



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-04-74-PT
Date: 3 February 2006
Original: ENGLISH

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Kevin Parker
Judge Jean-Claude Antonetti

Registrar: Mr. Hans Holthuis

Decision: 3 February 2006

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ**

**DECISION ON “PROSECUTION MOTION FOR JUDICIAL
NOTICE OF FACTS OF COMMON KNOWLEDGE AND
ADMISSION OF DOCUMENTARY EVIDENCE PURSUANT TO
RULES 94 (A) AND 89 (C)”**

Office of the Prosecutor:

Mr. Kenneth Scott
Mr. Daryl Mundis

Counsel for Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Jadranko Prlić
Mr. Tomislav Kužmanović and Ms. Senka Nožica for Bruno Stojić
Ms. Vesna Alaburić for Milivoj Petković
Mr. Tomislav Jonjić for Valentin Ćorić
Mr. Fahrudin Ibrišimović for Berislav Pušić

Accused:

Slobodan Praljak

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 SEIZED of the “Prosecution Motion for judicial notice of facts of common knowledge and admission of documentary evidence pursuant to Rules 94 (A) and 89 (C)”, filed on 27 December 2005 (“Prosecution Motion”), in which the Office of the Prosecutor (“Prosecution”) requests the Trial Chamber to take judicial notice of facts of common knowledge listed in Annex 1 to the Prosecution Motion,

NOTING the “Submission by Slobodon Praljak requesting a translation of documents” filed on 6 January 2006 (“Praljak Request”), in which the Accused Praljak indicated, *inter alia*, that he would not be able to respond to the Prosecution Motion before receiving “a Croatian translation” of the Prosecution Motion,

NOTING the Trial Chamber’s Order of 17 January 2006,¹ which grants the Accused Praljak the right to respond to motions within 14 days of receipt of a translation of such motions into his own language,

NOTING the responses to the Prosecution Motion of the Accused Valentin Ćorić, filed on 13 January 2006 (“Ćorić Response”), of the Accused Milivoj Petković, filed on 16 January 2006 (“Petković Response”), of the Accused Jadranko Prlić, filed on 17 January 2006 (“Prlić Response”), of the Accused Pušić, filed on 19 January 2006 (Pušić Response), of the Accused Stojić, filed on 27 January 2006 (“Stojić Response”) and of the Accused Praljak, filed 31 January 2006 (“Praljak Response”),

NOTING the “Prosecution’s Request for Leave to Reply to Defence Responses to Prosecution Motion for Judicial Notice of Facts of Common Knowledge and for the Admission of Documentary Evidence Pursuant to Rules 94(A) and 89(C),” filed by the Prosecution on 25 January 2006 (“Prosecution Reply”),

NOTING that the Prosecution in its Reply objects to the fact that all Responses from those Accused represented by counsel were filed beyond the time limit set by Rule 126 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”), which stipulates that a response to a motion

shall be filed within fourteen days of the filing of the motion, and that any reply to a response shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber,

CONSIDERING that all Responses from those Accused represented by counsel were filed beyond the above mentioned time limit, but that the that Prosecution Reply has equally been filed beyond the time limit with respect to the Ćorić Response, the Petković Response and the Prlić Response,

CONSIDERING that when those Accused represented by counsel received the Prosecution Motion by mail between 2 and 5 January 2006, they should have noted the date of filing marked on the Motion and immediately sought an extension of time from the Trial Chamber in which to file their responses, and that, similarly, the Prosecution should have sought an extension of time for the filing of its Reply to the Ćorić Response, the Petković Response and the Prlić Response,²

CONSIDERING HOWEVER that it is in the interests of justice on this occasion to accept the Defence Responses and the Prosecution Reply as validly filed,

NOTING that Annex 1 to the Prosecution Motion includes resolutions of the UN General Assembly, reports and letters of UN bodies such as the Security Council, the General Assembly and the UN Secretary-General, reports of the Special Rapporteur of the Commission on Human Rights, as well as letters by the political representatives to the UN addressed to the UN Secretary-General or to the President of the UN Security Council,

NOTING FURTHER that some of the above mentioned documents have annexes which contain, *inter alia*, agreements signed by the Accused Milivoj Petković,³ the final report of the Commission

¹ Order for translation of documents, 17 January 2006, p. 3

² On 26 January 2006, the Accused Prlić filed the "Jadranko Prlić corrigendum to Response to Prosecution Motion for judicial notice of facts of common knowledge and admission of documentary evidence pursuant to Rule 94(C) and 89(B)". On 27 January 2006, the Accused Valentin Ćorić filed a "Clarification to Response to the Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Admission of Documentary Evidence pursuant to Rules 94(A) and 89(C)", and on the same day, the Accused Milivoj Petković filed "the Accused Petković notice to the Trial Chamber concerning Prosecution's request for leave to reply to Defence responses to Prosecution motion for judicial notice of facts of common knowledge and for the admission of documentary evidence pursuant to Rule 94 (A) and 89 (C), of 25 January 2006". On 28 January 2006, the Accused Pusić filed the "Addendum to the Response on behalf of Berislav Pusić to the Prosecution's Motion for judicial notice of facts of common knowledge and admission of documentary evidence pursuant to Rules 94(A) and 89(B)". The Chamber has not taken these filings into consideration, as neither the Rules nor the practice of the Tribunal provide a party with a right to respond to a reply. Although leave to do so may be granted, this Trial Chamber has not been seized of a request for leave to respond to the Prosecution Reply. *See also Prosecutor v Miroslav Kvočka et al.*, "Decision on application by Prosecution for leave to file further response", Case No: IT-98-30/1-A, 6 June 2002, para. 2.

³ Annex 1 to the Prosecution Motion, pp. 19723-19721, 19774 and 19780.

of Experts established pursuant to UN Security Council Resolution 780,⁴ an UNPROFOR press summary,⁵ letters from the Steering Committee of the International Conference on the Former Yugoslavia,⁶ a joint statement by the Political Directors of the Foreign Ministries of Bosnia and Herzegovina, Croatia and Turkey, joint declarations by former Presidents Mate Boban and Alija Izetbegović,⁷ as well as a written statement submitted by the NGO Society of Endangered Peoples addressed to the UN Secretary General,⁸

NOTING that the Prosecution has requested the Trial Chamber to “*take judicial notice of the facts of common knowledge contained in and admit into evidence the documents listed in Annex 1 [to the Prosecution Motion]*”,⁹

CONSIDERING that the Prosecution bases its Motion on Rules 89 (C) and 94 (A) of the Rules cumulatively instead of alternatively, and that the Prosecution Motion has been formulated in such a way as to suggest that the prerequisites for the application of Rule 94 (A) are connected to the requirements of evidence pursuant to Rule 89 (C), namely probative value and relevance,¹⁰

CONSIDERING HOWEVER, that the Prosecution Reply states that the Motion “seeks two related, but potentially separate things,” being the admission of the documents listed in Annex 1 to the Motion, and judicial notice of the facts contained in those documents, and that if the Trial Chamber should decide not to take judicial notice of some or all of these facts, the Prosecution moves nonetheless to have the documents admitted into evidence pursuant to Rule 89(C),¹¹

CONSIDERING that judicial notice may be taken of facts of common knowledge, pursuant to Rule 94 (A), because such facts are notorious, requiring no proof, and that such facts cannot then be challenged during trial,¹²

⁴ Annex 1 to the Prosecution Motion, pp. 19448-19367.

⁵ Annex 1 to the Prosecution Motion, pp. 19476-19473

⁶ Annex 1 to the Prosecution Motion, pp. 19542-19538 and 19258-19247.

⁷ Annex 1 to Prosecution Motion, pp. 19785, 19782-19781, 19777-19775.

⁸ Annex 1 to Prosecution Motion, pp. 19469-19466.

⁹ Prosecution Motion, “action sought” in para. 23 (emphasis added).

¹⁰ See Prosecution Motion, paras 11-22.

¹¹ Prosecution Reply, para. 13.

¹² *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, “Decision on Appellant’s motion for judicial notice”, 1 April 2005 (“*Nikolić decision*”), para. 10, referring to *Prosecutor v. Krajišnik*, “Decision on Prosecution motions for judicial notice of adjudicated facts and for admission of written statements of witnesses pursuant to Rule 92 bis”, 28 February 2003.

CONSIDERING HOWEVER that *evidence* (as mentioned in Rule 89 (C) of the Rules) is something that tends to prove, or disprove the existence of an alleged fact,¹³ and that for such evidence to be admissible, a party must demonstrate its relevance, probative value and reliability,¹⁴

CONSIDERING that a fact of common knowledge, since it requires no proof, cannot be considered “evidence.”¹⁵

CONSIDERING that while it is plainly the duty of the pre-trial Judge and the pre-trial Chamber to take any measure necessary to prepare the case for a fair and expeditious trial,¹⁶ this Trial Chamber is of the view that a determination of the Prosecution Motion, insofar as it seeks admission into evidence of materials contained in Annex 1 to the Prosecution Motion pursuant to Rule 89 (C), involving as it does a critical examination of the content of the evidence and manner in which it is to be presented at trial, must be left to the bench that will hear the case,¹⁷

CONSIDERING THEREFORE that this Trial Chamber, at the current stage, will only consider the Prosecution’s application pursuant to Rule 94 (A) of the Rules,

CONSIDERING that judicial notice of facts of common knowledge pursuant to Rule 94 (A) of the Rules is subject to a two-pronged test: first, material submitted by a requesting party must be identified as a “fact of common knowledge”;¹⁸ once the latter has been established, it should be determined that such a fact of common knowledge is not subject of reasonable dispute,¹⁹

¹³ See Black’s Law Dictionary, seventh edition 1999.

¹⁴ *Prosecutor v. Musema*, Case No. ICTR-96-13, Appeal Judgement, 27 January 2001, paras 46 and 47.

¹⁵ See also Black’s law dictionary: “Evidence is any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof, as the basis of inference in ascertaining some other matter of fact.”, Black’s dictionary, seventh edition 1999, quoting James B. Thayer, *Presumptions and the Law of Evidence*, 3 Harv. L. Rev. 141, 142 (1889).

¹⁶ See Rules 65 *ter* (B), and 65 *ter* (M) of the Rules.

¹⁷ See also *Prosecutor v. Zeljko Mejakic et al.*, Case No. IT-02-65-PT, “Decision on Prosecution’s motion for admission of trial transcripts and statements pursuant to Rule 92 *bis* and Rule 89(F) and protective measures”, 22 October 2004; *Prosecutor v. Sefer Halilović*, Case No.: IT-01-48-PT, “Order on Prosecution application for admission of evidence under Rule 92 *bis*”, 22 October 2004.

¹⁸ A common example of a fact of common knowledge are the days of the week, *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, “Decision on the prosecutor’s motion for judicial notice and presumptions of facts pursuant to Rules 94 and 54”, 3 November 2000, para. 23; According to Judge Hunt, facts of common knowledge can be found in “atlases, dictionaries or other reference books”, *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, dissenting opinion of Judge Hunt, para. 8.

¹⁹ *Nikolić* decision, para. 10, citing *Prosecutor v. Blagoje Simić et al*, IT-95-9-PT, “Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina”, 25 March 1999.

NOTING the Prosecution's argument that the materials contained in Annex 1 to the Prosecution Motion ("materials") fall within the scope of Rule 94 (A) of the Rules "since they are official documents of the United Nations directly pertaining to the conflict on the territory of the former Yugoslavia between 1992 and 1995", and that "the facts contained in the [materials] are properly considered as 'laws of state, international law, historical events [and] constitution', or 'facts capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned'",²⁰

CONSIDERING, concerning the first prong of the abovementioned test, that information contained in the materials does not become a generally known, or notorious fact simply because it was generated by a body of the United Nations,

CONSIDERING that it is for the Prosecution to establish that facts are not the subject of reasonable dispute, not for the Accused to show that the facts are unsafe,²¹

CONSIDERING that a fact does not become "not subject to reasonable dispute" by simple merit of having been contained in a document generated by another, non-judicial body of the United Nations, and that many of the documents contained in Annex 1 of the Motion contain conclusions and characterisations that are not factual in nature,

CONSIDERING that the Prosecution argues in its Motion that the information contained in the materials establishes or *proves* certain very important aspects of their case, namely that (1) "between 1992 and 1994, there was an ongoing widespread or systematic attack against the Bosnian Muslim population and other non-Croats in the referenced municipalities, including the crimes that took place in numerous villages, including Sovići, Doljani, Mostar town, Stolac, and Stupni Do", that (2) "the maltreatment of prisoners in detention camps (Heliodrom, Dretelj, Ljubški, Vitina, Prozor and Stolac) effected the objective of the Bosnian Croat authorities to 'ethnically cleanse' the area of Bosnian Muslims and amounted to one facet of a larger campaign of persecution of the Bosnian Muslim and non-Croat population (...)", and that (3) "there was an ongoing international armed conflict in the area covered by and related to the Indictment," and that, if this is true, the information contained in the materials falls squarely into the realm of evidence rather than "facts of common knowledge,"

²⁰ Prosecution Motion, para. 11.

²¹ *Prosecutor v. Milošević*, 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, dissenting opinion of Judge Hunt, paras 9 and 11.

CONSIDERING the Prosecution's submission that "the weight to be accorded to these materials will be considered throughout the trial and at the close of the evidence and submission of the parties,"²² and that it thereby acknowledges that the nature of the materials is not that of facts of common knowledge, but of evidence,

NOTING that the *Čelebići* Trial Chamber stated it had "taken notice" of "resolutions of the United Nations Security Council and General Assembly, the Final Report of the United Nations Commission of Experts, reports of the United Nations Secretary-General, and declarations and statements from the European Community and the Conference on Security and Cooperation in Europe,"²³ but that the *Čelebići* Trial Chamber had not judicially noticed these documents pursuant to Rule 94 (A) of the Rules, as is suggested in the Prosecution Motion,²⁴ but rather admitted most of these materials into evidence through witnesses,²⁵

CONSIDERING THEREFORE that the entire content of the documents contained in Annex 1 to the Motion cannot be characterised as facts of common knowledge and have not been demonstrated by the Prosecution not to be subject to reasonable dispute, and that it is therefore inappropriate to take judicial notice of them under Rule 94(A), and that it would be premature to admit them into evidence at the present stage of proceedings under Rule 89(C), but that the Prosecution may tender all or some of these documents as evidence at trial, in the usual manner,

NOTING the Petković Response and the Stojić Response, wherein both Accused object to not having been provided with B/C/S translations of the documents included in Annex 1 to the Prosecution Motion,²⁶ to which the Prosecution has replied that the Accused do not have a right to such a translation,²⁷

²² Prosecution Motion, para. 22.

²³ *Prosecutor v. Delalić et al.*, Case No, IT-96-21-T, Judgement, 16 November 1998, para. 90.

²⁴ Prosecution Motion, para. 12.

²⁵ Examples of such exhibits admitted by the *Čelebići* Trial Chamber are: UN Security Resolutions and decision - exhibits D 30/4, D 31/4, D 32/4 and D 33/4; "Final report of the Commission of Experts" - exhibit 61; reports of the UN Secretary-General - exhibit 38, D20/3, D21/3 and D 37/4; EU/EC statement and declaration - exhibit 27 and 28. All the above mentioned documents were either admitted through Ms Calić, an expert witness who testified on 19 and 24 February 1997, or by Mr. Gow, an expert witness who gave evidence on 1 and 2 December 1997 and completed his testimony on 13 and 16 February 1998.

²⁶ Petković Response, para. 5

²⁷ Prosecution Reply, paras 14-20. The Prosecution Reply relates only to the Petković Response, as the Stojić Response was filed two days after the Prosecution Reply.

NOTING the Praljak Response, wherein the Accused Praljak requests that the Prosecution Motion be rejected,²⁸ and that at the at the time of filing his Response, he had not yet received a translation of the documents contained in Annex 1 to the Prosecution Motion,

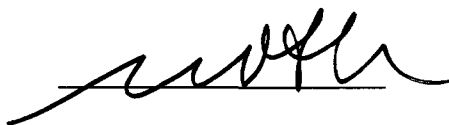
CONSIDERING, in light of the outcome of this Decision, and regardless of the question whether the Accused Stojić and the Accused Petković can claim a right to a translation of the materials included in Annex 1, that the translation of the aforementioned materials is unnecessary at the present time,

FOR THE FOREGOING REASONS, pursuant to Rules 73 and 94 (A), 89(C), and 127 (ii) of the Rules,

HEREBY GRANTS the Prosecution Request to file its Reply, and

DENIES the Motion.

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



Judge Carmel Agius
Presiding

Dated this third day of February 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁸ Praljak Response, para. 8.