



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-83-PT

Date: 09 July 2007

Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr. Hans Holthuis

Decision of: 09 July 2007

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR
ADMISSION OF DOCUMENTARY EVIDENCE
PURSUANT TO RULE 94(B)**

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

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”);

BEING SEISED of the “Prosecution’s Motion for Admission of Documentary Evidence Pursuant to Rule 94 (B)” (“Motion”) filed on 11 June 2007, requesting the Trial Chamber to take judicial notice pursuant to Rule 94(B) of the Rules of Procedure and Evidence (“Rules”) of 462 documents (“Documents”) listed in a Confidential Annex to the Motion, which were admitted into evidence in the case of *Prosecutor v. Hadžihasanović and Kubura* (“*Hadžihasanović and Kubura* case”);

NOTING the Defence “Response to Prosecution Motion for Admission of Documentary Evidence Pursuant to Rule 94(B)” filed on 25 June 2007 (“Response”) by which the Defence objects to the Motion;

NOTING that in support of its Motion the Prosecution submits that:

- (a) all Documents were designated as proposed exhibits in the Prosecution’s Rule 65ter exhibit list filed on 31 October 2006;¹
- (b) all of the requirements for admissibility under the jurisprudence pursuant to Rule 94 (B) of the Rules have been met,² and in particular, that the Documents:
 - (i) are relevant to the current proceeding and that the relevance of each document is set forth in the relevant column of the attached Confidential Annex;³
 - (ii) will not prejudice the right of the Accused to a fair trial as:
 - (a) they “were on the Prosecution 65 ter Exhibit List” of 31 October 2006 and were disclosed to the Defence on 14 November 2006;
 - (b) “many of the Documents can be shown to witnesses during the course of trial in order to have the witnesses explain or comment on them”;⁴

¹ Motion, para. 1.

² *Ibid.*

³ Motion, para. 7. The Annex sets forth the following information concerning each of the Documents: the prosecution-assigned Rule 65ter exhibit number in the present case; the date of the exhibit; the ERN number of the exhibit; the Rule 65ter description of the exhibit; a reference to the relevant paragraph of the Prosecution’s Pre-Trial Brief in the present case; the *Hadžihasanović and Kubura* case exhibit number of the document in question; the date that the exhibit was admitted in *Hadžihasanović and Kubura* case; the witness through whom the document was admitted in the *Hadžihasanović and Kubura* case or an indication that there was no tendering witness as was the case with exhibits that were tendered from the bar table; a reference to the relevant paragraph or page number of the exhibit as to the present

NOTING that in opposing the Motion the Defence submits that:

- (a) the admission of the Documents will not promote judicial economy as their admission would reverse the burden of proof as to the accuracy of the proposed documents and force the Defence to spend time and resources calling evidence in rebuttal;⁵
- (b) the Motion was filed prematurely and admitting the Documents at this stage of the proceedings, without their being tendered through a witness to give them context, will risk the Trial Chamber receiving irrelevant documents, thus overburdening the trial record;⁶
- (c) the Prosecution's submissions do not contain the information about each Document required by the practice of the Tribunal for taking of judicial notice – including whether a Document will be discussed with or shown to a particular witness, the fact that the Prosecution did not indicate which Documents are referenced to in the Prosecution's pre-trial brief, nor have they provided relevant transcript references to where each of the Documents was admitted into evidence during the *Hadžihasanović and Kubura* trial;⁷
- (d) the Prosecution has failed to show the relevance of the Documents to the present case and that “without the Prosecution describing exactly how *each* proposed document fits its case, notice should not be taken of such broad and unspecific documents”;⁸

CONSIDERING that Rule 94(B) aims at achieving judicial economy and harmonising judgements of the Tribunal by conferring the Trial Chamber with the discretionary power to take judicial notice of facts or documents from other proceedings and that 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;⁹

case. The Prosecution submits that these information are not set out for *Hadžihasanović and Kubura* exhibit numbers DH1170 and DH1461 as the translation requests into English are still pending.

⁴ Motion, para. 6.

⁵ Response, paras 11-14.

⁶ Response, para. 16.

⁷ Response, paras 17-18, 20. The Trial Chamber notes that the Defence in its Response acknowledges that the practice on taking of judicial notice it refers to in the Response as a support of its contention does not have binding force. Response, paras 17-18.

⁸ Response, para. 24 (emphasis in original). The Defence also analyses the Annex to the Motion pointing out the examples of how the Prosecution failed to properly show the relevance of the proposed documents to the current proceedings. Response, paras 24-26.

⁹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 Jun 2006, para. 41.

CONSIDERING that the legal effect of judicial notice is “to establish a well-founded presumption for the accuracy of the evidence, which therefore does not have to be proved again at trial, but which, subject to that presumption, may be challenged at that trial”;¹⁰

CONSIDERING that the party seeking judicial notice must establish that the document was admitted into evidence in a previous trial and that the document relates to matters at issue in the current proceedings;¹¹

CONSIDERING in this respect, that the fact that a document was deemed relevant in another trial does not mean that it is automatically relevant to the present case and that this Trial Chamber must still find that each document is relevant to matters at issue in the current proceedings;¹²

CONSIDERING that as a consequence the moving party must discharge its burden with regard to relevance as though it were offering the evidence in the usual manner under Rule 89 (C);¹³

CONSIDERING that in so doing, the party must ensure that the documents have more than a merely remote connection to the current proceedings and that the imperative factor will be identifying the *precise* portions of documents for which a party seeks judicial notice with clarity and specificity as well as proving their particular relevance to the current proceedings;¹⁴

CONSIDERING that additional factors which may be taken into account by the Trial Chamber with respect to judicial notice of adjudicated facts, and which also apply to judicial notice of documentary evidence, include “whether the facts, when taken together, will result in such a large number as to compromise the principle of a fair trial” and “whether the facts are too broad, too tendentious, not sufficiently significant, too detailed, too numerous, repetitive of other evidence already admitted by the Chamber, or not sufficiently relevant to the case”;¹⁵

RECALLING that the Trial Chamber enjoys the discretion to balance the dictates of judicial economy of the proceedings, on the one hand, with the fundamental right of the Accused to a fair trial, on the other;

¹⁰ See *Prosecutor v. Milan Milutinović et al*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 Oct 2006 (“*Milutinović* Decision”), para. 15. See also *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 Jun 2007, para. 16.

¹¹ *Milutinović* Decision, para. 16. See also *Prosecutor v. Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant’s Motion for Judicial Notice, 1 Apr 2005 (“*Nikolić* Appeal Decision”), para. 11.

¹² *Milutinović* Decision, paras 30, 32.

¹³ *Milutinović* Decision, para. 30.

¹⁴ *Milutinović* Decision, para. 16. See also *Prosecutor v. Bizimungu et. al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor’s Motion and Notice of Adjudicated Facts Rule 94(B) of the Rules of Procedure and Evidence, 10 Dec 2004, para. 11. The Appeals Chamber in *Nikolić* held that “the mere reference to whole sections or paragraphs of ‘documentary evidence’ of a previous judgement is insufficient to trigger the exercise of the Chamber’s discretion under rule 94(B) of the Rules”, *Nikolić* Appeal Decision, para. 47.

¹⁵ *Milutinović* Decision, para. 17. See also *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B), 1 Apr 2004, p. 5.

CONSIDERING that without having heard any witnesses who will provide context to the substance of the Documents, the admission of such a number of Documents risks unnecessarily over-burdening the trial record which in this Trial Chamber's view would have a negative impact on judicial economy;

CONSIDERING that given the number of the Documents and the fact that the Defence challenges the authenticity of many of them, to take judicial notice of them at this stage in the proceedings will not serve the purpose of judicial economy as the Defence will have to spend time rebutting them at trial;¹⁶

RECALLING in this respect that all Documents are on the Prosecution 65 *ter* exhibit list and that in the Prosecution's own submission "many of the documents can be shown to witnesses";¹⁷

CONSIDERING that it appears that it is indeed an intention of the Prosecution to present the Documents, or at least substantial number of them, to its witnesses regardless of whether the present Motion is granted and that therefore the Documents may be tendered through these witnesses;

CONSIDERING that the Prosecution remains free to offer these documents in the usual manner pursuant to Rule 89 (C), including when necessary from the bar table;¹⁸

¹⁶ Response, paras 27-28.

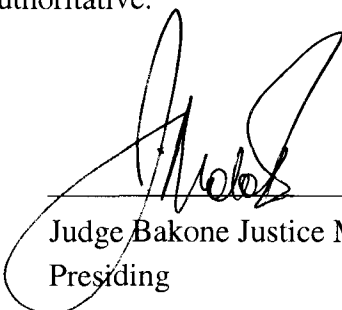
¹⁷ Motion, para. 6.

¹⁸ See *Milutinović* Decision, para. 33.

PURSUANT TO Articles 20 and 21 of the Statute and Rules 54, 89(C), 94(B) of the Rules;

DISMISSES the Motion.

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]