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: 16 June 2008

Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: **Mr Hans Holthuis**

Decision of: **16 June 2008**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION ON PROSECUTION MOTIONS FOR JUDICIAL NOTICE OF DOCUMENTS PURSUANT TO RULE 94 (B)

The Office of the Prosecutor

Ms Christine Dahl
Mr Daryl Mundis

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 from the Office of the Prosecutor ("Prosecution") requesting the Chamber, pursuant to Rule 94 (B) of the Rules of Procedure and Evidence ("Rules"), to take judicial notice of documentary evidence that was admitted in other cases before the Tribunal and is related to this case.

II. PROCEDURAL BACKGROUND

2. On 14 July 2006, the Prosecution filed a motion for judicial notice of documents that were admitted previously in the cases of *The Prosecutor v. Slobodan Milošević, The Prosecutor v. Mile Mrkšić et al., The Prosecutor v. Blagoje Simić et al.* and *The Prosecutor v. Momčilo Krajišnik* ("First Motion").[1]

3. On 28 November 2006, the Prosecution filed a second motion for judicial notice of other documents that were admitted previously in the cases of *The Prosecutor v. Slobodan Milošević* and *The Prosecutor v. Momčilo Krajišnik* ("Second Motion").[2]

4. On 12 March 2007, the Accused requested the translation of the Second Motion into a language he understands and, for each proposed document, "clear and precise explanations as to how each document relates to the contentious questions, so that [he] can express his preference and reject the [Second] Motion".[3]

5. On 26 April 2007, the Prosecution filed a request for leave to reply along with a reply to the Second Response ("Reply"), in which it replied to the Accused on a

[1] Prosecution's Motion to Take Judicial Notice of Documentary Evidence pursuant to Rule 94 (B) With Annex A, 14 July 2006 ("First Motion"); *Procès-Verbal* of reception of documents by the Accused, 17 August 2007.
[2] Prosecution's Second Motion to Take Judicial Notice of Documentary Evidence pursuant to Rule 94 (B) With Annex A, 28 November 2006 ("Second Motion"); *Procès-Verbal* of reception by the Accused, 16 August 2007.
[3] Professor Šešelj's Response to the Prosecution's Second Motion to Take Judicial Notice of Documentary Evidence pursuant to Rule 94 (B) With Annex, dated 12 March 2007 and filed 24 April 2007 ("Second Response"), p. 5.

specific point concerning documents relating to Biljeljina municipality, and indicated that it was seeking judicial notice of those documents.[4]

6. On 2 November 2007, the Accused responded to the First Motion ("First Response") and stated his objection to the judicial notice of the documents.[5]

7. The Chamber notes that the Accused failed to respond within the time-limit prescribed by Rule 126 *bis* of the Rules, which runs from the date of receipt of the documents by the Accused in a language he understands, but points out that it is important to take into account the exceptional circumstances of the pre-trial phase of this case and practical matters related in particular to representation of the Accused and the disclosure of translated documents. Exceptionally, the Chamber considers that it is therefore in the interests of justice to accept the responses out of time.

8. On 5 February 2008, the Chamber ordered the Prosecution to compile a new consolidated list of documents for which judicial notice was proposed, along with details of their origin, their admission and their relevance ("Order for Clarification").[6]

9. During the hearing of 6 February 2008, the Chamber indicated that following the Prosecution's response to this Order for Clarification, the Accused would have 14 days to respond, running from the date of receipt of this new list in a language he understands. The Accused then raised a formal oral objection to the judicial notice of documentary evidence and the Chamber advised him that if he failed to respond in writing within the prescribed time-limits, this oral response alone would be taken into account.[7] On 21 February 2008, the Prosecution prepared the "new consolidated list" of documents for which it seeks judicial notice, providing information on their origin, their admission and their relevance with respect to this case ("Notice").[8]

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[4] Prosecution's Reply to Accused's Response to the Prosecution's Second Motion to Take Judicial Notice of Documentary Evidence pursuant to Rule 94 (B) With Annex, 26 April 2007 ("Reply"), *Procès-verbal* of reception by the Accused, 10 May 2007.

[5] Professor Vojislav Šešelj's Response to the Prosecution's Motion to Take Judicial Notice of Documentary Evidence pursuant to Rule 94 (B) With Annex A", dated 2 November 2007 and filed on 7 November 2007 ("First Response").

[6] Order for Clarification of Two Prosecution Motions for Judicial Notice of Documentary Evidence, 2 February 2008, ("Order for Clarification").

[7] Hearing of 8 February 2008, Transcript in French ("T(F)") 3195-3197.

[8] Prosecution's Notice of Compliance with Order of 5 February 2008 Concerning Documentary Evidence, 21 February 2008 ("Notice"), indicating the references to the transcripts at the time the documents were admitted, as well as the paragraphs of the Indictment to which the documents relate; *Procès-verbal* of reception, 21 April 2008.

III. ARGUMENTS OF THE PARTIES

A. The First Motion

1. The First Prosecution Motion

10. It its First Motion, the Prosecution proposes that the Chamber take judicial notice of documents that are allegedly relevant to this case and have been admitted previously in three other cases before the Tribunal.[9] The Prosecution alleges that a document need not have been "adjudicated" to be judicially noticed, but that it is sufficient for it to have been admitted into evidence.[10]

11. The Prosecution further submits that the existence and authenticity of documents, and not their content, are judicially "noticed", and that conflicting evidence may always be presented in court.[11] However, the Prosecution asserts that the content of resolutions of organs of the United Nations as well as the provisions of valid law, annexed to the First Motion, may be judicially noticed.[12]

12. The Prosecution submits that the documents submitted for the consideration of the Chamber have been admitted in previous cases[13] and relate to the following subjects:

(i) the historical, political or military context of the alleged crimes;

(ii) the activities of the members of the alleged joint criminal enterprise;

(iii) the crimes alleged in Bosnia and Herzegovina (in particular in Bosanski Šamac) and in Croatia (in particular in Vukovar);

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[9] First Motion, para. 1; *Id.*, Annex.
[10] First Motion, para. 2.
[11] First Motion, para. 3, referring to *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosecution's Motion for Judicial Notice pursuant to Rules 73, 89, and 94, 2 December 2003.
[12] First Motion, para. 3, citing *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts pursuant to Rules 94 and 54, 3 November 2000, para. 38; First Motion, para. 6.
[13] First Motion, para. 4; *Id.*, Annex A.

(iv) the structure of the army, the police and government of certain territories.[14]

13. The judicial notice of United Nations documents is also sought.[15]

2. The Accused's First Response

14. First, according to the Accused, Rule 94 (B) of the Rules only permits the judicial notice of facts or documents alternatively and not cumulatively, which would prevent the Prosecution from submitting this motion without withdrawing its motion for the judicial notice of facts.[16]

15. The Accused further submits that judicial notice requires an agreement between the Parties, failing which the Party opposed to the judicial notice will exercise its right to challenge the judicially noticed evidence. Moreover, the Accused already states that he objects to this judicial notice and that he will be required to challenge any evidence so admitted during the trial.[17]

16. Additionally, the Accused argues that in order to be judicially noticed the documents must have been "brought to completion with a final judgement", which is not the case for most of the documents identified in the First Motion.[18]

17. Finally, the Accused points to the vagueness of the information submitted by the Prosecution with respect to the relevance of the documents to the Indictment, and asserts that it is thus impossible to grasp their relevance or potential use should they be judicially noticed.[19]

B. The Second Motion

1. The Second Prosecution Motion

18. In the Second Motion, the Prosecution seeks judicial notice of two categories of documents: those of a general nature and those relating to the crimes committed

[14] First Motion, para. 5.
[15] First Motion, paras. 6-7.
[16] First Response, p. 3.
[17] First Response, p. 4.
[18] First Response, p. 5.
[19] First Response, pp. 5-6.

and to the implementation of the joint criminal enterprise in Bosnia and Herzegovina.[20]

2. The Accused's Second Response

19. In the Second Response, the Accused points to the problems of disclosure of documents which are now obsolete.[21] He further objects to the judicial notice of a joint motion for the consideration of a plea agreement between Milan Babić and the Office of the Prosecutor.[22]

20. The Accused also objects to the judicial notice of documents relating to Biljeljina, a location no longer appearing in the Indictment, and requests clarification of the relevance of these documents to the case.[23] He further requests that the Prosecution indicate which documents are exculpatory in nature and notes that the Prosecution must produce, orally and publicly, all of the evidence against him.[24]

21. Finally, the Accused renews his objection to the judicial notice and refers, as regards the reasons for this objection, to the arguments set out in the First Response.[25]

3. The Prosecution's Reply

22. The Prosecution's reply addresses only one issue raised in the Second Response: that of documents related to locations no longer appearing in the Indictment. The Prosecution recalls the Decision on the Application of Rule 73 *bis* granting it leave to present, in respect of a "consistent pattern of conduct", non-crime-base evidence for certain crime sites.[26]

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[20] Second Motion, pp. 3-4. The information provided in the annex to the Second Motion is the same as that provided for the documents in the First Motion, however this time the annex is broken down into categories linked to the Indictment and to which the documents relate, namely: the exhibit number in the previous case, the case number, and the date and description of the document; Second Motion, Annex.
[21] Since the Second Response was drafted, the documents dealt with in the Second Motion were disclosed to the Accused pursuant to Rule 65 *ter* of the Rules.
[22] Second Response, p. 3.
[23] Second Response, p. 4.
[24] Second Response, p. 5.
[25] Second Response, p. 3.
[26] Decision on the Application of Rule 73 *bis* of the Rules, 8 November 2006, confirmed on Appeal by the Appeals Chamber's Decision on Appeal Against the Trial Chamber's Oral Decision of 9 January 2008, 11 March 2008.

4. The Prosecution's Notice[27]

IV. APPLICABLE LAW

23. Rule 94 (B) of the Rules provides that "at the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings." Accordingly, it is clear that judicial notice is a matter within the discretionary power of the Chamber not subject to agreement among the Parties.

24. The Accused raised the issue of the impossibility of taking judicial notice of facts and documentary evidence cumulatively.[28] However, the Appeals Chamber of the Tribunal ("Appeals Chamber"), while it did not expressly endorse the possibility of taking judicial notice of facts and documents from the same case cumulatively, did not rule it out, by agreeing to consider two such motions in a single decision.[29]

25. With respect to the determination of the criteria identifying the documentary evidence of which judicial notice may be taken, Rule 94 (B) of the Rules is clear as regards their necessary relevance to the current case and their admission in another case. Conversely, it does not specify whether judicial notice may be taken only of documents from a case which has been brought to final judgement, as the Accused submits.[30] The Appeals Chamber has established that, unlike facts, judicially noticed documentary evidence need not necessarily have been admitted in cases that have been brought to final judgement.[31]

26. In its decision in the case of *The Prosecutor v. Momir Nikolić,* the Appeals Chamber adopts an interpretation of Rule 94 (B) of the Rules from the case of *The*

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[27] *See supra,* para. 9, footnote 8.
[28] *See supra,* footnote 16.
[29] *The Prosecutor v. Momir Nikolić,* Case No. IT-02-60/1-A, Decision on Appelant's Motion for Judicial Notice, 1 April 2005 ("*Nikolić* Decision").
[30] *See supra,* para. 16 and footnote 18. The Chamber notes that the two versions of the Rules differ significantly. The English version mentions "adjudicated facts" while the French version refers only to *faits* /facts/ and not *faits jugés* /adjudicated facts/. The question as to whether the term "adjudicated facts" relates to both facts and documents seems inoperative after a reading of the French text.
[31] *The Prosecutor v. Momir Nikolić,* Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, para. 45.

Prosecutor v. Casimir Bizimungu et al. before the International Criminal Tribunal for Rwanda ("ICTR"). That chamber significantly limited the interpretation of the effects of judicial notice of documentary evidence and accepted only notice of the existence and authenticity of that evidence.[32] Nonetheless, the question of the effects of judicial notice of documents is the subject of interpretations which vary from one Trial Chamber to another, without the Appeals Chamber having had the opportunity to rule on its effects.[33]

27. The procedure for judicial notice is derived from common law jurisdictions where only one very restricted category of documents may be eligible. These jurisdictions take judicial notice of documents and the contents of documents over which an adversarial debate seems superfluous, in light of their indisputable nature.[34] In contrast, before the Tribunal, Appeals Chamber jurisprudence does not permit it to be argued that the content of the documents admitted by another Chamber has been judicially noticed. In fact, the Appeals Chamber seems to indicate implicitly that only the admission of documents by another Chamber is judicially noticed, and hence automatically their authenticity and reliability, but not their content.[35] As Rule 94 (B) requires the Chamber taking notice to verify that the documents are related to the proceedings prior to the judicial notice, the relevance of the documents is not part of what is noticed but must be verified by the Chamber prior to the notice. The authenticity and reliability of the documents, and nothing more, are all that remain for

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[32] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ITCR-99-50-I, Decision on Prosecution's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 2 December 2003 ("*Bizimungu* Decision"), p. 10.

[33] *See infra*, footnote 36.

[34] In the United States the procedure is akin to that under Rule 94 (A) of the Rules concerning the judicial notice of facts of common knowledge: *see* Rule 201 of the Federal Rules of Evidence, while Black's Law Dictionary, p. 851 (7th Ed. 1999) defines the procedure as follows: "A court's acceptance, for purposes of convenience and without requiring a party's proof of a well-known and indisputable fact; the court's power to accept such a fact". In England and in India, the procedure is even more restrictive and is limited to the admission of indisputable documents such as statutes and other official documents, *see* for example: Michael Howard, Jonathan Auburn, Roderick Bagshaw, Douglas Day, Daniel Hochberg, Peter Mirfield, Katharine Grevling, Charles Hollander, Rosemary Pattenden, Hodge M. Malek, Phipson on Evidence (16th Ed.), § 3-07 to 3-09; *see* also Sudipto Sarkar and V.R. Manohar, *Sarkar on Evidence* (15th Ed.), pp. 993-994.

[35] In the *Nikolić* Decision, the Appeals Chamber does not explicitly explain whether the judicial notice of documents refers to their content or simply their admission. However, it cites the ICTR's *Bizimungu* decision and agrees with its interpretation concerning the absence of the need to have conclusively adjudicated the judicially noticed documents; however, in the *Bizimungu* Decision, the direct consequence of this interpretation was the judicial notice of only the existence and authenticity of the documents, and not their content, *see Nikolić* Decision, para. 45 citing the *Bizimungu* Decision, and *see* the *Bizimungu* Decision, para. 44.

the Chamber to judicially notice. As the weight to attribute to each of the documents remains a matter for deliberation, judicial notice would merely constitute a potentially "accelerated" admission of documents through the notice of their authenticity by the Chamber, which relies on the Trial Chamber that admitted them previously. Nevertheless, neither the Chamber in the *Bizimungu* case nor the Appeals Chamber indicate what the effects of judicial notice of documents would be in the case of a subsequent objection by the opposing party to the authenticity of a document admitted in this manner.[36]

28. Judicial notice cannot deny the Party objecting to it the right to challenge the content of the "noticed" document with fresh evidence.[37] Nevertheless, where relevant, this would diminish, and even undermine, the benefit of judicial notice. If the direct consequence of the notice is the calling of witnesses and the presentation of additional evidence by the opposing party, this would run contrary to the very spirit of Rule 94 (B), since the purpose of this procedure is to expedite the trial.

V. DISCUSSION

29. The Chamber recalls that it must preserve the balance between two fundamental and guiding principles of the trial: the rights of the Accused and judicial economy. The Chamber has discretionary power to decide whether judicial notice is appropriate in this context.[38]

30. The Chamber further recalls the guidelines intended to govern the presentation of evidence and the conduct of the Parties at trial, as set out in the annex to the Order of 15 November 2007 ("Guidelines"), which informed the Parties that the admission of documents had to be requested by way of witnesses, except in exceptional

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[36] The Trial Chambers which have adjudicated on this rule following the *Nikolić* Decision have different interpretations of the rule as regards its legal effects, although they cite this decision, which appears to shed light on the problems surrounding this procedure: *see Milutinović et al.*, where the Chamber indicates that, contrary to the Prosecution allegations, the judicially noticed documents must be used for their content and not merely for their existence and authenticity, *The Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006; other Chambers have also followed this interpretation: *see The Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Prosecution's Motion for Admission of Documentary Evidence Pursuant to Rule 94 (B), 9 July 2007, p. 4 and *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution's Motion for Admission of Documentary Evidence Pursuant to Rule 89 (C) and Rule 94 (B) of the Rules, 24 January 2007, p. 3.

[37] The Parties concur in this respect: First Motion, para. 3, First Response, para. 4.

[38] *See supra*, para. 23.

circumstances to be considered on a case-by-case basis.[39] In the Decision on Admission of Exhibits Presented During Testimony of Reynaud Theunens, dated 24 April 2008 ("Theunens Decision"), the Chamber further specified that it reserves the possibility of admitting, after the presentation of evidence by the Parties, written documents that were not put to a witness.[40] That procedure must remain an exception, and the Chamber restates its preference for the admission of documents by way of a witness; however, it will examine this type of exceptional application for admission when appropriate.

31. Additionally, the Accused's objection in principle and restated intention to challenge all of the documents proposed by the Prosecution for judicial notice by bringing conflicting evidence can only work against the principle of judicial economy which underpins Rule 94 (B) of the Rules.

32. The Chamber considers that the judicial notice of all of the documents proposed by the Prosecution is inopportune, in light of the considerations set out in the preceding paragraphs[41] and in view of the principles of judicial economy and the interests of justice. The Chamber invites the Prosecution to comply with the Guidelines concerning the presentation of documentary evidence, giving priority to the presentation of documents by way of witnesses, and only in exceptional circumstances by way of ad hoc motions.

[39] Guidelines, Annex, para. 1; *see* also the Decision on Admission of Exhibits Presented During Testimony of Reynaud Theunens, 24 April 2008 ("Theunens Decision"), para. 32.
[40] *See supra,* footnote 39, Theunens Decision, para. 32.
[41] *See* in particular *supra* para. 30.

VI. DISPOSITION

33. For these reasons, in accordance with Rules 126 *bis* and 94 (B) of the Rules, **ACCEPTS** the Accused's responses out of time, and the filing of the Prosecution's reply; and **DENIES** the two Prosecution motions for judicial notice of documentary evidence.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this sixteenth day of June 2008
At The Hague
The Netherlands

[Seal of the Tribunal]