



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

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

**Before:** Pre-Trial Judge  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

**Date:** 8 February 2022

**Language:** English

**Classification:** Public

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**Decision on Defence Applications for Leave to Appeal the Decision Concerning  
Submission of Corrected Indictment and Request to Amend  
Pursuant to Rule 90(1)(b)**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 30 October 2020, further to the Pre-Trial Judge's decision confirming the indictment against Hashim Thaçi ("Mr Thaçi"), Kadri Veseli ("Mr Veseli"), Rexhep Selimi and Jakup Krasniqi (collectively "Accused"),<sup>2</sup> the Specialist Prosecutor's Office ("SPO") submitted the indictment as confirmed ("Indictment" or "Confirmed Indictment"), with redactions as authorised by the Pre-Trial Judge.<sup>3</sup>
2. On 22 July 2021, the Pre-Trial Judge ("PTJ") issued the "Decision on Defence Motions Alleging Defects in the Form of the Indictment".<sup>4</sup>
3. On 3 September 2021, the SPO filed its "Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)" ("3 September 2021 Request"), whereby it requested the Pre-Trial Judge to amend the Indictment and include three categories

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<sup>1</sup> KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

<sup>2</sup> KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, confidential. A public redacted version was filed on 30 November 2020, F00026/RED.

<sup>3</sup> KSC-BC-2020-06, F00034, Specialist Prosecutor, *Submission of Confirmed Indictment and Related Requests*, 30 October 2020, confidential, with Annex 1, strictly confidential and *ex parte*, and Annexes 2-3, confidential. A further corrected confirmed indictment, correcting certain clerical errors, was submitted on 4 November 2020, strictly confidential and *ex parte* (F00045/A01), with confidential redacted (F00045/A02) and public redacted (F00045/A03) versions. A lesser confidential redacted version was submitted on 11 December 2020 (F00134). Subsequent to the Decision on Defects in the Form of the Indictment, a further corrected confirmed indictment was submitted on 3 September 2021, strictly confidential and *ex parte* (F00455/A01), with confidential redacted (F00455/CONF/RED) and public redacted (F00455/RED) versions. A confidential further lesser redacted version of the confirmed indictment was filed on 17 January 2022, F00647/A01.

<sup>4</sup> KSC-BC-2020-06, F00413, Pre-Trial Judge, *Decision on Defence Motions Alleging Defects in the Form of the Indictment ("Impugned Decision")*, 22 July 2021, confidential. A public redacted version was issued the same day, F00413/RED.

("First Category", Second Category", and "Third Category") of allegations ("Proposed Amendments").<sup>5</sup>

4. On 23 December 2021, the Pre-Trial Judge, *inter alia*, granted leave to amend the Indictment in relation to the Third Category of the Proposed Amendments and, finding that the First and Second Categories of the Proposed Amendments amounted to new charges, ordered the Defence, if they so wish, to file submissions on the supporting material in relation to those categories, by 31 January 2022 ("Impugned Decision").<sup>6</sup>

5. On 17 January 2022, the Defence for Mr Thaçi ("Thaçi Defence") and the Defence for Mr Veseli ("Veseli Defence") requested leave to appeal the Impugned Decision ("Thaçi Request" and "Veseli Request" respectively, collectively "Defence Requests").<sup>7</sup>

6. On 27 January 2022, the SPO responded to the Defence Requests ("Response").<sup>8</sup>

7. On 1 February 2022, the Thaçi Defence replied to the Response ("Thaçi Reply").<sup>9</sup>

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<sup>5</sup> KSC-BC-2020-06, F00455, Specialist Prosecutor, *Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)*, 3 September 2021, strictly confidential and *ex parte*, with Annexes 1-5, strictly confidential and *ex parte*. Confidential redacted and public redacted versions were filed on 8 September 2021, F00455/CONF/RED and F00455/RED, respectively.

<sup>6</sup> KSC-BC-2020-06, F00635, Pre-Trial Judge, *Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)*, 23 December 2021, confidential.

<sup>7</sup> KSC-BC-2020-06, F00645, Defence for Mr Thaçi, *Thaçi Defence Request for Certification to Appeal the "Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)"*, 17 January 2022, confidential; F00646, Defence for Mr Veseli, *Veseli Defence Application for Leave to Appeal Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)*, 17 January 2022, confidential.

<sup>8</sup> KSC-BC-2020-06, F00658, Specialist Prosecutor, *Consolidated Prosecution Response to Defence Requests for Certification to Appeal the "Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)"*, 27 January 2022, confidential.

<sup>9</sup> KSC-BC-2020-06, F00672, Defence for Mr Thaçi, *Thaçi Defence Reply to SPO's Consolidated Response to Defence Requests for Certification to Appeal the "Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)"*, 1 February 2022, confidential.

## II. SUBMISSIONS

8. The Thaçi Defence requests leave to appeal the Impugned Decision on the following four issues (collectively “Four Thaçi Issues”):

- (1) Whether the PTJ erred in granting leave to amend the Indictment in respect of proposed new paragraph 42 and amended paragraph 141 of Annex 2 of the Submission of Corrected Indictment and Request to Amend (part of the Third Category of allegations) before the Accused has received a lesser redacted version of the Indictment and Outlines, having found that the Defence was able to provide “meaningful challenges to the Proposed Amendments (“First Thaçi Issue”);
- (2) Whether the PTJ erred in finding that the Third Category of amendments did not amount to new charges within the meaning of Rule 90(2) of the Rules (“Second Thaçi Issue”);
- (3) Whether the PTJ erred in finding that the Proposed Amendments were not prejudicial to or inconsistent with the rights of the Accused, in particular to be tried in a reasonable time (“Third Thaçi Issue”); and
- (4) Whether the PTJ erred in finding that there was no lack of diligence on the part of the SPO in bringing the Proposed Amendments and thus that the Proposed Amendments were not prejudicial or inconsistent with the rights of the Accused (“Fourth Thaçi Issue”).<sup>10</sup>

9. The Veseli Defence requests leave to appeal the Impugned Decision on the following six issues:

- (1) Whether the Pre-Trial Judge erred in law by failing to find a violation of the right to be heard in Article 39(8) of the Law and Rule 90(1)(b) of the Rules, in relation to allegations contained in paragraph 42 of the Proposed (now Amended) Indictment that are entirely redacted (“First Veseli Issue”);
- (2) Whether the redactions applied to paragraph 42 of the Amended Indictment violate the right of Mr Veseli to be informed promptly of the nature and cause of the charges against him, as guaranteed by Article 30(1) of the Constitution, Article 6 of the ECHR, as well as Article 21(4)(a) of the Law (“Second Veseli Issue”);
- (3) Whether the new allegations of personal participation could constitute an independent basis for conviction, i.e., a new charge, by virtue of being

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<sup>10</sup> Thaçi Request, paras 10, 19.

re-characterised by a Court of Appeals Panel acting pursuant to Article 46(6) (“Third Veseli Issue”);

- (4) Whether the Pre-Trial Judge erred by finding that the redacted allegation of personal participation of the Accused, referred to in paragraph 42 of the Amended Indictment does not carry an additional risk of conviction (“Fourth Veseli Issue”);
- (5) Whether the Pre-Trial Judge erred in law by failing to consider appropriate measures to counterbalance the redactions applied to paragraph 42 of the Amended Indictment (“Fifth Veseli Issue”); and
- (6) Whether prosecutorial “diligence” must be assessed against the conduct of the SPO, as opposed to the stage of the proceedings; whether the proposed amendments are inconsistent with the right to be tried within a reasonable time; whether the scope of the amendments infringe the right to have adequate time to prepare the defence; and taken together, whether the amendments are prejudicial to, and inconsistent with the rights of the Accused (“Sixth Veseli Issue”).<sup>11</sup>

10. The SPO submits that the Defence Requests should be rejected as they fail to meet the requirements for leave to appeal under Article 45 of the Law and Rule 77 of the Rules.<sup>12</sup>

11. The Thaçi Defence replies that the SPO mischaracterises the Defence submissions and reiterates that the Four Thaçi Issues are appealable.<sup>13</sup> While it addresses more in detail only the First and Second Thaçi Issues,<sup>14</sup> the Defence requests the Pre-Trial Judge to grant leave to appeal the Four Thaçi Issues.<sup>15</sup>

### III. APPLICABLE LAW

12. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the SPO in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be

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<sup>11</sup> Veseli Request, paras 1-2, 26.

<sup>12</sup> Response, paras 1, 28(b).

<sup>13</sup> Thaçi Reply, para. 4.

<sup>14</sup> Reply, paras 5-9.

<sup>15</sup> Thaçi Reply, para. 10.

granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that they involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

13. Rule 77(2) of the Rules further provides that the Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

#### IV. DISCUSSION

14. A right to appeal arises only if the Pre-Trial Judge is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.<sup>16</sup> The Pre-Trial Judge recalls the interpretation of these provisions as set out in detail previously.<sup>17</sup>

15. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

1. Whether the matter is an “appealable issue”;
2. Whether the issue at hand would significantly affect:
  - (1) The fair and expeditious conduct of the proceedings, or
  - (2) The outcome of the trial; and

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<sup>16</sup> KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Thaçi Decision on Leave to Appeal”), 11 January 2021, public, para. 9.

<sup>17</sup> *Thaçi Decision on Leave to Appeal*, paras 9-17.

3. Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>18</sup>

A. FIRST THAÇI ISSUE, FIRST, SECOND, AND FIFTH VESELI ISSUES

16. The Thaçi Defence argues that the First Thaçi Issue is appealable as it challenges the Pre-Trial Judge's finding granting the SPO leave to amend the Confirmed Indictment in relation to the Third Category of the Proposed Amendments.<sup>19</sup> It avers that the First Thaçi Issue affects Mr Thaçi's fair trial right to be heard before the Pre-Trial Judge grants leave for an Indictment to be amended and his right to be informed promptly and in detail of the nature and cause of the charges against him.<sup>20</sup> Lastly, the Thaçi Defence submits that a determination on the First Thaçi Issue may materially advance proceedings because it would provide legal certainty as to the nature and detail of the charges faced by the Accused.<sup>21</sup>

17. The Veseli Defence submits that the First Veseli Issue is concrete, easily identifiable and stems directly from the Impugned Decision.<sup>22</sup> It avers that the issue concerns the proper interpretation of Rule 90(1)(b) of the Rules; more specifically, the Defence avers that it was barred from demonstrating how the Third Category of the Proposed Amendments was factually or legally distinct and could serve as additional basis of conviction because paragraph 42 of the Proposed Amendments was fully redacted.<sup>23</sup> The Defence submits that the First Veseli Issue undoubtedly affects the fair conduct of the trial and the outcome of the proceedings, insofar as the right to be heard

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<sup>18</sup> *Thaçi Decision on Leave to Appeal*, para. 10.

<sup>19</sup> *Thaçi Request*, para. 11.

<sup>20</sup> *Thaçi Request*, para. 13.

<sup>21</sup> *Thaçi Request*, para. 17.

<sup>22</sup> *Veseli Request*, para. 4.

<sup>23</sup> *Veseli Request*, para. 5.



is a cornerstone requirement in guaranteeing a fair trial.<sup>24</sup> An immediate resolution by the Court of Appeals would therefore offer clarity on the interpretation of Rule 90(1)(b) of the Rules and avoid a potential violation of constitutional and human rights of the Accused.<sup>25</sup>

18. As regards the Second Veseli Issue, the Veseli Defence argues that, irrespective of whether the incident referred to in paragraph 42 of the Proposed Amendments constitutes a new charge, the Second Veseli Issue engages the constitutional rights of Mr Veseli to be informed promptly of the nature and cause of the charges against him and to have adequate time and resources to prepare his defence.<sup>26</sup> Recalling that the issue remains whether, considering the stage of proceedings, any redaction of the material facts alleged in the indictment would be *tout court* in violation of the right of the Accused to be promptly informed of the charges against them, the Defence concludes that any violation of the right to a fair trial will significantly affect the outcome of the trial and therefore an immediate resolution by a Court of Appeals Panel is warranted.<sup>27</sup>

19. As regards the Fifth Veseli Issue, the Veseli Defence argues that it stems from the Impugned Decision insofar as it relates to the Pre-Trial Judge's finding that redactions were necessary and proportionate to protect the identities of the witnesses and the confidentiality of the information related to said witnesses.<sup>28</sup> Considering that the safety of witnesses must be balanced against the right of the Accused to a fair trial, the Veseli Defence avers that the Pre-Trial Judge failed to consider appropriate counterbalancing measures.<sup>29</sup> As the Fifth Veseli Issue significantly affects the

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<sup>24</sup> Veseli Request, para. 6.

<sup>25</sup> Veseli Request, para. 6.

<sup>26</sup> Veseli Request, para. 7.

<sup>27</sup> Veseli Request, paras 8-9.

<sup>28</sup> Veseli Request, para. 16.

<sup>29</sup> Veseli Request, para. 17.



outcome of the trial, the Veseli Defence argues that a resolution by the Court of Appeals is urgently warranted.<sup>30</sup>

20. The SPO responds that the First Thaçi Issue amounts to a mere disagreement with the Impugned Decision as it contests the general outcome of the latter.<sup>31</sup> Moreover, the SPO submits that, given that redactions relating to the relevant amendments in the recently filed lesser redacted versions of both the Indictment and Rule 86(3)(b) Outline remain necessary, the fact that the Pre-Trial Judge granted leave to amend the Indictment prior to the filing of a lesser redacted version is irrelevant and the First Thaçi Issue is moot.<sup>32</sup> It further avers that the First Thaçi Issue would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, insofar as the loose and unsupported claims that the right to be heard is being infringed are misguided and insufficient to trigger appellate review.<sup>33</sup> In the SPO's view, the Defence has also not shown that the First Thaçi Issue would materially advance proceedings and, on the contrary, granting appeal now would only serve to unnecessarily delay proceedings.<sup>34</sup>

21. With regard to the First and Second Veseli Issues, the SPO responds that they are framed too broadly and also amount to a mere disagreement with the Impugned Decision.<sup>35</sup> The SPO further avers that the Veseli First and Second Issues would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, insofar as: (i) the loose and unsupported claims that the right to be heard is being infringed are misguided and insufficient to trigger appellate review; and (ii) the alleged impact of the redactions on the Accused's right to prepare a defence is highly speculative at this stage.<sup>36</sup> Lastly, as regards the First Veseli Issue, it submits

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<sup>30</sup> Veseli Request, para. 18.

<sup>31</sup> Response, para. 9.

<sup>32</sup> Response, para. 10.

<sup>33</sup> Response, para. 12.

<sup>34</sup> Response, para. 13.

<sup>35</sup> Response, para. 9.

<sup>36</sup> Response, para. 12.

that offering “clarity on the interpretation” of a provision is not sufficient to trigger the exceptional intervention of the Court of Appeal;<sup>37</sup> as regards the Second Veseli Issue, the SPO submits that insofar as the Veseli Defence concedes that the Court of Appeals is seized with a similar ground of appeal, resolution of the Second Veseli Issue would not materially advance proceedings.<sup>38</sup>

22. As regards the Fifth Veseli Issue, the SPO submits that it is not an appealable one since the Veseli Defence did not identify any counterbalancing measure that the Pre-Trial Judge should have considered and did not.<sup>39</sup> Moreover, insofar as the Defence wrongly assumes that: (i) the Pre-Trial Judge conducted no discussion on counterbalancing measures; (ii) the Impugned Decision did not indicate the decisions which constituted basis for the concerned redactions; and (iii) the rights of the Accused must prevail over the safety of witnesses, the SPO claims that the Fifth Veseli Issue amounts to a mere disagreement with the Impugned Decision.<sup>40</sup>

23. The Thaçi Defence replies that the First Thaçi Issue, contrary to what the SPO alleges, concerns the discrete finding that the Defence can make meaningful challenges to the proposed amendments.<sup>41</sup> Moreover, the Defence submits that the First Thaçi Issue cannot be considered moot since redactions that are subject of the First Issue are still present in the lesser redacted Indictment.<sup>42</sup> Lastly, the Defence rebuts the SPO’s allegations that Defence arguments are loose, unsupported and generalised.<sup>43</sup>

24. The Pre-Trial Judge notes that the First Thaçi Issue and the First, Second, and Fifth Veseli Issues all relate to redaction matters, in particular the application of redactions to some of the information contained in the Third Category of the Proposed

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<sup>37</sup> Response, para. 14.

<sup>38</sup> Response, para. 15.

<sup>39</sup> Response, para. 11.

<sup>40</sup> Response, para. 11.

<sup>41</sup> Thaçi Reply, para. 5.

<sup>42</sup> Thaçi Reply, para. 6.

<sup>43</sup> Thaçi Reply, paras 7-8.

Amendments and how such redactions impinge upon the Accused's right to be heard pursuant to, *inter alia*, Rule 90(1)(b) of the Rules and to be informed promptly of the nature and cause of the charges against them.

25. It is recalled that in the Impugned Decision, after noting that the Defence's right to be heard pursuant to Article 39(8) of the Law and Rule 90(1)(b) of the Rules is not limited to whether or not the Proposed Amendments are prejudicial,<sup>44</sup> the Pre-Trial Judge noted that the redactions at stake stem from previously granted protective measures that are necessary and proportionate to protect the identities of the witnesses.<sup>45</sup> It was nonetheless found that the Defence had been in an overall position to provide meaningful challenges to the Proposed Amendments on the basis of the confidential redacted version of the Confirmed Indictment and the supporting material. In this sense, the Pre-Trial Judge recalls that the right to be heard pursuant to Article 39(8) of the Law and Rule 90(1)(b) of the Rules is a cornerstone of criminal proceedings, but distinct from and informed by the level of information provided to the Defence. While the Accused have a right to receive all material and relevant evidence, pursuant to Article 21(6) of the Law, before being heard, there might be competing interests against which the right of the Accused must be balanced.<sup>46</sup> The Pre-Trial Judge finds that it is clear from the Impugned Decision that he carefully balanced the Accused's rights under Articles 21(6) and 39(8) of the Law and Rule 90(1)(b) of the Rules with the need to protect the identities of victims and

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<sup>44</sup> Impugned Decision, para. 45

<sup>45</sup> Impugned Decision, para. 47.

<sup>46</sup> See KSC-CC-PR-2017-01/F00004, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by the Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, 26 April 2017, public, para. 135 *in fine* ("Thus, it acknowledges that the principles of a fair trial guaranteed under Article 31 of the Constitution may also require that, in appropriate cases, the interests of the accused are balanced against those of witnesses or victims called upon to give evidence"), with further European Court of Human Rights references. See also KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, paras 46, 82 ("In this context it is recalled that it is permissible to withhold certain information from the Defence prior to trial"), 84.

witnesses (Article 23 of the Law and Rule 80 of the Rules), and, above all, found that those redactions could not be lifted until such time as ordered in the relevant protective measure decision(s).<sup>47</sup> Therefore, insofar as the First Thaçi Issue, and the First and Second Veseli Issues essentially aim, under different perspectives, at contesting the extent of the redactions assessed and applied in the Impugned Decision,<sup>48</sup> as ordered, and already extensively litigated upon, in the relevant protective measure decision(s) and essentially aim at calling into question the Pre-Trial Judge's balancing between competing rights, the issues represent a mere disagreement with the outcome of the Impugned Decision.

26. With regard to the Fifth Veseli Issue, the Pre-Trial Judge considers that the Veseli Defence misrepresents the Impugned Decision. In fact, in the Impugned Decision the Pre-Trial Judge duly scrutinised the redactions applied by the SPO and found them to be necessary and proportionate to protect the identities of the witnesses and the confidentiality of the information related to said witnesses.<sup>49</sup> By finding that the Defence was in an overall position to provide meaningful challenges to the Proposed Amendments, the Pre-Trial Judge implicitly considered that no further counter-balancing measures, other than those already considered in the respective protective measure decision(s), could be taken.

27. In light of the above, the Pre-Trial Judge considers that the First Thaçi Issue, and the First, Second and Fifth Veseli Issues do not constitute appealable issues. As a result, it is not necessary to address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules. Leave to appeal these issues is therefore rejected.

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<sup>47</sup> Impugned Decision, para. 47. Reference was made therein to footnote 25 of the 3 September 2021 Request, which, however, had to be redacted as the identity of some witnesses could have been inferred from specific paragraphs in the respective protective measure decision(s).

<sup>48</sup> Impugned Decision, para. 47 ("The Pre-Trial Judge has scrutinised the redactions applied by the SPO...").

<sup>49</sup> Impugned Decision, para. 47.

## B. SECOND THAÇI ISSUE AND FOURTH VESELI ISSUE

28. The Thaçi Defence argues that the Second Thaçi Issue arises from the Impugned Decision as it challenges the Pre-Trial Judge's finding that the Third Category of the Proposed Amendments are not new charges.<sup>50</sup> The Defence argues that the Second Thaçi Issue would significantly affect the outcome of the trial, as it would create separate and new potential basis for conviction.<sup>51</sup> Lastly, the Thaçi Defence submits that a determination on the Second Thaçi Issue may materially advance proceedings because it would provide legal certainty as to the nature and detail of the charges faced by the Accused.<sup>52</sup>

29. The Veseli Defence submits that the Fourth Veseli Issue stems from the Impugned Decision and concerns the Pre-Trial Judge's finding that the Third Category does not introduce a basis for conviction that is factually and/or legally distinct from any already alleged in the Indictment.<sup>53</sup> The Defence further argues that, as a counterbalancing measure, it should be allowed to have the issue reviewed by the Court of Appeals insofar as it is suspected that, due to extensive redactions to one of the Third Category incidents, a judicial error has occurred.<sup>54</sup>

30. The SPO responds that the Thaçi Defence fails to substantiate properly why the Second Thaçi Issue qualifies as appealable. It argues that, in any case, the Second Thaçi Issue is impermissibly broad and amounts to a mere disagreement with the Impugned Decision as the Thaçi Defence failed to identifying precisely what the Pre-Trial Judge should have done differently.<sup>55</sup> With regard to the Fourth Veseli Issue, the SPO submits at the outset that the Veseli Defence's submissions regarding an alleged automatic right to appeal shall be summarily dismissed.<sup>56</sup> The SPO submits that, in

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<sup>50</sup> Thaçi Request, para. 11.

<sup>51</sup> Thaçi Request, para. 14.

<sup>52</sup> Thaçi Request, para. 17.

<sup>53</sup> Veseli Request, para. 12.

<sup>54</sup> Veseli Request, para. 13.

<sup>55</sup> Response, para. 18.

<sup>56</sup> Response, para. 20.

any event, the Fourth Veseli Issue is a mere disagreement with the Impugned Decision, and misrepresents the latter.<sup>57</sup> More specifically, the SPO argues that Veseli erroneously characterises the Third Category of the Proposed Amendments as “new [Joint Criminal Enterprise] allegations” whereas the Pre-Trial Judge clearly identified them as two additional incidents adding further precision to a form of participation already pleaded in the Indictment.<sup>58</sup>

31. The Thaçi Defence replies that a party that seeks leave to appeal is not required to specify what it thinks the Pre-Trial Judge should have done differently, but rather identify how the issue fits the legal test for leave to appeal.<sup>59</sup>

32. The Pre-Trial Judge notes at the outset that both issues arise from the Impugned Decision as they concern the Pre-Trial Judge’s finding that the Third Category of the Proposed Amendments does not amount to a new, independent basis for conviction.<sup>60</sup>

33. In this regard, the Pre-Trial Judge notes that the Second Thaçi Issue in fact subsumes the Fourth Veseli Issue, in that whereas the latter only refers to the amendments contained in paragraph 42 of the Proposed Amendments to the Indictment, the former refers to the overall Third Category of the Proposed Amendments. The two issues are therefore considered together, the Second Thaçi Issue encompassing the Fourth Veseli Issue. The Pre-Trial Judge is satisfied that the issues are not mere disagreements with the Impugned Decision, but discrete topics emanating from the Impugned Decision.

34. The Pre-Trial Judge finds that the Second Thaçi Issue, as encompassing the Fourth Veseli Issue, relates to the scope of the charges against the Accused, and therefore to the Accused’s right under Article 21(4)(a) of the Law to be informed promptly and in detail of the nature and cause of the charges against them. In this

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<sup>57</sup> Response, para. 20.

<sup>58</sup> Response, para. 20.

<sup>59</sup> Thaçi Reply, para. 9.

<sup>60</sup> Impugned Decision, para. 26.

regard, the Pre-Trial Judge considers that it is important to resolve similar issues early on, in order for the Accused to have adequate time and facilities to prepare their defence, as provided in Article 21(4)(c) of the Law. Early resolution of the issues would also streamline the proceedings and advance the Accused's right to be tried within a reasonable time, as provided in Article 21(4)(d) of the Law.

35. For the considerations made above, the Pre-Trial Judge finds that the Second Thaçi Issue, as encompassing the Fourth Veseli Issue, would also benefit from an authoritative determination by the Court of Appeals at the earliest opportunity as this would guarantee that proceedings are carried out in compliance with the applicable legal framework and that all procedural rights of the Accused are complied with. Accordingly, the Pre-Trial Judge finds that an immediate resolution by the Court of Appeals of the Second Thaçi Issue, as encompassing the Fourth Veseli Issue, may materially advance the proceedings.

36. In light of the above, the Pre-Trial Judge grants leave to appeal the Second Thaçi Issue, as encompassing the Fourth Veseli Issue.

### C. THIRD VESELI ISSUE

37. The Veseli Defence argues that the Third Veseli Issue derives from the Impugned Decision and concerns the proper interpretation of the Law, namely whether Article 46(6) of the Law allows a Trial Panel or Court of Appeals Panel to change the legal characterisation of the facts and enter a finding of guilt on the basis of an alternative mode of liability not previously charged.<sup>61</sup> In particular, claiming that the phrase "alternative mode for liability" contained in Article 46(6) of the Law is vague, the Defence avers that the Pre-Trial Judge did not explicitly exclude the possibility

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<sup>61</sup> Veseli Request, para. 10.



that a Trial Panel or Court of Appeals Panel may enter a conviction based on an alternative mode of liability which is not already pleaded by the SPO.<sup>62</sup>

38. The SPO argues that the Third Veseli Issue does not merit leave to appeal as it concerns a speculative and hypothetical scenario of possible future actions and that the Defence fails to demonstrate that this is an appealable issue.<sup>63</sup>

39. The Pre-Trial Judge notes that in the Impugned Decision he found that the Court of Appeals' power to make findings in relation to alternative modes of liability does not establish whether a proposed amendment amounts to a new charge.<sup>64</sup> Insofar as the Veseli Defence wishes the Court of Appeals to clarify whether Article 46(6) of the Law allows a Trial Panel or Court of Appeals Panel to enter a finding of guilt on the basis of an alternative mode of liability not previously charged in the Confirmed Indictment, the Pre-Trial Judge finds that the Third Veseli Issue does not stem from the Impugned Decision, as the latter confined itself to find that the Third Category of the Proposed Amendments did not amount to new charges within the meaning of Rule 90(2) of the Rules, without addressing at all the scope of the powers of the Court of Appeals. Moreover, the Pre-Trial Judge considers that the Third Veseli Issue, insofar as it speculates on the powers and prerogatives of the Court of Appeals, amounts to a hypothetical legal question. As such, the Third Veseli Issue does not constitute an appealable issue. It is therefore not necessary to address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules. Leave to appeal this issue is therefore rejected.

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<sup>62</sup> Veseli Request, para. 10.

<sup>63</sup> Response, para. 19.

<sup>64</sup> Impugned Decision, para. 27.

## D. THIRD AND FOURTH THAÇI ISSUES AND SIXTH VESELI ISSUE

40. The Thaçi Defence submits that the Third and Fourth Thaçi Issues arise from the Impugned Decision as they challenge the Pre-Trial Judge's findings that: (i) the Proposed Amendments are not prejudicial to or inconsistent with the rights of the Accused, in particular to be tried within a reasonable time; and (ii) the SPO did not lack diligence in bringing the Proposed Amendments.<sup>65</sup> The Thaçi Defence avers that granting the Proposed Amendments would significantly affect the fair and expeditious conduct of the trial and cause undue delay.<sup>66</sup> Lastly, the Thaçi Defence submits that a determination at the pre-trial phase on the Third and Fourth Thaçi Issues may materially advance proceedings because it would ensure that Mr Thaçi's right to be tried in a reasonable time has not been violated to date.<sup>67</sup>

41. The Veseli Defence submits that the Sixth Veseli Issue stems from the Impugned Decision, which: (i) erroneously assessed prosecutorial diligence against the stage of the proceedings rather than against the conduct of the SPO;<sup>68</sup> (ii) failed to consider that additional procedural steps stemming from the amendment to the Indictment will encroach upon Mr Veseli's fair trial rights;<sup>69</sup> (iii) erroneously considered the First and Second Category Amendments as "*limited additions to the charges*", infringing Mr Veseli's right to have adequate time to prepare his defence.<sup>70</sup> It further argues that the Sixth Veseli Issue affects the fair and expeditious conduct of proceedings as well as the outcome of the trial due to the numerous fair trial rights guarantees encroached by the Impugned Decision and that therefore an immediate resolution by a Court of Appeals Panel is warranted.<sup>71</sup>

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<sup>65</sup> Thaçi Request, para. 11.

<sup>66</sup> Thaçi Request, para. 15.

<sup>67</sup> Thaçi Request, para. 17.

<sup>68</sup> Veseli Request, para. 22.

<sup>69</sup> Veseli Request, para. 23.

<sup>70</sup> Veseli Request, para. 24.

<sup>71</sup> Veseli Request, para. 25.

42. The SPO responds that the Thaçi Defence has not demonstrated that the Third and Fourth Thaçi Issues are appealable and simply disagrees with the Impugned Decision.<sup>72</sup> Regarding the Thaçi's Defence assertion that there is a risk of undue delay, the SPO responds that the allegation is purely speculative. Indeed, in the SPO's view, it is granting appeal that would delay proceedings, seeing as the additional steps required for the First and Second Category of amendments can be carried out in parallel with the remaining pre-trial phase.<sup>73</sup> As the Sixth Veseli Issue is concerned, the SPO submits that the issue is not adequately specific and fails to satisfy the first criterion of the certification above.<sup>74</sup> In addition, the SPO avers that the Sixth Veseli Issue is purely speculative and premature and cannot satisfy the second and third criterion either.<sup>75</sup>

43. The Pre-Trial Judge considers that the Third and Fourth Thaçi Issues and the Sixth Veseli Issue all arise from the Impugned Decision as they concern the following findings made by the Pre-Trial Judge: (i) that there had been no lack of diligence on the part of the SPO;<sup>76</sup> and (ii) that the Proposed Amendments would not deprive the Accused of adequate time to prepare their defence or otherwise impinge upon the fair trial rights of the Accused, including the right to be tried within a reasonable time.<sup>77</sup> The Pre-Trial Judge is satisfied that the issues are not mere disagreements with the Impugned Decision, but discrete topics emanating from the Impugned Decision.

44. The Pre-Trial Judge finds that the issues concern directly the expeditiousness and fair trial rights of the Accused, in particular the right to be tried within a reasonable time and the right to have adequate time to prepare their defence (Article 21(4)(c) and

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<sup>72</sup> Response, para. 23.

<sup>73</sup> Response, para. 24.

<sup>74</sup> Response, para. 26.

<sup>75</sup> Response, para. 26.

<sup>76</sup> Impugned Decision, para. 34.

<sup>77</sup> Impugned Decision, paras 36-37.

(4)(d) of the Law). Therefore, the Pre-Trial Judge finds that the issues significantly affect the fair and expeditious conduct of the proceedings.

45. The Pre-Trial Judge considers that an immediate resolution by the Court of Appeals Panel of the issues may materially advance the proceedings as it could impact the Pre-Trial Judge's assessment of the Proposed Amendments.

46. In light of the above, the Pre-Trial Judge grants leave to appeal the Third and Fourth Thaçi Issues and the Sixth Veseli Issue.

## V. DISPOSITION

47. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **GRANTS** leave to appeal the Second, Third, and Fourth Thaçi Issues and the Fourth and Sixth Veseli Issues;
- b. **REJECTS** leave to appeal the First Thaçi Issue and the First, Second, Third, and Fifth Veseli Issues;
- c. **ORDERS** the Thaçi Defence, the Veseli Defence and the SPO to file public redacted versions of, or indicate whether, their respective submissions (the Thaçi Request, the Veseli Request, and filings F00478, F00481, F00492) may be reclassified as public, by **Thursday, 10 February 2022**; and
- d. **ORDERS** the Registry to reclassify the Response and the Thaçi Reply as public.



**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Tuesday, 8 February 2022

At The Hague, the Netherlands.