



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

**In:** KSC-BC-2020-06  
**Specialist 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:** Dr Fidelma Donlon

**Filing Participant:** Acting Specialist Prosecutor

**Date:** 8 June 2023

**Language:** English

**Classification:** Public

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

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## I. INTRODUCTION

1. The Request<sup>1</sup> should be rejected because it fails to establish that any of the ten Issues<sup>2</sup> meet the standard for leave to appeal<sup>3</sup> under Article 45 of the Law<sup>4</sup> and Rule 77 of the Rules.<sup>5</sup>

2. Notice of adjudicated facts is a matter of discretion, not obligation.<sup>6</sup> The Panel is the trier of fact, and like for decisions on the admission of evidence, certification must be the absolute exception.<sup>7</sup> Rather than demonstrating that such exceptional relief is justified, the Defence improperly raises objections for the first time, misrepresents and merely disagrees with the Decisions, and fails to demonstrate any impact justifying certification.

## II. SUBMISSIONS

3. Throughout the Request, the Defence raises objections to SPO Facts<sup>8</sup> that were not raised in the Defence Response.<sup>9</sup> For example, the Request for the first time challenges SPO Facts on the basis that they: (i) concern the 'conduct of alleged JCE

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<sup>1</sup> Joint Defence Request for Certification to Appeal Decisions F01534 and F01536, KSC-BC-2020-06/F01557, 25 May 2023 ('Request').

<sup>2</sup> The Request raises ten issues ('Issues'). The Issues challenge the Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01534, 17 May 2023 ('Decision F01534') and/or the Decision on Defence Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01536, 18 May 2023 ('Decision F01536'; collectively with Decision F01534, 'Decisions').

<sup>3</sup> The applicable law has been set out in prior decisions. *See* Decision on Taçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses, KSC-BC-2020-06/F01237, 30 January 2023, para.8 and the sources cited therein.

<sup>4</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

<sup>5</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>6</sup> *See* ICTR, *Prosecutor v. Nizeyimana*, ICTR-00-55C-T, Decision on Defence Motion for Certification of the Trial Chamber 12 July 2011 Decision on Defence Motion to Take Judicial Notice of Adjudicated Facts, 8 August 2011 ('*Nizeyimana* Decision'), paras 10, 12, and the sources cited therein.

<sup>7</sup> ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para.5.

<sup>8</sup> The 'SPO Facts' are those set out in Annex 1 to Prosecution motion for judicial notice of adjudicated facts, KSC-BC-2020-06/F01330/A01.

<sup>9</sup> Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01417, 3 April 2023 ('Defence Response').

members and subordinates' (First Issue);<sup>10</sup> (ii) relate to live, 'core' issues (Second Issue);<sup>11</sup> (iii) contain legal characterisations (Third Issue);<sup>12</sup> (iv) relate to acts and conduct of the Accused (Fourth Issue);<sup>13</sup> and (v) are vague or ambiguous (Sixth Issue).<sup>14</sup> Such belated (and unsubstantiated) arguments are not properly advanced in a certification request and warrant summary dismissal.<sup>15</sup> Further, on the basis of these submissions, arguments in the Request about the extent of the Panel's alleged errors are overstated,<sup>16</sup> constituting misrepresentations of Decision F01534 and undercutting Defence attempts to show any, let alone significant, impact on the proceedings or outcome of the trial.

4. As the certification test is cumulative and the Defence has failed to demonstrate any significant impact on the proceedings or that appellate resolution would materially advance the proceedings, these requirements are addressed first. On this basis alone, the Panel could dismiss the Request. However, in addition to the lack of impact, the Request also fails to identify appealable issues arising from the Decisions, as demonstrated for each of the Issues below.

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<sup>10</sup> Request, paras 5, 7, fns.4, 6. The Defence raised no objection at all (no.251) or no C1 or C2 objection (nos.219, 227, 256, 266, 539) to six of the eight SPO Facts cited. *See* KSC-BC-2020-06/F01417/A01. *See also* Defence Response, para.7 (defining the 'C1' and 'C2' objections).

<sup>11</sup> Request, para.10, fns.13-14, 17. The Defence raised no C2 or other 'core issue' objections to five of the six SPO Facts cited (nos.230-232, 277-278). In relation to all five facts, the Defence only objected on the ground that such facts were based on evidence in this case (C10). *See* KSC-BC-2020-06/F01417/A01. *See also* Defence Response, para.7 (defining 'C2' and 'C10' objections).

<sup>12</sup> Request, para.12, fns.18, 20-23. The Defence raised no C8 objection to five of the SPO Facts cited (nos.345, 386-387, 600, 664). Further, cited SPO Fact 773 does not exist. *See* KSC-BC-2020-06/F01417/A01. *See also* Defence Response, para.7 (defining the 'C8' objection).

<sup>13</sup> Request, paras 16-17, fns.27, 29-32. The Defence raised no C1 objection to any of the eight SPO Facts cited (nos.222-225, 227-228, 230-237, 239-240, 264, 279). Indeed, only four C1 objections (to SPO Facts 460-461, 464-465) were raised in the Defence Response; none of which are cited in the relevant part of the Request. *See* KSC-BC-2020-06/F01417/A01.

<sup>14</sup> Request, para.22, fns.37-38. The Defence raised no C6 objection to 13 of the 21 SPO Facts cited (nos.284, 288, 470, 473-481, 493-494). *See* KSC-BC-2020-06/F01417/A01. *See also* Defence Response, para.7 (defining the 'C6' objection).

<sup>15</sup> *See e.g. Specialist Prosecutor v. Gucati and Haradinaj*, KSC-BC-2020-07/IA002/F00005, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 9 February 2021, para.29.

<sup>16</sup> *See e.g.* Request, paras 5, 7, 22, 26, 36, 39.

## A. THE DEFENCE FAILS TO DEMONSTRATE ANY SIGNIFICANT IMPACT

5. Defence submissions concerning impact make generalised and unsubstantiated assertions of fair trial rights violations.<sup>17</sup> The Request fails to acknowledge or engage with (i) the nature and purpose of Rule 157(2), which creates a *rebuttable* presumption of accuracy; (ii) the Panel's awareness that the opposing Parties may seek to rebut proposed facts, thereby consuming time and resources; or (iii) the Panel's obligation to ensure respect for the Accused's rights.<sup>18</sup>

6. First, in relation to the alleged impact on equality of arms,<sup>19</sup> the Defence does not and cannot argue that it was in a position of procedural inequality.<sup>20</sup> The Defence had the right to and did propose adjudicated facts, which were considered against the same standard applied to the SPO Facts.<sup>21</sup> Considering the broad discretion afforded to the Panel under Rule 157(2), it is insufficient to argue that there is an impact on fairness – as the Defence has done under the First, Second, Third, and Ninth Issues – solely because the standards were inconsistently applied. Even if the Defence demonstrated any inconsistency – which it has not – it is not entitled to equality of relief,<sup>22</sup> also in light of the Parties' distinct burdens. Rather than allege error based solely on comparison of Decisions concerning distinct facts and on distinct motions, the Defence – to identify an appealable issue or demonstrate an impact on the proceedings – must allege an error in each of the Decisions.

7. Likewise, the Defence fails to explain how any significant impact on the proceedings arises from: (i) notice of SPO Facts relating to the General Staff (none of which were opposed on that basis in the Defence Response<sup>23</sup>) or which were based on

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<sup>17</sup> Request, paras 34-39.

<sup>18</sup> Decision F01534, paras 11-13, 26.

<sup>19</sup> Request, paras 35, 38.

<sup>20</sup> ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance [...], 16 May 2002 ('*Blaškić Decision*'), para.20.

<sup>21</sup> Decision F01534, paras 10-13, 17-18; Decision F01536, paras 13-16, 39-43.

<sup>22</sup> See, similarly, *Blaškić Decision*, para.20.

<sup>23</sup> See para.3 above.

evidence the Defence allegedly cannot identify;<sup>24</sup> (ii) the number of noticed SPO Facts;<sup>25</sup> or (iii) an alleged lack of reasoning.<sup>26</sup> The Request ignores the SPO's burden to prove beyond reasonable doubt each element of the charged crimes and modes of liability, and the Defence's right and ability to contest the SPO Facts.<sup>27</sup> However, to mount a full defence, it is not incumbent on the Accused to rebut each of the SPO Facts.<sup>28</sup> In this respect, none of the SPO Facts concern the acts and conduct of the Accused or directly incriminate them in respect of the charged crimes.<sup>29</sup>

8. Finally, general arguments that the Defence must expend resources and time rebutting SPO Facts and that proceedings may be extended<sup>30</sup> are speculative and in the context of the Request, undeveloped. They are also insufficient to show any significant impact on the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>31</sup>

9. For the same reasons, the Defence fails to demonstrate that appellate intervention would materially advance the proceedings.<sup>32</sup> The Panel applied the plain language of Rule 157(2) and took into account established factors considered by other Chambers applying the same or similar provisions.<sup>33</sup> Further, throughout the

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<sup>24</sup> Request, para.36.

<sup>25</sup> Request, para.37.

<sup>26</sup> Request, para.37.

<sup>27</sup> Decision F01534, paras 11-13, 26. *See also Nizeyimana* Decision, para.13; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Defence Motion for Certification to Appeal Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 20 October 2006 ('*Popović* Decision'), pp.2-3; ICTY, *Prosecutor v. Ljubičić*, IT-00-41-PT, Decision on the Accused's Application for Leave to Appeal the Trial Chamber's Decision of 23 January 2003 on Judicial Notice of Adjudicated Facts, 3 February 2003 ('*Ljubičić* Decision'), p.3.

<sup>28</sup> IRMCT, *Prosecutor v. Stanišić and Simatović*, MICT-15-96-T, Decision on Stanišić Defence Motion for Certification to Appeal Against Decision on Judicial Notice of Adjudicated Facts, 15 January 2019 ('*Stanišić* Decision'), p.2; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Request for Certification of Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 23 February 2010 ('*Tolimir* Decision'), p.3.

<sup>29</sup> *See, similarly, Popović* Decision, p.3; *Ljubičić* Decision, p.3.

<sup>30</sup> Request, para.39.

<sup>31</sup> *See, similarly, Tolimir* Decision, p.3; *Stanišić* Decision, p.2.

<sup>32</sup> Request, para.40.

<sup>33</sup> *See* fn.21 above.

proceedings, the Panel must ensure respect for the Accused's rights,<sup>34</sup> and ultimately, assess any noticed facts in light of the entire record.<sup>35</sup> Accordingly, appellate intervention at this stage is unnecessary and premature. In any event, the Issues are also not appealable.

## B. THE ISSUES ARE NOT APPEALABLE

### *Issues related to both Decisions*

10. The First, Second, and Third<sup>36</sup> Issues constitute disagreements with and mischaracterisations of the Decisions, which applied the plain language of Rule 157(2) and established standards,<sup>37</sup> and were, as acknowledged by the Defence,<sup>38</sup> discretionary. The Defence merely alleges inconsistencies between the Decisions, without identifying any error in either. The submissions in support of these Issues are also misleading and inaccurate.<sup>39</sup>

11. For example, in relation to the First Issue, the Defence's attempt to compare the Panel's admission of SPO Facts 538-539 and Defence Facts<sup>40</sup> 117-118 is misleading. These facts do not relate to 'exactly the same issue'.<sup>41</sup> Instead, while they all relate in part to the role of Fatmir LIMAJ, they do not relate to the same time period. In addition, while SPO Facts 538-539 are confined to roles and positions, Defence Facts 117-118 also relate to control over certain territories and the date the 'Military Police Department' was created.

12. In relation to the Second Issue, the Defence incorrectly claims that the Panel rejected Defence Fact 127 and noticed SPO Facts 277-278 on the same Dukagjini Zone

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<sup>34</sup> Decision F01534, para.12.

<sup>35</sup> See, similarly, *Popović* Decision, pp.2-3. See also Decision F01534, para.26.

<sup>36</sup> Request, para.1(A).

<sup>37</sup> See para.9 above.

<sup>38</sup> Request, para.6, 13-14.

<sup>39</sup> See also para.3 above.

<sup>40</sup> Joint Defence Motion for Judicial Notice of Adjudicated Facts Annex A, KSC-BC-2020-06/F01331/A01 ('Defence Facts').

<sup>41</sup> Request, para.7.

meeting.<sup>42</sup> However, the Defence Fact and SPO Facts concern different meetings<sup>43</sup> and are therefore incapable of demonstrating any inconsistency.

13. Meanwhile, the Third Issue repeats previous arguments without engaging with the reality that terms – such as those cited in the Request<sup>44</sup> – were not used in the context of the relevant SPO Facts in such a way as to render them essentially legal in nature.<sup>45</sup>

#### *Issues related to Decision F01534*

14. The Fourth Issue<sup>46</sup> exclusively concerns SPO Facts that the Defence did not previously challenge as relating to the acts and conduct of the Accused.<sup>47</sup> In this respect, the Defence did not previously argue that any facts pertaining to the General Staff should be excluded for the reasons now advanced. Accordingly, the Fourth Issue should be dismissed outright.

15. In any event, in line with established jurisprudence, the Panel specifically considered that ‘the categorical prohibition on taking judicial notice of facts concerning acts and conduct of the accused does not extend to facts related to [...] the existence and activity of a joint criminal enterprise or its members (other than the Accused)’.<sup>48</sup> The Fourth Issue does not acknowledge or take issue with this consideration and represents a mere disagreement with its application in Decision F01534.

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<sup>42</sup> Request, para.10.

<sup>43</sup> Defence Fact 127 concerns a 10 July 1998 meeting, while SPO Facts 277-278 concern a meeting in August 1998.

<sup>44</sup> Request, paras 12-13.

<sup>45</sup> Prosecution motion for judicial notice of adjudicated facts, KSC-BC-2020-06/F01330, 1 March 2023 (‘Prosecution Motion’), para.12; Prosecution reply to ‘Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts’ with confidential Annex 1, KSC-BC-2020-06/F01443, 11 April 2023 (‘Prosecution Reply’), para.11. *See also* Decision F01536, para.47.

<sup>46</sup> Request, para.1(B)(iv).

<sup>47</sup> *See* para.3 above.

<sup>48</sup> Decision F01534, para.24.

16. Similarly, the Fifth, Sixth, Seventh, and Eighth<sup>49</sup> Issues all constitute mere disagreements with and misrepresent Decision F01534.<sup>50</sup>

17. The Fifth Issue repeats previous submissions attempting to introduce additional requirements contrary to the purposes of Rule 157(2) and misrepresenting the nature of adjudicated facts, which are not evidence.<sup>51</sup> Defence arguments misleadingly revolve around paragraph 26 of Decision F01534.<sup>52</sup> The Panel's reference to 'evidence' in that context refers to evidence to be presented by the SPO during the present case, not to 'evidence' underlying the SPO Facts. Further, much of the allegedly anonymous or unidentified evidence cited in the parts of the judgments from which the SPO Facts originate is actually available to the Defence.<sup>53</sup>

18. The Sixth Issue fails to acknowledge that the SPO Facts challenged in the Request as vague must be read in the context in which they appear in the moving Party's motion and having regard to surrounding facts.<sup>54</sup> When considered in light of the Panel's rejection of certain SPO Facts as lacking sufficient clarity, context, or specificity,<sup>55</sup> the Sixth Issue fails to identify an error arising from Decision F01534.

19. The Seventh and Eighth Issues merely repeat arguments already considered by the Panel.<sup>56</sup> In relation to the Seventh Issue, it is well established that the cumulative effect of taking judicial notice of numerous adjudicated facts, which in this case is far from unprecedented or unreasonable,<sup>57</sup> does not violate the presumption of innocence,

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<sup>49</sup> Request, para.1(B)(v)-(viii).

<sup>50</sup> See also para.3 above.

<sup>51</sup> Prosecution Reply, paras 5-8.

<sup>52</sup> Request, para.19.

<sup>53</sup> Prosecution Reply, para.7, fn.20. Indeed, the SPO previously referred the Defence to the evidence underlying most of the facts cited in footnote 34 of the Request (nos.264, 272, 301-302, 344-345). See KSC-BC-2020-06/F01443/A01.

<sup>54</sup> Decision F01534, para.11; Prosecution Motion, para.11.

<sup>55</sup> Decision F01534, paras 18-19.

<sup>56</sup> Decision F01534, paras 8, 15.

<sup>57</sup> Prosecution Reply, para.2.



nor shift the burden of proof to the accused.<sup>58</sup> In addition, the Defence fails to explain which facts specifically should not have been judicially noticed in light of the specific circumstances of this case.

20. In relation to the Eighth Issue, the Panel not only considered Defence submissions, but rejected an SPO Fact because it merely recounted evidence.<sup>59</sup> The Eighth Issue is therefore not only a misrepresentation, but also, insofar as it alleges merely a lack of consideration or reasoning, insufficient on its own to warrant certification.<sup>60</sup>

#### *Issues related to Decision F01536*

21. The Ninth and Tenth<sup>61</sup> Issues are both based on misrepresentations of and disagreements with Decision F01536, rendering them incapable of certification.

22. In relation to the Ninth Issue, the Defence's claim that the Panel 'failed to provide a reasoned opinion'<sup>62</sup> or that the facts were excluded 'without analysis of the specific relevance of these facts'<sup>63</sup> is inaccurate. First, the Panel expressly noted that it reviewed each fact individually.<sup>64</sup> The Panel extensively considered, analysed and responded to the arguments concerning Defence Facts on crimes committed by Serbian forces.<sup>65</sup> Only when it was not apparent from the Defence submissions and from the fact in question what its purported relevance to the case was, it declined to take judicial notice of it.<sup>66</sup> Accordingly, while it rejected some facts related to crimes

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<sup>58</sup> ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion for Stay of Proceedings, 8 April 2010, para.5; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010, para.15.

<sup>59</sup> Decision, para.22.

<sup>60</sup> See, similarly, STL, *Prosecutor v. Ayyash et al.*, Decision Dismissing Merhi Defence Motion for Certification to Appeal the Decision of 3 July 2014 [...], 25 July 2014, para.11.

<sup>61</sup> Request, para.1(C).

<sup>62</sup> Request, para.30.

<sup>63</sup> Request, para.31.

<sup>64</sup> Decision F01536, para.45.

<sup>65</sup> Decision, para.17-28, 45.

<sup>66</sup> Decision, para.45.

committed by Serbian forces, it also accepted others.<sup>67</sup> In this respect, some of the Defence Facts referred to in footnote 41 of the Request were in fact judicially noticed in part.<sup>68</sup>

23. Finally, in support of the Tenth Issue, the Defence claims that the Trial Panel failed to provide a reasoned opinion concerning the rejection of Defence Facts 8, 13-14, 26, 38-53, 55, 74, 78, 81, and 110.<sup>69</sup> However, out of these 25 Defence Facts, 15 have actually been judicially noticed, in whole or in part.<sup>70</sup> Defence Facts 42, 45, and 50 were judicially noticed as such. Meanwhile, Defence Facts 8, 13-14, 39, 40, 51-52, 55, 74, 78, 81, and 110 were reformulated or noticed in part, either to remove legal findings,<sup>71</sup> to correspond more closely to the original finding,<sup>72</sup> because parts were ambiguous,<sup>73</sup> and because the Defence failed to establish that certain parts were relevant.<sup>74</sup>

24. For those 10 Defence Facts that the Panel did reject, the Panel provided specific reasoning. The Panel decided that Defence Facts 26, 41, 44, 49 and 53 overlap with noticed SPO Facts<sup>75</sup> and that the Defence failed to establish that Fact 38, 43, and 46-48 were relevant.<sup>76</sup> While the Defence may disagree with these findings, it has not alleged any actual error arising from Decision F01536.<sup>77</sup>

25. Accordingly, none of the Issues satisfy any of the cumulative criteria required for certification.

### III. CONCLUSION

26. For the foregoing reasons, the Trial Panel should reject the Request.

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<sup>67</sup> See e.g. Defence Facts 745-763.

<sup>68</sup> Defence Facts, 52, 55, 74, 78 and 110. See Decision F01536, para.52.

<sup>69</sup> Request, para.32, fn.45

<sup>70</sup> Decision F01536, para.52; KSC-BC-2020-06/F01536/A01.

<sup>71</sup> Fact 14, see Decision F01536, paras 47, 52.

<sup>72</sup> Fact 39, 40, 51, see Decision F01536, para.51.

<sup>73</sup> Facts 8, see Decision F01536, para.48.

<sup>74</sup> Facts 52, 55, 74, 78, 81 and 110, see Decision F01536, para.45.

<sup>75</sup> Decision F01536, para.50.

<sup>76</sup> Decision F01536, para.45.

<sup>77</sup> See also para.20 and fn.60 above.

**Word count: 2993**



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Thursday, 8 June 2023

At The Hague, the Netherlands.