

In: KSC-BC-2020-06

The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Court of Appeals Panel**
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

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**Selimi Defence Reply to Consolidated Prosecution Response to Thaci and
Selimi Defence appeals of Decisions F01057 and F01058**

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I. INTRODUCTION

1. Pursuant to Article 45(1) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law")¹ and Rule 170(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules")², the Selimi Defence ("Defence") hereby submits a reply to the "Consolidated Prosecution Response to Thaci and Selimi Defence appeals of Decisions F01057 and F01058"³ which concerned a Defence Appeal⁴ of the "Decision on Prosecution Request to Add Two Witnesses and Associated Material", KSC-BC-2020-06/F01058, 27 October 2022 ("Impugned Decision").⁵
2. The SPO appears to accept that the authority to decide upon requests to add witnesses at the Specialist Prosecutor's Preparation Conference granted to the Trial Panel by the wording of Rule 118(2) does not extend to the Pre-Trial Judge. However, it then erroneously relies on both the Pre-Trial Judges purported inherent authority as well as its own illogical and unsubstantiated interpretation of Article 39 and Rule 95 to accord the Pre-Trial Judge almost unlimited authority to issue the Impugned Decision. Neither overcomes the ground of appeal set out by the Defence.
3. While this Reply is limited to addressing new issues raised in the Response, the Defence maintains its original submissions in full. Further, the absence of a

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

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

³ KSC-BC-2020-06/IA025-F00004, Consolidated Prosecution response to Thaci and Selimi Defence appeals of Decisions F01057 and F01058, 15 December 2022 ("SPO Response").

⁴ KSC-BC-2020-06/IA025-F00002, Selimi Defence appeal against "Decision on Prosecution Request to Add Two Witnesses and Associated Material", KSC-BC-2020-06/IA025/F00002, 2 December 2022 ("Appeal").

⁵ KSC-BC-2020-06/F01058, Decision on Prosecution Request to Add Two Witnesses and Associated Material, 27 October 2022.

specific submission in reply to any aspect of the Response is not indicative of a concession as to the validity of that submission.

II. SUBMISSIONS

A. The SPO concedes that the Pre-Trial Judge may not directly rely upon Rule 118(2)

4. The SPO appears to concede that the Pre-Trial Judge recognised he was unable to directly rely on Rule 118(2) to rule upon the SPO's request to add two witnesses to its Rule 95 list,⁶ as this provision was reserved for the Trial Panel. Instead, the SPO attempts to defend the Pre-Trial Judge's reference to this provision, as simple guidance for the legal test for applications to amend the list of witnesses and exhibits⁷ even though this was not actually set out in the Impugned Decision.
5. Far from rendering the Defence's argument in relation to Rule 118 moot, as the SPO suggests,⁸ that Rule 118 is not available to the Pre-Trial Judge, as conceded by the SPO, means that the authority of the Pre-Trial Judge to rule on the issue at hand must be based exclusively on other provisions of the KSC legal framework, and judged against the Pre-Trial Judge's reasoning as set out in the Impugned Decision to apply those provisions. No part of Rule 118 may therefore be relied upon to buttress the Pre-Trial Judge's authority in this regard.

⁶ KSC-BC-2020-06/F00947, Confidential redacted version of Prosecution request to add two witnesses and associated materials with strictly confidential and *ex parte* Annexes 1-2, 2 September 2022 ("SPO Request").

⁷ SPO Response, para. 26.

⁸ *Ibid.*

B. Article 39 of the Law is properly limited by Article 40, as implemented by Rule 118(2)

6. The Defence does not contest that Article 3 of the Law gives primacy to the Law over any source other than the Constitution, nor that the Rules must be interpreted consistent with the framework of the Law, nor even that Rule 4(2) provides for the primacy of the Law in case of conflict with the Rules.⁹ However, these provisions do not support the wide-ranging interpretation of the Pre-Trial Judge's powers under Article 39 as the SPO appears to claim.
7. Article 39 cannot be read in isolation but must also be read in context with the other relevant provisions contained in the Law, especially those relating to the powers and authority of the Trial Panel such as those set out by Article 40. In particular, Article 40(2) provides that the Trial Panel "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused."
8. Therefore, any restriction of the authority of the Pre-Trial Judge under Article 39 to decide upon requests to add witnesses to the Rule 95 SPO Witness List is not provided by Rule 118(2), but instead by Article 40 of the Law which has the same legal authority as Article 39. It is not a question of whether the drafters of the Rules intended to limit the Pre-Trial Judge's powers as the SPO erroneously asserts.¹⁰ Rule 118(2) simply implements Article 40 when granting the exclusive authority to the Trial Panel to decide upon such requests at the Specialist Prosecutor's Preparation Conference.
9. The general powers granted to the Pre-Trial Judge under Article 39 do not thereby provide "an independent legal basis for the Pre-Trial Judge's power to

⁹ Id, para. 27.

¹⁰ Id, para. 29.

decide the Request”¹¹ as the SPO claims, especially when the Pre-Trial Judge himself did not even refer to Article 39 in the Impugned Decision.

C. Rule 95 does not provide unlimited authority to the Pre-Trial Judge to expeditiously prepare the case for trial

10. The SPO avers that the Pre-Trial Judge saw the primary legal basis for authorising the SPO Request in Rule 95,¹² which, reflects his powers under the law to “take all necessary measures for the expeditious preparation of the case for trial.”¹³ Taking the SPO’s submissions to their logical end, the Pre-Trial Judge’s authority under Rule 95 would be unlimited, as long as it would assist in expeditiously preparing the case for trial.
11. This reasoning is wholly fatuous. It wrongly suggests that the Trial Panel has effectively a minimal role in proceedings, with powers granted to the Pre-Trial Judge akin, or even greater, to those granted to an investigative judge in a traditional civil law system. However, the KSC Legal Framework clearly sets out the limits of the Pre-Trial Judge’s authority under Rule 95, expressly reserving specific rights and obligations to be decided upon exclusively by the Trial Panel, separated by the relevant Chapter Heading.¹⁴ Under the SPO’s superficial and erroneous interpretation of authority of the Pre-Trial Judge, all these obligations could contribute to the expeditious preparation of the case for trial and therefore theoretically could be exercised by the Pre-Trial Judge. It cannot be a serious or logical interpretation of the legal framework of this court that the Pre-Trial Judge could wield such power over trial proceedings, especially where the separation

¹¹ Id, para. 28.

¹² Id, paras 26.

¹³ Id, para. 31.

¹⁴ Section 1 - Trial Preparation and Trial Management: Rules 115-123, Section 2 - Case Presentation: Rules 124-136; Section 3 – Evidence, Sub-section 1: Admissibility and Assessment of Evidence and Testimony: Rules 137-140, Sub-section 2 - Statements and Other Evidence: Rules 141-157.

of the competencies of each Panel are clearly delineated in the Rules with regard to the present issue.

D. Inherent authority of the Pre-Trial Judge to decide upon the Request

12. The SPO's final argument, essentially rests on the premise that as the SPO Request was filed before the Pre-Trial Judge, he would be "derelict of his duty to ensure the case is ready for trial" if he transferred the case file without disposing of such a request.¹⁵ This circular reasoning implies that any SPO request filed before the Pre-Trial Judge inherently grants him the authority to rule on it. It bears not even the most cursory scrutiny.
13. However, the interrelated and more substantive issue of whether the Pre-Trial Judge retains the inherent authority to decide upon this specific SPO Request may be relevant to this Appeal. Nonetheless, the SPO's submissions on this are found wanting.
14. First, the SPO's reference to similar but different provisions before the ICTR or ICC¹⁶ do not assist in resolving whether the Pre-Trial Judge before the KSC had the inherent authority to rule upon the SPO Request. Neither Tribunal specifically reserves the authority to decide upon adding witnesses to the Prosecution's witness list to the Trial Chamber, when there is a separate Pre-Trial Judge or Pre-Trial Chamber as is the case with Rule 118 at the KSC. Reliance on these other provisions, or their interpretation is therefore of limited assistance.
15. Second, the burden is not upon the Defence to demonstrate why it would be fairer and more efficient for the Trial Panel alone to decide upon the SPO Request rather than the Pre-Trial Judge.¹⁷ Only the Trial Panel is specifically mandated by Rule 118(2) to decide upon requests to add witnesses to the SPO Witness list

¹⁵ SPO Response, para. 32.

¹⁶ Ibid, para. 29.

¹⁷ Id, para. 32.

and the burden therefore rightly rests upon the Pre-Trial Judge to demonstrate why he is endowed with such inherent authority in issuing the Impugned Decision in the absence of explicit authority set out in the Rules.

16. In any event, logic dictates, and the specific wording of Rule 118(2) heavily implies, that the Trial Panel is far better placed to decide upon the SPO Request than the Pre-Trial Judge. Through other provisions detailed above, the Trial Panel is exclusively authorised to determine the general conduct of proceedings pursuant to Rule 116(3) as well as, *inter alia*:

- (i) determine the number of witnesses the Specialist Prosecutor may call and instruct him or her to remove repetitive witnesses;¹⁸
- (ii) invite the Specialist Prosecutor to reduce or narrow the number of charges in the indictment;¹⁹
- (iii) determine the time available to the Specialist Prosecutor for presenting evidence;²⁰ and,
- (iv) request the Specialist Prosecutor to shorten the estimated length of the direct examination of any witness identified on the Specialist Prosecutor Witness List filed with the Pre-Trial Judge under Rule 95(4)(b).²¹

17. Self-evidently, the Trial Panel is therefore in a far better position to assess the prejudice to the Defence caused by allowing the SPO to add relevant witnesses to its list, in the full context of how these rules will be exercised in this case, and specifically whether it is unfair to the Accused to add the two witnesses who were the subject of the initial SPO Request in that context.

¹⁸ Rule 118(1)(a).

¹⁹ Rule 118(1)(b).

²⁰ Rule 118(1)(d).

²¹ Rule 118(1)(e).

18. Further, as set out in the Appeal,²² deferring the decision to the Trial Panel would not have prevented notification of the SPO's intention to add two witnesses, or disclosure of their statements to the Defence at that time. No issues of efficiency therefore required the Pre-Trial Judge to have issued the Impugned Decision.

III. RELIEF REQUESTED

19. For the reasons set out in the Appeal, the Pre-Trial Judge erred in law in holding that he was empowered to decide upon the SPO Request by reliance on Rules 95 or Rule 118. Nothing in the SPO Response, which sought to bolster the flawed reasoning in the Impugned Decision by reference to the Pre-Trial Judge's purportedly unlimited authority pursuant to Article 39, or his inherent authority to authorise amendments to the SPO Witness List, compensates for this error.

20. For the abovementioned reasons, the Defence therefore respectfully requests the Appeals Panel to **GRANT** the Appeal and Reverse the Impugned Decision.

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Respectfully submitted on 22 December 2022,



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²² Appeal, paras 27-30.



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