



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

In: KSC-BC-2020-05
Specialist Prosecutor v. Salih Mustafa

Before: Trial Panel I
Judge Mappie Veldt-Foglia, Presiding
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 30 June 2021

Language: English

Classification: Public

Prosecution's motion for judicial notice of adjudicated facts

with public Annex 1

Specialist Prosecutor's Office

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Victims' Counsel

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A. INTRODUCTION

1. Pursuant to Article 21(4)(d) of the Law¹ and Rule 157 of the Rules,² the Specialist Prosecutor's Office ('SPO') hereby requests the Trial Panel ('Panel') to take judicial notice of facts relevant to this case which have been adjudicated in trials before the International Criminal Tribunal for the former Yugoslavia and Kosovo courts. The adjudicated facts for which the SPO is seeking judicial notice are listed in the Annex to this request ('Proposed Facts').
2. On 9 June 2021, the Panel requested the SPO and the Defence to consider whether they could file a joint motion on adjudicated facts by 30 June 2021.³
3. On 24 June 2021, the SPO sent a proposed list of facts to the Defence for consideration. On 29 June 2021, the Defence informed the SPO that they were not in agreement with any of the proposed adjudicated facts. The filing of a joint motion pursuant to Rule 157 is therefore not a practicable option.

B. SUBMISSIONS

4. Rule 157 allows the Panel, either *proprio motu* or upon request by a party, to take judicial notice of adjudicated facts from, *inter alia*, final proceedings in other jurisdictions, where the facts relate to matters at issue in the current proceedings and to the extent that they do not relate to the acts and conduct of the Accused as charged in the indictment.
5. Taking judicial notice of adjudicated facts aims at avoiding presentation of evidence in relation to facts that have been previously established in other

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all references to 'Article(s)' are to the Law.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule(s)' are to the Rules.

³ Transcript of Pre-Trial Conference, KSC-BC-2020-05, 9 June 2021, pp.249-250.

proceedings on the basis of evidence presented.⁴ It is a measure aimed at achieving judicial economy.⁵ By taking judicial notice of an adjudicated fact, a trier of fact establishes a well-founded presumption for the accuracy of this fact, which does not need to be proven again at trial.⁶ This presumption may however be rebutted with evidence.⁷

6. As elaborated below, the Proposed Facts satisfy the requirements for judicial notice: (i) they are relevant, factual in nature and identified with sufficient precision;⁸ (ii) they arise from final proceedings before other jurisdictions;⁹ and (iii) they do not relate to the acts and conduct of the Accused as charged in the Indictment.¹⁰
7. The Proposed Facts are relevant to the existence of an armed conflict between the Kosovo Liberation Army ('KLA') and forces of the former Yugoslavia fighting jointly with Serbian forces. To the extent that some of the Proposed Facts pre-date the period covered by the Indictment, they are relevant to the level of organization

⁴ ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-A, Decision on Judicial Notice, 29 October 2010, para.7; ICTY *Prosecutor v. Mladić*, IT-09-92-PT, Fourth Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts concerning the Rebuttal Evidence Procedure, 2 May 2012, para.13.

⁵ *Prosecutor v. Setako*, ICTR-04-81-A, Appeal Judgement, 28 September 2011, para.200.

⁶ ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-A, Decision on Judicial Notice, 29 October 2010, para.7.

⁷ *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, Appeal Judgement, 4 December 2012, para.261.

⁸ Rule 157. See similarly, ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1-AR73.1, Decision on Judicial Notice, 26 June 2007, para.13; *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Decision on Judicial Notice, 1 April 2005, para.55; ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-A, Decision on Judicial Notice, 29 October 2010, para.12.

⁹ Rule 157. For a fact to be considered as 'adjudicated' it needs to have been determined in a final judgement, with either no appeal having been lodged against its determination, or, if appealed, the fact in question has been upheld. *Prosecutor v. Setako*, ICTR-04-81-A, Appeal Judgement, 28 September 2011, para.200; *Prosecutor v. Kupreškić*, IT-05-16-A, Decision on the Motion of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence pursuant to Rule 115 and for Judicial Notice to be taken pursuant to Rule 94(B), 9 May 2001, para.6.

¹⁰ Rule 157; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Decision on Judicial Notice, 16 June 2006, paras 47-52.

of the KLA¹¹ and provide relevant contextual information to the allegations in this case.¹²

8. The Proposed Facts are identified with sufficient precision in the Annex by the indication of the paragraph number or page of the relevant judgment from which they are sourced.¹³ Further, they were adjudicated by the relevant judicial bodies on the basis of evidence presented at trial.¹⁴
9. Each of the Proposed Facts are taken from the judgements in the ICTY cases of *Dorđević* and *Milutinović*,¹⁵ and from the cases of *Latif Gashi et al.* and *Selim Krasniqi et al.*,¹⁶ tried before Kosovo courts. On appeal, these facts were either not contested by the parties or were upheld by the appellate body.¹⁷
10. The Proposed Facts do not relate directly to the acts and conduct of the Accused, although they bear, at least in some respect, on his alleged criminal responsibility. This is not a bar to their admission. As noted by the ICTR Appeals Chamber in *Karemera*, the purpose of a criminal trial is to establish an accused's criminal

¹¹ The presence of a command structure, the existence of a general staff, the issuance of political communiqués and of regulations, the ability to carry out large scale attacks, or the existence of headquarters, to make a few examples, are all indicators of the level of organization of an armed group, which is a requirement for the existence of an internal armed conflict, see e.g. ICTY, *Prosecutor v. Bošković and Tarčulovski*, IT-04-82-T, Judgement, 10 July 2008, paras 199-200.

¹² For the relevance of adjudicated facts outside the temporal scope of the indictment see ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1-AR73.1, Decision on Judicial Notice, 26 June 2007, para.14.

¹³ *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Decision on Judicial Notice, 1 April 2005, para.55.

¹⁴ Agreed facts that were not established on the basis of evidence cannot be deemed adjudicated facts and are not susceptible of judicial notice, see ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-A, Decision on Judicial Notice, 29 October 2010, para.11.

¹⁵ ICTY, *Prosecutor v. Dorđević*, IT-05-87/1-T, Judgement, 23 February 2011; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Judgement, 26 February 2009.

¹⁶ Pristina Basic Court, *Latif Gashi et al.*, P. no 448/2012, Judgment, 7 June 2013; Supreme Court of Kosovo, *Selim Krasniqi et al.*, Ap. KS. No. 371/2008, Judgment.

¹⁷ ICTY, *Prosecutor v. Dorđević*, IT-05-87/1-A, Judgement, 27 January 2014; *Prosecutor v. Sainović*, IT-05-87-A, Judgement, 23 January 2014; Pristina Court of Appeals, *Latif Gashi et al.*, PAKR 440/13, Judgment, 11 August 2015, p.18; Supreme Court of Kosovo, *Latif Gashi et al.*, Plm Kzz. 18/2016, Judgment, 13 May 2016; Supreme Court of Kosovo, *Selim Krasniqi et al.*, Ap. KS. No. 371/2008, Judgment, p.12.

responsibility; hence, facts that are not in some way related to this issue would not be relevant in a trial.¹⁸

C. RELIEF REQUESTED

11. Based on the foregoing, the SPO requests the Panel to take judicial notice of the facts listed in the Annex to this Application pursuant to Rule 157.

Word count: 1,292



Jack Smith

Specialist Prosecutor

Wednesday, 30 June 2021

At The Hague, the Netherlands.

¹⁸ *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Decision on Judicial Notice, 16 June 2006, paras 47-52.