



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-T
Date: 26 November 2009
Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, presiding
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: Mr John Hocking

Decision of: 26 November 2009

THE PROSECUTOR

v.

Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE OF
ADJUDICATED FACTS (*Prosecutor v. Naletilić and Martinović*)**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Douglas Stringer

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Karim A. A. Khan for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicholas Stewart for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

I. INTRODUCTION

1. Trial Chamber III ("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 seized of the "Motion for Judicial Notice of Adjudicated Facts (*Prosecutor v. Naletilić and Martinović*)" with an attached Annex, filed publicly by the Office of the Prosecutor ("Prosecution") on 15 October 2009 ("Motion"), in which the Prosecution requests that the Chamber take judicial notice of adjudicated facts in another case of the Tribunal, pursuant to Rule 94 (B) of the Rules of Procedure and Evidence ("Rules"),

II. PROCEDURAL BACKGROUND

3. On 14 March and 7 September 2006 the Pre-trial Chamber and the current Chamber respectively rendered two public decisions on several motions of the Prosecution to take judicial notice of adjudicated facts in other cases pursuant to Rule 94 (B) of the Rules, in particular in Case IT-98-34, *Prosecutor v. Mladen Naletilić and Vinko Martinović* ("*Naletilić Case*").¹

4. On 27 October 2009, Counsel for the Accused Slobodan Praljak, Milivoj Petković and Valentin Ćorić filed jointly and publicly "Slobodan Praljak, Milivoj Petković and Valentin Ćorić's Response to the Prosecution's Motion for Judicial Notice of Adjudicated Facts of 15 October 2009" joined by Counsel for the Accused Bruno Stojić and Berislav Pušić on 28 October 2009² ("*Joint Defence*"), in which the Joint Defence opposes the Motion ("*Joint Response*").

¹ "Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B)", 14 March 2006 ("Decision of 14 March 2006"); "Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006", 7 September 2006 ("Decision of 7 September 2006").

² "Joinder of Bruno Stojić to Slobodan Praljak, Milivoj Petković and Valentin Ćorić's Response to the Prosecution's Motion for Judicial Notice of Adjudicated Facts of 15 October 2009", 28 October 2009; "Berislav Pušić Motion to Join Slobodan Praljak, Milivoj Petković and Valentin Ćorić's Response to the Prosecution's Motion for Judicial Notice of Adjudicated Facts of 15 October 2009", 28 October 2009.

5. On 28 October 2009, Counsel for the Accused Prlić ("Prlić Defence") filed publicly "Jadranko Prlić's Response to Prosecution Motion for Judicial Notice of Adjudicated Facts" ("Prlić Response"), in which the Prlić Defence requests that the Motion be rejected, and joins in the arguments presented in the Joint Response, while submitting additional arguments.

6. On 2 November 2009, the Prosecution filed publicly "Prosecution Request for Leave to Reply to Defence Responses to Prosecution's Motion for Judicial Notice of Adjudicated Facts (*Prosecutor v. Naletilić and Martinović*) Filed on 15 October 2009 and Tendered Reply" in which the Prosecution requests leave of the Chamber to reply and respond to arguments presented in the Joint Response and the Prlić Response ("Reply").

III. ARGUMENTS OF THE PARTIES

7. In support of the Motion, the Prosecution requests that the Chamber, pursuant to Rule 94 (B) of the Rules, take judicial notice of adjudicated facts confirmed on appeal, excerpts of thirty paragraphs of the Judgement rendered in the *Naletilić* Case, listed in the Annex to the Motion ("Adjudicated Facts in the *Naletilić* Case").³

8. In support of the Motion, the Prosecution alleges that recently, during the trial, discussions were held at the hearing about the chain of command of the HVO and the "Convicts Battalion", whose content, according to the Prosecution, would contradict the facts adjudicated by the Tribunal and admitted definitively on appeal in the *Naletilić* Case.⁴

9. The Prosecution maintains that to take judicial notice of Adjudicated Facts in the *Naletilić* Case ensure greater coherence in Tribunal jurisprudence and deems that this, together with the expedience of trial, is one of the main objectives of Rule 94 (B) of the Rules.⁵

³ Request, paras 1, 5 and Annex.

⁴ Request, paras 2-5.

⁵ Request, para. 6.

10. The Prosecution asserts moreover that the Defence cannot object to the Motion on the ground that it contests the Adjudicated Facts in the *Naletilić* Case or that it intends to contest them.⁶

11. The Prosecution also recalls that in the Decision of 7 September 2006, the Chamber took judicial notice of adjudicated facts drawn from the *Naletilić* Case also relating to the "Conscripts Battalion".⁷

12. In the Joint Response and the Prlić Response, the Joint Defence and the Prlić Defence request that the Motion be rejected in its entirety.⁸

13. The Joint Defence recalls that the Prosecution case finished on 24 January 2008 and maintains that the Motion is out of time.⁹ The Joint Defence alleges that the Motion could only be admitted during the presentation of the Prosecution case and at the start of the trial.¹⁰ It bases this claim in particular on a decision rendered by the Chamber in *Blagojević*, in which that Chamber refused to take judicial notice of adjudicated facts in another case because of the advanced stage of the presentation of evidence.¹¹ Moreover, it argues that the Motion did not include any reasons to justify this delay and maintains that it was up to the Prosecution to file such a motion more than three years ago, when its earlier motions were submitted to the Chamber in order to take judicial notice of Adjudicated Facts in the *Naletilić* Case.¹²

14. The Joint Defence moreover maintains that to grant the Motion would be unfair to the extent that the purpose of the Motion is to establish a simple presumption of the accuracy of the Adjudicated Facts in the *Naletilić* Case of which judicial notice is to be taken in the present case.¹³ According to the Joint Defence, the Defence teams of Jadranko Prlić, Bruno Stojić and Slobodan Praljak have at this stage essentially lost their opportunity to rebut the presumption of accuracy of the Adjudicated Facts in the *Naletilić* Case, since their witnesses have already testified before the Chamber and,

⁶ Request, para. 9.

⁷ Request, para. 10.

⁸ Joint Response, paras 1 and 37; Prlić Response, p. 3.

⁹ Joint Response, paras 5 and 15.

¹⁰ Joint Response, paras 15, 16 and 18.

¹¹ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, "Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence", 19 December 2003, para. 23.

¹² Joint Response, paras 2, 15, 16, 17 and 19.

¹³ Joint Response, para. 15.

with regard to the other Defence teams, the latter only have a limited opportunity to do so since their resources were already spent elsewhere.¹⁴

15. The Joint Defence also maintains that it had to right to know well before the outset its case the facts that it would or would not need to rebut¹⁵ and requests that if the Chamber decides to grant the Motion, in order to cure the prejudice caused by this, it be allowed to recall many of the witnesses who have already testified before the Chamber and ask them to testify again.¹⁶

16. Finally, the Joint Defence objects fundamentally to the Adjudicated Facts in the *Naletilić* Case and maintains in particular that many of them cannot be candidates for judicial notice to the extent that they do not conform to the cumulative conditions that must be fulfilled before a Trial Chamber can take judicial notice.¹⁷ Moreover, the Joint Defence contends that the Adjudicated Facts in the *Naletilić* Case are neither sufficiently clear nor pertinent to the case nor free of legal characterisations.¹⁸

17. In the Prlić Response, the Prlić Defence joins the arguments presented in the Joint Response.¹⁹

18. More specifically, the Prlić Defence contends that the Prosecution is submitting the Motion in order to rebut Defence evidence.²⁰ It maintains that the Motion is premature and cannot be admitted to the extent that, pursuant to Rule 85 (A) of the Rules, evidence in rebuttal can only be presented after the presentation of the Defence case; that it must pertain to essential points and be limited to rebutting evidence that could not reasonably have been anticipated²¹ and, at any rate, cannot aim to reinforce or fill gaps in the evidence that has been admitted.²²

IV. DISCUSSION

A. Applicable Law

¹⁴ Joint Response, paras 15 and 19.

¹⁵ Joint Response, para. 21.

¹⁶ Joint Response, para. 25.

¹⁷ Joint Response, para. 31.

¹⁸ Joint Response, para. 31.

¹⁹ Prlić Response, p. 1.

²⁰ Prlić Response, para. 1.

²¹ Prlić Response, paras 2-6.

²² Prlić Response, para. 7.

19. Rule 94 (B) of the Rules states that:

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.

20. The judicial notice procedure set out in Rule 94 (B) of the Rules aims to guarantee coherence and harmony of jurisprudence at the Tribunal as well as to contribute to the expediency of the proceedings.²³ By taking judicial notice of adjudicated facts in another case, a Trial Chamber establishes an inconclusive presumption of the accuracy of these facts, which no longer need to be proved during the trial.²⁴ The only aim of this procedure is to free the Prosecution of the burden of proof on specific points and the Defence would then have the possibility of rebutting by bringing in evidence to the opposite.²⁵ However, while exercising its discretion to decide on the merits or lack of merits of a request to take judicial notice of adjudicated facts in another case, the Trial Chamber must establish a balance between the objectives sought in the Rule 94 (B) procedure and the fundamental right of the Accused to a fair trial. In any case, this procedure should not undermine the rights of the Accused to a fair trial.²⁶

B. Discussion

21. Firstly, the Chamber recalls under the "Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings", rendered publicly on 28 April 2006 ("Decision of 28 April 2006") and the Chamber's practice, replies are not accepted unless there are compelling circumstances and all parties wanting to file a reply must specify why the circumstances are sufficiently compelling for the Chamber to grant

²³ See, for example, *Prosecutor v. Nikolić*, Case No. IT-02-60/1-A, "Decision on Appellant's Motion for Judicial Notice", 1 April 2005, para. 12; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, "Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts", 9 October 2009, para. 14; Decision of 7 September 2006, p.6.

²⁴ *Prosecution 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, p. 4; Decision of 7 September 2006, para. 14.

²⁵ *Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice", 16 June 2006, para. 42.

²⁶ Decision of 7 September 2006, para. 14.

the leave to reply.²⁷ In the Chamber's opinion, in the Reply, the Prosecution does not show any compelling circumstance and merely asserts a general right to reply to arguments of the Joint Defence and the Prlić Defence, which cannot justify in itself the submission of the Reply. Moreover, the Prosecution does not explain in the Motion why it has not dealt with the matter of admissibility of the Motion, in this case, at the time when it filed the said Motion. The Chamber therefore finds that the Prosecution has not shown any compelling circumstance that could justify the filing of the Reply and consequently decides to deny it.

22. The Chamber finds that the aim of the Motion is to take judicial notice of numerous facts contained in thirty paragraphs of the Judgement rendered in the *Naletilić* Case and relating to the HVO chain of command and the "Convicts Battalion". In support of the Motion, the Prosecution submits that evidence recently presented in court by the Defence would be contrary to the Adjudicated Facts in the *Naletilić* Case²⁸ and that it would therefore be appropriate, in accordance with the procedure under Rule 94 (B) of the Rules, to ensure greater consistency in Tribunal jurisprudence.²⁹

23. The Chamber recalls that in the present case it has twice taken judicial notice of the Adjudicated Facts in the *Naletilić* Case, the first time before the start of the trial and the second time at the very beginning of the trial.³⁰ The Chamber notes that the Motion comes after the Prosecution case finished on 24 January 2008, without any explanation being given by the Prosecution for not having presented it during its earlier motions at the start of the trial.

24. The Chamber recalls that the aim of Rule 94 (B) is, in addition to guaranteeing consistency in Tribunal jurisprudence, to allow a party in the trial, in this case the Prosecution, not to have to present evidence on specific points and thus to speed up the trial proceedings.

25. The Chamber submits that the Prosecution itself recalls that, in accordance with jurisprudence, if the aim of the procedure established under Rule 94 (B) is to speed up

²⁷ Decision of 28 April 2006, p. 9; *see also* "Decision on Jadranko Prlić's Request for Reconsideration of the Decision of 9 April 2009", 28 May 2009, pp. 3 and 4.

²⁸ Motion, paras 2-5.

²⁹ Motion, para. 6.

the procedure, the first concern of the Trial Chamber is to ensure the right of the Accused to a fair trial.³¹ Therefore, if the Chamber decided to grant the Motion at such an advanced stage of the Defence case, the Defence teams which have already finished presenting their case would find it impossible to rebut the Adjudicated Facts in the *Naletilić* Case, apart from those where the Chamber allows them to recall witnesses or to call others, which would be completely contrary to the principle of expediency of the proceedings. Moreover, if the Chamber decided to grant the request of the Prosecution, the remaining Defence teams that have not yet finished presenting their case would, for their part, be obliged to call on new resources and spend additional court time in order to be able to present evidence in rebuttal of the Adjudicated Facts in the *Naletilić* Case.

26. The Chamber finds that this would contravene the principle of fairness and expediency of the trial and consequently to the spirit of Rule 94 (B) of the Rules.

27. Moreover, following the example of the Prlić Defence, the Chamber finds overwhelmingly that the Motion could not be admitted as a reply. In fact, the Rules stipulate that, unless otherwise decided the Chamber in the interests of justice, the Prosecution's reply comes after the Defence has presented its case.³² Furthermore, the Appeals Chamber established that the reply must pertain to an issue raised by the Defence "which could not reasonably have been anticipated" by the Prosecution.³³ In these proceedings, the Prosecution alleges that the Motion was submitted on the grounds that the Defence submitted claims and presented positions "which are directly contrary to adjudicated facts established". However, if the Prosecution intends to rebut these allegations raised by the Defence, the Prosecution does not explain why it would be in the interest of justice to admit the Motion at this stage and not after the end of the presentation of the Defence case, as advocated by Rule 85 (A) of the Rules.

28. Moreover, contrary to the procedure advocated by jurisprudence with regard to replies, the Prosecution does not explain why it could not have reasonably anticipated

³⁰ Decision of 14 March 2006 and Decision of 7 September 2006.

³¹ Motion, para. 7 citing *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, "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.

³² Rule 85 (A) of the Rules.

³³ *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "PAVO"), Hazim Delić and Esad Landžo (aka "ZENGA")*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 273.

that the issue of the HVO chain of command and the Convicts Battalion commanded by Mladen Naletilić would be raised by the Defence, even though the Chamber has already taken judicial notice, at the request of the Prosecution, of other facts relating to these issues.³⁴

29. For all of the reasons presented above, the Chamber consequently decides to deny the Motion.

FOR THE FOREGOING REASONS,

PURSUANT to Rule 85 (A) and Rule 94 (B) of the Rules,

DENIES the Motion.

The Presiding Judge adds a Separate Concurring Opinion to the present Decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-sixth day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁴ Motion, para. 10.

PRESIDING JUDGE JEAN-CLAUDE ANTONETTI'S SEPARATE
CONCURRING OPINION

Rule 94 of the Rules offers a Trial Chamber *ex officio* or at the request of a party, an opportunity to take judicial notice of adjudicated facts or documentary evidence admitted in other cases before the Tribunal which are at issue in the current proceedings.

The first question that arises is whether the 30 paragraphs in the Judgement rendered in the *Naletilić* Case relate to the present case.

The reply is a priori affirmative since the *Naletilić* Case relates to the present case. Paragraphs 9, 10, 11 and 12 of the Indictment establish a link to the extent that, according to the Prosecution, the HVO launched an attack on the Muslim population of Prozor and that a series of attacks occurred in April 1992, including the ones on Sovići and Doljani, and that a military offensive had been launched in Mostar.

However, this picture of events is contested by the Defence in its entirety and for this reason, the present Chamber is in no way bound by the conclusions reached by other Chambers, which were presented with different evidence.

For this reason, I hold that there should be a judicial notice of adjudicated facts, if they are not contested. If they are contested, there can be no judicial notice.

Moreover, I share the position of the Chamber stated in Paragraph 25 of its Decision, in which the accused must be able to rebut adjudicated facts and that, therefore, it is not possible to take such notice if some of the Defence teams have **already** finished the presentation of their Defence case.

/signed/