



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-98-29/1-T

Date: 18 July 2007

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Frederik Harhoff

Registrar: Mr. Hans Holthuis

Date: 18 July 2007

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

**DECISION ON APPEALS CHAMBER REMAND OF
JUDICIAL NOTICE OF ADJUDICATED FACTS WITH
SEPARATE OPINION OF JUDGE ROBINSON**

The Office of the Prosecutor:

Mr. Stefan Waespi
Ms. Carolyn Edgerton
Mr. John Docherty

Counsel for the Accused:

Mr. Branislav Tapušković
Ms. Branislava Isailović

1. **TRIAL CHAMBER III** (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the Appeals Chamber “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” (“Appeals Chamber Decision”) of 26 June 2007, in which the Appeals Chamber remands 69 Proposed Facts 56 through 181 to the Trial Chamber for further consideration in a manner consistent with the Appeals Chamber Decision.

I. INTRODUCTION

2. On 18 December 2006, the Prosecution filed a “Motion for Judicial Notice of Adjudicated Facts” (“Prosecution Motion”), to which the Defence responded on 19 January 2007 (“Defence Response”), and the Prosecution replied on 25 January 2007 (“Reply”). After hearing additional oral submissions from the parties on 12 February 2007, the Trial Chamber ruled upon the Motion on 10 April 2007 in 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” (“Trial Chamber Decision”). The Trial Chamber granted certification to appeal the decision on 3 May 2007. In its Decision, the Appeals Chamber ruled on both parties’ appeals of the Trial Chamber Decision.

3. The Appeals Chamber dismissed the Defence appeal in its entirety. The Prosecution’s appeal focused on the decision of the Trial Chamber not to take judicial notice of 69 Proposed Facts.¹ The Appeals Chamber granted, in part, the Prosecution’s appeal, directing the Trial Chamber to further consider the 69 Proposed Facts in a manner consistent with its Decision.²

II. APPLICABLE LAW

4. The Appeals Chamber saw “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.”³ In addressing the Prosecution’s appeal, the Appeals Chamber held that, according to the *Karemera*

¹ Facts numbered 57-59, 61, 63, 72, 77-80, 86, 87, 89, 94-98, 105-107, 111, 117-121, 124, 131-142, 144-146, 148-155, 157, 160, 165-175, 177-181 in the Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts filed by the Prosecution on 18 December 2006.

² Appeals Chamber Decision, p. 12.

³ *Ibid.*, para. 16.

Appeals Decision,⁴ “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.”⁵ As such, the Appeals Chamber held that establishing the existence of these crimes committed during the period in which Stanislav Galić was the commander of the SRK does not imply that Dragomir Milošević (“the Accused”) had knowledge of their commission.⁶

5. The distinction drawn by the Appeals Chamber between the existence of crimes prior to the indictment period and the notice of the Accused during the indictment period appears to rest on its finding that the Prosecution, regardless of any judicial notice of facts going to the existence of crimes under Stanislav Galić, will be required to demonstrate beyond reasonable doubt that the Accused knew of the crimes committed under the command of Stanislav Galić, supported its continuation when he took over command, and failed to prevent the crimes committed under his command and punish the perpetrators.⁷ The Appeals Chamber dismissed the Prosecution’s proposition that the Trial Chamber could rely on such adjudicated facts, *together with other evidence*, to draw inferences about notice to the Accused of crimes committed by SRK forces and it affirmed that evidence of the Accused’s notice of the crimes has to be produced separately from judicial notice of their existence.⁸

6. The Appeals Chamber also recalled 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”.⁹ In this regard, the Appeals Chamber emphasised the ability of the Accused to rebut the presumption, which would arise as a consequence of the admission of the 69 Proposed Facts, that certain crimes were committed under the command of Stanislav Galić.¹⁰

7. The Appeals Chamber held that the Trial Chamber had therefore committed a “discernable error when it found that shifting the burden to produce evidence would be inconsistent with [the

⁴ *Prosecutor v. Edouard 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*”)

⁵ Appeals Chamber’s Decision, para. 16.

⁶ *Ibid.*, para. 17.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 17.

Accused's] rights and refused to take judicial notice of Proposed Facts relating to the very existence of crimes committed by others and for which [the Accused] is not charged".¹¹

8. The Appeals Chamber upheld the decision of the Trial Chamber in all other aspects of its ruling.

III. DISCUSSION

9. The Appeals Chamber upheld the decision of the Trial Chamber except for its interpretation of the *Karemera* Appeals Decision concerning crimes committed by physical perpetrators other than the Accused before the time period mentioned in the Indictment. In light of the Appeals Chamber decision, the Trial Chamber finds that it must reconsider the 69 remaining Proposed Facts it initially refused to judicially notice, taking into account the Appeals Chamber Decision and the criteria identified in the Trial Chamber Decision.¹²

10. Of the 69 remaining facts, only facts which represent factual findings of the *Galić* Trial Chamber or the *Galić* Appeals Chamber and which do not contain any findings or characterisations that are of an essentially legal nature can be admitted.¹³ The Trial Chamber also retains its discretion to take judicial notice of adjudicated facts under Rule 94(B) for the purpose of expediting the proceedings, if it finds it to be in the interest of justice and provided the rights of the Accused are not thereby compromised.¹⁴ Furthermore, adjudicated facts, even in conjunction with other evidence, cannot be used to establish notice of the Accused of the crimes he is charged with.

11. The Trial Chamber understands a finding to be legal when it involves the interpretation or application of legal principles while a finding is factual when it requires a description of circumstances surrounding the case at hand.¹⁵

¹¹ *Ibid.*, para. 18.

¹² Trial Chamber Decision, 10 April 2007, paras 25-30.

¹³ Trial Chamber Decision, para. 27.

¹⁴ See *Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Appeals Chamber Remand on Judicial Notice, 11 December 2006.

¹⁵ See also *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Décision Relative à la Requête du Procureur aux Fins de Constat Judiciaire et d'Admission de Présomptions Factuelles, 15 May 2002, para. 39 in which the Trial Chamber held that "facts involving interpretation or legal characterisation of facts are not capable of admission under Rule 94."

12. The adjudicated facts at issue are relevant to the background of the case,¹⁶ or could provide circumstantial evidence from which the notice of the Accused of crimes committed under his command could be inferred.¹⁷ In light of the Appeals Chamber directions as to the type of evidence on which a finding on the notice of the Accused must be based, these facts cannot be used to establish notice. However, in light of the significance of the adjudicated facts for the historical and factual background of the Prosecution's case, the Trial Chamber concludes that facts related to crimes committed under the command of *Galić*, but which do not contain findings of an essentially legal nature, should be judicially noticed.

13. **FOR THOSE REASONS, THE TRIAL CHAMBER**

GRANTS IN PART the Prosecution's Motion with regard to the remaining adjudicated facts number 57, 58, 63, 72, 78, 79, 89, 105, 111, 117, 119, 132, 134, 142, 145, 146, 148, 150-152, 171, 172.

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



Judge Patrick Robinson
Presiding

Dated this eighteenth day of July 2007

At The Hague

The Netherlands

[Seal of the Tribunal]

¹⁶ In this regard, the Trial Chamber notes that the Prosecutor submitted that the adjudicated facts are "relevant to establish the historical and factual background of the Prosecution's case" in the Prosecution's Motion for Judicial Notice of Adjudicated Facts, 18 December 2006, para. 8. Further, the Prosecution orally submitted that the adjudicated facts go to prove that "the Accused was instrumental and a part of putting together [... the] criminal scheme into place [...] and [...] in August of 1994, when he became the commander of the SRK, he continued that scheme and did nothing to stop it", Trial Hearing, 12 February 2007, T. 1896.

¹⁷ See *Čelebići* Appeal Judgement, 20 February 2001, para. 238 in which the Appeals Chamber held that "A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he "had reason to know" [...]. As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge".

I. SEPARATE OPINON OF JUDGE ROBINSON

1. I fully support the Decision of the Trial Chamber. However, I have a difficulty with the statement in paragraph 11 that “a finding is factual when it requires a description of circumstances surrounding the case at hand.”

2. In the first place, if there is a need for a definition of any term in relation to the issue at hand, it is the term “legal” that should be defined, and I am quite content with the statement in the same paragraph that “a finding is legal when it involves the interpretation or application of legal principles.” It is a mistake to define terms that do not need definition. There is no need to define “factual”. Moreover, I find the definition offered vague and unhelpful.

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



Judge Patrick Robinson

Dated this eighteenth day of July 2007

At The Hague

The Netherlands

[Seal of the Tribunal]