



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: Court of Appeals Panel
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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**Public Redacted Version of 'Prosecution Response to Thaçi, Selimi and Krasniqi
Defence appeal regarding Trial Panel questioning (IA028/F00002) with public
Annex 1', KSC-BC-2020-06/IA028/F00003, dated 9 June 2023**

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Appeal by Thaçi, Selimi, and Krasniqi (collectively, 'Defence') from the Trial Panel's Oral Order¹ concerning Trial Panel questioning.² The Appeal exceeds the scope of the certified issues, misconstrues the sparse jurisprudence on which it relies, and ignores the ample authority that rebuts its premises. For these reasons and those set out below, the Appeal lacks merit and should be dismissed.

2. The judicial questioning procedure that the Appeal challenges – including the sequence, subject matter, form, and use of documents – complies with the Kosovo Specialist Chambers' ('KSC') statutory framework, and the rights of the accused to a fair and expeditious trial, and to adequate time and resources for their defence.

II. PROCEDURAL HISTORY

3. On 20 April 2023, the Trial Panel issued the Oral Order, in which it dismissed arguments raised by the Defence regarding the issue of judicial questioning.³

4. On 1 May 2023, the Defence filed a request for certification to appeal the Oral Order on four grounds.⁴ The SPO⁵ and Victims' Counsel⁶ filed responses opposing certification, and the Defence replied.⁷

5. On 17 May 2023, the Trial Panel granted certification to appeal the Second Issue and Fourth Issue raised by the Defence and denied the First Issue and Third Issue.⁸

¹ Transcript (Procedural Matters), 20 April 2023, pp.3263-3269 ('Oral Order').

² Thaçi, Selimi and Krasniqi Defence Appeal against the Oral Order on Trial Panel Questioning, KSC-BC-2020-06/IA028/F00002, 30 May 2023, Confidential ('Appeal').

³ [REDACTED]; Transcript (Procedural Matters), 20 April 2023, pp.3262-3263.

⁴ Thaçi, Selimi and Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning, KSC-BC-2020-06/F01495, 1 May 2023 ('Certification Request').

⁵ Prosecution Response to Defence Certification Request F01495, KSC-BC-2020-06/F01501, 5 May 2023.

⁶ Victims' Counsel's Response to the 'Thaçi, Selimi and Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning', KSC-BC-2020-06/F01503, 8 May 2023.

⁷ Thaçi, Selimi and Krasniqi Defence Reply to 'Prosecution Response to Defence Certification Request F01495', KSC-BC-2020-06/F01505, 8 May 2023; Thaçi, Selimi and Krasniqi Defence Reply to Victims' Counsel's Response (F01503), KSC-BC-2020-06/F01514, 10 May 2023.

⁸ Decision on Thaçi, Selimi and Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning, KSC-BC-2020-06/F01531, 17 May 2023 ('Certification Decision').

6. On 30 May 2023, the Defence filed their Appeal.

III. APPLICABLE LAW

7. Rule 127(3) states, in relevant part: 'A Judge may at any stage put any question to the witness.'

8. Trial panels enjoy considerable discretion to manage the proceedings before them.⁹ Where a decision being challenged is a discretionary one, 'a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.'¹⁰ The moving party bears the burden of showing error.¹¹ Where a panel acts within its discretion, an appeals panel should not intervene merely because it may have exercised its discretion differently.¹²

IV. SUBMISSIONS

A. SECOND ISSUE

(i) The Appeal exceeds the scope of the certified issue

9. The scope of the Appeal Panel's review lies strictly within the confines of the issues certified by the Trial Panel.¹³ Many of the Defence's submissions in the Second

⁹ See, e.g., ICTY, *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Judgement, 8 June 2021, paras 63, 84 and references cited therein; ICTY, *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Judgement, 20 March 2019, para.72 and references cited therein.

¹⁰ Decision on Defence Appeals Against Decision Concerning Request to Amend the Indictment Pursuant to Rule 90(1)(b) of the Rules, KSC-BC-2020-06/IA018/F00007, 22 March 2022, para.23.

¹¹ See, generally ICTY, *Prosecutor v. Prlic et al*, IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-examination of Defence Witnesses, 26 February 2009, para.26.

¹² See ICTR, *Prosecutor v. Bagosora et al*, ICTR-98-41-AR93, Appeals Chamber, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para.11.

¹³ Decision on the Defence Appeals Against Decision on Motions Challenging the Legality of the Specialist Chambers and the Specialist Prosecutor's Office and Alleging violations of Certain Constitutional Rights of the Accuse, KSC-BC-2020-06/IA013/F00012, 20 May 2022, para.18.

Issue exceed the scope of the Certification Decision by including arguments that fall under the Third Issue, which was denied appeal in the Certification Decision.

10. As the Third Issue in the Certification Request, the Defence sought leave to appeal '[w]hether the Trial Panel erred in invoking Rules 132 and 137 to use "additional evidence not called by the parties" in questioning witnesses, with no intention of admitting the relevant documents into the record', claiming that 'these Rules contemplate a different regime, being the calling and admission of additional evidence by the Trial Panel.'¹⁴ The Trial Panel denied certification on this issue, explaining 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.¹⁵

11. Nevertheless, in the Appeal, the Defence make the exact arguments—in the same terms—as those denied certification under the Third Issue. They argue that the Trial Panel improperly 'relied on Rules 132 and 137' as the basis for their decision.¹⁶ They allege error in that the Trial Panel's process would 'expand the SPO case beyond the evidential record',¹⁷ would make use of 'documents which are outside the record of evidence admitted in the case',¹⁸ and claim that the Trial Panel erred in using 'its own documentary evidence – outside the record – to question witnesses, and then not admitting that evidence into the record'.¹⁹ These claims fall under the Third Issue, and should be dismissed outright.

12. Regardless, as further explained below, and as the Trial Panel explained in the Oral Order, the documents the Judges have referenced in questioning witnesses have been entirely foreseeable to the Defence.

¹⁴ Certification Decision, KSC-BC-2020-06/F01531, para.8(3) (quoting Third Issue); *see also* Certification Request, KSC-BC-2020-06/F01495, paras 7, 13.

¹⁵ Certification Decision, KSC-BC-2020-06/F01531, paras 32-33.

¹⁶ Appeal, KSC-BC-2020-06/IA028/F00002, paras 19.

¹⁷ Appeal, KSC-BC-2020-06/IA028/F00002, para.22.

¹⁸ Appeal, KSC-BC-2020-06/IA028/F00002, para.23.

¹⁹ Appeal, KSC-BC-2020-06/IA028/F00002, para.26.

- (ii) The procedure for Trial Panel questioning complies with the KSC statutory framework

13. The procedure adopted by the Trial Panel for judicial questioning—wherein the Trial Panel asks questions after the parties, and permits limited additional examination on any new matters raised through its questions—is entirely commensurate with the statutory framework of the KSC. As the Trial Panel noted in its Oral Order, Rule 127(3) makes clear that a ‘Judge may at any stage put any question to the witness.’ The plain language of this Rule declares that there are no delineated limits as to the nature or timing of the questions that the Judges may pose. The Defence’s proposed restrictive interpretation of Rule 127(3) allowing mere ‘clarifying questions’²⁰ finds no purchase in the language of the Rule, the KSC’s statutory framework, nor in applicable precedent. As a practical matter, of course, the Judges’ questions will be focused on issues relevant to determining the case before them, and the Defence’s contention to the contrary²¹ is unfounded and speculative.

14. The Defence argue that Rule 127(3) is constrained by the sequence of presentation of evidence outlined in Rule 127(2).²² Even if this were so, the plain language of Rule 127(2) permits the Trial Panel to alter the sequence as it sees fit, by including the phrase ‘unless otherwise directed by the Panel.’ But more importantly, Rule 127(2) does not control Rule 127(3). The two Rule 127 sub-clauses cover different matters: the former addresses the stages of trial as a whole, the latter addresses the questioning of individual witnesses.

15. Nor do the Defence’s arguments premised on Rules 132 and 137(1) demonstrate error in the Trial Panel’s exercise of its discretion in how to conduct the trial. As the Trial Panel explained in the Certification Decision, it referenced Rules 132 and 137 in its Oral Order not ‘as the legal basis for its power to question witnesses’,²³ but to

²⁰ Appeal, KSC-BC-2020-06/IA028/F00002, paras 31-33.

²¹ Appeal, KSC-BC-2020-06/IA028/F00002, para.23.

²² Appeal, KSC-BC-2020-06/IA028/F00002, para.24.

²³ Certification Decision, KSC-BC-2020-06/F01531, para.32.

demonstrate the breadth of power conferred upon it in order to determine the truth in the case before it; power that is explicitly not constrained by evidence placed before it by the parties. The latitude of this power is likewise reflected in Article 40(6)(e), which permits the Trial Panel to ‘order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.’ However, any issues of timing contained in Article 40(6)(e) concerning ‘evidence in addition to that ... presented during the trial by the parties’, and the directives in Rules 132 and 137 as to ‘additional evidence not produced by the Parties,’ do not apply to judicial inquiry of evidence already produced by a party in the form of witnesses present in the courtroom. Further, Rule 143(4) empowers the Presiding Judge to ‘exercise control over the mode and the order of questioning witnesses and presenting evidence’ in order to accomplish various goals including the ascertainment of the truth.

16. The sequence of judicial questioning that the Trial Panel is applying is also consistent with the Order on the Conduct of Proceedings, finalised months ago, which clearly describes judicial questioning after cross-examination, including in relation to new matters.²⁴ As pointed out in the Oral Order, this provision was circulated for comments to all parties and participants before its adoption, and no request for modification was made.²⁵

17. As the Trial Panel has recently explained in the context of a Defence proposal to change the order of questioning a witness:

Judicial questions can be asked at any point. They are not cross-examination mirroring any parties’ questions. They are intended to seek and to contribute to the determination of the truth as it comes within its mandate. ... The Order on Conduct of Proceedings, therefore, foresees that judicial questions are to be asked at the end of every party’s questions so that we have the benefit of every party’s questions, and many judicial questions might be rendered unnecessary as a result of Defence cross-examination. The Order on the Conduct of Proceedings already provides for the necessary safeguards to ensure fairness by

²⁴ Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01, 25 January 2023, para.112.

²⁵ Oral Order, p.3268. *See also* Joint Defence Written Observations on the Draft Order on the Conduct of Proceedings (F01178/A01), KSC-BC-2020-06/F01203, 13 January 2023.

authorising parties to ask follow-up questions based on any new material elicited by judicial questioning.²⁶

18. In other cases before the KSC, similar procedures for judicial questioning were adopted. The respective Orders on the Conduct of Proceedings in *Gucati & Haradinaj*, *Mustafa*, and *Shala*, referring to Rule 127(3), stated that the Panel may at any stage put any question to the witness.²⁷ Moreover, the Trial Panels in *Mustafa and Shala* provided the possibility that, at the Presiding Judge's discretion, a witness may be given the possibility to present a free narration of the events the witness was called to testify about, before, during or after questioning by a Party or Victim's Counsel.²⁸

19. In both the *Mustafa* and *Gucati & Haradinaj* trials, the Trial Panel similarly asked questions after cross-examination (and re-direct examination).²⁹ Moreover, during Judges' questions to witnesses, they used documents which were not part of the list of exhibits those witnesses would address.³⁰ In *Gucati & Haradinaj*, after an objection raised by the Defence, the Judges proceeded using documents and the Defence was given the opportunity to ask additional questions on the matter.³¹

²⁶ Transcript (Procedural Matters), 11 May 2023, pp.3648-3649.

²⁷ *Specialist Prosecutor v. Shala*, Decision on the conduct of the proceedings, KSC-BC-2020-04/F00434, 24 February 2023, para.38; *Specialist Prosecutor v. Mustafa*, Decision on the conduct of the proceedings, KSC-BC-2020-05/F00170, 26 August 2021, para.27; *Specialist Prosecutor v. Gucati and Haradinaj*, Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314/A01, para.79. In addition, in the *Gucati & Haradinaj* case, the Order on the Conduct of Proceedings contained a provision identical to paragraph 112 in the Order on the Conduct of Proceedings in the present case, providing the possibility for parties to request further examination if judicial questioning raised entirely new matters. *Specialist Prosecutor v. Gucati and Haradinaj*, Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314/A01, para.77.

²⁸ *Specialist Prosecutor v. Shala*, Decision on the conduct of the proceedings, KSC-BC-2020-04/F00434, 24 February 2023, para.38; *Specialist Prosecutor v. Mustafa*, Decision on the conduct of the proceedings, KSC-BC-2020-05/F00170, 26 August 2021, para.27.

²⁹ See for example, *Specialist Prosecutor v. Mustafa*, Transcript (Open Session), pp.676 et seq.; *Specialist Prosecutor v. Mustafa*, Transcript (Private Session), pp.843-849; *Specialist Prosecutor v. Gucati and Haradinaj*, Transcript (Open Session), 26 October 2021, pp.1472 et seq.

³⁰ See for example, *Specialist Prosecutor v. Mustafa*, Transcript (Open Session), pp.682-684; *Specialist Prosecutor v. Gucati and Haradinaj*, Transcript (Open Session), 26 October 2021, pp.1479-1490.

³¹ *Specialist Prosecutor v. Gucati and Haradinaj*, Transcript (Open Session), 26 October 2021, pp.1479-1490. In the *Mustafa* trial, Parties were also allowed to asked further questions after questioning from the Judges: See *Specialist Prosecutor v. Mustafa*, Transcript (Private Session), 14 October 2021, pp.1237, lines 17-23, 1255-1258, 1261-1265.

20. As regards the Defence's argument concerning the purported difference between 'establishing' and 'determining' the truth, it suffices to point out that the Defence's claim that '[n]owhere do the Rules confer a duty or responsibility of the Trial Panel to establish the truth'³² is demonstrably false. Rule 62 states: 'In performing his or her functions, the Specialist Prosecutor shall contribute to the establishment of the truth by the Specialist Chambers.'³³ Regardless, whether determining, establishing, or ascertaining the truth, the Trial Panel's approach to questioning is permissible.

21. The Trial Panel's approach is also supported by the practice of other tribunals. As pointed out in the Oral Order, Rule 85(B) of the ICTY Rules of Procedure and Evidence³⁴ is identical to Rule 127(3), where both stipulate that a Judge may at any stage put any question to the witness. The ICTY Trial Chamber's Decision in *Hadžihasanović et al.*, referred to in the Oral Order,³⁵ was generally upheld by the ICTY Appeals Chamber in that case. The Appeals Chamber emphasised that pursuant to Rule 85(B), 'Judges may ask any questions that they deem necessary for the clarification of testimonies or for the discovery of the truth. They are therefore allowed to ask questions beyond the issues raised by the Parties'.³⁶

22. At the ICC, in addition to the Trial Chamber's Decision in *Lubanga* correctly cited in the Oral Order,³⁷ the Trial Chamber in *Bemba* recalled 'its power under Rule 140(2)(c) of the Rules to question witnesses as it considers appropriate. The Chamber will ensure that the rights of the accused are respected at all times and will give the

³² Appeal, KSC-BC-2020-06/IA028/F00002, para.21.

³³ The Rules also refer to the 'ascertainment of the truth', a phrase unaddressed by the Defence. Rule 143(4)(a).

³⁴ ICTY Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015, Rule 85.

³⁵ Oral Order, p.3267.

³⁶ ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-A, Judgment, 22 April 2008, para.102 (internal citation omitted).

³⁷ Oral Order, p.3267, referencing ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on judicial questioning, 18 March 2010.

parties the opportunity to explore any new issue raised by the Chamber to the extent necessary.³⁸

23. The Defence's sole reference to judicial authority in their argument on the Second Issue is to the ICTY Appeals Chamber's findings in *Blagojević*.³⁹ But—even apart from the distinguishable factual premises and procedural posture of that decision—the *Blagojević* passages they quote do not withstand the interpretation that the Defence seek to place upon them. For instance, the Defence quote a sentence that references a 'duty of the Chamber to discover the truth, but only from the evidence as presented to the Chamber,'⁴⁰ without recognising that the witnesses that the Trial Panel Judges are questioning have been presented to the Chamber by the SPO. They also do not explain how that sentence, if interpreted in the restrictive way the Defence propose, can be squared with the explicit right of the Trial Panel to adduce its own evidence in cases before the KSC.⁴¹ Indeed, another *Blagojević* passage that the Defence quote⁴² explicitly acknowledges Judges' ability to pose questions to witnesses in order to clarify 'questions of evidence', which is exactly what the Trial Panel has been doing.

24. Finally, to the extent that the Defence is implying that the Trial Panel is attempting to 'help the Prosecution discharge its burden of proof' through its questions,⁴³ such a characterisation does not comport with reality and they show no evidence of that. The procedure for Trial Panel questioning complies with KSC practice and the KSC statutory framework.

B. FOURTH ISSUE

25. The Defence fail to cite any jurisprudence supporting the claim that questions put to witnesses by Judges in the case before them to determine the truth is a violation

³⁸ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, para.7.

³⁹ Appeal, KSC-BC-2020-06/IA028/F00002, paras 2, 22, 23, 31, 32.

⁴⁰ Appeal, KSC-BC-2020-06/IA028/F00002, para.22.

⁴¹ See Article 40(6)(e); Rule 132.

⁴² Appeal, KSC-BC-2020-06/IA028/F00002, para.31.

⁴³ Appeal, KSC-BC-2020-06/IA028/F00002, paras 31-32.

of the right to fair and expeditious proceedings, or to adequate time and resources.⁴⁴ Contrary to the Defence claim that judicial questioning after the parties 'is a procedure never before seen or adopted in international criminal justice'⁴⁵, the compatibility of judicial questioning with fair trial rights is shown by the use of such procedures in other KSC trials and at other tribunals, as described above.⁴⁶ As a preliminary point, underlying the Defence's arguments is an assumption that the evidence the Judges might elicit will always be harmful to the Defence case, but there is no reason to believe that is so. As neutral fact-finders and professionals, the Judges' questions might also go to issues that bolster the Defence case.⁴⁷

26. The Trial Panel has broad powers to ensure a fair and expeditious trial under Article 40.⁴⁸ Indeed, judicial questioning may well expedite trial, in allowing Judges to decide on matters of concern to them at an earlier stage in the proceedings.⁴⁹ The Defence's claim that Judges' questions that elicit new evidence will unduly consume additional courtroom time⁵⁰ fails to recognise that time the Trial Panel spends asking questions will contribute to determining the facts in the case, which is the central purpose of this trial.

27. The Defence's concerns for the 'repeated objections' judicial questions 'will undoubtedly prompt',⁵¹ are, firstly, within the ability of the Defence to limit. Moreover, once the issue of the propriety of judicial questioning is ruled on through

⁴⁴ Appeal, KSC-BC-2020-06/IA028/F00002, paras 36-45.

⁴⁵ Appeal, KSC-BC-2020-06/IA028/F00002, para.10.

⁴⁶ See above, paras 18-19, 21-23.

⁴⁷ See ICTY, *Prosecutor v. Blagojević et al.*, IT-02-60-AR73, IT-02-60-AR73.2, IT-02-60-AR73.3, Decision, 8 April 2003, para.23 ('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.').

⁴⁸ Decision on Thaçi's and Selimi's Appeals against Decision F01057 and F01058, KSC-BC-2020-06/IA025/F00007, 18 April 2023, Confidential, para.20. See also *Specialist Prosecutor v. Mustafa*, Decision on the submission and the admissibility of evidence, KSC-BC-2020-05/F00169, 25 August 2021, para.11; *Specialist Prosecutor v. Shala*, Decision on the submission and admissibility of non-oral evidence, KSC-BC-2020-05/F00461, 17 March 2023, para.9.

⁴⁹ See ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on judicial questioning, 18 March 2010, para.38.

⁵⁰ Appeal, KSC-BC-2020-06/IA028/F00002, para.37.

⁵¹ Appeal, KSC-BC-2020-06/IA028/F00002, para.37.

the determination of the instant appeal, the basis—or lack thereof—of such objections will have been clarified. There is no reason to believe that the Trial Panel will not conduct its questioning in line with the ruling of this Appeals Panel, further diminishing the basis for any objections to judicial questioning.

28. The Defence's characterisation of the Trial Panel's questions as 'unfettered and unconstrained'⁵² does not reflect reality. Rather, the Judges' questions have been limited and focused. The Defence address only two witnesses in their submissions.⁵³ The judicial questioning for these witnesses took roughly 40 and 50 minutes respectively⁵⁴ and the re-cross-examination by the Defence teams who used that opportunity took only 10 and 40 minutes respectively.⁵⁵ There is, moreover, no reason to believe these times would be shortened were the participants to question in a different order. In addition, the Defence's reference to the April 2025 date for the conclusion of the SPO case⁵⁶ and implication that judicial questioning will disrupt that, overlooks that it was the Trial Panel itself that set that date, after consulting the Parties.

29. The Defence's arguments that the Trial Panel may ask questions that 'are being drawn from anywhere in the millions of pages of disclosed documents',⁵⁷ and that the Defence must be prepared to cross-examine 'on anything buried in the millions of pages of SPO disclosure'⁵⁸ is hyperbolic and speculative. Rather, as would be expected, the examples raised by the Defence and that prompted the Oral Order that the Defence now appeals show that the Trial Panel's questions have been relevant and foreseeable.

⁵² Appeal, KSC-BC-2020-06/IA028/F00002, para.37.

⁵³ Appeal, KSC-BC-2020-06/IA028/F00002, paras 4-5, 9, 37-38, footnotes 7-8, 12, 47, 49, referring to Transcript (Private Session), 19 April 2023, pp.3232-3238, 3242-3247, and Transcript (Private Session), 17 May 2023, pp.4176-4178.

⁵⁴ Regarding W02652: Transcript (Private Session), 19 April 2023, pp.3229-3247 and Live Transcript pp.118:21-136:16. Regarding W04748: Transcript (Private Session), pp.4174-4198 and Live Transcript pp.65:4-89:1.

⁵⁵ Regarding W02652: Transcript (Private Session), 19 April 2023, pp.3247-3252 and Live Transcript pp.136:17-141:21. Regarding W04748: Transcript (Private Session), pp.4199-4206, 4212-4227 and Live Transcript pp.89:1-95:13, 101:14-115:14.

⁵⁶ Appeal, KSC-BC-2020-06/IA028/F00002, para.37.

⁵⁷ Appeal, KSC-BC-2020-06/IA028/F00002, para.23.

⁵⁸ Appeal, KSC-BC-2020-06/IA028/F00002, para.44.

The Trial Panel asked a witness about the involvement of an Accused in the evidence presented by the witness,⁵⁹ and referred to relevant documents.⁶⁰ Even if some documents have not been admitted at the time of questioning, given that the Law and Rules empower the Trial Panel to admit any evidence they deem necessary, including *proprio motu*, it may be that the Judges ask questions of witnesses concerning documents in consideration of whether to admit them, and/or in determination of the eventual weight to ascribe them.

30. The Defence further claim that it is unfair to have to 'commit to a strategy' in regards to a witness before judicial questioning and assert it is being 'lured' into doing so by the Trial Panel.⁶¹ The Defence do not have a right for their 'strategy' not to be in conflict with the evidence in the case. Moreover, as professional judges, the Trial Panel is well equipped to assess the credibility of testimony, and assign it the appropriate weight, even if the Defence choose to make adjustments in their questioning approach based on answers a witness provides to the Trial Panel.⁶²

31. The Trial Panel has given the Defence the opportunity to request additional cross-examination if new matters arise during judicial questioning.⁶³ Importantly, the Trial Panel's grant of additional questioning is discretionary, not mandated.⁶⁴ Moreover, an accused's fair trial rights must be viewed holistically.⁶⁵ In addition to the

⁵⁹ Regarding W02652: [REDACTED].

Regarding W04748: [REDACTED].

⁶⁰ Regarding W02652: [REDACTED].

Regarding W04748: [REDACTED].

⁶¹ Appeal, KSC-BC-2020-06/IA028/F00002, paras 10, 38.

⁶² The SPO further notes that there is no guarantee of uniformity of approach amongst the Defence teams to any particular witness.

⁶³ See, *inter alia*, Transcript (Private Session), 19 April 2023, pp.3247-3252; Transcript (Private Session), pp.4199-4206, 4212-4227.

⁶⁴ See ICTY, *Prosecutor v. Prlić et al.*, Decision on Motion of Milivoj Petković for New Guidelines, IT-04-74-T, 1 April 2009, para.44.

⁶⁵ ECtHR, *Alexandru-Radu Luca v. Romania*, 20837/18, Judgment, 14 June 2022, para.56. See also, *Specialist Prosecutor v. Shala*, Public Redacted Version of the Decision on the Referral of Pjetër Shala to the Constitutional Court Panel Concerning Fundamental Rights Guaranteed by Articles 30 and 31 of the Kosovo Constitution and Article 6 of the European Convention on Human Rights, KSC-CC-2022-18/F00004/RED, 22 August 2022, para.19.

ability to cross-examine the SPO witnesses, the Defence will have an opportunity to present evidence they deem useful in rebuttal at the appropriate time.

32. Although the Rules require the SPO to file ‘a summary of the facts on which each witness is expected to testify’⁶⁶ and the Trial Panel has ordered the SPO to provide additional notice concerning the topics that the SPO will question witnesses on, such submissions are not required by fair trial rights. Moreover, these summaries put the Defence on notice as to the intended evidence of an adverse party in the litigation—the SPO—but are not required for the Trial Panel, which is a neutral fact finder. As stated by an ICTR Appeals Chamber, ‘it is up to the Judges to ask any questions they deem necessary for the clarification of testimonies and for the discovery of the truth.’⁶⁷

33. Regarding the form of the Trial Panel’s questions, the Defence assert that the Trial Panel asked leading questions and present this as problematic.⁶⁸ While the example given by the Defence is an illustration of the appropriate use of a prior statement to refresh a witness’s memory,⁶⁹ Judges are not limited to only asking non-leading questions.⁷⁰ At the ICC, the Trial Chamber in *Lubanga* held that ‘it is for the judges to decide whether, when they intervene, it is appropriate to use leading questions, and addressing the defence submission that the Bench must ensure that its questions cannot be perceived as revealing a preliminary view of the court, the appropriate manner of questioning will always depend on the circumstances, which is quintessentially a matter for judicial determination’.⁷¹ The Trial Chamber further held that ‘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 the form of the questions

⁶⁶ Rule 95(4)(b)(iv).

⁶⁷ ICTR, *Prosecutor v. Rutaganda*, Appeals Judgement, ICTR-96-3-A, 26 May 2003, para.111.

⁶⁸ Appeal, KSC-BC-2020-06/IA028/F00002, paras 4-5, 9, 39, 45.

⁶⁹ Appeal, KSC-BC-2020-06/IA028/F00002, para.5; Transcript (Private Session), 19 April 2023, pp.3232-3238. This is in line with paragraph 120 of the Order on the Conduct of Proceedings, KSC-BC-2020-06/F01226/A01. Whether or not such prior statement is admitted in evidence is irrelevant.

⁷⁰ ICTY, *Prosecutor v. Krajišnik*, IT-00-39-T, Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters, 24 April 2006, Annex, para.16(c): ‘The constraints on questioning a witness which are place upon the party calling the witness shall not apply to the judges.’

⁷¹ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on judicial questioning, 18 March 2010, para.43.

that judges are entitled to ask, and such a limitation would involve a serious interference with the independence of the judiciary.’⁷²

34. Nevertheless, it remains available to the Defence, where they deem it necessary, to seek additional time to prepare to re-cross-examine a witness on the basis that they could not have foreseen the matters addressed by the Trial Panel.⁷³

35. As set out above, the procedure of judicial questioning in place in the underlying case – including the sequence, subject matter, form and use of documents – is compatible with fair trial rights and in line with previous trials at the KSC, including one that resulted in a judgment upheld by an Appeals Panel, as well as trials at other courts.⁷⁴

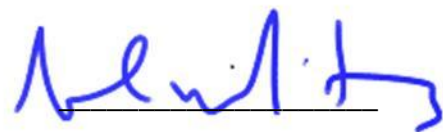
V. CLASSIFICATION

36. This filing is filed as confidential pursuant to Rule 82(4).⁷⁵ A public redacted version will be submitted.

VI. CONCLUSION AND RELIEF REQUESTED

37. The Accused fail to demonstrate error in the Oral Order. For the foregoing reasons, the SPO respectfully requests that the Appeals Panel dismiss the Appeal.

Word count: 4,600



Alex Whiting

Acting Specialist Prosecutor

Monday, 12 June 2023

At The Hague, the Netherlands.

⁷² ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on judicial questioning, 18 March 2010, para.46.

⁷³ [REDACTED].

⁷⁴ See above, paras 18-19, 21-23.

⁷⁵ The Appeal was filed as confidential.