



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:** 23 November 2022

**Language:** English

**Classification:** Public

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**Decision on Requests for Certification to Appeal F01057 and F01058**

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**Acting Specialist Prosecutor**

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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, Rexhep Selimi ("Mr Selimi") and Jakup Krasniqi,<sup>2</sup> the Specialist Prosecutor's Office ("SPO") submitted the indictment as confirmed, with redactions as authorised by the Pre-Trial Judge ("Confirmed Indictment").<sup>3</sup>

2. On 17 December 2021, the SPO filed its pre-trial brief and related material, including a list of witnesses and a list of exhibits, which were subsequently revised and amended.<sup>4</sup>

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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, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, strictly confidential and *ex parte*. A confidential redacted version was filed on the same day, F00026/CONF/RED. 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). A further corrected confirmed indictment was submitted on 3 September 2021, strictly confidential and *ex parte* (F00455/A01), with confidential redacted (F00455/CONF/RED/A01) and public redacted (F00455/RED/A01) versions. A confidential further lesser redacted version of the confirmed indictment was filed on 17 January 2022, F00647/A01. A confirmed amended indictment was filed on 29 April 2022, strictly confidential and *ex parte* (F00789/A01), with confidential redacted (F00789/A02) and public redacted (F00789/A05) versions. Following the decision authorising amendments to the charges, a further amended indictment was submitted on 30 September 2022, strictly confidential and *ex parte* (F00999/A01), with confidential redacted (F00999/A02) and public redacted (F00999/A03) versions.

<sup>4</sup> KSC-BC-2020-06, F00631, Specialist Prosecutor, *Submission of Pre-Trial Brief with Witness and Exhibit Lists*, 17 December 2021, confidential, with Annexes 1-3, strictly confidential and *ex parte*. A public redacted version with confidential redacted Annexes 1-3 was filed on 21 December 2021, F00631/RED.

3. On 20 July 2022, the SPO filed its Rule 102(2) submission and related requests (“SPO’s First Request”).<sup>5</sup>
4. On 2 September 2022, the SPO filed its request to add two witnesses and associated materials (“SPO’s Second Request”).<sup>6</sup>
5. On 27 October 2022, the Pre-Trial Judge issued two decisions authorising the SPO to amend its list of witnesses and its list of exhibits (“F01057” and “F01058”, respectively).<sup>7</sup>
6. On 2 November 2022, the SPO filed its amended witness and exhibit lists (“Amended Witness List” and “Amended Exhibit List”, respectively).<sup>8</sup>

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A corrected confidential redacted version of Annex 2 was filed on 23 May 2022, F00631/RED/A02/COR/CONF/RED. An amended exhibit list was filed on 18 March 2022, F00738/A01, strictly confidential and *ex parte*, and F00738/A02, confidential (for which a corrected version was submitted on 14 April 2022 in F00768/A01, confidential). Upon judicial authorisation, the SPO submitted an amended exhibit list, F00788, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List*, 29 April 2022, confidential, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential. Upon further judicial authorisation, the SPO further submitted an amended exhibit list, F00896, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List and Related Submissions*, 25 July 2022, confidential, with Annexes 1 and 4-5, strictly confidential and *ex parte*, and Annexes 2-3, confidential. Upon further judicial authorisation, the SPO further filed an amended exhibit list, F00967, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List*, 13 September 2022, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential. A revised witness list was filed on 18 July 2022, F00885/A01, strictly confidential and *ex parte*, and F00885/A02, confidential. A further revised witness list was filed on 2 September 2022, F00948/A01, strictly confidential and *ex parte* (“Revised Witness List”), and F00948/A02, confidential. *See also* F00952, Specialist Prosecutor, *Prosecution Submissions for Fourteenth Status Conference*, 5 September 2022, public, footnote 8.

<sup>5</sup> KSC-BC-2020-06, F00890, Specialist Prosecutor, *Prosecution Rule 102(2) Submission and Related Requests*, 20 July 2022, strictly confidential and *ex parte*, with Annexes 1-7 and 9, strictly confidential and *ex parte*, and Annex 8, confidential. A confidential redacted version was filed on 21 July 2022, F00890/CONF/RED.

<sup>6</sup> KSC-BC-2020-06, F00947, Specialist Prosecutor, *Prosecution Request to Add Two Witnesses and Associated Materials*, 2 September 2022, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential and *ex parte*. A confidential redacted version was filed on the same day, F00947/CONF/RED.

<sup>7</sup> KSC-BC-2020-06, F01057, Pre-Trial Judge, *Decision on Prosecution Rule 102(2) Submission and Related Requests* (“F01057”), 27 October 2022, strictly confidential and *ex parte*. A confidential redacted version was filed on the same day, F01057/CONF/RED; F01058, Pre-Trial Judge, *Decision on Prosecution Request to Add Two Witnesses and Associated Material* (“F01058”), 27 October 2022, strictly confidential and *ex parte*. A confidential redacted version was filed on the same day, F01058/CONF/RED.

<sup>8</sup> KSC-BC-2020-06, F01078, Specialist Prosecutor, *Prosecution Submission of Amended Witness and Exhibit Lists*, 2 November 2022, confidential, with Annexes 1 (“Amended Exhibit List”), 3 (“Amended Witness List”), strictly confidential and *ex parte*, and Annexes 2, 4, confidential.

7. On 3 November 2022, the Defence for Mr Thaçi (“Thaçi Defence”) requested certification to appeal F01057 (“Thaçi’s First Request”)<sup>9</sup> and F01058 (“Thaçi’s Second Request”),<sup>10</sup> and the Defence for Mr Selimi (“Selimi Defence”) requested certification to appeal F01058 (“Selimi’s Request”)<sup>11</sup> (collectively, “Requests”).

8. On 16 November 2022, the SPO responded to the Thaçi’s First Request (“Response to Thaçi’s First Request”),<sup>12</sup> to the Thaçi’s Second Request (“Response to Thaçi’s Second Request”),<sup>13</sup> and to the Selimi’s Request (“Response to Selimi’s Request”)<sup>14</sup> (collectively, “Responses”). The Thaçi Defence and the Selimi Defence did not reply to the Responses.

## II. SUBMISSIONS

### A. SUBMISSIONS ON F01057

9. The Thaçi Defence requests leave to appeal F01057 on the following four issues (collectively, “Thaçi’s Issues on F01057”):

- (1) Whether the Pre-Trial Judge erred in setting the starting point for assessing the timeliness of SPO disclosure at the date of the SPO’s interview, being the point at which “the SPO could fully ascertain the relevance” of the new evidence to its case (“Thaçi’s First Issue on F01057”);

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<sup>9</sup> KSC-BC-2020-06, F01080, Specialist Counsel, *Thaçi Defence Request for Certification to Appeal the “Decision on Prosecution Rule 102(2) Submission and Related Requests” (F01057)*, 3 November 2022, confidential.

<sup>10</sup> KSC-BC-2020-06, F01085, Specialist Counsel, *Thaçi Defence Request for Certification to Appeal the “Decision on Prosecution Request to Add Two Witnesses and Associated Materials” (F01058)*, confidential.

<sup>11</sup> KSC-BC-2020-06, F01084, Specialist Counsel, *Selimi Defence Request for Certification to Appeal the Decision on Prosecution Request to Add Two Witnesses and Associated Materials*, 3 November 2022, confidential.

<sup>12</sup> KSC-BC-2020-06, F01106, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Requests for Certification to Appeal Decision F01057*, 16 November 2022, confidential.

<sup>13</sup> KSC-BC-2020-06, F01107, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F01058*, 16 November 2022, confidential.

<sup>14</sup> KSC-BC-2020-06, F01108, Specialist Prosecutor, *Prosecution Response to Selimi Defence Request for Certification to Appeal Decision F01058*, 16 November 2022, confidential.

- (2) Whether the Pre-Trial Judge erred in his approach to the assessment of good cause by basing it, in part, on irrelevant factors, such as the [SPO's First] Request being filed [with]in the pre-trial stage or the ongoing Defence investigations ("Thaçi's Second Issue on F01057");
- (3) Whether the Pre-Trial Judge erred in basing the existence of good cause, in part, on the fact that the SPO applied to add the new witnesses and related material after having complied with an order to streamline the case and having withdrawn a limited number of witnesses from the SPO [w]itness [l]ist ("Thaçi's Third Issue on F01057"); and
- (4) Whether the Pre-Trial Judge erred in dismissing the Defence arguments that the proposed evidence of W01493 and the associated material do not advance the SPO case in a manner that justifies their late addition, on the basis that "whether the added witnesses and related material actually advances the SPO case can only truly be assessed at trial" ("Thaçi's Fourth Issue on F01057").<sup>15</sup>

10. The Thaçi Defence submits that the Thaçi's Issues on F01057 are appealable as they arise from F01057 and contest specific findings made by the Pre-Trial Judge.<sup>16</sup> It argues that the Thaçi's Issues on F01057 are not mere disagreements with F01057 and do not amount to hypothetical concerns.<sup>17</sup> The Thaçi Defence submits that the Thaçi's Issues on F01057 affect the accused's right to a fair trial and the expeditious conduct of the proceedings.<sup>18</sup> It further submits that immediate intervention by the Court of Appeals Panel will materially advance the proceedings.<sup>19</sup>

11. The SPO responds that the Thaçi's First Request should be rejected as the Thaçi's Issues on F01057 fail to meet the requirements for leave to appeal under Article 45 of the Law and Rule 77 of the Rules.<sup>20</sup>

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<sup>15</sup> Thaçi's First Request, para. 10. *See also* Thaçi's First Request, paras 12-15.

<sup>16</sup> Thaçi's First Request, para. 11.

<sup>17</sup> Thaçi's First Request, paras 16-17.

<sup>18</sup> Thaçi's First Request, paras 20-21.

<sup>19</sup> Thaçi's First Request, paras 22-23.

<sup>20</sup> Response to Thaçi's First Request, paras 1, 4-17, 19.

## B. SUBMISSIONS ON F01058

12. The Selimi Defence requests leave to appeal F01058 on the following two issues (collectively, “Selimi’s Issues on F01058”):

- (1) Whether the Pre-Trial Judge erred in finding that he was empowered to decide upon the [SPO’s Second] Request to add witnesses to its [w]itness [l]ist at this stage rather than deferring the matter to the Trial Panel (“Selimi’s First Issue on F01058”); and
- (2) Whether the Pre-Trial Judge erred, or otherwise abused his discretion, in authorizing the addition of W4846 to the witness list when this witness’ testimony does not relate to charges in the Indictment and without assessing either the prejudicial impact of the evidence of this witness or its effect on Defence preparation in the full context of this case (“Selimi’s Second Issue on F01058”).<sup>21</sup>

13. The Selimi Defence submits that the Selimi’s Issues on F01058 are appealable as they derive from F01058.<sup>22</sup> It argues that the Selimi’s Issues on F01058 affect the fairness and expeditiousness of the proceedings, and that the limited probative value of W04846’s evidence will be more than outweighed by its prejudicial effect.<sup>23</sup> The Selimi Defence further argues that an immediate resolution by the Court of Appeals Panel of the Selimi’s Issues on F01058 would materially advance the proceedings.<sup>24</sup>

14. The Thaçi Defence requests leave to appeal F01058 on the following four issues (collectively, “Thaçi’s Issues on F01058”):

- (1) Whether the Pre-Trial Judge erred in finding that the SPO provided timely notice for its [SPO’s Second] Request because the necessity of adding W04846 and W04669 and their associated material “became apparent to the SPO when recently preparing its Revised Witness List” in compliance with the Pre-Trial Judge’s order to this effect, in contradiction with his own finding that the SPO “should” have made the [SPO’s Second] Request at an earlier stage (Thaçi’s First Issue on F01058”);

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<sup>21</sup> Selimi’s Request, paras 1, 8-14.

<sup>22</sup> Selimi’s Request, para. 7.

<sup>23</sup> Selimi’s Request, paras 15-22.

<sup>24</sup> Selimi’s Request, paras 23-25.

- (2) Whether the Pre-Trial Judge erred in basing the existence of good cause, in part, on the fact that a certain level of flexibility must be maintained with respect to amendments of witness and exhibit lists “in complex multi-accused trials in which a considerable amount of evidence is presented by the prosecution” (“Thaçi’s Second Issue on F01058”);
- (3) Whether the Pre-Trial Judge erred in his approach to the assessment of good cause by basing it, in part, on irrelevant factors, such as the [SPO’s Second] Request being filed in the pre-trial stage (“Thaçi’s Third Issue on F01058”); and
- (4) Whether the Pre-Trial Judge erred in its assessment of the impact of the late addition of W04846 and W04669 on the Accused’s preparation for trial, by relying on irrelevant factors, such as the fact that part of their associated material had already been disclosed to the Defence under Rule 103 or Rule 102(3) or that much of W04669’s evidence was already accessible in his public testimony in [Case KSC-BC-2020-05] (“Thaçi’s Fourth Issue on F01058”).<sup>25</sup>

15. The Thaçi Defence submits that the Thaçi’s Issues on F01058 are appealable as they arise from F01058 and contest specific findings made by the Pre-Trial Judge.<sup>26</sup> It argues that the Thaçi’s Issues on F01058 are not mere disagreements with F01058 and do not amount to hypothetical concerns.<sup>27</sup> The Thaçi Defence submits that the Thaçi’s Issues on F01057 affect the accused’s right to a fair trial and the expeditious conduct of the proceedings.<sup>28</sup> It further submits that intervention by the Court of Appeals Panel will materially advance the proceedings.<sup>29</sup>

16. The SPO responds that the Selimi’s Request and the Thaçi’s Second Request should be rejected as the Selimi’s and Thaçi’s Issues on F01058 fail to meet the requirements for leave to appeal under Article 45 of the Law and Rule 77 of the Rules.<sup>30</sup>

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<sup>25</sup> Thaçi’s Second Request, paras 10, 12-17.

<sup>26</sup> Thaçi’s Second Request, para. 11.

<sup>27</sup> Thaçi’s Second Request, paras 18-19.

<sup>28</sup> Thaçi’s Second Request, paras 20-23.

<sup>29</sup> Thaçi’s Second Request, para. 24.

<sup>30</sup> Response to Selimi’s Request, paras 1, 2-11, 13; Response to Thaçi’s Second Request, paras 1, 2-15, 17.

### III. APPLICABLE LAW

17. 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. A party submitting an interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that the party alleges 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.

18. 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

19. 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>31</sup> The Pre-Trial Judge recalls the interpretation of these provisions as set out in detail previously.<sup>32</sup>

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

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<sup>31</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>32</sup> *Thaçi Decision on Leave to Appeal*, paras 10-17.



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
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>33</sup>

A. THAÇI’S ISSUES ON F01057

**1. Thaçi’s First Issue on F01057**

21. The Thaçi Defence submits that the standard for the assessment of timely notice adopted by the Pre-Trial Judge “retroactively forgives” any delay or lack of diligence on the part of the SPO in finding and interviewing witnesses, and sets an overly-expansive precedent for future requests to add new witnesses to the witness list.<sup>34</sup> The Thaçi Defence argues that the Pre-Trial Judge’s approach significantly affects the accused’s right to a fair trial and the expeditious conduct of the proceedings, as it erroneously ignores whether the SPO acted with due diligence in the conduct of its investigations, which contradict the requirement of an expeditious conduct of the proceedings.<sup>35</sup>

22. The Thaçi Defence further submits that: (i) intervention by the Court of Appeals Panel will help put an end to delays stemming from the expanding SPO exhibit list, and contribute to streamlining the SPO case, thereby materially advancing the proceedings;<sup>36</sup> and (ii) an immediate resolution by the Court of Appeals Panel of the

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<sup>33</sup> *Thaçi* Decision on Leave to Appeal, para. 10.

<sup>34</sup> *Thaçi*’s First Request, para. 12.

<sup>35</sup> *Thaçi*’s First Request, para. 20.

<sup>36</sup> *Thaçi*’s First Request, para. 22.

Thaçi's Issues on F01057 may materially advance the proceedings by impacting the Pre-Trial Judge's finding that the SPO showed good cause for the requested amendments to the witness and exhibit lists and, accordingly, affect the number of witnesses and the amount of material the SPO is permitted to rely on at trial.<sup>37</sup>

23. The SPO responds that the Thaçi Defence fails to explain how: (i) the Pre-Trial Judge should have assessed the timeliness of the SPO disclosure or applied the principles of "timely notice" and "good cause" differently in the case at hand;<sup>38</sup> (ii) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial;<sup>39</sup> and (iii) the intervention of the Court of Appeals Panel would materially advance the proceedings, considering that no examples of actual delays resulting from past amendments are given and similar issues have already been addressed on appeal.<sup>40</sup>

24. At the outset, the Pre-Trial Judge notes that the identification of the starting point for assessing the timeliness of the SPO's disclosure constitutes a discrete topic emanating from F01057.<sup>41</sup> The Pre-Trial Judge accordingly finds that the Thaçi's First Issue on F01057 is an appealable issue.

25. The Pre-Trial Judge next turns to the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial. The Pre-Trial Judge notes in this respect that the starting point for assessing the timeliness of the SPO's disclosure might have an impact on whether the SPO's late addition of two witnesses and associated material to its list of witnesses and list of exhibits was permissible. The Thaçi's First Issue on F01057 might therefore affect the SPO's addition of two further witnesses and associated material against the Accused and, in turn, the Accused's right to have adequate time and facilities for the preparation of his defence and to be

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<sup>37</sup> Thaçi's First Request, para. 23.

<sup>38</sup> Response to Thaçi's First Request, para. 5.

<sup>39</sup> Response to Thaçi's First Request, para. 6.

<sup>40</sup> Response to Thaçi's First Request, paras 7-8.

<sup>41</sup> F01057, paras 23, 32.

tried within a reasonable time. For this reason, the Pre-Trial Judge is satisfied that the Thaçi Defence has demonstrated that the Thaçi's First Issue on F01057 would impact the fair and expeditious conduct of the proceedings.

26. As to whether an immediate resolution of the issue by the Court of Appeals Panel may materially advance the proceedings, the Pre-Trial Judge considers it beneficial for the conduct of the proceedings and the rights of the Accused that there be clarity on the identification of the starting point for assessing the timeliness of the SPO's disclosure. The Pre-Trial Judge is therefore satisfied that immediate resolution of the Thaçi's First Issue on F01057 by the Court of Appeals Panel will materially advance the proceedings.

27. In light of the above, the Pre-Trial Judge grants leave to appeal the Thaçi's First Issue on F01057.

## **2. Thaçi's Second Issue on F01057**

28. The Thaçi Defence submits that: (i) the fact that the case remains at the pre-trial stage does not justify the late additions of witnesses to the SPO witness list, ten months past the deadline to file such a list; and (ii) the core right of the Accused to conduct investigations until the end of the case cannot justify the addition of witnesses at any time during the pre-trial phase or trial phase.<sup>42</sup> The Thaçi Defence argues that the Pre-Trial Judge's assessment of the "good cause" requirement significantly affects the Accused's right to a fair trial and to be tried without undue delay, as it would justify the addition of any witnesses at this stage of the proceedings, provided that the case has not been transferred to the Trial Panel yet and the Defence continues its investigations.<sup>43</sup>

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<sup>42</sup> Thaçi's First Request, para. 13.

<sup>43</sup> Thaçi's First Request, para. 21.

29. The Thaçi Defence further submits that: (i) intervention by the Court of Appeals Panel will help put an end to delays stemming from the expanding SPO exhibit list, and contribute to streamlining the SPO case, thereby materially advancing the proceedings;<sup>44</sup> and (ii) an immediate resolution by the Court of Appeals Panel of the Thaçi's Issues on F01057 may materially advance the proceedings by impacting the Pre-Trial Judge's finding that the SPO showed good cause for the requested amendments to the witness and exhibit lists and, accordingly, affect the number of witnesses and the amount of material the SPO is permitted to rely on at trial.<sup>45</sup>

30. The SPO responds that the Thaçi Defence fails to: (i) identify a discrete issue and instead expresses mere disagreement with the Pre-Trial Judge's overall exercise of his discretion;<sup>46</sup> and (ii) explain how the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>47</sup>

31. The Pre-Trial Judge notes that the issue of the relevance of the factors upon which his assessment of the good cause for the late addition of witnesses and exhibits is partly based constitutes a discrete topic emanating from F01057.<sup>48</sup> The Pre-Trial Judge accordingly finds that the Thaçi's Second Issue on F01057 is an appealable issue.

32. As concerns the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Pre-Trial Judge notes that whether the assessment of good cause can be based, in part, on factors such as the fact that the proceedings are at the pre-trial stage and the defence investigations are ongoing might have an impact on whether the SPO's late addition of two witnesses and associated material to its list of witnesses and list of exhibits was permissible. The Pre-Trial Judge therefore finds that the Thaçi's Second Issue on F01057 might affect the SPO's addition of two further witnesses and associated material against the Accused. In this context,

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<sup>44</sup> Thaçi's First Request, para. 22.

<sup>45</sup> Thaçi's First Request, para. 23.

<sup>46</sup> Response to Thaçi's First Request, para. 10.

<sup>47</sup> Response to Thaçi's First Request, para. 11.

<sup>48</sup> F01057, para. 28.

the Pre-Trial Judge is satisfied that the Thaçi Defence has demonstrated that the Thaçi's Second Issue on F01057 would impact the fair and expeditious conduct of the proceedings or the outcome of the trial.

33. As to whether an immediate resolution of the issue by the Court of Appeals Panel may materially advance the proceedings, the Pre-Trial Judge considers it beneficial for the conduct of the proceedings and the rights of the Accused that there be clarity on the identification of the factors on which the assessment of the good cause for the late addition of witnesses and exhibits can be based. The Pre-Trial Judge therefore finds that immediate resolution of the Thaçi's Second Issue on F01057 by the Court of Appeals Panel will materially advance the proceedings.

34. In light of the above, the Pre-Trial Judge grants leave to appeal the Thaçi's Second Issue on F01057.

### **3. Thaçi's Third Issue on F01057**

35. The Thaçi Defence submits that: (i) the fact that the SPO has complied with a court order to streamline its case cannot be used as a basis to find good cause for adding new witnesses to the witness list; and (ii) every additional document expands the evidentiary basis of the case and gives rise to prejudice to the Defence, which is required to review, analyse and investigate it.<sup>49</sup> The Thaçi Defence argues that the Pre-Trial Judge's assessment of the "good cause" requirement significantly affects the Accused's right to a fair trial and to be tried without undue delay, as the addition of new witnesses defeats the purpose of streamlining the case and necessarily impacts the Defence's capacity to prepare for trial.<sup>50</sup>

36. The Thaçi Defence further submits that: (i) intervention by the Court of Appeals Panel will help put an end to delays stemming from the expanding SPO exhibit list,

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<sup>49</sup> Thaçi's First Request, para. 14.

<sup>50</sup> Thaçi's First Request, para. 21.

and contribute to streamlining the SPO case, thereby materially advancing the proceedings;<sup>51</sup> and (ii) an immediate resolution by the Court of Appeals Panel of the Thaçi's Issues on F01057 may materially advance the proceedings by impacting the Pre-Trial Judge's finding that the SPO showed good cause for the requested amendments to the witness and exhibit lists and, accordingly, affect the number of witnesses and the amount of material the SPO is permitted to rely on at trial.<sup>52</sup>

37. The SPO responds that the SPO fails to: (i) identify an appealable issue, since the contested argument does not qualify as a basis for the Pre-Trial Judge's findings on good cause;<sup>53</sup> (ii) explain to what extent its capacity to prepare for trial is affected by the SPO's addition of witnesses;<sup>54</sup> and (iii) demonstrate how the addition of material would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>55</sup>

38. The Pre-Trial Judge notes that, as explained in F01057,<sup>56</sup> the SPO's withdrawal of seven witnesses has been relied upon when addressing and dismissing the Thaçi Defence's argument that the SPO expanded the scope of the case to the detriment of the Defence. The Pre-Trial Judge did not base his findings on the existence of good cause for the late addition of the additional witnesses and exhibits on the SPO's earlier withdrawal of seven witnesses, but on the *prima facie* relevance and sufficient importance of W01493's prior statements and associated material.<sup>57</sup> The Pre-Trial Judge finds that the Thaçi's Third Issue on F01057 misrepresents the Pre-Trial Judge's findings on the existence of good cause for the late addition of witnesses and exhibits. The Pre-Trial Judge accordingly finds that the Thaçi's Third Issue on F01057 is not an appealable issue as it does not arise from F01057.

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<sup>51</sup> Thaçi's First Request, para. 22.

<sup>52</sup> Thaçi's First Request, para. 23.

<sup>53</sup> Response to Thaçi's First Request, para. 13.

<sup>54</sup> Response to Thaçi's First Request, para. 14.

<sup>55</sup> Response to Thaçi's First Request, para. 15.

<sup>56</sup> F01057, para. 29.

<sup>57</sup> F01057, para. 30.

39. In light of the above, the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed. The request for leave to appeal the Thaçi's Third Issue on F01057 is therefore rejected.

#### **4. Thaçi's Fourth Issue on F01057**

40. The Thaçi Defence submits that the Pre-Trial Judge is not entitled to defer his assessment of whether the proposed evidence advances the SPO case, which is central to determining whether "exceptional circumstances" exist justifying the extremely late addition of this material to the SPO witness and exhibit lists.<sup>58</sup> The Thaçi Defence argues that the Pre-Trial Judge's approach directly affects the accused's right to a fair trial and to be tried without undue delay as well as the expeditious conduct of the proceedings, as it refers the matter to the Trial Panel, rather than saving the Trial Panel and parties' time by properly assessing whether such material is relevant and whether "exceptional circumstances" exist justifying its late addition.<sup>59</sup>

41. The Thaçi Defence further submits that: (i) intervention by the Court of Appeals Panel will help put an end to delays stemming from the expanding SPO exhibit list, and contribute to streamlining the SPO case, thereby materially advancing the proceedings;<sup>60</sup> and (ii) an immediate resolution by the Court of Appeals Panel of the Thaçi's Issues on F01057 may materially advance the proceedings by impacting the Pre-Trial Judge's finding that the SPO showed good cause for the requested amendments to the witness and exhibit lists and, accordingly, affect the number of witnesses and the amount of material the SPO is permitted to rely on at trial.<sup>61</sup>

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<sup>58</sup> Thaçi's First Request, para. 15.

<sup>59</sup> Thaçi's First Request, para. 21.

<sup>60</sup> Thaçi's First Request, para. 22.

<sup>61</sup> Thaçi's First Request, para. 23.

42. The SPO responds that the Thaçi Defence fails to: (i) identify an appealable issue;<sup>62</sup> and (ii) specify to what extent a different approach would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>63</sup>

43. The Pre-Trial Judge notes that, as explained in F01057,<sup>64</sup> he based his finding that the SPO had demonstrated good cause for the late addition of W01493 and associated material and his dismissal of the Thaçi Defence's argument to the contrary on the *prima facie* relevance and sufficient importance of such evidence. The Pre-Trial Judge's finding that "whether the added witness and related material actually advances the SPO case can only be truly assessed at trial" was not the basis for the dismissal of the Thaçi Defence's argument. Instead, it was an acknowledgment of the legal consequence of the *prima facie* standard applied when finding good cause for the late addition of W01493's evidence, whose relevance, credibility and probative value will only be fully assessed at trial. The Pre-Trial Judge finds that the Thaçi's Fourth Issue on F01057 misrepresents the Pre-Trial Judge's findings on the existence of good cause for the late addition of witnesses and exhibits. The Pre-Trial Judge accordingly finds that the Thaçi's Fourth Issue on F01057 is not an appealable issue as it does not arise from F01057.

44. In light of the above, the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed. The request for leave to appeal the Thaçi's Fourth Issue on F01057 is therefore rejected.

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<sup>62</sup> Response to Thaçi's First Request, para. 16.

<sup>63</sup> Response to Thaçi's First Request, para. 17.

<sup>64</sup> F01057, para. 30.



## B. ISSUES ON F01058

### 1. Selimi's First Issue on F01058

45. The Selimi Defence submits that a clear reading of Rule 118(2) of the Rules would have limited the authority to decide upon the SPO's Second Request to the Trial Panel and that the Pre-Trial Judge would not have been able to do so.<sup>65</sup> According to the Selimi Defence, Rule 118(2) of the Rules is relevant to reduce the repeated amendments to the SPO's list of witnesses, and is therefore directly relevant to determining the impact of adding witnesses to the SPO list and the right to adequate time to prepare a defence to the additional evidence with the SPO seeks to present.<sup>66</sup> The Selimi Defence therefore submits that the fairness and expeditiousness of the proceedings is directly impacted by the Selimi's First Issue on F01058.<sup>67</sup>

46. The Selimi Defence further argues that an immediate resolution by the Court of Appeals Panel of the Selimi's First Issue on F01058 would materially advance the proceedings as clarification as to the authority of the Pre-Trial Judge to adjudicate upon requests to amend its witness list would inform the SPO when and how this request, and indeed any other request to amend its witness list, could be adjudicated and the context in which this would occur.<sup>68</sup>

47. The SPO responds that: (i) contrary to the Selimi Defence's assertion, the Pre-Trial Judge relied on several Rules that confer broad powers to manage pre-trial proceedings, including the authority under Rule 95 of the Rules to "take all necessary measures for the expeditious preparation of the case for trial";<sup>69</sup> (ii) the logical consequence of this interpretation of Rule 118(2) of the Rules is that any decision on the SPO's request would be delayed until the case is before the trial panel, which could only exacerbate any alleged impact on the fair and expeditious conduct of the

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<sup>65</sup> Selimi's Request, paras 8-9.

<sup>66</sup> Selimi's Request, para. 16.

<sup>67</sup> Selimi's Request, paras 15-17.

<sup>68</sup> Selimi's Request, paras 23-25.

<sup>69</sup> Response to Selimi's Request, para. 3, referring to F01058, para. 18.

proceedings;<sup>70</sup> and (iii) the Selimi Defence also fails to demonstrate how an immediate resolution by the Court of Appeals Panel will materially advance the proceedings, given that the Court of Appeals Panel has previously affirmed the Pre-Trial Judge's authority to authorise amendments to the SPO exhibit list, which necessarily involves the same powers and analogous principles.<sup>71</sup>

48. The Pre-Trial Judge notes that whether he was empowered to decide upon the SPO request to add witnesses at this stage of the proceedings constitutes a discrete topic emanating from F01058.<sup>72</sup> In this regard, the Pre-Trial Judge is mindful that the Court of Appeals Panel held that, "in the context of a complex multi-accused trial in which a considerable amount of evidence is presented by the prosecution, a certain level of flexibility must be maintained" with respect to amendments of witness and exhibit lists, and that "the addition of exhibits at the pre-trial stage has generally been treated with flexibility".<sup>73</sup> However, the Court of Appeals Panel addressed the related yet discrete issue whether exhibits can be added at the pre-trial stage and was not seized with the more specific question regarding the legal basis for the Pre-Trial Judge to decide upon requests for addition of witnesses at this stage of the proceedings. The Pre-Trial Judge accordingly finds that the Selimi's First Issue on F01058 is an appealable issue.

49. As concerns the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Pre-Trial Judge notes that whether he was empowered to decide upon the SPO request to add witnesses at the pre-trial stage has an impact on whether the SPO's addition of witnesses to its list of witnesses is

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<sup>70</sup> Response to Selimi's Request, paras 4-5.

<sup>71</sup> Response to Selimi's Request, paras 6-7, referring to KSC-BC-2020-06, IA019/F00006, Court of Appeals, *Decision on Thaci's Appeal against "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures"* ("12 July 2022 Decision"), 12 July 2022, para. 21.

<sup>72</sup> F01058, para. 18.

<sup>73</sup> 12 July 2022 Decision, para. 21, referring to IRMCT, *Prosecutor v. Kabuga*, MICT-13-38-PT, *Decision on Prosecution Motions to Amend its Witness and Exhibits Lists*, 10 May 2022, p. 3; ICTY, *Prosecutor v. Dordjević*, IT-05-87/1-T, [\*Decision on Prosecution's Motion to Amend the Rule 65ter Exhibit List with Annexes A and B\*](#), 4 March 2009, paras 20, 22.

permissible at this stage of the proceedings. The Selimi's First Issue on F01058 therefore directly affects the SPO's addition of witnesses against the Accused at the pre-trial stage. For this reason, the Pre-Trial Judge is satisfied that the Selimi Defence has demonstrated that the Selimi's First Issue on F01058 would impact the fair and expeditious conduct of the proceedings.

50. As to whether an immediate resolution of the issue by the Court of Appeals Panel may materially advance the proceedings, the Pre-Trial Judge considers it beneficial for the conduct of the proceedings and the rights of the Accused that there be clarity on the legal basis for the Pre-Trial Judge to decide on requests to add witnesses at the pre-trial stage. The Pre-Trial Judge is therefore satisfied that immediate resolution of the Selimi's First Issue on F01058 by the Court of Appeals Panel will materially advance the proceedings.

51. In light of the above, the Pre-Trial Judge grants leave to appeal the Selimi's First Issue on F01058.

## **2. Selimi's Second Issue on F01058**

52. The Selimi Defence submits that the Pre-Trial Judge: (i) determined that W04846's evidence does not relate to charged events but could still be relevant to the underlying policy of the joint criminal enterprise ("JCE") without specifying how that was the case;<sup>74</sup> and (ii) failed to assess any prejudicial impact caused by the addition of this evidence.<sup>75</sup> The Selimi Defence argues that the specific authorisation to add W04846's statement to the SPO list will undoubtedly affect both the fairness and expeditiousness of the proceedings.<sup>76</sup> According to the Selimi Defence, W04846's evidence relates to serious allegations of Mr. Selimi's alleged involvement in two

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<sup>74</sup> Selimi's Request, para. 13.

<sup>75</sup> Selimi's Request, para. 14.

<sup>76</sup> Selimi's Request, para. 19.

uncharged alleged murders, and the Defence will be required to investigate and then address these allegations.<sup>77</sup>

53. The Selimi Defence also argues that the limited probative value of W04846's evidence will be more than outweighed by its prejudicial effect as, to the knowledge of the Selimi Defence, W04846 is the only witness who provides any evidence in support of his allegations, and relies to a degree on hearsay evidence, which is corroborated neither by any other witness nor documentary evidence.<sup>78</sup> The Selimi Defence further argues that an immediate resolution by the Court of Appeals Panel of the Selimi's Issues on F01058 would materially advance the proceedings.<sup>79</sup> The Selimi Defence argues that, had the Pre-Trial Judge erred in allowing W04846's addition to the witness list, resolving the Selimi's Second Issue on F01058 would avoid the risk of the Defence wasting time and resources on investigating and potentially presenting evidence relevant to W04846, and would also avoid the prejudicial impact caused by the evidence of this witness.<sup>80</sup>

54. The SPO responds that the Selimi Defence challenges the Pre-Trial Judge's exercise of his discretion without demonstrating any appealable issue, and instead merely disagrees with F01058.<sup>81</sup> The SPO also submits that: (i) the Selimi Defence's bare assertion that the addition of W04846 will require additional investigation and court time does not meet the high bar of significant impact on the fair and expeditious conduct of the proceedings;<sup>82</sup> (ii) the Selimi Defence's claim that the addition of W04846 risks the Defence "wasting time and resources on investigating and potentially presenting evidence relevant to this witness" is both unconvincing and insufficient to satisfy the requirements of the third prong of the certification test.<sup>83</sup>

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<sup>77</sup> Selimi's Request, paras 20-21.

<sup>78</sup> Selimi's Request, para. 22.

<sup>79</sup> Selimi's Request, para. 23.

<sup>80</sup> Selimi's Request, para. 25.

<sup>81</sup> Response to Selimi's Request, paras 8-9.

<sup>82</sup> Response to Selimi's Request, para. 10.

<sup>83</sup> Response to Selimi's Request, para. 11, *referring to* Selimi's Request, para. 25.

55. The Pre-Trial Judge notes that, as explained in F01058,<sup>84</sup> W04846's prior statements and associated material were found to be *prima facie* relevant and of sufficient importance.<sup>85</sup> The Pre-Trial Judge also considered that "given that the SPO has filed [the SPO's Second] Request while the pre-trial phase is still ongoing and considering that the requested late additions are limited in length, especially when compared to the volume of the evidence disclosed, [...] the Defence will be afforded meaningful time to process W04846's evidence, refocus its investigations, if needed, and prepare for trial".<sup>86</sup> The Pre-Trial Judge is therefore of the view that the Selimi's Second Issue on F01058: (i) constitutes a mere disagreement with the Pre-Trial Judge's findings on the relevance of W04846's prior statements and associated material; and (ii) misrepresents the Pre-Trial Judge's findings on the impact of the late addition on the Accused. The Pre-Trial Judge accordingly finds that the Selimi's Second Issue on F01058 is not an appealable issue as it does not arise from F01058.

56. In light of the above, the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed. Leave to appeal the Selimi's Second Issue on F01058 is therefore rejected.

### 3. Thaçi's First Issue on F01058

57. The Thaçi Defence submits that the Pre-Trial Judge cannot acknowledge that the SPO should have made its request at an earlier date, and, at the same time, find that the request is timely because the SPO determined the relevance of such evidence while updating its witness list pursuant to an order to streamline its case.<sup>87</sup> The Thaçi Defence further submits that: (i) the SPO's complying with an order to streamline the case cannot retroactively open the door to an expansion of the witness list;<sup>88</sup> and (ii) the

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<sup>84</sup> F01058, para. 26.

<sup>85</sup> F01058, para. 26.

<sup>86</sup> F01058, para. 27.

<sup>87</sup> Thaçi's Second Request, para. 12.

<sup>88</sup> Thaçi's Second Request, para. 13.

fact that the SPO withdrew seven witnesses is an irrelevant consideration.<sup>89</sup> The Thaçi Defence argues that the Pre-Trial Judge's assessment of the "good cause" requirement significantly affects the Accused's right to a fair trial and to be tried without undue delay, as the addition of new witnesses defeats the purpose of streamlining the case and necessarily impacts the Defence's capacity to prepare for trial.<sup>90</sup>

58. The Thaçi Defence further submits that: (i) intervention by the Court of Appeals Panel will help put an end to delays stemming from the expanding SPO exhibit list, and contribute to streamlining the SPO case, thereby materially advancing the proceedings;<sup>91</sup> and (ii) an immediate resolution by the Court of Appeals Panel of the Thaçi's Issues on F01058 may materially advance the proceedings by impacting the Pre-Trial Judge's finding that the SPO showed good cause for the requested amendments to the witness and exhibit lists and, accordingly, affect the number of witnesses and the amount of material the SPO is permitted to rely on at trial.<sup>92</sup>

59. The SPO responds that the Thaçi's First Issue on F01058 does not constitute an appealable issue emanating from F01058. According to the SPO, the Thaçi Defence fails to explain how the Pre-Trial Judge's finding that the SPO's Second Request was timely because it was filed "in the context and within the timing of [the] streamlining exercise" is logically inconsistent with the Pre-Trial Judge's comment that the SPO should have made its request earlier.<sup>93</sup> The SPO submits that the Thaçi Defence fails to: (i) explain how the issues would significantly affect the fair and expeditious conduct of the proceedings;<sup>94</sup> or (ii) demonstrate how an immediate resolution by the Appeals Panel will materially advance the proceedings.<sup>95</sup>

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<sup>89</sup> Thaçi's Second Request, para. 14.

<sup>90</sup> Thaçi's Second Request, para. 22.

<sup>91</sup> Thaçi's Second Request, para. 24.

<sup>92</sup> Thaçi's Second Request, para. 25.

<sup>93</sup> Response to Thaçi's Second Request, paras 3-5, *referring to* F01058, paras 24-25, 29.

<sup>94</sup> Response to Thaçi's Second Request, paras 12-13.

<sup>95</sup> Response to Thaçi's Second Request, para. 15.

60. The Pre-Trial Judge notes that, as explained in F01058,<sup>96</sup> he preliminarily found that the SPO should have made the SPO's Second Request at an earlier stage because the SPO was aware of the scope and nature of W04846's and W04669's evidence before the filing of its preliminary witness list. However, the Pre-Trial Judge additionally considered that the SPO's request was not based on mere inadvertence, as it stemmed from the Pre-Trial Judge's order to streamline the case, and based his finding that the SPO had provided timely notice for the late addition on this last consideration.<sup>97</sup> The Pre-Trial Judge therefore finds that the Thaçi's First Issue on F01058: (i) constitutes a mere disagreement with the Pre-Trial Judge's findings on the timeliness of the SPO's request; and (ii) misrepresents such findings so as to impose a contradiction between them. The Pre-Trial Judge accordingly finds that the Thaçi's First Issue on F01058 is not an appealable issue as it does not arise from F01058.

61. In light of the above, the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed. The request for leave to appeal the Thaçi's First Issue on F01058 is therefore rejected.

#### **4. Thaçi's Second Issue on F01058**

62. The Thaçi Defence submits that the Pre-Trial Judge's reliance on the need for "flexibility" in multi-accused trials must have limits as: (i) the accused have been in prison for 24 months; (ii) the SPO was ordered to produce its witness list ten months ago after having claimed that it was ready for trial in mid-2021; and (iii) every additional document expands the evidentiary basis of the case and gives rise to prejudice to the Defence who is required to review, analyse and investigate it.<sup>98</sup> The Thaçi Defence argues that the Pre-Trial Judge's assessment of the "good cause" requirement significantly affects the Accused's right to a fair trial, to be tried without

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<sup>96</sup> F01058, paras 24, 29.

<sup>97</sup> F01058, paras 25, 29.

<sup>98</sup> Thaçi's Second Request, para. 15.

undue delay, and to have adequate time and facilities for his preparation, as it would justify the addition of any witnesses at the pre-trial stage, considering that some flexibility would be required in a multi-accused case involving a significant amount of evidence.<sup>99</sup>

63. The Thaçi Defence further submits that: (i) intervention by the Court of Appeals Panel will help put an end to delays stemming from the expanding SPO exhibit list, and contribute to streamlining the SPO case, thereby materially advancing the proceedings;<sup>100</sup> and (ii) an immediate resolution by the Court of Appeals Panel of the Thaçi's Issues on F01058 may materially advance the proceedings by impacting the Pre-Trial Judge's finding that the SPO showed good cause for the requested amendments to the witness and exhibit lists and, accordingly, affect the number of witnesses and the amount of material the SPO is permitted to rely on at trial.<sup>101</sup>

64. The SPO responds that the Thaçi Defence fails to acknowledge that it takes issue with a restatement of a recent finding of the Court of Appeals Panel, expressed in the context of an appeal of a decision to amend the exhibit list.<sup>102</sup> The SPO submits that the Thaçi Defence does not offer any explanation for why the application of this appellate jurisprudence is an error.<sup>103</sup> The SPO therefore argues that the Thaçi Defence falls short of satisfying the requirements of the certification test.<sup>104</sup>

65. The Pre-Trial Judge first notes that the relevance of the factors upon which he partly based his assessment of the good cause for the late addition of witnesses and exhibits constitutes a discrete topic emanating from F01058.<sup>105</sup> The Pre-Trial Judge accordingly finds that the Thaçi's Second Issue on F01058 is an appealable issue.

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<sup>99</sup> Thaçi's Second Request, para. 23.

<sup>100</sup> Thaçi's Second Request, para. 24.

<sup>101</sup> Thaçi's Second Request, para. 25.

<sup>102</sup> Response to Thaçi's Second Request, para. 7, *referring to* 12 July 2022 Decision, para. 21.

<sup>103</sup> Response to Thaçi's Second Request, para. 7.

<sup>104</sup> Response to Thaçi's Second Request, paras 14-15.

<sup>105</sup> F01058, paras 26-27, 30.



66. As concerns the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Pre-Trial Judge notes that he found that the SPO had demonstrated good cause for the late addition of W04846 and W04669 and their associated material because, *inter alia*, a certain level of flexibility must be maintained with respect to amendments of witness and exhibit lists in complex multi-accused trials in which a considerable amount of evidence is presented by the prosecution, provided that adequate protection of the accused's rights is guaranteed.<sup>106</sup> The Pre-Trial Judge remarks that such a finding complies with a recent ruling of the Court of Appeals Panel.<sup>107</sup> The Pre-Trial Judge therefore considers that granting leave to appeal the Thaçi's Second Issue on F01058 would result in repetitive appeal proceedings. In this context, the Pre-Trial Judge finds that the Thaçi Defence has not demonstrated how the Thaçi's Second Issue on F01058 would impact the fair and expeditious conduct of the proceedings or the outcome of the trial.

67. In light of the above, the remaining requirement of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed. The request for leave to appeal the Thaçi's Second Issue on F01058 is therefore rejected.

### **5. Thaçi's Third and Fourth Issues on F01058**

68. The Thaçi Defence submits that: (i) the fact that the case remains at the pre-trial stage does not justify the late addition of witnesses to the SPO witness list, ten months past the deadline to file such a list;<sup>108</sup> and (ii) the reliance on the fact that part of the witnesses' evidence has already been disclosed under another Rule, or that it is

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<sup>106</sup> F01058, paras 26, 30.

<sup>107</sup> 12 July 2022 Decision, para. 21, referring to ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, [Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 ter Exhibit List](#), 25 October 2007, para. 18; *Prosecutor v. Popović et al.*, IT-05-88-AR73.1, [Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning](#), 14 December 2007, para. 38. The Court of Appeals Panel found that "[...] in the context of a complex multi-accused trial in which a considerable amount of evidence is presented by the prosecution, a certain level of flexibility must be maintained, although the adequate protection of the accused's rights remains the primary concern." See also above, para. 48.

<sup>108</sup> Thaçi's Second Request, para. 16.

otherwise publicly available, represents an impermissible burden shift.<sup>109</sup> The Thaçi Defence argues that the SPO's late additions are necessarily prejudicial given that they expand the evidentiary scope of the case and require the Defence to devote further time to its review, analyse and investigation.<sup>110</sup>

69. The Thaçi Defence argues that the Pre-Trial Judge's assessment of the "good cause" requirement significantly affects the Accused's right to a fair trial, to be tried without undue delay, and to have adequate time and facilities for his preparation, as: (i) it would justify the addition of any witnesses at the pre-trial stage, provided that the case has not been transferred to the Trial Panel yet; and (ii) by considering that the Defence would have sufficient time to prepare for trial because part of the witnesses' evidence has already been disclosed under another Rule or is in the public domain, the Pre-Trial Judge fails to properly assess the extent of the prejudice caused by the late addition of any witness and associated material to the SPO witness list and exhibit list at such an advanced stage of the pre-trial phase are outside the scope of the indictment.<sup>111</sup>

70. The Thaçi Defence further submits that: (i) intervention by the Court of Appeals Panel will help put an end to delays stemming from the expanding SPO exhibit list, and contribute to streamlining the SPO case, thereby materially advancing the proceedings;<sup>112</sup> and (ii) an immediate resolution by the Court of Appeals Panel of the Thaçi's Issues on F01058 may materially advance the proceedings by impacting the Pre-Trial Judge's finding that the SPO showed good cause for the requested amendments to the witness and exhibit lists and, accordingly, affect the number of witnesses and the amount of material the SPO is permitted to rely on at trial.<sup>113</sup>

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<sup>109</sup> Thaçi's Second Request, para. 17.

<sup>110</sup> Thaçi's Second Request, para. 17.

<sup>111</sup> Thaçi's Second Request, para. 23.

<sup>112</sup> Thaçi's Second Request, para. 24.

<sup>113</sup> Thaçi's Second Request, para. 25.

71. The SPO responds that the Thaçi Defence fails to identify discrete appealable issues as it complains that the Pre-Trial Judge based his assessment of good cause partly on irrelevant factors, but does not identify with any precision what those supposedly irrelevant factors are.<sup>114</sup> The SPO argues that the Thaçi Defence misrepresents F01058 and falls far short of satisfying the requirements of the certification test.<sup>115</sup>

72. The Pre-Trial Judge notes that the issue constitutes a discrete topic emanating from F01058.<sup>116</sup> The Pre-Trial Judge accordingly finds that the Thaçi Defence has demonstrated that the Thaçi's Third and Fourth Issues on F01058 are appealable issues.

73. As concerns the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Pre-Trial Judge notes that the correctness of the factors upon which he partly based his assessment of good cause and impact of the late addition of witnesses and exhibits on the Accused might have an impact on whether the SPO's late addition of two witnesses and associated material to its list of witness and list of exhibits was permissible. The Pre-Trial Judge therefore finds that the Thaçi's Third and Fourth Issues on F01058 might affect the SPO's addition of two further witnesses against the Accused. In this context, the Pre-Trial Judge is satisfied that the Thaçi Defence has demonstrated that the Thaçi's Third and Fourth Issues on F01058 would impact the fair and expeditious conduct of the proceedings or the outcome of the trial.

74. As to whether an immediate resolution of the issue by the Court of Appeals Panel may materially advance the proceedings, the Pre-Trial Judge considers it beneficial for the conduct of the proceedings and the rights of the Accused that there be clarity on the identification of the factors on which the assessment of good cause and of the

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<sup>114</sup> Response to Thaçi's Second Request, paras 7, 10-11.

<sup>115</sup> Response to Thaçi's Second Request, paras 14-15.

<sup>116</sup> F01058, paras 27-31.

impact on the Accused of the late addition of witnesses and exhibits can be based. The Pre-Trial Judge is therefore satisfied that immediate resolution of the Thaçi's Third and Fourth Issues on F01058 by the Court of Appeals Panel will materially advance the proceedings.

75. In light of the above, the Pre-Trial Judge grants leave to appeal the Thaçi's Third and Fourth Issues on F01058.

## V. CLASSIFICATION

76. Noting that the SPO has indicated that it does not object to its Responses' reclassification as public,<sup>117</sup> the Pre-Trial Judge: (i) pursuant to Rule 82(5) of the Rules, instructs the Registrar to reclassify the SPO Responses accordingly; and (ii) orders the Thaçi Defence and the Selimi Defence to submit a public redacted version of their Requests or request reclassification thereof by no later than **Friday, 9 December 2022**.

## VI. DISPOSITION

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

- a. **GRANTS** leave to appeal the Thaçi's First and Second Issues on F01057, the Selimi's First Issue on F01058 and the Thaçi's Third and Fourth Issues on F01058;
- b. **REJECTS** leave to appeal the Thaçi's Third and Fourth Issues on F01057, the Selimi's Second Issue on F01058 and the Thaçi First and Second Issues on F01058;
- c. **ORDERS** the Registry to reclassify the SPO Responses as public; and

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<sup>117</sup> Response to Thaçi's First Request, para. 18; Response to Thaçi's Second Request, para. 16; Response to Selimi's Request, para. 12.

- d. **ORDERS** the Thaçi Defence and the Selimi Defence to submit a public redacted version of their Requests or request reclassification thereof by no later than **Friday, 9 December 2022**.



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

Dated this Wednesday, 23 November 2022  
At The Hague, the Netherlands.