



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: Specialist Prosecutor's Office

Date: 21 September 2023

Language: English

Classification: Confidential

**Prosecution response to 'Second Defence Motion for Judicial Notice of
Adjudicated Facts'**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Motion¹ should be dismissed. The Proposed Fact² does not meet the requirements for judicial notice under Rule 157(2) of the Rules.³ As already found by the Panel, the Proposed Fact 'is not relevant or probative'.⁴ Thus, notice would undermine the primary purpose of Rule 157(2),⁵ namely, judicial economy.⁶

II. SUBMISSIONS

2. The Proposed Fact consists of five sentences; four of which merely summarise evidence and submissions by the parties in the *Demaj et al.* case.⁷ To the extent the *Demaj et al.* panel appears to indicate agreement with the summarised submissions or evidence, such agreement is subjective and conclusory. These parts of the Proposed Fact are not distinct, concrete, and identifiable factual findings and, in turn, are not appropriate for judicial notice under Rule 157(2).⁸

¹ Second Defence Motion for Judicial Notice of Adjudicated Facts with Annex A, KSC-BC-2020-06/F01780, 8 September 2023, Confidential ('Motion').

² The term 'Proposed Fact' refers to the judgment excerpt included in Annex A to the Motion (KSC-BC-2020-06/F01780/A01).

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule' or 'Rules' are to the Rules.

⁴ Transcript, 5 September 2023, p.7269.

⁵ Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01534, 17 May 2023 ('Prosecution Adjudicated Facts Decision'), para.18 (the Panel exercised its discretion to reject remotely relevant facts and facts with no clear and demonstrable connection to matters at issue); Decision on Defence Motion for Judicial Notice of Adjudicated Facts, KSC-BC-2020-06/F01536, 18 May 2023 ('Defence Adjudicated Facts Decision'), para.40.

⁶ Rule 157(2) ('in the interests of a fair and expeditious trial'); Prosecution Adjudicated Facts Decision, KSC-BC-2020-06/F01534, para.12.

⁷ Proposed Fact, sentences 1-4: 'The defense has submitted two lists, purporting to identify members of the Local Police. [...] As argued by the Prosecutor, if the KLA had information or was in possession of lists at that time and used them as the basis to suspect that the detainees were Local Police, or were engaged in activities hostile to the KLA, they would surely have confronted the detainees with these allegations. Again as argued by the Prosecutor, Jenuz Shurdhani who conducted interviews with the detainees while they in [sic] Ivaja, testified that he had no information as to why the detainees were kept there. In any event no claim was made that these lists were used by the KLA as a basis for the detentions.'

⁸ See Defence Adjudicated Facts Decision, KSC-BC-2020-06/F01536, paras 14, 42, 48, 50. See also ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Documents, 25 May 2013, para.13, Annex A, Decision column, facts (amongst others) 14, 16, 32, 34, 38 (rejecting summaries of evidence and submissions as not distinct, concrete, and identifiable findings capable of judicial notice).

3. The fifth sentence of the Proposed Facts reads as follows: ‘Thus even if these lists are accurate and reliable they fail to establish that they formed the basis upon which the detainees were arrested and held in captivity.’ Like the first four sentences of the Proposed Fact, this fifth sentence is not appropriate for judicial notice. First, contrary to Defence submissions,⁹ the previously noticed adjudicated facts from the *Dema et al.* case are distinguishable from the Proposed Fact at issue. The Proposed Fact concerns evidence put forward by the *Demaj et al.* defence, revolves around arguments made by the *Demaj et al.* prosecution, and is not a finding of fact as such, but instead an observation on the probative value of the ‘lists’ in the particular circumstances of the *Demaj et al.* case, including in light of the insufficiency of the evidence.¹⁰ On this basis alone, it fails to meet the requirements of Rule 157(2).¹¹ Notably, in this case, the SPO intends to present further evidence concerning these lists.¹²

4. Further, the fifth sentence of the Proposed Fact – when read in context and the absence of relevant evidence in *Demaj et al.*¹³ – merely states the obvious: that the ‘lists’, on their own and without more, do not establish the basis upon which persons were detained.

5. In an attempt to support their submissions, the Defence misrepresents the record by stating that ‘the SPO suggested in its Pre-Trial Brief that W04018 and other

⁹ Motion, KSC-BC-2020-06/F01780, para.20.

¹⁰ The fourth sentence of the Proposed Fact reads: ‘In any event no claim was made that these lists were used by the KLA as a basis for the detentions.’ See also *Prosecutor v. Demaj et al.*, 215/04, Verdict, 12 May 2005, p.51 ([...] although these lists were permitted in evidence, no testimony was offered as to how they were obtained or where they came from. No verification of their authenticity or accuracy was ever offered. Thus they have very limited probative value in this case [...]).

¹¹ See, for example, ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Defence Motion for Judicial Notice of Adjudicated Facts, 4 May 2010, paras 20-21 (declining to take notice of certain facts, noting, *inter alia*, acknowledgement by the original chamber in reaching the relevant finding of the evidentiary circumstances in the particular case, including disparities). See also ICTY, *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Prosecution Motion Judicial Notice of Adjudicated Facts, 22 August 2008, para.28 (differentiating between findings of facts and credibility assessments, the latter not being appropriate for judicial notice).

¹² See, for example, 036622-036837, p.036740; 074301-TR-ET Part 10 RED, p.9-14. The SPO does not assert that these lists were those read to W04018 during his detention. See para.5 below.

¹³ See fn.10 above.

individuals that he was allegedly detained with had been arrested because their names appeared on these lists.’¹⁴ However, in its Pre-Trial Brief, the SPO stated that when Enver AXHAMI questioned W04018, a list containing the names of several Kosovo Albanians that the KLA intended to abduct was read out to W04018.¹⁵ The Defence incorrectly asserts that the two lists at issue are the same as the list that was read out to the witness during his detention without even attempting to explain how they reached that conclusion.¹⁶ In fact, the witness himself denied knowledge of the lists, including when the Proposed Fact was put to him.¹⁷ In this respect, insofar as the Proposed Fact was read to and used during the questioning of W04018, it already forms part of the record.

6. Accordingly, the Defence – which bears the burden¹⁸ – has failed to establish that (any part of) the Proposed Fact meets the requirements of Rule 157(2) or even that it is relevant and probative. Judicial notice should be denied.

III. CLASSIFICATION

7. Consistent with the Motion’s classification, this response is confidential pursuant to Rule 82(4). However, as it does not contain any confidential information, the SPO does not object to its reclassification as public.

IV. RELIED REQUESTED

8. For the reasons stated above, the Panel should reject Motion.

¹⁴ Motion, KSC-BC-2020-06/F01780, para.16.

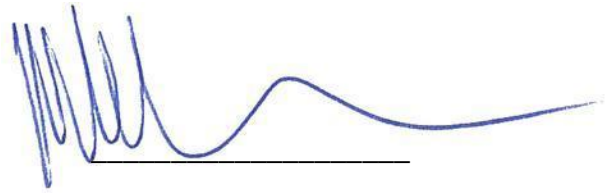
¹⁵ Lesser Redacted Version of ‘Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief’, KSC-BC-2020-06/F01594/A03, 9 June 2023, Confidential, para.532.

¹⁶ Motion, KSC-BC-2020-06/F01780, para.17. *See also* SPOE00093211-SPOE00093212-ET and 6D07-0055-6D07-0057.

¹⁷ *See* Transcript, 5 September 2023, p.7232.

¹⁸ Prosecution Adjudicated Facts Decision, KSC-BC-2020-06/F01534, para.17 (the onus of establishing the requirements of the Rules is upon the moving party).

Word count: 1192

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Ward Ferdinandusse

Acting Deputy Specialist Prosecutor

Thursday, 21 September 2023

At The Hague, the Netherlands.