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09 July 2007

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IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr. Hans Holthuis

Decision of: 9 July 2007

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR
JUDICIAL NOTICE OF ADJUDICATED FACTS AND
JOINT MOTION CONCERNING AGREED FACTS**

The Office of the Prosecutor:

Mr. Daryl A. Mundis
Ms. Laurie Sartorio
Mr. Kyle Wood
Mr. Aditya Menon

Counsel for the Accused:

Ms. Vasvija Vidović
Mr. Nicholas David Robson

I. INTRODUCTION

1. **TRIAL CHAMBER I** (“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 “Prosecution’s Motion for Judicial Notice of Adjudicated Facts” (“Motion”), filed by the Prosecution on 29 September 2006, and of the Joint Motion Concerning Agreed Facts (“Joint Motion”), filed on 29 May 2007, and hereby renders its decision.

II. PROCEDURAL HISTORY

2. The Prosecution filed the Motion on 29 September 2006, requesting the Trial Chamber to take judicial notice, pursuant to Rule 94(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), of 325 facts (“Proposed Facts”) listed in an Annex to the Motion, which it submits were adjudicated by the judgement in the case of *Prosecutor v. Hadžihasanović and Kubura*.¹ On 6 October 2006, the Defence filed a response to the Motion requesting a stay as the Annex to the Motion was in French and an order to the Prosecution to re-file the Annex in English when an official translation of the *Hadžihasanović et al.* Judgement was available.² On 11 October 2006, the Prosecution replied that it had no objection to the Defence’s request.³ On 18 October 2006, the Trial Chamber ordered a stay and the re-filing of the Annex listing the proposed adjudicated facts in English once the English translation of the Judgement was available.⁴ The English Annex of the proposed adjudicated facts was filed by the Prosecution on 27 November 2006.⁵ The Defence filed its response to the Motion on 11 December 2006 objecting to the admissibility of the proposed facts on the basis of several grounds which will be illustrated in detail below (“Response of 11 December 2006”).⁶ Finally, on 29 May 2007, a Joint Motion Concerning Agreed Facts (“Joint Motion”) was filed, by which motion the Defence indicated that a number of the Proposed Facts were acceptable and that they may now be considered as Agreed Facts. As a result of this agreement, the Prosecution withdrew 75 listed Proposed Facts from the Motion. The Trial Chamber therefore has

¹ *Prosecutor vs. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Judgement, 15 Mar 2006 (*Hadžihasanović et al.* Trial Judgement”). On 5 October 2006, the Prosecution filed a Corrigendum to the Motion and an Annex thereto in which the proposed adjudicated facts were reorganised and reformatted so as to make them easier to understand (“Corrigendum to the Prosecution Motion for Judicial Notice of Adjudicated Facts”).

² Defence Response to the Prosecution Motion for Judicial Notice of Adjudicated Facts, 6 Oct 2006 (“6 October Response”).

³ Prosecution Reply to Defence Response to the Prosecution Motion for Judicial Notice of Adjudicated Facts, 6 Oct 2006

⁴ Decision Regarding the Prosecution Motion for Judicial Notice of Adjudicated Facts” (“Decision”), 18 Oct 2006.

⁵ Submission pursuant to the Decision regarding the Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 Nov 2006.

to decide whether to take judicial notice of the remaining 250 Proposed Facts. The Trial Chamber also has to decide whether to admit into evidence a list of 163 Agreed Facts which has been attached by the parties to the Joint Motion.

III. SUBMISSIONS

3. The Prosecution submits that the Proposed Facts meet the criteria which must be satisfied in order for the Trial Chamber to take judicial notice thereof pursuant to Rule 94(B) of the Rules. In particular, the Prosecution argues that the Proposed Facts: (a) are relevant to the case the Prosecution must prove;⁷ (b) they have been “truly” adjudicated in the proceedings before the Tribunal and they are not the subjects of the appeal of either party in the original case;⁸ (c) they do not include any legal characterisations⁹ and (d) they are distinct, concrete and identifiable.¹⁰ The Prosecution further submits that the Proposed Facts will serve to promote efficient conduct of the proceedings.

4. The Defence’s primary submission in its Response of 11 December 2006 is that the *Hadžihasanović et al.* Judgement in its entirety is unsuitable for judicial notice of facts adjudicated in light of the fact that, *inter alia*, the methodology of the conduct of the trial is subject to appeal, and no final decision has been rendered thereon. In particular, among the grounds for appeal referred to by the Defence are: (a) the submission of the Appellant *Hadžihasanović* that the Trial Chamber erred in law because “through its practice of systematically questioning witnesses [...] gave the impression that the court was not impartial”;¹¹ (b) the submission of the Appellant *Hadžihasanović* that the Trial Chamber erred in admitting the “War Diaries” as a full Chambers

⁶ Defence Response to the Prosecution Motion for Judicial Notice of Adjudicated Facts, 11 Dec 2006. On 12 December 2006. The Defence filed a corrigendum to correct some mistakes in the text, Defence Corrigendum to Defence Response to the Prosecution Motion for Judicial Notice of Adjudicated Facts, 12 Dec 2006.

⁷ Motion, para. 7. The Prosecution submits that the Proposed Facts are of relevance to the proceedings because a significant number of the factual findings in *Hadžihasanović et al.* are directly relevant to a number of legal and factual issues in the *Delić* case by establishing the necessary background to place the crimes charged in context. They are also relevant to establishing the criminal responsibility of the Accused without being related to his specific acts, conduct or mental state. The Prosecution also submits that the case of *Hadžihasanović et al.* was related to the armed conflict between the Army of Bosnia and Herzegovina (“ABiH”) and Croatian Defence Council (“HVO”) in the territory of Central Bosnia in 1993. Like Rasim Delić, Enver Hadžihasanović and Amir Kubura were charged with murder and cruel treatment pursuant to Article 3 of the Statute for the crimes committed in Maline/Bikoši on 8 June 1993. Enver Hadžihasanović was Commander of the 3rd Corps of the ABiH and Amir Kubura was Commander of 7th Muslim Mountain Brigade of the ABiH. The Prosecution further notes that those facts which attest to the *modus operandi* of these units in 1992 and 1993 and their way of functioning in battle, are therefore relevant to the *Delić* case. Moreover, the Prosecution argues that the military and civilian system of justice is the same system applicable in the case against Rasim Delić, Motion, paras 7-9.

⁸ Motion, paras 11-12.

⁹ Motion, paras 14.

¹⁰ Motion, paras 15-16. In this regard, the Prosecution contends that the Proposed Facts meet all of the requirements established by the jurisprudence of the Tribunal.

¹¹ Response of 11 December 2006, para. 6.

Exhibit,¹² and (c) that the Trial Chamber wrongly failed to grant relief when the Defence applied for access to the EUMM Archives, thereby “seriously affect[ing] the ability of the Defence to prepare for trial and to effectively challenge the evidence led by the Prosecution during the presentation of its case”.¹³

5. Without prejudice to its primary contention, the Defence further submits that many of the individual proposed facts fail to meet the requirements of the legal test to be applied when determining whether a given proposed fact may be judicially noticed by a Trial Chamber.¹⁴ In particular, the Defence submits that some of them (i) are not facts but speculations or equivocal assertions;¹⁵ (ii) consist merely of the “Trial Chamber’s recitation of evidence that they heard before them”;¹⁶ (iii) merely amount to partial descriptions of documents and are not appropriate to be submitted as “adjudicated facts” because this is improperly advancing the content of a document as proof that the matters contained therein occurred;¹⁷ (iv) are only partially complete or taken out of context;¹⁸ (v) concerns “acts or conduct of the Accused”;¹⁹ (vi) “are not shown to not be based substantially on agreement between the parties”.²⁰

6. Finally, the Defence submits that numerous facts are “subject to reasonable dispute between the Parties”. Therefore, they cannot be judicially noticed because it would be wholly unfair if the

¹² Response of 11 December 2006, para. 8.

¹³ Response of 11 December 2006, para. 8.

¹⁴ The parties disagree regarding the legal test to be applied when determining whether a given proposed fact may be judicially noticed by a Trial Chamber. The Defence indicated seven requirements to be met in light of the jurisprudence, while the Prosecution listed only four.

¹⁵ Response of 11 December 2006, para. 11. The Defence cited the following Proposed Facts: 17, 20, 38, 65, 67, 68, 73, 74, 77, 79, 83, 86, 88, 113, 116, 134, 141, 151, 161, 170, 177, 192, 193, 194, 209, 215, 290. It also refers to the following Proposed Facts which it considers “imprecise” or unclear: 16, 24, 25, 41, 87, 107, 139, 235, 237, 238, 242, 248, 310. The Defence notes that many proposed facts contain expressions of equivocation such as “seems” or “it would appear” or involve estimates. The Defence argues that such facts are not “distinct, concrete and identifiable”. It further argued that when facts are formulated with insufficient precision they should be rejected on the ground that they will not promote judicial economy, *ibid.*

¹⁶ The Defence cited the following Proposed Facts: 73, 74, 81, 82, 116, 156, 157, 159-165, 175, 176, 177, 180, 182, 218, 219, 222, 223, 227, 228, 229, 235, 239, 240, 241, 243, 244, 254, 281, 282, 298, 299, 300, 312. The Defence also refers to the following Proposed Facts which it says “do not accurately reflect the document etc cited in the footnote as authority”: 59, 64, 105, 204. Response of 11 December 2006, para. 13.

¹⁷ The Defence cited the following Proposed Facts: 4, 12-16, 21- 23, 25, 26, 44, 45- 47, 89, 110, 190, 206, 210, 249, 261-264, 267- 270, 297. The Defence notes that none of the “facts” cited therein will advance judicial economy as they consist of (partial) excerpts from documents which will, as a matter of fairness to the Accused, have to be produced at his trial and “to alter the status of documentary exhibits by admitting them by way of Rule 94(B) is an impermissible reversal of the burden of proof which would otherwise fall on the Prosecution and is inconsistent with the Trial Chamber’s obligations to ensure that the fairness of the Accused’s trial is protected”. Response of 11 December 2006, para. 16.

¹⁸ The Defence cited the following Proposed Facts: 142, 284, 301, 307, 308, 309. Response of 11 December 2006, para. 17.

¹⁹ The Defence cited the following Proposed Facts: 26, 27, 149. Response of 11 December 2006, para. 18.

²⁰ Response of 11 December 2006, para. 19.

Accused was bound by facts that go to material matters relevant to the case against him and that were adjudicated by another Trial Chamber.²¹

IV. APPLICABLE LAW

7. 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.

8. Rule 94(B) aims at achieving judicial economy and harmonising judgements of the Tribunal by conferring the Trial Chamber with discretionary power to take judicial notice of facts or documents from other proceedings. This power has to be exercised “on the basis of a careful consideration of the accused’s right to a fair and expeditious trial”, that is in keeping with the principle of a fair trial enshrined in Articles 20 and 21 of the Statute.²²

9. The Appeals Chamber has clarified that a request for the admission of adjudicated facts “must specifically point out the paragraph(s) or parts of the judgement of which it wishes judicial notice to be taken, and refer to *facts*, as found by the trial chamber”.²³ In relation to the effects of taking judicial notice, the Appeals Chamber has further held that “by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial.”²⁴ Thus, “in the case of judicial notice under Rule 94 (B), the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into question by introducing reliable and credible evidence to the contrary.” It is however important to note that the burden of proof beyond reasonable doubt remains on the Prosecution.²⁵

²¹ The Defence submits also that no judicial economy will be achieved because the Accused will need to call evidence to establish the inaccuracy of these facts, Response of 11 December 2006, paras 20-22.

²² *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 Jun 2006 (“*Karemera et al.* Appeal Decision”), para. 41.

²³ See *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16, Decision on the Motions of Drago Jospović, Zoran Kupreškić and Vlatko Kupreškić to admit additional evidence pursuant to Rule 115 and for judicial notice taken pursuant to rule 94(B), 8 May 2001, (“*Kupreškić et al.* Decision”), para. 12.

²⁴ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution’s Interlocutory Appeal against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 Oct 2003, (“*Slobodan Milošević* Appeal Decision”), p. 4 (footnote omitted). The Appeals Chamber in *Karemera* reaffirmed this holding, and clarified that judicial notice of adjudicated facts only “relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into question by introducing reliable and credible evidence to the contrary”, *Karemera et al.* Appeal Decision, para. 42. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts with Annex, 26 Sep 2006 (“*Popović et al.* Decision”), para. 20.

²⁵ *Karemera et al.* Appeal Decision, para. 41.

10. According to the settled jurisprudence of the Tribunal, the Trial Chamber, in the exercise of its discretion to judicially notice adjudicated facts, has to consider whether the purported adjudicated facts meet at least the following requirements:

- (i) The fact must be distinct, concrete and identifiable;²⁶
- (ii) It must be pertinent and relevant to the case;²⁷
- (iii) It must not include findings or characterisations that are of an essentially legal nature;²⁸
- (iv) It must not be based on a plea agreement or on facts voluntarily admitted in a previous case;²⁹
- (v) It must be “truly adjudicated” i.e. it must not have been contested on appeal, or, if it has, the fact has been settled on appeal;³⁰
- (vi) It must not go to the act, conduct or mental state of the accused;³¹
- (vii) The formulation proposed in the moving party’s motion for admission must not differ in any significant way from the way the fact was expressed when adjudicated in the previous proceeding.³²

11. It is not required that the proposed facts not be subject to reasonable dispute between the parties.³³ However, as taking of judicial notice under Rule 94(B) is discretionary, the Trial Chamber always retains the right to withhold judicial notice of a fact even if it fulfils all the requirements above, when it believes that such notice would not serve the interests of justice.³⁴ Indeed, as held by

²⁶ See, for example, *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, (“*Krajišnik Decision*”), para. 14.

²⁷ *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant’s Motion for Judicial Notice, 1 April 2005 (“*Nikolić Appeal Decision*”), para. 52

²⁸ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1- AR73.1, Decision on Interlocutory Appeals Against Trial Chamber’s Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts, 26 June 2007, paras 19-22.

²⁹ *Popović et al.* Decision, para. 11 The Trial Chamber noted that such would be the case where the structure of the relevant footnote in the original judgement cites the agreed facts between the parties as a primary source of authority.

³⁰ *Kupreškić et al.* Decision, para. 6; *Krajišnik Decision*, para. 14; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 14 March 2006, (“*Prlić et al. Pre-Trial Decision*”), paras 12, 15.

³¹ *Karemera et al.* Appeal Decision, para. 51.

³² *Krajišnik Decision*, para. 14; *Prlić et al. Pre-Trial Decision*, para. 21.

³³ *Karemera et al.* Appeal Decision, para. 40. See also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff, 10 April 2007 (“*Milošević Decision*”), para. 27; *Popović et al. Decision*, fn. 19.

³⁴ *Karemera et al.* Appeal Decision, para. 41; *Popović et al. Decision*, para. 16.

the Appeals Chamber, a key factor in the Trial Chamber's determination as to the admission of adjudicated facts lies in the consideration that taking judicial notice of such facts will achieve judicial economy while preserving the right of the accused to a fair, public and expeditious trial.³⁵

12. With regard to the law applicable to the Agreed Facts, Rule 65 *ter* (H) provides that "[t]he pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact". Moreover, Rule 65 *ter* (M) provides that "[t]he Trial Chamber may *proprio motu* exercise any of the functions of the pre-trial Judge" and Rule 89(C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". The Trial Chamber will assess the proposed Agreed Facts in light of these Rules.

V. DISCUSSION

13. The Trial Chamber will address the primary submission of the Defence, according to which the judgement in its entirety is not yet suitable for judicial notice in light of the fact that, *inter alia*, the methodology of the conduct of the trial is subject to appeal.³⁶ The Trial Chamber recalls that the test to be applied is whether those facts, of which judicial notice is sought, are subject to appeal.³⁷ As held by the Appeal Chamber, "[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)".³⁸

14. The Trial Chamber notes the submission of the Appellant *Hadžihasanović* contained in its first ground of Appeal on the fairness of the trial that the Trial Chamber erred in law because "through its practice of systematically questioning witnesses [...] gave the impression that the court was not impartial."³⁹ The Trial Chamber cannot fail to note that this submission alleges an irregularity in the conduct of the trial, which, if upheld by the Appeal Chamber, would undermine the integrity of the entire *Hadžihasanović et al.* Judgement. The Trial Chamber is therefore of the view that this ground of appeal amounts to a direct challenge to the factual findings of that Judgement. It follows that the Proposed Facts of which judicial notice is sought cannot be

³⁵ *Nikolić* Appeal Decision, para. 11, with further references.

³⁶ *See supra*, para. 4.

³⁷ *Popović et al.* Decision para. 14.

³⁸ *Kupreškić et al.* Decision, para. 6; *Krajišnik* Decision, para. 14; *Prlić et al.* Pre-Trial Decision, paras 12, 15. The Trial Chamber notes that subsequent jurisprudence interpreted this holding to mean that "judicial notice of adjudicated facts should generally not be taken of facts which are *themselves* being appealed", *Prosecutor v. Paško Ljubčić*, Case No. IT-00-41-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 23 January 2003, ("Ljubčić Decision"), p. 5. In *Popović et al.*, the Trial Chamber stated that if an appeal is pending in respect of a judgement, a fact may only be judicially noticed if "the fact itself is clearly not among, or inextricably commingled with, those findings that have been challenged by a party." *Popović et al.* Decision, para. 14.

³⁹ *Hadžihasanović and Kubura*, Case No.IT-01-47-T, Notice of Appeal from Judgement on Behalf of Enver Hadžihasanović and Request for Leave to Exceed the Page Limit, 18 April 2006, p. 6.

considered truly adjudicated and, consequently, the Trial Chamber cannot take judicial notice of them. The Trial Chamber further notes, having reviewed the 65 *ter* witness list, that it appears that evidence concerning most of the Proposed Facts will be introduced through the witnesses coming to testify and the documents which the Prosecution has indicated it will submit.

15. The primary submission of the Defence being upheld, the Trial Chamber does not need to discuss the Proposed Facts further.

16. As regards the list of Agreed Facts, the Trial Chamber has carefully assessed those facts and has found them of relevance and probative value to the current case.

VI. DISPOSITION

17. On the basis of the reasoning set forth above, and recalling the discretionary power of the Trial Chamber in relation to adjudicated facts, the Trial Chamber decides as follows.

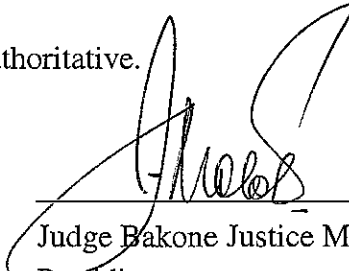
PURSUANT TO 65 *ter* (H), 65 *ter* (M) 89(C), and 94(B) of the Rules;

DENIED the Motion;

GRANTS the Joint Motion; and

ADMITS the 163 Agreed Facts.

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



Judge Bakone Justice Moloto
Presiding

Dated this ninth day of July 2007

At The Hague

The Netherlands

[Seal of the Tribunal]