



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-06/IA028

Before: A Panel of the Court of Appeals Chamber
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 4 July 2023

Original language: English

Classification: Public

**Public Redacted Version of Decision on Thaçi, Selimi and Krasniqi Appeal
against Oral Order on Trial Panel Questioning**

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”), is seised of an appeal filed on 30 May 2023 (“Appeal”) by Mr Hashim Thaçi (“Thaçi”), Mr Rexhep Selimi (“Selimi”), and Mr Jakup Krasniqi (“Krasniqi”) (collectively, “the Accused” or “the Defence”),² against the Trial Panel’s oral order of 20 April 2023 (“Impugned Order”).³ The Specialist Prosecutor’s Office (“SPO”)⁴ and Victims’ Counsel both responded on 9 June 2023 (“SPO Response” and “Victims Response”, respectively) that the Appeal should be dismissed.⁵ The Defence replied to the SPO and Victims’ Counsel on 16 June 2023⁶ and 19 June 2023,⁷ respectively (“Reply to SPO” and “Reply to Victims Counsel”, respectively).

¹ IA028/F00001, Decision Assigning a Court of Appeals Panel, 18 May 2023 (“Assignment Decision”).

² IA028/F00002/RED, Public Redacted Version of Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning, 2 June 2023 (confidential version filed on 30 May 2023) (“Appeal”).

³ Order on the extent of the Panel’s discretion to question a witness on prior statements or documents, Transcript, 20 April 2023, pp. 3263-3269 (“Impugned Order”).

⁴ IA028/F00003/RED, Public Redacted Version of ‘Prosecution Response to Thaçi, Selimi and Krasniqi Defence Appeal against regarding Trial Panel questioning (IA028/F00002) with public Annex 1’, KSC-BC-2020-06/IA028/F00003, dated 9 June 2023, 12 June 2023 (confidential version filed on 9 June 2023) (“SPO Response”).

⁵ IA028/F00005, Victims’ Counsel’s Response to the “Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning”, 9 June 2023 (confidential) (“Victims Response”).

⁶ IA028/F00007, Thaçi, Selimi and Krasniqi Defence Reply to ‘Prosecution Response to Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning (IA028/F00002)’, 16 June 2023 (“Reply to SPO”).

⁷ IA028/F00008, Thaçi, Selimi and Krasniqi Defence Reply to ‘Victims’ Counsel Response to “Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning”’, 19 June 2023 (confidential) (“Reply to Victims Counsel”).

I. BACKGROUND

1. On 25 January 2023, the Trial Panel issued the Order on the Conduct of Proceedings, which, *inter alia*, sets out the procedures governing the presentation of evidence and the questioning of witnesses.⁸
2. On 19 April 2023, Thaçi and Selimi raised issue regarding regard to the Trial Panel's questioning of a witness with respect to prior statements of the witness and a document not admitted into evidence during the direct and cross-examination of the witness by the Parties.⁹
3. On 20 April 2023, the Trial Panel issued the Impugned Order, dismissing the arguments raised by the Defence.¹⁰
4. On 1 May 2023, the Defence applied for leave to appeal the Impugned Order.¹¹ The SPO and Victims' Counsel responded on 5 May 2023¹² and 8 May 2023,¹³ respectively. The Defence replied to the SPO and Victims' Counsel's responses on 5 May 2023¹⁴ and 10 May 2023,¹⁵ respectively.

⁸ F01226/A01, Order on the Conduct of Proceedings, 25 January 2023 ("Order on the Conduct of Proceedings").

⁹ Transcript, 19 April 2023, pp. 3253-3260 (private session).

¹⁰ Impugned Order, pp. 3266-3269.

¹¹ F01495, Thaçi, Selimi & Krasniqi Defence Request for Certification to Appeal the Oral Order on Trial Panel Questioning, 1 May 2023 (confidential, reclassified as public on 17 May 2023) ("Defence Certification Request").

¹² F01501, Prosecution Response to Defence Certification Request F01495, 5 May 2023 (confidential, reclassified as public on 17 May 2023).

¹³ 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 (confidential, reclassified as public on 22 May 2023).

¹⁴ F01505, Thaçi, Selimi & Krasniqi Defence Reply to 'Prosecution Response to Defence Certification Request F01495', 8 May 2023.

¹⁵ F01514, Thaçi, Selimi & Krasniqi Defence Reply to Victims' Counsel's Response (F01503), 10 May 2023.

5. On 17 May 2023, the Trial Panel certified two issues for appeal, namely:¹⁶
- (a) “Whether the procedure for Trial Panel questioning as set out in the Impugned Decision is inconsistent with the statutory framework of the Specialist Chambers” (“First Certified Issue”); and
 - (b) “Whether the procedure for Trial Panel questioning set [out] in the Impugned Decision is inconsistent with the rights of the [A]ccused to fair and expeditious proceedings, and to adequate time and resources to defend themselves” (“Second Certified Issue”).
6. In the Appeal, the Defence requests the Court of Appeals Panel to reverse the Impugned Order and find that the Trial Panel cannot: (i) put questions to a witness based on documentary evidence that is not in the record of the case; or (ii) ask leading questions to a witness regarding acts or conduct of the Accused that fall outside the scope of direct or cross-examination by the Parties.¹⁷
7. On 9 June 2023, Mr Kadri Veseli (“Veseli”) responded to the Appeal (“Veseli Response”).¹⁸

¹⁶ 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”), paras 8, 31, 42, 44(a). The Trial Panel declined to certify the remainder of the issues put forth by the Accused, namely the “First” and “Third” Issues. See Certification Decision, paras 8, 22, 34.

¹⁷ Appeal, paras 35, 46.

¹⁸ IA028/F00004/COR/RED, Public Redacted Version of Corrected Version of Veseli Defence Response to Thaçi, Selimi and Krasniqi Defence Appeal against Oral Order on Trial Panel Questioning, 14 June 2023 (uncorrected confidential version filed on 9 June 2023, corrected confidential version filed on 12 June 2023) (“Veseli Response”).

8. On 12 June 2023, the SPO filed a motion requesting the Panel to strike the Veseli Response, or in the alternative for leave to reply thereto (“SPO Request”).¹⁹ Veseli responded to the SPO Request on 20 June 2023,²⁰ and the SPO replied on 23 June 2023.²¹

II. STANDARD OF REVIEW

9. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.²²

10. The Panel stresses that decisions concerning trial management issues and the conduct of proceedings are generally treated as discretionary.²³ The Trial Panel’s Impugned Order in this case regarding the permitted scope of judicial questioning of witnesses under Rule 127(3) of the Rules is a discretionary one to which the Appeals Panel must accord deference. In this regard, the Panel recalls that when challenging a discretionary decision, 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;

¹⁹ IA028/F00006, Prosecution request to strike Veseli Filing IA028/F00004 or for leave to reply, 14 June 2023 (confidential) (“SPO Request”).

²⁰ IA028/F00009, Veseli Defence Response to Prosecution Request to Strike Veseli Filing IA028/F00004COR or for Leave to Reply, 20 June 2023 (confidential) (“Veseli Response to SPO Request”).

²¹ IA028/F00010, Prosecution Reply to IA028/F00009, 23 June 2023 (confidential) (“SPO Reply”).

²² KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020 (“Gucati Appeal Decision”), paras 4-14. See also KSC-BC-2020-06, IA024/F00019, Decision on Defence Appeals against “Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant”, 27 December 2022 (“Appeal Decision on Confidential Information Framework”).

²³ Appeal Decision on Confidential Information Framework, para. 26. See also ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party’s Own Witness, 1 February 2008, para. 12; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case, 6 February 2007, paras 8, 20.

or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.²⁴

III. PRELIMINARY MATTERS

A. SCOPE OF CERTIFIED ISSUES

11. The Court of Appeals Panel recalls that the scope of its review lies strictly within the confines of the issues certified by the lower panel and that it may thus decline to consider arguments of an appellant that go beyond the issues in relation to which certification has been granted.²⁵ Nevertheless, the Panel may consider arguments even if they are outside the scope of the appeal as long as they are intrinsically linked to the issue certified for appeal.²⁶

12. The Panel first notes that the Appeal contains arguments on the Trial Panel's reliance on Rules 132 and 137 of the Rules to use evidence which lies outside of the record produced by the Parties in this case.²⁷ The Panel recalls that the Trial Panel expressly denied certification to appeal this specific issue.²⁸ The Panel therefore declines to consider these submissions and formally dismisses them.²⁹

²⁴ See e.g. *Gucati* Appeal Decision, para. 14.

²⁵ See e.g. KSC-BC-2020-04, IA004/F00008/RED, Public Redacted Version of Decision on Pjetër Shala's Appeal against Decision on Motion Challenging the Form of the Indictment, 22 February 2022 (confidential version filed on 22 February 2022), para. 10.

²⁶ KSC-BC-2020-06, IA012/F00015/RED, Public Redacted Version of Decision on Defence Appeals Against Decision on Motions Alleging Defects in the Form of the Indictment, 22 August 2022 (confidential version filed on 22 August 2022), para. 165.

²⁷ Appeal, paras 19, 26. See also Defence Certification Request, para. 13; SPO Response, para. 11.

²⁸ Certification Decision, paras 8, 23, 32-34 ("Third Issue" submitted for certification and for which certification was denied).

²⁹ The Panel recalls that the Trial Panel referred to Rules 132 and 137(1) of the Rules in the Impugned Order, not "as the legal basis for its power to question witnesses", but "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". See Certification Decision, para. 32.

13. The Panel further notes that the Defence also challenges the Trial Panel's recognition of a "duty to establish the truth" in the proceedings³⁰ and its use of leading questions with witnesses,³¹ while the Defence did not seek leave to appeal these specific issues.³² However, the Panel finds that these issues are closely connected to the Defence's challenge to the permissible scope of judicial questioning, as certified by the Trial Panel, and, as such, will consider the Defence's submissions on these issues.

B. ADMISSIBILITY OF VESELI RESPONSE

14. As a preliminary matter, the Panel will determine the admissibility of Veseli's submissions, as challenged in the SPO Request to strike the Veseli Response.

15. In this regard, the Panel first recalls that the Specialist Chambers' framework does not specifically provide for the filing of a response by a co-accused in appeal proceedings initiated by another co-accused. The Panel notes the limited jurisprudence of international tribunals on this issue, which have determined that such a response may be allowed on a case-by-case basis where the co-accused has a "specific interest in the matter", and its acceptance would be "in the interests of justice" and would not prejudice other parties.³³ However, the response must legitimately respond to the certified appeal, and cannot instead challenge the impugned decision by raising arguments on the co-accused's own behalf.³⁴

16. The Panel observes that Veseli did not request certification to appeal the Impugned Order. In his submissions, he asserts that he "does not join the Appeal filed

³⁰ Appeal, paras 20-23.

³¹ Appeal, paras 4, 45.

³² Defence Certification Request, paras 11-12, 14-20.

³³ ICTR, *Prosecutor v. Ndayambaje et al.*, ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 ("*Ndayambaje et al.* Appeal Decision on Witness List"), para. 11, citing ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007, para. 12.

³⁴ *Ndayambaje et al.* Appeal Decision on Witness List, para. 12.

by the Co-Accused” but merely seeks to “put the Panel on notice of the risk posed to the rights of the Accused and the integrity of the proceedings that is likely to result from the manner in which judicial questioning is being conducted”.³⁵

17. The SPO submits that Veseli does not respond to the Appeal, but makes claims on his own behalf and seeks relief distinct from the Appeal.³⁶ Veseli in turn argues that his submissions meet the criteria for admissibility.³⁷

18. The Panel observes that the substance of Veseli’s submissions contradicts his assertion that he “does not join the Appeal filed by the Co-Accused”. Notably, he “echoes” the arguments raised in the Appeal,³⁸ and raises arguments on his own behalf with respect to the Impugned Order when he cites to examples not raised in the Appeal that are specific to him.³⁹ The Panel finds that such arguments are inadmissible, as they do not merely respond to the Appeal, but challenge the Impugned Order by raising arguments on Veseli’s behalf with the objective of obtaining relief.⁴⁰ The Panel stresses that the proper procedural avenue to challenge the Impugned Order and to raise these arguments would have been to seek and obtain certification to appeal, which Veseli failed to do.

³⁵ Veseli Response, para. 4.

³⁶ As such, according to the SPO, the Veseli Response improperly attempts to circumvent the process for interlocutory appeals, and prejudices the SPO by depriving it of an opportunity to respond. See SPO Request, para. 3; SPO Reply, para. 2.

³⁷ Specifically, Veseli argues that: (i) his response is responsive to the Appeal as, while he “agreed with the Co-Accused’s submissions”, he disagreed with the requested relief and, as such, “does not fully support the Co-Accused’s Appeal”; (ii) he has an interest in the appeal, as it could result in a ruling that is harmful to his interests and future right to appeal; (iii) accepting his response is in the interests of justice, as the Appeal requests relief that may “curtail the Trial Panel’s ability to question witnesses”; and (iv) its acceptance does not prejudice the SPO, as the relief Veseli requests “does not stand diametrically opposed to that forwarded by the Prosecution”. See Veseli Response to SPO Request, paras 7-10.

³⁸ Compare Veseli Response, para. 10; Veseli Response to SPO Request, para. 7 with Appeal, paras 4, 31, 33, 45, 46 (on the Trial Panel’s use of leading questions regarding information not addressed by the Parties).

³⁹ Veseli Response, paras 11 (citing Transcript, 19 April 2023, pp. 3236-3237), 15 (citing Transcript, 22 May 2023, p. 4463). See also Veseli Response to SPO Request, para. 8.

⁴⁰ Veseli Response, para. 21.

19. In light of the above, the Court of Appeals Panel finds that the Veseli Response attempts to appeal the Impugned Order outside of the applicable time limitations without having requested certification. The Panel further finds that to admit the Veseli Response would open the interlocutory appeal process to abuse. Consequently, the Panel grants the SPO Request and strikes the Veseli Response in its entirety.⁴¹

C. PUBLIC FILINGS

20. The Appeals Panel notes that the Impugned Order was issued in open session and filed as public, while a number of appellate filings were filed as confidential, including the Victims Response, the SPO Request, the Reply to Victims Counsel, the Veseli Response to SPO Request and the SPO Reply.⁴² The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all non-public submissions filed before the Panel.⁴³ The Panel, therefore, orders Victims' Counsel, the SPO and Veseli to file public redacted versions of the above-mentioned appellate submissions,⁴⁴ or indicate, through a filing, whether they can be reclassified as public, within ten days of receiving notification of the present Decision.⁴⁵

⁴¹ In light of this finding, the Panel considers the SPO's alternative request to reply moot. See SPO Request, paras 1, 8.

⁴² Victims' Counsel indicates that its response was filed as confidential pursuant to Rule 82(4) of the Rules, referring to the Appeal. See Victims Response, para. 4. However, the Panel notes that a public redacted version of the Appeal was filed on 2 June 2023.

⁴³ See e.g. IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), paras 8-9. See also KSC-CA-2022-01, F00103, Decision on Gucati Application for Reclassification or Public Redacted Versions of Court of Appeals Panel Decisions, 9 January 2023, para. 2.

⁴⁴ Namely, Victims Response (IA028/F00005), SPO Request (IA028/F00006), Reply to Victims Counsel (IA028/F00008), Veseli Response to SPO Request (IA028/F00009) and SPO Reply (IA028/F00010). The Panel notes that the Certification Decision and the Assignment Decision were filed as public, and that public redacted versions of the Appeal, SPO Response and Veseli Response were also filed.

⁴⁵ The Panel notes that the SPO does not oppose the reclassification as public of the SPO Request. See SPO Request, para. 7.

IV. DISCUSSION

A. WHETHER THE PROCEDURE FOR TRIAL PANEL QUESTIONING IS INCONSISTENT WITH THE STATUTORY FRAMEWORK OF THE SPECIALIST CHAMBERS (FIRST CERTIFIED ISSUE)

1. Submissions of the Parties

21. The Defence submits that the Trial Panel's findings regarding the scope of judicial questioning of witnesses, as set out in the Impugned Order, are incompatible with the statutory framework of the Specialist Chambers.⁴⁶ In particular, the Defence submits that the Trial Panel's conclusion that it may question witnesses "at any point during the proceedings"⁴⁷ on "any evidence"⁴⁸ and "unconstrained by any considerations of subject or substance",⁴⁹ violates Rules 127(2), 132 and 137(1) of the Rules, which the Defence contends restrict the timing and substance of a Trial Panel's questioning of witnesses.⁵⁰

22. The Defence argues in this respect that Rule 127(2) of the Rules imposes a particular sequence for the presentation of evidence, limiting the Trial Panel's ability to "introduce evidence" until the conclusion of the SPO and Defence cases.⁵¹ According to the Defence, this interpretation is supported by Rule 137(1) of the Rules, which it asserts places the primary responsibility for submitting relevant evidence on the Parties,⁵² and by Rule 132 of the Rules, which explicitly requires a Trial Panel to have "heard" the parties before calling evidence.⁵³

⁴⁶ Appeal, paras 7, 11.

⁴⁷ Appeal, paras 6, 20, 33.

⁴⁸ Appeal, para. 33.

⁴⁹ Appeal, paras 6, 20.

⁵⁰ Appeal, paras 26, 33.

⁵¹ Appeal, para. 24.

⁵² Appeal, para. 25; Defence Certification Request, para. 11.

⁵³ Appeal, para. 25.

23. The Defence further submits that the Trial Panel erred in interpreting Rule 127(3) of the Rules as conferring an “absolute and unfettered discretion” to “elicit and call any evidence at any stage of the proceedings”.⁵⁴ In its view, Rule 127(3) of the Rules only contemplates “questions which seek to clarify the evidence heard” and not questions (i) eliciting “new and uncharged evidence” that is neither raised by the parties during their examination of a witness nor contained in the SPO’s witness summaries or pre-trial brief, or (ii) based on documents not admitted into evidence.⁵⁵

24. The Defence also submits that the Trial Panel erroneously asserted a “positive duty” or “responsibility to establish the truth” as a basis for its findings, which the Defence argues finds no support in the Rules.⁵⁶ In this regard, the Defence argues that the Trial Panel is “authorised to call evidence that it considers necessary for a determination of the truth”, but only based on the evidence presented to the panel and not on “incidents, events and allegations” not elicited by the parties during witness testimony.⁵⁷

25. The SPO and Victims’ Counsel respond that the Defence’s arguments should be dismissed because they lack merit.⁵⁸ In particular, the SPO asserts that the Trial Panel’s procedure for questioning witnesses, as set out in the Order on the Conduct of Proceedings,⁵⁹ is consistent with the Trial Panel’s authority under Rules 127(3) and 143(4) of the Rules, as well as the practice applied in other cases before the Specialist Chambers⁶⁰ and in international tribunals.⁶¹ In this respect, the SPO asserts that Rule

⁵⁴ Appeal, paras 33-34.

⁵⁵ Appeal, paras 31, 33, 45.

⁵⁶ Appeal, paras 20-21.

⁵⁷ Appeal, paras 21-23.

⁵⁸ SPO Response, para. 1; Victims Response, para. 3.

⁵⁹ SPO Response, para. 16.

⁶⁰ SPO Response, paras 18-19.

⁶¹ SPO Response, paras 21-22, citing ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Judgement, 22 April 2008 (“*Hadžihasanović and Kubura Appeal Judgement*”); ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2360, Decision on judicial questioning, 18 March 2010 (“*Lubanga Decision on Judicial Questioning*”).

127(3) of the Rules is not constrained by the sequence of evidence outlined in Rule 127(2) of the Rules, and that the Defence's interpretation that Rule 127(3) of the Rules is limited to clarifying questions finds no support in the Rules, legal framework or jurisprudence.⁶² Victims' Counsel adds that the Defence's argument conflates Rules 127(2) and 127(3) of the Rules, which regulate two distinct matters.⁶³

26. In response to the Defence's argument that the Trial Panel erred in its application of Rules 132 and 137 of the Rules, the SPO asserts that these Rules "do not apply to judicial inquiry of evidence already produced by a party".⁶⁴ Finally, the SPO and Victims' Counsel submit that the Defence's claim that the Rules do not "confer a duty or responsibility" on the Trial Panel to establish the truth is demonstrably false and contradicted by the Rules,⁶⁵ and they highlight that international tribunals have emphasised a trial chamber's discretionary power to question witnesses on any matter "necessary for the clarification of testimonies or for the discovery of the truth".⁶⁶

27. The Defence replies that it does not dispute the Trial Panel's authority to question witnesses beyond the issues raised by the Parties during their examination, provided that they fall within the charges in the indictment and the Accused are given notice.⁶⁷ In this respect, the Defence argues that the cases cited by the SPO in response are distinguishable and offer no support, as the Trial Panel's questions "elicit new allegations about the acts and conduct of the accused", by relying on documents not

⁶² SPO Response, para. 14.

⁶³ Victims Response, para. 24.

⁶⁴ SPO Response, para. 15.

⁶⁵ SPO Response, para. 20; Victims Response para. 26.

⁶⁶ SPO Response, paras 21-22; Victims Response, para. 32. The SPO adds that the Defence's reference to the *Blagojević et al.* Decision, which it cites as sole support for its argument, is quoted out of context and misconstrues the findings of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY"). See SPO Response, para. 23, referring to ICTY, *Prosecutor v. Blagojević et al.*, IT-02-60-AR73, Decision, 8 April 2003 ("*Blagojević et al.* Decision"). Victims' Counsel adds in this regard that the *Blagojević et al.* Decision does not support the Defence's proposition that the Trial Panel is to be a "passive recipient of evidence and cannot explore issues it regards as pertinent". See Victims Response, para. 35.

⁶⁷ Reply to SPO, para. 6.

admitted into evidence and of which it asserts the Accused had no notice.⁶⁸ The Defence further submits that it was “entitled to assume” that the reference to “new matters” in the Order on the Conduct of Proceedings referred to those falling within the charges and the list of topics identified in the SPO witness summaries.⁶⁹ Instead, the Defence argues that the Trial Panel’s finding that it may question witnesses based on any document removes the safeguards of relevance and probative value for the admission of exhibits, established in the Order on the Conduct of Proceedings.⁷⁰

2. Assessment of the Court of Appeals Panel

28. The Panel first recalls that, in the Impugned Order, the Trial Panel found that:

(i) “[T]he scope of judicial questioning is broad and is not constrained by any consideration of subject or substance”; (ii) “[u]nder Rule 127(3) [of the Rules]: ‘A Judge may at any stage put any question to the witness’”; and (iii) “the Defence has the right to reopen their examination on the basis of questions put to witnesses by the Panel” in accordance with paragraph 112 of the Order on the Conduct of Proceedings.⁷¹

29. In determining whether the procedure adopted by the Trial Panel for judicial questioning is consistent with the Specialist Chambers’ legal framework, the Panel considers that Rule 127(3) of the Rules is the starting point and provides the legal basis for the Trial Panel’s power to question witnesses.⁷² The Panel recalls that under Rule 127(3) of the Rules, “[a] Judge may at any stage put any question to the witness”.

⁶⁸ Reply to SPO, para. 6.

⁶⁹ Reply to SPO, para. 3.

⁷⁰ Reply to Victims Counsel, para. 15.

⁷¹ Certification Decision, para. 27, referring to Impugned Order, pp. 3267-3268.

⁷² While not precluding a Trial Panel from recalling a witness, the Panel notes that Rules 132 and 137(1) of the Rules in principle relate to the calling of additional witnesses not called by either of the parties, or the admission of additional evidentiary material not produced by the parties *after* the Defence has presented its own evidence, and do not apply to judicial questioning of a party’s witness, as the Defence suggests. See e.g. KSC-BC-2020-07, F00552, Decision Pursuant to Rule 132 of the Rules, 3 February 2022, para. 11.

The Panel will therefore turn to consider the permissible scope of judicial questioning under this Rule.

30. The Defence challenges the timing and substance of the Trial Panel's questions, asserting that: (i) Rule 127(2) of the Rules prevents a Trial Panel from questioning witnesses on matters not elicited during direct and cross-examination by the parties until the conclusion of the SPO and Defence cases; and (ii) judicial questioning is restricted to facts and issues elicited during witness testimony or raised in the SPO's witness summaries and pre-trial brief, and to documents admitted in the case.⁷³

31. The Panel notes that Rule 127(3) of the Rules is worded openly and gives broad discretion to a Judge in terms of the timing and the nature of the questions. With respect to timing, the Panel observes that, under this Rule, the Trial Panel may question witnesses at *any* stage and is therefore not bound by the sequence of the presentation of evidence contemplated by Rule 127(2) of the Rules.⁷⁴ In fact, each subparagraph of the Rule regulates a different subject-matter: Rule 127(2) of the Rules governs the sequence for the presentation of each party's evidence, while Rule 127(3) of the Rules regulates the sequence for the questioning of individual witnesses. Accordingly, the Panel finds unpersuasive the Defence's argument that the Trial Panel failed to consider the operation of Rule 127(2) of the Rules in the Impugned Order.⁷⁵

32. In terms of substance, the Panel notes that Rule 127(3) of the Rules, and the legal framework in general, places no limitation on the subject matter of the Trial Panel's questions to witnesses. Rule 127(3) of the Rules allows for *any* question to be asked, which does not support the Defence's argument that judicial questioning should be

⁷³ Appeal, paras 24, 31, 33, 45.

⁷⁴ In any event, the Panel notes that Rule 127(2) of the Rules also allows for a panel to change the sequence of the presentation of evidence by including the language "unless otherwise directed by the [p]anel".

⁷⁵ Contra Appeal, paras 33-34.

limited to “clarification questions”.⁷⁶ In this respect, the Panel specifically notes that a Trial Panel is not bound by Rule 143(3) of the Rules, which applies to the examination of witnesses by the parties. As correctly noted by the Trial Panel, this approach is in line with the jurisprudence of international criminal courts and tribunals,⁷⁷ recognising the broad discretionary power of a trial chamber to put to witnesses any questions deemed necessary for the clarification of their testimony or the discovery of the truth. The relevant provisions of the rules of procedure and evidence of these courts and tribunals likewise provide that judges may put any question at any time to a witness,⁷⁸ which may include facts and issues not raised by the parties, and facts beyond those described in the charges, provided that such questioning does not lead to the apprehension of bias, suffering of prejudice, or otherwise encroach upon the rights of the accused.⁷⁹ Similarly, the Panel finds that the Trial Panel is not constrained to questioning witnesses on facts and issues already examined by the parties, provided that no party suffers prejudice and that the rights of the Accused are respected, in accordance with Article 21 of the Law.⁸⁰

⁷⁶ Contra Appeal, paras 30-33.

⁷⁷ Impugned Order, p. 3267, referring to ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Decision on Defence Motion Seeking Clarification of the Trial Chamber’s Objective in its Questions Addressed to Witnesses, IT-01-47-T, 4 February 2005 (“*Hadžihasanović and Kubura* Decision on Judicial Questioning”) and *Lubanga* Decision on Judicial Questioning.

⁷⁸ ICTY Rules, Rule 85(B); ICTR Rules, Rule 85(B) (both providing that “a Judge may at any stage put any question to the witness”); ICC Rules, Rule 140(2)(c) (providing that “[t]he Trial Chamber has the right to question a witness before or after a witness is questioned by a participant”).

⁷⁹ See e.g. ICTR, *Rutaganda v. Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003 (“*Rutaganda* Appeal Judgement”), para. 111; *Lubanga* Decision on Judicial Questioning, paras 40-42.

⁸⁰ The Panel observes that the Defence’s interpretation of the *Blagojević et al.* Decision as placing a “constraint” on the subject matter of judicial questions is misplaced. Contra Appeal, paras 30-32. Notably, the question examined by the ICTY Appeals Chamber did not concern a “challenge to Judges’ questions”, as the Defence asserts, but whether the judges had engaged in a “prosecutorial investigation” of the case by reviewing materials produced by the parties in their disclosures prior to the start of trial. In rejecting the accused’s argument, the Appeals Chamber added that “[i]f Blagojević’s argument were that by allowing the judge to ask questions of the witness, the Rules allow the judge to help the Prosecution discharge its burden of proof, it would be plainly wrong”, as judicial questions posed to witnesses are intended to clarify “questions of evidence” for the court rather than one of the parties, and the answers may accordingly be to the benefit of either party. See *Blagojević et al.* Decision, paras 20-24.

33. With respect to any prejudice to the Defence, the Panel observes that the Order on the Conduct of Proceedings specifically provides the right to re-examine a witness on new matters raised during the Trial Panel's questioning of a witness, as a safeguard against any prejudice to the Parties.⁸¹ In this regard, the Panel notes that all Parties were provided with the opportunity to exercise that right,⁸² and the Defence does not point to any evidence that would support a finding of prejudice.

34. Turning to the Defence's argument that the Rules do not "confer" upon the Trial Panel a duty to establish the truth,⁸³ the Panel recalls the Trial Panel's broad powers under the Rules in managing the presentation of evidence and questioning of witnesses in order to make them "effective for the ascertainment of the truth",⁸⁴ and the Trial Panel's responsibility in making factual determinations regarding the relevance, credibility and reliability of testimony.⁸⁵ While a trial panel may not have an *obligation* to question witnesses or call evidence regarding facts and issues not explored by the parties, the Rules unambiguously vest it with the authority and discretion to do so, in fulfilling its duty to contribute to the determination of the truth.⁸⁶ This is consistent with the legal frameworks of international courts and

⁸¹ Order on the Conduct of Proceedings, para. 112; Impugned Order, p. 3268.

⁸² See Transcript, 19 April 2023, pp. 3247-3252; Transcript, 20 April 2023, pp. 3388, 3390-3391 (closed session); Transcript, 17 May 2023, pp. 4198, 4213, 4227 (private session).

⁸³ See Appeal, para. 21. The Panel finds unpersuasive the Defence's reliance on the drafting history of Article 69(3) of the Rome Statute in support of its argument, in light of the jurisprudence of the International Criminal Court, which endorses judicial questioning on matters beyond clarification of a witness's testimony. See *Lubanga* Decision on Judicial Questioning, paras 40-42; see also Victims Response, para. 37 (and references cited therein). Furthermore, the Panel notes that the Defence misrepresents the cited reference, which in fact supports that trial judges have the "power to extend the factual inquiry to areas unexplored by the parties". See Vasiliev, S., "International criminal trials: A normative theory" (2014), University of Amsterdam Digital Academic Repository, p. 293, citing Bitti, G., in Triffterer, O. (ed), *Commentary on The Rome Statute of the International Criminal Court* (Second Edition), C.H. Beck, Hart, Nomos, 2008, Article 64, p. 1213. For current edition, see Bitti, G., in Ambos, K. (ed), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Fourth Edition), C.H. Beck, Hart, Nomos, 2022, Article 64, mn. 45.

⁸⁴ Rule 143(4)(a) of the Rules.

⁸⁵ Rule 139 of the Rules.

⁸⁶ See e.g. *Hadžihasanović and Kubura* Appeal Judgement, paras 93, 102. See also *Hadžihasanović and Kubura* Decision on Judicial Questioning, pp. 5-6.

tribunals, which have a similar evidentiary regime.⁸⁷ Accordingly, the Panel rejects the Defence's argument that the Trial Panel erred in finding that Rule 127(3) of the Rules confers upon a trial panel broad discretionary power with respect to the subject or substance of questions put to witnesses.

35. In light of the above, the Panel finds that the Defence has failed to demonstrate that the procedure for trial questioning, as set out in the Impugned Order, is inconsistent with the legal framework of the Specialist Chambers. Accordingly, the Panel dismisses the First Certified Issue of the Appeal.

B. WHETHER THE PROCEDURE FOR TRIAL PANEL QUESTIONING IS INCONSISTENT WITH THE RIGHTS OF THE ACCUSED TO FAIR AND EXPEDITIOUS PROCEEDINGS AND TO ADEQUATE TIME AND RESOURCES (SECOND CERTIFIED ISSUE)

1. Submissions of the Parties

36. The Defence submits that the Impugned Order violates the rights of the Accused to a fair and expeditious trial, and to adequate time and resources to prepare their defence.⁸⁸ In the Defence's view, allowing the Trial Panel to question witnesses on what it characterises as "new evidence, new material, and new allegations" will "undoubtedly" impact the expediency of the trial by: (i) prolonging witness evidence through extensive cross-examination and repeated objections by the Defence;⁸⁹ and

⁸⁷ ICTY Rules, Rule 90(F), stating that "[t]he Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to [...] make the interrogation and presentation effective for the ascertainment of the truth"; ICC Regulations of the Court, Regulation 43, prescribing that the "fair and effective [...] determination of the truth" along with the need to preserve fairness and avoid delays, is a key consideration that the Presiding Judge takes into account when determining the mode and order of questioning of witnesses and presentation of evidence. See also UN Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997, A/AC.249/1997/L.9/Rev.1, 18 December 1997, fn. 28, noting under Article 44(3) (current Article 69(3)) that "relevant evidence cannot be determined by the parties alone, but has also to be determined by the Court's evaluation of the necessary depth of investigation and determination of the facts [...] delegations should bear in mind the additional historical dimension and truth-finding mission of the Court".

⁸⁸ Appeal, para. 36.

⁸⁹ Appeal, para. 37.

(ii) requiring the Defence to investigate and prepare to challenge “new and additional allegations” that were “previously thought to fall outside the SPO case”.⁹⁰

37. The Defence further argues that the Impugned Order deprives the Defence of adequate notice and time to prepare for the cross-examination of SPO witnesses, by allowing the Trial Panel to question witnesses on facts not elicited during the SPO’s direct examination or contained in the SPO’s witness summaries and pre-trial brief.⁹¹ The Defence argues that, in light of the size of the case, which involves an exceptional number of disclosures, the SPO witness summaries operate as a “central safeguard” to ensure adequate notice and time for preparation.⁹² In the Defence’s view, by “expanding” the potential scope of witness testimony to the content of any document in the SPO presentation queue or otherwise disclosed to the Defence, the Impugned Order deprives the Defence of sufficient time to investigate new allegations raised by the Trial Panel’s questions, making the case “impossible to prepare and defend”.⁹³

38. The Defence adds that the Impugned Order unfairly impacts its case preparation by requiring the Defence to commit to a strategy for the cross-examination of SPO witnesses before knowing the full scope of their testimony.⁹⁴ In this regard, the Defence argues that the opportunity to re-examine witnesses is an inadequate safeguard,⁹⁵ and asserts that the Accused should instead have the right to cross-examine witnesses after judicial questioning.⁹⁶

⁹⁰ Appeal, para. 42; Defence Certification Request, para. 21.

⁹¹ Appeal, paras 42, 44.

⁹² Appeal, para. 42.

⁹³ Appeal, paras 43-44.

⁹⁴ Appeal, paras 10, 38.

⁹⁵ Appeal, para. 38.

⁹⁶ Appeal, paras 10, 29.

39. Finally, the Defence argues that, by affording the Trial Panel an “unfettered right” to ask leading questions to witnesses regarding acts and conduct of the Accused, the Impugned Order also “risks creating an appearance of partiality”.⁹⁷

40. The SPO and Victims’ Counsel respond that the Defence’s claims are unsupported by relevant jurisprudence,⁹⁸ speculative⁹⁹ and contradicted by reality.¹⁰⁰ With respect to the impact on the expediency of the trial proceedings, the SPO first asserts that rather than delay the proceedings, judicial questioning may instead expedite the trial by allowing Judges to determine matters of concern at an early stage of the proceedings, and “contribute to determining the facts of the case, which is the central purpose of this trial”.¹⁰¹ Second, pointing to the length of judicial questioning and of the Defence’s subsequent re-cross-examination of the witnesses referenced in the Appeal, the SPO submits that the Trial Panel’s questions have been “limited and focused” and argues that altering the order of questioning is unlikely to shorten the length of questioning.¹⁰²

41. In response to the Defence’s argument that judicial questions eliciting new evidence impairs the Accused’s ability to prepare their case, the SPO first asserts that the examples cited by the Defence support the proposition that the Trial Panel’s questions were both relevant to the witnesses’ testimony and foreseeable to the Defence.¹⁰³ Specifically, the questions were directed at events discussed during direct and/or cross-examination, and based on documents that were associated with the

⁹⁷ Appeal, para. 45.

⁹⁸ SPO Response, paras 1, 25; Victims Response, paras 32-33.

⁹⁹ SPO Response, paras 13, 29; Victims Response, paras 46-47.

¹⁰⁰ SPO Response, paras 24, 28.

¹⁰¹ SPO Response, para. 26. In this regard, the SPO adds that the Defence assumes that evidence elicited through judicial questions will always be harmful to the Defence, while ignoring that questions might also elicit evidence that bolsters the Defence case. See SPO Response, para. 25.

¹⁰² SPO Response, para. 28, noting a duration of approximately 40 and 50 minutes, respectively, for judicial questioning of two witnesses, and an additional 10 and 40 minutes, respectively, for re-cross-examination by the Defence teams.

¹⁰³ SPO Response, para. 29.

witnesses and that were disclosed to the Defence.¹⁰⁴ Victims' Counsel adds that questions posed to witnesses are "an integral part of the proceedings" and "to forbid the Panel from following a line of enquiry that it regards as important" because it may be adverse to the interests of the Accused would interfere with its duty and role in the proceedings.¹⁰⁵

42. Second, the SPO asserts that the Defence does not have a "right for their 'strategy' not to be in conflict with the evidence in the case" and that the Trial Panel is able to assess the credibility of testimony, should the Accused have to adjust their approach based on a witness's responses to questions from the Trial Panel.¹⁰⁶ In this regard, Victims' Counsel asserts that the Defence's argument "confuses what would be, from the Defence perspective, an advantageous framework, with a fair trial right of the accused",¹⁰⁷ and that the right to examine witnesses "does not grant the Defence the right to choose and maintain [...] 'one course' of cross-examination".¹⁰⁸ Furthermore, the SPO argues that, in addition to re-examination following judicial questioning, the Defence has the opportunity to present rebuttal evidence at the appropriate time,¹⁰⁹ or if necessary to request additional time to prepare for re-examination.¹¹⁰ Victims' Counsel adds in this respect that the Defence has failed to support its assertion that recalling witnesses or requesting postponements is insufficient to address new matters raised by the Trial Panel.¹¹¹

43. Finally, the SPO and Victims' Counsel assert that Judges are not limited to asking non-leading questions, but have discretion to decide the appropriate form of

¹⁰⁴ SPO Response, para. 29.

¹⁰⁵ Victims Response, paras 47-50.

¹⁰⁶ SPO Response, para. 30.

¹⁰⁷ Victims Response, para. 42.

¹⁰⁸ Victims Response, para. 40, citing ECtHR, *Al-Khawaja and Tahery v. United Kingdom*, nos 26766/05 and 22228/06, Judgment, 15 December 2011 ("*Al-Khawaja and Tahery Judgment*"), para. 118.

¹⁰⁹ SPO Response, para. 31.

¹¹⁰ SPO Response, para. 34.

¹¹¹ Victims Response, para. 39.

questions,¹¹² and that “such a limitation would involve a serious interference with the independence of the judiciary”.¹¹³

44. The Defence replies that the Accused are entitled to know the allegations and case against them before mounting a defence, and that the calling of rebuttal evidence does not mitigate any prejudice to the Accused.¹¹⁴ In this respect, the Defence asserts that the “leading of uncharged allegations from the bench” transforms the Trial Panel into an “investigative and prosecutorial arm of the Court, which can also shape and present a case, but with no requirement of notice to the [A]ccused”¹¹⁵ and, as a result, the Defence is “flying blind, with no time to investigate, prepare, or respond to allegations”.¹¹⁶ Finally, with regard to the impact on the expediency of the proceedings, the Defence replies that even when asked by professional judges, questions “will indeed ‘extend’ the proceedings when they go beyond the case as charged”.¹¹⁷

2. Assessment of the Court of Appeals Panel

45. The Panel recalls that, pursuant to Article 40 of the Law, the Trial Panel must ensure that a trial is fair and expeditious, and that proceedings are conducted in accordance with the rights of the Accused. As part of his right to a fair trial, an accused is entitled to have adequate time and facilities for the preparation of his defence and to be tried within a reasonable time.¹¹⁸ What constitutes “adequate time and facilities”

¹¹² SPO Response, para. 33; Victims Response, para. 51.

¹¹³ SPO Response, para. 33, citing *Lubanga* Decision on Judicial Questioning, paras 43, 46.

¹¹⁴ Reply to SPO, para. 11.

¹¹⁵ Reply to SPO, para. 11.

¹¹⁶ Reply to Victims Counsel, para. 19 (emphasis removed).

¹¹⁷ Reply to Victims Counsel, para. 18.

¹¹⁸ Article 31 of the Constitution of the Republic of Kosovo; Articles 1(2) and 21 of the Law; Article 6 of the European Convention on Human Rights (“ECHR”). The Panel notes that, according to the ECtHR, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole, and not on the basis of an isolated consideration of one particular aspect or one particular incident. The Panel’s role is however different, and requires that a determination on an alleged violation of standards of international human rights law be conducted at

cannot be assessed in the abstract, but will depend on the specific circumstances of the case.¹¹⁹

46. The Panel will first consider the Defence's argument that the Impugned Order deprives the Defence of adequate notice and time to prepare for the examination of SPO witnesses. The Panel notes that, in the examples cited by the Defence,¹²⁰ the Trial Panel's questions were based on prior statements of the testifying witnesses and documents associated with their anticipated testimony, and did not elicit information that came to light for the first time upon questioning.¹²¹ Furthermore, these prior statements and documents were disclosed to the Defence in unredacted form on 30 and 31 January 2023,¹²² and were also identified in the SPO's submissions of information associated with each witness's anticipated testimony on 1 February 2023,¹²³ placing the Defence on notice of all documents the SPO intended to use with the witnesses. The Panel further notes that the Krasniqi Defence relied on one of these prior statements during its cross-examination of one of the witnesses.¹²⁴ Accordingly, the Panel finds that the Defence had reasonable notice and adequate opportunity to prepare for cross-examination.

47. The Panel acknowledges the Defence's argument that the SPO's final presentation queue is generally released to the Defence 24 hours in advance of a witness's testimony, in accordance with paragraph 79 of the Order on the Conduct of Proceedings.¹²⁵ However, the Panel observes in this regard that the witness statements and documents referenced by the Defence were not disclosed for the first time in the

this early stage of the proceedings. See KSC-BC-2020-04, IA006/F00007, Decision on Shala's Appeal Against Decision Concerning Prior Statements, 5 May 2023, para. 77.

¹¹⁹ ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, 23 February 2014, para. 30.

¹²⁰ Appeal, paras 4-5, citing Transcript, 19 April 2023, pp. 3232-3238 and Transcript, 17 May 2023, pp. 4176-4178.

¹²¹ The Panel notes that, in some instances, these same events had first been raised by the Parties during their direct and cross-examination of the witness. See SPO Response, para. 29, fns 59-60.

¹²² [REDACTED]; [REDACTED]. The Panel notes that these documents were also [REDACTED].

¹²³ [REDACTED]. The Panel notes that these documents were also [REDACTED].

¹²⁴ SPO Response, para. 29, fn. 60.

¹²⁵ Appeal, para. 43.

final presentation queue, as noted above. Furthermore, while the documents used by the Trial Panel during its questioning had not been tendered for admission into evidence by the Parties, the Panel notes that, in light of the Trial Panel's power to admit any evidence deemed necessary, such questioning may be relevant to its consideration of the reliability and admissibility of the documents.

48. The Panel now turns to the Defence's argument that the Impugned Order impairs the Defence's ability to meaningfully prepare their cross-examination of witnesses and that the Defence is "being lured into adopting a strategy" prior to hearing the full scope of a witness's testimony.¹²⁶ The Panel recalls that the right to cross-examination under Article 6(3)(d) of the ECHR requires that an accused be given "an adequate and proper opportunity" to challenge the testimony of witnesses, either at the time of the statement, or at a later time in the proceedings.¹²⁷ However, as noted by Victims' Counsel,¹²⁸ Article 6(3)(d) of the ECHR does not accord the Defence the right to choose the timing or sequence of cross-examination to its strategic advantage.

49. In this respect, the Panel observes that the modalities of witness questioning were adopted on 25 January 2023 in the Order on the Conduct of Proceedings, and were therefore known to the Defence during its trial preparation. This order specifically provides 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."¹²⁹ The Defence was therefore on notice that the questioning of witnesses may touch upon matters not raised during direct or cross-examination, and could adjust its strategic

¹²⁶ Appeal, para. 10.

¹²⁷ See e.g. *Al-Khawaja and Tahery Judgment*, para. 118.

¹²⁸ Victims Response, para. 40.

¹²⁹ Order on the Conduct of Proceedings, para. 112.

approach accordingly. As the Trial Panel recalled, the Defence did not object to or request a modification of this instruction.¹³⁰

50. Moreover, the Defence was given the opportunity to re-examine witnesses on matters raised during the Trial Panel's questioning, in accordance with the Order on the Conduct of Proceedings. The Panel notes in this regard that, on at least three occasions, one or more of the Defence teams chose not to exercise that right.¹³¹ Accordingly, the Panel finds that the Defence was given an "adequate and proper opportunity" to question the witnesses referenced by the Defence in the Appeal.

51. Turning now to the impact of the Impugned Order on the expediency of the proceedings, the Defence asserts that the Impugned Order will "undoubtedly" prolong witness evidence through extensive cross-examination.¹³² The Panel first stresses that the right to be tried within a reasonable time under Article 21(4)(d) of the Law protects the Accused against *undue* delay, and not against a justified or necessary delay in the proceedings.¹³³ The Panel further stresses that, when an accused asserts a violation of his fair trial rights on appeal, he must demonstrate that he has suffered actual prejudice from the violation,¹³⁴ and not merely raise a speculative or hypothetical risk of prejudice.¹³⁵ In the examples cited by the Defence, the Trial Panel's

¹³⁰ Impugned Order, p. 3268.

¹³¹ See Transcript, 19 April 2023, p. 3252 (private session), where Selimi, Krasniqi and Veseli declined to re-examine the witness after questions by the Trial Panel; Transcript, 20 April 2023, pp. 3390-3391 (closed session), where Veseli, Selimi and Krasniqi declined to re-examine the witness after questions by the Trial Panel; Transcript, 17 May 2023, p. 4227 (private session), where Selimi and Krasniqi declined to re-examine the witness after questions by the Trial Panel.

¹³² See Appeal, para. 37.

¹³³ See e.g. ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Judgement, ICTR-98-42-A, 14 December 2015, para. 108; ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006, para. 17.

¹³⁴ KSC-BC-2020-04, IA001/F00005/RED, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (confidential version filed on 20 August 2021), para. 17.

¹³⁵ See e.g. Reply to Victims Counsel, para. 18.

questions to witnesses were limited in number,¹³⁶ did not take excessive time,¹³⁷ and, for the most part, the Defence did not exercise its right to re-examine the witnesses on those matters.¹³⁸ Accordingly, the Appeals Panel is not persuaded that the Trial Panel's questions unduly prolonged the proceedings or constituted an error prejudicing the rights of the Accused. Moreover, the Panel observes that putting questions to SPO witnesses following their testimony-in-chief contributes to greater expediency in the proceedings than recalling the witnesses at a later time.

52. Turning to the Defence's argument that the Trial Panel's use of leading questions on "acts and conduct of the Accused" gives rise to an appearance of partiality,¹³⁹ the Panel notes that the Defence makes a general assertion regarding a potential "risk" without further developing its arguments or supporting them with jurisprudence. Furthermore, the Appeals Panel notes that the Defence does not point to any evidence that could rebut the presumption of impartiality which attaches to the Judges of the Trial Panel.¹⁴⁰ Regardless, the appropriate manner of questioning a witness will necessarily depend on the circumstances of that witness's testimony, and

¹³⁶ Cf. *Lubanga* Decision on Judicial Questioning, para. 8, where the Trial Chamber posed 133 questions to a single witness following examination by the parties; *Rutaganda* Appeal Judgement, para. 110, where the bench posed approximately 50 questions to the accused during the Defence's examination-in-chief.

¹³⁷ SPO Response, para. 28, fn. 55, noting that the Trial Panel's questions to the two witnesses referenced by the Defence lasted 40 minutes and 50 minutes, respectively).

¹³⁸ Further, the Panel notes that the Trial Panel questioned the witnesses after the conclusion of each Party's examination, and thus did not interrupt the flow of the Defence's examination, take substantial amounts of time away from the Defence, or otherwise impede the Defence's ability to present its case. Cf. ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Mode of Interrogating Witnesses, 10 May 2007, para. 7; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Transcript, 19 March 2007, pp. 15855-15858, 15867; *Prosecutor v. Prlić et al.*, IT-04-74-T, Transcript, 29 May 2008, pp. 28793-28797, where the parties argued that judicial questioning involving lengthy and frequent interventions during a party's direct examination, that took substantial amounts of time away from the party or interrupted the flow of examination, may impair a party's ability to present its case.

¹³⁹ Appeal, para. 45.

¹⁴⁰ See e.g. KSC-BC-2020-06, IA014/F00008/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, 31 March 2022 (confidential version filed on 31 March 2022), para. 34; *Hadžihasanović et al.* Appeal Judgement, para. 78; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001, para. 91; ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, paras 196-197.

is a matter for judicial determination.¹⁴¹ In the Appeals Panel's view, the Trial Panel's questions do not, on their face, demonstrate any bias or partiality, or the appearance thereof, that would constitute an abuse of its discretion.

53. Furthermore, while evidence of uncharged "acts and conduct of the Accused" may be inadmissible for the purpose of determining guilt for the crimes charged, such evidence may be admissible for other valid purposes.¹⁴² In that regard, the Panel notes that the Trial Panel is made up of professional Judges who are qualified to assess the credibility and probative value of witness testimony, and to consider what weight, if any, to afford to it. Accordingly, to pre-emptively limit the Trial Panel's questioning, as suggested by the Defence, because it *may* raise issues that are "problematic" for the Accused, would seriously interfere with the Trial Panel's role as neutral fact-finder.

54. As to the alleged impact of the Impugned Order on the Accused's right to adequate resources for the preparation of their defence, the Panel notes that, beyond this general assertion, the Defence does not identify any specific example where

¹⁴¹ *Lubanga* Decision on Judicial Questioning, para. 43. Furthermore, the Panel notes that, in the examples cited by the Defence, leading questions were used to refresh the witness's memory (Transcript, 19 April 2023, pp. 3232-3238) or to clarify a prior statement of the witness (Transcript, 17 May 2023, pp. 4251-4252).

¹⁴² See e.g. ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-RED Judgment on the appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, para. 117, finding that criminal acts falling outside the scope of the charges could be considered in establishing the contextual elements of crimes against humanity; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 1022, finding that evidence of events which occurred outside the scope of the charges may "assist in establishing the background and context of the events that fall within the timeframe of the charges"; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-2299-RED, Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012, 8 October 2012, para. 51, finding that evidence that occurred outside the scope of the charges may be admissible to "enable the Chamber to contextualise other pieces of evidence presented on the responsibility of the accused"; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, para. 315, noting that evidence of events falling outside the temporal scope of a case may be admitted and relied upon when "aimed at: [c]larifying a given context; [e]stablishing by inference the elements (in particular, criminal intent) of criminal conduct occurring [during the period relevant to the charges]; [or] [d]emonstrating a deliberate pattern of conduct" (footnotes omitted).

inadequate resources could be attributed to the measures imposed by the Impugned Order beyond this general assertion. Instead, the Defence merely states that the impact is “monumental”, as “the Defence must be prepared to cross-examine on anything buried in the millions of pages of SPO disclosure”.¹⁴³ The Panel therefore finds that this claim is unsubstantiated and summarily dismisses it.

55. In light of the above, the Panel finds that the Defence has failed to demonstrate that the procedure for trial questioning, as set out in the Impugned Order, is inconsistent with the rights of the Accused to fair and expeditious proceedings, and to adequate time and resources to defend themselves. Accordingly, the Panel dismisses the Second Certified Issue of the Appeal.

V. DISPOSITION

56. For these reasons, the Court of Appeals Panel:

DENIES the Appeal;

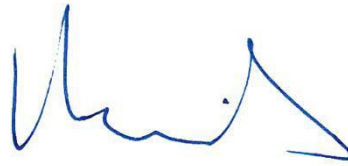
GRANTS the SPO Request;

STRIKES the Veseli Response;

ORDERS Victims’ Counsel and the SPO to submit public redacted versions of their appellate filings referenced in paragraph 20 or indicate, through a filing, whether these filings can be reclassified as public, within ten days of receiving notification of the present Decision; and

¹⁴³ Appeal, para. 44.

INSTRUCTS the Registry to execute the reclassification of the filings referenced in paragraph 20 upon indication by Victims' Counsel and the SPO, if any, that they can be reclassified.



**Judge Michèle Picard,
Presiding Judge**

Dated this Tuesday, 4 July 2023

At The Hague, the Netherlands