UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

Case No.: IT-95-5/18-T

Date: 14 June 2010

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **14 June 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTIONS FOR RECONSIDERATION OF DECISIONS ON JUDICIAL NOTICE OF ADJUDICATED FACTS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the Accused's "Motion for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts", filed on 4 March 2010 ("First Motion"), and the "Second Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts", filed on 26 April 2010 ("Second Motion") (collectively "Motions"), and hereby issues its decision thereon.

I. Background and Submissions

1. The Office of the Prosecutor ("Prosecution") has filed five motions for judicial notice of adjudicated facts in this case to date, namely, the "First Prosecution Motion for Judicial Notice of Adjudicated Facts", filed on 27 October 2008; the "Second Prosecution Motion for Judicial Notice of Adjudicated Facts and *Corrigendum* to First Prosecution Motion for Judicial Notice of Adjudicated Facts", filed on 17 March 2009; the "Third Prosecution Motion for Judicial Notice of Adjudicated Facts", filed on 7 April 2009; the "Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts", filed on 26 August 2009 ("Fourth Motion on Adjudicated Facts"); and the "Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts", filed on 15 December 2010 ("Fifth Motion on Adjudicated Facts"). At the time the Accused filed the Motions, the Trial Chamber had rendered decisions on the first three of these five motions.

2. In its "Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts", filed on 5 June 2009 ("First Decision on Adjudicated Facts"), the Chamber took judicial notice of 302 out of 337 facts proposed by the Prosecution;[1] in its "Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts", filed on 9 July 2009 ("Third Decision on Adjudicated Facts"), it took judicial notice of 466 out of 497 facts proposed;[2] and in its "Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts", filed on 9 October 2009 ("Second Decision on Adjudicated Facts"), it took judicial notice of 744 out of 1049 facts proposed.[3] These three decisions will be subsequently referred to as the "Decisions on Adjudicated Facts".

[1] First Decision on Adjudicated Facts, para. 39.
[2] Third Decision on Adjudicated Facts, para. 63.
[3] Second Decision on Adjudicated Facts, para. 54.

(a) First Motion

3. In the First Motion, the Accused makes four arguments for reconsideration of the Chamber's Decisions on Adjudicated Facts. His arguments are based upon a decision issued by the Trial Chamber in the *Tolimir* case ("*Tolimir* Decision") which, according to the Accused, applied a standard higher than the standard applied by this Chamber when accepting previously adjudicated facts for judicial notice.[4] The Accused argues that the Chamber should reconsider taking judicial notice of facts that: (i) contain the elements of the "chapeau of the [Tribunal's] Statute";[5] (ii) are based on an agreement between the parties in the original case, and where it remains unclear from the structure of the relevant footnote in the original judgement whether the agreement was relied upon more than other evidence;[6] and (iii) relate to the core of the Prosecution's case.[7] Regarding the last category of facts, the Accused submits that a fact may go to the "core of the case" if it may: relate to a specific allegation against the accused; pertain to an objective of the joint criminal enterprise alleged by the Prosecution; relate to the acts and conduct of persons for whose criminal conduct the accused is allegedly responsible; or relates to a highly contested issue.[8] Accordingly, the Accused requests the Chamber to reconsider its decision to take judicial notice of 25 facts which were denied judicial notice by the Trial Chamber in *Tolimir*.[9]

4. Although the Accused's arguments in the First Motion are mainly related to the reconsideration of the Decisions on Adjudicated Facts, the Accused also requests the Chamber to apply the *Tolimir* Chamber's reasoning in assessing the proposed facts in the Fourth Motion on Adjudicated Facts and the Fifth Motion on Adjudicated Facts.[10] However, the Chamber notes that it has already considered the Accused's arguments in that respect when issuing its "Decision on Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts", filed on 14 June 2010 ("Fourth Decision on Adjudicated Facts"), and in its "Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts", also filed on 14 June 2010 ("Fifth Decision on Adjudicated Facts").[11]

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[4] First Motion, paras. 2, 4–10. *See 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.

[5] First Motion, para. 5

[6] First Motion, para. 6–7.

[7] First Motion, paras. 8–10.

[8] First Motion, para. 8.

[9] First Motion, para. 2.

[10] First Motion, paras. 5, 7–8, 10.

[11] Fourth Decision on Adjudicated Facts, paras. 11–12, 96–97; Fifth Decision on Adjudicated Facts, paras. 9–10, 55.

5. On 9 March 2010, the Prosecution filed the "Prosecution Response to Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts" ("First Response"), in which it argues that differing exercises of discretion by Trial Chambers do not constitute grounds for reconsideration,[12] and that the Accused has failed to establish any errors in the reasoning of the Trial Chamber, or that reconsideration is necessary to prevent injustice.[13] The Prosecution notes that the Appeals Chamber in the *Slobodan Milošević* case held that the decision whether to take judicial notice of proposed adjudicated facts lies within the discretion of the Trial Chamber.[14] The Prosecution argues that it would create uncertainty and confusion, both legally and procedurally, if Trial Chambers reconsidered their decisions because another Trial Chamber exercised its discretion differently in a later decision.[15]

6. The Prosecution further asserts that the Accused has failed to show any errors of reasoning on the part of the Trial Chamber, or that reconsideration is necessary to prevent injustice in relation to the four categories of adjudicated facts on which reconsideration is requested.[16] With respect to facts claimed to contain an essentially legal characterisation the Prosecution submits that the Accused already challenged the majority of these facts on the same basis when responding to the First, Second, and Third Motions for Judicial Notice of Adjudicated Facts, and that the Trial Chamber has determined they are not essentially legal in nature.[17] Moreover, according to the Prosecution, the Accused misunderstood the *Tolimir* Decision with regard to judicial notice of facts that contain elements of the "chapeau of the Statute". The Prosecution argues that the *Tolimir* Trial Chamber chose not to take judicial notice of one particular proposed adjudicated fact because its language "effectively mirrors the language of the chapeau element of Article 5 of the Statute", but that generally, the *Tolimir* Decision does not suggest that individual facts that go to prove elements of the chapeau requirements cannot be judicially noticed. Rather, the *Tolimir* Decision confirms the existing jurisprudence that a proposed fact that contains "findings or characteristics of an *essentially* legal nature" should not be judicially noticed, which is the same test applied by this Trial Chamber in its Decisions on Adjudicated Facts.[18]

[12] First Response, para. 4.

[13] First Response, paras. 6–18.

[14] First Response, para. 4. *See 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, pp. 3–4.

[15] First Response, para. 5.

[16] First Response, para. 6.

[17] First Response, paras. 7–8.

[18] First Response, para. 9.

7. In relation to the 42 facts the Accused argues are based on an agreement between the parties in the original judgement, the Prosecution argues that he has not demonstrated any clear error of reasoning on the Trial Chamber's part, or that reconsideration of these facts is necessary to prevent injustice. The Prosecution informs the Chamber that it has already declined to take judicial notice of six of the adjudicated facts of which the Accused has requested reconsideration because they are based on an agreement between the parties.[19] Furthermore, the Prosecution argues that the Accused has failed to undertake the basic analysis to support his request for reconsideration of the remainder of the 36 facts based on this ground.[20] In response to the Accused's request for reconsideration of facts claimed to go to the "core of the case", the Prosecution argues that the *Tolimir* Decision did not suggest that all adjudicated facts which relate to an accused go to the "core of the case". The Prosecution further argues that even where an adjudicated fact is deemed to go to the "core of the case", it is not a *per se* bar to it being judicially noticed; rather, it remains within the Trial Chamber's discretion to deny judicial notice of such facts where it considers this to be in the interests of justice.[21]

8. Finally, the Prosecution submits that the Accused failed to demonstrate a clear error of reasoning in the Trial Chamber's decision to take judicial notice of 25 facts which are the same as those facts of which the *Tolimir* Trial Chamber declined judicial notice on the grounds they: 1) were not distinct, concrete, and identifiable;[22] or 2) differed substantially from the formulation in the original judgement.[23] The Prosecution argues that the Trial Chamber applied the correct legal test in analysing these facts, and that no clear error of reasoning is demonstrated by the fact that this Chamber reached a different factual conclusion from the *Tolimir* Trial Chamber in exercising its discretion.[24]

9. On 11 March 2010, the Accused filed the "Leave to Reply: Motion for Reconsideration of Adjudicated Facts" ("Request for Leave to Reply"), arguing that the spirit of judicial notice recommends that Trial Chambers exercise their discretion in a similar manner to ensure consistent judgements. Consequently, the Chamber should reconsider the Decisions on

[19] The Prosecution submits that adjudicated facts 386, 509, 723, 916, 1729, and 1736 were already denied judicial notice in the Second Decision on Adjudicated Facts and Third Decision on Adjudicated Facts; *see* Second Decision on Adjudicated Facts, para. 46; Third Decision on Adjudicated Facts, para. 49. First Response, para. 10.

[20] First Response, para. 11.

[21] First Response, paras. 12–13. *See Tolimir* Decision, para. 33. *See also Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006, para. 19.

[22] First Response, para. 16.

[23] First Response, para. 17.

[24] First Response, paras. 15–18.

Adjudicated Facts in light of the decision in the *Tolimir* case, which reached a different conclusion on the same facts by applying the same legal test.[25]

(b) Second Motion

10. In the Second Motion, the Accused requests the Chamber to reconsider its decision to take judicial notice of 86 adjudicated facts in the Second Decision on Adjudicated Facts in light of a recent decision from the *Stanišić & Župljanin* Trial Chamber ("*Stanišić & Župljanin* Decision").[26] The Accused argues that the *Stanišić & Župljanin* Chamber, citing and following the *Tolimir* Decision, applied more stringent criteria to the taking of judicial notice, particularly with respect to whether the adjudicated facts related to the "core" of the Prosecution's case.[27] The Accused further argues that the *Stanišić & Župljanin* Decision did not cite to this Chamber's Decisions on Adjudicated Facts, "indicating that those decisions have now been eclipsed by subsequent jurisprudence and warranting reconsideration of the criteria used by this Trial Chamber in its decisions".[28] The Accused submits that, in order to ensure a fair trial, only one standard of judicial notice should be applied, and further requests that the Chamber ameliorate the prejudice of the widespread use of judicial notice of adjudicated facts in his case by, at least, applying the principles of the *Stanišić & Župljanin* and *Tolimir* Decisions.[29] Finally, the Accused emphasises that, while the Chamber is not bound by the decisions of another Trial Chamber, it "ought to seriously consider whether it has erred when two other Trial Chambers reach different conclusions on the same facts as this Trial Chamber", indicating that the Chamber was "too generous" with the Prosecution, at his expense.[30]

11. On 10 May 2010, the Prosecution filed the "Prosecution Response to Second Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts" ("Second Response"), in which it reiterates that differing exercises of discretion by Trial Chambers is not grounds for reconsideration,[31] and that the Accused has failed to establish any errors in the reasoning of this Chamber, or that reconsideration is necessary to prevent an injustice.[32] The Prosecution argues that the *Stanišić & Župljanin* Trial Chamber did not, in fact, apply more stringent criteria to the taking of judicial notice; rather it applied the same nine-part test relied upon by this Chamber,

[25] Request for Leave to Reply, paras. 5–6. The Chamber granted the Accused leave to reply in the Fourth Decision on Adjudicated Facts. Fourth Decision on Adjudicated Facts, para. 11.

[26] Second Motion, paras. 1–2. *See Prosecutor v. Stanišić & Župljanin*, Decision Granting In Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 1 April 2010.

[27] Second Motion, para. 2.

[28] Second Motion, para. 3.

[29] First Motion, para. 3; Second Motion, paras. 4–5.

[30] Second Motion, para. 6.

[31] Second Response, para. 4.

[32] Second Response, paras. 5–8.

yet exercised its discretion differently in relation to certain facts.[33] Finally, the Prosecution submits that the Accused made erroneous arguments with respect to 31 adjudicated facts in the Second Motion. The Prosecution informs the Chamber that the *Stanišić & Župljanin* Trial Chamber, in fact, took judicial notice of three of the adjudicated facts the Accused claims were denied judicial notice.[34] With respect to the remaining 28 adjudicated facts the Accused argues were rejected by the *Stanišić & Župljanin* Trial Chamber after they had been judicially noticed by this Chamber, the Prosecution asserts that three of them were withdrawn by the Prosecution in that case, and that the other 25 were already rejected by the *Mićo Stanišić* Trial Chamber in a 2007 decision.[35] Moreover, the Prosecution submits that the Accused fails to show any error of reasoning on behalf of this Chamber in exercising its discretion in a different manner than the *Mićo Stanišić* or *Stanišić & Župljanin* Trial Chambers in relation to the facts in question.[36]

II. Applicable Law

12. There is no provision in the Rules for requests for reconsideration, which are a product of the Tribunal's jurisprudence, and are permissible only under certain conditions.[37] However, the Appeals Chamber has articulated the legal standard for reconsideration of a decision as follows: "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'"[38] Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.[39]

13. The Chamber has outlined the law applicable to motions made pursuant to Rule 94(B) of the Rules in its Decisions on Adjudicated Facts, as well as in the Fourth Decision on Adjudicated Facts and the Fifth Decision on Adjudicated Facts. The Chamber will not discuss

[33] Second Response, para. 4.

[34] Second Response, para. 5.

[35] Second Response, para. 6. *See Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Judicial Notice, 14 December 2007.

[36] Second Response, paras. 6–7.

[37] *Prosecutor v. Prlić et al*., Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.

[38] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis*.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); *see also Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

[39] *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *see also Prosecutor v. Popović et al*., Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, p. 2–3.

the applicable law again here, but refers to the relevant paragraphs of these decisions when necessary.[40]

III. Discussion

14. In applying the first prong of the test for reconsideration to the Motions, the Chamber finds that the Accused has failed to demonstrate a clear error of reasoning in the Chamber's Decisions on Adjudicated Facts. It is clear from both the *Tolimir* Decision and the *Stanišić & Župljanin* Decision that the *Tolimir* and *Stanišić & Župljanin* Trial Chambers applied the same legal test as this Trial Chamber in considering the adjudicated facts proposed for judicial notice by the Prosecution, but exercised their discretion differently from this Chamber in relation to some facts.[41] The Chamber notes that Rule 94(B) of the Rules states that a "… Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings."[42] Simply because other Trial Chambers have exercised their discretion in a different way does not demonstrate a clear error of reasoning on behalf of this Chamber. Indeed, the very exercise of discretion requires a Chamber to take into account a range of factors, including the specific circumstances of the case at hand, rather than the mechanical following of a course taken by another Chamber in a different case. The Accused seems to agree with this assertion, stating in the Second Motion that: "*While a Trial Chamber is not bound by the decisions of another Trial Chamber*, it ought to seriously consider whether it has erred when two other Trial Chambers reach different conclusions on the same facts as this Trial Chamber".[43]

15. Although the Accused argues that one of the underlying purposes of Rule 94(B) is indeed to ensure consistency in factual findings between judgements of the Tribunal,[44] the Chamber does not find that this goes so far as to mandate that Trial Chambers exercise their discretion concerning judicial notice in identical ways, as the desired consistency in *findings* does not require there to be complete consistency in decisions on judicial notice. Therefore, the Chamber does not consider that exercising its discretion to reach a different conclusion from other Trial Chambers in relation to a decision granting or denying judicial notice of adjudicated

[40] First Decision on Adjudicated Facts, paras. 6–9; Second Decision on Adjudicated Facts, paras. 13–16; Third Decision on Adjudicated Facts, paras. 9–12; Fourth Decision on Adjudicated Facts, paras. 13–16; Fifth Decision on Adjudicated Facts, paras. 11–14.

[41] *Tolimir* Decision, para. 22; *Stanišić & Župljanin* Decision, para. 37; First Decision on Adjudicated Facts, para. 29; Second Decision on Adjudicated Facts, para. 43; Third Decision on Adjudicated Facts, para. 40.

[42] Rule 94(B) of the Rules.

[43] Second Motion, para. 6 (emphasis added).

[44] Request for Leave to Reply, paras. 5–6.

facts demonstrates a clear error of reasoning, warranting a reconsideration of the Decisions on Adjudicated Facts.

16. With this broad consideration in mind, the Chamber has reviewed the Accused's challenges with respect to the specific facts claimed to contain an essentially legal characterisation. The Accused does not, however, articulate how the Chamber erred in assessing each specific fact and, instead, generally requests the Chamber to reassess the same facts in light of the conclusions reached in the *Tolimir* Decision.[45] However, both this Chamber, and the *Tolimir* Trial Chamber applied the same nine-part test for assessing all the facts proposed for judicial notice, which includes an examination of whether the proposed facts contain characterisations or findings of an essentially legal nature.

17. In response to the Accused's argument that this Chamber reached a different conclusion than the *Tolimir* Trial Chamber with respect to applying this aspect of the test to one proposed fact, the Chamber notes a crucial difference between the fact denied judicial notice in the *Tolimir* Decision[46] and the fact judicially noticed in this case.[47] The Chamber finds that proposed fact 83 from the *Tolimir* Decision was clearly a legal conclusion and was specifically taken from the section of the *Blagojević & Jokić* trial judgement containing legal findings. In that regard, it can easily be distinguished from adjudicated fact 1036 in this case, which is a factual finding on which the legal conclusion in proposed fact 83 from the *Tolimir* Decision could be based. Thus, the Chamber finds no error of reasoning on its part in applying the relevant test and reaching a conclusion different to that of the *Tolimir* Chamber with respect to this particular fact. Moreover, the plain language of the *Tolimir* Decision does not suggest, as asserted by the Accused, that it created a new legal standard requiring the rejection of all facts which, "… contain *elements* of the chapeau of the Statute".[48] The Chamber therefore finds that it committed no clear error of reasoning when evaluating whether proposed facts, challenged by the Accused, contained essentially legal characterisations.

[45] *See* First Motion, paras. 5–7.

[46] The *Tolimir* Chamber declined judicial notice of proposed fact 83, which states: "[t]he attack was clearly directed against the Bosnian Muslim civilian population in the Srebenica enclave". The *Tolimir* Chamber further noted that the fact was taken from the section of the *Blagojević & Jokić* trial judgement containing legal findings, and observed that, "[p]roposed [a]djudicated [f]act 83 effectively mirrors the language of the chapeau element of Article 5 of the Statute." *Tolimir* Decision, para. 23.

[47] The Accused argues that adjudicated fact 1036, accepted for judicial notice in the Second Decision on Adjudicated Facts, is similar to proposed fact 83 from the *Tolimir* Decision, and therefore, should be reconsidered and denied judicial notice because it contains an essentially legal characteristic. Adjudicated fact 1036 states: "Attacks were conducted by intensive shelling with heavy army weaponry. Houses in Muslim villages and neighbourhoods were targeted and shelled indiscriminately, resulting in extensive destruction and civilian casualties. Many of the survivors fled the villages and sought shelter in the surrounding forests." Second Decision on Adjudicated Facts, para. 44, Annex.

[48] First Motion, para. 5.

18. Similarly, both this Chamber and the *Tolimir* Trial Chamber adopted identical approaches to facts potentially based upon an agreement between the parties, stating in their respective decisions that "according to the jurisprudence of the Tribunal, a fact is only considered to be based on an agreement 'where the structure of the relevant footnote in the original judgement cites the agreed facts between the parties as the *primary source of authority*.'"[49] The Chamber notes that it already declined to take judicial notice of six of the adjudicated facts of which the Accused has requested reconsideration because they are based on an agreement between the parties in the original judgement.[50] The Chamber further notes that the Accused misconstrues the *Tolimir* Trial Chamber's position on this aspect of the test in the First Motion, and, moreover, fails to mention that the *Tolimir* Trial Chamber did not deny judicial notice of any proposed facts on this basis. In light of the Accused's failure to articulate any specific argument as to why the remainder of the 36 facts judicially noticed by this Chamber failed to satisfy this test, the Chamber finds that it committed no clear error in reasoning.

19. Finally, recalling the Accused's argument in the First Motion on facts which may go to the "core of the case",[51] the Chamber finds that it committed no clear error in reasoning in taking judicial notice of such facts. There is no part of the test for taking judicial notice of adjudicated facts that prohibits such judicial notice of facts which go to the core of the case. Should a Trial Chamber choose to exercise its discretion not to take judicial notice of facts which it considers go to the core of that particular case, this does not mean that a different Trial Chamber should reach the same conclusion about these facts, or indeed exercise its discretion in a similar manner. Indeed, in *Karemera et al.*, the Appeals Chamber affirmed that it has never gone so far as to suggest that judicial notice under Rule 94(B) cannot extend to facts that "go directly or indirectly" to the criminal responsibility of the accused (or that "bear" or "touch" thereupon).[52] In fact, the Appeals Chamber stated that "[f]acts that are not related, directly or indirectly, to that criminal responsibility are not relevant to the question to be adjudicated at trial", and added that "judicial notice under Rule 94(B) is in fact available *only* for adjudicated facts that bear, at least in some respect, on the criminal responsibility of the accused".[53] The Appeals Chamber is clear in its distinction of adjudicated facts in this category, and those facts which relate to the acts, conduct, and mental state of the accused. In *Karemera et al.*, it held that

[49] *Tolimir* Decision, para. 25; First Decision on Adjudicated Facts, para. 32; Second Decision on Adjudicated Facts, para. 46; Third Decision on Adjudicated Facts, para. 47.

[50] Adjudicated facts 386, 509, 723, 916, 1729, and 1736 were denied judicial notice in the Second Decision on Adjudicated Facts and Third Decision on Adjudicated Facts. Second Decision on Adjudicated Facts, para. 46; Third Decision on Adjudicated Facts, para. 49.

[51] First Motion, para. 8.

[52] *Prosecutor v. 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* Appeal Decision"), para. 48 (citations omitted).

[53] *Karemera* Appeal Decision, para. 48 (citations omitted).

while this latter category of facts "warrants complete exclusion, […] other facts bearing less directly on the accused's criminal responsibility are *left to the Trial Chamber's discretion*".[54]

20. The Chamber therefore concludes that in the Decisions on Adjudicated Facts, it carefully analysed all of the adjudicated facts challenged by the Accused under the proper Rule 94(B) framework. Although this Chamber did not conduct its analysis with specific regard to proposed facts which may go to the "core of the case", it notes that this is a new approach taken by the *Tolimir* and *Stanišić & Župljanin* Trial Chambers and not one this Chamber is obliged to follow. Moreover, both the *Tolimir* and *Stanišić & Župljanin* Trial Chambers expressly noted that taking judicial notice of facts which go the "core of the case" falls within the discretion of the Trial Chamber to determine whether taking judicial notice of such facts would serve the interests of justice and a fair trial.[55] They do not, therefore, suggest that this is a new aspect of the Rule 94(B) test applied by previous Chambers, including this one. Even if the *Tolimir* and *Stanišić & Župljanin* Trial Chambers had issued their respective decisions *before* the Decisions on Adjudicated Facts issued in this case, this Chamber would have applied the Rule 94(B) framework in the same way, and would have similarly exercised its discretion to grant or deny judicial notice of the proposed adjudicated facts, taking into account the particular context of this case.

21. With respect to the second prong of the test for reconsideration, the Accused reiterates his position that he objects to the "widespread use of judicial notice of adjudicated facts in his case, which he contends infringes on the presumption of innocence and reverses the burden of proof".[56] The Appeals Chamber has held that, by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which does not have to be proven again at trial.[57] However, judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution. As such, the Prosecution is only relieved of its initial burden to produce evidence on the point, but the Accused may then put the point into question by introducing reliable and credible evidence to the contrary.[58]

22. Pursuant to Rule 89(C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. At the end of the trial, the Chamber is obliged to assess all of the evidence presented to it and attribute weight, if any, appropriately. As previously stated by

[54] *Karemera* Appeal Decision, para. 51 (citations omitted) (emphasis added).
[55] *Stanišić & Župljanin* Decision, para. 46; *Tolimir* Trial Decision, para. 33.
[56] Second Motion, para. 5; First Motion, para. 11.
[57] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4.
[58] *Karemera* Appeal Decision, para. 42.

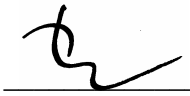
this Chamber, any facts that have been judicially-noticed in the case at hand will be taken into consideration in this process of assessment. Thus, the Chamber may base its final conclusions as to the individual criminal responsibility of the Accused on the evidence presented to it, along with any adjudicated facts from prior proceedings which have been the subject of judicial notice. The Chamber further notes that it is open to the Accused to challenge any or all of the judicially-noticed facts in this case and, indeed, in light of the Accused's assertions that he intends to refute all aspects of the Prosecution's case,[59] it may reasonably be assumed that he will attempt to do so. Moreover, not only will the Accused have an opportunity to bring evidence to rebut those adjudicated facts which are the subject of judicial notice, but the Accused has been on notice about the Decisions on Adjudicated Facts for several months—up to almost a year in some instances—which has given him sufficient time to prepare his case in rebuttal.

23. The Chamber has previously dealt with similar arguments raised by the Accused and has found that the Accused suffers no injustice through the approach to judicial notice adopted by it.[60]

IV. Disposition

24. For all of the reasons outlined above, the Trial Chamber, pursuant to Rules 54 and 73(B) of the Rules, hereby **DENIES** the Motions.

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



Judge O-Gon Kwon
Presiding

Dated this fourteenth day of June 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

[59] *See, inter alia*, Status Conference, T. 180 (2 April 2009); Response to First Prosecution Motion for Judicial Notice of Adjudicated Facts, 30 March 2009, paras. 6–9; Response to Third Prosecution Motion for Judicial Notice of Adjudicated Facts and Motion for List of Witnesses to be Eliminated, 29 May 2009, paras. 2, 4; Response to Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 22 July 2009, para. 2.

[60] *See, e.g.*, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits pursuant to Rule 92 *quater*, 20 August 2009, para. 10; Decision on Accused's Motion to Preclude Evidence or to Withdraw Adjudicated Facts, 31 March 2010, paras. 11–12, 17; Decision on Motion for Stay of Proceedings, 8 April 2010, paras. 5–7.