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23 JANUARY 2003

2249 AT

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-00-41-PT
	Date:	23 January 2003
	Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Liu Daqun, Presiding**
Judge El Mahdi
Judge Alphons Orie

Registrar: **Mr. Hans Holthuis**

Decision of: **23 January 2003**

PROSECUTOR

v.

PAŠKO LJUBIČIĆ

DECISION ON PROSECUTION'S MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

Office of the Prosecutor

Mr Mark B. Harmon

Counsel for the Accused

Mr Tomislav Jonjić

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 ("International Tribunal"),

BEING SEISED of the "Prosecution's Motion for Judicial Notice of Adjudicated Facts", filed by the Office of the Prosecutor ("Prosecution") on 19 December 2002 ("the Motion"), in which the Prosecution pursuant to Rule 94(B) of the Rules of Procedure and Evidence ("the Rules") requests the Trial Chamber to take judicial notice of 316 adjudicated facts derived from the judgements of the Trial Chambers in the cases of *Prosecutor v. Anto Furundžija* (IT-95-17/1-T), *Prosecutor v. Zlatko Aleksovski* (IT-95-14/1-T), *Prosecutor v. Zlatko Kupreškic et al.* (IT-95-16-T), *Prosecutor v. Tihomir Blaškić* (IT-95-14-T), and *Prosecutor v. Dario Kordić & Mario Čerkez* (IT-95-14/2-T), in support of which the Prosecution submits the following:

(a) That judicial notice of the proposed adjudicated facts will reduce the number of Prosecution witnesses in the trial, thereby shortening the trial and achieving judicial economy, this being the purpose of Rule 94(B);

(b) That there is a public interest in judicial notice of the proposed facts, because more extensive use of Rule 94(B) in this case and in others will make possible the earlier commencement of trials of other accused awaiting trial and will reduce the need for the same witnesses to repeatedly travel to the International Tribunal to give the same evidence in several trials;

(c) That the consent of the parties is not required under Rule 94(B), even though it may be helpful to a Trial Chamber;

(d) That none of the 316 alleged adjudicated facts are based on plea agreements;

(e) That none of the facts in question are legal findings;

(f) That Rule 94(B) does not expressly restrict a Chamber to notice of facts taken from judgements for which appeal proceedings have been finalized; and,

(g) That nothing prevents a Trial Chamber pursuant to Rule 89(D) from excluding or modifying the evidential value of an adjudicated fact taken on notice from a judgement under appeal, should that supposed fact be reversed or be modified by the Appeals Chamber,

NOTING the "Defence Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts", filed on 22 January 2003, explaining that the Motion was not delivered to counsel for the accused until 15 January 2003 and requesting the Trial Chamber to deny the Motion on the basis of the following:

(a) That while the accused is rightfully entitled to an *expeditious* trial, he is also entitled to a *fair* trial, which would be jeopardised if the Trial Chamber took notice of the proposed facts;

(b) That taking notice of adjudicated facts abolishes the minimum rights guaranteed to the accused by Article 21(4) of the Statute, that is the right to equality before the court and the right to examine witnesses and evidence;

(c) That the proposed adjudicated facts are clearly related not to general circumstances or inessential additional facts, but to the accused's participation in the war in central Bosnia, which may have direct consequences on the determination of the accused's guilt;

(d) That one source of the proposed facts (the *Kupreškic et al.* judgement) was corrected on appeal, when three accused were freed, and two other sources (the *Blaškić* and *Kordić & Čerkez* judgements) presently have appeals filed against them, rendering the fate of the proposed facts derived from those two sources totally uncertain;

(e) That the Appeals Chamber has stated that only facts in a judgement from which there has been no appeal, or as to which any appellate proceedings have been concluded, can truly be deemed "adjudicated facts" within the meaning of Rule 94(B);

(f) That with respect to the two sources whose appellate proceedings have been concluded (the cases of *Furundžija* and *Aleksovski*), the interests of the accused in the present case are in disharmony with the interests of the accused in the earlier cases, for the defence in those cases sought to shift responsibility to the present accused, or to the military unit under his command;

(g) That the proposed facts are, to a significant extent, mixed findings of fact and law, or include legal conclusions, or are based on hearsay evidence; and,

(h) That the defence has, already at a conference on 13 November 2002, conceded a number of facts relating to the Amended Indictment, which demonstrates its willingness to do everything possible to ensure a fair and expeditious trial,

CONSIDERING that subsection (A) of Rule 94 of the Rules provides that a Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof, and that pursuant to subsection (B) of Rule 94 a Trial Chamber, at the request of a party or *proprio motu*, and 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,

CONSIDERING that the purpose of judicial notice is judicial economy and that a balance between judicial economy and the right of the accused to a fair trial must be achieved when deciding a request for judicial notice,[1]

NOTING that the Defence's submissions are formulated in general terms, thus failing to explain concretely which of the proposed facts directly undermine the presumed innocence of the accused, or to explain how the eventual acquittal of three of the five accused in the *Kupreškic et al.* case, or the fact that the *Blaškić* and *Kordić & Čerkez*

[1] *Prosecutor v. Duško Sikirica et al.*, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", Case No. IT-95-8-PT, 27 September 2000.

judgements are being appealed, cast any doubt on the factual findings made in those cases and reproduced by the Prosecution in the present Motion,

CONSIDERING that the proposed 316 facts appear accurately to represent factual findings made by the Trial Chambers in the five cases listed above, that the proposed facts seem to be of some relevance to the present case, that none of them are based on plea agreements or could be characterized as legal findings, and that none of them tend, directly or indirectly, to incriminate the accused,[2]

NOTING, however, that the judgements of the Trial Chambers in the cases of *Prosecutor v. Tihomir Blaškić* and *Prosecutor v. Dario Kordić & Mario Čerkez* are being appealed, and that more than half the facts proposed in the Prosecution's Motion are taken from those two judgements,

CONSIDERING that the Appeals Chamber stated that "[o]nly facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed 'adjudicated facts' within the meaning of Rule 94(B)",[3] and that that statement was made in the context of a request to the Appeals Chamber to take judicial notice of *an entire judgement* which at the time was before the Appeals Chamber on appeal,

CONSIDERING the recent statement of Trial Chamber III, that "the Trial Chamber is willing to consider the admission of truly adjudicated facts, *particularly* where such

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[2] For the requirements mentioned in this paragraph, see, in addition to the other decisions mentioned in these footnotes, *Prosecutor v. Blagoje Simic et al.*, "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", Case No. IT-95-9-PT, 25 March 1999, and *Prosecutor v. Duško Sikirica et al.*, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts", Case No. IT-95-8-PT, 27 September 2000.

[3] *Prosecutor v. Zoran Kupreškic et al.*, "Decision on the Motions of Drago Josipovic, Zoran Kupreškic, and Vlatko Kupreškic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B)", Case No. IT-95-16-A, 8 May 2001.

facts are extracted from cases for which the Appeals Chamber has ruled on the merits or has not been called upon to do so",[4]

CONSIDERING that whether an adjudicated fact is taken from a judgement under appeal or from a judgement confirmed on appeal, it may, in either case, be open to refutation or qualification, and that judicial notice of an adjudicated fact means only that the proposing party (Prosecution or Defence) does not have to prove that fact at trial, not that that fact cannot be challenged, refuted, or qualified by evidence led at trial,

CONSIDERING that judicial notice of adjudicated facts should generally not be taken of facts which are *themselves* being appealed,

CONSIDERING that in the present case the Trial Chamber is *not* persuaded that the proposed adjudicated facts derived from the *Blaškić* or *Kordić & Čerkez* cases are not themselves currently being appealed,

CONSIDERING that the expediency of a trial should always be subject to two principles governing a fair trial, namely the presumption of the accused's innocence and the right of the accused to a public trial, and that where, as in the present case, the Prosecution puts forth hundreds of alleged adjudicated facts for notice as part of a motion which must be replied to and decided within the usual timeframes of this Tribunal, all in the interest of judicial economy, the Trial Chamber will be particularly alert to any injustice flowing to the accused from this process, and will be quick to reverse it if need be,

PURSUANT TO Rule 94(B) of the Rules,

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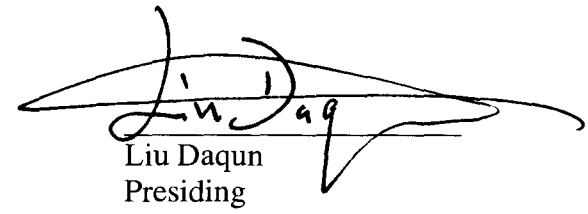
[4] *Prosecutor v. Slobodan Milošević*, "Decision on the Prosecution's Motion for Judicial Notice of Adjudicated Facts Relevant to the Municipality of Brcko", Case No. IT-02-54-T, 5 June 2002, emphasis added.

ALLOWS the Motion in respect of the facts listed in the annex to this decision, which consists of the facts the Prosecution derived from the *Furundžija*, *Aleksovski*, and *Kupreškic et al.* judgements (numbered as in the Motion), and,

DENIES the Motion in all other respects.

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



Liu Daqun
Presiding

Dated this twenty-third day of January 2003
At The Hague
The Netherlands

[Seal of the Tribunal]

Annex

21. The Jokers were a specialist, anti-terrorist unit of the Croatian Military Police based locally in the Bungalow in Nadioci. (KUPJ 132)

22. The Bungalow itself was 5-10 minutes in foot from Ahmići. (KUPJ 134)

23. The Jokers were set up as an anti-terrorist unit; they were part of the Military Police. (KUPJ 135)

24. Anto Furundžija was a commander of the Jokers. (FJ 65)

25. Anto Furundžija was an active combatant and participated in expelling Muslims from their homes. He also participated in arrests. (FJ 65)

47. The attack on Ahmići on 16 April 1993 was planned by HVO forces and the special unit of the Croatian Military Police called the Jokers. (KUPJ 333)

49. By 15 April many signs already indicated that a military operation was in the offing, and that many Croats were aware of this. (KUPJ 333)

55. The Croatian inhabitants of Ahmići, or at least those of them who belonged to the HVO or were in contact with Croatian armed forces, knew that in the early morning of the 16 April 1993, Croatian forces would initiate a massive military attack. (KUPJ 333)

65. The attack was carried out by military units of the HVO and members of the Jokers. (KUPJ 334)

66. The able-bodied Croatian inhabitants of Ahmići provided assistance and support in various forms. (KUPJ 334)

67. Some of them took part in the military operations against the Muslims. (KUPJ 334)

79. The attackers targeted Muslim civilians and their houses. (KUPJ 335)

80. In addition to the men not of military age, the elderly, women and children, there were also able-bodied Muslims who were members on leave from the BiH army, or reservists who participated in the village guards. (KUPJ 335)

101. The burning of the Muslim houses and the killing of the livestock were clearly intended to deprive the people living there of their most precious assets. (KUPJ 336)

106. The purpose of the attack was to destroy as many Muslim houses as possible, to kill all the men of military age, and thereby prompt all the others to leave the village and move elsewhere. (KUPJ 336)

107. The attacks carried out on the Muslim inhabitants of Ahmići constituted a form of "personalised violence", that is, violence directed at specific persons because of their ethnic identity. (KUPJ 337)

108. The Croatian attack of 16 April 1993 in Ahmići was aimed at civilians for the purpose of "ethnic cleansing". (KUPJ 338)

110. There were no Muslim military forces in Ahmići nor any military establishment belonging to the BiH army. (KUPJ 335)

216. Aleksovski held the position of prison warder from 25 January 1993 until at least 31 May 1993. (AJ 94)

217. The Kaonik prison was a military prison under the jurisdiction of the Travnik military tribunal. (AJ 95)

218. The detention of the Muslims of central Bosnia was also decided on by the HVO. (AJ 98)

219. Detainees were arrested and transferred to Kaonik by the military police or HVO soldiers. (AJ 98)

220. The prison's personnel belonged to the military police. (AJ 99)

221. The deputy warden of Kaonik prison, the secretary of Aleksovski, the head of the guards, and the guards themselves, were military policemen. (AJ 99)

223. Older people who had been appointed by the Busovača Croatian Defence Council and made up the Domobran unit reinforced the guard shifts during the second period of detention, when the number of guards had been reduced because some of them left for the front. (AJ 99)

225. The first detention period lasted 15 days, from 25 January to 8 February 1993, the date the Bosnian Muslims were exchanged in the presence of ICRC representatives for about 30 Croatian prisoners from Kacuni. (AJ 149)

226. Kaonik prison held about 400 Muslims during that period. (AJ 149)

227. A second wave of arrests occurred from about 14-20 April 1993. (AJ 150)

228. Some Muslims were taken straightaway to Kaonik prison whereas others were first detained at the Vitez cultural centre. (AJ 150)

229. In particular, such was the case of 13 Muslims living in Vitez who were arrested in mid-April and then transferred to Kaonik prison in early May. (AJ 150)

230. The Bosnian Muslims taken during the second wave of arrests were detained for a period of one to two months. (AJ 151)

231. All the detainees were Muslims and most were civilians. (AJ 153)

234. Kaonik prison compound accommodated former barracks of the Yugoslav People's Army (JNA) which were used primarily for the storage of weapons. (AJ 143)

235. At the entrance to the compound was a house with dormitories, a kitchen and offices on the upper floor. (AJ 144)

236. All the facilities date back to the time of the Yugoslav People's Army. Although not part of the Kaonik prison itself, some of the activities relating to the prison took place in this house. (AJ 144)

237. The entrance to Kaonik compound was under military police control. (AJ 144)

238. Kaonik prison itself consisted of two warehouses about one hundred metres from the entrance to the compound. (AJ 146)

240. Most of the cells were less than 10 square metres without lighting or windows facing out. (AJ 154)

241. A grate above each cell let in light from the corridor. (AJ 154)

242. The floor was concrete. Boards with straw mattresses were used as beds. (AJ 154)

243. The cells were so crowded that not everyone could lie down. (AJ 154)

244. Heating was inadequate. (AJ 155)

245. 300 to 400 people were crammed into the "second warehouse". (AJ 156)

246. On the first night, they had to sleep crouched on the concrete floor. (AJ 156)

247. Wooden pallets used to transport building materials were brought in the day after the detainees had arrived so that they could lie down on them. (AJ 156)

248. The number of pallets, however, fell far short of the number needed to accommodate all the detainees. (AJ 156)

249. Many former detainees complained about the inadequate supply of blankets and the lack of heating which made the detention conditions particularly difficult during that winter month. (AJ 156)

250. A fire was lit at the back of the warehouse a few days after the detainees arrived. (AJ 156)

251. The detainees who arrived in April 1993 were housed in this empty unheated warehouse. (AJ 157)

252. On the night of 15 - 16 April, 80 to 100 people slept in the warehouse. (AJ 157)

253. About thirty pallets were then brought in and a stove set up. Another detainee stated that a fire was sometimes lit. (AJ 157)

254. There were not enough pallets for all the detainees. A single blanket had to be shared by two prisoners. (AJ 157)

255. Some time between 15 and 20 May, 18 Muslims were still being detained in the second warehouse. (AJ 157)

256. The premises were not appropriate for the number of detainees. The inadequate space and heating made the detention particularly difficult. (AJ 158)

259. In the second period (approximately 14 April to 19 June 1993 – AJ 150/151), the detainees arrested and transferred to Kaonik prison on 15 and 16 April 1993 had to stand in the second warehouse facing the wall with their arms raised for two hours while they were being searched. (AJ 185)

260. The searching of some detainees accompanied by threats, the noise and screams relayed over the loudspeaker and the nocturnal visits of the soldiers to the cells clearly constituted serious psychological abuse of the detainees. (AJ 190)

261. Muslims detained during the second period (approximately 14 April to 19 June 1993 – AJ 150/151) were subjected to serious psychological and physical mistreatment. (AJ 204)

262. The psychological violence included a direct threat (holders of military identity papers were threatened with death) and was repetitive (men entered cells at night; screams were played over a loudspeaker). (AJ 226)

263. Acts of violence were committed at Kaonik during the second detention period (approximately 14 April to 19 June 1993 – AJ 150/151). (AJ 223)

265. Detention conditions were poor. (AJ 159)

266. The first warehouse had only one sink and two toilets in the corridor, one toilet for the staff and the other for the detainees. (AJ 159)

267. The detainees had to knock on the cell door and ask the guards to let them go to the toilet. (AJ 159)

268. Sanitary facilities were obviously insufficient for the number of detainees and five-litre metal containers were placed inside the cells to remedy the situation. (AJ 159)

269. Cleaning products was provided by the army or the ICRC but in insufficient quantities to keep whatever sanitary facilities there were clean. (AJ 159)

270. The conditions in the second warehouse were worse. (AJ 160)

271. At first, there were neither toilets nor places to wash. The detainees were either taken into the first warehouse or given pails by the guards. A latrine was then dug outside the warehouse. (AJ 160)

272. The sanitary conditions could have been considered reasonable for a number of detainees proportional to its prison capacity. However, they were highly unsatisfactory in view of the number of individuals detained throughout the period January to May 1993. (AJ 164)

273. The detention conditions at Kaonik prison were undoubtedly poor and clearly did not meet international human rights requirements. (AJ 212 and 221)

279. Aleksovski knew that detainees were used to dig trenches. (AJ 122)

280. As regards the use of detainees to dig trenches, the decision to do so was taken by the brigade commanders in Busovača and Vitez. (AJ 123)

281. The detainees were taken to the trench site and then back to Kaonik prison by HVO or military police soldiers, who were distinct from the prison guards. (AJ 123)

282. Aleksovski admitted having been informed by the ICRC that it was in contravention of the Geneva Conventions. (AJ 127)

283. Aleksovski knew not only that detainees were being sent off to dig trenches, but also that this practice was unlawful. (AJ 127)

284. Further, the detainees were very often used for this purpose and Aleksovski, as he was usually present when the prisoners returned, could not have been unaware of the extremely difficult conditions and the repeated abuse prisoners were subjected to at the trench site the marks of which were clearly visible on them. (AJ 128)

285. Aleksovski sometimes took part in designating the detainees to be sent off to dig trenches and made sure they returned. (AJ 129)

286. It was pursuant to orders from HVO commanders at the front that detainees were sent to dig trenches. (AJ 135)

287. Uncertainty weighed on the minds of the detainees as to whether they would be dispatched to dig trenches, and, more generally as to whether they would be released. (AJ 226)

288. The violence inflicted on the Muslim detainees of Kaonik prison appears to be a reprehensible infringement of international human rights which would be absolutely unacceptable in times of peace. (AJ 228)