



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi**

Before: Trial Panel II
Judge Charles L. Smith III
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 9 March 2023

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Decision Regarding Cross-Examination by Victims' Counsel

Acting Specialist Prosecutor
Alex Whiting

Counsel for Victims
Simon Laws

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
David Young

Counsel for Jakup Krasniqi
Venkateswari Alagenda

TRIAL PANEL II (“Panel”), pursuant to Articles 22(3) and (6), 40(2) and (6)(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), and Rules 2, 113(7), 114(1), (2) and (4), and 143 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.¹
2. On 3 and 13 February 2023, Victims’ Counsel notified the Panel of his wish to cross-examine a total of three witnesses² from the Specialist Prosecutor’s (“SPO”) list of first twelve witnesses.³
3. On 8 February 2023, the Defence for Hashim Thaçi (“Thaçi Defence”) requested the Panel to order Victims’ Counsel to conduct his questioning in a neutral manner and to avoid leading or closed questions (“Request”).⁴
4. On 15 February 2023, the Panel: (i) ordered Victims’ Counsel to file, by 22 February 2023, 4pm, submissions on the issue of what type of questions “cross-examination” entails pursuant to paragraph 76(ii)(a) of the Order on the Conduct

¹ F01226, Trial Panel II, *Order on the Conduct of Proceedings*, 25 January 2023, with Annex 1.

² F01253, Victims’ Counsel, *Victims’ Counsel’s Notification of Wish to Cross-Examine Witnesses and Request for Additional Time to Submit Further Notification*, 3 February 2023, confidential (a public redacted version was filed on 6 February 2023, F01253/RED); F01285, Victims’ Counsel, *Victims’ Counsel’s Further Notification of Wish to Cross-Examine Witnesses (as Listed in F01243)* (“Victims’ Counsel’s Further Notification”), 13 February 2023, confidential (a public redacted version was filed on 22 February 2023, F01285/RED).

³ F01243, Specialist Prosecutor, *Prosecution Submission of List of First 12 Witnesses and Associated Information*, 1 February 2023, with Annex 1, confidential.

⁴ F01267, Specialist Counsel, *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, para. 5.

of Proceedings, with responses, if any, to be filed on 27 February 2023; and (ii) decided that no replies would be entertained (“Sixth Oral Order”).⁵

5. On 22 February 2023, Victims’ Counsel filed his submissions pursuant to the Sixth Oral Order (“Victims’ Counsel’s Submissions”).⁶

6. On 27 February 2023, the Thaçi Defence filed its submissions pursuant to the Sixth Oral Order (“Thaçi Submissions”).⁷

II. SUBMISSIONS

7. In the Request, the Thaçi Defence requests that the Panel order Victims’ Counsel to conduct his questioning in a neutral manner and to avoid leading or closed questions,⁸ so as to ensure the fairness of the proceedings and to accord with the practice of other international criminal tribunals.⁹ It argues that the witnesses whom Victims’ Counsel wishes to “cross-examine” are not adverse to him, thus precluding any basis for their “cross-examination” with leading or closed questions. Furthermore, the Thaçi Defence avers that the role of Victims’ Counsel is different from the SPO’s role, which must be reflected in the scope and type of questions asked.¹⁰

8. Victims’ Counsel requests the Panel to adopt a flexible, case-by-case approach with regard to all Parties and participants as to whether or not leading questions are permitted.¹¹ He submits that there should be no distinction between the rules that apply to Victims’ Counsel’s use of leading questions in cross-examination and

⁵ Transcript of Hearing, 15 February 2023, p. 2039, line 25 to p. 2040, line 5 (Sixth Oral Order).

⁶ F01314, Victims’ Counsel, *Victims’ Counsel’s Submissions on the Issue of the Type of Questioning to be used in Cross-Examination*, 22 February 2023.

⁷ F01326, Specialist Counsel, *Thaçi Defence Response to Victims’ Counsel’s Submissions on the Issue of the Type of Questioning to be used in Cross-Examination*, 27 February 2023.

⁸ Request, paras 3, 5.

⁹ Request, paras 3-4.

¹⁰ Request, para. 4.

¹¹ Victims’ Counsel’s Submissions, paras 1, 40.

the rules that apply to the Parties in this regard.¹² According to Victims' Counsel, such a distinction would: (i) have no basis in the Rules or the Law;¹³ (ii) not reflect the practice of the Specialist Chambers ("SC") thus far;¹⁴ (iii) be inconsistent with the approach of the Criminal Procedure Code of Kosovo;¹⁵ (iv) be unnecessary;¹⁶ and (v) not be founded on any settled practice at the International Criminal Court ("ICC").¹⁷ Furthermore, Victims' Counsel argues that the test proposed by the Thaçi Defence in the Request, which was based on whether or not a witness is "adverse" to the questioning Party, is unnecessary, unhelpful and cumbersome.¹⁸

9. In the Thaçi Submissions, the Thaçi Defence requests the Panel to order Victims' Counsel to conduct his questioning in a neutral manner and to avoid leading or closed questions, without prejudice to the right of Victim's Counsel to petition the Panel, pursuant to paragraph 35 of the Order on the Conduct of 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.¹⁹ The Thaçi Defence argues that the Rules grant only Parties, but not Victims' Counsel, a right to cross-examination.²⁰ Moreover, it avers that 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.²¹ Furthermore, the Thaçi Defence contends that the submission by Victims' Counsel that there should be no distinction between the rules that apply to his use of leading questions on cross-

¹² Victims' Counsel's Submissions, paras 1, 11.

¹³ Victims' Counsel's Submissions, paras 12, 14-18.

¹⁴ Victims' Counsel's Submissions, paras 12, 19-21.

¹⁵ Victims' Counsel's Submissions, paras 12, 22-23.

¹⁶ Victims' Counsel's Submissions, paras 12, 24-29.

¹⁷ Victims' Counsel's Submissions, paras 12, 30-34.

¹⁸ Victims' Counsel's Submissions, paras 13, 35-39.

¹⁹ Thaçi Submissions, para. 25.

²⁰ Thaçi Submissions, in particular, paras 1, 11, 13-14, 17.

²¹ Thaçi Submissions, paras 1, 22.

examination and the rules that apply to the Parties, rests on: (i) a flawed interpretation of the Rules;²² (ii) provisions of the Criminal Procedure Code of Kosovo which have been supplanted by the Rules;²³ and (iii) a disregard of the purpose of cross-examination, as defined in the Rules.²⁴

III. APPLICABLE LAW

10. The relevant law is set out, in particular, in Rules 114(4) and 143, as discussed below.

IV. DISCUSSION

A. PRELIMINARY MATTER: FILING OF RESPONSES TO NOTICES; REQUESTING RELIEF IN A RESPONSE OR REPLY

11. As a preliminary matter, the Panel notes that the relief sought by the Taçi Defence was contained in a response to a notice by Victims' Counsel. A notice is not a motion, calling for a response. Rule 76 envisages that the sequence of filings is: motion; response; reply. In order to maintain this sequence, the Panel reminds Parties and participants not to file a response to a notice, nor, as a general matter, to seek relief on a discrete issue in a response or a reply. Any Party or participant seeking relief on a discrete issue should generally file a motion, which triggers the sequence and timelines set out in Rule 76.

12. However, in order to resolve the matter expeditiously, the Panel will exceptionally treat the Request as validly filed.

²² Taçi Submissions, paras 9-15.

²³ Taçi Submissions, paras 9, 16.

²⁴ Taçi Submissions, paras 6, 17-24.

B. CROSS-EXAMINATION BY VICTIMS' COUNSEL

13. Pursuant to Rule 114(4), whenever the personal interests of Victims participating in the proceedings are affected, and unless otherwise provided in the Rules, Victims' Counsel may, under the control of the Panel, make oral and written submissions and ask questions of 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). The *Thaçi* Defence notes²⁵ that Rule 114(4) "expressly leaves it to the Trial Panel's discretion to regulate how Victims' Counsel will be allowed to question witnesses".²⁶

14. Consistent with Rule 114(4), and without objection from the Defence, the Panel's Order on the Conduct of Proceedings made clear that cross-examination by Victims' Counsel would be permitted in the present proceedings.²⁷ Furthermore, the Panel imposed limitations on the nature of the questions that Victims' Counsel can put to witnesses, as follows:

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.

²⁵ *Thaçi* Submissions, para. 13.

²⁶ See also KSC-BC-2020-05, F00152, Trial Panel I, *Decision on Victims' Procedural Rights During Trial*, 12 July 2021, para. 40, and KSC-BC-2020-04, F00433, Trial Panel I, *Decision on Victims' Procedural Rights During Trial and Related Matters*, 24 February 2023, para. 48, where Trial Panel I held that Rule 114(4) does not contain any specific limitations as regards the type of questions that Victims' Counsel may put to witnesses.

²⁷ See Draft Order on the Conduct of Proceedings, paras 33, 76(ii)(a), 109, 131(ii).

15. Rule 143(1) provides that the examining Party may ask questions to the witness and may show the witness any document or other evidence in compliance with the Rules. It goes on to say that if a witness cannot recall the facts he or she has provided in a previous statement, the witness may, with the permission of the Panel, be shown documents to refresh his or her memory. The last sentence of Rule 143(1) then provides that: “This paragraph shall apply *mutatis mutandis* to the questioning of witnesses by Victims’ Counsel.”

16. Rule 143(3) specifically governs cross-examination: “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.”

17. Cross-examination in this provision is understood to refer to questioning by counsel other than the calling party. As such, the Panel understands that Rule 143(3) does not preclude cross-examination by Victims’ Counsel when questioning a witness called by the SPO or by the Defence. The Panel does not consider that the reference to “the cross-examining Party” in the second sentence of Rule 143(3) affects this conclusion. That sentence simply regulates in general terms the scope of permissible questioning by Counsel other than that of the calling party.

18. The Presiding Judge, under Rule 143(4), has broad discretion to exercise control over the mode and the order of questioning witnesses and presenting evidence so as to *inter alia* “make the questioning and presentation effective for the ascertainment of the truth” and “avoid repetition [and] undue consumption of time and resources”. The Presiding Judge’s power to control questioning in this way applies to direct, cross and redirect examination, and to questions by any Party or participant. Neither Rule 114(4) nor Rule 143 nor any other provision

expressly prohibits asking leading questions or regulates or limits the manner in which questions must be asked.

19. The Panel now turns to the ICC authorities cited by Victims' Counsel and the Taçi Defence.²⁸ These authorities reach different conclusions on the question of whether leading questions may be put by Victims' Counsel. They support the Panel's interpretation that the manner of questioning of witnesses by Victims' Counsel is, subject to Rule 143, primarily a matter within the discretion of the Panel concerned. The Panel notes, in particular, the holding of the *Katanga and Ngudjolo* Trial Chamber, cited but not in full by the Defence. There, the Chamber held that questioning by Victims' Counsel should in principle be done "in a neutral manner and avoiding leading or closed questions" while qualifying this for situations where Counsel challenges the credibility, accuracy or reliability of a witness's testimony where leading/closed questions would be authorised.²⁹

20. Turning to the SC's practice, the Panel notes that Trial Panel I, in the exercise of its discretion, held that: (i) the Parties and Victims' Counsel shall, in principle, examine witnesses by way of neutral questioning; and (ii) leading and closed questions may only be permissible when they are conducive to the expeditiousness of the proceedings and the determination of the truth, under the control of the Presiding Judge pursuant to Rule 143(4).³⁰ Thus, with regard to leading and closed questions, Trial Panel I did not make any distinction between Parties and participants.

²⁸ See Victims' Counsel's Submissions, paras 30-34; Taçi Submissions, paras 18-19. See also Request, para. 4.

²⁹ ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1665-Corr, Trial Chamber, [Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140 \(Corrigendum\)](#), 1 December 2009 (date of original: 20 November 2009), para. 91.

³⁰ KSC-BC-2020-05, F00170, Trial Panel I, *Decision on the Conduct of the Proceedings*, 26 August 2021, para. 29; KSC-BC-2020-04, F00434/RED, Trial Panel I, *Public Redacted Version of Decision on the Conduct of the Proceedings*, 24 February 2023, para. 41.

21. It is apparent from the above that the manner of questioning by Victims' Counsel is, consistent with the Rules and the practice of this and other jurisdictions, a matter that falls within the discretion of the Panel. The Panel finds, furthermore, that there is no general prohibition of leading questions by Victims' Counsel, in particular in circumstances such as those outlined in the ICC's *Katanga and Ngudjolo* precedent and the SC's precedents cited above.³¹

22. The Panel and the Presiding Judge will, pursuant to Rules 114(4) and 143, and the guidance the Panel has provided in paragraphs 33-35 of the Order on the Conduct of Proceedings, monitor all questioning of witnesses by Victims' Counsel and, if necessary, intervene on a case-by-case basis. The Panel considers that these provisions are sufficient to ensure that Victims' Counsel's participation is not prejudicial to or inconsistent with the rights of the Accused.³²

23. Furthermore, the Panel notes that thus far, Victims' Counsel has shown restraint in terms of the number of victims it wishes to cross-examine and the time estimated for cross-examination.³³ Therefore, the Panel is satisfied that the efficient conduct of the proceedings is not being compromised by the proposed time for cross-examination by Victims' Counsel at this stage.

24. For these reasons, the Panel is satisfied that it has discretion to permit Victims' Counsel to use both non-leading and leading questions when putting questions to witnesses for the SPO or the Defence. The Panel permits Victims' Counsel to do so, and will remain vigilant in exercising its control under Rules 114(4) and 143(4) to ensure that there is no unfairness to the Accused in the manner of questioning by Victims' Counsel. The Panel generally prefers to hear the *viva voce* evidence of a witness in the witness's own words, rather than in the words of counsel,

³¹ See also *Thaçi Submissions*, para. 12, referring to Garner, B. (ed.), *Black's Law Dictionary* (Eighth Edition), Thompson 2004, which states that "the cross-examiner is typically allowed to ask leading questions [...]".

³² See Article 22(6).

³³ See *Victims' Counsel's Further Notification*, para. 10.

although leading questions might be justified in circumstances such as those outlined in the ICC's *Katanga and Ngudjolo* precedent and the SC's precedents cited above.³⁴

C. CLASSIFICATION

25. Noting that both the Victims' Counsel's Submissions and the Thaçi Submissions are classified as public, the Panel orders the Thaçi Defence to submit a public redacted version of the Request, by 17 March 2023. The Thaçi Defence is ordered to redact, in particular, the witness pseudonym which is redacted in Victims' Counsel's Filings F01253/RED and F01285/RED.

V. DISPOSITION

26. For these reasons, the Panel hereby:

- (a) **DENIES** the Request; and
- (b) **ORDERS** the Thaçi Defence to submit a public redacted version of the Request, by **Friday, 17 March 2023**, in accordance with paragraph 25 of the present decision.



Judge Charles L. Smith, III
Presiding Judge

Dated this Thursday, 9 March 2023

At The Hague, the Netherlands.

³⁴ See above, paras 19-20.