



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

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

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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Public Redacted Version of 'Consolidated Prosecution response to Thaçi and Selimi Defence appeals of Decisions F01057 and F01058', KSC-BC-2020-06/IA025/F00004, dated 15 December 2022

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I. INTRODUCTION

1. The Court of Appeals Panel ('Panel') should dismiss the Appeals¹ and affirm the Pre-Trial Judge's decisions to allow the Specialist Prosecutor's Office ('SPO') to amend its witness and exhibit lists ('Decisions').² In the Decisions, the Pre-Trial Judge acted in accordance with Article 21(6) of the Law³ and Rules 95(4)(b) and (c), 102(1)(b), and 118(2) of the Rules⁴, as well as applicable jurisprudence. The Pre-Trial Judge considered relevant factors correctly. For the reasons set out below, the Appeals fail to demonstrate any error of fact or law, or that the Decisions were so unreasonable, such that there was an abuse of discretion.⁵

II. PROCEDURAL BACKGROUND

2. On 20 July 2022, the SPO filed its Rule 102(2) submission and related requests.⁶

3. On 2 September 2022, the SPO filed a request to add two witnesses and associated materials.⁷

¹ Selimi Defence Appeal against "Decision on Prosecution Request to Add Two Witnesses and Associated Material", KSC-BC-2020-06/IA025/F00002, 2 December 2022, Confidential ('Selimi Appeal'); and Thaçi Defence Appeal of F01057 and F01058, KSC-BC-2020-06/IA025/F00003, 5 December 2022, Confidential ('Thaçi Appeal'); together: 'Appeals'.

² Decision on Prosecution Rule 102(2) Submission and Related Requests, KSC-BC-2020-06/F01057, 27 October 2022, Strictly Confidential and *Ex Parte* ('Decision F01057'); and Decision on Prosecution Request to Add Two Witnesses and Associated Materials, KSC-BC-2020-06/F01058, 27 October 2022, Strictly Confidential and *Ex Parte* ('Decision F01058'); together: 'Decisions'.

³ 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.

⁴ 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.

⁵ Decisions to amend or vary Rule 95(4)(b)-(c) documents (witness and exhibit lists) are discretionary. *See, similarly*, ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015, para.174.

⁶ Prosecution Rule 102(2) submission and related requests with strictly confidential and *ex parte* Annexes 1-7 and 9, and confidential Annex 8, KSC-BC-2020-06/F00890, 20 July 2022, Strictly Confidential and *Ex Parte* ('SPO First Request'). A Confidential Redacted version was filed on 21 July 2022, F00890/CONF/RED.

⁷ Prosecution request to add two witnesses and associated materials with strictly confidential and *ex parte* Annexes 1-2, KSC-BC-2020-06/F00947, 2 September 2022, Strictly Confidential and *Ex Parte* ('SPO Second Request'). A Confidential Redacted version was filed on the same day, F00947/CONF/RED.

4. On 27 October 2022, the Pre-Trial Judge issued the Decisions, authorising the SPO to amend its witness and exhibit lists.⁸
5. On 2 November 2022, the SPO filed its amended witness and exhibit lists.⁹
6. On 3 November 2022, Thaçi sought leave to appeal Decisions F01057 and F01058,¹⁰ and Selimi requested leave to appeal Decision F01058.¹¹ On 16 November 2022, the SPO responded to the Defence Requests.¹² Thaçi and Selimi did not reply to the SPO Responses.
7. On 23 November 2022, the Pre-Trial Judge granted the Defence leave to appeal five issues.¹³
8. On 2 December 2022 and 5 December 2022, Thaçi and Selimi submitted their respective appeals.¹⁴ Both appeals were notified on 5 December 2022.

⁸ Decision, KSC-BC-2020-06/F01057; Decision, KSC-BC-2020-06/F01058.

⁹ Prosecution submission of amended witness and exhibit lists with strictly confidential and *ex parte* Annexes 1 and 3 and confidential Annexes 2 and 4, KSC-BC-2020-06/F01078, 2 November 2022, Confidential.

¹⁰ Thaçi Defence Request for Certification to Appeal the “Decision on Prosecution Rule 102(2) Submission and Related Requests” (F01057), KSC-BC-2020-06/F01080, 3 November 2022, Confidential; Thaçi Defence Request for Certification to Appeal the “Decision on Prosecution Request to Add Two Witnesses and Associated Materials” (F01058), KSC-BC-2020-06/F01085, 3 November 2022, Confidential.

¹¹ Selimi Defence Request for Certification to Appeal the Decision on Prosecution Request to Add Two Witnesses and Associated Materials, KSC-BC-2020-06/F01084, 3 November 2022, Confidential.

¹² Prosecution response to Thaçi Defence request for certification to appeal Decision F01057, KSC-BC-2020-06/F01106, 16 November 2022, Confidential; Prosecution response to Thaçi Defence request for certification to appeal Decision F01058, KSC-BC-2020-06/F01107, 16 November 2022, Confidential; Prosecution response to Selimi Defence request for certification to appeal Decision F01058, KSC-BC-2020-06/F01108, 16 November 2022, Confidential.

¹³ The Pre-Trial Judge granted Thaçi leave to appeal his First and Second Issues on Decision F01057, and his Third and Fourth Issues on Decision F01058. The Pre-Trial Judge granted Selimi leave to appeal his First Issue on Decision F01058. He rejected leave to appeal for all remaining Issues, *see* Decision on Requests for Certification to Appeal F01057 and F01058, KSC-BC-2020-06/F01118, 23 November 2022, para.77.

¹⁴ Selimi Appeal, KSC-BC-2020-06/IA025/F00002, 2 December 2022 and Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, 5 December 2022.

III. SUBMISSIONS

9. Decisions to amend or vary Rule 95(4)(b)-(c) documents (witness and exhibit lists) are discretionary.¹⁵ As outlined below, the Defence fails to demonstrate any error in the Decisions, let alone how such alleged error amounts to an abuse of discretion that invalidates them.¹⁶ Instead, the Defence's arguments are built on misrepresentations and/or errors, or amount to mere disagreements with the Pre-Trial Judge's exercise of discretion. Such submissions should be summarily dismissed.¹⁷ Moreover Thaçi's arguments, which take issue only with slices of factors that the Pre-Trial Judge considered, do not even assert that the putative errors individually or collectively would lead to a different outcome.

10. At the outset, the SPO addresses certain submissions in the Appeals that should be disregarded. First, the SPO notes that in his introduction, Thaçi gestures at claims that the additions to the witness and exhibit lists impact various of his rights.¹⁸ Thaçi did not request, and was not granted, the right to appeal these claims and they will not be addressed further.

11. Second, Thaçi makes an alarmist claim that the Decisions 'grant an unlimited right to the SPO to add exhibits and witnesses in the pre-trial phase.'¹⁹ In addition to being self-evidently mistaken, this apprehension will be moot by the time this matter

¹⁵ See *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015, para.174; ICTR, *Prosecutor v. Augustin Ngirabatware*, ICTR-99-54-AR73(C), Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses, 20 February 2012, para.12; ICTR, *Prosecutor v. Pauline Nyiramasuhuko 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, para.10; ICTY, *Prosecutor v. Milan Milutinović et al.*, IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to Its 65^{ter} Witness List, 20 April 2007, paras 9-10.

¹⁶ *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020 ('Gucati Appeals Decision'), para.14.

¹⁷ See, for example, *Specialist Prosecutor v. Shala*, Decision on Pjetër Shala's Appeal Against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, KSC-BC-2020-04/IA002/F00010, 11 February 2022, para.39; *Bizimungu* Decision, para.14 ('Disagreement with the result of an exercise of discretion, without more, is not a basis for appellate interference').

¹⁸ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.4.

¹⁹ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.5.

is decided due to the transfer of the case to the Trial Panel. Relatedly, Thaçi's claim that the addition of four witnesses and associated documents prevents the ability to 'finally move this case forward'²⁰ has been firmly rebutted by the imminent transfer of the case to the Trial Panel as well.

12. Third, it is worth noting that, to a substantial degree, Thaçi's and Selimi's arguments contradict each other. Thaçi argues that the decisions to add the witnesses come impermissibly late; Selimi, on the other hand, argues that they come impermissibly early, and should be resolved by the Trial Panel.²¹ Regardless, this incongruity is resolved by all of the claims being meritless.

A. THE PRE-TRIAL JUDGE CORRECTLY ASSESSED TIMELINESS (THAÇI'S FIRST ISSUE)

13. Thaçi wrongly argues that the Pre-Trial Judge committed error in assessing that the relevant time period regarding timeliness started from when the SPO interviewed [REDACTED] and W04034.²² Thaçi fails to marshal any jurisprudence demonstrating error in the Pre-Trial Judge's approach, and his claims of the deleterious consequences of such an approach are fatally flawed. Indeed, Thaçi's preferred approach²³ would itself encourage negative consequences.

14. As the Pre-Trial Judge correctly determined, the proper date from which to assess timeliness is 'the date on which the SPO interviewed [the witness] because it was at that point that the SPO could fully ascertain the relevance of [the witness's] evidence to its case.'²⁴ It is only in the context of a detailed picture of a witness's evidence that the SPO (or any party) can assess whether an individual merits being requested as a witness, with all of the consequences that flow from that. Such careful consideration, with sufficient information, in adding individuals to a witness list is to

²⁰ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.6.

²¹ Selimi's argument go solely to the witnesses addressed in Decision F01058.

²² Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, paras 17-21.

²³ Thaçi proposes that the time should be assessed 'from when the SPO first learned about the potential evidence' (*see* Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.21), and describes negative consequences that he purports flow from the Pre-Trial Judge's approach.

²⁴ Decision F01057, KSC-BC-2020-06/F01057, paras 23, 32.

be encouraged, as it ultimately results in more efficient trial processes that are more likely to reach the truth regarding charged crimes. Thaçi's approach, on the other hand, would have the SPO add all individuals to its witness list the moment the SPO 'first learned about the potential evidence', without such careful consideration, and then, presumably, reduce that list as the SPO gathers a fuller understanding of witnesses' knowledge. Such an approach, which would necessarily result in the inclusion on the witness list of a large number of individuals that the SPO will not ultimately call at trial, serves neither the interests of justice, nor the efficiency of the Defence's trial preparation.

15. Thaçi argues that by assessing timeliness from the date of interview, the Pre-Trial Judge has granted 'the SPO unlimited scope to interview new witnesses and add them to the SPO Witness List'²⁵ even where the SPO has 'sat on information for years.'²⁶ The problem with this scare-mongering, however, is that it ignores other factors of the Pre-Trial Judge's assessment as to whether addition of new witnesses should be allowed that would prevent such outcomes. First and foremost, it ignores the Pre-Trial Judge's careful assessment—as part of the timeliness factor—of whether the SPO has been diligent in obtaining the witness's evidence before the interview and then in making the amendment request after the interview.²⁷ It also ignores the Pre-Trial Judge's assessment of good cause and impact.²⁸

B. THE PRE-TRIAL JUDGE CORRECTLY ASSESSED GOOD CAUSE (THAÇI'S SECOND AND THIRD ISSUES)

16. Thaçi's submissions on the second and third issues are equally unconvincing. Thaçi claims that the Pre-Trial Judge, in finding that the SPO had shown good cause, relied on irrelevant factors, namely that: (i) the SPO Request was filed while the pre-

²⁵ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.19.

²⁶ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.20.

²⁷ Decision F01057, KSC-BC-2020-06/F01057, paras 24-25, 33-34.

²⁸ Decision F01057, KSC-BC-2020-06/F01057, paras 27-29, 36-37.

trial phase remains ongoing, and (ii) the Defence continues its investigations.²⁹ According to Thaçi, there is no link between the continuation of the pre-trial phase and a showing of good cause for the requested amendments, and the fact that investigations are active is immaterial.³⁰

17. Such argumentation lays bare Thaçi's misapprehension of the legal test for requests to amend the witness and/or exhibit lists.³¹ Through these lists, the SPO gives notice to the Defence of the evidence it intends to lead at trial. The lists thus assist the Defence in its preparation for trial, thereby safeguarding the Accused's right to adequate time and facilities for the preparation of his defence. The stage of proceedings at which changes to these lists are made, far from being irrelevant, is an influential factor in the balancing exercise between the Accused's right to adequate time to investigate the proposed new witnesses, and the prosecution's duty to present the available evidence to prove its case.³² Indeed, it would be a clear error to neglect to consider the timing of such requests, because of the obvious implications for the preparation of the Accused's defence.

18. Thaçi's complaint that the Pre-Trial Judge's consideration of the ongoing Defence investigations was an 'irrelevant factor' is also misplaced. Regardless of whether, as Thaçi claims, '[i]nvestigations will continue during the trial phase, and will likely continue into any subsequent appeal phase,'³³ it stands to reason that adjusting for new witnesses is easier when investigations are already underway, than

²⁹ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, paras 22-25.

³⁰ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.24.

³¹ Decision on Thaçi's Appeal against "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures", KSC-BC-2020-06/IA019/F00006, 12 July 2022 ('Appeal Decision'), paras 21, 23 (acknowledging that the stage of the proceedings and Defence investigations are both relevant considerations in assessing impact).

³² See Appeal Decision, KSC-BC-2020-06/IA019/F00006, para.21, ICTY, *Prosecutor v. Ratko Mladić*, IT-09-92-T, Decision on Prosecution Second Motion to Amend Rule 65ter Exhibit List, 27 June 2012, para.6 ('Mladić Decision'); see also ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-832, Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013, para.11 ('Kenyatta Decision'); *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-PT, Decision on Prosecution's Motion to Amend Rule 65ter Witness List and on Related Submissions, 22 April 2008, para.10 ('Lukić Decision').

³³ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.25.

to do so when such processes have ceased. Moreover, Thaçi himself has stated that his investigations at this stage are particularly active, recently describing the current period leading up to the start of trial as the ‘central period of pre-trial Defence investigations’.³⁴ It was, therefore, correct for the Pre-Trial Judge to consider that the decisions were made at the pre-trial phase, and while investigations were ongoing.

19. Furthermore, Thaçi’s baseless claim that the SPO requests have ‘kept the proceedings from moving to trial’³⁵ is demonstrably false, not least by the fact that the Pre-Trial Judge has now announced the transfer of the case to the Trial Panel, as he consistently stated he would.³⁶

C. THE PRE-TRIAL JUDGE CORRECTLY ASSESSED THE IMPACT OF THE ADDITIONS
(THAÇI’S FOURTH ISSUE)

20. In the fourth issue, Thaçi submits that the Pre-Trial Judge relied on irrelevant factors in his assessment of the impact of the amendments on the Defence’s trial preparation, namely that a significant portion of the additional evidence had already been made available to the Defence through disclosure, or [REDACTED].³⁷ At the outset, the SPO notes the incongruity in that, although the Pre-Trial Judge relied on analysis of the same factor in Decision F01057,³⁸ Thaçi did not seek to appeal on this basis for that decision.

³⁴ Thaçi Appeal Against the “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”, KSC-BC-2020-06/IA024/F00002, 8 September 2022, para.56.

³⁵ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.24.

³⁶ KSC-BC-2020-06, Transcript of Hearing, 8 September 2022, pp.1553 (stating that transfer would occur within ‘a reasonable delay’, despite requests which were being processed or still outstanding at that time, such as the Defence’s Rule 99 requests); KSC-BC-2020-06, Transcript of Hearing, 4 November 2022, pp.1587-1588 (stating that the Pre-Trial Judge intended to transfer the case before the end of the year); Notification Pursuant to Rule 98(3) of the Rules of Procedure and Evidence, KSC-BC-2020-06/F01131, 30 November 2022, para.4 (notification of readiness to transfer case to Trial Panel by 15 December 2022).

³⁷ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.27.

³⁸ See Decision F01057, KSC-BC-2020-06/F01057, paras 28, 37.

21. That Thaçi already had received much of the additional material is patently relevant when assessing the impact that the addition of evidence and witnesses will have on the Defence, and also accords with the jurisprudence of the Appeals Panel and other international tribunals.³⁹ Contrary to Thaçi's assertion, the Pre-Trial Judge did not 'circumvent the fact that the Defence preparations are affected by the late addition of witnesses and exhibits to the SPO Lists',⁴⁰ but instead explicitly considered that acknowledged consequence and how the fact that the Defence already had access to much of the material ameliorated that impact.

22. The Defence seek to downplay the fact that they have already received many of these documents by referencing the number of documents that have been disclosed. As an initial matter, all disclosure the SPO has provided to Thaçi (which he describes as 'over 52,000 documents'⁴¹) are the product of either an SPO obligation to disclose, or were requested by Thaçi. More importantly, while the Defence is, of course, entitled to prepare however it deems best, it is certainly appropriate to assume that the Defence is reviewing the documents that it receives. In this respect, these already-disclosed materials included items flagged as potentially exculpatory or related to SPO evidence, enhancing the likelihood of their review.⁴² That developments in the case, including the 'addition of these new witnesses, and new material, means more work for the Defence' is not a basis to claim error.⁴³

³⁹ Appeal Decision, KSC-BC-2020-06/IA019/F00006, para.22; ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1553, Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, 23 October 2009, para.27; STL, *Prosecutor v. Ayyash et.al.*, STL-II-01/PT/PTJ/F1029, Decision on Two Prosecution Submissions in Relation to Amending the Prosecution Rule 91 Filings, 5 August 2013, para.25 ('Ayyash Decision'); ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Decision on Fourteenth Prosecution Motion for Leave to Amend its Rule 65ter Exhibit List, 16 April 2010, para.19 ('Stanišić Decision').

⁴⁰ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.28.

⁴¹ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.28.

⁴² Decision F01057, KSC-BC-2020-06/F01057, paras 28, 37.

⁴³ Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.29.

23. Moreover, several additional factors underpinned the Pre-Trial Judge's finding concerning impact. In particular, the Pre-Trial Judge considered relevant to this finding that: (i) the SPO did not request delayed disclosure of [REDACTED] identity; (ii) the SPO filed the Request during the pre-trial phase; and (iii) the requested additions are limited in length, especially compared to the volume of evidence otherwise disclosed.⁴⁴ These factors, together with the prior availability of the relevant materials to the Defence, supported the Pre-Trial Judge's finding that the SPO had demonstrated good cause for the additions to the witness and exhibit lists.⁴⁵

24. Thus, the Pre-Trial Judge did not 'dismiss the Defence concerns on the basis that' the additional material was already available to the Defence.⁴⁶ Rather, the Pre-Trial Judge confronted the Defence's concerns head-on, but found that, 'in light of the current stage of proceedings', the Defence 'will be afforded meaningful time to process' the additional evidence.⁴⁷

D. THE PRE-TRIAL JUDGE WAS CORRECT TO RULE ON DECISION F01058 (SELIMI'S FIRST ISSUE)

25. Selimi's sole ground of appeal rests on the submission that the Pre-Trial Judge has no authority to decide the SPO's request to amend the witness and exhibit lists, as he did in Decision F01058. To get there, Selimi argues that: (i) Rule 118(2) only applies to the Trial Panel;⁴⁸ (ii) Rule 118(2) abrogates the 'inherent discretion' established in the jurisprudence of other international tribunals;⁴⁹ and (iii) Rule 95 does not provide an independent basis for deciding the SPO's request.⁵⁰ These submissions are necessarily cumulative, so that a failure to establish any of these arguments collapses

⁴⁴ Decision F01058, KSC-BC-2020-06/F01058, paras 27, 31.

⁴⁵ Decision F01058, KSC-BC-2020-06/F01058, paras 28, 32.

⁴⁶ *Contra*, Thaçi Appeal, KSC-BC-2020-06/IA025/F00003, para.27.

⁴⁷ Decision F01058, KSC-BC-2020-06/F01058, paras 27, 31.

⁴⁸ Selimi Appeal, KSC-BC-2020-06/IA025/F00002, paras 14-17, 20-34.

⁴⁹ Selimi Appeal, KSC-BC-2020-06/IA025/F00002, paras 12-13, 19.

⁵⁰ Selimi Appeal, KSC-BC-2020-06/IA025/F00002, paras 35-39.

Selimi's Appeal. At the outset, the SPO notes that the Pre-Trial Judge made a similar decision to amend the witness and exhibit lists in Decision F01057, and Selimi did not appeal.

26. Selimi's substantial efforts to argue the first point are ultimately moot. Contrary to Selimi's submissions,⁵¹ the Pre-Trial Judge did not consider Rule 118(2) as the primary legal basis for deciding the Request, which he saw instead in Rule 95.⁵² The Pre-Trial Judge merely referred to Rule 118(2) as guidance for the legal test for applications to amend the lists of witnesses and exhibits.⁵³ Accordingly, the Pre-Trial Judge required the SPO to establish 'timely notice and a showing of good cause', which also reflects the jurisprudence of other international tribunals.⁵⁴

27. Selimi also fails to establish the second point. Notably, Selimi cites no authority, nor does he substantiate his submissions with reference to rules of statutory interpretation. Indeed, Selimi does not even acknowledge the interpretative framework in Article 3 of the Law, which gives primacy to the Law over any source other than the Constitution of the Republic of Kosovo. Likewise, Selimi neglects to address the interpretive provisions in Rule 4. Rule 4(1) clarifies that the Rules must be interpreted consistent with the framework in Article 3 of the Law; and Rule 4(2) states that the Law prevails in the event of conflict between the Law and the Rules.⁵⁵ It is therefore axiomatic that Rule 118(2) is incapable of restricting any power conferred on the Pre-Trial Judge under the Law.

28. The Law grants broad powers to the Pre-Trial Judge in managing the preparation of the case for trial. In particular, the Pre-Trial Judge can: 'make any necessary orders or decisions to ensure the case is prepared properly and

⁵¹ Selimi Appeal, KSC-BC-2020-06/IA025/F00002, paras 14-17, 20-34.

⁵² Decision F01058, KSC-BC-2020-06/F01058, para.18.

⁵³ Decision F01058, KSC-BC-2020-06/F01058, para.26.

⁵⁴ ICTY, *Prosecutor v. Popović et. al.*, IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007, para.37; ICTY, Mladić Decision, para.6; STL, Ayyash Decision, para.20; ICC, Kenyatta Decision, para.11.

⁵⁵ See also Article 19.

expeditiously for trial’;⁵⁶ make ‘any other orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial’;⁵⁷ and ‘issue any other order as may be necessary for the preparation of a fair and expeditious trial’.⁵⁸ Not only do these broad enabling provisions pull in the opposite direction to Selimi’s arguments when interpreting the Rules, they also provide an independent legal basis for the Pre-Trial Judge’s power to decide the Request.⁵⁹ In light of the established hierarchy of sources, these powers, conferred under the Law, are immune from any interpretation of Rule 118(2) suggested by Selimi.

29. The case law of other international tribunals uniformly holds that the power to amend witness and exhibit lists forms part of the Pre-Trial Judge’s (and Trial Chamber’s) ‘inherent discretion’ in managing proceedings.⁶⁰ Selimi suggests that this jurisprudence is inapplicable because ‘there is no equivalent to Rule 118(2) in the procedural framework of any other international court’.⁶¹ This submission is not only factually incorrect – the Rules of Procedure and Evidence of the ICTR contain a provision explicitly dealing with applications to amend the list of witnesses – but also misguided.⁶² It again relies on the fallacious and unsubstantiated reasoning that the

⁵⁶ Article 39(1).

⁵⁷ Article 39(3).

⁵⁸ Article 39(13).

⁵⁹ See, similarly, ICC, Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-1590, Decision on the Prosecution’s application to add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537), 3 November 2009, para.12.

⁶⁰ ICTY, Prosecutor v. Popović et. al., IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin’s Questioning, 14 December 2007, para.37; STL, Ayyash Decision, para.20; Mladić Decision, paras 5-6; Lukic Decision, para.9; see also ICC, Kenyatta Decision, para.11; ICC, Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-1590, Decision on the Prosecution’s application to add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537), 3 November 2009, para.12.

⁶¹ Selimi Appeal, KSC-BC-2020-06/IA025/F00002, para.12.

⁶² ICTR, RPE, Rule 73bis(E); see ICTR, Prosecutor v. Nyiramasuhuko et al., ICTR-98-42-A, Judgement, 14 December 2015, para.174. See also ICC, Rules of Procedure and Evidence, Rule 76(2) and Rule 84; Official Records of the Assembly of States parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A, Rules 76(2), 84; ICC, Regulations of the Court, ICC-BD/01-05-16, 2018, Regulation 35(2).

drafters of the Rules intended to limit the Pre-Trial Judge's powers, in spite of the torrent of evidence to the contrary.

30. In addition, unable to find fault in the Pre-Trial Judge's reasoning in the Decision, Selimi instead complains about the Pre-Trial Judge's reasoning in a prior decision.⁶³ These submissions should be summarily dismissed, since that decision is not subject of the appeal.

31. Selimi's reasoning on the third point also fails. The Pre-Trial Judge's wide powers under the Law are reflected in Rule 95, which obliges the Pre-Trial Judge to 'take all necessary measures for the expeditious preparation of the case for trial'. What follows under Rule 95(2) is a list of tasks the Pre-Trial Judge shall perform, meaning he has an obligation to perform these functions, as opposed to merely being authorised to do so. That this list is illustrative rather than restrictive is plain from the words '*inter alia*'.

32. Any teleological interpretation of the relevant provisions points in the opposite direction to that advanced by Selimi. The purpose of the witness and exhibit lists is to 'allow the Defence to prepare its case and to ensure that the presentation of evidence during trial is efficient'.⁶⁴ Thus, ultimately these lists serve as notice, to the Defence, of the evidence the prosecution intends to rely on at trial.⁶⁵ Selimi does not advance a single argument why limiting the Pre-Trial Judge's power in the suggested manner would advance the twin arches of fairness and efficiency.⁶⁶ It would have the opposite effect. As the Pre-Trial Judge pointed out, he would be derelict of this duty to ensure the case is ready for trial if he transferred the case file to the Trial Panel before disposing of requests to amend the list of witnesses and/or exhibits.⁶⁷

⁶³ Selimi Appeal, KSC-BC-2020-06/IA025/F00002, paras 31-34.

⁶⁴ ICTY, Stanišić Decision, para.14.

⁶⁵ ICTY, Stanišić Decision, para.16.

⁶⁶ See e.g. Article 19(2); ICTY, Stanišić Decision, para.15.

⁶⁷ See Article 40(1).

33. Selimi's interpretation, limiting the powers of the Pre-Trial Judge under Rule 95, is also inconsistent with the confidence which the Law vests in the Pre-Trial Judge to make any necessary orders or decisions to properly and expeditiously prepare the case for trial.⁶⁸ As mentioned above, the Rules must be interpreted consistent with the Law and any conflict must be resolved in favour of the Law.⁶⁹

34. Finally, Selimi also fails to explain why, on a textual basis, the addition of exhibits may be ruled on by the Pre-Trial Judge, as the Court of Appeals has permitted,⁷⁰ but not the addition of witnesses. Both are governed by Rule 95 at the pre-trial stage, and allow amendment during the trial stage pursuant to Rule 118. Indeed, there is no difference, on the text alone (nor in the jurisprudence relied upon by the Court of Appeals),⁷¹ for permitting one but not the other.

35. For these reasons, in addition to the Pre-Trial Judge's inherent power, he has ample authority to rule on the SPO's requests to amend the witness and exhibit lists under the Law and the Rules. Selimi's Appeal is therefore without merit and should be dismissed.

IV. CLASSIFICATION

36. This response is confidential pursuant to Rule 82(4). The SPO does not object to its reclassification as public.

V. RELIEF REQUESTED

37. For the foregoing reasons, the Panel should dismiss the Appeals in their entirety.

⁶⁸ Article 39(1).

⁶⁹ Rule 4.

⁷⁰ Appeal Decision, KSC-BC-2020-06/IA019/F00006, paras 21-26.

⁷¹ See e.g. Appeal Decision, KSC-BC-2020-06/IA019/F00006, fns 48, 51 (referring to jurisprudence concerning amendments to both witness and exhibit lists).

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Tuesday, 25 April 2023

At The Hague, the Netherlands.