



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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Public Redacted Version of 'Prosecution reply to 'Joint Defence Response to Second Prosecution Motion for judicial notice of adjudicated facts''

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I. INTRODUCTION

1. The Facts¹ were established in the final *Mustafa* Judgment,² satisfy all applicable criteria, and are therefore appropriate for judicial notice. The Response³ does not show otherwise. Instead, the Defence repeats arguments already considered and rejected, misrepresents and ignores the record in this case and applicable jurisprudence, and attempts to introduce new criteria, which would undermine the very purposes of Rule 157(2).⁴

II. SUBMISSIONS

A. JUDICIAL NOTICE OF THE FACTS SERVES THE PURPOSES OF RULE 157(2)

2. The Response focuses primarily on assertions that judicial notice of the Facts will not promote judicial economy. Such submissions are premised on the baseless and wholly inaccurate claim that noticed adjudicated facts have not resulted in any reduction to the SPO's witness or exhibit lists.⁵ To the contrary, and as repeatedly and clearly stated,⁶ the SPO has taken into account adjudicated facts when streamlining its case and will continue to do so in the future.

¹ Prosecution second motion for judicial notice of adjudicated facts, KSC-BC-2020-06/F02365, 7 June 2024, Confidential ('Motion'), para.1 (defining 'Proposed Facts'). The Proposed Facts are referred to herein as 'Facts'. All footnote references to Facts are to the Response Annex, which includes the Facts with corresponding Defence objections. See KSC-BC-2020-06/F02419/A01 ('Response Annex').

² *Specialist Prosecutor v. Mustafa*, Trial Judgment, KSC-BC-2020-05/F00494, 16 December 2022, Confidential ('*Mustafa* Judgment').

³ Joint Defence Response to Second Prosecution Motion for judicial notice of adjudicated facts, KSC-BC-2020-06/F02419, 1 July 2024, Confidential ('Response').

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' refer to the Rules, unless otherwise specified.

⁵ Response, KSC-BC-2020-06/F02419, paras 4-5, 17-18, 21, 23.

⁶ E.g. Prosecution notice of witness changes, KSC-BC-2020-06/F02325, 21 May 2024, Confidential; Email from SPO dated 19 February 2024 at 11:07; Email from SPO dated 4 September 2023 at 9.40; Prosecution motion for admission of evidence of Witnesses W01237, W04594, W04592, W04872, W04871, W04673 and W04362 pursuant to Rule 153, KSC-BC-2020-06/F01658, 7 July 2023, Confidential, para.42; Prosecution motion for judicial notice of adjudicated facts, KSC-BC-2020-06/F01330, 1 March 2023, paras 15-16.

3. As acknowledged by the Defence,⁷ the SPO anticipates that, if the Motion is granted, it will be able to remove four witnesses from its witness list and tender the evidence of one (previously Rule 154) witness pursuant to Rule 153.⁸ This is the most recent – but far from only – example of how adjudicated facts serve judicial economy in this case.

4. During the pre-trial phase, the SPO took into account, *inter alia*, the possibility of seeking notice of adjudicated facts from relevant ICTY and Kosovo judgments when determining that Rule 153 was the appropriate mode of testimony for more than 19 witnesses who provide evidence concerning the Jabllanicë/Jablanica, Llapushnik/Lapušnik, Drenoc/Drenovac, Llapashticë/Lapaštica, Kleçkë/Klečka, Bob, Ivajë/Ivaja, Biçec/Bičevac, Varosh/Varoš Selo, Cahan, and Kukës crime sites.⁹ Further, since the First Decision,¹⁰ the SPO has taken into account, *inter alia*, adjudicated facts when: (i) removing witnesses from its Witness List,¹¹ including 15 witnesses relating to crime sites concerned by the First Decision;¹² (ii) converting witnesses to Rule 153, including at least five witnesses who provide crime base evidence about the sites listed above;¹³ and (iii) reducing the scope and length of direct examinations. Recourse to Rule 157(2) has therefore significantly expedited proceedings and saved substantial courtroom time. Indeed, if the Motion is granted, adjudicated facts, together with

⁷ Response, KSC-BC-2020-06/F02419, paras 20-21.

⁸ Motion, KSC-BC-2020-06/F02365, para.19. The Facts that these witnesses relate to are clear when considered in context and by reference to the *Mustafa* Judgment. Accordingly, the Defence request for fact-by-fact specification of relevant witnesses is unjustified. *See* Response, KSC-BC-2020-06/F02419, paras 6, 24.

⁹ [REDACTED]. This list does not include witnesses proposed under Rule 153, but converted to Rule 155, removed from the Witness List, or whose Rule 153 applications were denied without prejudice.

¹⁰ Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01534, 17 May 2023 ('First Decision').

¹¹ Amended List of Witnesses, KSC-BC-2020-06/F01594/A01, 9 June 2023, Strictly Confidential and *Ex Parte* ('Witness List').

¹² [REDACTED]. Relevant adjudicated facts are considered when removing any witness from the Witness List, including, but not limited, to those listed here.

¹³ [REDACTED]. This list does not include witnesses converted to Rule 153 following the First Decision, but whose Rule 153 applications were denied without prejudice (such as [REDACTED]).

other relevant factors, would have enabled the removal or Rule 153 submission of at least 44 witnesses in total. As it has done throughout this case, the SPO will continue to take into account adjudicated facts in future streamlining decisions.

5. Finally, while judicial economy is an important purpose of Rule 157(2), it is not the only interest served. Notice of adjudicated facts is also in the interests of consistency,¹⁴ justice, and the determination of the truth, ensuring the Panel is able to consider relevant facts and evidence in its holistic, final assessment.¹⁵

B. THE FACTS SATISFY ALL RELEVANT CRITERIA

6. The Defence's categorical objections¹⁶ are based on misrepresentations of the Facts, *Mustafa* Judgment, applicable criteria, and jurisprudence, and repeat objections¹⁷ already considered and rejected in the First Decision:

a. The C2 objections are to Facts that concern the acts and conduct of Salih MUSTAFA and his subordinates, and the commission of crimes at the Zllash/Zlaš detention site. As stated by the Panel, and in line with established jurisprudence, 'the categorical prohibition on taking judicial notice of facts concerning acts and conduct of the accused does not extend to facts related to, for example, the conduct of physical perpetrators or the existence and activity of a joint criminal enterprise or its members (other than the Accused)'.¹⁸ In this respect, Rule 157(2) is *only* available for, and necessarily foresees judicial notice of, facts that are relevant to the charges and, in turn, the Accused's

¹⁴ Motion, KSC-BC-2020-06/F02365, para.2 (and cited sources).

¹⁵ First Decision, KSC-BC-2020-06/F01534, para.26. *See also* ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgement, 8 April 2015, paras 23-26.

¹⁶ While the Response lists 10 objection categories, the Response Annex does not contain any C1 or C5 objections, which accordingly are not addressed further in this reply.

¹⁷ *See* Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated, KSC-BC-2020-06/F01417, 3 April 2023. *See also* Prosecution reply to 'Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts', KSC-BC-2020-06/F01443, 11 April 2023.

¹⁸ First Decision, KSC-BC-2020-06/F01534, para.24.

responsibility.¹⁹ To consider otherwise would, as stated by the ICTR Appeals Chamber when considering a similar provision, ‘render [Rule 157(2)] a dead letter’.²⁰

b. The C3 objections seek to improperly introduce a requirement that each Fact be supported by citations in the original judgment. Such a requirement has been explicitly rejected.²¹ In any event, when considered in the context of the *Mustafa* Judgment, there is no ambiguity about the basis of the Facts, which: (i) are supported by citations to evidence, including by use of cross-references; (ii) were reached on the basis of ‘the evidence taken as a whole’; and/or (iii) follow detailed reasoning.²²

c. The two C4 objections, which assert that certain sources are redacted,²³ are unfounded, since the Defence has access to the unredacted, confidential version of the *Mustafa* Judgment.²⁴

d. Contrary to the C6 objections, all Facts are distinct, concrete, identifiable, and accurately represent the original finding. They must be read in the context of the *Mustafa* Judgment and the surrounding Facts.²⁵ For example, the objection that some facts are too general disregards that these findings applied to defined categories of persons, such as all detainees at the Zllash/Zlaš detention site.²⁶

¹⁹ ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (‘*Karemera* Decision’), paras 48, 52-53.

²⁰ *Karemera* Decision, para.48.

²¹ ICTY, *Prosecutor v. Mladić*, IT-09-92-PT, First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 February 2012, paras 25,40-43; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009, para.20.

²² E.g. Facts 34, 41-42, 47, 98, 99.

²³ Facts 45-46.

²⁴ Decision on Prosecution Request Concerning Access to Confidential Versions of Judgments from Case KSC-BC-2020-05, KSC-BC-2020-06/F02276, 30 April 2024.

²⁵ Compare e.g. Fact 90 with Fact 82.

²⁶ E.g. Facts 52-56, 59-62, 66-74.

- e. The C7 objections ignore the language used in the relevant parts of the *Mustafa* Judgment, which clearly indicates that the Facts are findings and not ‘evidential descriptions’.²⁷
- f. The C8 objections fail to account for the placement and use of terms – such as ‘deprivation of liberty’, ‘lawfulness of detention’, ‘degrading’, ‘inhumane conditions’, ‘brutal beatings’, ‘mistreatment’, ‘*modus operandi*’, and ‘discrimination’²⁸ – in the *Mustafa* Judgment. These terms, when considered on a case-by-case basis and in context, are used factually and are not of an essentially legal nature.²⁹ Likewise, ‘Murder Victim’ is not a legal characterisation,³⁰ but a defined term.³¹
- g. The four C9 objections concern Facts on the BIA unit, 153 Brigade, Llap Zone command, and related orders from the General Staff.³² These Facts are findings reached on the basis of evidence, not an agreement between the Parties, satisfy all other applicable criteria, and are therefore appropriate for judicial notice.³³ Defence submissions in support of its C9 objections – which rely on speculations concerning the *Mustafa* Defence’s interests and that certain Facts

²⁷ That all Facts with a C7 objection are findings is clear from their placement in the *Mustafa* Judgment and language used, including: (i) their inclusion in ‘conclusions’ and ‘findings’ sections (e.g. Facts 100, 137, 139, 165, 167); and/or (ii) that they are preceded and followed by phrases, such as ‘the Panel finds’ (e.g. Facts 100, 156), ‘the evidence shows’ (e.g. Facts 106-107), ‘the Panel has established’ (e.g. Fact 140), ‘the Panel is satisfied’ (e.g. Facts 142, 153, 165), ‘the evidence unequivocally indicates’ (e.g. Facts 143-144), ‘in the Panel’s view and based on its factual findings’ (e.g. Fact 157), ‘the only reasonable conclusion’ (e.g. Facts 158, 164, 169), and ‘on the basis of the evidence as a whole’ (e.g. Facts 100, 153, 158). Further, for many of the Facts, the SPO has provided supporting references to other parts of the *Mustafa* Judgment where such findings are reiterated or confirmed.

²⁸ E.g. Facts 23, 48, 57, 60, 63, 78-79, 88, 98, 104, 110, 119, 123, 126.

²⁹ *Specialist Prosecutor v. Mustafa*, Appeal Judgment, KSC-CA-2023-02/F00038, 14 December 2023, Confidential, paras 61-62.

³⁰ Fact 84.

³¹ *Mustafa* Judgment, KSC-BC-2020-05/F00494, para.24.

³² Facts 1, 3, 11, 20.

³³ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015, para.622 (considering that, if all criteria are met, a Chamber may take judicial notice of an adjudicated fact even if it ‘may have been less central to the charges in the previous proceedings [...] than in the current proceedings’).

were subjected to a 'less burdensome level of scrutiny'³⁴ – are unsubstantiated and misplaced.

h. Contrary to the C10 objections, there is no bar to Facts that overlap with evidence in this case. Such a requirement would leave little scope for adjudicated facts and undermine the purposes of Rule 157(2). Further, contrary to C10 objections concerning W04746: (i) W04746's evidence did not form the basis of any of the Facts, as he was not a witness in *Mustafa*; and (ii) W04746's evidence in this case does not contradict the Facts.³⁵ Even if it did, the Panel's ability to consider the Facts together with evidence on the same or related matters will ultimately serve the interests of justice and the determination of the truth.³⁶

III. CLASSIFICATION

7. This filing is confidential pursuant to Rule 82(4).

IV. RELIEF REQUESTED

8. For the foregoing reasons and those given previously, the Panel should grant the Motion.

³⁴ Response, KSC-BC-2020-06/F02419, paras 28-29. The *Bagosora* decision cited by the Defence is inapposite, as it concerned portions of a sentencing judgment based on a guilty plea.

³⁵ Facts 1, 3, 9-13, 15-16, 20, 29. The references to 'Mr MUSTAFA' in the relevant footnotes of the *Mustafa* Judgment are to Salih MUSTAFA, not Rrustem MUSTAFA (W04746).

³⁶ See para.5 above.

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Monday, 8 July 2024

At The Hague, the Netherlands.