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 Christoph Barthe Judge Guénaël Mettraux Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi Specialist Counsel for Kadri Veseli Specialist Counsel for Rexhep Selimi Specialist Counsel for Jakup Krasniqi
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Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts with Confidential Annex 1

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I. INTRODUCTION

1. The Defence teams for Mr Thaçi, Mr Veseli, Mr Selimi, and Mr Krasniqi (collectively, "the Defence") opposes the SPO's attempt to seek judicial notice of an unprecedented number and breadth of adjudicated facts.[1]

2. The concept of 'adjudicated facts' is a sui generis concept, which was developed through the jurisprudence of the ad hoc Tribunals.[2] The concept originates from common law counties, where its use is confined to matters that cannot reasonably be disputed (there are thirty-one days in January, The Hague is a city in The Netherlands). As explained by Judge Hunt, when the concept was introduced into the ICTY Rules of Procedure and Evidence, it was also intended to encompass a similar range of facts of common knowledge:[3]

> The concept of judicial notice was well settled at the time when it was first introduced in Rule 94(A). It was basic to that concept that, because the judicially noticed fact was one which was not the subject of reasonable dispute, evidence of the relevant fact was unnecessary. When Rule 94(B) was added, it used the same expression "judicial notice" as Rule 94(A) had used. Judicial notice was therefore clearly intended to mean the same thing in both paragraphs, that the fact in question is not the subject of reasonable dispute, and thus evidence to establish it is unnecessary. In relation to Rule 94(B), instead of referring to atlases, dictionaries or other reference books (which are not admitted into evidence), the Chamber must look at the judgments to which it is referred by the parties (which likewise are not admitted into evidence). If the fact put forward as one of common knowledge or as a finding made in other proceedings before the Tribunal (called an adjudicated fact) is not the subject of reasonable dispute, judicial notice is taken of the fact of common knowledge or of finding made, but not (in the latter

[1] KSC-BC-2020-06/F01330, Prosecution motion for judicial notice of adjudicated facts with confidential Annexes 1-2, 1 March 2023.
[2] Rule 157(2) of the KSC Rules of Procedure and Evidence is modelled on Rule 94(B) of the ICTY Rules of Procedure and Evidence.
[3] Dissenting opinion, ICTY, *Prosecutor v. Milosevic,* '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, para. 8.

> case) of the evidence upon which that finding was based. The introduction of a discretion in Rule 94(B) which does not exist in Rule 94(A) was no more than a recognition that, in the particular case, taking judicial notice of an adjudicated fact (which then necessarily cannot be challenged) would be unfair to the accused in that case.

3. The concept nonetheless metamorphosed into a type of 'factual presumption' that can be rebutted by the Defence. While such rebuttable presumptions are not inherently incompatible with the presumption of innocence, they must be confined "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".[4] The means must also be proportionate to the aim sought to be achieved.[5] It is dangerous to resort to adjudicated facts to assist the Prosecution to prove elements which they would otherwise find difficult to prove: "If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to produce the information needed to avoid conviction. This would generally be unjust."[6]

4. By the same token, the goal of promoting judicial economy should not run roughshod over the presumption of innocence and the right to confront the evidence being led against the defendant. If the SPO has 'too many' facts to prove within a reasonable time-period, then the case simply needs to be streamlined. Otherwise, it will be impossible for the Defence to investigate and rebut such facts within a time-period that corresponds to the defendant's right to a speedy trial. As recalled in *Krajisnik*:[7]

> the "wholesale nature of the application to admit [a large number of facts] is capable of offending the principle of a fair trial, enshrined in Article 20 and 21 of the Statute of the Tribunal." Moreover, since the

[4] ECHR, *Salabiaku v France, App no.* 10519/83, 7 October 1988, pp. 15-16, § 28.
[5] ECHR, Janosevic v. Sweden, 34619/97, 23 July 2002, para. 101.
[6] Attorney-General's Department (Cth), A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, 2011, p. 50.
[7] ICTY, *Prosecutor v. Krajisnik,* Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, para. 16.

> admission of an adjudicated fact only creates a presumption as to its accuracy, the admission may consume considerable time and resources during the course of the proceedings, thereby frustrating, in practice, the implementation of the principle of judicial economy.

5. The Panel must also give due consideration to the fact that the scope for adjudicated facts at the KSC is far broader than its ICTY antecedents. At the ICTY, there a substantial safety net protecting the fairness of the process: there was one Prosecutor, who had access to all the underlying evidence (and the corresponding duty to disclose relevant materials from this body of evidence), one set of procedural and evidential rules, and one Appeals Chamber to harmonise the application of adjudicated facts across the different cases. In contrast, the KSC rules allow for the hypothetical possibility of facts issued by external international tribunals and domestic courts, which followed different rules of evidence and relied on evidence which is not available to this Panel. The extraordinary breadth of the rule thus militates in favour of a more conservative approach.

6. Accordingly, apart from the requirements set out in Rule 157(2) concerning the existence of a final judgment and the exclusion of facts concerning the acts and conduct of the accused, the Panel has a residual duty to ensure that the admission of specific adjudicated facts does not prejudice a fair and impartial resolution of the charges in this case. The Chamber must also ensure that the use of adjudicated facts is kept within reasonable limits and does not prejudice the impartial resolution of core issues. The use of such presumptions in relation to contested issues must not result in an irrebuttable reversal of the burden of proof, nor should it deprive the defendant of the right to silence during the Prosecution case.[8]

7. In line with these principles, and subject to the overarching requirement of relevance confirmed by the Panel that requires the moving party to demonstrate

[8] ECHR, *Telfner v Austria*, no. 33501/96, 20 March 2001, para. 18.

"more than a tenuous or remote connection to the facts and circumstances of a case,"[9] the Defence opposes both particular categories of facts and individually framed facts on the following grounds, namely that they are:[10]

C1 Facts concerning the acts and conduct of the accused;

C2 Core contested facts concerning alleged subordinates in relation to incidents that directly impact on the accused's responsibility;

C3 Facts which fail to cite to clearly identified evidential sources;

C4 Based on evidence that is either anonymous or not-disclosed in this case;

C5 Based on statements from suspects who never testified, statements of co-accused, or otherwise not compellable, such as deceased witnesses;

C6 Facts which contain language which is too vague/ambiguous to be relied upon, which don't refer 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;

C7 Facts which are comprised of evidential descriptions rather than factual findings;

C8 Facts which employ legal characterisations concerning the ultimate findings of fact;

C9 Facts which were not disputed in the first set of proceedings or which were taken from judgments that were not appealed; and

[9] KSC-BC-2020-06/F01409, Decision on Specialist Prosecutor's Bar Table Motion, 31 March 2023, para. 10, citing with approval ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Trial Chamber, Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts, 1 September 2008, para. 6.

[10] The Defence has set out its position as concerns individual facts in the attached Annex A. Further challenges based on the relevance of this fact, or which do not necessarily fit within these categories are also set out in relation to each proposed fact.

C10 Facts based on evidence or witness testimony, which the SPO intends to submit in this case.

8. Given the sheer scale of the Request, this response focusses on the facts that are particularly contentious, the adoption of which is most likely to prejudice the fair and impartial resolution of the charges in this case. The fact that the Defence has not opposed or addressed specific facts is without prejudice to the Chamber's independent duty to assess whether the relevant criteria are fulfilled and whether there are further discretionary grounds for rejecting the request.

II. SUBMISSIONS

a. Notice of facts concerning the acts and conduct of the accused

9. There is no unanimous position between international courts and tribunals as concerns the definition of the "acts and conduct of the accused". Whereas the ICTY and ICTR, in some decisions, have confined this notion to the personal conduct of the accused, other decisions have adopted a more extensive approach, excluding facts which concerned the conduct of organisations which were affiliated with the defendant.[11] The notion of acts and conduct also extends to evidence that could establish the defendant's knowledge or *mens rea*. For this reason, facts concerning statements or conduct that occurred in the presence of the defendant should be excluded, if they could lead to inferences being drawn concerning the knowledge or intent of the defendant.[12]

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[11] ICTR, *Prosecutor v. Karemera et al*, Decision on Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo, 15 December 2006, ICTR-98-44-T, para. 9: "An Accused need not be specifically named for statements to be held as going to the acts or conduct of the Accused, and in this case, it is the Prosecution's assertions that the Accused committed the crimes charged 'by using their power and authority as high level MRND political party leaders and their status as current or former ministers of government to recruit, indoctrinate, arm, train, and mobilize Hutu militiamen and ordinary Hutu citizens, mostly subsistence farmers, to attack, harm and destroy the Tutsi population of Rwanda during the period 1990- 1994'. The Chamber finds that these expressions, found under each of the four substantive headings in Mr. Serugendo's statement, do go to the acts and conduct of the Accused".

[12] ICTY, *Prosecutor v. Karadžić*, Decision on Prosecution's Third Motion For Admission of Statements and Transcripts of Evidence in Lieu ff Viva Voce Testimony pursuant to Rule 92 *Bis* (Witnesses for

10. Although the ICC does not employ the notion of adjudicated facts, the definition of 'acts and conduct' has been considered in the context of litigation concerning the admission of written statements. In this context, the ICC Appeals Chamber has emphasized that the notion cannot be defined in an overly rigid manner but must take into consideration the specific charges and facts and circumstances of the case:[13]

> Testimony used to prove the accused's acts and conduct may indeed describe the acts and conduct of the accused directly, or it may, for example, describe the acts and conduct of individuals in an organisation that the accused was an integral member of, or of individuals over whom he or she had authority. Depending upon the nature of the allegations, the latter testimony may still fall into the category of evidence that may be used, together with other evidence, to prove acts and conduct of the accused.

11. Domestic war crimes judgments in Bosnia and Herzegovina have also extended the notion of acts and conduct to the conduct of subordinates, in cases where the defendant was charged with superior responsibility for their actions or in connection with a joint criminal enterprise.[14]

12. The ICC and domestic approach is more appropriate for the current case. Like the ICC, the KSC relies on domestic legal frameworks and is more directly bound by human rights precedents, which advocate for a cautious approach to factual presumptions. Given that the defendants have been charged with command responsibility, aiding and abetting, and joint criminal enterprise, the admission of facts concerning criminal conduct of subordinates necessarily impacts on the responsibility of the defendants. The defendants can only rebut such presumptions by

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Sarajevo Municipality), para. 5 . See also ICC, *Prosecutor v. Bemba et al,* Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules, 29 October 2015, ICC-01/05-01/13-1430 para. 8.

[13] ICC, *Prosecutor v. Al Hassan* , Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules", 13 May 2022, ICC-01/12-01/18-2222, para. 54. See also para. 55.

[14] BiH State Court, Decision in Mladen Blagojevic, case no. X-KR/06/236, 6 November 2008, pp. 29-30; *Prosecutor v. Trbić*, Verdict, X-KR-07/386, 16 October 2009, p. 347.

advancing a positive defence case – which effectively deprives them of the right to silence.

b. Core contested facts concerning either the existence of a joint criminal enterprise or the conduct of subordinates in relation to incidents that directly impact on the accused's responsibility

13. While the Panel is required to exclude facts that relate to the acts and conduct of the accused, the Panel also has the discretion to exclude facts that are of core importance to the Prosecution's case.[15] In *Tolimir*, the Trial Chamber provided the following explanation as to what type of facts could fall within this category:[16]

> For example, a proposed fact may relate to a specific allegation against the Accused, or may pertain to an objective of the joint criminal enterprise alleged by the Prosecution. A proposed fact might also relate to the acts and conduct of persons for whose criminal conduct the Accused is allegedly responsible. […ğ ₣S]uch proposed facts are not inadmissible, yet the Trial Chamber retains its discretion to withhold judicial notice when it considers that such facts go to the core of the case and that taking judicial notice of them would not serve the interests of justice. Similarly, the Trial Chamber considers that a proposed adjudicated fact that relates to a highly contested issue may also go to the core of the case.

14. In line with these parameters, the Panel should exercise its discretion to exclude facts concerning the conduct of groups/organs/subordinate, which are so proximate to the accused that admission of the facts would lead to inevitable consequences for the accused's personal liability.[17] The same considerations also warrant the exclusion

[15] ICTY, *Popovic et al*, Decision on Prosecution's motion for Judicial Notice of Adjudicated Facts, 26 June 2006,. para. 19 ("*Popovic et al Decision"); Prosecutor v. Mićo Stanišić and Stojan Župljanin*, IT-08-91-T, Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 1 April 2010, para. 41.
[16] ICTY, *Prosecutor v. Tolimir,* Appeals Judgment, 8 April 2015, para. 31, citing Prosecutor v. Tolimir, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 17 December 2009, ("*Tolimir* Adjudicated Facts Decision") (para. 33).
[17] ICTR, *Prosecutor v. Karemera*, Decision on Prosecution's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 52 ("*Karemera* Decision").

of facts that would establish the existence of a joint criminal enterprise. [18] Key considerations include whether the facts occurred in the presence of the defendant (i.e. meetings)[19] or whether the facts concerns specific organs/unit/brigades/command structure, of which the defendant was a member.[20] Evidence concerning the commission of crimes in an area that falls under the control of the defendant or a co-perpetrator can also trigger discretionary exclusion.[21] Facts falling within this category include those where the paragraphs of the SPO Pre-Trial Brief to which these are linked refer directly to alleged KLA subordinates and their alleged participation in crimes potentially relevant to the information provided in the adjudicated fact.

c. Notice of facts which fail to cite to clearly identified evidential sources

15. The onus is on the Prosecution to demonstrate that the facts in question fulfil the requisite criteria for judicial notice, including identifying the evidential basis for each proposed fact. If it cannot be readily deduced from the text of the initial judgment as to whether the criteria are fulfilled, the Panel must reject the facts. As an example, if it is not possible to ascertain from the text and structure of the judgment whether the factual findings were contested or based on agreed facts, the Panel must exclude the facts.[22] Similarly, the Panel would be required to exclude facts if, "due to a lack of specificity in the original judgment, the Chamber has been unable readily to discern that the fact in question does not refer to the acts, conduct or mental state of one of the

[18] ICTY, *Prosecutor v. Stanisic & Simatovic,* Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 25 November 2009, para. 65 ("*Stanisic & Simatovic* Decision").
[19] ICTY, *Prosecutor v. Galić,* Decision on Interlocutory Appeals concerning Rule 92bis(C), 7 June 2002, para. 13.
[20] *Popovic et al Decision*, para. 18, fn. 62.
[21] In the context of Rule 92 *bis*, in Dordević, the Chamber found that evidence concerning the location of an exhumation site on property allegedly belonging to a co-perpetrator ought to be subjected to cross-examination: ICTY, *Prosecutor v. Dordević*, Decision On Prosecution's Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 11 February 2009, para. 13.
[22] *Popovic et al Decision*, para. 11.

accused before it, or that it does not derive directly from evidence that implicates the acts, conduct, or mental state of one of the accused".[23]

16. Facts falling within this category include those where the proposed fact is derived from a concluding paragraph in a judgement without any evidence cited in support and the individualized assessment of the evidence in the paragraphs above is not recounted.

d. Notice of facts which are based on evidence that is either anonymous or not-disclosed in this case;

17. During the course of its review, the Defence identified several facts which were based on testimonial evidence or exhibits, which had not been disclosed to the Defence. In order to cure this prejudice, on 20 March 2023, the Defence wrote to the SPO to inquire as to whether the SPO intended to obtain access to the evidence relied upon by the domestic Courts to reach the factual finding in question. The Defence underscored that without such access, the Defence cannot assess whether:

a. The fact accurately represents the information in the underlying evidence;
b. The fact is decontextualized from information in the underling evidence, which is necessary to understand the fact in question;
c. The underlying evidence was assessed in a different manner in other proceedings or relied upon to reach contradictory facts; and
d. The underlying evidence is also on the SPO's list of evidence (in which case, admission of the fact would result in duplication).

18. On 24 March, the SPO provided the obtuse response that "to the extent this evidence is in the SPO's possession and subject to any applicable protective measures, it has been notified and/or disclosed pursuant to Rules 102-103." In essence, this means that if the SPO has not obtained and disclosed the evidence in question, it has

[23] Ibid., para. 18.

no intention of doing so. The SPO is thus inviting this Panel to base its judgment on contested facts, divorced from any verifiable evidential foundation.

19. There are two critical reasons why such an outcome should be avoided. First, it is necessary for the Chamber to access the underlying evidence in order to determine whether the criteria for admission are fulfilled or conversely, there is a basis of exclusion. This is confirmed by ICTY case law, where the Chamber expressly referred to the underlying evidence in their conclusions.[24] Second, without access to the underlying evidence, the Defence will lack the means to contest and rebut the presumption of accuracy underpinning the adjudicated facts.

20. In terms of the latter aspect, the question as to whether the Defence is able to contest or rebut the adjudicated fact forms the lynchpin of the Panel's assessment as to whether notice would be compatible with the right to fair and adversarial proceedings. This right must be capable of being exercised in an effective manner. For example, in order to conclude that the defendant's right to confront witnesses is not violated, the Defence must possess the means to interview or call the witnesses in question.[25] This right is wholly illusory in circumstances where the original Chamber has relied on witnesses whose identities have not been disclosed in this case, or documentary evidence which has not been provided to the Defence. Judicial notice in such instances would be tantamount to reliance on anonymous witnesses or anonymous hearsay.

21. Due to its inherently unreliable nature, anonymous hearsay should not be relied upon to establish factual findings.[26] It would, moreover, be unduly prejudicial

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[24] ICTY, *Mladic,* Third Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 13 April 2012, para. 22; see also ICTY, *Prosecutor v. Mladic,* First Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 26 February 2012, para. 28.

[25] In concluding that the defendant's right to cross-examine witnesses was not violated, the Trial Chamber observed that the defence could call the witnesses during the Defence case: *Stanisic & Simatovic* Decision, para. 85.

[26] *ICC, Prosecutor v. Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 453, fn. 1283, specifically. ICC, *Prosecutor v. Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, paras. 28-29. See

to rely on facts established by undisclosed/anonymous evidence, as the Defence would lack the means to investigate and rebut the underlying foundation. The use of anonymous evidence must also be accompanied by adequate safeguards to preserve the adversarial process.[27] In this instance, neither the Defence nor the Panel itself possess the ability to verify the underlying reliability of the evidence which the original Chamber relied upon to reach its factual conclusion. Neither the Defence nor the Chamber can verify whether the original Chamber accurately described the facts established by this evidence. Due to the anonymity of the evidence, the Defence cannot verify whether the individuals concerned provided contradictory evidence in other cases or, were held to be unreliable in other cases. Without access to the underlying evidence, the Panel will also lack the ability to issue a reasoned opinion as to whether Defence evidence or argument has effectively reversed the presumption of accuracy The necessary safeguards for a fair and adversarial process are simply not present.

e. Notice of facts, based on statements from suspects who never testified or who cannot be compelled to testify as well as deceased witnesses

22. The Panel must exclude facts that are based on investigative statements provided by suspects, who never testified under oath, due to first, the fact that such facts were never fully tested, and second, critical issues of reliability.

23. As concerns the first aspect, there is a key distinction between admitting the facts from a suspect statement against the suspect who provided the statement, as compared to admitting the same facts against co-accused, who lacked the means to cross-examine or confront the suspect. As found in *Katanga & Ngudjolo,* there is an "overwhelming legal obstacle" against admission as concerns accusation from one

also: ICTR, *Prosecutor v. Ndindabahizi*, Appeal Judgement, 16 January 2007, para. 115 and, ECCC, Case 002/01 Appeal Judgement, 23 November 2016, paras 434 and 442

[27]ECHR, *Asani v. The former Yugoslav Republic of Macedonia,* 27962/10, 1 February 2018, para.37

accused, which the co-accused cannot test or confront through cross-examination.[28] While the ICTY Appeals Chamber found that there was no bar to the potential use of such statements, it is also underscored the problematic nature of relying on such evidence to reach determinations of fact.[29]

24. The necessary criterion of reliability is also not fulfilled in connection with facts based on the testimony of suspects, who have a clear incentive to minimise their own role, while attributing responsibility to others. In *Stanisic & Simatovic*, although the Trial Chamber refused to adopt a rule amounting to a mandatory exclusion of testimonial statements from co-accused, it acknowledged that "such evidence should be treated with great caution".[30] In *Karemera,* the Appeals Chamber also averted to reliability concerns arising from the risk that defendants in other cases would have "significantly less incentive to oppose those facts than they would facts related to their own actions …indeed, in some cases such cases defendants might affirmatively choose to allow blame to fall on another".[31] This objection applies equally to facts based on the statement of a co-accused, who cannot be compelled to testify in this case. Such facts cannot be considered as 'rebuttable' in circumstances where the Defence lacks the means to rebut them through cross-examination.

25. Similarly, the right of confrontation and ability to shift the presumption of accuracy is similarly impaired in circumstances where the fact is based on evidence elicited from a deceased witness, who never testified under oath and who was never

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[28] ICC, *Prosecutor v. Katanga and Ngudjolo*, Decision on the Prosecutor's Bat Table Motion, ICC-01/04-01/07-2635, 17 December 2010, para. 53: "To the extent that these statements implicate only the person making the statement, no issue under article 67(l)(e) and rule 68 arises. However, Mr Ngudjolo's statement contains accusations against Mr Katanga, thus creating an overwhelming legal obstacle against its admission, as Mr Ngudjolo cannot be compelled to submit to examination by, or on behalf of, Mr Katanga."

[29] ICTY, *Prosecutor v Prlic et al.,* Decision on Appeals against Admitting Transcripts of Jadranka Prlic's into Evidence, 23 November 2007, paras. 57-58;.

[30] *Stanisic & Simatovic* Decision, para. 89.

[31] *Karemera* Decision, para. 51.

cross-examined. In such circumstances, it would constitute an abuse of the Panel's discretion to base contested factual findings on such evidence.[32]

f. 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

26. The Panel "must also deny judicial notice where a purported fact is inextricably commingled either with other facts that do not themselves fulfil the requirements for judicial notice under Rule 94(B), or with other accessory facts that serve to obscure the principal fact".[33] The same result is warranted if the manner in which the fact has been "formulated- abstracted from the context of the judgment …whence they came - is misleading or inconsistent with the facts actually adjudicated in the cases in question".[34]

27. The Panel should also exercise its discretion to deny requests to notice adjudicated facts which "are unduly broad, vague, tendentious, or conclusory", on the basis that allowing such facts into the record is likely to frustrate judicial economy.[35] The notion of overly vague facts includes facts which employ subjective language or terms, which cannot be readily understood without referring to the underlying evidence.[36]

g. Notice of facts, which are comprised of evidential descriptions rather than factual findings

28. Given that the fact in question must have been the subject of a final adjudication, it must be clear from the underlying judgment that the Chamber found

[3232] *Kordic,* Decision on Appeal regarding Statement of Deceased Witness, 21 July 2000, paras. 23-28.
[33] *Popovic et al.* Decision, para. 6.
[34] *Karemera* Decision, para. 55.
[35] *Popovic et al* Decision, para. 16.
[36] *Tolimir* Adjudicated Facts Decision, para. 14.

that the facts were true and were established to the standard of beyond reasonable doubt. The Panel must therefore reject 'facts' which merely summarise evidence or testimony, where it is not clear that the Chamber reached a positive finding that all of the facts described in the testimony or evidence were true.[37]

h. Notice of facts which have legal characterizations

29. The Panel should exercise its discretion to reject facts, which employ legal characterizations.[38] Examples including findings that individuals were murdered (which presupposes a legal finding of intent),[39] or that victims were protected persons or not participating in the hostilities (which depends on the legal definition of participation in the hostilities).

i. The admission of facts, which were not disputed in the first set of proceedings

30. To be characterized as an 'adjudicated fact', the fact in question must have been contested at trial.[40] The findings cannot, therefore, be reached through a guilty plea or through agreed facts.[41]

31. The rationale of requiring facts to be established through a final judgment, which is arrived at through contested proceedings is to ensure that the facts were subjected to an appropriate degree of adjudicative scrutiny.[42] This rationale equally militates in favour of rejecting facts, which were not the subject of any proper debate

[37] BiH, *Prosecutor v. Dukic,* Verdict, X-KR-07/394, 12 June 2009, para. 22, noting that "The fact must be truly a "fact" that is: (…) ; b) not a conclusion, opinion or verbal testimony of a witness".
[38] ICTY: *Prosecutor v. D Milosevic*, Decision on Interlocutory Appeals against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, SCSL, *Prosecutor v. Sesay et al*, Decision on Sesay Application for Judicial Notice to be taken of Adjudicated Facts, 23 June 2008, para. 26; STL, Case against Akhbar Beirut, Decision on Request for Judicial Notice, 19 January 2016, para. 6.
[39] *Tolimir* Adjudicated Facts Decision, para. 24.
[40] ICTY, *Prosecutor v. Krajisnik,* Decision on Adjudicated Facts, 28 February 2003, para 15.
[41] ICTY, *Prosecutor v. Krajisnik,* Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, para. 14.
[42] ICTR, *Prosecutor v. Bagosara,* Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010, para. 11.

or scrutiny, for reasons that concerned the relevance of the fact to the parties in that case rather than the underlying contestability of the fact. This consideration arises in 'flip side' cases or in cases where both parties reached agreement not to dispute the facts. The SCSL Appeals Chamber observed in this regard in *Taylor* that:[43]

> It is commonly accepted that adjudicated facts are creations of international tribunals introduced through their Rules to increase efficiency and assist in factual harmonisation. Often they do neither. The amount of time consumed in their submission, evaluation and review can be substantially greater than the time necessary to introduce testimonial or documentary evidence and subject it to cross-examination and scrutiny. Likewise, harmonisation of facts is not always desirable. Investigations and issues change, depending on the focus of successive cases, and new facts that were either unavailable or irrelevant in previous trials come to light. Adjudicated Fact 15 is such a finding. It originally appeared in the Brima et al. Trial Judgment as a ―context finding, which the parties in that case had no interest in contesting. A risk in the application of Rule 94(B) is that the understanding of facts, which should be evolving in the interest of justice, can instead be calcified in the interest of harmony.

32. Similarly, in BiH adjudicated facts litigation, the Court imposed the requirement that "the fact must be established in proceedings before the ICTY in which the accused against whom the fact has been established, and the accused before the Court of BiH, have the same interests with reference to contesting a certain fact."[44]

33. These considerations are directly applicable to the SPO's attempt to admit a wide array of facts pertaining to the KLA/UCK from ICTY cases, where the charges concerned allegations of crimes committed by Serb forces in Kosovo. In such cases, neither the defendant nor the Prosecution had an incentive to contest allegations concerning the actions, structure or organisation of Kosovar individuals or groups. Since such facts were of peripheral relevance to the Chamber's disposition of the charges, it also cannot be assumed that the Judges employed a rigorous assessment as concerns the accuracy and reliability of the evidence underpinning the facts.

[43]SCSL, *Prosecutor v. Taylor,* Appeals Judgment, 26 September 2003, para. 110.
[44] BiH, *Prosecutor v. Dukic,* Verdict, X-KR-07/394, 12 June 2009, para. 22,

34. The same consideration applies to adverse facts from judgments, which resulted in an acquittal (for example, the *Haradinaj* retrial). In such cases, the defendants lacked the opportunity to seek a final judgment concerning the accuracy of the facts in question.

35. It is also artificial to cherry pick or decontextualize the adverse findings in such cases from other findings that are exculpatory to the defendants in this case: for example, the absence of a wide-spread of systematic attack against the civilian population, the absence of protracted hostilities at certain points in time or the absence of a common plan encompassing alleged crimes charged in this case. If it is the SPO's position that ICTY Prosecution investigations were deficient or defective on such points, it cannot simultaneously seek to rely on the fruits of such investigations for the purposes of establishing other facts.

j. Facts based on evidence or witness testimony, which the SPO intends to submit in this case;

36. The purpose of adjudicated facts is to promote judicial economy, in a fair and impartial manner. Both elements of this equation are destroyed in circumstances where the SPO seeks to admit adjudicated facts arising from evidence, which the SPO intends to tender separately. Given these considerations, ICTY Chambers exercised their discretion to reject adjudicated facts which were repetitive, in the sense that either the facts themselves overlapped, or the facts were based on the same evidence.[45] In *Mladic*, the Trial Chamber also rejected adjudicated facts based on documents that were likely to be tendered at trial.[46]

[45] ICTY, *Prosecutor v. Mladic,* Third Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 13 April 2012, para. 22; see also ICTY, *Mladic,* First Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 26 February 2012, para. 28 ("Mladic Decision").
[46] Mladic Decision, para. 15.

37. A significant number of facts proposed by the SPO are based to a large part, or often exclusively, on evidence of proposed SPO witnesses. It is inherently problematic to admit such facts, either before, or in addition to the testimony of those witnesses.

III. RELIEF SOUGHT

38. Accordingly, the Defence respectfully requests that the Trial Panel reject the SPO Request to admit facts set out in Annex 1 where subject to Defence challenge set out therein.

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Respectfully submitted on 3 April 2023,

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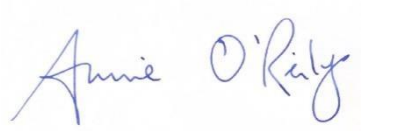

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