



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-06**
**The 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: Fidelma Donlon

Date: 18 May 2023

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**Decision on Defence Motion for Judicial Notice of Adjudicated Facts with
Annex 1 (Public)**

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TRIAL PANEL II (“Panel”), pursuant to Articles 3(2)(d) and (3), 12, 21 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 95(5), 104(1)(b), 138, 157(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 18 January 2023, at the Trial Preparation Conference, the Panel ordered: (i) the Specialist Prosecutor’s Office (“SPO”) and the four Defence teams (collectively, “Defence”) to file motions for judicial notice of adjudicated facts by 1 March 2023, at 16:00 hours, and (ii) the other Parties and participants to file responses and replies by 3 April 2023, at 16:00 hours, and 10 April 2023, at 16:00 hours, respectively.¹
2. On 20 February 2023, the Defence for Mr Hashim Thaçi (“Thaçi Defence”) filed a notice of defence (“Thaçi Defence Notice”),² in which it notified the Trial Panel, the SPO, and Victims’ Counsel of its intention to raise the defence of self-defence.
3. On 1 March 2023, the Defence filed a joint motion for judicial notice of adjudicated facts (“Joint Defence Motion”).³
4. On 2 March 2023, the SPO responded to the Thaçi Defence Notice (“SPO Response to the Thaçi Defence Notice”).⁴
5. On 6 March 2023, the Thaçi Defence requested leave to reply to the Response to Notice (“Thaçi Defence Request for Leave to Reply”).⁵

¹ Transcript of Hearing, 18 January 2023, p. 1903, lines 5-13.

² F01306, Specialist Counsel, *Thaçi Notice of Defence*, 20 February 2023.

³ F01331, Specialist Counsel, *Joint Defence Motion for Judicial Notice of Adjudicated Facts*, 1 March 2023, with Annex A.

⁴ F01338, Specialist Prosecutor, *Prosecution Response to Thaçi Notice of Defence (F01306)*, 2 March 2023.

⁵ F01344, Specialist Counsel, *Thaçi Defence Request for Leave to Reply to Prosecution Response to Thaçi Notice of Defence*, 6 March 2023.

6. On 9 March 2023, the Panel found the SPO Response to the Thaçi Defence Notice not to have a valid legal basis and not to be properly before the Panel, and therefore denied the Thaçi Defence Request for Leave to Reply.⁶

7. On 20 March 2023, the Panel held a Status Conference, during which the issue of self-defence was extensively discussed by the Parties.⁷

8. On 31 March 2023, the SPO responded to the Joint Defence Motion (“SPO Response”).⁸

9. On 11 April 2023, the Defence replied to the SPO Response (“Joint Defence Reply”).⁹

II. SUBMISSIONS

10. The Defence requests the Trial Panel to take judicial notice of the adjudicated facts listed in Annex A to the Joint Defence Motion (“Proposed Adjudicated Facts”).¹⁰ The Defence submits that the Proposed Adjudicated Facts comply with the requirements set out by Rule 157, as they: (i) were adjudicated in final proceedings before other Kosovo courts or the ICTY; (ii) relate to matters at issue in the current proceedings; and (iii) do not relate to the acts and conduct of any of the Accused as charged in the Indictment.¹¹

11. The SPO responds that the Joint Defence Motion should be dismissed in part as at least 80 of the 134 of the Proposed Adjudicated Facts do not meet the requirements for judicial notice under Rule 157(2), for the reasons set out in detail

⁶ F01357, Panel, *Decision on Thaçi Defence Request for Leave to Reply to Prosecution Response to Thaçi Notice of Defence*, 9 March 2023, paras 9, 11-12.

⁷ Transcript of Hearing, 20 March 2023, pp. 2084-2101, 2103-2111, public.

⁸ F01411, Specialist Prosecutor, *Prosecution Response to ‘Joint Defence Motion for Judicial Notice of Adjudicated Facts’*, 31 March 2023, with Annex 1.

⁹ F01442, Specialist Counsel, *Joint Defence Reply to Prosecution Response to ‘Joint Defence Motion for Judicial Notice of Adjudicated Facts’*, 11 April 2023, confidential (a public redacted version was filed on the same day, F01442/RED).

¹⁰ Joint Defence Motion, paras 1, 12, referring to Annex A to the Joint Defence Motion.

¹¹ Joint Defence Motion, para. 6.

in Annex 1 to the SPO Response.¹²

12. The Defence requests the Panel to reject the SPO objections and to take judicial notice of the Proposed Adjudicated Facts.¹³

III. APPLICABLE LAW

A. CONDITIONS FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

13. Rule 157(2) provides that “[u]pon 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.”

14. In addition, relevant jurisprudence suggests that the following factors, among others, are relevant to the Panel’s exercise of discretion when deciding whether to take judicial notice of proposed adjudicated facts: (i) the proposed facts are distinct, concrete, and identifiable; (ii) the proposed facts, as formulated by the moving Party, do not differ in any substantial way from the formulation of the original judgement; (iii) the proposed facts are not unclear or misleading in the context in which they are placed in the moving Party’s motion; (iv) the proposed facts do not contain legal findings or characterisations; (v) the proposed facts are not based on an agreement between the Parties to the original proceedings; and (vi) the proposed facts are not subject to pending appeal or review.¹⁴ In exercising

¹² SPO Response, paras 1, 19, referring to Annex 1 to the Request.

¹³ Joint Defence Reply, para. 17.

¹⁴ See e.g. ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Trial Chamber II, Decision on Judicial Notice of Adjudicated Facts Following the Motions Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005 (“[Hadžihasanović and Kubura Decision](#)”), 14 April 2005, p. 5; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on Accused’s Motion for Judicial Notice of Adjudicated Facts Related to Count One (“[Karadžić 21 January 2014 Decision](#)”),

its discretion whether to take judicial notice of a proposed fact, the Panel has generally rejected those that go to the core of the prosecution's case.¹⁵ Facts which are broad, vague, tendentious, or conclusory have also been rejected.¹⁶ Moreover, the Panel has also been mindful of the possibility that the opposing party might seek to rebut a proposed fact thus consuming time and resources and frustrating the goal of judicial economy which Rule 157(2) is intended to promote.¹⁷

15. The Panel notes that Rule 157(2) of the Rules aims at achieving judicial economy by conferring on the Trial Panel discretionary power to 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, thus avoiding or reducing the amount of time necessary to the presentation of evidence in relation to facts that have been previously established in other proceedings.¹⁸ In so doing, the Panel must ensure,

21 January 2014, para. 6; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber II, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex ("[Popović et al. Decision](#)"), 26 September 2006, paras 7-11, 14; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Trial Chamber I, [Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence](#), 19 December 2003, para. 16; *Prosecutor v. Prlić et al.*, IT-04-74-PT, Trial Chamber II, Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(b) ("[Prlić et al. Decision](#)"), 14 March 2006, para. 12; *Prosecutor v. Krajišnik*, IT-00-39-PT, Trial Chamber I, [Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis](#), 28 February 2003, para. 14; *Prosecutor v. Mladić*, IT-09-92, Appeals Chamber, Decision on Ratko Mladić's Appeal Against the Trial Chamber's Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts ("[Mladić Decision](#)"), 12 November 2013, paras 92, 94. The Panel notes that the requirement that the proposed facts do not pertain to the "acts and conduct" of the Accused as charged in the Indictment is not a discretionary factor, but a pre-condition to the possibility of taking judicial notice under Rule 157(2) of the Rules.

¹⁵ See ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-T, Trial Chamber II, Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B) ("[Stanišić and Župljanin Decision](#)"), 1 April 2010, para. 46; *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeals Chamber, Judgement ("[Tolimir Appeal Judgment](#)"), 8 April 2015, paras 33-35. See also *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts ("[Karadžić 14 June 2010 Decision](#)"), 14 June 2010, para. 20.

¹⁶ See also *Prosecutor v. Hadžić*, IT-04-75-T, Trial Chamber, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Documents ("[Hadžić Decision](#)"), 23 May 2013, para. 13.

¹⁷ See e.g. ICTY, [Popović et al. Decision](#), para. 16; [Stanišić and Župljanin Decision](#), para. 45.

¹⁸ KSC-BC-2020-05, F00191, Trial Panel I, Decision on Judicial Notice of Adjudicated Facts ("[Mustafa Decision](#)"), 7 September 2021, para. 9. See also [Karadžić 21 January 2014 Decision](#), para. 4; ICTR,

at the same time, respect for the accused's right to a fair and expeditious trial, as required by Rule 157(2) of the Rules.¹⁹

16. By taking judicial notice of adjudicated facts, the Panel establishes a well-founded presumption of accuracy of these facts, which therefore do not have to be proven again at trial.²⁰ Since it is a rebuttable presumption, the other Parties may present at trial proof which challenges the accuracy of the facts concerned. The Panel has discretion to admit evidence that supplements or corroborates the judicially noted fact.²¹

B. CLAIM OF SELF-DEFENCE

17. The Panel notes that a number of Proposed Adjudicated Facts rely upon the underlying proposition that they constitute evidence relevant to establishing a defence of self-defence to (some of) the charges.²² In relation to those Proposed Adjudicated Facts, the Panel notes that the Taçi Defence has submitted that at all times relevant to the indictment period, Mr Taçi undertook actions: (i) in response to imminent and unlawful use of force by forces associated with the Federal Republic of Yugoslavia and the Republic of Serbia (“Serbian Forces”); and (ii) in defence of protected persons and property, including the civilian population of Kosovo.²³ Mr Taçi’s actions are said to have been proportionate to the degree of danger posed by Serbian Forces.²⁴ According to the Taçi Defence, customary international law provides a legal basis for the invocation of self-defence, as

Prosecutor v. Bagosora et al., ICTR-98-41-A, Appeals Chamber, [Decision on Anatole Nsengiyumva's Motion for Judicial Notice](#), 29 October 2010, para. 10.

¹⁹ *Mustafa* Decision, para. 9. See also [Mladić Decision](#), para. 24.

²⁰ See e.g. ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Trial Chamber I, [Decision on Prosecution's Motion for Judicial Notice of Facts Relevant to the Srebrenica Crime Base](#), 22 September 2008, para. 21; *Prosecutor v. Popović et al.*, IT-05-88-A, Appeals Chamber, [Judgement](#), 30 January 2015, para. 620; [Stanišić and Župljanin Decision](#), para. 25.

²¹ See e.g. [Tolimir Appeal Judgment](#), para. 25-26.

²² Joint Defence Motion, para. 9, referring to Proposed Adjudicated Facts 37-105.

²³ Taçi Defence Notice, para. 2.

²⁴ Taçi Defence Notice, para. 2.

reflected in Articles 31(1)(c) and (d) of the Statute of the International Criminal Court (“ICC”), and confirmed by the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in the *Kordić and Čerkez* Trial Judgement.²⁵ The Thaçi Defence argues that the legal effect of the defence of self-defence is to exclude the criminal responsibility of Mr Thaçi for the crimes and modes of liability alleged in the Indictment.²⁶ On that basis, the Thaçi Defence requests a judgment of acquittal on all counts of the Indictment.²⁷ In the present context, the Thaçi Defence argues that the claim of self-defence warrants the admission of certain proposed adjudicated facts which are relevant to establishing this defence.

18. According to Rule 95(5), within a time limit set by the Pre-Trial Judge, the Defence shall notify the Specialist Prosecutor of its intent to offer a defence of alibi *or any other grounds excluding criminal responsibility*, including that of diminished or lack of mental capacity, intoxication, necessity, duress, and mistake of fact or law.²⁸ Neither the Law, nor the Rules, provide specifically for a defence of self-defence. At the same time, the Kosovo Criminal Code provides for the concept of “necessary defense”, which in substance amounts to a claim of self-defence.²⁹ The ICTY Trial Chamber in the *Kordić and Čerkez* case noted that self-defence is a defence under customary international law³⁰ and described it as a general principle of criminal law.³¹ The Panel notes that the International Military Tribunal in the *Krupp* Trial compared the defence of “necessity” and that of self-defence in a manner which made it clear that it would have regarded self-defence as being applicable to war crimes charges.³² The Panel further notes that self-defence has in

²⁵ Thaçi Defence Notice, para. 3, referring to ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Chamber, Judgement (“[Kordić and Čerkez Trial Judgment](#)”), 26 February 2001, paras 450-451.

²⁶ Thaçi Defence Notice, para. 4.

²⁷ Thaçi Defence Notice, para. 4.

²⁸ Emphasis added.

²⁹ Article 12 of the 2019 Kosovo Criminal Code.

³⁰ [Kordić and Čerkez Trial Judgment](#), paras 448-452.

³¹ [Kordić and Čerkez Trial Judgment](#), para. 449.

³² LRTWC, Vol. X, p. 148. See also, sharing that understanding, LRWTC, Vol. 15, 177.

fact been entertained in a number of war crimes trials³³ and it features as one of the grounds excluding responsibility applicable before the ICC.³⁴

19. On the basis of the above, the Panel considers that the defence of self-defence forms part of customary law. The Panel also notes that an Accused appearing before other Kosovo courts is entitled to raise self-defence, and any Accused before the SC is entitled to equality before the law. For these reasons, the Panel finds that self-defence may be validly raised before this jurisdiction.³⁵

20. As a preliminary matter, the Panel needs to consider the question of the onus of establishing (and/or disproving) the existence of such a defence. It is apparent from the precedents cited above that, in every case, it was the Defence that took it upon itself to establish the existence of circumstances warranting the application of such a defence. Such a view was echoed by the ICTY Appeals Chamber in the *Kordić and Čerkez* case when it held that “[t]he existence or the scope of self-defence [...] is an issue the Accused must demonstrate”.³⁶ In other words, the onus of establishing the elements of self-defence is upon the Defence. This does not, of course, displace the burden of proof that is at all times upon the Prosecutor to establish the elements of the charged offences, the modes of liability and, ultimately, the Accused’s individual criminal responsibility.³⁷

³³ See e.g. LRTWC, Vol. III, pp. 77, 78 and 79-80; Vol. V, pp. 73 and 76; Vol. XIII, pp. 149-50; Vol. XIV, p. 129. See also [Kordić and Čerkez Trial Judgment](#), paras 448-452.

³⁴ ICC Statute, Article 31(1)(c).

³⁵ Articles 3(2)(d) and (3) and 12 of the Law.

³⁶ ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeals Chamber, Judgement (“[Kordić and Čerkez Appeal Judgment](#)”), 17 December 2004, paras 835-838.

³⁷ Article 21(3) of the Law; Rule 140 of the Rules. See also ICTY, *Prosecutor v. Orić*, IT-03-68-T, Trial Chamber II, [Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings](#), 21 October 2004, p. 4; *Prosecutor v. Halilović*, IT-01-48-T, Trial Chamber I, [Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses](#), 9 May 2005, para. 9; *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Chamber, Judgement (“[Čelebići Trial Judgment](#)”), 16 November 1998, paras 599, 601; *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Chamber II, [Decision on the Defence Preliminary Motion on the Form of the Indictment](#), 24 February 1999, para. 60; ICTR, *Musema v. Prosecutor*, ICTR-96-13-A, Appeals Chamber, [Judgement](#), 16 November 2001, para. 200; *Zigiranyirazo v. Prosecutor*, ICTR-01-73-A, Appeals Chamber, [Judgement](#), 16 November 2009, para. 75; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeals Chamber, [Judgement](#),

21. Determining whether evidence offered by the Defence is relevant to establishing the claimed defence of self-defence requires an understanding of the elements of self-defence. First, as a preliminary matter, the lawfulness of resort to force by a state against another state in self-defence³⁸ must be distinguished from the question of self-defence raised as a defence in a criminal case.³⁹ The former applies to and regulates the conduct of a state under the *jus ad bellum*, while the latter applies to the question of the lawfulness of an individual's conduct under criminal law. Accordingly,

the question of the legitimacy of the decision to resort to force is irrelevant to the determination of individual criminal responsibility for violations of international humanitarian law; [...] “whether an attack was ordered as preemptive, defensive or offensive is from a legal point of view irrelevant [...]. The issue at hand is whether the way the military action was carried out [during an armed conflict] was criminal or not”.⁴⁰

In other words, whether a party to an armed conflict acted in self-defence does not, in and of itself, prevent the qualification of crimes committed therein as serious violations of international humanitarian law.⁴¹

22. The conditions to be met for self-defence to operate as a defence to charges involving allegations of international crimes are strenuous. This reflects the

7 July 2006, para. 170; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Appeals Chamber, [Judgment \(Reasons\)](#), 1 June 2001, para. 107; SCSL, *Prosecutor v. Taylor*, SCSL-03-1-T, Trial Chamber II, [Judgement](#), 26 April 2012, para. 180; ICC Statute, Article 66.

³⁸ See e.g. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (“[Legality of the Threat or Use of Nuclear Weapons](#)”), *I.C.J. Reports 1996*, p. 226, para. 42. See also ICRC, Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (“ICRC Commentary”), 8 June 1977, 1125 UNTS 3, para. 1927.

³⁹ See also ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Appeals Chamber, Judgement (“[Boškoski and Tarčulovski Appeal Judgment](#)”), 19 May 2010, para. 31, footnote 116 (noting that, since it was not alleged in that case that the concerned operation was against an action by another State, Article 51 of the United Nations Charter was not relevant to that case).

⁴⁰ ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Chamber II, [Public Judgement with Confidential Annex \(Volume II of II\)](#), 23 February 2011, para. 2053. See also [Boškoski and Tarčulovski Appeal Judgment](#), paras 31-32, footnote 116; *Prosecutor v. Martić*, IT-95-11-A, Appeals Chamber, Judgement (“[Martić Appeal Judgment](#)”), 8 October 2008, para. 268; [Kordić and Čerkez Appeal Judgment](#), para. 812; [Kordić and Čerkez Trial Judgment](#), para. 452.

⁴¹ ICTY, [Boškoski and Tarčulovski Appeal Judgment](#), para. 31.

importance which the international community attaches to these basic prohibitions.⁴² The ICTY Trial Chamber in the *Kordić and Čerkez* case held that self-defence could provide a defence to certain acts where the conduct in question constitutes “a reasonable, necessary and proportionate reaction to the attack”.⁴³ It further noted that Article 31(1)(c) of the ICC Statute imposes the following two conditions: (i) the act must be in response to “an imminent and unlawful use of force” against an attack on a “protected” person or property; and (ii) the act of defence must be “proportionate to the degree of danger”.⁴⁴ The *Kordić* Trial Chamber also pointed out that “any argument raising self-defence must be assessed on its own facts and in the specific circumstances relating to each charge” and that the fact that the alleged perpetrator was involved in “defensive operations” is not itself a ground for excluding criminal responsibility.⁴⁵ The Chamber emphasised that “military operations in self-defence do not provide a justification for serious violations of international humanitarian law.”⁴⁶

23. The elements of the defence of self-defence therefore appear to be the following. First, to be lawful, an act carried out in self-defence must be taken in response to an imminent and unlawful use of force against a person or object protected by law against such attack.⁴⁷ Second, such an act must be reasonable in light of the danger posed and not be the consequence of a situation created by the perpetrator in serious violation of the law.⁴⁸ The third requirement (‘proportionality’) requires that a person may use force against a protected individual or object only if there is no reasonable alternative, and that the degree

⁴² [Kordić and Čerkez Trial Judgment](#), para. 452. See also [Martić Appeal Judgment](#), para. 268.

⁴³ [Kordić and Čerkez Trial Judgment](#), para. 449.

⁴⁴ [Kordić and Čerkez Trial Judgment](#), para. 451. See also ICC Statute, Article 31(1)(c).

⁴⁵ [Kordić and Čerkez Trial Judgment](#), para. 452. See also above para. 21.

⁴⁶ [Kordić and Čerkez Trial Judgment](#), para. 452.

⁴⁷ See Article 31(1)(c) of the ICC Statute.

⁴⁸ For instance, counter-reprisals could not be justified on the ground of self-defence where the party seeking to adopt such measures committed a serious violation of international humanitarian law that resulted in reprisals from the opposing side. See United Nations War Crimes Commission, Law Reports of Trials of War Criminals (“LRTWC”), Vol. XIV, pp. 136-137, Vol. XV, p. 181.

of force used must be the minimum necessary that is reasonably open to the individual concerned.⁴⁹ Force can only be used to protect oneself (or another person or object entitled to protection) from harm and as a last resort.⁵⁰ For instance, the taking of a human's life is justified in self-defence only as a last resort, where there is no reasonable alternative available in the circumstances.⁵¹

24. Furthermore, self-defence cannot operate as a defence to justify violating a prohibition that is recognised by international law as being absolute. Thus, for instance, in the *Martić* case, the ICTY Trial Chamber noted that in light of the fact that the prohibition against attacking civilians under international law is absolute, the accused's action could not be justified by any argument that the military action was taken in self-defence.⁵² The same could be said of other offences that are based on an absolute prohibition under international law, such as, for example, torture.⁵³

⁴⁹ LRTWC, Vol. I, pp. 1-21, at pp. 11-12, 15-16.

⁵⁰ See e.g. LRTWC, Vol. III, pp. 77-80, Vol. XIII, pp. 149-150.

⁵¹ LRWTC, Vol. 15, p. 177. See also LRTWC, Vol. III, pp. 77-80; LRTWC, Vol. XIII, pp. 149-50.

⁵² [Martić Appeal Judgment](#), para. 268. A similar principle and exclusion applies in the context of the right of States to have recourse to force against another state in self-defence in respect of peremptory norms of international law. See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts ("DARSIWA"), November 2001, Supplement No. 10 (A/56/10), Article 26 (and associated Commentary). This would mean that a state could not justify actions taken in violation of international humanitarian law by reason of a claim of self-defence. See e.g. ICJ, [Legality of the Threat or Use of Nuclear Weapons](#), para. 42; ICRC Commentary, para. 1927; DARSIWA, Article 21 (and associated Commentary).

⁵³ See e.g. ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Chamber II, [Judgement](#), 10 December 1998, paras 144, 153, 156; [Čelebići Trial Judgment](#), paras 453-54; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Trial Chamber, [Judgement](#), 22 February 2001, para. 466; *Prosecutor v. Stanišić and Župljanin*, IT-08-91-T, Trial Chamber II, [Judgement \(Volume 1 of 3\)](#), 27 March 2013, para. 52; *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Chamber II, [Judgement](#), 15 March 2002, para. 182; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, [Judgement](#), 20 February 2001, para. 172, footnote 225; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Trial Chamber, [Judgement](#), 31 March 2003, para. 336; *Prosecutor v. Simić et al.*, IT-95-9-T, Trial Chamber II, [Judgement](#), 17 October 2003, para. 34; ECCC, *Prosecutor v. Duch*, 001/18-07-2007/ECCC/TC, [Judgement](#), 26 July 2010, para. 352; *Prosecutor v. Nuon Chea & Khieu Samphân*, 002/19-09-2007/ECCC/TC, [Case 002/01 Judgement](#), 7 August 2014, para. 702; ICC, *Situation in the Islamic Republic of Afghanistan*, [Public Redacted Version of "Request for Authorisation of an Investigation Pursuant to Article 15"](#), 20 November 2017, ICC-02/17-7-Conf-Exp, ICC-02/17-7-Red, 20 November 2017, paras 347-349, 354; AEC, *Prosecutor v. Habré*, [Judgement](#), 30 May 2016, para. 1541. See also ECtHR, *Nada v. Switzerland*, 10593/08, [Judgment \[GC\]](#), 12 September 2012, para. 47; *Al-Adsani v. United Kingdom*, 35763/97, [Judgment](#), 21 November 2001,

25. Based on the above, to be admissible, evidence said to be relevant to self-defence must be probative of one or several of the elements of this defence set out above. The same is true, *a priori*, for judicial notice to be taken of adjudicated facts said to be relevant to establishing a defence of self-defence.

26. Finally, the Panel notes that the *Thaçi* Defence claims that self-defence is relevant to assessing the lawfulness of the actions attributed by the SPO to Mr *Thaçi*.⁵⁴ On the Defence's own case, the proposed adjudicated facts that rely upon self-defence as justification to establish the lawfulness of Mr *Thaçi*'s conduct could be excluded by Rule 157(2), which prohibits judicial notice of facts that relate to the acts and conduct of the Accused as charged in the indictment.⁵⁵ The Panel need not, however, decide this matter at present as the Proposed Adjudicated Facts are also being advanced by the Defence on other grounds and justifications.⁵⁶

27. The Panel has reviewed the proposed adjudicated facts in light of the analysis above.

28. The Panel notes, furthermore, that the Parties will be afforded a full and fair opportunity at the end of the trial (and/or at the no-case to answer stage) to make relevant legal and factual submissions in respect of the application of the claim of self-defence to the facts of the case. The present findings are, therefore, made in preliminary fashion for the exclusive purpose of deciding whether any of the proposed adjudicated facts put forth by the Defence have been shown to come within the material scope of the claim of self-defence advanced by the *Thaçi* Defence.

para. 61; ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, [Judgment](#), *I.C.J. Reports 2012*, p. 422, para. 99.

⁵⁴ See above para. 17.

⁵⁵ See above para. 13.

⁵⁶ Joint Defence Motion, para. 9.

C. PROPOSED ADJUDICATED FACT IN RESPECT OF THE EXISTENCE, NATURE AND TIMEFRAME OF THE ARMED CONFLICT

29. The Defence is asking the Panel to take judicial notice of the following fact adjudicated by two Kosovo courts:

An armed conflict existed in Kosovo and lasted until the terms of the international peace plan that was agreed between NATO and the FRY on 9 June 1999.⁵⁷

30. Two questions arise from this: (i) whether the Panel authorised to take judicial notice of a finding regarding the existence, nature and timeframe of an alleged armed conflict; and (ii) assuming that the Panel can take such notice, how the Panel should exercise its discretion to take (or not to take) judicial notice of the proposed adjudicated fact.⁵⁸

31. The Panel observes that the determination of the existence, nature and timeframe of an armed conflict involve mixed questions of fact and law.⁵⁹ The

⁵⁷ Joint Defence Motion, Annex A, Proposed Adjudicated Fact 133.

⁵⁸ Regarding the Panel's discretion on that point, *see* Rule 157(2) of the Rules ("may, in the interests of a fair and expeditious trial"). *See also* ICTY, *Prosecutor v. Mladić*, IT-09-92-AR73.1, Appeals Chamber, [Decision on Ratko Mladić's Appeal Against the Trial Chamber Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts](#), 12 November 2013, para. 24; *Nikolić v. Prosecutor*, IT-02-60/1-A, Appeals Chamber, [Decision on Appellant's Motion for Judicial Notice](#), 1 April 2005, para. 11; *Prosecutor v. Milosević*, IT-02-54-AR73.5, Appeals Chamber, [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, p. 4; [Prlić et al. Decision](#), para. 9; [Hadžihasanović and Kubura Decision](#), p. 4; [Karadžić 14 June 2010 Decision](#), para. 15; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Accused's Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts](#), 14 September 2010, para. 8; [Popović et al. Decision](#), para. 15; [Stanišić and Župljanin Decision](#), para. 45; [Hadžić Decision](#), para. 13.

⁵⁹ *See* F01337, Trial Panel II, *Decision on Thaçi Defence Motion to Narrow the Charges in the Indictment* ("Decision on Motion to Narrow the Charges"), 2 March 2023, para. 19; F00026, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, strictly confidential and *ex parte*, para. 89 (a confidential redacted version was issued on 19 November 2020, F00026/CONF/RED; a public redacted version was issued on 30 November 2020, F00026/RED); ICTY, *Prosecutor v. Bošković and Tarčulovski*, IT-04-82-PT, Trial Chamber II, [Decision on Johan Tarčulovski's Motion Challenging Jurisdiction](#), 1 June 2005, para. 11; *Prosecutor v. Bošković and Tarčulovski*, IT-04-82-AR72.1, Appeals Chamber, [Decision on Interlocutory Appeal on Jurisdiction](#), 22 July 2005, para. 13; *Prosecutor v. Bošković and Tarčulovski*, IT-04-82-T, Trial Chamber II, [Decision on Bošković Defence Motion for Admission of Exhibits from the Bar Table - "Armed Conflict" and Related Requirements under Article 3 of the Statute](#), 27 February 2008, para. 6;

Panel also observes that, as noted above, Rule 157(2) appears to limit the ability of the Panel to take judicial notice of findings of *fact*.⁶⁰

32. This interpretation of Rule 157(2) is supported by the jurisprudence and practice associated with the question of taking judicial notice of the existence, nature and timeframe of an armed conflict. First, in the *Mustafa* case, Trial Panel I took judicial notice of facts relevant to establishing or inferring the existence, nature and timeframe of an armed conflict, but did not take judicial notice of findings by other tribunals of the actual existence, nature and timeframe of such a conflict.⁶¹ A similar approach is apparent from the practice of the ICTY, which applied a generally comparable rule.⁶² The ICTY made it clear that while the presence of legal terminology in an otherwise factual finding does not render it incapable of judicial notice, findings of an essentially legal nature, findings which make primarily legal points or those containing legal characterisations of facts will not be judicially noted.⁶³ This is the case, in particular, in respect of findings regarding the *chapeau* or contextual elements of Articles 3 and 5 of the ICTY Statute, including the question of the existence, nature and timeframe of an armed conflict.⁶⁴ The Panel is cognisant of jurisprudence from the ICTR and the SCSL

Prosecutor v. Gotovina et al., IT-06-90-PT, Trial Chamber I, [Decision on Several Motions Challenging Jurisdiction](#), 19 March 2007, para. 42.

⁶⁰ See above para. 13.

⁶¹ *Mustafa* Decision, paras 12-14. See also KSC-BC-2020-05, F00144, Prosecution's Motion for judicial Notice of Adjudicated Facts, 30 June 2021, with Annex 1.

⁶² Rule 94(B) ICTY RPE.

⁶³ See e.g. *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Trial Chamber III, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts ("[Lukić and Lukić Decision](#)"), 22 August 2008, paras 24-25; *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Chamber III, [Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006](#), 7 September 2006, para. 23; *Prosecutor v. Šešelj*, IT-03-67-T, Trial Chamber III, [Decision on the Prosecution Motion to Take Judicial Notice of Facts Under Rule 94\(B\) of the Rules of Procedure and Evidence](#), 10 December 2007, para. 15. See also *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Trial Chamber I, [Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts](#), 28 January 2010, paras 24, 39-43.

⁶⁴ Regarding the chapeau/contextual elements of Article 3 of the ICTY Statute (war crimes), see e.g. [Lukić and Lukić Decision](#), para. 25; *Prosecutor v. Simić et al.*, IT-95-9-T, Trial Chamber, [Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina](#), 25 March 1999, pp. 4-5; *Prosecutor v. Sikirica et al.*, IT-95-8-T, Trial Chamber, [Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts](#),

where certain Chambers took judicial notice of the existence (and/or nature) of an armed conflict and not just of facts relevant to inferring these.⁶⁵ Without addressing the merits of this approach and its compatibility with the presumption of innocence and the responsibilities of the Panel (*iura novit curia*), the Panel finds that the ICTR and SCSL precedents are distinguishable from the present situation. Both of these courts had jurisdiction only over non-international armed conflicts.⁶⁶ In contrast, as far as the present jurisdiction is concerned, the responsibility to determine if an armed conflict existed at the relevant time and what that conflict's nature and timeframe were has been placed within the legal and fact-finding responsibilities of the court itself.

33. Regarding the second issue, the Panel notes that the question of the start and end point of the non-international armed conflict relevant to this case is a live issue between the Parties. The Parties agree that a non-international armed conflict between, on the one hand, the KLA and, on the other, Serbian and Yugoslav forces existed in Kosovo between at least 30 November 1998 and 9 June 1999,⁶⁷ while they

27 September 2000, pp. 5-6. Regarding the *chapeau* elements of Article 5 of the ICTY Statute (crimes against humanity), see also *Prosecutor v. Mladić*, IT-09-92-PT, Trial Chamber I, [First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts](#), 28 February 2012, para. 38.

⁶⁵ ICTR, *Prosecutor v. Semanza*, ICTR-97-20-T, Trial Chamber III, [Judgement and Sentence](#), 15 May 2003, para. 281. See also *Prosecutor v. Semanza*, ICTR-97-20-I, Trial Chamber III, [Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54](#), 3 November 2000, para. 48, Annex A, para. 3; ICTR, *Semanza v. Prosecutor*, ICTR-97-20-A, Appeals Chamber, [Judgement](#), 20 May 2005, paras 191-192; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Appeals Chamber, [Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice](#), 16 June 2006, para. 29; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Appeals Chamber, [Decision on Motions for Reconsideration](#), 1 December 2006, para. 11; SCSL, *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73, Appeals Chamber, [Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence"](#), 16 May 2005, paras 34-40; *Prosecutor v. Brima et al.*, SCSL-04-16-PT, Trial Chamber II, [Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence](#), 25 October 2005, paras 29-31; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Chamber I, [Judgement](#), 2 March 2009, para. 969.

⁶⁶ See ICTR Statute, Article 4; SCSL Statute, Articles 3-4. See also United Nations Security Council, *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, UN Doc. S/1995/134, 13 February 1995, para. 11; United Nations Security Council, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, paras 14-16, 22.

⁶⁷ CRSPD 213, 10 May 2023. In its response of 13 March 2023, the SPO specified that its agreement that there existed a non-international armed conflict during this period was "without prejudice to the

disagree upon the questions of whether (i) such a conflict already existed in March 1998 and (ii) continued after June 1999 (until September 1999).⁶⁸

34. The Panel will make findings on these issues in its judgement, based on all the evidence admitted at trial.⁶⁹ As pointed out by the Parties, different conclusions have been reached by different courts and chambers regarding the exact timeframe of that conflict.⁷⁰ This reflects the fact that different courts and chambers focused on partly different aspects of the same conflict and/or had at their disposal different evidential records.

35. Therefore, even if the Panel had the authority to take judicial notice of the existence, nature or timeframe of the armed conflict relevant to this case, it would have exercised its discretion to refuse to do so for the reasons outlined above.

IV. DISCUSSION

A. THE PARTIES' SUBMISSIONS

36. The Defence submits that the Proposed Adjudicated Facts are suitable for judicial notice as they: (i) are "distinct, concrete, and identifiable"; (ii) do not differ in any substantial way from the formulation of the original judgement; (iii) are not unclear or misleading in the context in which they are placed; (iv) are not based

Prosecution's position that there existed a non-international armed conflict in Kosovo throughout the period of crimes charged in the Indictment".

⁶⁸ F00709, Specialist Prosecutor, *Prosecution Submission of Corrected Pre-Trial Brief and Related Request*, 24 February 2022, with Annexes 1, 3, strictly confidential and *ex parte*, and Annex 2, confidential, Annex 1 ("SPO Pre-Trial Brief"), paras 697-701 (a lesser redacted version of the SPO pre-Trial Brief was filed on 15 February 2023, F01296/A01); F01049, Specialist Counsel, *Selimi Defence Pre-Trial Brief*, 21 October 2022, confidential, paras 177-181; F01050, Specialist Counsel, *Pre-Trial Brief of Mr Hashim Thaçi*, 21 October 2022, confidential, paras 75-78 (a public redacted version was filed on 8 November 2022, F01050/RED); F01051, Specialist Counsel, *Pre-Trial Brief of Jakup Krasniqi*, 21 October 2022, confidential, paras 125-132; F01052/COR, Specialist Counsel, *Corrected Version of the Pre-Trial Brief on Behalf of Kadri Veseli, with Confidential Annexes 1-3 (dated 21 October 2022, F01052)*, 25 October 2022, paras 138-139 (a public redacted version was filed on 13 March 2023, F01052/COR/RED); Transcript of Hearing, 18 January 2023, pp. 1838-1855.

⁶⁹ See Decision on Motion to Narrow the Charges, para. 19.

⁷⁰ Transcript of Hearing, 18 January 2023, pp. 1845-1846, 1851-1853.

on an agreement between the Parties to the original proceedings; and (v) are not subject to pending appeals or reviews.⁷¹ The Defence contends that: (i) Proposed Adjudicated Facts 1-36 relate to the historical background of the armed conflict; (ii) Proposed Adjudicated Facts 37-105 are related to certain attacks on Kosovo Albanian civilians that occurred in geographical and temporal proximity to the events and charges in this case, provide important historical and contextual information on the allegations in this case, and are relevant to the level of organisation and structure of the KLA during the Indictment period and to the Thaçi Defence Notice; (iii) Proposed Adjudicated Facts 106-125 are specifically relevant to the level of organisation and structure of the KLA during the Indictment period, and are therefore relevant to the allegations in this case; and (iv) Proposed Adjudicated Facts 126-134 relate to the existence and temporal scope of the armed conflict between the KLA and forces of the former Federal Republic of Yugoslavia fighting jointly with Serbian forces, and therefore to the contextual element of war crimes.⁷²

37. The SPO responds that: (i) sixty-two Proposed Adjudicated Facts relating to crimes by Serbian forces are not relevant to self-defence or KLA organisation and it is insufficient to argue that they provide context or background;⁷³ (ii) ten Proposed Adjudicated Facts are partly or entirely reciting or summarising evidence and thus do not qualify as factual findings;⁷⁴ (iii) eight Proposed Adjudicated Facts are of an essentially legal nature;⁷⁵ (iv) thirteen Proposed Adjudicated Facts are inaccurately reformulated and ten proposed facts are misleading, including because they are taken out of context, and thereby differ in a substantial way from the formulation of the original judgment;⁷⁶ (v) nine

⁷¹ Joint Defence Motion, para. 7.

⁷² Joint Defence Request, paras 8-11. *See also* Annex 1 to the SPO Response.

⁷³ SPO Response, paras 2-13. *See also* Annex 1 to the SPO Response.

⁷⁴ SPO Response, paras 2, 14. *See also* Annex 1 to the SPO Response.

⁷⁵ SPO Response, paras 2, 15. *See also* Annex 1 to the SPO Response.

⁷⁶ SPO Response, paras 2, 16. *See also* Annex 1 to the SPO Response.

Proposed Adjudicated facts are vague and/or imprecise, and do not satisfy the requirements of specifically referring to discrete and identifiable factual findings, and/or citing the parts or paragraphs of the judgment proposed for judicial notice;⁷⁷ and (vi) four Proposed Adjudicated 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.⁷⁸

38. The Defence replies that the SPO seeks to exclude evidence of crimes committed by Serbian Forces against Kosovo Albanians on the basis that it lacks relevance, while, according to the Defence, those facts are plainly relevant to the context including of relevant public statements, the motivation of KLA fighters and the Accused and the revenge motivation of individual perpetrators of alleged crimes.⁷⁹ The Defence argues that the Proposed Adjudicated Facts do not differ substantially from the original judgments’ formulations, and that the language of the facts need not be identical to the original judgment, but must be substantially similar.⁸⁰ The Defence claims that: (i) the facts are distinct, concrete, and identifiable; and (ii) 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.⁸¹

B. GENERAL CONSIDERATIONS

39. The Panel has set out above the relevant law, and will briefly outline how it has applied the law in deciding the present application. First, the Panel conducted an individualised, fact by fact, analysis. Where a proposed fact contained several sentences and/or factual propositions, the Panel considered each of them. The

⁷⁷ SPO Response, paras 2, 17. *See also* Annex 1 to the SPO Response.

⁷⁸ SPO Response, paras 2, 18. *See also* Annex 1 to the SPO Response.

⁷⁹ Joint Defence Reply, para. 3. *See also* Joint Defence Reply, paras 4-12.

⁸⁰ Joint Defence Reply, paras 13-14.

⁸¹ Joint Defence Reply, paras 15-16.

Panel verified whether each Proposed Adjudicated Fact met the requirements of the Rules and, where it did, whether they should nevertheless be refused in the exercise of the Panel's discretion. In that context, the Panel has accounted for the fact that the onus of establishing the requirements of the Rules is upon the moving party.⁸² The Panel notes in that regard that the Defence did not provide for individualised submissions in respect of each Proposed Adjudicated Fact but organised its submissions by general categories.⁸³

40. In the exercise of its discretion, the Panel has taken into consideration a number of factors. First, the Panel has rejected facts that had no clear and demonstrable connection to matters at issue in the current proceedings. Where, however, a Proposed Adjudicated Fact contained irrelevant material (for example, evidence of Serbian crimes) but also some indications of potentially relevant considerations (for example, the operational capabilities of Serbian forces as might be relevant to establishing the existence of a non-international armed conflict), the Panel decided in favour of the moving party and admitted these parts of the Proposed Adjudicated Facts that it could connect to an issue of relevance to the case. Where the moving party failed to demonstrate such a connection, the Panel refused to take judicial notice of the Proposed Adjudicated Fact(s).

41. The Panel also exercised its discretion not to take judicial notice where the Proposed Adjudicated Facts were too closely connected to an important and live issue in the case. The Panel is of the view that little time would be gained by taking judicial notice of such facts and that they should be determined not on the basis of findings made by others but based on the evidence presented to this Panel.

42. The Panel also refused to take judicial notice of a number of Proposed

⁸² See ICTY, [Popović et al. Decision](#), para. 21; *Prosecutor v. Milosević*, IT-98-29/1-T, Trial Chamber III, [Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts with Dissenting Opinion of Judge Harhoff](#), 10 April 2007, para. 29; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber, Judgement and Sentence, 10 June 2010, para. 1611; [Tolimir Appeal Judgment](#), para. 24.

⁸³ See Joint Defence Motion, paras 8-11. See also above para. 36.

Adjudicated Facts where they were ambiguous, unclear, too general or lacked context or sufficient factual specificity to be of assistance to the Panel in the fulfilment of its fact-finding responsibilities.

43. In some instances, the Panel *proprio motu* reformulated Proposed Adjudicated Facts either to make them more consistent with the original formulation of the findings made by the relevant tribunal or to account for additional information contained in those findings. The Panel has also taken judicial notice of part of a Proposed Adjudicated Fact where only that part met the requirements of Rule 157(2) or where the Panel exercised its discretion not to take judicial notice of certain parts of the proposed fact. The Panel has also accepted slight reformulations of findings suggested by the Defence where they render the Proposed Adjudicated Facts more comprehensible and do not distort the substance of the original findings.⁸⁴

C. EVALUATION OF THE PROPOSED ADJUDICATED FACTS

44. The Panel is satisfied that all the Proposed Adjudicated Facts come from other proceedings of the Specialist Chambers or from final proceedings before other Kosovo courts or from other jurisdictions.

45. Having reviewed each of the Proposed Adjudicated Facts individually, the Panel finds that the Defence has failed to establish that several of them relate to matters at issue in the current proceedings. The Panel reiterates in that respect that the commission of crimes by the opposing side is of no relevance to this case unless it is directly relevant to a fact at issue in this case.⁸⁵ The Panel also recalls the requirements regulate the admission of evidence of self-defence.⁸⁶ Where it was

⁸⁴ See e.g. Annex 1 to the present decision, Adjudicated Fact 770 (Defence Proposed Adjudicated Fact 113) where “[f]rom March to September 1998” replaces the reference to the “Indictment period” in the original finding.

⁸⁵ Transcript of Hearing, 16 December 2022, pp. 1725-1726.

⁸⁶ See above paras 21-25.

not apparent from the Defence submissions and from the fact in question what its purported relevance to the case was, the Panel has declined to take judicial notice of it. The Defence failed, in particular, to establish that the following Proposed Adjudicated Facts (or parts thereof) relate to matters at issue in the current proceedings: 10, 15-18, 20-21, 27, 37, 38, 43, 46-48, 52, 53, 54, 55, 56, 57, 59-61, 63-73, 74, 76-77, 78, 79-80, 81, 82-85, 87-105, 109, and 110.

46. As noted above, proposed adjudicated facts underlying a claim of self-defence must comply with the requirement of Rule 157(2) that proposed adjudicated facts do not relate to the acts and conduct of the Accused as charged in the indictment.⁸⁷ The Panel notes that Proposed Adjudicated Facts 121-122 come close to relating to the acts and conduct of the Accused. To the extent that they do not constitute acts and conduct of the Accused as charged in the indictment, the Panel has exercised its discretion not to take notice of them so that these matters can be litigated in full at trial. The Panel is otherwise satisfied that none of the Proposed Adjudicated Facts pertain to the acts and conduct of the Accused as charged in the indictment. The Panel notes, however, that several of the proposed facts pertain to the responsibility, authority and/or powers of individuals who are alleged by the SPO to have been subordinates of the Accused or members or tools of the joint criminal enterprise. While such matters are not per se excluded by Rule 157(2), the Panel has exercised its discretion not to take judicial notice of Proposed Adjudicated Facts 114, 117-118 so that these issues can be addressed and decided in light of the evidence produced at trial.

47. As noted above, the Panel is not authorised to take judicial notice of findings of an essentially legal nature, findings which make primarily legal points or those containing legal characterisations of facts.⁸⁸ The Panel has identified a number of Proposed Adjudicated Facts (or parts thereof) which were either legal in nature

⁸⁷ See above paras 13, 26.

⁸⁸ See above paras 14, 32.

and/or contained legal findings which fall outside of the scope of Rule 157(2) or which the Panel is not prepared, in the exercise of its discretion, to take notice of. This concerns Proposed Adjudicated Facts 14, 15-17, 21, 120, and 133.

48. The Panel also considers that a number of Proposed Adjudicated Facts lack sufficient clarity, context, or specificity to assist the Panel in its fact-finding functions. The Panel has therefore declined to take judicial notice of Proposed Adjudicated Facts 58 and parts of Proposed Adjudicated Facts 8 and 26.

49. The Panel has also exercised its discretion to decline to take judicial notice of certain facts, where the fact in question is a live issue in the case and forms a core aspect of the case, in particular as regards the functioning and organisation of the KLA's structure. This concerns Proposed Adjudicated Facts 114, 116-125, 127, 130 and 131.

50. The Panel has further exercised its discretion to reject Proposed Adjudicated Facts 22 and 134 as they reflect the content of a document/exhibit rather than an actual finding of a tribunal. Insofar as the Defence wishes to rely upon the content of any such document, it may submit it in accordance with Rule 138. The Panel also notes that Proposed Adjudicated Fact 132 merely repeats Proposed Adjudicated Fact 126. For this reason, the Panel will only take judicial notice of Proposed Adjudicated Fact 126. The Panel further notes that Proposed Adjudicated Facts 6, 7, 26-36, 41, 44, 49, 53, 115, 129-131, and 134 overlap with certain adjudicated facts proposed by the SPO, or parts thereof, which have already been judicially noted by the Panel.⁸⁹ In order to avoid duplication of judicially noticed adjudicated facts, and having carefully accounted for any difference in the formulation of those facts as proposed suggested by the Defence, the Panel declines to take judicial notice of Proposed Adjudicated Facts 6, 7, 26-36,

⁸⁹ F01534, Panel, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex 1 (Confidential) and Annex 2 (Public)*, 17 May 2023. See Annexes 1-2, Adjudicated Facts 59, 76, 87, 139, 141-143, 145, 148, 154-156, 160, 162, 167, 169, 171, 186-188, 250, 277-278, 280-281, 305.

41, 44, 49, 53, 115, 129-131, and 134.

51. Finally, as already noted, the Panel has *proprio motu* reformulated some of the Proposed Adjudicated Facts so that they correspond more closely to the original findings. This concerns Proposed Adjudicated Facts 1, 9, 11-12, 19, 39-40, 51, and 108. The Panel also reformulated certain Proposed Adjudicated Facts or declined to take judicial notice of parts thereof when it considered that the relevant Proposed Adjudicated Facts (or parts thereof) did not meet the requirements of Rule 157(2). This pertains, in particular, to Proposed Adjudicated Facts 8, 13-14, 26, 38,-53, 55, 74, 78, 81, and 110.

52. Having conducted an individualised and detailed assessment of each of the Proposed Adjudicated Facts, and in the application of Rule 157(2), the Panel has come to the view that the following facts could, in whole or in part and as sometimes reformulated by the Panel, be judicially noted: 1-5, 8-9, 11-14, 19, 23-25, 38-40, 42, 45, 50-52, 55, 62, 74-75, 78, 81, 86, 106-108, 110-113, 126, and 128. The extent to which the Panel was prepared to take judicial notice of these Proposed Adjudicated Facts or parts thereof is detailed in Annex 1 to the present decision.

V. DISPOSITION

53. For the above-mentioned reasons, the Panel hereby:

- a) **GRANTS** the Joint Defence Motion, in part;
- b) **TAKES JUDICIAL NOTICE** in whole or in part of the following Proposed Adjudicated Facts, as amended by the Panel and as set out in Annex 1 to the present decision: 1-5, 8-9, 11-14, 19, 23-25, 38-40, 42, 45, 50-52, 55, 62, 74-75, 78, 81, 86, 106-108, 110-113, 126, and 128; and
- c) **DECLINES** to take judicial notice of all remaining Proposed Adjudicated Facts, or parts thereof, which are not included in Annex 1

to the present decision.



Judge Charles L. Smith, III
Presiding Judge

Dated this Thursday, 18 May 2023

At The Hague, the Netherlands.