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UNITED
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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-98-29/1-AR73.1

Date: 26 June 2007

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Decision of: **26 June 2007**

PROSECUTOR

v.

Dragomir MILOŠEVIĆ

PUBLIC FILING

DECISION ON INTERLOCUTORY APPEALS AGAINST TRIAL CHAMBER'S DECISION ON PROSECUTION'S MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS AND PROSECUTION'S CATALOGUE OF AGREED FACTS

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1. 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 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Prosecution's Interlocutory Appeal Brief against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff" filed on 10 May 2007 ("Prosecution's Interlocutory Appeal") and of the "*Appel contre la Décision prise par la Chambre d'appel de première instance sur la demande du Procureur aux fins de dresser le constat judiciaire de faits*" filed by Dragomir Milošević ("Milošević") on 10 May 2007 ("Defence's Interlocutory Appeal").

I. BACKGROUND

2. On 18 December 2006, the Prosecution filed before Trial Chamber III of the Tribunal ("Trial Chamber") its "Prosecution's Motion for Judicial Notice of Adjudicated Facts". In the Motion, the Prosecution requested, pursuant to Rule 94(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), that the Trial Chamber takes judicial notice of 181 facts which were adjudicated in the case of *Prosecutor v. Galić,* Case No. IT-98-29 ("*Galić* Case"), in the Trial Judgement rendered on 5 December 2003 ("*Galić* Trial Judgement") and in the Appeals Chamber Judgement of 30 November 2006 ("*Galić* Appeals Judgement"), and pertaining to the "deliberate targeting of civilians by forces of the Sarajevo Romanija Corps ("SRK") under the command of General Galić in the period of time preceding the indictment period in this case"[1] ("Proposed Facts"). On 19 January 2007, Milošević filed his response in which he deferred to the Trial Chamber's decision with regard to Proposed Facts 1 through 53. He opposed, however, judicial notice of Proposed Facts 54 through 181.[2] The Prosecution replied on 25 January 2007.[3] During a hearing held on 12 February 2007, both parties presented oral submissions on questions posed by the Trial Chamber.[4] At this occasion, the Prosecution abandoned its request for judicial notice of Proposed Facts 54 and 55.[5] On 28 February 2007, the Prosecution filed its Catalogue of Agreed Facts.[6] It was endorsed by the Defence on 14 March 2007.[7]

[1] Prosecution's Interlocutory Appeal, para. 2 (emphasis and footnote omitted).
[2] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, *Conclusion en Réponse de la Requête du Procureur aux fins de constat judiciaire de faits (Article 94B du Règlement de procédure et de preuve),* 19 January 2007.
[3] *Prosecutor v. Dragomir Milošević,* Case No. IT-98-29/1-T, Prosecution's Request for Leave to Reply and Reply to Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts, 25 January 2007.
[4] Trial Hearing, 12 February 2007, T. 1891-1935; *See* also, Trial Chamber III's Memorandum on Issues Relating to Judicial Notice for Clarification by the Parties, 9 February 2007 (Annex A to the Prosecution's Interlocutory Appeal).
[5] Trial Hearing, 12 February 2007, T. 1927.
[6] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Prosecution's Catalogue of Facts Agreed between the Prosecution and the Defence, 28 February 2007 ("Catalogue of Agreed Facts").

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3. On 10 April 2007, the Trial Chamber issued its "Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff" ("Impugned Decision"). The Trial Chamber gave leave to the Prosecution to file its Prosecution's Reply, and unanimously took judicial notice of the following Proposed Facts: 1-53, 56, 60, 64-71, 73-76, 81-85, 88, 90-93, 99-104, 108-110, 112-116, 122, 123, 125-130, 143, 147, 156, 158, 159, and 161-164, and by majority, Judge Robinson dissenting, Proposed Facts 62 and 176.[8] It rejected, by majority, Judge Harhoff dissenting,[9] the other Proposed Facts, but admitted into evidence the Catalogue of Agreed Facts.[10]

4. Both Interlocutory Appeals, filed following certification to appeal the Impugned Decision granted by the Trial Chamber on 3 May 2007,[11] rely on the *Karemera* Appeals Decision.[12] The Prosecution's Interlocutory Appeal challenges the Impugned Decision regarding the 69 Proposed Facts 56 through 181 rejected by the majority of the Trial Chamber.[13] The Prosecution submits that "the [m]ajority discernibly erred in the exercise of its discretion pursuant to Rule 94(B) by incorrectly interpreting the law set out by the Appeals Chamber in the *Karemera* Appeal[s] Decision and by abusing its discretion",[14] and "requests that the Appeals Chamber [...] remand the matter to the Trial Chamber directing it to apply the reasoning and holdings of the *Karemera* Appeal[s] Decision to its consideration of the Prosecution's Proposed Facts."[15] The Defence's Interlocutory Appeal requests the partial reversal of the Impugned Decision insofar as it judicially noticed 57 Proposed Facts from 56 to 181.[16] In its response filed on 21 May 2007,[17] the

[7] Trial Hearing, 14 March 2007, T. 3707. The parties agreed, pursuant to Rule 65*ter* (E) of the Rules, to 29 facts.
[8] Impugned Decision, p. 12.
[9] Dissenting Opinion of Judge Harhoff, paras 4, 17.
[10] Impugned Decision, p. 12.
[11] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Defence and Prosecution Motions for Certification to Appeal Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 3 May 2007; *See* also, *Demande de certification d'appel contre la décision prise par la Chambre de première instance le 10 avril 2007 sur la demande du Procureur aux fins de dresser le constat judicaire des faits*, 16 April 2007, and Prosecution's Rule 73(B) Request for Interlocutory Appeal Certification of Trial Chamber's 10 April 2007 Decision on Adjudicated Facts, 17 April 2007.
[12] *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera* Appeals Decision").
[13] Prosecution's Interlocutory Appeal, paras. 2, 3, 8.
[14] Prosecution's Interlocutory Appeal, para. 3.
[15] *Ibid.*, para. 35.
[16] Defence's Interlocutory Appeal, p. 5.
[17] Article IV.10. of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal (IT/155/Rev. 3), 16 September 2005, requires a party to file a response within ten days of the filing of an interlocutory appeal. Because 20 May 2007 fell on a Sunday – a non-working day of the International Tribunal – the deadline to file a response to both interlocutory appeals was Monday 21 May 2007.

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Prosecution seeks dismissal of the Defence's Interlocutory Appeal.[18] Milošević did not respond to the Prosecution's Interlocutory Appeal nor did he reply to the Prosecution's Response.

II. STANDARD OF REVIEW

5. Ruling on requests for judicial notice under Rule 94(B) of the Rules forms part of the discretionary power that lies with Trial Chambers, so as to allow them "to determine which adjudicated facts to recognize on the basis of a careful consideration of the accused's right to fair and expeditious trial".[19] A Trial Chamber's exercise of its discretion will only be overturned by the Appeals Chamber if it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".[20]

III. SUBMISSIONS OF THE PARTIES AND DISCUSSION

1. Submissions of the Parties

6. In the present case, the Prosecution sought judicial notice, under Rule 94(B) of the Rules, of 179 adjudicated facts. The Trial Chamber took judicial notice of 110 of them and rejected the other 69. The Prosecution appeals the rejection of these 69 Proposed Facts, while Milošević challenges the admission of 57 Proposed Facts.[21] Both appeals relate to the judicial notice of Proposed Facts comprised between 56 and 181.

7. In the Prosecution's Interlocutory Appeal, the Prosecution requests that the Impugned Decision be remanded regarding the 69 Proposed Facts excluded by the Trial Chamber. The Prosecution submits that these facts, adjudicated by the Trial Judgement and the Appeals Judgement in the *Galić* Case, "were those showing that civilians were deliberately targeted by SRK forces under the command of General Galić".[22] The Prosecution alleges that the majority of the Trial Chamber, by refusing admission of these Proposed Facts, erred in exercising "its

[18] Prosecution's Response to Defence Appeal against the Trial Chamber's Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 21 May 2007 ("Prosecution's Response").
[19] *Karemera* Appeals Decision, para. 41.
[20] *Karemera* Appeals Decision, para. 43; *See* also, *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.
[21] The Prosecution's Interlocutory Appeal erroneously refers to 56 admitted facts at paragraph 8 and footnote 14.
[22] Prosecution's Interlocutory Appeal, para. 8.

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discretion in a manner that is inconsistent with the principles set forth in the *Karemera* Appeal[s] Decision".[23]

8. The Prosecution firstly submits that the majority of the Trial Chamber erroneously "concluded that taking judicial notice of facts that have 'a strong link with the crimes charged' would be inconsistent with the rights of the Accused, in particular his right to examine witnesses against him".[24] It explains that "the [m]ajority rebalanced the interests" at stake, *e.g.*, the procedural rights of the accused vis-à-vis expediency, "drew the line elsewhere" than in the *Karemera* Appeals Decision and "applied this new line to the present case".[25] The Prosecution further alleges that the Trial Chamber's approach was "explicitly rejected by" the *Karemera* Appeals Decision and resulted in rendering Rule 94(B) of the Rules a "dead letter".[26] In this respect, it contends that "[i]f facts pertaining to crimes committed before the time period of the indictment cannot be judicially noticed because they 'have a strong link' with the crimes charged in the indictment, then facts pertaining to the crime base actually charged in the indictment could never be judicially noticed, since in that case the 'strong link' will be even more prevalent".[27] Concerning this issue, the Prosecution submits that "if the Proposed Facts were judicially noticed the Trial Chamber could rely on them, *together with other evidence,* to draw inferences about notice to the Accused of crimes being committed by SRK forces".[28]

9. The Prosecution secondly submits that the Trial Chamber erred in law and abused its discretion when "it apparently rejected Proposed Facts on the basis that they contained findings of an essentially legal nature".[29] In support of this submission, the Prosecution contends that the "determination of what constitutes a 'fact' under Rule 94(A) [as established in the *Karemera* Appeals Decision] provides apposite guidance on the question of what may constitute a 'fact' under Rule 94(B)".[30] It further argues that in reaching a contrary conclusion, the Trial Chamber read a sentence extracted from paragraph 37 of the Impugned Decision "out of context",[31] and erred in finding from that sentence that the Appeals Chamber in the *Karemera* Appeals Decision intended to "hold that legal conclusions could be judicially noticed under Rule 94(A)".[32] It also

[23] *Ibid.*, para. 9.
[24] *Ibid.*, para. 12 (footnote omitted).
[25] *Ibid.*, paras 13, 14.
[26] *Ibid.*, para. 15.
[27] *Ibid.* (footnote and emphasis omitted).
[28] *Ibid.*
[29] *Ibid.*, para. 19.
[30] *Ibid.*, para. 26.
[31] *Ibid.*, para. 27.
[32] *Ibid.*, para. 29.

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emphasizes that the Trial Chamber had itself "demonstrated the propriety of using 'legal language' to describe facts"[33] pending trial proceedings. It concludes that this conduct considered together with the "plain language" of Rules 94(A) and 94(B) of the Rules, the *Karemera* Appeals Decision and the *Prlić*[34] and *Popović*[35] Trial Chamber Decisions "demonstrate the validity of describing as 'factual' the Proposed Facts in this case".[36] Alleging that a review of the challenged Proposed Facts "shows that none of them are legal conclusions", the Prosecution claims that "judicial notice should have been taken of all of them".[37]

10. Milošević requests that the judicial notice of 57 Proposed Facts 56 through 181 be reversed and that the remaining part of the Impugned Decision be affirmed, thus amounting, in fact, to seeking rejection of all Proposed Facts from 56 to 181. In support of his appeal, Milošević submits that all these facts "deal with the period which falls outside that of the Indictment"[38] and relate "to the acts, conducts and *mens rea* of Stanislav Galić",[39] and thus "are in no way relevant" to the present case.[40] He further points out that despite that and the finding that "none of the[se] Proposed Facts go to the acts, conducts [sic] or mental state" of Milošević,[41] the Trial Chamber took judicial notice of them.[42] He concludes that in light of the *Karemera* Appeals Decision which ruled, *inter alia*, that "judicial notice under Rule 94(B) is in fact available only for adjudicated facts that bear, at least in some respect, on the criminal responsibility of the accused",[43] Proposed Facts 56 through 181 "cannot be the subject of judicial notice".[44]

11. The Prosecution responds that the Defence's Interlocutory Appeal should be dismissed on the ground that the "Proposed Facts that were judicially noticed by the Trial Chamber are plainly relevant to the current proceedings."[45] In this respect, it submits that because of the allegations against Milošević contained in the Amended Indictment,[46] the positions he held within the SRK

[33] *Ibid.*, para. 32.
[34] *Prosecution v. Jadranko Prlić et al.*, Case No. IT-04-74-T, *Décision relative aux requêtes des 14 et 23 juin 2006 de l'Accusation aux fins de dresser le constat judiciaire de faits admis*, 7 September 2006 ("*Prlić* Decision").
[35] *Prosecutor v. Vujadin Popović at al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 ("*Popović* Decision").
[36] Prosecution's Interlocutory Appeal, para. 34.
[37] *Ibid.*
[38] Defence's Interlocutory Appeal, para. 11.
[39] *Ibid.*, para. 16.
[40] *Ibid.*
[41] *Ibid.*, para. 15, citing the Impugned Decision, para. 32.
[42] *Ibid.*, para. 16.
[43] *Ibid.*, para. 17, citing the *Karemera* Appeals Decision, para. 48.
[44] *Ibid.*, para. 18.
[45] Prosecution's Response, para. 4.
[46] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Amended Indictment, 26 December 2006, ("Amended Indictment").

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before he became Commander[47] and "the evidence adduced at trial concerning the unchanging nature of the campaign of shelling and sniping from 1992 to 1995",[48] the Trial Chamber did not err when it found that the 57 Proposed Facts it judicially noticed were relevant.[49] The Prosecution also points out that Defence Counsel for Milošević have themselves "frequently elicited evidence concerning" the time period preceding the time period of the Amended Indictment, and that Milošević concedes that Proposed Facts 1 through 53, despite pertaining to the time period comprised before the Amended Indictment, are relevant.[50] It finally submits that while Milošević's arguments "may ultimately go to the weight that should be afforded [to] the judicially noticed Proposed Facts, [they should not go] to their admissibility."[51]

2. Discussion

12. Relying on the *Karemera* Appeals Decision, the Trial Chamber found that "none of the Proposed Facts go to the acts, conduct or mental state of the Accused".[52] It then went on to "assess whether taking judicial notice of them would be consistent with the rights of the accused, particularly the right to examine witnesses against him".[53] It held in this respect that "this right is particularly important with regard to Proposed Facts which go to crimes committed under the command of Galić, the Accused's predecessor, and which [...] have a strong link with the crimes charged in the indictment, particularly those facts which may in effect put the Accused on notice."[54] The Trial Chamber thus considered that if the Proposed Facts that relate to the crimes committed under the command of Milošević's predecessor were to be judicially noticed, it would shift the burden of producing evidence onto Milošević and oblige him to rebut those facts, which would be inconsistent with his rights.[55]

a. Relevance of the Proposed Facts

13. Milošević challenges taking judicial notice of all Proposed Facts from 56 to 181 on the sole ground that they relate to the time period before the Amended Indictment and to the acts, conduct and *mens rea* of Stanislav Galić ("Galić"), and are thus irrelevant to the present case.[56] In this

[47] Prosecution's Response, paras 4, 6.
[48] Prosecution's Response, para. 6, *see* also para. 5.
[49] *Ibid.*, para. 6.
[50] *Ibid.*, para. 5.
[51] *Ibid.*, para. 6.
[52] Impugned Decision, para. 32.
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] Defence's Interlocutory Appeal, para. 16.

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respect, the Trial Chamber correctly held that the adjudicated facts sought to be judicially noticed must be relevant to the matters at issue in the current proceedings.[57]

14. Proposed Facts 56 through 181 are grouped under the heading "Campaign against Civilians between September 1992 and August 1994".[58] The Amended Indictment against Milošević alleges that the SRK implemented a campaign of shelling and sniping the civilian population in Sarajevo during a forty-four month period from 1992 through 1995, and that Milošević inherited this campaign when he succeeded Galić as Commander of the SRK on or about 10 August 1994 and proceeded to maintain and further it through his own conduct.[59] The charges also allege that from May 1992, Milošević was Commander of the SRK's 1st Romanija Infantry Brigade, and from July 1993 the SRK's Chief of Staff, and that therefore he knew of the campaign against the civilian population when he himself became Commander of the SRK.[60] Even though these Proposed Facts fall outside the time period charged in the Amended Indictment and are related to the acts, conduct and *mens rea* of his predecessor, Galić, the Appeals Chamber finds that they are clearly relevant to the present case inasmuch as they concern the campaign against civilians between September 1992 and August 1994. While the Trial Chamber did not specifically state whether Proposed Facts 56 through 181 present any relevance for this case - except for those which go to crimes committed under Galić's command[61] - such a finding can be inferred from the Impugned Decision.[62] Therefore, Milošević has failed to demonstrate that the Trial Chamber committed an error in considering that the Proposed Facts it judicially noticed were relevant, and his appeal is dismissed.

b. Judicial Notice of Adjudicated Facts of Crimes Having a Strong Link with the Crimes against Milošević

15. At the outset, the Appeals Chamber notes that the Trial Chamber did not clearly articulate on which ground it relied to exclude the 69 Proposed Facts that are the subject of the Prosecution's Interlocutory Appeal. In light of the introductory statement of the Impugned Decision's

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[57] Impugned Decision, para. 27; *See, inter alia,* regarding this issue, *Prosecutor v. Momir Nikolić,* Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, para. 11; *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana,* Case Nos. ICTR-96-10 and ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts – Rule 94(B) of the Rules of Procedure and Evidence, 22 November 2001, para. 27; *Prosecutor v. Laurent Semanza,* Case No. ICTR-97-20-T, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94(B) and 54, 6 February 2002, para. 14.

[58] *See* Annex C to the Prosecution's Interlocutory Appeal.

[59] Amended Indictment, paras 11, 12, 13, 17, 19.

[60] *Ibid.*, para. 19.

[61] Impugned Decision, para. 32.

[62] At paragraph 27 of the Impugned Decision, the Trial Chamber stated that one of the criteria to be considered when deciding to judicially notice a proposed adjudicated fact is that "[t]he fact must have some relevance to an issue in the current proceedings". Although this matter was not specifically addressed by the Trial Chamber, it can be inferred from that stipulation and from the Trial Chamber's finding that the Proposed Facts which go to crimes committed under Galić's command have a strong link with the current case, that the Trial Chamber did indeed deem all Proposed Facts relevant.

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Disposition[63] as well as of the Dissenting Opinion of Judge Harhoff,[64] it seems, however, that in declining to take judicial notice of these 69 Proposed Facts the Trial Chamber mostly – if not exclusively - relied upon its finding that if the Proposed Facts which go to the crimes committed under the command of Galić and which have a strong link with the crimes charged in the Amended Indictment against Milošević, "particularly those facts which may in effect put the Accused on notice", were to be judicially noticed, the burden to produce evidence would be shifted to Milošević in such a manner that it would jeopardize his rights.[65]

16. The *Karemera* Appeals Decision established that it is prohibited to take judicial notice of "adjudicated facts relating to the acts, conduct, and mental state of the accused."[66] This means that, when an accused is charged with crimes committed by others, while it is possible to take judicial notice of adjudicated facts regarding the existence of such crimes, the *actus reus* and the *mens rea* supporting the responsibility of the accused for the crimes in question must be proven by other means than judicial notice.[67] Thus, the Appeals Chamber sees no reason why judicial notice could not be taken of adjudicated facts providing evidence as to the existence of crimes committed by others and which the accused is not even charged with, as in the instant case, as long as the burden remains on the Prosecution to establish, by means other than judicial notice, that the accused had knowledge of their existence. The Appeals Chamber recalls, in this respect, that judicial notice of adjudicated facts "does not shift the ultimate burden of persuasion, which remains with the Prosecution" and that the facts "established under Rule 94(B) are merely presumptions that may be rebutted by the defence with evidence at trial".[68]

17. Taking judicial notice of adjudicated facts related to crimes committed under the command of Galić, *e.g.* facts regarding the deliberate and indiscriminate sniping and shelling by forces under Galić's command on civilian persons and objects in Sarajevo, would provide evidence of the commission of such crimes. Milošević has full latitude to rebut the presumption that these crimes were committed by introducing reliable and credible evidence to the contrary. Furthermore, establishing the very existence of these crimes does not imply that Milošević had knowledge of

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[63] "The Trial Chamber understands [R]ule 94(B) as giving a Trial Chamber a discretionary power to admit adjudicated facts when it advances the expeditiousness of the proceedings and is in the interests of justice. Accordingly, the Trial Chamber will identify, in light of the foregoing analysis, those facts which it admits, leaving aside those which it rejects." Impugned Decision, p. 12.

[64] "However, I respectfully disagree with the majority's decision to decline from accepting judicial notice of the remaining 69 proposed adjudicated facts. All of these remaining facts relate to the factual situation or to particular incidents occurring in Sarajevo during General Galić's time in power, and they all imply somehow that the SRK – under Galić – deliberately and indiscriminately targeted civilians or civilian objects in Sarajevo." Dissenting Opinion of Judge Harhoff, para. 4.

[65] Impugned Decision, para. 32.

[66] *Karemera* Appeals Decision, para. 50.

[67] *Ibid.*, para. 52.

[68] *Ibid.*, para. 42.

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their commission. Whether proof that the SRK deliberately and indiscriminately targeted civilians in Sarajevo under Galić's command is adduced through judicial notice or through other means, the Prosecution will be required to demonstrate beyond reasonable doubt that Milošević knew of the campaign under Galić's command, supported its continuation when he took over command, and failed to prevent the crimes committed under his command and punish the perpetrators. In this respect, the Appeals Chamber finds ambiguous the Prosecution's statement that "if the Proposed Facts were judicially noticed the Trial Chamber could rely on them, *together with other evidence*, to draw inferences about notice to the Accused of crimes committed by SRK forces",[69] and recalls that evidence of the accused's notice of the crimes has to be produced separately from judicial notice of their existence.

18. Considering the above, the Trial Chamber therefore committed a discernable error when it found that shifting the burden to produce evidence would be inconsistent with Milošević's rights and refused to take judicial notice of Proposed Facts relating to the very existence of crimes committed by others and for which Milošević is not charged.

c. Adjudicated Facts Containing Findings of an Essential Legal Nature

19. Concerning the second Prosecution's ground of appeal that the Trial Chamber erred in law and abused its discretion by rejecting any of the 69 Proposed Facts at stake "on the basis that they contained findings of an essentially legal nature",[70] as a preliminary remark, and as already noted above,[71] the Appeals Chamber remains uncertain as to whether the Trial Chamber relied on this ground to deny judicial notice to any of these Proposed facts, but will consider this issue.

20. The Trial Chamber found that facts sought to be judicially noticed "must represent the *factual findings* of a Trial Chamber or Appeals Chamber. It must not, therefore, contain any findings or characterisations that are of an essentially legal nature".[72] It rejected the Prosecution's submission drawing a distinction between an essentially legal finding and a factual finding based on the *Karemera* Appeals Decision, because it found that "in no part [in this decision] did the Appeals Chamber hold that the facts it deemed suitable for judicial notice did not contain essentially legal conclusions or characterizations; it simply ruled that these facts were notorious."[73] Considering further that the "Prosecution submission relied extensively on an erroneous comparison of these facts",[74] the Trial Chamber declined to "determine the scope of the category of

[69] Prosecution's Interlocutory Appeal, para. 15.
[70] Prosecution's Interlocutory Appeal, para. 19.
[71] Para. 15.
[72] Impugned Decision, para. 27 (footnote omitted).
[73] Impugned Decision, para. 36.
[74] *Ibid.*

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essentially legal conclusions" and deemed it "sufficient to point out that, in arriving at its conclusion as to the narrowness of that category, the Prosecution relied on a flawed interpretation of the *Karemera* Appeals Decision".[75]

21. Contrary to the Prosecution's allegations, the Trial Chamber did not err in its analysis of the *Karemera* Appeals Decision. In that decision, the Appeals Chamber held that the key question regarding admission of facts of common knowledge, pursuant to Rule 94(A) of the Rules, is "whether the proposition can reasonably be disputed" and "not whether a proposition is put in legal or layman's terms."[76] When a Trial Chamber determines that a fact is notorious and not subject to reasonable dispute, it is obliged to take judicial notice of it under Rule 94(A) of the Rules. It has no discretion to act otherwise.[77] It is irrelevant whether the fact in question is defined by terms with a legal meaning as long as these terms describe factual situations.[78] In this respect, the Appeals Chamber does not agree with the Prosecution that the Trial Chamber held "that legal conclusions could be judicially noticed under Rule 94(A)" of the Rules.[79] The Trial Chamber limited itself to noting that the Appeals Chamber in *Karemera* ruled that "the submission that the term 'genocide' is a legal characterisation" could not even be considered given that "Rule 94(A) does not provide the Trial Chamber with discretion to refuse judicial notice on this basis."[80] This constitutes an accurate reflection of the *Karemera* Appeals Decision.[81] Furthermore, "whereas judicial notice under Rule 94(A) is mandatory, judicial notice under Rule 94(B) is discretionary."[82] Thus, the Trial Chamber correctly interpreted the *Karemera* Appeals Decision when it ruled that its conclusions with regard to Rule 94(A) could not be apposite to Rule 94(B) of the Rules.

22. The Appeals Chamber additionally notes that the Trial Chamber correctly held that "[j]udicial notice pursuant to Rule 94(B) is not designed for the importing of legal conclusions from past proceedings".[83] To determine "whether a proposed fact is truly a factual finding", the Trial Chamber referred to the *Krajišnik* Decision which adjudicated that "many findings have a legal aspect, if one is to construe this expression broadly. It is therefore necessary to determine on a case-by-case basis whether the proposed fact contains findings or characterizations which are of an essentially legal nature and which must, therefore, be excluded."[84] Thus, the Prosecution does

[75] Impugned Decision, para. 36.
[76] *Karemera* Appeals Decision, para. 29.
[77] *Ibid.*, paras 29, 37.
[78] *Ibid.*
[79] Prosecution's Interlocutory Appeal, para. 29.
[80] Impugned Decision, para. 35, citing the *Karemera* Appeals Decision, para. 37.
[81] *Karemera* Appeals Decision, para. 37.
[82] *Ibid.*, para. 41.
[83] Impugned Decision, para. 33.
[84] Impugned Decision, para. 33, quoting *Prosecutor v. Momčilo 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. 15

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not accurately represent the findings in the Impugned Decision when it claims that the Trial Chamber held "that facts could not be judicially noticed if they were described with legal language".[85] The Appeals Chamber also observes that the Trial Chamber's conclusion is fully in line with the jurisprudence of the Trial Chambers on this issue[86] – including after the issuance of the *Karemera* Appeals Decision.[87] The Prosecution's Interlocutory Appeal on this ground is therefore dismissed.

IV. DISPOSITION

Based on the foregoing reasons, the Appeals Chamber

DISMISSES the Defence's Interlocutory Appeal;

ALLOWS the Prosecution's Interlocutory Appeal **IN PART**;

AFFIRMS the Impugned Decision regarding judicial notice of the 57 Proposed Facts 56 through 181 appealed by Milošević;

REMANDS the remaining 69 Proposed Facts 56 through 181, which are the subject of the Prosecution's Interlocutory Appeal, to the Trial Chamber for further consideration in a manner consistent with the present Decision.

(In this decision, the Trial Chamber further observed that findings of an essentially legal nature "must, therefore, be excluded. In general, findings related to the *actus reus* or the *mens rea* of a crime are deemed to be factual findings. As long as they also comply with the other criteria [...] they may be admitted." (para. 15)).

[85] Prosecution's Interlocutory Appeal, para. 33.

[86] *Krajišnik* Decision, para. 15; *See* also, *inter alia, Prosecution v. Enver Hadžihasanović et al.*, Case No. IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005, 14 April 2005, p. 5, and Final Decision on Judicial Notice of Adjudicated Facts, 20 April 2004, pp. 7, 8; *Prosecutor v. Željko Mejakić*, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice pursuant to Rule 94(B), 1 April 2004, p. 4; *Prosecution v. Vidoje Blagojević et al.*, 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; *Prosecution v. Jadranko 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, para. 12.

[87] *Prlić* Decision, para. 23, ("*Quant à la condition n° 3 relative à l'absence de qualification juridique, la Chambre considère qu'elle doit être appréciée au cas par cas et interprétée de façon restrictive. En effet, certains paragraphes de jugements et arrêts proposés pour constat judiciaire, tout en décrivant essentiellement des réalités factuelles, renferment également, souvent, des termes juridiques. Ces paragraphes sont susceptibles d'être admis en application de l'article 94 B) du Règlement. Ce n'est que lorsque des paragraphes tirent principalement des conclusions juridiques qu'ils ne feront pas l'objet de constat judicaire.*" (footnotes omitted)); *Popović* Decision, para. 10 (The Trial Chamber endorsed the above-quoted position in the *Krajišnik* Decision).

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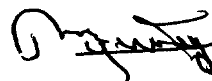
Done in English and French, the English version being authoritative.

Done this 26th day of June 2007,
At The Hague,
The Netherlands.



Mehmet Güney,
Presiding Judge

[Seal of the Tribunal]

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