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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-95-5/18-T

Date: 25 November 2009

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **25 November 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION REQUEST FOR RECONSIDERATION OF DECISION ON SECOND PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the "Prosecution Request for Reconsideration of Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts", filed on 19 October 2009 ("Request"), and hereby renders its decision thereon.

I. Background and submissions

1. On 9 October 2009, this Trial Chamber issued its "Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts" ("Decision") in which it, *inter alia*, declined to take judicial notice of a number of proposed facts on the basis that they were not relevant to the current proceedings.[1] The Office of the Prosecutor ("Prosecution") now requests that the Chamber reconsider this Decision in respect of the following denied facts: 383–392, 399, 423–425, 427–484, 507, 508, and 513.[2]

2. Denied facts 383–392, 423–425, and 427–484 relate to events in Croatia, while denied facts 399, 507, 508, and 513 relate to the organs of the Federal Republic of Yugoslavia ("FRY") and Serbia.[3] With respect to the former, the Prosecution argues that the Chamber erroneously limited the scope of what it considered to be relevant to facts which were geographically linked to the charges in the Third Amended Indictment ("Indictment"). As for the latter, the Prosecution claims that the Chamber erroneously determined that organs of the FRY and Serbia are irrelevant to the charges against the Accused in this case.[4]

3. According to the Prosecution, the Croatia-related facts denied by the Chamber are relevant to the present proceedings, as they show the existence of a consistent pattern of conduct and thus go to prove serious violations of international humanitarian law, which is the type of evidence admissible under Rule 93 of the Tribunal's Rules of Procedure and Evidence ("Rules") in order to demonstrate, for example, a special motive, intent, opportunity, and/or a plan. The Prosecution then asserts that the Croatia-related facts reveal a "similar method in the planning and implementation of a similar objective of forcible ethnic separation in relation to both Croatia and Bosnia and Herzegovina". Moreover, the Accused and other alleged members of the overarching joint criminal enterprise charged in the Indictment, namely Slobodan Milošević, Ratko Mladić, Vojislav Šešelj, Željko Ražnatović (Arkan), Jovica Stanišić, and Franko Simatović, were involved

[1] Decision, paras. 21–28.
[2] Request, para. 1.
[3] Request, Appendix A.
[4] Request, paras. 3–4.

in the planning and implementation of this similar objective in Croatia, later moving on to do the same or similar in Bosnia and Herzegovina. Thus, according to the Prosecution, the denied facts going to the prior involvement of these individuals in similar prior conduct are relevant to the present proceedings and the eventual formulation of the overarching joint criminal enterprise operating in Bosnia and Herzegovina.[5] The Prosecution also argues that the Croatia-related facts provide the Chamber with useful background and contextual information as the Accused has, on several occasions, expressed awareness of events in Croatia and his support for the Serbian side of that conflict. Thus, those facts, together with the statements made by the Accused relating to the situation in Croatia, "reflect [the Accused's] intent to participate in the [overarching joint criminal enterprise] using similar means and methods as those employed in Croatia."[6] The Prosecution then asserts that the use of adjudicated facts for this purpose would not run afoul of the restriction prohibiting the admission of such facts when they relate to the acts, conduct, and mental state of an accused, as the burden remains on the Prosecution to establish, by means other than judicial notice, that the Accused in this case had knowledge of those facts.[7]

4. As for the denied facts relating to the organs of the FRY and Serbia, the Prosecution asserts that, had the Chamber looked at them collectively, rather than in isolation, their relevance would have been apparent to it. This is because the denied facts 507, 508, and 513 describe the support which the Bosnian Serb army received from the FRY, while the denied fact 399 and the admitted fact 506 show a connection between the "wholly Serb dominated" FRY and the alleged members of the overarching joint criminal enterprise.[8]

5. Finally, in the alternative, the Prosecution argues that injustice would result should the Chamber refuse to reconsider its decision that the above mentioned proposed facts are irrelevant to the Indictment, as the Prosecution's case against the Accused will "fail to capture the full scope and nature of the criminal enterprise in which [the Accused] was engaged, leaving it unfairly susceptible to a variety of unfounded arguments which [the Accused] may raise".[9]

6. The Accused has not responded to the Request.

[5] Request, paras. 6–12.
[6] Request, para. 13.
[7] Request, para. 14.
[8] Request, paras. 15–16
[9] Request, para. 5.

II. Applicable law

7. There is no provision in the Rules for requests for reconsideration, which are a product of the Tribunal's jurisprudence, and are permissible only under certain conditions.[10] However, the Appeals Chamber has definitively articulated the legal standard for reconsideration of a decision as follows: "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'"[11] Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.[12]

III. Discussion

8. The Prosecution has failed to demonstrate a clear error of reasoning in the Chamber's Decision, despite its clarification regarding the relevance of certain proposed facts. In support of its Request, the Prosecution refers to a number of decisions, including a decision issued by the Appeals Chamber in the *Dragomir Milošević* case, holding that adjudicated facts pertaining to periods of time falling outside the indictment period but related to a campaign of similar crimes taking place prior to that period were relevant on the facts of that case and thus could be judicially noticed.[13] However, rather than demonstrating a clear error of reasoning on the part of this Chamber in its earlier Decision, this decision simply suggests that the Trial Chamber *can* judicially notice similar facts in similar circumstances. In addition, the *Dragomir Milošević* decision is distinguishable on the facts as the link in that case, between the crimes alleged to have been committed by the accused and the earlier crimes committed by his predecessor, appears to have been much stronger than the alleged link in this case, the one between the crimes committed in Croatia and those said to have taken place in Bosnia and Herzegovina. For example, both the prior crimes and the crimes alleged in the indictment against Dragomir Milošević were not only identical

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[10] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.

[11] *Prosecutor v. Milošević*, Case No. IT-02-54-AR108*bis*.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); *see also Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

[12] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *see also Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, p. 3.

[13] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007, paras. 14, 16.

in nature but were also taking place on the same territory, in and around the city of Sarajevo. In this case, however, the crimes in Croatia are geographically and temporally removed from the crimes alleged against the Accused.

9. The Prosecution seeks to rely on a number of other decisions which supposedly illustrate that judicially noticed facts may include matters outside of the geographic scope of the indictment where those facts relates to a consistent pattern of conduct relevant to serious violations of international humanitarian law. The Chamber notes, however, that none of those decisions was concerned with judicial notice but with admission of evidence through other means. Accordingly, in all but one,[14] the issue was either one of prior acts and conduct of the accused, or the purpose and methods of the joint criminal enterprise actually charged in the indictment.[15] Here, on the other hand, the proposed facts are concerned neither with the acts and conducts of this particular Accused nor with the purpose and methods of the overarching joint criminal enterprise in which he is alleged to have participated. Accordingly, as far as the Croatia-related facts are concerned, the Prosecution has failed to demonstrate a clear error of reasoning on behalf of the Chamber.

10. As for the remainder of the proposed facts, which deal mainly with the support the FRY provided to the Bosnian Serbs, the Chamber again is not persuaded by the Prosecution's arguments. Whether these facts are considered collectively or individually, the Chamber remains of the view that they are not relevant to the case against this particular Accused.

11. Having decided not to reconsider its Decision on the basis of the first limb of the test for reconsideration, the Chamber also does not accept the argument that its refusal to take judicial notice of these proposed facts would result in injustice, such that it should reconsider the remaining parts of its Decision. First, it should be borne in mind that the Decision does not preclude the Prosecution from bringing actual evidence relating to facts that have not been judicially noticed. The test developed by the Tribunal's jurisprudence in relation to judicial notice is stringent and, in the present circumstances, the requirement of relevance must be analysed by the Chamber before it has had the benefit of hearing any evidence at trial. When judicial notice of certain adjudicated facts is denied because the relevance requirement is not seen to be met, there are other ways in

[14] In the *Gotovina* case, the Trial Chamber admitted evidence which was outside the temporal and geographical scope of the indictment, but did so pursuant to Rule 92 *bis* on the basis that it satisfied the requirements of that Rule as it provided "some historical, political, and military background that is also relevant for the understanding of the events" alleged in the indictment. *See Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Defendant Ante Gotovina's Motion for Admission of Evidence of One Witness Pursuant to Rule 92 *bis*, 16 September 2009.

[15] *See e.g. Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, para. 321; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on the Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence, 22 January 2004; *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.7, Decision on Appeal Against the Trial Chamber's Oral Decision of 9 January 2008, 11 March 2008.

which the party seeking judicial notice can go about presenting its case. In other words, the fact that the Prosecution did not meet this test in relation to the denied facts does not preclude the proving of those facts at trial, should the Prosecution consider it necessary to bring the evidence to do so and should that evidence satisfy the requirements of Rule 89 of the Rules. Second, the Prosecution's argument that the Decision would lead to failure to understand the full scope and nature of the criminal enterprise in which the Accused was engaged, and would thus make the Prosecution "unfairly susceptible to a variety of unfounded arguments" by the Accused is unsound. After all, it is to be expected that any party whose attempt at obtaining judicial notice or tendering evidence is denied by a Chamber would feel exposed in some way or another to a variety of arguments from the other side. However, this is not the type of "injustice" that the Chamber should be concerned with when considering whether or not to reconsider one of its decisions.

IV. Disposition

12. Accordingly, pursuant to Rules 54 and 94 of the Rules, the Chamber hereby **DENIES** the Request.

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

Judge O-Gon Kwon, Presiding

Dated this twenty-fifth day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]