



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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

Date: 11 April 2023

Language: English

Classification: Public

Prosecution reply to 'Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts'

with confidential Annex 1

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 Alagendra

I. INTRODUCTION

1. The Proposed Facts¹ were established in previous, final judgments on the basis of evidence, satisfy all applicable criteria, and are therefore appropriate for judicial notice. The Response² fails to demonstrate otherwise. Instead, the Defence misrepresents applicable jurisprudence and attempts to introduce new criteria, which would undermine the purposes of Rule 157(2).

II. SUBMISSIONS

2. The Indictment in this case follows over 20 years of ICTY and Kosovo proceedings concerning crimes committed during the conflict in Kosovo. This Court's framework acknowledges this reality and reflects legislative intent that panels of the Kosovo Specialist Chambers ('KSC') should, in the interest of fair and expeditious proceedings, consider the results of such past proceedings, including evidence collected and factual findings reached.³ In this context, the number or breadth of the Proposed Facts is far from unprecedented or unreasonable.⁴

3. Moreover, that the Proposed Facts come from ICTY and Kosovo court judgments reached on the basis of different evidence and in the context of different legal frameworks does not militate in favour of a different approach than that consistently adopted and applied at the *ad hoc* tribunals.⁵ In this respect, the Defence sought judicial notice of facts from many of the same judgments and the objections throughout the Response should be considered together with the (often contradictory)

¹ See Prosecution motion for judicial notice of adjudicated facts, KSC-BC-2020-06/F01330, 1 March 2023 ('Motion'), para.2 (defining 'Proposed Facts').

² Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated facts, KSC-BC-2020-06/F01417, 3 April 2023 ('Response'). This reply is limited to new issues arising from the Response. See Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'), Rule 76. All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

³ Motion, paras.2,15-16.

⁴ *Contra* Response, paras.2-8. The *Mladić* and *Karadžić* Chambers each took judicial notice of approximately 2000 adjudicated facts. See ICTY, *Prosecutor v. Mladić*, MICT-13-56-A, Judgement, 8 June 2021, para.40; ICTY, *Prosecutor v. Karadžić* MICT-13-55-A, Judgement, 20 March 2019, para.109.

⁵ *Contra* Response, para.5.

submissions in the Defence Motion.⁶ In any event, the same basic principles in the jurisprudence of the *ad hoc* tribunals – reflected in the text of Rule 157(2) itself – ensure that judicial notice of adjudicated facts from any KSC, ICTY, or Kosovo judgment does not infringe the rights of the Accused.

A. THE DEFENCE'S OVERLY BROAD DEFINITION OF 'ACTS AND CONDUCT OF THE ACCUSED' IS NOT SUPPORTED BY CASE LAW

4. Objections C1 and C2 rest on a definition of 'acts and conduct of the accused' that runs counter to established jurisprudence.⁷ The ICTR Appeals Chamber held that the prohibition on taking judicial notice of facts concerning acts and conduct of the accused does not extend to facts related to, for example, the conduct of physical perpetrators or the existence and activity of a joint criminal enterprise or its members.⁸ This definition was repeatedly reaffirmed by ICTY and IRMCT Chambers⁹ and is consistent with KSC jurisprudence interpreting the same phrase, as used in other Rules.¹⁰ Further, Defence arguments concerning allegedly 'core' facts (C2)¹¹ ignore the purpose of criminal trials and the fact that Rule 157(2) is *only* available for and necessarily foresees judicial notice of facts that are relevant to and therefore bear on the responsibility of the Accused.¹²

⁶ Joint Defence Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01331, 1 March 2023 ('Defence Motion'). A number of Proposed Facts were also proposed by the Defence or are substantially similar to, from the same judgments, or have the same evidential basis as facts proposed by the Defence. However, the Defence now raises objections to certain of those facts. For example, the Defence objects to Proposed Fact 281, despite proposing the same fact for judicial notice. See KSC-BC-2020-06/F01331/A01, p.23, no.129.

⁷ Response, paras.9-12 (C1), 13-14 (C2).

⁸ ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ('Karemera Decision'), paras.48-53.

⁹ Motion, para.7 (and the sources cited therein).

¹⁰ Decision on Taçi Defence Motion Regarding the Preservation of Evidence, KSC-BC-2020-06/F01250, 2 February 2023, para.31; *Specialist Prosecutor v. Mustafa*, Decision on the Prosecution application pursuant to Rule 153 of the Rules, KSC-BC-2020-05/F00286/RED, 17 December 2021, para.19.

¹¹ Response, paras.13-14 (arguing that facts that 'directly impact on the accused's responsibility' should be excluded).

¹² *Karemera* Decision, paras.48,52-53.

B. RULE 157(2) IS CONCERNED WITH ESTABLISHED FACTS, NOT EVIDENCE

5. Defence objections C3, C4 and C5 attempt to introduce additional requirements – based on the underlying evidence, rather than the Proposed Facts themselves – that are not supported and would require the Panel to consider and re-assess the evidential basis of previous judgments, contrary to the purposes of Rule 157(2).

6. First, the Defence baselessly claims that the prosecution must identify the evidential basis for each proposed fact (C3). In support, the Defence cites two paragraphs of an ICTY decision, which are taken out of context and concern other – established – requirements for judicial notice.¹³ In another decision cited in the Response,¹⁴ the *Mladić* Chamber explicitly rejected a requirement for citations to – or consideration of – supporting evidence.¹⁵ Indeed, the *Karadžić* Chamber emphasised that it was ‘concerned to identify facts established in an earlier judgment rather than to record the evidentiary basis on which the findings were made’.¹⁶

7. Second, contrary to Defence arguments (C4),¹⁷ there is no requirement that the Accused have access to all evidence upon which prior judgments were based.¹⁸ The Defence’s attempt to equate adjudicated facts with anonymous hearsay misrepresents the nature of adjudicated facts, which are not evidence. Indeed, the effect of Rule 157(2) is to relieve a party from the need to present evidence in relation to facts that have been previously established.¹⁹ In any event, the Specialist Prosecutor’s Office (‘SPO’) is discharging its disclosure obligations, including in relation to evidence in

¹³ Response, para.15, fns.22-23, citing ICTY, *Prosecutor v. Popović et. al.*, IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 26 September 2006, paras.11 (concerning the requirement that proposed facts must not be based on an agreement between the parties to the original proceedings), 18 (concerning the requirement that proposed facts must not relate to acts, conduct, or mental state of the accused).

¹⁴ Response, para.19, fn.24.

¹⁵ ICTY, *Prosecutor v. Mladić*, IT-09-92-PT, First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 February 2012 (‘*Mladić* Decision’), paras.25,40-43.

¹⁶ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009 (‘*Karadžić* Decision’), para.20.

¹⁷ Response, paras.17-21.

¹⁸ See, similarly, *Karadžić* Decision, para.37.

¹⁹ Motion, para.2.

its possession which was also relied upon in other cases. Consequently, the Defence already has most of the underlying evidence.²⁰ It does not specifically explain why any further information is necessary to challenge any individual Proposed Fact.

8. Third, the Defence incorrectly claims that Proposed Facts based on evidence from suspects and deceased witnesses must be excluded.²¹ The Defence misleadingly cites decisions in *Katanga*, *Karemera*, and *Kordić* concerning evidence and adjudicated facts that directly implicated acts and conduct of the accused, which is not the case for any of the Proposed Facts. The Defence's remaining submissions about the reliability of hearsay evidence (including from a co-accused) only illustrate that adjudicated facts cannot be equated with the evidence underpinning those facts. As noted by the *Stanišić* Chamber, in the same paragraph cited by the Defence:²² 'these considerations were certainly taken into account by the [original Chamber] that found the evidence in question reliable'.²³ The same logic applies here.

C. DEFENCE OBJECTIONS ATTEMPT TO INTRODUCE NEW, UNJUSTIFIED REQUIREMENTS

9. Contrary to the C6 objections, the Proposed Facts are distinct, concrete and identifiable.²⁴ To meet these requirements, (i) each fact should be considered in context, including on the basis of the original judgment and as presented in the Motion;²⁵ (ii) the fact should represent a discrete and identifiable finding, but need not reproduce a paragraph or section of the original judgment in its entirety;²⁶ and (iii) inconsistencies in the underlying evidence are irrelevant to a determination of whether a fact is appropriate for judicial notice.²⁷

²⁰ By way of example, Annex 1 indicates, for certain C4 objections, the underlying evidence the Defence claims has not been disclosed. Much of the evidence relied upon in ICTY judgments is also publicly available.

²¹ Response, paras.22-25.

²² Response, para.24, fn.30.

²³ ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 25 November 2009, para.89.

²⁴ *Mladić* Decision, para.8(1), fn.29.

²⁵ Motion, para.8.

²⁶ See e.g. C6 objections labelled 'cherry-picking'.

²⁷ See e.g. C6 objections to Facts 635-636. See also Section II(D) above.

10. Moreover, facts opposed by the Defence on the basis that they are evidential descriptions (C7)²⁸ are in fact factual findings, as is clear from the context of the original judgments. For instance, such facts are located in specific sections dedicated to factual findings²⁹ or expressly accepted as factual findings.³⁰

11. Finally, the mere reference to a term that can, but does not necessarily, have legal meaning (C8) does not render a Proposed Fact inadmissible. It is necessary to determine on a case-by-case basis whether a fact contains findings or characterisations which are essentially legal or factual.³¹ The terms objected to by the Defence – such as ‘intensity’, ‘attack’, and ‘mistreated’³² – were used ‘factually’ to describe victims, objects or situations.

D. THE PROPOSED FACTS ARE NOT THE RESULT OF AN AGREEMENT BETWEEN THE PARTIES

12. The Defence submits that some findings were not *disputed* because they were not subject to ‘an appropriate degree of adjudicative scrutiny’.³³ The Defence’s assertion that Chambers would reach certain findings lightly is baseless and undeveloped. Adjudicated facts need not be beyond dispute to be noticed under Rule 157(2), since they are not established conclusively, but merely create presumptions that may be rebutted.³⁴ So long as the Proposed Facts meet the established requirements for adjudicated facts, the Panel may take judicial notice of them.³⁵

13. In addition, the Defence wrongly asserts that proposed facts must be rejected if they stem from a judgment that was not appealed.³⁶ To the contrary, a fact may be

²⁸ Response, para.28.

²⁹ See e.g. Fact 572: the cited paragraph is found in the section entitled ‘V. EVALUATION OF THE EVIDENCE: Factual Findings’ of the *Sabit Geci et al.* District Court Judgement.

³⁰ See e.g. Fact 494: *Latif Gashi et al.* Basic Court Judgment (P448/2012), paras.39.b,40 (where the Chamber ‘accepts Witness I’s evidence as set out in paragraph 39(a) to (h) above as true’).

³¹ *Karadžić* Decision, para.30.

³² See e.g. Facts 58,67,672. See also Motion, para.12.

³³ Response, paras.31-33.

³⁴ *Karemera* Appeal Decision, para.40.

³⁵ *ICTY, Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015, para.622.

³⁶ Response, paras.34-35.

noticed if it is 'determined in a final judgement, meaning that no appeal has been instituted against it or, if instituted, the fact in question has been upheld.'³⁷

E. PROPOSED FACTS BASED ON SPO EVIDENCE CAN BE JUDICIALLY NOTICED

14. Contrary to Defence submissions,³⁸ there is no requirement that proposed facts must not overlap with SPO evidence. Such a requirement would leave little scope for adjudicated facts that are relevant to the issues in the case. Indeed, the Panel's ability to consider the Proposed Facts together with any evidence presented on the same or related matters will ultimately serve the interests of 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.³⁹

15. The Defence's reference to two *Mladić* decisions is misleading.⁴⁰ In both decisions, the Chamber refused to consider facts which 'on the basis of underlying evidence' overlapped with 'other Proposed Facts',⁴¹ not other evidence to be presented during the trial.

III. CLASSIFICATION

16. Annex 1 is confidential as it contains references to confidential evidence and protected witnesses.

IV. RELIEF REQUESTED

17. The Panel should reject the Defence's objections and take judicial notice of the Proposed Facts.

³⁷ ICTR, *Setako v. Prosecutor*, ICTR-04-81-A, Judgement, 28 September 2011, para.200.

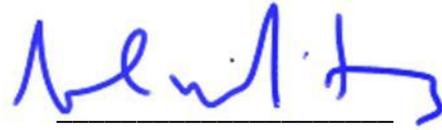
³⁸ Response, paras.36-37.

³⁹ Motion, para.16.

⁴⁰ Response, para.36.

⁴¹ *Mladić* Decision, para.28; ICTY, *Prosecutor v. Mladić*, IT-09-92-PT, Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 13 April 2012, para.22.

Word count: 1994



Alex Whiting

Acting Specialist Prosecutor

Tuesday, 11 April 2023

At The Hague, the Netherlands.