



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA 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 Guénaél Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Fidelma Donlon

**Date:** 5 April 2023

**Language:** English

**Classification:** Public

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**Decision on Thaçi Defence Motion Regarding Prosecution Agreements on  
Statement of Limited Use**

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**TRIAL PANEL II** (“Panel”), pursuant to Articles 21, 35(1)-(2) and 38 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 2, 43 and 86 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. At the status conference of 20 March 2023, following *inter partes* discussions, the Defence for Hashim Thaçi (“Thaçi Defence”) raised a number of complaints regarding the purported legal basis and scope of agreements on statements of limited use (“Agreements”) entered into by the Specialist Prosecutor’s Office (“SPO”) with two of its proposed witnesses (“Witnesses”).<sup>1</sup> Thereupon, the Panel orally ordered the Parties to make written submissions in relation to this matter.<sup>2</sup>
2. On 22 March 2023, the Thaçi Defence filed its submissions (“Motion”).<sup>3</sup>
3. On 27 March 2023, the SPO filed its response to the Motion (“Response”).<sup>4</sup>
4. On 29 March 2023, the Thaçi Defence replied to the Response (“Reply”).<sup>5</sup>

## II. SUBMISSIONS

5. In its Motion, the Thaçi Defence requests the Panel to:
  - (a) order the SPO to clarify the scope of the Agreements and their legal basis, in general, and their conformity with Article 38(4), specifically

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<sup>1</sup> Transcript of Hearing, 20 March 2023, p. 2133, line 22, to p. 2137, line 5. The Agreements were disclosed to all Defence teams in Disclosure Packages 657 and 713.

<sup>2</sup> Transcript of Hearing, 20 March 2023, p. 2137, lines 7-8, and p. 2138, lines 18-21.

<sup>3</sup> F01392, Specialist Counsel, *Thaçi Defence Submissions on the SPO Agreements on Statement of Limited Use*, 23 March 2023, confidential, with Annex 1, confidential (a public redacted version was filed on 29 March 2023, F01392/RED).

<sup>4</sup> F01400, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Submissions Concerning Statements of Limited Use*, 27 March 2023, confidential.

<sup>5</sup> F01407, Specialist Prosecutor, *Thaçi Defence Reply to ‘Prosecution Response to Thaçi Defence Submissions Concerning Statements of Limited Use’ (F01400)*, 29 March 2023, confidential.

("First Request");

- (b) authorise the Thaçi Defence to reply to the SPO's upcoming submissions within 48 hours ("Second Request"); and
- (c) rule on the lawfulness and scope of the Agreements prior to the testimony of the Witnesses ("Third Request").<sup>6</sup>

6. Underlying these Requests is the Thaçi Defence's contention that Article 38(4) enshrines a principle of mandatory prosecution with no exceptions, which in its view grants the SPO no discretion to waive the prosecution of a suspect upon the fulfilment of the conditions stipulated under that provision.<sup>7</sup> The Thaçi Defence also submits that the SPO has no legal authority to enter into an agreement with a suspect by which the SPO abdicates its legal obligation to use any and all evidence in its possession to prosecute a suspect for whom it has determined that there is a well-grounded suspicion that he/she is criminally liable for an offence within the jurisdiction of the Specialist Chambers ("SC").<sup>8</sup> In addition, the Thaçi Defence complains that 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), thereby making it impossible for the Thaçi Defence to evaluate whether well-grounded suspicions exist in relation to the Witnesses.<sup>9</sup> Furthermore, the Thaçi Defence complains that the Agreements fail to clarify their scope, namely, 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 Witnesses' oral or written testimony only.<sup>10</sup> Moreover, the Thaçi Defence submits that the SPO failed to

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<sup>6</sup> Motion, paras 2, 13.

<sup>7</sup> Motion, para. 9.

<sup>8</sup> Motion, para. 9.

<sup>9</sup> Motion, para. 10.

<sup>10</sup> Motion, para. 11.

provide a sufficiently specific response to its enquiry regarding the legal basis for and scope of the Agreements.<sup>11</sup>

7. In response, the SPO submits that the Motion has no legal basis and is without merit. The SPO avers that the terms of the Agreements are clear, that it is authorised to enter into such agreements, and that the Thaçi Defence has no standing to dispute their terms or to demand additional information regarding their underlying basis.<sup>12</sup> The SPO also submits that agreements of a generally similar sort are known to other relevant legal systems, not least under Kosovo law, and that such agreements are generally consistent with the effective protection of the Accused's rights.<sup>13</sup>

8. The Thaçi Defence replies that it has standing to question the legality and scope of the Agreements<sup>14</sup> and that the SPO failed to justify the legal basis for the Agreements, which it says are inconsistent with both the SC's legal framework and Kosovo law.<sup>15</sup> Furthermore, it requests the Panel to:

- (a) 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;
- (b) order the SPO to notify the Witnesses that the Agreements are void, and to inform the Panel on whether such an information has affected the Witnesses' willingness to testify; and
- (c) prohibit the SPO from concluding any similar agreement in the current proceedings ("Further Requests").<sup>16</sup>

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<sup>11</sup> Motion, paras 4, 8, 11.

<sup>12</sup> Response, paras 1-2.

<sup>13</sup> Response, para. 5.

<sup>14</sup> Reply, paras 1, 4-6.

<sup>15</sup> Reply, paras 1, 6-14.

<sup>16</sup> Reply, paras 2, 15.

### III. DISCUSSION

#### A. FIRST REQUEST AND SECOND REQUEST

9. With respect to the First Request, the Panel considers that the SPO's Response provides sufficient specification of the legal basis relied upon by the SPO to enter into such agreements. Accordingly, the Panel need not address this Request any further.

10. As regards the Second Request, noting that the Thiçi Defence has in the meantime filed a reply,<sup>17</sup> the Panel finds the Second Request to be moot.

#### B. THIRD REQUEST AND FURTHER REQUESTS

##### 1. Legal Basis for Favourable Agreements under the SC's Legal Framework

11. Article 35(1) provides that the Specialist Prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crimes falling within the SC's jurisdiction and shall be independent in the performance of his or her functions. Article 35(2), in particular, letters (b), (g) and (l), then specify that the SPO's authorities and responsibilities include:

b. collecting and examining information and evidence;

[...]

g. taking decisions on the initiation, continuation or termination of criminal proceedings within the subject matter jurisdiction of the Specialist Chambers;

[...]

l. undertaking all other necessary actions required of the Specialist Prosecutor under this Law.

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<sup>17</sup> See above, para. 4.

12. Article 38(1) specifies that the Specialist Prosecutor, other prosecutors and police in the SPO shall have the power to conduct investigations against persons criminally liable for criminal offences within the SC's jurisdiction.

13. Article 38(3) provides that if questioned, a 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. Article 38(3) goes on to list a number of rights which a suspect shall be informed of prior to questioning, in a language he or she speaks and understands. These rights are set out in further detail in Rule 43.

14. Article 38(4) goes on to say this:

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.

15. The Panel is satisfied that the above provisions provide the necessary and sufficient legal basis on which the SPO can enter into favourable agreements with prospective witnesses.

16. Rules 35 and 38 set out the general authorities and responsibilities of the SPO. In so doing, they do not provide an exhaustive but only an illustrative list of steps and measures which the SPO can validly adopt to fulfil its mandate as long as it complies with the fundamental rights of the Accused and maintains the integrity of the proceedings.

17. The possibility for prosecuting authorities to enter into agreements in which a suspect waives his/her right to remain silent and privilege against self-incrimination in favour of an undertaking not to prosecute him/her, or for other

types of favourable treatment such as a reduced sentence, on the basis of information provided in an interview with the prosecuting authorities, is known to many jurisdictions, national and international. Most relevantly for the present purpose, Kosovo law provides for the possibility of favourable agreements in the context of a guilty plea, with the possibility of punishment being waived for a cooperative witness.<sup>18</sup> Favourable agreements are also used, under different names, before international jurisdictions operating under procedural regimes generally comparable to that in place before the SC, in particular, before the International Criminal Tribunal for the Former Yugoslavia (“ICTY”)<sup>19</sup> and the International Criminal Court (“ICC”).<sup>20</sup> Neither the ICTY Statute nor the ICC Statute provide for an express legal basis authorising the use of such instrument. Instead, the possibility for the Prosecution to enter into such agreements comes under the umbrella of prosecutorial tools inherent to the effective exercise of its mandate. As explained in the *Prosecutor v. Halilović* proceedings before the ICTY:

[I]t is within the sole discretion of the Prosecution whether to deem an individual a “suspect” and whether to enter into a favourable agreement, if any, with an individual [...].<sup>21</sup>

18. Neither the Law, nor the Rules, set particular conditions of form for such agreements. That, too, falls within the general discretion of the SPO. Nor do the Rules demand that the SPO disclose the information based on which it came to the

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<sup>18</sup> Articles 233(4) and (11), and 234-239 of the Criminal Procedure Code of Kosovo, Law No. 04/L-123, adopted on 13 December 2012.

<sup>19</sup> See e.g. ICTY, [Manual on International Criminal Defence: ADC-ICTY Developed Practices \(2011\)](#), in particular, paras 27 and 36. For an illustration, see e.g. ICTY, *Prosecutor v. Halilović*, IT-01-48-PT, [Decision on Defence Motion for Identification of Suspects and Other Categories Among its Proposed Witnesses](#) (“Halilović Decision”), 14 November 2003, p. 3. See also *Prosecutor v. Obrenović*, IT-02-60-T, [Annex A to the Joint Motion for Consideration of Plea Agreement between Dragan Obrenović and the Office of the Prosecutor Plea Agreement](#), 20 May 2003; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, [Transcript of Hearing](#), 21 May 2003, pp. 557-558.

<sup>20</sup> The SPO cites the following as an example: ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-868-Red, [Public Redacted Version of Decision on Defence Application for a Permanent Stay of the Proceedings due to Abuse of Process](#), 5 December 2013, para. 94.

<sup>21</sup> See e.g. ICTY, [Halilović Decision](#), p. 3.

view that an individual should be regarded as a suspect. Regarding the tenor of any such agreement, the SPO is only bound to ensure that the fairness of proceedings and the rights of the Accused are not being prejudiced. This requires the SPO to disclose the existence and tenor of any such agreement to the Defence,<sup>22</sup> which has been done in the present case.<sup>23</sup>

19. On that basis, the Panel finds that the SPO had the authority to enter into favourable agreements with prospective witnesses, including the two of concern to the present Motion.

## 2. Article 38(4) – Decision Whether to File an Indictment

20. The Taçi Defence argues that, once it has determined that an individual fulfils the requirements of Article 38(4), the SPO must indict the relevant individual and has no discretion not to do so.

21. As a preliminary matter, the Panel notes that the test relevant to determining whether an individual should be regarded as a suspect for the purpose of Article 38(3) and Rules 2 and 43 is different from the test applicable to the question of whether a person should be indicted under Article 38(4). The standard applicable to the former is that of ‘grounds to believe’.<sup>24</sup> This standard is mirrored in Rule 43(1), which guarantees to those concerned certain minimum rights provided under Article 38(3). *In contrast*, the test applicable under Article 38(4) to the question of indictability is that of ‘a well-grounded suspicion’. That test is in turn mirrored in Rule 86(4), which regulates the process of confirmation of indictments.

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<sup>22</sup> See, again, ICTY, [Halilović Decision](#), p. 3.

<sup>23</sup> See above, fn. 1.

<sup>24</sup> Rule 2 (“Suspect”).



22. The test applicable under Article 38(4) and Rule 86(4) ('a well-grounded suspicion') is higher than that of Article 38(3) and Rules 2 and 43 ('grounds to believe'). This is the logical consequence of the fact that an individual against whom information of criminal conduct exists should enjoy the protection of his rights during the investigation regardless of whether he/she will be indicted at a later stage. The different standards also reflect a difference of purposes between these provisions. The relative breadth of the definition of a suspect within the meaning of Article 38(3) and Rules 2 and 43 is intended to ensure that the rights of any person who could incriminate him- or herself as part of the investigation are being effectively protected. In contrast, the purpose of Article 38(4) is to ensure that equality of treatment and the protection from discrimination are guaranteed in respect of those indicted before the SC.<sup>25</sup>

23. The difference in those tests means that a person in respect of whom there are 'grounds to believe' that he/she committed or participated in the commission of a crime within the SC's jurisdiction does not necessarily qualify under the higher standard under Article 38(4) and Rule 86(4). In other words, the fact that an individual is regarded as a suspect, within the meaning of Article 38(3) and Rules 2 and 43, does not compel the necessary inference that this person meets the requirements for indictability under Article 38(4) and Rule 86(4). This is further highlighted by Rule 47(1), which makes it clear that there is no necessary and automatic relationship between the determination of an individual's status as a suspect and the filing of an indictment against him/her.

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<sup>25</sup> See ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, [Decision on Motion by the Accused to Dismiss all Charges Against Him \(Submission 387\) and its Addendum \(Submission 391\)](#) ("Šešelj Decision"), 18 September 2008, para. 18; *Prosecutor v. Delalić et al.*, IT-96-21-A, [Judgement](#), 20 February 2001, para. 610; *Prosecutor v. Milutinović et al.*, IT-05-87-T, [Decision on Nebojsa Pačković's Motion for Dismissal of the Indictment Against Him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the Former Yugoslavia](#) ("Milutinović et al. Decision"), 21 February 2008, para. 25. See also [Milutinović et al. Decision](#), para. 23.

24. In the present case, there is no indication that the SPO has formed the view that either Witness met the threshold relevant to Article 38(4).<sup>26</sup> As explained above, the fact that these individuals were regarded as suspects, within the meaning of Article 38(3) and Rules 2 and 43, does not compel the inference that they were also regarded as meeting the higher threshold for an indictment under Article 38(4), a decision that the SPO, like any other prosecution, can and must in principle make only at the end of its investigation. Therefore, the Thaçi Defence has not demonstrated that the SPO was required to indict the Witnesses. For the foregoing reasons, the Panel need not determine for the present purposes whether Article 38(4) grants the SPO any discretion in deciding whether to indict an individual who meets the threshold relevant to that provision.

25. As noted above, the purpose of Article 38(4) is to ensure that equality of treatment and protection from discrimination is guaranteed in respect of those indicted before this jurisdiction.<sup>27</sup> With respect to the question whether in this case the SPO acted in compliance with these guarantees, the Panel notes the following. The SC's jurisdiction is not general in character. Instead, as is apparent from the Law, its jurisdiction has been carved *ratione temporis*, *ratione loci*, *ratione personae* and *ratione materiae* in a particular way to limit the SC's jurisdictional competence over a particular category of crimes. Equality of treatment and protection from discrimination is to be interpreted and guaranteed within that particular jurisdictional framework.<sup>28</sup> The Panel notes in that regard that the SC's jurisdiction is limited to cases that arise out of the work of the Special Investigative Task

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<sup>26</sup> The Agreements merely show that the Witnesses were regarded by the SPO as 'suspects' for the purpose of Article 38(3).

<sup>27</sup> See above, para. 22.

<sup>28</sup> KSC-CC-2022-13 (and KSC-CC-2022-14), F00010, Specialist Chamber of the Constitutional Court, *Decision on the Referral of Jakup Krasniqi Concerning the Legality of Charging Joint Criminal Enterprise and the Referral of Kadri Veseli Concerning Decision of the Appeals Panel on Challenges to the Jurisdiction of the Specialist Chambers*, 13 June 2022, para. 23. See also KSC-BC-2020-06, IA009/F00030, Court of Appeals Panel, *Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers"* ("23 December 2021 Appeals Decision"), 23 December 2021, paras 28, 44-45.

Force<sup>29</sup> which, in turn, relates to the Council of Europe Parliamentary Assembly Report of 7 January 2011 (“Council of Europe Report”).<sup>30</sup> This peculiar jurisdictional arrangement has been interpreted as requiring proof of a sufficient connection between the charges brought against an individual and the Council of Europe Report.<sup>31</sup> A determination as to the existence of such a link is to be made primarily by the SPO, under the control, if necessary, of the competent Panel.<sup>32</sup>

26. In the present case, the *Thaçi* Defence has failed to demonstrate that the SPO abused its authority and/or violated the Accused’s rights to equality of treatment and protection from discrimination when deciding not to indict the Witnesses.<sup>33</sup> In this regard, the Panel shares the following views of Judge David Baragwanath of the Special Tribunal for Lebanon:

While it is greatly to be preferred that all who commit criminal conduct are brought to justice, failure to meet that standard does not as a rule afford a defence to any who are brought to trial. Their right is to fairness of their trial, not to a discharge on the ground that others have not, or not yet, been charged. The latter will continue to face the prospect that in time they too will be tried. [...].<sup>34</sup>

27. Fairness demands that any agreement between the SPO and a prospective witness granting him or her any benefit or favour be disclosed insofar as the

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<sup>29</sup> See Article 1(2) (“Specialist Chambers within the Kosovo justice system and the Specialist Prosecutor’s Office are necessary to fulfil the international obligations undertaken in Law No. 04/L-274”), and Article 1(1) of Law No. 04/L-274.

<sup>30</sup> Articles 6(1), 12-14. See also F00026, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Hashim *Thaçi*, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 26 October 2020, strictly confidential and *ex parte*, paras 32 ff. (a confidential redacted version, F00026/CONF/RED, and a public redacted version, F00026/RED, were issued on 19 and 30 November 2020, respectively).

<sup>31</sup> See F00412, Pre-Trial Judge, *Decision on Motions Challenging the Jurisdiction of the Specialist Chambers*, 22 July 2021, paras 81 ff., 107 ff. (in particular, paras 108 and 111), and paras 124 ff. and 139 ff. See also 23 December 2021 Appeals Decision, paras 66 ff., in particular, paras 66, 73 and 83.

<sup>32</sup> *Ibid.*

<sup>33</sup> See [Šešelji Decision](#), para. 21.

<sup>34</sup> STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR90.1, [Decision on the Defence Appeals Against the Trial Chamber’s “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal”, Separate and Partially Dissenting Opinion of Judge Baragwanath](#) (“*Ayyash et al. Decision*”), 24 October 2012, para. 95. See also [Ayyash et al. Decision](#), paras 93-94.

existence and content of those agreements might be relevant to assessing his or her credibility as a witness.<sup>35</sup> Fairness does not demand, however, that the Defence must receive the information on which the SPO came to the view that an individual should be regarded as a suspect, should be indicted (or not) or should be offered a favourable agreement.<sup>36</sup> The Taçi Defence has provided no basis and no justification for why an order to disclose such information would have to be made here in relation to the Witnesses.

28. In light of the above, the Panel finds that the Agreements are lawful. The Third Request and the Further Requests are therefore dismissed.

#### IV. DISPOSITION

29. For the above-mentioned reasons, the Panel hereby:

- (a) **FINDS** that the First Request and the Second Request are moot;
- (b) **FINDS** that the Defence has failed to establish that the SPO entered into the impugned Agreements reached with relevant witnesses without a valid legal basis; and

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<sup>35</sup> See ICTY, [Halilović Decision](#), p. 3.

<sup>36</sup> See ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, [Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose Its Notes from Plea Discussions with the Accused Nikolić and Request for an Expedited Open Session Hearing](#), 13 June 2003, p. 5.

(c) **DISMISSES** the Third Request and the Further Requests.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style with a horizontal line underneath it.

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

Dated this Wednesday, 5 April 2023

At The Hague, the Netherlands.