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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: 31 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: 31 October 2003

PROSECUTOR

v

Slobodan MILOŠEVIĆ

SEPARATE OPINION OF JUDGE SHAHABUDDEEN APPENDED TO THE APPEALS CHAMBER'S DECISION DATED 28 OCTOBER 2003 ON THE PROSECUTION'S INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S 10 APRIL 2003 DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

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The Accused:
Mr Slobodan Milošević

Amici Curiae:
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1. I agree with the decision of the Appeals Chamber given on 28 October 2003. I append this separate opinion to the decision pursuant to the reservation noted on the last page of the decision.

2. I have two interlocking reasons for agreeing with the decision. I consider that (i) "adjudicated facts or documentary evidence from other proceedings", which are judicially noticed under Rule 94(B) of the Rules of Procedure and Evidence, are rebuttable by the opposing party, and that (ii) under that Rule, judicial notice may be taken of material which is the subject of "reasonable dispute" between the parties.

A. Whether the material is rebuttable

3. There is a difference between two categories, namely, a taking of judicial notice of a fact and a judicial finding of a fact on the basis of evidence. Much learning exists on the matter, but some simplification can be achieved by having regard to the position of the Tribunal as an international judicial body divorced from national rules of evidence and to the two provisions which it has adopted on the matter in Rule 94. That Rule, entitled "Judicial Notice", reads thus:

> (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.

Paragraph (A) was introduced in February 1994; paragraph (B) was added in July 1998. To which of the two categories mentioned above do these two paragraphs belong?

4. Rule 94(A) belongs to the first category. It provides for the usual case of judicial notice being taken of "facts of common knowledge". As the books show, the court may inquire before deciding to take judicial notice, but this does not mean that the court is making a finding on the basis of evidence: it is only equipping its own mind. The basis on which the

court acts is that the facts are notorious; in large part, they presuppose and underpin the capacity of the court to function. In such a case, the Rule commands the taking of judicial notice and prohibits the Trial Chamber from requiring proof of the relevant facts. Hence, the decision to take judicial notice not being based on evidence, neither side is permitted to adduce evidence in rebuttal.

5. By contrast, Rule 94(B), though it uses the language of judicial notice, moves in the direction of the second category, if indeed it does not belong outright to that category. It is different in four ways from Rule 94(A).

6. First, unlike Rule 94(A), Rule 94(B) is discretionary: the Trial Chamber may or may not decide to take judicial notice. Second, the parties have a right to be heard before the Trial Chamber acts; under Rule 94(A) they have no such right, even though they may be accorded a privilege. Third, Rule 94(B) is based on the circumstance that the fact has been adjudicated in other proceedings or that the documentary evidence has been presented in those proceedings, even though the adjudicated fact or the documentary evidence does not relate to "facts of common knowledge" within the meaning of Rule 94(A) but rather to "matters *at issue* in the current proceedings". Fourth, Rule 94(B) in consequence relates to a case in which evidence is necessary unless excluded by the taking of judicial notice; evidence is unnecessary in the case of Rule 94(A).

7. It follows that if, in its discretion, the Trial Chamber decides not to use the power given to it by Rule 94(B), evidence of the "matters at issue" has to be given in the ordinary way; if evidence is given in the ordinary way by one party on "matters at issue", the other party unquestionably has a right to rebut the evidence so given. Is that right of rebuttal lost where the Trial Chamber decides instead to take judicial notice of the relevant fact as an adjudicated fact?

8. The circumstance that Rule 94(B) provides for recourse to the mechanism of "judicial notice" does not conceal the real nature of what it is doing; and the real nature of what it is doing is important to the analysis. The provision, on the face of it, is not dealing with matters of common knowledge of which evidence cannot be given if judicial notice is taken of those matters. It is using the device of "judicial notice" to provide for an exemption from the necessity to adduce evidence on matters which are "at issue" between the parties and which

therefore need to be proved in the normal way by evidence. This being so, "judicial notice" does not carry the same consequence as in the case of matters of common knowledge.

9. There is argument that the term "judicial notice" should be given the same meaning in the two provisions in which it occurs. No doubt, it is a sound rule of construction to give the same meaning to the same words occurring in different parts of a law. But the rule is not inflexible; as the cases show, it can be varied if a variation is required by the context.[1] In my view, the context in this case requires the term "judicial notice" to bear different meanings in the two provisions under consideration.

10. It is possible that the model on which Rule 94(B) was crafted lies in the circumstance that states legislate to provide for judicial notice to be taken of matters which cannot all be described as matters of common knowledge. But there are three things about such legislation.

11. First, such legislation is concerned with matters which are manifestly capable of accurate verification, even if they are not of common knowledge. That being so, the state legislature has stepped in to say that evidence – though it can otherwise be led - is not necessary, the giving of it being a waste of time. In the instant case, the fact of adjudication is manifestly capable of accurate verification. But the correctness of the fact adjudicated may not be manifestly capable of accurate verification. Much may turn on the correctness of the fact adjudicated; the opposing party may have a very different view. Why should he not be permitted to advance it?

12. Second, such legislation is generally in the nature of main legislation.[2] That itself tends in a measure to insulate what is done from challenge. By contrast, Rule 94(B) is in the nature of subsidiary legislation: it was adopted by the judges in the exercise of the rule-making power conferred on them by article 15 of the Statute. The limitations of the Statute have therefore to be borne in mind, in particular the general requirement that trials shall be fair.

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[1] See *Maxwell on the Interpretation of Statutes*, 12th ed. (London, 1969), pp.279-280; *Craies on Statute Law*, 7th ed. (London, 1971), pp. 168-169; and F.A.R. Bennion, *Statutory Interpretation*, 4th ed. (London, 2002), pp. 1042-1043.

13. Third, in the case of such legislation, there is generally no risk of collision with an overriding requirement relating to the presumption of innocence: the matters provided for by such legislation are not of a kind calculated to put that presumption into question. In the case of Rule 94(B), the workings of the Rule do present a real risk of collision with that presumption if there is no right of rebuttal. Why is this so?

14. If there is no right of rebuttal, the consequence is that, as a result of the judicial notice, the opposing party would be bound by the adjudicated fact without an opportunity to dispute it with new evidence. The undesirability of this, particularly in a criminal case, cannot be overstated. The adjudicated fact may be important to the outcome of the case. As is sought to be shown below, it may well relate to a matter which is in reasonable dispute between the parties.

15. There would, therefore, be ground for objecting that there is an encroachment on the presumption of innocence, which is guaranteed by article 21(3) of the Statute, if there is no right of rebuttal. Rules have to be read subject to the Statute. Consequently, there is a compelling reason why the correctness of an adjudicated fact which is judicially noticed under Rule 94(B) must be understood as not conclusively binding on the accused. These considerations apply equally where the Chamber is acting *proprio motu* under Rule 94(B).

16. It is true that Rule 94(B) refers to "adjudicated facts" and not to the evidence on which the adjudication is based, but the adjudicated fact may be every bit as important to the opposing party as the evidence on which it is based. Further, there is the circumstance that the Trial Chamber is to take "judicial notice" not only of "adjudicated facts", but also of "documentary evidence". The adjudication made by the first Trial Chamber might not in fact have extended to "documentary evidence" presented to it. Why cannot the opposing party dispute the "documentary evidence" or its true effect?

17. It may be added that, if there is a right of rebuttal, it is not met by the reference in Rule 94(B) to the fact that judicial notice is taken "after hearing the parties". The parties are heard before the Trial Chamber decides to take judicial notice of the adjudicated fact. The

[2] For all practical purposes, this also applied to article IX of Military Government Ordinance No. 7, of 18 October 1946, which required military tribunals to take judicial notice of "the records and findings of military and other tribunals of any of the United Nations".

question is whether the opposing party has a right to rebut the adjudicated fact after it is judicially noticed. I think there is that right.

18. The importance of according to the accused a right of rebuttal is illustrated by what happened in *U.S. v Weizsaecker*[3]. There, Article X of Military Government Ordinance No. 7, of 18 October 1945, provided that certain determinations of the International Military Tribunal were "binding on the tribunals established [under that ordinance] and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned."[4] Nevertheless, without invoking the exception, the tribunal in that case decided to permit the defence to offer evidence in rebuttal of a point previously decided by the International Military Tribunal, stating that "[i]n so doing we have not considered this article to be a limitation on the right of the [present] Tribunal to consider any evidence which may lead to a just determination of the facts."

19. *Weizsaecker* may be understood to mean that the previous decision was indeed binding on the later tribunal (as enjoined by Article X of the ordinance), but binding only for what was decided on the facts before the earlier tribunal. The consequence was that the later tribunal was not prevented from considering the applicability of the previous decision to the new case in the light of any new facts. Similar reasoning may be applied to uphold a right of rebuttal in this case.

20. Lastly, there is an interesting argument founded on the Trial Chamber's view that "a fact, if admitted, is a fact that is accepted by the Chamber and cannot give rise to a presumption".[5] The argument is that the effect of conceding a right of rebuttal to the opposing party is to convert judicial notice of an adjudicated fact into a presumption of correctness, and that this cannot be because judicial notice is conclusive.

21. However, as has been argued above, the matter turns not on the use of the bare term "judicial notice" but on the context in which that term is used, inclusive of the constraints imposed by the Statute under which the Rule relating to judicial notice of adjudicated facts was adopted by the judges. When construed in that context, it appears that the taking of

[3] "The Ministries case", Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XIV, at p. 317, and at p. 323.
[4] See 6 TWC (Buffalo, New York, 1997) at p. XXVI.

judicial notice of an adjudicated fact creates, if not a presumption, something like a presumption,[6] in that the court must draw an inference that the adjudicated fact judicially noticed is accurate – but only unless and until rebutted.

22. This limitation applies especially in a criminal case. It underlay Rule 201(g) of United States Federal Rules of Evidence, which stated: "In a criminal case, the court shall instruct the jury[7] that it may, but is not required to, accept as conclusive any fact judicially noticed". Commenting on the provision, one authority says: "In a criminal case, Rule 201(g) treats judicial notice *like a presumption*:[8] it relieves one party of the need to produce evidence but does not prevent the other party from contesting" the judicially noticed fact with evidence and argument to the jury.[9]

23. In this respect, under article 15 of the Statute the judges of the Tribunal have power to make rules on evidence. It is within that competence for them to make a rule that a fact shall be presumed to have been proved if certain other facts are demonstrated. A rule so made may, for example, have the effect of providing that proof of the presence of an army from one country in another shall be presumed to have been made if a finding to that effect is demonstrated to have been made by a Trial Chamber. But that competence can only be exercised within reasonable limits.[10] In particular, account has to be taken of the presumption of innocence - the counterpart of the principle that the prosecution bears the burden of proof.[11] This means that account has also to be taken of the availability of a right of rebuttal of material presented by the prosecution,[12] and more particularly where the matter is "at issue" between the parties. In the absence of such a right of rebuttal, there could indeed be an impairment of the presumption of innocence.

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[5] Page 4 of the impugned decision.
[6] See some of the references given in *Cox v. Crooks (No. 2)*, [2000] TASSC 34.
[7] In the case of the Tribunal, fact-finding is done by the judges, but it is not thought that this difference is material to the point being discussed.
[8] Emphasis added.
[9] 21 Wright and Graham, *Federal Practice and Procedure*, Section 5111 (1999 Supp.), cited in *United States v. Bello*, 194 F.3d 18 (1999).
[10] See *Hoang v. France* (1992) 16 EHRR 53, 78, para. 33; *Salabiaku v. France* (1988) 13 EHRR 379, 388, para. 28; European Commission of Human Rights, *Bullock v. UK* (1996), 21 EHRR CD 85, 85-86, para. 1.
[11] See Stephen Seabrooke and John Sprack, *Criminal Evidence and Procedure* (London, 1996), p. 6, para. 1.3.3, and para. 12 of the Trial Chamber's judgment in *Vasiljević*, IT-98-32-T, of 29 November 2002.
[12] See *Bullock v. UK, supra*, p. 86, para. 1.

24. When the matter is seen this way, there is no question of the burden of proof being changed. A distinction has to be drawn between facilitating proof and dispensing with proof. It is not said that the accused must prove his innocence; the position still is that the prosecution must prove guilt. All that the law does is that it facilitates proof by allowing a party to adduce required evidence in a certain way. What is the value of that evidence is then a matter for the parties in the ordinary way. In establishing the value of the evidence – including evidence given by judicial notice being taken of adjudicated facts - the accused is entitled to a right of rebuttal.

B. Whether judicial notice is excluded where there is a reasonable dispute

25. I agree that, where the material relates to a matter which is *not* in "reasonable dispute" between the parties in the current proceedings, judicial notice of the adjudicated fact is not rebuttable. Indeed, there would not be need to rebut a fact which is not in reasonable dispute; it may be patently contradictory to do so. On the other hand, if the material relates to a matter which *is* in "reasonable dispute" between the parties, there would be every reason for the existence of a right of rebuttal.

26. So the issue boils down to one of whether the law can be construed to mean that judicial notice under Rule 94(B) is confined to material which relates to a matter which is not in reasonable dispute between the parties in the current proceedings. For the following reasons, I have not managed to locate in the controlling texts a basis for such a restriction; rather the contrary.

27. Rule 201(a) of the United States Federal Rules of Evidence states that the Rule "governs only judicial notice of adjudicative facts" – not, in passing, judicial notice of "adjudicated facts". Paragraph (b) then reads as follows:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

28. The structure of the federal Rule is different in three ways from that of Rule 94(B). First, the federal Rule uses the expression "not subject to reasonable dispute", but this wording does not occur in Rule 94(B). Second, under the federal Rule, the judicially noticed fact could not be in "reasonable dispute" between the parties because, on the face of the Rule, the grounds on which the fact is judicially noticed are themselves beyond reasonable dispute; that is not so under Rule 94(B). Third, and by contrast, the federal Rule does not use the expression "at issue", but this phrase occurs in Rule 94(B).

29. Rule 94(B) explicitly says that it applies to material relating "to matters at issue in the current proceedings". The phrase "at issue" has been authoritatively defined to mean "[t]aking opposite sides; under dispute".[13] Therefore, a matter which is in "reasonable dispute" is a matter "at issue". It is not permissible to interpolate a limitation to matters which are *not* in reasonable dispute; that involves a reversal of the stated intention. With respect, no provision supports the holding of the Trial Chamber in *Simić*[14] (followed in other cases) "that Rule 94 should be interpreted as covering facts not subject to reasonable dispute ...".

30. Argument may be made that the words "at issue" could include factual issues involved in the case but about which the parties are not divided. Well, if they are not, an agreement could be had under Rule 65*ter*(H), without the necessity for recourse to Rule 94(B). But, whether or not that is a possible interpretation, it does not remove the meaning that the expression embraces issues over which the parties are in active dispute.

31. It may be asked how, notwithstanding what appears to be a straightforward text to the contrary, it came to be thought that judicial notice of an adjudicated fact was restricted to cases in which that fact was *not* in "reasonable dispute" between the parties. The probable explanation is that it was considered that such a fact was irrebuttable. Arguing from this premise, it therefore appeared proper to limit the application of the Rule to cases in which there was no reasonable dispute between the parties about the fact. But the limitation is contrary to the express reference in the Rule to "matters at issue".

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[13] See *Black's Law Dictionary*, 7th edn. (Minnesota, 1999), p. 122. While the discussion has always been based on the English text, it is right to note that the French text may show differences of formulation. However, the French words "en rapport avec l'instance" certainly do not mean that judicial notice may be taken only if the matter is not in reasonable dispute.

32. Where, as here, there is no such limitation, with the consequence that judicial notice of a matter may be taken even if the parties are in reasonable dispute over it, this fortifies an interpretation that the intention of the lawgiver was that the opposing party should have an opportunity to rebut the matter judicially noticed. Otherwise, though the judicially noticed material relates to a matter which is "at issue" between the parties, the opposing party will not be allowed to contest the material however important to it may be the matter "at issue".

33. In effect, under the scheme of Rule 94(B), judicial notice relates to "matters at issue". This expression cannot be read as a reference to the opposite – namely, as a reference to "matters *not* at issue". But the fact that judicial notice relates to "matters at issue" is balanced by a right of rebuttal; the two things are interlinked and interdependent.

34. One final point. This concerns the reference in footnote 10 of the decision of the Appeals Chamber in this case to the scope of adjudicated facts. The Appeals Chamber was correctly concerned to ensure that judicial notice would not be taken of findings on facts which could be revised on appeal, and I agree. Accordingly, if a particular finding on a fact is not the subject of appeal, judicial notice may be taken of it in other proceedings notwithstanding the pendency of an appeal on other aspects.

C. Conclusion

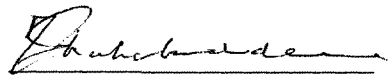
35. Rule 94(B) simplifies the task of the moving party by permitting that party, instead of having to provide evidence in the ordinary way, to give that evidence in the form of "adjudicated facts or documentary evidence from other proceedings". It is designed to facilitate proof by the moving party for the purpose of expediting the trial of cases by substituting a shorter form of evidence for the normal but more time-consuming form; also, it creates a presumption that the adjudicated fact was accurate unless rebutted. It is not intended to dispense with the right of the opposing party to make that rebuttal.

[14] IT-95-9-PT of 25 March 1999, p. 4.

36. This conclusion is in keeping with the caution recognised as appropriate to the subject and to the general consideration that "[j]udicial notice is merely a substitute for the conventional method of taking evidence to establish facts".[15]

37. In sum, the question is whether, in an era marked by concern for human rights (including those which can be implicated in international criminal law), Rules made by the judges of the Tribunal in exercise of their rule-making power can exclude the ordinary right of rebuttal on a question of fact in a criminal case when that fact is not one of common knowledge. Preferring earlier judicial opinions in the Tribunal, I think not.[16] I therefore respectfully agree with the decision of the Appeals Chamber to allow the appeal.

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



Mohamed Shahabuddeen

Dated 31 October 2003
At The Hague
The Netherlands

[Seal of the Tribunal]

[15] *Grand Opera Co. v. Twentieth Century-Fox Film Corp.*, C.A.7 (Ill.) 1956, 235 F. 2d 303 at 307. And see *U.S. v. Briddle*, S.D.Cal. 1962, 212 F. Supp. 584 at 589.
[16] Outside of the Tribunal, there is much argument between the "disputability" and the "indisputability" schools. However, it is to be noted that *Government of Virgin Islands v. Gerau*, C.A.3 (Virgin Islands) 523 F. 2d 140 (1975) at 147, footnote 17, held that facts judicially noticed "may ... be subject to rebuttal".