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: 21 January 2014

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: **21 January 2014**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS RELATED TO COUNT ONE

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 Judicial Notice of Adjudicated Facts: Count One", filed on 29 October 2013 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests that the Chamber exercise its power under Rule 94(B) of the Tribunal's Rules of Procedure and Evidence ("Rules") to take judicial notice of 26 facts ("Proposed Facts") relating to Count 1 of the Third Amended Indictment ("Indictment") and in particular, to the municipality of Prijedor, which were adjudicated by the Trial Chambers in the cases of *Prosecutor v. Krajišnik* ("*Krajišnik* case"), *Prosecutor v. Brđanin* ("*Brđanin* case"), *Prosecutor v. Stakić* ("*Stakić* case), and *Prosecutor v. Sikirica et al*. ("*Sikirica* case").[1] The Accused submits that the Proposed Facts meet the requirements set out in relevant Tribunal jurisprudence, as confirmed by the Chamber's prior decisions on judicial notice of adjudicated facts.[2] Although the Accused considers the taking of judicial notice of adjudicated facts to be "fundamentally unfair when used against a party who did not participate in the underlying trial", given the "modest amount of time allocated to him to defend against Count One", he submits that it is necessary to seek judicial notice of the Proposed Facts.[3]

2. On 8 November 2013, the Office of the Prosecutor ("Prosecution") filed the "Prosecution Response to Karadžić's Motion for Judicial Notice of Adjudicated Facts: Count One" ("Response"), in which it argues that the Motion should, in large part, be dismissed because, except for parts of two of the Proposed Facts, none meet the requirements for judicial notice under Rule 94(B) of the Rules.[4] According to the Prosecution, the vast majority of the Proposed Facts are legal findings made by Trial Chambers in prior cases and the Accused makes no attempt to explain "how these plainly inadmissible findings should be judicially noticed".[5] The Prosecution also argues that many of the Proposed Facts are vague, abstract, or otherwise unclear.[6] Regarding the two facts which are, in part, "suitable for adjudication", the Prosecution

[1] Motion, para. 1. *See Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006 ("*Krajišnik* Trial Judgement"); *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement"); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement"); *Prosecutor v. Sikirica et al*., Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001 ("*Sikirica* Rule 98 *bis* Judgement").

[2] Motion, para. 2.

[3] Motion, para. 3.

[4] Response, paras. 1, 4, 6; Appendix A.

[5] Response, para. 2; Appendix A.

[6] Response, para. 3; Appendix A.

submits that except for the last sentence, the remainder of Proposed Fact 11 meets the requirements of Rule 94(B) of the Rules, and that while Proposed Fact 12 could be reformulated to meet these requirements, the remaining portions are already in evidence in this case and thus, the Prosecution argues, it is not necessary to take its judicial notice.[7]

II. Applicable Law

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

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

4. Rule 94(B) aims at achieving judicial economy and harmonising judgements of the Tribunal by conferring on the Trial Chamber discretionary power to take judicial notice of facts or documents from other proceedings. The Appeals Chamber has held that "[w]hen applying Rule 94 of the Rules, a balance between the purpose of taking judicial notice, namely to promote judicial economy, and the fundamental right of the accused to a fair trial must be achieved".[8]

5. As to the effects of taking judicial notice, the Appeals Chamber has held that "by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial".[9]

6. 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.[10] The test for determining whether to consider taking judicial notice of an adjudicated fact pursuant to Rule 94(B) has been established as follows:

(a) The fact must be relevant to the current proceedings;[11]

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[7] Response, paras. 4–5; Appendix A.

[8] *Prosecutor v. Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, para. 12.

[9] *Prosecutor v. S. 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.

[10] *See Prosecutor v. Mladić*, Case No. IT-09-92-AR73.1, Decision on Ratko Mladić's Appeal Against the Trial Chamber's Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 12 November 2013 ("*Mladić* Appeal Decision"), para. 25; *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 ("*Popović* Decision"), para. 4.

[11] *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Reasons for Oral Decision Rendered 21 April 2004 on Appellant's Motion for Admission of Additional Evidence and for Judicial Notice, 17 May 2004, para. 16.

(b) The fact must be distinct, concrete, and identifiable;[12]

(c) The fact, as formulated by the moving party, must not differ in any substantial way from the formulation of the original judgement;[13]

(d) The fact must not be unclear or misleading in the context in which it is placed in the moving party's motion.[14] 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";[15]

(e) The fact must be identified with adequate precision by the moving party;[16]

(f) The fact must not contain characterisations or findings of an essentially legal nature;[17]

(g) The fact must not be based on an agreement between the parties to the original proceedings;[18]

(h) The fact must not relate to the acts, conduct, or mental state of the accused;[19] and

(i) The fact must clearly not be subject to pending appeal or review.[20]

III. Discussion

7. The Prosecution has directed specific challenges against the admission of the Proposed Facts on the basis that they do not meet one or more requirements of the test set out in paragraph

[12] *See, e.g.*, *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008 ("*Perišic* Decision"), para. 18; *Prosecutor v. Mičo Stanišić*, Case No. IT-04-79-PT, Decision on Judicial Notice, 14 December 2007 ("*Stanišić* Decision"), para. 37; *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* Decision"), para. 12; *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts Following the Motions Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005, 14 April 2005 ("*Hadžihasanović* Decision"), p. 5; *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. 14.

[13] *Krajišnik* Decision, para. 14.

[14] *Karemera* Appeal Decision, para. 55; *Popović* Decision, para. 8.

[15] *Popović* Decision, para. 8

[16] *Prosecutor v. 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* Appeal Decision"), para. 12; *Popović* Decision, para. 9.

[17] *Popović* Decision, para. 10; *Krajišnik* Decision, para. 15. *See also Hadžihasanović* Decision, p. 5; *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice pursuant to Rule 94(B), 1 April 2004 ("*Mejakić* Decision"), p. 4; *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, para. 16; *Prlić* Decision, paras. 12, 19.

[18] *Popović* Decision, para. 11; *Mejakić* Decision, p. 4; *Prosecutor v. 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 92 *bis*, 28 February 2003, para. 15.

[19] *Mladić* Appeal Decision, paras. 80–81, 85; *Karemera* Appeal Decision, para. 50.

[20] *Mladić* Appeal Decision, paras. 92, 94; *Kupreškić* Appeal Decision, para. 6.

6 above. The Chamber has given consideration to all of these challenges and has also considered whether each fact proposed by the Accused meets the test in its entirety.

A. Challenges to Proposed Facts as legal characterisations or findings

8. The Chamber notes that the majority of the Prosecution's challenges to the admission of the Proposed Facts pursuant to Rule 94(B) of the Rules are based on the assertion that they contain legal characterisations. The Prosecution challenges Proposed Facts 1–10, portions of 11 and 12, 13–15, and 17–26 on this basis[21] and therefore the Chamber will first consider these Proposed Facts. The Chamber recalls that taking judicial notice of adjudicated facts does not serve the purpose of importing legal conclusions from past proceedings.[22] While a finding is a legal conclusion when it involves the interpretation or application of legal principles, many findings have a "legal aspect" in the broad sense of that term. The Chamber considers that it is necessary to determine on a case-by-case basis whether a proposed fact must be excluded because it contains findings or conclusions which are of an essentially legal nature, or whether the factual content prevails.[23]

9. The Chamber notes that many of the Proposed Facts contain legal characterisations, primarily referring to the crime of genocide, and genocidal intent in particular, in municipalities in the Autonomous Region of Krajina ("ARK"), as alleged in Count 1 of the Third Amended Indictment ("Indictment").[24] For example, Proposed Fact 1 states: "The Chamber does not find, however, that any of these acts were committed with the *intent to destroy, in part, the Bosnian-Muslim or Bosnian-Croat ethnic group, as such*" and Proposed Fact 2 states: "The Chamber finds that in no instance are the killings themselves sufficient to make a conclusive finding on whether the *perpetrator had a genocidal intent*".[25] The Chamber considers that Proposed Facts 1 and 2 amount to legal findings pertaining to the charge of genocide as alleged in Count 1 of the Indictment, and are thus not available for judicial notice under Rule 94(B) of the Rules. Similarly, the Chamber finds that Proposed Facts 4, 5, 7, 8, 9, 13, 14, 15, 19, 20, 21, 22, 23, 24,

[21] *See* Response, Appendix A.

[22] *See* Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009 ("First Decision on Adjudicated Facts"), para. 29; Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 July 2009 ("Third Decision on Adjudicated Facts"), para. 40; Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 October 2009 ("Second Decision on Adjudicated Facts"), para. 43; Decision on Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010 ("Fourth Decision on Adjudicated Facts"), para. 76; Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010 ("Fifth Decision on Adjudicated Facts"), para. 46.

[23] *See* First Decision on Adjudicated Facts, para. 29; Second Decision on Adjudicated Facts, para. 43; Third Decision on Adjudicated Facts, para. 40; Fourth Decision on Adjudicated Facts, para. 76; Fifth Decision on Adjudicated Facts, para. 46.

[24] Indictment, paras. 36–40.

[25] *See* Motion, para. 1 (emphasis added).

25, and 26 consist entirely of legal characterisations relating to the charge of genocide and thus they are not appropriate for judicial notice. Accordingly, the Chamber will not take judicial notice of Proposed Facts 1, 2, 4, 5, 7, 8, 9, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, and 26.

10. Moreover, the Chamber considers that certain portions of Proposed Facts 3,[26] 6,[27] 10,[28] 11,[29] 12,[30] 17,[31] and 18[32] contain findings or characterisations of a legal nature. The Chamber considers that these portions of Proposed Facts 3, 6, 10, 11, 12, 17, and 18 are thus unavailable for judicial notice, will exercise its discretion pursuant to Rule 94(B) to remove them,[33] and will consider taking judicial notice of the remaining portions as long as the remaining requirements of the test, as set out in paragraph 6 above, are met. In this regard, the Chamber notes that the Prosecution has also challenged the admissibility of portions of Proposed Facts 3, 6, 10, 12, 17, and 18 on other bases and therefore the Chamber will discuss these specific challenges below.[34]

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[26] The last sentence of **Proposed Fact 3** states: "Considering the evidence as a whole, the Chamber can make no conclusive finding that any acts were *committed with the intent to destroy, in part, the Bosnian-Muslim or Bosnian-Croat ethnic group, as such*". *See* Motion, para. 1 (emphasis added).

[27] The first and last sentences of **Proposed Fact 6** state: "Even the more extreme statements of the Accused [Krajišnik], such as his speech at the Bosnian-Serb Assembly session of 8 January 1993, *do not enable the Chamber to conclude that his intent* went further than the removal of Muslims and Croats from territories in Bosnia-Herzegovina. The discriminatory remarks uttered by the Accused [Krajišnik] at that time, and the Assembly resolution adopted in this connection, served, as the Chamber explained above, to retrospectively legitimize the forcible removal.[…] They did not reveal *an intent to destroy an ethnic group in whole or in part*". *See* Motion, para. 1 (emphasis added).

[28] The last sentence of **Proposed Fact 10** states: "The Trial Chamber has not found evidence of this alleged escalation into *genocide* in the territory of the ARK". *See* Motion, para. 1 (emphasis added).

[29] The last sentence of **Proposed Fact 11** states: "Whilst these utterances strongly suggest the Accused's discriminatory intent, however, they do not allow for the conclusion that the Accused *harboured the intent to destroy the Bosnian Muslims and Bosnian Croats of the ARK*". *See* Motion, para. 1 (emphasis added).

[30] The last three sentences of **Proposed Fact 12** state: "This speech is not unequivocal. The most that can safely be gleaned from it is that the Accused ultimately endorsed the war option, as suggested by Dragan Kalinić, and not the negotiation option. His response to Kalinić *does not allow the finding that he had genocidal intent*". *See* Motion, para. 1 (emphasis added). The Chamber notes the Prosecution's submission that the last three sentences of Proposed Fact 12 are legal characterisations. *See* Response, para. 5; Appendix A. The Chamber considers that the last sentence of Proposed Fact 12 is a legal finding and is therefore not appropriate for judicial notice; however, the Chamber does not find that the two preceding sentences are legal findings by the Trial Chamber in the *Brđanin* case and considers that they are thus available for judicial notice as long as the remaining requirements of the test, as set out in paragraph 6 above, are met.

[31] The last part of **Proposed Fact 17** states: "[…] the Trial Chamber is unable to infer *an intention to destroy the Muslim group*". *See* Motion, para. 1 (emphasis added).

[32] The last part of **Proposed Fact 18** states: "[…] the Trial Chamber is not satisfied that Drljača pulled the Crisis Staff *into a genocidal campaign*". *See* Motion, para. 1 (emphasis added).

[33] The Chamber refers to the Appeals Chamber's recent holding on a trial chamber's discretion to reformulate proposed facts, including the removal of portions which it finds are inconsistent with the criteria for judicial notice: "[T]he 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". *Mladić* Appeal Decision, para. 58. *But see Mladić* Appeal Decision, para. 62 (holding that the Trial Chamber in the *Mladić* case exceeded its discretion by excluding findings of a legal nature which changed the meaning of the finding in the original judgement).

[34] *See* Response, Appendix A.

The Chamber also notes that the Prosecution does not challenge the remaining portions of Proposed Fact 11 and thus the Chamber will address its admission below in a final section of this decision.

B. Challenges to Proposed Facts as vague, abstract, or unclear

11. The Prosecution also challenges Proposed Facts 1–3, 6–10, 13–26 on the basis that they are vague, abstract, or otherwise unclear.[35] The Chamber has already determined that it will not take judicial notice of Proposed Facts 1, 2, 7, 8, 9, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, and 26, and therefore finds that it is unnecessary to address this challenge to those Proposed Facts. The Chamber will thus only consider the remaining portions of Proposed Facts 3, 6, 10, 17, and 18, as well as Proposed Fact 16 in its entirety.

12. When considering whether the Proposed Facts are indeed sufficiently concrete, distinct, or identifiable under section [b] of the test set out in paragraph 6 above, the Chamber must examine the Proposed Facts in the context of the original judgement with "specific reference to the place referred to in the judgement and to the indictment period of that case".[36] Furthermore, "[t]he Chamber must also deny judicial notice where a purported fact is inextricably commingled either with other facts that do not themselves fulfil the requirements for judicial notice under Rule 94(B), or with other accessory facts that serve to obscure the principal fact."[37]

13. The Chamber will first consider the portions of Proposed Facts 3, 6, 10, 17, and 18 which remain to be analysed after the Chamber declined to take judicial notice of portions therein as legal characterisations in paragraph 10 above.

14. First, the remaining sentence of Proposed Fact 3 states: "The Chamber has considered the surrounding circumstances, including words uttered by the perpetrators and other persons at the scene of the crime and official reports on the crimes, in order to establish the *mens rea*".[38] The Chamber has considered this fact in the context of the relevant part of the *Krajišnik* Trial Judgement and the indictment period of that case; however considering Proposed Fact 3 as stated above, taken out of context from the remainder of the paragraph, the Chamber does not find that it is sufficiently concrete and identifiable as a whole for the purposes of judicial notice. Moreover, the Chamber also considers the phrases "surrounding circumstances" and

[35] *See* Response, para. 3; Appendix A.

[36] *Krajišnik* Decision, para. 14, note 44; *see also 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 ("*Stanišić & Župljanin* Decision"), para. 30; *Tolimir* Decisión, para. 13; *Hadžihasanović* Decision, p. 6.

[37] *Tolimir* Decision, para. 13 (citing *Prlić* Decision, para. 12).

[38] *See* Motion, para. 1.

"perpetrators and other persons" to be insufficiently concrete. The Chamber thus declines to take judicial notice of Proposed Fact 3.

15. With respect to Proposed Fact 6, the remaining portion states: "The discriminatory remarks uttered by the Accused [Krajišnik] at that time, and the Assembly resolution adopted in this connection, served, as the Chamber explained above, to retrospectively legitimize the forcible removal".[39] The Chamber considers that the phrases "at that time" and "the Assembly resolution adopted in this connection" are not sufficiently concrete and identifiable for the purposes of judicial notice and in addition, considers that the remaining portion of this proposed fact is not sufficiently clear without the context provided by the first and last sentences, which were denied judicial notice by the Chamber in paragraph 10 above. Therefore the Chamber will deny judicial notice of Proposed Fact 6.

16. The remaining portion of Proposed Fact 10 states: "The Prosecution submits that, no later than the 12 May 1992 SerBiH Assembly Meeting, a decision was made to escalate the Strategic Plan to genocide, and that this decision can be inferred from the statements of the Bosnian Serb leadership and from the increase in the intensity against Bosnian Muslims and Bosnian Croats".[40] The Chamber does not consider that the specific phrases challenged by the Prosecution are entirely vague; however, the Chamber finds that the remaining sentence of Proposed Fact 10 is a summary of the Prosecution's submissions in the *Brđanin* case and therefore does not constitute a finding by the Trial Chamber in that case and is not appropriate for judicial notice.[41] The Chamber will thus decline to take judicial notice of Proposed Fact 10.

17. With regard to Proposed Fact 17, the remaining portion states: "Statements made by Dr. Stakić do not publicly advocate killings and while they reveal an intention to alter the ethnic composition of Prijedor […]".[42] The Chamber considers that the phrase "statements made by Dr. Stakić" is not sufficiently concrete and identifiable for the purposes of judicial notice and in addition, considers that the remaining portion of the fact as it reads above is not sufficiently distinct without the last part of the sentence. Therefore, the Chamber will deny judicial notice of Proposed Fact 17.

18. The remaining portion of Proposed Fact 18 states: "Simo Drljača, head of the Prijedor SJB, clearly played an important role in establishing and running the camps, and was portrayed

[39] *See* Motion, para. 1.
[40] *See* Motion, para. 1.
[41] *See* Decision on Three Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 4 May 2012 ("Reconsideration Decision"), para. 10.
[42] *See* Motion, para. 1.

by the evidence as being a difficult or even brutal person […]".[43] The Chamber does not find the phrase "the camps", as challenged by the Prosecution, to be unclear for the purposes of judicial notice and recalls that the Chamber took judicial notice of many similar adjudicated facts containing this term as proposed by the Prosecution during its case.[44] However, the Chamber recalls that a proposed 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".[45] The Chamber considers that in this case, the remaining portion of Proposed Fact 18 is misleading without the context provided in the last portion of the sentence, of which the Chamber denied judicial notice as a legal finding.[46] The Chamber thus declines to take judicial notice of Proposed Fact 18.

19. Finally, the Chamber will consider Proposed Fact 16 in its entirety, which states: "Had the aim been to kill all Muslims, the structures were in place for this to be accomplished".[47] The Chamber has considered this fact in the context of the relevant part of the *Stakić* Trial Judgement, the indictment period of that case, as well as in the context of the surrounding facts tendered in the Motion. The Chamber notes that it declined to take judicial notice of Proposed Fact 15,[48] which originates from the same paragraph in the *Stakić* Trial Judgement and provides context for Proposed Fact 16. As such, the Chamber considers that Proposed Fact 16 is not clear and distinct without the context provided in Proposed Fact 15 and moreover, fails to meet the minimum threshold of concreteness to be permissible for judicial notice. The Chamber thus declines to take judicial notice of Proposed Fact 16.

C. Discretion to refuse judicial notice

20. The Chamber shall now consider the admission of the remaining portions of Proposed Facts 11 and 12, given that the Chamber declined to take judicial notice of the portions which contain findings or characterisations of a legal nature in paragraph 10 above. The Chamber first notes that the Prosecution does not object to the remaining portion of Proposed Fact 11 being

[43] *See* Motion, para. 1.

[44] *See, e.g.*, Adjudicated Facts 1106, 1107, 1108, 1124, 1190 (admitted in the Second Decision on Adjudicated Facts).

[45] *See Popović* Decision, para. 8

[46] *See supra* para. 10, footnote 32, wherein the Chamber denied judicial notice of the last portion of Proposed Fact 18, which states: "[…] the Trial Chamber is not satisfied that Drljača pulled the Crisis Staff into a genocidal campaign".

[47] *See* Motion, para. 1 (emphasis in original).

[48] *See supra* para. 9. **Proposed Fact 15** states: "While the Trial Chamber is satisfied that the common goal of the members of the SDS in Prijedor municipality, including Dr. Stakić as President of the Municipality, was to establish a Serbian municipality, there is insufficient evidence of an intention to do so by destroying in part the Muslim group". *See* Motion, para. 1.

admitted pursuant to judicial notice.[49] The Chamber shall thus consider whether it meets the remainder of the requirements of the test set out in paragraph 6 above or if, in the alternative, it shall be denied according to the Chamber's discretion under Rule 94(B) of the Rules.[50] Similar to Proposed Fact 18 discussed above, the Chamber considers that without the context provided in the last sentence of Proposed Fact 11, the remaining portion in isolation is misleading. Therefore, the Chamber shall exercise its discretion to deny judicial notice of the remaining portion of Proposed Fact 11.

21. Finally, with regard to Proposed Fact 12, the Chamber notes the Prosecution's challenges to its remaining portions, namely that the first sentence is a summary of the Prosecution's argument in the *Brđanin* case and the remaining portions are already admitted into evidence in this case as exhibit P956.[51] The Chamber considers that the first sentence of Proposed Fact 12 is, in fact, a recitation of the Prosecution's submissions in the *Brđanin* case, and as stated above, does not constitute a finding by the Trial Chamber in that case and is therefore not appropriate for judicial notice.[52] Finally, as to the remainder of Proposed Fact 12, the Chamber notes that Dragan Kalinić's speech is in evidence in this case in exhibit P956,[53] and although it is not required for the moving party to demonstrate that the information contained in a proposed fact is not already in evidence,[54] in this instance, it is precisely quoted in the trial record and the Chamber does not find it necessary to admit it once more pursuant to Rule 94(B) of the Rules.

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[49] *See* Response; Appendix A.

[50] **Proposed Fact 11** states: "In his utterances, the Accused [Brđanin] openly derided and denigrated Bosnian Muslims and Bosnian Croats. He also stated publicly that only a small percentage of them could remain in the territory of the ARK. Some of the Accused's **[Brđanin's]** utterances are openly nasty, hateful, intolerable, repulsive and disgraceful. On one occasion, speaking in public of mixed marriages, he remarked that children of such marriages could be thrown in the Vrbas River, and those who would swim out would be Serbian children. On another occasion, he publicly suggested a campaign of retaliatory ethnicity based murder, declaring that two Muslims would be killed in Banja Luka for every Serbian killed in Sarajevo. ~~Whilst these utterances strongly suggest the Accused's discriminatory intent, however, they do not allow for the conclusion that the Accused harboured the intent to destroy the Bosnian Muslims and Bosnian Croats of the ARK.~~" *See supra* para. 10, wherein the Chamber denied judicial notice of the last sentence of Proposed Fact 11 as a legal finding.

[51] *See* Response, para. 5; Appendix A. **Proposed Fact 12** states: "The Prosecution makes much of the speech made by the Accused [Brđanin] following Dragan Kalinić's speech during the 16th session of the SerBiH Assembly, held on 12 May 1992. Dragan Kalinić, a delegate from Sarajevo and later SerBiH Health Minister, is recorded as stating: 'Have we chosen the option of war or the option of negotiation? I say this with a reason and I must instantly add that knowing who are enemies are, how perfidious they are, how they cannot be trusted until they are physically, militarily destroyed and crushed, which of course implies eliminating and liquidating their key people. I do not hesitate in selecting the first option, the option of war.' The Accused **[Brđanin]** began his own speech by applauding the speech made by Dragan Kalinić: 'I would like to say a heart-felt bravo to Mr. Kalinić. In all my appearances in this joint Assembly, it has never crossed my mind that though he seems to be quiet, while I seem hawkish, his opinions are the closest to mine. I believe this is a formula and we should adhere to this formula.' This speech is not unequivocal. The most that can safely be gleaned from it is that the Accused **[Brđanin]** ultimately endorsed the war option, as suggested by Dragan Kalinić, and not the negotiation option. ~~His response to Kalinić does not allow the finding that he had genocidal intent.~~" *See supra* para. 10, footnote 30, wherein the Chamber denied judicial notice of the last sentence of Proposed Fact 12 as a legal finding.

[52] *See* Reconsideration Decision, para. 10.

[53] *See* P956 (Transcript of 16th session of SerBiH Assembly, 12 May 1992).

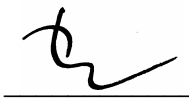
[54] *See* Reconsideration Decision, para. 9.

As such, the Chamber shall exercise its discretion and not take judicial notice of the remaining portion of Proposed Fact 12.

IV. Disposition

22. Accordingly, the Chamber, pursuant to Rules 54 and 94(B) of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-first day of January 2014
At The Hague
The Netherlands

[Seal of the Tribunal]