

In: KSC-BC-2020-06
The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

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**Public Redacted Version of ‘Joint Defence Response to Second Prosecution
Motion for judicial notice of adjudicated facts’**

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I. INTRODUCTION

1. In a decision on 17 May 2023, the Trial Panel took judicial notice of 699 facts adjudicated in other cases,¹ which now form part of the evidential record of the case. On 7 June 2024, the SPO filed its Second motion for judicial notice of adjudicated facts (“SPO Second Motion”),² asking that judicial notice be taken of an additional 172 facts which have been adjudicated in the *Mustafa* case³ (“Proposed Facts”).

2. The SPO Second Motion is premature. Specialist Counsel for Mr Mustafa has filed a ‘Defence Request for Protection of Legality’ seeking, *inter alia*, a retrial.⁴ The Proposed Facts are not final, and are subject to pending review, precluding the Trial Panel taking judicial notice.⁵

3. There is, however, a further obstacle to the admission of more adjudicated facts in the present case. The SPO and the Trial Panel have justified the process of taking judicial notice of adjudicated facts on the basis that it promotes judicial economy.⁶ Adjudicated facts are not, however, a guaranteed path to streamlined proceedings. This is because the admission of an adjudicated fact only creates a presumption as to its accuracy. As such, the Trial Panel has also recognised that the Defence may well seek to rebut adjudicated facts “thus consuming time and resources and frustrating the goal of judicial economy which Rule 157(2) is intended to promote”.⁷

¹ F01534, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 17 May 2023, with Annex 1 (Confidential) and Annex 2 (Public) (“First Decision”).

² KSC-BC-2020-06/F02365, Prosecution second motion for judicial notice of adjudicated facts with confidential Annex 1, 7 June 2024.

³ *Prosecutor v. Mustafa*, Trial Judgment, KSC-BC-2020-05/F00494, 16 December 2022; *Prosecutor v. Mustafa*, Appeal Judgment, KSC-CA-2023-02/F00038, 14 December 2023.

⁴ *Prosecutor v. Mustafa* KSC-SC-2024-02/F00011, Defence Request for Protection of Legality with Confidential Annex 1 and 2 pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules, 14 March 2024.

⁵ First Decision, para. 11(vi).

⁶ SPO Second Motion, paras. 1, 4, 8, 17 ; First Decision, para. 12.

⁷ First Decision, para. 11. See also ICTY, *Prosecutor v. Krajisnik*, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, para. 16: “admission of an adjudicated

4. 15 months into the trial, the parties and the Trial Panel are now in a position to assess whether the SPO's approach of seeking judicial notice of an objectively large number of adjudicated facts has advanced the stated goal of judicial economy, or not. As explained further below, it has not. Judicial economy is only achieved if the prosecuting authority relies on the adjudicated facts to then streamline its case accordingly. In the present case, this has not been done. Despite the admission of 699 adjudicated facts, the SPO has not reduced its witness list or exhibit list. By contrast, the SPO continues to elicit evidence from witnesses for which facts have been adjudicated.⁸ This means that time and resources have been expended on the underlying adjudicated facts litigation, with no commensurate gains. It also means that hundreds of adjudicated facts now sit in the record, presumed to be accurate, which the Defence teams for Mr Thaçi, Mr Veseli, Mr Selimi, and Mr Krasniqi (collectively, "the Defence") will now need to expend resources and courtroom time to rebut. Rather than promoting judicial economy, in these proceedings, the process has had the opposite effect.

5. As noted by Presiding Judge Smith, "[t]here is really no reason to take notice of adjudicated facts if we aren't going to use it for some practical purpose, and I think that should be taken into consideration and used, and we need to see it in action."⁹ At present, the only action from the SPO has been to seek the admission of more adjudicated facts.

6. For these reasons, expanded below, the Defence opposes the admission of further adjudicated facts in the present proceedings. Should the Trial Panel engage with the SPO Second Motion, the SPO should be asked to identify, adjudicated fact by

fact only creates a presumption as to its accuracy, the admission may consume considerable time and resources during the course of the proceedings, thereby frustrating, in practice, the implementation of the principle of judicial economy."

⁸ See, e.g. Transcript of 20 June 2023, pp. 5227-5229.

⁹ Transcript of 20 June 2023, p. 5253, lines 5-8.

adjudicated fact, which witness(es) will not be called if the adjudicated facts are accepted. In addition, specific Defence objections to individual facts are also included in Annex 1.

II. PROCEDURAL BACKGROUND

7. On 18 January 2023, at the Trial Preparation Conference, the Panel ordered: (i) the Specialist Prosecutor's Office ("SPO") and the four Defence teams (collectively, "Defence") to file motions for judicial notice of adjudicated facts by 1 March 2023, at 16:00 hours, and (ii) the other Parties and participants to file responses and replies by 3 April 2023, at 16:00 hours, and 10 April 2023, at 16:00 hours, respectively.¹⁰

8. On 1 March 2023, the SPO filed a motion for judicial notice of adjudicated facts ("SPO First Motion").¹¹ On 1 March 2023, the Defence also filed a joint motion for judicial notice of adjudicated facts.¹²

9. On 3 April 2023, the Defence responded to the SPO Motion ("Joint Defence Response").¹³ On 11 April 2023, the SPO replied to the Joint Defence Response ("SPO Reply").¹⁴

¹⁰ KSC-BC-2020-06, Transcript of 18 January 2023, page 121, lines 12-14.

¹¹ F01330, Specialist Prosecutor, Prosecution Motion for Judicial Notice of Adjudicated Facts, 1 March 2023, with Annexes 1 and 2. The SPO later filed F01395, Specialist Prosecutor, Prosecution Submission of Public Version of F01330/A01 and Related Matter, 24 March 2023, with Annex 1, public, and Annex 2, confidential.

¹² F01331, Specialist Counsel, Joint Defence Motion for Judicial Notice of Adjudicated Facts, 1 March 2023, with Annex A.

¹³ F01417, Specialist Counsel, Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts, 3 April 2023, with Annex 1, confidential.

¹⁴ F01417, Specialist Counsel, Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts, 3 April 2023, with Annex 1, confidential.

⁵ F01443, Specialist Prosecutor, Prosecution Reply to 'Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts', 11 April 2023, with Annex 1, confidential.

10. The Panel issued a decision on the SPO motion on 17 May 2023,¹⁵ and one on the Joint Defence motion on 18 May 2023.¹⁶ Both motions were granted in part, and as a consequence the Panel took judicial notice of a number of adjudicated facts.

11. On 7 June 2024, the SPO filed the Second SPO Motion. On 19 June 2023, the Trial Panel granted an extension of time for the Defence to respond to the SPO Second Motion until 1 July 2024.¹⁷ Pursuant to that order, the Defence files the present joint response to the SPO Second Motion.

III. APPLICABLE LAW

12. Rule 157(2) of the Rules of Procedure and Evidence¹⁸ provides that, “[u]pon request by a Party or *proprio motu* [...] the Panel may, in the interests of a fair and expeditious trial, take judicial notice of adjudicated facts from other proceedings of the Specialist Chambers or from final proceedings before other Kosovo courts or from other jurisdictions relating to matters at issue in the current proceedings, to the extent that they do not relate to the acts and conduct of the Accused as charged in the indictment.”

13. In the First Decision, the Trial Panel set out the factors it considered relevant to the exercise of the Panel’s discretion to take judicial notice of adjudicated facts, being (i) the proposed facts are distinct, concrete, and identifiable; (ii) the proposed facts, as formulated by the moving Party, do not differ in any substantial way from the formulation of the original judgement; (iii) the proposed facts are not unclear or

¹⁵ F01534, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 17 May 2023, with Annex 1 (Confidential) and Annex 2 (Public).

¹⁶ F01536, Decision on Defence Motion for Judicial Notice of Adjudicated Facts, 18 May 2023, with Annex 1 (“Decision on Defence Adjudicated Facts”), para. 53.

¹⁷ F02390, Decision on Joint Defence Request for Extension of Time to Respond to Prosecution Second Motion for Judicial Notice of Adjudicated Facts (F02365).

¹⁸ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

misleading in the context in which they are placed in the moving Party's motion; (iv) the proposed facts do not contain legal findings or characterisations; (v) the proposed facts are not based on an agreement between the Parties to the original proceedings; and (vi) the proposed facts are not subject to pending appeal or review.¹⁹

14. In applying these factors to the first round of proposed adjudicated facts, the Trial Panel generally rejected those facts that went to the core of the SPO's case.²⁰ The Trial Panel also rejected facts were considered broad, vague, tendentious, or conclusory.²¹

IV. SUBMISSIONS

a. The SPO Second Motion is Premature

15. On 19 March 2023, the Defence wrote to the SPO, noting that on 14 March 2024 the Specialist Counsel for Mr Mustafa had filed a Request for Protection of Legality,²² and asking whether the SPO could clarify its position on whether the Trial Panel could take judicial notice of facts from the *Mustafa* case while this Defence Request for Protection of Legality was still pending.²³ The SPO did not directly answer this question, but responded that that the Defence should indicate its agreement or otherwise with the proposed facts, noting that "a request for protection of legality

¹⁹ First Decision, para. 11.

²⁰ First Decision, para. 11, citing: ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-T, Trial Chamber II, Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 1 April 2010, para. 46; *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeals Chamber, Judgement, 8 April 2015, paras 33-35; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, para. 20.

²¹ First Decision, para. 11, citing: *Prosecutor v. Hadžić*, IT-04-75-T, Trial Chamber, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Documents, 23 May 2013, para. 13.

²² *Prosecutor v. Mustafa* KSC-SC-2024-02/F00011, Defence Request for Protection of Legality with Confidential Annex 1 and 2 pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules, 14 March 2024.

²³ Email, Defence to SPO, 19 March 2024.

cannot be filed on the ground of an erroneous or incomplete determination of the facts of the case".²⁴

16. It is premature for the Trial Panel to take judicial notice of facts from a judgment which is subject to review. The Trial Panel has held that a factor relevant to the exercise of its discretion is whether the proposed facts are subject to pending review.²⁵ One of the remedies which has been properly sought by the *Mustafa* Defence is indeed a retrial.²⁶ It is unsafe to populate the evidential record in these proceedings with facts which may end up being overturned, and inefficient for the Defence to prepare to rebut them.

b. General Submissions on the Process

17. The admission of 699 adjudicated facts has expanded the evidential record, without any commensurate saving of time. The SPO has not reduced its witness list, or exhibit list, nor have the pace of the proceedings increased, or the proceedings shortened as a result. By contrast, there are now concrete examples of the SPO eliciting evidence from witnesses that goes directly to facts that have already been adjudicated. In other words, the Trial Panel has taken judicial notice of adjudicated facts on the basis that this will streamline the evidence, and the SPO has not done the corollary work of then reducing its evidence to take these facts into account. As such, the process of judicial notice of adjudicated facts is not being used by the SPO to streamline its case, but rather to bolster it.

²⁴ Email, SPO to Defence, 20 March 2024.

²⁵ First Decision, para. 11(iv).

²⁶ KSC-SC-2024-02/F00011, Defence Request for Protection of Legality with Confidential Annex 1 and 2 pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules, 14 March 2024, para 3.

18. The SPO's practice of leading evidence which has already been the subject of an adjudicated fact has prompted objections from the Defence,²⁷ who questioned "what is the Prosecution doing calling a witness that takes a day and a half or two days to examine, backwards and forwards, in order to establish a fact that's already been adjudicated and accepted by this Panel [...]?"²⁸ In response, the SPO argued that judicial notice of adjudicated facts "could actually save time", but was unable to point to any ways in which its evidence had been reduced.²⁹ This is the false economy in action.

19. Similarly, SPO requests for admission of evidence under Rule 153 have regularly sought to justify admission of statements and exhibits on the basis that they "complement adjudicated facts".³⁰ On this basis, the evidential record is expanding, and its continued expansion is now being justified by the evidential record itself.

20. To address this reality, the SPO has now linked its Second Request to apparent future measures which it says might be possible **if** the Trial Panel takes judicial notice of the additional 172 adjudicated facts. Specifically, the SPO submits that:³¹

[...] judicial notice of the Proposed Facts would enable the SPO to take various measures that would streamline these proceedings. For example, if this motion is granted **and subject to consideration of the decision and circumstances as they exist at that time**, the SPO anticipates that it will be in a position to: (i)

²⁷ Transcript of 20 June 2023, pp. 5227-5228.

²⁸ Transcript of 20 June 2023, pp. 5228-5229.

²⁹ Transcript of 20 June 2023, pp. 5252-5253.

³⁰ See, e.g. F01994, Prosecution Motion for the Admission of the Evidence of Witnesses [REDACTED] pursuant to Rule 153, 8 December 2023, paras. 8-9, 12, 16, 21, 27, 30, 32, 36, 47. See also F02227, Prosecution motion for the admission of the evidence of witnesses [REDACTED] pursuant to Rule 153, 08 April 2024, paras. 4,10, 13, 18, 21, 24, 28, 32, 36, 39, 43; F02299, Prosecution motion for the admission of the evidence of witnesses [REDACTED] pursuant to Rule 153 [...], 08 May 2024, paras. 4, 8, 12, 15, 19, 24, 28, 31, 35, 38; F02322, Prosecution motion for the admission of the evidence of witnesses [REDACTED] pursuant to Rule 153 with confidential Annexes 1-6, 21 May 2024, para. 4; F02383, Prosecution motion for the admission of the evidence of witnesses [REDACTED] pursuant to Rule 153 [...], 14 May 2024, paras. 4, 8, 42, 47.

³¹ SPO Second Motion, para. 19 (emphasis added).

remove [REDACTED] from the Witness List; and (ii) tender [REDACTED] evidence pursuant to Rule 153. Of the ten crime-base witnesses for the April 1999 Zilash/Zlaš detention site currently on the Witness List, the SPO – if this motion is granted **and subject to circumstances as they exist at the time of the decision** – would only propose to call Rule 154 witnesses [REDACTED], who are currently estimated for a combined total of 3 hours of direct examination.

21. That a link is now being made between adjudicated facts and a reduced presentation of the SPO case, is a welcome and novel development. The problem is that the SPO proposal does little more than adopt suggestions made by the Defence in March 2024 for the SPO to reduce unnecessary and cumulative evidence. Specifically, the SPO now says that if the Trial Panel grants its motion and takes judicial notice of 172 new adjudicated facts, it may be in a position to “remove [REDACTED] from the Witness List”.³² On 20 March 2024, the Defence wrote to the SPO citing this same list, and noting that [REDACTED] provide unnecessary cumulative evidence. Serious consideration should be given to dropping some or all of these witnesses.”³³ The SPO is seeking to gain a litigation advantage by offering (without actually committing) to implement measures it should have already adopted, and making them contingent on a favourable decision from the Trial Panel.

22. To this end, the Trial Panel has previously stated that it has been “mindful of the possibility that the opposing Parties might seek to rebut a proposed fact thus consuming time and resources and frustrating the goal of judicial economy which Rule 157(2) is intended to promote.”³⁴ In this case, the SPO has alleged individual criminal responsibility of the accused through a joint criminal enterprise, in charges which include liability through JCE III. In a case of this type, where an accused can be held liable for the acts and conduct of others which falls outside the scope of the alleged criminal enterprise, the scope for leaving facts unchallenged in the evidential record is

³² SPO Second Motion, para. 19.

³³ Email, Defence to SPO, 8 April 2024.

³⁴ First Decision, para. 11.

extremely narrow. The huge range of potentially culpable acts in a JCE III case requires Defence Counsel, in the diligent exercise of their duties, to challenge a broader range of facts than in a case where the accused was alleged to have been a direct physical participant. The likelihood of the Defence needing to rebut adjudicated facts, even those which may appear straightforward or innocuous on their face, is increased by the SPO's framing of the charges in this case.³⁵

23. With this context in mind, and taking into account the already colossal size of the evidential record after 15 months of trial, and the fact that the admission of adjudicated facts has failed to improve judicial economy in these proceedings, the Trial Panel should reject the SPO Second Motion in its entirety.

24. Should the Trial Panel engage with the SPO request, the Defence submits that before the Trial Panel takes judicial notice of any additional 172 Proposed Facts, the SPO should be asked to identify, adjudicated fact by adjudicated fact, the witness(es) who will not be called if the adjudicated facts are accepted. If the SPO cannot (or will not) do so, then it is impossible to accept that the adjudicated facts should be admitted on the basis of efficiency. Moreover, the Defence submits that the Trial Panel should adopt an increasingly strict approach to judicial notice in general. Where they are central to the SPO case, the facts should be rejected. On the other hand, where the SPO has not unequivocally demonstrated that the Proposed Facts relate to a material issue in the case as found in the Indictment, judicial notice should not be taken, noting that SPO is required to demonstrate "more than a tenuous or remote connection to the facts and circumstances of a case."³⁶

³⁵ If the Trial Panel regards this as a strategic choice and not incumbent on counsel, seeking to rebut such relatively straightforward or innocuous facts remains a valid strategic choice that the Trial Panel cannot remove without infringing on the accused's right to a fair opportunity to present their case.

³⁶ KSC-BC-2020-06/F01409, Decision on Specialist Prosecutor's Bar Table Motion, 31 March 2023, para. 10, citing with approval ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Trial Chamber, Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts, 1 September 2008, para. 6.

25. The size of this case is of the SPO's own making, and any real or perceived inability to present it within two years does not justify a case being built through the findings of other Trial Panels, particularly through facts that are now subject to judicial review. Adjudicated facts should not be viewed as a panacea for lengthy proceedings. If the SPO is unable to present all the facts it wishes to establish within the timeframe it has been allocated to do so – in this case two years – the solution is not to expand the evidential record through the admission of facts which have been adjudicated in other trials. Rather, the solution is the disciplined streamlining and efficient presentation of the SPO case.

a. Specific Submissions on the 172 Proposed Facts

26. In addition, the Defence raises specific objections to individual Proposed Facts, as set out in Annex 1. The Defence opposes both particular categories of facts and individually framed facts on the following grounds, namely that they are:

C1 Facts concerning the acts and conduct of the accused;

C2 Core contested facts concerning alleged subordinates in relation to incidents that directly impact on the accused's responsibility;

C3 Facts which fail to cite to clearly identified evidential sources;

C4 Based on evidence that is either anonymous or not-disclosed in this case;

C5 Based on statements from suspects who never testified, statements of co-accused, or otherwise not compellable, such as deceased witnesses;

C6 Facts which contain language which is too vague/ambiguous to be

relied upon, which don't refer to the underlying evidence, or where the facts have been 'cherry-picked' from their original context in a manner that obscures or misrepresents the original findings;

C7 Facts which are comprised of evidential descriptions rather than factual findings;

C8 Facts which employ legal characterisations concerning the ultimate findings of fact;

C9 Facts which were not disputed in the first set of proceedings or which were taken from judgments that were not appealed; and

C10 Facts based on evidence or witness testimony, which the SPO intends to submit in this case.

27. Objection C9, being an objection to facts which were not disputed in the first set of proceedings, is particularly relevant in the present context. One of the factors relevant to the exercise of the Trial Panel's discretion, is whether the proposed facts are based on an agreement between the parties to the original proceeding.³⁷ The characterisation of "adjudicated" facts does not extend to those which were not tested or challenged at trial. These facts cannot be considered "adjudicated" because "they have not been established by the Trial Chamber on the basis of evidence." Rather, "such facts are merely accepted by the Trial Chamber upon a less burdensome level of scrutiny than the one applied to instances where the Prosecution must prove the facts

³⁷ First Decision, para. 11(v).

upon which convictions are based beyond reasonable doubt.”³⁸ They are therefore not appropriate for judicial notice.

28. This raises issues where, in the original trial, an accused does not have an interest in contesting certain facts, which then become central live issues in the case in which judicial notice is being sought. The Defence for Mr Mustafa had no interest in contesting, for example, whether the KLA General Staff “had taken measures to recruit, train, and deploy new soldiers, as well as to structure, expand and consolidate command structures for the Llap OZ.”³⁹ Patently, this is a central live issue in the present case, and it is disputed. As such, while this fact appears in the *Mustafa* case, it cannot be considered “adjudicated”, having been subjected to a less burdensome level of scrutiny. It is therefore not appropriate for judicial notice.

V. CONCLUSION

29. The process of taking judicial notice of adjudicated facts has not improved judicial economy in this case. The SPO has not done the work of reducing its case based on the Trial Panel granting its first request, and can point to no examples of any time saving or streamlining achieved as a result. Rather, the evidential record has been populated with hundreds of facts which the Defence is now entitled to take further time to rebut.

30. The Defence has now expended additional resources reviewing the Proposed Facts, getting instructions, coordinating among the teams, and responding to the SPO Second Motion. For the reasons set out above, the SPO request is premature. The proposed justification of judicial economy cannot be established, meaning that the

³⁸ ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-A, Decision on Judicial Notice, 29 October 2010, para. 10.

³⁹ SPO Second Motion, Annex 1, Proposed Fact 3.

introduction of further adjudicated facts runs contrary to the right of the accused to a fair and expeditious trial. For these reasons, the Defence respectfully requests that the Trial Panel

REJECT the Second SPO Motion; or, in the alternative

REJECT the request for the Proposed Facts for which the Defence has raised objections in Annex 1, and

ORDER that the SPO indicate, adjudicated fact by adjudicated fact, the witness(es) who will not be called if judicial notice is taken.

Word count: 4100 words

Respectfully submitted on 1 July 2024,



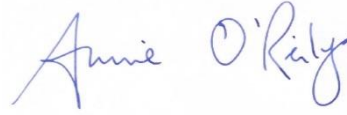
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