

In: KSC-BC-2020-06
The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

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

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Reply to Prosecution Response to Second Defence Motion for Judicial Notice of Adjudicated Facts

Specialist Prosecutor's Office

Ward Ferdinandusse

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I- INTRODUCTION

1. The Defence Motion should be granted. The arguments raised by the SPO¹ in relation to the formulation of the Proposed Fact do not prevent the Panel from exercising its discretion to take judicial notice of it; the Proposed Fact is appropriate for judicial notice, probative, and relevant, as further highlighted by the SPO submissions in response.

II- SUBMISSIONS

2. The SPO claims that four of the five sentences in the Proposed Fact “merely summarise evidence and submissions by the parties in the *Demaj et al.* case”, and are therefore not distinct, concrete, and identifiable factual findings suitable for judicial notice, and that the fifth sentence also ‘fails to meet the requirements of Rule 157(2)’.²

3. In relation to the first point, it is noted that the Court’s ultimate finding was that ‘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.’ In addition to this finding, the Proposed Fact includes the relevant passage which contains references to arguments and evidence taken into consideration by the Court to reach its ultimate finding. This does not prevent the Panel from taking judicial notice of the Proposed Fact.

4. Firstly, this is not a mere recitation of evidence; rather the Proposed Fact identifies the evidence that has been accepted by the Chamber, and which therefore forms the basis for that finding. Even the SPO accepts that the Court “appears to

¹ F01805, Prosecution response to ‘Second Defence Motion for Judicial Notice of Adjudicated Facts’, 21 September 2023 (hereinafter “Response”).

² Response, paras. 2, 3.

indicate agreement with the summarised submissions or evidence”.³ Secondly, it is not unusual for a Judgment to be constructed in such a way that certain sections contain both a recitation of evidence and the ultimate factual findings. In such cases, Chambers have accepted Proposed Facts when they were able to identify that the evidence in question was – either implicitly or explicitly - evaluated and accepted by the Chamber when reaching its findings.⁴

5. The Proposed Fact remains a finding on whether the lists formed the basis upon which the detainees were arrested and held in captivity; a fact that is distinct, concrete, and identifiable, and therefore appropriate for judicial notice pursuant to Rule 157(2). The Panel may also choose to reformulate the passage if considered appropriate.

6. In relation to the second part of the Response, it is unclear from the SPO submissions what the relevance is that the argument regarding the lists was proposed by the defence in *Demaj et al.*⁵ If anything, the fact that the argument was proposed by the defence reinforces the Court’s conclusion; in *Demaj et al.*, the defence had only the burden of raising reasonable doubt concerning the alleged crime by positing that the lists were used as a basis for detention, and the Chamber concluded that they failed to meet that relatively low burden.

7. The SPO in the present proceedings would have the higher burden of demonstrating beyond reasonable doubt that the lists were used. The Defence did not misrepresent the record.⁶ The SPO examination of W04018 suggested at the very least the existence of a link between the lists and the detention of W04018 and others. The

³ Response, para. 2.

⁴ ICTY, *Prosecutor v. Mladic*, IT-09-92-PT, [Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts](#), 13 April 2012, paras. 8-10; ICTY, *Prosecutor v. Stanasic and Zupljanin*, IT-08-91, [Decision Partially Granting Motion of Mico Stanasic for Judicial Notice of Adjudicated Facts](#), 29 June 2011, para. 5.

⁵ Response, para. 3.

⁶ Response, para. 5.

defence line of cross-examination, the request to admit portions of the judgment, and the Defence motion for judicial notice arose directly from questions posed by the. Moreover, these lists were also the object of judicial questioning, which makes the Proposed Fact not only relevant to the SPO case, but also to the Judges' questions.

8. The SPO also appears to disregard that having admitted the discussed two lists into evidence, and having heard testimony from W04018 that his abductors read out a list of names of Albanians they intended to abduct,⁷ the District Court concluded that *no lists* were used as a basis for the detentions.⁸ The SPO therefore wrongly claims that only two lists were considered by the District Court, which rather made a broader finding that no lists were used.

9. In any event, even if "the SPO does not assert that these lists were those read to W04018 during his detention",⁹ the relevance of the Proposed Fact is reinforced by the fact that "the SPO intends to present further evidence concerning these lists".¹⁰

10. The broader point made with the finding contained in the Proposed Fact is that "membership in the Local Police could not be found to be a basis for these detentions".¹¹ If the Panel considers that this quoted excerpt of the judgment is more suitable for judicial notice, the Defence is ready to submit a further request for judicial notice.

⁷ Exhibit P367, Minutes of the main trial on 14 December 2004, at p. SPOE00091676.

⁸ Verdict of District Court of Pristina against the accused Rrustem DEMA, Enver AXHAMI, Ejup RUNJEVA, Bujar TAFILI and Nuhi PROVOLIU, P. No. 215/04, 12 May 2005, p. 52 [emphasis added].

⁹ Response, footnote 12.

¹⁰ Response, para. 3.

¹¹ Verdict of District Court of Pristina against the accused Rrustem DEMA, Enver AXHAMI, Ejup RUNJEVA, Bujar TAFILI and Nuhi PROVOLIU, P. No. 215/04, 12 May 2005, p. 52.

11. Lastly, since the effect of taking judicial notice of an adjudicated fact is to establish ‘a well-founded presumption’ for the accuracy of a fact that may be challenged at trial,¹² the SPO would not be prevented from doing so.

III- RELIEF REQUESTED

12. For the foregoing reasons, the Defence requests the Trial Panel to take judicial notice of the fact included in Annex A to the Defence motion pursuant to Rule 157 of the Rules.

[Word count: 1089]

Respectfully submitted on 26 September 2023



Gregory W. Kehoe

Counsel for Hashim Thaçi

¹² F01534, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 17 May 2023, para. 13. See also *Prosecutor v. Slobodan Milosevic*, Decision on the Prosecution’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 “Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts”, IT-02-54-AR73.5, 28 October 2003, p. 4; *Prosecutor v. Hadzihasanovic and Kubura*, Final Decision on Judicial Notice of Adjudicated Facts, IT-01-47-T, 20 April 2004, p. 7; *Prosecutor v. Krajišnik*, Decision on prosecution motions for judicial notice of adjudicated facts and for admission of written statements of witnesses pursuant to rule 92bis, IT-00-39-PT, 28 February 2003, para. 16.



Geoffrey Roberts
Counsel for Rexhep Selimi



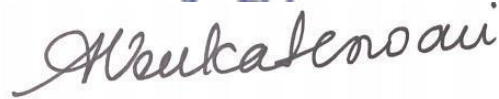
Eric Tully
Co-Counsel for Rexhep Selimi



Rudina Jasini
Co-Counsel for Rexhep Selimi



David Young
Co-Counsel for Rexhep Selimi



Venkateswari Alagenda
Lead Counsel for Jakup Krasniqi



Aidan Ellis



Victor Băieșu

Co-Counsel for Jakup Krasniqi

Co-Counsel for Jakup Krasniqi