



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: 3 October 2023

Language: English

Classification: Confidential

**Decision on Thaçi and Selimi Defence Request to Postpone the Testimony of
W00208, W04753 and W04491**

Acting Deputy Specialist Prosecutor

Ward Ferdinandusse

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Victims

Simon Laws

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

TRIAL PANEL II ("Panel"), pursuant to Article 21(4)(c) and (f) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 121 and 127 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 14 September 2023, the Specialist Prosecutor's Office ("SPO") filed a motion for admission of evidence of, *inter alia*, witnesses W00208, W04753 and W04491 ("Witnesses") pursuant to Rule 154 ("Rule 154 Motion").¹

2. On 15 September 2023, the SPO notified its intention to call the Witnesses as "possible reserve" witnesses for the evidentiary block running between 9 and 19 October 2023.²

3. On 21 September 2023, following inconclusive *inter partes* discussions,³ the Defence for Hashim Thaçi and Rexhep Selimi ("Defence") filed a request to postpone the testimony of the Witnesses ("Request").⁴

4. On 22 September 2023, the SPO filed the information required by paragraph 74 of the Panel's Order on the Conduct of Proceedings ("Order")⁵ in relation to the Witnesses.⁶

¹ F01788, Specialist Prosecutor, *Prosecution Motion for Admission of Evidence of Witnesses W00208, W02082, W02475, W04147, W04325, W04491, and W04753 Pursuant to Rule 154*, 14 September 2023, confidential, with Annexes 1-7, confidential.

² Correspondence 320. *See also* F01807/A01, Specialist Counsel, *Annex 1 to Thaçi and Selimi Defence Request to postpone the testimony of W00208, W04753 and W04491* (Annex 1 to the Request), 21 September 2023, confidential.

³ F01807/A02, Specialist Counsel, *Annex 2 to Thaçi and Selimi Defence Request to postpone the testimony of W00208, W04753 and W04491*, 21 September 2023, confidential.

⁴ F01807, Specialist Counsel, *Thaçi and Selimi Defence Request to postpone the testimony of W00208, W04753 and W04491*, 21 September 2023, confidential, with Annexes 1 and 2, confidential. A public redacted version was filed on 2 October 2023, F01807/RED.

⁵ *See* F01226/A01, Panel, *Annex 1 to the Order on the Conduct of the Proceedings*, 25 January 2023, para. 74(iv) and (vi).

⁶ F01811/A01, Specialist Prosecutor, *Annex 1 to Prosecution Submission of List of Reserve Witnesses* ("Reserve Witnesses List"), 22 September 2023, confidential.

5. On 27 September 2023, the SPO responded to the Request (“Response”).⁷
6. The Defence did not reply.

II. SUBMISSIONS

7. The Defence requests the Panel to: (i) reduce the time limit prescribed by Rule 76 of the Rules for the SPO’s response to the Request; and (ii) order the SPO to postpone the testimony of the Witnesses until the evidentiary block of November 2023, at the earliest.⁸ The Defence argues that the SPO’s late notice of the imminent testimony of the Witnesses is prejudicial as it infringes upon the rights of the Accused to have adequate time to prepare to examine them.⁹ The Defence stresses that the SPO gave no prior notice of its intent to call the Witnesses this year as they are not listed on the SPO’s list of the first forty witnesses or subsequent witness lists.¹⁰ The Defence avers that the following four factors aggravate prejudice: (i) the SPO’s failure to submit the information required by the Order in relation to the Witnesses;¹¹ (ii) the limited time the Panel will have to consider the merits of the Rule 154 Motion and the consequent limited time it will have to consider the evidence found appropriate for admission;¹² (iii) the SPO’s failure to justify why W01504’s availability and mode of testimony remain under consideration;¹³ and (iv) the lack of overlap in the Witnesses’ evidence.¹⁴ The Defence concludes that two to three weeks of preparation for the Witnesses are insufficient and that postponing their testimony to a later evidentiary block is the

⁷ F01820, Specialist Prosecutor, *Prosecution Response to Thaçi and Selimi Defence Request to Postpone Reserve Witnesses*, 27 September 2023, confidential. A public redacted version was filed on the same day, F01820/RED.

⁸ Request, paras 3, 15.

⁹ Request, paras 2, 8.

¹⁰ Request, paras 6-7.

¹¹ Request, para. 8 *referring to* Order, para. 74(iv) and (vi).

¹² Request, para. 9.

¹³ Request, para. 10.

¹⁴ Request, para. 11.

only adequate remedy to ensure the Defence adequate notice and time to prepare for cross-examination.¹⁵

8. The SPO responds that the Request should be denied, as premature and unfounded.¹⁶ The SPO argues that the Defence had sufficient notice and adequate time and facilities to prepare for cross-examination.¹⁷ It submits that no concrete prejudice arises from the potential testimony of the Witnesses during the 9-19 October 2023 evidentiary block (“October Block”).¹⁸ The SPO argues that notice of the Witnesses at this stage was required due to the number of reserve witnesses called between July and September 2023 evidentiary blocks.¹⁹ The SPO avers that inaccurate cross-examination estimates contributed to the number of previously noticed reserve witnesses being called to date.²⁰ The SPO further submits that, of the previously noticed reserve witnesses, two have not yet been called but neither are suitable for the October Block.²¹ It explains that the identification and notice of reserve witnesses is the result of a careful consideration of multiple, and often competing, factors.²² The SPO submits that: (i) it gave notice to the Defence of the Witnesses on 14 September 2023; (ii) it filed the information required by paragraph 74 of the Order on 22 September 2023; and (iii) there is only one document that it intends to use with the Witnesses that was not previously tendered as an associated exhibit in the Rule 154 Motion.²³ While conceding that the evidence of the Witnesses does not overlap, the SPO argues that: (i) the evidence of W04491 and W04753 relates to many of the same matters; and (ii) the scope of W00208’s evidence and related material is limited.²⁴ The SPO submits that

¹⁵ Request, para. 12.

¹⁶ Response, paras 1, 10.

¹⁷ Response, para. 1.

¹⁸ Response, para. 1.

¹⁹ Response, para. 2.

²⁰ Response, para. 3.

²¹ Response, para. 2.

²² Response, para. 4.

²³ Response, paras 5-6.

²⁴ Response, para. 7.

the necessity to resort to the Witnesses remains hypothetical and depends, *inter alia*, on accurate cross-examination estimates.²⁵ The SPO also adds that it is available to liaise *inter partes* about any issues, in particular in light of demonstrable prejudice, and that only after exhausting such *inter partes* consultations should the Defence seek relief from the Panel.²⁶

III. APPLICABLE LAW

9. Pursuant to the Order:

74. The SPO shall list the witnesses in the **tentative order** in which they are to be called, identifying them if necessary by groupings. The **SPO shall, thereafter, notify the Trial Panel and the Parties and participants in a timely fashion of any change in the proposed order of presentation of witnesses**. The list shall include:

- i. The name and pseudonym of the witness, subject to protective measures;
- ii. All prior statements or transcripts of evidence of the witness;
- iii. Whether the SPO proposes that the witness should give evidence partly or wholly live, and whether the SPO intends to tender the witness's statement or transcript of evidence pursuant to Rule 154;
- iv. The issues, facts and circumstances in relation to which the witness will be examined;
- v. Time estimate for direct examination;
- vi. Documents and exhibits which the SPO proposes to use with this witness, and the exhibit or MFI number of any of those already admitted or marked for identification;

[...]

77. At the end of any three-week block of hearings, the Party calling witnesses shall notify the Trial Panel and the other Parties and participants of the witnesses which it intends to call during the following three-week block of hearings.

78. On Thursday, at 16:00 hours, in any week preceding a week in which witnesses are to be heard, the Party calling witnesses shall notify the Trial Panel and the other Parties and participants of the witnesses which it intends to call during the following week.

80. **It is the duty of the presenting Party to notify** the Trial Panel, the other Parties and participants, and the Registry **as soon as possible of any changes to the order of witnesses** and/or any amendment to the list of (proposed) exhibits that it intends to use with a witness.

²⁵ Response, para. 8.

²⁶ Response, para. 8.

81. It is the presenting Party's responsibility to ensure that, at the conclusion of the evidence of a witness, there is another witness ready to begin to testify. If one of the proposed witnesses is not able to testify at the scheduled time or if there is no cross-examination of a witness, or if cross-examination proceeds faster than expected, **the presenting Party shall ensure that an alternative witness can be called so as to avoid any delay in the proceedings.** Only those witnesses notified pursuant to paragraph 77 may be called as alternative witnesses, unless prior approval of the panel is obtained.

84. Parties and participants are instructed to seek agreement, where possible, regarding the order in which witnesses are to be called in the following week. The Trial Panel reserves its right to order the Parties and participants to amend the order in which they propose to call witnesses.²⁷

IV. DISCUSSION

10. At the outset, the Panel observes that the SPO responded to the Request on 27 September 2023, *i.e.* five days before the time limit provided by Rule 76. The part of the Request seeking to shorten the time limit for the SPO to respond to the Request is therefore moot.

11. The Panel turns to the remainder of the Request, *i.e.* the requested postponement of the testimony of the Witnesses to the next evidentiary block at the earliest. In this regard, the Panel acknowledges that the Witnesses were not listed on the SPO's list of first 40 witnesses, nor in subsequent submitted lists of witnesses.²⁸ That said, the Panel observes that the Defence received notice of the possibility that the Witnesses may testify during the October Block on 15 September 2021,²⁹ *i.e.* at least three weeks before the commencement of the October Block of witnesses. The Panel further notes that such notice was given several additional weeks before any of these witnesses are to be called since they would only be called as "reserve" for listed witnesses in case the latter cannot testify and/or when there is a gap in the schedule that requires their

²⁷ Order, paras 74, 77-78, 80-81, 84.

²⁸ See F01117, Specialist Prosecutor, *Prosecution Submission of Provisional List of First 40 Witnesses to be Called at Trial*, 18 November 2022, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential; F01243, Specialist Prosecutor, *Prosecution Submission of List of First 12 Witnesses and Associated Information*, 1 February 2023, with Annex 1, confidential; F01630, Specialist Prosecutor, *Prosecution Submission of List of the Next 12 Witnesses, Reserve Witnesses and Associated Information*, 28 June 2023, with Annexes 1 and 2, confidential, and Annex 3, strictly confidential and *ex parte*.

²⁹ Correspondence 320. See also Annex 1 to the Request.

being called. The Panel, therefore, considers the Defence submission that the SPO noticed its intention to rely on the Witnesses “approximately three weeks before their eventual testimony”³⁰ as incorrect. The four scheduled witnesses for the October Block are W03880, W04577, W04769 and W04448. It follows that the earliest that the first of the Witnesses *could* be called to testify would, in any event, be during the latter part of the October Block. Considering that the SPO gave notice of the potential testimony of the Witnesses on 15 September 2023,³¹ the Defence will have had at least a month to prepare for the Witnesses.

12. Further, the Witnesses are “possible reserve witnesses”. It follows from the nature of *reserve* witnesses that the need to call the Witnesses to testify in the October Block depends largely on how direct examination and cross-examination of the *non-reserve* witnesses proceed.³² The Witnesses will testify in the October Block *only if* the testimony of the (*non-reserve*) scheduled witnesses concludes faster than anticipated or are no longer in a position to testify for unforeseen reasons. In that sense, the Defence Request is also premature. In this regard, the Panel further recalls that the more accurate the time estimates provided by the Parties, the less likely the (“possible reserve”) Witnesses will have to be called to testify.³³

13. Based on the above, the Panel is satisfied that the Defence will have adequate time to prepare for the cross-examination of the (potential) Witnesses should any of the proposed Witnesses need to be called during the October block. The Panel further notes in this respect that the SPO has provided the order in which these reserve Witnesses would be called, thereby enabling the Defence to prioritise preparation in the order in which those witnesses would be called.³⁴

³⁰ Request, para. 6.

³¹ Correspondence 320. *See also* Annex 1 to the Request.

³² Transcript of Hearing, 10 July 2023, pp. 5259-5261 (“Oral Order on Appearance of Reserve Witnesses”).

³³ Oral Order on Appearance of Reserve Witnesses.

³⁴ *See* Reserve Witnesses List.

14. As regards the Defence's argument that the SPO failed to provide the information required by paragraph 74(iv) and (vi) of the Order,³⁵ the Panel observes that, on 22 September 2023, the SPO provided information as to: (i) the issues, facts and circumstances in relation to which the Witnesses will be examined; and (ii) the proposed documents and exhibits to be used with the Witnesses.³⁶ The Panel is therefore satisfied that the SPO provided the required information and rejects Defence arguments to the contrary.

15. As regards the Defence's argument that it will have limited time prior to the Witnesses' testimony to consider the admissible Witnesses' evidence in light of the Panel's forthcoming decision on the pending Rule 154 Motion,³⁷ the Panel notes the following. The Panel acknowledges that there will indeed be limited time between the issuance of its decision on the Rule 154 Motion and the potential testimony of the first of the Witnesses. However, the Panel notes that the Defence has been on notice of the proposed evidence of these Witnesses since their statements were disclosed to the Defence. Furthermore, what statements of those Witnesses the SPO would seek to rely upon was made apparent from the SPO Rule 154 Motion, which was filed on 14 September 2023. Considering, as explained above, that the first of the Witnesses who *may* testify will not do so before the later part of the October Block, the Panel considers that there will be sufficient time for the Defence to adequately prepare for cross-examination. The Panel reiterates that the SPO provided the order in which the Witnesses will, if needed, be called.³⁸ The Panel is therefore satisfied that the Defence is in a position to prioritise preparation of the Witnesses on the basis of the order indicated by the SPO.

³⁵ Request, para. 8.

³⁶ See Reserve Witnesses List.

³⁷ Request, para. 9.

³⁸ See, *again*, Reserve Witnesses List.

16. As regards the Defence's argument that the SPO failed to justify why W01504's availability and mode of testimony remain under consideration, the Panel observes that: (i) the SPO notified the Defence and the Panel of this information in July 2023;³⁹ and (ii) the SPO indicated that it will provide "further information concerning this witness as soon as practicable".⁴⁰ In addition, the Panel recalls that there must be a degree of flexibility in the order of appearance of reserve witnesses due to the nature of such witnesses.⁴¹ The Panel also notes that, at this stage, the mode of testimony of which the Defence has notice is Rule 154 and that it should at this point prepare on that basis until further notice, if any. The Panel considers that the absence of specific justifications as to why another previously noticed reserve witness has not been scheduled before the Witnesses is not, on its own, sufficient ground for postponing the testimony of alternative reserve witnesses.

17. Lastly, as regards the Defence's argument that the lack of overlap in the Witnesses' evidence further complicates its preparations for cross-examination,⁴² the Panel observes that: (i) the evidence of two of the Witnesses (W04491 and W04753) relates to charged crime sites addressed by other scheduled or completed witnesses; and (ii) the scope of the evidence of W00208, and related material, is rather limited. While the calling in succession of related witnesses is desirable, doing so is not always a possibility and the Panel will not exercise its discretion here to prevent the SPO to call related witnesses at a different point in the presentation of its case. The Panel is therefore not persuaded by the Defence's argument that the lack of evidential overlap impedes preparations for cross-examination.

³⁹ See F01673, Specialist Prosecutor, *Prosecution Request Concerning Items Related to W03832 and Rule 154 Application for W01504*, 14 July 2023, confidential, para. 3. A public redacted version was filed on 17 July 2023, F01673/RED.

⁴⁰ See Response, fn. 8.

⁴¹ Oral Order on Appearance of Reserve Witnesses.

⁴² See Request, para. 8.

18. In light of the above, to the extent that the Witnesses are currently “possible reserve” witnesses only,⁴³ the Panel is of the view that the request for postponement is premature and otherwise without merit. In particular, the Panel is satisfied that the Defence received sufficient notice and will have sufficient time to adequately prepare for the (potential) testimony of the Witnesses. For this reason, the Panel is not satisfied that postponing the (potential) testimony of the Witnesses to the next evidentiary block is justified in the present circumstances.

V. DISPOSITION

19. The Panel hereby:

- a) **DECLARES** the request to reduce the time limit for the SPO to respond to the Request moot; and
- b) **DENIES** the request to postpone the testimony of the Witnesses.



Judge Charles L. Smith, III

Presiding Judge

Dated this Tuesday, 3 October 2023

At The Hague, the Netherlands.

⁴³ Correspondence 320. *See also* Annex 1 to the Request.