

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 Guénaél 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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Thaçi, Selimi & Krasniqi Defence Reply to Victims' Counsel's Response (F01503)

Specialist Prosecutor's Office

Alex Whiting

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

1. In responding to the Issues raised by the Defence for Mr Thaçi, Mr Selimi and Mr Krasniqi (“Defence”), Victim’s Counsel’s Response¹ provides substantive arguments about the merits of the Defence appeals.² These arguments are premature. The Defence has not yet provided its substantive arguments on these Issues, nor is it required to do so now.³ Apart from raising in general terms the Issues to be argued, should certification be granted, the Defence has not yet elaborated its arguments in support. The Victims’ Counsel’s approach of prematurely responding to arguments which have not been advanced and then classifying the Issues as disagreements and therefore not appealable, is erroneous.⁴

2. In addition, the Defence did not merely disagree with the Trial Panel’s approach. Rather, it articulated identifiable topics that are essential for the determination of the matter under examination: does the Trial Panel’s questioning fall within the KSC’s statutory framework, and is it compatible with the rights of the accused? That the Trial Panel and the Defence land in different places when answering this question does not mean the Issues are therefore “disagreements” and non-appealable. By this logic, a party could only appeal an issue where it held the same view as the Trial Panel.

3. As regards **Issue 1**, the Defence is not insisting on the modality of its arguments,⁵ namely, that they must be presented in writing. The question is not one of modalities; the Defence asked to make **further** submissions, and the Trial Panel

¹ KSC-BC-2020-06/F01503, Victims’ Counsel’s Response to the “Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning”, 8 May 2023 (“Response”).

² KSC-BC-2020-06/F01495, Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning, 1 May 2023 (“Request”).

³ KSC-BC-2020-07/F00423, Trial Panel II, Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect, 8 November 2021, para.21.

⁴ Response, paras. 3, 15, 17-21, 22-24.

⁵ Response, para.13.

undertook to consider them.⁶ On this basis, the Victims' Counsel is wrong to assert that "[t]he Selimi and Krasniqi Defence chose not to make submissions".⁷ Once the Trial Panel indicated its willingness to receive written submissions, Defence teams were not only entitled to hold their submissions for the forthcoming written pleadings, but were arguably required to do so. And while Victims' Counsel characterises this as a "straightforward issue",⁸ even issues which are relatively simple on their face may still have a momentous impact on Defence preparation, which is not always readily apparent to the other parties or Judges. The Defence intended to explain this in further written submissions, which the Trial Panel said it would consider.

4. In response to **Issues 2 and 3**, the Victims' Counsel responds to anticipated Defence arguments on appeal, rather than addressing whether the criteria for certification have been met. The Victims' Counsel submits, for example that "the Defence's interpretation of Rules 132 and 137(1) is contrary to the rationale that underlies this provisions",⁹ despite the Defence not having offered its interpretation of these rules, other than raising its intention to do so.

5. As regards **Issue 4**, in the same manner as the SPO,¹⁰ the Victims' Counsel defends the right of professional judges to ask questions at any time, in line with their "duty to arrive at the truth" which has "nothing to do with any illegitimate encroachment on [the Accused's] fair trial rights".¹¹ Firstly, the ICTY Appeals Chamber has recognised "the duty of the Chamber to discover the truth but only from the evidence as presented to the Chamber", and that it was **not** the duty of the

⁶ KSC-BC-2020-06, Transcript of Hearing on 19 April 2023, pp. 3253, 3255, 3260.

⁷ Response, para. 14.

⁸ Response, para. 15.

⁹ Response, para. 20.

¹⁰ KSC-BC-2020-06/F01505, Thaçi, Selimi & Krasniqi Defence Reply to 'Prosecution Response to Defence Certification Request F01495', 8 May 2023 ("Reply to SPO"), para. 1.

¹¹ Response, para. 24.

Chamber “to engage in the prosecutorial investigation of the case”.¹² On this basis, the process of Judges eliciting evidence concerning the act and conduct of the accused, outside the scope of examination by the parties, warrants appellate review.

6. Moreover, it is the **impact** on Defence preparation that gives rise to the encroachment on the accused’s rights. The Defence understood that the scope of a SPO witness’ evidence had been circumscribed by charges, the Pre-Trial Brief, and the SPO witness summary which exhaustively indicated the topics to be addressed. The Oral Order means that these limits have no practical utility. The Defence must now be prepared to cross-examine SPO witnesses on any aspect of any of the documents disclosed in this case, which may only be indicated to the Defence 24 hours before the testimony through their inclusion in the SPO presentation queue. This is not about the right of the Trial Panel to ask any question at any time, it is about whether the procedure for doing so, in this case, undermines the rights of the accused.

7. The *Prlić* and *Popović* caselaw supports the proposition for which it was cited.¹³ By contrast, the *Prlić* decision cited by the Victims’ Counsel, arose from objections as to “long and frequent interventions by the Judges” and questioning throughout the parties’ examinations.¹⁴ This is not the issue here. Regardless,¹⁵ the Defence is not asserting that Judges are prevented from asking questions at any stage to witnesses.¹⁶ The issue being raised is more specific: can the Trial Panel elicit evidence, even concerning the acts and conduct of the accused, outside the scope of examination by the parties, on the basis that the information has been disclosed at some point to the

¹² ICTY, *Prosecutor v. Blagojević*, IT-02-60-AR73.2, Decision, 8 April 2003, paras. 21-22.

¹³ Response, para. 27.

¹⁴ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision Regarding Questions Asked by the Judges During the Examination of a Witness in Court, 5 June 2008.

¹⁵ Reply to SPO, para. 1.

¹⁶ Response, para. 31.

Defence. Again, the Victims' Counsel does not address this point, which remains an appealable issue.

[Word count: 995 words]

Respectfully submitted on 10 May 2023,



Gregory W. Kehoe

Counsel for Hashim Thaçi



GEOFFREY ROBERTS

Lead 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

Co-Counsel for Jakup Krasniqi



Victor Băieșu

Co-Counsel for Jakup Krasniqi