

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 Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

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Public Redacted Version of Second Defence Motion for Judicial Notice of Adjudicated Facts

with Annex A

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I- INTRODUCTION

1. Pursuant to Articles 21 and 40 of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), and Rule 157 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), the Defence for Mr Thaçi, Mr Selimi, and Mr Krasniqi (collectively, "the Defence") respectfully requests the Trial Panel to take judicial notice of the adjudicated fact listed in Annex A ("Proposed Adjudicated Facts") to this motion.

2. During the Trial Preparation Conference of 18 January 2023, the Panel inquired whether the Parties intended to request judicial notice of adjudicated facts pursuant to Rule 157(2) of the Rules. The Defence confirmed its intention to file such a motion, jointly, prior to the commencement of the trial.¹ On the same day, the Panel ordered the SPO and the Defence to file motions requesting judicial notice of adjudicated facts pursuant to Rule 157(2) of the Rules by 1 March 2023 at 4.00 p.m.²

3. On 1 March, the Defence filed a joint motion for judicial notice of adjudicated facts,³ in which it indicated that it reserved the "right to file additional requests for judicial notice of adjudicated facts at a later stage of the proceedings".⁴ On the same day, the SPO also filed a motion for judicial notice of adjudicated facts.⁵

¹ KSC-BC-2020-06, Transcript of 18 January 2023, page 12, line 25 to page 13, line 11.

² KSC-BC-2020-06, Transcript of 18 January 2023, page 121, lines 12-14.

³ F01331, Specialist Counsel, Joint Defence Motion for Judicial Notice of Adjudicated Facts, 1 March 2023, with Annex A ("First Joint Defence Motion").

⁴ F01331, Specialist Counsel, Joint Defence Motion for Judicial Notice of Adjudicated Facts, 1 March 2023, with Annex A, para. 3.

⁵ F01330, Prosecution motion for judicial notice of adjudicated facts, 1 March 2023, with confidential Annexes 1-2.

4. On 31 March, the SPO responded to the First Joint Defence Motion.⁶ On 11 April the Defence filed a joint reply to the SPO response.⁷

5. On 3 April, the Defence responded to the SPO motion,⁸ and on 11 April the SPO replied to the Defence response.⁹

6. The Panel issued a decision on the SPO motion on 17 May 2023,¹⁰ and one on the Joint Defence motion on 18 May 2023.¹¹ Both motions were granted in part, and as a consequence the Panel took judicial notice of a number of adjudicated facts.

II- SUBMISSIONS

7. Rule 157(2) of the Rules stipulates that, “Upon request by a Party or *proprio motu* [...] the Panel may, in the interests of a fair and expeditious trial, take judicial notice of adjudicated facts from other proceedings of the Specialist Chambers or from final proceedings before other Kosovo courts or from other jurisdictions relating to matters at issue in the current proceedings, to the extent that they do not relate to the acts and conduct of the Accused as charged in the indictment.”

8. As stressed by the Trial Panel, “Rule 157(2) of the Rules aims at achieving judicial economy (“in the interests of a fair and expeditious trial”) by conferring on

⁶ F01411, Specialist Prosecutor, Prosecution Response to ‘Joint Defence Motion for Judicial Notice of Adjudicated Facts’, 31 March 2023, with Annex 1.

⁷ F01442, Specialist Counsel, Joint Defence Reply to Prosecution Response to ‘Joint Defence Motion for Judicial Notice of Adjudicated Facts’, 11 April 2023.

⁸ F01417, Specialist Counsel, Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts, 3 April 2023, with Annex 1.

⁹ F01443, Specialist Prosecutor, Prosecution Reply to ‘Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts’, 11 April 2023, with Annex 1.

¹⁰ F01534, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 17 May 2023, with Annex 1 (Confidential) and Annex 2 (Public).

¹¹ F01536, Decision on Defence Motion for Judicial Notice of Adjudicated Facts, 18 May 2023, with Annex 1 (“Decision on Defence Adjudicated Facts”), para. 53.

the Trial Panel discretionary power to take judicial notice of adjudicated facts from other proceedings of the Specialist Chambers or from final proceedings before other Kosovo courts or from other jurisdictions relating to matters at issue, thus avoiding the presentation of evidence in relation to facts that have been previously established in these other proceedings on the basis of evidence presented.”¹²

9. The Proposed Adjudicated Fact complies with the requirements set out by Rule 157, as (i) it was finally adjudicated before a Kosovo court; (ii) relates to matters at issue in the current proceedings; and (iii) does not relate to the acts and conduct of any of the Accused as charged in the Indictment.

10. The Proposed Adjudicated Fact is suitable for judicial notice. It is “distinct, concrete, and identifiable”;¹³ it does not differ from the formulation of the original judgement;¹⁴ it is not unclear or misleading in the context in which it is placed;¹⁵ it does not contain legal findings or characterisations;¹⁶ it is not based on an agreement

¹² Decision on Defence Adjudicated Facts, para. 14; Decision on Prosecution Adjudicated, para. 12. See also KSC-BC-2020-05/F00191, Decision on judicial notice of adjudicated facts, para. 9.

¹³ KSC-BC-2020-05/F00191, para. 10, citing ICTY, *Prosecutor v. Perišić*, IT-04-81-PT, Trial Chamber I, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008, para. 18; *Prosecutor v. Prlić et al.*, IT04-74-PT, Trial Chamber II, Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(b), 14 March 2006, para. 12; *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-T, Trial Chamber II, Decision on Judicial Notice of Adjudicated Facts Following the Motions Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005, 14 April 2005, p. 5; see also *Prosecutor v. Mičo Stanišić*, Case No. IT-04-79-PT, Decision on Judicial Notice, 14 December 2007, para. 37.

¹⁴ KSC-BC-2020-05/F00191, para. 10, citing ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, Decision on Accused’s Motion for Judicial Notice of Adjudicated Facts related to count one, 21 January 2014, para. 6; *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. 7; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Trial Chamber I, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, para. 16.

¹⁵ 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. 8.

¹⁶ *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Trial Chamber III, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts (“Lukić and Lukić Decision”), 22 August 2008, paras 24-25; *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Chamber III, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006, 7 September 2006, para. 23; *Prosecutor v. Šešelj*, IT-03-67-T, Trial Chamber III, Decision on the Prosecution Motion to Take Judicial Notice of Facts Under

between the Parties to the original proceedings,¹⁷ and it is not subject to pending appeal or review.¹⁸

11. The Proposed Adjudicated Fact originates from the *Rrustem Dema et al* case, which addressed allegations that are also included the Indictment in this case. Witness W04018, who testified in the present proceedings between 4 and 5 September 2023, was a ‘principal witness’ in the *Rrustem Dema et al* case.¹⁹

12. The Proposed Adjudicated Fact is directly and precisely related to an issue that was addressed in some length during the examination of W04018, and is relevant to the witness’ evidence as a whole.

13. The Proposed Adjudicated Fact concerns lists of individuals including W04018 and others who are alleged victims in both the present proceedings and in the *Rrustem Dema et al* case. These lists purport to identify members of the Local Police for the Serbian authorities.

14. The Panel in *Rrustem Dema et al* admitted these lists into evidence; heard testimonial evidence from [REDACTED] (W04722), identified by W04018 as the individual who conducted interviews of detainees in Ivaja, that “he had no

Rule 94(B) of the Rules of Procedure and Evidence, 10 December 2007, para. 15. See also *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Trial Chamber I, Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 January 2010, paras 24, 39-43.

¹⁷ ICTY, *Prosecutor v. Krajišnik*, IT-00-39-PT, Trial Chamber I, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis, 28 February 2003, para. 14; *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. 11.

¹⁸ ICTY, *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 92, 94; *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. 14.

¹⁹ 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. 6.

information as to why the detainees were kept there and why”; heard testimony from W04018 that his abductors read out a list of names of Albanians they intended to abduct,²⁰ and heard arguments from the Prosecution and the defendants in relation to these lists.

15. Having considered all of the above, the District Court concluded that, “even if accurate and reliable” (which was not established), these lists “fail to establish that they formed the basis upon which the detainees were arrested and held in captivity”.²¹

16. The SPO suggested in its Pre-Trial Brief²² that W04018 and other individuals that he was allegedly detained with had been arrested because their names appeared on these lists.

17. On 5 September 2023, W04018 was questioned on these lists.²³ During his examination by the SPO, W04018 stated that he had never seen either list before the SPO showed it to him and that no one mentioned any such document to him during his detention.²⁴ He did not have an answer as to why the names of other individuals that he named as co-detainees would be listed there.²⁵ However, he maintained during cross-examination that the list was read out by Enver Axhami (who W04018 identifies as the individual responsible for his arrest, detention and mistreatment)²⁶, although he could not explain how he could remember the numerous names that he listed to the District Court in his testimony in the *Rrustem Dema et al* case ; the witness finally

²⁰ Exhibit P367, Minutes of the main trial on 14 December 2004, at p. SPOE00091676.

²¹ 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. 51.

²² Prosecution Pre-Trial Brief, para. 520, footnote 2105.

²³ Transcript of 5 September 2023, T-7174, line 14 to T-7178, line 13; T-7179, line 16 to T-7184 line 14; T-7194 lines 4-10.

²⁴ T-7174, lines 14-21; T-7179, line 16 to T-7184 line 2;

²⁵ T-7176, lines 6-16; T-7180, line 6 to T-7181, line 11.

²⁶ See e.g. T-7178, line 23; T-7172, lines 24-25.

stated that he recalled from that list the names of individuals that were detained with him.²⁷

18. Counsel for Mr Thaçi put the relevant excerpt of the *Rrustem Dema et al* judgment to W04018, and particularly the District Court's conclusion that "no claim was made that these lists were used by the KLA as a basis for the detentions", before asking W04018 whether he had any reason to believe the contrary. W04018 answered: "I don't know anything about these lists or who drafted them, was it the KLA or somebody else. What I know, I can speak for myself, I was not on those lists."²⁸

19. The fact that the Trial Panel did not admit the excerpt of the judgment into evidence when its admission was sought through the evidence of W04018²⁹ does not preclude the admission of the Proposed Adjudicated Fact through this mechanism.

20. For the reasons outlined above, the Proposed Adjudicated Fact as formulated is entirely appropriate for judicial notice by this Trial Panel, and meets the enumerated criteria. The Trial Panel has already taken judicial notice of 12 adjudicated facts arising from the proceedings in question,³⁰ further underlining the relevance of these proceedings to the matters at issue in this case, and assuaging any concern that the Trial Panel is being "asked to accept another tribunal's judgment".³¹ The Trial Panel is not abrogating its fact finding function by admitting material that is directly relevant to its assessment of the SPO case concerning KLA detentions. In this regard, the Defence notes that the Trial Panel has already taken judicial notice of the following adjudicated fact from the same judgment: "[t]here was no evidence that those held in

²⁷ T-7236, line 6 to T-7240, line 5.

²⁸ T-7232 lines 12-20.

²⁹ T-7232 line 22 to T-7233, line 12 and T-7269, lines 8-14

³⁰ See Facts 556-567 in Annex 1 to the Decision on Prosecution Adjudicated Facts.

³¹ T-7269, lines 8-14

detention were advised by their captors as to why they were being held.”³² The Defence submits that the same standard should be applied to the proposed adjudicated fact.

III- RELIEF REQUESTED

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

[Word count: 2213]

Respectfully submitted on 8 September 2023



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³² See Fact 562 in Annex 1 to the Decision on Prosecution Adjudicated Facts.



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