

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 21 February 2022

Language: English

Classification: Public

Thaçi Defence Motion for Disclosure of Witnesses with Dual Status

Specialist Prosecutor

Jack Smith

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagenda

I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (“Defence”) hereby requests the Pre-Trial Judge order the disclosure to the Defence of the witness number and application forms of the witnesses with dual status, *i.e.* of the witnesses on the SPO’s list of witnesses¹ who have been authorised to participate as victims.² The Defence notes that both the Victims’ Counsel and the SPO have alluded to such victim-witness individuals in their previous filings, and that the issue of contact with dual status witnesses is on the agenda of the hearing scheduled for 22 February 2022.³ Given the SPO has not been disclosed the victims’ application forms, and may not be aware of their identity,⁴ the Defence suggests the adoption of a system similar to the one applied before the International Criminal Court (“ICC”). Therefore, it requests the Pre-Trial Judge to:

- (i) Order the Prosecutor, the Registry and the Victims’ Counsel to liaise without delay to identify the dual status victim-witness individuals;
- (ii) Order the Registry to transmit to the Prosecutor all victim application forms of dual status victim-witness individuals, together with the supporting documents, in an unredacted format; and
- (iii) Order the Prosecutor to apply redactions, if necessary, in accordance with the redaction regime defined by the Framework Decision on Disclosure of Evidence and Related Matters,⁵ and to disclose the said application forms and supporting documents to the Defence.

¹ KSC-BC-2020-06/F00631RED/A02/CONF/RED, Confidential Redacted List of Witnesses.

² KSC-BC-2020-06/F00257, Public Redacted Version of First Decision on Victims' Participation, 21 April 2021 (“First Decision on Victims’ Participation”); KSC-BC-2020-06/F00611/RED, Public Redacted Version of Second Decision on Victims' Participation, 10 December 2021 (“Second Decision on Victims’ Participation”).

³ KSC-BC-2020-06/F00698, Decision on Request for Hearing, 16 February 2022, para. 11(ii).

⁴ First Decision on Victims’ Participation, para. 70; Second Decision on Victims' Participation, para. 54.

⁵ KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2021 (“Framework Decision”).

II. APPLICABLE LAW

2. Rules 113 and 114 of the Rules of Procedure and Evidence (“Rules”) define the modalities of admission of victims for participation in the proceedings. Rule 113(1) specifies that “a person claiming to be a victim of a crime alleged in the indictment may file an application for admission as a victim participating in the proceedings, specifying how he or she qualifies as a victim and providing the location and date of an alleged crime giving rise to harm. Application forms shall not be disclosed to the Parties.”⁶

3. Pursuant to Rule 114(4), “where necessary and depending on the circumstances, the Panel shall issue specific guidelines regulating the participation of victims in the proceedings, in accordance with Article 22(3) and (6) of the Law.” In accordance with Article 22(6) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), the Specialist Chambers “must ensure that the victims’ participation in the proceedings is neither prejudicial to nor inconsistent with the rights of the accused.”⁷

4. Rule 80(1) of the Rules further provides that:

(1) Pursuant to Article 23(1) of the Law, a Panel may, *proprio motu* or upon request by a Party, the Witness Protection and Support Office, a witness, or Victims’ Counsel, where applicable, order appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings and others at risk on account of testimony given by witnesses, provided that the measures are consistent with the rights of the Accused.⁸

⁶ Emphasis added.

⁷ KSC-BC-2020-05/F00152, Decision on victims’ procedural rights during trial, 12 July 2021, para. 23 (emphasis added).

⁸ Emphasis added.

5. Rule 81 of the Rules defines the regime applicable to the variation of protective measures:

(1) Once protective measures have been ordered by a Panel in respect of a witness, victim participating in the proceedings, or other person at risk on account of testimony given by witnesses, such measures:

[...]

(b) shall not prevent the Specialist Prosecutor from discharging any disclosure obligations under the Rules in subsequent proceedings, provided that he or she notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered and of the obligation to abide thereby.

(2) A Party in the initial or subsequent proceedings within the Specialist Chambers or the Registrar seeking to vary protective measures ordered shall:

(a) apply to the Panel which ordered the protective measures; [...]

(6) The Panel or the Single Judge determining an application under this Rule shall ensure through the Witness Protection and Support Office that the protected person has given consent to the variation of protective measures. In the absence of such consent, variation of protective measures may be ordered *proprio motu* if justified by exigent circumstances or where a miscarriage of justice would otherwise result.⁹

6. Rules 102 and 103 of the Rules detail the disclosure obligations of the SPO. Pursuant to Rule 102(1)(b)(i), the SPO shall make available to the Defence within the time limit set by the Panel, and no later than thirty days prior to the opening of the SPO's case, the statements of all witnesses whom the SPO intends to call to testify at trial. Pursuant to Rule 102(3), the SPO shall disclose to the Defence, upon request and without delay, any statements or documents in the custody or control of the SPO, which are deemed by the Defence to be material to its preparation. Rule 103 requires that the SPO disclose to the Defence, immediately, any information as soon as it is in his or her custody, control or actual knowledge, which may affect the credibility or reliability of the Specialist Prosecutor's evidence.

7. Neither the Law or the Rules define the regime applicable to witnesses who have dual status, *i.e.* who have been admitted to participate in the case as victims. The

⁹ Emphasis added.

Specialist Chambers have also not ruled on the issue of disclosure of the application forms of witnesses with dual status.

8. The case law of the International Criminal Court (“ICC”) is therefore relevant: it considers that while dual status witnesses may benefit from protective measures, this should not prevent the disclosure of their identity and application forms to the Defence, by the prosecution, in accordance with its disclosure obligations.¹⁰ For instance, in the *Yekatom and Nagaiissona* case, the ICC Pre-Trial Chamber II issued the following Decision on Motion for Disclosure of Witnesses with Dual Status:

10. [...] nothing prevents the Defence receiving the victim application forms of all dual status victim-witness individuals.

11. The Chamber considers that victim application forms of dual status victim-witness individuals may contain exculpatory information or information material for the preparation of the Defence. The Chamber recalls that, pursuant to article 54(1)(a) of the Statute, the Prosecutor has an obligation to investigate incriminating and exonerating circumstances equally. In the context of the present Request, this means that, in order to properly discharge her statutory obligations, the Prosecutor must obtain and provide the Defence with the victim application forms of dual status victim-witness individuals.¹¹ In light of the above, the Chamber:

- (i) directs the Prosecutor, the Registry and the LRVs to liaise in order to identify the dual status victim-witness individuals;
- (ii) instructs the Registry to transmit to the Prosecutor all victim application forms of dual status victim-witness individuals, together with the supporting documents; and
- (iii) instructs the Prosecutor to apply redactions, as necessary and in consultation with the LRVs, and disclose said application forms and supporting documents to the Yekatom Defence [...]. Redactions shall follow the redaction regime adopted by the Chamber. The Prosecutor shall ensure that redactions applied to the victim application forms are consistent with the ones applied to the witness statements disclosed to the Defence. To that end, and in order

¹⁰ ICC, *Prosecution v. Lubanga*, ICC-01/04-01/06-1637, [Decision on the defence application for disclosure of victims applications](#), 21 January 2009, paras. 9-13; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-449, [Decision on Victims’ Participation in Trial Proceedings](#), 6 February 2015, para. 40; ICC, *Prosecutor v. Gbagbo et al*, ICC-02/11-01/15-915-Red OA9, [Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016](#), 31 July 2017 (“*Gbagbo Redactions Appeal Judgment*”), para. 56; ICC, *Prosecutor v. Said Abdel Kani*, [ICC-01/14-01/21-171](#), Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled “Decision establishing the principles applicable to victims’ applications for participation”, 14 September 2021, para. 76.

¹¹ Referring to: ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1060, [Order on the provision of victim application forms of dual status witnesses](#), 17 December 2015, para. 3.

to ensure the efficiency and expeditiousness of the proceedings, the Chamber's authorisation for the non-disclosure of information granted in relation to evidence provided by an individual in his/her capacity as witness extends, where applicable, to his/her victim application form.

[...]

ORDERS the Prosecutor to apply redactions, as necessary and in consultation with the LRVs, and disclose the victim application forms of dual status victim-witness individuals and supporting documents to the Yekatom Defence and the Ngaissona Defence.¹²

9. Similarly, in the *Al Hassan* case, Trial Chamber X ordered that the unredacted versions of the victim applications of dual status witnesses be transferred to the Prosecution, and that the Prosecution, in consultation with the Legal Representative of Victims, apply necessary redactions and transmit those applications to the Defence at the earliest opportunity.¹³

10. However, as recalled by the ICC Appeals Chamber in a Judgment on redactions to application forms of dual status witnesses, full disclosure remains the principle:

60. [...] In assessing the justification for redactions, the Appeals Chamber recalls its holding that:

The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception rather than the rule.¹⁴

It follows from this principle that, in the Trial Chamber's assessment of whether redactions to disclosable information are justified, there should be no burden placed

¹² ICC, *Prosecutor v. Yekatom and Ngaissona*, ICC-01/14-01/18-339, [Decision on Motion for Disclosure of Witnesses with Dual Status](#), 13 September 2019, paras 10-11 (emphasis added). See also, at the trial stage, ICC, *Yekatom and Ngaissona Case*, [ICC-01/14-01/18-914-Anx10](#), "Annex 10 to the Third Registry Quarterly Report Filing on the Case Record Decisions issued by way of e-mail from 8 December 2020 to 14 March 2021", 15 March 2021, pursuant to which the Single Judge recalled the Prosecution's obligation to apply redactions ensuring the safety of the dual status witnesses before disclosing the applications to the Defence and confirmed that the Registry is expected to provide the Prosecution with the unredacted applications of dual status individuals. The Prosecution must subsequently effect disclosure pursuant to its statutory disclosure obligations and in line with the abovementioned protocols.

¹³ ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-536, [Decision on the Prosecution request for access to the identity and applications of participating victims and inviting report and submissions on victim application procedure](#), 20 December 2019, paras. 10-11.

¹⁴ With reference to: ICC, *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-475, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"](#), 13 May 2008, para. 70.

on the defence. Rather, the Trial Chamber should consider the reasons for authorising the redactions being sought and, in reaching its overall decision as to whether they are justified, and in balancing the appropriate factors, should give the defence an opportunity to make submissions. [...] In addition, the Trial Chamber must bear in mind that the defence is at a disadvantage in being able to make a case given its inability to access the withheld information.”¹⁵

11. As stated by Trial Chamber IX in the *Ongwen* case, “should a victim’s participation in the proceedings increase to the extent that he or she is called to appear as a witness, he or she must relinquish his or her anonymity vis-à-vis the Defence. In such a case, the calling participant must disclose identifying information about the victim in accordance with the disclosure and redaction regime in place.”¹⁶ For the fairness of the proceedings, the names of victims who are also witnesses should be shared with the parties.¹⁷

III. DISCUSSION

12. In his First Decision on Victims’ Participation, issued on 21 April 2021, the Pre-Trial Judge dismissed a prior request from the Defence to be disclosed the application forms of dual status witnesses,¹⁸ considering it was premature:

65. Regarding the Defence request for immediate disclosure of all applications of potential dual-status witnesses, the Pre-Trial Judge further notes that, at this stage of the proceedings, where the SPO has not finalised its disclosure obligations and no witness list has been provided, requests for disclosure of any information contained in the application forms of victim applicants “who may be called by the SPO as witnesses in the proceedings” are decidedly premature.

66. The Pre-Trial Judge accordingly finds it appropriate to maintain the classification of the respective application forms and supporting documentation as strictly

¹⁵ *Gbabgo Redactions Appeal Judgment*, para. 60.

¹⁶ ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-471, [Decision on Disclosure of Victims’ Identities](#), 17 June 2016, para. 13.

¹⁷ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-320, [Fourth Decision on Victims’ Participation](#), 12 December 2008, para. 100.

¹⁸ KSC-BC-2020-06/F00208, *Thaçi Defence Response to the First Registry Report on Victims’ Applications for Participation in the Proceedings*, 26 February 2021, para. 25.

confidential and *ex parte* and therefore rejects the request of the Defence for the disclosure of any application forms.¹⁹

13. The Defence submits that, in light of the advanced stage of the proceedings, the fairness of the trial requires that the Defence be disclosed the names and application forms of the witnesses with dual status. Indeed, the case is progressing toward trial, the SPO having filed both its list of witnesses and its Pre-Trial Brief.

14. The information sought is necessary for the defence preparation. The application forms of victim-witness individuals are prior statements of witnesses whom the SPO intends to call to testify at trial, disclosable by the SPO pursuant to Rule 102(1)(b)(i) of the Rules, since they specify how the applicants qualify as a victim and provide the location and date of alleged crimes giving rise to harm, as per Rule 113(1) of the Rules. They are relevant to identify potential inconsistencies in a witness' testimony and may contain exculpatory information, since they may affect the credibility or reliability of the SPO's evidence; therefore, they are also disclosable by the SPO pursuant to Rules 102(3) and 103 of the Rules.

15. The Defence understands that the SPO is not in possession of the application forms and/or may not be aware of the fact that some of its witnesses have been admitted to participate in the proceedings.²⁰ In such circumstances, in order that the SPO be able to fulfil its disclosure obligations meaningfully and without delay, the Defence proposes the adoption of a system similar to the one applied in the *Yekatom and Nagaiissona* case and asks the Pre-Trial Judge to:

- (i) Order the Prosecutor, the Registry and the Victims' Counsel to liaise without delay to identify the dual status victim-witness individuals;

¹⁹ First Decision on Victims' Participation, paras. 65-66.

²⁰ First Decision on Victims' Participation, para. 70; Second Decision on Victims' Participation, para. 54.

- (ii) Order the Registry to transmit to the Prosecutor all victim application forms of dual status victim-witness individuals, together with the supporting documents, in an unredacted format; and
- (iii) Order the Prosecutor to apply redactions, if need be, in accordance with the redaction regime defined by the Framework Decision, and to disclose the said application forms and supporting documents to the Defence. The Prosecutor shall ensure that redactions applied to the victim application forms are consistent with the ones applied to the witness statements disclosed to the Defence.

IV. CONCLUSION

16. For the foregoing reasons, the Defence respectfully requests the Pre-Trial Judge to order the disclosure to the Defence of the witness number and application forms of dual status witnesses and more precisely to:

- (i) Order the Prosecutor, the Registry and the Victims' Counsel to liaise without delay to identify the dual status victim-witness individuals;
- (ii) Order the Registry to transmit to the Prosecutor all victim application forms of dual status victim-witness individuals, together with the supporting documents, in an unredacted format; and
- (iii) Order the Prosecutor to apply redactions, if need be, in accordance with the redaction regime defined by the Framework Decision, and to disclose the said application forms and supporting documents to the Defence.

[Word count: 2,727 words]

Respectfully submitted,



Gregory W. Kehoe

Counsel for Hashim Thaçi

Monday, 21 February 2022

At Tampa, United States