



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 Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Acting Specialist Prosecutor

**Date:** 31 March 2023

**Language:** English

**Classification:** Public

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**Prosecution response to 'Joint Defence Motion for Judicial Notice of Adjudicated Facts'**

**with public Annex 1**

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## I. INTRODUCTION

1. The Motion<sup>1</sup> should be dismissed in part. At least 80 of the 134 of the proposed facts – as formulated by the Defence – do not meet the requirements for judicial notice under Rule 157(2) of the Rules.<sup>2</sup> In Annex 1,<sup>3</sup> for each of the proposed facts, the Specialist Prosecutor’s Office (‘SPO’) indicates its objection(s) to the proposed facts and the grounds for the objection, including comments where necessary.

## II. SUBMISSIONS

2. As set out below and in Annex 1, the objectionable facts, which should be rejected, (a) are irrelevant; (b) merely recite or summarise evidence (and therefore do not constitute factual findings); (c) are of an essentially legal nature; (d) differ in a substantial way from the formulation in the judgment they purportedly emerge from; (e) are vague or imprecise; and/or (f) are based on qualified or negative findings reached on the basis of the absence or insufficiency of evidence.

### A. PROPOSED FACTS RELATING TO CRIMES BY SERBIAN FORCES ARE IRRELEVANT TO A MATERIAL ISSUE IN THIS CASE

3. Sixty-two proposed facts relating to crimes by Serbian forces are irrelevant to a material issue in this case<sup>4</sup> and do not meet the requirements of Rule 157.<sup>5</sup> The SPO

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<sup>1</sup> Joint Defence Motion for Judicial Notice of Adjudicated Facts with Public Annex A, KSC-BC-2020-06/F01331, 1 March 2023 (‘Motion’).

<sup>2</sup> 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’ or ‘Rules’ are to the Rules. The applicable law has been set out previously. See Prosecution motion for judicial notice of adjudicated facts, KSC-BC-2020-06/F01330, 1 March 2023 (‘Prosecution Motion’), paras 2-4.

<sup>3</sup> Annex 1 is a version of Annex A to the Motion (KSC-BC-2020-06/F01331/A01), modified to include a column entitled ‘Prosecution Objection(s)’.

<sup>4</sup> At Annex 1, under the column entitled ‘Prosecution Objection(s)’, the relevant objection is noted with the term ‘relevance’.

<sup>5</sup> Rule 157(2); *Specialist Prosecutor v. Mustafa*, Decision on judicial notice of adjudicated facts, KSC-BC-2020-05/F00191, 7 September 2021 (‘*Mustafa* Judicial Notice Decision’), para.10(i); ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Motion for Judicial Notice of Adjudicated Facts Related

has already agreed that ‘serious Serbian crimes [were] being committed during the relevant time’.<sup>6</sup> While it is open to the Defence to demonstrate that a given incident is relevant, it must do so on an individual and specific basis.<sup>7</sup> Submissions that facts relating to crimes by Serbian forces go – without further specification<sup>8</sup> – generally to ‘self-defence’, ‘the level of organization of the KLA<sup>[9]</sup> throughout the Indictment period’, and ‘important historical and contextual information’<sup>10</sup> are inadequate. The Defence’s failure to provide any further reasons for the purported relevance of such proposed facts speaks volumes.

**i. The proposed facts relating to crimes by Serbian forces are not relevant to self-defence.**

4. Proposed facts purportedly related to ‘self-defence’ are based on a faulty premise and should be rejected.

5. The Defence argues that facts ‘related to attacks on Kosovo Albanian civilians’ are relevant to the defence of self-defence, which the Thaçi Defence notified on 20 February 2023.<sup>11</sup> The Thaçi Defence recently clarified that he raises self-defence only (directly) in relation to allegations of illegal or arbitrary arrest and detention in Count

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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.

<sup>6</sup> Transcript (Status Conference), 16 December 2026, p.1725.

<sup>7</sup> See, similarly, Transcript (Status Conference), 16 December 2026, pp.1725-1726. See also Order on the Conduct of Proceedings, KSC-BC-2020-06/F012226/A01 (*Conduct of Proceedings Order*), para.104.

<sup>8</sup> The Motion merely states generally that the ‘attacks on Kosovo Albanian civilians [...] occurred in geographical and temporal proximity to the events and the charges in this case’. See Motion, KSC-BC-2020-06/F01331, para.9.

<sup>9</sup> Kosovo Liberation Army (‘KLA’).

<sup>10</sup> Motion, KSC-BC-2020-06/F01331, para.9. See also para.8.

<sup>11</sup> Motion, KSC-BC-2020-06/F01331, para.9, referring to Thaçi Notice of Defence, KSC-BC-2020-06/F01306, 20 February 2023 (*Notice*). See also Decision on Thaçi Defence Request for Leave to Reply to Prosecution Response to Thaçi Notice of Defence, KSC-BC-2020-06/F01357, 9 March 2023, para.10 (noting that the Parties will have the opportunity to state their position regarding the defence of self-defence in submissions relating to the Motion).

3 of the Indictment.<sup>12</sup> It is therefore apparently common ground between the Parties that self-defence cannot be a defence to the other war crimes and crimes against humanity charged in the Indictment, which followed arrests and detentions.<sup>13</sup> In this respect, the Defence does not argue that self-defence applies to the crime against humanity of imprisonment, as charged in Count 2 of the Indictment, despite the fact that both Counts 2 and 3 are based on the same underlying criminal conduct.

6. The Thaçi Defence wrongly asserts that self-defence can be invoked to justify any unlawful detention in the context of this case.<sup>14</sup> The Thaçi Defence has accepted that it bears the burden of demonstrating the existence and scope of the alleged self-defence;<sup>15</sup> its absence is not an element of a crime that the SPO must prove beyond reasonable doubt.<sup>16</sup> Defence submissions focus exclusively on the legal basis or right of the KLA to detain.<sup>17</sup> Whether the detentions were in fact unlawful is not a matter of self-defence;<sup>18</sup> rather, the lawfulness of detentions goes to the elements of the crime.<sup>19</sup>

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<sup>12</sup> Transcript (Status Conference), 20 March 2023, pp.2083-2114. The Thaçi Defence contended that self-defence is relevant to the remaining counts only insofar as they may be imputed to him under the extended form of joint criminal enterprise liability (JCE III).

<sup>13</sup> See also Transcript (Status Conference), 20 March 2023, pp.2092-2094, 2111.

<sup>14</sup> Notice, KSC-BC-2020-06/F01306, para.2 ('At all times relevant to the indictment period, Mr. Thaçi undertook actions (1) in response to imminent and unlawful use of force by [Serbian forces]; and (2) in defence of protected persons and property, including the civilian population of Kosovo'); Transcript (Status Conference), 20 March 2023, pp.2083-2114.

<sup>15</sup> Transcript (Status Conference), 20 March 2023, pp.2095-2096.

<sup>16</sup> ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004 ('Kordić Appeal Judgment'), para.838.

<sup>17</sup> Transcript (Status Conference), 20 March 2023, pp.2086-2089, 2108-2019.

<sup>18</sup> Transcript (Status Conference), 20 March 2023, pp.2099-2100, 2103-2105, 2110.

<sup>19</sup> Contrary to Defence arguments about the lack of clarity concerning the elements of arbitrary detention (see Transcript (Status Conference), 20 March 2023, *inter alia*, pp.2112-2114), such elements, which are broadly consistent with the elements of the crime against humanity of imprisonment, have been clearly set out in decisions and judgments of this court. See, *inter alia*, Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, KSC-BC-2020-06/F00026, 26 October 2020, Strictly Confidential and *Ex Parte*, paras 93-97; *Specialist Prosecutor v. Mustafa*, Public redacted version of Trial Judgment, KSC-BC-2020-05/F00494/RED, 16 December 2022, paras 646-651. See also Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", KSC-BC-2020-06/IA009/F00030, 23 December 2021 ('Jurisdiction Appeal Decision'), para.98 ('the Panel is satisfied that the Pre-Trial Judge did not err in concluding that there exists a set of basic, minimum guarantees, stemming from IHL that are of a CIL nature and must be afforded to any person detained, regardless of the legality of their detention and of the international or

It does not show that, carrying out otherwise unlawful detentions, the Accused acted: (i) reasonably in response to an imminent and unlawful use of force against an attack on a protected person or property; or (ii) in a manner proportionate to the degree of danger.<sup>20</sup>

7. Regardless of whether there is a legal basis or right to detain in the context of a non-international armed conflict, the Accused are charged with arbitrary detention as a serious violation of Common Article 3 to the Geneva Conventions based on the requirement of humane treatment.<sup>21</sup> It is trite law that military operations in self-defence do not provide a justification for serious IHL violations.<sup>22</sup> Insofar as the Taçi

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non-international nature of the armed conflict, the violation of which constitutes a serious violation of Common Article 3'); Transcript (Status Conference), 20 March 2023, pp.2116-2117.

<sup>20</sup> ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgment, 26 February 2001, paras 450-451. See also Transcript (Status Conference), 20 March 2023, pp.2097-2098.

<sup>21</sup> Jurisdiction Appeal Decision, KSC-BC-2020-06/IA009/F00030, paras 95 (considering that (i) the fact that international humanitarian law ('IHL') does not explicitly provide for authorisation to detain in a non-international armed conflict does not necessarily mean that such conduct is prohibited; and (ii) there might be other sources besides IHL that could provide for such legal basis), 96-98 (whether there is a legal right to detain does not affect a finding that arbitrary detention constitutes a serious violation of IHL), 109, 111.

<sup>22</sup> See, for example, ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Judgement, 19 May 2010, paras 31-32 (finding, *inter alia*, (i) that resort to force in self-defence in an internal armed conflict does not, in and of itself, prevent the qualification of crimes committed therein as serious violations of IHL and (ii) that the crimes concerned were serious violations of IHL, irrespective of the question of whether the forces to which the accused belonged were conducting a lawful operation in self-defence); ICTY, *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, para.28 (noting that in light of the fact that the prohibition against attacking civilians is absolute, the accused's action could not be justified by any argument that the military action was in self-defence); ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para.42 ('a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the laws applicable in armed conflict which comprise in particular the principles and rules of humanitarian law'); ICRC, Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, para.1927 ('the right of self-defence does not include the use of measures which would be contrary to international humanitarian law, even in a case where aggression has been established and recognized as such by the Security Council. The Geneva Conventions of 1949 and this Protocol must be applied in accordance with the Article 1 "in all circumstances"; the Preamble of the Protocol reaffirms that their application must be "without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict"). Similar considerations apply where military necessity is invoked as a defence. See ICTY, *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006 ('*Galić* Appeal Judgment'), para.130; ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, para.275; *Kordić* Appeal Judgement, para.54; ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 ('*Blaškić* Appeal Judgment'), para.109.

Defence agrees that the ‘ultimate question’ is whether arbitrary detention is a serious IHL violation,<sup>23</sup> this issue has already been settled by the Court of Appeals.<sup>24</sup>

8. As the self-defence raised in the Notice and the Motion revolves around irrelevant matters and is not substantiated, it is invalid and proposed facts (or evidence) advanced on this basis should not be accepted.<sup>25</sup>

**ii. Proposed facts relating to Serbian crimes are not relevant to KLA organisation.**

9. The Defence further argues that the proposed facts which relate to Serbian crimes are ‘relevant to the level of organization of the KLA throughout the indictment period’.<sup>26</sup> While the meaning of this argument is not apparent on its face, the Thaçi Defence recently submitted that the ‘conduct of Serbian forces’ and ‘chaotic circumstances’ created by Serbian offensives and crimes are related to the question of effective control.<sup>27</sup>

10. However, chaotic circumstances cannot excuse or mitigate serious international crimes; to consider otherwise risks mitigating the conduct of all personnel in a war zone, as conflicts are, by their very nature, chaotic.<sup>28</sup> Participants in a conflict are expected to reduce chaos and respect IHL.<sup>29</sup> Further, a commander is expected to order lawful combat operations and has the duty to work towards an effective chain of command.<sup>30</sup>

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<sup>23</sup> Transcript (Status Conference), 20 March 2023, p.2098.

<sup>24</sup> Jurisdiction Appeal Decision, KSC-BC-2020-06/IA009/F00030, paras 96-98, 109, 111.

<sup>25</sup> Conduct of Proceedings Order, KSC-BC-2020-06/F012226/A01, para.104.

<sup>26</sup> Motion, KSC-BC-2020-06/F01331, para.9.

<sup>27</sup> Transcript (Status Conference), 20 March 2023, pp.2090-2091, 2096, 2106-2107.

<sup>28</sup> *Blaškić* Appeal Judgment, para.711. *See also* para.7 above.

<sup>29</sup> *Blaškić* Appeal Judgment, para.711 (noting further that ‘the Appeals Chamber sees neither merit nor logic in recognising the mere context of war itself as a factor to be considered in the mitigation of the criminal conduct of its participants’).

<sup>30</sup> *Galić* Appeal Judgment, para.418 (concerning the Accused’s argument that he received command of a subordinate unit ‘practically in a state of chaos’).

11. The Defence refers to the *Orić* Trial Judgment<sup>31</sup> to support its arguments that the conduct of the Serbian forces and related chaos is relevant to effective control.<sup>32</sup> However, Defence submissions ignore the full reasoning and the unique circumstances of that case. The *Orić* Chamber, first, found that there was insufficient, direct evidence of the Accused's effective control over the perpetrators.<sup>33</sup> It was only after reaching that conclusion that it considered, not only the chaotic circumstances in Srebrenica (the location of the alleged crimes), but also the erratic behaviour of one of the Accused's alleged subordinates, ultimately finding that the Accused's effective control over the perpetrators had not been proven beyond reasonable doubt.<sup>34</sup>

12. Even if, *arguendo*, facts relating to crimes by Serbian forces were relevant to a material issue – which they are not – the Defence has failed to specifically explain how any individual proposed fact relating to crimes by Serbian forces is directly connected to, *inter alia*, any perpetrator of any charged crime, any charged incident, or any charged site in *this* case.

**iii. It is insufficient to argue that proposed facts concerning crimes by Serbian forces provide context or background.**

13. Insofar as the Defence argues that facts relating to Serbian crimes are relevant to context or background,<sup>35</sup> the Panel has already ruled that it 'will not entertain evidence of Serbian crimes simply because it is said to give a broader and more complete picture of the events in 1998 and 1999 in Kosovo'.<sup>36</sup> Such facts are only tangentially and marginally, if at all, related to this case and judicial notice thereof will

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<sup>31</sup> ICTY, *Prosecutor v. Orić*, IT-03-68-T, Judgement, 30 June 2006 ('*Orić* Trial Judgment').

<sup>32</sup> Transcript (Status Conference), 20 March 2023, pp.2090-2091, 2106.

<sup>33</sup> *Orić* Trial Judgment, para.503. See also ICTY, *Prosecutor v. Orić*, IT-03-68-A, Judgement, 3 July 2008, para.148 (noting that the 'Prosecution's argument appears to be based on the presumption that Orić must have had effective control over the Military Police unless something "negated" such control or "prevented" him from exercising it').

<sup>34</sup> *Orić* Trial Judgment, para.503. See also Transcript (Status Conference), 20 March 2023, p.2106.

<sup>35</sup> Motion, KSC-BC-2020-06/F01331, paras 8-9.

<sup>36</sup> Transcript (Status Conference), 16 December 2026, p.1726.

do nothing to expedite the proceedings, thereby undermining the stated purposes of Rule 157(2).<sup>37</sup>

#### B. PROPOSED FACTS THAT MERELY RECITE EVIDENCE

14. Ten proposed facts are partly or entirely reciting or summarising evidence<sup>38</sup> and thus do not qualify as factual findings.<sup>39</sup> The reference to evidence is either included in the proposed fact, or it was removed from the proposed fact but can be found in the original judgment,<sup>40</sup> which also renders such proposed facts to be inaccurate reformulations.<sup>41</sup>

#### C. PROPOSED FACTS OF AN ESSENTIALLY LEGAL NATURE

15. Eight proposed facts are partly or entirely findings of an essentially legal nature<sup>42</sup> and are therefore not admissible under Rule 157.<sup>43</sup> For instance, these facts contain findings concerning joint criminal enterprise members and common criminal plans alleged in other cases<sup>44</sup> or include legal language – such as ‘directed against [a]

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<sup>37</sup> Rule 157(2) (‘in the interests of a fair and expeditious trial’). *See also* Prosecution Motion, KSC-BC-2020-06/F01330, para.2 (and the sources cited therein).

<sup>38</sup> At Annex 1, under the column entitled ‘Prosecution Objection(s)’, these facts are marked as ‘recitation of evidence’.

<sup>39</sup> *See, similarly*, ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Documents, 25 May 2013, Annex A, Decision column, facts (amongst others) 14, 16, 31, 32, 34, 38, 51, 53.

<sup>40</sup> *See* Annex 1 (facts 13, 43, 46-47, 105, 113, 118-119, 121, 127-128).

<sup>41</sup> *See* Section II(D) below.

<sup>42</sup> At Annex 1, under the column entitled ‘Prosecution Objection(s)’, these facts are marked as ‘legal finding’ or ‘legal characterisation’.

<sup>43</sup> *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. In relation to misleading facts, *see 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.

<sup>44</sup> *See* Annex 1 (facts 14, 15, 20-21).



civilian population', 'effective control', 'widespread', and 'systematic'<sup>45</sup> – that make them inappropriate for judicial notice.<sup>46</sup>

D. PROPOSED FACTS THAT DIFFER IN A SUBSTANTIAL WAY FROM THE FORMULATION IN THE ORIGINAL JUDGMENT

16. Thirteen proposed facts are inaccurately reformulated and ten proposed facts are misleading, including because they are taken out of context,<sup>47</sup> and thereby differ in a substantial way from the formulation of the original judgment.<sup>48</sup> For example, one fact states that 'Serbian forces shelled' a given location; however, the original judgment states that 'the source of the shelling was not identified'.<sup>49</sup> In another case, the proposed fact selectively merges (parts of) sentences – including that merely recite evidence and without relevant context – from three different judgments.<sup>50</sup>

E. PROPOSED FACTS THAT ARE VAGUE AND IMPRECISE

17. Nine proposed facts are vague and/or imprecise,<sup>51</sup> and do not satisfy the requirements of specifically referring to discrete and identifiable factual findings, and/or citing the parts or paragraphs of the judgment proposed for judicial notice.<sup>52</sup>

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<sup>45</sup> See Annex 1 (facts 15, 18-19, 117, 120).

<sup>46</sup> See, similarly, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010, paras 46-49.

<sup>47</sup> At Annex 1, under the column entitled 'Prosecution Objection(s)', these facts are marked with the terms 'inaccurate reformulation' or 'misleading'.

<sup>48</sup> *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.

<sup>49</sup> Annex 1 (fact 92).

<sup>50</sup> Annex 1 (fact 121).

<sup>51</sup> At Annex 1, under the column entitled 'Prosecution Objection(s)', these facts are marked as 'vague' and 'imprecise'.

<sup>52</sup> *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.

## F. PROPOSED FACTS BASED ON QUALIFIED OR NEGATIVE FINDINGS

18. Four of the proposed facts use qualified language or are based on 'negative findings', reached in whole or in part on the absence or insufficiency of evidence in a particular case.<sup>53</sup> Such findings are not findings of fact, but instead declarations of or findings based on doubt inextricably linked to the circumstances of a particular case. Accordingly, such findings are not appropriate for judicial notice.<sup>54</sup>

## III. RELIEF REQUESTED

19. For the reasons stated above and in Annex 1, the Panel should reject those proposed facts that do not meet the requirements for judicial notice under Rule 157(2).

**Word count: 3309**



**Alex Whiting**

**Acting Specialist Prosecutor**

Friday, 31 March 2023

At The Hague, the Netherlands.

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<sup>53</sup> At Annex 1, under the column entitled 'Prosecution Objection(s)', these facts are marked with 'qualified/negative finding'.

<sup>54</sup> See, for example, ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Defence Motion for Judicial Notice of Adjudicated Facts, 4 May 2010, paras 20-21 (declining to take notice of certain facts, noting, *inter alia*, (i) that the relevant finding is formulated negatively, as a finding based on the insufficiency of the evidence and (ii) acknowledgement by the original chamber in reaching the relevant finding of the evidentiary circumstances, including disparities).