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	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-02-60/1-A
		Date:	1 April 2005
		Original:	English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision of: 1 April 2005

Momir NIKOLIĆ

v.

PROSECUTOR

DECISION ON APPELLANT'S MOTION FOR JUDICIAL NOTICE

Counsel for the Appellant:

Mr. Rock Tansey

Counsel for the Prosecution:

Mr. Norman Farrell

1. The Appeals 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 ("International Tribunal") is seised of the "Appellant's Motion for Judicial Notice" filed by Momir Nikolić ("Appellant") on 11 October 2004 ("Motion").

I. Background

2. On 20 August 2004, the Appellant filed his first Motion for Judicial Notice. The Prosecution responded on 30 August 2004, and the Appellant replied on 3 September 2004. On 30 September 2004, the Appellant's first Motion for Judicial Notice was dismissed by the Appeals Chamber on the grounds that it was unclear and did not specify whether the facts or documents were sought to be judicially noticed pursuant to Rule 94(A) or Rule 94(B) of the Rules of Procedure and Evidence ("Rules"), without prejudice to the Appellant's re-filing a motion consistent with the decision.[1]

3. Subsequently, the Appellant filed on 11 October 2004 the Motion at issue here, which includes four annexes. A corrected Annex A was filed on 12 October 2004.[2] In this Motion, the Appellant requests the Appeals Chamber to take judicial notice of: (i) certain facts - listed in Annex A to the Motion - that he asserts are matters of common knowledge, pursuant to Rule 94(A) of the Rules, and (ii) adjudicated facts contained in the *Krstić* Trial Judgement[3] enumerated in Annex B, and in section three of the "VRS Corps Command Responsibility Report" attached as Annex C, pursuant to Rule 94(B) of the Rules.

4. The Prosecution filed its response on 21 October 2004,[4] whereby it requests the Appeals Chamber to dismiss the Motion on the grounds, *inter alia*, that: (i) the Appellant seeks the admission of additional evidence and must therefore satisfy the requirements of Rule 115 of the Rules; (ii) the Appellant has failed to show that the facts sought to be judicially noticed are relevant

[1] Decision on Motion for Judicial Notice, 30 September 2004.
[2] Corrected Annex A to Appellant's Motion for Judicial Notice, 12 October 2004. The Appeals Chamber notes that even though the Defence filed a corrected Annex A, the Motion is still not in accordance with Annex A. Paragraph 3.1. of the Motion cites Annex A, number thirteen, which is in fact number one in the corrected Annex A; paragraph 3.2. of the Motion cites Annex A, numbers one to three, which are in fact numbers two to four in the corrected Annex A; paragraph 3.3. of the Motion cites Annex A, numbers four to eleven, which are in fact numbers five to twelve in the corrected Annex A; paragraph 3.4. of the Motion cites Annex A, number twelve, which is in fact number thirteen in the corrected Annex A. Rather, paragraphs 3.1 to 3.4 are in accordance to the first submitted Annex A, whereas the headings in paragraphs 8 and 11 of the Motion are in accordance with the corrected Annex A. Moreover, the heading in paragraph 14 of the Motion reads "Annex A: Proposed Fact No. 14"; the Appeals Chamber notes that there is no fact number fourteen, neither in the new Annex A, nor in the former Annex A. A considerable amount of time was spent in sorting out that the Appellant actually refers to fact number thirteen enclosed in Corrected Annex A (fact number twelve in the former Annex A).
[3] *Prosecutor v. Radislav Krstić*, IT-98-33, Judgement, 2 August 2001 ("*Krstić* Trial Judgement").

to the appeal; (iii) the report by the RS Srebrenica Commission has yet to be released; and (iv) some facts were already available to the Appellant at the sentencing stage.

5. In his Reply filed on 27 October 2004,[5] the Appellant argues that he does not have to meet the requirements of Rule 115 of the Rules when applying for judicial notice and asserts that the facts are all relevant and should be judicially noticed.

6. Since the Reply was filed one day after the expiration of the time limit prescribed in the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal[6] and exceeds the page-limit set out in the Practice Direction on the Length of Briefs and Motions,[7] the Appellant requests the Appeals Chamber to recognize the filing as validly done on the grounds, *inter alia*, that: (i) additional pages were necessary in order to respond to the over-sized Response; (ii) the excess length of the Response required additional time; (iii) the four days allowed for the preparation of the Reply covered the weekend of the annual conference for the Association of Defence Counsel practicing before the International Tribunal; and (iv) he was unable to obtain a copy of a relevant decision of the International Criminal Tribunal for Rwanda ("ICTR") because the ICTR database was out of order. In a response filed on 4 November 2004, the Prosecution specified that it did not oppose the Appellant's request.[8] In the circumstances of the case and pursuant to Rule 127 of the Rules, paragraph 19 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal and paragraph C(7) of the Practice Direction on the Length of Briefs and Motions, the Appeals Chamber recognizes the filing of the Reply as validly done.

7. On 17 November 2004, the Prosecution filed a "Prosecution's Motion to Strike", which was directed, *inter alia*, against some arguments advanced by the Appellant in his Reply, in particular paragraphs 6, 7, 9 to 14, 21, and 29.[9] The Prosecution's Motion to Strike was granted in part in relation to the Reply, in that the Appeals Chamber struck out paragraphs 6, 7, 9 to 14 and 21.[10] As a result the Appeals Chamber will not take into consideration the arguments developed in the said paragraphs in assessing the merits of the Motion.

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[4] Prosecution Response to Motion for Judicial Notice of 11 October 2004, 21 October 2004 ("Response"). An extension of pages was granted to the Prosecution by the Pre-Appeal Judge on 20 October 2004. *See* Decision on Prosecution's Motion for Extension of Pages, 20 October 2004.
[5] Appellant's Reply to the Prosecution Response to Appellant's Motion for Judicial Notice and Motion for Late-Filing of Over-Sized Same, 27 October 2004 ("Reply").
[6] IT/155/Rev.2, 21 February 2005.
[7] IT/184/Rev.1, 5 March 2002.
[8] Prosecution Response to Request for Extension of Time and Pages Regarding Appellant's Reply of 27 October 2004 and Notice of Prosecution Motion to Strike, 4 November 2004, para. 3.
[9] The First Motion to Strike exceeds the page limit set out in the Practice Direction IT/184/Rev.1. On 22 November 2004, the Pre-Appeal Judge granted an extension of pages requested by the Prosecution on 17 November 2004.
[10] Decision on Prosecution's Motion to Strike, 20 January 2005. *See*, in particular, paras 30-50.

8. By a decision dated 14 February 2005, the Deputy Registrar withdrew the assignment of Ms. Virginia Lindsay and assigned Mr. Rock Tansey as lead counsel for the Appellant effective from the date of the decision.[11]

II. Applicable Law

9. Rule 94 of the Rules reads:

> (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.

10. The Appeals Chamber has held that Rule 94(A) of the Rules commands the taking of judicial notice and that the basis on which judicial notice is taken pursuant to this sub-Rule is that the material is notorious.[12] Facts of common knowledge under Rule 94(A) of the Rules have been considered to encompass common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature, as well as those facts that are generally known within a tribunal's territorial jurisdiction.[13] Once a Trial Chamber deems a fact to be of common knowledge, it must also determine that the matter is not the subject of reasonable dispute.[14] In consequence, the taking of judicial notice of facts of common knowledge under Rule 94(A) of the Rules "normally implies that such facts *cannot* be challenged during trial."[15]

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[11] Decision of the Deputy-Registrar, 14 February 2005, filed on 16 February 2005.

[12] *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision of Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003 ("*Milošević* Appeal Decision"), pp. 3 and 4.

[13] *Prosecutor v. Laurent Semanza*, 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 of 3 November 2000"), para. 23, citing C. Bassiouni and P. Manikas, The Law of the International Tribunal for the Former Yugoslavia (United States of America 1996) and other references; the Appeals Chamber notes that in its decision the *Semanza* Trial Chamber refers only to Rule 94 because the Rules had not been amended yet to include Rule 94(B).

[14] *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, pp. 4 and 5. *See* also *Prosecutor v. Duško Sikirica et. al.*, IT-95-8-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000 ("*Sikirica* Decision of 27 September 2000"), p. 5; *Semanza* Decision of 3 November 2000, para. 24.

[15] *Prosecutor v. Momčilo Krajišnik*, 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 92*bis*, 28 February 2003 ("*Krajišnik* Decision of 28 February 2003"), para. 16. *See* in this respect *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.5, Separate Opinion of Judge Shahabuddeen Appended to the Appeals Chamber's Decision Dated 28 October 2003 on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 31 October 2003, para. 4.

11. In contrast thereto, Rule 94(B) of the Rules gives a Chamber the discretion to take judicial notice of adjudicated facts and documentary evidence from previous proceedings.[19] Under this specific provision, the moving party has to demonstrate how the facts or documentary evidence sought to be judicially noticed are related to the matters at issue in the current proceedings.[20] In this respect, the Appeals Chamber recalls its decision in the *Niyitegeka* case, where it dismissed a motion for judicial notice of documentary evidence because the appellant had failed to show that the evidence submitted related to "the matter at issue in the current proceedings."[21] As to the legal consequences that taking judicial notice of adjudicated facts carries, the Appeals Chamber stated that "by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial."[22]

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[19] *Milošević* Appeal Decision, p. 3. *See* also *Prosecutor v. Elizaphan and Gerard Ntakirutimana*, ICTR-96-10-T and ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts – Rule 94(B) of the Rules of Procedure and Evidence, 22 November 2001 ("*Ntakirutimana* Decision of 22 November 2001"), para. 28; *Prosecutor v. Momčilo Krajišnik*, IT-00-39-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, para.12.

[20] *See Ntakirutimana* Decision of 22 November 2001, para. 27; *Prosecutor v. Laurent Semanza*, ICTR-97-20-T, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94(B) and 54, 6 February 2002, para. 14; *Prosecutor v. Paško Ljubičić*, IT-00-41-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 23 January 2003 ("*Ljubičić* Decision of 23 January 2003"), p. 5; *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 16 December 2003, p. 9; *Prosecutor v. Željko Mejakić et al.*, IT-02-65-T, Decision on Prosecution Motion for Judicial Notice pursuant to Rule 94(B), 1 April 2004, p. 5; *Prosecutor v. Enver Hadžihasanović*, IT-01-47-T, Final Decision on Judicial Notice of Adjudicated Facts, 20 April 2004, p. 9; *Prosecutor v. Casimir Bizimungu et al.*, ICTR-99-50-I, Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94(B), 10 December 2004 ("*Bizimungu* 10 December 2004 Decision on Defence Motion"), para. 7; *Prosecutor v. Casimir Bizimungu et al.*, ICTR-99-50-I, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts (*Rule 94(B) of the Rules of Procedure and Evidence*), 10 December 2004 ("*Bizimungu* 10 December 2004 Decision on Prosecution Motion"), para. 11.

[21] *Prosecutor v. Eliézer Niyitegeka*, ICTR-96-14-A, Reasons for Oral Decision Rendered 21 April 2004 on Appellant's Motion for Admission of Additional Evidence and for Judicial Notice, 17 May 2004 ("*Niyitegeka* Appeal Decision"), para. 16.

[22] *Milošević* Appeal Decision, p. 4 (footnote omitted).

12. When applying Rule 94 of the Rules, a balance between the purpose of taking judicial notice, namely to promote judicial economy, and the fundamental right of the accused to a fair trial must be achieved.[23]

III. Submissions and Discussion

13. The Appeals Chamber will first discuss the issue raised by the Prosecution as to whether whenever a fact is judicially noticed during appeal proceedings, the Appeals Chamber must be satisfied that the said fact was not available before the Trial Chamber, in which case the requirements set out in Rule 115 of the Rules must be met before the admission of the evidence. Secondly, the Appeals Chamber will consider the parties' submissions concerning the facts and documentary evidence sought to be judicially noticed pursuant to Rule 94(A) and (B) of the Rules.

1. Prosecution's arguments regarding the relationship between Rules 94 and 115 of the Rules

14. The Prosecution asserts that "[j]udicial notice is a manner of proof, not a basis for admissibility"[32] and submits that Rule 94 of the Rules is not to be applied on appeal without regard to the limitations imposed by Rules 89(C) and 115 of the Rules.[33] The Prosecution alleges that the Appellant is seeking to have additional evidence (not presented before the Trial Chamber) admitted on appeal by way of invoking Rule 94(A) and Rule 94(B) of the Rules.[34] It submits that: "[b]efore a fact (judicially noticed or proven by other means) can be admitted on appeal, the Appeals Chamber must first assess whether it is a fact which was not before the Trial Chamber and is therefore additional to the record on appeal. If it is, the applicable Rule for the admission of additional evidence on appeal is Rule 115, not Rule 94."[35] The Prosecution argues that the Appellant has to demonstrate how the facts he requests the Appeals Chamber to take judicial notice of are "relevant to grounds of appeal, relevant to a factual issue in dispute arising from the ground of appeal and

[23] *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, p. 4; *Sikirica* Decision of 27 September 2000, p. 4; *Ntakirutimana* Decision of 22 November 2001, para. 28; *Ljubičić* Decision of 23 January 2003, p. 4; *Krajišnik* Decision of 28 February 2003, para. 11; *Prosecutor v. Radoslav Stanković*, IT-96-23/2-PT, Decision on Prosecution's Motion for Judicial Notice Pursuant to Rule 94(B), 16 May 2003, para. 7.
[32] Response, para. 4.
[33] Response, para. 8.
[34] Response, para. 3.
[35] Response, para. 11.

how, if the fact was before the Trial Chamber, it could have affected the sentence imposed."[36] The Prosecution claims that before a judicially noticed fact can be admitted on appeal the Appeals Chamber must be satisfied that it could have been a decisive factor in the Trial Chamber's Judgement, meaning that it could have affected the sentence imposed,[37] or, if the fact was available at trial, the Prosecution submits that the moving party must show that the "additional fact" would actually have affected the verdict.[38] In addition, the Prosecution submits that some of the facts sought to be judicially noticed were in the possession of the Appellant prior to the guilty plea and sentencing submissions, for example the report of Mr. Butler, a military expert working for the Office of the Prosecutor.[39] Finally, the Prosecution claims that it is "apparent that the Appellant's motion for judicial notice is to present additional evidence before the Appeals Chamber" and therefore the Appellant must satisfy the requirements provided for in Rule 115 of the Rules, which he did not.[40] The Prosecution relies further on case-law of the United States' jurisdiction in support of the argument that an appellant seeking judicial notice has to show that the evidence was not available at trial.[41]

15. Citing the Prosecution's argument in his Reply, the Appellant states that if judicial notice "is 'a means by which a court can accept a commonly known or indisputable fact without requiring proof' then evidentiary proceedings pursuant to Rule 115 would be inappropriate for use in connection with judicially noticed facts."[42] He submits that there is nothing in Rule 115, or in Rule 94 of the Rules to suggest that facts admitted pursuant to Rule 94 of the Rules must additionally fulfil the requirements of Rule 115 of the Rules. He finally adds that this would, moreover, "eviscerate Rule 94 in relation to all appellate proceedings."[43]

16. By virtue of Rule 107 of the Rules, Rule 94 (A) and (B) of the Rules is applicable *mutatis mutandis* to appeal proceedings.[44] However, so far, no previous decision rendered by the Appeals Chambers of either this International Tribunal or the ICTR has addressed the application of Rule 94 of the Rules during appeal proceedings. In the *Delalić et al.* case, where the Appeals Chamber was

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[36] Response, para. 13.
[37] *Ibid.*
[38] *Ibid.*
[39] Response, para. 17 and footnote 14.
[40] Response, para. 18.
[41] Response, paras 14-16.
[42] Reply, para. 33 (footnote omitted).
[43] Reply, para. 35.
[44] Regarding the application of Rule 94(B) of the Rules on appeal proceedings, *see Prosecutor v. Zoran Kupreškić et al,* IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 And For Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001 ("*Kupreškić* Appeal Decision"), para. 6. *See* also *Prosecutor* v *Delalić et al.,* IT-96-21-A, Order on Esad Landžo's Motion (1) to Vary in Part Order on Motion to Preserve and Provide Evidence, (2) to be Permitted to Prepare and Present Further Evidence, and (3) that the Appeals Chamber take Judicial Notice of Certain Facts, and on his Second Motion for Expedited Consideration of the Above Motion, 4 October 1999 ("*Delalić* Order of 4 October 1999"); and *Niyitegeka* Appeal Decision.

seised of a motion from one of the appellants requesting the Appeals Chamber to take judicial notice of certain facts, the Appeals Chamber dismissed the motion without detailed arguments.[45] In the *Kupreškić et al.* case, the Appeals Chamber was seised of an application for admission of evidence under both Rule 94 and Rule 115 of the Rules, nevertheless only the request for judicial notice was addressed and the interaction between both Rules was not examined.[46] In an ICTR case, the request for judicial notice filed on appeal by Eliezer Niyitegeka was denied on the ground that judicial notice of the documents submitted was "inappropriate".[47] Against this backdrop, and since there is no jurisprudence on the application of Rule 94 of the Rules in appellate proceedings, the Appeals Chamber turns to consider this issue for the first time.

17. The Appeals Chamber emphasizes that Rule 94 of the Rules is not a mechanism that may be employed to circumvent the general Rules governing the admissibility of evidence and litter the record with matters which would not be admitted otherwise. Accordingly, on appeal, a fact qualifying for judicial notice under Rule 94 of the Rules is not automatically admitted. For a fact capable of judicial notice to be admitted on appeal, the requirements provided for by Rule 115 of the Rules need to be satisfied.

18. Accordingly, the Appeals Chamber finds that a motion filed solely under Rule 94 of the Rules, without addressing the requirements of Rule 115 of the Rules, is an incorrect way to seek to have facts or documentary evidence admitted on appeal. Contrary to the argument of the Appellant, the Appeals Chamber finds that this will not "eviscerate" Rule 94 of the Rules in relation to all appellate proceedings, since the legal consequences attached to the taking of judicial notice remain the same. In this respect, the Appeals Chamber recalls that the taking of judicial notice under Rule 94(A) or 94(B) of the Rules entails specific consequences for the moving party.

19. In this case, the Appellant filed his Motion under Rule 94 of the Rules only and failed to show how the material sought to be admitted on appeal meets the requirements of Rule 115 of the Rules as he is required to do. While the Appeals Chamber considers that the Motion could be dismissed on this basis, without prejudice to the Appellant's re-filing a motion consistent with the proper procedure, the Appeals Chamber finds that it serves judicial economy in the present case to state the reasons why it is not satisfied that the facts or documentary evidence sought to be judicially noticed by the Appellant meet the requirements of Rule 94(A) or (B) of the Rules.[48]

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[45] *Delalić* Order of 4 October 1999, p. 5: "Considering that it is inappropriate to take judicial notice of any of those matters".
[46] *Kupreškić* Appeal Decision. One of the Appellants (Drago Josipović) requested the Appeals Chamber to admit into evidence the *Kordić* and *Čerkez* Trial Judgement pursuant to both Rule 94(B) and Rule 115 of the Rules.
[47] *Niyitegeka* Appeal Decision, paras 15 and 16.
[48] The Appeals Chamber recalls its decision in the *Niyitegeka* case, where it examined and dismissed a motion for judicial notice improperly filed under Rule 94 only.

2. Facts sought to be judicially noticed pursuant to Rule 94 (A) of the Rules

a) Fact Number One enclosed in Corrected Annex A: Republika Srpska Srebrenica Commission's Report

20. The Appellant submits that the date of the publication of the Republika Srpska ("RS") Srebrenica Commission's Report and "the fact of its historic admission" that mass executions were committed by RS forces in 1995 are "sufficiently notorious to be judicially noticed."[49] To corroborate this, the Appellant appends a press release issued on 11 June 2004 by the Office of the High Representative announcing the release of the report that same date, as well as news reports from BBCNews and the Washington Post.[50] The Appellant suggests that the relevance of this admission is demonstrated by the Prosecution's closing arguments at the sentencing hearing, where the Prosecution stated, *inter alia*, that such an admission places the government of the RS in a situation where they must "face the truth and acknowledge it, which would be a huge step towards reconciliation and a major historical move."[51] The Appellant submits that "the date of the Commission's report containing the historic admission is relevant to an assessment of the importance of [the] Appellant's guilty plea"[52] and "to [the] Appellant's substantial cooperation,"[53] since such report was released only nine months after his testimony in the *Blagojević and Jokić* trial.[54] He adds that the temporal relationship helps to "demonstrate his contribution to establishing the truth and promoting reconciliation within the RS."[55]

21. The Prosecution responds that there are actually three facts sought to be judicially noticed, first, that an official RS Srebrenica Commission report was released on 11 June 2004, second, that the Report was released nine months after the Appellant testified in the *Blagojević and Jokić* trial and third, that the Commission admitted for the first time that mass executions were committed by RS forces in 1995.[56] The Prosecution submits that the final and complete report has not yet been released, so that there is no report of which the Chamber can take judicial notice, and that the Appellant should await the release of that report.[57] Further, the Prosecution contends that the facts

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[49] Motion, para. 8.
[50] Motion, Annex D.
[51] Sentencing Hearing, Transcript pp 1642-5, cited in Motion, para. 9.
[52] Motion, para. 9.
[53] The Appeals Chamber notes that the relationship between the fact sought to be judicially noticed and the cooperation of the Appellant is only addressed in footnote 11 of the Motion.
[54] *Prosecutor v. Vidoje Blagojević and Dragan Jokić,* IT- 02-60. *See* Corrected Annex A, fact number one ("fact no. 1").
[55] Corrected Annex A, header to fact no. 1.
[56] Response, para. 47 a).
[57] Response, para. 49.

sought to be judicially noticed are not of common knowledge[58] and do not constitute notorious facts warranting judicial notice.[59]

22. In his Reply, the Appellant submits that "it is a matter of historical fact" that the admission in the report regarding the Srebrenica massacres in July 1995 was made on 11 June 2004, nine months after his testimony in the *Blagojević and Jokić* trial.[60] Further, the Appellant argues that the notoriety is "especially evident" within the territory of the International Tribunal's jurisdiction but also around the world.[61]

23. It appears that the Appellant does not only want to seek judicial notice of the fact that the Report was released on 11 June 2004, as the release date as such is not at all relevant to the Appellant's case. Rather, the Appeals Chamber notes the Corrected Annex A in which the Appellant states that he seeks judicial notice of the fact that the report was released nine months after the Appellant testified in the *Blagojević and Jokić* trial, that is, the fact of a "temporal relationship" between these two events.[62] However, this temporal relationship is not a fact of common knowledge; it can not be deemed a notorious fact that the Appellant testified nine months before the release of the Report.

24. Moreover, the Appeals Chamber notes that the Trial Chamber in the instant case did take into consideration the fact that the Appellant was the first Serb to acknowledge criminal responsibility regarding the events in Srebrenica. The Trial Chamber considered that the Appellant's admission that mass executions were committed in Srebrenica by the Bosnian Serb army – as well as the acceptance of his individual criminal responsibility for his role in the crime of persecutions – contributed to the establishment of a historical record and could further reconciliation.[63]

25. For the foregoing reasons, the Appeals Chamber finds that fact no. 1 of Corrected Annex A does not meet the requirement of Rule 94(A) of the Rules.

[58] Response, para. 56.
[59] Response, para. 49.
[60] Reply, para. 22.
[61] Reply, para. 23.
[62] Corrected Annex A, Heading to fact no. 1.
[63] *Momir Nikolić* Sentencing Judgement, 2 December 2003, paras 142-149.

b) Facts Numbers Two to Twelve enclosed in Corrected Annex A: Expert Report and Military Regulation

26. The Appellant seeks judicial notice under Rule 94(A) of the Rules of the provisions of military manuals and regulations relied upon in his Appellant's Brief.[64] Facts numbers two to twelve contain the following:

- facts numbers two and three ("facts nos. 2 and 3") are excerpts from the "JNA Manual for the work of command and staffs" from 1983 and from the "Interim Provisions on the Service in the Army of the Serb Republic" effective August 1992, respectively; both are included in the VRS Brigade Command Responsibility Report, prepared by Richard Butler;
- fact number four ("fact no. 4") is a sentence from paragraph 2.6 of Richard Butler's VRS Brigade Command Responsibility Report;
- facts numbers five and six ("facts nos. 5 and 6") are excerpts from the "Brigade Rules for Infantry, Motorised, Mountain, Alpine, Marine and Light Brigades 1984", of the Federal Secretariat for National Defence of the Socialist Federal Republic of Yugoslavia;
- facts numbers seven to nine ("facts nos. 7 to 9") are excerpts from the "Rules of Service of Security Organs in the Armed Forces of the Socialist Federative Republic of Yugoslavia", dated 1984; and
- facts numbers ten to twelve ("facts nos. 10 to 12") are excerpts from the "Service Regulations of the SFRJ Armed Forces Military Police" dated 1985.

27. The Appellant submits that these regulations, which were relied upon in the *Blagojević and Jokić* trial, corroborate his testimony and demonstrate "the limited scope of [the] Appellant's authority as an intelligence and security officer in a light infantry brigade."[65]

28. The Prosecution responds that facts nos. 2 to 12 are not relevant to the appeal.[66] Noting that the Appellant tries to establish the limited scope of his role through facts nos. 2 to 12, the Prosecution submits that the Trial Chamber made no findings to the detriment of the Appellant regarding his authority as the Chief of Intelligence and Security.[67]

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[64] Momir Nikolić's Opening Brief on Appeal, redacted and conformed, 21 September 2004.
[65] Corrected Annex A, previous description of facts nos. 2 to 12.
[66] Response, paras. 19 and 31.
[67] Response, para. 32.

29. The Appellant replies that the military regulations are "readily verifiable" and refers to a decision rendered in the *Bagosora* case where Rwandan laws were judicially noticed.[68]

(i) Facts nos. 2 and 3, and fact no. 4, facts contained in the VRS Brigade Command Responsibility Report

30. Regarding the VRS Brigade Command Responsibility Report (facts nos. 2 to 4 enclosed in Corrected Annex A), the Appellant argues that this report is "factually undisputed and that the portions relied upon in the Appellant's Opening Brief are merely citations to military regulations that are relevant to the issues in the appeal in this case."[69] The Prosecution contends that the Appellant did not show that facts nos. 2 and 3 "are established, published and accessible to the public and accepted as readily verifiable by reference to a reliable source,"[70] that facts nos. 2 and 3 do not stand for the facts which the Appellant wants judicially noticed,[71] and that Mr. Butler would have to provide evidence of the relevance and applicability of the material he relied upon in his report.[72] With respect to fact no. 4 the Prosecution submits that it contains the views of Mr. Butler, on command responsibility in Corps and Brigades after having regarded the laws and regulations applicable in the Former Yugoslavia. The Prosecution further submits, that laws and regulations might be judicially noticed but not the conclusion drawn by a military expert.[73]

31. The Appeals Chamber notes that facts nos. 2 and 3 enclosed in Corrected Annex A are contained in Richard Butler's "VRS Brigade Command Responsibility Report" in which the "JNA Manual for the work of Command and Staffs" and the "Interim Provisions on the Service in the Army of the Serb Republic" are quoted respectively. The Appeals Chamber notes that facts nos. 2 and 3, as submitted by the Appellant would need to be verified regarding the veracity of the material relied upon in the report, through Richard Butler's testimony. Facts nos. 2 and 3 thus do not constitute facts of common knowledge within the meaning of Rule 94(A) of the Rules.

32. Proposed fact no. 4 enclosed in Corrected Annex A is a concluding remark made by Mr. Butler after having reviewed several military regulations. Having regard to the criteria set out above, the Appeals Chamber does not find that proposed fact no. 4 enclosed in Corrected Annex A qualifies for judicial notice as a fact of common knowledge or public notoriety.

[68] Reply, para. 30.
[69] Motion, para. 13.
[70] Response, para. 50.
[71] Response, para. 51.
[72] Response, para. 50.
[73] Response, para. 52.

(ii) Facts nos. 5 to 12, Military Rules and Regulations

33. Regarding facts nos. 5 to 12, the Prosecution submits that these documents are classified as military secrets and confidential and therefore are not of common knowledge,[74] and that the Appellant did not show that these documents were applicable at the time of the commission of the crimes in 1995.[75]

34. The Appeals Chamber finds that military rules or regulations, in particular when classified as a "military secret"[76] and/or "strictly confidential,"[77] are not facts of common knowledge within the meaning of Rule 94(A) of the Rules.

35. For the foregoing reasons, the Appeals Chamber finds that facts nos. 5 to 12 of Corrected Annex A do not meet the requirements of Rule 94(A) of the Rules.

c) Fact Number Thirteen enclosed in Corrected Annex A: the Identification of Two Additional Mass Graves

36. The Appellant submits that the confirmation of the existence of two additional mass graves sites identified by the Appellant prior to his sentencing hearing should be judicially noticed as it demonstrates the Appellant's veracity and corroborates his substantial cooperation.[78] The Appellant argues that at the time of his sentencing only the existence of one mass grave was confirmed by the authorities of the Federation of Bosnia and Herzegovina.[79] He adds that, Prosecutor McCloskey, however, recently confirmed the existence of three sites previously not known, which were identified by the Appellant.[80] He further submits that the confirmation of these two additional mass graves is relevant for the evaluation of the Appellant's truthfulness and the value of his cooperation with the Prosecution. The Appellant acknowledges in his Motion that the statement of the Prosecutor is "not a matter of common knowledge, except among the parties to this case."[81] He argues, however, that "such common knowledge should be sufficient" in this case, as "recourse to Rule 115 of the Rules is futile because this one piece of information is not sufficient to constitute a

[74] Response, para. 54.
[75] Response, para. 55.
[76] *See* title pages of "Service Regulations of the SFRJ – Armed Forces Military Police 1985", "Rules of Service of Security Organs in the Armed Forces of the Socialist Federative Republic of Yugoslavia 1984", "Brigade Rules for Infantry, Motorised, Mountain, Alpine, Marine and Light Brigades 1984".
[77] *See* title page of "Rules of Service of Security Organs in the Armed Forces of the Socialist Federative Republic of Yugoslavia 1984".
[78] Motion, Corrected Annex A, description of fact no. 13.
[79] Motion, para. 14.
[80] Motion, para. 15.
[81] Motion, para. 17.

miscarriage of justice."[82] He further submits that this information was "specifically requested by the Trial Chamber."[83]

37. The Prosecution responds that fact number thirteen ("fact no. 13") enclosed in Corrected Annex A is not relevant to the appeal, since it is undisputed that the Appellant identified three unknown mass graves.[84] Further, the Prosecution argues that fact no. 13 enclosed in Corrected Annex A cannot be considered as common knowledge, even though it is undisputed.[85]

38. In reply, the Appellant argues that fact no. 13 enclosed in Corrected Annex A is relevant because two of the graves identified by the Appellant were not confirmed at the time of sentencing.[86]

39. That the Appellant admitted the existence of mass graves reveals nothing about the nature of such a fact being as either of common knowledge or indisputable. The Appeals Chamber finds it surprising that the Appellant himself recognizes that this fact is not a matter of common knowledge yet, still filed a request under Rule 94(A) of the Rules. Indeed, the fact that the Appellant had identified two additional mass graves sites is not a matter of common knowledge.

40. For the foregoing reasons, the Appeals Chamber finds that fact no. 13 enclosed in Corrected Annex A is not a fact of common knowledge within the meaning of Rule 94(A) of the Rules.

3. Facts sought to be judicially noticed pursuant to Rule 94(B) of the Rules

41. The Appellant requests the Appeals Chamber to judicially notice the adjudicated facts included in Annex B and C pursuant to Rule 94(B) of the Rules, as they are "relevant to his honesty and veracity, as well as to the value of his cooperation in the case"[87] and "to the legal errors made [by the Trial Chamber] when analysing [the] Appellant's limited position of authority",[88] respectively.

a) Facts enclosed in Annex C: Section three of the VRS Corps Command Responsibility Report

42. Annex C contains section three of Richard Butler's "VRS Corps Command Responsibility Report" of 5 April 2000 and is entitled "VRS Corps Staff and Branch Bodies: Authorities and

[82] *Ibid.*
[83] *Ibid.*
[84] Response, para. 22.
[85] Response, paras 56, 57.
[86] Reply, para. 25.
[87] Motion, para. 19 in relation to Annex B.
[88] Motion, para. 23 in relation to Annex C.

Responsibilities." The Appellant submits that this section of the report is relevant for the Appeals Chamber's analysis of his limited position of authority.[89]

43. The Prosecution responds that the section of the report enclosed in Annex C is not relevant to the appeal because it concerns the Corps level and the Appellant was a Security and Intelligence Officer at the Brigade level.[90] The Prosecution further argues that the Appellant failed to show that the documentation in Annex C is applicable to the Appellant's role at the Brigade level.[91] The Prosecution submits that judicial notice cannot be taken because facts contained in Annex C were available to the Defence at the sentencing stage.[92] Moreover, the Prosecution contends that Rule 94(B) of the Rules must be read as meaning that both the facts and the documentary evidence have been adjudicated, and submits that the facts enclosed in Annex C have not been adjudicated.[93]

44. In reply to the Prosecution's contention that documentary evidence must also be adjudicated, the Appellant submits that the Prosecution "is not fairly reading the statute".[94]

45. With respect to the Prosecution's argument to the effect that documentary evidence must also be adjudicated evidence, the Appeals Chamber concurs with the Trial Chamber in the *Bizimungu* case which concluded that the wording of Rule 94(B) of the Rules suggests that the term "adjudicated" only relates to "facts" and does not extend to "documentary evidence". Thus, the Trial Chamber held that:

> "...under Sub-Rule 94(B), both facts (which have been previously adjudicated) and documents (which have been received and admitted in previous proceedings) may be judicially noticed. Therefore, to be taken judicial notice of, the facts must be adjudicated facts, meaning facts upon which, on a previous occasion, in another case, this Tribunal in any of its several Chambers has deliberated and made a decision. Such decision must be conclusive in that it is not under challenge before the Appeals Chamber or if challenged, the Appeals Chamber upheld it. Regarding the second part of Sub-Rule 94(B), to be taken judicial notice of, documents must constitute "documentary evidence from other proceedings of the Tribunal" and must "relate to the matter at issue in this case". [95]
>
> [...] Documents do not need to be "adjudicated" i.e. the Chamber in other proceedings does not need to have pronounced a specific and unchallenged or unchallengeable decision on the admissibility of the document. It is enough that the document was admitted into evidence or "admis lors d'autres affaires portées devant le Tribunal"[96]

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[89] Motion, para. 22.
[90] Response, para. 28.
[91] Response, para. 38.
[92] Response, para. 64.
[93] Response, paras 66 and 67.
[94] Reply, para. 18.
[95] *Prosecutor v. Casimir Bizimungu et al.*, ICTR-99-50-I, Decision on Prosecution's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 2 December 2003, para. 34.
[96] *Ibid.*, para. 35.

46. The Appeals Chamber recalls a decision rendered in the *Kupreškić* case which held that under the term "documentary evidence" a Chamber was permitted to take judicial notice of items such as the testimony of a witness or a trial exhibit.[97]

47. The Appeals Chamber notes that concerning "documentary evidence", Rule 94(B) of the Rules enables a Chamber to take judicial notice of discrete items of evidence such as the testimony of a witness or a trial exhibit, not an entire judgement.[98] Accordingly, the Appeals Chamber could take judicial notice of the section of the report proffered by the Appellant in Annex C to his Motion, if it was satisfied that it meets the requirements set out in Rules 94(B) and 115 of the Rules. The Appeals Chamber notes that the Appellant states that "*only* Chapter 3 has been included in Annex C, as opposed to the entire exhibit."[99] The Appeals Chamber finds nonetheless, that it would not serve judicial economy to grant the Appellant's request and judicially notice entire sections of a report or document, since the Appellant has not demonstrated exactly which part of the section is relevant to the current proceedings. The mere reference to whole sections or paragraphs of "documentary evidence" of a previous judgement is insufficient to trigger the exercise of the Chamber's discretion under Rule 94(B) of the Rules.[100]

48. The Appeals Chamber notes, however, that it could be inferred from the Appellant's Motion, that only the last sub-paragraph of paragraph 3.1 of Annex C might be judicially noticed, as only this small portion of Annex C is referred to in the Appellant's Brief.[101] This would constitute a more specific request, which points out a part of a document referring to a particular fact. The sub-paragraph in question reads as follows: "Pertaining to the issue of controlling and directing the work of the Corps Security Organs, and the Military Police formations, this term should not be confused with command".[102] The Appeals Chamber first notes that this paragraph seems to refer only to the Corps Security organs, whereas the Appellant was a Security and Intelligence officer at the Brigade level. Second, and decisively, the Appeals Chamber recalls that the Trial Chamber held explicitly that the Appellant performed his functions "not in the capacity of a commander".[103] Consequently, the Appeals Chamber considers that the Appellant failed to establish how the fact sought to be judicially noticed is relevant to the matters at issue in the current proceedings.

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[97] *Kupreškić* Appeal Decision, para. 6, *ad finem*.
[98] *Ibid.*
[99] Apellant's Reply, para. 19 (emphasis added).
[100] Regarding "adjudicated facts" sought to be judicially noticed through the reproduction of whole paragraphs of a judgement, *see*: *Bizimungu* 10 December 2004 Decision on Defence Motion, para. 13 and *Bizimungu* 10 December 2004 Decision on Prosecution Motion, para. 19.
[101] Motion, para. 23, citing Appellant's Opening Brief on Appeal, para. 99.
[102] Annex C, para 3.1 (emphasis added).
[103] *Momir Nikolić* Sentencing Judgement, 2 December 2003, para. 135.

49. For the foregoing reasons, the Appeals Chamber finds that the facts enclosed in Annex C of the Motion do not qualify for judicial notice pursuant to Rule 94(B) of the Rules.

b) Facts enclosed in Annex B: Facts from the *Krstić* Trial Judgement

50. The facts sought to be judicially noticed and enclosed in Annex B consist of paragraphs 126-129, 130-144, 155, 265, 288, 290, 344, 345, 464 and 465 from the *Krstić* Trial Judgement which concern factual findings on the events that occurred in Bratunac and Potočari on 11, 12 and 13 July 1995. The Appellant submits that the findings in those paragraphs corroborate his testimony in the *Blagojević and Jokić* trial,[104] and are relevant to the assessment of his role in the commission of the crime for which he was convicted and his limited authority.[105] The Appellant submits that the facts contained in the paragraphs submitted are all admissible, in accord with a decision issued in the *Krajišnik* case.[106] The Appellant submits that the proposed paragraphs "are relevant to a full, fair and accurate determination of the issues presented in this appeal"[107] and describes the said issues in a list consisting of eight items.[108]

51. The Prosecution asserts that the Appellant does not explain how the issue of the corroboration of the Appellant's testimony could be relevant to his appeal.[109] It submits that since the Trial Chamber did not doubt his credibility with respect to the facts submitted in Annex B, the issue of corroboration cannot arise.[110] Further, it adds that the facts enclosed in Annex B do not seem to be relevant to the Appellant's role and limited authority.[111]

52. In the event the Appeals Chamber were to find that Annex B is relevant to the issues in the appeal, the Prosecution submits that generally it agrees with the Appellant that the facts contained within Annex B could constitute adjudicated facts under Rule 94(B) of the Rules.[112] The Prosecution adds that: "[s]ince the Appellant has admitted facts in paragraphs 126, 128, 138 and 143 of the *Krstić* Trial Judgement" the said paragraphs could be judicially noticed.[113]

53. The Appellant replies that the factual findings are "relevant to an accurate assessment of Appellant's limited authority in Potočari on 12 and 13 July 1995, and should be considered when evaluating the aggravating effect of his position of authority in relation to the forced transfers and

[104] Motion, para. 19.
[105] Motion, para. 19; Reply, para. 8.
[106] Motion, para. 20.
[107] Motion, para. 19.
[108] Motion, para. 19.1-19.8.
[109] Response, para. 40.
[110] Response, paras 41-43.
[111] Response, paras 44-46.
[112] Response, paras 60, 62.
[113] Response, para. 61.

the separations and detentions that occurred in Potočari".[114] The Appeals Chamber notes that the arguments which substantiated the Appellant's request for judicial notice to be taken of the facts addressed in this part of the decision which were raised in his Reply, were struck out.[115]

54. The Appeals Chamber notes that the Prosecution has conceded that paragraphs 126, 128, 138, and 143 of the *Krstić* Trial Judgement could be judicially noticed to the extent that they contain facts admitted by the Appellant.[116] The Appeals Chamber notes however, that paragraphs 126, 128, 138 and 143 of the *Krstić* Trial Judgement do not contain admissions of facts made by the Appellant *per se,* but rather provide an account of facts not contested by the Appellant, concerning: (i) his presence at the meetings held at the Hotel Fontana on 11 July 1995 at 20:00 and 23:00 hours; (ii) the fact that he worked on matters relating to the transportation of Bosnian women, children and elderly in his capacity as the Assistant Commander for Intelligence and Security Affairs of the Drina Corps Bratunac Brigade; and (iii) his presence in Potočari on 12 and 13 July 1995 at the time when women, children and elderly were moved out.

55. The Appellant provides a list of eight subjects, which relate to matters at issue in this appeal. Each item in the list starts as follows: "facts relating to..." and ends with a reference to one or more paragraphs of the *Krstić* Trial Judgement or the summary of the *Krstić* Trial Chamber's key findings.[117] Bearing in mind the text of Rule 94(B) of the Rules, the Appeals Chamber notes that one paragraph in a judgement can contain more than one fact. Accordingly, a request pursuant to Rule 94(B) of the Rules must be specific if the facts sought to be judicially noticed are to be clearly determined. A motion under Rule 94(B) of the Rules should specify exactly which fact is sought to be judicially noticed and how each fact relates to the matters at issue in the current proceedings, in the instant case, to the grounds of appeal raised.[118]

56. The Appellant's Motion is not specific enough. The Appeals Chamber is unable to ascertain which facts within the paragraphs from the *Krstić* Trial Judgement enclosed in Annex B, are to be judicially noticed, or their relevancy to the Appellant's grounds of appeal. The statement that the paragraphs relate to "meetings at the Hotel Fontana on 11 and 12 July 1995", "the organisation of the buses" or "the presence of Drina Corps Officers in Potočari on 12 and 13 July 1995", just to cite the first three items on the Appellant's list, is not sufficient to satisfy the Appeals Chamber as to how each of the facts contained in the paragraphs from the *Krstić* Trial Judgement sought to be judicially noticed, is relevant to the matters at issue in the appeal proceedings. It would not serve

[114] Reply, para. 8.
[115] *See* Decision on Prosecution's Motion to Strike, 20 January 2005, para. 37.
[116] Response, para. 63.
[117] Motion, para. 19.1. – 19.8.
[118] *Bizimungu* 10 December 2004 Decision on Defence Motion, para. 13; *Bizimungu* 10 December 2004 Decision on Prosecution's Motion, para. 19.

judicial economy to judicially notice paragraphs 126-129, 130-144, 155, 265, 288, 290, 344, 345, 464 and 465 from the *Krstić* Trial Judgement.

57. For the foregoing reasons, the Appeals Chamber finds that the facts enclosed in Annex B of the Motion do not qualify for judicial notice pursuant to Rule 94(B) of the Rules.

VI. Disposition

58. In light of the foregoing, the Appeals Chamber dismisses the Appellant's Motion in its entirety.

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

Done this 1st day of April 2005,

At The Hague,
The Netherlands.

Theodor Meron
Presiding Judge

[Seal of the International Tribunal]