



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: 8 February 2010  
Original: ENGLISH  
French

**IN TRIAL CHAMBER III**

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

**Registrar:** Mr John Hocking

**Decision of:** 8 February 2010

**THE PROSECUTOR**

v.

**VOJISLAV ŠEŠELJ**

***PUBLIC DOCUMENT WITH ANNEXES***

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**DECISION ON PROSECUTION MOTIONS TO TAKE JUDICIAL NOTICE  
OF FACTS CONCERNING THE *MRKŠIĆ* CASE**

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**The Office of the Prosecutor**

Mr Mathias Marcussen

**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 two motions to take judicial notice of adjudicated facts in *The Prosecutor v. Mrkšić et al.* case (“*Mrkšić Case*”) pursuant to Rule 94 (B) of the Rules of Procedure and Evidence (“Rules”) filed, respectively by the Office of the Prosecutor (“Prosecution”) on 26 September 2008 (“First Motion”)<sup>1</sup> and 21 July 2009 (“Second Motion”), respectively.<sup>2</sup>

## II. PROCEDURAL BACKGROUND

2. On 28 September 2008, the Prosecution filed its First Motion wherein it requested that judicial notice be taken of 274 facts from the Trial Judgement rendered on 27 September 2007 in the *Mrkšić Case* (“*Mrkšić Judgement*”).<sup>3</sup>

3. On 21 July 2009, the Prosecution filed its Second Motion wherein it requested that judicial notice be taken of 28 facts from the Appeals Judgement rendered by the Appeals Chamber in the *Mrkšić Case* (“*Mrkšić Appeals Judgement*”).<sup>4</sup>

4. The Accused did not respond to either of the motions within the 14 days, starting from the date of receipt of the BCS version, that he was granted under Rule 126 *bis* of the Rules.<sup>5</sup>

## III. ARGUMENTS OF THE PARTIES

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<sup>1</sup> “Motion for Judicial Notice of Facts Relevant to the Vukovar Crime Base”, 26 September 2008 (“First Motion”).

<sup>2</sup> “Prosecution’s Second Motion to Take Judicial Notice of Adjudicated Facts Concerning Vukovar Crime Base Pursuant to Rule 94(B) with Annex A”, 21 July 2009 (“Second Motion”).

<sup>3</sup> *The Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-T, “Judgement”, 27 September 2007 (“*Mrkšić Judgement*”).

<sup>4</sup> *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13-13/1-A, “Appeals Judgement”, 5 May 2009 (“*Mrkšić Appeals Judgement*”).

<sup>5</sup> The Accused received the BCS version of the First Motion on 11 November 2008 (*See*: Procès-verbal of Reception filed on 14 November 2008) and of the Second Motion on 18 August 2009 (*See*: Procès-verbal of Reception filed on 22 September 2009).

5. The Prosecution argues in its First Motion that a judicial notice of the 274 facts<sup>6</sup> would serve the interests of judicial economy and would not prejudice the right of the Accused to a fair trial.<sup>7</sup> Moreover, the Prosecution argues that the facts requested for admission fulfil the admissibility requirements under Rule 94 (B) of the Rules, i.e. that the facts are concrete, distinct, identifiable, relevant, are not based on plea agreements concluded in other cases, do not relate to the acts or conduct of the Accused, do not contain legal characterisations or subjective opinions and are not on appeal. In addition, the Prosecution notes that the facts requested for admission are formulated consistently with the *Mrkšić* Judgement and do not prejudice the rights of the Accused.<sup>8</sup>

6. The Prosecution argues in its Second Motion that the judicial notice of 28 facts<sup>9</sup> would also serve the interests of judicial economy<sup>10</sup> and would not prejudice the right of the Accused to a fair trial.<sup>11</sup> Moreover, the Prosecution states that the 28 facts sought for admission fulfil the requirements under Rule 94 (B) of the Rules, i.e. that the facts are sufficiently clear (concrete, distinct and identifiable) and relevant in respect of the Indictment, that they contain only factual findings and do not contain legal characterisations or subjective opinions, are not based on plea agreements concluded in earlier cases, are final, do not involve the criminal responsibility of the Accused and are consistent with the *Mrkšić* Appeals Judgement.<sup>12</sup>

#### IV. APPLICABLE LAW

7. Rule 94 (B) of the Rules provides that “[a]t 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”.

8. Thus, Rule 94 (B) of the Rules gives the Trial Chamber the *power* to take judicial notice of adjudicated facts from other proceedings relating to matters at issue

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<sup>6</sup> See: Annex to the First Motion.

<sup>7</sup> First Motion, paras 29-36.

<sup>8</sup> First Motion, paras 19-36.

<sup>9</sup> See: Annex to the Second Motion.

<sup>10</sup> Second Motion, paras 17-19.

<sup>11</sup> Second Motion, paras 13-16.

<sup>12</sup> Second Motion, paras 4-12.

in the current proceedings. The aim of such notice is to create a rebuttable presumption and to shift the burden of proof to the party contesting the fact which was the subject of the judicial notice, and to have that party prove the contrary.

9. Consequently, in the exercise of its discretionary power, the Chamber verifies that the facts in question fulfil the requirements that are set out in Rule 94 (B) of the Rules and elaborated by case-law,<sup>13</sup> i.e. that the facts are :

- 1) sufficiently clear (concrete, distinct and identifiable in terms of precise references to paragraphs of parts of previous judgements);
- 2) final (are not on appeal nor on review);
- 3) relevant with respect to the indictment;
- 4) cannot be reasonably contested by the adverse party;
- 5) constitute only factual findings and do not contain legal characterisations or subjective opinions;
- 6) are not based on plea agreements concluded in earlier cases;
- 7) do not potentially involve the criminal responsibility of the Accused; and
- 8) do not prejudice the right of the accused to a fair trial.

<sup>13</sup> See in this sense: *The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Vladimir Šantić*, Case No. 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; *The Prosecutor v. Momčilo 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 92 bis”, 28 February 2003; *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, “Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts”, 10 April 2003; *The Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, “Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005”, 14 April 2005; *The Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, “Decision on 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 Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B)”, 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 Ngirumpatse and Joseph Nzirorera*, Case ICTR-98-44-T, “Decision on Prosecution’s Motion for Judicial Notice”, 30 April 2004.

## V. DISCUSSION

10. The Chamber has analysed the 274 facts in the First Motion sought for judicial notice by the Prosecution in light of the arguments presented and the criteria set forth above.

11. Firstly, the Chamber notes that none of the 274 facts were contested in the *Mrkšić* Appeals Judgement.

12. Furthermore, the Chamber considers that there can be no judicial notice of the facts under the following numbers in the Annex to the First Motion on the grounds that they are **not sufficiently clear**: 11, 47, 53, 54, 58, 65, 66, 69, 70, 83, 85, 86, 88, 89, 90, 92, 93, 94, 112, 115, 116, 118, 120, 201, 204, 220, 221, 269, 272.

13. In addition, the Chamber considers that there can be no judicial notice of the facts under the following numbers in the Annex to the First Motion on the grounds that they may involve the **responsibility of the Accused** – as they refer to the goal or members of the alleged joint criminal enterprise as well as to persons the Accused is held responsible for – or are linked to a **fundamental question raised in the Indictment the Chamber will be ruling on**: 25, 62, 63, 84, 99, 104, 121, 123, 151, 167, 177, 178, 179, 180, 181, 182, 183, 189, 190, 191, 193, 199, 230, 231, 232, 233, 234, 236, 239, 240, 241, 242, 243, 245, 246, 270.

14. The Chamber also considers that there can be no judicial notice of the facts under the following numbers in the Annex to the First Motion on the grounds that they do not constitute simple factual conclusions but contain **legal characteristics or subjective opinions and are prejudicial to the right of the accused to a fair trial**: 41<sup>14</sup>, 207, 271.

15. Furthermore, the Chamber considers that there can be no judicial notice of the facts under the following numbers in the Annex to the First Motion on the grounds that they **are disputable**: 64<sup>15</sup>, 82, 117<sup>16</sup>, 206, 210, 257, 258, 259, 260, 261, 267, 268.

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<sup>14</sup> The use of the term “conquering” is not neutral.

<sup>15</sup> In paragraph 39 of the *Mrkšić* Judgement it is stated that: “The evidence indicates there...”.

<sup>16</sup> In paragraph 59 of the *Mrkšić* Judgement it is stated that: “Despite the evidence to the contrary...”.

16. The Chamber also considers that there can be no judicial notice of the facts under the following numbers in the Annex to the First Motion on the grounds that they **are not relevant or are not in line with the Judgement**: 212, 213, 214, 215, 216, 217, 218, 237<sup>17</sup>, 238<sup>18</sup>, 273.

17. Furthermore, the Chamber considers that there can be no judicial notice of the fact under the following number in the Annex to the First Motion on the grounds that it is **repetitive with regard to an already adjudicated fact**: 133<sup>19</sup>.

18. The Chamber also considers that there can be a **partial admission** of the fact under the following number in the Annex to the First Motion if certain parts are redacted in order to make the fact compatible with the above-mentioned admissibility requirements: 128.

19. Finally, the Chamber considers it appropriate to take judicial notice, with no changes, of the facts under the following numbers in the Annex to the First Motion: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 55, 56, 57, 59, 60, 61, 67, 68, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 87, 91, 95, 96, 97, 98, 100, 101, 102, 103, 105, 106, 107, 108, 109, 110, 111, 113, 114, 119, 122, 124, 125, 126, 127, 129, 130, 131, 132, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 168, 169, 170, 171, 172, 173, 174, 175, 176, 184, 185, 186, 187, 188, 192, 194, 195, 196, 197, 198, 200, 202, 203, 205, 208, 209, 211, 219, 222, 223, 224, 225, 226, 227, 228, 229, 235, 244, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 262, 263, 264, 265, 266, 274.

20. All the facts of the First Motion accepted for judicial notice by the Chamber are in Annex A to the present Decision. The facts are in English as in the Annex to the First Motion there is no official French translation of the list of facts the Prosecution seeks for judicial notice.

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<sup>17</sup> The date 20 November appears nowhere in the *Mrkšić* Judgement.

<sup>18</sup> The date 20 November appears nowhere in the *Mrkšić* Judgement.

<sup>19</sup> This fact is a repetition of adjudicated fact 132.

21. The Chamber has also analysed the 28 facts in the Second Motion sought for judicial notice by the Prosecution in light of the above-mentioned arguments and requirements.

22. Consequently, the Chamber considers that there can be no judicial notice of the fact under the following number in the Annex to the Second Motion on the grounds that it is not **in line with the judgement**: 5.

23. The Chamber also considers that there can be no judicial notice of the facts under the following numbers in the Annex to the Second Motion on the grounds that they do not constitute simple factual findings but contain **legal characteristics or subjective opinions and are prejudicial to the right of the accused to a fair trial**: 7, 8, 10, 14, 19.

24. The Chamber considers that there can be no judicial notice of the facts under the following numbers in the Annex to the Second Motion on the grounds that they are **not sufficiently clear**:<sup>20</sup> 9, 13, 23.

25. In addition, the Chamber considers that there can be no judicial notice of the facts under the following numbers in the Annex to the Second Motion on the grounds that they may involve the **responsibility of the Accused** – as they refer to the goal or members of the alleged joint criminal enterprise as well as to persons the Accused is held responsible for – or are linked to a **fundamental question raised in the Indictment the Chamber will be ruling on**: 11, 20, 21, 22, 24.

26. Finally, the Chamber considers it appropriate to take judicial notice, with no changes, of the facts under the following numbers in the Annex to the Second Motion: 1, 2, 3, 4, 6, 12, 15, 16, 17, 18, 25, 26, 27, 28.

27. In Annex B of this Decision are all the facts of the Second Motion that the Chamber accepts for judicial notice. These facts are in English as there is no official French translation of the list of facts in the Annex of the Second Motion that the Prosecution seeks for judicial notice.

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<sup>20</sup> There is no time frame given.

## VI. DISPOSITION

28. For the foregoing reasons, pursuant to Article 20 (1) of the Statute of the Tribunal and Rule 94 (B) of the Rules, the Chamber **PARTIALLY GRANTS** the First Motion and the Second Motion, and

**TAKES** judicial notice of the facts listed in English in Annexes A and B attached to this Decision;

**DISMISSES** the First Motion and Second Motion in all other respects.

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

/signed/  
Jean-Claude Antonetti  
Presiding Judge

Done this eighth day of February 2010  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**