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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-02-54-AR73.5
Date: 28 October 2003
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Mehmet Güney
Judge Inés Mónica Weinberg De Roca

Registrar: Mr Hans Holthuis

Decision of: 28 October 2003

PROSECUTOR

v

Slobodan MILOŠEVIĆ

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

Counsel for the Prosecutor:
Mr Geoffrey Nice
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The Accused:
Mr Slobodan Milošević

Amici Curiae:
Mr Steven Kay
Mr Branislav Tapušković
Mr Timothy McCormack

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal");

BEING SEISED of the "Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 'Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts'" filed on 21 May 2003 ("Interlocutory Appeal");[1]

NOTING the "Amici Curiae Observations on Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 'Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts'" filed on 30 May 2003 ("Observations");

NOTING the Prosecution's reply to the Observations filed on 3 June 2003 ("Reply");

NOTING the "Prosecution's Request for Early Decision on Appeal of Trial Chamber's 10 April 2003 'Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts'" filed on 16 September 2003;

NOTING that on 12 December 2002, the Prosecution filed a motion before the Trial Chamber seeking to have judicial notice taken of 482 adjudicated facts derived from four cases which had been the subject of final appeal decisions before the International Tribunal ("Prosecution's Motion");[2]

NOTING that on 2 April 2003, the Prosecution filed the "Additional Information regarding the Prosecution Motion for Judicial Notice of Adjudicated Facts, 2 April 2003" ("Additional Information"), whereby it brought to the attention of the Trial Chamber in the present case[3] the fact that on 28 February 2003 the Trial Chamber in another trial, *Prosecutor v. Momčilo*

[1] The Interlocutory Appeal was filed pursuant to the Appeals Chamber's "Order Granting Extension of Time", dated 21 May 2003, which granted the Prosecution's first request for extension of time, of 13 May, but denied the second of 19 May, with Judge Hunt dissenting from, and Judges Pocar and Shahabuddeen appending a joint declaration to the order.
[2] In fact, there were only 462 facts included in the Annex, as Facts 132-150 were missing.
[3] It was also mentioned by the Prosecution in court during the session held on that day. Interlocutory Appeal, para. 14.

Krajišnik, took judicial notice of approximately 620 facts,[4] and that "all of the facts proposed for judicial notice in the Prosecution's December Submission [*i.e.*, Prosecution's Motion] were among those approximately 620 facts accepted by the *Krajišnik* Chamber";[5]

NOTING that on 10 April 2003, the Trial Chamber decided to admit 130 paragraphs of facts as set out in Annex A to the Prosecution's Motion, and rejected the remaining facts listed in the annex;[6]

NOTING that on 22 April 2003 the Prosecution requested certification from the Trial Chamber to appeal from the Impugned Decision;[7]

NOTING that on 6 May 2003 the Trial Chamber granted the Prosecution's request and certified the interlocutory appeal from the Impugned Decision,[8] acknowledging that one of the Prosecution's reasons for seeking certification was that the Trial Chamber in the *Krajišnik* Decision had reached a different conclusion from that of the Trial Chamber in the present case;

CONSIDERING that the main issue in this appeal concerns the legal test for the admission of adjudicated facts under Rule 94(B),[9] and that, in considering this issue, the Appeals Chamber will not consider the alleged error in relation to each of the facts rejected by the Impugned Decision, the application of that test to each rejected fact being a matter to be decided by the Trial Chamber on the criteria hereinafter set forth;

CONSIDERING that Rule 94(B) does not define adjudicated facts, nor does Rule 94(A) explain what "facts of common knowledge" are;

CONSIDERING that Rule 94(A) commands the taking of judicial notice and Rule 94(B) gives a discretion to do so, and that, in the case of Rule 94(A), the basis on which judicial

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[4] Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements by Witnesses pursuant to Rule 92*bis*, 28 February 2003 ("*Krajišnik* Decision").
[5] Interlocutory Appeal, para. 9. Some 1,132 facts were proposed for admission in the *Krajišnik* case.
[6] Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 10 April 2003 ("Impugned Decision").
[7] Prosecution's Request for Certification under Rule 73 (B), 22 April 2003.
[8] Decision on two Prosecution Requests for Certification of Appeal against Decision of the Trial Chamber, 5 May 2003.
[9] Prosecution's Motion, para. 1.

notice is taken is that the material is notorious, whereas in the case of Rule 94(B), the basis is that the material, in the case of adjudicated facts, is the subject of an adjudication made by another Chamber;[10]

CONSIDERING 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,[11] but which, subject to that presumption, may be challenged at that trial;

FOR THE FOREGOING REASONS, the Appeals Chamber, by majority, Judge Hunt dissenting,

RETURNS the matter to the Trial Chamber for it to review the taking of judicial notice of the adjudicated facts in accordance with the present decision.

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

Dated this 28th day of October 2003,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding

Judge Hunt appends a dissenting opinion to the present decision.
Other judges reserve the right to append opinions to the present decision.

[Seal of the Tribunal]

[10] See also *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, para. 6, wherein the Appeals Chamber stated: "Only facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed 'adjudicated facts' within the meaning of Rule 94(B)."
[11] *Krajišnik* Decision, para. 16.

DISSENTING OPINION OF JUDGE DAVID HUNT

1. This appeal is concerned with the proper interpretation of Rule 94(B) of the Rules of Procedure and Evidence ("Rules"). Paragraph (B) was added to the existing Rule 94 in July 1998, which otherwise remained unchanged. The Rule now reads:

> **Rule 94**
>
> **Judicial Notice**
>
> (A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
>
> (B) 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.

2. The prosecution tendered in the continuing trial a large number of facts which had been decided by various Trial Chambers in four other proceedings which had been dealt with by way of final appeal. It argued that these facts were "adjudicated" facts within the meaning of Rule 94(B) of which it was appropriate to take judicial notice. The Trial Chamber agreed to take judicial notice of some but not all of the facts tendered by the prosecution upon that basis.[1] The appeal, which the Trial Chamber certified pursuant to Rule 73(B), relates to those facts of which the Trial Chamber refused to take judicial notice.

3. The Trial Chamber held that the correct approach to the interpretation of Rule 94(B) was as follows:[2]

(1) The purpose of taking judicial notice is to promote judicial economy and narrow the factual issues.

(2) A balance between judicial economy and the right of the accused to a fair trial must be achieved.

(3) Trial Chambers may take judicial notice of factual findings in other cases but not of the legal characterisation of such facts.

(4) The Trial Chamber may take judicial notice only of facts which are not the subject of reasonable dispute.

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[1] Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 10 April 2003 ("Trial Chamber Decision").

[2] Trial Chamber Decision, p 3.

(5) For a fact to be capable of being judicially noticed under Rule 94 (B), it should have been the subject of adjudication and not based upon an agreement between parties in previous proceedings.

This opinion is concerned only with the fourth of these steps, which was the critical issue in the Trial Chamber's refusal to take judicial notice of the facts to which this appeal relates.

4. The prosecution asserts that the Trial Chamber "clearly" proceeded on the assumption that all facts which cannot be characterised as "historical or geographical background" may be the subject of reasonable dispute, and it asserts that no other Chamber has accepted such a radical limitation to the admission of adjudicated facts.[3] This is a misunderstanding of what the Trial Chamber has said. What the Trial Chamber was saying is that it was admitting only those facts tendered by the prosecution which were not the subject of reasonable dispute, and it described the *particular* facts which it was admitting as being historical and geographical background information.[4] It did not purport to limit facts which are not the subject of reasonable dispute to facts which fell within such a category, and it is significant that no such limitation is included in the interpretation of Rule 94(B) which the Trial Chamber held to be the correct approach. It would be incorrect to impose such a limitation, and the Trial Chamber did not do so.

5. The prosecution submits that a fact is indisputable if it has been litigated at trial and on appeal,[5] although it accepts that, "in exceptional cases", even those facts may turn out to be unsafe and thus capable of reasonable dispute.[6] But, the prosecution says, before a Chamber may make a finding to this effect, the exceptional situation must be found to exist for a *specific* reason giving rise to a *specific* dispute.[7] Once admitted, the adjudicated fact becomes a "rebuttable presumption" which may be refuted or qualified by other evidence.[8] If the accused wishes to challenge a fact, he must show that it is unsafe.[9] The prosecution

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3 Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", 21 May 2003 ("Interlocutory Appeal"), par 55.

4 Trial Chamber Decision, p 4: "**CONSIDERING** that the first 130 paragraphs of facts set out in Annex A to the Prosecution Motion constitute facts properly characterised as historical and geographical background information and not subject to reasonable dispute".

5 Interlocutory Appeal, par 51.

6 *Ibid*, par 52.

7 *Ibid*, par 52. The emphasis appears in the Interlocutory Appeal.

8 *Ibid*, pars 35, 59-60.

9 *Ibid*, par 61.

concedes that this places a "certain, if small" burden of proof upon the accused.[10] It claims that this "limited shift of the burden of proof" does not infringe the accused's presumption of innocence given by Article 21.3 of the Tribunal's Statute,[11] and that such a burden of proof upon the accused is "not unheard of in criminal proceedings of this Tribunal" where the accused wishes to raise grounds of justification or excuse.[12]

6. These submissions are all interrelated. They are also all misconceived. The different classifications of presumptions is largely the outcome of the deliberations of civil lawyers and canonists, amongst whom the subject is apparently much discussed. It is generally accepted, however, that the use of presumptions in connection with the ordinary processes of inferential reasoning can be productive of confusion.[13] So-called presumptions of fact may be rebutted, but they are not truly presumptions at all. Two presumptions which do exist and which are most closely connected with the criminal law are the presumption of innocence and the presumption of sanity. The first presumption is in favour of the accused, and may be rebutted by the prosecution which carries the onus of proving that the accused is guilty. The second is in favour of the prosecution, and may be rebutted by the accused who carries the onus of proving insanity (at a lower burden of proof). But it is inappropriate to impose rebuttable presumptions of fact in favour of the prosecution in relation to the proof of its own case.

7. To identify an adjudicated fact as a rebuttable presumption necessarily (as the prosecution concedes) places some burden of proof (or, more properly, an *onus* of proof) upon the accused,[14] and this is contrary to the presumption of innocence which the Statute provides. The presumption of sanity, with the onus upon the accused to rebut that presumption, is a longstanding exception to the presumption of innocence, and it is well grounded in history. The suggestion by the prosecution that an onus placed upon the accused

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[10] *Ibid*, par 61.

[11] *Ibid*, par 61. The Interlocutory Appeal incorrectly refers to Article 20.3.

[12] *Ibid*, par 62.

[13] It is sometimes wrongly argued, for example, that the intention of an accused person may be determined by the application of a so-called presumption that every person intends the natural consequences of his acts. This produces an illegitimate transfer of the onus of proof upon the issue of intention from the prosecution to the accused: *Stapleton v The Queen* (1952) 86 CLR 358 at 365; *Smyth v The Queen* (1957) 98 CLR 163 at 166-167; *Parker v The Queen* (1963) 111 CLR 610 at 632; *Regina v Stokes & Difford* (1990) 51 A Crim R 25 at 28-30.

[14] The burden of proof usually refers to the standard of proof to be discharged (beyond reasonable doubt, or whatever), and the onus of proof usually refers to the identity of the party which must discharge that burden.

is "not unheard of" in proceedings in this Tribunal is otherwise wrong. The reference by the prosecution to the decision of the Appeals Chamber in *Delalić* concerns the presumption of sanity.[15] In every other case, such as (for example) the "defence" of alibi, there is no onus of proof upon the accused at all. The prosecution must at all times establish beyond reasonable doubt that the accused did the act alleged in the indictment. If the accused points to evidence given (from whatever source) which suggests that he was somewhere else at the time when the act was done, he is doing no more than requiring the prosecution to eliminate the reasonable possibility that his alibi is true.[16] The decision of a Chamber to take judicial knowledge of an adjudicated fact does *not* give the prosecution the benefit of a presumption of any kind.

8. The concept of judicial notice was well settled at the time when it was first introduced in Rule 94(A). It was basic to that concept that, because the judicially noticed fact was one which was not the subject of reasonable dispute, evidence of the relevant fact was unnecessary.[17] When Rule 94(B) was added, it used the same expression "judicial notice" as Rule 94(A) had used. Judicial notice was therefore clearly intended to mean the same thing in both paragraphs, that the fact in question is not the subject of reasonable dispute, and thus evidence to establish it is unnecessary. In relation to Rule 94(B), instead of referring to atlases, dictionaries or other reference books (which are not admitted into evidence), the Chamber must look at the judgments to which it is referred by the parties (which likewise are not admitted into evidence).[18] If the fact put forward as one of common knowledge or as a finding made in other proceedings before the Tribunal (called an adjudicated fact) is not the subject of reasonable dispute, judicial notice is taken of the fact of common knowledge or of finding made, but not (in the latter case) of the evidence upon which that finding was based. The introduction of a discretion in Rule 94(B) which does not exist in Rule 94(A) was no

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[15] *Prosecutor v Delalić et al*, IT-96-21-A, Judgment, 20 Feb 2001 ("*Delalić* Appeal Judgment"), par 582.

[16] *Ibid*, par 581; *Prosecutor v Kunarac et al*, IT-96-23&23/1-T, Judgment, 22 Feb 2001, par 625. There was no criticism of that proposition in the judgment of the Appeals Chamber: IT-96-23&23/1-A, 12 June 2002 ("*Kunarac* Appeal Judgment"), pars 204-206.

[17] This is the same in both the common law (*see*, for example, *Commonwealth Shipping Representative v P & O Branch Services* [1923] AC 191 at 212; *Baldwin & Francis Ltd v Patents Appeals Tribunal* [1959] AC 663 at 691) and in the civil law (*see*, for example, the German Criminal Procedure Code (*Strafprozessordnung, StPO*), Section 244(3); Dutch Criminal Procedure Code (*Wetboek van Strafvordering*), Article 339(2)).

[18] An example where judicial notice has been taken of findings made in other cases, and thus that the fact found was not the subject of reasonable dispute, is *Jones (Robert) v Williams* [1969] 3 All ER 1556 at 1561 (judicial notice taken of the fact that a particular brand of breathalyser had been approved by the Secretary of State in accordance with the relevant legislation). The case is also reported at [1970] 1 WLR 16.

more than a recognition that, in the particular case, taking judicial notice of an adjudicated fact (which then necessarily cannot be challenged) would be unfair to the accused in that case.

9. The judicially noticed fact does not then become evidence in the usual sense of being just another fact in the case. It is therefore erroneous to admit other evidence in the case in order to rebut (or, perhaps more appropriately, to refute) that judicially noticed fact. Such evidence is inadmissible in the trial itself.[19] Obviously enough, material may be put before the Chamber which is relevant to the issue as to whether the particular fact or finding is or is not the subject of reasonable dispute, but that material does not then become evidence in the trial. That is why the judicially noticed fact must not be the subject of reasonable dispute. To hold otherwise is to depart from this basic concept of judicial notice. From a practical point of view, it would in any event be manifestly unsatisfactory for a Trial Chamber to have to determine whether to accept the judicially noticed finding in other proceedings in the face of evidence tendered before that Chamber to refute it. To make that decision properly, the Trial Chamber would need to have before it the evidence upon which the finding was based in order to determine the effect of the refutation evidence upon that evidence – just as the Appeals Chamber proceeds when considering the effect of additional evidence (tendered on appeal under Rule 115) upon a Trial Chamber's finding of fact.[20]

10. There is no warrant for the prosecution's claim that a fact is indisputable merely because it has been litigated at trial and on appeal. The dismissal of an appeal against a finding of fact made by a Trial Chamber means only that the appellant had been unsuccessful in demonstrating that no reasonable tribunal of fact could have made such a finding upon the evidence which was before the Trial Chamber.[21] Nor can it be said that it is only in exceptional cases that a fact litigated at trial and on appeal may turn out to be unsafe. The ability of the particular accused person in the later trial to obtain evidence in relation to some

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[19] Morgan, "Judicial Notice" (1944) 57 *Harvard Law Review* 269.

[20] *Prosecutor v Kupreškić et al*, Decision on the Motions of Appellants Vlatko Kupreškić, [et al] to Admit Additional Evidence, 26 Feb 2001, par 12; *Prosecutor v Kupreškić et al*, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, 11 April 2001, par 8; *Prosecutor v Kupreškić et al*, Appeal Judgment, 23 Oct 2001 ("*Kupreškić* Appeal Judgment"), pars 66, 75.

[21] *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999, par 64; *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000, par 63; *Prosecutor v Jelisić*, IT-95-10-A, Judgment, 5 July 2001, par 37; *Prosecutor v Furundžija*, IT-95-17/1, Judgment, 21 July 2000, par 37; *Delalić* Appeal Judgment, par 434; *Kupreškić* Appeal Judgment, par 30; *Kunarac* Appeal Judgment, par 39; *Prosecutor v Mucić et al*, IT-96-21-A*bis*, Judgment on Sentence Appeal, 8 April 2003, par 55.

of the adjudicated facts from an earlier trial will often be very much greater than the accused person in that earlier trial. This is particularly so as the accused now being tried are increasingly more senior in position than those being tried in previous years. An easy example would be the findings of fact made by the Trial Chamber in 1997 in the *Tadić* case in relation to the international character of the armed conflict. The accused there was a café proprietor and a minor local politician. There are now Chiefs of General Staffs, Vice-Presidents and even a President being tried where many of the same facts are in issue. Their access to relevant evidence is very much greater than those accused who were tried earlier.

11. Once again, the prosecution seeks to place the onus upon the accused to show that a fact is unsafe. And, once again, that submission offends against the presumption of innocence which the Statute provides. It is the prosecution which seeks to have judicial notice taken of these facts, and it is for the prosecution to establish its entitlement to such relief. It is for the prosecution to establish that the facts are not the subject of reasonable dispute, not for the accused to show that the facts are unsafe. It is, however, insufficient for the accused merely to say that he disputes the facts in question. Just as in the case of the "defence" of alibi, he must point to evidence given (or material available) which demonstrates a genuine dispute. But it is wholly incorrect to say that there is any onus upon him to show that the facts are unsafe.

12. In the present case, the prosecution will be able to prove very expeditiously the facts of which the Trial Chamber refused to take judicial notice by the tender, pursuant to Rule 92*bis*(D), of the transcripts of the evidence upon which the various Trial Chambers had made the findings of fact which it had tendered pursuant to Rule 94(B).[22]

13. It follows from what has been said that the three decisions of Trial Chamber I upon which the prosecution relied in support of its arguments were wrongly decided, and they should be overruled upon those issues.[23]

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[22] The prosecution will also be able to take advantage of a recent decision of the Appeals Chamber in the present case: *Prosecutor v Milošević*, IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 Sept 2003.

[23] *Prosecutor v Ljubičić*, IT-00-41-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 23 Jan 2003; *Prosecutor v Krajišnik*, IT-00-39-PT, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and Admission of Written Statements of Witnesses Pursuant to Rule 92*bis*, 28 Feb 2003; *Prosecutor v Stanković*, Decision on Prosecution's Motion for Judicial Notice Pursuant to Rule 94(B), 16 May 2003.

14. For these reasons, I do not agree with the view of the majority that a judicially noticed fact is merely presumed to be true and may be challenged at the trial. As I have already stated, it is inappropriate to impose rebuttable presumptions of fact in favour of the prosecution which carries the onus of proof in relation to that fact. A basic right of the accused enshrined in the Tribunal's Statute is that he or she is innocent until proven guilty by the prosecution. Proof by way of presumptions of fact such as will be permitted by the majority decision offends against that basic right. It should only be where a fact is not the subject of reasonable dispute that judicial notice may be taken of it, and thus it cannot be challenged.

15. No error was made by the Trial Chamber in the decision it reached, and the appeal should be dismissed.

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

Dated this 28th day of October 2003,
At The Hague,
The Netherlands.

David Hunt

Judge David Hunt

[Seal of the Tribunal]