



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

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

**Before:** Trial Panel II  
Judge Charles L. Smith III, Presiding Judge  
Judge Christoph Barthe  
Judge Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 18 February 2025

**Language:** English

**Classification:** Public

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**Public Redacted Version of Decision on Thaçi Defence's Request to Compel the Specialist Prosecutor to Call Two Witnesses**

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**TRIAL PANEL II** ("Panel"), pursuant to Articles 21, 40(2) and 40(6)(e) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 62, 95(4)(b), 116, 118 and 127(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 9 June 2023, the Specialist Prosecutor's Office ("SPO") submitted an updated list of proposed witnesses ("Witness List"), listing, *inter alia*, [REDACTED] and [REDACTED] ("Two Witnesses") as prospective witnesses.<sup>1</sup>
2. On 16 September 2024, the SPO notified the Panel, the Defence and Victims' counsel that it no longer intended to rely upon, *inter alia*, the Two Witnesses.<sup>2</sup>
3. On 26 September 2024, the Defence for Hashim Thaçi ("Mr Thaçi" and Thaçi Defence") filed a request for the Panel to compel the SPO to call the Two Witnesses ("Request").<sup>3</sup>
4. On 9 October 2024, the SPO responded to the Request ("Response").<sup>4</sup>
5. On 14 October 2024, the Thaçi Defence replied to the Response ("Reply").<sup>5</sup>

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<sup>1</sup> See for example, F01594/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Updated Witness List and Confidential Lesser Redacted Version of Pre-Trial Brief* ("Witness List"), 9 June 2023, confidential, pp. [REDACTED].

<sup>2</sup> F02576, Specialist Prosecutor, *Prosecution Notice of Witness Changes*, 16 September 2024, confidential, para. 2 (a public redacted version was filed on the same day, F02576/RED).

<sup>3</sup> F02602, Specialist Counsel, *Thaçi Defence Motion to Compel the Specialist Prosecutor to Call Witnesses* [REDACTED] and [REDACTED], 26 September 2024, confidential (a public redacted version was filed on 10 October 2024, F02602/RED).

<sup>4</sup> F02629, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Motion to Compel the Specialist Prosecutor to Call Two Witnesses*, 9 October 2024, confidential (a public redacted version was filed on the same day, F02629/RED).

<sup>5</sup> F02647, Specialist Counsel, *Thaçi Defence Reply to SPO Response to Motion to Compel the Specialist Prosecutor to Call Witnesses* [REDACTED] and [REDACTED], 14 October 2024, confidential (a public redacted version was filed on 24 October 2024, F02647/RED).

## II. SUBMISSIONS

6. The Thaçi Defence requests the Panel to: (i) enter a finding that hearing the evidence from the Two Witnesses would contribute to the establishment of the truth by the Specialist Chambers ("SC"); and (ii) compel the SPO to retain the Two Witnesses on its Witness List and present their evidence to the Panel.<sup>6</sup> In the alternative, the Thaçi Defence requests that the Panel takes note that the Defence will ask the Panel, at the conclusion of the trial, to draw adverse inferences from the fact that the SPO has failed to call the Two Witnesses.<sup>7</sup>

7. The SPO responds that the Panel should reject the request to compel it to call the Two Witnesses as: (i) there is no legal basis to compel the SPO to call witnesses;<sup>8</sup> and (ii) even if there was a legal basis to compel the SPO to call witnesses, there is no justification to do so in the present case.<sup>9</sup> In addition, the SPO contends that the request to draw inferences adverse to the SPO should be summarily dismissed as: (i) the Thaçi Defence's arguments are a series of hypotheticals with no concrete relief sought; (ii) what the Thaçi Defence is proposing is not that the Panel draw adverse inferences but that it establish a series of positive facts without calling the necessary witnesses; and (iii) the authorities cited are inapplicable.<sup>10</sup>

8. The Thaçi Defence replies that nowhere in the Response does the SPO contend that the Two Witnesses' evidence would not contribute to the establishment of the truth, as this statement would not be legitimately open to the SPO to make.<sup>11</sup> The Thaçi Defence further argues that it is not seeking to force the SPO to call witnesses, rather the issue is whether the SPO is permitted to drop *its own*

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<sup>6</sup> Request, paras 4, 15-27, 36-37.

<sup>7</sup> Request, paras 4, 28-34, 36-37, in particular, para. 34 where the Thaçi Defence lists the facts that the calling of the Two Witnesses would establish.

<sup>8</sup> Response, paras 1-6, 14.

<sup>9</sup> Response, paras 1, 7-10, 14.

<sup>10</sup> Response, paras 11-12, 14.

<sup>11</sup> Reply, paras 1, 7-12.

*witnesses*, and whether this would impede the establishment of the truth.<sup>12</sup> The Thaçi Defence argues that the Panel has the power to compel the SPO to call, or deny the SPO the right to drop, the Two Witnesses and, assuming that the Panel cannot compel the SPO to call the Two Witnesses, the Panel has the power to enter a finding that hearing their evidence would contribute to the establishment of the truth.<sup>13</sup> Lastly, the Thaçi Defence states that, at this stage, it is not making submissions on the merits of the adverse inferences, but is merely requesting the Panel to take note of the argument.<sup>14</sup>

### III. APPLICABLE LAW

9. Pursuant to Article 40(2), the Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused.

10. Pursuant to Article 40(6)(e), the Panel may, as necessary, order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.

11. Pursuant to Rule 116(1), the Panel shall, on an ongoing basis, take all measures and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the trial proceedings.

12. Pursuant to Rule 118(2), the Panel may permit, upon timely notice and a showing of good cause, the amendment of the lists of witnesses and exhibits filed pursuant to Rule 95(4)(b).

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<sup>12</sup> Reply, paras 2, 6.

<sup>13</sup> Reply, paras 3-5.

<sup>14</sup> Reply, para. 13.

#### IV. DISCUSSION

##### A. DEFENCE REQUEST TO ORDER THE SPO TO RETAIN THE TWO WITNESSES ON THE WITNESS LIST

13. The Two Witnesses' SPO interviews are referenced in the Pre-Trial Brief.<sup>15</sup> The SPO has now notified that it no longer intends to rely upon the evidence of the Two Witnesses.<sup>16</sup>

14. As indicated, the Thači Defence asks the Panel to: (i) enter a finding, pursuant to Rule 62, that hearing the Two Witnesses' evidence is necessary to determine certain facts and establish the truth; and (ii) compel the SPO to retain the Two Witnesses on the Witness List.<sup>17</sup>

15. The Rules foresee that both the SPO and the Defence have discretion to decide which witnesses they wish to call to present evidence. Rule 95(4)(b) requires the Specialist Prosecutor to file "the list of witnesses the Specialist Prosecutor intends to call...". Similarly, Rule 119(2) provides that, should the Defence decide to present a case, it must file "the list of witnesses the Defence intends to call". That it is the calling party which primarily decides which witnesses it wishes to call is supported by jurisprudence from international tribunals.<sup>18</sup> As far as the SPO is concerned, Rule 62 adds that "[i]n performing his or her functions, the Specialist Prosecutor shall contribute to the establishment of the truth by the Specialist Chambers".

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<sup>15</sup> F01594/A03, Specialist Prosecutor, *Annex 3 to Prosecution Submission of Updated Witness List and Confidential Lesser Redacted Version of Pre-Trial Brief* ("Pre-Trial Brief"), 9 June 2023, confidential, paras [REDACTED].

<sup>16</sup> See *supra*, para. 2; fn. 2.

<sup>17</sup> Request, paras 4, 15-27, 37; Reply, paras 2-6.

<sup>18</sup> See for example, International Criminal Tribunal for the former Yugoslavia ("ICTY"), *Prosecutor v. Lukić and Lukić*, IT-98-32/1-PT, Trial Chamber, 22 April 2008, [Decision on Prosecutor's Motion to Amend Rule 65 ter Witness List and on Related Submissions](#) ("Lukić and Lukić Decision"), para. 11; *Prosecutor v. Halilović*, IT-01-48-T, Trial Chamber, [Decision on Prosecution's Motion to Vary its Rule 65 ter Witness List](#) ("Halilović Decision"), 7 February 2005, p. 6; *Prosecutor v. Seselj*, IT-03-67-T, Trial Chamber, [Decision on Prosecution's Motion for Leave to Amend its Witness List and Exhibit List](#) ("Seselj Decision"), 16 June 2008, para. 18.

16. As set out above, pursuant to Rule 95(4)(b), the Pre-Trial Judge shall order the SPO to file the list of witnesses the SPO intends to call at trial. Such a list is intended to ensure that the Defence has adequate and timely notice of those witnesses which the SPO might call at trial and for which it may be expected to prepare. Once such notice has been given, however, the Panel has some oversight of the list, pursuant to Rule 118. Specifically, the Panel may “determine the number of witnesses the Specialist Prosecutor may call and instruct him or her to remove repetitive witnesses”.<sup>19</sup> Further, pursuant to Rule 118(2), the Panel may permit (and therefore, implicitly, may deny) leave to the Specialist Prosecutor to amend its witness list. This power is primarily intended to ensure that the accused has fair and timely notice of the witnesses which the SPO might call so as to be able to prepare in timely fashion, to guarantee a fair and expeditious trial, and so as to prevent that the Defence be prejudiced as a result of the late addition of witnesses to the SPO’s Witness List.<sup>20</sup> However, it is clear from the plain meaning of Rule 118(2), and from international jurisprudence, that the SPO also requires permission to *remove* witnesses from its list of witnesses.<sup>21</sup>

17. The Panel recalls that, exercising its authority under Rule 118(1), it invited the SPO to streamline its case, gave the SPO deadlines by which to do so,<sup>22</sup> and issued guidance regarding the types of witnesses that could be removed from the Witness List.<sup>23</sup> The assessment of whether it is necessary for the SPO to call all witnesses on the Witness List is an ongoing process, to be reassessed in light of the evidence

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<sup>19</sup> Rule 118(1)(a).

<sup>20</sup> See for example, *Lukić and Lukić* Decision, para. 9; ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber, [Decision on Prosecution’s Third Motion for Provisional Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis](#) (“*Limaj* Decision”), 9 March 2005, para. 4.

<sup>21</sup> See for example, *Limaj* Decision, para. 4; *Lukić and Lukić* Decision, paras 9-11; *Halilović* Decision, p. 2; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC/F1780, Trial Chamber, [Decision Authorising the Prosecution to Amend its Witness and Exhibit Lists](#) (“*Ayyash* Decision”), 8 December 2014, paras 30-32; *Seselj* Decision, paras 6, 8-10. .

<sup>22</sup> See for example, Transcript of Hearing, 15 February 2023, p. 1907, lines 16-19; Transcript of Hearing, 21 February 2024, p. 12807, lines 2-12; Transcript of Hearing, 29 May 2024, p. 16328, lines 12-19.

<sup>23</sup> See for example, Transcript of Hearing, 15 February 2023, p. 1907, lines 16-17.

heard.<sup>24</sup>.

18. As the Panel repeatedly encouraged the SPO to streamline its case, it necessarily foresaw that it would authorise the SPO to remove witnesses from the Witness List in the interest of securing a fair and expeditious trial. As the Taçi Defence is objecting to the removal of the Two Witnesses from the Witness List, the Panel will now assess whether the requirements of Rule 118(2) are met in respect of that proposed removal.

19. For these reasons, the Panel clarifies that the issue before the Panel is not whether the Panel should compel the SPO to call the Two Witnesses but rather whether it should permit the SPO to amend its Witness List, pursuant to Rule 118(2).

20. The Panel will assess whether, at the current stage of proceedings, and pursuant to Rule 118(2), the SPO has provided timely notice and shown good cause for removing the Two Witnesses, and that no prejudice is caused to the Defence by the amendment of the Witness List.<sup>25</sup>

21. As regards timely notice, the SPO, following several orders from the Panel to streamline its case,<sup>26</sup> notified its intention to remove the Two Witnesses from the Witness List on 16 September 2024.<sup>27</sup> Accordingly, the Panel is satisfied that the SPO provided timely notice of the removal of the Two Witnesses from the Witness List.

22. As regards good cause, the Panel notes that the SPO notified its intention to remove the Two Witnesses from the Witness List, upon the order of the Panel to

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<sup>24</sup> See for example, F02877, Specialist Prosecutor, *Prosecution Notice of Further Changes to Witness List*, 30 January 2025, confidential, para. 1; F02808, Specialist Prosecutor, *Prosecution Notice of Further Changes to Witness List and Related Scheduling Matters*, 19 December 2024, confidential, para. 1, with one Annex, confidential; Transcript of Hearing, 22 January 2025, p. 24330, lines 16-19.

<sup>25</sup> See for example, F01544, Panel, *Decision on Prosecution Request to Add Five Items Relating to Expert Witness to the Exhibit List*, 23 May 2023, para. 8; *Lukić and Lukić Decision*, paras 9-10; *Ayyash Decision*, para. 15.

<sup>26</sup> See *supra*, fn. 22.

<sup>27</sup> See *supra*, para. 2, fn. 2.



streamline its case. The Panel also notes that the SPO has already called several witnesses who testified to the same set of facts and circumstances on which the Two Witnesses were expected to testify.<sup>28</sup> In that respect, the SPO argues that “[w]ith credible, corroborated, and consistent evidence already heard on this charged incident, it is simply unnecessary to call the Two Witnesses at this point.”<sup>29</sup> The Panel further notes that the SPO is best placed to assess whether it is necessary to call other witnesses to establish the facts and circumstances alleged in the Indictment and to decide which witnesses to call to prove its case.<sup>30</sup> Moreover, the removal of the Two Witnesses from the Witness List will contribute to the expediency of the proceedings and to the completion of the SPO’s case by the target date envisaged in Rule 118(5). Accordingly, the SPO has shown good cause to remove the Two Witnesses from the Witness List.

23. As regards prejudice, the Panel notes that the evidence of the Two Witnesses relates to a variety of facts and circumstances, including potentially incriminating evidence regarding Mr. Thaçi’s alleged direct participation in alleged crimes.<sup>31</sup> The Defence did not clearly identify what prejudice it would suffer should the Two Witnesses be withdrawn. The fact that the Thaçi Defence would be unable to elicit evidence it considers helpful to its case through a SPO witness is not cause to determine that prejudice exists. The SPO bears the burden to establish *its* case. It is not required to call every witness that might be relevant to its case, nor to call every witness which it once considered calling.<sup>32</sup> Rule 62 qualifies this general proposition by making it clear that the Specialist Prosecutor must perform her duties in a manner consistent with the establishment of the truth. There is no indication, and the Defence has not established, that the SPO’s decision not to call the Two Witnesses is inconsistent with the establishment of the truth. Further, the

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<sup>28</sup> Response, para. 10.

<sup>29</sup> Response, para. 10.

<sup>30</sup> *Lukić and Lukić* Decision, para. 11; *Halilović* Decision, p. 6.

<sup>31</sup> *See supra*, fns 1, 15.

<sup>32</sup> *See* Rule 127(1).



Panel will not engage, at this point, in comparing evidence that is on the record of these proceedings with information that is not. Nor does the Panel need to concern itself, at this stage, with various hypotheticals raised by the Defence in relation to possible contacts with either or both of the Two Witnesses. Accordingly, the Panel is satisfied that the removal of the Two Witnesses would not prejudice the Accused.

24. In light of the above, the Panel authorises the SPO to amend its Witness List by removing the Two Witnesses and orders the SPO to file its amended Witness List by no later than **Tuesday, 25 February 2025**.

B. DEFENCE REQUEST FOR THE PANEL TO TAKE NOTE THAT THE DEFENCE WILL ASK IT TO DRAW ADVERSE INFERENCES FROM THE SPO'S FAILURE TO CALL THE TWO WITNESSES

25. The Thaçi Defence asks the Panel to take note that the Defence will ask the Panel, at the conclusion of the trial, to draw adverse inferences from the SPO's failure to call the Two Witnesses.<sup>33</sup> The Panel will address the merit of any such submissions, if and when, made by the Thaçi Defence. The Panel can indicate, at this point, however, that it will base any and all findings and inferences on the evidence that is on the record of these proceedings and not on any information that has not been offered or admitted.

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<sup>33</sup> Request, paras 28-34, 36-37; Reply, para. 13.

V. DISPOSITION

26. For these reasons, the Panel hereby:

- a. **REJECTS** the Request;
- b. **AUTHORISES** the SPO to amend its Witness List to remove the Two Witnesses; and
- c. **ORDERS** the SPO to file an amended witness list by no later than **Tuesday, 25 February 2025**.



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**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated this Tuesday, 18 February 2025

At The Hague, the Netherlands.