its Witness List in light of the Trial Chamber's First Decision on Adjudicated Facts, 13 March 2012, paras 5-6.

7 T. 268.

8 Ibid.

9 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.

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II. SUBMISSIONS

5. In its Motion, the Prosecution invites the Chamber to adopt clear guidance for the parties on the effect of taking judicial notice of facts so as to ensure clarity and, ultimately, the fairness of the proceedings.[10] It submits that Trial Chambers have adopted different approaches to the parties' procedural rights once a judicially noticed fact has been challenged.[11] To illustrate this, the Prosecution refers to a decision in the case of *Prosecutor v. Milan Lukić and Sredoje Lukić* ("*Lukić* Reconsideration Decision"), in which the Prosecution was not allowed to lead evidence in rebuttal after the Defence, during the presentation of its case, challenged certain judicially noticed facts.[12] In this decision, the Trial Chamber reasoned that the Prosecution should have anticipated that the Defence would challenge the specific facts because they were significant to that case.[13] Accordingly, the Prosecution should have presented evidence on the facts in question during its case-in-chief, notwithstanding that the facts had been judicially noticed.[14]

6. The Prosecution argues that, in order for Rule 94 (B)'s full potential for judicial economy to be realised, procedural safeguards must be put in place to ensure that the party relying on a judicially noticed fact has the opportunity to lead evidence in support of the fact being challenged, if its evidential significance is vitiated upon a challenge.[15] In such instances, the Prosecution proposes a five part Rebuttal Evidence Procedure be followed,[16] which entails that:

i. the Chamber delivers its decision on the proposed Rebuttal Evidence Procedure prior to the Prosecution filing its Pre-Trial Brief, Witness List, and List of Exhibits ("Rule 65 *ter* (E) Filings");

ii. in the event that the Chamber does not deliver its decision on the proposed Rebuttal Evidence Procedure prior to the Prosecution's Rule 65 *ter* (E) Filings, the Prosecution will include in those filings all the evidence it intends to present, but will indicate which evidence it would lead should the Chamber grant its application as submitted;

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[10] Motion, paras 24-25.
[11] Motion, paras 25, 27.
[12] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Motion for Reconsideration or Certification to Appeal the Decision on Rebuttal Witnesses, 9 April 2009, paras 15-16; see also *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Rebuttal Witnesses, 25 March 2009, p. 8.
[13] *Lukić* Reconsideration Decision, para. 18.
[14] *Lukić* Reconsideration Decision, paras 15-16, 20.
[15] Motion, para. 27.
[16] Ibid.

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iii. the Defence, in its Pre-Trial Brief, may identify those judicially noticed facts it intends to challenge;

iv. after the Prosecution's case, and in its submission pursuant to Rule 65 *ter* (G) of the Rules ("Rule 65 *ter* (G) Filing"), the Defence must state clearly which judicially noticed facts it challenges and identify the evidence it will lead to challenge such facts; and

v. at the conclusion of the Defence case, the Prosecution may apply to present, in rebuttal, its evidence in support of a judicially noticed fact that has been challenged by the Defence. Further, the Chamber may deny a Prosecution application to call evidence in rebuttal upon a finding that the Defence has not led evidence sufficient to rebut the presumption afforded to judicially noticed facts.[17]

7. In its Response, the Defence did not address the Rebuttal Evidence Procedure.

III. APPLICABLE LAW

8. Rule 85 (A) of the Rules states:

> Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
>
> i. evidence for the prosecution;
>
> ii. evidence for the defence;
>
> iii. prosecution evidence in rebuttal;
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> iv. defence evidence in rejoinder;
>
> v. evidence ordered by the Trial Chamber pursuant to Rule 98; and
>
> vi. any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

9. The Appeals Chamber has held that rebuttal evidence must relate to a significant issue arising directly out of Defence evidence which could not have been reasonably anticipated.[18]

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[17] Ibid.

[18] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 273.

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10. Rule 94 (B) of the Rules provides that:

> At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

11. The Appeals Chamber has held that "by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial".[19] Judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution.[20] Rule 94 (B) of the Rules fosters judicial economy by avoiding the need for evidence in chief to be presented in support of a fact already previously adjudicated.[21] In the case of a Trial Chamber taking judicial notice under this Rule, the legal effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the Defence may then put the point into question by introducing reliable and credible evidence to the contrary.[22]

IV. DISCUSSION

12. Before discussing the merits of the Motion, the Chamber wishes to spend a few words on what seems to be at the heart of the issue.

13. Taking judicial notice of adjudicated facts aims at avoiding presentation of evidence in relation to facts, which a previous Chamber established on the basis of evidence which left no reasonable doubt in the mind of the judges of that Chamber when adjudicating those facts ("previous Chamber"). According to the Tribunal's jurisprudence with regard to the concept of judicial notice of adjudicated facts, a party to the proceedings can propose a fact that has been adjudicated by a previous Chamber ("proposing party"). A Trial Chamber taking judicial notice of such a fact establishes a rebuttable presumption of its accuracy and relieves the proposing party of

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19 *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, p. 4.

20 See *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 ("*Karemera* Decision"), para. 42.

21 See *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal on Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 ("*Karemera* Rebuttal Decision"), para. 20.

22 See *Karemera* Rebuttal Decision, para. 13; *Prosecutor v. Dragomir Milošević*, Case No. IT-98_29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 ("*Milošević* Appeal Decision"), para. 16; *Karemera* Decision, para. 42.

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its initial burden to produce evidence on that fact, on the basis of the previous Chamber's factual findings and evaluation of the evidence presented in that case.

14. The other party to the proceedings ("challenging party") may introduce evidence which contradicts a judicially noticed fact, and such evidence may rebut the presumed accuracy of that fact. If such evidence is heard, the proposing party has an interest in seeking to present evidence which rebuts the contradicting evidence, and which supports the accuracy of the fact that was taken judicial notice of.

15. The core issue is that, in taking judicial notice of an adjudicated fact, a Trial Chamber does not take notice of the evidence underlying this fact on which the previous Chamber established that fact. The presentation of contradicting evidence, if sufficiently relevant and probative to be considered pursuant to the criteria of Rule 89 (C),[23] is to be understood as a step to reopen the evidentiary debate on the fact the Chamber took judicial notice of. Therefore, if contradicting evidence is presented, and the proposing party still wishes to meet its burden of persuasion in relation to that fact, the Trial Chamber is invited to strike a balance between a judicially noticed *fact* and *evidence*. As facts in themselves cannot be weighed against contradicting evidence, in order to strike such a balance, the obvious way is to allow the proposing party to submit evidence in relation to the now challenged fact, which can then be weighed against the contradicting evidence. This restores a situation in which the Trial Chamber weighs evidence *pro* and *contra* the judicially noticed fact at issue and makes its own finding.[24]

16. There appears to be no uniform case law on eliciting rebuttal evidence with respect to judicially noticed facts.[25] The Chamber considers, however, that the sequencing order of the presentation of evidence, provided by Rule 85 (A) of the Rules, and the Appeal Chamber's

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[23] See *Karemera* Rebuttal Decision, para. 14.

[24] In this respect, the Chamber considers, in accordance with the Appeals Chamber's jurisprudence, that evidence underlying a challenged judicially noticed fact cannot be found inadmissible on the ground that it has already been considered and rejected by the previous Trial Chamber in making a finding on that fact. See *Karemera* Rebuttal Decision, para. 22.

[25] In the *Lukić* Reconsideration Decision, the Prosecution's request to lead rebuttal evidence on a challenged judicially noticed fact was denied because the Prosecution was considered to have been on notice of the Defence's intention to challenge a fact, since it related to a significant issue, and the Defence opposed the list of adjudicated facts relating to the challenged facts. See para. 18. The *Karadžić* Trial Chamber, on the other hand, held that when the Defence challenges adjudicated facts which were judicially noticed, the Prosecution may still choose to present additional evidence on that point during its rebuttal case. That Trial Chamber held that the Defence's argument, that judicially noticed facts that are not further substantiated with other evidence by the Prosecution will "disappear" once the fact is successfully challenged by the Defence, was "misguided". Further, the Trial Chamber reasoned that accepting this argument would effectively render Rule 94 (B) ineffectual, as the Prosecution would never be able to rely on adjudicated facts if it had notice that the Defence would challenge them. See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Motion to Strike Scheduled Sarajevo Shelling and Sniping Incidents, 27 January 2012 ("*Karadžić* Decision"), para. 11.

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jurisprudence on rebuttal evidence, appropriately adjusted for the significant differences at issue in relation to judicially noticed facts, give an answer to the Prosecution's query on the matter.[26]

17. The Trial Chamber in *Prosecutor v. Radovan Karadžić* and Judge Van den Wyngaert in her dissenting opinion appended to the *Lukić* Reconsideration Decision, observed that the purpose of Rule 94 (B) of the Rules would be defeated if the Prosecution could not rely on judicially noticed facts merely because the Defence had notified its intent to challenge them. The Rule would be at risk to become a "dead letter".[27] The Chamber shares this view and considers that even if the challenging party notifies the proposing party of its intention to challenge certain judicially noticed facts, the proposing party may still rely on the legal effect of being relieved of its initial burden to produce evidence on the point, until the moment that the challenging party puts the adjudicated fact into question by *introducing* evidence to the contrary.[28] A requirement that the proposing party, in its case-in chief, must present evidence on judicially noticed facts on the basis of a notification of a future challenge to those facts, would run counter to the very concept of judicial notice of adjudicated facts. Further, the legal effect of judicial notice would not serve its purpose if, when the challenging party presents contradicting evidence, such presentation results in the eradication of the proposing party's possibility to then present its evidence in support of this fact. The proposing party can meaningfully determine what evidence it should present to meet its burden of proof in relation to that fact once that contradicting evidence has been introduced.

18. Prior to the Chamber taking a decision on a motion for judicial notice of adjudicated facts, the challenging party can object to the taking of judicial notice in its response to the proposed facts through a clear identification of a specific challenge that would be brought against these facts during trial. In this respect, the Chamber observes that in its Response, the Defence raised a specific objection to a number of proposed facts, arguing that the interests of justice and the right to a fair and public trial support leading evidence on these facts during trial.[29] Having this specific information enables the Chamber to determine whether, in this case, taking judicial notice would indeed serve judicial economy.[30] By denying to take judicial notice of a number of these facts, the Chamber restored a situation where the Prosecution would need to bring evidence in chief to establish these facts.

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[26] See *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-AR73.1, Decision on the Prosecution's Appeal Against the Trial Chamber's Order to Call Alibi Rebuttal Evidence During the Prosecution's Case in Chief, 16 October 2008, paras 13-14, 22, 24.

[27] *Lukić* Reconsideration Decision, Dissenting Opinion of Judge Christine van den Wyngaert, 9 April 2009, p. 1; *Karadžić* Decision, para. 11.

[28] See *Karemera* Rebuttal Decision, para. 13; *Milošević* Appeal Decision, para. 16; *Karemera* Decision, para. 42.

[29] See First Decision, para. 11.

[30] Thus, the Chamber did not take judicial notice of, for example, proposed fact no. 322; see First Decision, para. 11.

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19. Once the Chamber has taken judicial notice of an adjudicated fact, there are, in line with the order of presentation of evidence provided in Rule 85 of the Rules, two stages prior to an envisaged presentation of prosecution evidence in rebuttal, during which the Defence may challenge that judicially noticed fact. First, a judicially noticed fact may be challenged during the presentation of the Prosecution's case, for example during cross-examination of a witness. The Prosecution may then adduce evidence through re-examination of that witness, or by expanding the scope of examination of other Prosecution witnesses or it may move for an amendment to its 65 *ter* (E) lists to add additional witnesses or exhibits. Second, the Defence may lead evidence during the presentation of its case, clearly contradicting a judicially noticed fact. The Prosecution may then introduce evidence through cross-examination of this or other Defence witnesses, or seek leave to present evidence in support of the challenged fact, notifying the Chamber of this intent in due time.

20. The above examples are not to be regarded as an exhaustive list of manners in which the proposing party can introduce evidence in support of the challenged judicially noticed fact. As a matter of principle, at any stage where the challenging party presents evidence contradicting a judicially noticed fact, the proposing party should have an opportunity to elicit evidence addressing the challenge or otherwise supporting the establishment of the fact by the means described above. Such an opportunity may also be given to the proposing party by allowing it to present evidence in rebuttal pursuant to Rule 85 (A) (iii).

21. The Chamber considers that in view of its discussion above, there is no need to discuss the Prosecution's Rebuttal Evidence Procedure.[31]

[31] With regard to part iv) of the Rebuttal Evidence Procedure, the Chamber considers that Rule 65 *ter* (G) of the Rules does not require the Defence to state which judicially noticed facts it intends to challenge or to identify the evidence it will lead to specifically challenge such facts. The Tribunal's case law permits the Defence to challenge judicially noticed facts at any time during the presentation of its case. A clear identification by the Defence in its Rule 65 *ter* (G) Filing, if any, of the judicially noticed facts it intends to challenge and the evidence it will present to this effect, would indeed be in the interests of judicial economy. The Chamber encourages the Defence to contribute to such expediency, but declines to add any additional requirements to those contained in the Rules.

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V. DISPOSITION

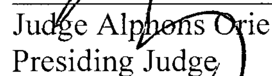
22. Pursuant to Rules 85 and 94 (B) of the Rules, the Chamber

DECIDES not to adopt the Rebuttal Evidence Procedure proposed by the Prosecution;

CONFIRMS that the approach outlined above shall be followed in this trial; and

INSTRUCTS the Prosecution to file a notification indicating the number of hours which will not be used, and the number and identities of witnesses who will not be called in light of the Chamber taking judicial notice of the Proposed Facts listed in the First, Second, and Third Decisions, within one week of the filing of this decision.

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



Judge Alphons Orie
Presiding Judge

Dated this Second of May 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

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