



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: 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

Registrar: Dr Fidelma Donlon

Filing Party: Acting Specialist Prosecutor

Date: 16 May 2023

Language: English

Classification: Public

Prosecution Reply to KSC-BC-2020-04/F00507

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') here replies¹ to a number of issues raised in the Response.² As illustrated in detail below, the Defence's submissions are misguided and at times misleading. The Judicial Notice Motion³ should be granted.

II. SUBMISSIONS

A. THE NUMBER OF PROPOSED FACTS IS NOT EXCESSIVE

2. Contrary to the Defence's submissions,⁴ 78 facts do not constitute an excessive number.⁵ To the contrary, they provide an adequate level of context and detail, without overburdening the Parties and the Panel.

3. In this regard, 'the mere number' of proposed facts does not *per se* 'militate against their admission'.⁶ The ultimate consideration is whether the proposed facts are 'still of a manageable size and of sufficient relevance'.⁷ The Defence has failed to

¹ This reply is made pursuant to Rule 76 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-04/Rev3/2020, 20 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

² 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, KSC-BC-2020-04/F00507, 10 May 2023, public with public Annex 1 and confidential Annex 2 ('Response').

³ Prosecution motion for judicial notice of facts of common knowledge and adjudicated facts with public Annex 1 and confidential Annexes 2 and 3, KSC-BC-2020-04/F00484, 14 April 2023, public ('Judicial Notice Motion').

⁴ Response, KSC-BC-2020-04/F00484, para.12.

⁵ The Defence relies on a *Krajišnik* decision in which the Prosecution had initially sought admission of 1,029 facts and in which a total number of 684 facts were ultimately admitted: *see* ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Prosecution's motion for judicial notice of adjudicated facts, 7 November 2002; Submission of Reduced List of adjudicated facts, 8 December 2004; Decision on third and fourth prosecution motions for judicial notice of adjudicated facts, 24 March 2005, paras 10, 22.

⁶ ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Third Prosecution's Motion for Judicial Notice of Adjudicated Facts, 23 July 2010 ('*Stanišić and Simatović* Decision on Third Judicial Notice Motion'), para.64.

⁷ *Stanišić and Simatović* Decision on Third Judicial Notice Motion, para.64. *See also*, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Decision on third and fourth prosecution motions for judicial notice of adjudicated facts, 24 March 2005, paras 10, 22.

demonstrate that the number of proposed facts is excessive, or that their number would compromise in any way the fairness and expeditiousness of the trial.⁸

B.THE PROPOSED FACTS DO NOT RELATE TO THE ACTS AND CONDUCT OF THE ACCUSED

4. The Defence's submission that proposed facts 34-61 do not qualify for judicial notice because they concern facts 'on which the Prosecution relies for the purposes of substantiating the alleged criminal responsibility of the Accused'⁹ is misleading.

5. First, the Defence does not cite any authority in support of the existence of such a broadly worded standard.¹⁰ Second, all facts of a case are, in a way or another, facts upon which the Prosecution relies to 'substantiate the accused's criminal responsibility.' As held by the ICTR Appeals Chamber in *Karemera*, judicial notice 'is in fact available *only* for adjudicated facts that bear, at least in some respect, on the criminal responsibility of the accused.'¹¹ This is because '[f]acts that are not related, directly or indirectly, to that criminal responsibility are not relevant to the question to be adjudicated at trial, and, [...] thus may neither be established by evidence nor through judicial notice.'¹² The Appeals Chamber thus rejected the assumption that judicial notice cannot extend to facts that 'go directly or indirectly' to, or 'bear or touch thereupon', the criminal responsibility of the accused.¹³

⁸ ICTY, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 16 December 2003, para.12.

⁹ Response, KSC-BC-2020-04/F00507, para.20.

¹⁰ See also Response, KSC-BC-2020-04/F00507, para.21 (asserting a standard of 'to those [acts and conducts] relied upon by the Prosecution to substantiate the Accused's criminal responsibility', again without citing any supporting authority).

¹¹ ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ('*Karemera* Appeals Decision'), para.48.

¹² *Karemera* Appeals Decision, para.48.

¹³ *Karemera* Appeals Decision, para.48; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motions For Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010 ('*Karadžić* Reconsideration Decision'), para.19.

6. Third, the Defence's reliance on the ICC *Al Hassan* decision is misguided.¹⁴ The consideration of 'acts and conduct' in that decision was in the context of an entirely different legal framework, being the admissibility in writing of witness statements. Moreover, the principles set out therein do not apply to the facts at issue in this case. In particular, in the *Al Hassan* case, the ICC Appeals Chamber established that testimony used to prove the accused's acts and conduct may include evidence describing 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*.'¹⁵ Proposed facts 57-60 do not concern the acts and conducts of individuals in an organisation the Accused is part of, but rather their roles and functions; and proposed fact 61 concerns the conduct of an individual over whom the SPO does not allege the Accused had authority.

7. Furthermore, in reaching its findings, the ICC Appeals Chamber relied on an ICTR decision in the *Karemera* case.¹⁶ In that case, the Trial Chamber found that references to the MRND political party, and to senior officials within the MRND, in a witness statement the Prosecution sought admission of, constituted implicit references to the acts and conduct of the accused, considering that the accused were charged with 'using their power and authority as high level MRNDA political party leaders' to commit the charged crimes.¹⁷

8. In the present case, the Accused's acts and conduct are not 'implicitly referred to' in proposed facts 34-50. Facts 34-50 concern simply the structure of the KLA, and demonstrate that the level of organisation of the KLA grew over time to eventually

¹⁴ Response, KSC-BC-2020-04/F00507, para.21.

¹⁵ ICC, Appeals Chamber, *Prosecutor v. Al Hassan*, 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 to Rule 68(2)(b) of the Rules", 13 May 2022 ('*Al Hassan* Decision'), para.54 (emphasis added).

¹⁶ See ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo, 15 December 2006 ('*Karemera* Serugendo Decision').

¹⁷ *Karemera* Serugendo Decision, para.9.

become an 'organised armed group' within the meaning of the *Tadić* test.¹⁸ These facts have been proposed with a view to proving the existence of an armed conflict in Kosovo during the Indictment period, and thus ultimately the contextual elements of war crimes, as charged in the Indictment.

C. FACTS THAT CONCERN CORE OR LIVE ISSUES IN THE CASE CAN BE JUDICIALLY NOTICED

9. The Defence submits that taking judicial notice of facts 34-61 would be unfair to the Accused as these facts concern core, or live issues in this case.¹⁹

10. First, while what forms part of the 'core' of a case is not uniformly defined and may vary depending on the Accused's alleged responsibility, Chambers of other tribunals have considered as going to the core of a case facts that relate to a specific allegation against the accused,²⁰ pertain to an objective of the joint criminal enterprise alleged by the Prosecution,²¹ relate to the acts and conduct of persons for whose criminal conduct the accused is responsible,²² or to a highly contested issue.²³ None of the challenged facts fall in these categories. In particular, as elaborated above,²⁴ proposed facts 34-50 pertain to the organisation and structure of the KLA and are relevant to the existence of an armed conflict in Kosovo. They do not contain specific allegations against the Accused, and do not relate to the objectives of the JCE, the acts and conduct of people the Accused is responsible for, or highly contested issues.

¹⁸ ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.70.

¹⁹ Response, KSC-BC-2020-04/F00507, paras 23, 32-34.

²⁰ ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 17 December 2009 ('*Tolimir* Judicial Notice Decision'), para.33.

²¹ *Tolimir* Judicial Notice Decision, para.33; ICTY, *Prosecutor v. Stanišić and Župljanin*, Case No. 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 ('*Stanišić and Župljanin* Decision'), para.46.

²² *Tolimir* Judicial Notice Decision, para.33; *Stanišić and Župljanin* Decision, para.46.

²³ *Tolimir* Judicial Notice Decision, para.33. See also, ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A Judgement, 8 April 2015 ('*Tolimir* Appeals Judgment'), para.33 (finding no error in the Trial Chamber's articulation of which facts it considered relevant to the core of the case).

²⁴ See above, para.8.

Insofar as Facts 51-61 concern the commission of crimes,²⁵ they focus on ‘crime base’ facts and not on the acts and conduct of the alleged JCE members fulfilling the common purpose.²⁶ The fact that the Defence denies the Accused’s responsibility and challenges all of the SPO’s allegations in the Indictment, does not mean that these can be considered ‘highly contested issues’.²⁷

11. Second, whether or not the proposed facts concern core issues in the case, or issues that are subject to reasonable dispute, is not *per se* an obstacle to judicially noticing them. As held by an ICTY Trial Chamber, ‘[t]here is no part of the test for taking judicial notice of adjudicated facts that prohibits such judicial notice of facts which go to the core of the case.’²⁸ Taking judicial notice of such facts falls within the discretion of a trial panel, which will determine whether it would serve the interests of justice and a fair trial.²⁹

D. THE PROPOSED FACTS ARE DISTINCT, CONCRETE AND IDENTIFIABLE

12. The Defence challenges the proposed facts on the basis that they are unduly broad and vague.³⁰ However, whether a fact is distinct, concrete and identifiable has to be determined by looking at the judgment and the indictment in the original case, as well as the surrounding facts in the motion.³¹ In the *Karadžić* case, for example, the Trial Chamber did not find that the words ‘three or four civilians’, ‘some surrounding buildings’, and ‘at least 35 people died and at least 78 persons were wounded’ rendered the proposed facts insufficiently distinct, concrete and identifiable when looked at in

²⁵ See Annex 2 to Judicial Notice Motion, KSC-BC-2020-04/F00484/A02, proposed facts 52-56, 61.

²⁶ See Case 04 Indictment, paras 8-10.

²⁷ Response, KSC-BC-2020-04/F00507, para.33, fn.40. The SPO notes that the Defence has not previously taken issue with Sabit GEČI’s presence in Kukës.

²⁸ *Karadžić* Reconsideration Decision, para.19.

²⁹ *Karadžić* Reconsideration Decision, para.20; *Stanišić and Župljanin* Decision, para.46; *Tolimir* Judicial Notice Decision, para.33.

³⁰ Response, KSC-BC-2020-04/F00507, paras 25-30, 31.

³¹ See ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010 (*Karadžić* Decision on Fifth Motion for Judicial Notice), para.25.

the context of the original judgment.³² Even if the Trial Panel was to consider some of the proposed facts ambiguous or vague as a result of their abstraction from the original judgments, such facts are not *per se* inadmissible. In the exercise of their discretion, Chambers can correct the facts' ambiguity by, for example, adding dates or replacing words.³³

III. RELIEF REQUESTED

13. For the reasons set out above and in the Judicial Notice Motion, the SPO requests the Panel to take judicial notice of the facts contained in Annexes 1 and 2 to the Judicial Notice Motion.

Word Count: 1,981



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Tuesday, 16 May 2023

At The Hague, the Netherlands.

³² *Karadžić* Decision on Fifth Motion for Judicial Notice, para.25.

³³ *See, for example, ICTY, Prosecutor v. Perišić, Case No. IT-04-81-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008, para.21.*