



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
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 30 January 2023

Language: English

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**Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of
Dual Status Witnesses**

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Counsel for Jakup Krasniqi

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TRIAL PANEL II (“Panel”), pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 77 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.¹

I. PROCEDURAL BACKGROUND

1. On 13 December 2022, following a request by the Defence for Hashim Thaçi (“Thaçi Defence”),² the Pre-Trial Judge issued the “Decision on Thaçi Defence’s Request for Disclosure of Dual Status Witnesses” (“Impugned Decision”).³
2. On 9 January 2023, the Thaçi Defence filed a request for leave to appeal the Impugned Decision (“Request”).⁴
3. On 20 January 2023, the Specialist Prosecutor’s Office (“SPO”) and Victims’ Counsel each responded to the Request (“SPO Response” and “Victims’ Counsel Response”, respectively).⁵
4. The Thaçi Defence did not reply.

¹ All references to Article(s) and Rule(s) are references to the Law and the Rules unless otherwise indicated.

² F00706, Specialist Counsel, *Thaçi Defence Motion for Disclosure of Witnesses with Dual Status*, 21 February 2022. The Specialist Prosecutor’s Office and Victims’ Counsel respectively filed responses on 3 March 2022 (see F00722, Specialist Prosecutor, *Prosecution Response to “Thaçi Defence Motion for Disclosure of Witnesses with Dual Status”*, 3 March 2022; F00723, Victims’ Counsel, *Victims’ Counsel Response to Thaçi Defence Motion for Disclosure of Witnesses with Dual Status*, 3 March 2022). The Thaçi Defence filed a reply on 8 March 2022 (see 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).

³ F01153, Pre-Trial Judge, *Decision on Thaçi Defence’s Request for Disclosure of Dual Status Witnesses*, 13 December 2022.

⁴ F01192, Specialist Counsel, *Thaçi Defence Request for Certification to Appeal the “Decision on Thaçi Defence’s Request for Disclosure of Dual Status Witnesses” (F01153)*, 9 January 2023. In the Impugned Decision, paragraph 46(h), the Pre-Trial Judge extended the deadline to request leave to appeal the Impugned Decision to 9 January 2023.

⁵ F01217, Specialist Prosecutor, *Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F01153*, 20 January 2023; F01218, Victims’ Counsel, *Victims’ Counsel’s Response to Thaçi Defence Request for Certification to Appeal the “Decision on Thaçi Defence’s Request for Disclosure of Dual Status Witnesses” (F01153)*, 20 January 2023.

II. SUBMISSIONS

5. The Thaçi Defence requests leave to appeal the following two issues:

- (1) Whether the Pre-Trial Judge erred in finding that “the victims applications forms shall not be disclosed to the SPO, or the Defence”, while the disclosure of the application forms of dual status witnesses to the Defence and the SPO is justified to ensure the fairness of the proceedings for the Accused pursuant to Articles 21(2), 21(4), and 22(6) of the Law and Rules 80(1), 102, and 103 of the Rules (“First Issue”); and
- (2) Whether the Pre-Trial Judge erred in considering that the application forms of dual status witnesses do not constitute “prior statements” disclosable to the Defence under Rules 102 and 103 of the Rules (“Second Issue”).⁶

6. The SPO and Victims’ Counsel respond that the Request should be rejected as it fails to meet the requirements for leave to appeal under Article 45(2) and Rule 77.⁷

III. APPLICABLE LAW

7. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth therein has been met, namely:

- a) Whether the issue at hand would significantly affect:
 - i. The fair and expeditious conduct of the proceedings, or
 - ii. The outcome of the trial; and
- b) Whether, in the opinion of the Panel, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

8. The Panel’s interpretation and application of these provisions has been set out in detail in previous decisions.⁸

⁶ Request, para. 11.

⁷ SPO Response, paras 1, 16; Victims’ Counsel Response, paras 2, 22.

⁸ See e.g., KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect (“Gucati Leave to Appeal”)*, 8 November 2021, paras 13-21; F00372, Trial Panel II,

IV. PRELIMINARY ISSUE

9. The Panel notes the SPO's submissions that the Request is untimely, arguing that the Thaçi Defence is seeking to revisit findings made by the Pre-Trial Judge in the Third Decision on Victims' Participation, which were not appealed at the time.⁹ The Panel considers that, while the Third Decision on Victims' Participation addressed the different roles of victims and witnesses and whether victims' application forms are disclosable,¹⁰ it did not address these issues in respect of witnesses who are also victims admitted to participate in the proceedings ("dual status witnesses").¹¹ Moreover, the Impugned Decision was pending before the Pre-Trial Judge at the relevant time.¹² Accordingly, the Panel considers that it was reasonable for the Thaçi Defence to not raise these issues at the relevant time, and rejects the SPO's submissions as to the timeliness of the Request. The Panel further notes that the Pre-Trial Judge himself did not suggest that the Defence had waived their right to raise the issue which he addressed in the Impugned Decision.

Decision on Haradinaj Defence's Application for Certification of F00328, 15 October 2021, paras 15-17; F00484, Trial Panel II, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. See also F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

⁹ Response, paras 5, 7, 10-11, 13 referring to F00817, *Third Decision on Victims' Participation*, 25 May 2022, strictly confidential and *ex parte*, para. 38. A public redacted version was issued on the same day, F00817/RED.

¹⁰ *Third Decision on Victims' Participation*, para. 38.

¹¹ See *Third Decision on Victims' Participation*, para. 40 where the Pre-Trial Judge explicitly noted that the decision was "without prejudice to any additional measures stemming from the victims' potential dual status".

¹² See *supra*, fn. 1.

V. DISCUSSION

A. GENERAL CONSIDERATIONS REGARDING BOTH ISSUES

10. Both issues for which certification is sought are premised on the underlying proposition that Rule 102 or Rule 103 would provide a basis on which disclosure of the victims' application forms could be ordered (assumingly from the SPO).

11. Such a premise is incorrect as the SPO's obligations to disclose under either of these rules is limited to material that is in its possession. With one possible qualification outlined below, the SPO has no obligation to acquire or seek to acquire material with a view to disclosing it to the Defence. Article 21(6) makes it clear that the SPO's disclosure obligations, as further specified in Rules 102 and 103, pertain to material and relevant evidence or facts *in possession of the Specialist Prosecutor's Office*.¹³ Such an understanding of the scope of the SPO's disclosure obligations is consistent with the jurisprudence of other tribunals.¹⁴ There is only one possible narrow qualification to this general principle. Caselaw indeed suggests that the prosecution might be required to attempt to bring exculpatory material within its control or possession where the defence clearly and specifically identifies exculpatory material it seeks to obtain, demonstrates that it has made diligent efforts to obtain it, and shows that the prosecution is in a better position than the defence to procure that material.¹⁵ The Panel does not need

¹³ See also Rule 102(3).

¹⁴ See, e.g., International Criminal Tribunal for Rwanda ("ICTR"), *Prosecutor v. Jean-Baptiste Gatete*, ICTR-2000-61-T, Trial Chamber III, [Decision on defence motion for disclosure of Rwandan judicial records pursuant to Rule 66 \(A\)\(ii\) and order to the prosecution to obtain documents](#), 23 November 2009, para. 24; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Miroslav Bralo*, IT-95-17-A, Appeals Chamber, [Decision on motions for access to ex parte portions of the record on appeal and for disclosure of mitigating material](#), 30 August 2006, para. 30; *Prosecutor v. Jadranko Prlic et al*, IT-04-74-T, Trial Chamber III, [Decision on Slobodan Praljak's request for the production of the rule 68 exculpatory material in relation to domestic proceedings](#), 10 May 2007; *Prosecutor v. Vujadin Popovic et al*, IT-05-88-T, Trial Chamber III, [Decision on Popovic's Motion for Disclosure Pursuant to Rule 66\(B\) and Request to File an Addendum to Professor Stojkovic's Expert Report](#), 6 October 2008, paras 10-11.

¹⁵ See, generally, ICTR, *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Trial Chamber II, [Decision on Jérôme-Clément Bicamumpaka's Motion For Judicial Notice Of A Rwandan Judgement Of 8 December 2000 And In The Alternative For An Order To Disclose Exculpatory Evidence](#), 15 December 2004, para. 22; *Prosecutor v*

to decide whether such a principle would apply in this jurisdiction as there is in any case no indication, at this stage, that the material in question contains exculpatory information.

B. FIRST ISSUE

12. The Taçi Defence argues that the First Issue arises from the Impugned Decision and contests specific findings made by the Pre-Trial Judge.¹⁶ The Taçi Defence submits that the Pre-Trial Judge erred by finding that Rule 113(1) precludes a Panel from ordering disclosure of the victims' application forms in any circumstances as: (i) the rule only regulates the admission of victims; (ii) the Pre-Trial Judge failed to strike a proper balance between, on the one hand, the safety, physical and psychological well-being, dignity and privacy of victims and, on the other hand, the rights and interests of the Defence; and (iii) the Pre-Trial Judge failed to consider that the Specialist Chambers' ("SC") framework does not contain a specific provision regulating dual status witnesses.¹⁷

13. The Taçi Defence further submits that the First Issue significantly affects the Accused's right to a fair trial and/or the expeditious conduct of the proceedings as: (i) the lack of disclosure of the victims' application forms of dual status witnesses impacts the Accused's right to receive material and to cross-examine witnesses;¹⁸ and (ii) it may impact the Panel's reliance on such witnesses pursuant to Rule 159.¹⁹ The Taçi Defence submits that an immediate resolution by the Court of Appeals Panel of the First Issue would materially advance the

Bizimungu et al, ICTR-99-50-T, Trial Chamber II, [Decision on Bicamumpaka's Motion for Disclosure of Exculpatory Evidence \(MDR Files\)](#), 1 November 2004, para. 14.

¹⁶ Request, para. 12.

¹⁷ Request, para. 13, *referring to* the fact that pursuant to Article 22(6) and Rule 80(1) any participation of victims and any protective measures applied to victims must be consistent with the rights of the Accused.

¹⁸ Request, para. 18.

¹⁹ Request, para. 19.

proceedings as it would clarify the status of the material associated with dual status witnesses, and limit the need for the Thaçi Defence to file similar requests in the future.²⁰

14. The SPO responds that the First Issue does not constitute an appealable issue, as the Thaçi Defence mischaracterises the Impugned Decision and merely raises the same arguments considered and rejected by the Pre-Trial Judge.²¹ The SPO submits that the Pre-Trial Judge's finding is consistent with the practice across cases before the SC.²² It argues that the First Issue does not impact the fairness of the proceedings, as the Defence can examine dual status witnesses with disclosed material.²³ The SPO submits that immediate resolution of the First Issue by the Court of Appeals Panel would not materially advance the proceedings as the Specialist Chamber of the Constitutional Court has already found that Rule 113 is not inconsistent with Chapter II of the Constitution of the Republic of Kosovo.²⁴

15. Victims' Counsel responds that the First Issue is not an appealable issue as it constitutes a mere disagreement with the Pre-Trial Judge's interpretation of Rule 113(1), and with the wording of the rule itself, which, he avers, is "crystal clear".²⁵ Victims' Counsel submits that: (i) Rule 113 cannot be read as being limited in time to only regulate the admission process as, for example, Rule 113(9) looks prospectively to the final judgement;²⁶ and (ii) the SC's legal framework provides

²⁰ Request, paras 18, 20.

²¹ SPO Response, paras 2-4, 7.

²² SPO Response, para. 4, referring to F00257, *First Decision on Victims' Participation*, 21 April 2021, confidential, paras 16, 64. A public redacted version was issued on the same day, F00257/RED; F00611, *Second Decision on Victims' Participation*, 10 December 2021, strictly confidential and *ex parte*, paras 11, 49. Confidential redacted (F00611/CONF/RED) and public redacted (F00611/RED) versions were issued on the same day; KSC-BC-2020-05, F00126/RED, Trial Panel I, *Public redacted version of Third decision on victims' participation*, 21 May 2021, para. 28

²³ SPO Response, para. 14.

²⁴ SPO Response, para. 15 referring to KSC-CC-PP-2017-01, F00004, Constitutional Court, *Judgement on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office* ("SCCC 26 April 2017 Judgement"), 26 April 2017, paras 184-185.

²⁵ Victims' Counsel Response, paras 7-9.

²⁶ Victims' Counsel Response, para. 10.

for dual status witnesses, and it must therefore be assumed that if the drafters intended to provide for disclosure of victims' application forms of dual status witnesses, they would have explicitly done so.²⁷ Victims' Counsel submits that the Thaçi Defence fails to show that the First Issue significantly affects the fairness of the proceedings, as the weight to be attached to the victims' application forms is very limited and the victims' expectation of confidentiality must also be weighed in the balance in deciding their disclosure.²⁸ Lastly, Victims' Counsel submits that the Thaçi Defence has failed to show how the immediate resolution by the Court of Appeals Panel would materially advance the proceedings as the Defence retains their right to examine dual status witnesses.²⁹

16. At the outset, the Panel notes that the First Issue reads "Whether the Pre-Trial Judge erred in finding that 'the victims application forms should not be disclosed to the SPO, or the Defence'".³⁰ The Panel recalls that the Impugned Decision only considered whether the victims' application forms of *dual status witnesses* should be disclosed to the SPO and the Defence.³¹ The Panel will interpret the First Issue accordingly and limit its consideration to this particular category of victims.

17. The Panel considers that the Thaçi Defence has failed to establish that the First Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Indeed, the Panel recalls that an issue must be one that is likely to have repercussions on one of these elements.³² In this respect, the Panel reiterates, as noted above, the SPO's disclosure obligations under Rules 102 and 103 exist only in respect of material in possession of the SPO. The victims' applications forms have not been shown to be in possession of the

²⁷ Victims' Counsel Response para. 13 *referring to* Articles 22(1) and 42(2) which respectively provide that "Participation by a Victim by the Specialist Chamber shall not be a bar to providing testimony as a witness before the Specialist Chamber" and "A Victim may be examined as a witness."

²⁸ Victims' Counsel Response, paras 184-185.

²⁹ Victims' Counsel Response, para. 21.

³⁰ Request, para. 11.

³¹ Impugned Decision, paras 28-32.

³² *Gucati* Leave to Appeal, para. 17.

SPO. None of the other provisions listed by the Thaçi Defence provide a valid legal basis upon which the SPO would be required to acquire and disclose the victims' application forms. The Panel notes further that Rule 114(5) would not be relevant and applicable to the present circumstances as the witnesses in question are to be called by the SPO, not Victims' Counsel as foreseen in that provision.

18. The Request is premised on another unproven assumption, namely, that the victims' application forms contain information of such importance that denying the Defence access would constitute a significant interference with the fairness of proceedings. There is no indication before this Panel that the material contains information of this sort. Use of the term "significantly" in the wording of the first prong of the certification test indicates that an applicant must not only show how the issue affects: (i) the fair and expeditious conduct of proceedings, or (ii) the outcome of the trial, but must also demonstrate the (significant) degree to which these factors are affected. Such a demonstration has not been made here. While the victims' application forms *could* contain information relevant to the Defence, this has not been established. Nor has it been established that the denial of such information would have an impact (significant or otherwise) on the fairness of proceedings. While the concerns underlying these suggestions are legitimate and will be addressed below, they are at this point mere conjectures insufficient to meet the threshold relevant to the present application.

19. In addition, the Panel observes that the Defence has access to all prior statements of dual status witnesses in the SPO's possession and will be able to cross-examine the dual status witnesses with such information. There is equality of arms between the SPO and the Defence to the extent that the victims' application forms are also not available to the SPO.

20. Accordingly, the Thaçi Defence has failed to establish that the First Issue would significantly affect the fair and expeditious conduct of the proceedings. The Thaçi Defence has not argued that the First Issue would significantly affect the

outcome of the trial. As a result, the remaining requirements of the certification test will not be addressed with respect to the First Issue.

21. For these reasons, the Panel finds that the First Issue does not meet the certification test for interlocutory appeals under Article 45(2) and Rule 77(2).

C. SECOND ISSUE

22. The Thaçi Defence submits that the Second Issue arises from the Impugned Decision, and that the Pre-Trial Judge erred in concluding that the victims' application forms of dual status witnesses are mere "administrative documents" and do not constitute "prior statements" disclosable to the Defence under Rules 102 and 103.³³ Specifically, the Thaçi Defence contends that the Pre-Trial Judge failed to take into account that the victims' application forms contain information relevant to the charges against the Accused (how the applicant qualifies as a victim and location and date of alleged crimes), which may be relevant to identify inconsistencies in a witness' testimony and which may contain exculpatory information.³⁴ The Thaçi Defence submits, for the same reasons as for the First Issue, that the Second Issue significantly affects the fair and expeditious conduct of proceedings and that the immediate resolution of the Court of Appeals Panel would materially advance the proceedings.³⁵

23. The SPO responds that the Second Issue is not an appealable issue, as the Thaçi Defence fails to show how this issue is essential to the Impugned Decision considering that it does not impact the Pre-Trial Judge's primary finding that the victims' application forms are not disclosed to Parties and are, therefore, outside the scope of the SPO's disclosure obligations.³⁶ The SPO submits, for the same

³³ Request, para. 14.

³⁴ Request, para. 14.

³⁵ See *supra*, para. 13; See also, Request, paras 18-20.

³⁶ SPO Response, paras 12-13.

reasons as for the First Issue, that the Thaçi Defence has failed to show that the Second Issue would significantly affect the fair and expeditious conduct of proceedings, or the outcome of the trial, and/or that the immediate resolution of the Court of Appeals Panel would materially advance the proceedings.³⁷

24. Victims' Counsel responds that the Second Issue is not an appealable issue as it is a mere disagreement with the Impugned Decision and the Thaçi Defence merely repeats arguments duly considered by the Pre-Trial Judge, namely that the victims' application forms, as material not disclosed to the SPO, cannot be subject to Rules 102 and 103.³⁸ Victims' Counsel submits, for the same reasons as for the First Issue, that the Thaçi Defence has failed to show that the Second Issue would significantly affect the fair and expeditious conduct of proceedings, or the outcome of the trial, and/or that the immediate resolution of the Court of Appeals Panel would materially advance the proceedings.³⁹

25. The Panel considers that the Thaçi Defence has failed to establish that the Second Issue would significantly affect either element in the first prong of the certification test. The Panel observes that the Second Issue is again premised upon the proposition that should victims' application forms be regarded as "prior statements", then they should be disclosed by the SPO to the Defence in respect of dual status witnesses pursuant to Rules 102 and 103. However, as noted above, it remains that the SPO is obligated only to disclose those statements in the SPO's possession. Therefore, even assuming that the victims' application forms do in this case qualify as "statements" for the purpose of disclosure, this would not render them disclosable under either of these rules. Accordingly, the Thaçi Defence has failed to establish that the Second Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

³⁷ See *supra*, para. 14; See also, SPO Response, paras 14-15.

³⁸ Victims' Counsel Response, paras 15-18.

³⁹ See *supra*, para. 15; See also, Victims' Counsel Response, paras 19-21.

26. For these reasons, the Panel finds that the Second Issue does not meet the certification test under Article 45(2) and Rule 77(2).

VI. DISPOSITION

27. For these reasons, the Panel **REJECTS** leave to appeal the First and Second Issues.

28. Despite the above, the Panel accepts that because of the way in which the disclosure regime is framed under the Rules, a situation could arise where the Defence is denied access to information that *could* be relevant to its case and which *could* impact the credibility, reliability and weight of evidence offered by the SPO. This, if unaddressed, could negatively affect the rights of the Accused. For that reason, the Panel will seek to address those concerns and will seek submissions from the Parties and participants in respect of it. Submissions regarding this issue will be sought at the 15 February 2023 Specialist Prosecutor's Preparation Conference. The Parties and participants are invited to address the question of the circumstances in which information contained in the application forms should be provided to the Defence and, where this should occur, by what means the communication of any such information should be done.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 30 January 2023

At The Hague, The Netherlands.