

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

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Language: English

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**Thaçi Defence Reply to Prosecution response to Defence Motion Justifying
Request for Unique Investigative Opportunities**

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I. INTRODUCTION AND APPLICABLE LAW

1. On 28 October 2022, the Defence for Hashim Thaçi (“Defence”) filed a motion justifying the need for unique investigative opportunities in relation to eight witnesses pursuant to Rule 99 of the Rules,¹ and in the alternative, depositions pursuant to Rule 100.² The measures requested were set out a Defence Notice filed on 7 October.³ On 10 November, the SPO filed its response.⁴ The Defence hereby replies to the SPO Response, pursuant to Rule 76.

2. The Defence maintains its Notice and Motion in full. This reply focuses, as stipulated by Rule 76, on “new issues arising from the response”.

3. The absence of comment on any aspect of the SPO Response is not a concession as to its validity; rather, it is an indication that the Defence has nothing additional to say which it has not already covered in its Notice or Motion.

4. The Defence is filing this Reply as confidential as it refers to previous confidential filings. It has no objection to it being reclassified as public.⁵

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

² KSC-BC-2020-06/F01068, Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, 28 October 2022 (“Motion”). The Defence has since filed an addendum to this Motion in respect of one additional witness: KSC-BC-2020-06/F01099, Addendum to Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, 11 November 2022.

³ KSC-BC-2020-06/F01018, Thaçi Defence Notice of Unique Investigative Opportunities, 7 October 2022 (“Notice”).

⁴ KSC-BC-2020-06/F01096, Prosecution Response to THAÇI Request for Unique Investigative Opportunities, 10 November 2022 (“Response”).

⁵ Rule 82(1).

II. SUBMISSIONS

A. MISCHARACTERIZATION OF DEFENCE SUBMISSIONS: NO REQUEST MADE TO TRANSFER CASE TO TRIAL PANEL

5. Contrary to the SPO's submissions, the Defence did not request that the case be transferred to the Trial Panel.⁶ Rather, it invited the President, at the request of the Pre-Trial Judge ("PTJ"), to assign a judge/s to hear the unique investigative opportunities as a one-off procedure.⁷ The ability of the President (at the invitation of the PTJ) to appoint a judge for this purpose is expressly provided for in Rule 99(3)(a). As argued in the Notice, the examples of 'measures' provided for in Rule 99(3)(a) are non-exhaustive. Consequently, it is open to the President to appoint more than one judge to hear the unique investigative opportunities. Further, nothing in Rule 99 prevents one or more members of the future trial panel being appointed to oversee the unique investigative opportunities, and the Defence suggests these judges are the most suitable to hear the evidence proposed.⁸ Their appointment to hear this evidence is a discrete task and is not the same as transferring the case to the Trial Panel, as was misleadingly suggested by the SPO.

B. MISUNDERSTANDING OF LEGAL TEST: AGE AND ESTIMATED LENGTH OF PROSECUTION CASE TOGETHER CAN BE A REASON THAT EVIDENCE MAY BECOME UNAVAILABLE

6. First, contrary to the SPO's submission,⁹ the Defence has never argued that age alone is an insufficient reason to believe that evidence of a potential witness may become unavailable, as that would be incorrect at law. The SPO is correct that in May 2022, the Defence was considering possible depositions due to age and deteriorating

⁶ Response, para. 2.

⁷ Notice, paras. 10-14; Motion, para. 13.

⁸ Notice, paras. 10-12.

⁹ Response, para. 4.

health of potential witnesses. However, the statement of Counsel for Mr Thaçi cited by the SPO was not a submission on the law, but simply a reflection of the facts at the time. The SPO is also correct that ill health is currently not a factor in its request for depositions and/or unique investigative opportunities.¹⁰ However, that does not render the basis for its request “insufficient on its face”. The test in Rules 99 and 100 is whether the evidence may be *unavailable* at trial. No further guidance is given about what constitutes ‘unavailable’, however, it is submitted the death of a witness or their incapacity will suffice. The SPO is correct that the moving party in the ICTY/ICTR cases cited by the Defence in their Motion relied on both age and another factor, such as ill-health, when requesting depositions. This reflects the facts particular to the proposed deposition witnesses in those cases, rather than any statement of the law. Indeed, the ratio of the Judges’ decisions in those cases and the additional ICC cases cited by the SPO in their footnote 10 do not provide any support for the SPO’s position that age combined with the potential length of the prosecution case is an insufficient legal basis to grant either a unique investigative opportunity or a deposition.

7. As the SPO and Court knows, many people die due to old age, and the risk of death or incapacity increases as a person enters advanced age.¹¹ Average life expectancy depends on many complex factors, including sex; lifestyle; date of birth; country of origin and residence; and access to health care, an assessment of which is beyond the expertise of this court. As stated in the Motion and not contested by the SPO in its Response, realistically, the Defence case will not begin before early 2025, and most of the eight male witnesses will be in their 80’s (many mid-late 80’s). The World Bank indicates that the average male life expectancy at birth is: 75 for

¹⁰ Motion, para. 26.

¹¹ For data regarding risk of incapacity, see: E. Fishman, ‘Risk of Developing Dementia at Older ages in the United States’ (2017) 54(5) *Demography*, available <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5624986/>

Americans; Dutch: 80; French: 79; and Albanian: 77.¹² Data from UNICEF is similar indicating the average life expectancy for men is: American: 75.4; French: 80.3; Albanian: 74.5; and Dutch: 80.9 years.¹³ Therefore, it is undeniable that, statistically, the evidence of the eight proposed witnesses may become 'unavailable' due to death or incapacity from advanced age by the time they can be expected to testify and thus must be sufficient justification.

C. SPO'S COUNTER-PROPOSAL PREJUDICES THE DEFENDANT

8. The SPO states, absent any legal basis, that before the Defence can request unique investigative opportunities or depositions it "must show that it has exhausted available measures or explain why such measures are inadequate" and points to its ability to interview the witnesses and then seek to call them later or admit their evidence under Rules 153-155.¹⁴ With respect, this misses the point.

9. Rule 153 allows the Panel to admit in lieu of oral testimony the written statement of a witness "which goes to proof of a matter other than the acts and conduct of the Accused". As set out in the Motion and the confidential Annexes, the evidence of the eight deposition witnesses goes to the acts and conduct of the accused and therefore any statement taken would not be admissible under Rule 153.

10. Rule 154 allows the Panel to admit the written statement of a witness that goes to the acts and conduct of the accused if the witness is: i) present in court; or ii) available for cross-examination or any questions from the Panel. This rule is also not

¹² World Bank, 'life expectancy at birth, total (years)', 2020, available https://data.worldbank.org/indicator/SP.DYN.LE00.IN?end=2020&most_recent_year_desc=false&start=2020&view=map.

¹³ UNICEF, 'Demography - Indicator: Life Expectancy, Sex: Male, Time Period: 2022', available https://data.unicef.org/resources/data-explorer/unicef-f/?ag=UNICEF&df=DM&ver=1.0&dq=DM_LIFE_EXP..M.&startPeriod=2022&endPeriod=2022.

¹⁴ Response, para. 7.

applicable to the present situation as the entire premise of the Motion and Notice is that the relevant witnesses may not be available at the relevant time to be cross-examined.

11. Rule 155 governs the admissibility of written statements of unavailable persons, for example, those who have died. Rule 155(5) provides that if the evidence goes to the acts and conduct of the accused, it may be a factor against its admission. Therefore, it is likely that this rule will not assist the Defence given the fact that these witnesses will all testify about the acts and conduct of the accused as charged. Even if the evidence is admitted, the witnesses will not be subject to cross examination; and the court will not be able to observe the witnesses and ask questions, which will affect its weight.¹⁵ This rule is not the solution.

D. DEFENCE REQUEST DOES NOT PREJUDICE THE SPO

12. The SPO has implicitly acknowledged that there is a risk in principle of losing testimony of elderly witnesses when it states that, if the Defence is granted the right to carry out these measures, it could “unnecessarily or unjustifiably delay or impact the ability” of its elderly witnesses to testify.¹⁶ The Defence agrees that the risk of losing testimony of elderly witnesses is high, which is why the measures that the Defence seeks to preserve this evidence are appropriate. However, the SPO’s claim that the measures it seeks will mean that the ability of their elderly witnesses to testify will be affected is spurious. This is because the Defence has estimated up to two days per witness – 16 trial days in total. It is hard to see how a month of depositions (assuming four sitting days a week) primarily in February 2023 (with one witness in April)¹⁷ would delay any SPO witnesses unless the SPO is now saying it is ready for

¹⁵ ICTY, *Prosecutor v Popovic et al.*, IT-05-88-T, Trial Chamber II, Judgment Vol. I, 10 June 2010, para 60.

¹⁶ Response, para. 6.

¹⁷ Motion, paras. 32-34.

trial in February 2023? If it is, then it is open to it to call its elderly witnesses at the start of its case in March 2023 (assuming we hear the seven Defence witnesses first under Rule 99 or 100) to ensure that their evidence is heard live by the trial panel as soon as possible.

E. W04147

13. Contrary to the SPO's submissions the Defence understands that the SPO intends to call W04147 live. The issue is *when* given his age and the fact that the SPO has not made any attempt to date to preserve his evidence via Rules 99 or 100. The Defence is comforted by the SPO's assurance that it will call this witness in its first 40 witnesses, presumably due to his age thus acknowledging the risk of losing testimony due to age, a concern the Defence shares.¹⁸ Indeed, given the age of a significant number of witnesses in this case, it may be that, in the spirit of fairness and equality of arms given that the SPO is an officer of the Court, it may consent to any subsequent application by the Defence to hear all elderly witnesses (Prosecution and Defence) first. It cannot be fair that the SPO is allowed to call its elderly witnesses live in good time, but that this is denied to the Defence because of the length of the prosecution case. Moreover, this approach risks depriving the court from hearing important evidence from significant witnesses that go to the core issues of the case. This is a matter to be argued before the trial panel in due course should this application for unique investigative opportunities be denied.

F. NO DELAY IN MAKING THE APPLICATION

14. Contrary to the SPO's submissions, the Defence has not delayed in making this application. It indicated its intention to do so in May 2022 and then filed its detailed

¹⁸ Response, para. 8.

applications according to the timetable set by the PTJ on 8 September 2022.¹⁹ There was no obligation on the Defence to do anything else contrary to the assertion by the SPO.²⁰ Moreover, the Defence has clearly set out in its Motion why February 2023 is a realistic starting date for depositions and will not repeat it here.²¹ Unlike the SPO (who for the last two years has been continuously stating that they are almost ready for trial, only to retract) the Defence believes that one must be realistic with time frames otherwise they are of little assistance to the court for its planning purposes.

III. RELIEF SOUGHT

15. The Defence reiterates the relief sought in its Notice and Motion.²²

Word count: 1,999 words

Respectfully submitted,



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Tuesday, 15 November 2022

At Tampa, United States

¹⁹KSC-BC-2020-06, Transcript of Fourteenth Status Conference, 8 September 2022, Oral Order 1, pp. 1582-1583.

²⁰ Response, para. 9.

²¹ Motion, para. 32.

²² Notice, paras. 16-17; Motion, paras. 37-38.