

**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-95-5/18-PT

Date: 6 April 2009

IN TRIAL CHAMBER III

Before:

Judge Iain Bonomy, Presiding
Judge Christoph Flüge
Judge Michèle Picard

Acting Registrar:

Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION REPLY TO THE "RESPONSE TO FIRST
PROSECUTION MOTION FOR JUDICIAL NOTICE OF
ADJUDICATED FACTS" AND FURTHER CORRIGENDUM TO
FIRST PROSECUTION MOTION FOR JUDICIAL NOTICE OF
ADJUDICATED FACTS**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-95-5/18-PT

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION REPLY TO THE “RESPONSE TO FIRST PROSECUTION
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JUDICIAL NOTICE OF ADJUDICATED FACTS**

A. Introduction

1. This reply to the Accused Radovan Karadžić’s (“Accused”) Response¹ is filed in accordance with the Trial Chamber’s Order² and is limited to addressing the Accused’s interpretation of the requirements that an adjudicated fact be distinct, concrete and identifiable; constitute a factual rather than a legal finding; not be unclear or misleading in the context in which it appears in the moving party’s motion; and not be based on an agreement between the parties to the original proceeding.
2. The Prosecution also withdraws proposed facts 25, 26, 28, 43, 116 and 136. In addition, the references in Appendix A of the Motion³ to the previous admission of proposed facts 64, 76, 88, 92 and 99 contained inaccuracies. Corrections to these references are set out in Section C below and in Appendix A of this Reply.

¹ Response to First Prosecution Motion for Judicial Notice of Adjudicated Facts, 30 March 2009 (“Response”).

² Order on Prosecution Request for Leave to Reply to the “Response to First Prosecution Motion for Judicial Notice of Adjudicated Facts”, 3 April 2009 (“Order”).

³ First Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 October 2008 (“Motion”).

B. Discussion

3. The Accused interprets the distinct, concrete and identifiable requirement in a manner which is not supported by the Tribunal's jurisprudence by suggesting that compliance with the requirement depends upon his immediate access to material underlying each proposed fact.⁴ There is no suggestion in the Tribunal's jurisprudence that the distinct, concrete and identifiable requirement obliges the Trial Chamber to consider anything beyond the text of a proposed fact to ensure that it is sufficiently clear.⁵ The Accused also contends that a number of the proposed facts appear in the *Galić* Trial Judgement without citations. The Accused avers that this too is a basis upon which the Trial Chamber may conclude that the proposed facts are not sufficiently identifiable.⁶ Again, there is no suggestion in the Tribunal's jurisprudence that the assessment of whether a proposed fact is sufficiently distinct, concrete and identifiable will turn on whether the fact appears in a judgement with a proper citation.⁷
4. The Accused requests that the Trial Chamber reject a number of facts on the basis that they contain terms and characterizations which he claims are of an essentially legal nature. The Accused takes particular issue with the term "civilian", claiming

⁴ See Response, Appendix A, reasons for exclusion pertaining to proposed facts 1-2, 5, 7-8, 10-11, 17, 19-23, 48-49, 55, 57, 67-68, 73-74, 76-77, 79, 80-83, 86, 88, 91, 93, 95-97, 101, 104-105, 107, 109, 142-143, 153, 156-160, 162, 168-169, 179-180, 183-185, 193, 195, 205, 210-211, 214, 217, 219, 225-226, 234-238, 240-241, 243, 261-265, 267, 277-279, 288-289, 296-298, 300-303, 308, 313, 317, 321, 324, 326-330, 332-336. To the extent the Accused considers it necessary to access confidential material from the *Prosecutor v. Galić* ("Galić") case in order to rebut the proposed adjudicated facts, he can file a motion seeking access to such material.

⁵ See *Prosecutor v. Prlić et al.*, IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts pursuant to Rule 94(B), 14 March 2006, para. 12, where the Trial Chamber indicates: "For these reasons, the Trial Chamber has assessed the proposed adjudicated facts submitted by the Prosecution to determine whether each fact: [...] is sufficiently clear (concrete, distinct, identifiable and not mixed with accessory facts that serve to obscure the principal fact) [*emphasis added*]." See also *Prosecutor v. Mićo Stanišić*, IT-04-79-PT, Decision on Judicial Notice, 14 December 2007, para. 37, which provides: "In order to determine whether a purported fact is distinct, concrete, and identifiable, the Trial Chamber must examine the purported fact in the context of the judgement of origin, with specific reference to the place referred to in the judgement and to the indictment period of that case. Therefore, when adjudicated facts proposed for notice are not sufficiently clear even in their original context, the Trial Chamber should not take judicial notice of them [*emphasis added*]." See also *Prosecutor v. Perišić*, IT-04-81-PT, Decision on Second Motion for Judicial Notice of Facts relevant to the Sarajevo Crime Base, 17 September 2008, para. 8.

⁶ Response, para. 30. See also Response, Appendix A, reasons for exclusion pertaining to proposed facts 3, 4, 30-46, 51, 53, 65, 70, 72, 75, 78, 85, 87, 89, 102, 109.

⁷ In addition, the Accused fails to appreciate that Trial Chambers frequently do not provide citations for every sentence in their judgements for reasons of brevity. Indeed, where multiple sentences following each other in a judgement are attributable to the same source(s), the last sentence frequently contains the citation to the applicable source(s). In other cases, factual findings which constitute inferences drawn from other factual findings often do not contain citations.

that the term “refers to persons specifically protected by International Humanitarian Law – thus being a legal finding within the meaning of International Humanitarian Law.”⁸ The Accused takes this statement from Judge Frederik Harhoff’s dissenting opinion on a Trial Chamber decision concerning judicial notice of adjudicated facts in *Prosecutor v. Dragomir Milošević* (“*Dragomir Milošević*”).⁹ In his dissenting opinion, Judge Harhoff cautions that the term “civilian” can be used in a legal or factual sense. Judge Harhoff indicates that a determination as to whether the term “civilian” is of a purely factual or an essentially legal nature will depend on the context in which it is used.¹⁰ Contrary to the Accused’s claim, though the term civilian has a legal aspect, it is used in the proposed facts in a factual manner to describe victims or objects bearing no affiliation to the Army of Bosnia and Herzegovina or any other armed force.¹¹ Similarly, other terms with which the Accused takes issue such as “widespread”, “indiscriminate”, “deliberate”, and “target” constitute inferences that describe a factual situation.

5. The Accused requests that the Trial Chamber reject proposed facts 14, 15, 20, 21, 23 and 133 on the basis that they are unclear or misleading in the context in which they appear in the Motion. The Accused’s arguments concerning these facts are deficient because he considers these facts in isolation.¹² Indeed, when assessing

⁸ Response, para. 30. *See also* Response, Appendix A, reasons for exclusion pertaining to proposed facts 8, 38-39, 41-43, 45-46, 49, 51, 53, 56-57, 59, 63-64, 69, 76, 81, 92, 98-100, 103, 108-109, 111-114, 119-121, 123, 125-129, 131, 139-146, 155, 164, 170, 178, 182, 188, 197, 221, 233, 239, 270, 278-279, 282, 297, 320, 322.

⁹ *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Dissenting Opinion of Judge Harhoff appended to 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, para. 9.

¹⁰ *Id.*

¹¹ *See Prosecutor v. Krajišnik*, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, para. 15, where the Trial Chamber indicates that “many findings have a legal aspect, if one is to construe this expression broadly. It is therefore necessary to determine on a case-by-case basis whether the proposed fact contains findings or characterizations which are of an essentially legal nature, and which must, therefore, be excluded. In general, findings related to the *actus reus* or the *mens rea* of a crime are deemed to be factual findings.”

¹² For example, the Accused’s claim that the time period in proposed fact 21 is unclear arises from his failure to consider proposed fact 21 in conjunction with proposed fact 22. Proposed fact 21 reads: “The SRK’s main forces were positioned around what was colloquially called the inner ring of Sarajevo, in particular in the area of Ilidža, Nedarići, and Grbavica.” Proposed fact 22, which immediately follows proposed fact 21 in the *Galić* Trial Judgement, provides additional detail concerning the SRK forces that were positioned around “the inner ring”, including the time period in which SRK forces occupied positions around the “inner ring”.

whether a proposed fact is unclear or misleading it is essential that the fact be considered in light of other surrounding facts.¹³

6. Finally, the Accused requests that the Trial Chamber reject proposed facts 6, 25, 26, 28 and 66 on the basis that they were agreed between the parties in *Galić*. As noted above, the Prosecution withdraws proposed facts 25, 26 and 28. However, because the agreement between the parties in *Galić* concerning proposed facts 6 and 66 is not the primary source¹⁴ for these facts, the Trial Chamber may safely conclude that these facts were not based on an agreement between the parties in *Galić*.

C. Further Corrigendum to First Prosecution Motion for Judicial Notice of Adjudicated Facts

7. The Prosecution withdraws proposed facts 25, 26, 28 and 116 for the reasons set forth in the Response. Furthermore, proposed fact 43 is withdrawn because the phrase "authority higher than the individual soldiers" is vague. Proposed fact 136 is withdrawn because it differs substantially from the formulation set out in the *Galić* trial judgement.
8. In addition, Appendix A of the Motion contained incorrect references to the previous admission of proposed facts 64, 76, 88, 92 and 99. In particular, with respect to proposed facts 64, 76, 88 and 92, the Prosecution incorrectly indicated that the *Dragomir Milošević* Trial Chamber had taken judicial notice of these proposed facts pursuant to a decision dated 10 April 2007. In fact, judicial notice was taken by the *Dragomir Milošević* Trial Chamber pursuant to a decision dated 18 July 2007. With respect to proposed fact 99, the Prosecution was incorrect in indicating that the *Dragomir Milošević* Trial Chamber had ever taken judicial notice of this proposed fact. For added clarity, the entries for proposed facts 64, 76, 88, 92 and 99 which appeared in Appendix A of the Motion have been

¹³ *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 ("*Popović et al.* Trial Decision"), para. 8.

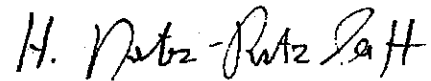
¹⁴ See *Popović et al.* Trial Decision, para. 11, where the Trial Chamber indicates that "if a Chamber cannot readily determine, from an examination of the citations in the original judgement, that the fact was not based on an agreement between the parties, it must deny judicial notice of the fact. Such 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 [emphasis added]."

reproduced in Appendix A of this Reply with corrected references to the previous decisions taking judicial notice of each proposed fact.¹⁵

D. Relief Requested

9. For the reasons set forth above and in its Motion, the Prosecution requests that with the exception of proposed facts 25, 26, 28, 43, 116 and 136, that the Trial Chamber take judicial notice of the proposed facts submitted with its Motion, taking account of the correction made in its subsequent Corrigendum¹⁶.

Word Count: 1,826



Hildegard Uertz-Retzlaff
Senior Trial Attorney

Dated this 6th day of April 2009
At The Hague, The Netherlands

¹⁵ The corrected references are underlined.

¹⁶ See Second Prosecution Motion for Judicial Notice of Adjudicated Facts and *Corrigendum* to First Prosecution Motion for Judicial Notice of Adjudicated Facts, 16 March 2009 ("Corrigendum").

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APPENDIX A

Proposed Fact No.	Proposed Adjudicated Fact	Source	Trial Chamber Decision(s) Taking Judicial Notice of the Proposed Adjudicated Fact & Previous Fact No.
64.	Between September 1992 and August 1994, civilians developed alternative routes to traverse the city, which offered a greater degree of cover from sniper fire from SRK-held areas. Even so, these routes could afford no protection from shelling with indirect fire weapons, such as mortars.	<i>Galić</i> Trial Judgement, para. 224	<i>D. Milošević</i> Decision 18 July 2007, No. 72; <i>Perišić</i> Decision 26 June 2008, No.72
76.	Between September 1992 and August 1994, civilians in the neighbourhood of Hrasno were exposed to shooting from several SRK positions.	<i>Galić</i> Trial Judgement, para. 260	<i>D. Milošević</i> Decision 18 July 2007, No. 89; <i>Perišić</i> Decision 26 June 2008, No.89
88.	During the conflict, a barricade was placed to protect civilians against sniping from the SRK-held part of Nedarići in Ante Babića Street.	<i>Galić</i> Trial Judgement, para. 292	<i>D. Milošević</i> Decision 18 July 2007, No. 105; <i>Perišić</i> Decision 26 June 2008, No.105
92.	The Orthodox Church in Dobrinja IV, which had been under construction when hostilities broke out and retained external scaffolding throughout the period between September 1992 and August 1994, was one of the sources of sniping fire against civilians in Dobrinja.	<i>Galić</i> Trial Judgement, para. 349	<i>D. Milošević</i> Decision 18 July 2007, No. 111; <i>Perišić</i> Decision 26 June 2008, No.111
99.	The Koševo hospital, a well- known civilian medical facility, was regularly targeted between September 1992 and August 1994 by the SRK.	<i>Galić</i> Trial Judgement, para. 509	<u>N/A</u>