In:	**KSC-BC-2020-06**
	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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Joint Defence Reply to Prosecution response to joint Defence request F02718

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1. Contrary to the SPO submissions,[1] the Defence Request[2] is well founded. The SPO, as the party which has gained a significant litigation advantage because of the way some members of the Panel have conducted their questioning, has predictably attempted to defend the *status quo* in its Response. But the Prosecution Response does not contest two fundamental propositions in the Request: (1) in the first nineteen months of trial, the members of the Panel have not pursued a single line of questioning that would, to a reasonable observer, appear to test the Prosecution case; and (2) to a reasonable observer, it would appear that the members of the Panel have spent most of their time testing the presumption of innocence of the Accused.

2. These two *uncontested* facts create an apprehension of bias and are alone sufficient to justify the relief sought. When combined with the time reports, they are sufficient to provide a holistic assessment to any reasonable observer. No "specific examples" are required. The fact that the SPO cannot identify a single line of questioning pursued by any member of the Panel over the first nineteen months of trial that a reasonable observer could have perceived as a test of the Prosecution case is itself sufficient to support a request for each member of the Panel to honor his ethical obligations under Rule 4 of the Code of Judicial Ethics.

3. The SPO wrongly claims that the Defence is relitigating the appeal[3] while ignoring the express language of Appeals Panel. Judges do not have an unlimited right to ask any question to witnesses. The Appeals Panel clearly defined a limit, which has been overstepped by the Trial Panel since the Appeals Panel ruling: the judges' questions should "not lead to the apprehension of bias, suffering of prejudice, or

[1] KSC-BC-2020-06/F02747, Prosecution response to joint Defence request F02718, 25 November 2024, public ("Response"), paras 1-2.
[2] KSC-BC-2020-06/F02718, Joint Defence Request for the Trial Panel to take Measures to Ensure the Appearance of Impartiality of the Proceedings and Avoid Prejudice to the Defence, 13 November 2024, public ("Request").
[3] Response, para. 2.

otherwise encroach upon the rights of the accused." The Appeals Chamber stressed that "the Trial Panel is not constrained to questioning witnesses on facts and issues already examined by the parties, provided that no party suffers prejudice and that the rights of the Accused are respected, in accordance with Article 21 of the Law."[4] It is improper for the SPO to ignore the explicit wording of the Appeal Decision quoted in the Motion,[5] and then claim that the Defence "seeks to impede" the Panel's "truth-finding function"[6] by requesting that each judge of the Panel adhere to the Appeals Panel's ruling that judges cannot create an "apprehension of bias" in the manner in which they conduct questioning. The Panel's "truth-finding function" is constrained by the Appeals Panel's Decision and by Article 4 of the Code of Judicial Ethics, not by the Defence.

4. The Judges may believe that they have impartial reasons for the manner in which they have conducted their questioning. That may satisfy the first part of Article 4(1) of the Code of Judicial Ethics, but it does not satisfy the second obligation: to ensure "the appearance of impartiality." The judges questioning thus far has, to a reasonable observer, created an appearance of bias and has been prejudicial for the Defence in several aspects, in particular being in breach of the Accused's rights to have adequate time for its preparation[7] and to a fair trial.[8]

5. For example, the length of the Panel's questioning (more than 71 hours), which is longer than the time taken by three Defence teams in cross-examination and has generated only 12 minutes of further examination by the SPO, gives rise to an appearance of bias. The SPO discreetly admits that the Judges' failure to pursue any questions that test the Prosecution case is a factor in why the SPO has not conducted

[4] KSC-BC-2020-06, IA028/F00011, Appeals Panel, *Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning*, 4 July 2023, public redacted version ("Appeal Decision"), para. 32.
[5] Motion, paras 5, 13.
[6] Response, paras 5, 12.
[7] Article 21(4)(c) of the KSC Law.
[8] Article 21(2) of the KSC Law.

any further examination.[9] The SPO's claim that the massive time discrepancy between SPO and Defence further examination[10] is also the result of Defence questioning that is "repetitive" or "beyond the scope" is disingenuous: both the SPO and the Trial Panel have been eager to shut down Defence further cross-examination at any suggestion that the Defence was being repetitive or exceeding the scope of judges' questioning. Even assuming *arguendo* that the Defence spent five hours asking such questions (*quod non*), this still results in a massive and disturbing time discrepancy of 26 hours for the Defence and twelve minutes for the Prosecution. A reasonable observer would have an apprehension of bias from these figures.

6. In its Request, the Defence expressly asked the Panel to avoid suggesting testimony to witnesses through leading questions.[11] Since then, the Defence has been made aware of a recent press conference held by President Trendafilova, in which she was questioned by the media about the manner in which judges have conducted their questioning in this trial, and asserted that, "leading questions are absolutely forbidden" and "we do not tolerate, we do not allow leading questions or guiding questions."[12] Yet some members of the Panel have used leading questions with witnesses.[13]

[9] Response, para. 9. The SPO states that its decision not to pursue further examination is not "solely" based on whether incriminatory or exculpatory evidence has been elicited by the judges. This amounts to an admission that the judges' failure to ask any questions testing the Prosecution case is indeed a factor, although the SPO claims that there are also other reasons.
[10] Response, para. 8.
[11] Request, para. 24.
[12] See the press conference of 12 November 2024, at https://scp-ks.app.box.com/s/pbs3rviwpflxg8odwqp7gdb2z1p9gvbh, 1:05:38 and 1:07:04. See also https://nacionale-com.translate.goog/drejtesi/le-te-imagjinojme-kryetarja-e-gjykates-speciale-pranon-se-pyetjet-orientuese-jane-te-ndaluara-kerkon-qe-ti-shohe-videot?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en-US&_x_tr_pto=wapp; https://nacionale-com.translate.goog/drejtesi/letra-e-krereve-te-uck-se-rastet-kur-gjyqtaret-e-hages-nxiten-dyshime-se-po-ia-mbajne-anen-prokurorise?_x_tr_sl=sq&_x_tr_tl=en&_x_tr_hl=nl&_x_tr_pto=wapp.
[13] For example, much of the judicial examination at KSC-BC-2020-06, Transcript of 22 February 2024, pp. 12893:19-12900:19, 12905:24-12913:9, was leading.

7. In addition, the Panel's now frequent[14] reliance on Rule 102(3) or Rule 103 documents not on any party's presentation queues, often concerning issues not raised by the parties and/or outside the scope of the Indictment and Pre-Trial Brief,[15] gives the impression that the Panel is pursuing a case of its own. For example, after the filing of the Request, one judge provided notice that he was going to conduct questioning using documents that had never been disclosed to some Defence teams.[16] This procedure violates the fair trial rights of the Accused, their rights to adequate notice, and their rights to an independent and impartial tribunal.

8. Considering, as outlined above, that the Panel have not pursued a single line of questioning that would appear to test the prosecution case, it is submitted that a reasonable observer would also perceive this material and the manner in which it is being utilised by the Panel, to also be introduced to support the prosecution case.

9. The late,[17] or lack of,[18] notice of the items intended to be used by the Panel, is prejudicial because the Defence does not have adequate time to prepare. It cannot read these items in their entirety, investigate their content or take instructions from their client, while being in court. In a case of this size, the Defence cannot be expected to have a full knowledge of the relevance of each item disclosed under Rule 102(3) or

[14] See, *inter alia*, emails from CMU dated 3 April 20204 (W04739), 23 April 2024 (W04741), 30 April 2024 (W03865), 25 June 2024 (W04744), 11 July 2024 (W04752), 4 September 2024 (W01511), 25 September 2024 (W04422), 26 November 2024 (W03873), 2 December 2024 (W04401).
[15] Such as, for instance, the creation of the LPK, the murder of Commander Drini or a witness' conviction after the war for crimes unrelated to the Indictment.
[16] The Defence notes that both the SPO and the Trial Panel consider that the objections raised by the Defence to items intended to be used by the Panel with W03873 are 'duplicative' or 'similar' to the submissions developed by the Defence in its Motion. See KSC-BC-2020-06, Transcript of 27 November 2024, pp. 22779-22780, especially p. 22780 l. 3 (SPO submissions), pp. 22780-22786, 22789-22790 (Defence objections), page 22803 (Panel's ruling). Accordingly, because both the SPO and the Trial Panel consider that the issue was covered by the Request, the Defence makes further submissions in Reply.
[17] The Panel usually notifies the items it intends to use with a witness less than 24 hours before the start of the judicial questioning, *i.e.* on a shorter notice than the minimum time required for the SPO's presentation queue, which must be released at least 24 hours before a witness starts to testify.
[18] See KSC-BC-2020-06, 18 November 2024, pp. 22338-22339, 22347-22350 (related to the reliance, by a Judge, on two Rule 102(3) items during its questioning of Nezir Cocaj without any prior notice).

Rule 103.[19] The Defence recalls that the SPO latest Rule 102(3) notice refers to a list of **78 538 Rule 102(3) items**,[20] and that more than **7500 Rule 103 items** have been disclosed so far.

10. The prejudice to the Defence is further exacerbated[21] when the judges rely on Rule 102(3) items which have not been disclosed to some of the Defence teams, of up to a hundred pages.[22] The Panel should not be authorised to rely on such items not disclosed to certain Defence teams, because their use for judicial questioning is intrinsically prejudicial. The fact that they will be disclosed after the Panel's notice, by the SPO upon Defence request a few minutes or hours before the judges' questioning, does not constitute a sufficient remedy: the Defence cannot be expected to review totally new items which will be used imminently by the Panel while the Defence is simultaneously conducting a cross-examination. A short stay of a few hours or days will not allow it to compare the new items to all the items in its custody or investigate its content, especially if it does not relate to an incident raised in the Indictment or Pre-Trial Brief.[23]

11. The fact that this situation is now recurrent, further gives rise to an appearance of bias and that the Panel is investigating its own case, and not limiting itself to the role adjudicator, as the Presiding Judge himself defined the Panel's role.[24] Rule 102(3) or Rule 103 items are not part of the record of the case on which the Panel will be able

[19] KSC-BC-2020-06, 27 November 2024, pp. 22789-22790.
[20] See Annex 1, p. 2, of KSC-BC-2020-06/F02701, Prosecution supplemental Rule 102(3) notice, confidential, 8 November 2024.
[21] KSC-BC-2020-06, Transcript of 27 November 2024, pp. 22785-22786.
[22] See email from CMU dated 26 November 2024 09:45, re 'Rule 102(3) and 103 notice - Judges questions of W03873', listing 24 items intended to be used during W03873's judicial questioning, and subsequent response from the Thaçi Defence, dated 26 November 2024 10:05, noting that 3 items have not been released to it yet, and requesting their immediate disclosure. See also KSC-BC-2020-06, Transcript of 26 November 2024, pp. 22685-22686, pursuant to which another item on the Panel's list had not been disclosed to the Selimi Defence.
[23] Such as, for instance, the attempted murder of Hamez HAJRA in 1998 and his subsequent murder in 2001, not mentioned in the Indictment or Pre-Trial Brief.
[24] Request, paras. 15, 24.

to rely to draft its judgement. While the Defence accepts that the Appeals Chamber has ruled that the Panel may use such items, the frequency of their use by the Panel has created an apprehension of bias that the Appeals Panel warned against, and has reached the level of the violation of the Defence right to have adequate time for its preparation, to a fair trial, and to an impartial tribunal.

12. For these reasons, the Defence reiterates the relief sought in paragraph 24 of its Motion.

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Respectfully submitted

The Hague, The Netherlands, 2 December 2024

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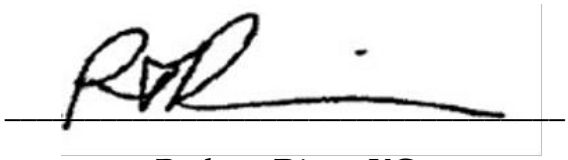

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