

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

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

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

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**Public Redacted Version of Thaçi, Selimi and Krasniqi Defence Reply to ‘Victims’
Counsel’s Response to the “Thaçi, Selimi and Krasniqi Defence Appeal against
Oral Order on Trial Panel Questioning”**

Specialist Prosecutor’s Office
Alex Whiting

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Victims
Simon Laws

Counsel for Rexhep Selimi
Geoffrey Roberts

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. SUBMISSIONS

A. INTRODUCTION

1. The Victims' Counsel response¹ demonstrates that this appeal will set expectations of "truth" for victims at the Kosovo Specialist Chambers going forward: is a Trial Panel adjudicating the responsibility of the specific accused in a case, or does the Trial Panel have a duty to go further by solving unsolved crimes? The Appellants submit that victim expectations should not be falsely raised. A Trial Panel's duty is to establish the truth about whether the Prosecution has proven beyond reasonable doubt that the Accused are guilty of the crimes charged.

B. SECOND ISSUE

2. Victims' Counsel asserts a "right of victims to the truth", from which he attempts to impose on the Trial Panel a *prosecutorial investigative duty* to determine "what happened" to victims and to identify "those responsible."² In so doing, Victims' Counsel misstates the holding of the European Court of Human Rights in *El Masri*,³ which held that *prosecuting authorities* have such duties to victims, without imposing such a duty on *courts*. The Defence for Mr Thaçi, Mr Selimi and Mr Krasniqi ("Defence") invites the Appeals Panel to clarify that victims and their families should have no expectation that the Trial Panel will be solving crimes or searching for missing persons, and that the Trial Panel has no duty to investigate beyond the allegations against these four Accused.

¹ KSC-BC-2020-06/IA028/F00005, Victims' Counsel's Response to the "Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning", 9 June 2023 ("Response").

² Response, paras. 2, 25-30.

³ Response para. 29, citing: ECtHR, *El Masri v The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Grand Chamber Judgement, 13 December 2012, para. 192.

3. Victims' Counsel concedes that the Judges' responsibility to determine the truth is not independently provided for in the Rules or the Law.⁴ The functions and powers of the Trial Panel are set out in Article 40(6)(a)-(h) of the KSC Law. The drafters did not include a duty to determine the truth. Similarly, Article 22 governs the rights of victims, and provides that victims' rights "in the criminal proceedings before the Specialist Chambers are notification, acknowledgement and reparation." The drafters did not include a right to truth.

4. Regardless, Victims' Counsel submits that it is "the judges' responsibility to determine the truth" which justifies its power to question witnesses in a manner which is "unconstrained by artificial limits", given that this plays an important role in "establishing the truth".⁵ By suggesting otherwise, the Defence is accused of having a "misunderstanding of the conceptual underpinning" of the KSC.⁶

5. In the trial against Mr Thaçi *et al.*, the Trial Panel is required to adjudicate, on the basis of admissible evidence, whether the SPO has met its burden of establishing beyond reasonable doubt, each of the elements of the crimes charged. Until this point, the four accused are presumed to be innocent. The "truth" in this context, and where referenced in the Rules,⁷ refers to the truth of the charges that the SPO included in the indictment, as part of its statutory role of investigating and prosecuting the case.⁸

6. In this context, the Trial Panel does not have an independent duty to search and ascertain the truth of what happened to each of the victims linked to this case, or their family members. The first witness, W04474, was open in [REDACTED] motivation for

⁴ Response, para. 26; Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law"); KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").

⁵ Response, paras. 26, 29.

⁶ Response, para. 35.

⁷ Rules 127(3), 132, and 143(4)(a) of the Rules.

⁸ Article 35(1) of the KSC Law.

testifying. When asked if [REDACTED], [REDACTED] responded [REDACTED],⁹ citing [REDACTED].¹⁰ Later, [REDACTED] repeated [REDACTED]¹¹

7. Should the Trial Panel determine that the SPO has failed to establish that any of the accused are implicated in [REDACTED], the Judges do not have an independent duty to search for the truth of what happened to [REDACTED]. The “truth” is constrained by the exercise at hand, being a criminal trial. As articulated by Judge Smith: “[t]his trial is about whether or not the four accused here did something wrong and whether they were part of a structure. That's what this trial is about.”¹²

8. Victims’ Counsel struggles in his attempt to distinguish the ICTY’s ruling in *Blagojević* that a trial court should not assume the prosecutorial investigative function, arguing that because *Blagojević* only concerned “pre-trial investigative work,” the holding has no applicability here.¹³ This is a distinction without a difference. Nothing in *Blagojević* could reasonably be interpreted as restricting a trial court from engaging in the prosecutorial investigative function only in the pre-trial phase, but allowing a trial court to do so at trial.

9. No one associated with these proceedings should be misleading victims into thinking that the outcome of this trial will involve finding out what happened to them or their family members. Rather, international criminal trials must be understood as an exercise in the impartial determination of the truth of the charges against the accused, in full accordance with the accused’s rights. There is no statutory basis for the Trial Panel to act in an investigative capacity, and deliver the “truth” to victims.

⁹ KSC-BC-2020-06, Transcript of Hearing (W04474 Testimony), 11 April 2023, p. 2449.

¹⁰ *Ibid.*, p. 2451.

¹¹ *Ibid.*, p. 2514.

¹² KSC-BC-2020-06, Transcript of Hearing (W04748 Testimony), 12 May 2023, p. 3745.

¹³ Response, para. 34.

Nor can unfettered and unconstrained judicial questions be justified on this basis, as the Victims' Counsel has attempted.¹⁴

10. Turning to the terminology around the admission of documents, Victims' Counsel claims confusion where none exists. The Appeal identified that:

During their questioning, the parties can seek to admit documents used with the witnesses into the record of the case. Some documents are admitted and form part of the record. For other documents, requests for admission have been denied, and these documents do not form part of the record.¹⁵

11. There can be no doubt that the Defence is objecting to the use of documents during Judges' questions which have not been admitted into evidence. Inventing a "need to clarify the terminology used by the Defence" on the basis of an alleged US-centric approach to evidential nomenclature¹⁶ is disingenuous. No confusion exists.

12. In addition, the Defence use of the "evidence" and "record" is consistent with how those terms are used at the KSC. The Trial Panel in *Shala* held:¹⁷

The Panel will only consider for its deliberations on the guilt or innocence of the Accused evidence that has **properly entered the evidentiary record** in accordance with this procedure... [T]he Panel will issue decisions following the submission of (each batch of) non-oral evidence, placing the evidence properly **on the record**. Evidence will be placed **on the record** when it is either: (a) admitted, where the Panel is compelled to rule on the admissibility of the evidence prior to its deliberations on the judgment, or decides to do so proprio motu, as will be further explained below; or (b) considered to be available to the Panel for the purpose of its deliberations [...]

¹⁴ Response, paras. 26, 29.

¹⁵ KSC-BC-2020-06/IA028/F00002, Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning, 30 May 2023, ("Appeal"), para. 3.

¹⁶ Response, para. 16.

¹⁷ KSC-BC-2020-04/F00461, Decision on the submission and admissibility of non-oral evidence, 17 March 2023, paras. 16-17.

13. Victims' Counsel is also counsel in the *Shala* case. He is therefore aware of what "evidence properly on the record" means, and his arguments that "this is not the way in which the term is used within the KSC legal framework" are surprising.¹⁸

14. Victims' Counsel then goes on to claim an unfettered right of Judges to question witnesses on material not yet admitted into evidence, on the basis that this is anticipated by the Conduct Order,¹⁹ and that "the same applies to Parties and Participants who, when examining witnesses, also rely on exhibits not yet admitted into evidence".²⁰ This is the entire point. The Conduct Order regulates how parties either seek to admit evidence through the Bar Table, or through the evidence of witnesses. In both cases, the Defence **has notice of this intention in advance**.

15. According to the Conduct Order, where a Party or Participant seeks to admit a document through a witness, it must "demonstrate the relevance and probative value of an exhibit, and the connection of an exhibit with the testimony of the witness through whom the Party seeks to tender the exhibit. Parties and participants should only seek to tender exhibits through a witness that are clearly relevant to that witness's evidence."²¹ Where a party cannot make this link, the Trial Panel has refused to allow the witness to be questioned on the document.²² No such safeguards or restrictions are being applied in relation to the use of documents during Judges' questions.

16. The Trial Panel was explicit; it "is **not limited** to questioning witnesses on the basis of material listed in the presentation queue of the calling party",²³ and as such can present **any document** to **any witness**, whether admitted or not, coming from

¹⁸ Response, para. 16.

¹⁹ KSC-BC-2020-06/F01226/A01, Annex 1-Order on the Conduct of Proceedings, 25 January 2023 ("Conduct Order").

²⁰ Response, para. 18.

²¹ Conduct Order, para. 49.

²² See, e.g., KSC-BC-2020-06, Transcript of Hearing (W02652 Testimony), 19 April 2023, pp. 3247-3248.

²³ KSC-BC-2020-06, Transcript of Hearing, 5 April 2023, p. 2436 (emphasis added).

anywhere in the disclosure, with no requirement to justify or explain any link between the document and the witness, with no prior notice to the Defence, and no obligation to demonstrate that the document meets the criteria for admission. Of course, at this stage, the Trial Panel could not admit the document even if it wanted to, since Rule 132 only permits the calling of evidence after hearing the parties. As such, all safeguards in place through an assessment of relevance, probity and reliability of these documents, fall away. The document is simply “used” by the Judge, circumventing the careful limits proscribed in the Conduct Order for the use and admission of documents.

C. FOURTH ISSUE

17. According to the Victims’ Counsel, “[q]uestions posed by professional judges cannot be seen as extending the proceedings: they are an integral part of the proceedings within the framework of the KSC”, which has “nothing to do with any illegitimate encroachment on the fair trial rights”.²⁴ An entirely unnuanced position.

18. Taking this position further; what if the Judges’ asked questions about incidents unrelated to the charges? About allegations that the Trial Panel had learnt about independently from the case record, and wanted to learn more about? About incidents that fell outside the temporal jurisdiction of the case, that were not themselves charged? There must be limits. Questions, even when asked by professional judges, will indeed “extend” the proceedings when they go beyond the case as charged. The Victims’ Counsel’s blanket approach is the equivalent of saying that the Judges can do no wrong, because they are the Judges.

²⁴ Response, paras. 49-50.

19. In reality, where Judges' questions take SPO witness testimony beyond anything for which the accused had notice, Defence Counsel are then flying blind, with no time to investigate, prepare, or **respond** to allegations. The safeguards put in place by the process of charging, briefing, circulating summaries, and listing documents for use with SPO witnesses are obliterated by the sheer unpredictability of what will happen after Defence Counsel sits down. This process makes the case impossible to defend. The suggestion by Victims' Counsel that this has nothing to do with fair trial rights is unhelpful, and wrong.

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Respectfully submitted on 19 June 2023,



Gregory W. Kehoe

Counsel for Hashim Thaçi



GEOFFREY ROBERTS

Lead Counsel for Rexhep Selimi



ERIC TULLY

Co-counsel for Rexhep Selimi



RUDINA JASINI
Co-counsel for Rexhep Selimi



DAVID YOUNG
Co-counsel for Rexhep Selimi



Venkateswari Alagendra
Lead Counsel for Jakup Krasniqi



Aidan Ellis
Co-Counsel for Jakup Krasniqi



Victor Băieșu
Co-Counsel for Jakup Krasniqi