



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06

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

Registrar: Fidelma Donlon

Date: 22 March 2022

Original language: English

Classification: Public

**Decision on Defence Appeals Against Decision Concerning Request to Amend
the Indictment Pursuant to Rule 90(1)(b) of the Rules**

Specialist Prosecutor's Office:
Jack Smith

Counsel for Hashim Thaçi:
Gregory Kehoe

Counsel for Victims:
Simon Laws

Counsel for Kadri Veseli:
Ben Emmerson

Counsel for Rexhep Selimi:
David Young

Counsel for Jakup Krasniqi:
Venkateswari Alagendra

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of two appeals filed on 21 February 2022 (collectively, “Appeals”) by Hashim Thaçi (“Thaçi”)² and Kadri Veseli (“Veseli”),³ (collectively, “the Accused” or “the Defence”) against the “Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)” (“Impugned Decision”).⁴ The Specialist Prosecutor’s Office (“SPO”) responded on 3 March 2022 that the Appeals should be dismissed.⁵ Thaçi and Veseli replied on 8 March 2022 (collectively, “Replies”).⁶

I. BACKGROUND

1. On 25 April 2020, the SPO submitted for confirmation a strictly confidential and *ex parte* indictment against the Accused, alongside evidentiary material in support of the factual allegations and a detailed outline pursuant to Rule 86(3)(b) of the Rules linking each item of evidentiary material to each allegation.⁷

¹ F00001, Decision Assigning a Court of Appeals Panel, 10 February 2022.

² F00002, Thaçi Defence Appeal with Leave Against the “Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)”, 21 February 2022 (confidential) (“Thaçi Appeal”).

³ F00003, Veseli Defence Appeal Against Decision Concerning Submissions of Corrected Indictment and Request to Amend, 21 February 2022 (confidential) (“Veseli Appeal”).

⁴ F00635/RED, Public Redacted Version of Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 14 February 2022 (confidential version filed on 23 December 2021) (“Impugned Decision”).

⁵ F00004, Consolidated Prosecution response to THAÇI and VESELI Defence appeals of the decision on the Prosecution Rule 90(1)(b) request, 3 March 2022 (confidential) (“Response”), paras 1, 9, 40.

⁶ F00005, Thaçi Defence Reply to Prosecution Response to Defence Appeal with Leave Against the “Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)”, 8 March 2022 (confidential) (“Thaçi Reply”); F00006, Veseli Defence Reply to Consolidated SPO Response to Thaçi and Veseli Defence Appeals Concerning Submissions of Corrected Indictment and Request to Amend, 8 March 2022 (confidential) (“Veseli Reply”).

⁷ F00002/RED, Public redacted version of ‘Submission of Indictment for confirmation’, filing KSC-BC-2020-06/F00002 dated 25 April 2020, 18 November 2020 (confidential version filed on 25 April 2020).

2. On 2 July 2020, the Pre-Trial Judge ordered the SPO to file a revised indictment, incorporating a detailed statement of facts delineating, with more specificity, a description of the factual allegations corresponding to each charged crime.⁸
3. On 24 July 2020, the SPO submitted a revised indictment for confirmation.⁹
4. On 26 October 2020, the Pre-Trial Judge confirmed the indictment against the Accused and ordered the SPO to file a further revised indictment, as confirmed.¹⁰ On 30 October 2020, the SPO submitted the Confirmed Indictment.¹¹
5. On 22 July 2021, the Pre-Trial Judge issued his “Decision on Defence Motions Alleging Defects in the Form of the Indictment”, *inter alia* ordering the SPO to file a corrected version of the Confirmed Indictment by 3 September 2021.¹²
6. On 3 September 2021, the SPO submitted a corrected version of the Confirmed Indictment, namely the operative indictment.¹³
7. On 3 September 2021 as well, the SPO requested leave to amend the Indictment and include allegations relating to (i) two related detention sites at two new locations

⁸ F00010, Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, 2 July 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020).

⁹ F00011/RED, Public redacted version of ‘Submission of revised Indictment for confirmation’, filing KSC-BC-2020-06/F00011 dated 24 July 2020, 18 November 2020 (confidential version filed on 24 July 2020).

¹⁰ F00026/RED, Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 30 November 2020 (strictly confidential and *ex parte* version filed on 26 October 2020, confidential redacted version filed on 19 November 2020) (“Confirmation Decision”).

¹¹ F00034/A01, Indictment, 30 October 2020 (strictly confidential and *ex parte*); F00045/A03, Further redacted Indictment, 4 November 2020 (strictly confidential and *ex parte*, reclassified as public on 5 November 2020) (“Confirmed Indictment”).

¹² F00413/RED, Public Redacted Version of Decision on Defence Motions Alleging Defects in the Form of the Indictment, 22 July 2021 (confidential version filed on 22 July 2021) (“Decision on the Form of the Indictment”).

¹³ F00455/RED/A01, Public Redacted Version of ‘Indictment’, KSC-BC-2020-06/F00455/A01, dated 3 September 2021, 8 September 2021 (strictly confidential and *ex parte* version filed on 3 September 2021, confidential redacted version filed on 8 September 2021) (“Indictment”). A lesser confidential redacted version of the Indictment was filed on 17 January 2022. See F00647/A01, Confidential Lesser Redacted Version of ‘Indictment’, KSC-BC-2020-06/F00455/A01, dated 3 September 2021, 17 January 2022 (confidential).

within a municipality already pleaded at or in connection with which Kosovo Liberation Army members committed acts of persecution, imprisonment/arbitrary detention, other inhumane acts/cruel treatment, torture, murder, and enforced disappearance (“First Category Amendments”); (ii) two incidents of persecution and murder committed in connection with a detention site already pleaded and a modification of the timeframe for that detention site (“Second Category Amendments”); and (iii) two incidents of the Accused’s personal participation in the crimes charged (“Third Category Amendments”) (collectively, “Proposed Amendments”).¹⁴

8. On 23 December 2021, the Pre-Trial Judge issued the Impugned Decision and, *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 2022.¹⁵

¹⁴ F00455/RED, Public Redacted Version of ‘Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)’, KSC-BC-2020-06/F00455, dated 3 September 2021, 8 September 2021 (strictly confidential and *ex parte* version filed on 3 September 2021; confidential redacted version filed on 8 September 2021) (“SPO Request”). See also F00455/CONF/RED/A02, Confidential Redacted Version of ‘Amended Indictment’, KSC-BC-2020-06/F00455/A02, dated 3 September 2021, 8 September 2021 (strictly confidential and *ex parte* version filed on 3 September 2021) (“Proposed Amended Indictment”). On 20 September 2021, Selimi, Thaçi, Krasniqi and Veseli responded to the SPO Request. See F00477/RED, Public Redacted Version of Selimi Defence Response to Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 22 September 2021 (confidential version filed on 20 September 2021); F00478/RED, Public Redacted Version of Thaçi Defence Response to Confidential Redacted Version of ‘Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)’, KSC-BC-2020-06/F00455, dated 3 September 2021, 10 February 2022 (confidential version filed on 20 September 2021) (“Thaçi Response to SPO Request”); F00480/RED, Public Redacted Version of Krasniqi Defence Response to the SPO Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b), 5 October 2021 (confidential version filed on 20 September 2021); F00481/RED, Public Redacted Version of Veseli Defence Response to SPO Submission of Corrected Indictment and Leave to Amend the Indictment (KSC-BC-2020-06/F00455/CONF/RED), 10 February 2021 (confidential version filed on 20 September 2021). On 27 September 2021, the SPO filed a reply. See F00492, Prosecution Reply Relating to its Rule 90(1)(b) Request, 27 September 2021 (confidential, reclassified as public on 11 February 2022).

¹⁵ Impugned Decision, para. 53.

9. On 17 January 2022, Thaçi and Veseli applied for leave to appeal the Impugned Decision (collectively, “Defence Certification Requests”).¹⁶

10. On 8 February 2022, the Pre-Trial Judge granted in part the Defence Certification Requests¹⁷ and certified the Second, Third, and Fourth Thaçi Issues and the Fourth and Sixth Veseli Issues (collectively, “Certified Issues”), defined as follows:

- (a) Whether the Pre-Trial Judge 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”);
- (b) Whether the Pre-Trial Judge 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”);
- (c) Whether the Pre-Trial Judge 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”);
- (d) 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

¹⁶ F00645/RED, Public Redacted Version of Thaçi Defence Request for Certification to Appeal the “Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)”, 10 February 2022 (confidential version filed on 17 January 2022); F00646, 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, reclassified as public on 11 February 2022). See also F00658, 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, reclassified as public on 8 February 2022); F00672, 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, reclassified as public on 8 February 2022).

¹⁷ F00682, 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), 8 February 2022 (“Certification Decision”), para. 47.

Amended Indictment does not carry an additional risk of conviction (“Fourth Veseli Issue”); and

- (e) 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”).

II. STANDARD OF REVIEW

11. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.¹⁸

III. PRELIMINARY MATTERS

A. PUBLIC FILINGS

12. The Appeals Panel notes that the Accused and the SPO have not filed public redacted versions of their respective Appeals, Response and Replies.¹⁹ The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all non-public submissions filed before the Panel.²⁰ The

¹⁸ KSC-BC-2020-07, F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020 (“Gucati Appeal Decision”), paras 4-14. See also e.g. F00030, Decision on Appeals Against “Decision on Motions Challenging the Jurisdiction of the Specialist Chambers”, 23 December 2021, para. 11.

¹⁹ The Panel notes that while the Impugned Decision was initially filed as confidential, a public redacted version was filed on 14 February 2022, prior to the filing of the Appeals.

²⁰ See e.g. F00005/RED, Public Redacted Version of Decision on Hashim Thaçi’s Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), para. 10. See also F00004/RED, Public Redacted Version of Decision on Kadri Veseli’s Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), para. 9 (encouraging

Panel also notes that the SPO and Thaçi do not oppose the reclassification as public of the Response and the Thaçi Reply, respectively.²¹ The Panel, therefore, orders the Parties to file public redacted versions of the above-mentioned filings, or indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of the present Decision.²²

B. ISSUES FALLING OUTSIDE THE SCOPE OF CERTIFIED ISSUES

13. The Court of Appeals Panel recalls that the scope of its review lies strictly within the confines of the issues certified by the lower panel and that it may thus decline to consider arguments of an appellant that go beyond the issues in relation to which certification has been granted.²³ The Panel also recalls the limited scope of the Issues certified by the Pre-Trial Judge.²⁴

14. The Court of Appeals Panel notes that Thaçi and Veseli both argue on appeal that because parts of the Third Category Amendments are entirely redacted, they are barred from making meaningful submissions with regard to these amendments.²⁵ The Panel recalls that the Pre-Trial Judge found that the specific issue of redactions regarding the Third Category Amendments and whether such redactions impinge on their right to be heard pursuant to Rule 90(1)(b) of the Rules was not appealable and

the parties to file public redacted versions of their filings as soon as possible, without waiting for an order to do so).

²¹ Response, para. 39; Thaçi Reply, para. 3.

²² See Rule 82(3) and (5) of the Rules; KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019, Article 39(1).

²³ See KSC-BC-2020-07, F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 (*"Gucati and Haradinaj Appeal Decision on Preliminary Motions"*), para. 20. See also e.g. KSC-BC-2020-04, F00008/RED, Public Redacted Version of Decision on Pjetër Shala's Appeal against Decision on Motion Challenging the Form of the Indictment, 22 February 2022 (confidential version filed on 22 February 2022), para. 10.

²⁴ See above, para. 10.

²⁵ See Thaçi Appeal, paras 15-16 (where Thaçi argues that because new paragraph 42 and the additions to new paragraph 141 of the Proposed Amended Indictment are entirely redacted, this limits his ability to properly pursue his appeal, in violation of his right to a fair trial. He reserves his challenges on appeal until he can read these allegations); Veseli Appeal, para. 12 (where Veseli argues that he is barred from providing any meaningful submission on the merits of the Third Category Amendments because the allegation in new paragraph 42 of the Proposed Amended Indictment is entirely redacted).

denied certification to appeal.²⁶ Consequently, the Panel finds that these arguments fall outside of the scope of the Certified Issues, as defined in the Certification Decision.²⁷ The Appeals Panel therefore declines to consider these submissions and formally dismisses them.

15. Nevertheless, the Court of Appeals Panel observes that some of the Third Category Amendments are redacted and that this information has, at this stage, not been disclosed to the Defence.²⁸ The Panel notes that the Pre-Trial Judge found that, despite redactions – deemed necessary and proportionate – stemming from previously granted protective measures, the Defence had been in an overall position to provide meaningful challenges to the Proposed Amendments.²⁹ Although it will not address this issue regarding the redactions, the Panel recalls the importance of the disclosure process in ensuring the fairness of the proceedings and that the rights of the defence are respected,³⁰ and will assess the parties' submissions mindful of the existing redactions.

²⁶ See Certification Decision, paras 24-27, 47(b).

²⁷ See Certification Decision, para. 47(a). See also Certification Decision, paras 8-9, 36, 46. The Panel further notes that the SPO submits that such arguments should be summarily dismissed because the Defence attempts to impermissibly circumvent the Certification Decision. See Response, para. 10. Contra Thaçi Reply, para. 4.

²⁸ See Proposed Amended Indictment, paras 42-43, 141.

²⁹ See Impugned Decision, para. 47. See also Certification Decision, paras 25-26.

³⁰ See KSC-BC-2020-07, F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021 (confidential version filed on 29 July 2021) ("*Gucati and Haradinaj* Appeal Decision on Disclosure"), para. 35. See also KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by 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, para. 135 (finding that entitlement to disclosure of relevant evidence is not an absolute right and that, in some cases, it may be necessary to withhold certain evidence from the Defence in order to preserve the fundamental rights of another individual or to safeguard an important public interest).

IV. DISCUSSION

A. WHETHER THE PRE-TRIAL JUDGE ERRED IN FINDING THAT THE THIRD CATEGORY AMENDMENTS DID NOT AMOUNT TO NEW CHARGES (SECOND THAÇI ISSUE; FOURTH VESELI ISSUE)

1. Submissions of the Parties

16. Thaçi submits that the Pre-Trial Judge erred in finding that the Third Category Amendments did not amount to new charges pursuant to Rule 90(2) of the Rules.³¹ More particularly, he contends that new paragraph 43 of the Proposed Amended Indictment relates to a new incident alleging the Accused's personal participation in the treatment of Opponents at a new location. In his view, and "absent more detail", these are not material facts giving greater precision to a form of participation already pleaded and underpinning the existing allegation of personal participation in the intimidation, interrogation, mistreatment and detention of opponents as the Pre-Trial Judge found, but a new charge.³²

17. Veseli contends that it was insufficient for the Pre-Trial Judge to conclude that the Third Category amendments did not amount to new charges because they involved the "intimidation, interrogation, mistreatment or detention of Opponents".³³ In his view, this would allow the SPO to add countless new alleged instances of personal participation of the Accused provided that they fit that generic description and would render the issue of new charges "practically moot".³⁴

18. According to Veseli, the correct legal test and critical question should rather have been whether the Third Category Amendments could *in and of themselves* support the conclusion that the Accused actually participated in the alleged JCE, thus

³¹ Thaçi Appeal, paras 12-14. See also Thaçi Reply, paras 5, 7.

³² Thaçi Appeal, para. 14, referring to Impugned Decision, para. 26. See also Thaçi Reply, para. 7.

³³ Veseli Appeal, para. 13. See also Veseli Reply, para. 5.

³⁴ Veseli Appeal, para. 13; Veseli Reply, para. 5.

presenting an additional, independent risk of conviction.³⁵ If so, they constitute new charges.³⁶ Veseli takes issue with the Pre-Trial Judge's "uncritical reading" of ICTY and ICTR authorities he relied upon.³⁷

19. The SPO responds that the Third Category Amendments are not new charges and that the Pre-Trial Judge correctly found that they consist of facts underpinning the pleaded allegation that the Accused contributed to the JCE through, *inter alia*, their participation in the "intimidation, interrogation, mistreatment and detention of Opponents".³⁸ The SPO submits that it proposed the Third Category Amendments following the Pre-Trial Judge's order to amend the indictment to add further instances of the Accused's participation in the alleged crimes.³⁹ It points to additional authorities that, according to the SPO, considered that new additional facts remedied defects in the indictment in the pleading of charged modes of liability, supporting existing charges rather than constituting new ones.⁴⁰ The SPO further argues that while Thaçi fails to demonstrate any error in the Pre-Trial Judge's application of the (correct) legal standard, Veseli proposes an unsupported and inadequate legal test according to which the Pre-Trial Judge should have considered whether the new incidents "could, in and of themselves, support the conclusion that the Accused actually participated in the alleged JCE".⁴¹ In addition, in the SPO's view, Veseli's efforts to distinguish the

³⁵ Veseli Appeal, para. 14; Veseli Reply, para. 8.

³⁶ Veseli Appeal, para. 14; Veseli Reply, paras 3, 5, 8.

³⁷ Veseli Appeal, paras 15-18, referring to Impugned Decision, fn. 72 and ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-PT, Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment, 16 December 2009 ("*Tolimir Decision*"), para. 41; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006 ("*Popović et al. Decision*"), para. 26; ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005 ("*Muvunyi Appeal Decision*"), para. 31. See also Veseli Reply, paras 6-7.

³⁸ Response, para. 13. See also Response, para. 17.

³⁹ Response, para. 13, referring to Decision on the Form of the Indictment, paras 90-92.

⁴⁰ Response, para. 14, and authorities cited therein.

⁴¹ Response, paras 15-17.

authorities relied upon by the Pre-Trial Judge from the present litigation are unpersuasive.⁴²

20. Thaçi replies that the SPO's argument that the Third Category Amendments are not new charges *because* they follow the decision by the Pre-Trial Judge is flawed as it does not mean that any amendments would automatically be deemed acceptable.⁴³

21. Veseli replies that he does not seek to present "a new test" that would be more rigorous than the one endorsed and applied by the Pre-Trial Judge.⁴⁴

2. Assessment of the Court of Appeals Panel

22. As recalled by the Pre-Trial Judge in the Impugned Decision, and pursuant to Article 39(8) of the Law and Rule 90(1)(b) of the Rules, after the indictment is confirmed but before the trial has begun, the SPO may, with the permission of the Pre-Trial Judge having heard the Parties, amend the indictment. If the SPO seeks to add new charges or to substitute more serious charges, the Pre-Trial Judge shall review such charges and hold an initial hearing in accordance with this Article.⁴⁵ Pursuant to Rule 90(2) of the Rules, a panel may grant leave to amend the indictment if satisfied that the amendment is not prejudicial to or inconsistent with the rights of the Accused. Where the SPO seeks to include new charges or substitute more serious charges, Rule 86(3) and (4) of the Rules shall apply *mutatis mutandis*.⁴⁶

⁴² Response, para. 18. See also Response, para. 13.

⁴³ Thaçi Reply, para. 5.

⁴⁴ Veseli Reply, paras 3, 5. See also Veseli Reply, para. 4.

⁴⁵ See Impugned Decision, para. 16.

⁴⁶ See Impugned Decision, para. 18. Rule 86(3) of the Rules provides, *inter alia*, that the indictment should be filed together with supporting material, including (a) evidentiary material supporting the material facts; and (b) a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the suspect with respect to the alleged crime(s). Rule 86(4) of the Rules provides, *inter alia*, that the Pre-Trial Judge should examine the supporting material in relation to each of the charges and should determine whether a well-grounded suspicion has been established against the suspect.

23. At the outset, the Appeals Panel considers that a decision on whether to grant leave to the SPO to amend the indictment pursuant to Article 39(8) of the Law and Rule 90 of the Rules is one within the discretion of the Pre-Trial Judge (or Trial Panel if seised). The Panel refers in this regard to the jurisprudence from international criminal tribunals confirming that there is a (wide) discretion of the trial chamber concerning amendments to the indictment and that appellate intervention is warranted only in very limited circumstances.⁴⁷ The Panel recalls that where the decision that is being challenged is a discretionary decision, a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.⁴⁸

24. The Panel notes that neither the Law nor the Rules sets out how to determine whether amendments constitute new charges or substitute more serious charges – which would trigger the application of Rule 86(3) and 86(4) of the Rules. The Panel recalls the distinction between counts or charges made in an indictment and the material facts underpinning them – the count or charge being the legal characterisation of the material facts which support that count or charge.⁴⁹ The Pre-Trial Judge found that a new charge introduces a new basis for conviction not previously reflected in the Indictment that is factually or legally distinct from any

⁴⁷ See e.g. ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 ("*Karemera et al.* Appeal Decision"), para. 9; ICTR, *Prosecutor v. Bizimungu et al.*, ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 ("*Bizimungu et al.* Appeal Decision"), para. 11; *Muvunyi* Appeal Decision, para. 38; SCSL, *Prosecutor v. Norman et al.*, SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43; *Tolimir* Decision, para. 19; IRMCT, *Prosecutor v. Kabuga*, MICT-13-38-PT, Decision on Prosecution Motion to Amend the Indictment, 24 February 2021 ("*Kabuga* Decision"), para. 8.

⁴⁸ See e.g. *Gucati* Appeal Decision, para. 14; *Gucati and Haradinaj* Appeal Decision on Disclosure, para. 36.

⁴⁹ *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 36, referring to *Muvunyi* Appeal Decision, para. 19.

already alleged.⁵⁰ The Pre-Trial Judge also found that the introduction of a factual allegation not previously alleged in the indictment may amount to a new charge, but only where it exposes an accused to an additional basis for conviction.⁵¹ The Panel notes that the legal standard set forth by the Pre-Trial Judge is strongly embedded in the jurisprudence of international criminal tribunals,⁵² and is not disputed by the Parties.⁵³

25. Turning first to the SPO's submission that because the Third Category Amendments were triggered by the Decision on the Form of the Indictment, they do not constitute new charges, the Panel notes that the Pre-Trial Judge ordered the SPO to file a corrected version of the Confirmed Indictment to ensure that instances of personal participation of the Accused in and contribution to the crimes charged are exhaustively pleaded.⁵⁴ The Pre-Trial Judge also indicated that *if* the SPO wished to plead *further* instances of personal participation of the Accused in the crimes charged, it had to seek an amendment of the Confirmed Indictment.⁵⁵ However, the Panel finds that whether the Third Category Amendments were proposed in response to the Pre-Trial Judge's decision is irrelevant to the question of their potential status as new charges.⁵⁶ The Panel observes that while the Pre-Trial Judge ordered the SPO to file a corrected version of the Confirmed Indictment to remedy the defective pleading of the Accused's personal participation in the charged crimes and while he stated that

⁵⁰ Impugned Decision, para. 22, and references cited therein.

⁵¹ Impugned Decision, para. 22, and reference cited therein.

⁵² See e.g. ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Motion to Amend the Amended Indictment, 12 January 2007, para. 16; *Popović et al.* Decision, para. 11; ICTY, *Prosecutor v. Halilović*, IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004 ("*Halilović* Decision"), para. 30; IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on the Prosecution Motion to Amend the Indictment, 17 October 2019 ("*Turinabo et al.* Decision"), fn. 76. See also similarly, ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-517, Decision on the 'Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges', 14 May 2020, paras 20-22.

⁵³ See *Thaçi Appeal*, para. 13; *Veseli Reply*, para. 3. See also *Response*, para. 17.

⁵⁴ Decision on the Form of the Indictment, paras 91-92, 179(d).

⁵⁵ Decision on the Form of the Indictment, para. 92.

⁵⁶ See *Response*, para. 13. See also *Thaçi Reply*, para. 5.

instances of personal participation are material facts which must be pleaded in the Confirmed Indictment,⁵⁷ seeking leave to add additional instances of such participation is a distinct process. As part of that distinct process of amending (rather than merely correcting) an indictment, the question of the “nature” of the amendments is precisely one that has to be addressed. The Panel finds that the determination as to whether any further instances of participation constitute new charges within the meaning of Rule 90(2) of the Rules must be done on a case-by-case basis by the Pre-Trial Judge. As a result, the Panel finds that the authorities cited by the SPO on the “curing” of defects in the indictment are unhelpful in the present context.⁵⁸

26. Turning next to the nature of the Third Category Amendments, and following a careful review of these amendments,⁵⁹ the Panel agrees with the Pre-Trial Judge that they constitute two additional incidents providing further examples of the Accused’s personal participation in the intimidation, interrogation, mistreatment and detention of opponents.⁶⁰ The Panel observes that the Third Category Amendments are factually distinct and involve different locations than the other instances already listed in the paragraphs following paragraph 40 of the Indictment, which provides that the Accused “personally participated in the treatment of Opponents on the ground by participating in the intimidation, interrogation, mistreatment, and detention of Opponents”. Nevertheless, the Panel considers that, because they are mere specifications of charges already pleaded, the Third Category Amendments fall within and constitute material facts underpinning this main, more general, allegation of intimidation, interrogation, mistreatment and detention of opponents.⁶¹ As a result, the Panel finds no error in the Pre-Trial Judge’s conclusion that the Third Category

⁵⁷ Decision on the Form of the Indictment, paras 90-92, 179(d).

⁵⁸ See Response, para. 14, fns 40-41 and references cited therein.

⁵⁹ See Proposed Amended Indictment, paras 42-43, 141.

⁶⁰ See Impugned Decision, para. 26.

⁶¹ See Impugned Decision, para. 26.

Amendments only provide greater precision to a form of JCE participation already pleaded in the Indictment, namely the intimidation and mistreatment of Opponents, rather than constituting a new form of participation in the alleged JCE.⁶²

27. Moreover, the Panel rejects Veseli's "test" according to which the Third Category Amendments would constitute a new charge since they can support, "in and of themselves", the conclusion that the Accused actually participated in the alleged JCE.⁶³ Veseli does not provide any legal basis for this argument and fails to provide any reason for departing from the well-established standard.⁶⁴ All the instances listed under paragraph 40 of the Indictment, including the Third Category Amendments, constitute separate incidents of the Accused's alleged personal participation to the JCE through the intimidation, interrogation, mistreatment and detention of Opponents. Yet, the Panel is of the view that Veseli fails to show how any of these incidents could serve as an *additional* or *independent* basis for conviction since they all form part of a type of JCE participation already reflected in the Indictment. The Panel further dismisses as speculative Veseli's submission that the SPO would then be allowed to bring an unlimited number of new instances of personal participation as they would all fit the "generic" description of intimidation and mistreatment of opponents.⁶⁵ The Panel recalls that any alleged new instance of personal participation would still have to be brought within the framework of an amendment request under Rule 90 of the Rules.

28. Finally, as to the authorities relied upon by the Pre-Trial Judge and challenged by Veseli, the Panel stresses that the question of whether a proposed amendment constitutes a new charge requires an individual, discretionary assessment that depends on the particularised circumstances of each case.⁶⁶ As a result, comparisons

⁶² Impugned Decision, para. 26.

⁶³ See Veseli Appeal, para. 14. See also Veseli Appeal, para. 18; Veseli Reply, para. 8.

⁶⁴ See above, para. 24.

⁶⁵ See Veseli Appeal, para. 13; Veseli Reply, para. 5.

⁶⁶ See above, para. 23.

with the assessment of the specific facts from other cases will, in general, be of limited assistance. Even considered on the merits, the Panel finds unpersuasive Veseli's attempt to distinguish the situations in these cases from the present case.⁶⁷ The Panel finds that Veseli merely disagrees with the Pre-Trial Judge's exercise of his discretion while failing to articulate any error on his part.⁶⁸ His argument is therefore dismissed.

29. In light of the above, the Panel therefore finds that the Accused have failed to demonstrate that the Pre-Trial Judge erred in concluding that the Third Category Amendments do not constitute new charges because they do not amount to a new, additional or independent basis for conviction.⁶⁹ The Second Thaçi Issue and Fourth Veseli Issue are therefore dismissed accordingly.

B. WHETHER THE PRE-TRIAL JUDGE ERRED IN FINDING THAT THE PROPOSED AMENDMENTS WERE NOT PREJUDICIAL TO OR INCONSISTENT WITH THE RIGHTS OF THE ACCUSED (THIRD AND FOURTH THAÇI ISSUES; SIXTH VESELI ISSUE)

1. Submissions of the Parties

30. Thaçi and Veseli submit that the Pre-Trial Judge erred in finding that there was no lack of diligence by the SPO in bringing the Proposed Amendments.⁷⁰

31. Thaçi contends that between obtaining the relevant evidence and applying to amend the Indictment, the SPO waited: (i) nine months for the First Category; (ii) one

⁶⁷ See e.g. *Tolimir* Decision, para. 41 (finding that the additional allegation that the Accused "participated in VRS efforts to restrict humanitarian aid supplies and UNPROFOR supplies and leave" amounted to an "additional act by the Accused in order to make life unbearable for the inhabitants of the Žepa enclave as part of the JCE to forcibly transfer" and was "not factually or legally distinct" from that broader existing allegation but rather gave it more precision). Contra Veseli Appeal, paras 15-18; Veseli Reply, para. 7.

⁶⁸ See e.g. *Gucati* Appeal Decision, para. 64; *Bizimungu et al.* Appeal Decision, para. 14.

⁶⁹ Impugned Decision, paras 26-28.

⁷⁰ Thaçi Appeal, paras 22, 24; Veseli Appeal, para. 21. See also Thaçi Reply, para. 11; Veseli Reply, paras 9-11.

year for the Second Category; and (iii) just over two years for the Third Category.⁷¹ In his view, this demonstrates a lack of diligence⁷² and the Pre-Trial Judge erred in failing to consider the length of time the SPO has been investigating the present case.⁷³

32. Veseli argues that the SPO Request was not timely since most witness statements were prepared prior to the submission of the Indictment, the most recent one was taken nine months prior to the SPO Request, and the SPO decision to “aggregate its proposals” was not justified.⁷⁴ In Veseli’s view, the “many processing steps” invoked by the SPO cannot demonstrate prosecutorial diligence since: (i) none of the alleged incidents were uncovered recently; (ii) because the SPO has been investigating since at least 2015 it was its responsibility to interview witnesses as soon as possible; (iii) the SPO’s internal bureaucracies are not a valid justification.⁷⁵ Veseli adds that the SPO failed to provide early notification to the Pre-Trial Judge and the Defence of its intention to amend the indictment.⁷⁶ He submits that the Pre-Trial Judge erred in considering the phase of the proceedings when assessing whether the SPO acted diligently since it is an additional criterion to be assessed separately.⁷⁷

33. As to the rights of the Accused, both Thaçi and Veseli submit that the Pre-Trial Judge erred in finding that the Proposed Amendments were not prejudicial to, and inconsistent with such rights.⁷⁸

34. Thaçi submits that the Pre-Trial Judge did not apply the “correct test” when finding that the additional steps triggered by allowing the Proposed Amendments

⁷¹ Thaçi Appeal, paras 25-29. Thaçi notes that the majority of the witness interviews constituting the evidential basis for the Proposed Amendments occurred *before* the completion of the confirmation proceedings. See Thaçi Appeal, paras 26-29.

⁷² Thaçi Appeal, para. 30, referring to ICTY, *Prosecutor v. Delić*, IT-04-83-PT, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006 (“*Delić Decision*”), paras 63, 69-74. See also Thaçi Reply, para. 11.

⁷³ Thaçi Appeal, para. 31.

⁷⁴ Veseli Appeal, para. 24. See also Veseli Appeal, paras 22-23; Veseli Reply, para. 9.

⁷⁵ Veseli Appeal, para. 25, referring to Impugned Decision, para. 34. See also Veseli Reply, para. 9.

⁷⁶ Veseli Appeal, para. 25.

⁷⁷ Veseli Appeal, para. 26; Veseli Reply, para. 10.

⁷⁸ Thaçi Appeal, paras 17, 23; Veseli Appeal, para. 33. See also Thaçi Appeal, para. 24.

could be done in parallel with the remaining stages of the pre-trial phase.⁷⁹ Thaçi claims that the Pre-Trial Judge's position that Defence investigations do not need to be "fully completed" before trial is unsupported by any external authority.⁸⁰ According to him, this would violate the Accused's right to prepare an effective defence.⁸¹ In addition, Thaçi stresses the SPO's lack of diligence in disclosing material pursuant to Rule 102(3) of the Rules and argues that it would be unfair and erroneous for the SPO to now benefit from the delay it has caused if this was used as a reason to allow the amendment of the indictment at this stage.⁸² Thaçi contends that the trial will not start before late 2022 at the earliest "[d]ue to repeated subsequent failures by the SPO".⁸³

35. Veseli submits that the Pre-Trial Judge failed to consider the already prolonged pre-trial proceedings when concluding that the additional procedural steps prescribed under Rule 90(3) and (4) of the Rules "will likely have a more limited impact" as they could be carried out in parallel with remaining stages of the pre-trial phase.⁸⁴ Pointing out the pace of the proceedings and scope of the SPO case and the fact that pre-trial proceedings are likely to continue for one more year, Veseli argues that the additional procedural steps resulting from the proposed amendments will still require additional time and "significantly encroach" on his right to be tried within a reasonable time.⁸⁵

36. Veseli submits that while the Defence will have no choice but to continue its investigations after the start of the trial due to a significant number of witnesses with delayed disclosure measures, it is crucial that it must be in a position to fully complete its investigations with regard to all other witnesses.⁸⁶ Veseli takes issue with the

⁷⁹ Thaçi Appeal, para. 17.

⁸⁰ Thaçi Appeal, para. 18.

⁸¹ Thaçi Appeal, para. 19.

⁸² Thaçi Appeal, para. 20. See also Thaçi Reply, paras 9-10.

⁸³ Thaçi Appeal, para. 21. See also Thaçi Reply, paras 9-10.

⁸⁴ Veseli Appeal, para. 27, referring to Impugned Decision, para. 35. See also Veseli Reply, paras 12-13.

⁸⁵ Veseli Appeal, para. 28. See also Veseli Reply, para. 13.

⁸⁶ Veseli Appeal, para. 30. See also Veseli Appeal, para. 29; Veseli Reply, para. 14.

Pre-Trial Judge's findings that the allegations are "limited", contending that the Pre-Trial Judge should have considered their scope independently and in relation to other cases before the Specialist Chambers, such as the *Mustafa* case where pre-trial proceedings lasted for almost one year although that case concerns "less than half of the new charges proposed by the SPO".⁸⁷

37. The SPO responds that the Pre-Trial Judge correctly found that there had been no lack of diligence on the part of the SPO in seeking the Proposed Amendments and in considering both the time between the most recent witness statement and the SPO Request as well as the justification advanced by the SPO on aggregating the amendments.⁸⁸ The SPO further recalls that the SPO Request followed the Pre-Trial Judge's findings concerning the scope of the charges.⁸⁹ The SPO further submits that Thaçi's reliance on the *Delić* Decision is flawed as the prejudice assessment must be conducted in light of the circumstances of a particular case as a whole.⁹⁰ Finally, it contends that even if the Pre-Trial Judge were to find a lack of diligence, the Proposed Amendments should not be barred as they serve the interests of justice and do not cause undue delay or prejudice.⁹¹

38. Moreover, the SPO argues that the Pre-Trial Judge correctly found that the Proposed Amendments were not unfair or inconsistent with the rights of the Accused and applied the proper legal standard.⁹² It adds that the Defence fails to identify any relevant factor the Pre-Trial Judge would have failed to consider or erroneously considered when weighing the benefits of the Proposed Amendments against potential prejudice.⁹³ The SPO also submits that it was within the Pre-Trial Judge's

⁸⁷ Veseli Appeal, para. 32, referring to Impugned Decision, para. 36. See also Veseli Reply, para. 16.

⁸⁸ Response, paras 23-24, 27. See also Response, para. 30.

⁸⁹ Response, para. 24.

⁹⁰ Response, para. 26.

⁹¹ Response, para. 29.

⁹² Response, paras 31-34. See also Response, para. 38.

⁹³ Response, paras 33-34.

discretion to assess the Accused's right to adequate preparation time.⁹⁴ According to the SPO, Veseli misleadingly argues that the Proposed Amendments increase the volume of evidentiary material to be assessed and his comparison submissions with other cases litigated before the Specialist Chambers are inaccurate, irrelevant and "intentionally inflated".⁹⁵

39. Veseli replies that, as confirmed by settled case-law, and contrary to the SPO's contention, the fact that additional charges may derive from already disclosed supporting material "does not automatically nullify prejudice to the Accused".⁹⁶

2. Assessment of the Court of Appeals Panel

40. At the outset, the Court of Appeals Panel observes that while Rule 90(1) of the Rules provides for three distinct situations in which the SPO may amend an indictment subject to specific requirements, it does not prescribe a time limit within which the SPO may request to do so. The Panel agrees with the Pre-Trial Judge that this does not mean, however, that such amendments can be requested at any time or under any circumstances since, as prescribed under Rule 90(2) of the Rules, the amendment must be deemed not to be prejudicial to or inconsistent with the rights of the Accused.⁹⁷ This assessment as to prejudice should be conducted in light of the circumstances of the case as a whole.⁹⁸ As rightly noted by the Pre-Trial Judge, and in accordance with well-established jurisprudence, the following factors, *inter alia*, should be considered for this purpose: (i) whether the amended indictment improves the clarity and precision of the case to be met; (ii) the diligence of the prosecution in

⁹⁴ Response, para. 35.

⁹⁵ Response, paras 37-38.

⁹⁶ Veseli Reply, para. 15.

⁹⁷ See Impugned Decision, para. 32.

⁹⁸ See e.g. *Halilović* Decision, para. 22; *Kabuga* Decision, para. 8; ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-PT, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, p. 5.

making the amendment in a timely manner that avoids creating an unfair tactical advantage; and (iii) any delay or prejudice to the defence from the amendment.⁹⁹

41. Turning first to the diligence of the SPO, the Panel notes that the Defence points to the amount of time that elapsed between the collection of the evidence relied upon in support of the Proposed Amendments and the SPO Request. It observes in particular that Thaçi repeats almost verbatim the submissions he made before the Pre-Trial Judge in that regard.¹⁰⁰ In the Panel's view, however, this falls short of demonstrating any error especially since, as acknowledged by Veseli,¹⁰¹ the Pre-Trial Judge – directly relying on the information provided by the Defence – expressly took into account the fact that the Proposed Amendments occurred nine months after the most recent witness statement and that a number of witness interviews underlying the Proposed Amendments occurred before the rendering of the Confirmation Decision.¹⁰²

42. Mindful of the fact that none of the incidents covered by the Proposed Amendments were discovered recently, the Panel finds that, in principle, the SPO Request could have been submitted earlier. However, the Panel recalls that this is only one among several factors considered by the Pre-Trial Judge, who also took into account, *inter alia*, the fact that the pre-trial stage was still ongoing and that the SPO was seeking to aggregate the amendment requests.¹⁰³ The Panel considers that the need to avoid multiple, piecemeal amendment requests, which was advanced by the SPO as one of the justifications for the timing of the SPO Request, can, in certain

⁹⁹ Impugned Decision, para. 32. See also e.g. ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment, 14 February 2005, para. 35; *Bizimungu et al.* Appeal Decision, para. 16; *Kabuga* Decision, para. 8.

¹⁰⁰ Compare Thaçi Appeal, paras 26-29 with Thaçi Response to SPO Request, paras 19-21.

¹⁰¹ See Veseli Appeal, para. 21.

¹⁰² See Impugned Decision, para. 34. The SPO does not contest that timeline and acknowledged that investigations relating to the Proposed Amendments commenced before the confirmation proceedings. See SPO Request, para. 10.

¹⁰³ See Impugned Decision, para. 34. In certain circumstances, and in light of other factors, an amendment request may still be granted despite a finding of lack of diligence. See *Tolimir* Decision, paras 36-38.

circumstances, militate in favour of a finding of prosecutorial diligence.¹⁰⁴ The Panel further notes that the Defence has not invoked any information that would suggest that the timing of the SPO Request was aimed at obtaining a tactical advantage.¹⁰⁵ In the Panel's view, it was thus within the reasonable exercise of the Pre-Trial Judge's discretion to consider the SPO's decision to aggregate amendment requests because of the numerous processing steps required in reaching his ultimate finding that there was no lack of diligence on the part of the SPO – despite the time that had elapsed since the supporting materials were obtained.¹⁰⁶ It might have otherwise resulted in several amendment requests potentially occasioning additional litigation and complexity to the present case. Because the Defence merely disagrees with the Pre-Trial Judge's position without articulating any clear error or showing any abuse of discretion in his assessment, their arguments are dismissed.¹⁰⁷

43. The Panel further does not accept Veseli's contention that prosecutorial diligence relates "exclusively" to the conduct of the SPO.¹⁰⁸ Recalling that the prejudice assessment must be conducted in light of the circumstances of a particular case as a whole,¹⁰⁹ the Panel finds that the assessment of the SPO's diligence must likewise be conducted while taking into account the circumstances of the case as a whole and that the stage of the proceedings bears some relevance in that determination. For these reasons, the Panel finds that the Pre-Trial Judge did not err in considering, in addition to the SPO's own conduct, the fact that the proceedings were still at the pre-trial stage

¹⁰⁴ See e.g. *Turinabo et al.* Decision, para. 20 (finding that the Prosecution acted with sufficient diligence in presenting all amendments "at once" after all the relevant information had been processed). In contrast, the Panel is not persuaded that the SPO had to wait for the Decision on the Form of the Indictment to file its amendment request and finds that requests pursuant to Rule 90 of the Rules should be filed at the earliest opportunity without having to be triggered by judicial orders. *Contra* Response, para. 24.

¹⁰⁵ See e.g. *Karemera et al.* Appeal Decision, para. 20 (finding that the Prosecution cannot earn a strategic advantage by holding an amendment in abeyance while the defence spends time and resources investigating allegations that the Prosecution does not intend to present at trial).

¹⁰⁶ See *Impugned Decision*, para. 34.

¹⁰⁷ See e.g. *Gucati* Appeal Decision, para. 64.

¹⁰⁸ See *Veseli Appeal*, para. 23.

¹⁰⁹ See above, para. 40.

when assessing the diligence of the SPO and the timeliness of the SPO Request.¹¹⁰ In that regard, the Pre-Trial Judge's indication that the need to aggregate amendment requests asserted by the SPO would not necessarily have been accepted as a valid justification were the proceedings more advanced,¹¹¹ confirms that he conducted his assessment in light of the circumstances of the case as a whole. As to Thaçi's claim that the Pre-Trial Judge should have assessed the SPO's diligence in light of the fact that it started investigating the present case "since September 2011" under the auspices of the Special Investigative Task Force, the Panel rejects this argument as unsupported and unpersuasive and further observes that the evidence supporting the Proposed Amendments was obtained, from his own indication, from 2019.¹¹²

44. In the Panel's view, it is of little relevance whether, in the particular context of a given case, an ICTY chamber exercised its discretion differently to conclude that the timing of an amendment request constituted "late notice".¹¹³ Indeed, such assessment is necessarily a case specific exercise.¹¹⁴ As a result, the Panel finds that Thaçi's attempt to compare the situation in the *Delić* case with the present circumstances falls short of showing any error in the manner the Pre-Trial Judge exercised his discretion.¹¹⁵

45. Turning next to the question of the prejudice to the Accused's rights, the Panel first notes that contrary to Thaçi's assertion,¹¹⁶ the Pre-Trial Judge applied the correct legal standard, namely any benefit brought about by the Proposed Amendments must be weighed against any prejudice to the Accused's rights, in particular the right to be

¹¹⁰ See Impugned Decision, para. 34.

¹¹¹ Impugned Decision, para. 34.

¹¹² See Thaçi Appeal, paras 26-29. Contra Thaçi Appeal, para. 31. See also Veseli Appeal, para. 25 (alleging that the SPO has been interviewing witnesses since 2015 and that it is its responsibility to interview potential witnesses as soon as possible).

¹¹³ See *Delić* Decision, para. 63.

¹¹⁴ See e.g. *Halilović* Decision, para. 22. See also similarly, ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial, 13 October 2009 ("*Karadžić* 2009 Appeal Decision"), paras 19, 23.

¹¹⁵ Contra Thaçi Appeal, para. 30.

¹¹⁶ See Thaçi Appeal, para. 17.

tried within a reasonable time.¹¹⁷ The Panel will turn to assess whether the Pre-Trial Judge applied that standard correctly.

46. With regard to undue delay, the Panel notes that the Pre-Trial Judge rightly acknowledged that because the First Category and Second Category of Amendments constituted “new charges” within the meaning of Rule 90(2) of the Rules, they trigger additional procedural steps (such as a review of the supporting material, a further appearance and potential additional litigation through the filing of preliminary motions) requiring additional time.¹¹⁸ While the Defence takes issue with the Pre-Trial Judge’s position that since these additional steps could be carried out “in parallel” with the remaining stages of the pre-trial phase, they would thus have a “more limited impact” on the time it takes to proceed to trial, it fails to identify any concrete error in this approach beyond a mere disagreement.¹¹⁹ The Panel finds that the Pre-Trial Judge correctly exercised his discretion in considering that if the Proposed Amendments could occasion *some* delay in the proceedings, such delay would nevertheless not be *undue* as a result.¹²⁰

47. In the Panel’s view, Defence’s arguments relating to the alleged unreasonable length of pre-trial proceedings because of SPO’s shortcomings are not relevant to the present determination since the review of the Panel is limited, in terms of undue delay,

¹¹⁷ Impugned Decision, para. 35. See also e.g. *Karemera et al.* Appeal Decision, para. 24 (finding that “[t]he question is whether [the] delay [due to motions challenging the Amended Indictment under Rules 50(C) and 72 and additional time to allow the Accused to prepare to respond to the new allegations in the Amended Indictment] may be outweighed by other benefits that might result from amending the indictment”); ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-PT, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, 28 April 2009, para. 13 (finding that the “possibility of delay in proceedings must be weighed against the benefits to the accused and the Chamber that the amendment may bring, such as the simplification of proceedings, a more complete understanding of the Prosecution’s case, and the avoidance of possible challenges to the indictment or evidence presented at trial. In assessing whether undue delay would be caused, a Trial Chamber may consider the course of the proceedings thus far, including the diligence of the Prosecution in advancing the case and the timeliness of the motion, but also the expected effect of the amendment on the overall proceedings”).

¹¹⁸ Impugned Decision, para. 35, referring to Rules 86(3) and (4) and 90(2), (3) and (4) of the Rules.

¹¹⁹ Impugned Decision, para. 35. See *Thaçi Appeal*, paras 17-18; *Veseli Appeal*, para. 27.

¹²⁰ See Impugned Decision, para. 35.

only to the impact of the Proposed Amendments on the proceedings.¹²¹ Such issues, which have been addressed in separate litigation, fall outside of the scope of the Appeals.¹²²

48. As regards adequate time for defence preparation, the Panel finds some merit in the Defence's claim that the fact that evidentiary material in support of the Proposed Amendments was already disclosed pursuant to Rule 102(1) of the Rules does not necessarily mean that the Accused will not be prejudiced in their ability to prepare for trial.¹²³ Indeed, the Panel recalls that "[i]t is to be assumed that an accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him".¹²⁴ Although the "volume" of material to be assessed by the Defence may not have increased following the Proposed Amendments, the Accused cannot reasonably be expected to start any preparation in that respect until the SPO officially puts the Defence on notice that the incidents falling under the Proposed Amendments form part of material facts it intends to prove at trial.¹²⁵ While the Pre-Trial Judge was correct in stating that investigations do not need to be fully completed before trial,¹²⁶ and while the assessment of the Accused's ultimate readiness for trial is premature at this stage especially since no start date has been scheduled at this point, the Court of Appeals Panel stresses that it remains crucial that the Accused be given sufficient time and resources to adequately investigate the new incidents.¹²⁷

¹²¹ See *Thaçi Appeal*, paras 20-21; *Veseli Appeal*, paras 27-28; *Thaçi Reply*, paras 9-10.

¹²² See above, paras 13-14.

¹²³ See *Veseli Reply*, para. 15. See also *Response*, para. 36; *SPO Request*, para. 12.

¹²⁴ See *Muvunyi Decision*, para. 22.

¹²⁵ See e.g. ICTR, *Uwinkindi v. Prosecutor*, ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011, para. 39 and references cited therein.

¹²⁶ See *Karadžić 2009 Appeal Decision*, para. 24 (considering preparation time during trial as one factor to be considered in the assessment of whether the Defence was given adequate total preparation time). *Contra* *Thaçi Appeal*, para. 18.

¹²⁷ Article 21(4)(c) of the Law. See e.g. *Karadžić 2009 Appeal Decision*, para. 26; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, para. 220. See also *Gucati and Haradinaj*

49. That being said, the Panel agrees with the Pre-Trial Judge that the additions to the charges through the Proposed Amendments remain limited.¹²⁸ Although the First Category and Second Category of Proposed Amendments have been considered as constituting “new charges” within the meaning of Rule 90(2) of the Rules, and are as a result of a more substantial nature,¹²⁹ the Panel is satisfied that they do not alter the nature of the existing charges or introduce new crimes or modes of liability. The Panel recalls in that respect that the First Category Amendments amount to two additional detention sites and twelve additional victims,¹³⁰ the Second Category Amendments amount to two additional instances of persecution and murder in respect of a previously pleaded detention site,¹³¹ and the Third Category Amendments amount to two additional instances of the Accused’s personal participation in the intimidation, interrogation, mistreatment, and detention of Opponents.¹³²

50. Moreover, the Panel finds Veseli unconvincing in contending, without any support, that the Pre-Trial Judge erred in assessing the scope of the Proposed Amendments against the scope of the case as a whole.¹³³ Likewise, the Panel considers that his attempt to compare the volume of evidentiary material and length of proceedings with that of other cases before the Specialist Chambers is unpersuasive as the assessment of whether the Accused are tried within a reasonable time and have adequate time and resources to prepare depends on a number of factors specific to each case.¹³⁴

Appeal Decision on Preliminary Motions, paras 36-38. See as well *Tolimir* Decision, para. 38; *Halilović* Decision, para. 22 (both finding that there should be no prejudice if the accused is given sufficient time to prepare an effective defence with regard to the new allegations added).

¹²⁸ See Impugned Decision, para. 36. Contra Veseli Appeal, para. 32.

¹²⁹ See Impugned Decision, para. 33.

¹³⁰ See Impugned Decision, para. 24. See also Proposed Amended Indictment, paras 68, 105, 157, pp. 69, 71.

¹³¹ See Impugned Decision, para. 25. See also Proposed Amended Indictment, paras 93, 174, pp. 58, 63.

¹³² See Impugned Decision, para. 27. See also Proposed Amended Indictment, paras 42-43, 141.

¹³³ Contra Veseli Appeal, para. 32.

¹³⁴ See e.g. *Karadžić* 2009 Appeal Decision, paras 19, 23. See also ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.7, Decision on Appeal from Decision on Motion for Further Postponement of Trial, 31 March 2010

51. The Panel further notes that the Pre-Trial Judge expressly indicated that, should it be required, schedules may be adjusted to facilitate adequate defence preparations.¹³⁵ The Panel recalls that other options remain available in order to remedy or substantially mitigate any possible prejudice that would arise subsequently.¹³⁶ For instance, Rule 90(4) of the Rules allows the possibility to postpone the date of the opening of the case to ensure adequate time for the preparation of the Defence. Consequently, and in light of the current stage of the proceedings, the Panel finds no error in the Pre-Trial Judge's conclusion that the introduction of the Proposed Amendments would not deprive the Accused of adequate time to prepare their defence.¹³⁷

52. For these reasons, the Panel finds that Thaçi and Veseli have failed to demonstrate that the Pre-Trial Judge erred in concluding that the Proposed Amendments are not prejudicial to or inconsistent with the rights of the Accused.¹³⁸ The Court of Appeals Panel dismisses Third Thaçi Issue, Fourth Thaçi Issue as well as Sixth Veseli Issue.

V. DISPOSITION

53. For these reasons, the Court of Appeals Panel:

DENIES the Appeals;

(“*Karadžić* 2010 Appeal Decision”), para. 23; ICTR, *Prosecutor v. Ngirabatware*, ICTR-99-54-A, Decision on Augustin Ngirabatware’s Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 28. Contra Veseli Appeal, para. 32.

¹³⁵ Impugned Decision, para. 36.

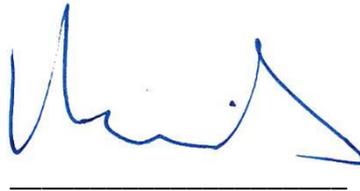
¹³⁶ See e.g. *Karemera et al.* Appeal Decision, para. 28; ICTR, *Prosecutor v. Setako*, ICTR-04-81-I, Decision on the Prosecution’s Request to Amend the Indictment, 18 September 2007, para. 14 (both mentioning the possibility to adjourn the proceedings or to recall witnesses for cross-examination). See also *Karadžić* 2010 Appeal Decision, para. 25.

¹³⁷ See Impugned Decision, para. 36.

¹³⁸ Impugned Decision, para. 37.

ORDERS the Parties to submit public redacted versions of their appellate filings referenced in paragraph 12 or indicate, through a filing, whether these filings can be reclassified as public within ten days of receiving notification of the present Decision; and

ORDERS the Registry to execute the reclassification of the filings referenced in paragraph 12 upon indication by the Parties that they can be reclassified.



**Judge Michèle Picard,
Presiding Judge**

Dated this Tuesday, 22 March 2022

At The Hague, the Netherlands