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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Thaçi, Selimi and Krasniqi Defence Reply to 'Prosecution Response to Thaçi, Selimi and Krasniqi Defence appeal regarding Trial Panel questioning (IA028-F00002)'

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I. SUBMISSIONS

A. SECOND ISSUE

1. At the heart of this appeal lies a fundamental question: does the legislative architecture of the Specialist Chambers allow a Judge to go beyond the SPO's pleaded allegations and to engage in his own prosecutorial investigation of the accused under the premise that he is allowed to ask any question while "searching for the truth?" The Appellants submit that this cannot be right.

2. The SPO attempts to assert an active duty on the part of the Trial Panel to "establish" the truth, on the basis that Rule 62 provides that "the Specialist Prosecutor shall contribute to the establishment of the truth by the Specialist Chambers".[1] No reasonable reading of this Rule could support an entirely unconstrained right of the Trial Panel to lead and elicit evidence of new allegations, in a manner incompatible with the rights of the accused. The ICTY Appeals Chamber's recognition of a "duty of the Chamber to discover the truth, **but only from the evidence as presented to the Chamber**" was not interpreted restrictively, nor is there any meaningful procedural distinction to be drawn between *Blagojević* and the present case.[2] Tellingly, the SPO does not even attempt to address the ICTY Appeals Chamber's more specific admonition, that it is **not** the duty of the Trial Judges "to engage in the prosecutorial investigation of the case".[3] Of course, this is precisely what the Trial Panel in the present case is doing.

[1] KSC-BC-2020-06/IA028/F00003, Prosecution Response to Thaçi, Selimi and Krasniqi Defence appeal regarding Trial Panel questioning (IA028-F00002), 9 June 2023 ("Response"), para. 20.
[2] Response, para. 23.
[3] KSC-BC-2020-06/IA028/F00002, Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning, 30 May 2023, ("Appeal"), para. 22, citing 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, paras. 21-22 (emphasis added).

3. The SPO is correct that the *Order on the Conduct of the Proceedings*[4] provides that, where Trial Panel questions "raise entirely new matters, any Party may orally apply for leave to further examine the witness on those new matters," and that the Defence for Mr Thaçi, Mr Selimi and Mr Krasniqi ("Defence") did not ask for a modification of this language.[5] The Defence was entitled to assume that "new matters" would be matters that fell (i) within the charges, and (ii) within the list of topics for which notice was given through the SPO Witness Summaries. Had the Conduct Order said "where Trial Panel questions seek to elicit new allegations falling outside the charges, concerning the acts and conduct of the accused, through leading questions, on the basis of documents not admitted into evidence and about which the Defence has no notice", Defence objections would have been immediate and vehement.

4. The SPO then paints a misleading picture of the Court's prior practice, asserting that "in both the *Mustafa* and *Gucati & Haradinaj* trials, the Trial Panel similarly asked questions after cross-examination" and "used documents which were not part of the list of exhibits those witnesses would address".[6] After presumably trawling the entire trial record of both cases, the SPO points to three examples of Judges' questions being asked after cross-examination and re-examination. Importantly, these were clarifying questions that did not seek to introduce new allegations concerning the acts and conduct of the accused.[7] The SPO then points to one example of the same Trial Panel overruling a Defence objection to Judge Barthe questioning a witness using a document for which the Defence had no notice:[8]

> JUDGE BARTHE: Thank you. Could I ask Madam Court Officer to put for us on the screen page 083894.

[4] KSC-BC-2020-06/F01226/A01, Annex 1-Order on the Conduct of Proceedings, 25 January 2023 ("Conduct Order"), para. 112.
[5] Response, para. 16.
[6] Response, para. 19.
[7] Response, fn. 39.
[8] KSC-BC-2020-07, Transcript of Hearing, 26 October 2021, pp. 1479-1480.

> MR. REES: Your Honour, can I ask if this is in the list of exhibits that had been indicated that this witness would address?
> PRESIDING JUDGE SMITH: It is not in the list. No, it is not.
> MR. REES: Well, I do understand, of course, that the Trial Panel is entitled to, if I just get the words right in the rules, invite the submission of additional evidence not produced by the parties where it considers it necessary for the determination of the truth. That's Rule 132.
> PRESIDING JUDGE SMITH: Yes.
> MR. REES: That is, of course, after hearing from the parties. And we've had no notice, of course, in relation to this.
> [Trial Panel confers]
> PRESIDING JUDGE SMITH: We will go ahead with Judge Barthe's questions. We will reserve some time for you to ask any questions about that afterwards.

5. The fact that the *Gucati* Defence did not seek certification to appeal does not undermine the arguments raised in the present appeal. The impugned procedure, which appears to have been as exceptional in prior cases as it is routine in the present, is erroneous in both.

6. References to rules of other tribunals permitting Judges to "at any stage put any question to the witness" or the ICTY Appeals Chamber permitting Trial Chamber questions which go "beyond the issues raised by the Parties",[9] do not assist. It is not disputed that Judges' questions which go beyond the issues raised in chief and cross, but which fall within the charges and the issues on notice to the accused, can be asked in a manner which does not infringe on the rights of the accused. The present appeal is about Judges' questions which go beyond the issues addressed by the parties in their examinations, and which seek to elicit new allegations about the acts and conduct of the accused, on the basis of documents not admitted, and for which the accused **have no notice**. The procedure in the present case finds no parallel in the *Hadžihasanović* or *Lubanga* examples cited.[10]

[9] Response, paras. 21-22.
[10] Response, paras. 21-22.

7. The Appeal also falls squarely within the certified issues. The Trial Panel certified: "[w]hether the procedure for Trial Panel questioning as set out in the Impugned Decision is inconsistent with the statutory framework of the KSC".[11] The statutory framework includes Rules 132 and 137. The SPO is correct that the Trial Panel denied certification of the Third Issue on the basis that "it did not invoke Rules 132 and 137 as a legal basis for its power to question witnesses".[12] The Appeal is properly directed at whether the framework as a whole, which necessarily includes Rules 132 and 137, permits unconstrained judicial questions of the kind posed by the Trial Panel, or whether it demonstrates an intention of the drafters to limit the calling of evidence by the Trial Panel until after the SPO and Defence case. The dismissal of the more specific ground of appeal cannot preclude a discussion of two central Rules, particularly given the broad framing of the Second Issue.

B. FOURTH ISSUE

8. There is a contradiction at the centre of the SPO Response. The Defence raised its concern that, rather than limiting its preparation to topics in the SPO Witness Summaries, it will now need to be prepared to cross-examine on any allegation contained anywhere in the disclosed material. This concern is characterised as being "hyperbolic and speculative".[13] The SPO dismisses any fair trial concerns on the basis that the Trial Panel's questions thus far have been "relevant and foreseeable", being "about the involvement of the Accused in the evidence presented by the witness".[14]

9. The Judges' questions sought to elicit new evidence on allegations that fell outside the SPO Witness Summaries. They were not, therefore, foreseeable. Regardless, the SPO is conceding that an alleged link with the witness' prior evidence

[11] 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").
[12] Certification Decision, paras. 32-33.
[13] Response, para. 29.
[14] Response, para. 29.

renders the questions foreseeable, and thereby mitigates prejudice. Meaning some questions are foreseeable and do not give rise to fair trial concerns, while others would. This concession undermines the SPO position that the Trial Panel is entitled to ask any question, on any topic, at any time, whether foreseeable or not. As the SPO implicitly recognised, there must be limits. The Defence position remains that these limits do not extend to the Panel asking **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.**

10. Nowhere does the SPO address that the "presentation queue" is released only 24 hours in advance of the testimony.[15] Nor does the SPO explain how the Defence would be able to investigate and find material to cross-examine on allegations that feature nowhere in the Indictment, Pre-Trial Brief, or SPO Witness Summaries, on the chance that they might possibly be raised by the Trial Panel. The practical impact on Defence preparations cannot simply be ignored.

11. The SPO sees no problem with the Defence being forced to modify its approach to the evidence of an SPO witness, after cross-examination, in order to adjust to Judges' questions.[16] To be clear, the problem is that this would effectively obliterate the effectiveness of cross-examination, a central fair trial safeguard through which evidence is tested and thereby rendered capable of reliance to support findings of fact. Nor can the proposed remedy of the Defence calling rebuttal evidence mitigate the impact of the unconstrained introduction of new allegations and evidence after Defence cross-examination.[17] The Defence **responds** to allegations that have been put forward by the prosecuting authority. The accused is entitled to know what these

[15] Appeal, para. 43.
[16] Response, para. 29.
[17] Response, para. 31.

allegations are, and the case against him, before mounting a defence. This sequence is at the heart of the Court's structural framework. The leading of uncharged allegations from the bench, after Defence cross-examination, about which the Defence has no prior notice, and using evidence not admitted into evidence, throws this structure off balance. Not only does it render the prior notice of SPO witness evidence entirely redundant, it morphs the Trial Panel from the finder of fact, to an entity which forms part of the investigative and prosecutorial arm of the Court, which can also shape and present a case, but with no requirement of notice to the accused.

12. The SPO then points to an alleged advantage of Judges' questions, being that they "might also go to issues that bolster the Defence case."[18] The Judges are not yet privy to the Defence case, and as such are in no position to know whether this new information bolsters or contradicts a case which has not yet been presented. Regardless, a Defence case is properly limited to defending against the allegations charged in the Indictment, and for which the accused has notice. Should the Trial Panel elicit new exculpatory information about uncharged allegations this does not "bolster the Defence case". The Defence case responds to the case as charged.

13. The suggestion[19] that the Defence could stop objecting to Judges' questions, in the interests of expediency, cannot be seriously entertained. Nor would this be consistent with Counsel's professional obligations. Even where the Trial Panel is, in the future, questioning in line with an adverse Appeals Panel ruling, as the SPO speculatively suggests,[20] a continuing record of objections would reflect the specifics of the prejudice in relation to the witness on the stand, and the possibility of eventual litigation in front of a Panel of the Constitutional Court.

[18] Response, para. 25.
[19] Response, para. 27.
[20] Response, para. 27.

[Word count: 1,938 words]

Respectfully submitted on 16 June 2023,

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