



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: 6 March 2023

Language: English

Classification: Public

**Order on the Disclosure of Application Forms Pertaining to Dual Status Witnesses
with strictly confidential and *ex parte* Annexes 1-3**

Acting Specialist Prosecutor

Alex Whiting

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Victims

Simon Laws

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagenda

TRIAL PANEL II (“Panel”), pursuant to Articles 21(2), 21(4)(f), and 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 5 and 113(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this order.

I. PROCEDURAL BACKGROUND

1. On 13 December 2022, following a request by the Defence for Hashim Thaçi (“Thaçi Defence”),¹ the Pre-Trial Judge issued a decision rejecting the Thaçi Defence’s request for disclosure of the application forms and supporting materials of dual status witnesses.²
2. On 9 January 2023, the Thaçi Defence filed a request for leave to appeal the decision.³
3. On 30 January 2023, the Panel denied leave to appeal and invited oral submissions from the Parties and participants regarding the disclosure of the application forms of dual status witnesses at the upcoming Specialist Prosecutor’s Preparation Conference.⁴

¹ F00706, Specialist Counsel, *Thaçi Defence Motion for Disclosure of Witnesses with Dual Status*, 21 February 2022. The Specialist Prosecutor’s Office and Victims’ Counsel 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.

² F01153, Pre-Trial Judge, *Decision on Thaçi Defence’s Request for Disclosure of Dual Status Witnesses* (“PTJ Decision on Disclosure”), 13 December 2022.

³ 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 decision of the Pre-Trial Judge, paragraph 46(h), the Pre-Trial Judge extended the deadline to request leave to appeal to 9 January 2023. *See also* 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.

⁴ F01237, Trial Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 27-28.

4. On 15 February 2023, at the conference, the Parties and participants made oral submissions on four questions posed by the Panel: (i) whether the Panel has the authority to order the disclosure of the application forms of participating victims who are also witnesses (“Dual Status Witnesses”) in light of the wording of Rule 113(1), second sentence; (ii) if the Panel has the authority, who should review and redact the forms prior to disclosure – the Panel or Victims’ Counsel; (iii) whether the review should focus on identifying those parts of the forms that are material to the preparation of the Defence case, or those parts that contain exculpatory information, or both; alternatively, whether the review should focus only on identifying for redaction contact details and other information the disclosure of which might affect the security of any person; and (iv) whether the Specialist Prosecutor’s Office (“SPO”) should have the opportunity to make further submissions on each application form prior to its disclosure to the Defence.⁵

II. SUBMISSIONS

5. In response to the Panel’s questions, no Party or participant submitted that the Panel does not have the authority to order the transmission to the Defence of the application forms of Dual Status Witnesses.

6. The SPO acknowledged that there is a concern about the fairness to the Accused if they are not given access to the application forms of Dual Status Witnesses, and it advocated for a narrow solution that takes account of the fact that Rule 113(1) presumes that the Parties would not be given access to victims’ applications.⁶ The SPO submitted that the plain terms of Rule 113 are clear and it cautioned against any departure from that Rule.⁷ The SPO proposes that the Panel

⁵ Transcript (SPO Conference), 15 February 2023, p. 2021, line 25 – p. 2022, line 14.

⁶ Transcript (SPO Conference), 15 February 2023, p. 2020, lines 18-25.

⁷ Transcript (SPO Conference), 15 February 2023, p. 2024, lines 15-20.

issue a narrow order transmitting only the material that the Panel is concerned would implicate the Accused's fair trial rights.⁸

7. The SPO submitted that, in practical terms, the Panel could order that Section 2 of the application form (which it understood from Victims' Counsel to be the most relevant section) be transmitted to the Defence.⁹

8. The Thaçi Defence argued that there may be issues of credibility, reliability, and/or the weight that should be assigned to the evidence of Dual Status Witnesses. The Thaçi Defence further submitted that Rule 103 is implicated if the Defence is denied access to information that may be relevant to its case.¹⁰ It argued that the Panel may wish to review the relevant application forms or request another Judge to do so.¹¹

9. Victims' Counsel stands ready to facilitate the SPO's proposal, but made clear his position that Rule 113 "applies in its own terms".¹² Victims' Counsel submitted that it should not be involved in a review of the application forms to determine whether their content may be exculpatory or otherwise disclosable to the Defence.¹³ However, Victims' Counsel seeks to review the application forms prior to disclosure in order to raise concerns about sensitive material affecting other participating victims.¹⁴

10. Victims' Counsel indicated that Section 2 of the application forms would be the most relevant to the Defence, as it contains an explanation of how the applicant qualifies as a "victim" participating in the proceedings.¹⁵

⁸ Transcript (SPO Conference), 15 February 2023, p. 2025, lines 10-19.

⁹ Transcript (SPO Conference), 15 February 2023, p. 2026, lines 3-4.

¹⁰ Transcript (SPO Conference), 15 February 2023, p. 2026, lines 13-19.

¹¹ Transcript (SPO Conference), 15 February 2023, p. 2021, lines 12-22; p. 2026, line 20 – p. 2027, line 5.

¹² Transcript (SPO Conference), 15 February 2023, p. 2021, lines 2-10; p. 2023, line 24 – p. 2024, line 4.

¹³ Transcript (SPO Conference), 15 February 2023, p. 2023, lines 5-20.

¹⁴ Transcript (SPO Conference), 15 February 2023, p. 2023, line 21 – p. 2024, line 1.

¹⁵ Transcript (SPO Conference), 15 February 2023, p. 2024, lines 2-12.

III. APPLICABLE LAW

11. The relevant law is set out in Articles 21(2), 21(4)(f), 23 and 40(2) of the Law, and Rules 4, 5, and 113 of the Rules, as further discussed below.

IV. DISCUSSION

12. The Panel is obliged under Article 40(2) to ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

13. The Panel is obliged under Article 21(4)(f) to respect the right of the accused to examine, or have examined, the witnesses against him or her.

14. Rule 113(1) states that applications for the admission of victims participating in the proceedings shall not be disclosed to the Parties. The Panel agrees with the Pre-Trial Judge's finding that: "Rule 113(1) of the Rules explicitly excludes the disclosure of 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. [...] [A]s 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".¹⁶

15. Rule 113 governs the process of admission to participate in the proceedings, and the consequences for the applicant of a decision to grant or deny admission. It is found in Chapter 8 of the Rules, regulating victims' participation in the proceedings, not Chapter 7, which regulates disclosure. Furthermore, Rule 113(1) deals exclusively with victims,¹⁷ not witnesses.

¹⁶ PTJ Decision on Disclosure, para. 29.

¹⁷ A "Victim" defined in Rule 2 is "[a] natural person who has suffered physical, material, or mental harm as a direct result of a crime alleged in an indictment confirmed by the Pre-Trial Judge".

16. The Panel considers that the purpose underlying the withholding of victims' application forms from the Parties under Rule 113(1) is to reduce litigation during the procedure for the admission of participating victims. That procedure is marginal to the question of whether the Accused is guilty or not guilty of the crimes charged.¹⁸ Victims' application forms are not intended to form any part of the evidentiary record which is used by the Panel to determine whether an Accused is guilty or not guilty. The effect of Rule 113(1) is to contribute to the expediency of the victim admission proceedings in the pre-trial phase.

17. However, neither the Law nor the Rules specifically regulate the question of whether the Defence should have access to the application forms of Dual Status Witnesses at trial. The Panel notes the application forms of Dual Status Witnesses contain information provided by a witness for the prosecution to staff of the SC which is directly relevant to the evidence that the witness is expected to give at trial.

18. The Panel finds that the question of whether the Defence should have access to relevant parts of the application forms of Dual Status Witnesses is a question which is not addressed by the Rules, and that Rule 5 therefore applies. The Panel is required by Rule 5 to rule in accordance with Article 19(2) and (3) of the Law, and the principles set out in Rule 4. Where any ambiguity cannot be settled in accordance with Rule 4(1), the Panel must resolve it by the adoption of the most favourable interpretation to the suspect or the Accused in the given circumstances.

¹⁸ See ICC, 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, ICC-01/14-01/21-171 (OA2), paras 60-61, justifying the non-disclosure of certain victims' application forms to the parties in part due to the delays caused by "an unnecessarily complicated or protracted procedure". See also Fardel, M. and Vehils Olarra, N., "The Application Process: Procedure and Players" in Tibori-Szabó, K. and Hirst, M. (eds) *Victim Participation in International Criminal Justice*, T.M.C. Asser Press 2017, pp. 29-30, describing some of the advantages of restricting the parties' ability to respond to applications of victims as "time and resource saving for the Registry, protection of victims' identities, time saving for the parties (and thus a reduction in legal aid expenditures on Defence work), expedition of decision-making on victim applications, and expedition of the judicial proceedings in general".

19. Article 40(2) gives the Panel the authority, having heard the parties, to “adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of the proceedings”. As noted above, no Party or participant argued that the Panel does not have authority to order the transmission to the Defence of the application forms of participating victims who are also witnesses. As both Victims’ Counsel and the SPO acknowledge,¹⁹ the Panel has the discretion to facilitate the transmission of relevant parts of the application forms to the Defence in order to ensure a fair proceeding.

20. The Panel finds that the question of whether the application forms of Dual Status Witnesses should be provided to the Defence is not clearly settled by reference to the interpretive framework in Rule 4(1), and the Panel must therefore resolve it by the adoption of the most favourable interpretation to the suspect or the Accused in the given circumstances. The Panel finds that the interpretation of the Rules which is most favourable to the Accused in the given circumstances is to order the transmission of the relevant parts of the application forms of Dual Status Witnesses, redacted to remove any information the disclosure of which might affect the security of any person. This interpretation will enable the Panel to ensure a fair and expeditious trial, and in particular to give full effect to the right of an accused under Article 21(4)(f) to examine or have examined witnesses against him or her.

21. The Panel turns now to discuss which part of the application form is most relevant. In Section 2 of the application form, each applicant is required, *inter alia*, to provide answers to the following questions:

- (a) “Please indicate the alleged crime in an indictment confirmed by the Kosovo Specialist Chambers as a direct result of which you became a victim”;
- (b) “Please describe how you became a victim as a direct result of this crime. Indicate, to the best of your knowledge, the date, time and location of the events as well as how

¹⁹ Transcript (SPO Conference), 15 February 2023, p. 2022, lines 17-20; p. 2026, lines 3-4.

the events unfolded. If possible, please identify or describe the persons present at the scene and/or involved in the events"; and (c) "Please describe the harm that you sustained as a direct result of this crime".

The form is completed and signed by the applicant, who confirms that the information provided in the form is correct to the best of his or her knowledge.

22. The Panel has reviewed Section 2 of the application forms and considers that the answers which Dual Status Applicants have provided to these questions may contain information that could assist the Defence in examining a Dual Status Witness. In particular, they contain information that might, if in the possession of the SPO, be disclosable under Rule 103. They also contain narratives of the relevant events that might be either inconsistent with other prior statements given by the witness or with the testimony that the witness gives at trial. With such information, the Defence may seek to impeach the witness's credibility.

23. The Panel therefore agrees with the suggestion of the Victims' Counsel, supported by the SPO, that a narrowly-tailored solution to the issue is provided by transmitting to the Defence the information in Section 2 of each application form. The Panel finds that granting access to the Defence to Section 2 of the application forms of Dual Status Witnesses is necessary to facilitate the fair and expeditious conduct of the proceedings, in particular to facilitate the right to examine a witness enshrined in Article 21(4)(f) and, more generally, the right to a fair trial under Article 21(2).

24. As part of the process for admission to participate in the proceedings under Rule 113, many Dual Status Witnesses have submitted, with their completed application forms, supporting documents that demonstrate their eligibility. The Panel considers that, where Section 2 of a particular application form is not comprehensible without a supporting document, the Panel will include, on an exceptional basis, that supporting document.

25. For these reasons, the Panel decides that Section 2 of all application forms of Dual Status Witnesses should be transmitted to the Defence, and, where necessary, supporting material referred to in Section 2. Prior to doing so, the Panel shall give the Victims' Counsel an opportunity to suggest, with fact-specific reasons, redactions to Section 2 or the supporting material which are necessary for the protection, safety, physical and psychological well-being, dignity or privacy of any person. Furthermore, the Panel will also give the SPO an opportunity to suggest redactions which may be necessary under Rule 108 or to protect any person referred to in Section 2 who is a witness for the SPO and whose identity is subject to an order for delayed disclosure.

26. The Panel is aware that applicants have provided information in the application forms on the understanding that the forms were not to be disclosed to the Parties. The Panel is mindful of its obligation under Article 40(2) to ensure that the trial is conducted with due respect for the protection of victims and witnesses. The Panel is also mindful of its power to 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."

27. The Panel expects that Victims' Counsel, as part of his ordinary duties, will have already notified Dual Status Witnesses of the SPO's obligations under Rule 102 to disclose any prior statements of Dual Status Witnesses to the Defence. The Dual Status Witnesses will therefore already be aware that their prior statements are to be disclosed to the Defence. The Victims' Counsel should also make the Dual Status Witnesses aware that Section 2 of their application forms will be transmitted to the Defence, in line with the present order. The Victims' Counsel is at liberty to transmit to the Panel any views or concerns raised by the Dual Status Victims as a result of the present order.

28. After the Panel has received the observations of the SPO and Victims' Counsel, it will authorise any necessary redactions to the application forms, and, where relevant, supporting material, and transmit the redacted material to the Parties and to the Victims' Counsel.

29. At present there are 62 Dual Status Witnesses.²⁰ The Panel will deal with the disclosure of the application forms on a rolling basis, focusing initially on the Dual Status Witnesses who fall within the first twelve SPO witnesses.

VI. DISPOSITION

30. For these reasons, the Panel hereby

- a) **TRANSMITS** in Annexes 1-3 to the present decision, on an *ex parte* basis, to the SPO and Victims' Counsel, Section 2 of the application forms of the Dual Status Witnesses who fall within the first twelve SPO witnesses, and any supporting document without which Section 2 of any application form would be incomprehensible;
- b) **SHALL TRANSMIT** on an ongoing basis to the SPO and Victims' Counsel Section 2 of the application forms of all other Dual Status Witnesses, and any supporting document without which Section 2 of any application form would be incomprehensible;

²⁰ F01312/A02, Annex 2 to Victims' Counsel and SPO Second Joint Filing in Compliance with Decision F01293, 22 February 2023, strictly confidential and *ex parte*.

- c) **ORDERS** the SPO and Victims' Counsel to submit their observations on any necessary redactions to such material no later than one week after they receive it from the Panel;
- d) **SHALL TRANSMIT** thereafter, with any necessary redactions, the material to the Parties and Victims' Counsel.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 6 March 2023

At The Hague, The Netherlands.