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| **In:** | **KSC-BC-2020-06**<br>**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi** |
| **Before:** | **Trial Panel II**<br>Judge Charles L. Smith III, Presiding<br>Judge Christoph Barthe<br>Judge Guénaël Mettraux<br>Judge Fergal Gaynor, Reserve Judge |
| **Registrar:** | Dr. Fidelma Donlon |
| **Filing Participant:** | Counsel for Hashim Thaçi<br>Counsel for Kadri Veseli<br>Counsel for Rexhep Selimi<br>Counsel for Jakup Krasniqi |
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**Public Redacted Version of**

**Joint Defence Reply to Prosecution Response to 'Joint Defence Motion for Judicial Notice of Adjudicated Facts', KSC-BC-2020-06/F01442, dated 11 April 2023**

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1. The Defence for Messrs. Thaçi, Veseli, Selimi, and Krasniqi ("Defence") hereby replies to the Prosecution Response to 'Joint Defence Motion for Judicial Notice of Adjudicated Facts'.[1]

2. This filing is classified as confidential as it refers to the content of confidential documents.[2]

3. Predictably, the SPO again seeks to exclude evidence of crimes committed by Serbian Forces against Kosovo Albanians. For the great majority of the facts proposed by the Defence, the only objection is relevance.[3] Yet, the facts are plainly relevant to the context including of relevant public statements,[4] the motivation of KLA fighters and the Accused and the revenge motivation of individual perpetrators of alleged crimes.

4. The Response wrongly suggests that such issues are not in dispute because the SPO agreed that "serious Serbian crimes [were] being committed at the relevant time".[5] This 'agreement' is devoid of any specific crimes, dates or locations, rendering it almost wholly meaningless. The Defence asked the SPO to agree to more specific facts but it refused.[6] Accordingly, the facts have not been agreed and the adjudicated facts mechanism is the most efficient means to adduce this important information.

[1] KSC-BC-2020-06, F01411, Specialist Prosecutor, *Prosecution Response to 'Joint Defence Motion for Judicial Notice of Adjudicated Facts'* ("Response"), 31 March 2023, public.
[2] Rule 82(3) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules").
[3] Response, paras 3-13.
[4] *See e.g.*, [REDACTED], cited in KSC-BC-2020-06, F01296/A01, Specialist Prosecutor, *Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief', KSC-BC-2020-06/F00709, dated 24 February 2022* ("SPO PTB"), 15 February 2023, confidential, fn. 44.
[5] KSC-BC-2020-06, Transcript of Hearing ("Status Conference 16 December"), 16 December 2022, public, p. 1725.
[6] KSC-BC-2020-06, F01116, Joint Defence, *Joint Defence Notice Related to Agreement on Facts pursuant to Rule 95(3)*, 18 November 2022, public, para. 3.

5. The SPO takes ridiculous positions in arguing that the facts are irrelevant. For instance, it submits without explanation that fact 60 which relates to the Reçak/Račak massacre is irrelevant. Yet the SPO is calling witnesses who testify about the Reçak/Račak massacre and refer to it as a pivotal event. [REDACTED] "[REDACTED]".[7] Plainly, fact 60 is relevant.

6. Moreover, the facts include crimes committed by Serbian Forces in Indictment locations including Prizren, Rahovec/Orahovac and Gjilan/Gnjilane. The Response argues that geographical and temporal proximity to the events and charges in this case is insufficient.[8] Yet that proximity is exactly why the facts are relevant. This Indictment alleges that the Accused were criminally responsible for crimes committed *inter alia* in Prizren, Rahovec/Orahovac and Gjilan/Gnjilane after the withdrawal of Serbian forces in June 1999. The Defence contends that any such crimes were not part of any common criminal plan but private acts of revenge. Demonstrating that serious crimes were committed by Serbian forces in close proximity to these alleged crimes is relevant; it is the scale, number and severity of Serbian crimes which makes individual revenge likely. Denying the relevance of this material will prejudice the Defence.

7. More broadly, the facts are relevant because they tend to show that the motivation of the Accused and individual KLA fighters was not to gain control over Kosovo by committing crimes, but to defend themselves and civilians from Serbian aggression. They are relevant to the true common purpose of the KLA. They are directly relevant to the Accused's intentions and understanding their actions. The SPO's opposition is transparently an attempt to prevent the Defence from contextualising and explaining its position.

[7] [REDACTED].
[8] Response, fn. 8.

8. Certain Serbian offensives and crimes, especially during the summer 1998 and the spring 1999, led to the withdrawal and/or disorganisation of the KLA on the field and impacted the eventual command and control within it.[9] Therefore, they constitute *a* factor, among others, which should be considered to assess the Accused's and the KLA General Staff's effective control.[10] Such evidence is relevant to effective control, and the *Orić* Trial Chamber agreed. The SPO hopelessly attempts to distinguish *Orić* by arguing that there, the Chamber "found that there was insufficient, direct evidence of the Accused's effective control over the perpetrators."[11] Even assuming this were true, the Trial Chamber reached its findings only after trial and after having heard all of the evidence, including the evidence of the Serbian siege. Here, the Prosecution is attempting to prevent the Accused from even introducing the evidence, so that the Trial Panel never sees it. As the Defence has noted previously,[12] the SPO can cite to no case where an international court has ever denied an Accused the right to adduce evidence of these defences, including self-defence.

9. With regard to self-defence, due to word count limitations, the Thaçi Defence will not respond here to all of the SPO's arguments. The SPO mischaracterises its position in numerous respects. First, the Thaçi Defence, at the last Status Conference, did not state that the "ultimate question" is whether "arbitrary detention is a serious IHL violation", but rather, whether the detention was arbitrary, and therefore whether it was a violation of IHL at all. The Thaçi Defence's position is that detention for purposes of military necessity or self-defence cannot be arbitrary,[13] and therefore cannot be a violation of IHL. Second, the Thaçi Defence did not limit its application of self-defence to the question of detention. The Notice of Self-Defence makes clear that

[9] KSC-BC-2020-06, Transcript of Hearing, 4 April 2023, public, pp. 2267-2268, 2287-2291.
[10] *Contra*, Response, para. 11.
[11] Response, para. 11.
[12] KSC-BC-2020-06, F01344, Thaçi Defence, *Thaçi Defence Request for Leave to Reply to Prosecution Response to Thaçi Notice of Defence*, 6 March 2023, public, para. 12.
[13] *See e.g.*, Article 9 of the 1976 Yugoslav Criminal Code.

it is invoking self-defence on all counts of the Indictment, including detention and the allegations contained in paragraph 12 of the SPO PTB.[14]

10. Furthermore, the facts are directly relevant to documents on which the SPO relies. Public statements responded to events including Serbian crimes. For instance, a Political Declaration issued following the Reçak/Račak massacre[15] is cited in the SPO PTB.[16] The SPO argued that other documents were admissible because they are relevant to the massacre at Reçak/Račak.[17] The SPO's reliance on such documents concedes the relevance of the facts which contextualise and explain their contents.

11. The facts should not be rejected because the Presiding Judge indicated, prior to hearing relevant submissions, that the Trial Panel would not entertain evidence "simply because it is said to give a broader and more complete picture".[18] The Presiding Judge continued: "[t]his Panel and the parties are only concerned with events and circumstances that are relevant to these accused." Upon Mr. Kehoe responding that "at the appropriate time we will discuss the relevance of particular Serbian crimes contextually with what's happening on the ground", the Presiding Judge confirmed "[t]hat's our only request". It is therefore clear that the Trial Panel was not excluding all evidence of Serbian crimes. Excluding relevant contextual evidence is inconsistent with other international courts, which have permitted expert evidence specifically on historical context.[19] Instead, it was requiring a showing of relevance, such as the Defence has made in this case.

[14] KSC-BC-2020-06, F01306, Thaçi Defence, *Thaçi Notice of Defence*, 20 February 2023, public, para. 4.
[15] [REDACTED].
[16] SPO PTB, fns 85, 181.
[17] *See e.g.*, KSC-BC-2020-06, F01268/A03, Specialist Prosecutor, *Annex 3 to Prosecution Application for Admission of Material through the Bar Table*, 8 February 2023, confidential, p. 12, [REDACTED].
[18] Status Conference 16 December, p. 1726.
[19] ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-2273, Trial Chamber III, *Decision on "Prosecution's Motion to Exclude Defence Political-Military Strategy Expert"*, 21 August 2012.

12. Further, despite challenging the relevance of the facts, the SPO itself proposed dozens of similar facts including the Serbian attacks in Qirez/Ćirez and Likoshan/Likošane,[20] the massacre of the Jashari family in Prekaz,[21] the attack on the Haradinaj compound in Gllogjan/Glođane,[22] operations by Serbian forces to gain control of main roads in Kosovo,[23] and various attacks launched by FRY and Serbian forces throughout the summer offensive in 1998[24] and in March 1999,[25] and a whole section defining the structure of FRY and Serbian forces.[26] Having put such fact forwards itself, the SPO cannot now deny their relevance.

13. The facts do not differ substantially from the original judgments' formulations. The language of the fact need not be identical to the original judgment, but must be substantially similar. Furthermore, the Trial Panel may correct minor inaccuracies or ambiguities in the facts resulting from their abstraction from the context of the original judgement.[27] Whilst the Defence has exceptionally amended the language of the facts to provide context or clarity, the proposed formulations are consistent with the meaning intended by the original judgment.

14. The SPO submission that a number of facts are inaccurately reformulated is unfounded. For instance, the SPO objects to fact 13 because "between 1989 and 1996 differs in a substantial way from the original finding". The original judgment reads "over the seven years following the revocation of Kosovo's autonomy",[28] which

[20] KSC-BC-2020-06, F01330/A01, Specialist Prosecutor, *Annex 1 to Prosecution Motion for Judicial Notice of Adjudicated Facts*, 1 March 2023, confidential, fact 24.
[21] *Idem*, facts 26-30.
[22] *Idem*, facts 34-42.
[23] *Idem*, facts 32-33.
[24] *Idem*, facts 44-48, 54, 58-59, 62, 69-70, 75-76, 79, 84-85, 87.
[25] *Idem*, fact 132.
[26] *Idem*, facts 140-177.
[27] ICTY, *Prosecutor v. Popović et al*., IT-05-88-T, Trial Chamber II, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts*, 26 September 2006, para. 7.
[28] ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Chamber II, *Judgement* ("*Đorđević*"), 23 February 2011, para. 29.

occurred in 1989. Though the language has been clarified, the formulation is entirely consistent with the judgment. Similarly, the SPO argues that facts 67 and 68 have been inaccurately reformulated despite the exact proposed formulation being found in the paragraph cited.[29]

15. Contrary to the Response, the facts are distinct, concrete, and identifiable.[30] The SPO wrongly objects to facts that are sufficiently clear or claims that the information does not appear in the listed paragraphs. For instance, the SPO objects to fact 123 because "the reference to 'the KLA' in this context is overly broad". This explanation does not show any vagueness. Further, the SPO argues that fact 65 is imprecise because "28 March 1999, in the Dushanovë/Dušanovo suburb" does not appear in the listed paragraphs, whereas the trial chamber's finding in the original paragraph clearly states that "a large number of Kosovo Albanians from Dušanovo/Dushanova, a neighbourhood of Prizren town, were expelled from their homes on 28 March 1999".[31]

16. Finally, the SPO wrongly asserts that a number of 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. For example, the SPO objects to fact 114 because "the Chamber took into account, *inter alia*, the absence of evidence concerning whether orders were followed or implemented". Its use of '*inter alia*' confirms that this was not the sole or main basis for the Trial Chamber's conclusion. Moreover, the SPO conveniently omits the last part of the paragraph where the Trial Chamber states that "[b]ased on the evidence discussed above, the Chamber concludes that Ramush Haradinaj, in his capacity as commander of the Regional Staff, did not exercise

[29] *Đorđević*, paras 482, 525.
[30] Response, para. 17.
[31] ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Chamber III, *Judgement*, 26 February 2009, Vol. 2, para. 286.

authority over all military and civilian matters in the area." Similarly, the judgment cited in fact 118 clearly sets out that the finding is based on the testimony of various witnesses.[32] The objection that this fact is "based, at least in part, on the absence of evidence" is therefore without merit.

17. Accordingly, the Defence respectfully requests the Trial Panel to reject the SPO objections and to take judicial notice of the proposed facts pursuant to Rule 157.

**Word count: 1,972**

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[32] EULEX, *People v. F.L.*, PKR. Nr 154/16, Basic Court of Gjakovë/Đakovica, *Judgment*, 9 March 2018, p. 40.

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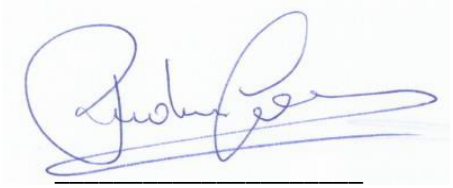

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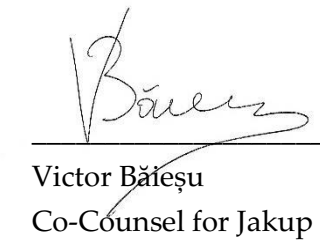

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