In:	**KSC-BC-2020-06** **The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Trial Panel II** Judge Charles L. Smith, III, Presiding Judge Judge Christoph Barthe Judge Guénaël Mettreaux Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
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Thaçi Defence Reply to Prosecution response to Defence Motion Regarding the Preservation of Defence Evidence

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I. INTRODUCTION AND APPLICABLE LAW

1. On 9 January 2023, the Defence for Mr Hashim Thaçi ("Defence") filed a motion requesting the preservation of evidence of nine elderly key Defence witnesses whose evidence may otherwise be unavailable at trial, either by taking them "out of order" or, alternatively, taking depositions from them.[1]

2. On 20 January 2023, the SPO filed its response.[2] The Defence hereby replies to the SPO Response, pursuant to Rule 76.[3]

3. The Defence maintains its Motion in full. This reply focuses, as stipulated by Rule 76, on "new issues arising from the response".

4. The absence of comment on any aspect of the 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 Motion.

5. In accordance with Rule 82(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.[4]

II. SUBMISSIONS

A. MISCHARACTERIZATION OF DEFENCE MOTION AS A REQUEST TO RECONSIDER

[1] KSC-BC-2020-06/F01191, Thaçi Defence Motion Regarding the Preservation of Defence Evidence, 9 January 2023, Confidential ("Motion").
[2] KSC-BC-2020-06/F01221, Prosecution Response to THAÇI Request Regarding the Preservation of Defence Evidence, 20 January 2023, Confidential ("Response"). The Response was notified to the parties on 23 January 2023.
[3] KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").
[4] Rule 82(5).

6. Contrary to the SPO's submissions,[5] the Defence Motion was not, nor should it have been, a request to reconsider the Pre-Trial Judge's ("PTJ") decision rejecting the Defence application for unique investigative opportunities; or alternatively depositions in relation to the same nine witnesses, pursuant to Rules 99 and 100 of the Rules. As stated in the Motion, in respect of the request under Rule 99, the PTJ observed that:

> 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.[6]

7. The PTJ further noted that his decision was "without prejudice to any future submissions to a Trial Panel seized with this case with respect to the modalities, timing and chronology of the testimony of the Witnesses".[7] As the SPO acknowledge, the Motion relates to the "order of the presentation of the evidence"[8] which is another way of saying "the timing and chronology of the testimony" of witnesses. The PTJ's finding that it was "best" if the trial panel decided any such motion opened the door to the filing of the Motion by the Defence as soon as a trial panel was assigned. Nothing in the PTJ's decision suggested that any such motion filed before the trial panel should be an application to reconsider his decision, rather it was the better forum for such a motion to be decided.

8. In respect of the application under Rule 100, the PTJ made a similar "without prejudice" finding, by holding that while he rejected the application at that time: "The Thaçi Defence is not precluded from making submissions with regard to the Witnesses to the relevant trial panel".[9] This finding expressly invited the Defence to file the

[5] Response, paras. 2, 9.
[6] KSC-BC-2020-06/F01125, Decision on Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, 28 November 2022 ("PTJ Decision"), para. 29.
[7] PTJ Decision, para. 31.
[8] Response, para. 3.
[9] PTJ Decision, para. 34.

Motion before the trial panel, which clearly the PTJ felt was more suited to decide it than him. Indeed, it is understandable that, with the imminent transmission of the case, the PTJ did not want to tie the hands of the trial panel who would hear this case. Consequently, the Motion was not, nor did it need to be, a motion for reconsideration requiring a change of circumstances.

B. PRESERVATION OF THE "LOGICAL" ORDER OF THE SPO'S CASE

9. It is not disputed that the usual order of hearing evidence in a criminal trial is for the prosecution to present its case first.[10] This is because it is the prosecution who brings the case and has the burden to prove it. However, a prosecutor is an officer of the court who must be fair, objective and even-handed in their approach to every case. Even in an adversarial system, they have a duty to protect the rights of defendants, perhaps most clearly seen in their duty of disclosure. The Defence Motion is made in good faith because of its real concern, based on average male life expectancy, that given the current estimated length of the SPO's case, some of its key witnesses will likely die or otherwise become incapacitated due to age-related impairments, before they have a chance to be heard. A fair prosecutor should work with the Defence to try and find a way to ensure that Mr Thaçi's basic fair trial right to defend himself is not put in peril because of the length of the case the SPO has chosen to present. The SPO makes no attempt to do so and sticks rigidly to the mantra that the "logical order" of evidence should be followed, and the Defence application should be rejected as it will interfere with this.

10. However, as the SPO indicated at the recent Trial Preparation Conference, it will itself be departing from what some may consider to be the "logical order" to present its case; namely, by categories of issues, chronologically, or by crime site. The SPO has stated it will not be putting on its evidence in any of these ways due to

[10] Response, para. 3.

problems with the availability of its witnesses, due to unsubstantiated security concerns, personal obligations and publicity concerns. Instead, the SPO's case will be led by witness availability.[11] Therefore, when it suits the SPO, they are willing to depart from the usual "logical order" of case presentation. The irony is not lost on the Defence that witness availability is dictating the order in which the SPO will put on its case, when they opposed the court taking into account this factor when it comes to Defence evidence.

11. Moreover, when submitting that other international courts have similar frameworks that emphasise the logical presentation of evidence, the SPO omitted a key part of the Rules to which it cites,[12] which allows the evidence to be taken out of order at the direction of the trial chamber if it is "in the interests of justice".[13] It is therefore clear that, contrary to the SPO's submission, the logical order is not sacrosanct in other international tribunals if the interests of justice demand it be adapted.

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

12. Contrary to the SPO's assertions,[14] the Defence has never contended, nor submitted jurisprudence in support of the idea 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. It is correct that the moving party in the ICTY/ICTR cases cited by

[11] KSC-BC-2020-06, Transcript of Trial Preparation Conference, 18 January 2023, Confidential, pp. 1818-1823.
[12] Response para. 3.
[13] *See, e.g.*, ICTY RPE, Rule 85(A); ICTR RPE, Rule 85(A) and IRMCT RPE, Rule 102 (A) *i.e.* those cited by SPO in Response, fn. 9.
[14] Response, para. 10.

the Defence in their Motion relied on both age and another factor, such as ill-health, when requesting depositions.[15] 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 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 allow taking of evidence out of order or the granting of a deposition.

D. DEFENCE REQUEST DOES NOT PREJUDICE THE SPO

13. In its Response, the SPO implicitly acknowledges that there is a risk in principle of losing the testimony of elderly witnesses when it states that hearing the witnesses out of order would "unnecessarily and unjustifiably delay and impact the ability of Prosecution witnesses to testify, threatening the mandate of both the SPO and KSC".[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 requested will affect the ability of their elderly witnesses to testify is spurious. This is because the Defence has estimated up to two days per witness – 18 trial days in total. It is hard to see how a little over a month of depositions; or witness testimony if taken out of order (assuming four sitting days a week) would delay any SPO witnesses to such a degree that their evidence would become unavailable.

14. The SPO further asserts that if the Defence request was granted, the protective measures regime in place would be undermined.[17] It is unclear how this would be the

[15] Motion, para. 30.
[16] Response, para. 5.
[17] Response, para. 5.

case, and in any event, there must be a solution to ensure the protection of witnesses does not entail the Defence losing its ability to call its witnesses.

E. W04147

15. The SPO misunderstands the Defence submission regarding Witness W04147, which concerns his willingness to be a witness for the SPO.[18] As stated in the Motion,[19] Defence communications with this witness prior to the imposition of the Witness Protocol[20] led to his inclusion in the Defence deposition list, and it is on that basis that the Defence seeks to hear his evidence either out of order or in deposition format.

F. RULE 95(5)(C) LIST

16. The Defence reminds the SPO[21] that it is not obligated to file a Rule 95(5)(c) list of potential witnesses, rather it is 'invited' to do so. The fact that the nine witnesses are not on any such list does not indicate that they are not critical for Mr Thaçi's defence. They are, hence the importance of securing their evidence now before it becomes unavailable.

III. RELIEF SOUGHT

17. The Defence reiterates the relief sought in its Motion.[22]

[18] Response, paras. 6, 15.
[19] Motion, para. 31.
[20] KSC-BC-2020-06/F00854, Pre-Trial Judge, 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, 24 June 2022, Public, pp. 85-91 containing the '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'.
[21] *Contra* Response, para. 12.
[22] Motion, paras. 42-43.

Word Count: 1,815 words

Respectfully submitted,

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Monday, 30 January 2023

At Tampa, United States