



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

Case No. IT-98-32/1-T
Date: 12 November 2008
Original: English

IN TRIAL CHAMBER III

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

Registrar: Mr. Hans Holthuis

Decision of: 12 November 2008

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON SREDOJE LUKIĆ'S AMENDED
MOTION FOR JUDICIAL NOTICE OF ADJUDICATED
FACTS WITH ANNEX A**

The Office of the Prosecutor

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I. INTRODUCTION

1. Trial Chamber III (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of “Notice of withdrawal of ‘Sredoje Lukić’s motion for judicial notice of adjudicated facts’ from 9 September 2008 and submission of ‘Sredoje Lukić’s amended motion for judicial notice of adjudicated facts with Annex A’” filed on 12 September 2008 (“12 September Motion”), wherein the Defence of Sredoje Lukić requests, pursuant to Rule 94(B) of the Rules of Procedure and Evidence (“Rules”), that the Trial Chamber take judicial notice of three proposed adjudicated facts (“Proposed Facts”) derived from the trial judgement delivered in *Prosecutor v. Mitar Vasiljević*¹:

1. The medical records from the Užice hospital, were accurate and “these records give rise, at least, to the reasonable possibility that the Accused [Vasiljević] was present at the Užice hospital as stated in those records.”
2. “[T]here was no evidence to suggest that these hospital records had been interfered with.”
3. “[T]he Accused [Vasiljević] was in hospital on the date and at the time recorded in the protocol of patients admitted to the Užice hospital.”²

II. PROCEDURAL HISTORY

2. Prosecution responded on 26 September 2008 (“Prosecution Response”).³ The Defence of Milan Lukić also responded on 26 September 2008 (“Milan Lukić Response”).⁴ On 2 October 2008, the Defence of Sredoje Lukić filed a reply (“Sredoje Lukić Reply”),⁵ wherein it requested leave to reply. Leave is granted.

III. SUBMISSIONS OF THE PARTIES

3. The Sredoje Lukić Defence submits that the Proposed Facts satisfy the requirements for judicial notice of adjudicated facts under the Tribunal’s Rules and jurisprudence.⁶ The Defence further submits that judicial notice of the Proposed Facts will expedite the trial of the Accused by

¹ *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-29-T, Judgment, 29 November 2002.

² Notice of withdrawal of ‘Sredoje Lukić’s motion for judicial notice of adjudicated facts’ from 9 September 2008 and submission of ‘Sredoje Lukić’s amended notice of adjudicated facts with annex A’, 12 September 2008 (“12 September Motion”), p. 8.

³ Prosecution’s response to Sredoje Lukić’s motion for judicial notice of adjudicated facts”, 26 September 2008 (“Prosecution Response”).

⁴ Milan Lukić’s response to Sredoje Lukić’s amended motion for judicial notice of adjudicated facts”, 26 September 2008, (“Milan Lukić Response”).

⁵ Sredoje Lukić’s request for leave to reply and reply to Prosecution’s and Milan Lukić’s responses to Sredoje Lukić’s motion for judicial notice of adjudicated facts, 2 October 2008 (“Sredoje Lukić Reply”).

⁶ *Ibid.*, paras 7-8.

obviating the need for the presentation of evidence in proof of issues already adjudicated in the *Vasiljević* Trial Judgement, as reflected in the Proposed Facts.⁷ It is also argued that the granting of the 12 September Motion will serve the interests of judicial economy by enabling the Trial Chamber to devote a greater portion of its time and resources to considering the Accused's alibi and alleged criminal responsibility.⁸

4. The Prosecution Response asserts that the Proposed Facts do not qualify for judicial notice because they were never truly adjudicated to begin with.⁹ Noting that the Proposed Facts comprise the *Vasiljević* Trial Chamber's findings on the alibi defence raised in that case, the Prosecution contends that the standard employed in the assessment of evidence geared towards establishing an alibi, is considerably lower than that employed with respect to evidence adduced for the grounding of a conviction.¹⁰ The Prosecution thereby argues that factual findings concerning an alibi defence, being the products of so low a standard of evidentiary scrutiny, cannot be regarded as having been truly adjudicated. As a result, they should not be accorded "the presumption of reliability that justifies the taking of judicial notice of adjudicated facts".¹¹

5. The Prosecution further submits that judicial notice of the Proposed Facts would not serve the interests of justice, particularly in view of the fact that they are not *prima facie* relevant to the current proceedings, in that they "do not relate directly to proof or disproof of any element of any crime in the Indictment".¹² Noting that the underlying purpose of the Defence's request for the admission of the Proposed Facts is to attack the credibility of the Prosecution's witnesses, the Prosecution submits that the question of credibility is one which should be assessed by each Trial Chamber in each distinct set of proceedings.¹³ It is thereby argued that in the interests of justice, the Trial Chamber should refuse to take judicial notice of the Proposed Facts.¹⁴

6. Alternatively, in the event that the Trial Chamber decides to take judicial notice of the Proposed Facts, the Prosecution requests: (1) that the Chamber clearly indicate that its decision does not constitute a legal determination with regard to the credibility of the Prosecution's witnesses, and (2) that the Chamber take judicial notice of six facts extracted from the *Vasiljević* Trial Judgement

⁷ *Ibid.*, para. 3.

⁸ *Ibid.*, para. 8.

⁹ Prosecution Response, para. 7.

¹⁰ *Ibid.*, paras 8-9. The Prosecution contrasts the evidential standard for establishing an alibi, that is, that the evidence should merely raise the reasonable possibility that an accused was not present at the crime scene, with the standard required for evidence grounding a conviction, that is, proof beyond reasonable doubt.

¹¹ *Ibid.*, para. 9.

¹² *Ibid.*, paras 11-12.

¹³ *Ibid.*, para. 12.

¹⁴ *Ibid.*, para. 13.

(“Prosecution’s Proposed Facts”) “in order to put the Proposed Facts in their proper context”.¹⁵ The Prosecution’s Proposed Facts are as follows:

1. VG-87, whilst he was hiding in the attic on Pionirska Street, had Mitar Vasiljević within his sight for a substantial part of the period from noon to 4:00 p.m. on 14 June 1992.
 2. Mitar Vasiljević was in Pionirska Street for a substantial part of the afternoon, for about four hours from midday, on 14 June 1992.
 3. The Kortinik group arrived in Pionirska Street at about 2:00 p.m. [on 14 June 1992].
 4. Mitar Vasiljević did address the [Koritnik] group and he did hand a piece of paper to Mujo Halilović which he suggested was as a guarantee of their safety.
 5. Mitar Vasiljević intended to ensure that the [Koritnik] group remained together.
 6. Mitar Vasiljević did seek to ensure that the [Koritnik] group stayed together. He did this because he knew that some evil was to befall them.¹⁶
7. The Milan Lukić Response supports the granting of judicial notice to the first and third Proposed Facts in the 12 September Motion.¹⁷ The Defence submits, however, that the second Proposed Fact should not be judicially noticed as its formulation in the 12 September Motion divests it of its proper context relative to the original section of the *Vasiljević* Trial Judgement from which it was derived.¹⁸ It argues that the construction of the second Proposed Fact is highly vague owing to the fact that while the original passage of the Judgement from which the Proposed Fact is extracted discusses the medical records sourced from both the Užice Hospital and the Višegrad Medical Centre, the second Proposed Fact fails to indicate specifically which of these two institutions’ records it refers to.¹⁹
8. The Sredoje Lukić Reply counters that the Prosecution has failed to substantiate its submission that factual findings relating to an alibi defence cannot be regarded as having been truly adjudicated with any relevant case law. It argues that nothing in the Tribunal’s jurisprudence suggests that factual findings which relate to an alibi defence raised in a previous case cannot be considered as having been adjudicated for the purposes of Rule 94(B).²⁰
9. With regard to the Prosecution’s assertion that the Proposed Facts are irrelevant to the current proceedings as they do not directly relate to the proof or disproof of any element of any crime in the Indictment, the Defence contends that they do relate to the criminal responsibility of

¹⁵ *Ibid.*, paras 14-15.

¹⁶ *Ibid.*, Annex A, Additional proposed facts, p. 2.

¹⁷ Milan Lukić Response, para. 6.

¹⁸ *Ibid.*, para. 7.

¹⁹ *Ibid.*, para. 8.

²⁰ Sredoje Lukić Reply, para. 11.

the Accused and that, consequently, judicial notice of them would serve the interests of justice.²¹ The Defence notes that a disputed issue in the present case is whether the Accused was present on Pionirska Street on 14 June 1992. It argues that as the Proposed Facts are relevant in challenging the evidence of Prosecution witnesses who place the Accused on the scene of the crime along with Mitar Vasiljević, they bear, at least indirectly, on the criminal responsibility of the Accused and are therefore admissible under Rule 94(B).²²

10. The Defence for Sredoje Lukić further submits - in reply to the Defence for Milan Lukić's assertion that they have been taken out of the context of the *Vasiljević* Trial Judgement from which they were derived - that all of the Proposed Facts are contextually sound.²³

IV. APPLICABLE LAW

11. Rule 94(B) provides that a Trial Chamber may, either *proprio motu* or at the request of a party, "decide to take notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings". Rule 94(B) is regarded as conferring discretion upon the Trial Chamber to determine which adjudicated facts are eligible for judicial notice.²⁴ In exercising its discretion under Rule 94(B), the Trial Chamber must assess: (1) whether each adjudicated fact satisfies the various requirements enumerated in the Tribunal's case law for judicial notice, and (2) whether a fact, despite having satisfied the aforementioned requirements, should be excluded on the basis that its judicial notice would not be in the interests of justice.²⁵ The requirements for admissibility under Rule 94(B) are as follows:

- (a) The fact must be relevant to the current proceedings;²⁶
- (b) The fact must be distinct, concrete and identifiable;²⁷

²¹ *Ibid.*, paras 15-16. The Defence of Sredoje Lukić cites the Appeals Chamber finding in *Prosecutor v. Eduoard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's interlocutory appeal of decision on judicial notice, 16 June 2006 ("*Karemera* Appeal Decision"), para. 48. The Defence of Sredoje Lukić emphasises the Appeals Chamber's finding that judicial notice under Rule 94(B) is in fact only available for adjudicated facts "that bear, at least in some respect, on the criminal responsibility of the accused". It is argued that in light of this finding judicial notice may be taken of facts, such as the instant Proposed Facts, which go indirectly to the criminal responsibility of the Accused.

²² Sredoje Lukić Reply, para. 16.

²³ *Ibid.*, para. 13.

²⁴ *Karemera* Appeal Decision, para. 41.

²⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Popović's motion for judicial notice of adjudicated facts with Annex, 2 June 2008 ("*Popović* Decision"), para. 6; *Prosecutor v. Dragomir Milošević*, decision on Prosecution's motion for notice of adjudicated facts and Prosecution's catalogue of agreed facts with dissenting opinion of Judge Harhoff, IT-98-29/1-T, 10 April 2007 ("*Dragomir Milošević* Trial Chamber Decision"), para. 28.

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

²⁷ *Perišić* Decision, para. 16; *Popović* Decision, para. 6.

- (c) The fact, as formulated by the moving party, must not differ in any substantial way from the formulation of the original judgment;²⁸
- (d) The fact must not be unclear or misleading in the context in which it is placed in the moving party's motion.²⁹ In addition, the fact must be denied judicial notice "if it will become unclear or misleading because one or more of the surrounding purported facts will be denied judicial notice",³⁰
- (e) The fact must be identified with adequate precision by the moving party;³¹
- (f) The fact must not contain characterisations or findings of an essentially legal nature;³²
- (g) The fact must not be based on an agreement between the parties to the original proceedings;³³
- (h) The fact must not relate to the acts, conduct or mental state of the accused;³⁴ and
- (i) The fact must clearly not be subject to pending appeal or review.³⁵

V. DISCUSSION

12. The Trial Chamber takes note of the Prosecution's submission that findings of fact regarding alibi evidence should not be regarded as truly adjudicated facts owing to the "much lower level of scrutiny" involved in weighing alibi evidence, against the higher degree of scrutiny employed in analysing evidence used to ground a conviction.³⁶

13. While indeed the defence in raising alibi has only to "raise reasonable doubt about the presence of the accused at the crime site",³⁷ and while "the Prosecution's burden is to prove the accused's guilt as to the alleged crimes beyond reasonable doubt in spite of the proffered alibi",³⁸ it is the Trial Chamber's view that this does not imply that alibi evidence will be any less subject to the stringent tests and careful scrutiny inherent to the trial process. The Prosecution for example, is afforded the opportunity to cross examine on such evidence, and may produce evidence of its own to counter the alibi defence. Furthermore, as part of the deliberation process, Trial Chambers conduct meticulous evaluations of both the defence's alibi evidence and the Prosecution's alibi

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Popović* Decision, para. 10.

³¹ *Perišić* Decision, para. 16; *Popović* Decision, para. 6.

³² *Perišić* Decision, para. 16; *Popović* Decision, para. 6; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-AR73.1, Decision on interlocutory appeals against Trial Chamber's decision on Prosecution's motion for judicial notice of adjudicated facts and Prosecution's catalogue of agreed facts, 26 June 2007 ("*Dragomir Milošević* Appeal Decision"), paras 19-22.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Prosecution Response, paras 8-9.

³⁷ *Jean de Dieu Kamuhanda v. Prosecutor*, Case No. ICTR-00-54A-A, Judgement, (Reasons), 1 June 2001, para. 167.

³⁸ *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-A, Judgement, 27 September 2007, para. 63.

rebuttal evidence – assessing credibility, evidentiary value and evidential weight - prior to making any factual determinations. The Trial Chamber consequently considers that findings of fact resulting from so thorough a judicial process properly attract the presumption of reliability. In light of the foregoing, the Trial Chamber therefore finds that Proposed Facts 1, 2 and 3 of the 12 September Motion, may indeed be regarded as adjudicated facts.

14. With particular regard to Proposed Fact 2, the Trial Chamber notes that it refers to “these hospital records”. In the original context of the *Vasiljević* Trial Judgement,³⁹ mention is made of only two medical institutions – the Užice Hospital and the Višegrad Medical Centre. The first and third Proposed Facts make specific and exclusive mention of the Užice Hospital. The Trial Chamber therefore concludes that “these hospital records” also refers to the Užice Hospital records. Consequently, the Trial Chamber finds that the second Proposed Fact is not misleading or contextually unsound in its construction.

15. The Trial Chamber further considers Proposed Facts 1, 2 and 3 of the 12 September Motion to be relevant to the Sredoje Lukić defence strategy and therefore relevant to the current proceedings. The Chamber also finds that they cannot be denied judicial notice on any of the bases set out in paragraph 11 above. The Trial Chamber therefore takes judicial notice of Proposed Facts 1 through 3.

16. Having reviewed all six of the Prosecution’s Proposed Facts, the Trial Chamber considers that they assist in providing a more complete picture with regard to Mitar Vasiljević’s whereabouts on 14 June 1992, as well as important timeframes relative to his whereabouts on that day. The Chamber also finds that they cannot be denied judicial notice on any of the bases set out in paragraph 11 above. The Trial Chamber therefore finds that the Prosecution’s Proposed Facts are relevant to the current proceedings, and takes judicial notice of them.

17. The Trial Chamber finally reminds the parties that the conferral of judicial notice on these adjudicated facts does not constitute a predetermination with regard to the credibility of the witnesses of any party to the proceedings or the Accused’s alleged criminal responsibility.

³⁹ Vasiljević Trial Judgement, para. 138.

VI. DISPOSITION

18. For the foregoing reasons the Trial Chamber:
- (a) **GRANTS** leave to the Defence of Sredoje Lukić to reply, pursuant to Rule 126 *bis*;
 - (a) **GRANTS** the 12 September Motion in its entirety; and
 - (c) **GRANTS** the Prosecution request that judicial notice be taken of the Prosecution's Proposed Facts.

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



Judge Robinson
Presiding Judge

Dated this twelfth day of November 2008

At The Hague

The Netherlands

[Seal of the Tribunal]