



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: Acting Specialist Prosecutor

Date: 5 May 2023

Language: English

Classification: Confidential

Prosecution Response to Defence Certification Request F01495

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The joint Defence Request¹ should be rejected because it fails to meet the requirements for leave to appeal under Article 45 of the Law² and Rule 77 of the Rules.³ The matters raised do not constitute issues within the meaning of the applicable test, and the Defence does not demonstrate that any of the alleged errors in the Oral Order issued 20 April 2023 ('Oral Order')⁴ meet the strict threshold for certification.⁵

II. SUBMISSIONS

First Issue

1. Under the First Issue, the Defence argue they were deprived of the ability to make submissions regarding the modality of Trial Panel questioning of witnesses.⁶ This argument is misconceived, as the issue misrepresents the record and does not arise from the Oral Order. First, the modalities of Trial Panel questioning were decided upon in the Order on the Conduct of Proceedings.⁷ The relevant paragraph expressly foreshadowed that entirely new matters may be raised by the Panel in its questioning. As noted by the Trial Panel in the Oral Order,⁸ all parties had the opportunity to comment upon that

¹ Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning, KSC-BC-2020-06/F01495, 1 May 2023 ('Request').

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

³ 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, unless otherwise specified.

⁴ Transcript (Procedural Matters), 20 April 2023, pp.3263-3269 ('Oral Order').

⁵ The applicable law has been set out in prior decisions. *See e.g.* Decision on the Krasniqi Defence Request for Certification to Appeal the "Order on the Conduct of Proceedings", KSC-BC-2020-06/F01300, 16 February 2023, paras 12-13.

⁶ Request, KSC-BC-2020-06/F01495, paras 8-10.

⁷ Annex to the Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023, para.112.

⁸ Oral Order, p.3268.

paragraph prior to its adoption or to seek leave to appeal in respect of that issue – none of the Defence teams chose to do so.⁹

2. Equally, each of the Defence teams had the opportunity to make oral submissions in court on 19 April 2023, after the Veseli Defence initially raised the issue.¹⁰ The Thaçi Defence then made similar submissions,¹¹ and the other Defence teams had an equal opportunity to make oral submissions on this point, but did not do so.

3. The Trial Panel indicated to the Veseli Defence it could file written submissions on the issue, if they so wished.¹² However, as a general matter, the Trial Panel need not wait for possible requests from Defence teams on issues that concern the fair and expeditious conduct of proceedings. It is empowered to make such rulings on an ‘ongoing basis’.¹³

4. On 20 April 2023, as the Panel were issuing the Oral Order, only the Thaçi Defence made a further objection,¹⁴ even though they had already made submissions the day before. No other Defence team registered any objection, or sought to be further heard on the matter. As such, the argument that the Defence has generally been deprived of the ‘right to be heard’ is not accurate.

5. Even if the First Issue could be considered to arise from the Oral Order, the Defence does not explain how resolution of the First Issue would materially advance the proceedings. Instead, it introduces arguments around how the Panel’s approach to questioning would potentially extend the length of the case¹⁵ – an issue entirely separate

⁹ Only the Krasniqi Defence sought leave to appeal of the Order on the Conduct of Proceedings, and this was not on the issue of judicial questioning (Krasniqi Defence Request for Certification to Appeal the “Order on the Conduct of Proceedings”, KSC-BC-2020-06/F01246, 1 February 2023).

¹⁰ Transcript (Private Session), 19 April 2023, pp.3253-3260.

¹¹ Transcript (Private Session), 19 April 2023, pp.3256-3258.

¹² Transcript (Private Session), 19 April 2023, p.3255.

¹³ Rule 116(1).

¹⁴ Transcript (Open Session), 20 April 2023, pp.3262-3263.

¹⁵ Request, KSC-BC-2020-06/F01495, para.21.

from the First Issue as framed, *i.e.* whether or not the Defence had an opportunity to be heard, which they did.

6. The First Issue therefore fails to meet the criteria for certification.

Second and Third Issues

7. The Second Issue also does not arise from the Oral Order. It asserts that a 'procedure' for Trial Panel questioning was set out in the Oral Order. However, the Order on the Conduct of Proceedings had previously set out the procedure in place for safeguarding the rights of the parties in relation to judicial questioning, in a context where Rule 127(3) clearly provides that a Judge may put any question at any time. The Oral Order did not create any new procedure, and the Second Issue therefore does not arise from it.

8. In both the Second and Third Issues, the Defence argues that in the Oral Order the Trial Panel effectively changed the sequencing of the presentation of evidence,¹⁶ contrary to Rule 127(2). This argument is manifestly incorrect. Contrary to the Defence's arguments, the ability of a Panel to ask a question of a witness 'at any stage' – as provided for in Rule 127(3)¹⁷ – does not amount to changing the sequence of evidence. Notably, the Defence does not refer to Rule 127(3) in its Request, because it is fatal to its position. Again, the issue does not arise from the Oral Order.

9. Finally, the Defence's argument that the Trial Panel 'erroneously' applied Rules 132 and 137(1)¹⁸ are equally unavailing. These provisions relate not to judicial questioning *per se* but to evidence and witnesses called by the Panel *after* the Defence has presented its own evidence. The Trial Panel recited them in its explanation of the broad judicial

¹⁶ Request, KSC-BC-2020-06/F01495, para.11(i).

¹⁷ Rule 127(3): 'A Judge may at any stage put any question to the witness.'

¹⁸ Request, KSC-BC-2020-06/F01495, para.12.

powers applicable to the Panel's role in the establishment of the truth and the production of evidence. Importantly, however, they were *not* dispositive of the issue under consideration, namely, the Panel's ability to ask questions of a witness. In order to constitute an 'issue' for the purposes of Rule 77, the matter must be one the resolution of which is essential for the determination of the question at hand. That is not the case here.

10. In any event, the Defence do not substantiate how resolution of the Second and Third Issues impact the fairness and expeditious conduct of proceedings or the outcome of the trial. As with the First Issue, the Defence repeats arguments that the misapplication of the above provisions would result in unfairness and prolong the trial process, as the Defence would need extra time to prepare.¹⁹ These arguments are devoid of substance. It does not logically follow that the Panel's exercise of its legal ability to ask questions of a witness necessarily increases the preparation burden on Defence teams. This is left unexplained by the Defence.

Fourth Issue

11. The Defence initially frames the Fourth Issue by submitting that, in the Oral Order, the Trial Panel set down a 'procedure' for questioning that is inconsistent with the rights of the accused to fair and expeditious proceedings.²⁰ However, as set out above, a careful review of the Oral Order reveals that no new 'procedure' was set down. The Panel simply referred to relevant legal provisions and its broad discretion to ask questions of witnesses, a position supported by international jurisprudence, which the Defence does not engage with.²¹

¹⁹ Request, KSC-BC-2020-06/F01495, para.22.

²⁰ Request, KSC-BC-2020-06/F01495, para.7.

²¹ Transcript (Open Session), 20 April 2023, p.3267, *citing to ICC, Trial Chamber I, Prosecutor v. Lubanga, ICC-01/04-01/06-2360, Decision on Judicial Questioning, 18 March 2010; ICTY, Trial Chamber II, Prosecutor*

12. Rather than substantiating its argument under the Fourth Issue, the Defence proceeds to repeat arguments that the Panel's questioning of witnesses – using documents that have been disclosed, on the exhibit list, and on the Prosecution's presentation queue – causes unfairness through increased preparatory work for the Defence.²² The argumentation put forward that the Defence would have to prepare for 'all aspects of all prior statements or documents associated with all SPO witnesses'²³ are hyperbolic, and the scenarios put forward are hypothetical and seem premised on the idea that the Trial Panel would choose to focus its questioning on matters of no relevance to the charges and/or the credibility of the witness. These arguments are unpersuasive, and, importantly, lack the necessary precision required for certification. When making a request for certification, it is incumbent upon the Defence to identify a discrete appealable issue that requires resolution by the Court of Appeals. It fails to do so with regard to the Fourth Issue.

III. CLASSIFICATION

13. This filing is classified as confidential as it responds to a filing of the same classification. However, the Prosecution submits that both the Request, and this response, can be reclassified as public.

IV. RELIEF SOUGHT


14. For the foregoing reasons, the Panel should deny certification.

v. Hadžihasanović & Kabura, IT-01-47-T, Decision on Defence motion seeking clarification of the Trial Chamber's objective in its questions addressed to witnesses, 4 February 2005.

²² Request, KSC-BC-2020-06/F01495, paras 14-20.

²³ Request, KSC-BC-2020-06/F01495, para.15. See also para.18.

Word count: 1518



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Friday, 5 May 2023

At The Hague, the Netherlands.