

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: Victims' Counsel

Date: 3 March 2022

Language: English

Classification: Public

**Victims' Counsel Response to Thaçi Defence Motion for Disclosure of Witnesses
with Dual Status**

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I. INTRODUCTION

1. Pursuant to Article 22(6) and Article 39(13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Rule 114(4)(a) and Rule 76 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("RPE"), and Pre-Trial Judge's First and Second Decision on Victims' Participation,¹ Victims' Counsel responds to the Thaçi Defence Motion for Disclosure of Witnesses with Dual Status ("Thaçi Defence Motion" or "Request").²
2. Victims' Counsel opposes the Request, noting that it is not compatible with the terms of Rule 113(1) RPE. If the Request were to be granted, Victims' Counsel emphasises the need to observe protective measures granted to dual status witnesses and requests to be involved in the redaction process of applications of dual status witnesses prior to their disclosure to the Defence.

II. CLASSIFICATION OF FILING

3. Pursuant to Rule 82(4) RPE, this filing is classified as public as it responds to a previous filing that is public.

III. PROCEDURAL HISTORY

4. On 21 April 2021, the Pre-Trial Judge admitted nine applicants as VPPs and determined the modalities of their participation in pre-trial proceedings.³

¹ *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F00257, First Decision on Victims' Participation, 21 April 2021 ("First Decision on Victims' Participation"), paras 84 and 85(d)(vi); KSC-BC-2020-06/F00611, Second Decision on Victims' Participation, 10 December 2021 ("Second Decision on Victims' Participation"), para. 60.

² *Prosecutor v. Thaçi et al.*, KSC-BC-2020-06/F00257, Thaçi Defence Motion for Disclosure of Witnesses with Dual Status, 21 February 2022.

³ First Decision on Victims' Participation, para. 85(a).

5. On 10 December 2021, a further twelve victims were admitted as participants in the *Thaçi et al.* case.⁴
6. On 21 February 2022, the Thaçi Defence submitted its Motion for Disclosure of Witnesses with Dual Status.⁵

IV. SUBMISSIONS

i. Liaison to identify dual status witnesses

7. If the Request is granted, Victims' Counsel is not opposed to liaising with the Specialist Prosecutor's Office ("SPO") and the Registry to identify the dual status witnesses. Such an order should be of a standing character to simplify the conduct of the proceedings in respect of possible future dual status witnesses who have yet to be admitted as VPPs in this case. It may be expedient for this to happen regardless of the decision in relation to the Request. A confirmed list of dual status witnesses shared between the SPO and Victims' Counsel would permit the SPO to inform Victims' Counsel if the Defence notify the SPO that they wish to interview a dual status witness whose status was unknown to the Defence.

ii. Transmission of application forms and supporting documents of dual status witnesses to the Prosecutor

8. If the Request for disclosure of the application forms is granted, then it follows that there will be transmission of the victim application forms (together with the supporting documents) of dual status witnesses to the Prosecutor. However, Victims' Counsel notes that the protective measures currently in force with regard to those individuals involve anonymity under Rule 80(4)(e)(i) RPE. Technically, therefore, transmission of unredacted application forms and

⁴ Second Decision on Victims' Participation, para. 70(b).

⁵ Thaçi Defence Motion.

supporting documents to the SPO would require modification of the protective measures in force.

iii. Redactions of application forms and supporting documents and their disclosure to the Defence

9. With regard to the key issue of whether an order for disclosure should be made, Victims' Counsel draws attention to the final sentence of Rule 113(1) RPE: "Application forms shall not be disclosed to the Parties." On its face, that provision is fatal to the Thaçi Request.
10. Victims' Counsel notes that the Thaçi Defence has not addressed this provision, nor explained how it is consistent with the Request, despite having cited it.⁶
11. It is agreed that disclosure of application forms is routine in proceedings before the International Criminal Court ("ICC"). However, the ICC's Rules of Procedure and Evidence ("ICC RPE") establish a very different regime for applications by victims to that established at the Kosovo Specialist Chambers: see in particular Rule 89 of the ICC RPE.
12. If, contrary to this Response, there is an order for the disclosure of application forms and supporting documents, then, the Prosecutor will need to apply redactions in accordance with their disclosure obligations.
13. Self-evidently, these redactions must reflect, and not undermine, the protective measures in force, including where there is an order for delayed disclosure of the identity of a witness.
14. Given the sensitivity of this disclosure, Victims' Counsel asks that the SPO be ordered to provide the proposed redacted material to Victims' Counsel prior to

⁶ Thaçi Defence Motion, para 2.

its disclosure for approval within seven days. It is submitted that this is in keeping with the approach of the Trial Chamber in the *Lubanga* case:

“[T]he prosecution must apply the same approach to this material as it does to any other exculpatory material in its possession. The only caveat is that prior to disclosure of information relevant to these particular witnesses who hold dual status, the views of their individual representatives must be sought, and if objections to disclosure are raised, the matter should be brought immediately to the attention of the Chamber by way of a filing, for *determination*.”⁷

15. Finally, Victims’ Counsel reserves the right to seek continuation of protective measures for dual status witnesses, including under Rule 80(4)(e) (i) and (ii) RPE.

V. CONCLUSION

16. Victims’ Counsel opposes the Request, and stresses the need to ensure the safety and security of dual status witnesses and to observe protective measures granted to these individuals. It is in this context that Victims’ Counsel requests that, if there is an order for disclosure of the application forms, his approval of redactions applied to the application forms and supporting documents of dual status witnesses is sought prior to disclosure of this material to the Defence.

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⁷ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1637, Decision on the defence application for disclosure of victims applications, 21 January 2009, para. 13.