

**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

**Filing Participant:** Specialist Counsel for Hashim Thaçi

**Date:** 7 October 2022

**Language:** English

**Classification:** Public

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**Thaçi Defence Notice of Unique Investigative Opportunities**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Hashim Thaçi**

Gregory Kehoe

**Counsel for Kadri Veseli**

Ben Emmerson

**Counsel for Victims**

Simon Laws

**Counsel for Rexhep Selimi**

David Young

**Counsel for Jakup Krasniqi**

Venkateswari Alagendra

## I. INTRODUCTION

1. On 8 September 2022, at the Fourteenth Status Conference, the Pre-Trial Judge (“PTJ”) issued an oral order inviting the Defence to file notice of any investigative opportunities pursuant to Rule 99 of the Rules<sup>1</sup> by 7 October. It should include “any information necessary for their preparation should a request be granted such as the type of measures requested, location where the measure is to be carried out, the number of witnesses to be interviewed, if any, and the recommended procedure for carrying out the measure.”<sup>2</sup> The PTJ further ordered that requests justifying the need for such measures be filed by 28 October 2022.<sup>3</sup>

## II. APPLICABLE LAW

2. Rule 99 (1) provides that:

“Where the Parties consider that an investigation presents a unique opportunity to take testimony from a witness or to examine, collect or test evidence which may not be available subsequently at trial, the Pre-Trial Judge may upon the request of a Party take such measures as may be necessary to ensure the preservation of the evidence.”

3. Rule 99 (3) provides:

“The measures referred to in paragraph (1) include:

- (a) upon request by the Parties or *proprio motu*, participation of the Pre-Trial Judge or of a Judge assigned by the President in a unique investigative opportunity;
- (b) making recommendations or orders regarding procedures to be followed;
- (c) directing that a record be made of the proceedings; and
- (d) authorising Specialist Counsel to attend and represent the interests of the Defence.”

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<sup>1</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

<sup>2</sup> KSC-BC-2020-06, Transcript of Fourteenth Status Conference, Oral Order 1, 8 September 2022, Public, p. 1582 line 21 to p. 1583 line 6.

<sup>3</sup> *Ibid.*

4. Rule 99 (4) provides:

“The admissibility of evidentiary material collected or preserved for trial pursuant to this Rule shall be governed at trial by Rule 138, and given such weight as determined by the Trial Panel.”

### III. NOTIFICATION

5. Pursuant to Rule 99, the Defence for Mr Hashim Thaçi (“Defence”) hereby gives notice of its intention to request that the PTJ takes “such measures as may be necessary” to “take”, “examine” and “test” testimony from 9 international witnesses whose evidence is crucial to the defence case and “may not be available subsequently at trial”.

6. These 9 witnesses are of advanced age – ranging from 77 to 88, and of varying degrees of health. Consequently, there is a very real risk that their evidence “may not be available subsequently at trial”, or at least by the time that the Prosecution closes its case and the Defence case begins. Therefore there is a need, pursuant to Rule 99, for a unique investigative opportunity (akin to a deposition) as set out below for each of these 9 witnesses, to ensure the preservation of their evidence before the trial commences.

#### A. NUMBER AND IDENTITY OF THE WITNESSES

7. These 9 international witnesses, were all, in the Indictment period, high level senior international diplomats, administrators and military figures serving in high level positions in the North Atlantic Treaty Organization (NATO); the Organizaton for Security and Co-operation in Europe (OSCE); the United Nations (UN); the UN Interim Administration in Kosovo (UNMIK); the Kosovo Monitoring Mission (KVM); Kosovo Diplomatic Observer Mission (KDOM); and one top government official from a country neighboring Kosovo. They interacted with Mr Thaçi closely, both on a professional and in some cases, a personal level.<sup>4</sup>

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<sup>4</sup> Their identities will be provided in the motion that the Defence will file on 28 October 2022 (“Future Motion”).

8. As will be outlined in depth in the Future Motion, these 9 witnesses will testify about matters that are central to the case against Mr. Thaçi, including, but not limited to, Mr. Thaçi's role in the events that are the subject matter of the Indictment. This includes the structure, organization or lack thereof, of the diverse groups of individuals making up the Kosovo Liberation Army ("KLA"), and those persons holding themselves out as KLA, but who were in no way related to the KLA; Mr. Thaçi's degree of authority within the KLA or lack thereof; and his interest in working with and securing the support of the international community to seek a political solution to the conflict, and his opposition to inter ethnic violence and revenge killings that threatened that support. They will also testify about the historical and political background of the conflict and post conflict situation in Kosovo.

9. Each of these 9 witnesses had personal contact with Mr. Thaçi, working with him and other major actors, local and international, on the main issues facing them all during this time. They will provide their observations of Mr. Thaçi, and describe their interactions with him, including his conduct, attitudes and behavior during the Indictment period that are relevant to the charges against him. As such, their evidence, coming from years of experience in conflict and post conflict environments, will provide the Trial Panel with a unique and valuable look into the events and persons so crucial in understanding the conflict in Kosovo and the crimes charged in the Indictment. Their live testimony, as it is rigorously tested through cross examination and questions from the Trial Panel, will greatly assist the Trial Panel in finding the truth of what occurred and ultimately assessing the guilt or innocence of Mr. Thaçi.

#### B. RECOMMENDED PROCEDURE

10. Rule 99(1) gives the PTJ discretion to "take such measures as may be necessary" to ensure the preservation of the evidence of these 9 witnesses whose evidence "may not be available subsequently at trial" given their advanced age. Rule 99(3) provides a non-exhaustive list of possible "measures", one of which is the "participation" in the unique investigative opportunity of a judge assigned by the President.

11. Given their standing and roles in Kosovo in 1998-1999, their unique vantage point and involvement with the key individuals who shaped the events in question, these 9 witnesses will undoubtedly provide some of the most important evidence the Court will hear in this case, for either side. Furthermore, the Defence anticipates that their evidence will take several weeks to hear. Consequently, given both the importance of this evidence to the case and the length and complexity envisioned in presenting it, it is only reasonable that the PTJ invites the President to appoint at least one member of the Trial Panel or preferably all three members to “participate” in the unique investigative opportunity to preserve this evidence in advance of trial. The Defence notes that nothing in Rule 99 prevents the President from taking this approach and indeed the Defence recalls that she has the discretion to do so under both this Rule and as part of her “core administrative function” pursuant to Article 32(3) of the Law<sup>5</sup> and Rules 13(1)(b) and/or (c).

12. The benefit of all three members of the Trial Panel participating (rather than only one; and/or a judge who will not hear the case such as the PTJ) is that they can each hear the evidence of these 9 central witnesses live and pose questions as they each deem appropriate, rather than being bound by what their brother or sister judge may or may not have asked the witness. Further, the Trial Panel would be in the position to control the presentations and conduct of the parties as appropriate.

13. As will be detailed in more depth in the Future Motion, the Defence intends that “the measures” be carried out in the courtroom of the Kosovo Specialist Chambers, in The Hague, provided that the witnesses are well enough to travel, as it is more cost effective to bring the witnesses to the tribunal rather than getting the tribunal to travel to them. Such a presentation will save untold resources on the parties, the Registry and the PTJ, should these measures be taken individually in locations far and wide from the courtroom in The Hague. The experience of video-link testimony in other international tribunals is a testament of the massive resources that would be necessary should these measures occur on an individual basis.

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<sup>5</sup> Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”).

14. Further all the Defence teams, SPO, Victims' Counsel will need to be present for the taking of this critical evidence which will consist of an examination in chief by the Thaçi Defence and potentially cross-examination by the other accused's counsel, the SPO, together with questions, if desired, from the Victims Counsel and the Trial Panel. These 9 international witnesses are independent of the defence, and given that their testimony will be heard in The Hague, there is no resource or other issue preventing the attendance of Mr Thaçi (and the other accused) and there will be no prejudice to the SPO in the accused being present. Indeed, the SPO will likely seek to put their case "on" by cross-examining these 9 witnesses and, as such, the accused have a right to be tried in their presence.<sup>6</sup> It is further submitted, in the interests of transparency and open justice, that the questioning of these witnesses take place in open session as with any other unprotected witness.

15. In the alternative, should the PTJ not be persuaded by the Defence request for a unique investigative opportunity under Rule 99 as set out above, the Defence invites the PTJ to preserve the evidence of these 9 witnesses via depositions under Rule 100 in advance of trial. Pursuant to the Rule 100(3), the PTJ "may observe" such depositions.<sup>7</sup>

#### IV. CONCLUSION

16. Ideally, the Defence would call these 9 witnesses in its own case (at the close of the SPO's case) and they would be heard in the same fashion as all other witnesses called by the Defence. However, as will be set out in the Future Motion, due to the advanced age of these witnesses, Mr Thaçi cannot risk waiting until the SPO closes its case for them to be called, hence this request for unique investigative opportunities and for the measures granted pursuant to Rule 99 to allow their testimony to be "taken", "examined" and "tested" in the same way as all other witnesses in this case. Specifically, in advance of trial, these 9 witnesses would give live evidence in open session in the KSC courtroom in The Hague, before at least one, but preferably all three members of the Trial Panel in the presence of the accused. They would be examined in chief by the Defence, followed by potential cross-examination by the other accuseds' counsel, the SPO, Victims' Counsel and the Trial Panel as desired. To this end,

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<sup>6</sup> KSC Law, Article 21(4)(e).

<sup>7</sup> Rules, Rule 100(3).

the Defence recalls Mr Thaçi's fundamental fair trial right "to obtain the attendance and examination of witnesses on his or her behalf *under the same conditions* as witnesses against him", which this proposed procedure will guarantee.<sup>8</sup>

17. In the alternative, the Defence requests the PTJ to preserve the evidence of these 9 witnesses pursuant to depositions which he "may observe" under Rule 100.

18. The Defence will provide a full list of the 9 witnesses together with the request justifying the need for such measures by 28 October 2022, as ordered by the PTJ.<sup>9</sup>

[Word count: 1,889 words]

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "G. W. Kehoe", is written over a white rectangular redaction box.

**Gregory W. Kehoe**

**Counsel for Hashim Thaçi**

Friday, 7 October 2022

At Tampa, United States

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<sup>8</sup> KSC Law, Articles 21(4)(f) (emphasis added).

<sup>9</sup> KSC-BC-2020-06, Transcript of Fourteenth Status Conference, Oral Order 1, 8 September 2022, Public, p. 1582 line 21 to p. 1583 line 6.