

**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-98-32/1-T
Date: 31 October 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: 31 October 2008

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON MILAN LUKIĆ'S REQUEST FOR
RECONSIDERATION OF OR CERTIFICATION TO
APPEAL THE DECISION ON PROSECUTION'S
MOTION FOR NOTICE OF ADJUDICATED FACTS**

The Office of the Prosecutor

Mr. Dermot Groome
Mr. Frédéric Ossogo
Ms. Laurie Sartorio
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Counsel for the Accused

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

TRIAL CHAMBER III (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of “Milan Lukić’s request for reconsideration or certification to appeal the decision on Prosecution’s motion for notice of adjudicated facts” filed 29 August 2008 (“Motion”), whereby the Defence of Milan Lukić (“Defence”) requests that the Trial Chamber either reconsider or grant certification to appeal the “Decision on Prosecution’s motion for judicial notice of adjudicated facts”, issued 22 August 2008 (“22 August Decision”), to the extent that the Trial Chamber took judicial notice of adjudicated facts 52, 54, 56, 58-60, 62-66, 68-69 and 71-79.¹

1. Procedural history

1. The Prosecution responded on 12 September 2008 (“Response”).² The Defence of Sredoje Lukić did not respond within the time prescribed by Rule 126 *bis* of the Rules of Procedure and Evidence (“Rules”).

2. Arguments of the parties

(a) Regarding the Defence request for reconsideration

2. The Defence submits that the Trial Chamber’s decision to take judicial notice of adjudicated facts 52, 54, 56, 58-60, 62-66, 68-69 and 71-79 violates the Accused’s right to be presumed innocent under Article 21(3) of the Statute of the Tribunal (“Statute”), as these facts go to the acts and conduct of the Accused, as well as “specific incidents of which direct commission is alleged”.³

3. The Defence also alleges that discrepancies have emerged in the evidence on the Prosecution’s case and argues that as a result, the matters contained in the contested adjudicated facts are more appropriate for determination at the end of the trial proceedings, after the Defence’s witnesses have been heard.⁴

¹ Adjudicated facts 52, 54, 56, 58-60, 62-66, 68-69 and 71-79 were among 79 adjudicated facts proposed for judicial notice pursuant to Rule 94(B) in the “Prosecution’s motion for notice of adjudicated facts”, filed on 28 February 2008. These facts were in turn derived from *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-29-T, Judgement, 29 November 2002, and *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-29-A, Judgement, 25 February 2004.

² Prosecution response to Milan Lukić’s request for reconsideration or certification to appeal the decision on Prosecution’s motion for notice of adjudicated facts, 12 September 2008 (“Response”).

³ Motion, para. 7.

⁴ Motion, para. 8.

4. In its Response, the Prosecution submits the standard set by the Tribunal's jurisprudence⁵ for the reconsideration of interlocutory decisions, noting that a Trial Chamber has an inherent discretionary power to reconsider a previous interlocutory decision in exceptional circumstances where: (1) a clear error of reasoning is demonstrated or (2) where it proves necessary to do so in order to prevent injustice.

5. The Prosecution argues that the Defence "has failed to demonstrate that the Chamber has made a clear error of reasoning",⁶ emphasising that the Defence is obliged to "state *specifically*" how the Trial Chamber's decision to take judicial notice of the adjudicated facts in question constituted a clear error of reasoning.⁷ The Prosecution also submits that the Defence's reference to the presumption of innocence under Article 21(3) is insufficient to satisfy the first limb of the standard for reconsideration.⁸

6. The Prosecution further submits that the Defence has failed to illustrate how reconsideration of the Trial Chamber's decision to admit the adjudicated facts in question would prevent an injustice.⁹ The Prosecution asserts that "nothing prevents a Trial Chamber from rescinding judicial notice of a particular fact".¹⁰ Moreover, the Prosecution argues that the Trial Chamber may: (1) admit other evidence deemed to be of probative value pursuant to Rule 89(C); (2) order the Prosecution or any other party to produce evidence pursuant to Rule 98; and (3) adjust the evidentiary weight to be accorded to an adjudicated fact at a later juncture.¹¹ In the Prosecution's view, submits that the taking of judicial notice of adjudicated facts does not preclude the Defence from adducing evidence during the course of the trial to rebut the veracity of the adjudicated facts.¹²

(b) Regarding the Defence request for certification to appeal

7. In the alternative, the Defence submits that the 22 August Decision satisfies the prerequisites for certification. It is argued that: (1) "adjudicated facts are a matter that would

⁵ Response, para. 7, citing Decision on Sredoje Lukić's request for reconsideration or, in the alternative, certification to file an interlocutory appeal on the Trial Chamber's decision of 15 May 2008 and on Milan Lukić's motion to extend deadlines, notice of joinder in motion to reconsider decision or in the alternative for certification for appeal, 9 June 2008, p. 4, and *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on the Prosecution motion for reconsideration, 23 August 2006 ("*Rasim Delić* Decision").

⁶ Response, para. 8.

⁷ *Id.*, para. 10 (emphasis in the original).

⁸ *Ibid.*

⁹ *Id.*, paras 8 and 11.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Response, para. 14.

significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”, and (2) “an interlocutory decision would materially advance the proceedings”.¹³

8. The Defence submits that adjudicated facts 52, 54, 56, 58-60, 62-66, 68-69 and 71-79 contain descriptions of criminal circumstances and that consequently, the Trial Chamber’s decision to judicially notice these facts, implicates the Accused in the criminal conduct which they describe. In light of this submission, the Defence argues that the 22 August Decision will prejudice the Accused’s right to be presumed innocent under Article 21(3) of the Statute.¹⁴ The Defence further argues that the 22 August Decision will significantly impact the outcome of the trial in view of the discrepancies in the evidence of the Prosecution’s witnesses.¹⁵

9. With regard to the second prerequisite for granting certification to appeal, the Defence submits that by “providing clear guidelines for the present case in the presentation of evidence and foundational base for the judgement”, an immediate resolution by the Appeals Chamber on the 22 August Decision, would materially advance the present proceedings.¹⁶

10. In its Response the Prosecution argues that the 22 August Decision would not adversely affect the fair and expeditious conduct of the proceedings or the fair outcome of the trial in light of the fact that the Defence has the opportunity to produce evidence challenging a particular adjudicated fact.¹⁷ Finally, the Prosecution rejects the Defence submission that an immediate resolution by the Appeals Chamber would materially advance the current proceedings in light of the fact the Trial Chamber may: (1) “as the trial progresses [...] rescind judicial notice of a particular fact”; (2) admit other evidence it might deem of probative value under Rule 89(C); (3) order the Prosecution or other party to produce additional evidence pursuant to Rule 98 and (4) adjust the evidentiary weight assigned to an adjudicated fact at a later stage.¹⁸

¹³ Motion, para. 9.

¹⁴ *Ibid.*, para. 11.

¹⁵ *Ibid.*, para. 10. The Defence also argues: (1) that the admission of the adjudicated facts in question would amount to a trial of the Accused *in absentia*, contrary to his right under Article 20(4)(d) of the Statute, and (2) that the Accused’s right to a fair trial would be infringed by the fact that these adjudicated facts were determined based on the “limited evidence” produced in the *Vasiljević* proceedings for the specific purpose of determining Mitar Vasiljević’s culpability. *See*, Motion, para. 12.

¹⁶ *Ibid.*, para. 16.

¹⁷ Response, para. 18.

¹⁸ *Ibid.*, para.21.

3. Applicable law

(a) Regarding reconsideration

11. A Trial Chamber has an inherent discretionary power to reconsider a previous interlocutory decision “if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice”.¹⁹

(b) Regarding certification to appeal

12. Pursuant to Rule 73(B), the Chamber may grant certification of an interlocutory appeal if the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial (“first prong”) and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings (“second prong”). Both prongs must be met in order for certification to be granted.²⁰

4. Discussion

(a) Regarding the Defence request for reconsideration

13. The Trial Chamber takes note of the Defence’s submission that the Chamber’s decision to take judicial notice of adjudicated facts 52, 54, 56, 58-60, 62-66, 68-69 and 71-79 has a prejudicial effect on the trial proceedings by infringing the Accused’s right to be presumed innocent under Article 21(3) of the Statute. The Trial Chamber considers that this submission largely echoes a similar line of reasoning already made in “Milan Lukić’s response to ‘Prosecution’s motion for judicial notice of adjudicated facts with public annex A’”²¹ - and already considered by the Trial Chamber in the deliberations which resulted in its 22 August Decision.

14. The Trial Chamber’s decision to take judicial notice of adjudicated facts does not fetter its inherent discretion to decide what degree of evidential weight, if any, to be ultimately assigned to those facts. As a result, the admission of the adjudicated facts cannot be said to amount to a denial to the Accused of his right to be presumed innocent under Article 21(3). Furthermore, the Defence

¹⁹ *Juvenal Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, 23 May 2005 (“*Kajelijeli Appeal Judgement*”), para. 204; citing *Nahimana et al v. The Prosecutor*, ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza’s Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005, p. 2; *Rasim Delić* Decision, pp. 3-4; *Slobodan Milošević*, Decision, para. 25, footnote 40 citing the *Kajelijeli Appeal Judgement*, paras 203-204.

²⁰ *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Decision on Prosecution request for certification for interlocutory appeal of ‘Decision on Prosecutor’s motion seeking leave to amend the indictment’, 12 January 2005, p. 1.

²¹ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Milan Lukić’s Response to “Prosecution’s Motion for Judicial Notice of Adjudicated Facts with Public Annex A” filed 28 March 2008, para. 18.

is fully entitled to adduce evidence during the course of its case to rebut the factual circumstances encapsulated in the adjudicated facts in question.²²

15. The Trial Chamber finds that the Defence has failed to show that the Chamber committed a clear error of reasoning in the 22 August Decision or that reconsideration is necessary to prevent an injustice.

(b) Regarding the Defence request for certification

16. The Trial Chamber considers that the mechanism of judicial notice facilitates the expeditious conduct of trial proceedings. The Chamber further considers that its findings above in paragraph 14 apply equally in this respect. Thus, given that the Defence may adduce evidence to rebut the judicially noticed facts, the fairness of the proceedings or the outcome of the trial would not be significantly affected by the 22 August Decision as such. The Trial Chamber therefore finds that the Defence has failed to satisfy the first prong.

17. In view of the fact that both prongs of Rule 73(B) are cumulative, the Defence request for certification fails.

²² *Prosecutor v. Eduoard Karemera et al*, ICTR-98-44-AR73(C), Decision on Prosecutor's interlocutory appeal on judicial notice, 16 June 2006, paras 48-49 and 52. At para. 49, the Appeals Chamber states as follows:

How can this [...] be reconciled with the presumption of innocence? First, as noted above, judicial notice under Rule 94(B) does not shift the ultimate burden of persuasion, but only the initial burden of production (the burden to produce credible and reliable evidence sufficient to bring the matter into dispute). [T]he accused bears the burden of production with respect to a matter centrally related to the guilt of the accused; yet this shift does not violate the presumption of innocence because, as the Appeals Chamber has repeatedly recognized, the prosecution retains the burden of proof of guilt beyond a reasonable doubt".

5. Disposition

18. The Trial Chamber **DENIES** the Motion in its entirety.

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



Judge Patrick Robinson
Presiding Judge

Dated this thirty-first day of October 2008
At The Hague
The Netherlands

[Seal of the Tribunal]