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In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel** Judge Michèle Picard Judge Kai Ambos Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi Specialist Counsel for Rexhep Selimi Specialist Counsel for Jakup Krasniqi
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Public Redacted Version of 'Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning'

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I. INTRODUCTION

1. The burden placed on the Trial Panel as the finders of fact in a criminal trial is a significant one. As such, the Judges are afforded broad discretion as to how they arrive at the factual findings that inform their legal conclusions. This is reflected in the Rules,[1] which give the Trial Panel the authority to "order the submission of or call evidence that it considers necessary for the determination of the truth,"[2] and "at any stage put any question to the witness".[3]

2. The Trial Panel's ability to elicit evidence, however, is not without limits. The same Rules which confer these broad rights as regards Judges' questions, also contain express limitations as to when and how they can be exercised. The ICTY Appeals Chamber, for example, has held that a trial court should search for the truth, but only on the basis of evidence submitted to it by the parties; the trial court should not assume the prosecutorial investigative function in its questioning of witnesses.[4]

3. In the *Thaçi et al.* trial, a procedure has been adopted whereby a Witness Summary is produced by the SPO well in advance of the testimony of the relevant witness. The summary puts the Defence on notice of the SPO witness's proposed testimony and its relevance to the charges.[5] The SPO then conducts its examination-in-chief, eliciting the evidence foreshadowed in the SPO Witness Summary, following which the Defence cross-examines on the basis of this evidence. During their questioning, the parties can seek to admit documents used with the witnesses into the record of the case. Some documents are admitted and form part of the record. For

[1] KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").
[2] Rule 137(1) of the Rules.
[3] Rule 127(3) of the Rules.
[4] ICTY, *Prosecutor v. Blagojević et al.*, IT-02-60-AR73 IT-02-60-AR73.2, IT-02-60-AR73.3, Appeals Chamber, Decision, 8 April 2003 ("*Blagojević* Appeal Decision"), paras. 21-22.
[5] Rule 95(4)(b)(iv) of the Rules.

other documents, requests for admission have been denied, and these documents do not form part of the record.[6]

4. The present appeal is based on what has happened next. Following the parties' examinations, the Judges in these proceedings have questioned the SPO witnesses. Rather than ask questions seeking clarification or explanations on the evidence elicited by the parties, the Panel has posed **leading questions** through documents which **are not part of the record**, directed at eliciting **new evidence**, on incidents and allegations which **have not been addressed by the parties**, and which concern the **acts and conduct of the accused**.[7]

5. After the testimony of W02652, for example, questions from the bench were directed at Mr Thaçi's alleged direct involvement in an uncharged incident, which had not been raised by the parties, was not included in the SPO Witness Summary (or the Indictment or SPO Pre-Trial Brief), on the basis of a prior statement which had not been used with the witness or admitted into evidence, and did not form part of the record. When W02652 was unable to give an answer, his memory was refreshed in a leading manner through the reading of his prior statement, which was not in evidence, from the bench. Specifically, Judge Barthe stated, [REDACTED][8] At this point, W02652 had been testifying for over 12 hours. The leading questions then continued.

6. In response to Defence objections, the Trial Panel rendered the Impugned Decision,[9] in which it conferred on itself an absolute and unfettered discretion to question witnesses from the bench, at any point during the proceedings, on matters

[6] *See, e.g.*, KSC-BC-2020-06, Transcript of Hearing, 23 May 2023, p. 4595 lines 15-17; KSC-BC-2020-06, Transcript of Hearing, 17 May 2023 ("Hearing on 17 May 2023"), pp. 4251-4252.
[7] *See, e.g.*, Hearing on 17 May 2023, pp. 4176-4178.
[8] KSC-BC-2020-06, Transcript of Hearing, 19 April 2023 ("Hearing on 19 April 2023"), pp. 3232-3238.
[9] KSC-BC-2020-06, Transcript of Hearing, 20 April 2023 ("Hearing on 20 April 2023"), pp. 3263-3269 ("Impugned Decision").

falling outside the scope of the witness' testimony elicited by the Parties, and on the basis of any documents, including those not admitted in the case. The Judges concluded that the scope of judicial questioning "is not constrained by any consideration of subject or substance".[10] The Trial Panel cited the ability of the Defence to re-cross-examine following judicial questions,[11] concluding that the Defence's ability to "re-open" its examination would maintain the fairness of the proceedings.

7. For the reasons set out in the present appeal, the Defence teams for Mr Hashim Thaçi, Mr Rexhep Selimi and Mr Jakup Krasniqi ("the Defence") submit that, rather than maintaining the fairness of the proceedings, this entirely unrestrained approach to Judges' questions is undermining it. The approach set out in the Impugned Decision is incompatible with the Court's statutory regime, and violates a number of the accused's fair trial rights.

8. Critically, this sequencing forces the Defence to examine SPO witnesses without a full understanding of the witness' evidence. The unfairness lies in the vastly different possible strategies for the Defence cross-examination of an SPO witness. If the witness has given evidence which is not fundamentally damaging to the accused, Defence counsel may treat the witness as essentially reliable, and use cross-examination to bolster the witness' credibility and to seek to elicit further testimony in support of the Defence case. By contrast, if the witness has given damaging evidence, Defence counsel may decide to attack the credibility of the witness, and seek to undermine the incriminating testimony presented. This decision can only ever be taken after the entirety of the witness' evidence has been heard.

9. The effect of the leading questions from the bench, which have been directed towards eliciting **new evidence,** including about acts and conduct of the accused, and

[10] Impugned Decision, p. 3267.
[11] Impugned Decision, p. 3268.

on the basis of documents that are not in the record, is that Defence counsel have already locked themselves into their strategy. When the witness is then led by the bench to places that are fundamentally problematic for an accused – as is being deliberately and repeatedly done[12] - it is already too late for the Defence to change gears if cross-examination has been directed at reinforcing the witness's credibility and testimony.

10. No amount of "re-cross-examination" will assist, where the Defence counsel has spent hours or even days bolstering the witness on the basis that he did not incriminate the accused until the Judges led him to do so. This is particularly prejudicial given the practice of the bench in this case requiring Defence counsel to "state your case" on particular issues during the cross-examination of SPO witnesses,[13] while knowing full well that, after asking Defence teams to lock themselves into positions, the Judges will themselves then alter the scope of the witness' evidence. The accused has a right to hear the evidence against him before exercising his right to cross-examination. In this case, the Defence is being lured into adopting a strategy, when the scope of the evidence and the impact of the witness is still unknown. In the combined experience of the Defence teams, this is a procedure never before seen or adopted in international criminal practice.

11. This, and other prejudicial consequences of the Impugned Decision, are set out below. This unrestrained approach to judicial questions makes the case impossible to investigate, prepare and defend, and is inconsistent with the regime for the presentation of evidence as set out in the Rules. The Defence therefore appeals, with leave of the Trial Panel,[14] the following two issues (together, "Issues"):

[12] *See, e.g.,* Hearing on 17 May 2023, pp. 4176-4178; Hearing on 19 April 2023, pp. 3233-3235, 3242-3247.
[13] *See, e.g.,* KSC-BC-2020-06, Transcript of Hearing, 23 May 2023, p. 4526 lines 19-21; Hearing on 20 April 2023, p. 3339 lines 7-10; KSC-BC-2020-06, Transcript of Hearing, 12 April 2023, p. 2685 lines 15-16.
[14] KSC-BC-2020-06/F01531, Decision on Thaçi, Selimi and Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning, 17 May 2023 ("Certification Decision").

Issue 2: Whether the procedure for Trial Panel questioning as set out in the Impugned Decision is inconsistent with the statutory framework of the KSC ("Second Issue"); and

Issue 4: Whether the procedure for Trial Panel questioning set in the Impugned Decision is inconsistent with the rights of the accused to fair and expeditious proceedings, and to adequate time and resources to defend themselves ("Fourth Issue").

12. In accordance with Rule 82, this appeal is filed as confidential because it refers to the content of witness testimony that remains confidential. A public redacted version will be filed.

II. PROCEDURAL HISTORY

13. Following the Judge's questioning of W02652 on 19 April 2023 referenced above, Counsel for Mr Hashim Thaçi and Mr Kadri Veseli orally raised issues with this questioning, including its impact on the fairness and expeditiousness of the proceedings.[15] The next day, Counsel for Mr Thaçi reiterated the importance of the issue, its impact on virtually all SPO witnesses, and its effect on all four accused.[16] On two separate occasions, Counsel for Mr Veseli and Counsel for Mr Thaçi requested the opportunity to file written submissions addressing this issue.[17]

14. Notwithstanding this request from the parties, the Trial Panel stated it "fully understood the circumstances yesterday",[18] and did not need to wait for briefing from

[15] Hearing on 19 April 2023, pp. 3253-3260.
[16] Hearing on 20 April 2023, pp. 3262-3263.
[17] Hearing on 19 April 2023, p. 3253; Hearing on 20 April 2023, pp. 3262-3263.
[18] Hearing on 20 April 2023, pp. 3263.

the parties. The Trial Panel therefore issued an oral order dismissing the arguments raised by the Defence.[19]

15. On 1 May 2023, the Defence filed a request for certification to appeal the Impugned Decision on the basis of four issues.[20] On 4 May 2023, the SPO filed a response, alleging the Defence had failed to demonstrate the alleged errors met the threshold for certification.[21] On 8 May 2023, Victims' Counsel also filed a response, alleging that the issues raised constituted mere disagreements rather than appealable issues.[22] The Defence replied to the SPO[23] and to Victims' Counsel[24] on 8 and 10 May 2023 respectively.

16. On 17 May 2023, the Trial Panel issued the Certification Decision, granting certification to appeal two of the four issues.[25] The Trial Panel noted that it was beneficial for the conduct of proceedings that "any dispute concerning the permitted scope of judicial questioning of witnesses be addressed by the Court of Appeals Panel in light of the Panel's responsibility to establish the truth, insofar as relevant to the case before it."[26]

[19] Impugned Decision.
[20] KSC-BC-2020-06/F01495, Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning, 1 May 2023, para. 7.
[21] KSC-BC-2020-06/F01501, Prosecution Response to Defence Certification Request F01495, 5 May 2023.
[22] KSC-BC-2020-06/F01503, 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, para. 3.
[23] KSC-BC-2020-06/F01505, Reply to 'Prosecution Response to Defence Certification Request F01495', 8 May 2023.
[24] KSC-BC-2020-06/F01514, Reply to Victims' Counsel's Response (F01503), 10 May 2023.
[25] Certification Decision, para. 44.
[26] Certification Decision, para. 41.

III. STANDARD OF REVIEW

17. The standard of review applicable to interlocutory appeals is the standard provided for appeals against judgments, as specified in the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").[27]

18. In relation to an **error of law**, a party "must identify the alleged error, present arguments in support of the claim, and explain how the error invalidates the decision."[28] In relation to a **discretionary decision**, a party must demonstrate that the lower level panel has committed a discernible error, in that the exercise of discretion is based on an erroneous interpretation of the law; it is exercised on a patently incorrect conclusion of fact; or where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[29]

IV. SUBMISSIONS

A. SECOND ISSUE

19. In claiming an unfettered scope of judicial questioning which "is not constrained by any consideration of subject or substance",[30] the Trial Panel relied on Rules 132 and 137(1) of the Rules, which it described as follows:[31]

> Rules 132 and 137(1) of the Kosovo Specialist Chambers Rules of Procedure and Evidence recognise that "a Panel may order the submission of or call evidence that it considers necessary for the determination of the truth." Under Rule 132, the Panel may, after hearing the parties and, where applicable, Victims' Counsel, "invite the submission of or *proprio motu* call additional evidence not produced by the parties, including expert evidence, where it considers it necessary for the determination of the truth".

[27] KSC, *Prosecutor v. Gucati*, KSC-BC-2020-07/IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeals Decision"), para. 10.
[28] *Gucati* Appeals Decision, para. 12.
[29] *Gucati* Appeals Decision, para. 14.
[30] Impugned Decision, p. 3267.
[31] Impugned Decision, p. 3266.

20. The Trial Panel then framed its truth-finding function in terms of a positive duty, or "responsibility" to "establish the truth".[32] On this basis, the Trial Panel concluded it can ask any question, to any witness, at any time, in a manner unconstrained by any considerations of subject or substance.

21. Nowhere do the Rules confer a duty or responsibility of the Trial Panel to establish the truth. Rather, the Trial Panel is authorised to call evidence that it considers necessary for a determination of the truth. This mirrors the language of Article 69(3) of the Rome Statute, which also provides that the Trial Chamber "shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth". Importantly, this language was adopted in favour of a prior version of Article 69(3), then Article 44 of the ILC Draft, which referred to the "authority and duty to call all evidence that it considers necessary for the determination of the truth".[33] This reference to the Trial Chamber's active duty to establish the truth was abandoned by states during the preparatory conference in December 1997 as having gone too far,[34] with a scholarly consensus having now emerged that the Rome Statute falls short of establishing a judicial obligation to extend factual inquiry to areas unexplored by the parties.[35] The basis for the Trial Panel's imposition of a positive responsibility at the KSC to establish the truth is therefore unexplained.

[32] Impugned Decision, p. 3268.
[33] S. Vasiliev, *International criminal trials: A normative theory* (UvA-DARE, 2014) ("Vasiliev"), p. 294.
[34] D.K. Piragoff, 'Article 69', in O. Triffterer & K. Ambos (eds), *The Rome Statute of the International Criminal Court* (CH Beck, 2016), pp. 1303-4; S. Kirsch, 'The Trial Proceedings before the ICC', (2006) 6 *International Criminal Law Review* 275, pp. 276-277.
[35] Vasiliev, p. 293, citing "G. Bitti, 'Article 64', in Triffterer (ed.), Commentary on the Rome Statute 1213; S. Kirsch, 'The Trial Proceedings before the ICC', (2006) 6 International Criminal Law Review 275, at 276; C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 JICJ 603, at 612 (noting that Art. 69(3) 'does not reflect the pure inquisitorial model whereby the trial judges are under a strict duty to determine the truth'). Cf. Eser, 'The "Adversarial" Procedure' (n 16), at 210, n8".

22. In any event, the ability of the Trial Panel to call evidence "where it considers it necessary for the determination of the truth" does not act as a *carte blanche* for the Trial Panel to expand the SPO case beyond the evidential record. Chambers of the *ad hoc* Tribunals also relied on the need to determine the truth. Crucially, however, the ICTY Appeals Chamber rightly recognised a "**duty of the Chamber to discover the truth, but only from the evidence as presented to the Chamber**".[36] The Appeals Chamber was explicit that is **not** the duty of the Trial Judges "to engage in the prosecutorial investigation of the case".[37]

23. The procedure adopted in the present case is exactly that. The Trial Panel is erroneously engaging in a prosecutorial investigation of the case, deliberately and repeatedly stepping outside the bounds of the SPO Witness Summaries and testimony elicited by the parties, including by using documents which are outside the record of evidence admitted in the case. On the basis of its asserted "responsibility to establish the truth",[38] the Trial Panel is expanding the SPO's case to now include incidents, events and allegations which feature nowhere in the SPO case as presented, but are being drawn from anywhere in the millions of pages of disclosed documents. Establishing the "truth" cannot mean the truth about anything that happened in Kosovo in 1998 and 1999. Rather, it means the truth of the evidence as presented to the Chamber.[39]

24. Nor can an entirely unrestrained scope of questioning be read into Rules 132 and 137(1). The Trial Panel cites to Rule 127(3), which provides that "[a] Judge may at any stage put any question to the witness." However, this authority must be read

[36] *Blagojević* Appeal Decision, paras. 21-22.
[37] *Blagojević* Appeal Decision, para. 21.
[38] Impugned Decision, p. 3268.
[39] *Blagojević* Appeal Decision, paras. 21-22.

together with the more specific rules which govern the trial proceedings, and which limit the Trial Panel's ability to introduce evidence to **after** the presentation of the SPO and Defence cases. Rule 127(2) provides the sequence for the presentation of evidence, and reads as follows:

> Evidence at the trial shall be presented in the following sequence, unless otherwise directed by the Panel:
> (a) evidence for the Specialist Prosecutor;
> (b) evidence for the Defence;
> (c) evidence called by the Panel pursuant to Rule 132;
> (d) with leave of the Panel, Specialist Prosecutor evidence in rebuttal; and
> (e) with leave of the Panel, Defence evidence in rejoinder.

25. Rule 132 then reinforces this sequence, and authorises the calling of evidence by the Trial Panel "**after hearing the parties** and, where applicable, the Victims' Counsel". Rule 137(1) provides that "[t]he Parties may submit evidence relevant to the case". Importantly, however, it then conditions the Trial Panel's calling of evidence as being "in accordance with Rule 132", which authorises the Trial Panel to seek or call evidence only "**after** hearing the parties". The commentary to the Criminal Code of Kosovo, cited by the Trial Panel, describes the right of Judges to "seek additional information **after** the prosecution and defence present their cases."[40]

26. Here, the Trial Panel is unquestionably using its own documentary evidence - outside the record - to question witnesses, and then not admitting that evidence into the record because it knows that it is not allowed to do so at this stage under the Rules. The Trial Panel is also unambiguously introducing new evidence through its questions, in a situation where it is clear that the SPO did not intend to lead evidence on these incidents or events, and where the Defence therefore did not need to address them in cross-examination. There is no other reasonable view; the Trial Panel is seeking and calling its own evidence. As such, the Trial Panel is necessarily acting in

[40] Impugned Decision, p. 3265 (emphasis added).

violation of the sequence set out in the Rules, and the restriction placed on the Trial Panel from doing so before the conclusion the SPO and Defence cases..

27. The Impugned Decision relies on the *Hadžihasanović* decision, which states that "the procedure followed before the Tribunal is a *sui generis* procedure combining elements from the adversarial and inquisitorial systems".[41] The Defence recognises that these proceedings are neither solely inquisitorial nor adversarial in nature, and that parties should not seek automatic recourse to the procedures with which they are familiar from their own national systems. The Defence also recognises that those from inquisitorial systems will be far more familiar with Judges eliciting evidence from witnesses, and familiar with a procedure whereby the majority of the evidence can be led by the Judges, before the parties are left to ask essentially supplemental questions.

28. Importantly, however, even in this inquisitorial system of Judge-led evidence, the Defence is still given the opportunity to question witnesses **after** the Judges and the Prosecution. Meaning, crucially, the Defence has the benefit of knowing and understanding the witness' evidence before deciding if and how to respond. As such, Judges eliciting evidence can be consistent with the rights of the accused when it occurs - as it does in the inquisitorial systems – **before** the Defence examination of the witness.

29. By contrast, in the present proceedings, the Impugned Decision has constructed a Frankenstein-like procedure[42] which facilitates an essentially party-led examination in chief and cross, before then turning to unrestrained, inquisitorial-type judicial questions which can - and have - taken the testimony of SPO witnesses in entirely different directions. For the reasons discussed above, this deprives the Defence of the

[41] Impugned Decision, para. 3267.
[42] R. Skilbeck, 'Frankenstein's Monster: Creating a New International Procedure' (2010) *Journal of International Criminal Justice* 8(2), p. 451.

ability to make a meaningful decision as to how to approach the witness. When the Trial Panel was urged to, at least, ask its questions at the end of the Prosecution examination, the Trial Panel was explicit that it wanted to ask its questions "at the end of every party's questions **so that we have the benefit** of every party's questions."[43] The Trial Panel is not entitled to this benefit. It is instead the right of the accused to be made aware of the testimonial evidence against him before he is afforded an opportunity to address it in cross-examination.

30. As such, the present litigation is not an example of tension between the civil and common law approaches to criminal procedure. It is instead about the misapplication of an inquisitorial procedure, at the wrong time and place. A hybrid procedure must not be implemented in a way whereby aspects are adopted from both, with the safeguards of neither. In this way, it is not important "whether a rule is either adversarial or 'inquisitorial' but whether it assists 'the Tribunals in accomplishing their tasks […]' and whether it complies with fundamental fair trial standards."[44]

31. By contrast, Judges' questions which seek to clarify the evidence heard, rather than introduce new and uncharged evidence, are perfectly consonant with the regime reflected in the Rules. These kinds of clarification questions are legitimate, and often necessary. In this regard, the ICTY Appeals Chamber recognised the proper constraints of the Judges' role, when responding to a challenge to Judges' questions made on behalf of Mr Blagojević, noting that:[45]

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[43] KSC-BC-2020-06, Transcript of Hearing (W04748 Testimony), 11 May 2023, p. 3648.
[44] K. Ambos, 'International criminal procedure: "adversarial", "inquisitorial" or mixed?' (2003) *International Criminal Law Review* 1, p. 35, citing to R. Dixon, 'Developing international rules of evidence for the Yugoslav and Rwanda Tribunals', (1997) 7 *Transnat'l L. & Contemp. Probs.* 81, p. 98; May/Wierda, 'Trends in international criminal evidence: Nuremberg, Tokyo, The Hague and Arusha', (1999) 37 Col. J. of Transnational Law 725, pp. 753-764; Robinson, 'Ensuring Fair and Expeditious Trials at the ICTY' (2000) 11 EJIL 569, p. 569 regarding fairness as an "overarching requirement"; C. Safferling, *Towards an International Criminal Procedure* (2001), pp. 2, 20-21, regarding the human rights approach.
[45] *Blagojević* Appeal Decision, para. 23.

> If Blagojević's argument were that by allowing the judge to ask questions of the witness, the Rules allow the judge to help the Prosecution discharge its burden of proof, it would be plainly wrong. The questions asked by the judge are asked in order to clarify for the court, as opposed to the parties, certain questions of evidence, and the answers may be to the advantage of the accused. In both common and civil law systems, a judge can ask witnesses questions, *proprio motu*.

32. Here, the ICTY Appeals Chamber drew a distinction between questions which seek to clarify certain questions of evidence, and questions through which the Judges took over a role traditionally ascribed to the parties.

33. It is these types of clarification questions that are anticipated by Rule 127(3), which allows a Trial Panel to "at any stage put any question to a witness". To read Rule 127(3) as going further, and introducing a *carte blanche* for the Trial Panel to elicit and call any evidence at any stage of the proceedings, is incompatible with the sequencing regime set out in Rules 127(2), 132 and 137(1) of the Rules, and the express limitations on Trial Panel evidence being called only after the parties have been heard.

34. As such, the Trial Panel committed a discernible error. In isolating and relying on phrases and sections of the applicable Rules, rather than analysing and applying the statutory framework as a whole, the Trial Panel's exercise of its discretion in the Impugned Decision was based on an erroneous interpretation of the law.[46] The procedure for Trial Panel questioning as set out in the Impugned Decision is inconsistent with the statutory framework of the KSC, warranting the intervention of the Court of Appeals Panel.

35. Accordingly, the Defence requests that the Court of Appeals Panel find that the Trial Panel cannot (i) put questions to witnesses on the basis of documentary evidence which is not in the record of the case, or (ii) lead evidence regarding acts or conduct of the accused which is outside the scope of the evidence led by the parties.

[46] *Gucati* Appeals Decision, para. 14.

B. FOURTH ISSUE

36. In addition to the incompatibility with the statutory regime, the Impugned Decision also impacts the rights of the accused to fair and expeditious proceedings, and to adequate time and resources to defend themselves.

37. Judges' questions which elicit new evidence, new material, and new allegations, will also consume additional courtroom time. These questions will undoubtedly prompt both repeated objections, and then re-cross-examination by the affected Defence teams, which has already played out in the witness testimony heard thus far.[47] The SPO case is already scheduled to last until April 2025, on the basis of the SPO's case as enumerated in the charging documents and SPO Witness Summaries. There can be no doubt that unfettered and unconstrained judicial questions will impact the expediency of the trial, which is also inconsistent with the accused's right to fair and expeditious proceedings, and to be tried within a reasonable time.[48]

38. Other fairness issues raised are perhaps of greater concern. As described above, the procedure established by the Impugned Decision requires the Defence to commit to a strategy for the cross-examination of SPO witnesses, while being ignorant of what evidence outside the scope of the evidence led by the SPO is still to be elicited from the bench. For each SPO witness, Defence counsel must thus cross-examine the witness before knowing the full scope of the witness' testimony. This is not a hyperbolic or speculative submission; this reality has already played out.[49]

[47] *See, e.g.*, Hearing on 19 April 2023, pp. 3247-3250.
[48] Articles 40(2) and 21(4)(d) of the KSC Law.
[49] *See, e.g.*, Hearing on 19 April 2023, pp. 3233-3235; Hearing on 17 May 2023, pp. 4176-4178.

39. The Trial Panel's proposed safeguard of Defence re-cross-examination[50] cannot mitigate this unfairness. The Defence might treat a witness as essentially credible after hearing the Prosecution evidence, and then clumsily switch course if a previously friendly witness is rendered hostile through the leading questions of the bench directed at the acts and conduct of the accused, which were deliberately unaddressed by the parties. The fairness of the proceedings *vis-à-vis* the accused is being undermined.

40. The Impugned Decision's procedure also undermines the right of the accused to adequate time and resources to prepare his defence. In the context of other multi-accused international criminal proceedings, the size of the SPO case against these four accused is exceptional. The SPO has disclosed more than 57,000 documents (including over 22,000 incriminating items and nearly 7,000 exculpatory items). New batches of evidence continue to be disclosed on a regular basis. The SPO currently has 312 witnesses on its Witness List,[51] and 19,290 documents on its Exhibit List.[52]

41. The four accused are being charged with events that occurred over 20 years ago, and were the subject of previous proceedings at the ICTY, EULEX and Kosovan courts. As such, many SPO witnesses have been interviewed and examined numerous times already. It is therefore not unusual for disclosure in relation to a particular SPO witness to include thousands of pages of material. Within those thousands of pages will be topics, and even direct accusations against the accused themselves, that the SPO does not deem credible enough to present. With a case of this size, both the Pre-Trial Judge and Trial Panel have repeatedly urged the SPO to limit and refine the scope

[50] Impugned Decision, p. 3268.
[51] KSC-BC-2020-06/F01291/A02, Annex 2 – Amended List of Witnesses, 14 February 2021.
[52] KSC-BC-2020-06/F01376/A02, Annex 1 – Prosecution Submission of Amended Exhibit List, 16 March 2023.

of its case,[53] including through reducing or narrowing the number of charges in the Indictment, shortening the length of intended direct examination of witnesses and, importantly, circulating SPO Witness Summaries, detailing the areas to be addressed by the SPO during examination-in-chief.[54]

42. The SPO Witness Summaries are therefore a central safeguard to ensure the accused have sufficient notice of the evidence to be presented in the courtroom, and to allow Defence counsel to properly prepare to cross-examine the SPO witnesses. The effect of the Impugned Decision is that these SPO Witness Summaries are now entirely redundant as a means of informing the Defence about the testimony that will be presented in the courtroom. Instead, the Defence must be prepared to re-cross-examine on any new and additional allegations that might be raised by the bench. In response to Defence objections on this basis in respect of the questioning of W02652, the Trial Panel reasoned that:[55]

> ... the Panel put questions to the witness on a document which was also listed in the SPO' s presentation queue. The Defence was therefore, on clear notice of the relevance of these documents to the evidence of the witness concerned and knew that such documents might be discussed with the witness. No prejudice was caused, and the defendants were in a position well before the witness even started testifying to prepare for questions on the basis of those documents if they had any questions for this witness.

43. However, the SPO is only required to provide their presentation queue to the Defence 24 hours before the start of the witness' evidence,[56] even if that falls on a

[53] *See, e.g.*, KSC-BC-2020-06, Transcript of Eleventh Status Conference, 24 March 2022, Oral Order 2, p. 1161; KSC-BC-2020-06/F00863, Pre-Trial Judge, Order Setting the Date for a Thirteenth Status Conference and for Submissions, 1 July 2022, para. 22(3); KSC-BC-2020-06, Transcript of Trial Preparation Conference, 18 January 2023, pp. 1812-1814; KSC-BC-2020-06/F01227, Trial Panel II, Agenda for Specialist Prosecutor's Preparation Conference, 26 January 2023, para. 7; KSC-BC-2020-06, Transcript of SPO Preparation Conference, 15 February 2023, pp. 1907-1909.

[54] *See* Rule 95(4)(b)(iv) of the Rules. *See also* order of the Trial Panel regarding the information to be provided for first 12 witnesses: KSC-BC-2020-06, Transcript of Sixteenth Status Conference, 16 December 2022, Oral Order 3 – pp. 1773-1775.

[55] Impugned Decision, p. 3266.

[56] KSC-BC-2020-06/F01226/A01, Order on the Conduct of Proceedings, 25 January 2023, para. 79.

weekend or other non-working day.[57] Therefore, expanding the potential scope of the SPO witness' testimony to the content of any document contained in a presentation queue makes proper preparation impossible. But the Trial Panel has gone even further. While the Trial Panel in this instance found that no prejudice would arise from the judges questioning W02652 on uncharged acts and conduct of Mr Thaçi because the relevant materials featured in the SPO presentation queue, it reserved for itself even broader power, finding that "the Panel is not limited to questioning witnesses on the basis of material listed in the presentation queue of the calling party", and can ask any question, at any time.[58]

44. In effect, therefore, the Defence must be prepared to cross-examine on anything buried in the millions of pages of SPO disclosure. The impact on the right of the accused to adequate time and resources to prepare is monumental, particularly considering that preparation for cross-examination does not simply involve reading the evidence, but investigating the allegations therein. Defence investigations cannot be limitless. They must have a defined scope. Defence investigations have accordingly been directed at examining material facts which the SPO has indicated it will present in support of its case. The Impugned Decision throws this wide open, meaning that the SPO witness testimony can encompass anything in the disclosed material, effectively making the case impossible to prepare and defend.

45. Judges are entitled, and arguably required, to seek clarification of the evidence presented where necessary for their understanding, and the understanding of the parties. These clarification questions, where they are based on the evidence already in the record of the case, fall properly within the scope of Rule 127(3). When Judges instead assume prosecutorial investigative functions, and seek and elicit evidence that

[57] KSC-BC-2020-06, Transcript of Hearing, 5 April 2023, p. 2436.
[58] Impugned Decision, p. 3267.

goes beyond the evidence led by the SPO, the proceedings become fundamentally unbalanced, as they have in the present case. Further, an unfettered right to ask leading questions about the acts and conduct of the accused allows the judges to descend into the arena and hence risks creating an appearance of partiality. In ascribing itself such a broad and unfettered right to pose **leading questions**, directed at eliciting **new evidence**, on incidents and allegations which **have not been addressed by the parties**, and which concern the **acts and conduct of the accused**, relying on documents which **are not part of the record**, the Impugned Decision is fundamentally incompatible with the rights of the accused to fair and expeditious proceedings, and to adequate time and resources to prepare. As such, in rendering the Impugned Decision, the Trial Panel committed a discernible error, and reached a decision so unfair and unreasonable as to constitute an abuse of discretion.[59]

V. CONCLUSION & RELIEF SOUGHT

46. The intention of the present appeal is not stifle the legitimate process of judicial questioning of witnesses. Rather, there are sensible and reasonable limits to be set. The Impugned Decision provides for a procedure for Judges' questions that is, deliberately, limitless. This was not the intention of the drafters, who set express limits in Rules 127(2), 132 and 137(1) of the Rules, which provide for a regime which is compatible with the full enjoyment of the accused's rights. As such, the Defence requests that the Court of Appeals Panel:

GRANT the present appeal;

REVERSE the Impugned Decision, insofar as it purports to grant the Trial Panel the authority to ask questions without any consideration of subject or

[59] *Gucati* Appeals Decision, para. 14.

substance; and find that the Trial Panel cannot ask **leading questions**, directed at eliciting **new evidence**, on incidents and allegations which **have not been addressed by the parties**, and which concern the **acts and conduct of the accused**, relying on documents which **are not part of the record**; and

ORDER that the Trial Panel question witnesses in accordance with the limits of the KSC statutory framework, in full respect for the rights of the accused.

[Word count: 5,853 words]

Respectfully submitted on 30 May 2023,

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