

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, Presiding Judge
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Victims' Counsel

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**Public Redacted Version of
Victims' Counsel's Request for Reconsideration of the "Trial Panel's Order on the
Disclosure of Application Forms Pertaining to Dual Status Witnesses with strictly
confidential and *ex parte* Annexes 1-3" (14 March 2023)**

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I. INTRODUCTION

1. Pursuant to Article 22(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office (Law No. 05/L-053) ("Law"), Rule 114(4)(a) and Rule 79(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), Victims' Counsel submits this request for reconsideration of the Trial Panel's "Order on the Disclosure of Application Forms Pertaining to Dual Status Witnesses with strictly confidential and *ex parte* Annexes 1-3".¹
2. Victims' Counsel submits that the Order is erroneous because it is inconsistent with:
 - a. a recent decision by Trial Panel I concerning Rule 113(1) and non-disclosure of victims' application forms;
 - b. the earlier approach of Trial Panel I on this issue;
 - c. the position of the Pre-Trial Judge on this issue which was consistent with the interpretation adopted by Trial Panel I; and
 - d. the plain wording of Rule 113(1) in the context of the legal framework of the Kosovo Specialist Chambers ("KSC").
3. The implementation of the Order will lead to different procedural standards applicable to VPPs in different cases, [REDACTED].
4. Therefore, Victims' Counsel requests reconsideration of the Order under Rule 79(1) of the Rules.

II. CLASSIFICATION OF FILING

5. This filing is classified as public as it concerns a public order and contains no confidential information.

¹ *Prosecutor v. Thaçi et al.* ("Case 06"), KSC-BC-2020-06/F01348, Order on the Disclosure of application Forms Pertaining to Dual Status Witnesses with strictly confidential and *ex parte* Annexes 1-3, 6 March 2023 ("Order").

III. PROCEDURAL HISTORY

6. On 21 February 2022, the Thaçi Defence requested disclosure of the application forms and supporting materials of dual status victims/witnesses.²
7. On 3 March 2022, both Victims' Counsel³ and the Specialist Prosecutor's Office ("SPO") filed their responses,⁴ to which the Thaçi Defence replied on 8 March 2022.⁵
8. On 13 December 2022, the Pre-Trial Judge rejected the Thaçi Defence request for disclosure of the application forms and supporting materials of dual status victims/witnesses.⁶
9. On 9 January 2023, the Thaçi Defence requested leave to appeal the Pre-Trial Judge's Decision,⁷ to which the SPO⁸ and Victims' Counsel⁹ responded on 20 January 2023.
10. On 30 January 2023, the Panel denied the Thaçi Defence Request for leave to appeal,¹⁰ noting however, that "because of the way in which disclosure regime is framed under the Rules, a situation could arise where the defence is denied

² KSC-BC-2020-06/F00706, Thaçi Defence Motion for Disclosure of Witnesses with Dual Status, 21 February 2022.

³ KSC-BC-2020-06/F00723, Victims' Counsel Response to Thaçi Defence Motion for Disclosure of Witnesses with Dual Status, 3 March 2022 ("Victims' Counsel's Response to Thaçi Defence Motion for Disclosure").

⁴ KSC-BC-2020-06/F00722, Prosecution Response to "Thaçi Defence Motion for Disclosure of Witnesses with Dual Status", 3 March 2022.

⁵ KSC-BC-2020-06/F00728, Thaçi Defence Consolidated Reply to Prosecution and Victims' Counsel Responses to "Thaçi Defence Motion for Disclosure of Witnesses with Dual Status", 8 March 2022.

⁶ KSC-BC-2020-06/F01153, *Decision on Thaçi Defence's Request for Disclosure of Dual Status Witnesses*, 13 December 2022 ("Pre-Trial Judge's Decision").

⁷ KSC-BC-2020-06/F01192, Thaçi Defence Request for Certification to Appeal the "Decision on Thaçi Defence's Request for Disclosure of Dual Status Witnesses" (F01153), 9 January 2023 ("Thaçi Defence Request for leave to appeal").

⁸ KSC-BC-2020-06/F01217, Specialist Prosecutor, Prosecution Response to Thaçi Defence Request for Certification to Appeal Decision F01153, 20 January 2023.

⁹ KSC-BC-2020-06/F01218, 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 ("Victims' Counsel's Response to Thaçi Defence Request for Certification").

¹⁰ KSC-BC-2020-06/F01237, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023 ("Decision on Thaçi Defence Request for Leave to Appeal").

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”.¹¹ Consequently, the Panel invited oral submissions from the Parties and participants regarding the disclosure of the application forms of dual status victims/witnesses during the SPO’s preparation conference on 15 February 2023.¹²

11. On 15 February 2023, the Parties and Victims’ Counsel made oral submissions on the matter.
12. On 6 March 2023, the Trial Panel issued the Order.

IV. SUBMISSIONS

13. Where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice a Panel may upon request by, among others, Victims’ Counsel, reconsider its own decisions (see Rule 79 of the Rules).
14. The Order concerns disclosure of information provided by the VPPs in their application forms submitted to the KSC. Therefore, the Order involves the interests of VPPs directly.
 - a. *Trial Panel I’s decisions, including one explicitly addressing Rule 113(1) that post-dates the last submissions on this issue to Trial Panel II, support the conclusion that Rule 113(1) prohibits the disclosure of application forms*
15. Victims’ Counsel’s understanding of Rule 113(1) is consistent with the interpretation of that rule adopted by Trial Panel I in the *Salih Mustafa* case (“Case 05”), and more recently in the *Pjetër Shala* case (“Case 04”).

¹¹ Decision on Thaçi Defence Request for Leave to Appeal, para. 28.

¹² Decision on Thaçi Defence Request for Leave to Appeal, para. 28.

16. In Case 05, there was no disclosure of VPPs' application forms.
17. In Case 04, Trial Panel I, in ordering the disclosure of the identities of dual status VPPs, held that:

“That being said, the Panel stresses that the disclosure of the identities of Dual Status Victims-Witnesses does not entail the disclosure of the relevant victims' applications and related supporting material, as clearly stipulated in Rule 113(1) of the Rules, second sentence.”¹³

18. Victims' Counsel respectfully adopts that emphatic summary of the effect of Rule 113(1) and notes that this analysis by Trial Panel I was issued after the final submissions to Trial Panel II on this topic, and that it is not referred to in the Order.
19. One of the consequences of the Order is therefore the creation of different approaches to this issue by different panels of the KSC. This is not a matter of discretion in which different judges may take different approaches, but of irreconcilable interpretations of the same provision. [REDACTED]. This undesirable situation alone provides grounds for the decision to be reconsidered.
20. The difficulties do not end there. Having come into possession of the forms as a result of the Order, the SPO will be obliged to consider them for disclosure [REDACTED].
21. [REDACTED].

b. Opinion of the Pre-Trial Judge

22. Victims' Counsel's reading of of Rule 113(1) is consistent not only with the interpretation of the rule by Trial Panel I but also with the understanding of that provision by the Pre-Trial Judge.¹⁴

¹³ *Prosecutor v. Pjetër Shala*, KSC-BC-2020-04/F00433/public, Decision on victims' procedural rights during trial and related matters, 24 February 2023, para. 58.

¹⁴ Pre-Trial Judge's Decision, paras 28-32.

23. One cannot ignore the limited purpose and most importantly, the circumstances in which victims' application forms have been filled in and submitted to the Specialist Chambers which affects their probative value and disqualifies them from the category of "prior statements":

"[...] 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. 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. Rather, this information gathering is effectuated primarily through the disclosure process. Importantly, unlike a witness, a victim applicant is not informed of his or her rights 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."¹⁵

24. Finally, Victims' Counsel notes that all of the dual status victims/witnesses have provided extensive statements to the SPO, and have done so prior to submitting their application forms for participation in the proceedings. This material is or will be available to the Defence.
25. Therefore, as rightly found by the Pre-Trial Judge:

"[t]he above interpretation [of Rule 113(1)] 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."¹⁶

¹⁵ Pre-Trial Judge's Decision, para. 30 (footnotes omitted).

¹⁶ Pre-Trial Judge's Decision, para. 31.

c. There is no ambiguity in the Rules as to the non-disclosure of victims' application forms to the Parties throughout all stages of the proceedings

26. Having found that neither the Law nor the Rules specifically regulate the question of whether the Defence should have access to the application forms of dual status victims/witnesses at trial, the Panel decided to apply Rule 5.¹⁷ This has led the Panel to rely on the principle set out in Rule 4.¹⁸
27. According to the Panel, “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 [pursuant to Rule 4(3)] resolve it by the adoption of the most favourable interpretation to the suspect or the Accused in the given circumstances”.¹⁹
28. Consequently, relying on Rule 4(3) and Article 40(2) of the Law, the Trial Panel found that “the most favourable to the Accused interpretation of the rules in the given circumstances is to order transmission of the relevant parts of the application forms of Dual Status Witnesses [...]”.²⁰ According to the Panel, “[t]his 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
29. Contrary to the above cited findings of the Trial Panel, there is no ambiguity as to the scope of Rule 113(1). Therefore, there was no need for the Panel to resort to Rule 4(3) and its powers under Article 40(2) of the Law.
30. As previously submitted by Victims’ Counsel in his Response to Thaçi Defence Motion for Disclosure, Rule 113(1) of the Rules is crystal clear.²² Victims’ Counsel

¹⁷ Order, paras 17-18.

¹⁸ Order, para. 18.

¹⁹ Order, para. 20.

²⁰ Order, para. 20.

²¹ Order, para. 20.

²² Victims’ Counsel’s Response to Thaçi Defence Motion for Disclosure, para. 9.

has maintained this position in his subsequent written²³ and oral submissions on the matter²⁴ and his position remains unchanged.

31. The fact that Rule 113 regulates the “Admission of Victims for Participation in the Proceedings” does not render the provision pertaining to non-disclosure of victims’ application forms to the Parties ineffective after victims are admitted to participate in the proceedings, be it in relation to single or dual status VPPs. The key provision prohibiting disclosure cannot be read as being limited in time. Nor does Rule 113 only regulate the admission process itself. Rule 113(9), for example, looks prospectively to the final trial judgment. The Rule is therefore not limited in its scope to the modalities of admission, as concluded by the Trial Panel.
32. The conclusion that non-disclosure of victims’ application forms to the Parties “is meant only to reduce litigation during the procedure for the admission of participating victims” is based on the experience of the International Criminal Court (“ICC”). However, the application process at the ICC cannot be meaningfully compared to that of the KSC.
33. Pursuant to Rule 89(1) of the ICC Rules of Procedure and Evidence, parties are provided with a copy of victims’ application forms and entitled to reply to them. For example, at the ICC issues such as completeness of the application forms, adequacy and validity of supporting documents, or the harm suffered by applicants were litigated by the parties.²⁵ Pursuant to Rule 113(2) of the KSC Rules, Parties are provided with a confidential report from the Victims’ Participation Office and may only make observations on legal, as opposed to factual, grounds regarding admissibility and common representation.

²³ Victims’ Counsel’s Response to Thaçi Defence Request for Certification, paras 8, 10.

²⁴ See paragraphs 38-41 below.

²⁵ See for example: ICC, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-305, Defence Observations Concerning the 259 Victims Participation Applications and supporting Documents, 21 October 2015; *Prosecutor v. Francis Kirimi Muthaura, Uguru Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-248, Defence Observations on 245 Applications for Victim Participation in the Proceedings with Confidential Annex 1, Confidential *ex parte* Annexes 2 and 3, and Public Annex 4, 17 August 2015.

34. Therefore, there was no need for the drafters to additionally “reduce litigation” by ensuring non-disclosure of application forms to the Parties. Prohibition of disclosure of the application forms is not a measure to reduce litigation. Rather, this goal was achieved by Rule 113(2) and (3).
35. It is submitted that this reading of the application process at the KSC is consistent with the Pre-Trial Judge’s view that the application forms are essentially a matter between the applicants/VPPs and the judges.²⁶ This interpretation offers maximum protection for the safety, dignity and wellbeing of the VPPs from the earliest stages of their engagement with the Specialist Chambers.
36. Victims’ Counsel suggests that the observation that “neither the Law nor the Rules regulate the question of whether the Defence should have access to the application forms of Dual Status Witnesses at trial”,²⁷ is entirely consistent with the fact that Rule 113 precludes their disclosure to the Defence and that the absence of any Rules regulating Defence access to them should therefore not come as a surprise.
37. This conclusion is supported by the fact that the Law contains specific provision for dual status witnesses. For example, Article 22(1) of the Law provides that: “Participation by a Victim by [sic] the Specialist Chambers shall not be a bar to providing testimony as a witness before the Specialist Chambers”. Similarly, Article 42(2) of the Law provides that a Victim may be examined as a witness. In those circumstances, it must be assumed that had the drafters intended to provide for disclosure of application forms of dual status victims to the Parties, they would have explicitly done so and not left Rule 113 to stand in its unqualified and unambiguous terms.

²⁶ Pre-Trial Judge’s Decision, para. 30.

²⁷ Order, para. 17.

d. Submissions as to Article 40(2)

38. In paragraph 19 of the Order, the Panel noted:

“[...] 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, 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”.

39. However, as the Panel also notes in paragraph 9 in the oral hearing, Victims’ Counsel’s position was unchanged:

“Victims’ Counsel stands ready to facilitate the SPO’s proposal, but made clear his position that Rule 113 “applies in its own terms” .”

40. Victims’ Counsel has, as the Panel acknowledge, never resiled from the position that he took in the first filing on this issue,²⁸ namely that Rule 113 is clear on its face and that the discretionary power to order disclosure of the application forms only arises once the Panel has decided not to apply Rule 113 on the grounds of fairness. It is only at that stage that the power under Article 40(2) can apply, but the submission of Victims’ Counsel is that that stage should not be reached because of the clear prohibition in Rule 113:

“I should make it clear for the record that our position, keen though we are to assist the Bench, and we’ll do whatever is necessary, our position remains the same, that Rule 113 applies in its own terms. I can’t pretend that we have adopted another position because we haven’t.”²⁹

“I don’t dispute that the Court has the power to do as it wishes to do, because this Court has a power to make orders that will facilitate the expeditious and fair conduct of the proceedings. I’ve already said what I say about Rule 113. But if we’re going to

²⁸ Victims’ Counsel’s Response to Taçi Defence Motion for Disclosure, para. 9; Victims’ Counsel’s Response to Taçi Defence Request for Certification, paras 8, 10.

²⁹ KSC-BC-2020-06/public, Transcript, 15 February 2023, p.2021:5-10.

consign that rule to the sidelines and focus on a mechanism, then the Court has the power to do that.”³⁰

41. In summary then, Victims’ Counsel submits that, although it is agreed that the Trial Panel has the power to do as it proposes, that is not the same as Victims’ Counsel agreeing that the Trial Panel should exercise that power.

V. CONCLUSION

42. Implementation of the Panel’s interpretation of Rule 113(1) necessarily imports the procedural difficulties identified above.
43. For the Panel’s conclusion in respect of Rule 113(1) to be correct, it requires that there has been an error by Trial Panel I in their interpretation of the Rules, an error by the Pre-Trial Judge in his interpretation of the Rules, and an error in the drafting of the Rules themselves.
44. The other possibility is that the error lies with Trial Panel II’s interpretation of Rule 113(1) and this is the conclusion that Victims’ Counsel respectfully invites the Panel to reach.

VI. RELIEF REQUESTED

45. For all the foregoing reasons, Victims’ Counsel respectfully asks the Trial Panel to re-consider the Order, and reverse it with regard to the disclosure of application forms.

Word count: 2960

³⁰ KSC-BC-2020-06/public, Transcript, 15 February 2023, p.2022:17-23.



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