

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 Guénaél Mettreaux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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**Public Redacted Version of Thaçi Defence Motion Regarding the Preservation of Defence
Evidence**

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I. INTRODUCTION

1. On 16 December 2022, Trial Panel II (“Panel”) held a Trial Preparation Conference. The Panel ordered the Defence for Hashim Thaçi (“Defence”) to file any motion requesting taking witnesses “out of turn” or depositions “right after the recess”.¹

2. The Defence hereby files a request to preserve the evidence of nine elderly important and essential Defence witnesses whose evidence may otherwise be unavailable at trial either by taking them “out of order” or, in the alternative, taking depositions from them.

3. The Defence is filing this Motion as confidential as it refers to the identity and personal information of the proposed witnesses.² It will file a public redacted version shortly.

II. BACKGROUND

4. On 28 November 2022, the Pre-Trial Judge (“PTJ”) issued a decision rejecting a Defence application for unique investigative opportunities in relation to the same nine witnesses pursuant to Rule 99 of the Rules,³ and in the alternative, depositions pursuant to Rule 100. In the course of his decision 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

¹ KSC-BC-2020-06, Transcript of Sixteenth Status Conference, 16 December 2022, public, p. 1777 lines 19-24.

² Rule 82(1).

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).

testimony of the Witnesses is a matter that is best decided by the trial panel that will be assigned to hear the case.”⁴

Further, he noted that his decision was “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”.⁵ The PTJ made a similar “without prejudice” finding to a future application to the Trial Panel for depositions for the nine witnesses.⁶

5. At the outset the Defence notes that it has lifted much of the reasoning below from its motion and notice before the PTJ requesting the preservation of evidence pursuant to Rules 99 and 100⁷ as the necessity and basis of this request remains the same and the PTJ expressly found that his decision denying the previous requests was without prejudice to future submissions to the Trial Panel before whom any such application was more appropriate.

III. APPLICABLE LAW

A. CASE MANAGEMENT POWERS

6. The Panel is vested with broad powers pursuant to Rule 116 and Article 40 of the Law⁸, to manage proceedings to ensure they are fair and expeditious with full respect to the rights of the accused.

B. ORDER OF EVIDENCE

⁴ KSC-BC-2020-06/F01125/1, Decision on Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, 28 November 2022, (“PTJ Decision”) para. 29.

⁵ PTJ Decision, para. 31.

⁶ PTJ Decision, para. 34.

⁷ KSC-BC-2020-06/F01018, Thaçi Defence Notice of Unique Investigative Opportunities, 7 October 2022; KSC-BC-2020-06/F01068, Thaçi Defence Motion Justifying Request for Unique Investigative Opportunities, 28 October 2022.

⁸ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”).

7. Rule 127 governs the order of the presentation of evidence providing that evidence for the Defence should follow evidence for the Specialist Prosecutor (“SPO”) “unless otherwise directed by the Panel”.⁹ It further provides for the possibility of additional evidence called by the Panel (to come after the Defence evidence),¹⁰ defined in Rule 132 as evidence the panel considers is “necessary for the determination of the truth”.¹¹

C. DEPOSITIONS

8. Rule 141 provides that “the testimony of a witness at trial shall be given in person, except to the extent provided under Rule 100.” Rule 100 provides for deposition evidence as ordered by the PTJ, specifically:

Rule 100(1) provides:

“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 Specialist Chambers to give evidence.”

Rule 100(2) provides:

“The motion for the taking of a deposition shall indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined and of the circumstances justifying the taking of the deposition.”

9. Pursuant to Article 40(6)(a) the Trial Panel may “exercise any functions or powers of the Pre-Trial Judge referred to in Article 39.” Article 39 (1) provides that the PTJ shall have the power to “make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial”. The Defence understands that these provisions taken together with Rule 116, empower the Panel to grant a defence

⁹ Rule 127 (2).

¹⁰ Rule 127 (2).

¹¹ Rule 132. *See also* Rule 137.

application for the preservation of evidence through depositions should there be reason to believe that the evidence of a potential witness “may otherwise become unavailable”.¹²

IV. IDENTITY OF THE WITNESSES

10. The Defence seeks to preserve the testimony of the following nine witnesses (in alphabetical order):

Full Name	Description and Age
Steve BENNETT	Director of the OSCE Department of Police Education and Development, United Nations Mission in Kosovo, 1999-2006. Age: 78 years old
[REDACTED] Current SPO witness W04147	[REDACTED] Age: [REDACTED]
General Wesley CLARK	Supreme Allied Commander Europe of NATO, and Commander-in-Chief of the United States European Command from 1997 to May 2000. Age: 78 years old
Jock COVEY	Principal Deputy of the UN Mission in Kosovo (UNMIK) 1999 to 2001. Age: 78 years old

¹² Rule 100 (1).

Michael DURKEE	Political advisor to NATO Supreme Allied Commanders in Europe (SACEUR) Clark, 1998-1999 Age: 83 years old
Daan W. EVERTS	Head of the OSCE Office in Tirana, Albania and then of the OSCE Office in Pristina in 1999. Age: 81 years old
[REDACTED]	[REDACTED]. Age: [REDACTED]
Bernard KOUCHNER	Special Representative for the Secretary General of the UN Interim Administration on Kosovo (UNMIK), July 1999 to January 2001 Age: 82 years old
Ambassador William WALKER	Head of OSCE KVM from 17.10.98 – mid-June 1999 Age: 87 years old

11. The Defence review of the SPO's evidence continues. It is mindful that the SPO will be disclosing the identity of 67 witnesses and approximately 46,000 pages of new, less redacted or unredacted evidence 30 days before trial,¹³ and it may be that having reviewed that evidence and understanding the SPO's case more fully, it will apply to add one or two more witnesses. The Defence assures the court that any such application will be timely.

¹³ KSC-BC-2020-06/F00952, Prosecution submissions for fourteenth status conference, 5 September 2022, para. 11. While in this filing, it was stated that the identity of 68 witnesses would be disclosed 30 days before trial, the identity of one witness has subsequently been disclosed, see: KSC-BC-2020-06/F00977/CONF/RED, Confidential Redacted Version of 'Prosecution notification regarding non-standard redactions pertaining to W03821's identity', 12 October 2022, and Disclosure Packages 567-569.

12. In confidential Annexes 1-9 attached, the Defence has provided a precis for each of the proposed witnesses, containing:

- (i) Name;
- (ii) Age and/or Date of birth;
- (iii) Whereabouts; and
- (iv) Statement of the matters on which the person is to be examined.

This information is required pursuant to Rule 100(2) for the deposition request but is also relevant to the reasons and justification for the Defence's primary alternate request to take the witnesses out of order.

13. The Defence has detailed below the circumstances justifying its request to take the witnesses out of order; or in the alternative, the taking of a deposition under Rule 100; and the location and date of any such procedure for each witness.

V. PROCESS

14. The primary relief that the Defence seeks is to invite the Panel to direct a variation in the usual order of the evidence under Rule 127. Rather than hearing the evidence of these nine defence witnesses after the conclusion of the SPO's case it invites the Panel to order it be heard before the commencement of the SPO's witnesses. All witnesses would be heard in open session save [REDACTED], for whom a request will be made in due course to testify in closed session.

15. In the alternative, the Defence invites the Panel to preserve the evidence of these nine witnesses via depositions under Rule 100 as soon as possible before the opening of the SPO's case. As stated above, the Defence understands that Article 40(6)(a) combined with Rule 116 empowers the Panel to grant a defence application

for the preservation of evidence through depositions should there be reason to believe that the evidence of a potential witness “may otherwise become unavailable”.¹⁴

16. Pursuant to the Rule 100(3), the PTJ “may observe” such depositions. It is assumed that if the Panel were to grant the depositions, they could similarly observe them by virtue of the fact that the Panel can exercise any functions of the PTJ pursuant to Article 40 (6)(a) and their general trial management powers under Rule 116. Indeed, the Defence submits that to guarantee 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”¹⁵ all members of the Panel should be present in any deposition. 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 nine witnesses will undoubtedly provide some of the most important evidence the Court will hear in this case, for either side. They all interacted with Mr Thaçi, both on a professional and in some cases, a personal level. Consequently, the Defence submit that it would be beneficial for all members of the Panel, to hear this evidence live so that they can observe the witnesses and ask their own questions as appropriate.

VI. JUSTIFICATION

17. The nine witnesses were all, in the Indictment period, senior international diplomats, administrators and military figures serving in high level positions in the North Atlantic Treaty Organization (NATO); the Organization for Security and Co-operation in Europe (OSCE); the United Nations (UN); the UN Interim Administration in Kosovo (UNMIK); the Kosovo Monitoring Mission (KVM); [REDACTED]. They interacted with Mr Thaçi both on a professional and in some cases, a personal level.

¹⁴ *Supra.* para. 11.

¹⁵ KSC Law, Article 21(4)(f) (emphasis added).

As detailed below in paragraphs 37-38, they will all testify about matters that are central to the case against Mr Thaçi including the structure of the Kosovo Liberation Army (“KLA”) and General Staff and Mr Thaçi’s role in both; the demilitarization and disarmament of the KLA after the war including Thaçi’s role in this; and the causes and organised nature, or lack thereof, of the violence in 1999.

18. All nine witnesses are of advanced age – ranging from [REDACTED] to 87 as stated above. Ideally, the Defence would call these nine 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, due to their advanced age, there is a real risk that their evidence “may otherwise become unavailable”,¹⁶ or at least by the time that the SPO closes its case, and the Defence case begins, either through death of the individual due to old age or incapacity. The test in Rule 100 is whether the evidence “may otherwise become *unavailable*” at trial. No further guidance is given about what constitutes “unavailable”, however, it is submitted that the death of a witness or their incapacity will suffice.

19. The Defence notes that it has already lost two potential witnesses: Former US Secretary of State, Madeleine Albright, who died this year aged 84, and former US diplomat, Richard Holbrooke, who died in 2010 aged 69. These examples demonstrate the very real need to preserve the evidence of these nine individuals. Consequently, the Defence’s proposal to take the witnesses out of order or to take their depositions will ensure that the Defence does not lose the opportunity to call any more witnesses which would fatally undermine Mr Thaci’s right to a fair trial.

20. This request to call the witnesses out of order is a last resort and is only being done to avoid the risk of losing any one of them. It also arguably provides the SPO

¹⁶ Per Rule 100 (1).

with an advantage to see the Defence case in advance and it certainly will not prejudice them given who these nine individuals are – credible senior and respected international [REDACTED] figures. Indeed, these witnesses should actually fit into the beginning of the SPO's case given their positions and overall knowledge and lived experience of the events in question. Indeed, normally the prosecution would call high level military and diplomatic witnesses such as these in this type of a case. These witnesses are objective, not hostile to the SPO and clearly have relevant evidence to assist the Court in its role to determine the truth. Any inconvenience to the prosecution (should it exist) can be cured by their ability to ask leading questions in cross examination.

21. Critical to justifying the Defence request is estimating when the Defence case is likely to begin and how old the nine witnesses will be by then – i.e., can the Defence simply wait till it puts on its case to call them? As with any criminal trial, this is not an exact science, however, the Defence has attempted to estimate based on the information it has about the size and breath of the SPO's case, as set out below.

22. There are currently 18,560 exhibits on the SPO's Exhibit List,¹⁷ and 323 witnesses on the SPO's Witness List.¹⁸ This is made up of:

- (i) 40 witnesses whose testimony will be 'live';
- (ii) 197 Rule 154 witnesses;¹⁹
- (iii) 50 Rule 153 witnesses;²⁰ and

¹⁷ KSC-BC-2020-06/F01154/A02, Annex 2 – Prosecution Submission of Amended Exhibit List, 13 December 2022, Confidential ("SPO Exhibit List").

¹⁸ KSC-BC-2020-06/F01078/A04, Annex 4 – Amended List of Witnesses, 2 November 2022, Confidential ("SPO Witness List").

¹⁹ Rule 154 provides for admission of written statements and transcripts in lieu of direct examination, but cross-examination is possible for the parties.

²⁰ Rule 153 provides for admission of written statements and transcripts in lieu of oral testimony, with cross-examination only possible with judicial authorisation.

(iv) 36 Rule 155 witnesses, including 32 who are deceased.²¹

23. The SPO's most recent estimate of the time needed for direct examination of the witnesses it intends to call is 713 hours.²² There has been no formal discussion about the time estimate for cross-examination or re-examination by the defence to date, although at a minimum, equality of arms dictates that the Defence be granted the same time as the SPO. Whether that is collectively, or for each defendant, is a matter to be argued before the Panel. Further, the SPO's decision to call 197 witnesses pursuant to Rule 154 may impact on the time needed for cross-examination.²³

24. Subject to the above, the SPO's calculation of 713 hours, if matched by a minimum of 713 hours of cross examination by the defence in total, brings the time needed to hear witness evidence in the SPO's case to 1426 hours. The Panel has indicated that it intends to sit for a maximum of 620 hours in Court per year. It will sit for three consecutive weeks, 20 hours per weeks spread over four days per week. This will be followed by one week out of court, followed by three weeks sitting and two weeks out of court. The pattern will continue to alternate between one and two weeks out of court throughout the trial.²⁴

25. To get an accurate estimate of when the Defence case may begin, it is necessary to add to this figure of 1426 hours sufficient time for the following including, but not limited to: questions posed to the SPO's witnesses by the Legal Representative for the Victims; legal arguments; adjournments for disclosure and review of evidence

²¹ Rule 155 provides for admission of written statements of unavailable persons and of persons subjected to interference. The evidence of these witnesses would be wholly in writing, with neither direct examination or cross-examination possible.

²² See, SPO Witness List, p. 19.

²³ KSC-BC-2020-06, Transcript of Fourteenth Status Conference, Oral Order 1, 8 September 2022, Public, pp. 1517-1519.

²⁴ KSC-BC-2020-06, Transcript of Sixteenth Status Conference, 16 December 2022, Confidential, p. 1699, lines 23-24.

pertaining to the 98 witnesses whose identity and unredacted materials will only be disclosed to the Defence shortly before or during proceedings, and investigation of the same; time for the preparation, argument, decision and potential appeal of any application to dismiss the charges, pursuant to Rule 130; and other factors that may impact the length of the trial such as the sickness of the accused, witnesses or even members of the Panel; unavailability of witnesses the majority of whom will be travelling from overseas; and finally whether the Legal Representative of the Victims calls witnesses between the close of the Prosecution case and the opening of the Defence case. Consequently, with the SPO's case due to start on 1 March 2023, being realistic, it is unlikely that the Defence case will begin before late 2025, worst case early 2026.

26. While no two cases are the same, it is perhaps also instructive to consider the time it took the prosecution to present its case in multi-accused trials at the ICTY in which it called over 100 witnesses. For example, in *Šainović et al.*,²⁵ the six accused were charged with four counts of crimes against humanity and one count of war crimes; there were 117 prosecution witnesses; and 1,455 prosecution exhibits. The prosecution case ran from 10 July 2006 until 1 May 2007, and the defence case ran from 6 August 2007 until 16 May 2008. Thus, the time from the start of the prosecution case to the start of the defence case was 392 days. However, as is clear from the cited statistics, the scope of the *Šainović* case was smaller, both in terms of crimes charged and the number of witnesses, which were approximately one third of those that the SPO intends to call in this case. That said the Defence notes that there were six accused and therefore likely six cross examinations. Notwithstanding, and realising it is approximate, had the ICTY prosecutor called 323 witnesses in *Šainović* and charged 10 counts, as in this case, one would expect the time it took from the start of the

²⁵ See: ICTY, *Prosecutor v. Šainović et al.*, IT-05-87, 'Case Information Sheet', available https://www.icty.org/x/cases/milutinovic/cis/en/cis_sainovic_al_en.pdf. Following the acquittal of Milan Milutinovic, the name of the case was changed from *Milutinović et al.* to *Šainović et al.*

prosecution's case to the start of the defence case to almost treble, bringing it to somewhere around 1,176 days.

27. In *Popović et al.*,²⁶ the seven accused were charged between them with two counts of genocide and conspiracy to commit genocide and six counts of crimes against humanity and war crimes.²⁷ The prosecution called 182 witnesses and there were 2,906 prosecution exhibits. The prosecution case ran from 21 August 2006 to 7 February 2008, and the defence case from 2 June 2008 to 12 March 2009. The time from the start of the prosecution case to the start of the defence case was therefore 651 days. Again, the scope of *Popović et al.* was smaller in terms of crimes charged, and the number of witnesses were just over half those on the SPO's witness list. However, the number of cross-examinations would have been more as there were seven accused. Notwithstanding, and realising it is approximate, had the prosecution called 323 witnesses in *Popović et al.*, and charged 10 counts, as in this case, one would expect the time it took from the start of the prosecution case to the start of the defence case to at least double, bringing it to somewhere around 1,302 days.

28. On any view, as stated above, it is unlikely that the Defence case will begin before late 2025. By this time, the majority of the nine individuals listed above will then be in their 80's, many mid to late 80's. 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.²⁸ Average life expectancy depends on many complex factors, including

²⁶ See: ICTY, *Prosecutor v. Popović et al.*, IT-05-88. 'Case Information Sheet,' available https://www.icty.org/x/cases/popovic/cis/en/cis_popovic_al_en.pdf.

²⁷ Specifically: Popović, Beara, Nikolić, Pandurević and Borovčanin were charged with: One count of genocide (Count 1); and One count of conspiracy to commit genocide (Count 2); Five counts of crimes against humanity: Extermination (Count 3); Murder (Count 4); Persecutions (Count 6); Inhumane acts (forcible transfer) (Count 7); Deportation (Count 8); One count of the violations of the laws or customs of war: Murder (Count 5); and Miletić and Gvero with four counts of crimes against humanity: Murder (Count 4); Persecutions (Count 6); Inhumane acts (forcible transfer) (Count 7); Deportation (Count 8) and One count of the violations of the laws or customs of war: Murder (Count 5).

²⁸ For data regarding risk of incapacity, see: E. Fishman, 'Risk of Developing Dementia at Older ages in the United States' (2017) 54(5) *Demography*: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5624986/>

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. The World Bank indicates that the average male life expectancy at birth is: 75 for Americans; Dutch: 80; French: 79; and [REDACTED].²⁹ Data from UNICEF is similar indicating the average life expectancy for men is: American: 75.4; French: 80.3; [REDACTED]; and Dutch: 80.9 years.³⁰ Therefore, it is undeniable that statistically, when considered individually there is a real risk that any of the nine witnesses' evidence may become 'unavailable' due to death or incapacity from advanced age by the time they testify. However, when considered together, the odds of losing the evidence or one or two of the witnesses must multiply exponentially. They all go to key issues in the case and simply calling them out of order would negate this risk completely. This must be sufficient justification for the Panel to take action now to preserve their testimony. In this regard, the Defence notes that the Rules provide for a Reserve Judge to be assigned to the case as a precaution in the eventuality that another judge is 'unable to continue sitting'³¹. Thus, the Court recognises human frailty and has sensibly built a safety mechanism to ensure that any case is not disrupted if a judge is unable to continue sitting through death or incapacity. The Defence request is akin to this safety function for its witnesses to ensure that their evidence is not lost.

29. Had this trial taken place closer to the end of the war, we would not be in this situation. However, the SPO indicted Mr Thaçi in 2020, more than 20 years after the end of the conflict. Mr Thaçi should not be prejudiced because of this, which is entirely beyond his control. It is imperative that the Court step in and guarantee Mr Thaçi's fundamental fair trial right "to obtain the attendance and examination of witnesses on

²⁹ World Bank, 'life expectancy at birth, total (years)', 2020: https://data.worldbank.org/indicator/SP.DYN.LE00.IN?end=2020&most_recent_year_desc=false&start=2020&view=map.

³⁰ UNICEF, 'Demography - Indicator: Life Expectancy, Sex: Male, Time Period: 2022': https://data.unicef.org/resources/dataexplorer/unicef/f/?ag=UNICEF&df=DM&ver=1.0&dq=.DM_LIFE_EXP..M.&startPeriod=2022&endPeriod=2022

³¹ Rule 19 (5).

his or her behalf *under the same conditions* as witnesses against him”.³² The Defence submit that, by granting this application, it will do so.

30. The Defence submits that there is precedent in the case law of the *ad-hoc* tribunals that advanced age and the length of time before the defence case is likely to be heard are relevant considerations in determining whether depositions are warranted. A review of the case law of the ICTY and ICTR indicates that the time before the defence case is likely to be heard and the age of the witness were factors that merited the granting of depositions under their Rule 71³³ to preserve evidence that would otherwise be unavailable if they did not act. Each case considered turns on its facts. For example, in *Krajišnik and Plavšić*, the Trial Chamber considered that it would be “in the interests of justice” to allow the Defence to take deposition evidence because of the “the age and infirmity of the witness, and the length of time before the defence case is likely to be heard.”³⁴ In *Nzabonimana*, the Defence filed a motion seeking the deposition of a witness on the basis of his old age and frail health. Whilst this application hinged primarily on the ill health of the witness (which is not currently a factor in play in this case), it was also based on his age. The Trial Chamber granted the application “in the interests of justice”, finding that the witness would be unable to attend at trial and his testimony was “sufficiently important to make it unfair to proceed without it.”³⁵ Moreover, they ordered that one of their number, Judge Mparny Rajohson be the Presiding Officer in the deposition.³⁶ Consequently, there is authority for the proposition advanced by the Defence that the age and likely time until the

³² KSC Law, Article 21(4)(f) (emphasis added).

³³ ICTR, Rules of Procedure and Evidence, Rule 71; ICTY, Rules of Procedure and Evidence, Rule 71.

³⁴ ICTY, *Prosecutor v. Krajišnik and Plavšić*, IT-00-39 & 40-PT, Trial Chamber, Decision to proceed by way of deposition pursuant to Rule 71, 16 November 2001.

³⁵ ICTR, *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Trial Chamber III, Decision on Callixte Nzabonimana’s motion for protection measures and deposition of witness RW-42, 27 October 2009, para. 10.

³⁶ *Ibid*, Order No III on page 6.

Defence case are reasons upon which a decision granting a mechanism to preserve evidence that may otherwise be unavailable can be based.

VII. W04147

31. One witness the Defence has included above is currently included on the SPO Witness List: W04147. The Witness Protocol³⁷ prevents the Defence from communicating with him, however, Defence communications with him prior to the imposition of the Protocol have led to his inclusion. His evidence is important for the Defence. The Defence notes that the SPO has stated that he will be called in their first 40 witnesses.³⁸ [REDACTED]. Notwithstanding, the Defence seek an exception be made to the Protocol that allows the Defence to meet with him and prepare him for a deposition to preserve his testimony pursuant to Rule 100, or alternatively that he be tendered to the Defence as a Defence witness for the Defence to take him out of order before the first SPO witness.

VIII. LOCATION AND DATE OF 'OUT OF ORDER' WITNESSES /DEPOSITIONS

32. If the Panel grants the Defence request to hear these witnesses out of order, they will be heard in the Courtroom of the KSC as any other live witness, but simply out of order.

33. If the Panel grants the alternate request for depositions under Rule 100 for each of the nine witnesses, the Defence requests that these be carried out in open session in

³⁷ 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' ("Witness Protocol").

³⁸ KSC-BC-2020-06/F01096, Prosecution Response to Taçi Request for Unique Investigative Opportunities, 10 November 2022, para. 8.

the courtroom of the KSC, in The Hague, if they are well enough to travel, as it is more cost effective to bring the witnesses to the tribunal. Such a presentation will save untold resources on the parties, the Registry, and the relevant judge(s), should these measures instead be taken individually in locations far from the courtroom in The Hague. The experience of in video-link testimony in other international tribunals is a testament to the massive resources that would be necessary should these measures occur on an individual basis.

34. The Trial is scheduled to commence on 1 March 2023.³⁹ The witnesses would have to be heard 'out of order' at a date after 1 March. All of the potential witnesses that the Defence have been in contact with are available in March 2023, apart from one. Jock Covey is available in April 2023, and we propose that he be heard then. The Defence is unable to ascertain the availability of W04147 due to the Witness Protocol.

35. In the alternative, if the Panel wished to preserve the evidence of these witnesses via depositions in advance of trial, this can be done in February 2023 for all save Jock Covey as stated above.

36. It is estimated that it will take up to two days to "hear" the witnesses under either measure (out of order or depositions). It will consist of an examination in chief by the Thaçi Defence and potentially cross examination by the other accused's counsel, and the SPO, together with questions, if desired, from the Victims Counsel and the Panel.

³⁹ KSC-BC-2020-06, Transcript of Sixteenth Status Conference, 16 December 2022, Confidential, p. 1773, lines 5-6.

IX. AREAS ON WHICH THE WITNESSES WILL BE EXAMINED

37. As is outlined in detail in the annexes, these nine 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 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 and over 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; the authority, or not, of the General Staff over the KLA on the ground and the latter's military capacity; the demilitarization and disarmament of the KLA after the war including Thaçi's role in this; and the causes and organised nature, or lack thereof, of the violence in 1999; and [REDACTED]. They will also testify about the historical and political background of the conflict and post conflict situation in Kosovo including the Rambouillet conference and its aftermath and Mr Thaçi's role.

38. Each of these nine 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 behaviour 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 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 Panel, will greatly assist the Panel in finding the truth of what occurred and ultimately assessing the guilt or innocence of Mr. Thaçi.

X. NO ALTERNATIVE OPTIONS

39. As stated above, this application is made as a last resort. There are no satisfactory alternatives open to the Defence, specifically, Rules 153-155 are inadequate. 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 above and the confidential Annexes, the evidence of the nine witnesses goes to the acts and conduct of the accused and therefore any statement taken would not be admissible under Rule 153.

40. 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; and ii) available for cross-examination or any questions from the Panel. This rule is also not applicable to the present situation as the entire premise of this motion is that the relevant witnesses may not be available at the relevant time to be cross-examined.

41. 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 the 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 and that their statements may not be admissible on this basis. If the evidence is admitted, the witness will not be subject to cross examination; and the court will not be able to observe the witness and ask questions which will affect its weight.⁴⁰ In short, this Rule is not the solution.

⁴⁰ ICTY, *Prosecutor v Popovic et al.*, IT-05-88-T, Trial Chamber II, [Judgment Vol. I](#), 10 June 2010, para 60.

XI. CONCLUSION

42. Ideally, the Defence would call these nine 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, due to the advanced age of these witnesses, Mr Thaçi cannot risk waiting until the start of the Defence case to call them as their evidence may not be available, hence this request to take them 'out of turn' at a suitable time.

43. In the alternative, the Defence requests the Trial Panel to preserve the evidence of these nine witnesses pursuant to depositions which they "may observe" under Rule 100.

Word count: 5,680 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

9 January 2023

At Tampa, United States