

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

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Thaçi Defence Reply to 'Prosecution response to Thaçi Defence submissions concerning statements of limited use' (F01400)

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I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“the Defence”) hereby replies to the Prosecution response¹ to Thaçi Defence submissions concerning statements of limited use.² Contrary to the SPO submissions,³ the Defence has standing to question the legality and scope of the Agreements. In addition, the SPO fails to justify the legal basis of the Agreements,⁴ which are inconsistent with both the KSC legal framework and Kosovo law.

2. In consequence, the Defence respectfully requests the Trial Panel to:

- (i) Declare the Agreements, and any statements provided thereunder, as null and void, except for the purpose of using the Agreements and statements for cross-examination of the Witnesses by the Defence;
- (ii) Order the SPO to:
 - i. notify the Witnesses that the Agreements are void;
 - ii. inform the Panel on whether such an information has affected the Witnesses’ willingness to testify;
- (iii) Prohibit the SPO from concluding any similar agreement in the current proceedings.

3. This filing is filed as confidential in light of the current classification of the Request and Response. The Defence does not object to its reclassification as public.

¹ KSC-BC-2020-06/F01400, Prosecution response to THAÇI Defence submissions concerning statements of limited use, 27 March 2023, Confidential (“Response”).

² KSC-BC-202006/F01392, Thaçi Defence Submissions on the SPO Agreements on Statement of Limited Use, 23 March 2023, Confidential (“Request”).

³ Response, para. 2.

⁴ The ‘Agreements’ are cited in footnotes 2-3 of the Request. The witnesses who signed such agreements are identified in paragraph 1 of the Request and are referred to herein as the ‘Witnesses’. Finally, the statements given by the Witnesses under the conditions set out in the Agreements are referred to herein as the ‘Limited Use Statements’.

II. SUBMISSIONS

A. The Defence's legal standing to challenge the lawfulness of the Agreements

4. In the absence of any tangible arguments to justify the legal basis of the Agreements, the SPO challenges⁵ the legal standing of the Defence to raise complaints of non-compliance of the Agreements with the Law⁶ and the Rules.⁷ Yet, the Defence has standing to question the legality and scope of the Agreements, since it affects the SPO conduct of the proceedings against Mr Thaçi, in particular the conditions pursuant to which witnesses are interviewed by the SPO and may testify in Court, and consequently, Mr Thaçi's right to a fair trial. The Defence needs to be certain of the lawfulness of the Agreements and to be aware of the full scope of the immunity granted to these Witnesses in order to effectively cross-examine them, particularly to identify potential credibility or other issues.

5. In the Request, the Defence requested the Trial Panel to 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. Although the Request sought information that could be used during the cross-examination of the respective Witnesses – which even the SPO agrees is a legitimate reason⁸ –, another equally important purpose of the Request is to ensure that the SPO acted in accordance with, *inter alia*, Rule 42(1)(b), which explicitly prohibits the SPO from subjecting a suspect to 'to any form of [...] inducement [or] undue promise [...]' This is relevant for the Defence as the SPO's failure to comply with Rule 42(1)(b) affects not only the credibility of the respective Witnesses but also, more importantly, their willingness to testify in these proceedings and the

⁵ Response, para. 2.

⁶ Law No. 05/L-53 on the 'Specialist Chambers and Specialist Prosecutor's Office' ('Law').

⁷ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

⁸ Response, paras. 1 and 4.

procedural basis under which their testimony may be provided. Namely, if the SPO induced these Witnesses to testify under the false pretense that the Agreements were lawful and/or that the SPO had legal authority to provide them with limited immunity for their testimony in the present case, a finding by the Trial Panel that the Agreements are *null* and *void* may have an impact on the Witnesses' willingness to testify and/or may trigger the Trial Panel to order such Witnesses to testify under a special procedural framework or, even, to prevent such Witnesses from testifying.

B- The SPO's 'legal references' only confirm the Agreements' lack of legal basis

6. In its Response, instead of clarifying the legal purpose and basis of the Agreements, the SPO seeks to draw inexistent comparisons between the supposed free and voluntary waiver of the right to remain silent under the Agreements and compelled waivers of the right against self-incrimination that can be ordered exclusively by the Trial Panel under Rules 151(1) and (2).⁹ According to the SPO, these waivers are comparable as they are "*based on similar considerations, serve similar interests and include similar safeguards*".¹⁰ This argument is contradictory and absurd.

7. Firstly, as opposed to the supposed free and voluntary waiver of the right to remain silent in the Agreements, the waiver of the right against self-incrimination foreseen in Rules 151(1) and (2) is compulsory and can be ordered only by the Trial Panel under a specific set of legal conditions, and not by the SPO.

8. Secondly, unlike the explicit legal authority of the Trial Panel to compel a witness to waive his/her right against self-incrimination and, when doing so, to

⁹ Response, para. 4, footnotes 10 and 11.

¹⁰ *Ibid.*

provide limited immunity to the witness, enshrined in Rules 151(1) and (2), the SPO has no comparable legal basis to enter into the Agreements or perform the legal obligations it undertook by the latter. This is evident from the SPO's desperate attempt to justify the lawfulness of the Agreements by invoking general provisions of the Law that have no relevance to the Agreements, such as SPO's legal mandate to "*investigate, including through suspect interviews, war crimes and crimes against humanity*" and its legal authority to "*take measures to preserve evidence and protect the rights and interests of, inter alia, suspects and witnesses*."¹¹ The Response also cites Article 23 of the Law, without explaining how the latter is relevant and applies to the Agreements. These arguments should be summarily dismissed.

9. Thirdly, the Response suggests that Article 35(2)(e) of the Law, which authorizes the SPO to agree "*not to disclose at any stage of the proceedings information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents*", may serve as legal basis of the Agreements. This argument is without merit. While Article 35(2)(e) of the Law provides the SPO with the right to conclude confidentiality agreements with information providers, the aforementioned provision does not authorize the SPO to grant a suspect/witness limited use immunity, as the Agreements purport to do. Likewise, and as noted in the Request, nothing in Article 38 of the Law, which is also cited in the Response, or the other aforementioned legal provisions, gives the SPO the right to forego mandatory prosecution in cases when it determines that there is "*a well-grounded suspicion that a person is criminally liable for any offence within the jurisdiction of the Specialist Chambers*."

10. More importantly, in the Response, the SPO acknowledges that, in spite of the Agreements, "*the Witnesses will have the right to object to providing testimony that might*

¹¹ *Ibid*, para. 5

incriminate them" and that the Trial Panel may then compel them to waive this right according to Rules 151(1) and (2).¹² This appears to be in direct contradiction to the content and purpose of the Agreements. The existence and purpose of Rule 151 lends further credence to the argument that these Agreements were not envisaged under the Rules and the Law, and therefore lack any legal basis. In addition, such an approach will generate substantial issues in the courtroom if a witness continually states he cannot answer a question, especially during cross-examination, requiring the Trial Panel to determine if the witness should be compelled to testify.

11. The Defence further submits that the SPO's references to the "*Kosovo practice*"¹³ are groundless. Article 233 of the Kosovo Criminal Procedure Code¹⁴ relates to plea agreements. As it is clear, the Agreements have not been entered in the process of negotiating a plea agreement with the Witnesses. In any case, it is important to underline that the SPO has not even complied with the requirements of Article 233 of the Kosovo Criminal Procedure Code. In cases when the negotiation of a plea agreement is initiated by the State Prosecutor, the latter is required to (i) send a letter to the Defence counsel with a description of the offered plea agreement, including the terms required under paragraph 12 of this Article, or (ii) meet with the Defence counsel and defendant to negotiate the possibility of and terms for a plea agreement.¹⁵ Nothing in the Agreements suggests that the SPO followed the aforementioned procedure. In fact, as it is evident in the Agreements, the SPO has not even divulged the actual criminal offenses for which the plea agreements may be agreed with the respective Witnesses or the criminal offenses for which they are being investigated and to which limited use immunity under the Agreements would apply. Kosovo Criminal Procedure Code requires such a specification. This is due to the fact that even

¹² Response, para. 4.

¹³ *Ibid* and footnote 19.

¹⁴ Code No. 04/L-123 on 'Criminal Procedure,' as amended and supplemented, ('Kosovo Criminal Procedure Code').

¹⁵ *Ibid*, Article 233(5).

if plea agreements are entered before an indictment has been issued, the State Prosecutor is required to file a special indictment against the defendant on which he/she is pleading guilty, which shall be filed concurrently with the plea agreement.¹⁶

12. Also, according to Article 233(11) of the Kosovo Criminal Procedure Code, cited in the Response, limited use immunity applies only in cases when the plea agreement is not approved by the court, which is not the case here. The aforementioned legal provision provides that *"[i]f the state prosecutor and the Defence counsel or defendant fails to reach a guilty plea agreement, or if the plea agreement is not accepted by the court, any statements of the defendant made during the plea negotiations, as provided in paragraph 3, 4 and 5 of this Article, shall be inadmissible as evidence in the court trial or other related proceedings."*¹⁷

13. More importantly, in case a plea agreements does not enter into effect for any of the aforementioned reasons, the statements provided under limited use immunity are not only inadmissible against the suspect/accused but also cannot be used in any other related proceedings. Accordingly, the Agreements cannot be justified under Article 233 of the Kosovo Criminal Procedure Code. In fact, even if this provision were to apply, it is clear that the Agreements have been concluded in violation of its key requirements.

14. Finally, the Response seeks shelter under Articles 235 – 239 of the Kosovo Criminal Procedure Code to justify the lawfulness of the Agreements. These legal provisions are not applicable to the Agreements as the limited use immunity foreseen under Article 235(1) of the Kosovo Criminal Procedure Code relates to statements made before the judge hearing the application of the State Prosecutor for declaring a

¹⁶ *Ibid*, Article 233(12) and (15).

¹⁷ *Ibid*, Article 233(11).

suspect/accused a cooperative witness. Also, and more importantly, the limited use immunity provided in these cases is much broader than the one provided by the Agreements. According to Article 235(1) of the Kosovo Criminal Procedure Code *"[s]tatements made to the judge during this examination cannot be used in criminal proceedings against the cooperative witness or against any other person as evidence to support a finding of guilt."* Consequently, the Agreements cannot be justified under Articles 235-239 of the Kosovo Criminal Procedure Code, either.

III. RELIEF SOUGHT

15. Accordingly, the Defence respectfully requests the Trial Panel to grant the relief sought in paragraph 2.

[Word count: 1967 words]

Respectfully submitted,



Gregory W. Kehoe

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Wednesday, 29 March 2023

At The Hague, The Netherlands