Case No.:	**KSC-BC-2020-04**
	Specialist Prosecutor v. Pjetër Shala
Before:	**Trial Panel I**
	Judge Mappie Veldt-Foglia, Presiding Judge
	Judge Roland Dekkers
	Judge Gilbert Bitti
	Judge Vladimir Mikula, Reserve Judge
Registrar:	Dr Fidelma Donlon
Date:	10 May 2023
Filing Party:	Specialist Defence Counsel
Original Language:	English
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THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Defence Response to the "Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts" with public Annex 1 and confidential Annex 2

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I. INTRODUCTION

1. Pursuant to the Trial Panel ("Panel")'s instructions on 28 April 2023[1] and Rules 76 and 157 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), the Defence for Mr Pjetër Shala ("Defence" and "Accused", respectively) hereby files its Response to the Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts.[2]

2. The Prosecution seeks judicial notice of 78 proposed facts, as set out in Annexes 1 and 2 to the Motion, comprising: (i) 17 proposed facts of common knowledge, and (ii) 61 proposed facts that have been adjudicated in trials before the International Criminal Tribunal for the former Yugoslavia ("ICTY") and Kosovo courts.[3]

3. The Defence opposes the Motion since the proposed facts: (i) lack the required relevance to an issue in the present proceedings; (ii) are not distinct, concrete and identifiable; (iii) are vague, inaccurate, or misleading when taken out of the context of the original judgements; (iv) are related to the alleged acts and conduct of the Accused; (v) go to issues that are central to the present case; (vi) use formulation that is materially different from that of the original judgements; (vii) relate to matters that are subject to dispute between the Parties; and (viii) stem from findings reached in judicial proceedings where the interests of the Accused were not represented and therefore their introduction in the present proceedings would be unfair.

[1] KSC-BC-2020-04, F00495, Decision on Defence request for extension of time limit (F00494), 28 April 2023, para. 9(b). All further references to filings in this Response concern Case No. KSC-BC-2020-04 unless otherwise indicated.
[2] F00467, Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts with Public Annex 1 and Confidential Annexes 2 and 3, 14 April 2023 (confidential)("Motion").
[3] Motion, para. 1. *See also,* Annex 1 and Annex 2 to the Motion.

4. Annex 1 to the present Response indicates the grounds and reasoning of the Defence in relation to its objections to the proposed facts.

II. PROCEDURAL BACKGROUND

5. On 8 February 2022, the Prosecution noted its intention to request the Panel to take judicial notice of a set of facts establishing the existence of an armed conflict in Kosovo.[4]

6. On 30 September 2022, the Panel issued its "Decision setting the dates for the trial preparation conferences and requesting submissions", in which it ordered, *inter alia*, the Parties to indicate whether they intend to request, jointly or separately, that the Panel take judicial notice of adjudicated facts under Rule 157(2) of the Rules and, if so, when such request(s) would be made and for how many facts.[5]

7. On 10 October 2022, the Prosecution notified the Panel of its intention to request, before the start of trial, judicial notice of no more than 150 adjudicated facts under Rule 157(2) of the Rules.[6] On the same day, the Defence submitted that it did not intend to make a request seeking judicial notice of adjudicated facts and that it expected the Prosecution to prove in court the entirety of its case.[7]

[4] F00139, A01, Annex 1 to Submission of Lesser redacted version of the 'Confidential Redacted Version of the Prosecution Pre-Trial Brief', 31 January 2022 (confidential), para. 20.
[5] F00289, Decision setting the dates for trial preparation conferences and requesting submissions with one strictly confidential and *ex parte* annex, 30 September 2022, para. 7.
[6] F00303, Prosecution submissions in advance of the trial preparation conference, with strictly confidential and *ex parte* Annexes 1-2 and confidential Annex 3, 10 October 2022 (confidential), para. 35.
[7] F00305, Defence Submissions Pursuant to Order on Trial Preparation Conferences, 10 October 2022 (strictly confidential and *ex parte)*, para. 20.

8. On 23 February 2023, the Panel instructed the Prosecution to submit any request under Rule 157(2) of the Rules by 14 April 2023.[8]

9. On 14 April 2023, the Prosecution filed the Motion.

III. APPLICABLE LAW

10. Article 40(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") provides:

> The Trial Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The Trial Panel, having heard the parties, may adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of proceedings. It may give directions for the conduct of fair and impartial proceedings and in accordance with the Rules of Procedure and Evidence.

11. Rule 157 of the Rules provides the following:

> (1) The Panel shall not require proof of facts of common knowledge but shall take judicial notice thereof.
> (2) Upon request by a Party or *proprio motu*, after hearing the Parties and, where applicable, Victims' Counsel, the Panel may, in the interests of a fair and expeditious trial, take judicial notice of adjudicated facts from other proceedings of the Specialist Chambers or from final proceedings before other Kosovo courts or from other jurisdictions relating to matters at issue in the current proceedings, to the extent that they do not relate to the acts and conduct of the Accused as charged in the indictment.

IV. SUBMISSIONS

12. At the outset, the Defence notes the sheer number of facts proposed for judicial notice which is evidently excessive given the relatively small scale of the present case. This in itself is at odds with the objective to "promote judicial economy"[9] and the right of the Accused to a fair and expeditious trial[10] as it would plainly require the Defence to consume time ordinarily needed for the

[8] F00434, Decision on the conduct of the proceedings, 24 February 2023 (confidential), para. 73.
[9] Motion, paras. 1, 6, 8.
[10] Motion, paras. 1, 5.

preparation and advancement of its case, for the purpose of investigating and rebutting the admitted facts.[11]

13. In the view of the Defence, the Prosecution's justification of the proposed facts is generic and fails to meet the strict and detailed tests applicable for judicial notice. It fails to apply the tests for each proposed fact by putting them in "groups" and "categories" rather than sufficiently explaining how each proposed fact meets the standard required for judicial notice.

14. The Defence notes the significant impact that the granting of judicial notice has on the Accused's rights to be presumed innocent, to a fair trial, and to confront his accusers and witnesses against him. Judicial notice reverses the applicable burden of proof, as it "establishes a well-founded presumption for the accuracy of [a noticed] fact, which therefore does not have to be proven again at trial, but which, subject to that presumption may be challenged at the trial".[12] Taking such notice needs to be carefully considered; the rights of the Accused cannot simply be outweighed by considerations of judicial economy.

[11] *See also*, ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-30-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005 ("*Krajišnik* Decision"), para. 16: "The Chamber also notes that 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 Statue of the Tribunal.' Moreover, since the 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" (footnotes omitted).

[12] ICTY, *Prosecutor v. Nikolić,* Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005 ("*Nikolić Decision")*, para. 11*; referring to* ICTY, *Prosecutor v. Milošević,* Case No. IT-02-54-AR73.5, 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 ("*Milošević Appeal Decision")*, p. 4.

Facts Proposed for Judicial Notice as Facts of Common Knowledge

15. According to established jurisprudence, whether a fact qualifies as a "fact of common knowledge" is a legal question.[13] The term "common knowledge" "encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute".[14] Facts that are "so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary".[15]

16. The Defence objects to proposed facts 1-17 as set out in Annex 1 of the Motion. Despite having indicated the paragraphs of the Indictment and the Prosecution's Pre-Trial Brief allegedly relevant to proposed facts 1-17, and claiming that "[t]hey are relevant […] in that they provide contextual and background information to the events and charges in Case 04, including their occurrence in Albania after the beginning of the NATO bombing campaign",[16] the Prosecution fails to demonstrate how the proposed facts relate "to an *issue* in the current proceedings".[17]

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[13] ICTR, *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecution's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, ("*Karemera Appeal Decision")*, para. 23.

[14] ICTR, *The Prosecutor v. Semanza,* Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 194; *The Prosecutor v. Semanza,* Case No. ICTR-97-20, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000, paras. 23, 24, providing, *inter alia,* that "'common knowledge' encompasses those facts that are generally known within a tribunal's jurisdiction or capable of accurate and ready determination by resort to sources whose accuracy cannot be called in question".

[15] ICTR, *The Prosecutor v. Semanza,* Case No. ICTR-97-20, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000, para. 25. *See also Milošević Appeal Decision*, p. 3, where the Appeals Chamber found that "Rule 94(A) of the Rules [corresponding to Rule 157(1) of the KSC Rules] commands the taking of judicial notice and that the basis on which judicial notice is taken pursuant to this sub-Rule is that the material is notorious".

[16] Motion, para. 5.

[17] *Nikolić Decision*, paras. 11, 48, 56.

17. The onus is on the Prosecution to demonstrate that the proposed facts are sufficiently relevant in the current proceedings. The fact that these proposed facts were taken into consideration in the proceedings indicated in Annex 1 does not automatically mean that the same facts are relevant to matters at issue in the present proceedings; a finding that each document is relevant to matters at issue in the current proceedings is required.[18] The Prosecution must demonstrate "more than a merely remote connection to the current proceedings".[19] Requesting the Panel to take judicial notice of facts which would, without sufficient indication of relevance, overburden the evidentiary record must not be allowed. This is particularly important in view of the effect a fact of common knowledge has, after taking judicial notice, as conclusive evidence.[20]

18. Furthermore, proposed facts 3-17 are not readily identifiable by reference to a reliable and authoritative source. The Defence reiterates that "common knowledge" encompasses those facts that are generally known within a tribunal's jurisdiction or capable of accurate and ready determination by resort to sources whose accuracy cannot be called in question".[21] Whereas proposed facts largely refer to UN Resolutions, negotiations, agreements, and developments of UN affiliated bodies, as well as bodies involved in international monitoring in Kosovo, the Prosecution does not identify

[18] ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 16; *Prosecutor v. Perišić,* Case No. IT-04-81-PT, Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts with confidential annexes, 1 September 2008, para. 6.
[19] ICTY, *Prosecutor v. Perišić,* Case No. IT-04-81-PT, Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts with confidential annexes, 1 September 2008, para. 6.
[20] *See, for instance, Karemera Appeal Decision* para. 42, where the Appeals Chamber found, *inter alia,* that facts that are judicially noticed as facts of common knowledge "are established conclusively" as opposed to noticed adjudicated facts which are "merely presumptions that may be rebutted by the defence with evidence at trial".
[21] ICTR, *The Prosecutor v. Semanza,* Case No. ICTR-97-20, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000, para. 23.

authoritative, primary source documents of the proposed facts *by* these very bodies. Instead, they indicate as their source judgements whose content does not contribute to any understanding as to whether the said proposed facts were contested or based on agreed facts. The central question, "whether the proposition can reasonably be disputed", does not contribute to a finding by the Panel of a fact so notorious and not subject to reasonable dispute for it to be obliged to take judicial notice pursuant to Rule 157(1) of the Rules.[22]

Facts Proposed for Judicial Notice as Adjudicated Facts

19. The test for taking judicial notice of adjudicated facts has been systematically developed in the jurisprudence of international criminal tribunals. As stressed by the Appeals Chamber at the ICTY in *Mladić*:[23]

> "[a] trial chamber must first determine whether a proposed adjudicated fact meets the admissibility criteria for judicial notice and then consider whether, even if all admissibility criteria are met, it should nonetheless decline to take judicial notice on the ground that doing so would not serve the interests of justice. Guided by prior jurisprudence, the *Popović et al.* Trial Chamber identified nine criteria which must be met in order for a trial chamber to exercise its discretion in this regard. […] To be admissible proposed adjudicated facts must: (i) be relevant to an issue in the proceedings; (ii) be distinct, concrete, and identifiable; (iii) as formulated by the moving party, not differ in any substantial way from the formulation of the original judgement; (iv) not be unclear or misleading in the context in which they are placed in the moving party's motion; (v) be identified by adequate precision by the moving party; (vi) not contain characterisations of an essentially legal nature; (vii) not be based on an agreement between the parties to the original proceedings; (viii) not relate to the acts, conduct or mental state of the accused; and (ix) not be subject to pending appeal or review."

[22] *Karemera Appeal Decision,* paras. 29, 37. *See also* ICTY, *Prosecutor v. Dragomir Milošević,* Case No. IT-98-29/1-AR73.1, 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, 26 June 2007, para. 21.

[23] ICTY, *Prosecutor v. Ratko Mladić,* Case No. 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, para. 25 (footnotes omitted); *referring, inter alia,* to *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision of Prosecution Motion of Judicial Notice of Adjudicated Facts with Annex, 26 September 2006, paras. 4-14; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009, para. 9; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 25 November 2009, para. 27.

i. Facts That Relate to the Acts and Conduct of the Accused

20. Judicial notice cannot be taken of facts which relate to the acts, conduct, or mental state of the Accused. The Defence submits that proposed facts 34-61 do not qualify for judicial notice on this basis as they clearly concern facts on which the Prosecution relies to for the purposes of substantiating the alleged criminal responsibility of the Accused.

21. The Defence notes the need for "*complete* exclusion" (emphasis added) of facts falling under this category for the purposes of striking a balance between the rights of the Accused and the interests of expediency. Judicially noticing such facts may impermissibly infringe the accused's right to hear and confront the witnesses against him or her.[24] Given the importance of this rule, the term "acts and conduct of the accused" extends beyond acts and conduct directly linked to the charges against the Accused, to those *relied* upon by the Prosecution to substantiate the Accused's criminal responsibility. As the ICC Appeals Chamber found, when interpreting "testimony going to proof of the 'acts and conduct of the accused'" in the context of Rule 68(2)(b) of the ICC Rules of Procedure and Evidence, "*[t]estimony 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*".[25]

[24] ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision of Prosecution Motion of Judicial Notice of Adjudicated Facts with Annex, 26 September 2006, para. 12, *referring, inter alia,* to the *Karemera Appeal Decision,* para. 51.

[25] ICC, *Prosecutor v. Al Hassan Ag Abgdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18 OA4, 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 of Rule 68(2)(b) of the Rules", 13 May 2022, paras. 55, 56, *referring, inter alia*, to ICTR, *The Prosecutor v. Karemera*, Case No. ICTR-98-44-

22. The Prosecution describes proposed facts 34-50 as relating to "the KLA", proposed facts 51-56 as relating to "Kukës" and proposed facts 57-61 as relating to the "presence and role of JCE members at the Kukës Metal Factory".[26] The Prosecution notes that these proposed facts "all relate to material issues in the case", "the role of specific individuals", "the use of the Kukës Metal Factory as a base for their military operations and as a detention facility, the crime committed therein, and the presence and conduct of JCE members other than the Accused, as charged in the Indictment".[27] These proposed facts go far beyond the provision of contextual elements of crimes or relevant background information, to the purported proof of the Accused's alleged knowledge, involvement, criminal liability, and *mens rea.*

ii. Facts That Go to Issues Central to the Case

23. In the view of the Defence, proposed facts 34-61, and especially proposed facts 51-61, cannot be judicially noticed because they go to the issues at the core of the case at hand. Taking judicial notice of facts that are central to the Prosecution's case and need to be proven at trial, would effectively shift the "ultimate burden of persuasion which remains with the Prosecution",[28] and as such be antithetical to any possible interpretation of the rights of the Accused to a fair trial. As held in the ICTY case of *Popović*, "[i]n balancing judicial economy with the Accused's right to a fair and public trial, the Trial Chamber

T, Decision on Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo, 15 December 2006, para. 9.

[26] Motion, paras. 10, 11.

[27] Motion, paras. 10, 11.

[28] *See, for example, Karemera Appeal Decision,* para. 42; *Prosecutor v. Dragomir Milošević,* Case No. IT-98-29/1-AR73.1, 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, 26 June 2007, para. 16.

is of the view that a number of these facts [that go to issues which are at the core of this case] should be excluded in the interests of justice".[29]

iii. Facts Whose Relevance to an Issue in the Proceedings Has Not Been Shown

24. The Prosecution submits that proposed facts 1-33 as set out in Annex 2 "all relate to material issues in the case, namely the existence of an armed conflict in Kosovo".[30] The Prosecution further purports to justify the existence of relevance by submitting that the proposed facts that pre-date the Indictment Period as well as proposed facts 30-33 about the LDK are relevant as contextual information to the case.[31] Neither these generic submissions nor any presumption that judicially noticed facts in other proceedings before the KSC must automatically receive judicial notice in the present proceedings constitute legitimate and adequate indication of relevance, for the purposes of the Motion.[32] The Motion "should specify exactly which fact is sought to be judicially noticed and how each act relates to the matters at issue in the current proceedings".[33]

iv. Facts That Are Not Distinct, Concrete or Identifiable with Adequate Precision and Facts That Are Misleading When Removed from the Context of the Original Judgements

25. In order to determine whether a purported fact is distinct, concrete and identifiable, a Chamber must examine it in the context of the original judgment with specific reference to the place referred to in the judgement and to the

[29] *Popović* Decision, para. 19. *See also* SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on Sesay Defence Application for Judicial Notice to be Taken of Adjudicated Facts Under rule 94(B), 23 June 2008, para. 21.
[30] Motion, para. 10.
[31] Motion, para. 10.
[32] *See* Motion, para. 11, n. 29.
[33] ICTY, *Prosecutor v. Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, para. 55 (and cases cited therein).

indictment period of that case.[34] The Chamber must also "deny judicial notice where a purported fact is inextricably commingled either with other facts that do not themselves fulfil the requirements of judicial notice under Rule 94(B) [corresponding to Rule 157(2) of the Rules] or with other accessory facts that serve to obscure the principal fact".[35] In line with this, the Defence notes that proposed facts that are unduly broad, vague, tendentious, detailed, repetitive of other evidence or conclusory, which include proposed facts 1, 2, 4, 8, 10-32, 34, 37, 45, 47, 53-55, and 61 as set out in Annex 2 to the Motion, must not be judicially noticed.[36]

26. The Prosecution submits that all proposed adjudicated facts "represent distinct findings of fact resulting from the relevant courts' assessment of the evidence tendered in the original trials".[37]

27. However, the fact that the Prosecution subsequently omits references to names, dates, and locations, and instead argues that "this information is identifiable and available by reference to, *inter alia*, the temporal and geographical scope of the relevant charges addressed in each judgment, as well as from surrounding Proposed Facts" appears to require that the proposed facts be read within the context of each judgement contrary to the requirements that they be sufficiently clear, identified with adequate precision, and not be misleading when removed from the context of the original findings.

28. This, for instance, is evident in the case of proposed facts 53 and 55. Specifically, in proposed fact 53, neither the phrase "KLA camp in Kukës" nor "in three different locations" are capable of accurately informing as to the place of

[34] *Popović* Decision, para. 6; *Krajišnik* Decision, para. 14.
[35] *Popović* Decision, para. 6.
[36] ICTY, *Prosecution v. Mejakić et al.*, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B), 1 April 2004, p. 4; *Popović* Decision, para. 16.
[37] Motion, para. 17.

alleged detention of the individuals identified; this is more so when read outside the context of the original judgement, in which case the phrase can misleadingly imply that there were multiple detention locations in Kukës. Likewise, by referring to "[t]he toilet" being located "outside", proposed fact 55 is ambiguous and when removed from the context of the judgement cited, misleadingly suggesting that the toilet was located outdoors as opposed to outside a specific room or rooms. There is no reason why the Prosecution should rely on adjudicated facts for describing the location relevant to the Indictment instead of presenting relevant evidence in court. The Prosecution had to replace phrases from the original judgement in proposed fact 52 twice, relying on its own suggested meaning. This is indicative of the proposed fact's vagueness and misleading content.

29. For instance, proposed facts 2, 8, 28, 29, 34, 47, 53, 54, 55, and 61 employ excessively vague wording (such as "increased significantly", "large numbers", "constraints of the existing constitutional and legal regimes", "at least until", "other equipment", "other countries", "majority of arms", "most weapons", "system", "three different locations", "almost all witnesses", "extremely small", "not sufficient for the number of detainees", "several witnesses", "almost non-existent", "located outside", and "was involved in the transport"). Furthermore, proposed facts 31, 45, 59 and 60 lack the necessary specificity (for example, stating that "Ibrahim Rugova was elected president of the LDK" without stating the date; stating "were issued to" without indication of who issued satellite telephones; stating "with a command role, holding authority and control over soldiers below him" without providing specific information; and stating "a position of authority" without providing further and specific information).

30. Additionally, the Defence submits that proposed facts 10-33 (relating to, according to the Prosecution, the FRY and Serbia: the "VJ", the "MUP", and the

"LDK") are unnecessarily broad and detailed to the effect that they are more likely to place an undue burden on the Accused to rebut them and less likely to serve the interests of justice and judicial economy.

v. Facts That Are Materially Different from the Formulation in the Original Judgements

31. Proposed fact 52 is formulated in a manner significantly different from the original judgements on which it purports to rely on. Contrary to the Prosecution's claim, this is not cured by a "holistic reading of the paragraph or the section to which the finding belongs".[38] In particular, the Prosecution impermissibly replaces "[a]ll the perpetrators were members of" with "[t]he KLA was", conflating two different subjects and making presumptions of a conclusory character. In the same sentence, the Prosecution replaces "the place where the persons displaced from Kosovo stayed or were detained" with "Kukës Metal Factory" relying on an unjustified and inaccurate presumption and interpretation. In addition, the underlying findings were made when the interests of the Accused, who was not a party to those proceedings, were not heard. This cannot be accepted.

vi. Facts That Are Subject to Reasonable Dispute Between the Parties

32. At the outset, the Defence strongly opposes proposed facts 51-61 as they emanate from proceedings which rely on highly controversial evidence and investigations. As the Defence stressed in its Pre-Trial Brief, substantiated complaints were made about the serious corruption of EULEX investigators and prosecutors, coupled with strong indications that evidence the Prosecution seeks to rely on at trial has been fabricated or is otherwise the result of

[38] Annex 2, nn. 2, 3.

inappropriate questioning, flawed, and selective investigation.[39] In view of such strong indications of lack of impartiality, prejudice, and unfairness, the Defence strongly requests that the said proposed facts be rejected.

33. In addition, the Prosecution seeks that proposed facts 36, 41, 52 and 53, which concern allegations relating to the KLA's "formal structure", hierarchy, organization, and control, as well as proposed facts 54-56, which relate directly to the counts containing the charges against the Accused (namely, arbitrary detention, cruel treatment, torture, and murder) be judicially noticed. The Defence strongly objects to this request as these proposed facts, other than going to the heart of the Prosecution's case regarding the Accused's acts and conduct (*see above,* paragraphs 20-23 in this Response), are evidently subject to reasonable dispute between the Parties and to the Panel's assessment upon having reviewed all evidence tendered by the Parties in their entirety. As stated in the Pre-Trial Brief, the Defence intends to challenge with evidence these alleged facts relating to the KLA, to the acts and conduct of the Accused, including any alleged involvement with the KLA at the Kukës Metal Factory, and to the alleged events at the Kukës Metal Factory.[40]

34. An indicative example can be found in yet another set of contested facts, namely proposed facts 57 and 58, in relation to which the Prosecution seeks judicial notice of the presence of Sabit Geci, an alleged participant in the JCE described in the Indictment, whereas the Defence intends to rely on strong evidence to the contrary.[41] Taking judicial notice of facts that are live issues at this trial would be unfair.

[39] F00265, Defence Pre-Trial Brief with Confidential Annex, 5 September 2022 (confidential)("Defence Pre-Trial Brief"), paras. 15-20.
[40] Defence Pre-Trial Brief, paras. 2, 8, 47, 50, 52, 57-73, 75-80, 91, 93. *See also* nn. 14, 22, 25, 79.
[41] *See,* for instance, ERN SITF00016019-00016023; ERN SPOE00248405-00248500, p. 86.

vii. Facts That Stem from Findings Where the Interests of the Accused were not Represented

35. The Defence further submits that the proposed facts as set out in Annex 2 rely on findings made in judicial proceedings in which the focus of the defence was evidently not the same as the defence in the present case. The interests of the Accused in this case was not presented or taken into consideration in such proceedings. For instance, proposed fact 53 concerns fundamental live and disputed issues in this case, including the identity of alleged victims. Accepting the proposed facts would violate the Accused's fair trial rights including his right to confront witnesses against him.

V. CLASSIFICATION

36. Pursuant to Rules 82(3) and 82(4) of the Rules, the Response and Annex 1 are filed as public as they relate to public filings, whereas Annex 2 is classified as confidential as it relates to confidential Annexes 2 and 3 of the Motion. The Defence seeks leave to file a public redacted version of Annex 2 in due course following the Prosecution's filing of public redacted versions of the said Annexes.

VI. RELIEF REQUESTED

37. For all the above reasons and as further indicated in Annexes 1 and 2 to this Response, the Defence respectfully requests the Panel to dismiss the proposed facts as set out in Annexes 1 and 2 to the Motion in their entirety.

Word count: 4994

Respectfully submitted,

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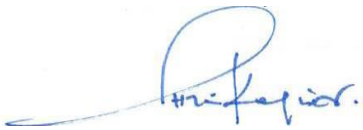

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Wednesday, 10 May 2023

The Hague, the Netherlands