



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
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 21 August 2024

Language: English

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Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts

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TRIAL PANEL II (“Panel”), pursuant to Articles 3(2)(d) and (3), 12, 21 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 95(5), 104(1)(b), 138, 157(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 16 December 2022, Trial Panel I issued its judgment in the case against Mr Salih Mustafa (“*Mustafa Judgment*”).¹
2. On 14 December 2023, the Court of Appeals Panel issued its judgment in the same case.²
3. On 17 and 18 May 2024, the Panel issued two decisions taking judicial notice of adjudicated facts.³
4. On 7 June 2024, the Specialist Prosecutor’s Office (“SPO”) filed a second motion (“*Motion*”) for judicial notice of adjudicated facts.⁴
5. On 1 July 2024, having been granted an extension of time to do so,⁵ the four Defence teams (collectively, “*Defence*”) responded to the SPO Motion

¹ KSC-BC-2020-05, F00494, Trial Panel I, *Trial Judgment (“Mustafa Judgment”)*, 16 December 2022, confidential (a further redacted version of corrected version of public redacted version was filed on 24 January 2024, F00494/RED3/COR).

² KSC-CA-2023-02, F00038, Court of Appeals Panel, *Appeal Judgment (“Mustafa Appeal Judgment”)*, 14 December 2023, confidential (a public redacted version was filed on the same day, F00038/RED).

³ F01534, Panel, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (“Decision on Prosecution Adjudicated Facts”)*, 17 May 2023, with Annex 1, confidential, and Annex 2, public; F01536, Panel, *Decision on Defence Motion for Judicial Notice of Adjudicated Facts (“Decision on Defence Adjudicated Facts”)*, 18 May 2023, with Annex 1.

⁴ F02365, Specialist Prosecutor, *Prosecution Second Motion for Judicial Notice of Adjudicated Facts*, confidential, 7 June 2024, with Annex 1, confidential (public redacted versions of the Motion and Annex 1 to the Motion were filed on 10 June 2024, F02365/RED and F02365/A01/RED).

⁵ F02390, Panel, *Decision on Joint Defence Request for Extension of Time to Respond to Prosecution Second Motion for Judicial Notice of Adjudicated Facts (F02365)*, 19 June 2024.

(“Response”).⁶

6. On 8 July 2024, the SPO replied to the Response (“Reply”).⁷

II. SUBMISSIONS

7. The SPO requests the Panel to take judicial notice of 172 facts adjudicated in the *Mustafa* case before the Kosovo Specialist Chambers (“Proposed Adjudicated Facts”)⁸ which, it submits, are relevant to this case.⁹ The SPO submits that the Proposed Adjudicated Facts: (i) relate to matters at issue in the current proceedings;¹⁰ (ii) do not relate to the acts and conduct of the accused as charged in the confirmed indictment;¹¹ (iii) are distinct, concrete, and identifiable;¹² (iv) do not differ in any substantial way from the formulation of the *Mustafa* Judgment;¹³ (v) are not unclear or misleading in the context in which they are placed in the Motion;¹⁴ (vi) do not contain legal findings or characterisations;¹⁵ (vii) are not based on an agreement between the *Mustafa* parties;¹⁶ (viii) are not subject to pending appeals;¹⁷ and (ix) will facilitate fair and expeditious proceedings, and promote judicial economy.¹⁸

⁶ F02419, Specialist Counsel, *Joint Defence Response to Second Prosecution Motion for Judicial Notice of Adjudicated Facts*, 1 July 2024, confidential, with Annex 1, confidential (public redacted versions of the Response and Annex 1 to the Response were filed on 4 July 2024, F02419/RED and F02419/A01/RED).

⁷ F02434, Specialist Prosecutor, *Prosecution Reply to ‘Joint Defence Response to Second Prosecution Motion for Judicial Notice of Adjudicated Facts’*, 8 July 2024, confidential (a public redacted version was filed on the same day, F02434/RED).

⁸ Annex 1 to the Motion.

⁹ Motion, paras 1, 21.

¹⁰ Motion, paras 3, 5-6.

¹¹ Motion, paras 3, 7-8.

¹² Motion, paras 3, 9.

¹³ Motion, paras 3, 10-11.

¹⁴ Motion, paras 3, 12.

¹⁵ Motion, paras 3, 13.

¹⁶ Motion, paras 3, 14.

¹⁷ Motion, paras 3, 15-16.

¹⁸ Motion, paras 1, 3, 17-19.

8. The Defence opposes the admission of further adjudicated facts and rejects the suggestion that their admission will promote judicial economy or expeditiousness.¹⁹ The Defence responds that the Panel should reject the Motion as premature in light of the pending request for protection of legality in the *Mustafa* case.²⁰ In the alternative, the Defence submits that the Panel should ask the SPO to identify, adjudicated fact per adjudicated fact, which witness(es) it will not call if a given adjudicated fact is accepted. The Defence avers that, failing this, the Proposed Adjudicated Facts should not be admitted on the basis of efficiency.²¹ In addition, the Defence opposes the following categories of facts (“Categorical Objections”):

- (i) facts concerning the acts and conduct of the accused;²²
- (ii) core contested facts concerning alleged subordinates in relation to incidents that directly impact on the accused’s responsibility (“C2 Objections”);²³
- (iii) facts which fail to cite to clearly identified evidential sources (“C3 Objections”);²⁴
- (iv) facts which are based on evidence that is either anonymous or not-disclosed in this case (“C4 Objections”);²⁵
- (v) facts based on statements from suspects who never testified, statements of co-Accused, or witnesses who cannot be compelled to testify such as deceased witnesses;²⁶

¹⁹ Response, paras 6, 17-23, 25, 29-30.

²⁰ Response, paras 15-16, 30.

²¹ Response, paras 6, 24.

²² Response, para. 26 C1. The Panel notes that Annex 1 to the Response contains no “C1” objection, *see* para. 17 below.

²³ Response, para. 26 C2. *See also* Annex 1 to the Response.

²⁴ Response, para. 26 C3. *See also* Annex 1 to the Response.

²⁵ Response, para. 26 C4. *See also* Annex 1 to the Response.

²⁶ Response, para. 26 C5. The Panel notes that Annex 1 to the Response contains no “C5” objection, *see* para. 17 below.

- (vi) facts where the language is too vague/ambiguous to be relied upon, without reference 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 (“C6 Objections”);²⁷
- (vii) facts which are comprised of evidential descriptions rather than factual findings (“C7 Objections”);²⁸
- (viii) facts which employ legal characterizations concerning the ultimate findings of fact (“C8 Objections”);²⁹
- (ix) facts which were not disputed in the first set of proceedings or which were taken from judgments that were not appealed (“C9 Objections”);³⁰ and
- (x) facts based on evidence or witness testimony, which the SPO intends to submit in this case (“C10 Objections”).³¹

9. The SPO replies that the Proposed Adjudicated Facts satisfy all applicable criteria and are therefore appropriate for judicial notice.³² The SPO rejects the Defence’s submissions that noticed adjudicated facts have not resulted in reduction to the SPO’s witness or exhibit lists.³³ It submits that noticed adjudicated facts have served and will continue to serve judicial economy in this case.³⁴ The SPO avers that, if the Motion is granted, it will be able to remove four witnesses from its witness list and tender the evidence of one witness (previously Rule 154), pursuant to Rule 153.³⁵ The SPO avers that taking judicial notice of the Proposed Adjudicated Facts would serve the purposes of Rule 157(2).³⁶ To the Categorical

²⁷ Response, para. 26 C6. *See also* Annex 1 to the Response.

²⁸ Response, para. 26 C7. *See also* Annex 1 to the Response.

²⁹ Response, para. 26 C8. *See also* Annex 1 to the Response.

³⁰ Response, paras 26 C9, 27-28. *See also* Annex 1 to the Response.

³¹ Response, para. 26 C10. *See also* Annex 1 to the Response.

³² Reply, paras 1, 6, 8.

³³ Reply, para. 2.

³⁴ Reply, paras 2, 4.

³⁵ Reply, para. 3.

³⁶ Reply, paras 2-5.

Objections, the SPO replies that they: (i) misrepresent the Proposed Adjudicated Facts, the *Mustafa* Judgment, the applicable criteria and the jurisprudence;³⁷ and (ii) were already considered and rejected by the Panel in the first Decision on Prosecution Adjudicated Facts.³⁸ Lastly, the SPO reiterates that the Panel should grant the Motion.³⁹

III. APPLICABLE LAW

10. The Panel incorporates by reference the applicable law and general considerations set out in its previous decisions.⁴⁰

IV. DISCUSSION

A. PREMATURE NATURE OF THE MOTION

11. The SPO submits that the factual findings in the *Mustafa* Judgment are final and ripe for judicial notice under Rule 157(2).⁴¹ The SPO argues that requests for extraordinary remedies, such as the pending *Mustafa* Defence's request for protection of legality ("Request for Protection of Legality"),⁴² follow "final" judgments.⁴³ According to the SPO, it follows that the pending Request for Protection of Legality does not impact the Panel's authority under Rule 157(2).⁴⁴

12. The Defence responds that, since one of the remedies sought in the Request for Protection of Legality is to return the case for a retrial,⁴⁵ the Proposed

³⁷ Reply, para. 6.

³⁸ Reply, para. 6.

³⁹ Reply, para. 8.

⁴⁰ Decision on Prosecution Adjudicated Facts, paras 10-13, 17-18; Decision on Defence Adjudicated Facts, paras 13-16, *see also* paras 39-43.

⁴¹ Motion, para. 15.

⁴² KSC-SC-2024-02, F00011, Specialist Counsel, *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.

⁴³ Motion, para. 16.

⁴⁴ Motion, para. 16.

⁴⁵ Request for Protection of Legality, para. 117(ii).

Adjudicated Facts are not final but subject to pending review. In the Defence's view, it follows that the Panel cannot take judicial notice of the Proposed Adjudicated Facts.⁴⁶

13. The Panel notes that, since the Parties filed their submissions, the Supreme Court Chamber rendered its decision on the Request for Protection of Legality.⁴⁷ The Supreme Court Chamber: (i) partly granted the Request for Protection of Legality; (ii) annulled *Mustafa* Appeal Judgment "only insofar as it relates to Mr Mustafa's sentence"; and (iii) returned *Mustafa* Appeal Judgment to the Appeals Panel "for a new determination of Mr Mustafa's sentence pursuant to Rule 194(1)(b)".⁴⁸

14. The Panel also notes that, pursuant to Rule 193 and Article 48(6) to (8) of the Law, a "party may request protection of legality within three (3) months of the final judgment [...] against which protection of legality is sought". The Panel recalls that the Court of Appeals Panel issued the *Mustafa* Appeal Judgment on 14 December 2023.⁴⁹ Therein, the Court of Appeals Panel rejected all appeal grounds challenging the Trial Panel's findings in the *Mustafa* Judgment.⁵⁰

15. The Panel observes that a request for protection of legality shall *not* be filed on the ground of an erroneous determination of the facts of the case.⁵¹ Lastly, the Panel notes that the Supreme Court Chamber returned *Mustafa* Appeal Judgment only for a new determination of Mr Mustafa's sentence.⁵² It therefore follows that the Proposed Adjudicated Facts, which emanates from the *Mustafa* Judgment, are from "final proceedings" and are not "subject to pending appeals".

⁴⁶ Response, para. 2.

⁴⁷ KSC-SC-2024-02, F00018, Supreme Court Chamber, *Decision on Salih Mustafa's Request for Protection of Legality* ("Decision on Request for Protection of Legality"), 29 July 2024.

⁴⁸ Decision on Request for Protection of Legality, para. 112.

⁴⁹ See *supra* para. 2, footnote 2.

⁵⁰ *Mustafa* Appeal Judgment, paras 483-484.

⁵¹ Rule 193(3).

⁵² Decision on Request for Protection of Legality, para. 112(e).

16. Accordingly, the Panel considers that the Motion is not premature. The Panel rejects the Defence's argument to the contrary.

B. EVALUATION OF PROPOSED ADJUDICATED FACTS

17. The Panel will start by addressing the Defence Categorical Objections. At the outset, the Panel observes that although the Defence lists ten Categorical Objections, Annex 1 to the Response contains no identifiable objection "C1" or "C5". The Panel will therefore not address these objections.

18. With regard to the C2 Objections,⁵³ the Panel recalls that 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.⁵⁴ Notably, facts that are not related, directly or indirectly, to the Accused's criminal responsibility are, in essence, not relevant to matters at issue in the proceedings. It follows that judicial notice under Rule 157(2) is only available for adjudicated facts that "bear, at least in some respect, on the criminal responsibility of the accused".⁵⁵ The Panel is satisfied that all Proposed Adjudicated Facts impugned by a C2 Objection were made in respect of Mr Salih Mustafa and/or his subordinates, and not in respect of any of the Accused in this case. Accordingly, the Panel rejects the C2 Objections.

⁵³ Response, para. 26 C2; Annex 1 to the Response, C2 Objections: "core contested facts concerning alleged subordinates in relation to incidents that directly impact on the accused's responsibility".

⁵⁴ Decision on Prosecution Adjudicated Facts, para. 24. See also ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73(C), Appeals Chamber, [Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice](#) ("Karemera Decision"), 16 June 2006, paras 48-53; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber II, [Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts](#) with Annex, 26 September 2006, para. 13; *Prosecutor v. Mladić*, IT-09-92, Appeals Chamber, [Decision on Ratko Mladić's Appeal Against the Trial Chamber's Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts](#), 12 November 2013, paras 82-87.

⁵⁵ [Karemera Decision](#), para. 45.

19. With regard to the C3 Objections,⁵⁶ the Panel recalls that the lack of express citations to supporting evidence does not prevent a Panel from taking judicial notice of adjudicated facts, provided that they satisfy the requirements for taking judicial notice.⁵⁷ In any event, the Panel observes that, when read in the context of the *Mustafa* Judgment, the basis for the impugned Proposed Adjudicated Facts is clear as they: (i) are either directly supported by evidence or cross-references;⁵⁸ (ii) correspond to a Panel's finding reached on the basis of an holistic analysis of the evidence;⁵⁹ or (iii) follow a detailed reasoning from Trial Panel I.⁶⁰ The Panel therefore rejects the C3 Objections.

20. With regard to the C4 Objections,⁶¹ the Panel notes that it concerns two Proposed Adjudicated Facts.⁶² The Panel observes that the sources to these two impugned Proposed Adjudicated Facts are redacted in the public version of the *Mustafa* Judgment but unredacted in its confidential version.⁶³ The Panel recalls that, further to a Panel's decision, the Defence has access to the unredacted confidential version of the *Mustafa* Judgment.⁶⁴ The Panel therefore considers that the Defence's objections on this ground are without merit.

⁵⁶ Response, para. 26 C3; Annex 1 to the Response, C3 Objections: "facts which fail to cite to clearly identified evidential sources".

⁵⁷ ICTY, Trial Chamber I, *Prosecutor v. Ratko Mladić*, IT-09-92-PT, Trial Chamber I, [First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts](#), 28 February 2012, para. 25.

⁵⁸ See e.g. Proposed Adjudicated Fact 41 referring to *Mustafa* Judgment, para. 423 wherein footnote 861 refers to paragraphs supported by evidence.

⁵⁹ See e.g. Proposed Adjudicated Fact 27 referring to *Mustafa* Judgment, para. 715: "The Panel finds that [...]". See also Proposed Adjudicated Facts 30-31 referring to *Mustafa* Judgment, paras 252, 332: "The Panel sees no reason to doubt the Accused on the gist of the evidence [...]"; Proposed Adjudicated Fact 34 referring to *Mustafa* Judgment, para. 500: "The Panel has established [...]". "Panel considers that the only reasonable conclusion based on the evidence as a whole is [...]".

⁶⁰ See e.g. Proposed Adjudicated Fact 43 referring to *Mustafa* Judgment, para. 454.

⁶¹ Response, para. 26 C4; Annex 1 to the Response, C4 objections "facts based on evidence that is either anonymous or not disclosed in this case".

⁶² Proposed Adjudicated Facts 46-47.

⁶³ See *Mustafa* Judgment, footnotes 1367, 1411 (compare public redacted and confidential versions).

⁶⁴ F02276, Panel, *Decision on Prosecution Request Concerning Access to Confidential Versions of Judgments from Case KSC-BC-2020-05*, 30 April 2024.

21. With regard to the C6 Objections,⁶⁵ the Panel recalls that all the Proposed Adjudicated Facts arise from the *Mustafa* case. When assessing the clarity and specificity of the Proposed Adjudicated Facts, the Panel did so within the context of the geographical, temporal and subject-matter scope of the *Mustafa* case – namely the alleged arbitrary detention, cruel treatment, and torture of at least six persons at the Zllash Detention Compound in Zllash/Zlaš, Kosovo, between approximately 1 April 1999 and 19 April 1999, and the murder of a named person, between approximately 19 April 1999 and around the end of April 1999.⁶⁶ With this in mind, the Panel considers that all the Proposed Adjudicated Facts are distinct, concrete, identifiable, and accurately represent the original finding. The Panel rejects the C6 Objections.

22. With regard to the C7 Objections,⁶⁷ the Panel considers that Proposed Adjudicated Fact 100, as well as the last sentence of Proposed Adjudicated Fact 106,⁶⁸ constitute evidential descriptions more than factual findings *per se*. The Panel therefore exercises its discretion and rejects Proposed Adjudicated Fact 100 and the last sentence of Proposed Adjudicated Fact 106. The Panel is satisfied that the remaining Proposed Adjudicated Facts constitute factual findings. The Panel therefore rejects the remainder of the C7 Objections.

23. With regard to the C8 Objections,⁶⁹ the Panel recalls that to determine whether a proposed fact is a factual finding, the Panel shall ensure through a case-by-case assessment whether the proposed fact contains findings or characterisations which

⁶⁵ Response, para. 26 C6; Annex 1 to the Response, Objections C6 “facts where the language is too vague/ambiguous to be relied upon, without reference 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”.

⁶⁶ See *Mustafa* Judgment, para. 24.

⁶⁷ Response, para. 26 C7; Annex 1 to the Response, objections C7 “Facts comprised of evidential descriptions rather than of factual findings”.

⁶⁸ “Salih Mustafa then said to the other BIA members: “let him be, because [he] is lucky”.

⁶⁹ Response, para. 26 C8; Annex 1 to the Response, C8 Objections “facts which employ legal characterisations concerning the ultimate findings of fact”.

are of an “essentially legal nature”.⁷⁰ First, regarding Proposed Adjudicated Fact 84, the Panel observes that “Murder Victim” is a defined term in the *Mustafa* Judgment and refers to a specific individual.⁷¹ The Panel rejects the Defence’s suggestion that it amounts to a legal characterisation.⁷² Second, the Panel observes that, save for Proposed Adjudicated Facts 37, 63 and 75, the remainder of the Proposed Adjudicated Facts impugned by a C8 Objections are contained in the factual findings section of the *Mustafa* Judgment.⁷³ The Panel is therefore satisfied that these facts consist of findings which are not essentially legal in nature. Lastly, having assessed the remainder of the impugned Proposed Adjudicated Facts on a case-by-case basis, the Panel is satisfied that the terms used therein are used in a factual sense and not in a judicial characterisation. The Panel therefore rejects the C8 Objections.

24. With regard to the C9 Objections,⁷⁴ the Panel observes that the four Proposed Adjudicated Facts impugned on this ground are supported by evidence.⁷⁵ Regardless of whether Mr Salih Mustafa had an interest in contesting these facts, the Panel is of the view that they are not based on an agreement between the Parties. Rather, these four Proposed Adjudicated Facts are findings reached by Trial Panel I on the basis of evidence presented during the *Mustafa* trial. Accordingly, the Panel rejects the C9 Objections.

25. With regard to C10 Objections,⁷⁶ the Panel recalls that taking judicial notice of adjudicated facts establishes a well-founded presumption of the accuracy of these

⁷⁰ *Mustafa* Appeal Judgment, para. 61.

⁷¹ *Mustafa* Judgment, para. 24.

⁷² See Annex 1 to the Response, C8 Objection regarding Fact 84.

⁷³ See Annex 1 to the Response, C8 Objections.

⁷⁴ Response, paras 26 C9, 27-28. See also Annex 1 to the Response, C9 Objections “facts which were not disputed in the first set of proceedings or taken from judgments that were not appealed”.

⁷⁵ See *Mustafa* Judgment, para. 334, footnotes 656 and 659; para. 339, footnote 676; para. 342, footnote 694. See also Proposed Adjudicated Facts 1, 3, 11, 20.

⁷⁶ Response, para. 26 C10; Annex 1 to the Response, C10 Objections “facts which are based on evidence of witness testimony which the SPO intends to submit in this case”.

facts, which therefore do not have to be proven again at trial.⁷⁷ However, it does not eliminate the burden that rests upon the SPO to prove material facts relevant to its case beyond reasonable doubt. Subject to the need to avoid unnecessary repetitions in the evidence and to ensure that proceedings are not unduly prolonged, it is therefore important that the Panel be provided with evidence of all facts relevant to this case, in particular in respect of facts that are in dispute between the parties. For this reason, provided that the other criteria are satisfied, the Panel is not persuaded that the circumstance that certain facts are based on the evidence of witness testimony that the SPO intends to submit in the current proceedings precludes taking judicial notice of these facts. The Panel also recalls that taking judicial notice of adjudicated facts does not affect the right and ability of the Defence to challenge any factual allegation that forms part of the Prosecution case or any fact that has been judicially noted by the Panel.⁷⁸ Indeed, the Defence will be in a position to challenge at trial the accuracy of the facts with which it takes issue.⁷⁹ The Panel observes that, if the witnesses testify as currently intended by the SPO, the Defence will have the opportunity to cross-examine witnesses who will testify in respects of facts and circumstances subject to the present Motion and which the Defence opposes by means of C10 Objections.⁸⁰ Turning to Proposed Adjudicated Facts 1-3, 9-13, 15-16, 20, 29, for which the Defence argues that they rely upon W04746's evidence, the Panel observes that W04746 did not testify in the *Mustafa* trial. The Panel further observes that the basis of the impugned Proposed

⁷⁷ See e.g. ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Trial Chamber I, [Decision on Prosecution's Motion for Judicial Notice of Facts Relevant to the Srebrenica Crime Base](#), 22 September 2008, para. 21; *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, [Judgement](#), 30 January 2015, para. 620; *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. 25.

⁷⁸ Decision on Prosecution Adjudicated Facts, para. 26.

⁷⁹ Decision on Prosecution Adjudicated Facts, para. 13.

⁸⁰ For example, the Defence will be able to cross-examine W04484 and W04485 regarding Proposed Adjudicated Fact 21; W04485 and W04600 regarding Proposed Adjudicated Fact 22; W04600 and W04485 regarding Proposed Adjudicated Fact 29; W03593 regarding Proposed Adjudicated Facts 38, 46, 64, 84, 100-108, 135-136; and all Proposed Adjudicated Facts relating to W01679, if W01679's evidence is not tendered pursuant to Rule 153.

Adjudicated Facts is not W04746 but Mr Salih Mustafa. The Panel therefore rejects the C10 Objections.

26. In addition to the individual review of each of the Defence Categorical Objections, the Panel conducted an individualised, fact by fact, analysis of all Proposed Adjudicated Facts. Where a proposed fact contained several sentences and/or factual propositions, the Panel considered each of them. The Panel verified whether each Proposed Adjudicated Fact met the requirements of the Rules and, where it did, whether judicial notice should nevertheless be refused in the exercise of the Panel's discretion.

27. The Panel recalls that it declined to take judicial notice of Proposed Adjudicated Fact 100 and the last sentence of Proposed Adjudicated Fact 106.⁸¹ Having reviewed each of the remaining Proposed Adjudicated Facts individually, the Panel is satisfied that all of them: (i) come from other proceedings of the Specialist Chambers, namely from the *Mustafa* case; (ii) relate to matters at issue in the current proceedings; and (iii) meet the requirements of Rule 157(2) as they do not relate to the acts and conduct of the Accused as charged in the indictment. With regard to the latter, the Panel notes that the Defence does not submit that any of the Proposed Adjudicated Facts relate to the acts and conduct of the Accused.⁸²

28. The Panel is also of the view that Proposed Adjudicated Facts 1-42, 44-91, 93-99, 101-105, 106,⁸³ 108-162, 164-171: (i) are distinct, concrete, and identifiable; (ii) do not differ in any substantial way from the formulation of the original judgement; (iii) are not unclear or misleading in the context in which they are placed in the moving Party's motion; (iv) do not contain legal findings or characterisations; (v) are not based on an agreement between the Parties to the original proceedings; and (vi) are not subject to pending appeal or review. The Panel is satisfied that

⁸¹ See paras 21-22 above.

⁸² Annex 1 to the Response contains no C1 objection. See also para. 17 above.

⁸³ Save for the last sentence, see para. 22 above.

these Proposed Adjudicated Facts should be judicially noted.

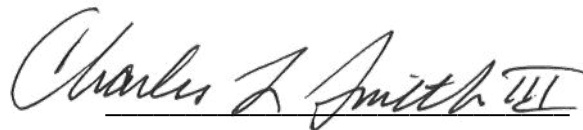
29. However, the Panel finds that Proposed Adjudicated Facts 43, 92, 163 and 172 will not assist the Panel in fulfilling its fact-finding functions. The Panel therefore exercises its discretion and declines to take judicial notice of these proposed adjudicated facts.

30. Lastly, as reflected in the Annex to this decision, the Panel has exercised its discretion to *proprio motu* remove one word from Proposed Adjudicated Fact 159. Similarly, the Panel observes that a portion of Proposed Adjudicated Fact 165 merely repeats a portion of Proposed Adjudicated Fact 164. For this reason, the Panel removed the repetitive words from Proposed Adjudicated Fact 165.

V. DISPOSITION

31. For the above-mentioned reasons, the Panel hereby:

- a) **GRANTS** the Motion, in part;
- b) **TAKES JUDICIAL NOTICE** of the following Proposed Adjudicated Facts, as they appear in Annex 1 to the present decision: 1-42, 44-91, 93-99, 101-162, and 164-171; and
- c) **DECLINES** to take judicial notice of the following Proposed Adjudicated Facts, or parts thereof: 43, 92, 100, 106 (last sentence), 163 and 172.



Judge Charles L. Smith, III

Presiding Judge

Dated this Wednesday, 21 August 2024

At The Hague, the Netherlands.