



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:** 13 April 2023

**Language:** English

**Classification:** Public

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**Public Redacted Version of Decision on Thaçi Defence Request for Disclosure of  
Information Related to the Relocation of Prosecution Witnesses**

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**TRIAL PANEL II** (“Panel”), pursuant to Articles 21(2) and (4)(f), 23(1), 34(8) and 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 102(3), 103 and 116(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 20 March 2023, during the Status Conference, the Defence for Mr Thaçi (“Thaçi Defence”) raised issues pertaining to the relocation of witnesses and the disclosure of information associated therewith. In response, the Panel invited the Thaçi Defence to raise the matter in writing should it wish the Panel to adjudicate the issue.<sup>1</sup>

2. On 28 March 2023, the Thaçi Defence filed a request for disclosure of information related to the relocation of prosecution witnesses (“Request”).<sup>2</sup>

3. On 6 April 2023, the Specialist Prosecutor’s Office filed its response to the Request (“Response”).<sup>3</sup> On the same day, the Registry filed its submissions in relation to the Request (“Registry Submissions”).<sup>4</sup>

## II. SUBMISSIONS

4. The Thaçi Defence requests the Panel to order the SPO and/or the Registry to disclose to the Defence: (i) the costs associated with the relocation and subsistence of [REDACTED] (“Witnesses”); (ii) how many family members were involved

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<sup>1</sup> Transcript of Hearing, 20 March 2023, pp. 2119-2120.

<sup>2</sup> F01404, Specialist Counsel, *Thaçi Defence Request for Disclosure of Information Related to the Relocation of Prosecution Witnesses*, 28 March 2023, confidential, with Annexes 1-2, confidential.

<sup>3</sup> F01429, Specialist Prosecutor, *Prosecution Response to ‘Thaçi Defence Request for Disclosure of Information Related to the Relocation of Prosecution Witnesses’*, 6 April 2023, confidential.

<sup>4</sup> F01436, Registry, *Registry Submissions in Relation to Thaçi Defence Request for Disclosure of Certain Information Related to Witnesses (F01404)*, 6 April 2023, confidential.

with the relocation of these witnesses; and (iii) the date of relocation of these witnesses (“Information Sought”).<sup>5</sup>

5. The SPO responds that the Request should be rejected as: (i) the Information Sought relates to the witness protection programme (“WPP”) managed by the neutral and independent Registry and is not subject to disclosure; and (ii) the Defence’s unfounded allegations that relocation as part of the WPP necessarily impacts the credibility of the Witnesses and is therefore subject to disclosure ignores the scope of Rules 102-103 and the nature and purposes of the WPP.<sup>6</sup> The SPO therefore submits that the Panel should dismiss the Request.<sup>7</sup>

6. The Registry submits that it maintains strict confidentiality in relation to the WPP, upholding a level of independence from all parties and participants to the proceedings, including the calling party, who is also not provided with details regarding the implementation of protection arrangements.<sup>8</sup> The Registry further submits that the type of assistance and protective measures provided to a witness, with the resulting costs, are determined in an objective manner, based on the profile of an individual or family.<sup>9</sup> The Registry confirms that all such costs covered are necessary, reasonable and justifiable in the specific circumstances, reflective of the actual costs incurred.<sup>10</sup>

### III. DISCUSSION

#### A. PARTIES AND PARTICIPANTS’ SUBMISSIONS

7. The Thaçi Defence submits that physical and long-term relocation of witnesses goes far beyond the usual management of witnesses and is an

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<sup>5</sup> Request, paras 1-2, 32.

<sup>6</sup> Response, para. 1.

<sup>7</sup> Response, para. 11.

<sup>8</sup> Registry Submissions, para. 8.

<sup>9</sup> Registry Submissions, para. 10.

<sup>10</sup> Registry Submissions, para. 11.

extraordinary measure, which constitutes an incentive for a witness to testify and may have an impact on his/her credibility.<sup>11</sup> The Thaçi Defence therefore submits that details surrounding witness relocation, including the date of relocation, number of relatives involved, and related costs, including any subsistence payments, must be disclosed to the Defence, in order for the Defence to be able to explore that line of questioning in its cross-examination of the witness.<sup>12</sup> The Thaçi Defence states that the Defence has not been disclosed any details regarding the relocation, [REDACTED], of the Witnesses, by the SPO or the Registry.<sup>13</sup> In the Thaçi Defence's view, the disclosure of information related to the relocation of the Witnesses is justified as: (i) the Thaçi Defence is not requesting information regarding their new [REDACTED] of residence nor the working practice of the Registry with regard to relocation, but simply the costs and number of persons involved;<sup>14</sup> and (ii) the Defence must be in a position to explore the credibility issues raised by the Witnesses' relocation given that their testimony goes directly to the conduct of the Accused.<sup>15</sup> Noting that some of the requested information may be in the Registry's custody, the Thaçi Defence submits that the Panel has the authority to order the Registry to disclose to the Defence the Information Sought, pursuant to the legal framework of the Specialist Chambers ("SC").<sup>16</sup>

8. The SPO responds that the Request is based on fundamental mischaracterisation of relocation as part of the WPP.<sup>17</sup> It contends that relocation is a last resort protective measure through which the Witnesses, as a matter of strict necessity, were relocated away from the source of grave threats to their safety and security.<sup>18</sup> The SPO argues that: (i) the WPP provides for equal

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<sup>11</sup> Request, para. 23.

<sup>12</sup> Request, para. 23.

<sup>13</sup> Request, para. 26.

<sup>14</sup> Request, para. 28.

<sup>15</sup> Request, para. 30.

<sup>16</sup> Request, para. 31.

<sup>17</sup> Response, para. 2.

<sup>18</sup> Response, para. 2.

treatment for all witnesses requiring relocation; (ii) the Registry ensures that payments and assistance to witnesses in the context of the WPP are necessary and justifiable, and reflective of the actual costs incurred in the individual case; (iii) necessary assistance provided as part of the WPP does not impact witness credibility; (iv) the Information Sought is not subject to disclosure; and (v) the Defence relies on inapplicable jurisprudence and disregards decisions that found that necessary assistance provided by the Registry and [REDACTED] – as distinguished from the Prosecution – to relocated witnesses did not impact credibility and was not subject to disclosure.<sup>19</sup> The SPO maintains that it is discharging its disclosure obligations, including in relation to any witness expenses or benefits which may reasonably impact on witness credibility. It submits that the Information Sought does not fall into this category, does not impact on witness credibility, and is not subject to disclosure.<sup>20</sup> Lastly, the SPO submits that the Thaçi Defence’s submissions as to the materiality of specific relocation dates are unsupported.<sup>21</sup>

9. The Registry submits that [REDACTED], details related to the implementation of the WPP and relocation, such as the ones requested by the Defence, should not be provided to the Parties. It further submits that the amounts spent in relation to the WPP and relocation are only what is necessary, reasonable and justifiable.<sup>22</sup> The Registry requests that, if the Panel decides that further information should be made available, the information be kept strictly confidential and be provided to the Panel only.<sup>23</sup>

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<sup>19</sup> Response, paras 3-6.

<sup>20</sup> Response, paras 7-8.

<sup>21</sup> Response, para. 9.

<sup>22</sup> Registry Submissions, para. 12.

<sup>23</sup> Registry Submissions, para. 13.

## B. DEFENCE REQUEST FOR AN ORDER TO THE SPO AND/OR THE REGISTRY

10. The Panel observes that, pursuant to Rules 102(3) and 103 (subject to Rules 107 and 108), the SPO must disclose material in its possession that: (i) is deemed by the Defence to be material to its preparation or were obtained from or belonged to the Accused; or (ii) may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility or reliability of the Specialist Prosecutor's evidence. The Panel notes that information pertaining to payments, benefits or other forms of assistance, given to a witness and/or his or her family members, which go beyond the expenses reasonably required for the management of the witness, may be relevant to evaluating the credibility of witnesses and may be material to the Defence preparation, and is therefore expected to be considered by a trial panel when making an assessment of a witness's credibility.<sup>24</sup> The Panel therefore finds that, contrary to the SPO's views,<sup>25</sup> information pertaining to payments, benefits or other forms of assistance given to a witness and/or his or her family members falls within the SPO's disclosure obligations under Rules 102(3) or 103 when such assistance goes beyond the expenses reasonably required for the management of the witness.

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<sup>24</sup> ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, Trial Chamber III, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses ("[Karemera et al. Decision](#)"), 23 August 2005, para. 7. See also F01149, Pre-Trial Judge, *Decision on Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR)* ("Pre-Trial Judge's Decision"), 9 December 2022, confidential, para. 61; ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Trial Chamber II, [Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68bis](#), 12 October 2011, para. 45; ICTR, *Prosecutor v. Nzirorera et al.*, ICTR-98-44-I, Trial Chamber III, [Decision on the Defence Motion for Disclosure of Exculpatory Evidence](#), 7 October 2003, para. 16; STL, *Prosecutor v. Ayyash et al.*, STL-11-01-T/TC, F1519, Trial Chamber, Decision on Prosecution Witness Expenses ("[Ayyash et al. Decision](#)"), 9 May 2014, paras 8-12; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Appeals Chamber, Judgment ("[Taylor Appeal Judgment](#)"), 26 September 2013, paras 139-142; ICC, *The Prosecutor v. Bemba*, ICC-01/05-01/08-2924-Red, Trial Chamber III, [Public Redacted Version of "Decision on 'Defence Motion Concerning Information on Contacts \[of\] Witnesses 169 and 178 with Other Witnesses'"](#), 11 December 2014, para. 19.

<sup>25</sup> Annex 1 to the Request, p. 2. See also Response, paras 1, 7.

11. The Panel notes that relocation has been considered to fall within those forms of assistance to a witness and/or his or her family members that could affect the credibility of a witness.<sup>26</sup> As such, the Panel finds that information that a witness was relocated falls within the SPO's disclosure obligations. The Panel finds, furthermore, that the SPO has fully discharged its disclosure obligations by notifying the Defence that the Witnesses have been relocated.<sup>27</sup> The Panel rejects the Thaçi Defence's submissions that information pertaining to the costs associated with witness relocation must also *always* be disclosed insofar as this form of assistance to witnesses *necessarily* goes beyond the usual management of the witnesses.<sup>28</sup> The Panel stresses that relocation cannot fairly be described as "an economic and social opportunity".<sup>29</sup> As a result of relocation, witnesses are uprooted from their community and have no choice but to endure severe and often long-term consequences in association with such measures. Because of its negative effect upon those concerned, relocation is a measure of last resort intended to protect individuals at particular risk of harm. The Panel is therefore of the view that reasonable costs associated with such an exceptional measure do not fall within the disclosure obligations of the SPO.<sup>30</sup>

12. As to the assessment of the reasonableness of the relocation costs, upon which rests the existence of a disclosure obligation on the part of the SPO, the Panel observes that the SC's disclosure regime is based on a presumption of good faith on the part of the SPO, *i.e.* on a presumption that the SPO will disclose what the Rules requires it to disclose. The Panel is of the view that, to the extent that the information is within the SPO's custody, control or actual knowledge, it falls

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<sup>26</sup> ICTY, *Prosecutor v. Martić*, IT-95-11-T, Trial Chamber I, [Judgement](#), 12 June 2007, paras 36-38. *See also* ICTR, *Prosecutor v. Zigiranyirazo*, ICTR-01-73-T, Trial Chamber III, [Judgement](#), 18 December 2008, para. 139; SCSL, [Taylor Appeal Judgment](#), para. 141.

<sup>27</sup> Annex 1 to the Request, p. 2; F01335, Specialist Prosecutor, *Delayed Disclosure Notification for Four Witnesses*, 1 March 2023, confidential, para. 1, footnote 4. *See also* Request, paras 5, 10.

<sup>28</sup> Request, para. 23.

<sup>29</sup> Request, para. 29.

<sup>30</sup> *See* Pre-Trial Judge's Decision, para. 61; [Karemera et al. Decision](#), para. 7.



within the SPO's primary responsibility to determine whether the costs associated with the relocation of a witness goes beyond the reasonable costs for such a measure and, as such, has to be disclosed to the Defence.<sup>31</sup> In this regard, the Panel recalls its direction to the SPO to adopt a conservative understanding of its obligations under Rule 103 whereby, in case of doubt as to the exculpatory nature of the material in question, the SPO should err on the side of disclosure.<sup>32</sup> The Panel finds that the Thaçi Defence has not established that: (i) the SPO has custody, control or actual knowledge of information on the costs of relocation of the Witnesses, which it failed to disclose; and (ii) the SPO has failed to discharge its disclosure obligations with respect to information pertaining to any of the [REDACTED] witnesses concerned. The Panel also notes the Registry's submission that costs covered for witness relocation are necessary, reasonable and justifiable in the specific circumstances of the witnesses, reflective of the actual costs incurred.<sup>33</sup> There is no basis before the Panel to suggest this assessment is incorrect. The Panel therefore rejects the Thaçi Defence's request for an order to the SPO or the Registry to disclose the costs associated with the relocation and subsistence of the Witnesses.

13. Turning to the Thaçi Defence's request for information pertaining to the date and number of relatives concerned by the Witnesses' relocation. First, the Defence has failed to establish that the SPO has custody, control or actual knowledge of that information. Secondly, even if that was the case, the Defence has failed to demonstrate how such information could affect the credibility of the Witnesses and is therefore subject to disclosure. The Panel therefore rejects the Thaçi Defence's request for an order to the SPO to disclose: (i) how many family

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<sup>31</sup> See ICTR, [Karemera et al. Decision](#), para. 7; STL, [Ayyash et al. Decision](#), para. 9.

<sup>32</sup> F01245, Trial Panel II, *Decision on Thaçi Defence Request for a Finding of Disclosure Failure*, 1 February 2023, para. 29. See also ICC, *The Prosecutor v. Ntaganda*, ICC-01/04-02/06-904, Trial Chamber VI, [Decision on Defence Requests Seeking Disclosure Orders and a Declaration of Prosecution Obligation to Record Contacts with Witnesses](#), 16 October 2015, para. 32.

<sup>33</sup> Registry Submissions, para. 11.



members were involved with the relocation of the Witnesses; and (ii) the date of relocation of the Witnesses.

14. Lastly, the Panel would emphasise that the SPO's apparent suggestion that it would have no disclosure obligations in respect of benefits associated with relocation – where they go beyond the expenses reasonably required for the management of the witness – is incorrect. The SPO's disclosure obligations are not dependent on whether it is the SPO or the Registry that is in charge of the relocation of SPO witnesses. The determining factor is whether the SPO has custody, control or actual knowledge of information that falls within its disclosure obligations.

#### IV. CLASSIFICATION

15. The Panel notes that the Request, the Response and the Registry Submissions have been filed confidentially. The Panel notes that the SPO does not object to the reclassification of the Response as public.<sup>34</sup> The Panel therefore: (i) directs the Registry to reclassify the Response as public; and (ii) orders the Thaçi Defence and the Registry to file public redacted versions of the Request and the Registry Submissions by Friday, 28 April 2023.

#### V. DISPOSITION


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

- a) **REJECTS** the Request;
- b) **DIRECTS** the Registry to reclassify the Response as public; and

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<sup>34</sup> Response, para. 10.

- c) **ORDERS** the Thaçi Defence and the Registry to file public redacted versions of the Request and the Registry Submissions by Friday, 28 April 2023.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style and is positioned above a horizontal line.

**Judge Charles L. Smith, III**

**Presiding Judge**

Dated this Thursday, 13 April 2023

At The Hague, the Netherlands.