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| **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:** | 8 March 2022 |
| **Language**: | English |
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**Thaçi Defence Consolidated Reply to Prosecution and Victims' Counsel Responses to 'Thaçi Defence Motion for Disclosure of Witnesses with Dual Status'**

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**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 Alagendra

## I. INTRODUCTION

1. The Defence for Mr Hashim Thaçi (the "Defence") hereby replies to the Prosecution[1] and Victims' Counsel[2] responses to the Thaçi Defence Motion for Disclosure of Witnesses with Dual Status.[3]

2. The Defence maintains its prior submissions pursuant to which it is entitled to be disclosed the witness numbers and application forms of dual status witnesses, in a redacted format if necessary, pursuant to Article 22(6) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Rules 80(1), 81, 102, 103, 113 and 114 of the Rules of Procedure and Evidence ("Rules") and Articles 6(1) and 6(3) of the European Convention of Human Rights.

## II. SUBMISSIONS

3. The SPO and the Victims' Counsel object to the relief sought on the ground, essentially, that contrary to Rule 89(1) of the ICC Rules of Procedure and Evidence, Rule 113(1) of the Rules provides that application forms shall not be disclosed to the parties.[4]

4. However, Rule 113(1) is a general rule that only deals with persons with the status of "Victims". It does not address the situation at issue here, where a "Victim" is also a witness for the prosecution in the proceedings. The Accused has a right under the Rules to all prior statements of a witness – including a Victim/Witness – and including statements made by the Victim/Witness in the application forms. The

[1] KSC-BC-2020-06/F00722, Prosecution response to 'Thaçi Defence Motion for Disclosure of Witnesses with Dual Status', 3 March 2022 ("SPO Response").
[2] KSC-BC-2020-06/F00723, Victims' Counsel Response to Thaçi Defence Motion for Disclosure of Witnesses with Dual Status, 3 March 2022 ("Victims' Counsel Response").
[3] KSC-BC-2020-06/F00706, Thaçi Defence Motion for Disclosure of Witnesses with Dual Status, 21 February 2022 ("Defence Motion").
[4] SPO Response, para. 2, Victims' Counsel Response, paras. 2, 9-11.

Defence submits that, in the absence of any specific provisions regulating the regime applicable to witnesses with dual status, Rule 113 of the Rules, which is a general provision relating only to the *'Admission of Victims for Participation in the Proceedings'*, does not preclude the Pre-Trial Judge from ordering the disclosure of the witness number and application form of a victim-witness individual when it is required to ensure the fairness of the proceedings for the accused. Indeed, pursuant to Article 22(6) of the Law, the participation of victims must neither be prejudicial to, nor inconsistent with, the rights of the accused. Similarly, pursuant to Rule 80(1) of the Rules, any protective measure applied for victims participating in the proceedings must be *"consistent with the rights of the Accused"*. Rule 81 of the Rules thus allows a Pre-Trial Judge or Trial Panel to vary protective measures, including in the absence of consent of the protected persons, *"if justified by exigent circumstances or where a miscarriage of justice would otherwise result."*

5. The Defence reiterates that the application form of a witness with dual status is disclosable pursuant to Rules 102 and 103 of the Rules, since it equates to a prior statement of an incriminating witness.[5] The SPO and Victims' Counsel do not address this point.

6. It is especially important that all statements made by witnesses in pursuit of a pecuniary interest in the outcome of these proceedings are disclosed to the Defence, as they may impact the Trial Panel's assessment of the witness's motive, credibility and bias.

7. The SPO relies on prior decisions from the KSC having ordered the non-disclosure of the applications forms and the anonymity of victims;[6] however, these decisions did not deal with the particular issue of dual status witnesses, except one, where the Pre-Trial Judge in the current case simply stated that such disclosure,

[5] Defence Motion, para. 14.
[6] SPO Response, para. 2, footnote 5.

related to *potential* dual status witnesses, would be *premature*,[7] and all the decisions mentioned explicitly noted that *"any protective measures ordered in relation to the aforementioned VPPs at this stage are without prejudice to the variation of such measures* ***at a later stage****, including by the Trial Panel, if and when the need arises."*[8]

8. The Defence submits that disclosure should intervene at the current stage of the proceedings, because the SPO has notified its witness list and pre-trial brief and has finally completed, at least in principle, the disclosure of any Rule 102(1) material. The Defence has already been invited to provide an estimate of when it would be prepared to file pre-trial brief[9] and has started to work on it. Therefore, the trial may start in a few months only. The fact that the victim application process before the Pre-Trial Judge is still ongoing is irrelevant.[10] The Defence Motion does not concern *potential* dual status witnesses anymore but witnesses on whom the SPO intends to rely against the Accused. The Defence is currently reviewing all the material disclosed pertaining to SPO witnesses to identify potential contradictions, credibility issues, and investigative leads. Any delayed disclosure of a prosecution witness' prior statement, including the information contained in the victim-witness application forms relating to the alleged crimes, will require the Defence to go through this exercise again and may further delay the proceedings. The withholding of the witness number and application forms of victim-witness individuals is, from now on, seriously detrimental to the Defence's ability to prepare in relation to their future testimonies. Therefore, a variation of the protective measures previously ordered is currently justified.

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[7] KSC-BC-2020-06/F00257, First Decision on Victims' Participation, 21 April 2021, paras. 65, 69, referring, *inter alia*, to ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-471, Decision on Disclosure of Victims' Identities, paras. 12-14.
[8] *Ibid.*, para. 69; KSC-BC-2020-06/F00611/CONF/RED, Second Decision on Victims' Participation, 10 December 2021, para. 53; KSC-BC-2020-05/F00105/RED, Second Decision on Victims' Participation, 30 April 2021, para. 44; KSC-BC-2020-05/F00126/RED, Third decision on victims' participation, 21 May 2021, para. 31.
[9] KSC-BC-2020-06/F00655, Order Setting the Date for Tenth Status Conference and for Submissions, 25 February 2022, para. 16.
[10] SPO Response, paras 3-4.

9. The SPO further relies on Article 218(2) of the Kosovo Criminal Procedure Code ("KCPC") to object to the Defence motion.[11] Article 218 provides that:

> 1. During the investigatory stage or within sixty (60) days of the filing of the indictment, the injured party may file a simple declaration of damage from the charged criminal offence. The victim advocate may assist the injured party in filing a declaration of damage. The victim advocate's office may issue a standard form for a declaration on damage that shall satisfy this Article.
> 2. The declaration may be filed anonymously **if permitted** by the Court and if the identity of the victim is disclosed to the Court.
> […]

10. The Defence notes that this article relates to the *"investigatory stage or within sixty (60) days of the filing of the indictment"*, *i.e.* a very early stage of criminal proceedings in comparison with the current stage of the case, and that the declaration may be filed anonymously *only if permitted* by the Court, which means that anonymity is not granted as a principle but would rather be the exception. This provision therefore does not prevent the relief sought by the Defence, but rather supports it.

11. Last, with regard to the 'objectively justifiable risk' relied upon by the Pre-Trial Judge to justify the non-disclosure of the victims' application forms and identity in his prior decisions, quoted by the SPO to oppose the Defence Motion,[12] the Defence stresses that it does not require to be disclosed more (identifying) information than what is already provided by the SPO in its Rule 102 and Rule 103 material, *i.e.* their witness number and the information contained in their application forms related to the alleged crimes and eventual involvement of any Accused or the KLA. The Defence does not require to be disclosed their identity at this stage if, as prosecution witnesses, they have been granted the delayed disclosure of their identity 30 days prior trial or prior to their testimonies.[13] The Defence submits that, having now been disclosed statements for all the SPO witnesses, it is possible, without exposing any victim-

[11] SPO Response, para. 2, footnote 5.
[12] SPO Response, para. 3.
[13] Victims' Counsel Response, para. 13.

witness individual to any further risk, to disclose a redacted version of their application forms to the Defence. The Defence does not oppose the Victims' Counsel's request that his views be sought prior to the disclosure of their redacted application forms and supporting documents to the Defence.[14]

12. The Defence further maintains that the notice, to the Defence, of the witness number of dual status witnesses will further protect them since the Defence will necessarily have to inform their Victims' Counsel if it wanted to contact them, as per Article 16 of the Code of Professional Conduct.[15]

## III. CONCLUSIONS

13. For the foregoing reasons, the Defence asks the Pre-Trial Judge to grant the relief sought in the Defence Motion.

**[Word count: 1,491 words]**

Respectfully submitted,

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**Gregory W. Kehoe**

**Counsel for Hashim Thaçi**

Tuesday, 8 March 2022

At Tampa, United States

[14] Victims' Counsel Response, paras. 14, 16.

[15] KSC-BC-2020-06/F00705, Thaçi Defence Reply to Prosecution Response to Registrar's Submissions on Proposed Protocol for Interviews with Witnesses, 21 February 2022, para. 7. *See also*, Victims' Counsel Response, para. 7.