

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

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**Thaçi Defence Response to Victims' Counsel's Submissions on the Issue of the
Type of Questioning to be used in Cross-Examination**

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) hereby responds to the Victims’ Counsel’s Submissions on the Issue of the Type of Questioning to be used in Cross-Examination.¹ As set forth below, the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”) grant only Parties a right to cross-examination: no similar right is granted to Victims’ Counsel. Moreover, because the Rules allow only Parties to cross-examine witnesses of an opposing Party about the subject-matter of the direct examination and matters affecting the credibility of the witness, as a general rule, the Parties alone should be allowed to use leading questions in cross-examination.

II. PROCEDURAL HISTORY

2. On 25 January 2023, Trial Panel II issued the Order on the Conduct of Proceedings.² Paragraph 33 of the Order on the Conduct of Proceedings provided Victims’ Counsel with an opportunity to notify the Trial Panel and the Parties of the witnesses whom he “wishes” to cross-examine, “with a general description of the issues or areas of evidence in relation to which he wishes to cross-examine each witness, including a brief explanation as to how the anticipated testimony affects their personal interests.”

3. On 1 February 2023, the Specialist Prosecutor’s Office (“SPO”) filed its list of the first twelve witnesses.³

4. On 3 and 13 February 2023, Victims’ Counsel notified the Trial Panel that he wished to cross-examine a total of three witnesses to be called by the SPO.⁴

¹ KSC-BC-2020-06/F01314, Victims’ Counsel’s Submissions on the Issue of the Type of Questioning to be used in Cross-Examination, 22 February 2023, Public (“Victims’ Counsel’s Submissions”).

² KSC-BC-2020-06/F01226/A01, Trial Panel, Annex 1 – Order on the Conduct of Proceedings, 25 January 2023, Public (“Order on the Conduct of Proceedings”).

³ KSC-BC-2020-06/F01243/A01, Annex 1 - Prosecution submission of list of first 12 witnesses and associated information, 1 February 2023, Confidential.

⁴ KSC-BC-2020-06/F01285, Victims’ Counsel’s Further Notification of Wish to Cross-Examine Witnesses (as Listed in F01243), 13 February 2023, Confidential; KSC-BC-2020-06/F01253, Victims’ Counsel’s

5. On 8 February 2023, the Defence responded to the notice provided by Victims' Counsel and requested that the Trial Panel *"order Victims' Counsel to conduct his questioning in a neutral manner and to avoid leading or closed questions."*⁵

6. On 10 February 2023, Victims' Counsel sought leave to reply to the submission of the Defence of 8 February 2023, arguing that *"if the Thaçi Defence wishes to pursue its argument it first needs to persuade the Trial Panel to reconsider the contents of Section VIII of the Order on the Conduct of Proceedings, with the parties and participants having a proper opportunity to make submissions on the matter."*⁶

7. On 15 February 2023, the Trial Panel ordered Victims' Counsel to file, by 22 February 2023, *"submissions on the issue of what type of questioning is entailed by cross-examination pursuant to paragraph 76(ii)(a) of the Order on the Conduct of the Proceedings,"* and that any responses be filed by 27 February 2023.⁷

8. On 22 February 2023, Victims' Counsel filed his Submissions.

III. SUBMISSIONS

9. Victims' Counsel argues that *"there should be no distinction between the rules that apply to his use of leading questions on cross-examination, and the rules that apply to the Parties."*⁸ As set forth below, Victims' Counsel's argument rests on (1) a flawed interpretation of the Rules, (2) citation to provisions of the Criminal Procedure Code of Kosovo which have been supplanted by the Rules, and (3) disregard of the purpose of cross-examination, as defined in the Rules.

Notification of Wish to Cross-Examine Witnesses and Request for Additional Time to Submit Further Notification, 3 February 2023, Confidential.

⁵ KSC-BC-2020-06/F01267, Thaçi Defence Response to 'Victims' Counsel's Notification of Wish to Cross-Examine Witnesses and Request for Additional Time to Submit Further Notification' (F01253), 8 February 2023, Confidential ("Thaçi Response").

⁶ KSC-BC-2020-06/F01270, Victims' Counsel's Request for Leave to Reply to Thaçi Defence Filing F01267, 9 February 2023, Confidential, para. 17.

⁷ KSC-BC-2020-06, Transcript of SPO Preparation Conference, 15 February 2023, Public, Oral Order 6 – pp. 2039-2040, lines 1-5.

⁸ Victims' Counsel's Submissions, para. 11.

A. THE RULES RELATING TO CROSS-EXAMINATION DRAW A DISTINCTION BETWEEN PARTIES AND PARTICIPANTS

10. Victims' Counsel is plainly wrong when he submits that the "*Rules relating to cross-examination draw no distinction between the Parties and the Participants.*"⁹

11. Rule 127(3) grants a *right* of cross-examination only to a Party (defined in Rule 2 as the "Specialist Prosecutor or the Defence"):

A witness called before the Trial Panel shall first be examined by the calling Party, then cross-examined *by the opposing Party if it elects to exercise this right*. Direct examination and cross-examination *shall be allowed in each case*. The Panel may allow redirect examination as deemed necessary.¹⁰

12. The Rules do not provide an express definition of the term "cross-examination." However, Black's Law Dictionary provides the following definition:

The questioning of a witness at trial or hearing *by the party opposed to the party who called the witness to testify*. The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony. *The cross-examiner is typically allowed to ask leading questions but is traditionally limited to matters covered on direct examination and to credibility issues.*¹¹

13. Rule 127(3) provides no similar right to cross-examination for Victims' Counsel. On the contrary, Rule 114(4)(b) expressly provides more limited rights to Victims' Counsel to, "*under the control of the Panel,*" "*ask questions of witnesses*" whenever the personal interests of victims participating in the proceedings are affected. Rule 114(4) then expressly leaves it to the Trial Panel's discretion to regulate how Victims' Counsel will be allowed to question witnesses: "*Where necessary and depending on the circumstances, the Panel shall issue specific guidelines regulating the participation of victims in the proceedings, in accordance with Article 22(3) and (6) of the Law.*"

⁹ Victims' Counsel's Submissions, para 14.

¹⁰ Emphasis added.

¹¹ B. Garner (ed.), Black's Law Dictionary, 8* edition (Thompson) (2004). Emphasis added.

14. Furthermore, Rule 127(3) notably bestows a right of cross-examination only on an “opposing” (or adverse¹²) Party. Victims’ Counsel’s submission that the “*usual test is not adversity but who has called the witness, with the other Parties being entitled to cross-examine witnesses whom they have not called*”¹³ thus stands in direct contradiction to the plain terms of Rule 127(3). Indeed, although Victims’ Counsel complains that Victims would be denied equality with the Parties if he is not allowed to cross-examine witnesses called both by the SPO and the Defence,¹⁴ in practice he seeks a position *superior* to both the SPO and the Defence: while the SPO and Defence are limited to cross-examining witnesses of the *opposing* Party, Victims’ Counsel requests that he be placed in the privileged position of cross-examining any witness whom he has not called, regardless of whether the witness was called by a Party which is not opposed to the interests of Victims.

15. Accordingly, even if the Trial Panel were to assume *arguendo* that Victims’ Counsel could be considered a “Party” for purposes of Rule 127(3) (he cannot), Victims’ Counsel has made no showing that the interests of Victims are “opposed” to those of the SPO such that Victims’ Counsel should, as a general rule, be allowed to ask leading questions of SPO witnesses. On the contrary, the interests of Victims are aligned with those of the SPO to the extent that Victims’ claims for reparation pursuant to Article 22(8) to Article 22(10) of the Law and Rules 167-168 depend on the SPO obtaining convictions against the Accused.

16. Victims’ Counsel in his submissions ignores Rules 114 and 127 entirely and instead relies on Article 9 of the Criminal Procedure Code of Kosovo for the proposition that “*it is the obvious intention of the Code [of Criminal Procedure of Kosovo] to guarantee equal procedural rights for victims.*”¹⁵ The Defence submits that Article 9 of the

¹² Black’s Law Dictionary defines “adverse” as “opposed; contrary; in resistance or opposition to a claim, application or proceeding.” (Emphasis added). The terms “opposing” and “adverse” are thus interchangeable in this context.

¹³ Victims’ Counsel’s Submissions, para. 36.

¹⁴ Victims’ Counsel’s Submissions, paras. 22-23.

¹⁵ Victims’ Counsel’s Submissions, para. 23.

Criminal Procedure Code of Kosovo cannot supersede express contrary provisions of the KSC Rules, which are *lex specialis*.

B. VICTIMS' COUNSEL IGNORES THE OBJECTIVES OF CROSS-EXAMINATION BY PARTIES UNDER THE RULES

17. As noted above, the Rules bestow a right to cross-examination only on Parties, not Participants. Rule 143(3) defines the purpose of cross-examination by the Parties: "*Cross-examination shall be limited to the subject-matter of the direct examination and matters affecting the credibility of the witness.*" The Rules provide no similar right to Victims to question witnesses about the subject-matter of the direct examination or on matters affecting the witness's credibility. Instead, Rule 114(4)(b) allows Victims' Counsel to ask questions of witnesses only "*[w]henver the personal interests of victims participating in the proceedings are affected,*" and even then only "*under the control of the Panel*". This limited right of Victims' Counsel to question witnesses is reflected in paragraphs 34-35 of the Order on the Conduct of the Proceedings:

34. Questioning of witnesses by Victims' Counsel shall be limited in principle to: (i) the harm or injury done to victims and circumstances in which this occurred; (ii) the consequences of those acts, on the victim, close relatives or the community to which he or she belongs; and (iii) the appropriate relief to remedy the harm done to the victim.

35. Where Victims' Counsel wishes to ask questions on any other issue, he shall seek leave from the Trial Panel together with: (i) a brief indication of the issue; (ii) a justification for the request; and (iii) an estimate of the time necessary for the additional questioning.

18. The distinction between the purpose of cross-examination of witnesses by the Parties versus the purpose of questioning witnesses by Victims' Counsel is important. In the *Lubanga* case, Trial Chamber I of the International Criminal Court ("ICC") explained that, unlike victims' legal representatives, Parties are allowed to ask leading questions precisely to advance the objectives of cross-examination that are also defined in Rule 143(3) of the KSC Rules: "*the purpose of "cross-examination" is to raise relevant or pertinent questions on the matter at issue or to attack the credibility of the witness.*"

In this context, it is legitimate that the manner of questioning differs, and that counsel are permitted to ask closed, leading or challenging questions, where appropriate.”¹⁶

19. The Lubanga Trial Chamber went on to conclude that the object and purpose of questioning by the victims' legal representatives is different, and that as a result “*there is a presumption in favour of a neutral form of questioning, which may be displaced in favour of a more closed form of questioning, along with the use of leading or challenging questions, depending on the issues raised and the interests affected.*”¹⁷

20. The KSC Rules create a clear distinction between “examination” and “cross-examination.” The Defence submits that the core of the distinction is precisely in the use of leading questions on cross-examination. For example, Rule 143(3) contains the following provision:

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. [Emphasis added].

21. Rule 143(3) thus makes clear that an *opposing* Party may conduct cross-examination concerning the subject-matter of the direct examination and matters affecting the credibility of the witness, but must conduct *examination* (rather than *cross-examination*) “[w]here the witness is able to give evidence relevant to the case of the cross-examining Party.” The distinction is important, and reflects the intent of the drafters of the Rules to allow leading questions on cross-examination but not in examination-in-chief. It was presumably for this reason that when Trial Panel I in the *Mustafa* proceedings sought to limit the right of the Parties **and** Participants¹⁸ to pose leading questions, it was required to do so expressly. In the absence of such a variation in the

¹⁶ ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2127, Trial Chamber I, Decision on the Manner of Questioning Witnesses by the Legal Representative of Victims, 16 September 2009, para. 23.

¹⁷ *Ibid.*, para 29.

¹⁸ *Prosecutor v. Salih Mustafa*, KSC-BC-2020-05/F00170, Trial Panel I, Decision on the conduct of proceedings, 16 August 2021, para. 29.

present case, the roles of the Parties and Participants remain as ascribed by a plain reading of the Rules.

22. Accordingly, the Trial Panel should allow the Parties to use leading questions in cross-examination concerning (1) the subject-matter of the direct examination of a witness or (2) on matters affecting the witness's credibility. In contrast, because Victims' Counsel as a general rule is not permitted to question witnesses on either basis (unless satisfying the Trial Panel that one or both grounds affect "*the personal interests of victims participating in the proceedings*"), Victims' Counsel should not, as a general rule, be allowed to use leading questions when posing questions to witnesses.

23. Nor do the ICC cases relied upon by the Victims' Counsel assist. While he is correct that the two single-accused cases he identifies mean that the position at the ICC is not universal, in the majority of cases before that Court, Chambers have issued specific directions requiring that the Legal Representative of Victims' pose their questions in a neutral manner, and avoid leading or closed questions, which is justified on the basis of the different role ascribed to the participants in the proceedings.¹⁹

24. This different role is also linked to the efficient conduct of the proceedings. Chambers at the ICC have been careful to ensure that the role of the Legal Representative of Victims' has not morphed into an equivalent of the parties, given that it would necessarily prolong the proceedings to have three rather than two parties enjoying the same participatory rights. In the present case where the target date for the closing of the SPO case has now been set as 1 April 2025, the continued attention to the efficient conduct of the proceedings is particularly acute.

IV. RELIEF REQUESTED

25. For all of the foregoing reasons, the Defence respectfully requests the Trial Panel to order the Victims' Counsel to conduct his questioning in a neutral manner

¹⁹ Thaçi Response, para. 4.

and to avoid leading or closed questions, without prejudice to the right of Victims' Counsel to petition the Trial Panel, pursuant to paragraph 35 of the Order on the Conduct of the Proceedings, for leave to use leading or closed questions if necessary to protect "*the personal interests of victims participating in the proceedings*" and consistent with the rights of the Accused.

[Word count: 2,493 words]

Respectfully submitted,



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Monday, 27 February 2023

At Tampa, United States