



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-04-81-PT

Date: 25 September 2008

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding Judge
Judge Christine Van Den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Decision of: 25 September 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON MOTION FOR JUDICIAL NOTICE OF
ICTY CONVICTIONS**

The Office of the Prosecutor

Mr. Mark Harmon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith
Mr. James Castle

TRIAL CHAMBER 1 (“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 Motion for Judicial Notice of ICTY Convictions” (“Motion”), filed publicly on 10 July 2008, and hereby renders its Decision.

I. SUBMISSIONS

1. In its Motion, the Prosecution requests that the Trial Chamber take judicial notice of the convictions by the Tribunal of the following five alleged subordinates of the Accused Momčilo Perišić (“Accused”): Stanislav Galić, Radislav Krstić, Dragan Obrenović, Vidoje Blagojević and Dragan Jokić (collectively, the “Subordinates”).¹ The Prosecution requests that judicial notice be taken of these convictions (“Convictions”) as facts of common knowledge under Rule 94(A) of the Rules of Procedure and Evidence (“Rules”).²

2. The Prosecution submits that the Convictions are “directly relevant and probative” to the issues in the Indictment concerning the alleged involvement of the Subordinates in crimes committed in Sarajevo and Srebrenica.³ The Prosecution further contends that the Convictions are facts which are “generally known within the Tribunal’s jurisdiction”, and “not reasonably subject to dispute”, since they are “a matter of judicial record of this Tribunal” and “based on finding[s] of guilt beyond reasonable doubt”.⁴ The Prosecution also argues that the Convictions are “defined to a great degree of particularity and specificity as regards both individual concerned and the crime committed.”⁵

3. According to the Prosecution, the taking of judicial notice of the Convictions would not impact on the presumption of innocence of the Accused, since the Prosecution must still prove beyond reasonable doubt the linkage between the Accused and the Subordinates, as well as the *actus reus* and *mens rea* of the crimes for which the Accused allegedly bears criminal responsibility.⁶ The Prosecution also asserts that the taking of such judicial notice would “significantly expedite” the trial, “by reducing the time necessary to re-prove issues which have

¹ Motion, para. 2.

² Motion, paras 2, 19. The details of the Convictions are set out in Annex A to the Motion.

³ Motion, paras 2, 13-18, citing the Indictment, paras 41-42, 57-58, 61.

⁴ Motion, para. 20.

⁵ Motion, para. 21.

⁶ Motion, para. 22.

already been proven” beyond reasonable doubt before the Tribunal, such as a link between the Subordinates and their underlying crimes.⁷

4. On 22 July 2008, the Defence informed the Trial Chamber that it would not oppose the Motion.⁸

5. In a hearing on 2 September 2008, asked by the Trial Chamber to clarify its request in the Motion, the Prosecution submitted that it was seeking the Trial Chamber to take judicial notice of the mere fact that there had been the Convictions by the Tribunal.⁹ At the same time, it also asserted that the judicial notice of those Convictions would relieve the Prosecution of having to prove that the Subordinates committed the crimes as described in the Indictment.¹⁰ The Defence responded that while it would not oppose taking judicial notice of the existence of the Convictions, the underlying facts or conceptual or legal basis upon which the Conviction of each Subordinate rests would “not [be] appropriately the subject matter under Rule 94”.¹¹

II. APPLICABLE LAW

6. Rule 94 of the Rules provides:

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, 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.

7. The Trial Chamber first notes that the purposes of taking judicial notice are judicial economy and harmonisation of the Tribunal’s judgements.¹² However, when taking judicial notice, the Trial Chamber must balance such interests with the right of the accused to a fair trial.¹³

⁷ Motion para. 23. The Prosecution adds that, should this Motion be granted, together with the Prosecution’s Second Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base of 10 July 2008, and its Motion for Judicial Notice of Facts Relevant to the Srebrenica Crime Base of 10 July 2008, the number of Prosecution witnesses and the length of time required to present its case will be reduced, Motion, para. 3.

⁸ Email Correspondence of 22 July 2008.

⁹ Status Conference, 2 September 2008, T. 265.

¹⁰ Status Conference, 2 September 2008, T. 257, 269.

¹¹ Status Conference, 2 September 2008, T. 263-264.

¹² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006, 7 September 2006 (“*Prlić* September 2006 Decision”), para. 14; *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 (“*Semanza* Decision”), para. 20. *See also* *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant’s Motion for Judicial Notice, 1 April 2005 (“*Momir Nikolić* Appeal Decision”), para. 12; *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Judicial Notice, 14 December 2007 (“*Stanišić* Decision”), para. 11; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (“*Karemera et al.* Appeal Decision”), para. 39.

1. Rule 94(A): Facts of Common Knowledge

8. Rule 94(A) is mandatory and does not allow the Trial Chamber any discretion to refuse to take judicial notice of a fact once it has determined that this fact is “of common knowledge”.¹⁴ Once a fact of common knowledge is judicially noticed, it becomes conclusive evidence.¹⁵

9. Facts of common knowledge under Rule 94(A) are those facts which are notorious, and not subject to reasonable dispute.¹⁶ They include “commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature.”¹⁷ The Appeals Chamber has held that for the purposes of judicial notice under Rule 94(A), “[i]t is irrelevant whether the fact in question is defined by terms with a legal meaning as long as these terms describe factual situations”.¹⁸ Furthermore, 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.”¹⁹

10. Finally, pursuant to Rule 89(C), in order for a fact of common knowledge to be judicially noticed, it must be relevant to the case at hand.²⁰

2. Rule 94(B): Adjudicated Facts

11. For the purposes of the present Decision, the Trial Chamber considers it worthwhile to note some aspects of the law governing judicial notice of adjudicated facts under Rule 94(B).

12. While facts of common knowledge under Rule 94(A) are those beyond reasonable dispute, adjudicated facts under Rule 94(B) are those “which have been established in a proceeding between other parties on the basis of the evidence the parties to that proceedings chose to introduce, in the

¹³ *Prlić* September 2006 Decision, para. 14. See also *Momir Nikolić* Appeal Decision, para 12; *Karemera et al.* Appeal Decision, para. 47; *Stanišić* Decision, para. 11.

¹⁴ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals 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 (“*Dragomir Milošević* Appeal Decision”), para. 21; *Karemera et al.* Appeal Decision, paras 22-23, 29; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A), 26 September 2006 (“*Popović et al.* Decision”), para. 12.

¹⁵ *Karemera et al.* Appeal Decision, para. 42; *Momir Nikolić* Appeal Decision, para. 10; *Stanišić* Decision, para. 10; *Semanza* Decision, para. 41.

¹⁶ *Prosecutor v. Laurent Semanza*, Case No. ICTR-07-20-A, Judgement, 20 May 2005 (“*Semanza* Appeal Judgement”), para 194; *Karemera et al.* Appeal Decision, para. 22; *Momir Nikolić* Appeal Decision, para. 10; *Popović et al.* Decision, para. 13. The onus is on the Prosecution to establish that the proposed fact is not the subject of reasonable dispute, *Stanišić* Decision, para. 12; *Prosecutor v. Jadranko Prlić et al.*, 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 2006, p. 6.

¹⁷ *Semanza* Appeal Judgement, para. 194; *Karemera et al.* Appeal Decision, para. 22; *Popović et al.* Decision, para. 13.

¹⁸ *Dragomir Milošević* Appeal Decision, para. 21; *Karemera et al.* Appeal Decision, paras 29, 37. See also *Stanišić* Decision, para. 13.

¹⁹ *Karemera et al.* Appeal Decision, para. 29; *Popović et al.* Decision, para. 15.

particular context of that proceeding.”²¹ It follows that facts judicially noticed under Rule 94(B) may not be accepted as conclusive in proceedings involving different parties who have not had the chance to contest them.²² Such facts are merely presumptions that may be rebutted by the Defence with evidence at trial.²³ For the same reason, unlike Rule 94(A), judicial notice under Rule 94(B) is discretionary, allowing the Trial Chamber to determine which adjudicated facts to judicially notice on the basis of a careful consideration of the accused’s right.²⁴ Furthermore, as judicial notice under Rule 94(B) is not designed for the importing of legal conclusions from past proceedings, a proposed fact under this Rule must not include findings or characterisations that are of an *essentially* legal nature.²⁵

III. DISCUSSION

13 In the present case, the Accused is charged with aiding and abetting, or failing to prevent or punish as a superior, the Subordinates’ criminal conduct in Sarajevo and Srebrenica between 1993 and 1995. The alleged Subordinates’ criminal conduct has been condemned through the Convictions by the Tribunal as set out in Annex A to the Motion.²⁶ Therefore, the Convictions are relevant to the issues in the Indictment for the purpose of Rule 89(C).

14 The Trial Chamber now turns to examine whether the Convictions meet the criteria under Rule 94(A).

15 Although the precise relief requested by the Prosecution in the Motion is rather unclear, the Trial Chamber understands that the Prosecution seeks that the Trial Chamber take judicial notice of the Subordinates *having committed* the crimes, rather than the *mere existence* of the Convictions. In other words, the proposed subject of the judicial notice encompasses the underlying facts as well as the legal basis on which the Convictions rest. Indeed, according to the Prosecution, the judicial notice of the Convictions would relieve it of having to prove that the Subordinates committed the crimes as alleged in the Indictment.²⁷

²⁰ *Stanišić* Decision, para. 11; *Popović et al.* Decision, para. 11; *Semanza* Appeal Judgement, para. 189, citing *Momir Nikolić* Appeal Decision, para. 17; *Karemera et al.* Appeal Decision, fn. 32 and para. 36.

²¹ *Karemera et al.* Appeal Decision, para. 40.

²² *Karemera et al.* Appeal Decision, paras 40, 42.

²³ *Karemera et al.* Appeal Decision, para. 42; *Momir Nikolić* Appeal Decision, para. 11. See also *Dragomir Milošević* Appeal Decision, para. 17.

²⁴ *Karemera et al.* Appeal Decision, para. 41.

²⁵ *Dragomir Milošević* Appeal Decision, para. 22; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, para. 15.

²⁶ Indictment, paras 40-46, 55-62; Annex A to the Motion.

²⁷ Status Conference, 2 September 2008, T. 269. In Annex A to the Motion, the Prosecution refers not only to the dispositions of the relevant judgements, but also to the paragraphs containing conclusions as to the individual criminal responsibility of the Subordinates in view of the entire evidence in those particular cases.

16. At the outset, the Trial Chamber is of the view that a conviction is an ultimate *legal finding on the criminal responsibility* of an individual on the basis of a given factual situation. However, the subject of judicial notice under Rule 94(A) must be a *factual situation* and sufficiently well defined, even if it is described by terms with a legal meaning.²⁸ This is not the case for a conviction. In other words, a “conviction” cannot be understood to be a legal term referring to sufficiently well defined facts, and therefore cannot be used, as such, as a medium to introduce facts contained in the judgement of conviction for the purposes of judicial notice. Rather, the substance of a conviction can be judicially noticed, normally under Rule 94 (B), only through the accurate identification of each and every relevant fact, on which the conviction rests.²⁹ Hence a conviction cannot be characterised as a “fact” suitable for judicial notice under Rule 94.

17. Even if the Convictions as formulated in Annex A to the Motion were to be characterised as “facts”, the Trial Chamber needs to be satisfied that the Convictions are facts “of common knowledge”. As it is clear from the wording of Rule 94(A), a fact “of common knowledge” is a notorious fact beyond reasonable dispute, whether or not there is a judicial decision affirming it. The judicial determination of individual criminal responsibility does not, in and of itself, elevate the contents of this finding to the level of “common knowledge.” The Prosecution has therefore failed to establish that the Convictions are facts “of common knowledge”.

18. Over and above the foregoing analysis, the Trial Chamber notes that the Convictions arose from and should be viewed in the particular context of the judicial proceedings of each of the Subordinates’ cases. Such factors are, however, similar to those taken into account when taking judicial notice of an adjudicated fact pursuant to Rule 94(B), in accordance with the jurisprudence developed under this provision.³⁰ In light of the general principle that facts adjudicated in judicial proceedings are “conclusively binding only, at most, on the parties to those proceedings (*res judicata*),” when such facts are judicially noticed under Rule 94(B), they may be rebutted by the Defence with evidence at trial.³¹ By contrast, taking judicial notice of the Convictions under Rule 94(A) would deprive the Defence of an opportunity to rebut the evidence and might cause prejudice to the right of the Accused to a fair trial.

²⁸ See para. 9 *supra*.

²⁹ See Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008, para. 16 (i).

³⁰ See para. 12 *supra*.

³¹ *Karemera et al.* Appeal Decision, para. 42.

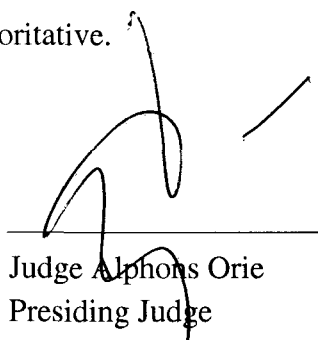
19. The Trial Chamber also recalls that in a number of prior decisions, it has already judicially noticed pursuant to Rule 94(B) various adjudicated facts relevant to the Subordinates' criminal responsibility, including the linkage between the Subordinates and the underlying crimes.³²

20. In case the Prosecution wishes to place on the record the mere fact that there exist the Convictions of the Subordinates by the Tribunal, it remains free to do so by referring to the relevant judgements in court during its case.³³

IV. DISPOSITION

21. For the reasons set out above, and pursuant to Rules 54 and 94 of the Rules, the Trial Chamber hereby **DENIES** the Motion.

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


 Judge Alphons Orie
 Presiding Judge

Dated this twenty-fifth day of September 2008

At The Hague

The Netherlands

[Seal of the Tribunal]

³² Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008; Decision on Second Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base, 17 September 2008; Decision on Prosecution's Motion for Judicial Notice of Facts Relevant to the Srebrenica Crime Base, 22 September 2008. *See also* Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes, 1 September 2008.

³³ Status Conference, 2 September 2008, T. 267.