



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-05-88/2-PT
Date: 23 February 2010
Original: English

IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 23 February 2010

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON REQUEST FOR CERTIFICATION OF DECISION ON
PROSECUTION MOTION FOR JUDICIAL NOTICE OF ADJUDICATED
FACTS**

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

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”);

BEING SEISED OF the Accused Tolimir’s “Request for Permission from the Trial Chamber to File a Complaint against the Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)”, submitted on 26 January 2010 and filed in English on 1 February 2010 (“Motion”);

NOTING the “Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)” issued on 17 December 2009 (“Impugned Decision”), in which the Trial Chamber granted in part the “Prosecution’s Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)” filed on 13 February 2009 and decided to take judicial notice of the adjudicated facts specified in the Annex to the Impugned Decision;

NOTING that in the Motion the Accused seeks certification of the Impugned Decision on the grounds that the Impugned Decision “is defective to the extent that it requires the intervention of the Appeals Chamber and that solving the issues that are the subject of the [Impugned] Decision would considerably advance the proceedings”;¹

NOTING that the Accused submits that issues pertaining to adjudicated facts naturally influence the fairness and expeditiousness of the trial;²

NOTING that, in the submission of the Accused, the admission of too many facts will place too heavy a burden on the Accused, as it forces the Accused to find evidence to deal with issues on which he would otherwise not have adduced evidence;³

NOTING that the Accused further submits that he is unable to adduce evidence with respect to certain Adjudicated Facts or, alternatively, they place too heavy a burden on the Accused and would significantly protract the proceedings, that, for example, Adjudicated Facts 600–603 result in a presumption of correctness and establish criteria for assessing the credibility of the Prosecution’s intercept evidence, which would alone provide a sufficient basis for addressing the Appeals Chamber in order to resolve issues that might greatly advance the proceedings and ensure a fair trial;⁴

¹ Motion., para. 3.

² *Ibid.*, para. 4.

³ *Ibid.*, para. 5. See also *Ibid.*, para. 7.

⁴ *Ibid.*, para. 8. See also *Ibid.*, para. 6.

NOTING that the Prosecution has not filed a response to the Motion;

NOTING that, pursuant to Rule 73(B), “[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”;

NOTING that Rule 73(B) precludes certification unless the Trial Chamber finds that both of its requirements are satisfied, and that even where both requirements of Rule 73(B) are satisfied certification remains in the discretion of the Trial Chamber,⁵ and that certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not;⁶

NOTING that the Appeals Chamber has held that by taking judicial notice of an adjudicated fact a Chamber establishes a well-founded presumption for the accuracy of the fact, which therefore does not have to be proven again at trial, but which subject to that presumption may be challenged at that trial;⁷

NOTING that Adjudicated Facts 600–603 go to the validity of the methods used by the Prosecution in relation to the intercept material, but they by no means fully establish the reliability of such material;

NOTING that the need for an accused to carry out additional work in order to rebut adjudicated facts does not alone affect the fairness of the proceedings;

NOTING that while judicial notice of adjudicated facts may advance judicial economy by “condens[ing] the relevant proceedings to what is essential for the case of each party without rehearing supplementary allegations already proven in past proceedings”,⁸ it is possible that attempts at rebuttal of adjudicated facts by an accused may consume excessive time and resources and consequently frustrate the principle of judicial economy;⁹

⁵ *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

⁶ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005, para. 4.

⁷ *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.5, 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, 28 October 2003, p. 4 (footnote removed).

⁸ Impugned Decision, para. 32. *See also Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses pursuant to Rule 92bis, 28 February 2003, para. 11.

⁹ Impugned Decision, para. 32. *See also Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, para. 16; *Prosecutor v. Mejakić*,

NOTING that to mount a fully adequate defence it is not incumbent on an accused to rebut each fact presented in the course of the Prosecution case;

CONSIDERING, therefore, that even though the implementation of the Impugned Decision may in some degree extend or reduce the length of the proceedings, it does not significantly affect the fair and expeditious conduct of those proceedings;

NOTING that the Trial Chamber held in the Impugned Decision that Adjudicated Facts must not relate to the acts, conduct or mental state of the Accused¹⁰ and that where a proposed fact went to the core of the case, it would not serve the interests of justice to take judicial notice of it;¹¹

CONSIDERING, therefore, that the Impugned Decision does not involve an issue that would significantly affect the outcome of the trial;

CONSIDERING, that, in view of the level of significance of the Adjudicated Facts for the Prosecution case against the Accused and the possible effect that they may have on the length of the trial, the Impugned Decision does not involve an issue for which an immediate resolution by the Appeals Chamber may materially advance the proceedings;

FINDING, therefore, that neither of the requirements for certification set forth in Rule 73(B) have been met;

PURSUANT TO Rule 73(B) of the Rules;

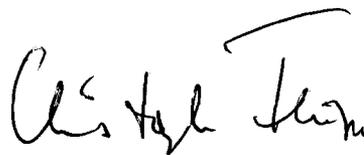
HEREBY DENIES the Motion.

Gruban, Fuštar, and Knežević, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice pursuant to Rule 94(B), 1 April 2004, p. 5; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 16 December 2003, paras. 11–12, 19.

¹⁰ Impugned Decision, para. 8.

¹¹ *Ibid.*, para. 33.

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



Judge Christoph Flügge

Presiding Judge

Dated this 23rd day of February 2010
At The Hague
The Netherlands

[Seal of the Tribunal]