



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: Acting Specialist Prosecutor

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**Prosecution motion for judicial notice of adjudicated facts
with confidential Annexes 1-2**

Specialist Prosecutor's Office

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagenda

I. INTRODUCTION

1. Pursuant to the Order,¹ Article 21(4)(d) of the Law,² and Rule 157 of the Rules,³ 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 ('ICTY') and Kosovo courts. The facts for which the SPO is seeking judicial notice are listed in Annex 1 to this motion (collectively, 'Proposed Facts').⁴ Taking judicial notice of the Proposed Facts will promote judicial economy, is in the interests of justice and respects the rights of the Accused to a fair, public and expeditious trial. The Proposed Facts fulfil the requirements of Rule 157 in that they are relevant, clear and unambiguous, as illustrated below.

II. SUBMISSIONS

2. Rule 157(2) provides the Trial Panel with discretionary power, upon request by a party or *proprio motu*, to take judicial notice of adjudicated facts from other Specialist Chambers ('SC') proceedings or from final proceedings before Kosovo courts or other jurisdictions, with a view to promoting judicial economy.⁵ Adjudicated facts of which

¹ Trial Preparation Conference, Transcript, 18 January 2023, p.1903 (setting the deadline for motions on adjudicated facts (Rule 157(2)) to 1 March 2023 at 16.00) ('Order'). The SPO intends to file a separate motion requesting judicial notice of facts of common knowledge in due course, noting that certain facts proposed as adjudicated facts in Annex 1 are likewise capable of judicial notice, in the alternative, under Rule 157(1). As noted previously, the SPO may file a further motion for adjudicated facts, for instance after the conclusion of the appellate proceedings in Case 5. See Trial Preparation Conference, Transcript, 18 January 2023, p.1791.

² 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.

³ 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.

⁴ Annex 2 includes the relevant trial and appeal judgments.

⁵ Rule 157(2) ('in the interests of a fair and expeditious trial'). See also *Specialist Prosecutor v. Mustafa*, Decision on judicial notice of adjudicated facts, KSC-BC-2020-05/F00191, 7 September 2021 ('*Mustafa* Judicial Notice Decision'), para.9; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010 ('*Karadžić* Decision on Fifth Motion for Judicial Notice'), para.12; ICTR, *Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-

judicial notice can be taken are findings of fact made in the context of proceedings between other parties on the basis of the evidence those parties chose to introduce.⁶ By taking judicial notice of adjudicated facts, the Panel establishes a presumption of accuracy of the relevant facts, which do not have to be proven at trial.⁷ The other party may, however, present evidence to rebut this presumption.⁸ The practice of taking judicial notice of adjudicated facts is well-established in the jurisprudence of international courts.⁹

3. As elaborated in further detail below, the Proposed Facts satisfy all relevant criteria: (i) they relate to matters at issue in the current proceedings;¹⁰ (ii) they do not relate to the acts and conduct of the accused as charged in the confirmed indictment;¹¹ (iii) they are distinct, concrete, and identifiable;¹² (iv) as formulated by the moving

AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ('Karemera Appeals Decision'), para.39.

⁶ ICTY, *Prosecutor v. Mladić*, IT-09-92-PT, First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 February 2012 ('Mladić First Decision'), para.23; *Karemera Appeals Decision*, para.40.

⁷ This does not impact the Prosecution's burden to prove the charges.

⁸ *Mustafa Judicial Notice Decision*, KSC-BC-2020-05/F00191, para.11; *Karemera Appeals Decision*, para.42.

⁹ *See, inter alia*, IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019 ('Karadžić Appeal Judgment'), para.118.

¹⁰ Rule 157(2); *Mustafa Judicial Notice Decision*, KSC-BC-2020-05/F00191, para.10(i); ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for Judicial Notice of Adjudicated Facts Related to Count One, 21 January 2014 ('Karadžić Decision on Judicial Notice Related to Count one'), para.6(a); ICTY, *Prosecutor v. Mladić*, IT-09-92-AR73.1, 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 ('Mladić Appeals Decision'), para.25(i); ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 26 September 2006 ('Popović Adjudicated Facts Decision'), para.5.

¹¹ Rule 157(2); *Mustafa Judicial Notice Decision*, KSC-BC-2020-05/F00191, para.10(i); *Karadžić Decision on Judicial Notice Related to Count one*, para.6(h); *Mladić Appeals Decision*, para.25(viii); *Karemera Appeals Decision*, para.50; *Popović Adjudicated Facts Decision*, para.12.

¹² *Mustafa Judicial Notice Decision*, KSC-BC-2020-05/F00191, para.10(ii); *Karadžić Decision on Judicial Notice Related to Count one*, para.6(b); *Mladić Appeals Decision*, para.25(ii); *Popović Adjudicated Facts Decision*, para.6. Proposed facts must be identified with adequate precision by the moving party. *See Karadžić Decision on Judicial Notice Related to Count one*, para.6(e); *Mladić Appeals Decision*, para.25(v); *Popović Adjudicated Facts Decision*, para.9; ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Decision on the Motions 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), 8 May 2001, para.12.

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

4. Accordingly, judicial notice of the Proposed Facts ensures an appropriate balance between judicial economy and the fundamental right of the Accused to a fair trial.¹⁸

¹³ *Mustafa* Judicial Notice Decision, KSC-BC-2020-05/F00191, para.10(iii); *Karadžić* Decision on Judicial Notice Related to Count one, para.6(c); *Mladić* Appeals Decision, para.25(iii); *Popović* Adjudicated Facts Decision, para.7.

¹⁴ *Mustafa* Judicial Notice Decision, KSC-BC-2020-05/F00191, para.10(iv); *Karadžić* Decision on Judicial Notice Related to Count one, para.6(d); *Mladić* Appeals Decision, para.25(iv); *Popović* Adjudicated Facts Decision, para.8.

¹⁵ *Mustafa* Judicial Notice Decision, KSC-BC-2020-05/F00191, para.10(v); *Karadžić* Decision on Judicial Notice Related to Count one, para.6(f); *Mladić* Appeals Decision, para.25(vi); *Popović* Adjudicated Facts Decision, para.10.

¹⁶ *Mustafa* Judicial Notice Decision, KSC-BC-2020-05/F00191, para.10(vi); *Karadžić* Decision on Judicial Notice Related to Count one, para.6(g); *Mladić* Appeals Decision, para.25(vii); *Popović* Adjudicated Facts Decision, para.11.

¹⁷ *Mustafa* Judicial Notice Decision, KSC-BC-2020-05/F00191, para.10(vii); *Karadžić* Decision on Judicial Notice Related to Count one, para.6(i); *Mladić* Appeals Decision, para.25(ix); *Popović* Adjudicated Facts Decision, para.14.

¹⁸ See *Mustafa* Judicial Notice Decision, KSC-BC-2020-05/F00191, para.9; ICTY, *Prosecutor v. Nikolić*, IT-02-60/1-A, 'Decision on Appellant's Motion for Judicial Notice', 1 April 2005, para.12; *Karemera* Appeals Decision, para.39.

i. The Proposed Facts relate to matters at issue in the current proceedings

5. The Proposed Facts relate ‘to a material issue’ in the case, as found in the Indictment.¹⁹ For each Proposed Fact, Annex 1 includes a reference to corresponding Pre-Trial Brief²⁰ and Indictment²¹ paragraphs, demonstrating the relevance thereof.²²

6. The Proposed Facts set out in Sections I (Background) provide relevant historical context, *inter alia*, in the lead up to the armed conflict (Section II) and creation and evolution of the relevant political groups and armed forces (Sections III-VII).²³ The Proposed Facts set out in, *inter alia*, Sections II (Armed Conflict), III (FRY Forces), and VII (KLA) directly relate to the existence of an armed conflict in Kosovo during the indictment period, including the level of organisation of the KLA.²⁴ Further, the Proposed Facts set out in, *inter alia*, Sections IV (LDK), V (FARK), and VI (LPK) relate to groups and parties relevant not only to the historical background, but also to the alleged JCE. Proposed Facts set out in Sections VIII-XVI bear upon the alleged crimes

¹⁹ See *Karadžić* Decision on Fifth Motion for Judicial Notice, para.18; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para.17; ICTR, *Prosecutor v. Semanza*, ICTR-97-20-A, Judgement, 20 May 2005, para.189 ([t]he Appeals Chamber affirms that Rule 94 of the Rules is not a mechanism that may be employed to circumvent the ordinary requirement of relevance and thereby clutter the record with matters that would not otherwise be admitted’); *Popović* Adjudicated Facts Decision, para.5.

²⁰ Prosecution submission of corrected Pre-Trial Brief and related request with strictly confidential and ex parte Annexes 1 and 3 and confidential Annex 2, KSC-BC-2020-06/F00709, 24 February 2022, Annex 2, confidential (‘Pre-Trial Brief’).

²¹ Submission of confirmed amended Indictment with strictly confidential and ex parte Annex 1, confidential Annex 2, and public Annex 3, KSC-BC-2020-06/F00999, 30 September 2022, Annex 3 (‘Indictment’).

²² Such citations are not intended to be exhaustive.

²³ *Mustafa* Judicial Notice Decision, KSC-BC-2020-05/F00191, para.13; *Mladić* First Decision, para.34.

²⁴ Indictment, KSC-BC-2020-06/F00999, para.18; Pre-Trial Brief, KSC-BC-2020-06/F00709, paras 697-701. 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 organisation of an armed group, which is a requirement for the existence of an internal armed conflict. See Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026/RED, 26 October 2020, para.87.

committed at various locations, as charged in the Indictment.²⁵ Finally, Section XVII²⁶ includes Proposed Facts relevant to proof of, *inter alia*, a pattern, widespread or systematic attack, existence and implementation of the alleged common purpose, and/or a campaign of persecution, as alleged in the Indictment.²⁷

ii. The Proposed Facts do not relate to the acts and conduct of the accused

7. Rule 157(2) excludes the possibility of taking judicial notice of facts concerning the acts and conduct of the Accused as charged in the Indictment.²⁸ As held by an ICTY Trial Chamber, '[t]his exclusion focuses narrowly on the deeds, behaviour, and mental state of the accused – that is, on the conduct of the accused fulfilling the physical and mental elements of the form of responsibility through which he or she is charged with responsibility.'²⁹ The Proposed Facts do not concern the deeds, behaviour, and mental state of the Accused. In particular, Sections VIII-XVII concern

²⁵ Judicial notice of such facts, which concern the acts of others, including alleged JCE members and tools, and subordinates of the Accused is permitted, as addressed in the following section. *See, for example, Karemera Appeals Decision, para.52.* In this respect, adjudicated facts, considered alone or in conjunction with other evidence forming part of the record, may be relied upon in reaching findings on crimes committed by persons other than the Accused. *See, for example, Karadžić Appeal Judgment, para.452, fn.1194.*

²⁶ *See also* Section IX(F).

²⁷ Indictment, KSC-BC-2020-06/F00999, paras 17, 59, 113, 138; Pre-Trial Brief, KSC-BC-2020-06/F00709, paras 267, 702-707. *See, similarly, ICTY, Prosecutor v. Dragomir Milošević, IT-98-29/1-AR73.1, Decision on Interlocutory Appeal against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 ('D.Milošević Interlocutory Appeal Decision'), paras 14 (finding facts falling outside the time period charged in the indictment and relating to the acts and conduct of the accused's predecessor relevant to the case inasmuch as they concerned the shelling and sniping campaign against civilians which the accused inherited and furthered with his own conduct), 16 (the Appeals Chamber saw no reason why judicial notice could not be taken of adjudicated facts as to the existence of crimes committed by others and which the accused is not charged with), 18 (considering that the Trial Chamber committed a discernible error when it found that taking judicial notice would be inconsistent with the accused's rights and refused to take judicial notice of proposed facts relating to the existence of crimes committed by others and for which the accused was not charged). Circumstantial evidence – including of uncharged incidents – is relevant to proving a course of conduct, such as a criminal campaign. *See, for example, ICTY, Prosecutor v. Galić, IT-98-29-A, Judgement, 30 November 2006, paras 216-219, 224.**

²⁸ *Karemera Appeals Decision, para.52; D.Milošević Interlocutory Appeal Decision, para.16; Mladić Appeals Decision, para.80.*

²⁹ *Popović Adjudicated Facts Decision, para.13 (emphasis added). See also D.Milošević Interlocutory Appeal Decision, para.16; Mladić Appeals Decision, paras 82-87; Karemera Appeals Decision, para. 52.*

crimes committed by alleged JCE members and tools, and subordinates of the Accused. Many of such Proposed Facts were reached in previous proceedings concerning the direct responsibility of these persons and taking judicial notice is in the interests of justice, judicial economy, and the fair and expeditious conduct of the proceedings.³⁰ Doing so will enable the Panel and Parties to focus the presentation of evidence on the responsibility of the Accused for such crimes.

iii. The Proposed Facts are distinct, concrete, and identifiable

8. The Proposed Facts are sufficiently concrete, distinct and identifiable, when examined in the context of the original judgment, with ‘specific reference to the place referred to in the judgment and to the indictment period of that case.’³¹ The Proposed Facts reflect the factual findings resulting from the assessment of the evidence introduced in the original proceedings, not discussions of evidence,³² or subjective qualifications.³³ In keeping with the language of the findings, certain Proposed Facts do not explicitly include reference to precise names, dates, or geographical locations, however, in context, this information is identifiable and available by reference to, *inter alia*, the temporal and geographical scope of the relevant charges addressed in each judgment, as well as from surrounding Proposed Facts, which provide context.

iv. The Proposed Facts do not differ in any substantial way from the formulation of the original judgement

9. The Proposed Facts do not carry a ‘substantially different meaning than the adjudicated fact in the original judgment’.³⁴ In certain cases, Proposed Facts were

³⁰ See also Section II.ix below.

³¹ *Karadžić* Decision on Fifth Motion for Judicial Notice, para.23; *Karadžić* Decision on Judicial Notice Related to Count one, para.12; *Popović* Adjudicated Facts Decision, para.6.

³² *Mladić* First Decision, para.24.

³³ *Mladić* First Decision, para.27.

³⁴ *Karadžić* Decision on Fifth Motion for Judicial Notice, para.29.

reformulated or paraphrased to render them clearer. As reformulated, they remain consistent with the meaning intended by the original chamber.³⁵

10. Each of the Proposed Facts are taken from the judgements in the ICTY cases of *Limaj*, *Milutinović*, *Dorđević*, and *Haradinaj*,³⁶ and from cases tried before Kosovo courts.³⁷ On appeal, these facts were either not contested by the parties or were upheld by the relevant appellate body.³⁸ While one of the trial judgments cited was not appealed by the parties,³⁹ it followed an earlier trial judgment and appeal judgment, concerning the same crimes.

v. The Proposed Facts are not unclear or misleading in the context in which they are placed in the moving party's motion

11. Having regard to the surrounding Proposed Facts,⁴⁰ the Proposed Facts are neither unclear, nor misleading as extrapolated from the original judgment, and placed in the context of this motion.⁴¹ They are clear and consistent with the original judgments and with each other, in the context in which they are placed.

³⁵ *Popović* Adjudicated Facts Decision, para.7; *Karadžić* Decision on Fifth Motion for Judicial Notice, paras 29, 31.

³⁶ *Prosecutor v. Fatmir Limaj*, IT-03-66-T, Judgment, 30 November 2005; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Judgment, 26 February 2009; ICTY, *Prosecutor v. Dorđević*, IT-05-87/1-T, Judgment, 23 February 2011; *Prosecutor v. Ramush Haradinaj*, IT-04-84bis-T, Judgment, 29 November 2012.

³⁷ The relevant trial and appeal judgments are set out in Annex 2. Certain of these judgments include redactions or pseudonyms. The SPO has requested unredacted and/or certified versions and, if and when received, such versions will be submitted. However, the use of initials, pseudonyms, and redactions does not impact on the relevance or reliability of the Proposed Facts, when considered in context. Where possible, by way of footnote in Annex 1, the SPO has provided full names of the relevant persons, whose names were not included in the published versions of the judgments. In certain cases, judgments in the same case were not consistent, with one providing full names and one providing initials or pseudonyms. In such cases, the Proposed Facts are phrased consistently with the relevant judgment itself.

³⁸ See Annex 2.

³⁹ See ICTY, *Prosecutor v. Ramush Haradinaj*, IT-04-84bis-T, Judgment, 29 November 2012.

⁴⁰ See *Karadžić* Decision on Fifth Motion for Judicial Notice, para.40; *Popović* Adjudicated Facts Decision, para.8.

⁴¹ *Popović* Adjudicated Facts Decision, para.8; *Karadžić* Decision on Fifth Motion for Judicial Notice, paras 40-43.

vi. The Proposed Facts do not contain legal findings or characterisations

12. The Proposed Facts do not contain findings or conclusions which are of an essentially legal nature.⁴² While terms such as ‘not taking active part in hostilities’,⁴³ ‘conflict’,⁴⁴ or ‘armed group’,⁴⁵ have a ‘legal aspect’ in the broad sense of the term, they are not used in the original judgments in such a way as to render the facts essentially legal in nature.⁴⁶

vii. The Proposed Facts are not based on an agreement between the parties to the original proceedings

13. None of the Proposed Facts are based on an agreement between the parties; rather, they reflect factual findings made by competent judicial bodies during trials, with the parties able to confront and challenge witnesses and documentary evidence concerning the underlying facts.

viii. The Proposed Facts are not subject to pending appeals or reviews

14. All Proposed Facts are final determinations made by the relevant courts and tribunals, and are not subject to any pending appeals or reviews.⁴⁷

ix. The Proposed Facts will expedite proceedings

15. As also set out above, judicial notice of the Proposed Facts will promote judicial economy and ultimately advance the fair and expeditious conduct of these proceedings. If judicial notice is taken, the Panel will be able to assign weight to and take into consideration the findings of multiple other chambers, at the ICTY and in Kosovo, that have evaluated evidence of factual matters relevant to this case. Further, depending on the Defence’s position on and the nature of each Proposed Fact, the SPO

⁴² *Karadžić* Decision on Fifth Motion for Judicial Notice, para.46; *Karadžić* Decision on Judicial Notice Related to Count one, para.8.

⁴³ *See, for example*, fact 405.

⁴⁴ *See, for example*, fact 118.

⁴⁵ *See* fact 42.

⁴⁶ *See Karadžić* Decision on Fifth Motion for Judicial Notice, para.47; *Mladić* First Decision, para.37.

⁴⁷ *See also* para.10 above. The relevant appeal judgments, including those not specifically referenced in Annex 1, are set out in Annex 2 to facilitate review by the Panel and Defence.

may take various measures that could ultimately streamline these proceedings. For example, the SPO may decide: (i) not to introduce certain evidence; (ii) to further reduce its direct examination time estimates for certain witnesses; and/or (iii) that the evidence of further witnesses may be tendered under Rules 153-154.

16. As reflected in its Pre-Trial Brief and witness and exhibit lists, the SPO intends to present evidence on many of the same matters concerned by the Proposed Facts. The SPO bears the burden of proof and, considering the Defence's right to present reliable and credible evidence to rebut the Proposed Facts, the SPO has a corresponding right to seek to produce evidence to prove the Proposed Facts, even if judicially noticed.⁴⁸ Indeed, in most cases, the same evidence is relevant not only to the Proposed Facts, but other matters at issue in this case. Any attempt to segment such evidence would be artificial and threaten any fulsome assessment of the record at the end of the proceedings. Thus, the Panel's ability to consider the Proposed Facts – which is consistent with legislative intent that such judgments in prior proceedings be considered, where consistent with the rights of the Accused⁴⁹ – together with any evidence presented on the same or related matters will ultimately serve the interests justice and ensure that relevant facts and evidence are available to the Panel when ultimately reaching its judgment in light of the totality of the record.

III. CLASSIFICATION

17. Annexes 1 and 2 are confidential as they contain, *inter alia*, versions of Kosovo judgments not publicly available and/or information redacted or omitted from the

⁴⁸ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, paras 24-25; *Karadžić Appeal Judgment*, paras 128-133, 452-453, 459. *See also* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgment, 24 March 2016, paras 27-31 (setting out its approach to adjudicated facts, including that it considered the totality of the record (including adjudicated facts and evidence) and recalling that it did not serve the interests of justice to preclude the Prosecution from bringing witnesses to give evidence that overlapped with the content of adjudicated facts because the Defence could challenge any and all of the adjudicated facts during its case).

⁴⁹ Rule 157. *See also* Article 37.

public versions of the relevant Kosovo judgments. A public version of Annex 1 will be submitted.

IV. RELIEF REQUESTED

18. Based on the foregoing, the SPO requests the Panel to take judicial notice of the Proposed Facts pursuant to Rule 157(2).

Word count: 3487



Alex Whiting

Acting Specialist Prosecutor

Wednesday, 1 March 2023

At The Hague, the Netherlands.