



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-AR73.1
Date: 12 November 2013
Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Carmel Agius, Presiding
Judge Patrick Robinson
Judge Arlette Ramaroson
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov**

Registrar:

Mr. John Hocking

Decision:

12 November 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON RATKO MLADIĆ'S APPEAL AGAINST THE
TRIAL CHAMBER'S DECISIONS ON THE PROSECUTION
MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS**

The Office of the Prosecutor:

Mr. Dermot Groome
Mr. Peter McCloskey

Counsel for the Accused:

Mr. Branko Lukić
Mr. Miodrag Stojanović

1. The Appeals 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 ("Appeals Chamber" and "Tribunal", respectively) is seised of an interlocutory appeal filed by Ratko Mladić ("Mladić") on 4 July 2012 ("Appeal")¹ against the: (i) "First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", issued on 28 February 2012 ("First Decision") by Trial Chamber I of the Tribunal ("Trial Chamber"); (ii) "Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", issued by the Trial Chamber on 21 March 2012 ("Second Decision"); and (iii) "Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", issued by the Trial Chamber on 13 April 2012 ("Third Decision") (collectively, "Impugned Decisions").

I. BACKGROUND

A. Procedural History

2. On 9 December 2011, the Prosecution filed a motion for judicial notice of adjudicated facts before the Trial Chamber.² The Prosecution requested that the Trial Chamber, pursuant to Rule 94(B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), take judicial notice of 2,883 proposed adjudicated facts ("Proposed Facts") from 15 Tribunal judgements set forth in three separate annexes.³ Mladić responded to the Motion on 1 February 2012,⁴ opposing the admission of all but 38 of the Proposed Facts.⁵ The Prosecution filed a request for leave to reply to the Defence Response to Motion, which was denied by the Trial Chamber.⁶ The Trial Chamber issued the Impugned Decisions, one decision in respect of each annex attached to the Motion, granting the Motion in part and taking judicial notice of a total of 1,976 Proposed Facts pursuant to Rule 94(B) of the Rules ("Impugned Adjudicated Facts").⁷ On 2 May 2012, the Trial Chamber issued the "Fourth Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Concerning the Rebuttal Evidence Procedure".

¹ Defense Interlocutory Appeal Brief against the Trial Chamber Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, Public and Public Annexes, 4 July 2012; Order Assigning Judges to a Case before the Appeals Chamber, 9 July 2012.

² Prosecution Motion for Judicial Notice of Adjudicated Facts, Public with Public Annexes A-C, 9 December 2011 ("Motion").

³ Motion, para. 1; Corrigendum to Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 December 2011 para. 2.

⁴ Defense Response to "Prosecution Motion for Judicial Notice of Adjudicated Facts" filed 9 December 2012, 1 February 2012 ("Defence Response to Motion"); Defense Corrigendum to Response to "Prosecution Motion for Judicial Notice of Adjudicated Facts" filed 9 December 2012, 2 February 2012.

⁵ Defence Response to Motion, para. 17. See also First Decision, para. 5.

⁶ Prosecution Request for Leave to Reply to Upcoming Defence Response to Prosecution Adjudicated Facts Motion and to Extend Time to File Reply, 13 January 2012; First Decision, para. 3.

⁷ First Decision, para. 51; Second Decision, para. 36; Third Decision, para. 39.

3. Mladić filed motions requesting leave to appeal the First Decision, Second Decision, and Third Decision on 14 March, 28 March, and 20 April 2012, respectively.⁸ The Prosecution responded on 28 March, 11 April, and 4 May 2012, respectively.⁹ Mladić requested leave to reply and replied on 5 April, 18 April, and 9 May 2012, respectively.¹⁰ On 27 June 2012, the Trial Chamber granted Mladić leave to appeal the First Decision, Second Decision, and Third Decision.¹¹

4. Mladić filed the Appeal on 4 July 2012.¹² The Prosecution responded to the Appeal on 16 July 2012,¹³ and Mladić filed his reply on 20 July 2012.¹⁴

5. On 1 October 2012, the Prosecution advised the Appeals Chamber that it had identified errors in three Impugned Adjudicated Facts, and advised the Trial Chamber that instead of relying on Proposed Fact No. 2234 or the erroneous dates in Proposed Facts Nos 2343 and 2318, it would call evidence to establish the facts in question.¹⁵

⁸ 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 (together, "Certification Motions").

⁹ Prosecution Response to Defence Motion for Certification to Appeal the First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 March 2012; Prosecution Response to Defence Motion for Certification to Appeal the Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 11 April 2012; Prosecution Response to Defence Motion for Certification to Appeal the Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 4 May 2012.

¹⁰ 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; 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; 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 Decision on the Defence Motions for Certification to Appeal the Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 June 2012 ("Certification to Appeal"). The Trial Chamber granted Mladić's request for leave to reply to the First Decision and Second Decision and denied his request for leave to reply to the Third Decision (*ibid.*, para. 3). The Trial Chamber granted certification to appeal its decisions 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; (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 *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 ("*Popović et al.* Trial Judgement") (*ibid.*, para. 18).

¹² Order Assigning Judges to a Case before the Appeals Chamber, 9 July 2012.

¹³ Prosecution Response to Defence Interlocutory Appeal of the Trial Chamber's First, Second and Third Decisions on Prosecution Motion for Judicial Notice of Adjudicated Facts, Public with Public Annexes A and B, 16 July 2012 ("Response").

¹⁴ Reply in Support of Defense Interlocutory Appeal Brief against the Trial Chamber Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, Public & Public Annexes, 20 July 2012 ("Reply").

¹⁵ Prosecution Notification Regarding Adjudicated Facts 2343, 2318 and 2234, 1 October 2012 ("Prosecution Notification"), para. 1.

B. Impugned Decisions

6. The Trial Chamber took judicial notice of: (i) 1149 Proposed Facts in the First Decision, 274 of which it reformulated;¹⁶ (ii) 332 Proposed Facts in the Second Decision, 71 of which it reformulated;¹⁷ and (iii) 495 Proposed Facts in the Third Decision, 128 of which it reformulated.¹⁸

7. The Trial Chamber noted that under Rule 94(B) of the Rules, it retains full discretion to determine which adjudicated facts to recognise following a careful consideration of the accused's rights to a fair and expeditious trial.¹⁹ In exercising its discretion under Rule 94(B) of the Rules, the Trial Chamber considered that for a Proposed Fact to be eligible for judicial notice, it must: (i) be distinct, concrete, and identifiable; (ii) be relevant to the matters at issue in the current proceedings; (iii) not include findings or characterisations of an essentially legal nature; (iv) not be based on a plea agreement or on facts voluntarily admitted in a previous case; (v) not be contested on appeal or, if contested, settled on appeal; (vi) not relate to the acts, conduct, or mental state of the accused; and (vii) as formulated by the moving party, not differ in any substantial way from the originally adjudicated fact.²⁰

8. The findings of the Trial Chamber which are at issue in the Appeal will be discussed in the relevant sections below.

II. STANDARD OF REVIEW

9. The decision to take judicial notice of adjudicated facts pursuant to Rule 94(B) of the Rules is a discretionary one.²¹ Discretionary decisions by a trial chamber must be afforded deference by the Appeals Chamber.²² It is for the party challenging the exercise of a trial chamber's discretion to

¹⁶ First Decision, para. 51.

¹⁷ Second Decision, para. 36.

¹⁸ Third Decision, para. 39.

¹⁹ First Decision, para. 8, referring to *Karemera et al.* Appeal Decision, para. 41. See also Second Decision, para. 3 and Third Decision, para. 3, incorporating First Decision, paras 6-8 by reference.

²⁰ First Decision, para. 8. See also Second Decision, para. 3 and Third Decision, para. 3, incorporating First Decision, paras 6-8 by reference.

²¹ *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 et al.* Appeal Decision"), para. 41; *Prosecutor v. Dragomir Milošević*, Case No. 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"), para. 5; *Prosecutor v. Vujadin Popović et al.* Case No. IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 ("*Popović et al.* Decision"), paras 3, 15; *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 ("*Slobodan Milošević* Appeal Decision"), pp. 3-4.

²² See for example *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-AR73.1, Decision on Interlocutory Appeal Against Oral Decision of the Pre-Trial Judge of 11 December 2007, 28 March 2008 ("*Tolimir* Appeal Decision"), para. 7.

demonstrate a discernible error.²³ The Appeals Chamber will only overturn decisions within a trial chamber's discretion if the challenged decision was: (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.²⁴ In addition, the Appeals Chamber has held that a discernible error may be demonstrated if the trial chamber "has given weight to extraneous or irrelevant considerations, or [...] has failed to give weight or sufficient weight to relevant considerations".²⁵

III. DISCUSSION

A. Introduction

10. Mladić raises four issues in the Appeal. The first and second issues are connected to the reformulation of numerous Proposed Facts by the Trial Chamber and for that reason will be addressed together by the Appeals Chamber. First, Mladić argues that the Trial Chamber erred in the Impugned Decisions by reformulating Proposed Facts prior to taking judicial notice of them, "thereby changing the meaning of the same, divorcing them from the context of the original judgement, instead of rejecting them as improper for judicial notice as originally formulated".²⁶ Secondly, Mladić submits that the Trial Chamber erred in the Third Decision by taking judicial notice of Proposed Facts despite their containing time-references inconsistent with the original judgements.²⁷ Thirdly, Mladić argues that the Trial Chamber erred in the Impugned Decisions by taking judicial notice of Proposed Facts without fully addressing his submissions that the facts in question go to his acts, conduct or mental state.²⁸ Finally, he submits that the Trial Chamber erred in the Second Decision by taking judicial notice of Proposed Facts from the case of *Prosecutor v. Popović et al.*,²⁹ which is under appeal at the present time.³⁰

²³ *Prosecutor v. Slobodan Milošević*, Case Nos IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("Slobodan Milošević 18 April 2002 Decision"), para. 5.

²⁴ *Karemera et al.* Appeal Decision, para. 43; *Dragomir Milošević* Appeal Decision, para. 5. See also *Slobodan Milošević* 18 April 2002 Decision, paras 5-6.

²⁵ *Slobodan Milošević* 18 April 2002 Decision, para. 5. See also *Tolimir* Appeal Decision, para. 7.

²⁶ Appeal, para. 8.

²⁷ Appeal, paras 8, 22.

²⁸ Appeal, para. 8.

²⁹ *Prosecutor v. Popović et al.* Case No. IT-05-88 Trial Judgement, 10 June 2010 ("*Popović et al.* Trial Judgement").

³⁰ Appeal, para. 8.

11. The Prosecution responds that the Appeal should be dismissed on the basis that Mladić has not demonstrated that the exercise of the Trial Chamber's discretion constituted a discernible error resulting in prejudice to him.³¹

B. Preliminary Matter

12. As a preliminary matter, the Prosecution submits that Mladić should not be permitted to incorporate by reference arguments from the Defence Response to Motion, which was appended to the Appeal. It argues that this violates the Practice Direction on the Length of Briefs and Motions and the practice of the Tribunal requiring arguments in support of appeals to be included in appeal briefs and not by reference to submissions made elsewhere.³²

13. Mladić submits that the Practice Direction states that an appendix may contain "items from the record", which in his view includes pleadings underlying an impugned decision on appeal,³³ and that the arguments upon which the Appeal are based are included in the Appeal.³⁴

14. The Appeals Chamber notes that the annexes to the Appeal contain the Defence Response to Motion and the Certification Motions. These filings are items from the record and as such are readily available to the Appeals Chamber. Therefore, their attachment to the Appeal does not infringe the Practice Direction as long as they do not include any legal or factual arguments upon which Mladić relies.³⁵ The Appeals Chamber will not engage in a *de novo* review of the submissions contained in these filings and will confine its analysis to the arguments advanced by Mladić in the Appeal.

³¹ Response, para. 1, referring to *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.3, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Prosecution Motion Seeking Determination that the Accused Understands English, 4 June 2009, para. 5, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para. 11. The Prosecution further submits that Mladić does not demonstrate the Trial Chamber's exercise of discretion was: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Chamber's discretion (Response, para. 1, referring to *Dragomir Milošević* Appeal Decision, para. 5).

³² Response, paras 2-4, referring to Practice Direction on Length of Briefs and Motions, IT/184 Rev. 2, 16 September 2005 ("Practice Direction"); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009, para. 13.

³³ Reply, paras 5-7, referring to Practice Direction, Part 6.

³⁴ Reply, para. 9.

³⁵ The Practice Direction specifically provides that "[a]n appendix or book of authorities will not contain legal or factual arguments, but rather references, source materials, items from the record, exhibits, and other relevant, non-argumentative material." See Practice Direction, section I.(C).6.

C. Alleged Errors in the Reformulation of Proposed Facts Prior to Taking Judicial Notice

1. Submissions of the Parties

(a) Mladić's Submissions

15. Mladić argues that a trial chamber can correct a minor inaccuracy in a proposed fact but that it should not introduce a substantive change.³⁶ He submits that the Trial Chamber correctly considered each Proposed Fact to determine whether it was consistent with the requirements for judicial notice,³⁷ and correctly referred to the “premise that ‘the facts as formulated by the moving party must not differ in any substantial way from the facts actually adjudicated in the original judgement’”.³⁸ However, Mladić argues that in each of the Impugned Decisions, the Trial Chamber nevertheless failed to adhere to this standard by reformulating the Proposed Facts in such manner as to render them substantially different from the original judgements or divorced from their context.³⁹ He submits that if a Proposed Fact was unclear in its original context, the Trial Chamber should have refused to take judicial notice of it.⁴⁰ Mladić submits that the reformulated Proposed Facts impact on the fairness and expeditiousness of the proceedings because they impose an undue burden on the Defence to rebut them.⁴¹

16. Regarding the Second Decision in particular, Mladić submits that the Trial Chamber failed to sufficiently analyse his objections in relation to the Proposed Facts it reformulated,⁴² and erred by reformulating Proposed Facts that conflict with one another. In his view, this amounts to impermissible pre-judging.⁴³

17. In relation to the Third Decision, Mladić submits that the Trial Chamber reformulated Proposed Facts that did not meet the admissibility criteria, instead of rejecting them.⁴⁴ Mladić further argues that these modifications went beyond purely editorial corrections and that they lack reasoning.⁴⁵ He further submits that the Trial Chamber erred by taking judicial notice of several

³⁶ Appeal, para. 9, referring to *Prosecutor v. Mićo Stanišić*, IT-04-79-PT, Decision on Judicial Notice, 14 December 2007 (“*Miće Stanišić Decision*”), para. 38.

³⁷ See Appeal, paras 10, 19.

³⁸ Appeal, para. 11, referring to First Decision, para. 8(vii).

³⁹ Appeal, paras 10-11, 14-15, 20-21; Reply, para. 12, referring to *Popović et al.* Decision, para. 5.

⁴⁰ Appeal, paras 10, 14, 20, 21 referring to *Miće Stanišić Decision*, paras 37, 40; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts pursuant to Rule 94(B), 14 March 2006 (“*Prlić et al. Pre-Trial Decision*”), para. 16; *Popović et al.* Decision, para. 17.

⁴¹ Appeal, paras 12, 17 referring to *Popović et al.* Decision, para. 16.

⁴² Appeal, para. 14.

⁴³ Appeal, para. 16, regarding Proposed Facts: 1391, 1393, 1439, and 1442.

⁴⁴ Appeal, paras 19-21, referring to Third Decision, paras 6, 9, 26, 30, 38.

⁴⁵ Appeal, paras 20-21, referring to Third Decision, para. 6.

Proposed Facts in the Third Decision which included time-references proposed by the Prosecution despite their being inconsistent with the original judgements.⁴⁶

18. Mladić requests that the Appeals Chamber: (i) vacate and reverse the Trial Chamber's decision to take judicial notice of Proposed Facts after reformulating them; and (ii) remand the matter to the Trial Chamber, directing it to review the Proposed Facts in question as written and, without reformulating them, to determine whether they meet the criteria for judicial notice.⁴⁷

(b) Prosecution's Response

19. The Prosecution responds that the Trial Chamber acted within the scope of its discretion when it reformulated Proposed Facts before it took judicial notice of them.⁴⁸ It submits that since Rule 94(B) of the Rules is discretionary, trial chambers can take judicial notice of proposed facts *proprio motu*, which means that it is permissible for them to adopt their own formulation of particular proposed facts.⁴⁹ Further, it asserts that it is well established that a chamber may correct minor inaccuracies or ambiguities of a moving party's formulation of a proposed fact *proprio motu*.⁵⁰

20. The Prosecution submits that reformulation is permissible to the extent that the reformulated fact does not convey a substantially different meaning from the original fact and is otherwise consistent with the requirements for judicial notice.⁵¹ In its view, the Trial Chamber acted in accordance with the correct law by stating that proposed facts when reformulated must not differ in any substantial way from the facts adjudicated in the original judgement.⁵² The Prosecution submits

⁴⁶ Appeal, paras 8, 22, referring to Third Decision, para. 37.

⁴⁷ Appeal, para. 18. See also Appeal, paras 13, 23.

⁴⁸ Response, para. 5, referring to Response, Annex A which sets forth a comparison of the adjudicated facts as reflected in the Annexes to the Decisions. See also Response, para. 7, referring to *Dragomir Milošević* Appeal Decision, para. 5; *Karemera et al.* Appeal Decision, paras 41, 52.

⁴⁹ Response, paras 7-8.

⁵⁰ Response, para. 9, referring to *Popović et al.* Decision, para. 7; *Mičo Stanišić* Decision, para. 38. *Prosecutor v. Karadžić*, Case No. ICTY-95-5/18-PT, Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009 ("*Karadžić* First Decision"), paras 20-22; *Prosecutor v. Karadžić*, Case No. ICTY-95-5/18-T, Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 July 2009 ("*Karadžić* Third Decision"), para. 28; *Prosecutor v. Karadžić*, IT-95-5/18, Decision on Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010 ("*Karadžić* Fourth Decision"), para. 65; *Prosecutor v. Karadžić*, Case No. ICTY-95-5/18-T, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010 ("*Karadžić* Fifth Decision"), paras 37, 39; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 17 December 2009 ("*Tolimir* Decision"), para. 17; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005 ("*Krajišnik* Decision"), para. 21.

⁵¹ Response, para. 13.

⁵² Response, paras 13-14, referring to First Decision, para. 8.

that this is evidenced by the fact that the Trial Chamber refused to take judicial notice of certain Proposed Facts it considered to be misleading or differ substantially from the original judgement.⁵³

21. The Prosecution further submits that none of the reformulated Proposed Facts addressed by Mladić have a substantially different meaning from the original facts or are otherwise impermissible for judicial notice, and that Mladić fails to demonstrate an error in the Trial Chamber's approach.⁵⁴ Finally, the Prosecution submits that Mladić was given and exercised the opportunity to challenge the substance of the Proposed Facts against the criteria for judicial notice, and that while the judicial notice procedure requires that parties be heard, there is no requirement that they are heard on the "precise, final, formulation" of the fact, as long as they have an opportunity to comment on the substance.⁵⁵ The Prosecution thus submits that Mladić fails to demonstrate an error by the Trial Chamber or that he has suffered any prejudice through his inability to make submissions on facts as ultimately formulated.⁵⁶

(c) Mladić's Reply

22. Mladić replies that the Trial Chamber's reformulation of Proposed Facts demonstrates a potential bias and pre-judging on the part of the Trial Chamber, which "was not in a position to re-write texts from judgements when it has not heard the evidence."⁵⁷ He submits that the Trial Chamber altered dates in certain Proposed Facts, rendering them different from the facts as found in the original judgements, such that they cannot be regarded as adjudicated.⁵⁸ Finally, he submits that in several instances, text that did not encompass the complete context or meaning of the judgement was selectively included to the detriment of the Defence, because it included inferences of guilt as to subordinate or affiliated third parties and excluded mitigating or qualifying language.⁵⁹

2. Applicable Law

23. Rule 94(B) of the Rules states:

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.⁶⁰

⁵³ Response, para. 14, referring to First Decision, para. 48.

⁵⁴ Response, paras 6, 17, regarding Proposed Facts Nos 101, 308, 316, 388, 776, 1570, 1577, 1617, 1620, and 1643.

⁵⁵ Response, para. 19, referring to *Prosecutor v. Setako*, Case No. ICTR-04-81-A, Judgement, 28 September 2011, para. 200.

⁵⁶ Response, para. 19, *contra* Appeal, para. 10.

⁵⁷ Reply, para. 10. See also Reply, para. 11.

⁵⁸ Reply, para. 11. Mladić refers by way of example to Proposed Facts Nos 136, 672, 746, 776, 1086-1106, 1128, 1459.

⁵⁹ Reply, para. 13, referring in particular to Proposed Fact No. 1146.

⁶⁰ Rule 94(B) of the Rules was promulgated in July 1998 and amended in December 2010 (See Rules IT/32/Rev. 13, 9 & 10 July 1998 and Rules IT/32/Rev. 45, 8 December 2010, respectively).

24. The Appeals Chamber recalls that the taking of judicial notice of adjudicated facts is intended to achieve judicial economy and harmonisation of judgements of the Tribunal and the International Criminal Tribunal for Rwanda ("ICTR") "while ensuring the right of the Accused to a fair, public and expeditious trial".⁶¹ The Appeals Chamber further recalls that adjudicated facts of which judicial notice is taken are admitted as rebuttable presumptions that may be disproved by the opposing party through the presentation of evidence at trial.⁶² For this reason, the Appeals Chamber considers that chambers ought to take a cautious approach in exercising their discretion to take judicial notice of adjudicated facts in order to ensure the right of the accused to a fair trial.

25. The principles guiding the exercise of a trial chamber's discretion in this respect have been developed through the jurisprudence of the Tribunal and the ICTR.⁶³ A trial chamber must first determine whether a proposed adjudicated fact meets the admissibility criteria for judicial notice, and then consider whether, even if all admissibility criteria are met, it should nonetheless decline to take judicial notice on the ground that doing so would not serve the interests of justice.⁶⁴ Guided by prior jurisprudence, the *Popović et al.* Trial Chamber identified nine criteria which must be met in order for a trial chamber to exercise its discretion in this regard.⁶⁵ Trial chambers have since relied on these or similar criteria in exercising their discretion to take judicial notice of adjudicated facts.⁶⁶ To be admissible, proposed adjudicated facts must: (i) be relevant to an issue in the proceedings;⁶⁷ (ii) be distinct, concrete, and identifiable;⁶⁸ (iii) as formulated by the moving party, not differ in any substantial way from the formulation of the original judgement;⁶⁹ (iv) not be unclear or misleading in the context in which they are placed in the moving party's motion;⁷⁰ (v) be identified with adequate precision by the moving party;⁷¹ (vi) not contain characterisations of an essentially legal nature;⁷² (vii) not be based on an agreement between the parties to the original proceedings;⁷³

⁶¹ *Karemera et al.* Appeal Decision, para. 39.

⁶² *Karemera et al.* Appeal Decision, para. 42; *Slobodan Milošević* Appeal Decision, p. 4; *Dragomir Milošević* Appeal Decision, para. 16, citing *Karemera et al.* Appeal Decision, para. 50.

⁶³ *Karemera et al.* Appeal Decision, para. 41.

⁶⁴ See for e.g. *Popović et al.* Decision, para. 4.

⁶⁵ *Popović et al.* Decision, paras 5-14.

⁶⁶ See for e.g. *Mičo Stanišić* Decision, para. 34; *Karadžić* First Decision, para. 9; *Tolimir* Decision, para. 8; *Stanišić and Simatović*, Case No. IT-03-69-T Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 25 November 2009 ("*Stanišić and Simatović* Decision"), para. 27.

⁶⁷ *Popović et al.* Decision, para. 5; *Karadžić* First Decision, para. 9(a); *Tolimir* Decision, para. 8(a); *Stanišić and Simatović* Decision, para. 27(ii). See also *Dragomir Milošević* Appeal Decision, para. 13.

⁶⁸ *Popović et al.* Decision, para. 6; *Karadžić* First Decision, para. 9(b); *Tolimir* Decision, para. 8(b); *Stanišić and Simatović* Decision, para. 27(i).

⁶⁹ *Popović et al.* Decision, para. 7; *Karadžić* First Decision, para. 9(c); *Tolimir* Decision, para. 8(d); *Stanišić and Simatović* Decision, para. 27(vii).

⁷⁰ *Popović et al.* Decision, para. 8; *Karadžić* First Decision, para. 9(d); *Tolimir* Decision, para. 8(e). See also *Karemera et al.* Appeal Decision, para. 55.

⁷¹ *Popović et al.* Decision, para. 9; *Karadžić* First Decision, para. 9(e); *Tolimir* Decision, para. 8(c).

⁷² *Popović et al.* Decision, para. 10; *Karadžić* First Decision, para. 9(f); *Tolimir* Decision, para. 8(f); *Stanišić and Simatović* Decision, para. 27(iii). See also *Dragomir Milošević* Decision, para. 22.

⁷³ *Popović et al.* Decision, para. 11; *Karadžić* First Decision, para. 9(g); *Tolimir* Decision, para. 8(g); *Stanišić and Simatović* Decision, para. 27(iv).

(viii) not relate to the acts, conduct, or mental state of the accused;⁷⁴ and (ix) not be subject to pending appeal or review.⁷⁵

26. Although not clearly contested by either party, the Appeals Chamber will address the issue of whether and to what extent it is within a trial chamber's discretion to reformulate proposed adjudicated facts prior to taking judicial notice of them. The Appeals Chamber notes that several trial chambers have held that it is within their discretion to make minor corrections to proposed facts to render their formulation consistent with the meaning intended by the original judgement, as long as the corrections do not introduce any substantive changes.⁷⁶ For example, the *Popović et al.* Trial Chamber held that:

[...] if the moving party's formulation contains only a minor inaccuracy or ambiguity as a result of its abstraction from the context of the original judgement, the Chamber may, in its discretion, correct the inaccuracy or ambiguity *proprio motu*. In such circumstances, the correction should introduce no substantive change to the proposed fact, and the purpose of such correction should be to render the formulation consistent with the meaning intended by the original Chamber. The fact corrected in this manner may then be judicially noticed, as long as it fulfils all the other admissibility requirements of Rule 94(B).⁷⁷

Moreover, in the *Mičo Stanišić* Decision, the Trial Chamber corrected proposed facts by adding information on their temporal and/or geographic scope drawn from the trial judgement from which the proposed fact was taken.⁷⁸

27. The Appeals Chamber also recalls that:

[a] Trial Chamber can and indeed must decline to take judicial notice of facts if it considers that the way they are formulated – abstracted from the context in the judgement from whence they came – is misleading or inconsistent with the facts actually adjudicated in the cases in question. A fact taken out of context in this way would not actually be an 'adjudicated fact' and thus is not subject to judicial notice under Rule 94(B).⁷⁹

28. The Appeals Chamber, Judge Robinson dissenting, considers that the approach taken by the trial chambers as set out above would not fall outside a chamber's discretion to take judicial notice of adjudicated facts. However, only minor modifications or additions, which do not alter the

⁷⁴ *Popović et al.* Decision, paras 12-13; *Karadžić* First Decision, para. 9(h); *Tolimir* Decision, para. 8(g); *Stanišić and Simatović* Decision, para. 27(vi). See also *Karemera et al.* Appeal Decision, paras 48-50; *Dragomir Milošević* Appeal Decision, para. 16.

⁷⁵ *Popović et al.* Decision, para. 14; *Karadžić* First Decision, para. 9(i); *Tolimir* Decision, para. 8(h); *Stanišić and Simatović* Decision, para. 27(v). See also *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001 ("*Kupreškić et al.* Appeal Decision"), para. 6; *Slobodan Milošević* Appeal Decision, p. 4, fn. 10.

⁷⁶ *Popović et al.* Decision, para. 7; *Mičo Stanišić* Decision, para. 38; *Karadžić* First Decision, paras 20-22; *Karadžić* Third Decision, para. 28; *Karadžić* Fourth Decision, para. 65; *Karadžić* Fifth Decision, paras 37, 39; *Tolimir* Decision, para. 17. See also *Krajišnik* Decision, para. 21.

⁷⁷ *Popović et al.* Decision, para. 7 (references omitted).

⁷⁸ *Mičo Stanišić* Decision, para. 38.

⁷⁹ *Karemera et al.* Appeal Decision, para. 55.

meaning of the original judgement from which the proposed adjudicated fact originates, are permissible.

3. Analysis

(a) Introduction

29. The Appeals Chamber notes that the Trial Chamber reformulated 473 Proposed Facts prior to taking judicial notice of them.⁸⁰ In some instances where the Trial Chamber found that Proposed Facts were not suitable for judicial notice pursuant to Rule 94(B) of the Rules, it only took judicial notice of the particular portion of the Proposed Fact that satisfied the requirements outlined above.⁸¹

30. The Trial Chamber found that a large number of Proposed Facts as formulated by the Prosecution did not satisfy the requirement that a fact “must be distinct, concrete and identifiable”.⁸² For example, the Trial Chamber noted that some Proposed Facts lacked time or place references, while others were overly broad and vague.⁸³ The Trial Chamber also identified Proposed Facts that included subjective qualifications or information repetitive of other Proposed Facts, or which only referred to evidence presented before the original trial chamber.⁸⁴ However, rather than rejecting these Proposed Facts in their entirety, the Trial Chamber reformulated or redacted them so that they could satisfy the requirements for judicial notice.⁸⁵ In order to reformulate the Proposed Facts lacking time or place references, for example, the Trial Chamber

⁸⁰ First Decision, para. 51, Annex to Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts in Annex A (reformulating 274 Proposed Facts prior to judicially noticing them); Second Decision, para. 36, Annex to Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (reformulating 71 Proposed Facts prior to judicially noticing them); Third Decision, para. 39, Annex to the Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (reformulating 128 Proposed Facts prior to judicially noticing them).

⁸¹ First Decision, para. 21; Second Decision, para. 11; Third Decision, para. 6. See *supra*, para. 7.

⁸² First Decision, para. 33, fn 53, referring to Proposed Facts Nos 19, 25, 34, 37, 70, 85, 95, 100-101, 104, 108, 111, 118, 121, 132, 136, 138, 144, 151, 154, 164, 170, 172, 184, 187, 189, 193, 211, 222, 225, 227, 233, 257, 266, 269, 288, 292, 294, 303, 308, 316, 324, 344, 347, 350, 355, 360-361, 363, 367, 375, 388, 391, 397, 407, 425-426, 474, 476, 484, 493, 499, 506, 514, 527, 531, 540, 557, 564, 574, 578, 580, 585, 604-605, 608, 610-612, 621, 638, 678, 699, 720-721, 724, 740, 746, 756, 759-762, 773, 775-776, 781, 789-790, 792, 812, 827, 834, 846, 860, 886, 911, 917, 925, 929-930, 933, 936, 947, 951, 963, 975, 982-983, 1007, 1010, 1020, 1023, 1026, 1039, 1042, 1064, 1079, 1085-1086, 1093, 1096-1097, 1099, 1104-1106, 1123, 1135, 1137, 1142, 1146, 1148, 1151, 1154-1155, 1157, 1160, 1171, 1179, 1201, 1203, 1206, 1210, 1213, 1220, 1222, 1229-1230, 1232-1234, 1250, 1253-1254, 1256, 1260, 1263, and 1269; Second Decision, para. 19, fn 28, referring to Proposed Facts Nos 1270, 1296-1298, 1303, 1310, 1317, 1325, 1327, 1329, 1336, 1340, 1342, 1346, 1349, 1353, 1366, 1368, 1374, 1395, 1399, 1402, 1459, 1465, 1467, 1477, 1520, 1558, 1570, 1606, 1615, and 1656; Third Decision, para. 26, fn 44, referring to Proposed Facts Nos 1692, 1699, 1701, 1792, 1822, 1857, 1927, 1962-1963, 2096, 2256, 2269, 2318, 2334, 2336, 2343, 2397, 2482, 2499, 2511, 2561, 2606, 2613, 2617, 2624, 2628, 2647-2648, 2664, 2701, 2709, 2733, 2782, 2801, 2807, 2817, 2826, 2830, and 2852. See also First Decision, para. 8, referring *inter alia* to *Popović et al.* Decision, para. 6. See also Second Decision, para. 3, fn. 7 and Third Decision, para. 3, fn. 9 where the Trial Chamber incorporated this statement by reference into the Second Decision and the Third Decision.

⁸³ First Decision, para. 33; Second Decision, para. 19; Third Decision, para. 26.

⁸⁴ First Decision, para. 33; Second Decision, para. 20; Third Decision, para. 26.

⁸⁵ First Decision, para. 33; Second Decision, para. 22; Third Decision, para. 26.

identified the missing reference from “one of the surrounding paragraphs within the relevant trial judgement” and added it to the otherwise defective Proposed Fact.⁸⁶

31. In addition, the Trial Chamber reformulated several Proposed Facts containing “findings or characterizations of a legal nature”, in order to ensure that the Proposed Facts only contained factual findings.⁸⁷ It also noted that a “number of Proposed Facts are based on multiple sources from different judgments” and considered it sufficient if the factual finding could be found in one of the sources, as long as it was not contradicted by another source.⁸⁸ When the multiple sources conflicted as to the factual finding, the Trial Chamber removed the contradicting information where possible or declined to further consider the Proposed Fact.⁸⁹ Finally, in each of the Impugned Decisions, the Trial Chamber reformulated Proposed Facts that it considered to be misleading or not accurately reflecting the original text in order to resolve the potential mischaracterisation.⁹⁰

32. The Appeals Chamber notes that the Trial Chamber frequently corrected or added information to Proposed Facts which it found did not meet one or more of the criteria for judicial notice. The Appeals Chamber is mindful of the Trial Chamber’s discretion to take judicial notice of adjudicated facts on a *proprio motu* basis pursuant to Rule 94(B) of the Rules. However, the Appeals Chamber considers that this does not provide the Trial Chamber with the authority to substantively alter facts as proposed by a moving party and that any such exercise of a trial chamber’s discretion should form a separate analysis.⁹¹

33. As indicated above, the Appeals Chamber considers that it is within a trial chamber’s discretion to make minor corrections or additions to proposed facts to render them clearer and

⁸⁶ Second Decision, para. 19.

⁸⁷ First Decision, para. 39, referring to Proposed Facts Nos 50, 682, 711, 884, 1026, and 1180; Second Decision, para. 24, referring to Proposed Fact No. 1438; Third Decision, para. 30, referring to Proposed Facts Nos 1853, 2037, 2050, 2090, 2222, 2238, 2256, 2266, 2268, 2283, 2304, 2318, 2362, 2397, 2528, 2623, 2628, 2645, 2653, 2660, 2662-2663, 2689, 2693, 2709, 2711, 2738, 2801, and 2826. See also First Decision, para. 8, referring to *Dragomir Milošević* Appeal Decision, para. 22. See also Second Decision, para. 3, fn. 7 and Third Decision, para. 3, fn. 9 where the Trial Chamber incorporated this statement by reference into the Second Decision and the Third Decision.

⁸⁸ Second Decision, para. 6; Third Decision, para. 4.

⁸⁹ Second Decision, para. 6; Third Decision, para. 4. See also Second Decision, para. 21, referring to Proposed Facts Nos 1391, 1393, 1439, 1442.

⁹⁰ First Decision, para. 50, referring to Proposed Facts Nos 9-11, 42, 190, 214, 260, 302-303, 309, 333, 386, 421, 423, 429, 482-483, 626, 672, 738, 773, 806, 811, 915, 924, 1013, 1106, 1128, 1134, and 1245; Second Decision, para. 35, referring to Proposed Facts Nos 1301 and 1592; Third Decision, para. 38, referring to Proposed Facts Nos 1883, 1943, 1964, 2266, 2343, 2436, 2458, 2546, 2759, 2771, 2855, and 2868. See also First Decision, para. 8 (vii), referring to *Karemera et al.* Appeal Decision, para. 55. See also Second Decision, para. 3, fn. 7 and Third Decision, para. 3, fn. 9 where the Trial Chamber incorporated this statement by reference into the Second Decision and the Third Decision.

⁹¹ In this regard, the Appeals Chamber notes the Trial Chamber’s Decision on *Proprio Motu* Taking Judicial Notice of Two Adjudicated Facts, 5 June 2012, in which it decided to take judicial notice of two adjudicated facts after first hearing from the parties and indicating that it had carefully considered the applicable law in relation to taking judicial notice of adjudicated facts (See Decision on *Proprio Motu* Taking Judicial Notice of Two Adjudicated Facts, 5 June 2012, paras 1, 6).

consistent with the meaning intended in the original judgement.⁹² However, the Appeals Chamber considers that it is not permissible for a trial chamber to do so in a manner that introduces new information, which is extraneous to the proposed fact as submitted by the moving party.

34. The Appeals Chamber recalls that the analysis of each Proposed Fact would be best left to the Trial Chamber on remand.⁹³ However, considering that under this ground of appeal Mladić does not contest the test for admission itself, but rather its application by the Trial Chamber, the Appeals Chamber will assess whether the Trial Chamber exceeded its discretion when it reformulated the Proposed Facts in question. Specifically, the Appeals Chamber will consider whether the Trial Chamber introduced any substantive changes to the meaning of Proposed Facts as adjudicated by the original chamber, or introduced new information which is extraneous to the Proposed Fact as submitted by the Prosecution.

(b) Proposed Facts reformulated by making minor editorial changes

35. The Appeals Chamber considers that the addition of minor alterations to proposed facts, such as the replacement of pronouns with name or place references, the insertion of time-references, or the replacement or deletion of cross-referencing language, is generally within a trial chamber's discretion because such changes, as long as they accurately reflect the findings in the original judgement, do not substantively change the meaning of the facts in question.⁹⁴ The Appeals Chamber notes that while the Trial Chamber stated in the Second Decision that it added time or place references which could be found in the surrounding paragraphs of the original judgement,⁹⁵ it did not expressly include the sources of the information it added to Proposed Facts. It would have been preferable for the Trial Chamber to do so, as such information would benefit the parties and would facilitate a review by the Appeals Chamber. As a result, the Appeals Chamber has had to review the original judgements to locate the probable source for the information added by the Trial Chamber and in most instances has been able to do so.

36. Mladić argues that in relation to Proposed Facts Nos 136, 672, 746, 776, 1086, 1089, 1091, 1093, 1096, 1097, 1099, 1104, 1105, 1106, 1128, and 1459, the Trial Chamber improperly reformulated dates such that they do not reflect the findings in the original judgements.⁹⁶ The

⁹² See *supra*, paras 26-28.

⁹³ *Karemera et al.* Appeal Decision, para. 43. See also *Slobodan Milošević* Appeal Decision, p. 3.

⁹⁴ For example, reformulated Proposed Facts Nos 9-11, 108, 161, 193, 211, 294, 361, 375, 377, 386, 391, 409, 474, 514, 540, and 564 come under this category of reformulations.

⁹⁵ Second Decision, para. 19.

⁹⁶ Reply, para. 11. In his submission, Mladić refers to Proposed Facts Nos 136, 672, 746, 776, 1086-1106, 1128, and 1459. However, the Appeals Chamber notes that the Trial Chamber: (i) refused to take judicial notice of Proposed Facts Nos 1087-1088 (First Decision, para. 26); (ii) took judicial notice of Proposed Facts Nos 1090, 1092, 1094-1095, 1098, and 1100-1103 without reformulating them (First Decision, para. 51); and (iii) took judicial notice of Proposed Facts

Appeals Chamber notes that the dates added by the Trial Chamber to Proposed Facts Nos 672, 746, 776, 1086, 1093, and 1096 are all sourced from the same, or neighbouring, paragraphs of the original judgements as the Proposed Facts and accurately reflect the findings in the original judgements.⁹⁷ The time-reference added to Proposed Fact No. 1099 is also based on factual findings made in the original judgement in relation to the events described in the Proposed Fact.⁹⁸ The Appeals Chamber notes that the sources for the dates added to Proposed Facts Nos 1104-1106 are the section headings in the *Stakić* Trial Judgement encompassing each Proposed Fact.⁹⁹ Accordingly, the Appeals Chamber finds that they too reflect the factual findings of the *Stakić* Trial Chamber. The Appeals Chamber considers that these reformulations were within the Trial Chamber's discretion since they do not introduce new information to the Proposed Facts and render them clearer and consistent with the original judgements.

37. However, in its reformulation of Proposed Fact No. 136, the Trial Chamber incorrectly added the date of "early April 1994" whereas the original judgement refers to "March and early April 1992".¹⁰⁰ Therefore, the Appeals Chamber finds that the Trial Chamber erred in exercising its discretion to reformulate Proposed Fact No. 136. In addition, the Appeals Chamber has been unable to locate the source for the time-references added to Proposed Facts Nos 1097¹⁰¹ and 1927,¹⁰² and for the names added to Proposed Fact No. 557,¹⁰³ and is therefore unable to assess whether these

Nos 1089 and 1091 after reformulating them but not in relation to the dates (First Decision, para. 51). Mladić's submissions in relation to Proposed Facts Nos 1128 and 1459 are addressed below, in the sub-sections concerning Proposed Facts reformulated by adding information from the original judgement and Proposed Facts reformulated by merging information from findings in more than one original judgement, respectively. See *infra* paras 50, 69.

⁹⁷ (i) Regarding Proposed Fact No. 672 (First Decision, Annex), see *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement"), para. 275 (See Motion, Annex A); (ii) regarding Proposed Fact No. 746 (First Decision, Annex), see *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006 ("*Krajišnik* Trial Judgement"), para. 664 (Motion, Annex A); (iii) regarding Proposed Fact No. 776 (First Decision, Annex), the Appeals Chamber dismisses Mladić's submission that the date added by the Trial Chamber is not in the original judgement (Appeal, para. 11) as it is supported in a footnote in the original judgement, see *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement"), para. 619, fn. 1567 (See Motion, Annex A); (iv) regarding Proposed Fact No. 1086 (First Decision, Annex), see *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement"), para. 277 and *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgement, 7 May 1997 ("*Tadić* Trial Judgement"), para. 151 (Motion, Annex A); (v) regarding Proposed Fact No. 1093 (First Decision, Annex), see *Stakić* Trial Judgement, para. 283 (Motion, Annex A) and *Stakić* Trial Judgement, para. 284 which the Appeals Chamber notes appears to be the source for the addition made by the Trial Chamber; and (vi) regarding Proposed Fact No. 1096 (First Decision, Annex), see *Stakić* Trial Judgement, para. 286 (Motion, Annex A).

⁹⁸ The source for Proposed Fact No. 1099 (First Decision, Annex) is *Stakić* Trial Judgement, para. 291 (Motion, Annex A). The Appeals Chamber notes that the source for the time-reference added by the Trial Chamber appears to be *Stakić* Trial Judgement, paras 129-130, 135-136.

⁹⁹ Regarding Proposed Facts Nos 1104-1106, see *Stakić* Trial Judgement, paras 297 (heading I.E.7.b), 299 (heading I.E.7.c), and 301 (heading I.E.7.g), respectively.

¹⁰⁰ See *Krajišnik* Trial Judgement, para. 122; Proposed Fact No. 136 (First Decision, Annex). The Appeals Chamber notes that the source for Proposed Fact No. 136 is *Krajišnik* Trial Judgement, para. 122 (See Motion, Annex A).

¹⁰¹ See Proposed Fact No. 1097 (First Decision, Annex). The source for the Proposed Fact is *Stakić* Trial Judgement, para. 289 (See Motion, Annex A).

¹⁰² See Proposed Fact No. 1927 (Third Decision, Annex). The source for the Proposed Fact is *Dragomir Milošević* Trial Judgement, para. 138 (See Motion, Annex C).

¹⁰³ See Proposed Fact No. 557 (First Decision, Annex). The source for the Proposed Fact is *Krnojelac* Trial Judgement, para. 26 (See Motion, Annex A).

additions made by the Trial Chamber were consistent with the original judgements. The Appeals Chamber considers that in these circumstances a cautious approach in applying the admissibility criteria for judicial notice pursuant to Rule 94(B) of the Rules is preferable, and thus finds that the Trial Chamber exceeded its discretion by adding this information.

38. Mladić argues that Proposed Fact No. 316, as submitted by the Prosecution, omits a cross-reference to the fourth part of the original judgement, the *Krajišnik* Trial Judgement, in which more detail is provided, thereby changing its context.¹⁰⁴ The Appeals Chamber notes that Proposed Fact No. 316, as amended by the Trial Chamber, states:

The VRS Main Staff Intelligence report of 28 July 1992, while aimed at bringing law back to areas now under Bosnian-Serb control, also shows that the VRS was more concerned with looting and the breakdown of order than with the widespread crimes committed by the paramilitaries, **[as described in more detail in part 4 of the judgement (omitted by the Prosecution)]**.¹⁰⁵

The Appeals Chamber notes that the fourth part of the *Krajišnik* Trial Judgement refers to the take-over of power and crimes in municipalities.¹⁰⁶ The essential part of this Proposed Fact is the concern of the VRS Main Staff Intelligence report, rather than the details of the crimes committed by the paramilitaries. Whether or not the Proposed Fact included a cross reference to the fourth part of the *Krajišnik* Trial Judgement, the information therein could not have been subject to judicial notice by reference. In light of this, the Appeals Chamber finds the omission of the cross-reference to have been within the Trial Chamber's discretion as it does not go beyond a minor change.

39. Finally, the Appeals Chamber notes Mladić's submission that Proposed Fact No. 1570, as amended, "attempts to obscure" that it goes to his alleged acts and conduct, or those of his subordinates or groups he may have been a part of, and changes the meaning of the text.¹⁰⁷ The Appeals Chamber notes that the Trial Chamber amended Proposed Fact No. 1570 because it found it not to be clear, distinct, or identifiable.¹⁰⁸

Members of the Zvornik Brigade Military Police assisted in the detention of prisoners, with the approval of Dragan Obrenović, the deputy commander of the Zvornik Brigade, who knew of the murder operation at the time when he allowed the Military Police members to assist Drago Nikolić, the chief of security of the Zvornik Brigade who was in charge of the detention of the Bosnian Muslim men in Orahovac.¹⁰⁹

¹⁰⁴ Appeal, para. 11.

¹⁰⁵ Proposed Fact No. 316 (First Decision, Annex). The source for the Proposed Fact is *Krajišnik* Trial Judgement, para. 316 (See Motion, Annex A). The Appeals Chamber notes that the source for the addition to the fact appears to be the same.

¹⁰⁶ *Krajišnik* Trial Judgement, paras 289-701.

¹⁰⁷ Appeal, para. 15.

¹⁰⁸ Second Decision, para. 19, fn. 28.

¹⁰⁹ Proposed Fact No. 1570 (Second Decision, Annex). The Appeals Chamber notes that the source for the Proposed Fact is *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005

The Appeals Chamber notes that the Trial Chamber added the title and role of Drago Nikolić to Proposed Fact No. 1570, rendering it clearer and more consistent with the original judgement.¹¹⁰ The Appeals Chamber considers that this does not amount to a substantive change to the Proposed Fact as submitted by the Prosecution, since it merely clarifies the title and role of Drago Nikolić. Furthermore, the Appeals Chamber finds that it was within the Trial Chamber's discretion to take judicial notice of this Proposed Fact since it does not fall within the narrow requirement that facts going to the alleged acts, conduct, or mental state of the accused are impermissible.¹¹¹ Therefore, the Appeals Chamber finds that the addition made by the Trial Chamber was within its discretion.

(c) Proposed Facts reformulated by adding information from the original judgement

40. The Appeals Chamber notes that the Trial Chamber added to Proposed Facts Nos 101, 214, 288, 309, 397, 421, 423, 721, 929, 1128, 1146, 1171, 1301, 1317, 1395, and 1402 information from the original judgements that went beyond minor additions, for the purpose of clarifying the facts in question. The Appeals Chamber will address each of them in consecutive order.

41. The Trial Chamber added information to Proposed Fact No. 101 because it found it to be unclear, indistinct, or unidentifiable in the form presented by the Prosecution.¹¹²

On 9 January 1992, the Bosnian-Serb Assembly unanimously proclaimed "The Republic of the Serbian People of Bosnia and Herzegovina" to be a federal unit of the Yugoslav federal state. The Assembly added that the "territorial delimitation with political communities of other peoples of Bosnia-Herzegovina, as well as the solution of other mutual rights and obligations, shall be performed in a peaceful manner and with mutual agreement."¹¹³

Mladić submits that the Trial Chamber's reformulation of Proposed Fact No. 101 changes the meaning of the proclamation referred to and that the Trial Chamber should have included additional text from the proclamation cited in the original judgement.¹¹⁴ The Appeals Chamber considers that the addition made to Proposed Fact No. 101 amounts to the inclusion of new information not proffered by the Prosecution as opposed to a mere clarification of the information contained therein.

("Blagojević and Jokić Trial Judgement"), para. 372 (See Motion, Annex B) and that the source for the reformulation is the same.

¹¹⁰ See *Blagojević and Jokić Trial Judgement*, para. 372.

¹¹¹ See *infra*, paras 80-81.

¹¹² First Decision, para. 33, fn. 53.

¹¹³ Proposed Fact No. 101 (First Decision, Annex). The source for the Proposed Fact is *Krajišnik Trial Judgement*, para. 103 (See Motion, Annex A). The Appeals Chamber notes that the source for the addition appears to be the same.

¹¹⁴ Appeal, para. 11. Mladić submits that the Trial Chamber should have also added: "On 9 January 1992, the Bosnian-Serb Assembly unanimously proclaimed 'the Republic of the Serbian People of Bosnia and Herzegovina' to be: 'a federal unit of the Yugoslav federal state in the territories of the Serbian autonomous areas in the region and of other Serbian ethnic entities in Bosnia-Herzegovina, including the regions in which the Serbian people remained in minority due to the genocide conducted against it in World War II, and on the basis of the plebiscite held on 9 and 10 November 1991, at which the Serbian people decided to remain in the joint state of Yugoslavia'" (Appeal, para. 11, referring to *Krajišnik Trial Judgement*, para. 103).

The Appeals Chamber therefore finds that the Trial Chamber exceeded its discretion when it included the additional information.

42. The Trial Chamber reformulated Proposed Fact No. 214 because it considered it to be misleading or to not accurately reflect the text of the original judgement:¹¹⁵

As part of that role, the Commission was to differentiate between civilians and prisoners of war, with a view to releasing the former and preventing crisis staffs or paramilitary formations from committing crimes against the latter. In practice, exchanges of prisoners were left to the authority of the individual exchange commissioners in each region.¹¹⁶

The Appeals Chamber considers that the information added to Proposed Fact No. 214 introduces a new factual finding, extraneous to the Proposed Fact as submitted by the Prosecution. In light of this, the Appeals Chamber finds that the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 214:

43. The Trial Chamber reformulated Proposed Fact No. 288 on the basis that it was not clear, distinct, or identifiable¹¹⁷ and that it included, in addition to factual findings, essentially subjective qualifications made by the original trial chamber.¹¹⁸

Prior to May 1992, the JNA had played a ~~significant~~ role in the training and equipping of Bosnian Serb ~~and Croatian Serb~~ paramilitary forces. In 1991 and ~~on~~ into 1992, ~~the Bosnian Serb and Croatian Serb paramilitary~~ ~~these~~ forces cooperated with and acted under the command and within the framework of the JNA. These forces included Arkan's Serbian Volunteer Guard and various forces styling themselves as Chetniks, a name which, ~~as has been seen~~, is of significance from the fighting in the Second World War against the German, Italian and Croat forces in Yugoslavia. Some were even given training in the compounds of the 5th JNA Corps in Banja Luka. The reliance placed on such forces by the JNA reflected a general manpower shortage.¹¹⁹

The Appeals Chamber notes that while at first glance these changes appear to be a clarification of the information included in the Proposed Fact, they actually add information that the JNA played a role in the training and equipping of the Croatian Serb paramilitary forces. This information is extraneous to the fact as proposed by the Prosecution and is not supported by the original judgement.¹²⁰ Consequently, the Appeals Chamber finds that the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 288.

¹¹⁵ First Decision, para. 50.

¹¹⁶ Proposed Fact No. 214 (First Decision, Annex). The Source for the Proposed Fact is *Krajišnik* Trial Judgement, para. 157 (See Motion, Annex A).

¹¹⁷ First Decision, para. 33, fn. 53.

¹¹⁸ First Decision, para. 33.

¹¹⁹ Proposed Fact No. 288 (First Decision, Annex). The Source for the Proposed Fact is *Tadić* Trial Judgement, para. 593 (See Motion, Annex A).

¹²⁰ See *Tadić* Trial Judgement, para. 593.

44. The Trial Chamber found that Proposed Fact No. 309 was repetitive or overlapped with information contained in Proposed Fact No. 308¹²¹ and that its proposed form was misleading or did not accurately reflect the text of the original judgement.¹²² It thus reformulated Proposed Fact No. 309 as follows to make it clear, distinct, or identifiable:

The SOS paramilitary groups were also active in Sanski Most, where the local crisis staff decided to transform them into a TO unit on 22 April 1992. Although the ARK assembly formally placed the SOS under the control of the Banja Luka CSB on or about 29 April 1992, the group retained a certain degree of autonomy.¹²³

The Appeals Chamber notes that the addition to Proposed Fact No. 309 is not limited to information contained in Proposed Fact No. 308.¹²⁴ Furthermore, it goes beyond enhancing the factual finding contained in Proposed Fact No. 309 since it adds factual information. The Appeals Chamber therefore considers the addition to be impermissibly substantive and finds that the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 309.

45. The Trial Chamber reformulated Proposed Fact No. 397 on the basis that it was not clear, distinct, or identifiable.¹²⁵

Accordingly, On 10 June 1992, it—the Bosnian-Serb Presidency issued an official decision establishing war commissions to further tighten the central grip over the municipalities.¹²⁶

The Appeals Chamber is of the view that indicating that “it” refers to “the Bosnian-Serb Presidency” was within the Trial Chamber’s discretion. However, the addition of “to further tighten the central grip over the municipalities” amounts to a substantive change. The Trial Chamber therefore exceeded its discretion by reformulating Proposed Fact No. 397 in this manner.

46. The Trial Chamber reformulated Proposed Fact No. 421 because it considered it to be misleading or an inaccurate reflection of the original judgement:¹²⁷

The ARK War Presidency continued to meet at least until 8 September 1992, just one week prior to the adoption of the SerBiH constitutional amendment that abolished the ARK as a territorial

¹²¹ First Decision, para. 33, fn. 55.

¹²² First Decision, para. 50.

¹²³ Proposed Fact No. 309 (First Decision, Annex). The Source for the Proposed Fact is *Krajišnik* Trial Judgement, para. 212 (See Motion, Annex A).

¹²⁴ Proposed Fact No. 308, as it was reformulated by the Trial Chamber, states: “The Serbian Defence Forces (SOS) paramilitary group under Nenad Stevandić, a member of the ARK crisis staff, was operative in Banja Luka in spring and summer 1992. It included convicted criminals. Members of the SOS acted as escorts for SDS leaders such as Radoslav Brdanin.” First Decision, Annex. See also Motion, Annex A.

¹²⁵ First Decision, para. 33, fn. 53.

¹²⁶ Proposed Fact No. 397 (First Decision, Annex). The source for the Proposed Fact is *Krajišnik* Trial Judgement, para. 276 (See Motion, Annex A).

¹²⁷ First Decision, para. 50.

unit of the SerBiH. By 17 July 1992, the ARK Crisis Staff had stopped exercising its powers and functions in practice.¹²⁸

The Appeals Chamber considers that the addition introduces a substantive change to the fact as proposed by the Prosecution and that therefore the Trial Chamber exceeded its discretion.

47. The Trial Chamber reformulated Proposed Fact No. 423 because it considered it “misleading in [its] present form or [that it] do[es] not accurately reflect the text of the original judgement”.¹²⁹ It made the following change:

At least between 24 May and 30 August 1992, the head of the CSB of Banja Luka was Stojan Župljanin.¹³⁰

The Appeals Chamber notes that the source for Proposed Fact No. 423 states: “[a]t the time of the events alleged in the Amended Indictment, the head of the CSB was Stojan Župljanin.”¹³¹ It further notes that all counts in the *Kvočka et al.* Amended Indictment were alleged to have occurred between 24 May and 30 August 1992.¹³² By contrast, the addition to the Proposed Fact implies that the original trial chamber found that Župljanin could have been the head of the CSB for a longer period of time. The Appeals Chamber notes that the original trial chamber did not comment on this or make any factual finding on this point. Therefore, it should not be implied through a reformulation of the Proposed Fact. The Appeals Chamber considers that the Trial Chamber thus exceeded its discretion by making this addition.

48. The Trial Chamber reformulated Proposed Fact No. 721 by making the following addition on the basis that the fact was not clear, distinct, or identifiable:¹³³

Several mosques in Foča town and municipality were burned or otherwise destroyed. The Aladža mosque dating from 1555 and under UNESCO protection was blown up, and the mosque in the Granovski Sokak neighbourhood was destroyed.¹³⁴

The Appeals Chamber considers that an addition that clarified the location of the two mosques would have been within the Trial Chamber’s discretion. However, the introduction of the fact that “several mosques” were destroyed in Foča town is substantive as it changes the meaning of

¹²⁸ Proposed Fact No. 421 (First Decision, Annex). The source for the Proposed Fact is *Brdanin* Trial Judgement, para. 196 (See Motion, Annex A).

¹²⁹ First Decision, para. 50.

¹³⁰ Proposed Fact No. 423 (First Decision, Annex). The source for the Proposed Fact is *Prosecutor v. Mirslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 (“*Kvočka et al.* Trial Judgement”), para. 26 (See Motion, Annex A).

¹³¹ *Kvočka et al.* Trial Judgement, para. 26.

¹³² *Kvočka et al.* Trial Judgement, Annex D. The Appeals Chamber also notes that para. 13 of the Amended Indictment states: “Unless otherwise set forth below, all acts and omissions set forth in the counts of this Indictment took place between 1 April 1992 and 30 August 1992.”

¹³³ First Decision, para. 33, fn. 53.

¹³⁴ Proposed Fact No. 721 (First Decision, Annex). The source for the Proposed Fact is *Krnjelac* Trial Judgement, para. 33 (See Motion, Annex A). The Appeals Chamber notes that the source for the addition appears to be the same.

Proposed Fact No. 721. The Appeals Chamber therefore finds that the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 721.

49. The Trial Chamber reformulated Proposed Fact No. 929 on the basis that it was not clear, distinct, or identifiable.¹³⁵

Upon its formation in May 1992, the Prijedor Crisis Staff implemented restrictive measures against non-Serbs, who were fired from their jobs, refused necessary documentation and whose children were barred from attending primary and secondary schools. Non-Serbs no longer qualified for leadership positions in Prijedor and were eventually forced to leave almost all positions.¹³⁶

The Appeals Chamber considers that the additional information amounts to a substantive change and that therefore the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 929 prior to taking judicial notice of it.

50. The Trial Chamber reformulated Proposed Fact No. 1128 because it considered it to be misleading or not accurately reflecting the text of the original judgement.¹³⁷

Beginning began—on 22 May and ~~lasted~~ for approximately seven days, ~~the~~ Serbs forces — including the VRS, Kušić's men, and volunteer forces — shelled and, finally, took control of Rogatica town and the surrounding villages. They met resistance from only about 50 Muslims armed with light weapons. After the shelling—~~of Rogatica~~—the Serbs ordered the Muslims to gather in the town's central square. Soldiers in JNA uniform, including a reserve JNA captain, demanded that the Muslim population sign a loyalty oath to surrender and move to the Veljko Vlahović secondary school, under the threat of being killed if they did not comply. A total of 2,500-3,000 Muslims assembled in the town square.¹³⁸

The Appeals Chamber considers that the Trial Chamber exceeded its discretion by adding the following information which substantively alters Proposed Fact No. 1128: “forces – including the VRS, Kušić's men, and volunteer forces – shelled and, finally, took control of Rogatica town and the surrounding villages. They met resistance from only about 50 Muslims armed with light weapons.” Consequently, the Appeals Chamber finds that the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 1128.

51. Mladić submits that the Trial Chamber selectively added text to Proposed Fact No. 1146 which includes inferences of guilt about subordinates or affiliated third parties but excludes

¹³⁵ First Decision, para. 33, fn. 53.

¹³⁶ Proposed Fact No. 929 (First Decision, Annex). The source for the Proposed Fact is *Tadić* Trial Judgement, para. 150 (See Motion, Annex A). The Appeals Chamber notes that the source for the addition appears to be the same.

¹³⁷ First Decision, para. 50.

¹³⁸ Proposed Fact No. 1128 (First Decision, Annex). The source for the Proposed Fact is *Krajišnik* Trial Judgement, para. 678 (See Motion, Annex, A). The Appeals Chamber notes that the source for the addition appears to be the same.

mitigating or qualifying language.¹³⁹ The Trial Chamber reformulated Proposed Fact No. 1146 because it found it not to be clear, distinct, or identifiable.¹⁴⁰

After the troops had entered the villages, a number of people who had not fled were killed. Houses were looted and people fleeing were deprived of the valuables that they were carrying with them.¹⁴¹

The Appeals Chamber considers that the addition amounts to a substantive change and therefore finds that the Trial Chamber exceeded its discretion.

52. The Trial Chamber reformulated Proposed Fact No. 1171 because it found it to be unclear, indistinct, or unidentifiable as proposed by the Prosecution.¹⁴²

On 27 May 1992, Serb forces shelled the village of Hrustovo, an almost exclusively Muslim village. Prior to their arrival, there had been announcements on the local radio on behalf of the 'Serbian Republic' demanding that Bosnian Muslims surrender their weapons. On 30 May 1992, the Muslims of the village decided to hand in their weapons, but the shelling continued. The next day, as people from 21 households were forced to leave Jelečevići, a Muslim hamlet in the area of Hrustovo, about 30 women and children and one man took refuge inside a garage. Eight to ten Serb soldiers in camouflage uniform came to the garage and ordered the Muslims out. A man who tried to mediate was shot and the soldiers killed sixteen women and children when they tried to get away.¹⁴³

The Appeals Chamber considers this to be a substantive change, and therefore finds that the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 1171.

53. The Trial Chamber reformulated Proposed Fact No. 1301 on the basis that it was inconsistent with the original judgement.¹⁴⁴

The number of men in the 28th Division outnumbered those in the Drina Corps and reconnaissance and sabotage activities were carried out by the 28th Division of the Army of Bosnia and Herzegovina ("ABiH") on a regular basis against the VRS forces in the area.¹⁴⁵

The Appeals Chamber considers this to be a substantive change and therefore finds that the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 1301.

54. The Trial Chamber reformulated Proposed Fact No. 1317 on the basis that it was not clear, distinct, or identifiable.¹⁴⁶

¹³⁹ Reply, para. 13.

¹⁴⁰ First Decision, para. 33, fn. 53.

¹⁴¹ Proposed Fact No. 1146 (First Decision, Annex). The source for the Proposed Fact is *Brđanin* Trial Judgement, para. 102 (See Motion, Annex A). The Appeals Chamber notes that the source for the addition appears to be the same.

¹⁴² First Decision, para. 33, fn. 53.

¹⁴³ Proposed Fact No. 1179 (First Decision, Annex). The source for the Proposed Fact is *Krajišnik* Trial Judgement, para. 516 (See Motion, Annex A). The source for the addition appears to be *Krajišnik* Trial Judgement, para. 514.

¹⁴⁴ Second Decision, para. 35.

¹⁴⁵ Proposed Fact No. 1301 (Second Decision, Annex). The sources for the Proposed Fact are *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement"), para. 21 and *Blagojević and Jokić* Trial Judgement, paras 114-115 (See Motion, Annex B).

On May 31 1995, Bosnian Serb forces captured outpost Echo, which lay in the southeast corner of the enclave. In response, [a] raiding party of Bosniacs attacked the nearby Serb village of Višnjica, in the early morning of 26 June 1995. Although it was a relatively low-intensity attack, [S]ome houses were burned and several people were killed.¹⁴⁷

The Appeals Chamber considers the addition of the first sentence to amount to a substantive change. It therefore finds that the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 1317.

55. The Trial Chamber reformulated Proposed Fact No. 1395 on the basis that it was not clear, distinct or identifiable:¹⁴⁸

On 12 and 13 July 1995, upon the arrival of Serb forces in Potočari, the Bosnian Muslim refugees taking shelter in and around the compound were subjected to a terror campaign comprised of threats, insults, looting and burning of nearby houses, beatings, rapes, and murders.¹⁴⁹

The Appeals Chamber considers this to be a substantive change. It therefore finds that the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 1395.

56. The Trial Chamber reformulated Proposed Fact No. 1402 because it found it to be lacking a time reference:¹⁵⁰

The separations were frequently aggressive. DutchBat members protested, especially when the men were too young or too old to reasonably be screened for war criminals or to be considered members of the military, and when the soldiers were being violent. The separations continued throughout 12 and 13 July 1995.¹⁵¹

The Appeals Chamber considers that the question of when the separations stopped is of great importance and that the information added by the Trial Chamber substantively changes Proposed Fact No. 1402 as proffered by the Prosecution. The Appeals Chamber therefore finds that the Trial Chamber exceeded its discretion.

57. The Appeals Chamber has reviewed all of the Proposed Facts to which the Trial Chamber added information. It is satisfied that, apart from those Proposed Facts specifically mentioned above, the Trial Chamber did not exceed its discretion when it added information to them.

¹⁴⁶ Second Decision, para. 19, fn. 28.

¹⁴⁷ Proposed Fact No. 1317 (Second Decision, Annex). The source for the Proposed Fact is *Kršić* Trial Judgement, para. 30 (See Motion, Annex B). The Appeals Chamber notes that the source for the addition appears to be the same.

¹⁴⁸ Second Decision, para. 19, fn. 28.

¹⁴⁹ Proposed Fact No. 1395 (Second Decision, Annex). The sources for the Proposed Fact are *Kršić* Trial Judgement, para. 150 and *Blagojević and Jokić* Trial Judgement, paras 162-164, 167 (Prosecution Motion, Annex B). The Appeals Chamber notes that the source for the reformulation appears to be *Kršić* Trial Judgement, para. 150.

¹⁵⁰ Second Decision, para. 19.

¹⁵¹ Proposed Fact No. 1402 (Second Decision, Annex). The source for the Proposed Fact is *Blagojević and Jokić* Trial Judgement, para. 168 (See Motion, Annex B). The Appeals Chamber notes that the source for the reformulation appears to be the same.

(d) Proposed Facts reformulated by deleting information which the Trial Chamber found infringed one or more criteria for judicial notice

58. The Appeals Chamber notes that the Trial Chamber reformulated numerous Proposed Facts by removing portions of them which, in its view, were inconsistent with the criteria for judicial notice. The Appeals Chamber recalls that trial chambers are obliged to refuse to take judicial notice of proposed facts which are inconsistent with the criteria for judicial notice as set forth above.¹⁵² However, the Appeals Chamber considers that where the information contained in a proposed fact includes more than one factual finding, trial chambers may refuse to take judicial notice of part of the proposed fact while taking judicial notice of another. In doing so, a trial chamber must ensure that the remaining part fully meets the criteria for judicial notice when considered on its own and accurately reflects the findings in the original judgement. The Appeals Chamber finds that in these circumstances, removing information from a proposed fact is consistent with the cautious approach that must be taken by trial chambers in taking judicial notice.

59. In relation to Proposed Fact No. 1641, Mladić argues that the deletion changes the context provided by the original judgement.¹⁵³ The Trial Chamber reformulated Proposed Fact No. 1641 as follows, removing what it considered to be a subjective qualification by the original trial chamber:

~~The reburial evidence demonstrates~~ **There was** a concerted campaign to conceal the bodies of the men in these primary gravesites, ~~which was undoubtedly prompted by increasing international scrutiny of the events following the takeover of Srebrenica.~~¹⁵⁴

The Appeals Chamber considers that Proposed Fact No. 1641 contains two discernible factual findings of the original chamber; first, that there was a concerted campaign to conceal bodies in primary gravesites and second, the concealment of the bodies was likely prompted by international scrutiny of the events following the takeover of Srebrenica. The Appeals Chamber finds that it was within the Trial Chamber's discretion to remove information that it considered to be speculative while taking judicial notice of the remaining factual finding contained in the Proposed Fact. The Appeals Chamber further finds that, contrary to Mladić's submission, the omission of the second factual finding has no effect on the first one. It thus finds that the Trial Chamber acted within its discretion when it reformulated Proposed Fact No. 1641.

60. Regarding Proposed Fact No. 388, Mladić submits that the amendments made by the Trial Chamber separate it from the context of the original judgement. Proposed Fact No. 388, as amended by the Trial Chamber, states:

¹⁵² See *supra*, paras 25-28.

¹⁵³ Appeal, para. 15. The Appeals Chamber notes that Mladić incorrectly cited Proposed Fact No. 1643.

~~There might not have been any practical difference, since, as explained above, However,~~
already the crisis staffs acted as executive organs.¹⁵⁵

The Appeals Chamber considers that the context for Proposed Fact No. 388 is sufficiently established by Proposed Fact No. 387, which is based on the same paragraph of the original judgement as Proposed Fact No. 388. Therefore, the reformulation was within the Trial Chamber's discretion.

61. The Appeals Chamber has reviewed all of the remaining reformulated Proposed Facts and finds that, apart from Proposed Facts Nos 2623 and 2638, the Trial Chamber did not exceed its discretion when deleting information from them.¹⁵⁶

62. Regarding Proposed Fact No. 2623, the Appeals Chamber notes that the Trial Chamber reformulated it to exclude findings of a legal nature and because it found that the Proposed Fact included a reference to a discussion of evidence presented to the original trial chamber in addition to factual findings.¹⁵⁷ The Trial Chamber made the following changes:

~~Nevertheless, No military activity which could have accounted for the shooting was underway at the time of the incident in the vicinity of Marshal Tito Barracks and the victim and her family were being targeted deliberately.~~¹⁵⁸

The Appeals Chamber considers that these amendments amount to an impermissible change. The reformulated fact implies that there was no military activity at the time, while the original judgement states that no military activity *which could have accounted for the shooting* was underway at the time. In light of this, the Appeals Chamber finds that the Trial Chamber exceeded its discretion by reformulating Proposed Fact No. 2623.

63. Regarding Proposed Fact No. 2638, the Appeals Chamber notes that the Trial Chamber deleted information contained therein because it referred to a discussion of the evidence presented

¹⁵⁴ Proposed Fact No. 1641 (Second Decision, Annex). The source for the Proposed Fact is *Kršić* Trial Judgement, para. 78 (Motion, Annex B).

¹⁵⁵ Proposed Fact No. 388 (First Decision, Annex). The source for the Proposed Fact is *Krajšnik* Trial Judgement, para. 272 (Motion, Annex A). The Appeals Chamber notes that the source for the addition appears to be the same.

¹⁵⁶ In this regard, the Appeals Chamber is mindful of Mladić's submission that the deletions made by the Trial Chamber to Proposed Fact No. 1577 obscure the fact that it implicates the acts or conduct of the accused, a group of which he may have been part, or the acts of his alleged subordinates (Appeal, para. 15), however, the Appeals Chamber notes that the information deleted from Proposed Fact No. 1577 is repetitive of Proposed Facts Nos 1571-1572 (Second Decision, para. 36) and considers that the Trial Chamber's decision to take judicial notice of Proposed Fact No. 1577, as amended, was within its discretion since it does not fall within the narrow requirement that facts going to the alleged acts, conduct, or mental state of the Accused are impermissible (See, *infra*, paras 80-81).

¹⁵⁷ Third Decision, paras 26, 30.

¹⁵⁸ Proposed Fact No. 2623 (Third Decision, Annex). The source for the Proposed Fact is *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement, 5 December 2003 ("*Galić* Trial Judgement"), para. 251 (See Motion, Annex C).

before the original trial chamber, as opposed to factual findings of the original trial chamber.¹⁵⁹

Proposed Fact 2638, as amended by the Trial Chamber, states:

~~Witnesses who belonged to the SRK testified that soldiers of their army in the area of Špicasta Stijena did not fire at civilians, but other witnesses from a wide variety of backgrounds, including a senior UN representative and residents of the city, testified that~~ Civilians in ABiH-controlled territory in the vicinity of Špicasta Stijena regularly experienced shooting.¹⁶⁰

The Appeals Chamber considers that the remaining information in the Proposed Fact cannot stand on its own because it is inconsistent with the factual finding of the original trial chamber.¹⁶¹

Therefore, the Appeals Chamber finds that the Trial Chamber exceeded its discretion when it reformulated Proposed Fact No. 2638.

(e) Proposed Facts reformulated by merging information from Proposed Facts and/or from findings in more than one original judgement

64. Mladić contests the merging of Proposed Facts Nos 1391, 1393, 1439, and 1442, submitting that the Trial Chamber engaged in impermissible pre-judging by removing conflicting information.¹⁶²

65. Regarding Proposed Facts Nos 1391 and 1393, the Trial Chamber noted:

The Prosecution provided two sources for this Proposed Fact, the *Krstić* Trial Judgement and the *Blagojević* Trial Judgement. The *Blagojević* Trial Judgement contains an estimate of 24,000-35,000 Bosnian Muslims in Potočari, whereas the *Krstić* Trial Judgement contains the 20,000-25,000 person estimate found in the Proposed Fact.¹⁶³ Similarly, Proposed Fact No. 1393 contains a different estimate from that of Proposed Fact No. 1391 as to the number of Bosnian Muslims in Potočari.¹⁶⁴

66. Proposed Fact No. 1391, as amended, states:

By the end of 11 July, ~~an estimated 20,000 to 25,000~~ Bosnian Muslims were gathered in Potočari. Several thousand had pressed inside the UN compound itself, while the rest were spread throughout the neighbouring factories and fields.¹⁶⁵

¹⁵⁹ Third Decision, para. 26.

¹⁶⁰ Third Decision, Annex. See also Motion, Annex C.

¹⁶¹ See *Galić* Trial Judgement, para. 520. The Appeals Chamber notes that the source for Proposed Fact No. 2638 is *Galić* Trial Judgement, para. 520 (See Motion, Annex C).

¹⁶² Appeal, para. 16; Reply, paras 10-11.

¹⁶³ Second Decision, para. 21, referring to *Blagojević and Jokić* Trial Judgement, para. 146 and *Krstić* Trial Judgement, para. 37.

¹⁶⁴ Second Decision, para. 21.

¹⁶⁵ Proposed Fact No. 1391 (Second Decision, Annex). The Sources of the Proposed Fact are *Krstić* Trial Judgement, para. 37 and *Blagojević and Jokić* Trial Judgement, para. 146 (See Motion, Annex B).

Proposed Fact No. 1393, as amended, states:

The ~~small~~ water supply available was insufficient for the ~~20,000 to 30,000~~ refugees who were outside the UNPROFOR compound.¹⁶⁶

The Appeals Chamber notes that Proposed Fact No. 1391, as amended, refers to the fact that several thousands of the refugees present at Potočari had pressed inside the UN compound and the rest were spread throughout the neighbouring factories and fields. Proposed Fact No. 1393, as amended, refers to the water supply being insufficient for the refugees who were outside the UN compound. The Appeals Chamber disagrees with Mladić that the Trial Chamber engaged in impermissible pre-judging as each Proposed Fact represents factual findings which are not dependent on the number of refugees present at Potočari. It would remain for the Prosecution to establish the number of refugees who were in fact present at Potočari. The Appeals Chamber therefore considers that the deletions of portions of Proposed Facts Nos 1391 and 1393 were within the Trial Chamber's discretion because they do not affect the substance of the facts as proffered by the Prosecution or as adjudicated in the original judgements.

67. Regarding Proposed Facts Nos 1439 and 1442, the Appeals Chamber notes that Proposed Fact No. 1439 is based on both the *Blagojević and Jokić* Trial Judgement and the *Krstić* Trial Judgement, which set out information about seemingly similar events but with different findings as to the dates on which the events transpired, being 10 or 11 July 1995, respectively.¹⁶⁷ Proposed Fact No. 1442 is based on the *Blagojević and Jokić* Appeal Judgement, which refers only to the date of 12 July 1995.¹⁶⁸

68. In relation to Proposed Fact No. 1439, the Trial Chamber combined the information from the two judgements but deleted the conflicting dates:

As the situation in Potočari escalated towards crisis on the ~~evening of 11 July 1995~~, word spread through the Bosnian Muslim community that the able-bodied men should take to the woods, form a column together with members of the 28th Division of the ABiH, and attempt a breakthrough towards Bosnian Muslim-held territory in the north.

Proposed Fact No. 1442, as amended, states:

¹⁶⁶ Proposed Fact No. 1393 (Second Decision, Annex). The Source of the Proposed Fact is *Blagojević and Jokić* Trial Judgement, para. 147 (See Motion, Annex B).

¹⁶⁷ *Blagojević and Jokić* Trial Judgement, para. 218 (emphasis added) states: "As the situation in Srebrenica escalated towards crisis on the evening of 10 July, word spread through the Bosnian Muslim community that the able-bodied men should take to the woods, form a column together with members of the 28th Division of the ABiH and attempt a breakthrough towards Bosnian Muslim-held territory to the north of the Srebrenica enclave." *Krstić* Trial Judgement, para. 60 (emphasis added) states: "As the situation in Potočari escalated towards crisis on the evening of 11 July 1995, word spread through the Bosnian Muslim community that the able-bodied men should take to the woods, form a column together with members of the 28th Division of the ABiH and attempt a breakthrough towards Bosnian Muslim-held territory in the north."

¹⁶⁸ See *Blagojević and Jokić* Appeal Judgement, para. 57, referring to *Blagojević and Jokić* Trial Judgement, paras 218-221.

On 11 and 12 July 1995, ~~as the crisis deepened in Srebrenica~~, 10,000 to 15,000 mostly Bosnian Muslim men and boys, both civilians and members of the 28th Division of the ABiH, formed a column and proceeded toward Muslim-held territory in Tuzla.

It is unclear what prompted the Trial Chamber to add the date of 11 July 1995 to Proposed Fact No. 1442. The only explanation for the amendments to Proposed Facts Nos 1439 and 1442 provided by the Trial Chamber is that, "the sources for Proposed Facts Nos 1439 and 1442 contain contradictory information as to the date of the events mentioned."¹⁶⁹ By merging the dates in the two Proposed Facts, the Trial Chamber conflated the information contained therein, as Proposed Fact No. 1439 refers to when word spread about the column and Proposed Fact No. 1442 refers to when the column departed. By combining information from different judgements, it is questionable whether the factual information can be considered as adjudicated since the Trial Chamber has selectively assigned dates to original trial chambers' findings, thus substantively changing the Proposed Facts as adjudicated by the original trial chambers. The Trial Chamber was not in a position to determine which of the dates was accurate. Accordingly, the Appeals Chamber finds that the Trial Chamber exceeded its discretion by altering the information contained in Proposed Facts Nos 1439 and 1442.

69. In addition, the Appeals Chamber notes that the Trial Chamber reformulated Proposed Fact No. 1459 because it considered that it was not clear, distinct, or identifiable and lacked a time or place reference.¹⁷⁰

In the early morning of 13 July along the Bratunac-Konjević Polje Road, Ambushes were set up and, in other places, the Bosnian Serbs shouted into the forest, urging the men to surrender and promising that the Geneva Conventions would be complied with. **In other places, ambushes were set up.**¹⁷¹

The Appeals Chamber notes that the sources for Proposed Fact No. 1459 provided by the Prosecution are the *Krštić* Trial Judgement and the *Blagojević and Jokić* Trial Judgement.¹⁷² The *Krštić* Trial Judgement refers to events on 12 July 1995 and the *Blagojević and Jokić* Trial Judgement refers to events on 13 July 1995. The information added by the Trial Chamber is directly derived from the *Blagojević and Jokić* Trial Judgement. The Appeals Chamber considers that it was inappropriate for the Trial Chamber to choose one conflicting time-reference over another and that this resulted in a substantive alteration of the facts as adjudicated by the original trial chambers. The Appeals Chamber therefore finds that the Trial Chamber exceeded its discretion in so doing.

¹⁶⁹ Second Decision, para. 21.

¹⁷⁰ Second Decision, para. 19.

¹⁷¹ Proposed Fact No. 1459 (Second Decision, Annex). The sources for the Proposed Fact are *Krštić* Trial Judgement, para. 63 and *Blagojević and Jokić* Trial Judgement, para. 227 (See Motion, Annex B). The Appeals Chamber notes that the source for the reformulation appears to be *Krštić* Trial Judgement, para. 63.

¹⁷² See Motion, Annex B.

70. The Appeals Chamber finds that the merger of two or more Proposed Facts was within the Trial Chamber's discretion, as long as the newly formulated Proposed Fact appropriately reflects the original judgements and that the information contained therein has not been substantively changed. In this vein, the Appeals Chamber finds no error in the Trial Chamber's merger, in the Second Decision, of Proposed Facts Nos 1430 and 1416,¹⁷³ Proposed Facts Nos 1434 and 1426,¹⁷⁴ Proposed Facts Nos 1553 and 1465,¹⁷⁵ Proposed Facts Nos 1499 and 1490,¹⁷⁶ Proposed Facts Nos 1617 and 1620.¹⁷⁷ Similarly the Appeals Chamber finds no error in the Trial Chamber's merger, in the Third Decision, of Proposed Facts Nos 1780 and 1779, Proposed Facts Nos 1794 and 1793, Proposed Facts Nos 2066 and 2065, Proposed Facts Nos 2224 and 2238, Proposed Facts Nos 2253 and 2256, and Proposed Facts Nos 2337 with 2335 as the source for each set of facts is the same original judgement and the Proposed Facts resulting from their merger reflect the findings of the original judgement.¹⁷⁸

¹⁷³ The Appeals Chamber notes that the source for Proposed Fact No. 1416 is *Blagojević and Jokić* Appeal Judgement, para. 53 and that the source for Proposed Fact No. 1430 is *Blagojević and Jokić* Trial Judgement, para. 216 (See Motion, Annex B), however while the sources of each Proposed Fact are different original judgements, it finds that both sources support Proposed Fact No. 1416 as reformulated by the Trial Chamber (See Second Decision, Annex).

¹⁷⁴ The Appeals Chamber notes that the sources for Proposed Fact No. 1426 are *Krštić* Trial Judgement, para. 50 and *Blagojević and Jokić* Trial Judgement, para. 184 and that the source for Proposed Fact No. 1434 is *Blagojević and Jokić* Trial Judgement, para. 184 (See Motion, Annex B), however while the sources of each Proposed Fact are different original judgements, it finds that both sources support Proposed Fact No. 1426 as reformulated by the Trial Chamber (See Second Decision, Annex).

¹⁷⁵ The Appeals Chamber notes that the sources for Proposed Fact No. 1465 are *Krštić* Trial Judgement, para. 171 and *Blagojević and Jokić* Trial Judgement, para. 253 and that the sources for Proposed Fact No. 1553 are *Krštić* Trial Judgement, para. 171 and *Blagojević and Jokić* Trial Judgement, para. 240 (See Motion, Annex B), however while the sources of each Proposed Fact are different original judgements, it finds that both sources support Proposed Fact No. 1465 as reformulated by the Trial Chamber (See Second Decision, Annex).

¹⁷⁶ The Appeals Chamber notes that the source for Proposed Facts Nos 1490 and 1499 is *Krštić* Trial Judgement, para. 547 (See Motion, Annex B) and that their merger appropriately reflects the findings of the original judgement.

¹⁷⁷ See Second Decision, para. 16, fn. 27. The Appeals Chamber notes Mladić's submission that the Trial Chamber's merger of Proposed Facts Nos 1617 and 1620 changes the meaning of the information contained in the Proposed Facts (Appeal, para. 15). Proposed Fact No. 1617, as amended by the Trial Chamber, states: On 17 July 1995, the Zvornik Brigade Engineering Company provided an excavator, which was used to dig a mass grave. **Members of the Company participated in digging the mass graves** (Second Decision, Annex). The Appeals Chamber notes that the source for Proposed Fact No. 1617 is *Blagojević and Jokić* Appeal Judgement, para. 159 and the source for Proposed Fact No. 1620 is *Blagojević and Jokić* Trial Judgement, para. 377 (See Motion, Annex B). The Appeals Chamber finds this merger to be within the Trial Chamber's discretion because it does not substantively change the information contained in the Proposed Facts as adjudicated or as proffered by the Prosecution.

¹⁷⁸ See Third Decision, para. 24. The Appeals Chamber notes that: (i) the source for Proposed Fact No. 1779 is *Galić* Trial Judgement, para. 201 and the source for Proposed Fact No. 1780 is *Galić* Trial Judgement, para. 615 (See Motion, Annex B); (ii) the source for Proposed Fact No. 1793 is *Galić* Trial Judgement, para. 660 and the source for Proposed Fact No. 1794 is *Galić* Trial Judgement, para. 618 (See Motion, Annex C); (iii) the source for Proposed Fact No. 2065 is *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgement, 12 December 2007 ("*Dragomir Milošević* Trial Judgement"), para. 794 and the source for Proposed Fact No. 2066 is *Dragomir Milošević* Trial Judgement, para. 796 (See Motion, Annex C); (iv) the source for Proposed Fact No. 2224 is *Galić* Trial Judgement, para. 352 and the source for Proposed Fact No. 2238 is *Galić* Trial Judgement, para. 356 (See Motion, Annex C); (v) the source for Proposed Fact No. 2253 is *Galić* Trial Judgement, para. 270 and the source for Proposed Fact No. 2256 is *Galić* Trial Judgement, para. 267 (See Motion, Annex C); and (vi) the source for Proposed Fact No. 2335 is *Dragomir Milošević* Trial Judgement, para. 288 and the source for Proposed Fact No. 2337 is *Dragomir Milošević* Trial Judgement, para. 289 (See Motion, Annex C).

(f) Proposed Fact which Mladić submits was reformulated in a manner that separates it from the context of the original judgement

71. The Appeals Chamber notes that the Trial Chamber amended Proposed Fact No. 308 because it found it not to be clear, distinct, or identifiable.¹⁷⁹

The **Serbian Defence Forces** (SOS) paramilitary group under Nenad Stevandić, a member of the ARK crisis staff, was operative in Banja Luka in spring and summer 1992. It included convicted criminals. Members of the SOS acted as escorts for SDS leaders such as Radoslav Brdanin.¹⁸⁰

Mladić points out that while the paragraph from the original judgement states that the SOS “included convicted criminals and had links to SJB and CSB officials”, Proposed Fact No. 308 as proffered by the Prosecution does not include this information.¹⁸¹ He argues that by accepting the Proposed Fact in the form submitted by the Prosecution, the Trial Chamber has omitted “critical language that provides an innocent explanation for why members served as escorts, due to their links with Police Officials, and not tied to the SDS or Brdanin.”¹⁸² The Prosecution responds that the omission does not substantially alter the meaning of Proposed Fact No. 308 and that Mladić would need to develop his theory at trial.¹⁸³ The Appeals Chamber notes that Mladić made a similar argument before the Trial Chamber.¹⁸⁴ The Appeals Chamber further notes that the Trial Chamber has not explained why it rejected Mladić’s submission and accepted the Proposed Fact in the form provided by the Prosecution which omits language from the original judgement, while at the same time it clarified the acronym SOS. The Appeals Chamber considers that this amounts to a discernible error because it failed to give sufficient weight to Mladić’s submission that the fact was taken out of context.

(g) Proposed Facts containing time-references provided by the Prosecution

72. Mladić also argues that the Trial Chamber erred by taking judicial notice of Proposed Facts Nos 1725, 1735, 1806, 1825, 1835, 1854, 1938, 1940, 1954-1957, 1961, and 1967 because they contain time-references provided by the Prosecution.¹⁸⁵ The Trial Chamber held that:

[...] a number of Proposed Facts are not consistent with the text of the original judgments, in that they contain time-references, which do not flow directly from the text of the original judgments.

¹⁷⁹ First Decision, para. 33, fn. 53.

¹⁸⁰ Proposed Fact No. 308 (First Decision, Annex). The source for the Proposed Fact is *Krajišnik* Trial Judgement, para. 212 (See Motion, Annex A).

¹⁸¹ Appeal, para. 11.

¹⁸² Appeal, para. 11, referring to *Krajišnik* Trial Judgement, para. 212 (emphasis added).

¹⁸³ Response, para. 17.

¹⁸⁴ See Defence Response to Motion, Annex A.

¹⁸⁵ Appeal, para. 22, referring to Third Decision, para. 37.

Having examined these Proposed Facts in the context of the judgments they originate from, the Chamber will accept the time-reference proposed by the Prosecution.¹⁸⁶

The Appeals Chamber considers that the context of a judgement, as opposed to an explicit factual finding, cannot form the basis for judicial notice of a proposed fact. Proposed facts can only be considered truly adjudicated if they are explicitly supported by the original judgement and meet the admissibility requirements for judicial notice of adjudicated facts. Therefore, in accepting time-references which are not supported by an explicit factual finding in the original judgement as proposed by the Prosecution, the Trial Chamber exceeded its discretion.

73. The Appeals Chamber finds that all remaining reformulated Proposed Facts were amended in a manner within the Trial Chamber's discretion.

D. Alleged Errors in Taking Judicial Notice of Proposed Facts going to the Acts, Conduct, or Mental State of the Accused and Failure to Address Defence Objections

1. Submissions of the Parties

(a) Mladić's Submissions

74. Mladić submits that the Trial Chamber erred by taking judicial notice of Proposed Facts which allegedly go to his acts, conduct, or mental state without fully addressing Defence challenges to their admission.¹⁸⁷ Regarding the First Decision and Third Decision, he submits that the Trial Chamber failed to address this issue in relation to Defence challenges to specific Proposed Facts which were identified in the Defence Response to Motion by codes B1, C3, and C6, and failed to individually analyse the said Proposed Facts.¹⁸⁸ According to Mladić, the Trial Chamber thus ignored his argument that certain Proposed Facts: (i) went to his alleged acts and conduct, or those of his alleged subordinates or groups of which he may have been a part; or (ii) relate to the alleged objective and/or members of the joint criminal enterprise or other fundamental issue in the

¹⁸⁶ Third Decision, para. 37, referring to Proposed Facts Nos 1725, 1735, 1806, 1825, 1835, 1854, 1938, 1940, 1954-1957, 1961, and 1967. The Appeals Chamber notes that the Trial Chamber did not provide specific sources for these time-references.

¹⁸⁷ Appeal, paras 24, 28, 31.

¹⁸⁸ Appeal, paras 25-26, 28. Mladić submits that the Trial Chamber failed to address defence challenges enumerated by codes B1, C3, and C6 in relation to hundreds of proposed facts in the Defence Response to Motion, para. 16, Annex A (Appeal, paras 25-26, 28, Annex 1). According to the Defence Response to Motion appended to the Appeal as Annex 1, Code B1 signifies challenges on the basis that the proposed fact relates to "Crimes Committed during time before Mladic [sic] was appointed in VRS (BEFORE 12 MAY 1992)." Code C3 signifies challenges on the basis that: "The Proposed fact relates to alleged acts and conduct or mental state of the Accused or to alleged acts/convictions of alleged subordinates of the Accused; convictions or acts of alleged subordinates; goes directly or indirectly towards acts and conduct or responsibility of the Accused; implicates the acts or conduct of the accused, or groups of which he may have been a part." Code C6 signifies challenges on the basis that: "The Proposed Fact bears upon the responsibility of the accused or relating to the objective and members of the joint criminal enterprise, as well as facts relating to a fundamental issue raised in the indictment." See Appeal, Annex 1, para. 16.

Indictment.¹⁸⁹ In addition, he submits that, as set out in his Defence Response to Motion, the Proposed Facts he challenged do, in fact, go to his alleged acts and conduct.¹⁹⁰ Mladić argues that the Trial Chamber failed to explain in the Third Decision why it specifically considered that Proposed Fact No. 1754 did not go to his acts and conduct while it did not consider his challenges to other Proposed Facts.¹⁹¹

75. Regarding the Second Decision, Mladić submits that the Trial Chamber erred by mixing up the codes signifying Defence challenges under this criteria as set forth in the Defence Response to Motion.¹⁹²

76. Mladić requests that the Appeals Chamber: (i) vacate and reverse the Trial Chamber's decision to take judicial notice of the Proposed Facts in question; and (ii) remand the matter to the Trial Chamber, directing it to review the relevant Proposed Facts "under the appropriate standard for acts and conduct type evidence".¹⁹³

(b) Prosecution's Response

77. The Prosecution responds that Mladić does not show that the Trial Chamber failed to provide a reasoned opinion, failed to analyse his arguments, or committed a discernible error.¹⁹⁴ The Prosecution submits that the fairness of the trial was guaranteed by the Trial Chamber's examination of each Proposed Fact and its express statement that it would not admit any Proposed Facts which relate to the acts, conduct, or mental state of the accused.¹⁹⁵

78. The Prosecution further submits that the Trial Chamber considered the relevant Defence challenges,¹⁹⁶ and that Mladić fails to show that the Trial Chamber erred in its consideration of the Proposed Facts concerning subordinates or groups of which he may have been a part, as the facts in question do not fall within the narrow exclusion of facts relating to the acts, conduct, and mental

¹⁸⁹ Appeal, para. 26, referring to *Krajišnik* Decision, para. 14; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Motion for Judicial Notice of ICTY Convictions, 25 September 2008, para.16; *Popović et al.* Decision, para. 18, fn. 62; *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on the Prosecution Motion to Take Judicial Notice of Facts Under Rule 94(B) of the Rules of Procedure and Evidence, 10 December 2007, para. 13.

¹⁹⁰ Appeal, para. 27, referring to Defence Response to Motion, para. 16, Annex A.

¹⁹¹ Appeal, para. 28, referring to Third Decision, para. 35.

¹⁹² Appeal, paras 29-30. Mladić submits that the Trial Chamber mixed-up defence code "C5", which was for objections based on text different from the original judgement with defence codes "C3 and C6" (Appeal, para. 29). See also Reply, para. 20.

¹⁹³ Appeal, para. 32.

¹⁹⁴ Response, para. 20.

¹⁹⁵ Response, paras 21, 23. The Prosecution further submits that the Trial Chamber found Proposed Facts which it accepted for admission did not "refer to the acts, conduct or mental state of the Accused" and points out that the Trial Chamber did not admit Proposed Facts Nos 168, 169, 247, 802, and 1754 because they did not fulfil this requirement. (Response, para. 23, referring to First Decision, paras 45-46, Third Decision, paras 34-35).

state of the accused.¹⁹⁷ Moreover, the Prosecution submits that the Trial Chamber examined each Proposed Fact and refused to take judicial notice of those which it found to infringe this requirement, including Proposed Fact No. 1754.¹⁹⁸ The Prosecution argues that since the Defence challenged approximately 2,600 Proposed Facts on the basis that they allegedly go to the acts, conduct, or mental state of the accused, the Trial Chamber was justified in not addressing each challenge individually.¹⁹⁹

79. Finally, the Prosecution submits that the Trial Chamber made minor typographical errors in its use of the Defence codes, representing various challenges, in the Second Decision and the Third Decision which did not result in prejudice to the Accused.²⁰⁰

2. Applicable Law

80. The Appeals Chamber recalls that judicial notice may not be taken of adjudicated facts “relating to the acts, conduct, and mental state of the accused”.²⁰¹ In the *Karemera et al.* Appeal Decision, the ICTR Appeals Chamber held that there are two reasons warranting complete exclusion of this category of facts. First, it noted that such exclusion strikes a balance between the procedural rights of the accused and the interests of expediency. Secondly, it noted that there is a reliability concern associated with facts adjudicated in other cases which bear on the actions, omissions, or mental state of an individual who was not on trial, as defendants in those cases have less incentive to contest those facts and might even choose to allow blame to fall on another.²⁰²

81. The Appeals Chamber further recalls that it is not categorically impermissible to take judicial notice of adjudicated facts relating directly or indirectly to the accused’s guilt,²⁰³ as judicial notice of adjudicated facts must, to some degree, bear on the responsibility of an accused if these facts are to have any relevance for admission.²⁰⁴ It is for trial chambers to assess each fact to determine whether judicial notice is consistent with an accused’s rights in the circumstances of the case.²⁰⁵ The ICTR Appeals Chamber has clarified that proposed facts relating to the existence of a joint criminal enterprise, the conduct of its members other than the accused, and facts related to the conduct of physical perpetrators of crimes for which an accused is alleged to be criminally

¹⁹⁶ Response, para. 22, referring to First Decision, para. 45, citing Defence Response to Motion, para. 16 (Codes B1, C3, and C6); Second Decision, para. 34, citing Defence Response to Motion, para. 16 (Code C5); Third Decision, para. 35, citing Defence Response to Motion, para. 16 (Code C5).

¹⁹⁷ Response, para. 26, referring to *Popović et al.* Decision, para. 13.

¹⁹⁸ Response, para. 23.

¹⁹⁹ Response, paras 23-24. The Prosecution specifically refers to Defence Code C3 in this regard.

²⁰⁰ Response, para. 25.

²⁰¹ *Karemera et al.* Appeal Decision, para. 50. See also *Dragomir Milošević* Appeal Decision, para. 16.

²⁰² *Karemera et al.* Appeal Decision, para. 51.

²⁰³ *Karemera et al.* Appeal Decision, para. 53.

²⁰⁴ *Karemera et al.* Appeal Decision, para. 48.

responsible, may be subject to judicial notice.²⁰⁶ The burden remains on the Prosecution, however, to establish, by other means, that the accused had knowledge of the existence of crimes established by way of judicial notice of adjudicated facts.²⁰⁷ Trial chambers must first determine whether proposed facts are related to the acts, conduct, or mental state of the accused and if not, “whether under the circumstances of the case admitting them will advance Rule 94(B)’s objective of expediency without compromising the rights of the Accused”.²⁰⁸

3. Analysis

82. The Appeals Chamber notes that in his Appeal, Mladić has not identified the specific Proposed Facts of which he alleges the Trial Chamber improperly took judicial notice. Rather, he submits that the Trial Chamber failed to consider his submissions that numerous Proposed Facts relate to his acts, conduct, or mental state and misconstrued his submissions by mixing up the codes for various challenges he relied on in the Defence Response to Motion. The Appeals Chamber recalls that “[i]t is necessary for any appellant claiming an error of law on the basis of lack of a reasoned opinion to identify the specific issues, factual findings, or arguments which an appellant submits the trial chamber omitted to address and to explain why this omission invalidated the decision”.²⁰⁹ The Appeals Chamber will thus limit its review under this ground of appeal to the approach taken by the Trial Chamber in its analysis of the requirement that an adjudicated fact must not relate to the acts, conduct, or mental state of the accused and its interpretation of the Defence challenges in this regard. It will not conduct an analysis of whether the Trial Chamber improperly took judicial notice of individual Proposed Facts which Mladić objected to in relation to this criteria in the Defence Response to Motion.

²⁰⁵ *Karemera et al.* Appeal Decision, para. 52.

²⁰⁶ *Karemera et al.* Appeal Decision, paras 52-53. See also *Dragomir Milošević* Appeal Decision, para. 16; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Second Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base, 17 September 2008 (“*Perišić* Decision 17 September 2008”), para. 20; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Third Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base, 12 January 2010 (“*Perišić* Decision 12 January 2010”), para. 31; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Prosecution’s Motion for Judicial Notice of Facts Relevant to the Srebrenica Crime Base, 22 September 2008 (“*Perišić* Decision 22 September 2008”), paras 40-42; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Third Prosecution’s Motion for Judicial Notice of Adjudicated Facts, 23 July 2010 (“*Stanišić and Simatović* Decision 23 July 2010”), para. 44; *Tolimir* Decision, paras 27-28; *Mičo Stanišić* Decision, para. 44; *Stanišić and Župljanin* Decision, para. 39; *Popović et al.* Decision, para. 13.

²⁰⁷ *Dragomir Milošević* Appeal Decision, para. 16.

²⁰⁸ *Karemera et al.* Appeal Decision, para. 53.

²⁰⁹ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgement, 4 December 2012, para. 11; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-A, Judgement, 19 July 2010, para. 10; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement, 19 May 2010, para. 10; *Prosecutor v. Dragomir Milošević*, Case No. IT 98-29/1-A, Judgement, 12 November 2009, para. 13; *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009, para. 12; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008, para. 9; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgement, 16 October 2007, para. 7; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 9.

83. The Appeals Chamber notes that the Trial Chamber correctly stated the legal standard for the criterion that an adjudicated fact “[...] must not relate to the acts, conduct or mental state of the accused”.²¹⁰ In addition, it correctly noted that this “does not apply to the conduct of other persons for whose criminal acts and omissions the accused is allegedly responsible through one or more of the forms of responsibility enumerated in the Statute.”²¹¹

84. Contrary to Mladić’s contention, the Trial Chamber specifically considered his submissions on this issue. In the First Decision, it noted that:

The Defence challenges a number of Proposed Facts under this criterion, submitting that they ‘relate to alleged acts or convictions of alleged subordinates of the Accused, that they implicate the acts or conduct of the Accused, bear upon the responsibility of the Accused, or relate to the objective and members of the joint criminal enterprise’.²¹² Many Proposed Facts are challenged on the basis that they refer to a time period “before the Accused was appointed in VRS” and could thus imply his responsibility for actions of his predecessors.²¹³

The Trial Chamber rejected Mladić’s submission and concluded that the Proposed Facts which he challenged on these bases do not refer to the acts, conduct, or mental state of the accused.²¹⁴ In addition, in each of the Impugned Decisions, the Trial Chamber expressly addressed the question of whether any of the Proposed Facts pertain to the acts, conduct, or mental state of the accused,²¹⁵ and specifically excluded those which do. It held that since “Proposed Facts Nos 168-169, and 247 refer, among others, to the Accused and Proposed Fact No. 802 directly refers to orders issued by the Accused” it would not consider them further.²¹⁶ Similarly, it declined to take judicial notice of Proposed Fact No. 1754 on the basis that it refers to the acts, conduct or mental state of the accused.²¹⁷

85. The Appeals Chamber considers that the Trial Chamber’s approach is consistent with the jurisprudence that proposed facts relating to the existence of a joint criminal enterprise, the conduct of its members other than an accused, and facts related to the conduct of physical perpetrators of crimes for which an accused is alleged to be criminally responsible, may be subject to judicial notice.²¹⁸ It is within a trial chamber’s discretion to take judicial notice of facts bearing on elements

²¹⁰ First Decision, para. 8, referring to *Dragomir Milošević* Appeal Decision, para. 16; *Karemera et al.* Appeal Decision, paras 50-53. See also Second Decision, para. 3, fn. 7 and Third Decision, para. 3, fn. 9 where the Trial Chamber incorporated this statement by reference.

²¹¹ First Decision, para. 8, referring to *Karemera et al.* Appeal Decision, para. 52. See also Second Decision, para. 3, fn. 7 and Third Decision, para. 3, fn. 9 where the Trial Chamber incorporated this statement by reference.

²¹² First Decision, para. 45, referring to Defence Response to Motion, para. 16 (codes C3 and C6).

²¹³ First Decision, para. 45, referring to Defence Response to Motion, para. 16 (code B1).

²¹⁴ First Decision, para. 45.

²¹⁵ First Decision, para. 45; Second Decision, para. 34; Third Decision, para. 35. See also First Decision, para. 12.

²¹⁶ First Decision, para. 46.

²¹⁷ Third Decision, para. 35. The Appeals Chamber notes that, contrary to Mladić’s submission, the Trial Chamber refused to take judicial notice of Proposed Fact No. 1754.

²¹⁸ *Karemera et al.* Appeal Decision, paras 52-53. See also *Dragomir Milošević* Appeal Decision, para. 16; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Second Motion for Judicial Notice of Facts Relevant to the

of the accused's guilt but which do not come within the narrow category of facts going to the alleged acts, conduct, or mental state of the accused.²¹⁹ The Appeals Chamber further finds that, in the circumstances of this case, the Trial Chamber was not obliged to address each Proposed Fact individually.

86. In addition, the Appeals Chamber considers that the Trial Chamber's indication that it would not take judicial notice of Proposed Facts going to the alleged acts, conduct, or mental state of the accused²²⁰ demonstrates that it had regard to the correct legal standard and purported to follow it in its assessment of each Proposed Fact. Mladić has not established that the Trial Chamber erred in its assessment of this requirement in relation to any particular Proposed Fact. Consequently, the Appeals Chamber finds that Mladić has not established that the Trial Chamber failed to give sufficient weight to his arguments that the Proposed Facts in question allegedly relate to his acts, conduct or mental state.

87. The Appeals Chamber notes that in the Second Decision and Third Decision, the Trial Chamber referred to incorrect codes for the Defence challenges to Proposed Facts allegedly going to the acts, conduct, or mental state of the accused.²²¹ However, the Appeals Chamber observes that the Trial Chamber specifically relied on its discussion in the First Decision, which correctly reflects Mladić's challenges in this regard.²²² In the Appeals Chamber's view, it is apparent from the prior discussion in the First Decision that the Trial Chamber was clearly informed of the substance of Mladić's submissions and was guided by the applicable law, which it applied in its analysis of each Proposed Fact. The Appeals Chamber therefore finds that the error was due to mere inadvertence and had no consequence on the reasoning of the Trial Chamber.

Sarajevo Crime Base, 17 September 2008 ("*Perišić* Decision 17 September 2008"), para. 20; *Perišić* Decision 12 January 2010, para. 31; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Prosecution's Motion for Judicial Notice of Facts Relevant to the Srebrenica Crime Base, 22 September 2008 ("*Perišić* Decision 22 September 2008"), paras 40-42; *Stanišić and Simatović* Decision 23 July 2010, para. 44; *Tolimir* Decision, paras 27-28; *Mičo Stanišić* Decision, para. 44; *Stanišić and Župljanin* Decision, para. 39; *Popović et al.* Decision, para. 13.

²¹⁹ See *Karemera et al.* Appeal Decision, para. 53.

²²⁰ See First Decision, para. 12.

²²¹ Second Decision, para. 34; Third Decision, para. 35. The Trial Chamber referred to Code C5 instead of Codes B1, C3, or C6.

²²² See First Decision, para. 8, referring to *Dragomir Milošević* Appeal Decision, para. 16; *Karemera et al.* Appeal Decision, paras 50-53. See also Second Decision, para. 3, fn. 7 and Third Decision, para. 3, fn. 9 where the Trial Chamber incorporated this statement by reference.

E. Alleged Errors in Taking Judicial Notice of Proposed Facts from the *Popović et al.* Trial Judgement

1. Submissions of the Parties

(a) Mladić's Submissions

88. Mladić submits that the Trial Chamber erred in the Second Decision by taking judicial notice of Proposed Facts from the *Popović et al.* Trial Judgement, which he argues “are *prima facie* inappropriate for judicial notice.”²²³ He submits that the Proposed Facts in question are currently contested on appeal, particularly since several appellants in the *Popović et al.* proceedings have raised arguments on appeal alleging the unfairness of the trial and that errors in the *Popović et al.* Trial Judgement amount to a miscarriage of justice.²²⁴ Mladić submits that the Trial Chamber failed to consider jurisprudence from the *Delić* proceedings, which require that where the fairness of the trial has been challenged on appeal, facts in the trial judgement cannot be subject to judicial notice until the appeal is final.²²⁵

89. Mladić requests that the Appeals Chamber: (i) vacate and reverse this part of the Second Decision; and (ii) remand the matter to the Trial Chamber directing it to exclude all Proposed Facts from the *Popović et al.* Trial Judgement.²²⁶

(b) Prosecution's Response

90. The Prosecution submits that Mladić repeats arguments he made before the Trial Chamber without showing a discernible error in the Trial Chamber's reasoning that would result in prejudice to him.²²⁷

91. The Prosecution submits that:

The *Delić* Trial Chamber's analysis highlights that whether a proposed fact is considered to be 'contested on appeal' is based [...] on the extent to which its substance, considered in all the

²²³ Appeal, paras 33-34, regarding facts: 1320, 1321, 1322, 1329, 1338, 1339, 1340, 1341, 1342, 1343, 1344.

²²⁴ Appeal, para. 34, referring to *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Second Notice of Re-Classification and Re-Filing of Public Redacted Version of Appellant's Brief on Behalf of Drago Nikolić, 3 August 2011 (“Nikolić Appeal Brief”), grounds 4-5, 7, 17-18; *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appellant Ljubiša Beara's Notice of Re-Classification and Re-Filing of the Public Redacted Version of Appeal Brief, 16 June 2011 (“Beara Appeal Brief”), grounds 1-19, 21-32; *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of Notice of Appeal on Behalf of Vinko Pandurević against the Judgement of the Trial Chamber Dated 10th June 2010, 9 March 2011 (“Pandurević Notice of Appeal”), grounds 4-5; *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Notice of Appeal by the Radivoje Miletić Defence, 24 September 2010 (“Miletić Notice of Appeal”), grounds 13-14, 20, 22-23.

²²⁵ Appeal, para. 35, referring to *Delić* Decision, para. 14; *Karadžić* Fourth Decision, paras 22-30; *Šešelj* Decision, paras 11-13; *Stanišić and Župljanin* Decision, para. 29. See also Reply, para. 17.

²²⁶ Appeal, para. 36.

²²⁷ Response, para. 27.

circumstances, demands the conclusion that the proposed fact will be revised if that ground of appeal succeeds such that the fact cannot be considered adjudicated.²²⁸

It argues that a ground of appeal implicating all factual findings in a judgement would be rare and that it should be for the Trial Chamber to determine when such a situation exists.²²⁹ In addition, the Prosecution argues that the *Popović et al.* appeal briefs are limited to attacks on specific factual or legal findings, as opposed to the fairness of the trial.²³⁰

2. Applicable Law

92. The Appeals Chamber held in the *Kupreškić et al.* case that proposed facts may be subject to judicial notice if the original judgement has not been appealed or where the judgement is finally settled on appeal.²³¹ It clarified that:

Since the Appeals Chamber may in the course of that appeal revise the findings of the Trial Chamber, the Appeals Chamber thinks it unwise to assume that the facts contained in the Trial Chamber's judgement are 'adjudicated'. Only facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed 'adjudicated facts' within the meaning of Rule 94(B).²³²

In a subsequent Appeals Chamber decision, Judge Shahabuddeen appended a separate opinion, elaborating that "if a particular finding on a fact is not the subject of appeal, judicial notice may be taken of it in other proceedings notwithstanding the pendency of an appeal on other aspects."²³³ In addition, trial chambers have interpreted the holding in the *Kupreškić et al.* Appeal Decision broadly to allow judicial notice of adjudicated facts from judgements pending appeal or review which are not *themselves* clearly at issue in the appeal, before the appeal is finally concluded.²³⁴ The Appeals Chamber finds this interpretation of the *Kupreškić et al.* Appeal Decision to be persuasive. However, when determining whether proposed facts are subject to appeal or review, the Appeals Chamber emphasises that trial chambers should take a cautious approach and err on the side of excluding proposed facts which could be altered on appeal.

²²⁸ Response, para. 32.

²²⁹ Response, para. 32. See also *ibid.*, para. 31.

²³⁰ Response, para. 33.

²³¹ *Kupreškić et al.* Appeal Decision, para. 6. See also for e.g. *Popović et al.* Decision, para. 14; *Perišić* Decision 17 September 2008, para. 18; *Perišić* Decision 22 September 2008, para. 37; *Delić* Decision, para. 13.

²³² *Kupreškić et al.* Appeal Decision, para. 6; *Slobodan Milošević* Appeal Decision, p. 4, fn. 10.

²³³ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Separate opinion of Judge Shahabuddeen Appended to the Appeals Chamber's Decision Dated 28 October 2003 on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 31 October 2003 ("Separate Opinion of Judge Shahabuddeen"), para. 34.

²³⁴ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92bis, 28 February 2003 ("*Krajišnik* Trial Chamber Decision, 28 February 2003"), para. 14. See also *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 23 January 2003 ("*Ljubičić* Pre-Trial Decision"), pp. 4-5. See for example *Prlić et al.* Pre-Trial Decision, para. 15; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and

3. Analysis

93. Mladić contests the Trial Chamber's decision to take judicial notice of Proposed Facts Nos 1320, 1321, 1322, 1329, 1338, 1339, 1340, 1341, 1342, 1343, 1344, which originate from the *Popović et al.* Trial Judgement. The Appeals Chamber notes that, in addition, the Trial Chamber took judicial notice of Proposed Facts Nos 1628-1634, which also originate from the *Popović et al.* Trial Judgement. When addressing the admission of the Proposed Facts from the *Popović et al.* proceedings, the Trial Chamber recalled:

[...] that for it to take judicial notice, a Proposed Fact must not have been contested on appeal, or, if it has, the Proposed Fact has been settled on appeal. If a particular finding on a fact is not the subject of appeal, judicial notice may be taken of it in other proceedings notwithstanding an appeal pending on other aspects. The Defence has not identified, and neither has the Chamber found, any of the challenged Proposed Facts originating from the *Popović* Trial Judgement as being the subject of an appeal. The fact that the *Popović* Trial Judgement is subject to appeal on the grounds raised by the Defence in its Response does not prevent the Chamber from taking judicial notice of Proposed Facts originating from that Judgement. Therefore, the Chamber finds that all 19 Proposed Facts satisfy this criterion, but notes that Proposed Fact Nos 1319, 1635 and 1638 are denied under separate criteria. However, should the *Popović* Trial Judgement, or portions of it, ultimately be reversed on appeal, the Defence may request that the Chamber reconsider its decision on any of the Proposed Facts sourced to that Trial Judgement of which this Chamber takes judicial notice.²³⁵

The Trial Chamber did not explain why it found that none of the Proposed Facts in question are subject to appeal.

94. While it is within a trial chamber's discretion to determine whether proposed facts are subject to appeal or review for the purposes of taking judicial notice pursuant to Rule 94(B) of the Rules, as with all discretionary decisions, that discretion is subject to review.²³⁶ The Appeals Chamber recalls that judicial notice of adjudicated facts is an exception to the ordinary burden of producing evidence.²³⁷ Consequently, the Appeals Chamber considers that trial chambers should err on the side of exclusion of proposed facts which could be altered on appeal because judicial economy is poorly served in circumstances where parties in one proceeding are required to follow the status of another proceeding on appeal to determine which adjudicated facts are operative in their case.

95. As submitted by Mladić, when considering whether a proposed fact is subject to appeal, the *Delić* Trial Chamber found that a ground of appeal alleging an irregularity in the conduct of the trial "would undermine the integrity of the entire [...] [j]udgement" if it were upheld by the Appeals

Documentary Evidence, 19 December 2003 ("*Blagojević and Jokić* Trial Chamber Decision 19 December 2003"), paras 16, 19.

²³⁵ Second Decision, para. 33 (footnotes omitted).

²³⁶ See *supra*, para. 9.

²³⁷ See for example *Karemera et al.* Appeal Decision, para. 42.

Chamber, and that therefore proposed facts from the judgement could not be considered truly adjudicated.²³⁸

96. The Appeals Chamber has reviewed the grounds of appeal raised by the *Popović et al.* appellants to which Mladić refers²³⁹ and has found that some of those grounds could have a bearing not only on general issues of trial fairness, but also on the veracity of specific Proposed Facts. Specifically, the Appeals Chamber considers that grounds 22 and 23 of the Appeal Brief of Radivoje Miletic ("Miletic"), an appellant in the *Popović et al.* appeal proceedings, could be construed as calling into question the fairness of the proceedings.²⁴⁰ In ground 22 of his appeal, Miletic argues that the *Popović et al.* Trial Chamber erred in refusing to admit an exhibit into evidence. He asserts that its decision to refuse the evidence favoured expeditiousness of the trial over fairness to the accused, thereby rendering the trial unfair and invalidating the judgement against him.²⁴¹ Furthermore, in ground 23 of Miletic's appeal, he asserts that the *Popović et al.* Trial Chamber failed to render a decision on a Defence motion.²⁴² He argues that this error impacts the fairness of his trial, "puts in doubt the impartiality of the Chamber" and renders his conviction null and void.²⁴³ The Appeals Chamber notes the difficulty in assessing the likely outcome of grounds of appeal in a separate proceeding and considers that it is not for this Bench of the Appeals Chamber to do so. The question before the Appeals Chamber is merely whether, if these grounds of appeal were successful, the integrity of the entire *Popović et al.* Trial Judgement could be undermined such that Proposed Facts from the judgement could not be considered truly adjudicated.²⁴⁴ In these circumstances, the Appeals Chamber considers that it could potentially be so undermined. Consequently, the Appeals Chamber finds that the Trial Chamber failed to give these grounds of

²³⁸ *Delic* Decision, para. 14. See also *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Judicial Notice of Adjudicated Facts: *Bagosora* Judgement, 20 May 2009, para. 4, where the *Karemera et al.* Trial Chamber refused to admit proposed facts from the *Bagosora et al.* Trial Judgement pursuant to Rule 94(B) of the ICTR Rules. It held that the proposed facts could not be considered adjudicated within the meaning of Rule 94(B) of the ICTR Rules because the *Bagosora et al.* Trial Judgement was being appealed by two of the accused who alleged "a number of errors that have the potential to affect all of the factual findings in the trial judgement" and the third accused had indicated his desire to file a notice of appeal following the translation of the trial judgement into French.

²³⁹ See Appeal, para. 34, referring to Nikolic Appeal Brief, grounds 4-5, 7, 17-18; Beara Appeal Brief, grounds 1-19, 21; Pandurevic Notice of Appeal, grounds 4-5; Miletic Notice of Appeal, grounds 13-14, 20, 22-23.

²⁴⁰ See *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Notification de la Defense de Radivoje Miletic [sic] Relative au Dépôt de la Version Publique et Expurgée Corrigée du Memoire D'Appel, 18 April 2011, Annex B, Appeal Brief of the Radivoje Miletic Defence Public Redacted Version ("Miletic Appeal Brief"), paras 425-427.

²⁴¹ Miletic Appeal Brief, paras 425-427. The Appeals Chamber notes that the name and description of the exhibit in question are redacted from the public version of Miletic's Appeal Brief.

²⁴² Miletic Appeal Brief, para. 428. The Appeals Chamber notes that the name and description of the motion are redacted from the public version of Miletic's Appeal Brief.

²⁴³ Miletic Appeal Brief, paras 430-431.

²⁴⁴ See *Delic* Decision, para. 14.

appeal sufficient weight in determining whether the Proposed Facts in question are subject to appeal, and therefore committed a discernible error.²⁴⁵

97. Moreover, the Appeals Chamber notes that Proposed Fact No. 1322 relies in part on the testimony of witness Manojlo Milovanović (“Milovanović”),²⁴⁶ and that in ground 20 of Miletić’s Appeal Brief, Miletić argues that the *Popović et al.* Trial Chamber incorrectly assessed witness Milovanović’s testimony.²⁴⁷ The Appeals Chamber further notes that Proposed Fact No. 1321²⁴⁸ relies solely on the testimony of Vinko Pandurević (“Pandurević”), and that Proposed Facts Nos 1329²⁴⁹ and 1338²⁵⁰ rely on Pandurević’s testimony, in part. In ground one of his Appeal Brief, Ljubiša Beara (“Beara”), another appellant in the *Popović et al.* appeal proceedings, argues that the Trial Chamber erred in not allowing Defence evidence to challenge Pandurević’s credibility when he testified as a witness.²⁵¹ Furthermore, in ground five of his appeal, Beara argues that the *Popović et al.* Trial Chamber erred in giving any weight to Pandurević’s testimony because it lacked credibility and reliability.²⁵² The Appeals Chamber considers therefore that Proposed Facts Nos 1321-1322, 1329, and 1338 could be impacted by these grounds of appeal. Consequently, the Appeals Chamber finds that the Trial Chamber failed to give these grounds of appeal sufficient weight in its analysis of the Proposed Facts, and therefore committed a discernible error in taking judicial notice of them.²⁵³

98. Furthermore, the Trial Chamber’s offer to the Defence to request reconsideration in the event that the *Popović et al.* Trial Judgement, or portions of it, is reversed on appeal does little to reduce any prejudice to Mladić because the date of delivery of the *Popović et al.* appeal judgement is currently unknown.²⁵⁴ The *Mladić* trial proceedings or, at least, a significant portion of them, could be completed by the time the *Popović et al.* appeal judgement is issued.

99. The Appeals Chamber finds that in the circumstances of this particular case, it is in the interests of justice to quash the Trial Chamber’s decision to take judicial notice of Proposed Facts

²⁴⁵ See *supra*, para. 9.

²⁴⁶ The source for Proposed Fact No. 1322 is *Popović et al.* Trial Judgement, para. 119 (See Motion, Annex B), referring, *inter alia*, to Manojlo Milovanović, T. 12153 (29 May 2007).

²⁴⁷ Miletić Appeal Brief, paras 409-414.

²⁴⁸ The source for Proposed Fact No. 1321 is *Popović et al.* Trial Judgement, para. 104 (See Motion, Annex B), referring to Vinko Pandurević, T. 31013 (2 Feb 2009).

²⁴⁹ The source for Proposed Fact No. 1329 is *Popović et al.* Trial Judgement, para. 134 (See Motion, Annex B), referring, *inter alia*, to Vinko Pandurević, T. 30943 (30 Jan 2009).

²⁵⁰ The source for Proposed Fact No. 1338 is *Popović et al.* Trial Judgement, fn. 327 (See Motion, Annex B referring, *inter alia*, to Vinko Pandurević, T. 30881 (30 Jan 2009), T. 31187 (10 Feb 2009), T. 32193 (26 Feb. 2009).

²⁵¹ Beara Appeal Brief, para. 3.

²⁵² Beara Appeal Brief, paras 52-53.

²⁵³ See *supra*, para. 9.

²⁵⁴ See Second Decision, para. 33.

Nos 1320, 1321, 1322, 1329, 1338, 1339, 1340, 1341, 1342, 1343, 1344, and 1628-1634, which originate from the *Popović et al.* Trial Judgement.

IV. DISPOSITION

Based on the foregoing reasons, the Appeals Chamber, Judge Robinson partially dissenting,

ALLOWS the Appeal, **IN PART**;

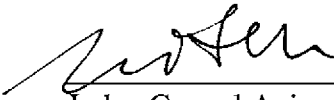
DIRECTS the Trial Chamber to:

1. remove from the record, without prejudice, Impugned Adjudicated Facts Nos 101, 136, 214, 288, 308, 309, 397, 421, 423, 557, 721, 929, 1097, 1128, 1146, 1171, 1301, 1317, 1395, 1402, 1439, 1442, 1459, 1725, 1735, 1806, 1825, 1835, 1854, 1927, 1938, 1940, 1954-1957, 1961, 1967, 2623, and 2638, on the basis that the Trial Chamber exceeded its discretion by reformulating them;
2. remove from the record Impugned Adjudicated Facts Nos 1320, 1321, 1322, 1329, 1338, 1339, 1340, 1341, 1342, 1343, 1344, and 1628, 1629, 1630, 1631, 1632, 1633, 1634, which originate from the *Popović et al.* Trial Judgement, on the basis that the Trial Chamber exceeded its discretion in finding that they are not subject to appeal; and
3. remove from the record Impugned Adjudicated Facts Nos 2234, 2318 and 2343 in light of the Prosecution Notification;²⁵⁵

AFFIRMS the Impugned Decisions regarding the remaining Impugned Adjudicated Facts.

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

Done this 12th day of November 2013,
At The Hague,
The Netherlands.


Judge Carmel Agius,
Presiding

[Seal of the Tribunal]

²⁵⁵ Prosecution Notification, para. 1.

V. PARTIAL DISSENTING OPINION OF JUDGE PATRICK ROBINSON

100. I respectfully disagree with some aspects of the Majority's findings in its decision to deny Mladić's appeal, in part, against the Trial Chamber's decisions to take judicial notice of adjudicated facts. More specifically, I take issue with the measures taken by the Trial Chamber to make a proposed adjudicated fact admissible by: (a) adding additional information from the original judgement;²⁵⁶ (b) deleting information which it found infringed one or more criteria for judicial notice;²⁵⁷ and (c) merging information from proposed facts and/or from findings from more than one original judgement.²⁵⁸ In my view, this appeal presents a challenge, not only to the validity of the measures adopted by the Trial Chamber in relation to the judicial notice of adjudicated facts, but to the validity of the Rule itself authorising a Trial Chamber to take judicial notice of adjudicated facts.

101. Although I accept that the Tribunal's case-law (the *Milošević* and *Karemera et al.* decisions) has confirmed the constitutionality of Rule 94(B), subject to the nine qualifications set out by the *Popović et al.* Trial Chamber,²⁵⁹ I have always been concerned about its validity. The traditional response to the criticism of Rule 94(B) is that it does not affect the legal burden which remains on the Prosecution to prove its case beyond reasonable doubt; it only imposes an evidential burden on the accused to rebut the proposed fact. However, this response overlooks the fact that the accused's failure to rebut the proposed fact will inevitably strengthen the Prosecution's case, thereby facilitating the Prosecution's discharge of its legal burden to prove the guilt of the accused beyond reasonable doubt. It is right, therefore, that the Decision should implicitly acknowledge how unusual and dangerous Rule 94(B) is, and the consequential need for caution to ensure that in its application it does not produce any unfairness to the accused.²⁶⁰ However, for the reasons set out below, I question whether the Decision goes far enough in addressing the validity of the measures taken by the Trial Chamber that I have referred to above.

102. Despite the presence of some civil law inquisitorial features, the Tribunal's legal system, insofar as the presentation of evidence is concerned, remains fundamentally common law adversarial with two parties, the Prosecution and the Defence, and a Trial Chamber in the middle holding the scales evenly between the parties. Over the years in the life of the Tribunal, in response to the slow pace of trials, Trial Chambers have been encouraged and in some cases required to take

²⁵⁶ See Decision, paras 40-57.

²⁵⁷ See Decision, paras 58-63.

²⁵⁸ See Decision, paras 64-70.

²⁵⁹ See Decision, para. 25.

²⁶⁰ See Decision, para. 24: "For this reason, the Appeals Chamber considers that chambers ought to take a cautious approach in exercising their discretion to take judicial notice of adjudicated facts in order to ensure the right of the Accused to a fair trial".

on a more active, inquisitorial role in trial proceedings. This has led to Trial Chambers exercising functions more akin to the role of a judge in the civil law inquisitorial system than the common law adversarial system. That function and role does not of course mean that the Trial Chamber is acting in breach of the Statute. This is so because ultimately the question is one of fairness. However, extreme caution is advisable in relation to the gathering of evidence. It is the parties who bring the evidence to the court. It is questionable whether it is a part of the function of a Trial Chamber to adduce evidence; the reason is obvious: the involvement of the Trial Chamber in evidence-gathering has the potential to interfere with the balance between the Prosecution and the Defence as well as the balance between the role of a judge and that of a party. I note that Rule 98, which allows a Trial Chamber to call a witness, in no way resembles what the Trial Chamber did in the measures it adopted, as noted in paragraph 1 above, by shaping and perfecting the inadmissible evidence of one party to make it admissible.

103. If it is said that this perfecting of evidence presented by the Prosecution is permissible on the basis that Rule 94(B) empowers a Trial Chamber *proprio motu* to take judicial notice of adjudicated facts, then the constitutionality of that provision must be questioned. A Rule that allows a Trial Chamber to assume a protagonist-party role in a trial, in effect allowing the Trial Chamber to descend into the arena, may be *ultra vires* the Statute and customary international law. Is it a part of the function of a Trial Chamber to make substantive changes to evidence presented by the Prosecution in the form of an adjudicated fact so as to make admissible that evidence which is otherwise inadmissible for failing to meet one of the nine criteria that the Tribunal's case-law has set for the judicial notice of adjudicated facts? If changes are to be made to such evidence it must be made by the Prosecution itself and thereafter the Trial Chamber, if the occasion arises, rules on the admissibility of the amended adjudicated facts. The overriding, overarching requirement of fairness to the accused called for by both the Statute and customary international law may be compromised by a system that not only enables the Trial Chamber to adduce evidence that strengthens the case of one party (in this case, the Prosecution) but also to pare, prune, tailor, amend and perfect evidence presented by the Prosecution so as to make it admissible. The difficulty for me is to determine whether my concerns are met by the opportunity which the Appeals Chamber has to correct the mistakes of the Trial Chamber in the action it has taken. In other words, is the issue more simply one of an abuse of discretion by the Trial Chamber or more profoundly, one of the constitutional validity of the Rule on the basis of which the Trial Chamber acted.

104. No other Rule gives a Trial Chamber, not only an evidence-gathering role of this kind, but also allows it to mould and bring evidence adduced by one party to a level where it can convert inadmissible evidence into admissible evidence. When evidence has been so "treated" by a Trial Chamber, the accused is responding not to evidence presented by a party, *i.e.*, the Prosecution, but

to evidence presented by the Trial Chamber. As I have noted, Rule 98 does give a Trial Chamber an evidence-gathering function in empowering it to call a witness. But there is no way that that power could be deployed in the partial manner reflected in the measures taken by the Trial Chamber as noted above. When under Rule 98 a Trial Chamber calls a witness and that witness's statement is collected a Trial Chamber does not have the power to amend it so as to make admissible a statement that was otherwise inadmissible.

105. It is arguable therefore that the Trial Chamber's power to take notice of adjudicated facts infringes its basic duty under Article 20(1) to ensure that a trial is fair. The whole purpose of Article 21 is to set out a bundle of rights that reflect the minimum standard of fairness for an accused. That minimum standard may be breached by the evidence-gathering function under Rule 94(B), and certainly by the manner in which it was used by the Trial Chamber. Therefore, the question may not be so much whether the Trial Chamber abused or properly exercised its discretion in the measures taken by adding, deleting and merging information to make an otherwise inadmissible proposed fact admissible; it is, rather, whether under the law of the Tribunal, properly understood, there is any power in relation to which the discretion is said to exist. What I mean by this, for example, is that the question for the Appeals Chamber may not be whether the Trial Chamber properly exercised its discretion in merging information from proposed facts, or from findings from more than one original judgement; it is, rather, whether the Trial Chamber under the law of the Tribunal has any power to merge such information.

106. One way of addressing the concerns I have raised without deciding on the constitutionality of Rule 94(B) itself is for the Appeals Chamber to hold in this case that when amendments are to be made to an adjudicated fact submitted by a party for admission, those amendments must be made by the relevant party and not by the Trial Chamber, whose role is confined to ruling on the admissibility of the amended adjudicated fact and to making minor editorial changes. The advantage to a trial of a Trial Chamber itself making the amendment is that it promotes expeditiousness; the question, however, is whether it also promotes fairness.

107. Finally, it is a matter for regret that more challenges to the constitutional validity of a particular Rule or action have not been made by the parties in proceedings at the Tribunal. Challenges of that kind are more frequently made in common law adversarial system. Challenges to the constitutional validity of a provision or action would serve to develop the law of the Tribunal. I would have certainly welcomed such a challenge in this appeal in relation to the *proprio motu* power of the Trial Chamber under Rule 94(B).

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



Judge Patrick Robinson

Done this 12th day of November 2013,
At The Hague,
The Netherlands.

[Seal of the Tribunal]