



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-02-65-PT
Date: 1 April 2004
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Bert Swart

Registrar: Mr. Hans Holthuis

Order of: 1 April 2004

PROSECUTOR

v.

**ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ**

**DECISION ON PROSECUTION MOTION FOR
JUDICIAL NOTICE PURSUANT TO RULE 94(B)**

The Office of the Prosecutor:

Ms. Joanna Korner
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Jovan Simić, for Željko Mejačić
Ms. Sanja Turlakov, for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić, for Dušan Fuštar
Ms. Slobodanka Nedić, for Duško Knežević

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 (“the International Tribunal”),

BEING SEISED of a “Prosecution’s Motion for Judicial Notice (Rule 94(B))”, filed on 17 December 2003, together with a “*Corrigendum* to 17 December 2003 “Prosecution’s Motion for Judicial Notice (Rule 94(B))”, filed on 18 December 2003 (“the Motion”), in which the Prosecution requests the Trial Chamber to take judicial notice of 252 facts derived from three cases which, it submits, “have been fully litigated and can no longer be considered in dispute”,¹

NOTING the Prosecution arguments in favour of the admission of the proposed facts, *inter alia*, as follows:

- (a) at this stage of the Tribunal’s history, the proposed facts cannot be reasonably considered in dispute;
- (b) the findings do not directly prove any of the four accused’s guilt;
- (c) while the facts help prove particular elements of the crimes or explain the necessary background, they do not establish conclusive links between the four accused and the charges, therefore, there is no prejudice to the four accused; and
- (d) by admitting these facts dealing with the background and context of the commission of the alleged crimes, the Trial Chamber will save judicial and prosecutorial resources, and shorten the length of the trial,

NOTING the “Defence Response to Prosecution Motion for Judicial Notice Rule 94 (B)” filed by the Defence of Željko Mejačić on 27 January 2004, in which it objects to several of the proposed facts on the basis, *inter alia*, that:

- (a) in some instances, the proposed facts are vague, distorted or inaccurate;

¹ *Prosecutor v. Tadić*, Judgement, Case No. IT-94-1-T, 7 May 1997 (“*Tadić* Judgement”), settled on appeal on 15 July 1999; *Prosecutor v. Delalić et al.*, Judgement, Case No. IT-96-21-T, 16 November 1998, settled on appeal on 20 February 2001; and *Prosecutor v. Sikirica*, Sentencing Judgement, Case No. IT-95-8-S, 13 November 2001.

- (b) many of the proposed facts relating to the general conditions at the Omarska camp are in dispute;
- (c) facts relating to the general conditions at the Omarska camp are part of the alleged individual criminal responsibility of the accused Mejakić, who is charged as the commander of the camp (with authority to change those conditions), as such, a core element of the Prosecution's case against Mejakić;
- (d) the principle of judicial economy contained in Rule 94 (B) cannot neutralize the rights of the accused granted by the Statute, in particular, the right to be presumed innocent, the right to be tried in his presence, and the right to examine the witnesses against him;
- (e) the circumstances of the *Tadić* case militate against the admission of the findings in that judgment since Tadić – charged with crimes committed at the Omarska camp as a “visitor” – may not be said to have had the same interest as Mejakić – charged as the commander of the camp – to challenge the allegations in relation to the conditions of the camp; and
- (f) the Trial Chamber in *Kvočka*² made different findings with respect to the conditions at the Omarska camp, the Prosecution has not appealed against those findings (therefore, capable of admission as adjudicated facts),

NOTING the confidential “Defence Response to “Prosecution’s Motion for Judicial Notice (Rule 94(B))” filed on 30 January 2004 on behalf of Dušan Fuštar, in which the Trial Chamber is requested to deny the admission of several facts on the basis, *inter alia*, that:

- (a) in some instances, the proposed facts are distorted or inaccurate;
- (b) many of the proposed facts relating to the general conditions at the Omarska camp are in dispute;
- (c) facts relating to the general conditions at the Omarska camp are part of the alleged individual criminal responsibility of the accused Gruban, who is charged as a shift commander at the camp;

² *Prosecutor v. Kvočka*, Judgement, Case No. IT-98-30/1-T, 2 November 2001.

- (d) taking judicial notice of the proposed facts would shift the burden of proof to the accused, in violation of his rights under the Statute, in particular, the right to be presumed innocent, the right to a public trial, the right to be tried in his presence, and the right to examine the witnesses against him;
- (e) the circumstances of the *Tadić* case militate against the admission of the findings in that judgment since Tadić – charged with crimes committed at the Omarska camp as a “visitor” – may not be said to have had the same interest as Gruban – charged as a shift commander at the camp – to challenge the allegations in relation to the conditions of the camp; and
- (f) the Trial Chamber in *Kvočka* reached different findings with respect to the conditions at the Omarska camp, the Prosecution has not appealed against those findings, the Defence would agree to the admission of findings from that judgment,

NOTING the “Duško Knežević’s Response to Prosecution’s Motion for Judicial Notice (Rule 94(B)) filed on 30 January 2004 by the Defence of Duško Knežević in which it agrees to some but not all of the historical and background facts, and objects to the remainder of the proposed facts for the following reasons:

- (a) some of the proposed facts are legal findings which are excluded from the scope of Rule 94(B) in the practice of the Tribunal;
- (b) it is probable that the Prosecution sought to have the same facts admitted pursuant to Rule 94(B) in *Milošević*, an application that was denied (in part) by the Trial Chamber in that case on 16 December 2003;³
- (c) with a few exceptions, the facts from the *Sikirica* Judgment should not be admitted as facts based upon an agreement between the parties in that case which are subject of reasonable dispute; and
- (d) in some instances, the proposed facts are either improperly referenced, incomplete or inaccurate,

³ *Prosecutor v. Slobodan Milošević*, Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, Case No. IT-02-54-T, 16 December 2003.

NOTING that the application is made pursuant to Rule 94 (B) of the Rules of Procedure and Evidence (“Rules”), which provides that a Trial Chamber “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”,

CONSIDERING this Trial Chamber’s previous approach with respect to applications for judicial notice pursuant to Rule 94 (B), the relevant features of which may be set out as follows:⁴

- (a) the purpose of taking judicial notice is to promote judicial economy and narrow the factual issues;
- (b) a balance between judicial economy and the right of the accused to a fair trial must be achieved;
- (c) Trial Chambers may take judicial notice of factual findings in other cases but not of the legal characterisation of such facts;
- (d) the Trial Chamber may only take judicial notice of facts which are not the subject of reasonable dispute; and
- (e) for a fact to be capable of admission under Rule 94 (B) it should have been the subject of adjudication and not based upon agreement between parties in previous proceedings,

CONSIDERING that the Appeals Chamber has since held in *Milošević*⁵ that (1) the Trial Chamber has a discretion to take judicial notice of adjudicated facts on the basis that that it has been the subject of an adjudication by another Chamber, meaning that the fact has not been the subject of an appeal or appellate proceedings have concluded; and (2) by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of that fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at trial,

⁴ *Prosecutor v. Slobodan Milošević*, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 10 April 2003, Case No. IT-02-54-T, 10 April 2003, p. 3 (footnote omitted).

⁵ *Prosecutor v. Slobodan Milošević*, Decision on Prosecution’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 Decision on Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, Case No. IT-02-54-AR73.5, 28 October 2003 (“Appeals Chamber Decision”), p. 4.

CONSIDERING therefore, applying the test set by the Appeals Chamber, that once a particular fact has been the subject of a final adjudication by another Chamber, it is capable of admission under Rule 94 (B) subject, as always, to the discretion of the Trial Chamber,

CONSIDERING that this Trial Chamber has recently held that, in the exercise of its discretion pursuant to Rule 94 (B), factors that may be taken into account include:⁶ (a) whether the facts, when taken together, will result in such a large number as to compromise the principle of a fair and expeditious trial;⁷ and (b) whether the facts are too broad, too tendentious, not sufficiently significant, too detailed, too numerous, repetitive of other evidence already admitted by the Chamber, or not sufficiently relevant to the case, thus excluded from the operation of Rule 94 (B),

Historical and Political Background (facts 1-76)

CONSIDERING that since these facts which cover the historical, geographical and political background to the conflict in Yugoslavia up to the disintegration of the federation in the 1990s, may accurately be described as providing an overall picture and background information, the Trial Chamber will, in the exercise of its discretion, admit the following facts as numbered in Annex A to the Motion: 1-72 (with fact 57 properly referenced),⁸ 74-76; the proposed fact numbered 73 is refused on the basis that, as referenced, the Trial Chamber was unable to find it in the *Tadić* Judgement,⁹

Prijedor Region (facts 77-103)

CONSIDERING that these facts concerning the Prijedor municipality relate to the takeover of the town of Prijedor by the SDS assisted by the police and "Serb forces", the establishment of a local Crisis Staff, and the attacks on the village of Hambarine and the town of Kozarac eventually resulting in the displacement of thousands of non-Serbs,

⁶ *Prosecutor v. Slobodan Milošević*, Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, Case No. IT-02-54-T, 16 December 2003.

⁷ This would be the case (i) when the admission of facts would place too heavy a burden of rebuttal upon the accused; and (ii) when attempts by an accused to rebut these facts may absorb considerable time and resources, thereby defeating the purpose of Rule 94 (B), i.e. judicial economy. *Ibid*, pp 6-7.

⁸ *Tadić* Judgement, para. 109, not para. 108.

⁹ The fact numbered 73 in Annex A to the Motion is incorrectly cited as taken from the *Tadić* Judgement, para. 109.

CONSIDERING that these facts are adjudicated facts within the meaning of the Appeals Chamber's Decision in *Milošević*,¹⁰ and that there is no basis for the exercise of the Trial Chamber's discretion not to admit them,

The Camps (facts 104-250)

CONSIDERING that this category of facts that the Prosecution seeks to have admitted deals with the operation of, and conditions in, the Omarska and Keraterm camps, and are adjudicated facts within the meaning of the *Milošević* Decision, the Chamber will admit: facts 104-105, and 111-120, all concerning the creation of the camps, their geographical locations, and a physical description of the Omarska camp,

CONSIDERING that whilst the facts derived from *Tadić* and *Delalić* cases are capable of admission pursuant to Rule 94 (B), the same may not be said of facts derived from the *Sikirica* Judgement based, as it was, on a plea agreement between the parties; following the Tribunal's jurisprudence, also reflected in the Trial Chamber's own approach, those facts do not meet the "adjudicated fact" requirement under Rule 94 (B),

CONSIDERING therefore, that judicial notice may not be taken of the proposed facts from the *Sikirica* Judgement, numbered 163 to 250 (87) in Annex A to the Motion, all related to the Keraterm camp; the remainder of the facts sought to be admitted under this category, all relating to the conditions of detention at the camps, shall be excluded as too tendentious to be admitted in the exercise of the Trial Chamber's discretion,

Context (facts 251-252)

CONSIDERING that these two facts, taken from the *Tadić* Judgement, cover the existence of an armed conflict in the municipality at the relevant time, and provide the context of the commission the alleged crimes, the Trial Chamber will exclude them in the exercise of its discretion, on the basis that the facts are too broad, tendentious and containing legal characterizations of facts,

CONSIDERING that, following the test laid down by the Appeals Chamber,¹¹ nothing in this Decision should be read as touching upon the right of the accused to challenge at trial the facts so admitted,

¹⁰ *Supra* n 5.

¹¹ Appeals Chamber Decision, p. 4.

PURSUANT TO Rules 94 (B) of the Rules of Procedure and Evidence of the International Tribunal,

HEREBY ADMITS the following facts: 1-72 (with fact numbered 57 correctly referenced), 74-105, and 111-120, as set out in Annex A to the Motion; **DOES NOT ADMIT** the remainder of the facts set out by the Prosecution in Annex A to its Motion; and **ORDERS** that the 114 facts so admitted are subject to the right of the accused to challenge those facts at trial.

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



Patrick Robinson
Presiding

Dated this first day of April 2004
At The Hague
The Netherlands

[Seal of the Tribunal]