



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** KSC-BC-2023-12

**The Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni  
Kilaj, Fadil Fazliu and Hajredin Kuçi**

**Before:** Pre-Trial Judge

Judge Marjorie Masselot

**Registrar:** Fidelma Donlon

**Date:** 7 April 2025

**Language:** English

**Classification:** Public

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**Public Redacted Version of Decision on Bashkim Smakaj's Application for Stay  
of Proceedings**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Articles 21(2) and (6), 38(4), 39(1)-(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), and Rules 62, 86(3)-(4) and 103, of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby issues the following decision.

## I. PROCEDURAL BACKGROUND

1. On 4 March 2025, the Defence for Bashkim Smakaj ("Defence" and "Mr Smakaj") applied for a stay of proceeding on the grounds of abuse of process pursuant to Rule 110 of the Rules ("Application").<sup>2</sup>

2. On 17 March 2025, the Specialist Prosecutor's Office ("SPO") filed a response to the Application, in which it requested that the Application be rejected in its entirety ("Response").<sup>3</sup>

3. On 24 March 2025, the Defence filed a reply to the Response in which it maintained its Application ("Reply").<sup>4</sup>

## II. SUBMISSIONS

### A. APPLICATION

4. The Defence submits that the SPO withheld from the Pre-Trial Judge relevant information which was potentially adverse to the SPO's request for

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<sup>1</sup> KSC-BC-2023-12, F00015, President, *Decision Assigning a Pre-Trial Judge*, 6 June 2024, public.

<sup>2</sup> KSC-BC-2023-12, F00202, Defence, *Smakaj Application for a Stay of Proceedings as an Abuse of Process*, 4 March 2025, confidential. A public redacted version of the Application was filed on 5 March 2025, F00202/RED.

<sup>3</sup> KSC-BC-2023-12, F00225, Specialist Prosecutor, *Prosecution Response to Application for a Stay of Proceedings*, 17 March 2025, confidential. A public redacted version of the Response was filed on 24 March 2025, F00225/RED.

<sup>4</sup> KSC-BC-2023-12, F00240, Defence, *Smakaj Reply re Application for a Stay of Proceedings*, 24 March 2025, confidential. A public redacted version of the Reply was filed on 28 March 2025, F00240/RED.

confirmation of the indictment against Mr Smakaj in breach of the SPO's duty of candour.<sup>5</sup>

5. More specifically, the Defence submits that in finding in the decision confirming the charges ("Confirmation Decision")<sup>6</sup> that there was a well-grounded suspicion that Mr Smakaj agreed to attempt the offence of obstruction and assisted Hashim Thaçi ("Mr Thaçi") to commit the offence of contempt of court, the Pre-Trial Judge inferred from the supporting material supplied to her, namely the transcript of the 7 October 2023 visit to Mr Thaçi at the detention facilities of the Specialist Chambers ("SC Detention Facilities"), that after the previous 9 September 2023 visit to Mr Thaçi at the SC Detention Facilities ("9 September 2023 Visit") Mr Smakaj had been in contact with Witness 2 to follow-up on Mr Thaçi's instructions to unlawfully influence the forthcoming testimony of Witness 2 in the trial of *The Specialist Prosecutor v. Hashim Thaçi et al.* ("Thaçi et al. trial").<sup>7</sup> According to the Defence, Mr Smakaj's contact with Witness 2 was an important feature in the Pre-Trial Judge's: (i) determination that Mr Smakaj participated in a joint effort to influence the forthcoming testimony of Witness 2; and (ii) assessment that the requirements of direct and/or eventual intent were satisfied in case of Mr Smakaj in relation to the offence of obstruction as well as direct and purposeful intention to assist Mr Thaçi in relation to the offence of contempt of court.<sup>8</sup>

6. The Defence avers in this regard that, in the context of the confirmation of the indictment process, which it notes is an *ex parte* process, the SPO failed to disclose to the Pre-Trial Judge an interview given by Witness 2 to the SPO on

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<sup>5</sup> Application, paras 17, 20-50.

<sup>6</sup> KSC-BC-2023-12, F00036, Pre-Trial Judge, *Decision on the Confirmation of the Indictment*, 29 November 2024, confidential. A public redacted version was issued on 12 February 2025, [F00036/RED](#).

<sup>7</sup> Application, para. 28.

<sup>8</sup> Application, para. 29.

6 December 2023 in which said witness: (i) described the extent of the contact that he had with Mr Smakaj after the 9 September 2023 Visit; and (ii) [REDACTED] (“Witness 2 Interview”).<sup>9</sup> According to the Defence, the Witness 2 Interview: (i) shows that, [REDACTED], Mr Smakaj had not followed up on Mr Thaçi’s instructions to unlawfully influence the forthcoming testimony of Witness 2 in the *Thaçi et al.* trial;<sup>10</sup> and thus (ii) directly undermines the Pre-Trial Judge’s finding as regards Mr Smakaj’s contact with Witness 2.<sup>11</sup>

7. The Defence concludes that: (i) the non-disclosure of the Witness 2 Interview “undoubtedly made a difference to the [Pre-Trial Judge]’s decision” on whether to confirm the charges against Mr Smakaj;<sup>12</sup> and (ii) regardless of the SPO’s justifications for said non-disclosure, the SPO’s conduct “should itself be a critical factor in determining whether [Counts 13 and 14 in the Confirmation Decision] should be set aside as an abuse of the process of the court”.<sup>13</sup>

#### B. RESPONSE

8. The SPO responds that: (i) the disclosure of the Witness 2 Interview would not have made any difference to the Confirmation Decision;<sup>14</sup> and (ii) it has fully complied with its disclosure obligations.<sup>15</sup>

9. As regards the Defence’s submissions on the Witness 2 Interview’s purported impact on the Pre-Trial Judge’s findings in the Confirmation Decision, the SPO submits that any disputes between the Parties as to the strength or credibility of the evidence are matters for trial.<sup>16</sup> The SPO maintains

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<sup>9</sup> Application, paras 9, 30-40, 43-44.

<sup>10</sup> Application, para. 42.

<sup>11</sup> Application, para. 41.

<sup>12</sup> Application, paras 45-48.

<sup>13</sup> Application, paras 1-2, 25, 50.

<sup>14</sup> Response, paras 1-8.

<sup>15</sup> Response, paras 1, 9-14.

<sup>16</sup> Response, paras 7-8, 12.

that, in any event, the submissions of the Defence are entirely confuted by a review of the Confirmation Decision,<sup>17</sup> since: (i) Mr Smakaj's contact with Witness 2 was only *one* of multiple elements/factors considered by the Pre-Trial Judge in reaching her conclusions;<sup>18</sup> and (ii) even assuming that the Witness 2 Interview provides an alternative explanation for Mr Smakaj's contact with Witness 2, said evidence does not undermine the Pre-Trial Judge's overall conclusion that Mr Smakaj participated in the common action of the group based on all other facts.<sup>19</sup>

10. As regards the Defence's submissions on the SPO's disclosure obligations, the SPO first contends that the rules governing disclosure of evidence between the Parties during the pre-trial stage of the proceedings, such as Rules 103 and 110 of the Rules, do not apply during the confirmation of the indictment process, which is conducted without the participation of the defence.<sup>20</sup> Second, the SPO submits that its assessment as to the existence of a well-grounded suspicion, in the context of Rule 86 of the Rules, is based on a holistic evaluation of the evidence gathered during its investigation, considering both incriminating and exculpatory aspects.<sup>21</sup> Third, the SPO maintains that, when seeking the confirmation of an indictment, it is only required to submit to the Pre-Trial Judge *sufficient* evidence to meet the relevant threshold - as opposed to a full case file evidence.<sup>22</sup>

11. Lastly, as regards the Defence's contention that the SPO's alleged failure to disclose the Witness 2 Interview amounts to an abuse of process, the SPO argues that, even assuming that such an obligation to disclose existed, the

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<sup>17</sup> Response, para. 7.

<sup>18</sup> Response, paras 3-5.

<sup>19</sup> Response, para. 6.

<sup>20</sup> Response, paras 9-10.

<sup>21</sup> Response, para. 11.

<sup>22</sup> Response, paras 8, 11-12.

Defence has failed to demonstrate that a stay of proceedings is warranted in this case because a fair trial has become impossible or proceeding with trial would contravene the court's sense of justice.<sup>23</sup>

### C. REPLY

12. The Defence reiterates its assertion that, when the SPO requested confirmation of the indictment against Mr Smakaj, the SPO withheld material from the Pre-Trial Judge which directly undermined its request, i.e. the Witness 2 Interview, in breach of the SPO's duty to ensure full and frank disclosure and fair *ex parte* proceedings.<sup>24</sup>

13. The Defence further argues that, in the Response, the SPO fails to: (i) provide reasons for withholding such evidence;<sup>25</sup> and (ii) advance any persuasive authority or interpretation in support of the SPO's position as regards its prerogative to present supporting material to the Pre-Trial Judge during the confirmation of the indictment process.<sup>26</sup>

14. According to the Defence, withholding relevant material, albeit adverse, to the *ex parte* request for confirmation of an indictment before the Specialist Chambers, amounts to a clear manipulation of the Specialist Chambers,<sup>27</sup> and such conduct warrants the exceptional remedy of stay of proceedings.<sup>28</sup>

### III. APPLICABLE LAW

15. Pursuant to Article 21(2) of the Law, in the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to

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<sup>23</sup> Response, para. 13.

<sup>24</sup> Reply, paras 3, 6, 8, 16-19, 21-22, 24.

<sup>25</sup> Reply, para. 5.

<sup>26</sup> Reply, paras 7, 9-22.

<sup>27</sup> Reply, paras 6, 11-12, 20, 23.

<sup>28</sup> Reply, paras 25-26.

Article 23 of the Law and any measures ordered by the Specialist Chambers for the protection of victims and witnesses.

16. Pursuant to Article 21(6) of the Law, all material and relevant evidence or facts in possession of the SPO which are for or against the accused shall be made available to the accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

17. Pursuant to Article 39(1) and (2) of the Law and Rule 86(4) of the Rules, the Pre-Trial Judge shall have the power to review an indictment and examine the supporting material. Pursuant to Article 39(2) of the Law and Rule 86(4) and (5) of the Rules, if satisfied that a well-grounded suspicion has been established by the SPO, the Pre-Trial Judge shall confirm the indictment. If the Pre-Trial Judge is not so satisfied, the indictment or charges therein shall be dismissed.

18. Pursuant to Article 38(4) of the Law and Rule 86(3) of the Rules, an indictment must set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged. The indictment shall be filed together with supporting material, i.e. evidentiary material supporting the facts underpinning the charges, and a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation.

19. Pursuant to Rule 62 of the Rules, in performing his or her functions, the Specialist Prosecutor shall contribute to the establishment of the truth by the Specialist Chambers and shall take measures for the fundamental rights of suspects and accused.

20. Pursuant to Rule 103 of the Rules, and subject to Rules 107 and 108 of the Rules, the SPO shall immediately disclose to the Defence any information, as soon as it is in its custody, control or actual knowledge, which may reasonably

suggest the innocence or mitigate the guilt of the accused or affect the credibility or reliability of the SPO's evidence.

21. Pursuant to Rule 110 of the Rules, the Pre-Trial Judge may decide, upon request by a Party or *proprio motu*, on measures to be taken as a result of the non-compliance with disclosure obligations pursuant to the Rules, including a stay of proceedings and the exclusion of evidence, except for exculpatory evidence.

#### IV. DISCUSSION

##### A. LEGAL BASIS

22. The Pre-Trial Judge notes that the Defence seeks a stay of proceedings pursuant to Rule 110 of the Rules alleging the SPO's failure to disclose to the Pre-Trial Judge relevant information potentially adverse to the SPO's request for the confirmation of the indictment against Mr Smakaj.<sup>29</sup> The Pre-Trial Judge notes that Rule 110 of the Rules concerns the disclosure of evidence process between the Parties, which takes place *after* the initial appearance of the Accused,<sup>30</sup> following the confirmation of the indictment, and that is governed by Rules 102-112 of the Rules. Since the SPO's alleged failure arose in the context of the confirmation of the indictment process, the Pre-Trial Judge finds Rule 110 of the Rules inapposite.

23. That being said, the Pre-Trial Judge recalls that the Accused is entitled to a fair trial, as guaranteed under Articles 3(2) and 21 of the Law.<sup>31</sup> Where the Accused can no longer be guaranteed a fair trial, she has an inherent discretionary power to order exceptionally a (permanent) stay of proceedings based on her intimate

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<sup>29</sup> See *supra* paras 1, 4-7.

<sup>30</sup> See KSC-BC-2023-12, F00100, Pre-Trial Judge, [Framework Decision on Disclosure of Evidence and Related Matters](#) ("Framework Decision on Disclosure") 20 December 2024, public, paras 24-25.

<sup>31</sup> See also Article 31 of the Constitution of the Republic of Kosovo, and Article 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms.



understanding of the process thus far.<sup>32</sup> The Pre-Trial Judge will therefore entertain the Application under this lens.

24. A stay of proceedings (or termination/discontinuance of proceedings) is a remedy of exceptional nature to be applied as a last resort.<sup>33</sup> Not every infraction of the law or breach of the rights of the Accused will give rise to a finding of abuse of process, but only those that are gross and repugnant to the rule of law to put the accused on trial, making it unacceptable for justice to embark on its course.<sup>34</sup> The Panel must be convinced that the situation motivating the request cannot be resolved or cured at a later stage.<sup>35</sup> It is not necessary to demonstrate that the SPO acted in bad faith; it is sufficient to show that the rights of the Accused have been violated to such an extent that the essential preconditions of a fair trial are missing, and there is no sufficient indication that this will be resolved at trial.<sup>36</sup> The threshold

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<sup>32</sup> See, similarly, amongst many, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, Appeals Chamber, [Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19\(2\)\(a\) of the Statute of 3 October 2006](#) (“Lubanga Judgment”), 14 December 2006, paras 36-39; *Prosecutor v. Kenyatta*, ICC-01/09-02/11-868-Red, Trial Chamber V(B), [Public Redacted Version of Decision on Defence Application for a Permanent Stay of the Proceedings Due to Abuse of Process](#) (Kenyatta Decision”), 5 December 2013, para. 14; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1883, [Decision on Defence request for stay of proceedings with prejudice to the Prosecution](#) (“Ntaganda Decision”), 28 April 2017, paras 20-22; *Prosecutor v. Al Hassan*, ICC-01/12-01/18-1009-Red, Trial Chamber X, [Public redacted version of ‘Decision on the Defence Request to Terminate the Proceedings and Related Requests’](#) (“Al Hassan Decision”), 24 August 2020 (date of public redacted version is 29 October 2020), paras 50-56; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, Appeals Chamber, [Decision on Karadzic’s Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement](#) (“Karadžić Decision”), 12 October 2009, para. 45; *Prosecutor v. Šešelj*, IT-03-67-T, Trial Chamber III, [Decision on Oral Request of the Accused for Abuse of Process](#) (“Šešelj Decision”) 10 February 2010, paras 18-22.

<sup>33</sup> See similarly, ICC, [Lubanga Judgment](#), paras 37, 39; [Kenyatta Decision](#), para. 14(iii); [Ntaganda Decision](#), para. 22; [Al Hassan Decision](#), paras 51, 55; ICTY, [Šešelj Decision](#), para. 22. See also ICTY, *Prosecutor v. Karadžić*, IT-95-5/18/T, [Decision on Motion for Stay of Proceedings](#), 8 April 2010, para. 4.

<sup>34</sup> See similarly, ICC, [Lubanga Judgment](#), para. 30; [Kenyatta Decision](#), para. 14(i) and (iii); [Ntaganda Decision](#), para. 22; [Al Hassan Decision](#), para. 51.

<sup>35</sup> See similarly, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1401, Trial Chamber I, [Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54\(3\)\(e\) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008](#), 13 June 2008, para. 91; *Prosecutor v. Banda*, Trial Chamber IV, ICC-02/05-03/09-410, [Decision on the Defence Request for a Temporary Stay of Proceedings](#), 26 October 2012, para. 121.

<sup>36</sup> See similarly, ICC, [Kenyatta Decision](#), para. 14(ii); [Ntaganda Decision](#), para. 21; [Al Hassan Decision](#), para. 53.

meriting a stay of proceedings is high.<sup>37</sup> Accordingly, a permanent stay of proceedings seems warranted if it is impossible to piece together the constituent element of a fair trial.<sup>38</sup>

25. The Pre-Trial Judge lastly underlines that, to avoid any pre-determination of issues or pre-adjudication regarding the probative value of the evidence at this stage, this decision will address only what is necessary and sufficient in order to dispose of the Application. By the same token, this is not the place to revisit the Confirmation Decision, or to supplement it in light of the Defence arguments. Any explanation is limited to what is strictly necessary to respond to the Defence arguments in light of the remedy requested.

#### B. MERITS

26. The Pre-Trial Judge recalls at the outset that the confirmation of the indictment, as set forth under Article 39(1) and (2) of the Law and Rule 86(4) and (5) of the Rules, is an *ex parte* process without the involvement of the Defence. Judicial intervention at this stage is meant to ensure that only those charges are considered at trial for which sufficient evidence has been presented and that, upon confirmation, the Accused is provided with sufficient information to understand clearly and fully the nature and cause of the charges against him or her.<sup>39</sup> The Pre-Trial Judge also recalls that, during the review process, she examines the supporting material in relation to each charge in the indictment, with a view to determining whether the SPO has established a well-grounded suspicion that the suspect committed or participated in the commission of an offence within the jurisdiction of the SC.<sup>40</sup>

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<sup>37</sup> See similarly, ICC, [Ntaganda Decision](#), para. 22; [Al Hassan Decision](#), para. 55.

<sup>38</sup> See similarly, ICC, [Ntaganda Decision](#), para. 20; [Al Hassan Decision](#), paras 54-55; in the same vein, ICTY, [Šešelj Decision](#), paras 21, 23; [Karadžić Decision](#), para. 45.

<sup>39</sup> [Confirmation Decision](#), para. 41 and references cited therein.

<sup>40</sup> [Confirmation Decision](#), para. 42 and references cited therein.

27. The Pre-Trial Judge also notes the Specialist Prosecutor's general duty pursuant to Rule 62 of the Rules to contribute to the establishment of the truth by the Specialist Chambers and overall obligation to fully respect and ensure the suspect's and accused's fair trial rights.<sup>41</sup>

28. In the context of the review of the indictment process, the Pre-Trial Judge accepts that the SPO is not required to present to the Pre-Trial Judge *all* the evidentiary material in its possession in order to discharge her duty pursuant to Article 38(4) of the Law and Rule 86(3) of the Rules. Nevertheless, the SPO is to draw the Pre-Trial Judge's attention to any evidence that would, on its face, challenge or contradict the SPO's overall theory. Indeed, the Pre-Trial Judge has discretion, at that stage of the proceedings, to consider inconsistencies, ambiguities, contradictions, or other weaknesses in the evidence which would result in a charge not being supported to the relevant standard.<sup>42</sup> This open approach satisfies the SPO's obligation under Rule 62 of the Rules and ensures, as recalled above, that only those charges are considered at trial for which sufficient evidence has been presented.<sup>43</sup>

29. At the outset, the Pre-Trial Judge deems it important to clarify that, as the language in Rule 86 of the Rules clearly suggests, during the confirmation of the indictment process, the evidentiary material supporting the material facts is not "disclosed" to the Pre-Trial Judge, but is made available to her for the purposes of

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<sup>41</sup> See also KSC-BD-07-Rev/2021, Registrar, [Registrar Practice Direction - Code of Professional Conduct](#), 28 April 2021, public, Articles 6(1)(e) and 30.

<sup>42</sup> Similarly, KSC-BC-2020-06, F00777/RED, Pre-Trial Judge, [Public Redacted Version of Decision on the Confirmation of Amendments to the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi](#) ("Case 06 Decision on Amendments"), 22 April 2022 (date of public redacted version is 6 May 2022), public, para. 37. See also, similarly, in the context of the confirmation charges proceedings before the International Criminal Court: ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-514, Appeals Chamber, [Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges"](#) (Mbarushimana Judgment), 30 May 2012, para. 46.

<sup>43</sup> See *supra* para. 266 and references cited therein. See, similarly, ICC, [Mbarushimana Judgment](#), para. 47.

rendering a decision on the SPO indictment. In contrast, as is explained above, the *actual inter partes* disclosure of evidence takes place after the initial appearance of the Accused, following the confirmation of the indictment.<sup>44</sup> For this reason, the Pre-Trial Judge finds it inappropriate to use the term “disclose” in her assessment below.

30. Turning to the Defence argument, the Pre-Trial Judge observes that the Witness 2 Interview, which the SPO allegedly failed to produce at the time of the Pre-Trial Judge’s review of the indictment against Mr Smakaj, relates to her findings as regards Mr Smakaj’s contact with Witness 2 after the 9 September 2023 Visit. In her view, the Defence argument essentially rests on the belief that the availability of this piece of evidence would have led the Pre-Trial Judge to either request its submission, through Rule 86(4) of the Rules, or eventually reject the confirmation of the charges against Mr Smakaj, in whole or in part.<sup>45</sup> While it would have been preferable for the SPO to include this piece of evidence in the indictment-supporting material, the Pre-Trial Judge remains unpersuaded that not providing her with said interview is “repugnant to the rule of law” to such an extent that the essential preconditions of a fair trial are missing. Specifically, having regard to the indictment-supporting material submitted and the SPO arguments accepted in the Confirmation Decision, the Pre-Trial Judge is not convinced that Witness 2 Interview alone, had it been submitted, “would have undoubtedly made a difference to the judge’s decision”.<sup>46</sup> It is worth recalling that, as is clear from the Confirmation Decision, Mr Smakaj’s contact with Witness 2 was *one of several* factors and elements considered by the Pre-Trial Judge to determine Mr Smakaj’s criminal responsibility.<sup>47</sup> Additionally, the Pre-Trial Judge considers that the Defence

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<sup>44</sup> See paragraph 22 above.

<sup>45</sup> Application, paras 48 and 49.

<sup>46</sup> Application, para. 48.

<sup>47</sup> See the comprehensive analysis in the [Confirmation Decision](#), paras 145-155, 203, 282-283, 285-286, 292 and references and supporting material cited therein.

manifestly overstates the importance of Mr Smakaj's contact with Witness 2<sup>48</sup> *vis-à-vis* her conclusions on Mr Smakaj's alleged responsibility and, thereby, misconstrues the Confirmation Decision. Strikingly, the Defence does not engage at all with the entirety of the Pre-Trial Judge's relevant reasoning, but singles out the Witness 2 Interview for the purpose of reaching one particular conclusion. What is more, it openly admits the hypothetical nature of its argumentation.<sup>49</sup> In sum, even if the interpretation of what has happened, as proposed by the Defence on the basis of the Witness 2 Interview, cannot be excluded, the Pre-Trial Judge is of the view that, for the reasons set above in paragraph 28, the SPO has not violated its obligations *vis-à-vis* the Pre-Trial Judge in not including the Witness 2 Interview in the indictment-supporting material for the purpose of reviewing the indictment, let alone mislead the Pre-Trial Judge.

31. Furthermore, the Pre-Trial Judge recalls that the SPO's hypothesis (and the Pre-Trial Judge's determination) need not be the *only* reasonable conclusion drawn from the supporting material in order to meet the evidentiary threshold applicable at this stage of the proceedings, i.e. well-grounded suspicion, since that would amount to requiring a level of proof for conviction, i.e. beyond reasonable doubt.<sup>50</sup> Hence the Confirmation Decision may include a conclusion that is reasonable, but that may be reconsidered at trial. The Witness 2 Interview is a matter to be aired and discussed at trial, in light of the Parties arguments and evidence as a whole.

32. Lastly, the Pre-Trial Judge notes that, on 18 December 2024, following the initial appearance of Mr Smakaj on 8 December 2024,<sup>51</sup> the SPO disclosed to the Defence the Witness 2 Interview, in accordance with its obligations under

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<sup>48</sup> See Application, paras 9, 47; Reply, para. 6.

<sup>49</sup> Application, paras 45 ("it cannot be stated now with certainty"), 47 ("one possible outcome ... might have resulted in the following conclusions"), 49 ("might have supported").

<sup>50</sup> [Confirmation Decision](#), para. 179 and references cited therein.

<sup>51</sup> See KSC-BC-2023-12, Transcript of Hearing, 8 December 2024, public, pp. 21-44.

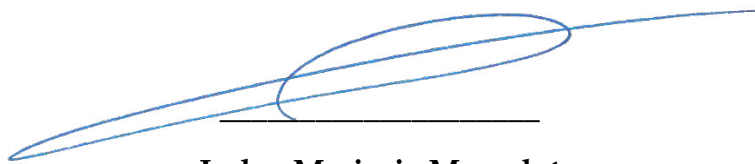
Rule 103.<sup>52</sup> Furthermore, this disclosure early in the process equips the Defence to prepare and present its version of the facts at trial when the evidence of the case will be discussed.

33. For these reasons, the Pre-Trial Judge sees no merit in the Defence's claims that, by not producing the Witness 2 Interview as supporting material to its request for confirmation of the indictment against Mr Smakaj, the SPO (i) violated its duties and obligations pursuant to Article 38(4) of the Law, and Rules 62 and 86(3) of the Rules; (ii) failed to act in a manner compatible with fair trial principles and human rights standards (Articles 3(2), 38(4) of the Law); or (iii) knowingly mislead the Pre-Trial Judge. As a result, the threshold meriting a (permanent) stay of proceedings has not been reached.

## V. DISPOSITION

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

**REJECTS** the Application.



**Judge Marjorie Masselot**  
**Pre-Trial Judge**

Dated this Monday, 7 April 2025

At The Hague, the Netherlands.

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<sup>52</sup> See Disclosure Package 7; [Framework Decision on Disclosure](#), paras 59-62.