KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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
	Judge Christoph Barthe
	Judge Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Fidelma Donlon
Date:	26 February 2025
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Decision on Joint Defence Request for the Panel to take Measures to Ensure the Appearance of Impartiality of the Proceedings and Avoid Prejudice to the Defence

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TRIAL PANEL II ("Panel"), pursuant to Articles 3(2), 21(2), 21(4), 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 20 and 127(3) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 25 January 2023, the Panel issued the order on the conduct of proceedings ("Order on the Conduct of Proceedings") which, *inter alia*, sets out the procedures governing the questioning of witnesses.[1]

2. On 19 April 2023, the Defence for Hashim Thaçi and the Defence for Kadri Veseli raised issues regarding the Panel's questioning of a witness with respect to material not admitted into evidence during the direct examination or the cross-examination of the witness by the Parties.[2]

3. On 20 April 2023, the Panel issued an Oral Order on the scope of judicial questioning, dismissing the Defence's argument ("Oral Order").[3]

4. On 17 May 2023, further to a request from the Defence for Hashim Thaçi, the Defence for Rexhep Selimi, and the Defence for Jakup Krasniqi,[4] the Panel partly certified the request for leave to appeal the Oral Order ("Certification Decision").[5]

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[1] F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023.
[2] Transcript of Hearing, 19 April 2023, confidential, p. 3253, line 19 to p. 3260, line 8.
[3] Transcript of Hearing, 20 April 2023, p. 3263, line 12 to p. 3269, line 16.
[4] F01495, Specialist Counsel, *Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning*, 1 May 2023. *See also* F01501, Specialist Prosecutor, *Prosecution Response to Defence Certification Request F01495*, 5 May 2023; F01503, Victims' Counsel, *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; F01505, Specialist Counsel, *Thaçi, Selimi & Krasniqi Defence Reply to 'Prosecution Response to Defence Certification Request F01495'*, 8 May 2023; F01514, Specialist Counsel, *Thaçi, Selimi & Krasniqi Defence Reply to Victims' Counsel's Response (F01503)*, 10 May 2023.
[5] F01531, Panel, *Decision on Thaçi, Selimi and Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning* ("Certification Decision"), 17 May 2023.

5. On 4 July 2023, the Court of Appeals Panel issued a decision denying the appeal against the Oral Order ("Appeals Decision").[6]

6. On 19 March 2024, further to a request from the Defence,[7] the Panel held that it would endeavour to give notice to the Parties, prior to the commencement of questioning, of material from the public domain or material that was disclosed to the Defence pursuant to Rule 102(3) ("Order on Rule 102(3) Material").[8]

7. On 5 June 2024, again in response to the Defence request, the Panel extended the Order on Rule 102(3) Material to Rule 103 material, indicating that it will endeavour to give timely notice to the Parties of any Rule 103 material prior to judicial questioning ("Order on Rule 103 Material").[9]

8. On 13 November 2024, the Defence teams for Hashim Thaçi ("Mr Thaçi"), Kadri Veseli ("Mr Veseli"), Rexhep Selimi ("Mr Selimi"), and Jakup Krasniqi ("Mr Krasniqi") (collectively, "Defence") filed a joint request for the Panel to take measures to ensure the appearance of impartiality of the proceedings and avoid prejudice to the Defence ("Request").[10]

9. On 25 November 2024, the Specialist Prosecutor's Office ("SPO") responded to the Request ("Response").[11]

10. On 27 November 2024, the Panel heard related submissions from the Parties regarding the Defence's objection to the use of some Rule 102(3) Material by the Panel during judicial questioning of witness W03873 ("Additional

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[6] IA028/F00011, Court of Appeals Panel, *Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning*, 4 July 2023, confidential (a public redacted version was filed on the same day, IA028/F00011/RED).
[7] Transcript of Hearing, 18 March 2024, p. 13247, line 22 to p. 13248, line 16.
[8] Transcript of Hearing, 19 March 2024, p. 13381, line 10 to p. 13383, line 6.
[9] Transcript of Hearing, 5 June 2024, p. 16710, line 16 to p. 16711, line 3.
[10] F02718, Specialist Counsel, *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.
[11] F02747, Specialist Prosecutor, *Prosecution Response to Joint Defence Request F02718*, 25 November 2024.

Submissions").[12] On the same day, the Panel indicated that it will take into consideration the Additional Submissions when adjudicating the present Request.[13]

11. On 2 December 2024, the Defence replied to the Response ("Reply").[14]

II. SUBMISSIONS

12. The Defence requests the Panel to take steps to ensure the appearance of impartiality and to limit prejudice to the Defence during judicial questioning.[15] The Defence requests that the Panel: (i) take note of the Defence objections; (ii) act impartially; and (iii) make a good faith effort to create the appearance of impartiality in the manner in which it conducts judicial questioning.[16] In particular, the Defence requests the Panel to: (i) ask questions that test the SPO's case; (ii) limit the practice of suggesting answers to witnesses; and (iii) avoid "use of judicial questioning as a means of eliciting evidence against the Accused that is beyond the Prosecution's direct examination".[17] The Defence argues that the Panel's way of conducting judicial questioning throughout this trial has: (i) created an appearance of bias;[18] and (ii) violated the Accused's fair trial rights and right to an independent and impartial tribunal.[19]

13. The SPO responds that the Request should be rejected.[20] The SPO submits that the Request seeks to impede the Panel's truth-finding function and to

[12] Transcript of Hearing, 27 November 2024, p. 22779, line 3 to p. 22790, line 8.
[13] Transcript of Hearing, 27 November 2024, p. 22803, lines 10-14.
[14] F02756, Specialist Counsel, *Joint Defence Reply to Prosecution Response to Joint Defence Request F02718*, 2 December 2024.
[15] Request, paras 1, 19.
[16] Request, para. 24.
[17] Request, para. 24.
[18] Request, paras 21, 23. *See also* Request, paras 19-20.
[19] Request, para. 23.
[20] Response, paras 1, 14.

impermissibly restrict the right of the Judges to question witnesses.[21] The SPO argues that the Defence's allegations of bias and/or prejudice are procedurally misplaced and unsubstantiated.[22] The SPO avers that the relief sought by the Defence is vague, unwarranted and should be summarily dismissed.[23]

14. The Defence replies that the Request is well founded.[24] The Defence reiterates that the Panel's questioning: (i) has created an appearance of bias and (ii) has been prejudicial to the Accused's fair trial rights.[25] The Defence submits that the SPO does not contest that it would appear to a reasonable observer that, to date, the Panel's judicial questioning: (i) has not tested the Prosecution's case and (ii) has mostly tested the presumption of innocence of the Accused. In the Defence's submissions, these two "uncontested facts", combined with the empirical evidence provided by time reports, justify the relief sought.[26]

15. In the Additional Submissions,[27] the Veseli Defence argues that receiving, right before judicial questioning, notice that the Panel intends to use material disclosed under Rules 102(3) and 103: (i) does not constitute adequate notice and (ii) is unfair and prejudicial.[28] The Thaçi Defence echoed the Veseli Defence's submissions that such practice is prejudicial to the Defence due to lack of adequate notice.[29] The Selimi Defence and Krasniqi Defence joined these submissions.[30] The SPO responds that it immediately disclosed to the Thaçi Defence and the Selimi

[21] Response, paras 2, 4-5. *See also* Response, paras 12-13.
[22] Response, para. 3. *See also* Response, paras 7-9.
[23] Response, paras 3, 10-13.
[24] Reply, para. 1.
[25] Reply, para. 4. *See also* Transcript of Hearing, 27 November 2024, p. 22780, lines 20-22, p. 22781, lines 15-25, p. 22782, line 1.
[26] Reply, para. 2.
[27] *See supra* para. 10.
[28] Transcript of Hearing, 27 November 2024, p. 22780, lines 20-22, p. 22781, lines 15-25, p. 22782, line 1, p. 22783, lines 1-7, p. 22784, lines 10-20.
[29] Transcript of Hearing, 27 November 2024, p. 22785, lines 1-25, p. 22786, lines 2-6.
[30] Transcript of Hearing, 27 November 2024, p. 22789, line 23 to p. 22790, lines 7-8.

Defence the items that had not been previously distributed.[31] The SPO argues that: (i) the Defence's request to delay judicial questioning regarding this material is premature; and that (ii) if need be, the Defence can request additional time, after judicial questioning.[32]

III. APPLICABLE LAW

A. IMPARTIALITY

16. Pursuant to Article 21 of the Law, the Accused are entitled, *inter alia*, to: (i) a fair and public hearing in the determination of charges against them; (ii) have adequate time and facilities for the preparation of their defence; (iii) examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.

17. Pursuant to Article 40(2) of the Law, the Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused. Pursuant to that provision, the Panel may give directions for the conduct of fair and impartial proceedings.

18. Pursuant to Article 3(2) of the Law and Article 6(1) of the European Convention on Human Rights, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

19. Pursuant to Article 4(1) of the Code of Judicial Ethics for Judges appointed to the roster of international Judges of the Kosovo Specialist Chambers ("KSC"), the

[31] Transcript of Hearing, 27 November 2024, p. 22788, lines 14-17.
[32] Transcript of Hearing, 27 November 2024, p. 22788, lines 17-23. *See also* Transcript of Hearing, 27 November 2024, p. 22786, lines 10-17.

Judges shall exercise their functions impartially and ensure the appearance of impartiality.[33]

20. Rule 20 sets out the conditions and circumstances in which Judges should recuse themselves or be disqualified, and sets out the procedure by which such a relief may be sought.

21. As set out in relevant jurisprudence, Judges enjoy a strong presumption of impartiality and there is a high threshold to reach in order to rebut this presumption.[34] Judges should not only be subjectively free from bias, but also there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.[35]

22. An unacceptable appearance of bias exists where the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[36] The reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that

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[33] KSC-BD-01/Rev1/2023, *Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of the Kosovo Specialist Chambers* (adopted on 14 March 2017 and amended on 24 March 2023), Article 4(1).
[34] KSC-BC-2020-07, F00272, President of the Specialist Chambers, *Decision on the Application for Recusal or Disqualification* ("Case 07 Disqualification Decision"), 6 August 2021, paras 31-32 and references therein. *See also* International Criminal Tribunal for the Former Yugoslavia ("ICTY"), *Prosecutor v. Hadžihasanović et al.*, IT-01-47-A, Appeals Chamber, *Judgement* ("*Hadžihasanović* Appeal Judgement"), 22 April 2008, para. 78; *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeals Chamber, *Judgement* ("*Furundžija* Appeal Judgment"), 21 July 2000, para. 197; *Prosecutor v. Galić*, IT-98-29-A, Appeals Chamber, *Judgement* ("*Galić* Appeal Judgement"), 30 November 2006, para. 41; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Chamber, *Judgement* ("*Čelebići* Appeal Judgement"), 20 February 2001, para. 707; International Criminal Tribunal for Rwanda ("ICTR"), *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Appeals Chamber, *Judgement* ("*Nahimana et al.* Appeal Judgement"), 28 November 2007, para. 48; *Rutaganda v. Prosecutor*, ICTR-96-3-A, Appeals Chamber, *Judgement* ("*Rutaganda* Appeal Judgement"), 26 May 2003, para. 42; *Prosecutor v. Akayesu*, ICTR-96-4-A, Appeals Chamber, *Judgement* ("*Akayesu* Appeal Judgement"), 1 June 2001, para. 91.
[35] ICTY, *Hadžihasanović* Appeal Judgement, para. 78. *See also* *Galić* Appeal Judgement, para. 38; *Furundžija* Appeal Judgement, para. 189; *Nahimana et al.* Appeal Judgement, para. 49; *Rutaganda* Appeal Judgement, para. 39; *Akayesu* Appeal Judgement, para. 203.
[36] Case 07 Disqualification Decision, para. 31. *See also* ICTY, *Hadžihasanović* Appeal Judgement, para. 78; *Galić* Appeal Judgement, para. 39; *Furundžija* Appeal Judgement, para. 189; *Nahimana et al.* Appeal Judgement, paras 49-50; *Rutaganda* Appeal Judgement, para. 39; *Akayesu* Appeal Judgement, para. 203.

form a part of the background, and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.[37]

23. Where the recusal or disqualification of a Judge is sought on grounds of lack of impartiality and/or lack of appearance thereof, the moving Party bears the burden of adducing sufficient evidence that the Judge is not impartial, and there is a high threshold to rebut the presumption of impartiality.[38] The Party must demonstrate "a reasonable apprehension of bias by reason of pre-judgement" which is "firmly established".[39] This high threshold is required because "it is as much a threat to the interests of the impartial and fair administration of justice for Judges to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias as is the real appearance of bias itself".[40]

24. When raising such grounds, the moving Party must set forth the arguments in support of their allegation of bias in a precise manner; a Panel cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality.[41]

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[37] *Rutaganda* Appeal Judgement, para. 40.
[38] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74, Presidency, Decision of the President on Jadranko Prlić 's Motion to Disqualify Judge Árpád Prandler ("Prlić Decision"), 4 October 2010, para 7 and references cited. *See also Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1, Presidency, Decision on Motion for Disqualification ("Lukić Decision"), 12 January 2009, para 3; *Prosecutor v. Vidoje Blagojević*, IT-02-60-R, Presidency, Decision on Motion for Disqualification ("Blagojević Decision"), 2 July 2008, para 3; *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Presidency, Decision on Motion for Disqualification ("Šešelj Decision"), 16 February 2007, para 5; Furundžija Appeal Judgment, 21 July 2000, paras 196-197; *In the Case against Florence Hartmann*, IT-02-54-R77-5, Trial Chamber, Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and Senior Legal Officer, 27 March 2009, para 25.
[39] Lukić Decision, para 3; Blagojević Decision, para 3; *Furundžija* Appeal Judgement, para 197; Čelebići Appeal Judgment, para 707; Prlić Decision, para 7. *See also* Special Tribunal for Lebanon ("STL"), *In the Matter of El Sayed*, CH/PRES/2010/09, Presidency, *Decision on Mr El Sayed's Motion for the Disqualification of Judge Chamseddine from the Appeals Chamber Pursuant to Rule 25*, 5 November 2010, para. 17.
[40] Lukić Decision, para 3; Blagojević Decision, para 3; Čelebići Appeal Judgment, para. 707; Prlić Decision, para. 7.
[41] *Rutaganda* Appeal Judgement, para. 43; *Akayesu* Appeal Judgement, para. 91.

25. To determine the existence of judicial impartiality, the European Court of Human Rights ("ECtHR") applies two tests: (i) the *subjective test*, implying the absence of the personal conviction or interest of a given Judge in a particular case; and (ii) the *objective test*, which consists in ascertaining whether the tribunal offers sufficient guarantees to exclude any legitimate doubt as to its impartiality, or whether there are ascertainable facts which may raise doubts as to its impartiality.[42] What is decisive is whether this fear can be held to be objectively justified.[43] Appearances may be of some importance.[44]

B. SCOPE OF JUDICIAL QUESTIONING

26. Regarding judicial questioning, Rule 127(3) provides that Judges "may at any stage put any question to the witness".

27. In this regard, the Appeals Panel previously held that Rule 127(3), which provides the legal basis for the Panel's power to question witnesses,[45] places no limitation on the subject matter of the Panel's questions to witnesses.[46] Rather, the Panel has a broad discretionary power to put to witnesses any questions deemed necessary for the clarification of their testimony or the discovery of the truth.[47] Notably, the Appeals Panel found that questions to a witness "may include facts and issues not raised by the parties, and facts beyond those described in the charges, provided that such questioning does not lead to the apprehension of bias, suffering of prejudice, or otherwise encroach upon the rights of the accused".[48]

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[42] ECtHR, *Kyprianou v. Cyprus*, no. 73797/01, Grand Chamber, *Judgment* ("*Kyprianou* Judgment"), 15 December 2005, paras 118-119; *Morice v. France*, no. 29369/10, Grand Chamber, Judgment ("Morice Judgment"), 23 April 2015, para. 73; *Hauschildt v. Denmark*, no. 10486/83, Grand Chamber, *Judgment*, 24 May 1989, para. 46; *Revtyuk v. Russia*, no. 31796/10, Grand Chamber, *Judgment*, 9 April 2018, para. 22.
[43] *Morice* Judgment, para. 76.
[44] *Kyprianou* Judgment, para. 118; *Morice* Judgment, para. 78.
[45] Appeals Decision, para. 29.
[46] Appeals Decision, para. 32 and references cited therein.
[47] Appeals Decision, para. 32 and references cited therein.
[48] Appeals Decision, para. 32 and references cited therein.

28. Lastly, when setting out the procedures governing the presentation of evidence and the questioning of witnesses,[49] this Panel has determined that where questions put to a witness by the Panel after cross-examination and re-direct examination raise entirely new matters, any Party may orally apply for leave to further examine the witness on those new matters.[50]

IV. DISCUSSION

A. NATURE OF THE REQUEST

29. The Defence submits that, in light of the considerable advancement of the proceedings, the situation has changed since the Court of Appeals Panel rendered the Appeals Decision.[51] The Defence argues that the new relief sought in the Request is justified by the changed situation which has arisen since the Appeals Decision.[52]

30. The SPO argues that the Request attempts to relitigate an appellate ruling without raising new legal arguments or addressing the legal test for reconsideration.[53]

31. The Defence rejects the SPO's claim that the Defence is relitigating the Appeals Decision as the Court of Appeals Panel clearly defined a limit in relation to judicial questioning, which has been overstepped by the Trial Panel since the Court of Appeals Panel's ruling.[54]

32. The Panel accepts that some of the arguments raised in the Request substantially overlap with, or repeat, those that the Defence advanced in the

[49] Order on the Conduct of Proceedings, Section F – Questioning of Witnesses, pp. 26-28.
[50] Order on the Conduct of Proceedings, para. 112.
[51] Request, para. 22.
[52] Request, para. 22.
[53] Response, paras 2, 4, 6.
[54] Reply, para. 3.

context of the litigation which led to the Appeals Decision.[55] However, the Panel is of the view that the overarching legal question in the present Request – i.e. whether the Panel's way of conducting judicial questioning creates an appearance of bias – differs from the one adjudicated in the Appeals Decision – i.e. whether the scope of the judicial questioning exceeded what was permissible under the Law and the Rules.[56] For this reason, the Panel is not persuaded by the SPO's argument that the Defence seeks only to relitigate the Appeals Decision without raising new arguments and is of the view that the present Request does not amount to a reconsideration request. The Panel will therefore entertain the Request on its merits, without addressing the legal test for reconsideration.

33. However, the Panel cannot be expected to entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality. The Panel notes in this regard that the Defence is not challenging any one decision rendered by the Panel, nor has the Defence pointed to any question which it claims raised the impartiality concern outlined in its submissions. The Panel will not, therefore, address any matter not properly placed before it.[57] The Panel also takes notice of the fact that the Defence is seeking a relief not expressly provided by the Rules and is not making use of the relief expressly provided by those Rules.[58]

B. JUDICIAL QUESTIONING

34. The Defence submits that the "very substantial" time used for judicial

[55] *See e.g.* Appeals Decision, paras 23-24, 27, 30, 36-39, 44, footnotes 55, 57, 68, 70, 73, 88-97, 114-117 and references therein.
[56] Certification Decision, paras 8(2) and (4), 23-31, 35-42.
[57] *See* *Furundžija* Appeal Judgement, paras. 173-174. *See also* *Galić* Appeal Judgement, para. 34; Čelebići Appeal Judgment, paras. 651-709.
[58] *See* Rule 20.

questioning[59] is affecting the expeditious conduct of the proceedings.[60] The Defence argues that any gaps in the evidence should be addressed by the Parties through re-examination, while judicial questions should ordinarily be used to clarify aspects of the evidence and should not take longer than the questioning by the Parties.[61] The Defence further argues that the "gross disparity" in the time required, *after* judicial questioning, by the Defence for its further questioning versus the time required by the SPO for its further questioning[62] demonstrates that: (i) the SPO does not perceive the Judges' questions to be challenging the Prosecution's case; (ii) the Defence perceives the Judges' questions to be undermining the presumption of innocence of the Accused; and (iii) a reasonable observer could not perceive judicial questioning to be even-handed.[63] The Defence submits that this is inconsistent with: (i) the right of the Accused to an independent and impartial tribunal; and (ii) the Panel's ethical obligation to not only be subjectively impartial, but to also create an appearance of impartiality when asking questions.[64]

35. The SPO responds that the only point that the Defence offers in support of its allegation of the appearance of bias is the amount of time used by the Panel in judicial questioning, when compared to the subsequent time spent by the Parties on further examination, without even attempting to measure the actual questions asked by the Panel against the legal test for judicial bias.[65] The SPO submits that the Defence's interpretation of time taken in judicial questioning is misleading,

[59] Request, para. 19 indicates "71 hours 36 minutes and 34 seconds as of 11 November 2024"; "13 days of court time"; "exceeds the time used by three of the four Defence teams".
[60] Request, para. 19.
[61] Request, para. 19.
[62] Request, para. 20 indicates "As of 11 November 2024, the Defence collectively required 31 hours and 23 minutes for further questions after judicial questioning; the Prosecution has used 12 minutes" noting that the Defence "have thus needed to use more than 100x the amount of time in further questioning than the Prosecution".
[63] Request, paras 20-21, 23.
[64] Request, para. 21.
[65] Response, para. 7.

meaningless and insufficient to mount any judicial bias claim without consideration of the specific circumstances of each witness and the questioning undertaken by the Panel.[66] The SPO also argues that the Defence fails to acknowledge that parts of the Defence's further examination have been repetitive or beyond the scope of judicial questioning prompting the Panel to take remedial measures.[67]

36. The Defence replies that the Court of Appeals Panel expressly held that judicial questioning should not "lead to the apprehension of bias, suffering of prejudice, or otherwise encroach upon the rights of the Accused".[68] In the Defence's submissions, the Panel overstepped this limit.[69] The Defence rejects the SPO's submission that it seeks to impede the Panel's truth-finding function. Rather, the Defence argues that the Panel's truth-finding function is constrained by the Appeals Decision and by Article 4 of the Code of Judicial Ethics.[70] The Defence further rejects the SPO's claim that the discrepancy between the time used by the Parties in further examination results from "repetitive" and "beyond the scope" questioning from the Defence.[71] Finally, the Defence asserts that leading questions were asked by the Panel despite the Panel's Order to the Defence to avoid such questioning and the President's statement that such questioning is expressly forbidden.[72]

37. In relation to the overall length of Panel's questioning, first, the Panel notes that the Rules set no limit to the time which the Panel can spend asking questions. The Panel underlines that, in many legal systems, the bulk of questioning comes from the Court. The only limitations applicable in that respect are the same as for

[66] Response, paras 8-9.
[67] Response, para. 8.
[68] Reply, para. 3.
[69] Reply, para. 3.
[70] Reply, paras 3-4.
[71] Reply, para. 5.
[72] Reply, para. 6.

the Parties and participants: relevance; avoidance of unnecessary repetition; and consideration of the fundamental right of the Accused to a trial without undue delay. Second, the Panel notes that the length of questioning has to be seen in the context of the witnesses' overall testimony.[73] In the present circumstances, the Defence merely relies upon the overall time taken for judicial questioning without consideration of the nature or substance of those questions and/or of the witness to whom they are being asked. For example, the Defence submits that around nine witnesses have been questioned by the Panel for more than two hours.[74] The Defence has not identified any one question put by the Panel to any of those witnesses that was not relevant or not conducive to the search for the truth. The Panel notes, furthermore, that all of these witnesses were complex witnesses with substantial direct examination and/or cross-examination times,[75] and often more than one Panel member had questions for the witness. Therefore, the overall time taken for judicial questioning was commensurate with the importance and relevance of these witnesses as well as with the Panel's truth-seeking responsibilities. Those questions would not lead a reasonable observer, properly informed, to reasonably apprehend bias. The Defence's submissions merely raise a speculative or hypothetical risk of prejudice that is unsubstantiated and does not account for the fact that, under the applicable regime, Judges are responsible for arriving at the truth.[76] The clarification of a witness's evidence and/or the eliciting of evidence which might affect a witness's credibility is such as to enable the Panel

[73] Appeals Decision, para. 52.
[74] Request, para. 22.
[75] *See* Periodic Time Report, 11 November 2024, confidential; W04746 (Total questioning from the Parties 16 hours 7 minutes), W04769 (Total questioning from the Parties 7 hours 57 minutes), W04765 (Total questioning from the Parties 8 hours 38 minutes), W01493 (Total questioning from the Parties 6 hours 30 minutes), W04147 (Total questioning from the Parties 12 hours 16 minutes), W04739 (Total questioning from the Parties 9 hours 19 minutes), W04744 (Total questioning from the Parties 8 hours 49 minutes), W04752 (Total questioning from the Parties 31 hours 25 minutes), W04737 (Total questioning from the Parties 8 hours 42 minutes), W04240 (Total questioning from the Parties 7 hours), W04758 (Total questioning from the Parties 8 hours 22 minutes).
[76] Appeals Decision, para. 51.

to base its findings on all relevant evidence, thereby furthering the truth-seeking process. Further, the Panel notes that putting questions to SPO witnesses following their testimony-in-chief contributes to greater expediency in the proceedings than recalling the witnesses at a later time[77] or for the Panel to make use of the possibility to call evidence under Rule 132. Accordingly, the Panel is not persuaded that its questions unduly prolonged the proceedings or prejudiced the rights of the Accused.

38. In relation to the "gross disparity" in the time required by the Defence versus the time required by the SPO for further examination *after* judicial questioning,[78] the Panel notes that it is for each Party to decide if and when to ask questions subsequent to judicial questions. The fact that the Defence seeks to sometimes ask extensive questions following judicial questioning is its prerogative, just as it is the SPO's prerogative not to do so. These are choices that fall squarely within the discretion of Counsel, which the Panel has accommodated. The appropriate manner of questioning a witness will necessarily depend on the circumstances of that witness's testimony.[79] Once again, the Panel notes that the Defence has not identified any one question put by a Judge that it suggests unnecessarily or unduly delayed proceedings. Therefore, the Defence has failed to demonstrate that Panel's questioning of witnesses, and the resultant "gross disparity" in the Parties' further examination times would lead a reasonable observer, properly informed, to reasonably apprehend bias.

39. In relation to Defence submissions that the Panel's questioning of witnesses has not tested the Prosecution's case,[80] the Panel notes that the Court of Appeals

[77] Appeals Decision, para. 51.
[78] Request, para. 20 indicates "As of 11 November 2024, the Defence collectively required 31 hours and 23 minutes for further questions after judicial questioning; the Prosecution has used 12 minutes" noting that the Defence "have thus needed to use more than 100x the amount of time in further questioning than the Prosecution".
[79] Appeals Decision, para. 52.
[80] Request, paras 21, 23.

Panel previously held that Rule 127(3), which provides the legal basis for the Panel's power to question witnesses,[81] places no limitation on the subject matter of the Panel's questions to witnesses.[82] Rather, the Panel has a broad discretionary power to put to witnesses any questions deemed necessary for the clarification of their testimony or the discovery of the truth.[83] The Panel's truth-seeking questions can lead to either incriminatory or exculpatory evidence or matters of clarification or issues pertaining to the credibility of a witness. Questions are not being asked to elicit incriminating or exculpatory evidence, but to elicit evidence which the Panel considers relevant and necessary to the fulfilment of its truth-seeking function. The Defence has failed to provide any specific citations to the record in which the Panel is alleged to have abused their broad discretion to put to witnesses any questions deemed necessary for the clarification of their testimony or the discovery of the truth.

40. In relation to the Defence request for the Panel to avoid suggesting testimony to witnesses through leading questions, the Panel recalls that Rule 127(3) gives the Panel broad discretionary power to put to witnesses any questions deemed necessary. It does not regulate the manner in which judicial questions should be asked. The Panel further recalls that the Court of Appeals Panel held that the appropriate manner of questioning a witness will necessarily depend on the circumstances of that witness's testimony.[84] For the one example the Defence cites,[85] the Panel notes that this witness had to be repeatedly reminded to answer the questions asked by the Panel.[86] The Panel used leading questions therefore to keep the witness focused on the question being asked and to ensure that the

[81] Appeals Decision, para. 29.
[82] Appeals Decision, para. 32 and references cited therein.
[83] Appeals Decision, para. 32 and references cited therein.
[84] Appeals Decision, para. 52.
[85] Reply, footnote 13.
[86] *See e.g* Transcript of Hearing, 22 February 2024, p. 12883, lines 13-14, p. 12883, lines 21-23, p. 12884, lines 14-16, p. 12886, lines 19-21, p. 12887, lines 10-12, p. 12888, lines 9-10, p. 12890, lines 14-16, p. 12895, lines 9-13.

witness was being responsive, as is expected and required. A failure by a witness to answer questions, whether asked by a Judge or a Party, could be relevant to the Panel's assessment of his or her credibility. In these circumstances, the Defence has failed to demonstrate that the Panel's questioning would lead a reasonable observer, properly informed, to reasonably apprehend bias.

41. In light of the foregoing, the Panel finds that its judicial questioning did not violate the Accused's rights or lead a reasonable observer, properly informed, to reasonably apprehend bias. Nor has it been established that judicial questioning improperly or unreasonably interfered with the right to a trial without undue delay.

C. USE OF RULE 102(3) AND 103 MATERIAL DURING JUDICIAL QUESTIONING

42. The Defence argues that the Panel's reliance on Rule 102(3) or Rule 103 material, which had not been included on any Party's presentation queues, often concerning issues not raised by the Parties and/or outside the scope of the Indictment[87] and SPO's Pre-Trial Brief[88], gives the impression that the Panel is pursuing a case of its own.[89] The Defence argues that the late, or lack of, notice of the items intended to be used by the Panel, is prejudicial because the Defence does not have adequate time to prepare.[90] The Defence further argues that prejudice to the Defence is further exacerbated when the Judges rely on Rule 102(3) items, some up to a hundred pages, which have not been disclosed to all of the Defence teams.[91] In the Additional Submissions, the Defence objects to the use by the Panel in judicial questioning of documents disclosed to some of the Defence teams under

[87] *See* F00999/A01, Specialist Prosecutor, *Annex 1 to Submission of Confirmed Amended Indictment* ("Indictment"), 30 September 2022, confidential.
[88] *See* F01594/A03, Specialist Prosecutor, *Annex 3 to Prosecution Submission of Updated Witness List and Confidential Lesser Redacted Version of Pre-Trial Brief* ("SPO Pre-Trial Brief"), 9 June 2023, confidential.
[89] Reply, para. 7
[90] Reply, para. 9.
[91] Reply, para. 10.

Rules 102(3) and 103.[92]

43. The SPO responds that the Defence has received sufficient notification through the Rule 102(3) procedure. If various Defence teams choose not to request specific items, there are consequences that follow.[93]

44. In relation to Defence submissions that there was late, or a lack of, notice of Rule 102(3) items used in judicial questions, the Panel notes first, the Panel notes that the procedural arrangement by which the Panel gives notice of material disclosed under Rule 102(3) and Rule 103 which might be of relevance to judicial questioning, is not required by the Rules.[94] That relief was granted and put in place by the Panel as a result of the Defence's express requests to that effect and in order to ensure fairness and the Parties' ability to prepare. The Defence is now challenging or questioning relief that was sought by the Defence and granted for its benefit. Second, the Panel notes that its orders and decisions putting in place that arrangement were not subject to any challenge (such as a request for reconsideration) by the Defence after they were put in place. Third, the Panel notes that, like the cross-examining or re-examining Party, the Panel is only in a position to give notice of the documents that it might use in questioning once it has heard the questions from the Parties (and participants) and the witness's evidence. The Defence has failed to explain how notice could be given earlier. The Panel also notes that the Defence did not request in respect of any of the witnesses more time to prepare for further questioning following Judges' questions. Fourth, most of the items for which notice has been given by the Panel has been in the possession of the Defence for months or years and can be assumed to have been known to the Defence. Whether the Defence has requested disclosure of Rule 102(3) Material for which it had notice and/or reviewed, Rule 102(3) Material disclosed to it are

[92] Transcript of Hearing, 27 November 2024, p. 22780, line 20 to p. 22790, line 8.
[93] Transcript of Hearing, 27 November 2024, p. 22788, lines 6-13.
[94] Transcript of Hearing, 19 March 2024, p. 13381, lines 18-20.

matters within the sole prerogative of the Defence. The Panel cannot be faulted for the decision of Counsel to not do so.[95] Further, the Panel notes that it has systematically erred on the side of caution by giving the Parties and participants notice of all documents relevant to judicial questioning, even if the likelihood of use was limited so that the Defence is in a position to prepare effectively for the Panel's questions and, as the case may be, to ask follow-up questions to those asked by the Judges. Lastly, in its Order on Rule 102(3) Material, the Panel held that it would endeavour to give notice to the Parties, prior to the commencement of questioning, of material from the public domain or material that was disclosed to the Defence pursuant to Rule 102(3) and Rule103.[96] For the one example the Defence gives for its claim of lack of notice,[97] the Panel was responding immediately to issues arising from Defence questions, and the Panel made it clear that it would have given notice of the relevant Rule 102(3) Material to the Defence had it had time to do so.[98] No prejudice arose as is apparent from the fact that: (i) Counsel was able to identify the document in question; (ii) the Defence did not ask for more time to prepare; and (iii) the Defence chose not to further examine the witness on this document. The Panel is therefore satisfied that the Defence suffered no prejudice.

45. In relation to the Panel's reliance on Rule 102(3) items, some of which are hundreds of pages, and which have not been disclosed to some of the Defence teams,[99] the Panel notes that of the Rule 102(3) and Rule 103 items notified to the Defence only one Rule 102(3) document[100] and one Rule 103 document[101] was

[95] Transcript of Hearing, 19 March 2024, p. 13381, line 25 to p. 13382, line 2.
[96] Transcript of Hearing, 19 March 2024, p. 13383, lines 1-5; Transcript of Hearing, 5 June 2024, p. 16710, line 16 to p. 16711, line 3.
[97] Reply, footnote 18.
[98] Transcript of Hearing, 18 November 2024, p. 22354, lines 20-22.
[99] Reply, para. 10.
[100] Transcript of Hearing, 27 November 2024, p 22870, line 8 to p 22871, line 13.
[101] Transcript of Hearing, 27 November 2024, p 22866, line 9, p. 22875, line 2.

ultimately used during the Panel's questioning of W03873. The Rule 102(3) document was disclosed to the Defence on 30 January 2023,[102] and the Rule 103 document was disclosed to the Defence on 31 August 2022.[103] The Panel further notes that it is the responsibility of Defence Counsel to prepare for trial and, as noted above, the decision whether to seek disclosure (and review) of Rule 102(3) Material of which the Defence has received notice is the sole responsibility and prerogative of Counsel for each of the Defendants. In this regard, the Panel notes that when such material is linked to judicial questioning, the Panel circulates a list of Rule 102(3) and Rule 103 items that might be used in judicial questioning and orders the SPO to facilitate disclosure should not all Defence teams be in possession of the relevant material. Again, whether Counsel chooses to acquaint himself or herself with such material is Counsel's choice and sole prerogative. In regards to the Defence's submissions that in a case as large as the present case, the Defence cannot be expected to have a full knowledge of the relevance of each item disclosed under Rule 102(3) or Rule 103,[104] the Panel notes that the items of which the Parties receive notice are those which the Defence asked to receive. They are limited in scope and are all clearly connected to the evidence of the proposed witnesses. At no time during judicial questioning did the Defence ask for more time to review the documents the Panel had given notice of prior to asking follow-up questions. The Panel is therefore satisfied that the Defence has not suffered any prejudice.

46. The Defence also submits that the Panel's reliance on Rule 102(3) or Rule 103 material, not on any Party's presentation queues, often concerning issues not raised by the Parties and/or outside the scope of the Indictment and SPO's Pre-Trial Brief, gives the impression that the Panel is pursuing a case of its own.[105] As already stated, the Panel does not have nor is it pursuing a "case". Its

[102] Disclosure 659.
[103] Disclosure 418.
[104] Reply, para. 9.
[105] Reply, para. 7.

responsibility is to assess and, as might be necessary, elicit evidence with a view to enable it to arrive at the truth in respect of and in light of the evidence presented by both Parties. The Panel also recalls that evidence of uncharged acts may be inadmissible for the purpose of determining guilt for the crimes charged, but may be admissible for other valid purposes.[106] In addition, the Panel is made up of professional Judges who are qualified to assess the credibility of a witness and the reliability of a witness's testimony. To pre-emptively limit the Panel's questioning would seriously interfere with the Panel's role as a neutral fact-finder.[107] The Defence points to general examples of issues it considers outside the scope of the Indictment and SPO Pre-Trial Brief, without specific citations to the record.[108] The Panel is therefore not in a position to assess these issues in their proper context. For the one specific example the Defence cites,[109] the Panel notes that the SPO during direct examination first raised this incident with W03873.[110] The Defence did not object to judicial questions on that point. Accordingly, the Defence has not demonstrated that the Panel violated the Accused's rights to a fair hearing by an independent and impartial tribunal by using its broad discretionary power to put to witnesses any questions deemed necessary for the clarification of their testimony or the discovery of the truth.

47. Regarding documents disclosed to the Defence pursuant to Rule 103 of which notice was given by the Panel regarding its potential use or relevance to judicial questioning, the Panel notes that there has been no suggestion that the Defence was not in possession of or had not acquainted itself of the contents of those documents which had been disclosed to it by the SPO pursuant to Rule 103. The Panel further notes that disclosure of a document under Rule 103 is a particularly

[106] Appeals Decision, para. 53.
[107] Appeals Decision, para. 53.
[108] Reply, footnote 15.
[109] Reply, footnote 23.
[110] Transcript of Hearing, 25 November 2024, p. 22632, lines 11-25.

significant indicator of its potential relevance and importance to the Defence as it pertains to 'exculpatory evidence'. The Panel further considers that, once the documents were used or relied upon by the Panel, the Defence had the opportunity to ask further questions in respect of these documents if and when new issues arose from Panel's questions. The Defence also had the opportunity to ask for more time to seek instructions from their clients on any of these documents or to prepare for questioning. The Defence did not do so. Nor has the Defence otherwise pointed to an alleged prejudice.

48. In relation to Defence submissions that the frequency of the use of Rule 102(3) and Rule 103 items has created an apprehension of bias and that the Panel is investigating its own case,[111] the Panel recalls that it has broad discretionary power to put to witnesses any questions deemed necessary for the clarification of their testimony or the discovery of the truth.[112] The Defence correctly notes[113] that the Court of Appeal Panel has ruled that the Panel may use Rule 102(3) and Rule 103 items during judicial questioning. Again, the Defence does not point to any specific examples where it considers the Panel has abused their broad discretion to put to witnesses any questions deemed necessary for the clarification of their testimony or the discovery of the truth. With respect to any prejudice to the Defence, the Panel recalls the Defence has the right to reopen their examination on the basis of questions put to witnesses by the Panel[114] or request more time to review documents if necessary.[115]

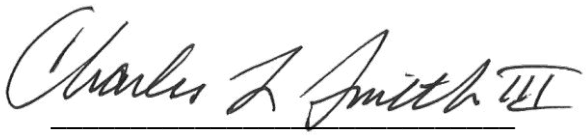
49. In light of the foregoing, the Panel is satisfied that notification of Rule 102(3) and Rule 103 Material was carried out in compliance with the Law, the Rules and the Panel's previous orders. The Panel is, furthermore, satisfied that the Defence

[111] Reply, para. 11.
[112] Appeals Decision, para. 32.
[113] Reply, para. 11.
[114] Order on the Conduct of Proceedings, para. 112.
[115] Transcript of Hearing, 19 March 2024, p. 13382, lines 15-17.

suffered no prejudice and the Panel's use of Rule 102(3) or Rule 103 material would not lead a reasonable observer, properly informed, to reasonably apprehend bias.

V. DISPOSITION

50. For these reasons, the Panel has taken note of the Defence objections raised in the Request and otherwise **DENIES** the Request.



Judge Charles L. Smith, III
Presiding Judge

Dated this Wednesday, 26 February 2025
At The Hague, the Netherlands.