



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** **KSC-BC-2020-05**

**The Prosecutor v. Salih Mustafa**

**Before:** **Trial Panel I**

Judge Mappie Veldt-Foglia, Presiding Judge

Judge Roland Dekkers

Judge Gilbert Bitti

Judge Vladimir Mikula, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 07 September 2021

**Language:** English

**Classification:** **Public**

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**Decision on judicial notice of adjudicated facts**

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**To be notified to:**

**Specialist Prosecutor**

Jack Smith

**Counsel for the Accused**

Julius von Bóné

**Victims' Counsel**

Anni Pues

**TRIAL PANEL I** (Panel)<sup>1</sup> hereby renders this decision on judicial notice of adjudicated facts.

## I. PROCEDURAL BACKGROUND

1. On 20 May 2021, the Panel issued the “Decision setting the dates for trial preparation conferences and requesting submissions”, in which the Panel requested submissions from the Specialist Prosecutor’s Office (SPO) and the Defence for Salih Mustafa (Mr Mustafa or Accused) on the possibility to request the Panel to take judicial notice of adjudicated facts and, if so, for how many facts.<sup>2</sup>

2. On 9 June 2021, during the trial preparation conference, the Parties informed the Panel that *inter partes* discussions on adjudicated facts were ongoing.<sup>3</sup> Further, the Parties indicated that they would be in a position to make either a joint or separate request(s), depending on whether they would be able to agree or not, seeking judicial notice of adjudicated facts, if any, by the end of June 2021.<sup>4</sup>

3. On 18 June 2021 the Panel issued the “Decision setting the date for the commencement of the trial and related matters”, in which it ordered the SPO and the Defence to file, by 30 June 2021, joint and/or separate submissions requesting the Panel to take judicial notice of any adjudicated facts.<sup>5</sup>

4. On 29 June 2021, the Defence for Mr Mustafa informed the Panel that it had not reached an agreement with the SPO on a joint proposal requesting the Panel to

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<sup>1</sup> KSC-BC-2020-05, F00114, President, *Decision assigning Trial Panel I*, 5 May 2021, public.

<sup>2</sup> KSC-BC-2020-05, F00123, Trial Panel I, *Decision setting the dates for trial preparation conferences and requesting submissions*, 20 May 2021, public, para. 10, point 7, with Annexes 1-2, strictly confidential and *ex parte*.

<sup>3</sup> KSC-BC-2020-05, Transcript, 9 June 2021 (9 June 2021 Transcript), public, p. 239, line 11 to p. 240, line 14.

<sup>4</sup> 9 June 2021 Transcript, p. 240, line 24 to p. 244, line 13.

<sup>5</sup> KSC-BC-2020-05, F00138, Trial Panel I, *Decision setting the date for the commencement of the trial and related matters*, 18 June 2021, public, para. 8.

take judicial notice of adjudicated facts and that it did not request the Panel to take judicial notice of any adjudicated facts.<sup>6</sup>

5. On 30 June 2021, the SPO proposed a list of adjudicated facts and sought judicial notice thereof (SPO Request).<sup>7</sup> The Defence for Mr Mustafa did not file a response to the SPO Request.

## II. APPLICABLE LAW

6. The Panel notes Article 40(2) and (6) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office and Rules 116(1) and 157(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

## III. SUBMISSIONS OF THE PARTIES

7. The SPO requests the Panel to take judicial notice of 52 adjudicated facts (Proposed Facts) relevant to the case from final proceedings before Kosovo courts and the International Criminal Tribunal for the former Yugoslavia.<sup>8</sup> The SPO submits that the Proposed Facts satisfy the requirements for judicial notice since they are relevant, factual in nature and identified with sufficient precision; they arise from final proceedings before other jurisdictions; and they do not relate to the acts and conduct of the Accused as charged in the (confirmed) indictment.<sup>9</sup>

8. The Defence for Mr Mustafa submits that it has the intention to present (expert) evidence on the nature of the conflict, the forces acting therein, and the legitimacy

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<sup>6</sup> KSC-BC-2020-05, F00142, Defence, *Defence submission on adjudicated facts* (Defence Submission), 29 June 2021, public, paras 2-3.

<sup>7</sup> KSC-BC-2020-05, F00144, Specialist Prosecutor, *Prosecution's motion for judicial notice of adjudicated facts*, 30 June 2021, public, with Annex 1, public, containing the list of adjudicated facts the SPO is requesting the Panel to take judicial notice thereof.

<sup>8</sup> SPO Request, para. 1 and Annex 1.

<sup>9</sup> SPO Request, para. 6.

of the aggressive forces operating on the territory of Kosovo, which it believes to lead to a re-assessment and re-qualification of the aforementioned issues and events.<sup>10</sup>

#### IV. DISCUSSION

##### A. LEGAL TEST

9. Rule 157(2) of the Rules aims at achieving judicial economy (“in the interests of a fair and expeditious trial”) by conferring on the Trial Panel discretionary power to 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, thus avoiding the presentation of evidence in relation to facts that have been previously established in these other proceedings on the basis of evidence presented.<sup>11</sup> In so doing, the Panel must ensure, at the same time, respect for the accused's right to a fair and expeditious trial, as required by Rule 157(2) of the Rules.

10. In exercising its discretion, the Panel will consider, *inter alia*, the following factors: (i) the proposed facts do not relate to the acts and conduct of the Accused as charged in the confirmed indictment, and relate to matters at issue in the current proceedings, as stipulated in Rule 157(2) of the Rules; (ii) the proposed facts are distinct, concrete, and identifiable;<sup>12</sup> (iii) the proposed facts, as formulated by the

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<sup>10</sup> Defence Submission, para. 4.

<sup>11</sup> Similarly, ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Accused's Motion for Judicial Notice of Adjudicated Facts related to count one](#) (Karadžić Decision), 21 January 2014, para. 4; ICTR, Appeals Chamber, *Prosecutor v. Bagosora et al.*, ICTR-98-41-A, [Decision on Anatole Nsengiyumva's Motion for Judicial Notice](#), 29 October 2010, para. 10.

<sup>12</sup> Similarly, ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Trial Chamber I, [Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo](#), 26 June 2008, para. 18; *Prosecutor v. Prlić et al.*, IT-04-74-PT, Trial Chamber II, [Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94\(b\)](#) (Prlić Decision), 14 March 2006, para. 12; *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-T, Trial Chamber II, [Decision on Judicial Notice of Adjudicated Facts Following the Motions Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005](#) (Hadžihasanović Decision), 14 April 2005, p. 5.

moving Party, do not differ in any substantial way from the formulation of the original judgement;<sup>13</sup> (iv) the proposed facts are not unclear or misleading in the context in which they are placed in the moving Party's motion;<sup>14</sup> (v) the proposed facts do not contain legal findings or characterisations;<sup>15</sup> (vi) the proposed facts are not based on an agreement between the Parties to the original proceedings;<sup>16</sup> and (vii) the proposed facts are not subject to pending appeals or reviews.<sup>17</sup>

11. By taking judicial notice of adjudicated facts, the Panel establishes a well-founded presumption for the accuracy of these facts, which therefore do not have to be proven again at trial.<sup>18</sup> Since it is a presumption, the other Party may present at trial proof which challenges the accuracy of the facts concerned.<sup>19</sup>

## B. ADJUDICATED FACTS

12. The Panel notes that the proposed facts relate mainly to the existence of an armed conflict (Proposed Facts 1-6) between the Kosovo Liberation Army (KLA)

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<sup>13</sup> Similarly, ICTY, [Karadžić Decision](#), para. 6; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber II, [Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex](#) (Popović Decision), 26 September 2006, para. 7; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Trial Chamber I, [Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence](#) (Blagojević Decision), 19 December 2003, para. 16.

<sup>14</sup> Similarly, ICTY, [Popović Decision](#), para. 8.

<sup>15</sup> Similarly, ICTY, [Popović Decision](#), para. 10; [Prlić Decision](#), para. 12; [Hadžihasanović Decision](#), p. 5; [Blagojević Decision](#), para. 16.

<sup>16</sup> Similarly, ICTY, *Prosecutor v. Krajišnik*, IT-00-39-PT, Trial Chamber I, [Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis](#), 28 February 2003, para. 14; [Popović Decision](#), para. 11.

<sup>17</sup> Similarly, ICTY, *The Prosecutor v. Ratko 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 92, 94; [Popović Decision](#), para. 14.

<sup>18</sup> Similarly, ICTY, *Prosecutor v. S. Milošević*, IT-02-54-AR73.5, Appeals Chambers, [Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts](#), 28 October 2003 (Milošević Decision), p. 3; [Karadžić Decision](#), para. 5; SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, [Decision on Sesay Defence Application for Judicial Notice to be taken of Adjudicated Facts under Rule 94\(b\)](#), 23 June 2008, para. 18.

<sup>19</sup> Similarly, ICTY, [Hadžihasanović Decision](#), p. 4; [Milošević Decision](#), p. 3; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, [Appeal Judgement](#), 4 December 2012, para. 261.

(*Ushtria Çlirimtare e Kosovës*) (Proposed Facts 32-52) and forces of the former Federal Republic of Yugoslavia fighting jointly with Serbian forces (Proposed Facts 7-31).

13. After having carefully assessed the Proposed Facts (1-52) against the criteria set out in paragraph 10 above, the Panel is of the opinion that all Proposed Facts (1-52) meet the requirements as rehearsed above. To the extent that some of the Proposed Facts pre-date the period covered by the indictment, the Panel considers them to be relevant to the level of organization of the KLA and to provide contextual information on the allegations in this case.<sup>20</sup>

14. As a result, the Panel finds that taking judicial notice of the aforementioned facts serves the interests of justice and of a fair and expeditious trial. Accordingly, it takes judicial notice of the Proposed Facts (1-52). This finding is without prejudice to the Defence of Mr Mustafa presenting evidence and challenging the accuracy of the Proposed Facts (1-52).

## V. DISPOSITION

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

- a. **GRANTS** the SPO Request; and
- b. **TAKES** judicial notice of the Proposed Facts (1–52) as contained in Annex 1 to the SPO Request.

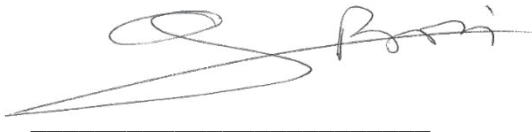
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<sup>20</sup> SPO Request, para. 4.



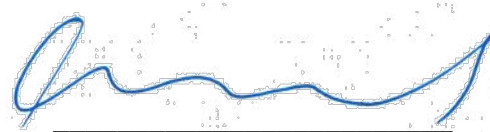
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**Judge Mappie Veldt-Foglia**  
**Presiding Judge**



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**Judge Gilbert Bitti**



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**Judge Roland Dekkers**

Dated this 7 September 2021  
At The Hague, the Netherlands.