



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-06
**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi**

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 28 November 2022

Language: English

Classification: Public

**Decision on Thaçi Defence Motion Justifying Request for
Unique Investigative Opportunities**

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(11) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 99 and 100 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 8 September 2022, the Pre-Trial Judge invited the Defence teams to file notices of any investigative opportunities pursuant to Rule 99 of the Rules by 7 October 2022 and ordered that requests justifying the need for such measures be filed by 28 October 2022.²

2. On 7 October 2020, the Defence for Hashim Thaçi ("Mr Thaçi" and "Thaçi Defence") filed a notice indicating that it will seek measures to preserve the testimony of nine witnesses in the context of a unique investigative opportunity pursuant to Rule 99 of the Rules or, in the alternative, depositions pursuant to Rule 100 of the Rules ("Notice").³

3. On 28 October 2022, the Thaçi Defence filed a motion justifying the need for the requested measures for eight witnesses in the context of a unique investigative opportunity ("Motion").⁴

4. On 10 November 2022, the Specialist Prosecutor's Office ("SPO") responded to the Motion ("Response").⁵

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

² KSC-BC-2020-06, Transcript of Hearing, 8 September 2022, public, p. 1582, line 21 to p. 1583, line 6.

³ KSC-BC-2020-06, F01018, Specialist Counsel, *Thaçi Defence Notice of Unique Investigative Opportunities*, 7 October 2022, public, paras 16-17.

⁴ KSC-BC-2020-06, F01068, Specialist Counsel, *Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities*, 28 October 2022, confidential. A public redacted version was filed on 1 November 2022, F01068/RED.

⁵ KSC-BC-2020-06, F01096, Specialist Prosecutor, *Prosecution Response to Thaçi Request for Unique Investigative Opportunities*, 10 November 2022, confidential.

5. On 11 November 2022, the Thaçi Defence filed an addendum to the Motion (“Addendum”), justifying the need for the requested measures for a ninth witness.⁶
6. On 15 November 2022, the Thaçi Defence replied to the Response (“Reply”).⁷
7. On the same day, 15 November 2022, the Pre-Trial Judge varied the time limit for: (i) the SPO to respond to the Addendum; and (ii) the Thaçi Defence to reply to the SPO’s response to the Addendum.⁸
8. On 18 November 2022, the SPO responded to the Addendum (“Response to Addendum”).⁹
9. On 23 November 2022, the Thaçi Defence replied to the Response to Addendum (“Reply to Addendum”).¹⁰

II. SUBMISSIONS

10. The Thaçi Defence argues that there is a unique investigative opportunity in relation to nine¹¹ international witnesses (“Witnesses”) whose evidence, it submits, is crucial to the defence case and may not be available subsequently at trial.¹² The Thaçi Defence avers that it would ideally call the Witnesses in its own

⁶ KSC-BC-2020-06, F01099, Specialist Counsel, *Addendum to Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities*, 11 November 2022, confidential, with Annex 1, confidential. A public redacted version was filed on 22 November 2022, F01099/RED. A corrected version was filed on 24 November 2022, F01099/COR.

⁷ KSC-BC-2020-06, F01102, Specialist Counsel, *Thaçi Defence Reply to Prosecution Response to Defence Motion Justifying Request for Unique Investigative Opportunities*, 15 November 2022, confidential.

⁸ KSC-BC-2020-06, F01103, Pre-Trial Judge, *Order Varying Time Limit for Response and Reply to Thaçi Defence Addendum to Motion Justifying Request for Unique Investigative Opportunities*, 15 November 2022, public.

⁹ KSC-BC-2020-06, F01112, Specialist Prosecutor, *Prosecution Response to Thaçi Addendum to its Motion for Unique Investigative Opportunities*, 18 November 2022, confidential.

¹⁰ KSC-BC-2020-06, F01120, Specialist Counsel, *Thaçi Defence Reply to Prosecution Response to Addendum to Defence Motion Justifying Request for Unique Investigative Opportunities*, 23 November 2022, confidential.

¹¹ Motion, paras 9, 11; Addendum, para. 2.

¹² Notice, paras 5-6; Motion, para. 16; Addendum, paras 14, 20.

case, after the close of the SPO's case.¹³ However, in light of the advanced age and varying degrees of the health of the Witnesses, the Thaçi Defence submits that there is a very real risk that their evidence may not be available at trial, by the time the Defence case begins, either through death or incapacity of the Witnesses.¹⁴ The Thaçi Defence thus argues that a unique investigative opportunity exists and seeks to preserve the evidence of the Witnesses pursuant to Rule 99 of the Rules, or in the alternative, via the taking of depositions pursuant to Rule 100 of the Rules ("Requested Measures").¹⁵

11. As to the procedure, the Thaçi Defence: (i) requests that the Pre-Trial Judge invite 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";¹⁶ and (ii) proposes that, provided that the Witnesses are well enough to travel, their testimony be taken in the courtroom of the Kosovo Specialist Chambers ("SC") in the presence of the Accused ("First Measure").¹⁷ The Thaçi Defence submits that the implementation of the First Measure will: (i) enable the Witnesses to be examined in chief by the Defence, potentially cross-examined by the other Accused' Counsel, the SPO, the Victims' Counsel and questioned by the Trial Panel;¹⁸ and (ii) guarantee Mr Thaçi's fundamental fair trial right to obtain the attendance and examination of witnesses on his behalf "under the same conditions as witnesses against him".¹⁹

12. The Thaçi Defence provides the identity, description, age, whereabouts and statement of the matters on which each of the Witnesses is to be examined.²⁰ It

¹³ Notice, para. 16; Motion, para. 16; Addendum, para. 21.

¹⁴ Notice, para. 6; Motion, para. 16.

¹⁵ Notice, paras 5, 16-17; Motion, paras 1, 9, 12-14, 37-38; Addendum, paras 9, 11-12, 21-22.

¹⁶ Notice, para.11. *See also* Notice, paras 5, 10, 12; Motion, para. 13.

¹⁷ Notice, para. 13; Motion, para. 13; Addendum, paras 11, 16. *See also* Reply to Addendum, fn. 1.

¹⁸ Notice, para. 16; Motion, para. 13; Addendum, para. 11.

¹⁹ Notice, para. 16; Motion, paras 25, 28-29. *See also* Addendum, para. 14.

²⁰ Motion, paras 9, 11; Annexes 1-8 to Motion; Addendum, paras 14, 19-20; Annex 1 to Addendum.

argues that the Witnesses: (i) were all senior and high-level international diplomats, administrators or military figures in various organisations in Kosovo during the Indictment period; (ii) interacted with Mr Thaçi on a professional and, in some cases personal, level; (iii) will testify about matters central to the case;²¹ and (iv) will provide some of the most important evidence that the SC will hear in this case.²² The Thaçi Defence avers that the loss of two potential witnesses demonstrates the real need to preserve the evidence of the Witnesses.²³ It contends that the estimate of when the Defence case is likely to begin, and the age of the Witnesses by then, is another critical parameter to account for.²⁴

13. The Thaçi Defence invites the Pre-Trial Judge to consider the case law of the ad-hoc tribunals regarding depositions, which indicates that the time before the defence case is likely to be heard and the age of the witness are factors that merit the granting of depositions to preserve evidence that would otherwise be unavailable.²⁵

14. In the alternative, and for the same reasons underlying its First Measure request under Rule 99 of the Rules, the Thaçi Defence invites the Pre-Trial Judge to preserve the evidence of the Witnesses in advance of trial via depositions under Rule 100 of the Rules (“Alternative Measure”).²⁶ The Thaçi Defence submits that, unlike the First Measure, the Alternative Measure would not guarantee Mr Thaçi’s right to obtain the attendance and examination of witnesses on his behalf “under the same conditions as witnesses against him”.²⁷

²¹ Motion, para. 15; Addendum, paras 13, 19-20.

²² Motion, para. 15; Addendum, para. 20.

²³ Motion, para. 16.

²⁴ Motion, paras 17-25.

²⁵ Motion, para. 26.

²⁶ Notice, paras 15, 17; Motion, paras 14, 27; Addendum, paras 12, 22.

²⁷ Motion, paras 28-29.

15. The SPO responds that the Motion and the Addendum should be denied as the Requested Measures lack legal basis and adequate justification.²⁸ The SPO avers that the age of the Witnesses and the potential length of the SPO's case – without more – are inadequate to justify unique investigative opportunities under Rule 99 of the Rules or the taking of depositions under Rule 100 of the Rules.²⁹ The SPO submits that the First Measure – *i.e.* hearing of the Witnesses by the judges of the yet to be appointed trial panel – should be summarily dismissed as it exceeds the powers vested in the Pre-Trial Judge considering that: (i) the President appoints a trial panel upon transfer of the case file; and (ii) the presentation of evidence thereafter falls within the power of the trial panel.³⁰ The SPO further avers that the Motion fails to demonstrate: (i) that the Witnesses' evidence may be unavailable at trial;³¹ and (ii) that the Requested Measures are necessary as, it submits, no unique circumstances warrant to depart from the normal procedure and the Defence does not show that it has taken the steps available to it within the legal framework to preserve the Witnesses' evidence.³² The SPO opines that the conduct of the Defence undermines the alleged urgency in hearing the Witnesses.³³ Lastly, the SPO challenges the alleged "crucial" nature of the Witnesses' evidence. In the SPO's view, the professional and, in some cases, personal close interactions of the Witnesses with Mr Thaçi does not necessarily render their evidence fundamental. Instead, the SPO submits that the anticipated evidence of some Witnesses is marginally relevant.³⁴ The SPO concludes that, in its view, the Motion is an attempt to reverse the order of the case presentation prescribed by the Rules.³⁵

²⁸ Response, paras 1, 3-5; Response to Addendum, paras 1, 4.

²⁹ Response, paras 1, 3-5; Response to Addendum, para. 4.

³⁰ Response, para. 2; Response to Addendum, para. 3.

³¹ Response, paras 4-5.

³² Response, paras 6-8.

³³ Response, para. 9.

³⁴ Response, para. 10; Response to Addendum, para. 4.

³⁵ Response, para. 11.

16. The Thaçi Defence replies that the SPO misunderstands the First Measure requested: it does not request that the case be transferred to a trial panel; rather, it requests the Pre-Trial Judge to invite the President to assign a judge, or a panel of judges, to hear the Witnesses at the occasion of a unique investigative opportunities as a discrete task as provided for in Rule 99(3)(a) of the Rules.³⁶ The Thaçi Defence suggests, however, that the judge(s) most suitable to hear the evidence are the judges who will constitute the trial panel who will be appointed to hear the case at trial.³⁷ Further, the Thaçi Defence replies that the SPO mischaracterises the legal test proposed: while the age of the Witnesses alone is an insufficient reason, it submits that the Witnesses' age combined with the estimated length of the SPO's case can be a sufficient reason to believe that the Witnesses' evidence may become unavailable.³⁸ To the SPO's argument that the Thaçi Defence failed to exhaust other measures available to it, such as interviewing the Witnesses itself in order to later seek admission of the Witnesses' evidence under Rules 153-155 of the Rules, the Thaçi Defence replies that such Rules will likely not assist given that the evidence of the Witnesses go to the acts and conduct of the Accused.³⁹ The Thaçi Defence argues that taking the First Measure in February and April 2023 will not prejudice the SPO and delay the testimonies of the SPO witnesses.⁴⁰ Lastly, the Thaçi Defence rejects the SPO's submissions that there was a delay in filing the Motion, noting that it complied with the timetable set by the Pre-Trial Judge.⁴¹

³⁶ Reply, para. 5. *See also* Reply to Addendum, para. 7.

³⁷ Reply, para. 5. *See also* Reply to Addendum, para. 7.

³⁸ Reply, paras 6-7.

³⁹ Reply, paras 8-11.

⁴⁰ Reply, para. 12.

⁴¹ Reply, para. 14.

17. The SPO in its Response to the Addendum responds that the Addendum was filed after the deadline prescribed by the Pre-Trial Judge and that no request for a variation of the time limit was made pursuant to Rule 9(5) of the Rules.⁴² The SPO avers that the Addendum also fails on the merits as it suffers from the same defects as the Motion.⁴³

18. In its Reply to the Addendum, the Thaçi Defence replies that the Addendum was not filed out of time. It argues that: (i) the SPO and the Pre-Trial Judge were on notice of the forthcoming request in relation to the ninth witness within the prescribed deadline; and that (ii) it filed the Addendum as soon as it received clearance from the relevant authorities.⁴⁴ The Thaçi Defence maintains that the First Measure does not exceed the powers vested in the Pre-Trial Judge as the ability of the President to appoint a judge, at the invitation of the Pre-Trial Judge, for the purpose of the First Measure is expressly provided for in Rule 99(3)(a) of the Rules.⁴⁵

19. The Thaçi Defence further maintains that the age and estimated length of the SPO's case *together* can be a reason that evidence may become unavailable.⁴⁶ The Thaçi Defence specifically argues that it is undeniable that the evidence of the ninth witness may become unavailable due to death or incapacity from advanced age by the time he can be expected to testify.⁴⁷ Lastly, the Thaçi Defence submits that the importance of the evidence of the ninth witness is clear in light, *inter alia*, of his role at the relevant time.⁴⁸

⁴² Response to Addendum, para. 2.

⁴³ Response to Addendum, paras 3-5.

⁴⁴ Reply to Addendum, para. 5.

⁴⁵ Reply to Addendum, para. 7.

⁴⁶ Reply to Addendum, paras 8-9.

⁴⁷ Reply to Addendum, para. 9.

⁴⁸ Reply to Addendum, para. 10.

III. APPLICABLE LAW

20. Pursuant to Article 39(11) of the Law, the Pre-Trial Judge may, where necessary, provide, *inter alia*, for the preservation of evidence.

21. Pursuant to Rule 99(1) of the Rules, 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.

22. Pursuant to Rule 100(1) of the Rules, where there is reason to believe that the evidence of a potential witness may otherwise become unavailable, the Pre-Trial Judge may decide, *proprio motu* or upon request by a Party, that a deposition be taken for use at trial, regardless of whether or not the person whose deposition is sought is able physically to appear before the SC to give evidence.

23. Pursuant to Rule 9(5) of the Rules, the Panel may, *proprio motu* or upon showing of good cause, extend any time limit set by the Panel or recognise as valid any act carried out after the expiration of the time limit.

IV. DISCUSSION

A. TIMELINESS OF THE ADDENDUM

24. As regards the SPO's argument that the Addendum should be rejected as filed out of time,⁴⁹ the Pre-Trial Judge recalls that he ordered the Defence teams to file any requests justifying the need for any investigative opportunities pursuant to Rule 99 of the Rules by 28 October 2022.⁵⁰ The Pre-Trial Judge observes that the Thaçi Defence filed the Addendum on 11 November 2022 with no request to vary the time limit.

⁴⁹ Response to Addendum, para. 2.

⁵⁰ KSC-BC-2020-06, Transcript of Hearing, 8 September 2022, public, p. 1582, line 21 to p. 1583, line 6.

25. That said, the Pre-Trial Judge also observes that the Thaçi Defence: (i) notified of its intent to seek measures pursuant to Rule 100 of the Rules in relation to nine individuals as of the filing of its Notice on 7 October 2022;⁵¹ (ii) explained that, at the date of filing the Motion, “for reasons beyond his control” it was only able to apply for measures in respect of only eight witnesses;⁵² and (iii) explained that, at the time of filing the Addendum, having only just received clearance from the relevant authorities, it was now in a position to apply for the measures for this ninth witness it had initially referred to in its Notice.⁵³ Given these specific circumstances, the Pre-Trial Judge is satisfied that the late filing of the Addendum was beyond the control of the Thaçi Defence. Moreover, the SPO is not prejudiced given that it was: (i) on notice of the Thaçi Defence’s intent to request measures for nine witnesses; and (ii) able to fully respond to the Addendum. Accordingly, the Pre-Trial Judge rejects the submissions of the SPO in this regard.

26. In light of the foregoing, the Pre-Trial Judge accepts the late filing of the Addendum.

B. FIRST MEASURE

27. At the outset, the Pre-Trial Judge recalls that Rule 99 of the Rules provides that the investigation must present a unique opportunity because the evidence may not be available subsequently at trial. Accordingly, the legal test under the provision consists in the availability of an investigative act which presents a unique opportunity to secure evidence that may not be available subsequently at trial. The Pre-Trial Judge notes that an assessment as to whether the evidence may “not be available subsequently at trial” is one that is carried out on a case-by-case basis and includes consideration of factors such as, *inter alia*, the passage of time,

⁵¹ Notice, para. 5.

⁵² Motion, para. 9.

⁵³ Addendum, para. 2.

the health or physical condition of a witness, temporary access to the evidentiary item, or the pressure exerted upon a witness.⁵⁴ In addition to the abovementioned legal test, the Pre-Trial Judge is of the view that Rule 99 of the Rules implies that the requested investigative act ought to be relevant for the preparation of the case of the requesting party. Lastly, the measures taken pursuant to Rules 99 and 100 of the Rules does not preclude the Parties' from subsequently requesting the admission at trial of prior written statements or transcripts in accordance with Rules 153 to 155 of the Rules.

28. With regard to the Thiçi Defence arguments related to the Witnesses ("advanced age" and "varying degree of health"), the Pre-Trial Judge notes that the Witnesses are between 77 and 87 years old. However, nothing in the Motion or the Addendum indicates that the health condition of the Witnesses is, at present, a serious concern that would warrant the immediate preservation of their evidence. To the contrary, the Pre-Trial Judge notes that the Thiçi Defence acknowledges that the frail or ill health of the Witnesses "is not currently a factor

⁵⁴ See e.g. ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-316, Pre-Trial Chamber II, [Decision on the "Second Prosecution Application to the Pre-Trial Chamber to Preserve Evidence and Take Measures Under Article 56 of the Rome Statute"](#), 23 March 2016, public, para. 9; *Prosecutor v. Ongwen*, ICC-02/04-01/15-277, Pre-Trial Chamber II, [Decision on the Prosecution Application to the Pre-Trial Chamber to Preserve Evidence and Take Measures Under Article 56 of the Rome Statute](#), 27 July 2015, public redacted, paras 7, 14. See also *Prosecutor v. Al Hassan*, ICC-01/12-01/18-204, [Décision relative aux requêtes du Procureur aux fins de prendre des mesures nécessaires en application de l'article 56-2 du Statut pour les témoins MLI-OTP-P-0066, MLI-OTP-P-0004, MLIOTP-P-0605, MLI-OTP-P-0582 et MLI-OTP-P-0537](#), 13 December 2018, public, para. 44; *Prosecutor v. Al Hassan*, ICC-01/12-01/18-232, Pre-Trial Chamber I, [Décision relative à la requête du Procureur aux fins de prendre des mesures nécessaires en application de l'article 56-2 du Statut pour le témoin MLI-OTP-P-0065](#), 30 January 2019, public, para. 18; *Prosecutor v. Ongwen*, ICC-02/04-01/15-520, Trial Chamber IX, [Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute](#), 10 August 2016, public, para. 9; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11, Trial Chamber V, [Confidential Redacted Version Decision on the Prosecution's Application Pursuant to Article 56](#), 18 January 2013, confidential, para. 17; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-491, Trial Chamber V, [Order regarding Prosecution's application pursuant to Article 56'](#), 29 November 2012, public, para. 3; ICC-01/04-93, Pre-Trial Chamber I, [Decision following the Consultation held on 11 October 2005 and the Prosecution's Submission on Jurisdiction and Admissibility filed on 31 October 2005](#), 9 November 2005, public; see also *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-126, Pre-Trial Chamber I, [Decision to Hold Consultations Under Rule 144](#), 28 April 2011, public.

in play in this case".⁵⁵ As the Thaçi Defence has admitted,⁵⁶ age alone is an insufficient reason to believe that the evidence of a witness may become unavailable.

29. With regard to the anticipated length of time before the defence case is likely to start, the Pre-Trial Judge recalls that he will transmit the case to a trial panel by the end of 2022.⁵⁷ It follows that a Trial Panel will, in any event, be seised with the proceedings in this case well before the First Measure envisaged by the Thaçi Defence in February 2023 can realistically be implemented, should the First Measure be granted. Accordingly, in light of the imminent transmission of the case to trial and the subsequent impending assignment of a trial panel, the Pre-Trial Judge is of the view that the assessment of the relevance, importance, necessity and scheduling of the testimony of the Witnesses is a matter that is best decided by the trial panel that will be assigned to hear the case.

30. Accordingly, the Pre-Trial Judge finds that the Thaçi Defence has failed to substantiate its request for a unique investigative opportunity and rejects the request for the First Measure.

31. That being said, this decision is without prejudice to any future submissions to a Trial Panel seised with this case with respect to the modalities, timing and chronology of the testimony of the Witnesses.

⁵⁵ Motion, para. 26; Reply, para. 6.

⁵⁶ Reply, para. 6.

⁵⁷ KSC-BC-2020-06, Transcript of Hearing, 4 November 2022, public, p. 1587, line 22 to p. 1588, line 2.

C. ALTERNATIVE MEASURE

32. The legal test under Rule 100 of the Rules for the taking of a deposition for use at trial is whether “there is a reason to believe that the evidence of the potential witness may otherwise become unavailable”.

33. For the reasons set out above,⁵⁸ the Pre-Trial Judge is not persuaded that the advanced age and varying degree of health of the Witnesses and the anticipated length of time before the defence case is likely to be heard constitute, at this stage, a reason to believe that the evidence of the Witnesses may otherwise become unavailable within the meaning of Rule 100 of the Rules.

34. Accordingly, the Pre-Trial Judge rejects the request for the Alternative Measure. The Pre-Trial Judge recalls that the Thaçi Defence is not precluded from making submissions with regard to the Witnesses to the relevant trial panel, if it so chooses.

V. CLASSIFICATION

35. Noting the submissions of the Parties,⁵⁹ the Pre-Trial Judge directs: (i) the Registrar to reclassify the Reply (F01102) and the Response to Addendum (F01112) as public; (ii) the SPO to file a public redacted version of the Response (F01096), redacting the identity of the two witnesses named in paragraph 10; and (iii) the Thaçi Defence to file the public redacted of the Reply to Addendum (F01120), redacting the identity and personal information of the proposed witness in paragraphs 1, 8-10 and footnote 21.

⁵⁸ See *supra* paras 28-29.

⁵⁹ Response, para. 12; Reply, para. 4; Response to Addendum, para. 6; Reply to Addendum, para. 4.

VI. DISPOSITION

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

- (a) **REJECTS** the Motion; and
- (b) **ORDERS** the Registry to reclassify the Reply (F01102) and the Response to Addendum (F01112) as public by **Monday, 5 December 2022**;
- (c) **ORDERS** the SPO to file a public redacted version of the Response (F01096), as specified in paragraph 35 above, by **Monday, 5 December 2022**;
- (d) **ORDERS** the Thaçi Defence to file a public redacted version of the Reply to Addendum (F01120), as specified in paragraph 35 above, by **Monday, 5 December 2022**.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 28 November 2022

At The Hague, the Netherlands.