

UNITED
NATIONS



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-03-67-T

Date: 10 December 2007

Original: ENGLISH
French

BEFORE TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr Hans Holthuis

Decision of: 10 December 2007

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**DECISION ON THE PROSECUTION MOTION TO TAKE JUDICIAL NOTICE OF
FACTS UNDER RULE 94(B) OF THE RULES OF PROCEDURE AND EVIDENCE**

The Office of the Prosecutor:

Ms Christine Dahl

The Accused:

Mr Vojislav Šešelj

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 a motion to take judicial notice of adjudicated facts in other proceedings under Rule 94(B) of the Rules of Procedure and Evidence ("Rules"), filed by the Office of the Prosecutor ("Prosecution") on 23 May 2006 ("Motion").¹

II. PROCEDURAL BACKGROUND

2. On 23 May 2006, the Prosecution filed a motion in which it requested that judicial notice of 418 facts derived from several judgements rendered in other cases be taken.²

3. Having been granted an extension of the time to respond, as well as an increase of the word limit³, the Accused submitted his response on 25 August 2006, which was filed on 26 July 2007 ("Response"),⁴ following leave of the Pre-Trial Judge hearing the case at the time⁵

4. On 2 August 2007, the Prosecution sought leave to reply, and it attached its reply contesting in general terms the arguments put forward by the Accused in his Response ("Reply").⁶

III ARGUMENTS OF THE PARTIES

5. The Prosecution maintains that judicial notice of the 418 facts referred to in the annex of its Motion would serve judicial economy and harmonise the case-law of the Tribunal, while respecting the rights of the Accused.⁷ It would in fact allow the Chamber not to waste time unnecessarily on

¹ "Prosecution's Motion for Judicial Notice of Adjudicated Facts, with Annex", 23 May 2006.

² *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005; *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-2-T, Judgement, 16 November 1998; *The Prosecutor v. Stanislav Galić*, Case No. 98-39-T, Judgement, 5 December 2003; *The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Judgement, 14 January 2000; *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002; *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001; *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T, Judgement, 22 February 2001; *The Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić, Dragoljub Prcać*, Case No. IT-98-30/1-T, Judgement, 2 November 2001; *The Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003; *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003; *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005; *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgement, 7 May 1997; *The Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002.

³ By Decision of Trial Chamber I of 12 July 2006 see "Decision Regarding Deadlines for Responses to Motions on Expert Witnesses and Adjudicated Facts", 12 July 2006, p. 3. The Accused made an oral request in this respect during a status conference, see Status Conference of 4 July 2006, Court transcript in French/ 545.

⁴ "Submission 210 - Dr. Vojislav Šešelj's Response to the Prosecutor's Request for Taking Judicial Notice of Adjudicated Facts and Appendix", filed on 25 August 2006 and recorded on 26 juillet 2007 ("Response").

⁵ Decision on the Accused's Third Motion to Admit Submissions 210, 211 and 212 (No. 286), 26 July 2007. It should be noted that the written submissions filed on 25 August 2006 were submitted several times by the Accused, and then rejected by the Registry because they did not comply with the already extended word limit (5000 words) which was set by the decision of Trial Chamber I on 12 July 2006. See above, footnote 2. See also "A Repeated Request from Professor Vojislav Šešelj, PhD to the Trial Chamber that it Receives Submissions Nos. 210, 211 and 212", filed on 8 janvier 2007; "Professor Vojislav Šešelj's Third Motion that Trial Chamber III Admit Submissions 210, 211 and 212", presented on 11 April 2007 and filed on 25 April 2007, p. 3.

⁶ "Prosecution's Reply to Accused's Response (No. 210) (D21427) to the Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B) (D12516)", filed on le 2 August 2007 ("Reply").

⁷ Motion, paras. 8-16.

establishing the facts alleged in the indictment against the Accused ("Indictment") and/or the historical background, so that it may focus solely on the issues related to the responsibility of the Accused.⁸ Furthermore, the Prosecution indicates that the facts for which it seeks judicial notice are related to the current proceedings and comply with the criteria set by the case-law applicable to Rule 94(B) of the Rules.⁹

6. The Accused responds by seeking the dismissal of the Motion essentially for two reasons.¹⁰ First, the criteria for upholding the Motion would allegedly not be satisfied¹¹. In fact, the consequence of admitting the Motion would, *inter alia*, violate his right to a fair trial by unduly reversing the Prosecution's burden of proof.¹² The Accused notes, for instance, that judicial notice cannot be taken of the facts admitted against the Serbian people in the *Čelebići* case since the accused here were Muslims and consequently it was completely in their interest not to object to the admission of such facts.¹³ Secondly, the Accused maintains that the Prosecution would be committing an abuse of law by presenting facts as adjudicated in previous proceedings, whereas they are not.¹⁴

IV APPLICABLE LAW

7. Rule 94(B) of the Rules provides that

The Chamber may, as a matter of course or at the request of a party, and after hearing the parties, decide to take judicial notice of facts or pieces of documentary evidence admitted in other cases which arose before the Tribunal and in connection with the proceedings.

8. Rule 94(B) thus gives the Chamber the *power* to take judicial notice of adjudicated facts in other proceedings related to this case. This judicial notice has the effect of creating a mere presumption and of reversing the burden of proof onto the party challenging the fact of which the judicial notice was taken, with the result that this party would have to provide evidence to the contrary.

9. In exercising its discretionary power, the Chamber thus verifies that the facts in question effectively meet the criteria laid down in Rule 94(B) of the Rules and elaborated upon in the case-law,¹⁵ that is these facts

⁸ *Id.*, para. 10

⁹ *Id.*, paras. 17-19. The Prosecution also very briefly explains the organization of the Annex to the Motion (Motion, paras. 20-22). See also the Reply in which the Prosecution admits that certain facts are connected to the joint criminal enterprise alleged in the Indictment (Reply, para. 9). Moreover, it maintains that the facts whose admission is sought were neither taken out of context nor altered, and that their formulation was only modified when it was necessary to explain the context or the contents of the facts (Reply, para. 11). Finally, it notes that many facts whose admission it seeks have already been the subject of judicial notice (Reply, para. 13).

¹⁰ Response, pp. 2, 107.

¹¹ *Id.*, pp. 2-10.

¹² *Id.*, p. 2.

¹³ *Id.*, pp. 4, 7.

¹⁴ *Id.*, pp. 10-11. The Accused makes specific observations to illustrate what he said, basing himself on certain facts for which judicial notice is requested (see Response, pp. 11-107).

¹⁵ See in particular *The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Vladimir Šantić*, Case No. IT-95-16-A, Decision on requests by appellants Drago Josipović, Zoran and Vlatko Kupreškić to admit additional pieces of evidence, pursuant to Rule 115, for judicial notice, pursuant to Rule 94(B), 8 May 2001; *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on Prosecution Motion to Take Judicial Notice of Admitted Facts and the Admission of Written Statements, Applying Rule 92 *bis*, 28 February 2003; *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion to Take Judicial Notice of Adjudicated Facts, 10 April 2003; *The Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Decision on the Judicial Notice of Adjudicated Facts, at the Request of the Counsel for the Accused Hadžihasanović and Kubura filed on 20 January 2005, 14 April 2005; *The Prosecutor v. Momir Nikolić*, Case No.

- 1) are sufficiently clear (specific, distinct and identifiable in particular by precise references to the paragraphs or parties in the previous judgement);
- 2) are definitive (are not the subject of appeal proceedings or review);
- 3) are relevant to the indictment;
- 4) cannot reasonably be challenged by the opposing party;
- 5) consist only of factual findings, not containing any legal characterization or subjective opinion;
- 6) do not rely on plea agreements concluded in previous cases;
- 7) potentially do not raise the question of criminal responsibility of the Accused; and
- 8) not compromising the right of the accused to a fair trial.

V. DISCUSSION

10. The Chamber agrees to examine the Reply filed within the deadline set in Rule 126*bis* of the Rules and which responds to the arguments presented by the Accused.

11. The Chamber examined the 418 facts for which the Prosecution has sought judicial notice in the light of the arguments presented by the parties, the criteria recalled above, and the judgements quoted by the Prosecution.

12. Consequently, the Chamber considers that the judicial notice of the facts in the annex of the Motion, as numbered below, cannot be taken, on the ground that they are not **relevant** to the Indictment because they specifically pertain to regions or municipalities - Kosovo, Prijedor, Sanski Most, Foča and Višegrad – not contained in the Indictment, or superfluous details relating to the municipalities on which the Prosecution cannot produce any evidence on the “consistent pattern of conduct” alone, in particular Bosanski Šamac¹⁶: 28, 210, 211, 261, 330 to 418.

13. The Chamber deems, moreover, that the judicial notice of the facts numbered below cannot be taken on the ground that they potentially raise the question of the **responsibility of the Accused** — in that they relate specifically to the objective or to the members of the alleged joint criminal enterprise, and to the persons for whom the Accused is held responsible — or that they are linked to a **fundamental issue raised in the Indictment, on which the Chamber will rule** — specifically, the concept of “Greater Serbia” and the questions relating thereto, and the organized propaganda of the Serbian authorities and media: 1, 3, 29 to 36,¹⁷ 37, 57, 61, 71, 72, 75, 84, 87, 91,

IT-02-60/1-A, Decision on the Appellant's Motion for Judicial Notice, 1 April 2005; *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Valentin Ćorić and Berislav Pušić*, Case No. 04-74-PT, Decision on Prosecution Motion to Take Judicial Notice of Adjudicated Facts, Applying Rule 94(B) of the Rules, 14 March 2006; *The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, Case No. IT-05-88-T, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex", 26 September 2006; *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on the Prosecutor's Motion to Take Judicial Notice, 30 April 2004.

¹⁶ See Decision on the Implementation of Rule 73*bis* of the Rules, 8 November 29006, French translation of 26 March 2007.

¹⁷ This fact mentions the Accused by name.

92, 95, 114, 122 to 128, 132 to 135, 166, 168 to 170, 173 to 177, 180, 216, 222 to 228, 230 to 233, 249 to 253, 259, 260, 262, 288, 321.

14. The Chamber finds furthermore that the judicial notice of the facts numbered below cannot be taken on the ground that they are **not sufficiently clear**: 2,¹⁸ 5, 13, 159, 184, 220,¹⁹ 229, 264, 265, 302, 318.²⁰

15. The Chamber also finds that the judicial notice of the facts numbered below cannot be taken on the ground that they are not mere factual findings, but contain **legal characterizations or subjective opinions**: 46, 47, 62, 130, 131, 254, 266, 294, 296, 301, 313, 320, 323, 326, 329.

16. The Chamber finally considers that the judicial notice of the facts numbered below cannot be taken on the ground that they are not **definitive**: 64, 156.²¹

17. The Chamber considered, however, that certain facts numbered below could be **partially admitted** if certain sections were removed or added in order to make the fact compatible with the above-mentioned criteria admissibility: 26, 59, 94, 148, 186, 246, 267, 275, 276, 281, 282, 290, 293, 317, 322, 324, 328.

18. Lastly, the Chamber found it appropriate to take the judicial notice of the facts numbered below without making any modification to them: 4, 6 to 12, 14 to 25, 27, 38 to 45, 48-56, 58, 60, 63, 65 to 70, 73, 74, 76 to 83, 85, 86, 88 to 90, 93, 96 to 113, 115 à 121, 129, 136 to 147, 149 to 155, 157, 158, 160 to 165, 167, 171, 172, 178, 179, 181 to 183, 185, 187 to 209, 212 to 215, 217-219, 221, 234 to 245, 247, 248, 255 to 258, 263, 268 to 274, 277 to 280, 283 to 287, 289, 291, 292, 295, 297 to 300, 303 to 312, 314 to 316, 319, 325, 327.

19. All the facts for which the Chamber agrees to take judicial notice appear in the annex of this decision. These facts are given in English as to date there is no official French translation of the list of facts for which the Prosecution seeks judicial notice, appearing in the annex of the Motion.

VI. DISPOSITION

20. For the foregoing reasons and pursuant to Rule 20(1) of the Statute of the Tribunal and Rule 94(B) of the Rules, the Chamber **PARTIALLY GRANTS** the Motion and takes judicial notice of the facts listed in English in the annex attached to this decision.

21. The Chamber **REJECTS** the Motion in all other respects.

¹⁸ This fact repeats fact 80 which is clearer.

¹⁹ For this fact, the Prosecution provides no specific reference which would have allowed the Chamber to verify whether the fact was really admitted in another case.

²⁰ For this fact, the Prosecution provides a reference which does not correspond to the fact mentioned.

²¹ Facts 64 and 156 concern the case *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, in which the appeal proceedings were reopened further to the decision, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-Misc.1, "Decision on Strugar's Request to Reopen Appeal Proceedings", 7 June 2007.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this tenth day of December 2007
at The Hague
The Netherlands

[Seal of the Tribunal]