



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA 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:** 16 June 2023

**Language:** English

**Classification:** Public

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

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**TRIAL PANEL II** (“Panel”), pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 77 and 157(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 17 May 2023, the Panel issued the Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (“F01534”).<sup>1</sup>
2. On 18 May 2023, the Panel issued the Decision on Defence Motion for Judicial Notice of Adjudicated Facts (“F01536”).<sup>2</sup>
3. On 25 May 2023, the Defence for Mr Thaçi (“Thaçi Defence”), the Defence for Mr Veseli (“Veseli Defence”), the Defence for Mr Selimi (“Selimi Defence”), and the Defence for Mr Krasniqi (“Krasniqi Defence”) (collectively “Defence”) filed a joint request for certification to appeal F01534 and F01536 (“Impugned Decisions”) (“Joint Defence Request”).<sup>3</sup>
4. On 8 June 2023, the Specialist Prosecutor’s Office (“SPO”) responded to the Joint Defence Request (“SPO Response”).<sup>4</sup>
5. On 13 June 2023, the Defence replied to the SPO Response (“Joint Defence Reply”).<sup>5</sup>

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<sup>1</sup> F01534, Panel, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts*, 17 May 2023, with Annex 1, confidential, and Annex 2, public. The adjudicated facts proposed by the SPO and assessed by the Panel are referred to throughout the decision as SPO Proposed Adjudicated Facts.

<sup>2</sup> F01536, Panel, *Decision on Defence Motion for Judicial Notice of Adjudicated Facts*, 18 May 2023, with Annex 1. The adjudicated facts proposed by the Defence and assessed by the Panel are referred to throughout the decision as Defence Proposed Adjudicated Facts.

<sup>3</sup> F01557, Specialist Counsel, *Joint Defence Request for Certification to Appeal Decisions F01534 and F01536*, 25 May 2023.

<sup>4</sup> F01589, Specialist Prosecutor, *Prosecution Response to ‘Joint Defence Request for Certification to Appeal Decisions F01534 and F01536’*, 8 June 2023.

<sup>5</sup> F01600, Specialist Counsel, *Joint Defence Reply to Prosecution Response to ‘Joint Defence Request for Certification to Appeal Decisions F01534 and F01536’*, 13 June 2023.

## II. SUBMISSIONS

6. The Defence requests certification to appeal the following ten issues (“Issues”):

Issues regarding F01534 and F01536:

- (1) Whether the Trial Panel erred in its inconsistent assessment of [SPO and Defence] Proposed Adjudicated Facts pertaining to the alleged JCE [joint criminal enterprise] members and subordinates (“First Issue”);
- (2) Whether the Trial Panel erred in its inconsistent assessment of facts relating to “live issues forming a core aspect of the case” (“Second Issue”); and
- (3) Whether the Trial Panel erred in its assessment of [SPO and Defence] Proposed Adjudicated Facts which contain and/or consist exclusively of legal characterisations (“Third Issue”);

Issues regarding F01534:

- (4) Whether the Trial Panel erred in admitting Proposed Facts pertaining to the “acts and conduct of the Accused” (“Fourth Issue”);
- (5) Whether the Trial Panel erred in admitting [SPO] Proposed Adjudicated Facts without clearly identified and accessible underlying evidence (“Fifth Issue”);
- (6) 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 (“Sixth Issue”);
- (7) Whether the Trial Panel failed to consider the cumulative prejudice caused by the admission of an extensive number of facts proposed by the SPO (“Seventh Issue”); and
- (8) Whether the Trial Panel has failed to consider a number of Defence objections in their entirety (“Eight Issue”);

Issues regarding F01536:

- (9) Whether the Trial Panel erred in a wholesale rejection of facts relevant to crimes committed by Serb forces (“Ninth Issue”); and

(10) Whether the Trial Panel failed to provide a reasoned opinion with regards to the rejection of a number of Defence Proposed Adjudicated Facts (“Tenth Issue”).<sup>6</sup>

7. The Defence submits that the Issues satisfy the requirements of Article 45(2) and Rule 77(2) insofar as: (i) they are appealable issues deriving from the Impugned Decisions;<sup>7</sup> (ii) they significantly affect the fair and expeditious conduct of the proceedings;<sup>8</sup> and (iii) their immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>9</sup>

8. The SPO responds that the Joint Defence Request should be rejected because it fails to meet the requirements for leave to appeal under Article 45(2) and Rule 77.<sup>10</sup> The SPO argues that notice of adjudicated facts is a matter of discretion, not obligation, and that, rather than demonstrating that certification to appeal is justified, the Defence improperly raises objections for the first time, misrepresents and merely disagrees with the Impugned Decisions, and fails to demonstrate any impact justifying certification.<sup>11</sup>

9. The Defence replies that: (i) the SPO’s assertion that the Defence improperly raises objections for the first time is entirely borne out of the SPO’s inapposite reading of the Joint Defence Request;<sup>12</sup> and (ii) the SPO’s argument that the Defence fails to demonstrate any impact justifying certification as it is not entitled to “equality of relief” on account of the Parties’ “distinct burdens” is inaccurate.<sup>13</sup> The Defence therefore requests the Panel to reject the SPO objections and to grant certification on all issues outlined in the Joint Defence Request.<sup>14</sup>

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<sup>6</sup> Joint Defence Request, paras 1, 41.

<sup>7</sup> Joint Defence Request, paras 4-33.

<sup>8</sup> Joint Defence Request, paras 34-39.

<sup>9</sup> Joint Defence Request, para. 40.

<sup>10</sup> SPO Response, paras 1, 9-26.

<sup>11</sup> SPO Response, paras 2-9.

<sup>12</sup> Joint Defence Reply, paras 2-5.

<sup>13</sup> Joint Defence Reply, paras 6-11, *referring to* SPO Response, para. 6.

<sup>14</sup> Joint Defence Reply, para. 12.

### III. APPLICABLE LAW

10. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth therein has been met.

11. Rule 77(2) provides:

The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

12. The standard for certification of appeal under Rule 77(2) has been outlined in past decisions and will not be reiterated in full here.<sup>15</sup>

### IV. DISCUSSION

A. ISSUES REGARDING F01534 AND F01536: FIRST, SECOND AND THIRD ISSUES

13. The Defence submits that the Panel's approach in admitting SPO and Defence Proposed Adjudicated Facts regarding the conduct of alleged JCE members and the structure of the Kosovo Liberation Army ("KLA") was inconsistent.<sup>16</sup> The Defence also submits that the Panel inconsistently admitted certain SPO Proposed Adjudicated Facts containing essentially legal qualifications while simultaneously

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<sup>15</sup> F01237, Trial Panel II, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect ("Gucati and Haradinaj Decision on Leave to Appeal")*, 8 November 2021, paras 13-21; F00372, Trial Panel II, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, Trial Panel II, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. *See also* F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

<sup>16</sup> Joint Defence Request, paras 5-11, *referring to* SPO Proposed Adjudicated Facts 219, 227-228, 230-232, 242, 251, 256, 266, 277-278, 538-539, and Defence Proposed Adjudicated Facts 117-118, 123-125, 127.

rejecting several adjudicated facts proposed by the Defence including similar terms.<sup>17</sup>

14. The SPO responds that the First Issue, Second Issue and Third Issue constitute disagreements with and mischaracterisations of the Impugned Decisions, which applied the plain language of Rule 157(2) and established standards, and were discretionary.<sup>18</sup>

15. The Defence replies that it challenges: (i) the adoption of disparate legal standards across the Impugned Decisions; and/or (ii) the inconsistent application of the legal standards that the Panel itself has established, in the Impugned decisions, to the SPO and Defence Proposed Adjudicated Facts indicatively referenced and to other such facts.<sup>19</sup>

16. In relation to the First Issue and Second Issue, the Panel observes that, in F01534, it found that, *inter alia*, SPO Proposed Adjudicated Facts 219, 227, 242, 251, 256, 266, and 538-539 meet the requirements of Rule 157(2) insofar as they do not relate to the acts and conduct of the Accused as charged in the indictment.<sup>20</sup> In particular, the Panel 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 the conduct of physical perpetrators or the existence and activity of a JCE or its members (other than the Accused).<sup>21</sup> The Panel also observes that, in F01536, it consistently found that the Defence Proposed Adjudicated Facts pertaining to the responsibility, authority and/or powers of alleged JCE members

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<sup>17</sup> Joint Defence Request, paras 12-14, referring to SPO Proposed Adjudicated Facts 345, 363, 385-387, 389, 403, 405, 407, 411, 414-415, 417, 420, 459, 600, 664, and Defence Proposed Adjudicated Facts 15, 17.

<sup>18</sup> SPO Response, paras 10-13.

<sup>19</sup> Joint Defence Reply, para. 3.

<sup>20</sup> F01534, para. 24.

<sup>21</sup> F01534, para. 24, referring to ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73(C), Appeals Chamber, [Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice](#), 16 June 2006, paras 48-53; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber II, [Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex](#), 26 September 2006, para. 13; *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](#), 12 November 2013, paras 82-87.

or subordinates of the Accused are not *per se* excluded by Rule 157(2).<sup>22</sup> However, the Panel notes that, in the Impugned Decisions, it stated that it would exercise its discretion not to take judicial notice where the SPO and Defence Proposed Adjudicated Facts were too closely connected to an important and live issue in the case.<sup>23</sup> Accordingly, the Panel exercised its discretion not to take judicial notice of, *inter alia*, Defence Proposed Adjudicated Facts 114 and 117-118 so that the underlying issues can be addressed and decided in light of the evidence produced at trial.<sup>24</sup> For the same reasons, the Panel also exercised its discretion to decline to take judicial notice of certain Defence Proposed Adjudicated Facts pertaining to the functioning and organisation of the KLA's structure.<sup>25</sup>

17. Regarding the First Issue, the Panel adds the following. The Defence's attempt to contrast the approach taken by the Panel in relation to two sets of proposed adjudicated facts – SPO Proposed Adjudicated Facts 538-539; and Defence Proposed Adjudicated Facts 117-118 – fails to account for material differences between them affecting the possibility of their being judicially noted. For instance, Defence Proposed Adjudicated Fact 117 contains a legal finding ('effective control'). SPO Proposed Adjudicated Facts 538-539 pertain to a period of time when Mr Limaj's position and role do not appear to be in dispute between the Parties. In contrast, Defence Proposed Adjudicated Fact 118 pertains to a time when his role, functions and power are understood by the Panel to be in dispute between the Parties.<sup>26</sup> The same is true of the facts pertaining to the General Staff. While satisfying itself that none of the SPO Proposed Facts coming in that category pertained to the acts and conduct of the Accused, the Panel rejected two Defence Proposed Adjudicated Facts (121-122) as they came close to constituting material relevant to the acts and conduct of the

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<sup>22</sup> F01536, para. 46.

<sup>23</sup> F01536, para. 41; F01534, para. 11.

<sup>24</sup> F01536, para. 46.

<sup>25</sup> F01536, para. 49.

<sup>26</sup> F01411/A01, Specialist Prosecutor, *Annex 1 to Prosecution Response to 'Joint Defence Motion for Judicial Notice of Adjudicated Facts'*, 31 March 2023, pp. 33-34, Defence Proposed Adjudicated Fact 118.

Accused. Therefore, the Panel was consistent in approaching the two sets of facts concerned by this Issue.

18. Regarding the Second Issue, all three examples put forth by the Defence in support of its claim fail to account for material differences between the adjudicated facts which they seek to compare. For instance, regarding the first set of facts – Defence Proposed Adjudicated Fact 123; and SPO Proposed Adjudicated Facts 230-232 – the Defence fails to account for one substantial difference between those: while the former goes to the General Staff's actual *ability* to communicate (or not), the three SPO facts go to the issue of *means of communication*. Similarly, the Defence fails to account for the different nature of the second set of facts which it seeks to contrast, *i.e.* SPO Proposed Adjudicated Fact 228 and Defence Proposed Adjudicated Facts 124-125. The SPO fact pertains generically to the use by the General Staff of communiques, a matter not in dispute between Parties. In contrast, Defence Proposed Adjudicated Fact 124 pertains to the purported goal/purpose of communiques which is an issue in dispute and which the Panel will need to determine in the exercise of its fact-finding functions. Similarly, the question of who prepared and issued the communiques in general – in particular some of them – is a live issue in the case. The two sets of proposed facts are, therefore, again materially distinguishable. The same is true of the third set of facts (Defence Proposed Adjudicated Fact 127; and SPO Proposed Adjudicated Facts 277-278). While the proposed Defence fact pertains to the functioning of the joint forces, an issue the Panel understands to be in dispute between the Parties, the SPO proposed facts pertain to the occurrence of certain meetings where the joint forces were discussed, a matter the Panel understands not to be in dispute between the Parties.

19. The Panel therefore finds that the Defence has failed to identify an error in the Panel's approach to SPO and Defence Proposed Adjudicated Facts pertaining to the acts and conduct of the Accused and to the KLA's structure was inconsistent



in the Impugned Decisions. The Panel is of the view that the First Issue and Second Issue constitute mere disagreements with the Panel's exercise of its discretion not to admit adjudicated facts too closely connected to important and live issues in the case.

20. Turning to the Third Issue, the Panel observes that, in the Impugned Decisions, it stated that it would not take judicial notice of, *inter alia*: (i) findings which have no clear and demonstrable connection to matters at issue in the current proceedings; and (ii) findings of an essentially legal nature or containing legal characterisations of facts.<sup>27</sup> The Panel notes that, in the Impugned Decisions, it then consistently proceeded to: (i) accept SPO and Defence Proposed Adjudicated Facts containing relevant factual findings;<sup>28</sup> and (ii) decline to take judicial notice of SPO and Defence Proposed Adjudicated Facts containing a legal characterisation of the underlying facts and/or not relating to matters at issue in the current case.<sup>29</sup> The SPO Proposed Adjudicated Facts to which the Defence points as illustrations of its complaint were judicially noted for the factual findings they contain, not for any legal characterisation of the status of the individuals concerned. The same is true of adjudicated facts pertaining to certain mistreatment and killings of certain individuals. *In contrast*, facts pertaining to the *chapeau* elements of the charged offences involve legal findings of which the Panel did not take notice. The Panel therefore finds that the Defence has failed to substantiate how the Panel's approach to the prohibition to take judicial notice of adjudicated facts containing legal findings was inconsistent in the Impugned Decisions. The Panel is of the view that the Third Issue mischaracterises the Panel's findings in the Impugned Decisions and constitutes a mere disagreement with such findings.

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<sup>27</sup> See F01534, paras 11, 18; F01536, paras 14, 32, 40.

<sup>28</sup> See e.g. F01534, para. 25, referring to, *inter alia*, SPO Proposed Adjudicated Facts 345, 363, 385-387, 389, 403, 405, 407, 411, 414-415, 417, 420, 459, 600, 664; F01536, para. 52.

<sup>29</sup> See e.g. F01534, paras 20-21; F01536, paras 45, 47, referring to, *inter alia*, Defence Proposed Adjudicated Facts 15, 17.

21. The Panel accordingly finds that the Defence has failed to establish that the First Issue, Second Issue and Third Issue arise from the Impugned Decision.

22. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the First Issue, Second Issue and Third Issue is therefore rejected.

## B. ISSUES REGARDING F01534

### 1. Fourth Issue

23. The Defence submits that, in F01534, the Panel erred by admitting several SPO Proposed Adjudicated Facts pertaining to the acts and conduct and to the *mens rea* of the Accused.<sup>30</sup>

24. The SPO responds that the Fourth Issue: (i) exclusively concerns SPO Proposed Adjudicated Facts that the Defence did not previously challenge as relating to the acts and conduct of the Accused; and (ii) does not acknowledge or take issue with the Panel's finding 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>31</sup>

25. The Defence replies that, in relation to F01534, it challenges the application to the SPO Proposed Adjudicated Facts of the legal standards that the Panel itself has delineated, and not how the Panel addressed the Defence objections to such facts.<sup>32</sup>

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<sup>30</sup> Joint Defence Request, paras 15-18, referring to SPO Proposed Adjudicated Facts 222-225, 227-228, 230-237, 239-240, 264, 279.

<sup>31</sup> SPO Response, paras 14-15, referring to F01534, para. 24.

<sup>32</sup> Joint Defence Reply, para. 4.

26. The Panel observes that, in F01534, it acknowledged the prohibition of taking judicial notice of adjudicated facts relating to the acts and conduct of the Accused as charged in the indictment.<sup>33</sup> The Panel further recalls that it 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 the conduct of physical perpetrators or the existence and activity of a joint criminal enterprise or its members (other than the Accused).<sup>34</sup> Accordingly, the Panel found that, *inter alia*, SPO Proposed Adjudicated Facts 222-225, 227-228, 230-237, 239-240, 264, and 279 meet the requirements of Rule 157(2) insofar as they do not relate to the acts and conduct of the Accused as charged in the indictment.<sup>35</sup> None of these facts have been shown by the Defence to fall within the definition of ‘acts and conduct’ within the meaning outlined above. The Defence arguments are also fundamentally flawed as the Defence fails to distinguish between ‘acts and conduct’ of the accused *in general*, and ‘acts and conduct of the Accused *as charged in the indictment*’. Only the latter are relevant to Rule 157(2). The Panel therefore finds that the Defence has failed to substantiate how the Panel erred in its assessment of the SPO Proposed Adjudicated Facts pertaining to the existence of a JCE and the activity of its members other than the Accused.

27. The Panel also notes that the Defence did not previously challenge the possibility of judicial notice being taken of those SPO Proposed Adjudicated Facts relating to the acts and conduct of the Accused.<sup>36</sup>

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<sup>33</sup> F01534, para. 10.

<sup>34</sup> F01534, para. 24, referring to ICTR, *Prosecutor v. Karemera*, ICTR-98-44-AR73(C), Appeals Chamber, [Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice](#), 16 June 2006, paras 48-53; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber II, [Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex](#), 26 September 2006, para. 13; *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](#), 12 November 2013, paras 82-87.

<sup>35</sup> F01534, para. 24.

<sup>36</sup> See F01417, Specialist Counsel, *Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts*, 3 April 2023, with Annex 1, confidential.

28. The Panel is thus of the view that the Fourth Issue constitutes a mere disagreement with the Panel's findings in F01534.

29. The Panel accordingly finds that the Defence has failed to establish that the Fourth Issue arises from the Impugned Decision.

30. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Fourth Issue is therefore rejected.

## 2. Fifth Issue

31. The Defence submits that, in F01534, the Panel erred by admitting a wide array of SPO Proposed Adjudicated Facts that are based on findings whose underlying evidence is either anonymous or not clearly identified.<sup>37</sup>

32. The SPO responds that 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>38</sup>

33. The Panel observes that, in the concluding paragraph of the discussion section of F01534, it stressed that "the fact that the Panel has taken judicial notice of an adjudicated fact does not eliminate the burden that rests upon the SPO to prove material facts relevant to its case beyond reasonable doubt".<sup>39</sup> The Panel then stated that "[i]t is important that the Panel should be provided with all relevant evidence pertaining to any such facts so as to enable it to perform its fact-finding functions".<sup>40</sup> The Panel is satisfied that it is clear from the context of the entire

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<sup>37</sup> Joint Defence Request, paras 19-20, *referring to* SPO Proposed Adjudicated Facts 68, 74, 80, 262, 264, 272, 301-302, 331, 344, 345, 382, 391.

<sup>38</sup> SPO Response, paras 16-17.

<sup>39</sup> F01534, para. 26.

<sup>40</sup> F01534, para. 26.

paragraph that this sentence does not relate to the SPO Proposed Adjudicated Facts, but to the material facts that the SPO has to prove beyond reasonable doubt. Judicial notice of an adjudicated fact does not depend on the assessment of quality, reliability or sufficiency of the evidence underlying it. The Panel further notes that, pursuant to Rule 157(2), adjudicated facts do not require the identification of their underlying evidence nor does that Rule require that such evidence be judicially noticed. The Panel is therefore of the view that the Fifth Issue mischaracterises the Panel's findings in F01534.

34. The Panel accordingly finds that the Defence has failed to establish that the Fifth Issue arises from the Impugned Decision.

35. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Fifth Issue is therefore rejected.

### **3. Sixth Issue**

36. The Defence submits that, in F01534, the Panel erred by admitting a wide array of SPO Proposed Adjudicated Facts that are devoid of any temporal or spatial indicia.<sup>41</sup>

37. The SPO responds that the Sixth Issue fails to acknowledge that the SPO Proposed Adjudicated Facts challenged in the Joint Defence 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>42</sup>

38. The Panel observes that, in F01534, it acknowledged the prohibition to take judicial notice of adjudicated facts which are not distinct, concrete and

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<sup>41</sup> Joint Defence Request, paras 21-23, referring to SPO Proposed Adjudicated Facts 219, 284, 288, 303, 470-481, 492-496, 525-526.

<sup>42</sup> SPO Response, paras 16, 18.

identifiable, unclear or misleading.<sup>43</sup> The Panel also notes that it stated that “[it] refused to take judicial notice of a number of [SPO] 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”.<sup>44</sup>

39. The Panel accordingly found that SPO Proposed Adjudicated Facts 115, 248, 265, 270, and 274 lack sufficient clarity, context, or specificity and therefore exercised its discretion not to take judicial notice of them.<sup>45</sup> Conversely, the Panel was satisfied that, *inter alia*, SPO Proposed Adjudicated Facts 219, 284, 288, 303, 470-481, 492-496, and 525-526 are distinct, concrete and identifiable, and are not unclear or misleading in the context in which they are placed.<sup>46</sup> The Panel considers that, when reading the relevant SPO Proposed Adjudicated Facts together and in the context of the SPO’s motion,<sup>47</sup> their temporal and territorial scope are sufficiently apparent. The Defence did not identify any adjudicated fact lacking sufficient specificity, temporally or territorially, that would render it so ambiguous or misleading as to exclude the possibility of notice being taken of it. The Panel therefore finds that the Defence has failed to identify an error in the Panel’s assessment of the clarity and specificity of the SPO Proposed Adjudicated Facts. The Panel is of the view that the Sixth Issue constitutes a mere disagreement with the Panel’s findings in F01534.

40. The Panel accordingly finds that the Defence has failed to establish that the Sixth Issue arises from the Impugned Decision.

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<sup>43</sup> F01534, para. 11.

<sup>44</sup> F01534, para. 18.

<sup>45</sup> F01534, para. 21.

<sup>46</sup> F01534, para. 25.

<sup>47</sup> See F01330, Specialist Prosecutor, *Prosecution Motion for Judicial Notice of Adjudicated Facts*, 1 March 2023, with Annexes 1-2, confidential.

41. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Sixth Issue is therefore rejected.

#### 4. Seventh Issue

42. The Defence submits that, in F01534, the Panel failed to consider the cumulative impact of the vast number of factual findings on matters pertaining to crucial elements of the charges on the rights of Accused.<sup>48</sup>

43. The SPO responds that: (i) the Seventh Issue merely repeat arguments already considered by the Panel; and (ii) it is well established that the cumulative effect of taking judicial notice of numerous adjudicated facts does not violate the presumption of innocence, nor shift the burden of proof to the Accused.<sup>49</sup>

44. At the outset, the Panel notes that Rule 157(2) provides that adjudicated facts should not relate to the acts and conduct of the Accused as charged in the indictment but does not require a panel to be satisfied that the amount of proposed adjudicated facts is not prejudicial to the Defence before taking judicial notice of them.

45. The Panel further observes that, in F01534, it stressed that “its taking judicial notice of adjudicated facts establishes a rebuttable presumption of accuracy of such facts [which] [...] does not affect the right and ability of the Defence to challenge any factual allegation that forms part of the Prosecution case or any fact that has been judicially noted by the Panel”.<sup>50</sup> The Panel also stated that “the fact that the Panel has taken judicial notice of an adjudicated fact does not eliminate the burden that rests upon the SPO to prove material facts relevant to its case

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<sup>48</sup> Joint Defence Request, paras 24-26.

<sup>49</sup> SPO Response, paras 16, 19.

<sup>50</sup> F01534, para. 26. *See also* F01534, para. 13.

beyond reasonable doubt”.<sup>51</sup> The Defence has failed to establish any prejudice arising from the fact that the Panel took judicial notice of a large number of adjudicated facts. The Panel notes, in that regard, that this should contribute to shortening proceedings, which is in the interest of the Accused.

46. The Panel further notes that Rule 157(2) does not require a ‘cumulative’ assessment of the sort suggested by the Defence. Nor has the Defence pointed to precedents that would have required the Panel to conduct such an exercise.

47. The Panel therefore finds that the Defence has failed to identify the error arising from the mere number of facts that were judicially noticed. The Panel is of the view that the Seventh Issue constitutes a mere disagreement with the Panel’s findings in F01534.

48. The Panel accordingly finds that the Defence has failed to establish that the Seventh Issue arises from the Impugned Decision.

49. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Seventh Issue is therefore rejected.

## **5. Eighth Issue**

50. The Defence submits that, in F01534, the Trial Panel failed to consider a number of Defence objections.<sup>52</sup>

51. The SPO responds that the Eighth Issue is not only a misrepresentation, but also insufficient on its own to warrant certification.<sup>53</sup>

52. At the outset, the Panel notes that the Court of Appeals Panel has stated that, in order to fulfil its obligation to provide a reasoned opinion, a panel is not

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<sup>51</sup> F01534, para. 26.

<sup>52</sup> Joint Defence Request, paras 27-28.

<sup>53</sup> SPO Response, paras 16, 20.



required to address all of the arguments raised by the Parties.<sup>54</sup> The Panel observes that, in F01534, it extensively accounted for the Defence objections<sup>55</sup> and provided a reasoned opinion in relation to each applicable legal requirement for taking judicial notice of the SPO Proposed Adjudicated Facts.<sup>56</sup> In F01534, the Panel outlined each and all of the Defence's objections, which were accounted for and taken into consideration in coming to its decision. The Panel holds that the Defence has failed to identify the specific arguments that the Panel failed to consider in relation to the each SPO Proposed Adjudicated Fact and how their further consideration would have led to the relevant fact not being judicially noticed by the Panel. The Panel therefore finds that the Defence has failed to identify how the Panel erred by not considering the Defence's objections when taking or declining to take judicial notice of the SPO Proposed Adjudicated Facts. The Panel is of the view that the Eighth Issue mischaracterises the Panel's findings in F01534 and constitutes a mere disagreement with such findings.

53. The Panel accordingly finds that the Defence has failed to establish that the Eighth Issue arises from the Impugned Decision.

54. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Eighth Issue is therefore rejected.

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<sup>54</sup> KSC-BC-2020-07, F00114, Court of Appeals Panel, *Appeal Judgment*, 2 February 2023, para. 33, with Annexes 1-2 (and references cited in associated footnotes).

<sup>55</sup> F01534, paras 8, 15.

<sup>56</sup> F01534, paras 17-18, 24-25.

## C. ISSUES REGARDING F01536

**6. Ninth Issue**

55. The Defence submits that, in F01536, the Panel erred by excluding all facts relating to crimes committed by Serb forces, without analysis of the specific relevance of these facts.<sup>57</sup>

56. The SPO responds that the Defence's claims that the Panel failed to provide a reasoned opinion or that the facts were excluded without analysis of the specific relevance of these facts is inaccurate.<sup>58</sup>

57. The Panel observes that, in F01536, it conducted an individualised, fact by fact, analysis of the Defence Proposed Adjudicated Facts.<sup>59</sup> With specific respect to the Defence Proposed Adjudicated Facts pertaining to crimes committed by Serbian forces, the Panel notes that it also stated 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.<sup>60</sup> Accordingly, the Panel found that the Defence has failed to establish that Defence Proposed Adjudicated Facts 10, 15-18, 20-21, 27, 37, 38, 43, 46-48, 52-57, 59-61, 63-73, 74, 76-85, 87-105, and 109-110 relate to matters at issue in the current proceedings. In contrast, the Panel admitted certain adjudicated facts which contained indications of crimes committed by Serbian forces if and where satisfied that they contained circumstances of relevance to this case.<sup>61</sup> The Panel further notes that the Defence failed to individualise its submissions regarding the purported relevance of each proposed fact. It is the moving party's responsibility to establish the purported relevance of each proposed adjudicated fact, where that relevance is not otherwise apparent from

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<sup>57</sup> Joint Defence Request, paras 29-31, *referring to* Defence Proposed Adjudicated Facts 10, 15-18, 20-21, 27, 37, 38, 43, 46-48, 52-57, 59-61, 63-73, 74, 76-85, 87-105, 109-110.

<sup>58</sup> SPO Response, paras 21-22.

<sup>59</sup> F01536, paras 39-52.

<sup>60</sup> F01536, para. 45.

<sup>61</sup> *See e.g.* Defence Proposed Adjudicated Facts 14, 19, 38-40 (accepted as Adjudicated Facts 745-746, 750-751, *see* Annex 1 to F01536, pp. 2-3).

the fact itself. The Panel therefore finds that the Defence has failed to identify an error in the Panel's assessment of the relevance of those Defence Proposed Adjudicated Facts. The Panel is of the view that the Ninth Issue mischaracterises the Panel's findings in F01536 and constitutes a mere disagreement with such findings.

58. The Panel accordingly finds that the Defence has failed to establish that the Ninth Issue arises from the Impugned Decision.

59. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Ninth Issue is therefore rejected.

## 7. Tenth Issue

60. The Defence submits that, in F01536, the Panel erred by failing to explain the basis for the rejection of Defence Proposed Adjudicated Facts 8, 13-14, 26, 38-53, 55, 74, 78, 81, and 110.<sup>62</sup>

61. The SPO responds that, out of the twenty-five adjudicated facts that the Defence takes issue with: (i) fifteen have been judicially noticed, in whole or in part;<sup>63</sup> (ii) five have been rejected because of their overlapping with SPO Proposed Adjudicated Facts;<sup>64</sup> and (iii) and five have been rejected because due to the Defence's failure to establish their relevance.<sup>65</sup>

62. The Panel notes that, out of the twenty-five Defence Proposed Adjudicated Facts that the Defence takes issue with: (i) three have been judicially noted by the Panel in their entirety;<sup>66</sup> (ii) twelve have been judicially noticed in part and as

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<sup>62</sup> Joint Defence Request, paras 32-33.

<sup>63</sup> SPO Response, para. 23, *referring to* Defence Proposed Adjudicated Facts 8, 13-14, 39-40, 42, 45, 50-52, 55, 74, 78, 81, 110.

<sup>64</sup> SPO Response, para. 24, *referring to* Defence Proposed Adjudicated Facts 26, 41, 44, 49, 53.

<sup>65</sup> SPO Response, para. 24, *referring to* Defence Proposed Adjudicated Facts 38, 43, 46-48.

<sup>66</sup> F01536, para. 52, *referring to* Defence Proposed Adjudicated Facts 42, 45, 50.

reformulated by the Panel on account of their original ambiguousness or lack of relevance, or to remove legal findings, or to correspond more closely to the original finding;<sup>67</sup> and (iii) nine have been rejected because of their lack of relevance, lack of clarity or overlapping with SPO Proposed Adjudicated Facts.<sup>68</sup> Each of them was addressed individually and reasons given for their being judicially noted or not. The Panel therefore finds that the Defence has failed to substantiate how the Panel erred by failing to explain the basis for the rejection of Defence Proposed Adjudicated Facts 8, 14, 26, 38-53, 55, 74, 78, 81, and 110. The Panel is of the view that the Tenth Issue mischaracterises the Panel's findings in relation to those Defence Proposed Adjudicated Facts and constitutes a mere disagreement with such findings.

63. The Panel accordingly finds that the Defence has failed to establish that the Tenth Issue raised in relation to Defence Proposed Adjudicated Facts 8, 14, 26, 38-53, 55, 74, 78, 81, and 110 arises from the Impugned Decision.

64. The Panel acknowledges that Defence Proposed Adjudicated Fact 13 has been judicially noticed as reformulated by the Panel without a full reasoned opinion being provided for such reformulation.<sup>69</sup> Accordingly, the Panel finds that the Tenth Issue in relation to Defence Proposed Adjudicated Fact 13 arises from the decision. However, considering that the text of said adjudicated fact as reformulated by the Panel is available to the Defence,<sup>70</sup> the Defence would have no difficulty understanding the rationale behind the reformulation of this fact. The Panel therefore finds that the Defence has failed to establish that the Tenth Issue in relation to Defence Proposed Adjudicated Fact 13 may affect the fair and expeditious conduct of proceedings or the outcome of the trial.

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<sup>67</sup> F01536, paras 45, 47-48, 51, *referring to* Defence Proposed Adjudicated Facts 8, 14, 38-40, 51-52, 55, 74, 78, 81, 110.

<sup>68</sup> F01536, paras 45, 48, 50, *referring to* Defence Proposed Adjudicated Facts 26, 41, 43-44, 46-49, 53.


<sup>69</sup> *See* F01536, paras 51-52.

<sup>70</sup> Annex 1 to F01536, p. 2.

65. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for certification to appeal the Tenth Issue is therefore rejected.

## V. DISPOSITION

66. For all the reasons stated above, the Panel **REJECTS** the Joint Defence Request.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style and is positioned above a horizontal line.

**Judge Charles L. Smith, III**

**Presiding Judge**

Dated this Friday, 16 June 2023

At The Hague, the Netherlands.