



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06/IA025

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

Registrar: Fidelma Donlon

Date: 18 April 2023

Original language: English

Classification: Public

**Public Redacted Version of Decision on Taçi's and Selimi's Appeals against
Decisions F01057 and F01058**

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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 an appeal filed on 5 December 2022 and 2 December 2022 (collectively, “Appeals”), respectively by Mr Hashim Thaçi (“Thaçi”)² and Mr Rexhep Selimi (“Selimi”)³ (collectively, “the Accused” or “the Defence”), against the “Decision on Prosecution Rule 102(2) Submission and Related Requests” and the “Decision on Prosecution Request to Add Two Witnesses and Associated Materials” (collectively, “Impugned Decisions”).⁴ The Specialist Prosecutor’s Office (“SPO”) responded on 15 December 2022 that the Appeals should be rejected.⁵ Thaçi and Selimi replied respectively on 27 December 2022 and 22 December 2022.⁶

¹ IA025/F00001, Decision Assigning a Court of Appeals Panel, 28 November 2022.

² IA025/F00003, Thaçi Defence Appeal of F01057 and F01058, 5 December 2022 (confidential) (“Thaçi Appeal”).

³ IA025/F00002, Selimi Defence Appeal against “Decision on Prosecution Request to Add Two Witnesses and Associated Material”, KSC-BC-2020-06/F01058, dated 27 October 2022, 2 December 2022 (confidential) (“Selimi Appeal”).

⁴ F01057/RED, Public Redacted Version of Decision on Prosecution Rule 102(2) Submission and Related Requests, 27 March 2023 (strictly confidential and *ex parte* version filed on 27 October 2022, confidential redacted version filed on 27 October 2022) (“First Impugned Decision”); F01058/RED, Public Redacted Version of Decision on Prosecution Request to Add Two Witnesses and Associated Materials, 27 March 2023 (strictly confidential and *ex parte* version filed on 27 October 2022, confidential redacted version filed on 27 October 2022) (“Second Impugned Decision”) (collectively, “Impugned Decisions”).

⁵ IA025/F00004, Consolidated Prosecution response to Thaçi and Selimi Defence appeals of Decisions F01057 and F01058, 15 December 2022 (confidential) (“Response”), para. 37.

⁶ IA025/F00006, Thaçi Defence Reply to ‘Consolidated Prosecution response to Thaçi and Selimi Defence appeals of Decisions F01057 and F01058’, 27 December 2022 (confidential) (“Thaçi Reply”); IA025/F00005, Selimi Defence Reply to Consolidated Prosecution Response to Thaci and Selimi Defence appeals of Decisions F01057 and F01058, 22 December 2022 (confidential) (“Selimi Reply”).

I. BACKGROUND

1. On 30 October 2020, pursuant to the Pre-Trial Judge's decision confirming the indictment, the SPO submitted a confirmed indictment with redactions.⁷
2. On 17 December 2021, the SPO filed its Pre-Trial Brief and related material, including a list of witnesses ("SPO Witness List") and a list of exhibits ("SPO Exhibit List") (collectively, "SPO Lists"), which were subsequently revised and amended.⁸
3. On 20 July 2022, the SPO *inter alia* requested leave to add two witnesses, [REDACTED] and W04043 and associated materials to the SPO Lists ("First SPO Request").⁹ On 2 September 2022, the SPO filed a request to add another two

⁷ 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); 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). A corrected confirmed indictment was filed on 3 September 2021. See 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). A confirmed amended indictment was filed on 29 April 2022. See F00789/A05, Public Redacted Version of Amended Indictment, 29 April 2022 (strictly confidential and *ex parte* version filed on 29 April 2022, confidential redacted version filed on 29 April 2022). A further amended indictment was submitted on 30 September 2022. See F00999/A03, Public Redacted Version of Amended Indictment, 30 September 2022 (strictly confidential and *ex parte* version filed on 30 September 2022, confidential redacted version filed on 30 September 2022). A lesser redacted public redacted version of the further amended indictment was filed on 27 February 2023. See F01323/A01, Public Lesser Redacted Version of Amended Indictment, 27 February 2023 (confidential, reclassified as public on 27 February 2023).

⁸ F00631/RED, Public Redacted version of 'Submission of Pre-Trial Brief, with witness and exhibit lists', KSC-BC-2020-06/F00631, dated 17 December 2021, 21 December 2021 (confidential version filed on 17 December 2021). See F00738, Prosecution submission of amended exhibit list, 18 March 2022; F00788, Prosecution submission of amended exhibit list, 29 April 2022 (confidential); F00896, Prosecution submission of amended exhibit list and related submissions, 25 July 2022 (confidential); F00967, Prosecution submission of amended exhibit list, 13 September 2022 (confidential, reclassified as public on 16 September 2022); F00885, Prosecution submission of corrected and lesser redacted witness list, 18 July 2022; F00948, Prosecution submission of revised witness list, 2 September 2022.

⁹ F00890/RED, Public redacted version of 'Prosecution Rule 102(2) submission and related requests with strictly confidential and *ex parte* Annexes 1-7 and 9, and confidential Annex 8', KSC-BC-2020-06/F00890, dated 20 July 2022, 10 March 2023 (strictly confidential and *ex parte* version filed on 20 July 2022, confidential redacted version filed on 21 July 2022). See also *inter alia* F00909/RED, Public Redacted Version of 'Thaçi Defence Response to Prosecution Rule 102(2) submission and related requests (F00890)', 16 March 2023 (confidential version filed on 3 August 2022).

witnesses, [REDACTED] and [REDACTED], and associated materials to the SPO Lists (“Second SPO Request”),¹⁰ (collectively, “SPO Requests”).

4. On 27 October 2022, the Pre-Trial Judge issued the Impugned Decisions authorising *inter alia* the addition of the four requested witnesses to the SPO Witness List and the inclusion of the associated materials in the SPO Exhibit List.¹¹

5. On 2 November 2022, the SPO filed its amended witness and exhibit lists (“Amended Witness List” and “Amended Exhibit List”, respectively).¹²

6. On 3 November 2022, Thaçi requested certification to appeal the Impugned Decisions,¹³ and Selimi requested certification to appeal the Second Impugned Decision (collectively, “Certification Requests”).¹⁴ On 16 November 2022, the SPO responded.¹⁵ No replies were filed.

¹⁰ F00947/RED, Public redacted version of ‘Prosecution request to add two witnesses and associated materials with strictly confidential and *ex parte* Annexes 1-2’, KSC-BC2020-06/F00947, dated 2 September 2022, 10 March 2023 (strictly confidential and *ex parte* version filed on 2 September 2022, confidential redacted version filed on 2 September 2022). See also *inter alia* F00974/RED, Public Redacted Version of ‘Thaçi Defence Response to Prosecution request to add two witnesses and associated materials (F00947)’, 16 March 2023 (confidential version filed on 15 September 2022); F00975/RED, Public Redacted Version of Selimi Defence Response to Confidential redacted version of Prosecution request to add two witnesses and associated materials, KSC-BC-2020-06/F00975, dated 15 September 2022, 15 March 2023 (confidential version filed on 15 September 2022).

¹¹ First Impugned Decision, para. 58(a)-(b); Second Impugned Decision, para. 47(a)-(b).

¹² F01078, Prosecution submission of amended witness and exhibit lists, 2 November 2022 (confidential).

¹³ F01080, Thaçi Defence Request for Certification to Appeal the “Decision on Prosecution Rule 102(2) Submission and Related Requests” (F01057), 3 November 2022 (confidential, reclassified as public on 28 November 2022); F01085/RED, Public Redacted Version of Thaçi Defence Request for Certification to Appeal the “Decision on Prosecution Request to Add Two Witnesses and Associated Materials” (F01058), 25 November 2022 (confidential version filed on 3 November 2022).

¹⁴ F01084/RED, Public Redacted Version of Selimi Defence Request for Certification to Appeal the Decision on Prosecution Request to Add Two Witnesses and Associated Materials, 8 December 2022 (confidential version filed on 3 November 2022).

¹⁵ F01106, Prosecution response to Thaçi Defence requests for certification to appeal Decision F01057, 16 November 2022 (confidential, reclassified as public on 23 November 2022); F01107, Prosecution response to Thaçi Defence request for certification to appeal Decision F01058, 16 November 2022 (confidential, reclassified as public on 23 November 2022); F01108, Prosecution response to Selimi Defence request for certification to appeal Decision F01058, 16 November 2022 (confidential, reclassified as public on 23 November 2022).

7. On 23 November 2022, the Pre-Trial Judge certified the following five issues out of the total ten issues raised by the Defence (collectively, “Certified Issues”):¹⁶

- (a) 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 (“First Thaçi Issue on First Impugned Decision”);
- (b) 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 [First SPO] Request being filed within the pre-trial stage or the ongoing Defence investigations (“Second Thaçi Issue on First Impugned Decision”);
- (c) 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 [Second SPO] Request being filed in the pre-trial stage (“Third Thaçi Issue on Second Impugned Decision”);
- (d) Whether the Pre-Trial Judge erred in its assessment of the impact of the late addition of [REDACTED] and [REDACTED] 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 [REDACTED]'s evidence [REDACTED] (“Fourth Thaçi Issue on Second Impugned Decision”);
- (e) Whether the Pre-Trial Judge erred in finding that he was empowered to decide upon the [Second SPO] Request to add witnesses to [the SPO Witness List] at that stage rather than deferring the matter to the Trial Panel (“First Selimi Issue on Second Impugned Decision”).

8. On 30 November 2022, the President assigned Trial Panel II to the case upon transmission of the case file.¹⁷ On 15 December 2022, the Pre-Trial Judge transmitted the case file to the Trial Panel pursuant to Rule 98 of the Rules.¹⁸

¹⁶ F01118, Decision on Requests for Certification to Appeal F01057 and F01058, 23 November 2022 (“Certification Decision”), paras 9(1)-(2), 12(1), 14(3)-(4), 77(a). The Pre-Trial Judge declined to certify the remainder of the issues put forward by the Accused, namely the Third and Fourth Thaçi Issues on First Impugned Decision, the Second Selimi Issue on Second Impugned Decision, and the First and

9. On 18 January 2023, the Trial Panel held a Trial Preparation Conference. On 15 February 2023, during the SPO Preparation Conference, the Trial Panel scheduled the opening of the case for 3 April 2023.¹⁹

II. STANDARD OF REVIEW

10. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.²⁰

III. PRELIMINARY MATTERS

A. PUBLIC FILINGS

11. The Appeals Panel notes that the Impugned Decisions were filed confidentially and that no public redacted versions were issued at the time. As a result, the appellate filings were filed as confidential pursuant to Rule 82(4) of the Rules. However, the Certification Decision and the Assignment Decision were filed as public and public redacted versions of the Impugned Decisions were filed subsequently. 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.²¹ The

Second Thaçi Issues on Second Impugned Decision. See Certification Decision, paras 9(3)-(4), 12(2), 14(1)-(2), 77(b).

¹⁷ F01132, Decision Assigning Trial Panel II, 30 November 2022.

¹⁸ F01166, Decision Transmitting the Case File to Trial Panel II, 15 December 2022.

¹⁹ See Oral Order “Opening of the case and postponement requests”, 15 February 2023.

²⁰ KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also e.g. IA019/F00006, Decision on Thaçi’s Appeal against “Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures”, 12 July 2022 (“Appeal Decision on Amendment of Exhibit List”), para. 14.

²¹ See e.g. IA008/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), paras 8-9 (encouraging the parties to file public redacted versions of their filings as soon as possible, without waiting for an order to do so). See also KSC-CA-2022-01, F00103, Decision on Gucati Application for Reclassification or Public Redacted Versions of Court of Appeals Panel Decisions, 9 January 2023, para. 2.

Panel, therefore, orders the Accused and the SPO to file public redacted versions of the above-mentioned appellate submissions,²² or indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of the present Decision.²³ When assessing whether to do so, the Panel invites the Parties to follow the guidance provided by the redactions appended in the public redacted versions of the Impugned Decisions issued by the Pre-Trial Judge.

B. ISSUES FALLING OUTSIDE THE SCOPE OF CERTIFIED ISSUES

12. 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.²⁴ The Panel also recalls the limited scope of the Certified Issues.²⁵

13. The Court of Appeals Panel notes that the Thaçi Appeal contains arguments on the overall “expansion” of the SPO’s proposed evidence, the volume of additional documents as well as the “constant[] shifting” of the SPO Lists and the alleged impact on the rights of the accused, while Thaçi did not seek leave to certify these specific issues and while some aspects do not arise from the Impugned Decisions.²⁶

²² Namely, Thaçi Appeal (IA025/F00003); Selimi Appeal (IA025/F00002); Response (IA025/F00004); Thaçi Reply (IA025/F00006); Selimi Reply (IA025/F00005).

²³ The Panel notes that prior to the issuance of the public redacted versions of the Impugned Decisions, the SPO indicated that it would not oppose the reclassification as public of the Response. See Response, para. 36.

²⁴ See KSC-BC-2020-07, IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, para. 20. See also e.g. KSC-BC-2020-04, IA004/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.

²⁵ See above, para. 7.

²⁶ See Thaçi Appeal, paras 3-5, 30. See also Response, para. 10.

14. The Appeals Panel finds that these arguments fall outside of the scope of the Certified Issues. The Panel therefore declines to consider these submissions and formally dismisses them.

IV. DISCUSSION

A. ALLEGED ERRORS REGARDING THE PRE-TRIAL JUDGE'S AUTHORITY TO ISSUE THE IMPUGNED DECISIONS (SELIMI GROUNDS A-B; FIRST SELIMI ISSUE ON SECOND IMPUGNED DECISION)

1. Submissions of the Parties

15. At the outset, Selimi indicates that his appeal relates to the general authority of the Pre-Trial Judge to authorise the addition of any witnesses to the SPO Witness List and is not limited to the addition of [REDACTED] alone.²⁷ He first submits that Rule 118(2) of the Rules, as the sole provision within the procedural framework of the Specialist Chambers specifically referring to amendments to a Rule 95(4) witness list, is exclusively limited to the Trial Panel and there is no provision extending such authority to the Pre-Trial Judge *mutatis mutandis*.²⁸ Selimi points out that because there is no direct equivalent of this provision in the procedural framework of any other international court, the jurisprudence on the "inherent discretion" relied upon by the Pre-Trial Judge is inapposite.²⁹

16. Selimi further contends that Rules 95(2), 95(4) and 102 of the Rules cannot be used to interpret Rule 118 of the Rules to grant the Pre-Trial Judge the authority to authorise the amendment of the SPO Witness List.³⁰ He argues that the Pre-Trial Judge's reasoning for extending the authority provided by Rule 118 of the Rules fails for the following reasons: (i) in "erroneously transform[ing]" the SPO request to add

²⁷ Selimi Appeal, paras 7-8.

²⁸ Selimi Appeal, paras 10-19. See also Selimi Appeal, para. 22; Selimi Reply, paras 5, 19.

²⁹ Selimi Appeal, paras 12-13. See also Selimi Reply, paras 13-14.

³⁰ Selimi Appeal, paras 20-23, 35, 40. See also Selimi Reply, paras 10-11.

two witnesses to its Witness List in a request exclusively relating to disclosure, the Pre-Trial Judge “wholly misunderstands” the relationship between the list of witnesses on the SPO list and the disclosure of their evidence since such disclosure can occur regardless of whether the witnesses are added to the SPO Witness List;³¹ (ii) the Rules expressly provide for a clear division of responsibilities between the Pre-Trial Judge and the Trial Panel and no presumption exists under the Rules that if the Trial Panel has the authority to decide upon specific issues later in proceedings, this can be automatically translated to the Pre-Trial Judge;³² and (iii) Rule 95(2) of the Rules is a general provision only endowing the Pre-Trial Judge with a residual authority when the Rules do not specifically address a topic which Rule 118(2) of the Rules clearly does, and Rule 95(4) of the Rules does not grant the Pre-Trial Judge the power to authorise the addition of witnesses, as it merely requires the Pre-Trial Judge to set a limit for the filing of the Rule 95(4) witness list but does not envisage any amendment thereof.³³

17. The SPO responds that the Pre-Trial Judge has inherent power and ample authority to rule on the SPO Requests under the Law and the Rules.³⁴ According to the SPO, the Pre-Trial Judge did not consider Rule 118(2) of the Rules as the primary legal basis for deciding the Request, but rather Rule 95 of the Rules.³⁵ In addition, the SPO argues that Rule 118(2) is incapable of restricting the broad power conferred on the Pre-Trial Judge in managing the preparation of the case for trial under the Law and Selimi fails to address the relevant interpretative framework under Article 3 of

³¹ Selimi Appeal, paras 24-30. See also Selimi Reply, para. 18.

³² Selimi Appeal, paras 31-34, referring to F00727/CONF/RED, Confidential Redacted Version of Decision on Specialist Prosecutor’s Request to Amend its Exhibit List and to Authorise Related Protective Measures, 8 March 2022 (confidential) (strictly confidential and *ex parte* version filed on 8 March 2022) (“Decision on Amendment of Exhibit List”), para. 24. See also Selimi Reply, paras 10-11.

³³ Selimi Appeal, paras 35-39. See also Selimi Reply, para. 10.

³⁴ Response, paras 25, 28, 35. The SPO also points out that the Pre-Trial Judge made a similar decision to amend the SPO Lists that Selimi did not appeal. See Response, para. 25.

³⁵ Response, para. 26.

the Law and Rule 4 of the Rules.³⁶ The SPO further submits that the case law of other international tribunals holds that the power to amend witness and exhibit lists forms part of the Pre-Trial Judge's (and Trial Chamber's) 'inherent discretion' in managing proceedings, claiming that Selimi's assertion that there is no equivalent to Rule 118(2) in the procedural framework of any other international court is "factually incorrect" and "misguided".³⁷ As to the Pre-Trial Judge's reliance on Rule 95 of the Rules, the SPO takes issue with Selimi's interpretation limiting the Pre-Trial Judge's powers under such provision.³⁸ In the SPO's view, this would have the opposite effect than advancing the fairness and efficiency of the proceedings.³⁹

18. Selimi replies that the SPO appears to concede that the Pre-Trial Judge may not directly rely on Rule 118(2) of the Rules.⁴⁰ In addition, he submits that Article 39 of the Law, to which the Pre-Trial Judge did not even refer, does not provide an independent legal basis for the Pre-Trial Judge's power to decide the SPO Requests and is properly limited by Article 40 of the Law.⁴¹ According to Selimi, the fact that a request is filed before the Pre-Trial Judge does not inherently grant him the authority to rule on it.⁴² Selimi finally argues that the Trial Panel is in a "far better position" to decide on requests to add witnesses to the SPO Witness list and "the burden is not upon the Defence to demonstrate why it would be fairer and more efficient for the Trial Panel alone to decide on [such requests]".⁴³

³⁶ Response, paras 27-28.

³⁷ Response, para. 29. The SPO also contends that Selimi's reliance on the Pre-Trial Judge's reasoning in a previous decision should be summarily dismissed since that decision is not subject of the appeal. See Response, para. 30.

³⁸ Response, paras 31-34.

³⁹ Response, para. 32.

⁴⁰ Selimi Reply, paras 4-5. See also Selimi Reply, para. 2.

⁴¹ Selimi Reply, paras 6-9.

⁴² Selimi Reply, para. 12.

⁴³ Selimi Reply, paras 15-17.

2. Assessment of the Court of Appeals Panel

19. Turning first to whether the Pre-Trial Judge erred in law in deciding that he could issue a decision on amending the SPO Witness List pursuant to Rule 118(2) of the Rules, the Panel agrees with Selimi that this provision is the only one within the Rules or the Law that expressly foresees the amendment of witness and exhibit lists and endows this authority to the Trial Panel.⁴⁴ However, the Panel finds that, contrary to Selimi's contention, the Pre-Trial Judge did not consider Rule 118(2) of the Rules as the *legal basis* for deciding the Request but referred to it as being relevant for the *legal test* to assess the SPO Requests.⁴⁵ Rather, the Pre-Trial Judge found that he was empowered to rule on the SPO Requests pursuant to Rule 95(2)(b) of the Rules.⁴⁶ Selimi's arguments that the Pre-Trial Judge "usurp[ed]" the Trial Panel's authority under Rule 118(2) of the Rules are thus dismissed.⁴⁷

20. The question is therefore whether the absence in the Rules of an equivalent to Rule 118(2) of the Rules for the Pre-Trial Judge necessarily precludes the Pre-Trial Judge from ruling on requests to amend the SPO Lists at an earlier stage of the proceedings. The Panel agrees with Selimi that the legal framework of the Specialist Chambers provides a clear division of responsibilities between the Pre-Trial Judge and the Trial Panel and that the fact that the Trial Panel is granted authority to decide on specific issues does not automatically entail that the Pre-Trial Judge should be vested

⁴⁴ Rule 118(2) of the Rules provides that:

The Panel may permit, upon timely notice and a showing of good cause, the amendment of the lists of witnesses and exhibits filed pursuant to Rule 95(4)(b).

⁴⁵ See Second Impugned Decision, paras 18, 26. See also First Impugned Decision, para. 22.

⁴⁶ See Second Impugned Decision, para. 18. Rule 95(2)(b) of the Rules provides that:

The Pre-Trial Judge shall ensure that the proceedings are not unduly delayed and shall take all necessary measures for the expeditious preparation of the case for trial. The Pre-Trial Judge shall, *inter alia*:

[...] set time limits for disclosure in accordance with Chapter 7, take any measures to ensure timely disclosure, and prepare a disclosure report for the Trial Panel; [...].

⁴⁷ See Selimi Appeal, paras 14-19, 22.

by the same authority.⁴⁸ However, both the Pre-Trial Judge and the Trial Panel have the responsibility pursuant to the Law, under Articles 39 and 40 respectively, to ensure the fair and expeditious conduct of the proceedings and possess broad powers to that end. Selimi fails to demonstrate how Article 40 of the Law would “limit” the powers of the Pre-Trial Judge granted under Article 39 of the Law.⁴⁹

21. The Panel recalls that under Article 39 of the Law, the Pre-Trial Judge has discretion to make any necessary orders or decisions to ensure that the case is prepared properly and expeditiously for trial.⁵⁰ The Panel further considers that Rule 95 of the Rules grants broad discretion to the Pre-Trial Judge to adopt a range of measures for the preparation of the case for trial. The term “*inter alia*” used in Rule 95(2) of the Rules signposts that the list of measures that ensues is of a non-exhaustive nature and can as such encompass “any necessary measures for the expeditious preparation of the case for trial”. The Panel is not persuaded by Selimi’s argument that this provision has only a residual character.⁵¹

22. In light of the above and of the fact that the Pre-Trial Judge may set time limits for the SPO to file its witness and exhibit lists by virtue of Rule 95(4)(b) of the Rules, the Panel considers that the ability to adjudicate requests to amend such lists prior to the transmission of the case file to the Trial Panel, although not expressly foreseen in the Rules, necessarily falls among the scope of measures the Pre-Trial Judge can take under Rule 95(2) of the Rules. As the Pre-Trial Judge correctly stated:

⁴⁸ Selimi Appeal, para. 32. To the extent that Selimi relies on findings the Pre-Trial Judge made in a separate decision, the Panel will not address such arguments as they do not arise from the Impugned Decisions. See e.g. IA017/F00011/RED, Public Redacted Version of Decision on Hashim Thaçi’s Appeal Against Decision on Review of Detention, 5 April 2022 (confidential version filed on 5 April 2022), para. 17. See also Selimi Appeal, para. 31, referring to Decision on Amendment of Exhibit List, para. 24.

⁴⁹ See Selimi Reply, paras 6-9.

⁵⁰ See IA024/F00019, Decision on Defence Appeals against “Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant”, 27 December 2022 (“Appeal Decision on Framework for Contacting Witnesses”), para. 26.

⁵¹ See Selimi Appeal, para. 37.

[I]t would be contrary to the Pre-Trial Judge's obligation under Rule 95(2) of the Rules to take all necessary measures for the expeditious preparation of the case for trial if a request to amend a witness or exhibit list could not be entertained before the start of the trial.⁵²

23. In the Panel's view, considering otherwise would hinder the Pre-Trial Judge's duty under Article 39 of the Law to ensure the *expeditious* preparation of the case for trial as the disposition of requests to vary the SPO Lists made at an earlier stage of the pre-trial proceedings would have to be delayed until the transmission of the case file to a trial panel. Denying the Pre-Trial Judge the authority to decide on a request to amend a witness or exhibit list during the pre-trial phase would also contradict the SPO's duty to raise any such request at the earliest opportunity.⁵³

24. The Panel recalls that, as noted by the Pre-Trial Judge, this approach is also in line with the jurisprudence of international criminal tribunals holding that it is within the inherent discretion of the pre-trial judge (and trial chambers) to authorise amendments of witness and exhibit lists.⁵⁴ As before the Specialist Chambers, the relevant provisions of the rules of procedure and evidence of these courts likewise provide that the pre-trial judge shall order the prosecution to file witness and exhibit lists within set time-limits,⁵⁵ while they only endow trial chambers with the possibility to determine the number of witnesses to be called⁵⁶ and to rule on requests from the

⁵² Second Impugned Decision, para. 18.

⁵³ See below, para. 36. See also Rule 102(2) of the Rules (which provides that statements of additional SPO witnesses which have not been disclosed in the time period prescribed under Rule 102(1)(b) of the Rules shall be made available to the Defence *as soon as possible* and shall be accompanied by reasons for the late disclosure), referred to in Second Impugned Decision, para. 18.

⁵⁴ See Second Impugned Decision, para. 18. See also Appeal Decision on Amendment of Exhibit List, para. 21.

⁵⁵ Compare Rule 95(4) of the Rules with ICTY Rules of Procedure and Evidence, Rule 65 *ter* (E)(ii) and (iii); STL Rules of Procedure and Evidence, Rule 91(G)(ii) and (iii); IRMCT Rules of Procedure and Evidence, Rule 70(E)(ii) and (iii). See also ICTR Rules of Procedure and Evidence Rule 73 *bis* (B)(iv) and (v) (where, unlike before other courts, it is for the trial chamber to do so at the pre-trial conference).

⁵⁶ Compare Rule 118(1)(a) of the Rules with IRMCT Rules of Procedure and Evidence, Rule 81(C); ICTY Rules of Procedure and Evidence, Rule 73 *bis* (C); ICTR Rules of Procedure and Evidence, Rule 73 *bis* (D); STL Rules of Procedure and Evidence, Rule 127(C)(ii).

prosecution to vary the number of witnesses “after the commencement of the trial”.⁵⁷ However, these courts have nevertheless recognised that the pre-trial judge was vested with the authority to rule on such requests at the pre-trial stage despite the absence of any specific provision foreseeing that possibility.⁵⁸ The Appeals Panel sees no error in the Pre-Trial Judge relying on the same approach.⁵⁹

25. As to Selimi’s argument that the Pre-Trial Judge, in relying on Rule 95(2)(b) of the Rules, “transformed” the SPO Requests into a request exclusively relating to disclosure,⁶⁰ the Panel recalls that the Pre-Trial Judge referred to Rule 95(2)(b) of the Rules, “seeing as the Request ultimately concerns disclosure under Rule 102(1)(b) of the Rules and how such disclosure has been memorialised through the Revised Witness List and Amended Exhibit List”.⁶¹ While any addition to the SPO Lists necessarily entails some consequences in terms of (additional) disclosure obligations pursuant to Rule 102 of the Rules, the Panel agrees with the Defence that the timeline to disclose witness statements and the variation of the SPO Witness List are two distinct issues. Nevertheless, and while the Pre-Trial Judge’s reasoning in this respect could have been clearer, the Panel finds that the Pre-Trial Judge did not consider the SPO Requests solely as relating to disclosure.⁶² Selimi’s arguments in that respect are therefore rejected.

⁵⁷ Compare Rule 118(2) of the Rules with IRMCT Rules of Procedure and Evidence, Rule 81(F); ICTY Rules of Procedure and Evidence, Rule 73 bis (F); ICTR Rules of Procedure and Evidence, Rule 73 bis (E).

⁵⁸ See e.g. IRMCT, *Prosecutor v. Kabuga*, MICT-13-38-PT, Decision on Prosecution Motion to Amend its Witness and Exhibit Lists, 10 May 2022 (“*Kabuga Decision*”), pp. 2-3; ICTY, *Prosecutor v. Lukić and Lukić*, IT-98-32/1-PT, Decision on Prosecution’s Motion to Amend Rule 65 ter Witness List and on Related Submissions, 22 April 2008 (“*Lukić and Lukić Decision*”), para. 9; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Decision on Two Prosecution Submissions in Relation to Amending the Prosecution Rule 91 Filings, 5 August 2013 (“*Ayyash et al. Decision*”), para. 20. See also ICTR, *Prosecutor v. Kanyarukiga*, ICTR-02-78-I, Decision on Prosecutor's Motion to Vary His Witness List, 11 August 2009 (“*Kanyarukiga Decision*”), paras 10, 13.

⁵⁹ Contra Selimi Appeal, para. 12.

⁶⁰ Selimi Appeal, para. 30.

⁶¹ Second Impugned Decision, para. 18.

⁶² Contra Selimi Appeal, paras 24-30. See above, para. 22.

26. The Panel considers that Selimi has failed to demonstrate that the wording of Rule 118(2) of the Rules and the fact that the Rules do not contain a mirroring provision for the Pre-Trial Judge should be interpreted as preventing the Pre-Trial Judge from being vested with the authority to rule on variations of the SPO Lists.⁶³ The Panel is satisfied that Rule 95(2) of the Rules taken in combination with Article 39 of the Law provides a proper legal basis, independent from Rule 118(2) of the Rules, for the Pre-Trial Judge to decide on such variations.⁶⁴ Therefore, the Panel sees no error in the Pre-Trial Judge finding that he was empowered to rule on the SPO Requests and denying Selimi's request to defer the decision to the Trial Panel.⁶⁵ In the Panel's view, that the Pre-Trial Judge relied on the specific provision of Rule 95(2)(b) of the Rules and the fact that he did not expressly refer to Article 39 of the Law in his reasoning does not affect this conclusion.⁶⁶

27. The Panel also rejects Selimi's claim that the Trial Panel is in a "far better position" to rule on the SPO Requests. That being said, in light of the fact that the Trial Panel has now been assigned to the case since the issuance of the Impugned Decisions, the Trial Panel has authority to rule on any future requests to amend the Lists pursuant to Rule 118(2) of the Rules.

28. In light of the above, the Appeals Panel dismisses Selimi's Grounds A and B.

⁶³ See Appeal Decision on Framework for Contacting Witnesses, para. 28.

⁶⁴ The Panel recalls that the Rules are an instrument for the implementation of the Law and are therefore subordinate to it, a provision of the Rules cannot be interpreted as narrowing the scope of a provision of the Law. See Appeal Decision on Framework for Contacting Witnesses, fn. 72.

⁶⁵ Second Impugned Decision, para. 18.

⁶⁶ Contra Selimi Reply, para. 9.

B. ALLEGED ERRORS REGARDING THE ASSESSMENT OF TIMELINESS (THAÇI GROUND A;
FIRST THAÇI ISSUE ON FIRST IMPUGNED DECISION)

1. Submissions of the Parties

29. Thaçi argues that since the SPO has known about [REDACTED] and W04043 for years and was aware of [REDACTED]'s and W04043's relevance to the case respectively in February 2020 and February 2021, the Pre-Trial Judge erred in finding that the SPO's request to add these witnesses – six months after the expiry of the deadline – was timely.⁶⁷ Thaçi takes issue with the fact that the Pre-Trial Judge started his assessment of timeliness of the SPO Requests from the date on which the SPO interviewed these witnesses.⁶⁸ In Thaçi's view, with this reasoning, the request to add witnesses will "always be timely" regardless of when the SPO first knew of their existence, provided that the SPO is able to process and disclose the interviews and file the request within a reasonable period, giving the SPO "unlimited scope" to add new witnesses to the SPO Witness List.⁶⁹ Thaçi contends that the relevant time period should rather start from when the SPO first learned about the potential evidence.⁷⁰

30. The SPO responds that the Pre-Trial Judge correctly determined that the proper date from which to assess timeliness is the date on which the SPO interviewed [REDACTED] and W04043 as it is only at that point that the SPO could fully ascertain the relevance of their evidence.⁷¹ The SPO further contends that Thaçi fails to point to any jurisprudence demonstrating an error in the Pre-Trial Judge's approach.⁷² According to the SPO, this approach ultimately results in more efficient trial processes while Thaçi's approach to focus on when the SPO "first learned about the potential evidence" would result in the inclusion on the witness list of a large number of

⁶⁷ Thaçi Appeal, paras 17-18.

⁶⁸ Thaçi Appeal, paras 18-20. See also Thaçi Appeal, para. 31; Thaçi Reply, para. 3.

⁶⁹ Thaçi Appeal, paras 19-21. See also Thaçi Appeal, para. 5; Thaçi Reply, para. 3.

⁷⁰ Thaçi Appeal, para. 21.

⁷¹ Response, paras 13-14.

⁷² Response, para. 13.

individuals that the SPO will not ultimately call at trial.⁷³ In the SPO's view, Thaçi's "scare-mongering" that this would grant the SPO unlimited scope to add new witnesses ignores other factors of the Pre-Trial Judge's assessment, including the SPO's diligence to obtain the witnesses' evidence before the interview.⁷⁴

31. In reply, Thaçi argues that the fact that the SPO mentions "a large number of individuals" being interviewed after the filing of its SPO Lists is indicative of its "problematic approach" to the pre-trial phase as that process was required to have been completed before 17 December 2021, the date of the filing of the initial Witness and Exhibit Lists.⁷⁵

2. Assessment of the Court of Appeals Panel

32. The Panel recalls that the Pre-Trial Judge, when assessing the timeliness of the SPO Requests, considered that the starting point was not the date on which information or documents on the witnesses became available but the date on which the SPO interviewed [REDACTED] and W04043 as it was "at that point that the SPO could fully ascertain the relevance of [their] evidence to its case".⁷⁶

33. The Panel agrees with the Pre-Trial Judge that what matters in terms of determining timeliness is that the Party is in a position to appraise the content of the potential evidence. In the Panel's view, merely "know[ing] about" a witness is not sufficient to carry out such an assessment.⁷⁷ The Panel further notes that while Thaçi takes issue with the Pre-Trial Judge's approach, he fails to cite to any authority in support of his position that such reasoning was erroneous.

34. The Appeals Panel is satisfied that the Pre-Trial Judge conducted a careful assessment, based on the specific circumstances of the case, in order to determine the

⁷³ Response, para. 14.

⁷⁴ Response, para. 15

⁷⁵ Thaçi Reply, paras 4-6.

⁷⁶ First Impugned Decision, paras 23, 32.

⁷⁷ Contra Thaçi Appeal, paras 17, 20. See also Thaçi Appeal, para. 21.

reasonableness of the time frames. Notably, he took into account the time that elapsed between the interview and the finalisation of the transcripts, and the time needed to fully process the interviews, as well as the time between the date of finalisation and the filing of the First SPO Request.⁷⁸ The Panel finds that Thaçi fails to identify any error in the manner in which the Pre-Trial Judge exercised his discretion in this regard.

35. The Panel further notes that contrary to Thaçi's submissions, the Pre-Trial Judge also examined the SPO's conduct *prior* to the interviews of [REDACTED] and W04043 and whether the SPO had exercised the required due diligence in obtaining their evidence.⁷⁹ Such assessment would necessarily exclude hypothetical scenarios where the SPO would have "sat on information for years".⁸⁰ Thus, the Panel rejects Thaçi's claim that the SPO enjoys an unlimited scope to add new witnesses and that any requests will "always" be timely.⁸¹

36. That being said, the Panel stresses that the SPO should strive to respect the time limits foreseen under the Rules for the filing of its Witness and Exhibit Lists and endeavour to identify all relevant witnesses prior to the expiration of such time limits. The Panel recalls that although the addition of witnesses and exhibits at the pre-trial

⁷⁸ First Impugned Decision, paras 25-26, 34.

⁷⁹ See First Impugned Decision, paras 24 (where the Pre-Trial Judge found that the SPO exercised due diligence in obtaining the evidence of [REDACTED], noting notably that the SPO: requested some assistance while the response took eleven months due to issues related to the COVID-19 pandemic; contacted the witness to discuss security and logistical matters in less than two months; sought to arrange the interview earlier but it had to be postponed due to scheduling conflicts), 33 (where the Pre-Trial Judge found that the SPO exercised due diligence in arranging its interview with W04043 "notwithstanding conflicting information in its possession on the witness's identity and whereabouts", noting notably that the interview did not take place until April 2022 due to scheduling and logistical issues, including complications arising from the COVID-19 pandemic).

⁸⁰ Thaçi Appeal, para. 20.

⁸¹ Thaçi Appeal, paras 5, 19, 21; Thaçi Reply, para. 3. Thaçi's contention that the SPO enjoys an "unlimited scope" to add new witnesses was speculative at the time he filed his appeal and is now moot in light of the transmission of the case file to the Trial Panel. In any event, the Panel notes that the SPO did not request any further addition to its Witness List since the filing of the Amended Witness List.

stage has generally been treated with flexibility,⁸² the ability to subsequently seek variation of the SPO Lists is subject to the scrutiny and discretion of the Pre-Trial Judge (or Trial Panel), on a case-by-case basis, and should always be balanced with the right of the accused to have adequate time and facilities to prepare a defence and to be tried without undue delay.⁸³

37. For these reasons, the Panel finds that the Pre-Trial Judge did not err in concluding that the First SPO Request was made in a timely manner.⁸⁴ In light of the above, Thaçi's Ground A is dismissed accordingly.

C. ALLEGED ERRORS REGARDING THE ASSESSMENT OF GOOD CAUSE (THAÇI GROUND B; SECOND THAÇI ISSUE ON FIRST IMPUGNED DECISION AND THIRD THAÇI ISSUE ON SECOND IMPUGNED DECISION)

1. Submissions of the Parties

38. Thaçi submits that the Pre-Trial Judge erred in finding that the SPO demonstrated good cause for the late addition of [REDACTED] and [REDACTED] on the basis, *inter alia*, that the SPO Requests were filed while the pre-trial phase was still ongoing and the fact that the Defence was investigating the case.⁸⁵ Pointing to the SPO's original estimate – in November 2020 – that it anticipated to be ready to start the presentation of its case in the summer of 2021, Thaçi argues that the fact that the case is “almost inconceivably” still in pre-trial phase 18 months later cannot operate

⁸² See Appeal Decision on Amendment of Exhibit List, para. 21 and references cited therein; *Kabuga* Decision, pp. 2-3. See also above, para. 24.

⁸³ See Appeal Decision on Amendment of Exhibit List, para. 21. See also e.g. ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007 (“*Popović et al.* Appeal Decision”), para. 37; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Motion for Leave to Amend its Witness List to Add Witness KDZ597, 1 July 2010 (“*Karadžić* Decision”), para. 4; ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-832, Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013 (“*Kenyatta* Decision”), para. 11; *Kanyarukiga* Decision, para. 11.

⁸⁴ See First Impugned Decision, paras 26, 35.

⁸⁵ Thaçi Appeal, paras 22-23, 25. See also Thaçi Appeal, para. 31; Thaçi Reply, paras 7-8.

as a factor in the SPO's favour to continue to add witnesses and exhibits to the SPO Lists.⁸⁶ In his view, it is these kinds of expansions and delays that have prevented the case from moving to trial.⁸⁷ Likewise, Thaçi contends that the fact that Defence investigations are ongoing is irrelevant to a finding of good cause as such investigations will continue at the trial phase and will likely continue into any subsequent appeal phase.⁸⁸ According to Thaçi, the Pre-Trial Judge's reasoning "effectively penalises the Defence for the diligent exercise of its duties".⁸⁹

39. The SPO responds that Thaçi's submissions show his "misapprehension of the legal test" to amend the SPO Lists.⁹⁰ Since they aim to assist the Defence in its preparation for trial, the stage of the proceedings at which changes to such lists are made is therefore an "influential factor" in the overall assessment.⁹¹ Furthermore, according to the SPO, regardless of whether Defence investigations will continue during the trial phase, adjusting for new witnesses is "easier" when investigations are already underway than when they have ceased and it was thus correct for the Pre-Trial Judge to consider this factor when assessing good cause.⁹² Finally, the SPO argues that Thaçi's claim that the SPO Requests prevented the proceedings from moving to trial is "baseless" as the transfer of the case to the Trial Panel was announced.⁹³

40. Thaçi replies that the Pre-Trial Judge's reasoning is "circular" if requests for additional witnesses are granted on the basis that the pre-trial phase continues.⁹⁴ He adds that since Defence investigations do not cease and "run in the background of the entire proceedings, this is a non-factor".⁹⁵

⁸⁶ Thaçi Appeal, para. 24. See also Thaçi Appeal, para. 2; Thaçi Reply, para. 7.

⁸⁷ Thaçi Appeal, para. 24. See also Thaçi Reply, para. 7.

⁸⁸ Thaçi Appeal, para. 25. See also Thaçi Reply, para. 8.

⁸⁹ Thaçi Appeal, para. 25. See also Thaçi Reply, para. 8.

⁹⁰ Response, paras 16-17.

⁹¹ Response, para. 17.

⁹² Response, para. 18.

⁹³ Response, para. 19.

⁹⁴ Thaçi Reply, para. 7.

⁹⁵ Thaçi Reply, para. 8.

2. Assessment of the Court of Appeals Panel

41. At the outset, the Appeals Panel recalls that in striking the proper balance between the prosecution's duty to present the available evidence to prove its case with the right of the accused to have adequate time and facilities to prepare a defence and to be tried without undue delay, a certain level of flexibility must be maintained in the context of a complex multi-accused trial in which a considerable amount of evidence is presented by the prosecution.⁹⁶

42. The Panel notes that in assessing whether the SPO demonstrated good cause for the late addition of [REDACTED] and [REDACTED] and associated material to the SPO Lists, the Pre-Trial Judge took into consideration, *inter alia*, the fact that the pre-trial phase was still ongoing and/or that the Defence was continuing its investigations.⁹⁷

43. While Thaçi argues that these factors are "irrelevant" to the determination of good cause,⁹⁸ the Appeals Panel recalls its previous finding that both the stage of the proceedings and Defence investigations are relevant in assessing whether to allow the addition of witnesses or exhibits.⁹⁹ This approach is also endorsed by the jurisprudence of international criminal courts which views the (early) stage of proceedings¹⁰⁰ and ongoing investigations¹⁰¹ as factors weighing in favour of allowing the addition of exhibits and/or witnesses.

⁹⁶ Appeal Decision on Amendment of Exhibit List, para. 21.

⁹⁷ See First Impugned Decision, paras 28, 31; Second Impugned Decision, paras 27-28. See also First Impugned Decision, paras 37, 39 (with regard to W04043); Second Impugned Decision, paras 31-32 (with regard to [REDACTED]).

⁹⁸ Thaçi Appeal, paras 23, 25.

⁹⁹ Appeal Decision on Amendment of Exhibit List, paras 21, 23-24.

¹⁰⁰ See e.g. *Lukić and Lukić* Decision, para. 10; *Karadžić* Decision, para. 5; *Kenyatta* Decision, para. 11; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015, para. 179.

¹⁰¹ See e.g. *Lukić and Lukić* Decision, para. 10; 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; ICTR, *Prosecutor v. Bizimungu et al.*, ICTR-00-56-T, Decision on the

44. In the Panel's view, the stage of the proceedings and the ongoing Defence investigations were appropriate factors for the Pre-Trial Judge to take into account when exercising his discretion on this issue.¹⁰² The Panel considers that the fact that Defence investigations will continue during the trial phase does not affect the correctness of the Pre-Trial Judge's finding.¹⁰³ The Panel is further not persuaded by Thaçi's undeveloped claim that the Pre-Trial Judge's consideration of the fact that the Defence is investigating would "penalis[e]" the Defence.¹⁰⁴

45. Finally, and in light of the fact that the case file has now been transmitted to the Trial Panel and the trial has now started, Thaçi's submission that the SPO Requests have prevented the case from moving to trial is dismissed as moot.¹⁰⁵

46. For the reasons set forth above, the Court of Appeals Panel finds that Thaçi has failed to demonstrate that the Pre-Trial Judge erred in his assessment of good cause by having relied on irrelevant factors. Thaçi's Ground B is therefore dismissed.

D. ALLEGED ERRORS REGARDING THE ASSESSMENT OF THE IMPACT OF THE ADDITIONS
(THAÇI GROUND C; FOURTH THAÇI ISSUE ON SECOND IMPUGNED DECISION)

1. Submissions of the Parties

47. Thaçi submits that while the Defence opposed the late addition of [REDACTED] and [REDACTED] and their associated material, and while the Pre-Trial Judge acknowledged that it might require the Defence to "refocus its investigations", he nonetheless erred in dismissing the Defence concerns on the basis that part of [REDACTED]'s and [REDACTED]'s associated material had already been disclosed to the Defence under Rule 103 or Rule 102(3) of the Rules, and that much of

Prosecution's Motion Dated 9 August 2005 to Vary its List of Witnesses Pursuant to Rule 73 *bis* (E), 21 September 2005, para. 32.

¹⁰² See First Impugned Decision, paras 28, 37; Second Impugned Decision, paras 27, 31.

¹⁰³ Contra Thaçi Appeal, para. 25; Thaçi Reply, para. 8.

¹⁰⁴ See Thaçi Appeal, para. 25; Thaçi Reply, para. 8.

¹⁰⁵ Thaçi Appeal, para. 24. See also Thaçi Reply, para. 7.

[REDACTED]'s evidence was already accessible [REDACTED].¹⁰⁶ In Thaçi's view, the fact that the new material can be found among "millions of pages of SPO disclosure" or in the public record [REDACTED] are irrelevant factors which cannot circumvent the fact that Defence preparations are affected by the late addition of witnesses and exhibits to the SPO Lists.¹⁰⁷ Thaçi further argues that the Defence was entitled to focus its preparation on witnesses and proposed exhibits that the SPO indicated it would present at trial.¹⁰⁸

48. The SPO responds that the fact that Thaçi already had received much of the additional material is "patently relevant" when assessing the impact that the addition of evidence and witnesses will have on the Defence, and is in line with the jurisprudence of the Appeals Panel and other international tribunals.¹⁰⁹ In the SPO's view, the Defence "seek[s] to downplay" this fact by referencing the number of documents that have been disclosed.¹¹⁰ The SPO further claims that several additional factors underpinned the Pre-Trial Judge's finding concerning impact.¹¹¹ The SPO also submits that whether the addition of new witnesses "means more work for the Defence" is not a basis to claim error.¹¹² The SPO finally argues that the Pre-Trial Judge explicitly considered the impact on the Defence preparations and properly assessed the Defence concerns in ultimately finding that the Defence will be afforded meaningful time to process the additional evidence.¹¹³

49. Thaçi replies that while the Defence reviews the documents it receives, the entire point of the SPO being required to file an Exhibit List and a Witness List is to

¹⁰⁶ Thaçi Appeal, para. 27, referring to Second Impugned Decision, paras 27-28, 31-32. See also Thaçi Appeal, para. 29; Thaçi Reply, para. 9.

¹⁰⁷ Thaçi Appeal, paras 28-29. See also Thaçi Appeal, paras 4-6, 26, 31; Thaçi Reply, para. 11.

¹⁰⁸ Thaçi Appeal, para. 28. See also Thaçi Appeal, para. 1; Thaçi Reply, para. 11.

¹⁰⁹ Response, para. 21.

¹¹⁰ Response, para. 22.

¹¹¹ Response, para. 23.

¹¹² Response, para. 22.

¹¹³ Response, paras 21, 24.

allow the Defence to focus on witnesses and proposed exhibits the SPO has indicated it would present at trial.¹¹⁴

2. Assessment of the Court of Appeals Panel

50. The Panel first observes that, as acknowledged by Thaçi,¹¹⁵ the Pre-Trial Judge expressly considered the Defence's arguments on the impact of the addition of [REDACTED] and [REDACTED] and their associated material on the Accused's preparations for trial.¹¹⁶

51. In the Panel's view, and contrary to Thaçi's submission, that the Defence already had received some of the additional material and/or that much of it was publicly accessible is necessarily of relevance when assessing the impact that the additions will have on the Defence. The Panel finds that the Pre-Trial Judge was therefore entitled to rely, *inter alia*, on this factor when reaching his conclusion.¹¹⁷ This is also in line with the jurisprudence of the Appeals Panel and that of international criminal tribunals.¹¹⁸

¹¹⁴ Thaçi Reply, para. 11.

¹¹⁵ See Thaçi Appeal, para. 27.

¹¹⁶ See Second Impugned Decision, paras 27, 31.

¹¹⁷ Second Impugned Decision, paras 27, 31.

¹¹⁸ See Appeal Decision on Amendment of Exhibit List, para. 22 (finding that no undue prejudice was caused because the additional materials concerned witnesses whose statements and associated exhibits had previously been disclosed). See also ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1553, Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, 23 October 2009, para. 27 (taking into consideration the fact that the redacted form of the transcripts of the new witness had already been disclosed to the Defence); *Ayyash et al.* Decision, para. 24 (finding that no prejudice was caused notably on the basis that the statements of two of the witnesses had already been disclosed to the Defence). Cf. ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 15 (finding that the Prosecution may be relieved of its obligation to disclose exculpatory material if it is known to the Defence and reasonably accessible through the exercise of due diligence); ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 296 (finding that the Prosecution's duty to disclose does not encompass material of a public nature).

52. In addition, Thaçi ignores the fact that the Pre-Trial Judge also took into consideration several other factors when ultimately authorising the SPO to add [REDACTED] and [REDACTED] and their associated materials to the SPO Lists, such as the relatively limited volume of the requested additions compared to the volume of the evidence disclosed and/or the fact that the witnesses' interview and redacted statement, respectively, will be disclosed to the Defence sufficiently in advance of the witness's testimony.¹¹⁹

53. While the Panel finds some merit in the Defence's contention that it should be expected to be able to prepare for trial on the basis of the listed witnesses "the [SPO] intends to call" as per Rule 95(4)(b) of the Rules and of the listed exhibits "the [SPO] intends to present" as per Rule 95(4)(c) of the Rules,¹²⁰ the Panel recalls that the legal framework of the Specialist Chambers foresees the possibility for the variation of the SPO Lists after the expiration of the deadlines set under these provisions provided that the legal requirements are met and subject to judicial review.¹²¹ The Panel is therefore satisfied that the Pre-Trial Judge adequately assessed the Defence concerns and finds that Thaçi fails to demonstrate any error in the Pre-Trial Judge's exercise of his discretion when ultimately concluding that the Defence will be afforded meaningful time to process the additional evidence and will have the opportunity to refocus its investigations "if needed".¹²²

54. In light of the above, the Court of Appeals Panel finds that Thaçi has failed to demonstrate that the Pre-Trial Judge erred in his assessment of the impact of the addition of [REDACTED] and [REDACTED] and their associated material on the

¹¹⁹ See Second Impugned Decision, paras 27, 31.

¹²⁰ See Thaçi Reply, para. 11. Cf. IA018/F00007, Decision on Defence Appeals Against Decision Concerning Request to Amend the Indictment Pursuant to Rule 90(1)(b) of the Rules, 22 March 2022, para. 48.

¹²¹ See above, paras 22-24, 26. See also First Impugned Decision, para. 29.

¹²² See Second Impugned Decision, paras 27, 31.

Accused's preparation for trial and in concluding that no prejudice to the Defence arose in these circumstances. Thiçi's Ground C is dismissed accordingly.


V. DISPOSITION

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

DENIES the Appeals;

ORDERS the Accused and the SPO to submit public redacted versions of their appellate filings referenced in paragraph 11 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 11 upon indication by the Accused and the SPO that they can be reclassified.



**Judge Michèle Picard,
Presiding Judge**

Dated this Tuesday, 18 April 2023

At The Hague, the Netherlands