



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-95-5/18-T

Date: 14 September 2010

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 14 September 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S THIRD MOTION FOR RECONSIDERATION OF
DECISION ON JUDICIAL NOTICE OF ADJUDICATED FACTS**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts”, filed by the Accused on 30 August 2010 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 14 June 2010, the Chamber issued the “Decision on Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts” (“Fourth Adjudicated Facts Decision”), wherein it partially granted the “Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts” filed by the Office of the Prosecutor (“Prosecution”) on 26 August 2009, by taking judicial notice of facts adjudicated in the case of *Prosecutor v. Krajišnik* (“*Krajišnik Case*”). Amongst those were Facts 1934,¹ 1935,² 1936,³ 1996,⁴ 2731,⁵ and 2759⁶ (“Six *Krajišnik* Facts”).

2. On 23 July 2010, Trial Chamber III hearing the case of *Prosecutor v. Šešelj* (“*Šešelj Case*”) issued a “Decision on Prosecution Motion for Judicial Notice of Facts Adjudicated by *Krajišnik Case*” (“*Šešelj Decision*”), in which a similar Prosecution motion for judicial notice of facts stemming from the *Krajišnik Case* was also partially granted. In the *Šešelj Decision*, the Trial Chamber did not take judicial notice of the Six *Krajišnik* Facts,⁷ on the basis that they were not sufficiently clear.⁸

3. In the Motion, the Accused requests that the Chamber reconsider the Fourth Adjudicated Facts Decision because another Trial Chamber found the Six *Krajišnik* Facts to be insufficiently

¹ Fact 1934: The SDS protested that such a declaration would be unconstitutional as it would infringe on the rights of one nationality recognized by the Bosnia-Herzegovina constitution, namely the Serbs, and it had not been vetted by the Council for Ethnic Equality.

² Fact 1935: In the course of the debate on whether to vote on such a declaration of sovereignty, during the night of 14 and 15 October 1991 when the other parties decided to proceed with the vote, Momčilo Krajišnik, as President of the Assembly, adjourned the session to the next morning.

³ Fact 1936: The SDS deputies, as well as most Serb deputies not in the SDS, left the hall. However, the vice-president of the Assembly then reconvened the session and the declaration was adopted.

⁴ Fact 1996: The Constitution defined the Bosnian-Serb Republic as part of federal Yugoslavia, and not of Bosnia-Herzegovina.

⁵ Fact 2731: The Serb civilians had been informed of a plan to have them killed, and some were forced by Serb paramilitaries to abandon their homes.

⁶ Fact 2759: The Novi Izvor factory was guarded by the reserve police.

⁷ Fact 1934 corresponds to Fact 24 in the *Šešelj Case*, Fact 1935 corresponds to Fact 25, Fact 1936 corresponds to Fact 26, Fact 1996 corresponds to Fact 63, Fact 2731 corresponds to Fact 160 and Fact 2759 corresponds to Fact 171.

⁸ *Šešelj Decision*, para. 9.

clear for the purpose of taking judicial notice thereof.⁹ The Accused further submits that there must be a unique standard of judicial notice amongst Chambers in order to ensure a fair trial.¹⁰

4. The Prosecution indicated its opposition to the Motion in the “Prosecution Response to Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts”, filed on 10 September 2010 (“Response”). It argues that the Motion essentially repeats submissions upon which the Chamber has already ruled and that the Accused has failed to establish any error of reasoning on the part of the Chamber or that reconsideration is necessary to prevent any injustice.¹¹

II. Applicable Law

5. In a recent decision, the Chamber recalled that the standard for reconsideration of a decision set forth by the Appeals Chamber is that “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.’”¹²

6. The Chamber has detailed the law applicable to judicial notice of adjudicated facts in the five decisions it has issued to date on this topic and shall therefore not repeat it here.¹³

III. Discussion

7. The Chamber first notes that, as part of the nine-prong test for judicial notice of adjudicated facts applied in the Fourth Decision on Adjudicated Facts, it examined whether any of the facts proposed for judicial notice were “unclear or misleading in the context of which [they are] placed in the Motion”, even though the Accused had not challenged any of the Six *Krajišnik* Facts on the basis that they were unclear.¹⁴ Having conducted that analysis, the

⁹ Motion, para. 5.

¹⁰ Motion, para. 3.

¹¹ Response, paras. 1, 3–4.

¹² Decision on Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010 (“Reconsideration Decision”), para. 12, citing *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, 6 April 2006, para. 25, fn. 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle”, 14 June 2006, para. 2.

¹³ Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009, paras. 6–9; Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 July 2009, paras. 9–12; Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 October 2009, paras. 13–16; Fourth Adjudicated Facts Decision, paras. 13–16; Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010, paras. 11–14.

¹⁴ Response to Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 30 November 2009, para. 8 (Fact 1935 was challenged on the basis that it was (largely) based on documentary evidence); paras. 21–22 (Fact 2759 was challenged on the basis that it would not be in the interests of justice to take its judicial notice).

Chamber did not consider that any of the Six *Krajišnik* Facts were unclear.¹⁵ The Trial Chamber hearing the *Šešelj* Case conducted the same exercise but reached a different conclusion and found that the Six *Krajišnik* Facts, amongst others, were not sufficiently clear for the purposes of judicial notice.¹⁶

8. In the Motion, the Accused does not identify the manner in which the Six *Krajišnik* Facts are unclear. Rather, he simply argues that because the three Judges of the Trial Chamber hearing the *Šešelj* Case — amongst whom is Judge Lattanzi, who is also the reserve Judge in the present case—found these facts to be unclear, then this Chamber should reconsider its decision to take judicial notice thereof. However, the Chamber finds that this is not a sufficient basis to establish that it exercised its discretion erroneously in the Fourth Decision on Adjudicated Facts. In a previous decision on another of the Accused’s motions for reconsideration of judicial notice, the Chamber did not consider “that exercising its discretion to reach a different conclusion from other Trial Chambers in relation to a decision granting or denying judicial notice of adjudicated facts demonstrates a clear error of reasoning”.¹⁷ The Chamber can only reiterate this earlier finding in relation to the argument set forth in the Motion.

9. In respect of the Accused’s argument that a Judge of this Chamber also sits in the Trial Chamber hearing the *Šešelj* Case, the Chamber simply recalls that Rule 15ter(D) of the Rules of Procedure and Evidence of the Tribunal states that “[a] reserve Judge shall be present, but shall not vote, during any deliberations in a trial.” The reserve Judge in the present case therefore did not vote during the deliberations pertaining to the Fourth Decision on Adjudicated Facts.

10. The Chamber therefore finds that the Accused has failed to demonstrate a clear error of reasoning in the Fourth Decision on Adjudicated Facts.

11. With regard to the second prong of the reconsideration test, namely the necessity to reconsider the decision in order to prevent any injustice, the Accused once again repeats his position that he “remains strongly opposed to the widespread use of judicial notice of adjudicated facts in this case, which he contends infringes on the presumption of innocence and reverses the burden of proof.”¹⁸ The Chamber has repeatedly dealt with this argument and found that the Accused suffers no injustice through the approach to judicial notice adopted by it.¹⁹

¹⁵ Fourth Decision on Adjudicated Facts, paras. 66–72.

¹⁶ *Šešelj* Decision, para. 9.

¹⁷ Reconsideration Decision, para. 15.

¹⁸ Motion, para. 4.

¹⁹ Reconsideration Decision, paras. 21–22, fn. 60.

12. The Chamber therefore finds that the Accused has failed to demonstrate that reconsideration of the Fourth Decision on Adjudicated Facts is warranted to prevent any injustice.

IV. Disposition

13. For these reasons, pursuant to Rule 54 of the Rules, the Chamber hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this fourteenth day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]