



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**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 Mettraux

Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 2 February 2023

**Language:** English

**Classification:** Public

---

**Decision on Thaçi Defence Motion Regarding the Preservation of Evidence**

---

**Acting Specialist Prosecutor**  
Alex Whiting

**Counsel for Hashim Thaçi**  
Gregory Kehoe

**Counsel for Victims**  
Simon Laws

**Counsel for Kadri Veseli**  
Ben Emmerson

**Counsel for Rexhep Selimi**  
David Young

**Counsel for Jakup Krasniqi**  
Venkateswari Alagenda

**TRIAL PANEL II** (“Panel”), pursuant to Articles 19(3), 21, 40 of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 100, 116(1), 127 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 28 November 2022, the Pre-Trial Judge rejected an application from the Defence for Hashim Thaçi (“Mr Thaçi” or “the Defence”) for unique investigative opportunities in relation to nine witnesses pursuant to Rule 99, and in the alternative, the taking of depositions pursuant to Rule 100 (“Decision on Unique Investigative Opportunities”).<sup>1</sup>
2. On 9 January 2023, the Defence filed a new motion regarding the preservation of Defence evidence (“Motion”).<sup>2</sup>
3. On 20 January 2023, the SPO responded to the Motion (“Response”).<sup>3</sup>
4. On 30 January 2023, the Defence replied to the Response (“Reply”).<sup>4</sup>

## II. SUBMISSIONS

### A. DEFENCE MOTION

5. The Defence seeks to preserve the evidence of nine witnesses (“Witnesses”) to guarantee, it submits, Mr Thaçi’s right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.<sup>5</sup> To do so,

---

<sup>1</sup> F01125, Pre-Trial Judge, *Decision on Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities*, 28 November 2022, para. 29.

<sup>2</sup> F01191, Specialist Counsel, *Thaçi Defence Motion Regarding the Preservation of Defence Evidence*, 9 January 2023, confidential.

<sup>3</sup> F01221, Specialist Prosecutor, *Prosecution Response to Thaçi Request Regarding Preservation of Defence Evidence*, 20 January 2023, confidential. A corrected version was filed on 23 January 2023, F01221/COR.

<sup>4</sup> F01236, Specialist Counsel, *Thaçi Defence Reply to Prosecution Response to Defence Motion Regarding the Preservation of Defence Evidence*, 30 January 2023, confidential.

<sup>5</sup> Motion, paras 2, 14-16, 19, 28-29.

the Defence requests the Panel to vary the usual order of the evidence, as set forth in Rule 127, in order to hear the evidence of the Witnesses before the commencement of the SPO's case, rather than after its conclusion ("Primary Relief").<sup>6</sup> *In the alternative*, the Defence invites the Panel to secure the evidence of the Witnesses by observing the taking of depositions under Rule 100 ("Alternative Relief").<sup>7</sup> The Defence submits that the legal framework of the Specialist Chambers ("SC") empowers the Panel to grant an application for the preservation of evidence through depositions should there be reasons to believe that the evidence of a potential witness may otherwise become unavailable.<sup>8</sup>

6. The Defence submits that the Witnesses will provide some of the most important evidence that the SC will hear in this case, *inter alia*, due to their: (i) standing and roles in Kosovo during the indictment period; (ii) unique vantage point and involvement with key individuals during that time; (iii) interactions with Mr Thaçi on a professional and, in some cases, personal level; and (iv) ability to testify about matters central to the case.<sup>9</sup> The Defence avers that the Motion is justified in light of two factors: (i) the advanced age of the Witnesses and (ii) the estimated time when the Defence is likely to begin in light of the current projections, *i.e.* late 2025 or early 2026.<sup>10</sup> The Defence argues that these factors are relevant in determining whether a mechanism to preserve evidence that may otherwise be unavailable is warranted.<sup>11</sup> It submits that by the time the Defence case begins there is a very real risk that the evidence of the Witnesses – who will then be in their 80's – may no longer be available due to death or incapacity.<sup>12</sup> The Defence contends that the Motion is a last resort to

---

<sup>6</sup> Motion, paras 13-14. *See also* Motion, paras 29, 42.

<sup>7</sup> Motion, paras 13, 15. *See also* Motion, paras 29, 43.

<sup>8</sup> Motion, paras 8-9, 15.

<sup>9</sup> Motion, paras 10, 16-17, 37-38. *See also* Annexes 1-9 to the Motion.

<sup>10</sup> Motion, paras 18-28.

<sup>11</sup> Motion, para. 30.

<sup>12</sup> Motion, paras 18, 28, 42.

avoid risking losing any of the Witnesses.<sup>13</sup> It avers that Rules 153-155 are inadequate.<sup>14</sup> It argues that no prejudice is caused to the SPO as any inconvenience, should it exist, can be cured by the SPO's ability to ask leading questions in cross-examination.<sup>15</sup>

7. As to the procedure of the Primary Relief, the Defence requests that the Witnesses be heard in the SC courtroom in March 2023, but for one who is only available as of April 2023.<sup>16</sup> As for the Alternative Relief, it requests that the depositions be carried out in open session in the SC courtroom if the Witnesses are well enough to travel in February 2023, save for the one witness available in April 2023.<sup>17</sup> The Defence estimates that the implementation of either of the relief sought will take up to two days, consisting of an examination in chief by the Defence, a possible cross-examination by the other Defence teams and the SPO, together with questions from the Victims Counsel and the Panel, if any.<sup>18</sup>

#### B. SPO RESPONSE

8. The SPO responds that the Motion should be denied in its entirety as unsubstantiated.<sup>19</sup>

9. As regards the Primary Relief, the SPO argues that the Defence fails to demonstrate that varying the order of presentation of evidence is exceptionally warranted and that the evidence of the Witnesses may be unavailable at the time of the Defence case.<sup>20</sup> Further, the SPO submits that hearing the Witnesses out of order would cause irreparable prejudice and run against the interests of justice because it would delay

---

<sup>13</sup> Motion, paras 19-20, 28, 39.

<sup>14</sup> Motion, paras 39-41.

<sup>15</sup> Motion, para. 20.

<sup>16</sup> Motion, paras 32, 34.

<sup>17</sup> Motion, paras 33, 35.

<sup>18</sup> Motion, para. 36.

<sup>19</sup> Response, paras 1-2, 17.

<sup>20</sup> Response, paras 3-7.

and impact the ability of SPO's witnesses to testify (*e.g.* elderly witnesses or witnesses in precarious security situation).<sup>21</sup>

10. As regards the Alternative Relief, the SPO contends that the Defence fails to demonstrate that the Witnesses' evidence may be unavailable at trial.<sup>22</sup> The SPO avers that no change of circumstances would warrant reconsideration of the Pre-Trial Judge's decision which rejected the initial Defence's motion on the basis that there was no reason to believe that the evidence of the Witnesses may become unavailable.<sup>23</sup> The SPO stresses that the Defence advances no health consideration in the Motion.<sup>24</sup> The SPO contends that the Defence fails to demonstrate the necessity to preserve the Witnesses' evidence.<sup>25</sup> The SPO argues that the Defence further fails to demonstrate that the Panel's intervention is necessary as alternative options are available under Rules 153-155.<sup>26</sup>

### C. DEFENCE REPLY

11. In its Reply, the Defence maintains its Motion in full.<sup>27</sup> First, the Defence submits that the SPO mischaracterizes the Motion as a request to reconsider the Decision on Unique Investigative Opportunities, considering that this decision invited the Defence to file the Motion before the Panel.<sup>28</sup> Secondly, while the Defence acknowledges the usual order of presentation of evidence, it argues that this order is not sacrosanct and a panel may allow the evidence to be taken out of order "in the interests of justice".<sup>29</sup> In this regard, the Defence stresses that the SPO itself intends to depart from the traditional order of presentation within its own witnesses due to availability and/or

---

<sup>21</sup> Response, para. 5.

<sup>22</sup> Response, paras 8-15.

<sup>23</sup> Response, para. 9.

<sup>24</sup> Response, paras 10-11.

<sup>25</sup> Response, paras 12-13.

<sup>26</sup> Response, paras 14-7.

<sup>27</sup> Reply, paras 3-4, 17.

<sup>28</sup> Reply, paras 6-8.

<sup>29</sup> Reply, paras 9, 11.

security concerns.<sup>30</sup> The Defence submits that the Motion is made in good faith and that a “fair prosecutor should work with the Defence” to ensure that the accused’s “right to defend himself is not put in peril because of the length of the case the SPO has chosen to present”.<sup>31</sup> Thirdly, the Defence contends that the SPO misunderstands the legal test to apply to the Motion and avers that there is no support for the SPO’s position that age combined with the potential length of the prosecution case is an insufficient legal basis to allow the taking of evidence out of order or the granting of a deposition.<sup>32</sup> Fourthly, the Defence submits that the Motion does not prejudice the SPO as: (i) hearing the Witnesses would only take up to 18 trial days in total; and (ii) it is unclear how this would undermine the protective measures regime.<sup>33</sup>

### III. APPLICABLE LAW

12. Pursuant to Articles 19(3), 21, 40 and Rule 116(1), the Panel shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused. The Panel, having heard the parties, may adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of proceedings. It may give directions for the conduct of fair and impartial proceedings.

13. Pursuant to Article 40(6)(a), the Panel may exercise any functions or powers of the Pre-Trial Judge referred to in Article 39.

14. Pursuant to Rule 127, each Party is entitled to present evidence relevant to the case. Unless otherwise directed by the Panel, evidence at the trial shall be presented in the following sequence: (a) evidence for the Specialist Prosecutor; (b) evidence for the Defence; (c) evidence called by the Panel pursuant to Rule 132; (d) with leave of

---

<sup>30</sup> Reply, para. 10.

<sup>31</sup> Reply, para. 9.

<sup>32</sup> Reply, para. 12.

<sup>33</sup> Reply, paras 13-14.

the Panel, Specialist Prosecutor evidence in rebuttal; and (e) with leave of the Panel, Defence evidence in rejoinder.

15. Rule 141 provides that the testimony of a witness at trial shall be given in person, except to the extent provided under Rule 100.

16. Rule 100 provides that 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.

#### IV. DISCUSSION

##### A. PRELIMINARY CONSIDERATIONS

17. As regards the nature of the Motion,<sup>34</sup> the Panel observes the following. First, in his Decision on Unique Investigative Opportunities, the Pre-Trial Judge noted that: (i) considerations pertaining to “the testimony of the Witnesses [was] a matter best decided by the trial panel that will be assigned to hear the case”;<sup>35</sup> (ii) 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”;<sup>36</sup> and (iii) the Defence was “not precluded from making submissions with regard to the Witnesses to the relevant trial panel”.<sup>37</sup> Second, during the trial preparation conference of 16 December 2022, the Panel directed the Defence to file its motion on depositions or taking witnesses out of turn after the judicial recess.<sup>38</sup>

---

<sup>34</sup> Response, paras 2, 9; Reply, paras 6-9.

<sup>35</sup> Decision on Unique Investigative Opportunities, para. 29.

<sup>36</sup> Decision on Unique Investigative Opportunities, para. 31.

<sup>37</sup> Decision on Unique Investigative Opportunities, para. 34.

<sup>38</sup> Transcript of Hearing, 16 December 2022, p. 1777, lines 19-25.

18. In light of the foregoing, the Panel will not treat the Motion as a request for reconsideration of the Decision on Unique Investigative Opportunities, but as a fresh application to be considered anew by the Panel.

#### B. PRIMARY RELIEF

19. At the outset, the Panel recalls that Rule 127 prescribes that the presentation of evidence at trial shall start by the evidence of the SPO followed by the evidence of the Defence.<sup>39</sup> The order of presentation of the evidence acknowledges the fact that proceedings before the SC are primarily party-driven and that the burden of establishing the guilt of the Accused is upon the Prosecution. This order of presentation also preserves the right and possibility for the Defence, at the end of the Prosecution case, not to call a case.<sup>40</sup>

20. Nevertheless, Rule 127 empowers the Panel to direct that another order of presentation of evidence than the one prescribed by the Rules be followed.<sup>41</sup> Read in conjunction with Rule 116(1), the Panel accepts that it could alter the order of the presentation of evidence – and thus order that evidence of Defence witnesses be presented in part before evidence for the SPO – to facilitate the fair and expeditious conduct of the trial proceedings. The Panel considers that certain circumstances, for instance in the event where a witness would be in an advanced stage of a terminal illness, could dictate such alteration in order to facilitate the fair and expeditious conduct of the proceedings. Circumstances in which such a course of action will be adopted are necessarily rare and this possibility cannot be adopted as a matter of convenience or based on the preferences of a Party. The threshold to be met for such a relief is, therefore, necessarily high.

21. Turning to the specific circumstances invoked in support of the Motion, the Panel considers that nothing in the submissions of the Defence indicates that the health

---

<sup>39</sup> See also Rule 126.

<sup>40</sup> Rule 119.

<sup>41</sup> Rule 127(2) (“unless otherwise directed by the Panel”).



condition of the prospective Witnesses is, at present, a serious concern that would warrant the exceptional course of action suggested.<sup>42</sup> Indeed, the Defence submits no evidence, such as medical evidence from a treating physician for instance, which would raise immediate concern as regards the availability of the evidence of the prospective Witnesses.

22. In light of the above, the Panel is not persuaded that the justifications advanced by the Defence – old age of the Witnesses combined with the estimate as to the timing of the opening of the Defence case – demonstrate that taking the Witnesses “out of order” is necessary and justified at this stage to ensure that proceedings are and remain fair to the Accused.

23. Furthermore, the Panel finds that the Defence has not adequately explained why, at this stage, it could not take statements from the prospective witnesses, which it could later seek to tender, as the case may be, by means of Rule 153, 154 or 155.

24. Accordingly, the Panel rejects the Primary Relief.

### C. ALTERNATIVE RELIEF

25. As regards the Alternative Relief, *i.e.* the taking of depositions, the Panel recalls that the legal test under Rule 100 for the taking of a deposition is that there should be “reason to believe that the evidence of a potential witness may otherwise become unavailable”.<sup>43</sup>

26. At the outset, the Panel recalls that the Pre-Trial Judge recently held that he was “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

---

<sup>42</sup> See *similarly* Decision on Unique Investigative Opportunities, para. 28.

<sup>43</sup> Rule 100. See *also* Decision on Unique Investigative Opportunities, para. 32.

constitute, at this stage, a reason to believe that the evidence of the Witnesses may otherwise become unavailable within the meaning of Rule 100".<sup>44</sup>

27. Having conducted its own assessment, the Panel agrees with this finding. Indeed, the Panel considers that the circumstances advanced by the Defence in the Motion fail to establish that there is reason to believe that the evidence of the Witnesses may, in the absence of depositions being taken pursuant to Rule 100, become unavailable. Furthermore, as noted above, the Defence has failed to provide cogent reasons why Rules 153-154 do not provide for an adequate safeguard at this point in time.

28. The Panel is not convinced that the case law of the *ad hoc* tribunals supports the Defence proposition that the two factors advanced – age of the Witnesses and length of the case – justifies, without more, granting such a relief.<sup>45</sup> Rather, it seems clear that the age of the individual of whom the evidence is sought to be preserved is, in itself, insufficient if unaccompanied by other relevant factors such as, for instance, poor, ill or rapidly deteriorating health, frailty of the witness, or inability to appear physically before the court.<sup>46</sup> In this regard, the Panel considers it telling that the precedents cited as authority by the Defence concerns individuals who were old *and* in frail health or suffering from an infirmity.<sup>47</sup> The Panel observes that, aside from the age of the Witnesses, the Defence advances no compelling circumstances pertaining to the

---

<sup>44</sup> Decision on Unique Investigative Opportunities, para. 33.

<sup>45</sup> See Motion, para. 30.

<sup>46</sup> See e.g. ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Trial Chamber, [Decision on Prosecutor's Motion to Allow Witness DBO to Give Testimony by Means of Deposition](#), 25 August 2004, para. 8; *Prosecutor v. Nihimana et al.*, ICTR-99-52-A, Trial Chamber I, [Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition](#), 10 April 2003, para. 8; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Trial Chamber III, [Decision on Prosecutor's Motion for Deposition of Witness OW](#), 5 December 2001, para. 12; *Prosecutor v. Simba*, ICTR-2001-76-I, Trial Chamber I, [Decision on the Defence's Extremely Urgent Motion for a Deposition](#), 11 March 2004, para. 7; *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Trial Chamber III, [Decision on Callixte Nzabonimana Motion for Protection Measures and Deposition of Witness RW-42](#), 27 October 2009, paras 4-5. See also ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16, Appeals Chamber, [Decision on Appeal by Dragan Papić Against Rule to Proceed by Deposition](#), 15 July 1999, paras 19-20; *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Chamber, [Decision on Prosecution and Defence Requests to Proceed by Deposition](#), 11 February 1999.

<sup>47</sup> Motion, para. 30, fns 34-35.

Witnesses themselves (*e.g.* such as suffering from a serious condition) to conclude that a risk exists at this point in time that their evidence may become unavailable.

29. Secondly, the Panel disagrees with both Defence arguments that it has no satisfactory alternative to preserve the Witnesses' evidence.<sup>48</sup> Indeed, the SC legal framework does not limit the availability of the evidence to evidence presented in court. Instead, Rules 153-155 provides a variety of ways through which evidence of a witness can be presented to the court. Equality of arms is duly maintained if the Defence were to make use of such Rules as the Prosecution has indicated that it would.

30. It follows that Rule 100 cannot be interpreted as giving a right to either party to ensure that a witness is heard live in court although the normative regime applicable before the SC expresses a preference for this sort of evidence.<sup>49</sup> As pointed out by the Defence and as enshrined in Article 21(4)(f), the accused has the right to be able to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The Panel considers that such a procedural right is safeguarded if the Defence is able to interview relevant witness(es) and preserve their account in a statement meeting the requirements of Rules 153-155 or, if the Defence elects to call a case, to call witnesses to give live evidence.<sup>50</sup>

31. Further, the Panel disagrees with the Defence argument that Rules 153-155 are inadequate for the preservation of the evidence that is the subject of the Motion.<sup>51</sup> First, as regards the alleged incompatibility of the nature of the evidence that the Defence seeks to preserve, the Panel observes that evidence of the Witnesses going to proof of a matter "other than the acts and conduct of the accused" could be submitted for admission under Rule 153, and evidence going to proof of "the acts and conduct of

---

<sup>48</sup> Motion, paras 39-41.

<sup>49</sup> Article 37(2) of the Law. *See also* ICTY, *Prosecutor v. Kupreškić et al*, IT-95-16, Appeals Chamber, [Decision on the Appeal by Dragan Papić Against the Ruling to Proceed by Deposition](#) ("Papić Decision"), 15 July 1999, paras 18-19.

<sup>50</sup> Papić Decision, para. 24.

<sup>51</sup> Motion, paras 39-41.

the accused” could be submitted for admission under Rule 154. Furthermore, as further explained below, “acts and conduct” are to be understood as those underlying the case of the Prosecution against the Accused. It does not refer, generically, to the conduct of an Accused where not relevant to establishing the responsibility of the Accused.<sup>52</sup> Second, as regards the claim that Rule 154 is “unhelpful” considering that the Motion is based on the premise that the Witnesses will no longer be able to testify in court (“Premise”),<sup>53</sup> the Panel observes that: (i) the Premise is hypothetical; and (ii) if the Premise were to materialize, Rule 155 would then become applicable. Lastly, with respect to the allegation that Rule 155 would be of no assistance to the Defence as the evidence of the Witnesses go to the proof of the acts and conduct of the Accused, the Defence misrepresents the provision. Rule 155(5) only provides that the fact that evidence goes to proof of the acts and conduct of the Accused “*may* be a factor against the admission of such evidence” under such a rule. In other words, it is merely a factor that the Panel *may* choose to take into account when deciding on the admission of the statement. It is not, contrary to what the Defence portrays, a determinative factor which would necessarily preclude the admission of such statement. In addition, the Panel is of the view that Rule 155(5) is intended to protect the Defence against the admission of material that would be prejudicial to its case and which the Defence could not fairly challenge, thereby negating the accused’s fundamental right to confrontation. Therefore, while the fact that the evidence goes to proof of the acts and conduct of the Accused may be a factor against admission when adduced by the Prosecution, this factor would not carry the same weight when the statement in question is tendered by an Accused. Lastly, the Panel notes that the “acts and conduct of the Accused” refer to the acts and conduct “as charged in the indictment”. It follows

---

<sup>52</sup> See e.g. ICTR, *Prosecutor v. Karemera & Ngirumpatse*, ICTR-98-44-T, Trial Chamber III, [Decision on Motion by Mathieu Ngirumpatse for the Admission of Statements Pursuant to Rule 92 bis of the Rules and for the Protection of Witnesses](#) (“Karemera Decision”), 11 November 2009, para. 23.

<sup>53</sup> Motion, para. 40.

that Rule 155(5) is irrelevant for evidence going to the actions and statements of an accused other than those that form the basis of the charges.<sup>54</sup>

32. For all these reasons, the Panel is of the view that the Defence has failed to demonstrate that, in the current circumstances, Rules 153-155 could not reasonably be used by the Defence as a way to preserve the evidence of the prospective Witnesses.

33. In light of the above, the Panel finds that, at present, there is no reason to believe that the Witnesses' evidence may become unavailable in the absence of depositions pursuant to Rule 100.

34. Accordingly, the Panel rejects the Alternative Relief.

#### D. W04147

35. Noting that W04147 is currently scheduled to testify amongst the first 40 SPO witnesses, the Defence submits that it included W04147 in the Motion in light of the importance of his evidence and on the basis of communications held prior to the issuance by the Pre-Trial Judge of his decision regulating contact between a party and witnesses of the opposing party ("Contact Decision").<sup>55</sup> As an exception to the Contact Decision which, it alleges, prevents them from communicating with W04147, the Defence seeks to be allowed to meet with W04147 to prepare him for a deposition pursuant to Rule 100. In the alternative, the Defence invites the Panel to vary the order of presentation of evidence so that W04147 be tendered as a Defence witness *before* the first SPO witness.<sup>56</sup>

---

<sup>54</sup> See e.g. Karemera Decision, para. 23. See also ICTR, *Prosecutor v Karemera et al*, ICTR-98-44-T, Trial Chamber III, [Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List](#), 11 December 2006, para. 10.

<sup>55</sup> 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.

<sup>56</sup> Motion, para. 31.

36. The SPO responds that the Defence fails to explain why it would be necessary to call W04147, whom the SPO intends to call amongst its first 40 witnesses, *before* the SPO's case.<sup>57</sup> It also submits that the request of the Defence with regard to W04147 is premature as the Defence made no request to interview him under the conditions set in the Contact Decision.<sup>58</sup>

37. The Defence replies that the SPO misunderstands its submission. The Defence clarifies that its request to hear the evidence of W04147 out of order or in a deposition format, as well as its decision to include W04147 on its list of witnesses, are based upon discussions held with the witness *prior* to the Contact Decision.<sup>59</sup>

38. At the outset the Panel notes that, aside from asserting that W04147 is of "advanced age and fragile health",<sup>60</sup> the Defence provides no indication, let alone supporting documentation, that W04147 suffers from ill-health or would be unable to come to the SC to testify. Under these circumstances, the Panel sees no reason at this stage which would warrant varying the order of presentation of evidence for W04147. If anything, in the Panel's view, the fact that the SPO intends to call W04147 to testify live as part of its first 40 witnesses<sup>61</sup> further undermines the claim that it would be necessary to preserve W04147's evidence at this stage. For these reasons and those set out above,<sup>62</sup> the Panel rejects the Defence's request that W04147 be heard as a Defence witness before the first SPO witness.

39. Furthermore, it is in principle for the calling party to decide the order in which to call its witnesses. However, the Panel could step in to modify the proposed order of calling of witnesses where, for instance, fairness of proceedings demand or to ensure

---

<sup>57</sup> Response, para. 6.

<sup>58</sup> Response, para. 15.

<sup>59</sup> Reply, para. 15.

<sup>60</sup> Motion, para. 31.

<sup>61</sup> See F00631/A02, Specialist Prosecutor, *Annex 2 to Submission of Pre-Trial Brief, with Witness and Exhibit Lists, List of Witnesses*, 17 December 2021, strictly confidential and *ex parte*, p. 324.

<sup>62</sup> See *supra* para. 21.

that evidence is presented in an intelligible manner. The Defence has not demonstrated that the Panel should do so in respect of this particular witness.

40. With regard to the Defence's request to be allowed to meet with W04147 to prepare him for a deposition pursuant to Rule 100,<sup>63</sup> the Panel – for the same reasons set out above with regard to the other Witnesses<sup>64</sup> – sees no compelling circumstances pertaining to W04147 to conclude that his evidence may become unavailable. As a result, the Panel finds that the taking of W04147's deposition pursuant to Rule 100 is not warranted at this stage. It follows that the Defence's request to make an exception to the Contact Decision in order to prepare W04147 for a deposition is not warranted. The Panel understands that the Defence was in contact with W04147 prior to the issuance of the Contact Decision.<sup>65</sup> The Panel notes nonetheless that, should the Defence wish to interview W04147 further, the Defence could ask to do so under the conditions set out in the Contact Decision.

41. In light of the foregoing, the Panel rejects the Defence submissions with regard to W04147. That being said, considering the importance of W04147 for the Defence, the Panel invites the parties to explore the possibility of W04147 being called as early as possible in the SPO's case.

## V. CLASSIFICATION

42. The Panel notes that the SPO and the Defence respectively do not object to the reclassification of the Response (F01221/COR) and the Reply (F01236) as public;<sup>66</sup> and that the Defence indicated that it will file a public redacted version of the Motion

---

<sup>63</sup> Motion, para. 31; Reply 15.

<sup>64</sup> *See supra* para. 28.

<sup>65</sup> Reply, para. 15. *See also* Motion, para. 31.

<sup>66</sup> Response, para. 16; Reply, para. 5.

(F01191) shortly.<sup>67</sup> Accordingly, the Panel directs the Defence to do so and the Registry to reclassify the Response and the Reply as public.

## VI. DISPOSITION

43. In light of the foregoing, the Panel hereby:

- (i) **DENIES** the Motion;
- (ii) **INVITES** the Parties to discuss and explore the possibility of W04147 being called early in the SPO's case;
- (iii) **DIRECTS** the Defence to file a public redacted version of the Motion (F01191) by **Wednesday, 15 February 2023**; and
- (iv) **INSTRUCTS** the Registry to reclassify the Response (F01221/COR) and the Reply (F01236) as public by **Tuesday, 7 February 2023**.



**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated this Thursday, 2 February 2023  
At The Hague, the Netherlands.

---

<sup>67</sup> Motion, para. 3.