UNITED
NATIONS

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-05-88-T

Date: 26 September 2006

Original: English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle–Reserve Judge

Registrar: **Mr. Hans Holthuis**

Decision of: **26 September 2006**

PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF FACTS OF COMMON KNOWLEDGE PURSUANT TO RULE 94(A)

The Office of the Prosecutor:
Mr. Peter McCloskey

Counsel for the Accused:
Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović for Radivoje Miletić
Mr. Dragan Krgović and David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

I. INTRODUCTION

1. **TRIAL CHAMBER II** 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 Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)" filed by the Office of the Prosecutor ("Prosecution") on 21 July 2006 ("Motion"), in which the Prosecution, pursuant to Rule 94(A) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), requests the Trial Chamber to take judicial notice of the following fact ("Proposed Fact"):

> Starting in April 1992 and until 16 April 1993, Bosnian Serb political and military leaders implemented a plan to link Serb-populated areas in Bosnia and Herzegovina together, to gain control over these areas and to create a separate Bosnian Serb state from which most non-Serbs would be permanently removed. This plan involved the forced movement of many Bosnian Muslims from their homes via a pattern of conduct commonly referred to as "ethnic cleansing".[1]

2. On 3 August 2006, counsel for Drago Nikolić and counsel for Vujadin Popović ("Nikolić" and "Popović", respectively) filed the "Response on Behalf of Drago Nikolić to Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)" ("Nikolić Response") and the "Response of Vujadin Popović's Defence to the Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)" ("Popović Response"). On 4 August 2006, counsel for Radijove Miletić and counsel for Milan Gvero (collectively, "Miletić and Gvero") filed the "Joint Defence Response by the Accused Radivoje Miletić and Milan Gvero to Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)" ("Miletić and Gvero Response"). On the same day, counsel for Vinko Pandurević and counsel for Ljubomir Borovčanin each joined in the Nikolić Response and the Popović Response.[2]

II. SUBMISSIONS OF THE PARTIES

A. Submissions by the Prosecution

3. In the Motion, the Prosecution submits that both the existence and implementation of the plan to create an ethnically pure Bosnian Serb state by Bosnian Serb political and military leaders are facts of common knowledge and have been held to be historical and accurate in a wide range of sources. According to the Prosecution, the Proposed Fact is notorious and cannot therefore be reasonably disputed. As a basis for its submission, the Prosecution refers to a large collection of

[1] Motion, p. 1.
[2] "Response of the Accused Vinko Pandurević to the Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)"; "Borovčanin Defence Response to Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)".

judicial and other materials, including judgements of the Tribunal,[3] sentencing judgements of the Tribunal,[4] the Decision on the Strategic Objectives of the Serbian People in Bosnia and Herzegovina of 12 May 1992, the Operational Directive no. 4 of the Main Staff of the Army of Republika Srpska of 19 November 1992, resolutions of the United Nations Security Council ("Security Council resolutions"),[5] reports of the United Nations and of non-governmental organisations ("UN reports" and "NGO reports", respectively),[6] scholarly articles and books.[7]

B. Submissions by the Defence[8]

1. The Proposed Fact does not fall in the category of facts of common knowledge

4. Nikolić submits that the Proposed Fact does not fall in the category of facts of common knowledge, which would include historical events and phenomena and universally known facts such as the laws of nature.[9]

5. In addition, Popović contends that the characterisation of acts as 'ethnic cleansing' is a legal one, which should be proven at trial and is therefore inappropriate for judicial notice.[10]

2. The Proposed Fact can be reasonably disputed

6. Both Nikolić and Popović further allege that the Proposed Fact is not of common knowledge and can be reasonably disputed. While Nikolić submits that the legal record referenced in the Motion does not support the assertion that the Proposed Fact cannot be reasonably disputed,[11] Popović raises a number of more specific challenges. In particular, it is alleged that most of the

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[3] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgement, 7 May 1997, para. 84; *Prosecutor v. Radoslav Brđanin*, Case. No. IT-99-36-T, Judgement, 1 September 2004, paras 65, 72; *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006, paras 82, 103–120.

[4] *Prosecutor v. Biljana Plavsić*, Case No. IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, paras 32–35; *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgement, 30 March 2004, paras 57–58.

[5] Security Council Resolution 819, U.N. Doc. S/RES/819 (16 April 1993); Security Council Resolution 824, U.N. Doc. S/RES/824 (6 May 1993).

[6] *See* for instance UN Economic and Social Council, Commission on Human Rights, Special Rapporteur of the Commission on Human Rights, Situation of Human Rights in the Territory of the Former Yugoslavia, E/CN.4/1994/3, paras 31, 37; Human Rights Watch, "The Fall of Srebrenica", Vol. 7, n. 13, October 1994, pp. 5–6; Helsinki Watch, "War Crimes in Bosnia-Herzegovina", Vol. II, August 1992, p. 63.

[7] *See* for instance Jan Willem Honig & Norbert Both, "Srebrenica: Record of a War Crime", 1996, p. 77; Steven L. Burg & Paul S. Shoup, "The War in Bosnia-Herzegovina", 1999, p. 140.

[8] In Section II of the present decision, the Trial Chamber shall present the submissions set out in the Nikolić Response, the Popović Response and the Miletić and Gvero Response. *See* para. 2 *supra* and corresponding fn. 2 *supra* for Vinko Pandurević and Ljubomir Borovčanin, who joined in the Nikolić Response and the Popović Response. For the purpose of the present decision, when referring collectively to the seven accused in the case No. IT-05-88-T, the Trial Chamber shall use the term of 'Accused'.

[9] Nikolić Response, paras 2-4, referring to *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera* Decision"), para. 30.

[10] Popović Response, para. 31.

[11] Nikolić Response, paras 11–12; *see also* corresponding fn. 3–8.

Prosecution's references to judgements of the Tribunal do not contain an accurate and entire description of the Proposed Fact and that moreover, facts stemming from judgements based on plea agreements and from subjective assertions and opinions, such as that published in books and scholarly articles should not be considered to be beyond reasonable dispute.[12] It is further contended that "information does not become a generally known or notorious fact simply because it was generated by a body of the United Nations."[13]

7. On the question of reasonable dispute, it is further contended that the Proposed Fact contains issues which are currently on appeal or being adjudicated before the International Court of Justice.[14]

3. The Proposed Fact is imprecise

8. It is further contended that the Proposed Fact is vague and imprecise in terms of the time and location covered, the type, contents and goals of the plan referred to and the identity of its authors.[15] In addition, Nikolić questions the omission of all references to the role of the Federal Republic of Yugoslavia in the plan concerned.[16]

4. The Proposed Fact necessarily presumes the existence of intent

9. Popović submits that the assertion that the plan was executed via ethnic cleansing is based on an inherent presumption as to the motive or intent underlying the alleged forced population movements charged in the Indictment. Accordingly, this is a matter to be established through evidence at trial.[17] According to Miletić and Gvero, the Proposed Fact involves the existence and implementation of a plan which generally implies the intent of unidentified persons, some of whom could be the accused in the present case.[18]

III. APPLICABLE LAW

10. Rule 94(A) of the Rules provides that "[a] Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof." The jurisprudence of the Tribunal and

[12] Popović Response, paras 9–22; *see also* Miletić and Gvero Response, para. 18.
[13] Popović Response, para. 19; Miletić and Gvero Response, para. 20, referring to *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, Borislav Pušić*, Case No. IT-04-74-PT, 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), 3 February 2000.
[14] Miletić and Gvero Response, paras 19, 25, referring to *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Appellant's Brđanin's Brief on Appeal, 25 July 2005, paras 26–55; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Transcript of 4 May 2006, paras 7–9, available at http://www.icj-cij.org/icjwww/idocket/ibhyframe.htm.
[15] Nikolić Response, paras 5–7; Popović Response, paras 29–31.
[16] Nikolić Response, para. 6(f).
[17] Popović Response, p. 12.

that of the International Criminal Tribunal for Rwanda ("ICTR") has clarified the scope of its application.

11. Pursuant to Rule 89(C) of the Rules, a fact of 'common knowledge' must be relevant to the case at hand before being judicially noticed and thus admitted as evidence.[19]

12. Further, unlike Rule 94(B) of the Rules which concerns judicial notice of adjudicated facts, Rule 94(A) is mandatory and does not provide the Trial Chamber with discretion to refuse judicial notice of a fact once it has determined that this fact is of common knowledge.[20]

13. It is well established that facts are of common knowledge when they are notorious.[21] These are facts "that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature."[22] For instance, the Appeals Chamber in the *Karemera* case took judicial notice pursuant to Rule 94(A) of the Rules of the existence of widespread or systematic attacks against a civilian population and of genocide in Rwanda in 1994.[23] In doing so, the Appeals Chamber reviewed all judgements issued by the appeals and trial chambers, as well as "the essentially universal consensus of historical accounts included in sources such as encyclopaedias and history books"[24], scholarly articles, media reports, reports and resolutions from the United Nations, national court decisions as well as reports from governments and non-governmental organisations. With regard to genocide, it concluded that "the fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a 'fact of common knowledge.'"[25]

14. The Appeals Chamber in the *Karemera* case clarified whether exceptions to the application of Rule 94(A) of the Rules exist. It first held that whether a fact proposed for judicial notice is a legal qualification is immaterial when it also describes a 'factual situation'.[26] Similarly, there exists

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[18] Miletić and Gvero Response, para. 13.
[19] Rules 89(C) of the Rules provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value"; *Karemera* Decision, para. 36; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement"), para. 189, referring to *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 5 April 2005, para. 17.
[20] *Karemera* Decision, para. 29; *but see* para. 16 *infra*.
[21] *Prosecutor v. Slobodan 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 ("*Milošević* Decision"), p. 4.
[22] *Semanza* Appeal Judgement, para. 194; *see also Karemera* Decision, paras 22, 30, stating that "[s]uch facts include notorious historical events and phenomena, such as, for instance, the Nazi Holocaust, the South African system of apartheid, wars, and the rise of terrorism."
[23] *Karemera* Decision, paras 26, 33.
[24] *Karemera* Decision, para. 31.
[25] *Karemera* Decision, para. 35.
[26] *Karemera* Decision, para. 29.

no exception to the application of Rule 94(A) of the Rules when a fact proposed for judicial notice constitutes an element of an offence charged in the indictment.[27]

15. Finally, although judicially noticed facts of common knowledge are *general* notorious facts, the *Karemera* Decision further clarified that the facts proposed for judicial notice must be "*sufficiently well defined* such that the accuracy of their application to the described situation is not reasonably in doubt."[28]

IV. DISCUSSION

16. The Trial Chamber first holds that the alleged existence and implementation of a plan by 'Bosnian Serb political and military leaders' to create an ethnically pure Bosnian Serb state in 1992 and 1993 is an important component of the present case. The Proposed Fact, therefore, is relevant for the purpose of Rule 89(C).[29]

17. The Proposed Fact consists of several elements, namely the existence and the implementation of a certain plan during a stated time-period, for a specific purpose, by particular perpetrators. For the Proposed Fact to be commonly accepted, it would not be sufficient that each element is separately recognised in the sources referenced by the Prosecution. Rather, it is the totality of the elements constituting the Proposed Fact which would have to be accepted in the body of these sources.

18. The Prosecution supports its claim that the Proposed Fact is notorious with a number of judicial and documentary references. Yet, in the majority of these sources, information is insufficient regarding the actual existence and implementation of the alleged plan during the specified time-period as well as the participation of the Bosnian Serb political and military leadership in this plan.[30] The Security Council resolutions and UN reports referred to in the Motion do not recognise that any plan was elaborated by the Bosnian Serb political or military leaders.[31]

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[27] *Karemera* Decision, para. 30.
[28] *Karemera* Decision, para. 29 (emphasis added).
[29] Rule 89(C) of the Rules provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value." *See* in particular, Indictment, 4 August 2006, paras 19–25, in which the Prosecution refers to the "12 May 1992 Decision on the Strategic Objectives of the Serbian People in BiH" by Momčilo Krajišnik which set out the six strategic goals of the Bosnian Serb leadership, and proceeds to describe the implementation of these objectives throughout 1992 and 1993.
[30] *See* fn. 3, 4 *supra*.
[31] Security Council Resolution 819, U.N. Doc. S/RES/819 (16 April 1993), condemning and rejecting "the deliberate actions of the Bosnian Serb party to force the evacuation of the civilian population from Srebrenica and its surrounding areas as well as from other parts of the Republic of Bosnia and Herzegovina as part of its overall abhorrent campaign of "ethnic cleansing"; Security Council Resolution 824, U.N. Doc. S/RES/824 (6 May 1993), pertaining to the creation of safe areas in eastern Bosnia and Herzegovina but lacking any reference to the existence of a plan as described in the Proposed Fact; UN Economic and Social Council, Commission on Human Rights, Special Rapporteur of the Commission on Human Rights, Situation of Human Rights in the Territory of the Former Yugoslavia, E/CN.4/1994/3,

The Prosecution further submits that a variety of books, scholarly articles and NGO reports recognise the Proposed Fact. Again, these sources do not explicitly make reference to the involvement of the Bosnian Serb political and military leadership in a plan as set forth in the Proposed Fact.[32] In most instances, where mention is made of a plan or a campaign, information relating to the political or military character of the stated participants is lacking. Moreover, in the majority of the sources provided by the Prosecution, the question as to whether the stated participants are Bosnian Serbs as described in the Proposed Fact, or Serbs from the Republic of Serbia, is left open. The only source provided by the Prosecution which contains information bearing close resemblance to that contained in the Proposed Fact is the October 1994 Human Rights Watch Report. Yet, even this source does not mention the involvement of the Bosnian Serb political leadership or the duration of the ethnic cleansing campaign.[33] Consequently, the Trial Chamber comes to the conclusion that the judicial and documentary record provided by the Prosecution is not sufficient to establish that the Proposed Fact is notorious and commonly accepted.

19. While it is not necessary to go further, the Trial Chamber questions whether some of the elements of the Proposed Fact would be sufficiently precise for acceptance as facts of common knowledge. It is also not satisfied that the Proposed Fact would be beyond reasonable dispute.

V. DISPOSITION

20. For the reasons discussed above, pursuant to Rule 94(A) of the Rules, the Trial Chamber hereby **DENIES** the Motion.

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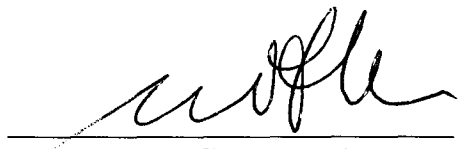
paras 31, 37, describing that "the first wave of ethnic cleansing in eastern Bosnia and Herzegovina was carried out by Serb forces in April/May 1992".

[32] *See* for instance Fran Pilch, "The Prosecution of the Crime of Genocide in the ICTY: The Case of Radislav Krstić", 12 *U.S.A.F.Acad.J.Legal Stud.* 39, 44, 48 (2002), referring to 'Serbs' in general; David Hirsh, "Law Against Genocide: Cosmopolitan Trials", p. 57 (2003), mentioning 'Serb forces'; Steven M. Weine, "When History is a Nightmare", p. 46-47 (1999), defining the group targeted by the military operation of ethnic cleansing but not the perpetrators; Netherlands Institute of War Documentation, "Report", 10 April 2002, Part I, Chap. 5, Sect. 1, wherein the involvement of the Bosnian Serb political and military leadership is not apparent.

[33] Human Rights Watch, "The Fall of Srebrenica", Vol. 7, No. 13, Oct. 1994, pp. 5–6.

Done in English and French, the English version being authoritative



Judge Carmel Agius
Presiding Judge

Dated this twenty-sixth day of September 2006,

At The Hague

The Netherlands

[Seal of the Tribunal]