

In: KSC-BC-2020-06

The 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: Counsel for Hashim Thaçi
Counsel for Kadri Veseli
Counsel for Rexhep Selimi
Counsel for Jakup Krasniqi

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Joint Defence Reply to Prosecution Response to ‘Joint Defence Request for Certification to Appeal Decisions F01534 and F01536’

Acting Specialist Prosecutor
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 Alagenda

1. The Joint Defence hereby files a Reply to two new issues set out in the SPO Response¹ to the Defence Request.²
2. First, the SPO erroneously argues³ that the Defence is seeking to raise new objections to facts proposed by the SPO for judicial notice⁴ (“SPO Proposed Facts”) that it has not raised at the time of the Defence filing its Response⁵ rather than identifying an appealable error in the Impugned Decision.
3. The nature of the Defence submissions is entirely different. The Defence challenges (i) the adoption of disparate legal standards across the pair of decisions,⁶ and/or (ii) the inconsistent application of the legal standards that the Panel itself has thus established, in the decisions, to the facts indicatively referenced and to other such facts.⁷
4. Similarly, for issues concerning solely the Decision on the SPO Motion⁸ the Defence challenges the application to the SPO Proposed Facts of the legal standards that the Trial Panel itself has delineated, and not how the Trial Panel addressed the Defence Response objections to such facts.
5. The issues put forward by the Defence concern exclusively the Trial Panel’s *own* formulation of the authoritative legal standards and *its* application of such

¹ KSC-BC-2020-06/F01589, Prosecution response to ‘Joint Defence Request for Certification to Appeal Decisions F01534 and F01536’, 8 June 2023 (“SPO Response”).

² KSC-BC-2020-06/F01557, Joint Defence Request for Certification to Appeal Decisions F01534 and F01536, 25 May 2023 (“Request”).

³ SPO Response, paras. 2-3, 14.

⁴ KSC-BC-2020-06/F01330, Prosecution Motion for Judicial Notice of Adjudicated Facts, 1 March 2023, with Annexes 1 and 2.

⁵ KSC-BC-2020-06/F01417, Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts, 3 April 2023, with Annex 1 (“Defence Response”).

⁶ Request, paras 5-6.

⁷ Request, paras 7, 9-10, 12-13.

⁸ KSC-BC-2020-06, F01534, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex 1 (Confidential) and Annex 2 (Public), 17 May 2023.

standards. The SPO's assertion that the Defence "improperly raises objections for the first time" is entirely borne out of its inapposite reading of the Request.

6. Second, the SPO argues, inaccurately, at best, that it is insufficient for the Defence to demonstrate an impact on the fairness of the proceedings as the Defence is not entitled to "equality of relief" considering the Parties' "distinct burdens".⁹
7. The effect of the SPO's submission is that evidence tendered by the SPO, be it in the form of proposed adjudicated facts or otherwise, should be treated more leniently out of sympathy for the heightened burden of proof that the SPO bears, and concomitantly that evidence or facts proposed by the Defence may be discarded with greater ease. Not only is this grave misapprehension wholly incompatible with the fundamental principle of equal application of the law, but also with that of equality of arms. The latter point is demonstrated by the jurisprudence that the SPO itself references.
8. The *Blaškić* decision that the SPO cites concerns whether the entitlement of an Appellant to a requested relief is dependent upon whether another Appellant has been granted the same relief in other proceedings before the tribunal.¹⁰ The Chamber answered in the negative and posited that equality of arms does not entail a right to equality of relief. In support, the Chamber cites to its previous decision in *Kordić & Čerkez*, where it determined that the fact that a party is not entitled to equality of relief means that it is not entitled to the same relief granted to another party *solely* by reason of such relief being granted in the first instance.¹¹ Thus, a party may not automatically attain the same relief granted to another

⁹ SPO Response, para. 6.

¹⁰ ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance [...], 16 May 2002 ('*Blaškić* Decision'), para.20.

¹¹ ICTY, *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Decision on Application by Mario Čerkez for Extension of Time to File His Respondent's Brief, 11 September 2001, para. 9.

party if it failed to show that the requirements for such relief have been met in respect of its application.¹²

9. Nonetheless, the SPO appears to suggest that even if the requirements for a particular relief have been met by one party, then that party is seemingly prevented from being granted the relief it seeks as granting such relief is somehow conditional upon each party's burden of proof. Alternatively, the SPO suggests that the lesser burden of proof for one party somehow elevates the requirements for the granting of relief to that party. Neither of these interpretations are supported by any jurisprudence or may be reasonably extrapolated from the two decisions above.
10. The SPO then proceeds to ignore the determinative finding in *Blaškić* that the Accused and the Prosecution "have equal access to processes available at the International Tribunal, and an equal opportunity to seek procedural relief where needed."¹³
11. The Defence has demonstrated that its equal access to the process of judicial notice has been impeded by the discrepancies identified in the two Impugned Decisions, which has a significant impact on the fairness of the proceedings, and seeks procedural relief by way of leave to appeal to cure these discrepancies. The SPO's position that its elevated burden of proof would alter this *status quo* is entirely unsubstantiated. So is the SPO's additional position that "[r]ather than allege error based solely on comparison of Decisions concerning distinct facts and on distinct motions, the Defence [...] must allege an error in each of the Decisions",¹⁴ as the equal access of the Defence to the process of judicial notice has been impeded by the cumulative effect of these two decisions.

¹² *Id.*

¹³ *Blaškić* Decision, para. 20

¹⁴ SPO Response, para. 6.

12. In light of these two issues, the Defence respectfully requests the Trial Panel to reject the SPO objections and to grant certification on all issues outlined in the Request.

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Respectfully submitted on 13 June 2023,



Gregory W. Kehoe
Counsel for Hashim Thaçi



Ben Emmerson, CBE KC
Counsel for Kadri Veseli



Andrew Strong
Co-Counsel for Kadri Veseli



Annie O'Reilly
Co-Counsel for Kadri Veseli



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 Alagendra
Lead Counsel for Jakup Krasniqi



Aidan Ellis
Co-Counsel for Jakup Krasniqi



Victor Băieșu
Co-Counsel for Jakup Krasniqi