

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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Thaçi Defence Reply to “Prosecution response to Hashim Thaçi’s request for certification to appeal the ‘Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused’”

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I. PRELIMINARY ISSUE: VIOLATION OF THE PRACTICE DIRECTION

1. The SPO Response¹ is 4,104 words in length. Article 43 of the “Practice Direction on Files and Filings before the KSC” limits responses to 3,000 words. The SPO Response should be dismissed, or immediately re-filed with the Defence afforded a further right of reply.

II. SUBMISSIONS

2. The general criticism that submissions on Issues were grouped together² is misplaced. The PTJ has adopted this approach when parties have grouped together appealable issues that have the same effect on fair and expeditious proceedings.³

A. ISSUES 1, 2 AND 5

3. That the PTJ has a duty to provide a reasoned opinion is beyond debate. This is an issue of fairness; a lower level panel must indicate with sufficient clarity the basis for its decision.⁴

4. Summarising a party’s arguments is not a substitute for providing a reasoned basis for their dismissal.⁵ That the PTJ addressed Articles in another context is manifestly insufficient.⁶ The Defence is not “seek[ing] additional analysis”,⁷ or

¹ KSC-BC-2020-06/F00506, Prosecution response to Hashim Thaçi’s request for certification to appeal the ‘Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused’, 6 October 2021 (“Response”).

² Response, para. 13.

³ See, KSC-BC-2020-07/F00169, Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021 (“Leave to Appeal Decision”).

⁴ KSC-BC-2020-06/IA004/F00005, Decision on Hashim Thaçi’s Appeal against Decision on Interim Release, 30 April 2021 (“Appeal Decision”), para. 27.

⁵ Response, para. 16.

⁶ Response, paras. 16, 23.

⁷ Response, para. 17.

wanting “additional reasoning included in the Decision”,⁸ but is properly identifying the PTJ’s error in failing to provide any or sufficient reasoning.

5. Identifying a failure to provide “any or sufficient” reasoning is sufficiently specific;⁹ this PTJ has previously considered issues phrased in precisely the same terms.¹⁰ The parties cannot be expected to guess whether the PTJ considered arguments cumulatively as well as individually.¹¹ The absence of any indication that the PTJ assessed Defence arguments in the aggregate in the face of a specific request is an error.

6. A failure to give reasons is “an error of law” that undermines the subsequent finding.¹² The SPO’s position that a failure to give reasons does not necessarily affect the ultimate outcome,¹³ is incompatible with fair and transparent proceedings, and incorrect.

B. ISSUE 3

7. The Defence never asserted that the incorporation of Article 159(1) of the KCPC was the sole basis for the PTJ’s decision.¹⁴ Whether the PTJ committed an error by failing to address the Exchange of Letters is an issue for appeal, and the SPO’s arguments are on the merits and premature.¹⁵

⁸ Response, para. 21.

⁹ Response, paras. 15, 19, 31.

¹⁰ *See, e.g.* KSC-BC-2020-07/F00178, Decision on the Defence Applications for Leave to Appeal the Decision on Request for Information on Diplomatic Briefing, 9 April 2021, para. 22.

¹¹ Response, para. 32.

¹² Appeal Decision, para. 28.

¹³ Response, para. 21.

¹⁴ Response, para. 23.

¹⁵ Response, para. 24.

8. The KSC Law and Rules fail to specifically regulate the period within which an SPO investigation must be carried out, and are therefore silent on this issue. In stating otherwise the SPO appears to deliberately misstate the Request.¹⁶ The PTJ committed an error of law in reaching the impugned finding, which warrants appellate intervention. To presume that the same finding would have been reached had the error not been committed is speculative.¹⁷

C. ISSUES 4 AND 7

9. The SPO asserts that a certification request must do more than identify appealable issues. In addition to identifying how the PTJ erred, the SPO submits that the Defence must also “*explain*” how the Decision does not address its arguments, or “*explain*” how additional reasoning would impact the proceedings,¹⁸ or “*explain*” how the PTJ’s interpretation of ECtHR caselaw was erroneous.¹⁹

10. To give these explanations would improperly morph the certification process into litigation on the merits, an approach which was consistently rejected at the Tribunals,²⁰ and which cannot be reconciled with the applicable KSC word counts. As the PTJ has previously cited, “certification is not concerned with whether a decision is correctly reasoned, but whether the standard for certification has been met”.²¹

¹⁶ Response, para 23. *See also* KSC-BC-2020-06/F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021, para. 54.

¹⁷ Response, para. 26.

¹⁸ Response, para. 29.

¹⁹ Response, para. 38.

²⁰ *See, e.g.*, ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Decision on Defence Motion for Certification to Appeal the Chamber’s Decision Under Rule 98 *bis*, 16 May 2014, para. 5.

²¹ KSC-BC-2020-06/F00172, Decision on the Taçi Defence Application for Leave to Appeal, 11 January 2021, para. 17; Leave to Appeal Decision, para. 18, citing ICTR, *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Defence Motion for Leave to Appeal the Trial Chamber’s Decision on the Defence Request to Call Prosecution Investigators, 10 May 2011, para. 12.

D. ISSUE 6

11. The Issue identified is precise. A new legal basis introduced by a PTJ can be properly challenged on appeal; this does not make it a “newly introduced” argument by the party itself.²² There is no misrepresentation of the issue, the PTJ dismissed Defence arguments on the basis of the novel and unanticipated position that the SPO is not constrained by requirements of independence and impartiality, which the Court of Appeal should be permitted to consider.

E. ISSUE 8

12. The issue, which is sufficiently clear, is that the PTJ’s consideration of whether the Marty Report was a standalone document violated the presumption of innocence. He thereby failed to consider the challenge raised, being the KSC and SPO’s own benediction of the report, and the Marty Report’s status as the document by which the Court claims to define itself. Rather than being an abstract question, the Issue raises a fundamental issue of fairness, meets the criteria for certification, and should properly be considered by the Court of Appeals Panel.²³

Word count: 983 words

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'G. W. Kehoe', is written over a white rectangular box.

Gregory W. Kehoe

Counsel for Hashim Thaçi

Monday, 18 October 2021

At Tampa, United States

²² Response, para. 35.

²³ Response, para. 40.