

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Hashim Thaçi
Counsel for Kadri Veseli
Counsel for Rexhep Selimi
Counsel for Jakup Krasniqi

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**Joint Defence Request for Certification to Appeal Decisions F01534 and
F01536**

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law and Rules 77 and 157 of the Rules of Procedure and Evidence, the Defence for Mr Thaçi, Mr Veseli, Mr Selimi and Mr Krasniqi respectfully requests certification to appeal the Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (“First Impugned Decision”)¹ and the Decision on Defence Motion for Judicial Notice of Adjudicated Facts (“Second Impugned Decision”),² in relation to the following issues:

A. Issues for the certification to appeal both Decisions:

- i) **First Issue:** Whether the Trial Panel erred in its inconsistent assessment of Proposed Adjudicated Facts pertaining to the alleged JCE members and subordinates.
- ii) **Second Issue:** Whether the Trial Panel erred in its inconsistent assessment of facts relating to “live issues forming a core aspect of the case”.
- iii) **Third Issue:** Whether the Trial Panel erred in its assessment of Proposed Adjudicated Facts which contain and/or consist exclusively of legal characterisations.

¹ KSC-BC-2020-06, F01534, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex 1 (Confidential) and Annex 2 (Public), 17 May 2023.

² KSC-BC-2020-06, F01536, Decision on Defence Motion for Judicial Notice of Adjudicated Facts with Annex 1 (Public), 17 May 2023.

B. Issues for the certification to appeal the First Impugned Decision

- iv) **Fourth Issue:** Whether the Trial Panel erred in admitting Proposed Facts pertaining to the “acts and conduct of the Accused”.
- v) **Fifth Issue:** Whether the Trial Panel erred in admitting Proposed Adjudicated Facts without clearly identified and accessible underlying evidence.
- vi) **Sixth Issue:** Whether the Trial Panel erred in admitting a wide array of facts that are vague and/or ambiguous, in spite of its assertion that it has rejected such facts.
- vii) **Seventh Issue:** Whether the Trial Panel failed to consider the cumulative prejudice caused by the admission of an extensive number of facts proposed by the SPO.
- viii) **Eighth Issue:** Whether the Trial Panel has failed to consider a number of Defence objections in their entirety.

C. Issues for the certification to appeal the Second Impugned Decision

- ix) **Ninth Issue:** Whether the Trial Panel erred in a wholesale rejection of facts relevant to crimes committed by Serb forces.
- x) **Tenth Issue:** Whether the Trial Panel failed to provide a reasoned opinion with regards to the rejection of a number of Defence Proposed Adjudicated Facts.

2. Due to the considerable overlap between the issues in the two Decisions and the fact that many of the issues enumerated above can only be explained by reference

to both Decisions, a consolidated request for certification appears to be more appropriate in the present circumstances.

3. Furthermore, given the exceptionally large number of facts that the present request concern and the limited time prescribed for the filing of such requests under Rule 77(1), the references to specific facts in the sections below are only indicative.

II. SUBMISSIONS

A. The Issues Are Appealable

4. All the identified issues derive from the two Impugned Decisions.

1. Issues Related to Both Impugned Decisions

a. First Issue

5. In the First Impugned Decision, the Trial Panel noted that the ICTY and ICTR found that “the categorical prohibition on taking judicial notice of facts concerning acts and conduct of the accused does not extend to facts related to, for example, the conduct of physical perpetrators or the existence and activity of a joint criminal enterprise or its members (other than the Accused).”³ The Trial Panel thus focused entirely on the mandatory exclusion aspects of the prohibition of admitting such facts and admitted many facts proposed by the SPO (“SPO Proposed Facts”) concerning the conduct of alleged JCE members and subordinates.⁴
6. In contrast, in the Second Impugned Decision, the Trial Panel noted that several of the facts proposed by the Defence (“Defence Proposed Facts”) “pertain to the

³ First Impugned Decision, para. 24.

⁴ Including, but not limited to, SPO Proposed Facts 242, 227, 219, 251, 256, 266, 538-539.

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 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.”⁵

7. In terms of application, the Trial Panel admitted certain SPO Proposed Facts that relate to the function and authority of a named JCE member,⁶ while it rejected the facts proposed by the Defence on exactly the same issue.⁷ Similarly, for facts pertaining to the General Staff, the Trial Panel admitted a plethora of SPO Proposed Facts imputing acts to the General Staff as a whole or pertaining to its authority “insofar as they do not relate to the acts and conduct of the Accused as charged in the indictment”⁸, while it rejected two Defence Proposed Facts on the same subject matter on the grounds that they “come close to relating to the acts and conduct of the Accused” and therefore constitute live issues.⁹
8. Considering the foregoing, the present issue is therefore appealable.

b. Second Issue

9. In the Second Impugned Decision, the Trial Panel exercised its discretion to reject several Defence Proposed Facts that constitute “a live issue in the case and form[s] a core aspect of the case, in particular as regards the functioning and

⁵ Second Impugned Decision, para. 46.

⁶ SPO Proposed Facts 538-539.

⁷ Defence Proposed Facts 117-118.

⁸ First Impugned Decision, para. 24.

⁹ Second Impugned Decision, para. 46.

organisation of the KLA's structure."¹⁰ In the First Impugned Decision, the Trial Panel held that it has likewise rejected such facts,¹¹ yet inconsistently applied the exclusion of such facts between the two Impugned Decisions.

10. For example, the Trial Panel rejected a Defence Proposed Fact pertaining to the means of communication employed by the KLA on the grounds enunciated above,¹² yet proceeded to admit three SPO Proposed Facts on precisely the same matter.¹³ In the same vein, the Trial Panel admitted a SPO Proposed Fact related to communiques issued by the General Staff,¹⁴ yet it has rejected two Defence Proposed Facts that relate to such communiques.¹⁵ Finally, even on isolated matters such as the conduct of the meeting on the issue of the change of leadership in the Dukagjin Zone, the Trial Panel proceeded with rejecting the Defence Proposed Fact on the matter¹⁶ and admitted the SPO ones which concern the very same event.¹⁷
11. Considering the foregoing, the present issue is therefore appealable.

c. Third Issue

12. In the First Impugned Decision, the Trial Panel admitted a total of 46 facts relating to whether an individual has been actively participating in hostilities,¹⁸

¹⁰ Second Impugned Decision, para. 49.

¹¹ First Impugned Decision, para. 11.

¹² Defence Proposed Fact 123.

¹³ SPO Proposed Facts 230-232.

¹⁴ SPO Proposed Fact 228.

¹⁵ Defence Proposed Facts 124-125.

¹⁶ Defence Proposed Fact 127.

¹⁷ SPO Proposed Fact 277-278.

¹⁸ For example, SPO Proposed Facts 385, 387, 389, 403, 405, 407, 411, 414-415, 417, 420.

an essentially legal qualification, despite recognising that findings regarding the *chapeau* elements of Articles 3 and 5 of the ICTY Statute are not suitable for judicial notice.¹⁹

13. The Trial Panel also admitted several facts in the First Impugned Decision that include references to murders and robberies²⁰ and other legal characterizations of acts, such as “torture”²¹, “cruel treatment”²² and “inhumane treatment”²³ while simultaneously rejecting several Defence Proposed Facts including similar terms.²⁴
14. Therefore, while the Trial Panel held that the presence of legal characterizations is a factor in deciding whether to admit a particular fact in both Decisions,²⁵ whether it has erred in its assessment of this factor is therefore an appealable issue.

2. Issues Related to the First Impugned Decision

a. Fourth Issue

15. In the First Impugned Decision, despite holding that facts pertaining to the acts and conduct of the Accused are subject to mandatory as opposed to discretionary

¹⁹ Second Impugned Decision, para. 32.

²⁰ SPO Proposed Facts 363, 386, 387, 389, 600, 664, 773.

²¹ SPO Proposed Fact 345

²² SPO Proposed Fact 387.

²³ SPO Proposed Fact 459.

²⁴ Defence Proposed Facts 15 and 17.

²⁵ First Impugned Decision, para. 11; Second Impugned Decision, para. 14.

exclusion,²⁶ the Trial Panel proceeded to admit several facts that fall within this concept.

16. First, the Panel makes specific findings on the activity and functions of the General Staff²⁷ with no distinction drawn between the General Staff members implicated. These facts therefore relate to “the deeds, behaviour, and mental state of the [A]ccused”²⁸ as they relate to, *inter alia*, discussions that took place between General Staff members on operational issues,²⁹ appointments made by members of the General Staff,³⁰ or orders made by members of the General Staff.³¹
17. Second, the Panel admitted several facts that are directly related to the *mens rea* of the Accused³² such as the means of communication employed by the General Staff and the receipt of reports from the zone command by the General Staff. Facts of this nature are probative of their alleged knowledge of the alleged crimes.
18. Considering the foregoing, the present issue is therefore appealable.

b. Fifth Issue

19. The Trial Panel held in the First Impugned Decision that “[i]t is important that the Panel should be provided with all relevant evidence pertaining to any such

²⁶ First Impugned Decision, footnote 11.

²⁷ Including, but not limited to, SPO Proposed Facts 222, 223, 224, 225, 227, 228, 230, 231, 232, 233, 234, 235, 236, 237, 239, 240, 264, 279,

²⁸ ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006, para. 13.

²⁹ Fact 222.

³⁰ Fact 223.

³¹ Facts 237.

³² Including, but not limited to, SPO Proposed Facts 230, 231, 231, 234, 239, 279.

facts so as to enable it to perform its fact-finding functions, in particular in respect of facts that are in dispute between the parties.”³³ Nevertheless, the Panel proceeded with admitting a wide array of facts that are based on findings where the evidence underlying them is either anonymous³⁴ or not clearly identified.³⁵

20. Whether the Trial Panel erred in admitting such facts without being able to identify the underlying evidence upon which they are based is therefore an appealable issue.

c. Sixth Issue

21. The Panel held that it has “refused to take judicial notice of a number of Proposed 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.”³⁶
22. Nevertheless, the Panel proceeded to admit a wide array of facts that can only be categorized as such. In particular, the Trial Panel has admitted numerous facts which are devoid of any temporal or spatial indicia, which only stand to confuse the evidentiary record.³⁷ In particular, a number of facts concerning the role of particular individuals relevant to the SPO’s case entirely fail to specify the timeframe concerned or account for the various changes of roles incurred by such individuals.³⁸

³³ First Impugned Decision, para. 26.

³⁴ For example, SPO Proposed Facts 262, 264, 272, 301, 302, 344, 345.

³⁵ For example, SPO Proposed Facts 68, 74, 80, 331, 382, 391.

³⁶ Second Impugned Decision, para. 18,

³⁷ For example, SPO Proposed Facts 470-481, 492-496, 525-526, 284, 288.

³⁸ SPO Proposed Facts 219, 284 and 303.

23. Whether the Trial Panel therefore erred in admitting vague and ambiguous facts into evidence is therefore an appealable issue.

d. Seventh Issue

24. The Trial Panel admitted a total of 699 facts proposed by the SPO.
25. In light of these admitted facts, the Defence may be forced to present a case to rebut the plethora of acts in support of which the SPO need not in principle adduce evidence, which is inherently incompatible with the right to a fair and speedy trial and with the presumption of innocence.³⁹ While the SPO's case may be shortened, the concomitant extension of Defence cases will invariably render the added benefit illusory.
26. As such, whether the Panel failed to consider the cumulative impact of such a vast number of factual findings on matters pertaining to crucial elements of the charges on the rights of the Accused is therefore an appealable issue.

e. Eighth Issue

27. In the First Impugned Decision, the Trial Panel failed to consider a number of Defence objections, including those relating to (i) facts based on statements from suspects who never testified, statements of co-accused, or otherwise not compellable witnesses, such as deceased witnesses; (ii) facts which are comprised of evidential descriptions rather than factual findings;⁴⁰ and (iii) facts

³⁹ ICC, *The Prosecutor v. Ruto and Sang*, Case No. ICC-01/09-01/11, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), 3 June 2014, para. 12.

⁴⁰ Albeit that in the Second Impugned Decision, the Trial Panel has rejected two facts proposed by the Defence precisely on such grounds (Second Impugned Decision, para. 50).

based on evidence or witness testimony, which the SPO intends to submit in this case.

28. The failure of the Panel to consider these objections, in relation to specific Defence submissions, is therefore an appealable issue.

3. Issues related to the Second Impugned Decision

a. Ninth Issue

29. In relation to the ninth issue, the Trial Panel has rejected a wide array of facts related to crimes committed by Serbian forces.⁴¹ In that respect, the Trial Panel concluded 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.”⁴²
30. However, the Defence articulated that the relevance of such facts is borne out of their direct connection with, *inter alia*, the motivation of the Accused and other KLA members, their close temporal and geographic proximity to Indictment allegations, as well as potential revenge motivations of alleged crimes.⁴³ While the Trial Panel has noted these submissions,⁴⁴ it has nonetheless failed to provide a reasoned opinion as to why said considerations have been discounted.
31. Whether the Trial Panel erred by excluding all facts relating to crimes committed by Serb forces, without analysis of the specific relevance of these facts, is therefore an appealable issue.

⁴¹ Defence Proposed Facts 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.

⁴² Second Impugned Decision, para. 45.

⁴³ KSC-BC-2020-06, F01442, Joint Defence Reply to Prosecution Response to ‘Joint Defence Motion for Judicial Notice of Adjudicated Facts’, 11 April 2023, paras. 3-12.

⁴⁴ Second Impugned Decision, para. 38.

b. Tenth Issue

32. The Trial Panel has rejected a number of facts proposed by the Defence on the sole basis that such facts, or parts thereof, “did not meet the requirements of Rule 157(2).”⁴⁵ In that respect, the Defence is incapable of ascertaining what were the factors relied upon by the Panel to exclude such facts, so as to enable it to understand the reasons for their exclusion and to make specific submissions.
33. Whether the Trial Panel erred in failing to explain the basis for the rejection of such proposed facts is therefore an appealable issue.

B. The Issues Affect the Fair and Expeditious Conduct of Proceedings or the Outcome of the Trial

34. All ten issues significantly affect the fair and expeditious conduct of the proceedings.
35. The inconsistent articulation and application of the legal framework concerning judicial notice of adjudicate facts to both SPO and Defence Proposed Facts, as demonstrated by the **first**, **second** and **third** issues directly impacts equality of arms.
36. The **fourth**, **fifth** and **sixth** issues directly impact upon the Accused’s individual criminal responsibility as they allow for the admission of a substantial number of facts relating purporting to attribute conduct to the Accused based on

⁴⁵ Second Impugned Decision, referring to Defence Proposed Facts 8, 13-14, 26, 38-53, 55, 74, 78, 81, and 110.

membership of the General Staff, and which are premised on underlying evidence which the Defence cannot identify, assess or contest.

37. The **seventh** issue directly impacts upon the Accused's right to a fair trial, right to silence and the presumption of innocence. The failure to provide sufficient reasoning as set out in the **eighth** and **tenth** issues likewise prevents the Defence from understanding the rationale behind the admission of some facts and the concomitant exclusion of others and from properly exercising its right of appeal in relation to these facts.
38. Finally, the **ninth** issue prevents the Defence from admitting evidence through Rule 157, which directly impacts upon the ability of the Defence to present evidence under the same conditions as evidence presented against the Accused.
39. All ten issues also affect the expeditiousness of proceedings. The admission of a plethora of vague and incomplete facts in the First Impugned Decision, which only serves to oversaturate the trial record with facts that will require the Defence to spend extensive time in investigating and challenging them in court, combined with a rejection of the vast majority of Defence proposed facts thereby requiring the Defence to prove such facts through other evidence or witnesses, risks exponentially extending the duration of proceedings.

C. Immediate Resolution May Materially Advance Proceedings

40. The resolution of all the above issues would materially advance the current proceedings. Both parties have sought to make use of Rule 157 to ensure that what they consider to be relevant and probative facts can be assessed by the Trial Panel in lieu of eliciting evidence in other manners on the same topics. A clear determination of the appropriate interpretation and application of this procedural avenue will assist the parties to make timely and informed decisions

regarding which witnesses it ultimately needs to call or how such evidence will otherwise be presented. It will also guide the parties and the Trial Panel in determining any future applications for adjudicated facts.

III. CONCLUSION AND RELIEF REQUESTED

41. The Defence requests that the Trial Panel grant certification for all the ten issues identified in the present filing.

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Respectfully submitted on 25 May 2023,



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