



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**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

**Date:** 13 December 2022

**Language:** English

**Classification:** Confidential

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**Decision on Thaçi Defence's Request for Disclosure of Dual Status Witnesses**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Articles 21(2), 23(1) and 39(11) and (13) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 80, 95(2)(h), 113 and 114 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 4 January 2021 and on 6 July 2021, the Pre-Trial Judge issued two framework decisions establishing the principles governing the admission of victims to participate in the proceedings against the four Accused ("Accused" or "Defence") in the present case ("First Framework Decision" and "Second Framework Decision").<sup>2</sup>

2. The Pre-Trial Judge has issued four decisions on victims' participation, admitting a total of 53 victims to participate in the proceedings ("Participating Victims") and rejecting 28 applications.<sup>3</sup>

3. On 21 February 2022, the Defence for Hashim Thaçi ("Thaçi Defence") filed a motion for disclosure of witnesses with dual status ("Request").<sup>4</sup>

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<sup>1</sup> KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 23 April 2020, public.

<sup>2</sup> KSC-BC-2020-06, F00159, Pre-Trial Judge, *Framework Decision on Victims' Applications*, 4 January 2021, public; F00382, Pre-Trial Judge, *Second Framework Decision on Victims' Participation*, 6 July 2021, public.

<sup>3</sup> KSC-BC-2020-06, F00257, Pre-Trial Judge, *First Decision on Victims' Participation* ("First Decision on Victims' Participation"), 21 April 2021, confidential, para. 85(a), (f). A public redacted version was issued on the same day, F00257/RED; F00611, Pre-Trial Judge, *Second Decision on Victims' Participation* ("Second Decision on Victims' Participation"), 10 December 2021, strictly confidential and *ex parte*, para. 70(b). Confidential redacted and public redacted versions were issued on the same day, F00611/CONF/RED and F00611/RED; F00817, Pre-Trial Judge, *Third Decision on Victims' Participation* ("Third Decision on Victims' Participation"), 25 May 2022, strictly confidential and *ex parte*, para. 50(a). A public redacted version was issued on the same day, F00817/RED; F01152, Pre-Trial Judge, *Fourth Decision on Victims' Participation* ("Fourth Decision on Victims' Participation"), 12 December 2022, strictly confidential and *ex parte*.

<sup>4</sup> KSC-BC-2020-06, F00706, Specialist Counsel, *Thaçi Defence Motion for Disclosure of Witnesses with Dual Status*, 21 February 2022, public.

4. On 3 March 2022, the Specialist Prosecutor's Office ("SPO") and Victims' Counsel respectively responded to the Request ("SPO Response" and "Victims' Counsel Response").<sup>5</sup>

5. On 8 March 2022, the Thaçi Defence filed a consolidated reply to the SPO Response and Victims' Counsel Response ("Reply").<sup>6</sup>

6. On 15 September 2022, following an appeal against the "Third Decision on Victims' Participation" by the Defence for Kadri Veseli,<sup>7</sup> the Court of Appeals confirmed the Pre-Trial Judge's legal test applicable in granting protective measures ("Court of Appeals Decision").<sup>8</sup>

## II. SUBMISSIONS

### A. THAÇI DEFENCE REQUEST

7. The Thaçi Defence requests that the Pre-Trial Judge order the disclosure to the Defence of the witness codes and application forms of the witnesses with dual status, namely the witnesses on the SPO's list of witnesses who have been authorised to participate as victims ("Dual Status Witnesses"). The Thaçi Defence submits that as the SPO has not been disclosed the victims' application forms, and may not be aware of their identities, a system similar to the one applied before the

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<sup>5</sup> KSC-BC-2020-06, F00722, Specialist Prosecutor, *Prosecution Response to "Thaçi Defence Motion for Disclosure of Witnesses with Dual Status"*, 3 March 2022, public; F00723, Victims' Counsel, *Victims' Counsel Response to Thaçi Defence Motion for Disclosure of Witnesses with Dual Status*, 3 March 2022, public.

<sup>6</sup> KSC-BC-2020-06, F00728, Specialist Counsel, *Thaçi Defence Consolidated Reply to Prosecution and Victims' Counsel Responses to "Thaçi Defence Motion for Disclosure of Witnesses with Dual Status"*, 8 March 2022, confidential.

<sup>7</sup> KSC-BC-2020-06, IA023/F00002, Specialist Counsel, *Veseli Defence Interlocutory Appeal Against Third Decision on Victims' Participation*, 12 July 2022, public.

<sup>8</sup> KSC-BC-2020-06, IA023/F00006, Court of Appeals, *Decision on Veseli's Appeal Against "Third Decision on Victims' Applications"* ("Court of Appeals Decision"), 15 September 2022, public, paras 32, 52-52. A corrected version was filed on the same day, IA023/F00006/COR.

International Criminal Court (“ICC”) should be adopted.<sup>9</sup> The Thaçi Defence, therefore, requests that the Pre-Trial Judge:

- a. order the SPO, the Registry and the Victims’ Counsel to liaise without delay to identify Dual Status Witnesses;
- b. order the Registry to transmit to the SPO all victim application forms of Dual Status Witnesses, together with the supporting documents, in an unredacted format; and
- c. order the SPO to apply redactions, if necessary, in accordance with the redaction regime defined by the First Framework Decision and to disclose the said application forms and supporting documents to the Defence.<sup>10</sup>

8. The Thaçi Defence submits that Rules 113 and 114 of the Rules define the modalities of admission of victims for participation in the proceedings and that, pursuant to Article 22(6) of the Law, the Specialist Chambers (“SC”) “must ensure that the victims’ participation in the proceedings is neither prejudicial to, nor inconsistent with, the rights of the accused”.<sup>11</sup> The Thaçi Defence further argues that, pursuant to Rule 80 of the Rules, measures for the protection of victims shall be “consistent with the rights of the accused” and pursuant to Rule 81 of the Rules, which defines the regime applicable to the variation of protective measures, protective measures “shall not prevent the Specialist Prosecutor from discharging any disclosure obligations”.<sup>12</sup>

9. The Thaçi Defence further submits that in accordance with its disclosure obligations the SPO shall: (i) pursuant to Rule 102(1)(b)(i) of the Rules make available to the Defence within the time limit set by the Panel, and no later than

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<sup>9</sup> Request, para. 1.

<sup>10</sup> Request, paras 1, 15-16.

<sup>11</sup> Request, paras 2-3.

<sup>12</sup> Request, paras 4-5.

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; (ii) pursuant to Rule 102(3) of the Rules 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; and (iii) pursuant to Rule 103 of the Rules disclose to the Defence, immediately, any information as soon as it is in its custody, control or actual knowledge, which may affect the credibility or reliability of the Specialist Prosecutor's evidence.<sup>13</sup> The Taçi Defence submits that as the application forms of Dual Status Witnesses are prior statements of witnesses whom the SPO intends to call to testify at trial, which specify how the applicants qualify as a victim and provide the location and date of alleged crimes giving rise to harm in accordance with Rule 113(1) of the Rules, they are disclosable to the Defence pursuant to these Rules.<sup>14</sup>

10. The Taçi Defence submits that neither the Law, nor the Rules, define the regime applicable to Dual Status Witnesses. As the SC have not ruled on the issue of disclosure of the application forms of Dual Status Witnesses, the Taçi Defence submits that the case law of the ICC is relevant which, it submits, provides that, while Dual Status Witnesses may benefit from protective measures, this should not prevent the disclosure of their identities and application forms to the Defence, by the SPO, in accordance with its disclosure obligation.<sup>15</sup>

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<sup>13</sup> Request, paras 6, 14.

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

<sup>15</sup> Request, paras 7-11 referring to ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-339, Pre-Trial Chamber II, [Decision on Motion for Disclosure of Witnesses with Dual Status](#), 13 September 2019, paras 10-11; *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-536, Trial Chamber X, [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; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-915-Red, Appeals Chamber, [Public Redacted Version of Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016](#), 31 July 2017, para. 60.

11. Lastly, the Thaçi Defence submits that, while the Pre-Trial Judge dismissed a prior request from the Defence for disclosure of the application forms of Dual Status Witnesses considering it was premature, the fairness of the trial requires that the Defence be disclosed the names and application forms of the Dual Status Witnesses as the SPO has filed both its list of witnesses and its pre-trial brief.<sup>16</sup>

#### B. SPO RESPONSE

12. The SPO responds that the Request should be denied as it is contrary to the applicable framework and fails to demonstrate that a variation of protective measures is justified.<sup>17</sup> The SPO submits that the procedure proposed by the Defence, namely that applied at the ICC, is based on a different framework and is not applicable before the SC. In particular, the SPO submits that, while Rule 89(1) of the ICC Rules of Procedure and Evidence expressly envisages disclosure of victim application forms, Rule 113(1) of the Rules provides that, at the SC, such forms shall not be disclosed to the Parties.<sup>18</sup>

13. The SPO submits that, in granting Participating Victims anonymity, the Pre-Trial Judge considered that disclosure both to the public and Parties of any material or information leading to their identification poses an objectively justifiable risk to them and their family members, underscoring that any potential dual status had a minimal effect on the Defence's ability to prepare their case.<sup>19</sup> The SPO further notes that the victim application process is ongoing before the Pre-Trial Judge and the potential number of Dual Status Witnesses is relatively limited. The SPO adds that, pursuant to Rule 102(1)(b) of the Rules, subject to

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<sup>16</sup> Request, paras 12-13.

<sup>17</sup> SPO Response, para. 1.

<sup>18</sup> SPO Response, para. 2 also *referring to* Article 218(2) of Criminal No. 04/L-123 on Procedure Code of Assembly of Republic of Kosovo.

<sup>19</sup> SPO Response, para. 3.

necessary and proportionate protective measures authorised by the Pre-Trial Judge, the Defence has already received, *inter alia*, the statements of the witnesses the SPO intends to call, including any with dual status.<sup>20</sup> The SPO emphasises the Pre-Trial Judge's finding that protective measures granted to Participating Victims are without prejudice to any necessary variation at a later stage, including by the Trial Panel. Finally, the SPO argues that the Request fails to justify a variation of protective measures considering: (i) the stage of the proceedings, including the fact that no trial date has yet been set; (ii) the victim application process before the Pre-Trial Judge is ongoing; (iii) the minimal, if any, prejudice to the Defence; and (iv) the real and objective risks to the Participating Victims.<sup>21</sup>

#### C. VICTIMS' COUNSEL RESPONSE

14. Victims' Counsel opposes the Request, noting that it is not compatible with the terms of Rule 113(1) of the Rules.<sup>22</sup> Victims' Counsel adds that the Thaçi Defence has not addressed this provision, nor explained how it is consistent with the Request, despite having cited it. Victims' Counsel also avers that, while disclosure of application forms before the ICC is routine, its regime for applications by victims is different from the SC.<sup>23</sup>

15. If the Request were to be granted, Victims' Counsel: (i) 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;<sup>24</sup> (ii) is not opposed to liaising with the SPO and the Registry to identify the Dual Status Witnesses and notes that any such order

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<sup>20</sup> SPO Response, para. 3.

<sup>21</sup> SPO Response, para. 4.

<sup>22</sup> Victims' Counsel Response, paras 2, 9, 16.

<sup>23</sup> Victims' Counsel Response, paras 9-11.

<sup>24</sup> Victims' Counsel Response, para. 2.



should be of a standing order to simplify the conduct of the proceedings in respect of possible future Dual Status Witnesses who have yet to be admitted as Participating Victims;<sup>25</sup> (iii) submits that the protective measures currently in force with regard to Participating Victims involve anonymity under Rule 80(4)(e)(i) of the Rules, and that transmission of unredacted application forms and supporting documents to the SPO would, therefore, require modification of the protective measures in place;<sup>26</sup> and (iv) submits that the SPO would have to apply non-standard redactions in accordance with their disclosure obligations to give effect to protective measures in place and, in keeping with the approach of the ICC Trial Chamber in the *Lubanga* case, be ordered to provide such non-standard redactions to Victims' Counsel for approval prior to disclosure to the Defence.<sup>27</sup>

16. Lastly, Victims' Counsel submits that, regardless of the outcome of the Request, it may be expedient for the SPO and Victims' Counsel to have a confirmed list of Dual Status Witnesses shared between them as such list 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 is unknown to the Defence.<sup>28</sup> Victims' Counsel also reserves the right to seek continuation of protective measures for Dual Status Witnesses, including under Rule 80(4)(e)(i) and (ii) of the Rules.<sup>29</sup>

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<sup>25</sup> Victims' Counsel Response, para. 7.

<sup>26</sup> Victims' Counsel Response, para. 8.

<sup>27</sup> Victims' Counsel Response, paras 12-14 referring to ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1637, Trial Chamber I, [Decision on the defence application for disclosure of victims applications](#), 21 January 2009, para. 13.

<sup>28</sup> Victims' Counsel Response, para. 7.

<sup>29</sup> Victims' Counsel Response, para. 15.



#### D. THAÇI DEFENCE REPLY

17. The Thaçi Defence replies that it is entitled to be disclosed the witness codes and application forms of Dual Status Witnesses, in redacted form if necessary, pursuant to Article 22(6) of the Law, Rules 80(1), 81, 102, 103, 113 and 114 of the Rules and Articles 6(1) and (4) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>30</sup> The Thaçi Defence argues that Rule 113(1) of the Rules is a general rule that only deals with “victims” and not Dual Status Witnesses. In the absence of any specific provisions regulating Dual Status Witnesses, it submits that Rule 113 of the Rules, which only relates to the “Admission of Victims for Participation in the Proceedings”, does not preclude the Pre-Trial Judge from ordering the disclosure of the witness codes and application form of Dual Status Witnesses when it is required to ensure the fairness of the proceedings for the Accused.<sup>31</sup>

18. The Thaçi Defence further argues that the Pre-Trial Judge is empowered, pursuant to Rule 81 of the Rules, 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”.<sup>32</sup> Additionally, the Thaçi Defence opposes the SPO’s reliance on prior decisions from the SC having ordered the non-disclosure of the applications forms and the anonymity of victims as these decisions did not deal with the particular issue of Dual Status Witnesses.<sup>33</sup> It further contends that the SPO’s reliance on Article 218(2) of the Criminal Procedure Code of Kosovo is inapposite since it only applies in early stages of criminal proceedings and accordingly does not prevent the relief sought.<sup>34</sup>

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<sup>30</sup> Thaçi Reply, para. 2.

<sup>31</sup> Thaçi Reply, para. 4 *arguing* that, pursuant to Article 22(6) of the Law and Rule 80 of the Rules, participation of victims and/or protective measures must neither be prejudicial to, nor inconsistent with, the rights of the Accused.

<sup>32</sup> Thaçi Reply, para. 4.

<sup>33</sup> Thaçi Reply, para. 7.

<sup>34</sup> Thaçi Reply, paras 9-10.

19. The Thaçi Defence submits that disclosure should take place at the current stage of the proceedings as: (i) the SPO has notified its witness list and pre-trial brief; (ii) the SPO has finally completed, at least in principle, the disclosure of any Rule 102(1) material; and (iii) at the time of the Thaçi Reply, the Defence has already been invited to provide an estimate of when it would be prepared to file their pre-trial briefs and have started to work on it.<sup>35</sup> The Thaçi Defence adds that the fact that the victim application process before the Pre-Trial Judge is still ongoing is irrelevant. The Thaçi Defence argues that it is currently reviewing all the material disclosed pertaining to SPO witnesses. It maintains that any delayed disclosure of a prosecution witness' prior statement, including the application forms, will require the Defence to go through this exercise again, which may further delay the proceedings and, therefore, be detrimental to the Defence's ability to prepare its case.<sup>36</sup>

20. With regard to the "objectively justifiable risk", justifying the non-disclosure of the victims' application forms and identities in prior decisions, the Thaçi Defence stresses that it does not require the identities of the Dual Status Witnesses to be disclosed, at this stage, if they have been granted delayed disclosure of their identities as SPO witnesses.<sup>37</sup>

### III. APPLICABLE LAW

21. Pursuant to Article 21(2) and (4)(c) of the Law, the Accused is entitled to a fair and public hearing and adequate time and facilitates to prepare their defence.

22. Pursuant to Article 23(1) of the Law and Rule 80(1) of the Rules, the Pre-Trial Judge may order, *proprio motu* or upon request, appropriate measures for the

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<sup>35</sup> Thaçi Reply, para. 8.

<sup>36</sup> Thaçi Reply, para. 8.

<sup>37</sup> Thaçi Reply, para. 11.

protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings, as well as other persons at risk on account of testimony given by witnesses. Pursuant to Rule 80(4) of the Rules, such measures may include non-disclosure to the Parties of any material or information that may lead to the disclosure of the identity of a victim participating in the proceedings. Protective measures ordered by the Panel in the proceedings may be amended, as necessary.

23. Pursuant to Article 39(11) of the Law and Rule 95(2)(h) of the Rules, the Pre-Trial Judge may, where necessary, decide on motions related to the protection and privacy of victims and witnesses, filed before the transmission of the case file to the Trial Panel.

24. Pursuant to Rule 113(1) of the Rules, after the confirmation of an indictment and sufficiently in advance of the opening of the case, 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.

25. Pursuant to Rule 113(2) of the Rules, the Victims' Participation Office ("VPO") registers and assesses the applications and files them before the Pre-Trial Judge together with a recommendation on admissibility and common representation, and a request for protective measures under Rule 80 of the Rules, as applicable.

26. Pursuant to Rule 114(4) of the Rules, whenever the personal interests of victims participating in the proceedings are affected, and unless otherwise provided in the Rules, Victims' Counsel may, under the control of the Panel, make oral and written submissions.

#### IV. DISCUSSION

27. While at the time of the Request the Pre-Trial Judge had admitted 20 Participating Victims and the Request therefore only applies to those individuals,<sup>38</sup> the Pre-Trial Judge holds that the below findings extend to all victims who have since been granted,<sup>39</sup> or which will eventually be granted, participation and who are also witnesses in this case.

##### A. DISCLOSURE OF THE VICTIM APPLICATION FORMS OF DUAL STATUS WITNESSES TO THE PARTIES

28. The Pre-Trial Judge recalls that he, first and foremost, applies the legal instruments of this court,<sup>40</sup> which expressly provide in Rule 113(1) of the Rules that “Application forms shall not be disclosed to the Parties”.<sup>41</sup> While the Pre-Trial Judge recognises that the practice before the ICC is to disclose to the Defence the victims’ application forms, including those of Dual Status Witnesses, during the application process,<sup>42</sup> the Pre-Trial Judge considers that such precedent is not relevant at the SC, as the non-disclosure of the application forms to the Parties is expressly addressed by the Rules.

29. The Pre-Trial Judge further notes the *Thaçi* Defence’s argument that the SPO has an obligation to disclose the victim application forms of Dual Status Witnesses to the Defence pursuant to Rules 102 and/or 103 of the Rules.<sup>43</sup> However,

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<sup>38</sup> See First Decision on Victims’ Participation, para. 85(a); Second Decision on Victim’s Participation, para. 70(a).

<sup>39</sup> See Third Decision on Victims’ Participation, para. 50(a) where the Pre-Trial Judge admitted a further 12 Participating Victims; Fourth Decision on Victims’ Participation, para. 73(a) where the Pre-Trial Judge admitted a further 21 Participating Victims.

<sup>40</sup> Article 3(2) of the Law. See also KSC-BC-2020-06, F00412, Pre-Trial Judge, *Decision on Motions Challenging the Jurisdiction of the Specialist Chambers*, 22 July 2021, para. 89.

<sup>41</sup> See also Court of Appeals Decision, fn. 108 referring to that the Parties do not have access to application forms pursuant to Rule 113(1)-(3) of the Rules.

<sup>42</sup> See Rule 89(1) of the ICC Rules of Procedure and Evidence.

<sup>43</sup> Request, para. 14; Reply, paras 8, 11.

Rule 113(1) of the Rules explicitly excludes the disclosure of the victim application forms to the Parties. The victim application forms are therefore excluded from the SPO's disclosure obligations, as Rule 113(1) of the Rules prevents them from *coming within the SPO's possession*.<sup>44</sup> The Pre-Trial Judge emphasises that, as a result, information provided by Participating Victims is not subject to the same disclosure regime as the material and information in the SPO's possession.<sup>45</sup>

30. In addition, the Pre-Trial Judge is not persuaded by the Thaçi Defence's argument that Rule 113 of the Rules regulates the admission of victims' participation only and that the victim application forms therefore can be disclosed to the Defence.<sup>46</sup> The Pre-Trial Judge considers that victim application forms have a limited purpose and, as administrative documents, are primarily intended to enable the Pre-Trial Judge or Trial Panel to assess whether victim applicants should be admitted to participate in the proceedings.<sup>47</sup> The victim application forms are not intended to be used as evidence in the present case and are not intended to be used to gather information that may be important for the preparation of the Defence's case.<sup>48</sup> Rather, this information gathering is

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<sup>44</sup> See Article 21(6) of the Law which provides that the Accused shall be entitled to "all material and relevant evidence or facts *which are in the possession of the Specialist Prosecutor's Office* which are for or against the Accused" (emphasis added). The same applies for Rule 102(3) of the Rules (referring to "material and evidence in his or her possession" or "tangible objects in the custody of the Specialist Prosecutor") and Rule 103 of the Rules (referring to information "in his or her custody, control or actual knowledge").

<sup>45</sup> See Third Decision on Victims' Participation, para. 38; See similarly ICC, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-169, Pre-Trial Chamber II, [Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case](#), 8 July 2011, paras 9-11.

<sup>46</sup> Reply, para. 4.

<sup>47</sup> Similarly, ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2012-Red, Trial Chamber III, [Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011](#), 9 February 2012, para. 101; *Situation in Uganda*, ICC-02/04-101, Pre-Trial Chamber II, [Public Redacted Version of Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06](#), 10 August 2007, para. 13.

<sup>48</sup> See Third Decision on Victims' Participation, para. 38. It is for this reason that the Parties do not receive the application forms, but only the VPO Report, in relation to which the Parties are entitled, per Rule 113(3) of the Rules, to make limited submissions on legal grounds regarding admissibility and common representation. See similarly ICC, *Prosecutor v. Mahamat Said Abdel Kani*, ICC-01/14-01/21-171,

effectuated primarily through the disclosure process. Importantly, unlike a witness, a victim applicant is not informed of his or her rights<sup>49</sup> and that his or her application form, including supporting documentation, may be used as evidence in criminal proceedings. For the same reasons, the Pre-Trial Judge also finds that victim application forms do not constitute “prior statements”, as argued by the Thaçi Defence.<sup>50</sup>

31. The above interpretation is also not prejudicial to or inconsistent with the rights of the Accused, as the Defence retains their right to examine and test Dual Status Witnesses at trial on the basis of the testimony and other material exchanged between the Parties.

32. In light of the foregoing, the Pre-Trial Judge finds that the victim application forms shall not be disclosed to the SPO, or the Defence, and accordingly rejects this part of the Request. Consequently, the request to order the SPO to apply redactions to the victim application forms and supporting material is equally rejected.

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Appeals Chamber, [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. 51; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-449, Trial Chamber VI, [Decision on victims’ participation in trial proceedings](#), 6 February 2015, para. 36; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2012-Red, Trial Chamber III, [Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011](#), 9 February 2012, paras 100-101; *Situation in Darfur, Sudan*, ICC-02/05-110, Pre-Trial Chamber I, [Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86\(2\)\(e\) of the Regulation of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor](#), 3 December 2007, paras 6, 20.

<sup>49</sup> See Rules 42-44 of the Rules.

<sup>50</sup> Similarly, ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2012-Red, Trial Chamber III, [Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011](#), 9 February 2012, para. 101.

## B. DISCLOSURE OF WITNESS CODES OF DUAL STATUS WITNESSES

33. The Thaçi Defence requests the disclosure of the witness codes of Dual Status Witnesses which affects the protective measure regime(s) already in place.

34. The Pre-Trial Judge emphasises that there are two regimes of protective measures: the protective measures for the protection of SPO witnesses, and protective measures for the protection of Participating Victims. Accordingly, protective measures may apply, as authorised, simultaneously to Dual Status Witnesses.

35. Protective measures in place for the Participating Victims are adjustable, mindful of the stage of the proceedings and the modalities of participation, under Article 22 of the Law and Rule 114 of the Rules, and may need to be reassessed.<sup>51</sup> The Pre-Trial Judge recalls that, when authorising the non-disclosure of the identities of Participating Victims, including Dual Status Witnesses, such protective measures were authorised “without prejudice to any future ruling by the relevant Trial Panel and without prejudice to any additional measures stemming from the victims’ potential dual status”.<sup>52</sup> Considering that the case is close to be transmitted to trial,<sup>53</sup> and Participating Victims with dual status are called to testify at trial, potentially incriminating the Accused, the Pre-Trial Judge finds merit in the Defence request<sup>54</sup> that, in principle, they be provided with the witness codes of Dual Status Witnesses in order to prepare for trial.<sup>55</sup>

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<sup>51</sup> See Court of Appeals Decision, paras 47, 49.

<sup>52</sup> First Decision on Victims’ Participation, para. 67; Second Decision on Victims’ Participation, para. 50; Third Decision on Victims’ Participation, para. 40; Fourth Decision on Victims’ Participation, para. 61.

<sup>53</sup> KSC-BC-2020-06, F01131, Pre-Trial Judge, *Notification Pursuant to Rule 98(3) of the Rules of Procedure and Evidence*, 30 November 2022, public.

<sup>54</sup> Request, para. 16.

<sup>55</sup> Article 21(2), (4)(c) and (f) of the Law. Similarly, ICC, *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-471, Trial Chamber IX, [Decision on Disclosure of Victims’ Identities](#), 17 June 2016, para. 13.



36. The SPO and Victims' Counsel only have partial knowledge about the status of the individuals having dual status due to the protective measures in place.<sup>56</sup> At present, the protective measures for Participating Victims are comprehensive and ordered vis-à-vis both Parties,<sup>57</sup> while the protective measures for SPO witnesses are ordered vis-à-vis the Defence and will eventually cease, according to the time schedule adopted in the relevant decisions. Victims' Counsel, who has access to all confidential filings and material in the case record,<sup>58</sup> has, as regards witness-related matters, the same level of knowledge as the Defence.

37. To achieve that the witness codes of Dual Status Witnesses be disclosed to the Defence, the protective measure authorised to individuals as Participating Victims, pursuant to Rule 80(4)(e)(i) of the Rules, namely non-disclosure of their identities to the Parties and the Accused throughout the proceedings, shall be varied.

38. The Defence bases its request for variation of protective measures on Rule 81 of the Rules. This Rule is inapplicable in this context, as the protective measures of *Participating Victims* have not been ordered in other proceedings before the SC or another jurisdiction, but in the present case. Therefore, the legal basis for varying the protective measures of Participating Victims is Article 39(11) of the Law and Rule 80 of the Rules.

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<sup>56</sup> See a comparison of First Decision on Victims' Participation; Second Decision on Victims' Participation; Third Decision on Victims' Participation; Fourth Decision on Victims' Participation; KSC-BC-2020-06, F00885/A01, Specialist Prosecutor, *Annex 1 to Submission of corrected and lesser redacted versions of witness list*, 18 July 2022, strictly confidential and *ex parte*; F00885/A02, Specialist Prosecutor, *Annex 2 to Submission of corrected and lesser redacted versions of witness list*, 18 July 2022, confidential.

<sup>57</sup> First Decision on Victims' Participation, para. 85(g); Second Decision on Victims' Participation, para. 70(f); Third Decision on Victims' Participation, para. 50(e); Fourth Decision on Victims' Participation, para. 73(e).

<sup>58</sup> First Decision on Victims' Participation, para. 82 ("Victims' Counsel shall have access to the entire case file, including all public and confidential filings, transcripts and evidentiary material and excluding any *ex parte* items of the case file").

39. Vested with the authority to vary protective measures, the Pre-Trial Judge determines that (i) the identities of Participating Victims who are also SPO witnesses shall be disclosed to the SPO;<sup>59</sup> and (ii) the Rule 80(4)(e)(i) measures for Participating Victims, who are also SPO witnesses, shall be temporally aligned with the protective measures authorised to them as SPO witnesses. The above variation will allow the SPO and Victims' Counsel to liaise and identify the Dual Status Witnesses. It will also allow the Defence, when the identities of the SPO witnesses are disclosed to the Defence (for example 30 days prior to testimony), to know the identities of Dual Status Witnesses at the same time.

40. Victims' Counsel and the SPO, upon consultation, shall submit, by **Friday, 13 January 2023**, a list of Dual Status Witnesses strictly confidential and *ex parte*. This list shall be made available to the Witness Protection and Support Office and the VPO.

41. The Pre-Trial Judge considers it necessary that Victim's Counsel informs Dual Status Witnesses about the variation of victim-related protective measures. Should the Dual Status Witnesses have any concerns, they may raise them with the Panel until **Monday, 23 January 2023**. When raising concerns, Dual Status Witnesses must give detailed reasons in light of the fact that their identities (as witnesses) are known to the SPO and is either presently disclosed to the Defence, or will be disclosed to the Defence when their protective measures (as witnesses) cease to apply

42. Subsequently, absent any concerns, the list of Dual Status Witnesses will be shared with the Defence on a confidential basis.

43. Moving forward, the same procedure applies in relation to any individual who will be granted the status as Participating Victims who has dual status. Upon

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<sup>59</sup> The Pre-Trial Judge considers it unproblematic to allow the SPO to know the identities of the Participating Victims with dual status as their identities, as SPO witnesses, are known to the SPO.

admission as Participating Victim, Victims' Counsel shall approach the SPO and, if need be, update the list of Dual Status Witnesses. Victims' Counsel shall inform his clients within two weeks and, absent any concerns, the updated list of Dual Status Witnesses shall be shared with the Defence on a confidential basis.

#### C. EXTENSION OF TIME LIMIT FOR CERTIFICATION TO APPEAL

44. The Pre-Trial Judge notes that, in accordance with Rule 77(1) of the Rules, when a Party seeks to appeal a decision for which an appeal does not lie as of right, that Party shall request certification from the Panel that rendered the impugned decision within seven (7) days thereof. In light of the upcoming winter judicial recess,<sup>60</sup> the Pre-Trial Judge considers it appropriate to vary, pursuant to Rule 9(5)(a) of the Rules, the time limit for requesting certification to appeal the present decision. Accordingly, any such request(s) shall be filed by **Monday, 9 January 2023**. Any related responses and replies shall follow the time limits set out in Rule 76 of the Rules.

#### V. CLASSIFICATION

45. The Pre-Trial Judge orders the Thaçi Defence to file a public redacted version of the Reply by no later than **Tuesday, 20 December 2022**.

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<sup>60</sup> The winter judicial recess runs from Monday, 19 December 2022, to Friday, 6 January 2023, see KSCPR-2021, F00002, President, *Judicial Recess Periods for 2022*, 11 November 2021, p. 2, public.

## VI. DISPOSITION

46. In light of the foregoing, the Pre-Trial Judge:

- a) **REJECTS** in part the Request, namely the request for the victim application forms and supporting material, as well as the request for redactions;
- b) **GRANTS** the Request to the extent that Victims' Counsel liaise with the SPO and identify the Dual Status Witnesses and file a list of Dual Status Witnesses, strictly confidential and *ex parte*, by **Friday, 13 January 2023**, to be notified also to WPSO and VPO;
- c) **ORDERS** Victims Counsel to inform Dual Status Witnesses that their protective measures as Participating Victims have been varied, as set forth in this decision;
- d) **ORDERS** Victims' Counsel to file before the Panel any concerns raised by Dual Status Witnesses, if any, by **Monday, 23 January 2023**;
- e) **ORDERS** that, absent any concerns, the list of Dual Status Witnesses, be reclassified as confidential by **Friday, 27 January 2023**;
- f) **ORDERS** that the same procedure be followed in relation to any individual who will be granted the status as Participating Victims and who has dual status, as described in paragraph 43;
- g) **ORDERS** the Thaçi Defence to file a public redacted version of the Reply by no later than, **Tuesday, 20 December 2022**; and
- h) **VARIES** the time limit for any request(s) for certification to appeal the present decision and **ORDERS** that any such request(s) shall be filed by **Monday, 9 January 2023**.



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**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Tuesday, 13 December 2022

At The Hague, the Netherlands.