

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: Counsel for Kadri Veseli

Date: 12 June 2023

Language: English

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Public Redacted Version of Corrected Version of Veseli Defence Response to Thaçi, Selimi and Krasniqi Defence Appeal Against Oral Order on Trial Panel Questioning

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I. INTRODUCTION

1. In accordance with Rules 76 and 170 of the Rules,¹ the Defence for Mr Kadri Veseli (“Defence”) hereby files this response to the *Thaçi, Selimi and Krasniqi* appeal against the Oral Order on Trial Panel questioning (“Response”).²
2. The Defence does not join the appeal filed by the Co-Accused because Mr Veseli has yet to suffer actual prejudice from the answers given to the judicial questions asked of witnesses.³ The Defence nonetheless acknowledges the importance of the concerns raised therein – particularly those relating to the Panel’s involvement in the “prosecutorial investigation of the case.”⁴
3. This Response, therefore, seeks to draw the Panel’s attention to the ever-present risk that prejudice is *likely* to arise if the Judges continue to pose questions in respect of issues not borne out during the course of the Parties’ evidentiary presentations.
4. The submissions contained herein seek to put the Panel on notice of the risk posed to the rights of the Accused and the integrity of these proceedings that is likely to result from the manner in which judicial questioning is being conducted in this case.

II. SUBMISSIONS

A. Legal Basis

5. Preliminarily, the Defence avers that this Response is admissible. Whereas Rule 170 of the Rules dictates that “[t]he Respondent may file a response within ten

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

² IA028/F00002, *Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning*, 30 May 2023, confidential.

³ See, Transcript, 20 April 2023, pp. 3263-3269.

⁴ IA028/F00002, paras 22-23.

(10) days of the appeal”, the term “Respondent” is not defined, nor is it limited exclusively to the Party directly opposed to the Defence – *i.e.*, the Prosecution. Moreover, nothing in the Specialist Chambers’ Legal Framework or jurisprudence precludes the Defence from responding to an appeal filed by the other Co-Accused.

6. Furthermore, the Defence has differentiated its position from that expressed in the appeal,⁵ and seeks to further detail its stance on the issue raised by the Co-Accused in the paragraphs below.

B. The Nature and Extent of Judicial Questioning

7. The Defence acknowledges the Panel’s unique power to ask of witnesses questions it deems appropriate. This is expressly provided for in Rules,⁶ and is reflected in the Order on the Conduct of Proceedings which states that judicial questioning may raise “entirely new matters” that were not introduced or otherwise left unaddressed during direct and cross-examination by the Parties.⁷ The reason for this is due, in part, to the fact that these proceedings are conducted in the absence of lay persons, with professional Judges acting both as the arbiters *and* as the triers of fact.
8. None of this, of course, diminishes the inherently adversarial principles upon which the Specialist Chambers was founded, and pursuant to which it is entrusted to function. Indeed, the right to have all evidence produced in the presence of the Accused with a view to adversarial argument before an

⁵ See paragraph 2 above.

⁶ Rule 127(3) of the Rules states, *inter alia*, that “[a] Judge may at any stage put any question to the witness.”

⁷ F01226/A01, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023, public, para. 112 which states that “[w]here questions put to a witness by the Trial Panel after cross-examination and re-direct examination raise entirely new matters, any Party may orally apply for leave to further examine the witness on those new matters.”

independent and impartial adjudicator resides at the forefront of those governing principles and merits particular attention.

9. It follows that whilst the Judges of the Specialist Chambers are entitled to actively partake in the instant proceedings, they are in any event enjoined to remain neutral during the elicitation of evidence. It is entirely inapposite for a Judge to descend into the arena and comport themselves as if they were an advocate when, as a matter of law, their role is to consider the evidence as presented – intervening only to clarify information and eradicate inconsistencies.
10. Despite these considerations, the Defence notes that on at least three occasions, Judges on the Trial Panel have asked questions of witnesses that went well beyond clarifying or eradicating inconsistencies and delved, rather, into substantive information left unaddressed by the Parties' presentation of evidence. The Defence submits that the three examples reflected below are illustrative of the looming risk that prejudice is likely to arise if judicial questioning of this nature continues unabated.
 - i. *Questioning by Judge Barthe on 19 April 2023*
11. On 19 April 2023, Judge Barthe embarked on a wholly open-ended inquiry into the acts and conduct of Mr Veseli despite the fact that he had not featured in any capacity whatsoever in W02652's evidence:

JUDGE BARTHE: This is my last question or last questions. Do you have any information about the other two accused, Mr. Veseli or Mr. Selimi? Do you know, for example, whether and if so what functions they had during the war, that is, in 1998 and 1999, and maybe you also know if they or whether they were members or also members of the KLA General Staff?

MR. EMMERSON: I'm sorry, I do apologise for interrupting when one of the Bench is asking a question. But if the witness is going to be asked a general open-ended question such as that, then some foundation for the knowledge needs to be properly laid.

[Trial Panel confers]

JUDGE BARTHE: So I'll start with the first question. Witness, do you know or do you have information about the other two accused, starting with Mr. Veseli? And my question was, do you know whether Mr. Veseli was also a member of the KLA General Staff?

A. As far as I know, all the commanders called themselves members of the staff.

JUDGE BARTHE: And was Mr. Veseli, to your knowledge, a commander?

A. I don't know. I have no knowledge of that.⁸

12. Although W02652's responses to Judge Barthe's questions did not, in the event, result in prejudice to Mr Veseli, the fact remains that the questions were not intended to clarify the witness' testimony. Instead, they sought to illicit new information which had an inordinately high possibility of damaging Mr Veseli's position, with no apparent concern for notice to the Accused or whether the appropriate foundation for those questions had been laid.

ii. Judge Mettraux's Questioning on 19 April 2023

13. Following Judge Barthe's inquiry set out above, Judge Mettraux then asked W02652 about a document known as Communiqué, or Notice, No. 4 of the KLA Military Police Directorate. At the time of questioning, the authenticity of this item had already been challenged by the Defence,⁹ and a ruling on its admissibility had yet to be provided.¹⁰

JUDGE METTRAUX: And am I right to understand that Mr. Selmon Binici and Mr. Ramiz Hoxha are the two individuals who you said were found by the side of the road with a note on their bodies about their execution? Are they the same persons?

A. Yes.

⁸ Transcript, 19 April 2023, p. 3236, line 23 – p. 3237, line 17.

⁹ F01387, Annex 1 to Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table, 21 March 2023, confidential, see objections to Exhibit List Item No. 53, ERN 043862-043862, pp. 164-168, see also, Nos 53A and 53B.

¹⁰ See generally, F01409, *Decision on Specialist Prosecutor's Bar Table Motion*, 31 March 2023, confidential; F01596/CONF/RED, *Confidential Redacted Version of Second Decision on Specialist Prosecutor's Bar Table Motion*, 9 June 2023, confidential.

Q. And were you aware that the KLA, through the military police directorate, has taken responsibility for the killing?

MR. EMMERSON: I'm so sorry. Before the witness answers that question, obviously, we haven't been, any of us, given notice that this exhibit was going to be raised, but it's the subject of a judicial determination in Kosovo that it was not issued by the KLA. So it might be helpful in the future if new exhibits were introduced, we all had some notice about it.

MR. PACE: Your Honour, if I can just mention, it was on my presentation queue.

JUDGE METTRAUX: Well, I was about to say it was on the presentation queue, so you had notice of the relevance of this document. We take your point about the admissibility, Mr. Emmerson. It is, indeed, part of an offer that's been made on the bar table from the Prosecution, so we're not discussing admission today. But can you answer my question, sir? **Do you know that, at least according to this document, which you said you had read, that the KLA, through this document, suggests the military police directorate took responsibility for the killing of Mr. Binici and Hoxha?**

A. Yes.¹¹

14. In this instance, Mr Veseli *would* have been prejudiced but for Defence Counsel's objection that domestic proceedings found the Communiqué not to have derived from the KLA.¹² This, in turn, negated any damage Mr Veseli might have sustained from the so-called Communiqué which notably misrefers to the alleged KLA "intelligence service" as the source of the information regarding persons named therein.¹³

¹¹ Transcript, 19 April 2023, p. 3245, line 8 – p. 3246, line 8.

¹² Transcript, 19 April 2023, p. 3245, lines 15-20 referring to SPOE00067951-SPOE00067992-ET and DKV0129-0135.

¹³ See, 043862-043862. Note that the translation of this document (043862-043862-ET Revised 1) read to the witness by Judge Mettreux mistranslates the words "Shërbimit informativ" into English as "intelligence service," whereas one of the versions tendered by the SPO properly translates the words as "information service." As a result, Judge Mettreux inadvertently connected the "intelligence service" to this document on the record, for the first time, even though the document does not mention the intelligence service at all. Compare in particular, 043862-043862 to P00090.3; P00090.3_ET and 043862-043862-ET Revised 1.

iii. Questioning by Judge Barthe on 22 May 2023

15. On 22 May 2023, Judge Barthe asked the following questions of W03165 even though Mr Veseli's name had not been mentioned during the presentation of evidence – neither by the Parties, nor the witness:

JUDGE BARTHE: Thank you. My last question: **Did you try to speak with any of the four accused about the death of your relative, of your [REDACTED]?**

A. Can you please repeat the question?

JUDGE BARTHE: Sure. My question was: Did you try to speak with any of the four accused in this case about the death of your [REDACTED]?

A. No, I couldn't meet them or talk to them.

JUDGE BARTHE: Did you try to make an appointment?

A. Yes, I did try. I asked for them in the headquarters, but they said, "The commander is not here." So I did go to the headquarters, but nobody would face me there.

JUDGE BARTHE: **Just to be clear on that. I mean, or I meant, the four accused here in this courtroom, or three in this courtroom and one on Zoom.**

A. No, no, not with these ones. I apologise.

JUDGE BARTHE: Thank you.¹⁴

16. As with Judge Barthe's earlier line of questioning, the questions asked did not seek to clarify a matter in the witness's evidence, or even in his prior statements. They sought to unearth fresh, incriminating, evidence which was not reflected in any of the witness' accounts to date.
17. It is against the backdrop of these types of judicial questions that the omnipresent risk of prejudice *possibly* arising is founded.
18. The core of the Defence's argument is essentially one of fairness. The Panel is obviously entitled to pose questions as it sees fit. The issue that lingers,

¹⁴ Transcript, 22 May 2023, p. 4463, lines 1-17.

however, is the nature and extent of those questions and the degree to which the Accused suffers prejudice, if any, as a result.

19. Whereas the Defence echoes the Thaçi, Selimi and Krasniqi appeal insofar as they argue that the Panel should not concern itself with the “prosecutorial investigation of the case”, it respectfully disagrees with the formulation of their request to impose criteria on judicial questioning in the manner suggested.¹⁵
20. Instead, the Defence submits that the Panel is entitled to ask questions however it sees fit but *must* be necessarily alive to the fact that certain formulations of questions – for example, those which seek to elicit new information about the acts and conduct of the Accused – carry such a high probability of evoking a prejudicial answer that they cannot reasonably be put to a witness by a fair and impartial finder of fact, particularly in the absence of any circumstances that could constitute fair notice. Engaging in such lines of questioning will inevitably result in the arbiter taking their place as a litigant and advancing one side’s position at the expense of another.
21. While the criteria set out by the Thaci, Selimi and Krasniqi Defence teams are a useful guide, the Defence respectfully submits that they are neither exhaustive nor absolute. Instead, the bounds of judicial questioning must be set where a reasonable mind could conclude that there is a high probability that a question will result in unfairness to the Accused.
22. In the event that Mr Veseli suffers actual prejudice as a result of such questions in the future, the Defence reserves the right make the requisite objections – either orally or via written submissions.

¹⁵ IA028/F00002, para. 46.

III. CONCLUSION

23. In light of the foregoing, the Defence requests that the Appeals Panel take judicial notice of the clear risks that arise from questioning witnesses on issues falling beyond the purview of information elicited during the presentation of evidence by the Parties.

Word Count: 2,268



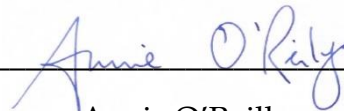
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