

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

**Before:** Trial Panel II  
Judge Charles L. Smith, III, Presiding  
Judge Christoph Barthe  
Judge Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Hashim Thaçi

**Date:** 23 March 2023

**Language:** English

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**Public Redacted Version of ‘Thaçi Defence Submissions on the SPO Agreements on Statement of Limited Use with Confidential Annex 1’**

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## I. INTRODUCTION

1. In accordance with the Trial Panel's oral order of 20 March 2023,<sup>1</sup> the Defence for Mr Hashim Thaçi ("the Defence") hereby files the present submissions on the SPO's Agreements on Statement of Limited Use concluded with [REDACTED]<sup>2</sup> and [REDACTED]<sup>3</sup> (collectively, "Agreements").

2. The Defence respectfully requests the Trial Panel to:

- (i) order the SPO to clarify the scope of the Agreements and their legal basis, in general, and their conformity with Article 38(4) of the Law N° 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), specifically;
- (ii) authorise the Defence to reply to the SPO upcoming submissions within 48 hours; and
- (iii) rule on the lawfulness and scope of the Agreements prior to the testimony of [REDACTED] and [REDACTED].

## II. PROCEDURAL BACKGROUND

3. On 30 January 2023<sup>4</sup> and 13 March 2023,<sup>5</sup> the SPO disclosed the identities of [REDACTED] and [REDACTED], respectively, with a less redacted or underacted version of the Agreements signed by these witnesses.<sup>6</sup> These Agreements contain two parts: (i) the waiver of the suspect's right against self-incrimination as well as, *inter alia*, the suspect's undertaking to respond truthfully and completely to SPO's

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<sup>1</sup> KSC-BC-2020-06, Transcript of the Status Conference, 20 March 2023, p. 2138.

<sup>2</sup> Agreement on Statement of Limited Use with [REDACTED], 070705–070707 RED2 ("[REDACTED] Agreement").

<sup>3</sup> Agreement on Statement of Limited Use with [REDACTED], 060458–060462 ("[REDACTED] Agreement").

<sup>4</sup> Disclosure Package 657, dated 30 January 2023.

<sup>5</sup> Disclosure Package 713, dated 13 March 2023.

<sup>6</sup> [REDACTED] Agreement; [REDACTED] Agreement.

questions; and (ii) the undertaking by the SPO not to use the oral or written statements of the suspect, elicited under the Agreements, against the respective suspect, except in case of false testimony and/or other criminal offenses against the administration of justice.<sup>7</sup> Both Agreements refer to Article 38(3) of the Law.

4. Following review of [REDACTED] Agreement, on 3 March 2023, the Defence approached the SPO, *inter partes*, with a request to clarify the legal basis under which the aforesaid agreement was concluded, stressing that Article 38(3) did not appear to authorise such an Agreement.<sup>8</sup> The SPO did not address the Request for Clarification of Legal Basis in its entirety. Instead, the SPO provided a general response, stating that the agreement was “in conformity with the legal framework of the KSC and practice in Kosovo and before comparable institutions”, and focused only on one of the aspects of the [REDACTED] Agreement:<sup>9</sup> the waiver of his right not to incriminate himself, alleged to be in conformity with Article 38(3). The SPO offered no relevant legal references to justify the other, more important, part of the agreement: the SPO’s undertaking not to use the suspect’s evidence against him. The SPO’s response, or lack thereof, reinforced the Defence’s concerns regarding the lack of legal basis for the [REDACTED] Agreement.

5. As a result, the Defence raised this matter before Trial Panel at the status conference on 20 March 2023.<sup>10</sup> In particular, the Defence stressed that not only the legal basis but also the scope of these Agreements were unclear. The Defence noted that the Agreements did not clarify whether the witnesses were entitled to full immunity from any prosecution, on the basis of the witness’ evidence or any other evidence (except for offences against the administration of justice), or whether their

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<sup>7</sup> Paragraph 2 of the Agreements on Statements of Limited Use reads as follow: [REDACTED].

<sup>8</sup> Annex 1, Email of Sophie Menegon to SPO, dated 3 March 2023 (“Request for Clarification of Legal Basis”).

<sup>9</sup> Annex 1, SPO email to Sophie Menegon, dated 6 March 2023 (“SPO Response”).

<sup>10</sup> KSC-BC-2020-06, Transcript of the Status Conference, 20 March 2023, pp. 2133-2138 .

protection was limited to the SPO undertaking not to prosecute them on the basis of their oral or written testimony only. In the latter instance, the SPO would then be entitled to prosecute the relevant witnesses on the basis of other evidence.<sup>11</sup> After a brief discussion, the Trial Panel – at the urging of the SPO – invited the Defence to file written submissions on this issue.<sup>12</sup>

### III. APPLICABLE LAW

#### 6. Pursuant to Article 38(3) of the Law:

3. If questioned, the suspect shall not be compelled to incriminate himself or herself or to confess guilt. Nor shall he or she be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman and degrading treatment or punishment. He or she shall have the following rights of which he or she shall be informed prior to questioning, in a language he or she speaks and understands:

- a. The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Specialist Chambers;
- b. The right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he or she makes shall be recorded and may be used in evidence;
- c. The right to be assisted by Specialist Counsel of his or her own choosing and to be questioned in the presence of Specialist Counsel, including the right to have legal assistance provided by the Specialist Chambers without payment by him or her where he or she does not have sufficient means to pay for it;
- d. The right to have the free assistance of an interpreter if he or she cannot understand or speak the language used for questioning.

#### 7. Article 38(4) of the Law further provides that:

4. Upon a determination that a well-grounded suspicion that a person is criminally liable for any offence within the jurisdiction of the Specialist Chambers, the Specialist Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the person is charged under this Law. The indictment shall be filed with the Specialist Chambers together with supporting material.

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<sup>11</sup> *Ibid.*, pp. 2133-2136.

<sup>12</sup> *Ibid.*, p. 2138.

#### IV. SUBMISSIONS

8. In its Request for Clarification of Legal Basis, the Defence asked the SPO to elucidate the lawfulness of the [REDACTED] Agreement *vis-à-vis* not only Article 38(3), but also Article 38(4) of the Law, which provides that the SPO shall prepare an indictment “[u]pon a determination that a well-grounded suspicion that a person is criminally liable for any offence within the jurisdiction of the Specialist Chambers.” The SPO evaded this question in its response, referring to the Agreements as mere waivers of the suspects’ right against self-incrimination. The SPO’s failure to address this rather straightforward question is telling.

9. According to Article 38(4) of the Law, the SPO is legally required to prepare an indictment “[u]pon a determination that a well-grounded suspicion that a person is criminally liable for any offence within the jurisdiction of the Specialist Chambers.” This provision, which enshrines the principle of mandatory prosecution, contains no exceptions. Consequently, it is clear that the SPO has no discretion to waive the prosecution of a suspect upon the fulfilment of the condition stipulated under Article 38(4) of the Law. By the same token, the SPO has no legal authority whatsoever to enter into an agreement with a suspect by which the SPO abdicates its legal obligation to use any and all evidence it has in its possession to prosecute a suspect for whom it has determined there is a well-grounded suspicion that he/she is criminally liable for an offence within the jurisdiction of the Specialist Chambers.

10. In addition, the two Agreements contain no information on the underlying criminal offence(s) the witnesses are suspected to have committed, nor any precision on the eventual evidence in the SPO’s custody in support of such underlying offence(s). In the absence of such information, it is impossible to assess whether the testimony of the respective suspect affects the SPO’s determination as to whether a well-grounded suspicion exists that the respective suspect is criminally liable for any

offence within the jurisdiction of the Specialist Chambers. As such, the Agreements are vulnerable to abuse and may be misused to circumvent the SPO's legal obligation to pursue mandatory prosecution, whenever the conditions of Article 38(4) of the Law have been met.

11. Furthermore, the Agreements, and the SPO Response, fail to clarify their scope; namely, as noted above, whether the witnesses benefit from full immunity from any prosecution on the basis of any evidence, or whether such immunity is limited to the guarantee not to be prosecuted on the basis of the witness' oral or written testimony only.

12. The lawfulness and scope of the Agreements must be addressed before the oral testimony of these witnesses, since such agreements may have been used to incentivise them to testify. A determination that the Agreements have no proper legal foundation would mean that the SPO solicited the testimony of the respective suspects under unlawful conditions, which may have an impact on the reliability of their evidence. It would also affect the suspects' waivers against self-incrimination, as contained in the Agreements, and the conditions of their appearance before the Trial Panel. Thus, an earlier clarification of the legal basis and scope of the Agreements will enable the Defence and the Trial Panel to assess the impact that any violation of the Law would have on the validity of the Agreements and/or the credibility of witnesses testifying under such Agreements.

## **V. RELIEF SOUGHT**

13. Accordingly, the Defence respectfully requests the Trial Panel to:

- (i) order the SPO to clarify the scope of the Agreements and their legal basis, in general, and their conformity with Article 38(4) of the Law, specifically;

- (ii) authorise the Defence to reply to the SPO upcoming submissions within 48 hours; and
- (iii) rule on the lawfulness and scope of the Agreements prior to the testimony of [REDACTED] and [REDACTED].

**[Word count: 1,609 words]**

Respectfully submitted,



**Gregory W. Kehoe**

**Counsel for Hashim Thaçi**

Thursday, 23 March 2023

At The Hague, The Netherlands