In:	**KSC-BC-2020-06** **The 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:	Victims' Counsel
Date:	9 June 2023
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Victims' Counsel's Response to the "Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning" with one public Annex

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I. INTRODUCTION

1. Pursuant to Article 22(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law No. 05/L-053) ("Law"), and Rule 114(4)(a) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), Victims' Counsel hereby responds to the Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning ("Defence Appeal").[1]
2. The scope and mode of judicial questioning concerns directly the interests of victims participating in the proceedings ("VPPs"), specifically, their right to the truth.
3. Victims' Counsel submits that the Joint Defence Appeal should be denied as it (i) exceeds the scope of the decision on certification; (ii) fails to substantiate its arguments; and (iii) constitutes a disagreement with the legal framework of the Kosovo Specialist Chambers ("KSC") rather than with the Oral Order on Trial Panel Questioning.

II. CLASSIFICATION OF FILING

4. This filing is classified as confidential pursuant to Rule 82(3) and (4) of the Rules.

III. PROCEDURAL HISTORY

5. During the court hearing on 19 April 2023, members of the Trial Panel asked questions to witness W02652.[2]
6. During the same court hearing, Defence Counsel for Kadri Veseli made oral submission on the issues that arose from the judicial questioning.[3]

[1] *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/IA028/F00002, Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning, 30 May 2023.
[2] KSC-BC-2020-06, Transcript, 19 April 2023, T. 3229:15-3247:10.
[3] KSC-BC-2020-06, Transcript, 19 April 2023, T. 3253:19-25, T. 3254:1-3255:8; T. 3255:12-15.

7. Further oral submissions on the matter were made during that hearing by the Specialist Prosecutor's Office ("SPO"),[4] the Defence for Hashim Thaçi[5] and the Defence for Kadri Veseli.[6]

8. On 20 April 2023, at the beginning of the hearing, the Panel announced that before starting the evidence of the next witness, it would issue an "oral order in response to the questions and comments on Judges' questions" that arose at the end of the hearing of 19 April 2023.[7]

9. The Panel, having noted that it would not wait for the matter to be briefed as it had "fully understood the circumstances" and was ready to decide the matter,[8] issued its oral order.[9]

10. On 1 May 2023, the Defence for Hashim Thaçi, Rexhep Selimi and Jakup Krasniqi filed the Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning ("Joint Defence Request").[10]

11. The Specialist Prosecutor Office ("SPO") responded on 4 May 2023[11] and Victims' Counsel responded on 8 May 2023.[12]

12. On 17 May 2023, the Trial Panel granted the Defence Joint Request in part, i.e. in relation to two out of four issues identified by the Defence (the second and the fourth issue).[13]

13. On 30 May 2023, the Defence Appeal was submitted.[14]

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[4] KSC-BC-2020-06, Transcript, 19 April 2023, T. 3256:1-13; T. 3257:18-25.
[5] KSC-BC-2020-06, Transcript, 19 April 2023, T. 3256:17-3257:15; T. 3258:3-18.
[6] KSC-BC-2020-06, Transcript, 19 April 2023, T. 3255:21-24; T. 3258:19-3260:7.
[7] KSC-BC-2020-06, Transcript, 20 April 2023, T. 3262:11-17.
[8] KSC-BC-2020-06, Transcript, 20 April 2023, T. 3263:12-14.
[9] KSC-BC-2020-06, Transcript, 20 April 2023, T. 3263:15-3269:16 ("Oral Order" and/or "Impugned Decision").
[10] KSC-BC-2020-06/F01495, Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning, 1 May 2023.
[11] KSC-BC-2020-06/F01501, Prosecution Response to Defence Certification Request F011495, 5 May 2023.
[12] 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.
[13] 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").
[14] KSC-BC-2020-06/IA028/F00002, Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning, 30 May 2023 ("Defence Appeal").

IV. SUBMISSIONS

1) *Unclear use of the terms "evidence" and "record" throughout the Defence Appeal and the ability of the Panel to rely on documents not yet admitted into evidence*

14. At the outset, Victims' Counsel notes the need to clarify the terminology used by the Defence throughout the Defence Appeal. Specifically: the term "new evidence" as opposed to "evidence" or documents "admitted into evidence", and the term "record" and documents forming (or not) "part of the record".[15]

15. The Defence seems to suggest that documents which are not yet admitted into evidence are "not part of the record".[16] However, the Defence fails to explain this proposition or provide any legal ground for it. Victims' Counsel submits that documents/exhibits which are not admitted into evidence form part of the record and the case file.

16. This understanding of the term "record" is compatible with Rule 24 of the Rules[17] as well as the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers ("Practice Direction"). The latter, in Article 2, defines the term "record" as "any material set forth in Article 14" which includes, for example, exhibits, along with lists of admitted exhibits as well as evidentiary material.[18] Victims' Counsel acknowledges that in the United States the "record"

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[15] For example, Defence Appeal, paras 3-5, 8-9, 21-29, 35, 37, 40, 42, 45, 46 and relief sought.
[16] Defence Appeal, paras 3-5.
[17] RPE, Rule 24 Record of Proceedings and Custody of Evidence
(1) The Registrar shall maintain a full and accurate record of the proceedings.
(2) The Registrar shall preserve all evidence and other materials produced during the proceedings in accordance with any judicial order.
(3) [1]The Registrar shall maintain a judicial database, which shall hold each case file brought before the Specialist Chambers. [2]Public records in the judicial database shall be made available to the public.
(4) The Registrar shall record or take minutes of the Plenary, as appropriate.
[18] Practice Direction, Article 14 Composition of Files
File records shall include, as applicable:
a. Filings, including any translations into the official languages;
b. Exhibits, including their corresponding translations, along with lists of admitted Exhibits and their corresponding translations, created and maintained by the Registry;
c. Case-related correspondence;

has a narrower definition, namely the record of the proceedings, but that is not the way in which the term is used within the KSC legal framework.

17. Victims' Counsel notes that the body of material contained in the record is not evidence as such until it is admitted by the Trial Panel, in accordance with the Rules[19] and Annex 1 to the Order on the Conduct of Proceedings.[20] This pertains also to exhibits which can be tendered for admission either through a witness or through the bar table.[21]

18. The suggestion that the Judges are not permitted to rely on material contained in the record (but not yet admitted into evidence) when questioning witnesses is wrong and inconsistent with the KSC legal framework and Annex 1 to the Order on the Conduct of Proceedings.[22] The same applies to the Parties and Participants, who, when examining witnesses also rely on exhibits not yet admitted into evidence. Furthermore, contrary to the Defence's submissions, it is inconsistent with the practice of other international courts.[23]

2) *Second Issue*

Whether the procedure for Trial Panel questioning as set out in the Impugned Decision is inconsistent with the statutory framework of the KSC

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d. Transcripts of court proceedings in the working languages;
e. Audio-visual recordings of court proceedings;
f. Oral decisions rendered during court proceedings;
g. Evidentiary material, including their corresponding translations;
h. Registry reports on hearings;
i. Lists of witnesses, created and maintained by the Registry; and
j. Disclosure logs of all disclosure actions by Participants.

[19] RPE, Rules 137 and 138.

[20] KSC-BC-2020-06/F01126/A01, Annex 1 to Order on the Conduct of Proceedings, paras 46-56, 60-62, 80-83.

[21] Ibid.

[22] KSC-BC-2020-06/F01126/A01, Annex 1 to the Order on the Conduct of Proceedings, para. 48 *et seq*.

[23] ECCC, Internal Rules (Rev. 10), Rule 87 and Case File No. 001/18-07-2007/ECCC/TC, Decision on Admissibility of Materials on the Case File, E43/4, 26 May 2009, para. 6; STL, Rules of Procedure and Evidence (Rev. 10), Rules 149, 150 and *The Prosecutor v. Ayyash et al*., STL-11-01/T/TC, F1326, Decision on the Conduct of the Proceedings, Guidelines on the Conduct of Proceedings, 16 January 2014, paras 3-4, 10, 16.

i. Scope of the Appeal

19. Paragraphs 27 to 31 of the Certification Decision provide the parameters and reasoning of the Trial Panel's grant of certification as it relates to the second issue, the scope of judicial questioning as provided by Rule 127(3) and paragraph 112 of Annex 1 to the Order on the Conduct of Proceedings.[24] The Trial Panel rejected certification of the third issue identified in the Defence Request which concerned the Panel's reference to Rules 132 and 137 in the reasoning of the Impugned Decision. The Panel explained in the Certification Decision that "it did not invoke Rules 132 and 137 as the legal basis for its power to question witnesses, but referred to those Rules to illustrate that the Panel is made up of professional judges who, in order to make accurate factual findings, are authorised to take the steps they consider necessary for the determination of the truth, including by calling evidence."[25]
20. Victims' Counsel therefore submits that the Defence's arguments, as they relate to Rule 132 or Rule 137 as a legal basis for the Impugned Decision,[26] should be disregarded.

ii. Basis for judicial questioning in the KSC legal framework

21. Victims' Counsel submits that the Impugned Decision is correctly based on (a) Article 127(3) of the Law, and (b) on the principle that the Panel has a responsibility to determine the truth.

[24] Decision on Certification, para. 27.
[25] Decision on Certification, para. 32.
[26] Defence Appeal, paras 19, 24-25.

a. Correct interpretation of Article 127(3) of the Rules

22. Rule 127(3) which regulates the order of questioning of witnesses by the parties and participants, and concludes that "a Judge may at any stage put any question to the witness."[27]

23. The Defence suggests that Rule 127(3) must be read together with the provisions which limit the Trial Panel's ability to introduce evidence until after the presentation of the SPO and Defence cases, as provided for in Rule 127(2) of the Rules.[28] Furthermore, the Defence submits that the Panel by "unambiguously introducing new evidence through its questions" is "seeking and calling its own evidence" and by doing so it is "necessarily acting in 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."[29]

24. This argument conflates Rule 127(2) and (3) and Rule 132. Rule 127(2) regulates the sequence of presentation of evidence by the Parties and the Panel whereas Rule 127(3) regulates the order/sequence in which witnesses are examined. Victims' Counsel submits that there is a fundamental difference between the Panel's authority to call and present evidence pursuant to Rule 132 and the Panel's authority to question witnesses called to testify by the Parties and, if appropriate, using documents to do so.

[27] Note that the wording of Rule 127 (3), sentence four, is derived from Rule 85B of the ICTY Rules of Procedure and Evidence. In the Decision Regarding Questions Asked by the Judges During the Examination of a Witness in Court, the Prlić Trial Chamber relied on its plain terms to reject a motion by the Office of the Prosecutor and two of the Defence teams which argued for restrictions on questioning by the judges (ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision Regarding Questions Asked by the Judges During the Examination of a Witness in Court, 5 June 2008).
[28] Defence Appeal, para. 24.
[29] Defence Appeal, para. 26.

b. The Panel's responsibility to determine the truth in the framework of the KSC

25. The Defence submits that "[n]owhere do the Rules confer a duty or responsibility of the Trial Panel to establish the truth". At the same time, it notes that "the Trial Panel is authorised to call evidence that it considers necessary for a determination of the truth" (Rule 132 of the Rules).[30]
26. Although not independently provided for in the Rules or the Law, the judges' responsibility to determine the truth is encapsulated in the rules governing evidentiary proceedings before the Specialist Chambers.
27. First, according to the above-mentioned Rule 127(3), judges may pose any question to a witness at any stage. Second, Rule 132 grants the Panel the power to call additional evidence *proprio motu*, if it considers it necessary for the determination of the truth. Third, Rule 143(4), which sets out the objective of all questioning to be conducted at the KSC, provides, among other things, that "[u]pon an objection raised by a Party or *proprio motu*, the Presiding Judge may exercise control over the mode and the order of questioning witnesses and presenting evidence so as to: make the questioning and presentation effective for the ascertainment of the truth" (Rule 143(4)(a)).
28. Finally, according to the Law, the Specialist Chambers shall adjudicate and function in accordance with customary international law (Article 3(2)(d)) and international human rights law which sets criminal justice standards, including the European Convention on Human Rights and Fundamental Freedoms ("ECHR") (Article 3(2)(e)).
29. The right to truth, that is the right "to be informed of what had happened, including getting an accurate account of the suffering [victims] had allegedly endured and the role of those responsible for [their] alleged ordeal",[31] has been

[30] Defence Appeal, para. 21.
[31] ECHR, *El Masri v. The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Grand Chamber Judgement, 13 December 2012, § 192.

recognized not only by the ECHR and the Inter-American Court of Human Rights,[32] but also, by Trial Panel I of the Kosovo Specialist Chambers.[33] The judicial power to question witnesses, unconstrained by artificial limits on the manner of the questioning, is plainly capable of playing an important role in enforcing that right and in establishing the truth.

30. No Party or Participant should want a verdict based on something other or less than the truth and it is untenable to propose that the Panel does not have a positive responsibility to establish it.

iii. Regulations and jurisprudence of other international and national jurisdictions

31. The Defence seems to base its main argument against judicial questioning of the KSC judges by reference to Article 69(3) of the Rome Statute of the International Criminal Court ("Rome Statute" and "ICC"),[34] which resembles the wording of Rule 132 of the Rules. The Defence further refers to the draft wording of this provision and academic literature concerning Article 69(3) which, according to the Defence, indicate that there is "a scholarly consensus (…) that the Rome Statute falls short of establishing a judicial obligation to extend factual inquiry to areas unexplored by the parties."[35] Based on this reference, the Defence concludes that "the Trial Panel's imposition of a positive responsibility at the

[32] UN Doc. E/CN.4/1435, First Report of the Working Group on Enforced or Involuntary Disappearances to the Commission on Human Rights, 22 January 1981, para. 187; OEA/Ser.L//V/II.68, Doc. 8 rev 1, Annual Report of the InterAmerican Commission of Human Rights, 1985–1986, 28 September 1986, p. 205; Inter-American Commission, Report No. 136/99, of 22 December 1999, Case of Ignacio Ellacrı´a et al., para. 221.
[33] *Prosecutor v. Salih Mustafa*, KSC-BC-2020-05/F00152, Decision on victims' procedural rights during trial, 12 July 2021, paras 16-19.
[34] Article 69(3) of the Rome Statute: "The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth."
[35] Defence Appeal, para. 21.

KSC to establish the truth is therefore unexplained."[36] No further explanation of this conclusion is given.

32. Significantly, the Defence fails to support its argument by reference to any relevant jurisprudence of the ICC. That jurisprudence runs directly contrary to the Defence argument, including endorsing judicial questioning on matters going beyond clarification and in a similar sequence to that proposed by the Panel.[37]

33. Further, the Defence asserts that the Trial Panel is limited in what it can consider in its determination of the truth – i.e., that it is bound by evidence presented to the Trial Panel.[38] In support of that proposition, *Blagojević* is cited. The procedural and legal context of that decision is so far removed from the issues in this Appeal as to render it valueless.

34. The *Blagojević* decision concerns an ICTY Trial Chamber's request to review disclosure before the start of trial, in a different legal framework.[39] The Appeals Chamber found that the Trial Chamber in that case was not taking over pre-trial investigative work,[40] and that when the time came for deliberations after the hearing of the case at trial, the Trial Chamber was:

> [a]uthorised by the Statute and the Rules to make factual findings on the basis of evidence presented by the parties […] to determine the guilt or innocence of the accused. In that sense, the factual findings, subject to appeal and review, are parts of the truth proved beyond reasonable doubt. It does not, however, follow that the Trial Chamber, by assessing

[36] Ibid.
[37] ICC, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/20-478, Directions on the conduct of proceedings, 4 October 2021, para. 39 ("The Chamber may pose questions to the witness at any time including after the conclusion of the questioning by the parties and participants"); *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-619, 6 June 2015, Decision on the conduct of proceedings, para. 23 ("The Chamber will actively ensure the efficiency and focus of the examination of witnesses. The Chamber may ask questions of the witnesses at any stage of the testimony, including before the questions from the calling party. These questions may go beyond mere clarification. Furthermore, if the Chamber is not satisfied by the manner in which the calling party conducts its examination-in-chief, it may intervene and conduct its own examination of the witness").
[38] Defence Appeal, paras 22-28.
[39] ICTY, *Prosecutor v Blagojević et al.*, IT-02-60-AR73.3, Decision, 8 April 2003, para. 1.
[40] ICTY, *Prosecutor v Blagojević et al.*, IT-02-60-AR73.3, Decision, 8 April 2003, para. 21.

evidence presented by the parties, will be discharging some of the prosecutorial responsibilities.[41]

35. In this case, as in *Blagojević*, the Trial Panel will be bound in its deliberations by the evidence that has been adduced during trial (including evidence that it has itself adduced). It does not support the proposition that a Panel at the KSC is expected to be a passive recipient of evidence and cannot explore issues that it regards as pertinent.

36. The Defence Appeal demonstrates a misunderstanding of the conceptual underpinning and terminology used by the KSC, other similar internationalised/international jurisdictions, and national civil law jurisdictions generally.[42]

[41] ICTY, *Prosecutor v Blagojević et al.*, IT-02-60-AR73.3, Decision, 8 April 2003, para. 22.

[42] See, for example: Norwegian Code of Criminal Procedure, Section 135 ("Each party shall examine the witnesses who are summoned at his request. When the said party has finished examining a witness, the opposite party may further examine the said witness, and subsequently additional questions from both sides may be addressed to the witness if the president of the court so permits. When the parties have finished their examinations, the members of the court may ask questions. If neither the prosecuting authority nor defence counsel appears, the president of the court shall conduct the examination. If either the prosecuting authority or defence counsel does not appear, the president of the court shall conduct the examination in his place. Witnesses summoned by the court of its own motion shall be examined by the president of the court if he does not find reason to leave the examination to the parties."); Code of Criminal Procedure of Germany, Section 239 ("(1) The presiding judge is required to leave the examination of witnesses and experts named by the public prosecution office and by the defendant to the public prosecution office and defence counsel upon concurring application by both. Witnesses and experts named by the public prosecution office are first to be examined by the public prosecution office; those named by the defendant are first to be examined by defence counsel. (2) After this examination, the presiding judge is also required to ask the witness and experts such questions as he or she deems necessary for the further clarification of the case."); Polish Code of Criminal Procedure, Art. 370 ("Art. 370. Manner of examining. § 1. After an examined individual, summoned by the presiding judge, has expressed himself freely, pursuant to Article 171 § 1 the following persons may ask questions in the following order: the public prosecutor, the subsidiary prosecutor, the subsidiary prosecutor's attorney, the private prosecutor, the private prosecutor's attorney, the expert, the defence counsel, the accused and the members of the adjudicating panel. § 2. The party, on whose motion a witness was admitted, asks questions to this witness before the remaining parties. § 2a. If needed, the members of the adjudicating panel may ask additional questions at any time. § 3. If a witness was admitted ex officio, the members of the adjudicating panel are the first to ask questions to this witness. § 4. The presiding judge disallows questions referred to in Article 171 § 6, or those that he finds irrelevant for other reasons").

3) *Fourth Issue*

Whether the procedure for Trial Panel questioning set in the Oral Order is inconsistent with the rights of the accused to fair and expeditious proceedings, and to adequate time and resources to defend themselves

i. Fair trial rights of the accused – the right to examine witnesses

37. From the right of a defendant to examine witnesses and to prepare his defence one cannot infer that the judges are prohibited to ask questions going beyond the evidence elicited through a given witness by the parties.

38. The Defence argues that the Impugned Decision violates fair trial rights as "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 must thus cross-examine the witness before knowing the full scope of the witness' testimony."[43]

39. The Defence further suggests that the possibility for further examination by the Parties in instances when questions put to a witness by a Trial Panel after cross-examination and redirect examination raise entirely new matters[44] "cannot mitigate this unfairness."[45] The Defence has failed to explain how its ability to recall witnesses or request postponements is insufficient to address new matters. As explained by the Panel, this procedure fulfils the fair trial guarantee of the defendant to cross-examine witnesses against him/her and to have adequate time and resources to prepare one's defence.

[43] Defence Appeal, para. 38.
[44] Impugned Decision, T. 3268:4-7; Annex 1 to the Order on Conduct of Proceedings, para. 112.
[45] Defence Appeal, para. 39.

40. Contrary to the Defence's submissions,[46] the right to a fair trial, specifically, to examine witnesses, does not grant the Defence the right to choose and maintain one assessment of a witness and "one course" of cross-examination towards a witness. According to the ECHR standard the right to examine witnesses "require[s] that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings".[47]
41. Therefore, at the heart of the Defence complaint is an argument that their strategic approach to a witness is potentially disrupted by judicial questioning that follows their cross-examination.[48]
42. This argument confuses what would be, from the Defence perspective, an advantageous framework, with a fair trial right of the accused. The unhindered right to impose a chosen strategy on the finders of fact is not to be found among the list of rights guaranteed to the accused in any system. Nor can the Defence strategy be accorded such precedence as to require that the judges must suppress inquiries that they regard as important in reaching the truth.
43. If the judges' questions result in evidence that is "fundamentally problematic for an accused"[49] (or for that matter a VPP or the SPO), then that may well be indicative of the truth emerging.
44. The Defence proposal amounts to no more than a desire to exert control over the judges' questions so as to present the evidence in a manner they see as desirable. The unambiguous wording of Rule 127 (3) sentence 4, shows that this desire must be left unfulfilled: the jurisprudence of the ICC and civil law jurisdictions demonstrate that to do so is not unfair.

[46] Defence Appeal, paras 8, 38, 42, 44.
[47] ECHR, *Al-Khawaha and Tahery v The United Kingdom*, Applications nos. 26766/05 and 22228/06, Grand Chamber Judgement, 15 December 2011, § 118.
[48] Defence Appeal, paras 8-10.
[49] Ibid., para. 9.

ii. Right to expeditious trial

45. Victims' Counsel submits the Defence has failed to substantiate how the Impugned Decision would impact the expeditiousness of proceedings. The Defence has not demonstrated how judicial questioning would extend proceedings to the extent that it suggests.

46. Rather, the Defence has engaged in speculation at paragraphs 37 to 39 and provided no concrete information demonstrating that the time afforded to judicial questioning would unduly prolong proceedings. Victims' Counsel notes that the right to expeditiousness is not the only consideration for the Panel. The Trial Panel must also determine the truth.

iii. Adequate time and resources

47. The Defence argues that the Panel's ability to ask questions on documents (beyond the presentation queue) requires the Defence to be prepared to cross-examine on "anything buried in the millions of pages of SPO disclosure", with a "monumental" impact on the right to adequate time and resources to prepare.[50] This argument is wholly speculative. The suggested scenario is yet to arise: should it do so, that will be the point at which to asses the impact on the Defence on a case-by-case basis. The impact may range from the trivial to the more significant and the Panel is well-placed to gauge any possible prejudice and respond to any Defence requests to ameliorate it. [51] The alternative, which is simply to forbid the Panel from following a line of enquiry that it regards as important, is to place a restriction on the task of the Panel which is incompatible with its role in the proceedings.

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[50] Defence Appeal, para. 44.

[51] The Trial Panel has already demonstrated a flexible approach to matters affecting the Defence's time to prepare. On an occasion when a witness provided new material shortly before testifying, the Panel indicated that it would be open to the Defence to request that the witness be recalled for further cross-examination in the future if that course was necessary." See Order concerning Defence request for adjournment, KSC-BC-2020-06, Transcript, 11 May 2023, T. 3647:17-21.

48. Victims' Counsel submits that issue four represents a fundamental disagreement with the legal framework of the KSC and the principles that underpin it, rather than with the Impugned Decision, which simply reflects that framework.

49. Questions posed to witnesses by professional judges cannot be seen as extending the proceedings: they are an integral part of the proceedings within the framework of the KSC.

50. The Panel's liberty to ask any question is premised upon their duty to arrive at the truth. That process may or may not prove to be adverse to the interests of the Accused, but it has nothing to do with any illegitimate encroachment on their fair trial rights.

V. CONCLUSION

51. As noted above, the Defence Appeal demonstrates a misunderstanding of the conceptual underpinning and terminology used by the KSC. International jurisdictions and national civil jurisdictions routinely provide for the ability of judges to ask questions. This is so even when they are asked after the parties have questioned a witness,[52] even when they are leading questions,[53] even when

[52] See, for example: STL Rules of Procedure and Evidence (Rev. 10), Rule 145(B); ICC Rules of Procedure and Evidence, Rule 140(2) (providing that a Trial Chamber may question before or after parties and that the Defence "shall have the right to be the last to examine a witness").

[53] See, for example: *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2360, Decision on judicial questioning, 18 March 2010, para. 46 ("The Rome Statute framework, and national judicial systems generally, do not limit the role or the independence of judges in the way suggested, and it is for the judges to decide whether, when they intervene, it is appropriate to use leading questions, depending on all the circumstances. For instance, the Bench may conclude that earlier answers given by the person testifying, or other witnesses, justify a judge dealing with an issue by way of leading rather than neutral questioning. Generally, the Romano Germanic and the Common Law systems of law do not identify by way of a list, or a catalogue, the nature or form of the questions that judges are entitled to ask, and such a limitation would involve a serious interference with the independence of the judiciary."); *Prosecutor v Laurent Gbagbo & Charles Blé Goudé*, ICC-02/11-01/15-498-AnxA, Annex A to Decision adopting amended and supplemented directions on the conduct of the proceedings, 4 May 2016, para. 28 ("Leading and closed questions may be permissible when they are conducive to the expeditiousness of the proceedings and the determination of the truth.").

they relate to the acts and conduct of the accused,[54] even when they rely on documents that have not (or not yet) been admitted into evidence,[55] and even when they raise additional matters.[56] This is consistent with the civil law emphasis on determining the truth.[57] Whether these complaints are taken in conjunction, as appears to be the case from the phrasing of the relief requested by the Defence Appeal,[58] or disjunctively, the Defence has failed to demonstrate that the Trial Panel exceeded the wide latitude afforded to it, or that the procedural protections provided to the Defence are inadequate.

VI. RELIEF REQUESTED

52. For the foregoing reasons the Defence Appeal should be denied.

Word count: 5272

[54] *Prosecutor v Thomas Lubanga*, ICC-01/04-01/06-2360, Decision on judicial questioning, 18 March 2010, paras 40-41 ("40. Furthermore, in establishing the true context of, and background to, the facts and circumstances described in the charges, the Chamber will inevitably receive evidence relating to other alleged criminality {e.g. some children who were allegedly enlisted, conscripted or used as child soldiers may have witnessed, been involved in or been the victims of a wide range of criminal offences). 41. There is no foundation in the Rome Statute framework or in any relevant jurisprudence of the Court, or otherwise, for the suggestion that the Bench is unable to ask questions about facts and issues that have been ignored, or inadequately dealt with, by counsel. For the reasons set out above, the general evidence in the case is not restricted to the facts and circumstances described in the charges and any amendments to the charges, and under Article 69(3) the Chamber is entitled to request the submission of all evidence that it considers necessary for the determination of the truth.").

[55] See, for example, ECCC, Internal Rules (Rev. 10), Rule 87 and Case File No. 001/18-07-2007/ECCC/TC, Decision on Admissibility of Materials on the Case File, E43/4, 26 May 2009, para. 6; STL, Rules of Procedure and Evidence (Rev. 10), Rules 149, 150 and *Prosecutor v. Ayyash et al*., STL-11-01/T/TC, F1326, Decision on the Conduct of the Proceedings, Guidelines on the Conduct of Proceedings, 16 January 2014, paras 3-4, 10, 16.

[56] See, for example, STL Rules of Procedure and Evidence (Rev. 10), Rules 145(B) and 150(K).

[57] See, for example, STL Rules of Procedure of Evidence (Rev. 10), Rules 55(C), 92(C), 150 (G); ECCC Internal Rules (Rev. 10), Rules 55(5), 60, 87(4), 85. See also, German Code of Civil Procedure, Section 244; French Code of Criminal Procedure, Article 310.

[58] Defence Appeal, p. 19.

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9 June 2023, The Hague, the Netherlands