



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

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Prosecution response to 'Selimi Defence Motion for Safeguards concerning the Cross-Examination of Defence Witnesses'

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I. INTRODUCTION

1. The relief sought in the Request¹ would needlessly override the procedure governing this trial, as it conflicts with the clear language of the Rules² and the Order on the Conduct of Proceedings,³ pertains to hypothetical issues that may never arise, fails to articulate any prejudice that cannot be addressed through the existing legal framework, and is incompatible with the requirements of a fair, balanced trial. It should be rejected in its entirety.

II. SUBMISSIONS

A. THE SPO IS ENTITLED TO CROSS-EXAMINATION ON ISSUES RELEVANT TO ITS CASE

2. In its Request, the Selimi Defence seeks, *inter alia*, an order limiting the SPO's cross-examination to 'issues *substantially* covered during its case-in-chief'.⁴ It does so while ignoring the clear language of Rule 143(3) pertaining to cross-examination, and by omitting directly relevant precedent from the Kosovo Specialist Chambers ('KSC') in its Request. Under Rule 143(3), not only is the SPO – like other cross-examining Parties – permitted to explore issues in cross-examination that arose during direct

¹ Selimi Defence Motion for Safeguards concerning the Cross-Examination of Defence Witnesses, KSC-BC-2020-06/F03342, 17 July 2025 ('Request'). The Request specifically seeks the following: (i) an order limiting the Specialist Prosecutor's Office's ('SPO') cross-examination of Defence witnesses; (ii) an order that the SPO 'must satisfy the standard of "fresh evidence" should it wish to admit additional items during its cross-examination'; (iii) an order prohibiting the Parties from eliciting evidence 'related to the acts and conduct of a co-Accused who has not called that witness'; and (iv) an amendment of paragraph 112 of the Order on the Conduct of Proceedings 'to allow the cross-examining Parties from the Defence to re-open their cross-examination' should 'new issues material to their case arise in the course of the Prosecution's cross-examination'. See Request, KSC-BC-2020-06/F03342, para.25.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules.

³ Annex 1 to 'Order on the Conduct of Proceedings', KSC-BC-2020-06/F01226/A01, 25 January 2023 ('Order on the Conduct of Proceedings').

⁴ Request, KSC-BC-2020-06/F03342, para.25(i) (emphasis added).

examination, but it is further permitted to cross-examine the witness on issues *relevant to its case*.⁵

3. The Case 07 Trial Panel previously addressed the issue of SPO cross-examination under Rule 143(3). During proceedings, the Case 07 Trial Panel underscored the broad scope of Rule 143(3) as it applies to the SPO,⁶ emphasising that the plain language of Rule 143(3) grants the SPO, like other cross-examining Parties, ‘broad discretion’ to examine the witness on the subject matter relevant to its case, and not merely on matters within the scope of the direct examination or witness credibility.⁷ It follows that, as emphasised by the Case 07 Trial Panel, Rule 143(3)’s clear language permits cross-examination on matters relevant to ‘the case of the cross-examining party’, including the SPO.⁸

⁵ Rule 143(3) (‘Cross-examination shall be limited to the subject-matter of the direct examination and matters affecting the credibility of the witness. Where the witness is able to give evidence relevant to the case of the cross-examining Party, he or she may be examined on the subject-matter of that case, provided that the cross-examining Party puts to that witness the nature of that case’).

⁶ Transcript of Hearing, KSC-BC-2020-07, 24 January 2022 (‘Case 07 January 24 Hearing’), T.3304-3305 (‘MS. BOLICI: Your Honour, this is a case about witness intimidation. It’s a case about witness intimidation in Kosovo and obstruction of justice. Mr. Reid has experience about Kosovo cases and witness intimidation in Kosovo cases. I would like to receive the expert testimony about this particular topic. [...] PRESIDING JUDGE SMITH: The question is relevant. Witness intimidation is central in this case. It has something to do with this case. And the question will be allowed. So go ahead’).

⁷ Case 07 January 24 Hearing, T.3311 (‘MR. CADMAN: Your Honour, I would just ask for reference to Rule 143(3), which deals with the scope of cross-examination. These are matters that fall outside of that. [...] PRESIDING JUDGE SMITH: And if you read the balance of paragraph 3, you will see that the witness may be examined on the subject matter of the case of the cross-examining party, and that is what the Prosecution is doing. Your objection is overruled’).

⁸ Case 07 January 24 Hearing, T.3311; *see also* Appeal Judgment, KSC-CA-2022-01/F00114 22 February 2023 (‘Case 07 Appeal Judgment’), paras 48, 52 (rejecting the Defence’s assertion that the trial panel ‘exceed[ed] the scope of the examination-in-chief in its cross examination of the Accused and of Witness Mr Robert Reid’).

B. THE PROCEDURAL FRAMEWORK PERMITS THE SPO TO USE AND TENDER ITEMS ON CROSS-EXAMINATION WITHOUT SATISFYING A 'FRESH EVIDENCE' STANDARD

4. In addition to seeking an order contrary to the plain language of Rule 143(3), the Selimi Defence further requests an order requiring the SPO to satisfy the 'fresh evidence' standard with regard to material utilised by the SPO during cross-examination that was not disclosed during its case in chief.⁹ Such a standard is not provided for in the Rules and is unwarranted.

5. The Request ignores the existing procedural and statutory framework that permits the admission of evidence tendered during cross-examination. Under Rule 143(1), the SPO – like other Parties before the KSC – is permitted broad discretion in 'show[ing] the witness any document or other evidence in compliance with the Rules'.¹⁰ As emphasised by the Trial Panel in Case 07, the SPO as a cross-examining Party may avail itself of Rule 143(1) to show previously undisclosed documents to a witness while questioning them on matters relevant to its case, and not merely pertaining to the scope of direct examination.¹¹ Whether or not material utilised during cross-examination is admitted is then decided on a case-by-case basis, as the Panel assesses the relevance, authenticity, probative value, and prejudice of its

⁹ Request, KSC-BC-2020-06/F03342, para.11.

¹⁰ Rule 143(1).

¹¹ Transcript of Hearing, KSC-BC-2020-07, 28 January 2022, ('Case 07 January 28 Hearing'), T.3316 ('Also, in accordance with Rule 143(1) and paragraph 67 of the Order on the Conduct of the Proceedings, a cross-examining party can, in principle, use any document during its cross whether they are admitted or not and even if they have not been previously disclosed'). Paragraph 67 of the Order on the Conduct of Proceedings in Case 07 is identical to the Order on the Conduct of Proceedings in Case 06. *Compare* Annex 1 to Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314/A01 ('Case 07 Order on the Conduct of Proceedings'), 17 September 2021, para.67 *with* Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, para.83.

admission.¹² This practice is followed not only by the KSC, but by other tribunals, and sufficiently safeguards against undue prejudice to an Accused.¹³

6. Balancing the probative value of tendered evidence with the need to ensure a fair trial requires context, and cannot be adjudicated in the abstract, in order to fully assess allegations of prejudice, and what counterbalancing measures a trial panel may implement, including measures already envisioned in the Order on the Conduct of Proceedings.¹⁴ Any potential ‘prohibition’ regarding the admission of previously undisclosed evidence is premature.¹⁵

¹² See, e.g., Case 07 January 28 Hearing, T.3370-3371 (Trial Panel admitting a video utilised by the SPO during cross-examination which was not disclosed during its case, underscoring that ‘[t]he Defence had an opportunity to re-examine the witness, so any prejudice of these items does not outweigh their probative value’).

¹³ See, e.g., ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Third Registry’s report on the evidence recognised as formally submitted to the Chamber (1786-Anx4-Red), 08 April 2016, p.6 (‘The Chamber is aware that the Prosecution closing its evidence presentation does have some bearing as to what it is entitled to submit following its examination of defence witnesses. [...] the Chamber agrees that items tendered by the Prosecution in this context must, in principle, have a genuine and not pretextual connection to its examination [...] the Chamber considers that the 16 items in question have a genuine connection to the Prosecution’s examination’).

¹⁴ Compare Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, paras 83 (‘The presentation queue shall also list any documents or other material not previously disclosed. Any opposing Party may request a short adjournment in order to examine such material’), 112 (‘The Trial Panel shall only permit re-cross-examination if new material is introduced during re-direct examination or cross-examination by any Party or participant. In such circumstances, a Party is entitled to further cross-examine the witness’); with ICTY, *Prosecutor v. Delić et al.*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal against Trial Chamber’s Oral Decision on Admission of Exhibits 1316 and 1317, 15 April 2008, para.23 (overturning the admission of an exhibit utilised by the prosecution on the basis that the trial panel should have noted ‘measures to address [] prejudice [to the Accused] – for example providing more time for cross-examination, adjourning the session, or granting the possibility of recalling the witness if [the Accused] shows it is necessary’).

¹⁵ ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Defence Motion for Reconsideration of the Trial Chamber’s Oral Decisions of 15 and 16 July 2010 on Admission of “Fresh Evidence”, 17 September 2010, para.17 (underscoring the requirement to assess requests for admission of additional evidence, including ‘fresh’ evidence, ‘on a case-by-case-basis’).

7. Contrary to what the Request implies,¹⁶ there is not a universally accepted standard or definition of what ‘fresh evidence’ encompasses,¹⁷ and certainly no ‘standard’ that is binding on the KSC’s procedural framework. Some courts frame a ‘fresh evidence’ inquiry as simply a particular application of the general admissibility framework. For example, the ICTY Appeals Chamber in *Kordić and Čerkez* considered the admission of such evidence to be ‘merely the Trial Chamber’s exercise of its discretionary powers to admit or exclude relevant evidence [...] taking into account both the probative value of that evidence and the need to ensure a fair trial’.¹⁸

8. Finally, such an order would negatively impact the fairness, expeditiousness, and efficiency of the proceedings,¹⁹ as, by impermissibly restricting the scope of cross-examination, the Panel would be confronted with requests to recall previously present witnesses in rebuttal to address matters unduly excluded from the scope of cross-examination.²⁰ The Panel should thus reject the Defence request to supersede the

¹⁶ See, e.g., Request, KSC-BC-2020-06/F03342, paras 11-12.

¹⁷ See, e.g., ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-A, Judgment, 20 February 2001, para.283 (noting that ‘fresh evidence’ refers to evidence probative of guilt that was either not available or not reasonably foreseeable to the prosecution during its case presentation); see similarly ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on ‘Prosecution’s information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169’ and ‘Defence Urgent Submissions on the 5 August Letter’, 11 December 2014, para.25 (noting that ‘fresh evidence’ includes not only evidence not available at the closing of the case, but evidence that was previously available but whose importance was only revealed in light of new evidence); see contra ICTY, *Prosecutor v. Prlić*, IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-examination of Defence Witnesses, 26 February 2009, para.15 (noting that ‘fresh evidence’ is a term of art that refers to all material not included in the prosecution’s case in chief that is later tendered during cross examination, regardless of whether the material was available to the prosecution or not, as well as regardless of whether it was tendered for witness impeachment or otherwise).

¹⁸ ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004, para.222.

¹⁹ The restriction proposed by the Selimi Defence would lead to highly inefficient trials, as the prosecution would be forced to tender all evidence *remotely* relevant to cross-examination during its case-in-chief. The untenable and unreasonable nature of this approach is further underscored when considering the lack of notice a prosecution has of a defence’s case and its proposed witnesses.

²⁰ Similar proposals seeking to effectively exclude one co-accused from the continuation of proceedings have been rejected on the basis they would lead to unnecessarily duplicative evidence, including in the context of rebuttal evidence. See, e.g., ICTY, *Prosecutor v. Delalić*, Decision on the Motion by Defendant

existing framework concerning the admission of material tendered during cross-examination.

C. THE PRESENT FRAMEWORK SAFEGUARDS THE RIGHTS OF A CO-ACCUSED

9. The Selimi Defence seeks an additional order further restricting the SPO's ability to effectively cross-examine under Rule 143(3), as well as an amendment of the Order on the Conduct of Proceedings, purportedly to 'safeguard' his rights as a co-Accused. However, the relief sought ignores the substantive safeguards already in place protecting a co-Accused, including a co-Accused not presenting a Defence case, from undue prejudice.

10. Specifically, the Selimi Defence seeks a prohibition of the SPO 'eliciting evidence in cross-examination that relates to [the Accused Selimi's] acts and conduct, whether or not such evidence is relevant'.²¹ This blanket prohibition is not warranted and should be rejected entirely, as it (i) pertains to hypothetical issues that require context to adjudicate, (ii) is not required in light of the extensive safeguards within the present framework, and (iii) is antithetical to witness examination and truth-finding. As underscored by case law cited by the Selimi Defence,²² objections regarding prejudice to a co-Accused must be decided on a case-by-case basis should such issues arise.

Delalić Requesting Procedures for Final Determination of the Charges Against Him, IT-96-21-T, 1 July 1998, para.47 ('A witness whose testimony requires rebuttal will be required to testify as many times as there are accused persons testimony to rebut').

²¹ Request, KSC-BC-2020-06/F03342, para.13.

²² See, e.g., SCSL, *Prosecutor v. Norman et al*, SCSL-04-14-T, Decision on the Impermissibility of Eliciting Evidence Involving the Second Accused Through Cross-Examination of Witnesses Called by the Third Accused, 10 November 2006, para.18 (underscoring that the scope of cross examination by co-Accused and the prosecution could include not only matters that arose during the direct examination and credibility but also matters pertaining to joint criminal enterprise that touches upon other co-Accused, emphasising that the scope of questioning 'will be decided on a case by case basis'); see also ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Evidence Tendered Through Witness K82, 3 October 2006, para.12 ('[...] whether a Chamber should admit or refuse the evidence depends upon the

11. The procedural framework sufficiently safeguards against any potential prejudice any co-Accused may encounter during the cross-examination of a co-Accused's witness. Not only is a co-Accused explicitly granted the right to cross-examine the witness of a co-Accused, any Party – including the Selimi Defence – may 'object to a question during testimony of a witness', and may similarly, at least one day prior, provide notice to the Panel of a 'particularly complex or factual or legal objection' relating to testimony or a proposed exhibit, providing the objecting party an opportunity to be heard by the Panel.²³

12. Furthermore, under paragraph 112 of the Order on the Conduct of Proceedings – which the Selimi Defence seeks to amend without sufficient justification – 'any Party', including a co-Accused, is 'entitled to further cross examine' a witness on new material.²⁴ Instead, contrary to the Request's assertions, any amendment to paragraph 112 of the Order on the Conduct of Proceedings to 'allow the cross-examining Parties' to 're-open their cross-examination if new issues material to their case arise in the course of the Prosecution's cross-examination' is unnecessary, as the language of paragraph 112 already provides sufficient opportunity for a Party to seek leave to re-cross-examine a witness.²⁵

13. The restrictions proposed in the Request, plainly directed only at the SPO,²⁶ would allow the Accused to impermissibly control witness examination in a manner

circumstances of a particular case. It is difficult to distil from any of these specific cases a general jurisprudential principle that can apply across the board to all other cases').

²³ Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, paras 115, 118.

²⁴ Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, para.112 (noting that a Party is 'entitled to further cross-examine the witness on [] new material').

²⁵ Request, KSC-BC-2020-06/F03342, para.25(iv).

²⁶ Request, KSC-BC-2020-06/F03342, para. 13 (emphasis added: 'To protect Mr. Selimi from undue prejudice, it is necessary for the Trial Panel to *prohibit the SPO* from eliciting evidence in cross-examination that relates to his acts and conduct') (emphasis added).

antithetical to truth-finding, victims' rights, and a fair, balanced trial,²⁷ as it could lead to the restriction of highly relevant lines of questioning and to unchallenged direct examinations. Instead, the existing procedural framework provides clear pathways for any Party to raise potential prejudice for the Panel's consideration,²⁸ particularly when considering that the Panel is comprised of 'professional judges able to exclude [...] prejudicial evidence from their minds' when assessing the guilt of several accused.²⁹ As such, the request for an order restricting the cross-examination of the SPO to 'safeguard' the interests of a co-Accused, as well as the request to amend paragraph 112 of the Order on the Conduct of Proceedings, should be rejected.

III. RELIEF SOUGHT

14. In light of the foregoing, the Panel should reject the Request in its entirety.

²⁷ The SPO further notes that the 'concept of a fair trial' applies to the Prosecution as well, as the prosecution 'acts on behalf of and in the interests of the community, including the interests of the victims'. ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para.25. It follows that unwarranted restrictions on the conduct of proceedings impact the fair trial rights of the victims.

²⁸ ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Decision on the Defence Motion for the Re- Examination of Defence Witness DE, 19 August 1998, para. 15; ('If in the course of cross-examination some ostensibly prejudicial evidence, about a co-accused, is brought to light and is admitted by the Trial Chamber, the co-accused who may have been implicated will have the right to request the Chamber to engage in further questioning of that particular witness in order to clarify the matter'); see also *Prosecutor v. Nyiramasuhuko and Kanyabashi*, ICTR-98-42-T, Decision on Ntahobali's and Nyiramasuhuko's Oral Motions to Exclude Certain Evidence from the Expected Testimony of Kanyabashi's Witnesses D-2-13-O, D-2-15-S and D-20-H, 5 November 2007, para.26 (noting that, in the context of multiple accused, there are 'several remedies to ensure that each accused does not lose the rights that he or she would have if tried alone,' including 'cross-examination, further cross examination, recall, or rebuttal of evidence').

²⁹ ICTY, *Prosecutor v. Šešelj et al*, IT-95-14-R77.3, IT-94-14-R77.4, IT-95-14 & 14/2- R77, Decision on Motion for Joinder, 31 May 2006, para.42.

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