



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

**Registrar:** Fidelma Donlon

**Date:** 12 April 2023

**Language:** English

**Classification:** Public

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**Decision on Victims' Counsel's Request for Reconsideration of Trial Panel II's  
"Order on the Disclosure of Application Forms Pertaining to Dual Status  
Witnesses"**

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**TRIAL PANEL II** (“Panel”), pursuant to Article 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 79, 113(1), 116(1) and (3) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 13 December 2022, following a request by the Defence for Hashim Thaçi (“Thaçi Defence”),<sup>1</sup> the Pre-Trial Judge issued a decision rejecting the Thaçi Defence’s request for disclosure of the application forms and supporting materials of participating victims who will also testify for the SPO at trial (“Dual Status Witnesses”).<sup>2</sup>
2. On 9 January 2023, the Thaçi Defence filed a request for leave to appeal the decision.<sup>3</sup>
3. On 30 January 2023, the Panel denied leave to appeal, noting, however, 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

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<sup>1</sup> 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.

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

<sup>3</sup> 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.

affect the rights of the Accused". Consequently, the Panel invited the Parties and Victims' Counsel to make oral submissions at the SPO Preparation Conference regarding the disclosure of the application forms of Dual Status Witnesses.<sup>4</sup>

4. On 15 February 2023, at the SPO Preparation Conference, the Parties and Victims' Counsel made oral submissions on the matter.<sup>5</sup>

5. On 6 March 2023, after recalling the oral submissions, the Panel issued an order in which it decided to receive from the SPO and Victims' Counsel observations on redactions, and to then transmit to the Parties redacted versions of section 2 of the application forms of Dual Status Witnesses, and, in exceptional circumstances where section 2 is incomprehensible without reference to supporting material, that supporting material ("Impugned Order").<sup>6</sup>

6. On 14 March 2023, Victims' Counsel filed a request under Rule 79 for reconsideration and reversal of the Impugned Order ("Request").<sup>7</sup>

## II. APPLICABLE LAW

7. Rule 79 provides in relevant part:

In exceptional circumstances and where a clear error of reasoning has been demonstrated or where reconsideration is necessary to avoid injustice, a Panel may, upon request by [...] Victims' Counsel, [...] reconsider its own decisions.

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<sup>4</sup> 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.

<sup>5</sup> Transcript (SPO Conference), 15 February 2023, p. 2021, line 17 *et seq.*

<sup>6</sup> F01348, Trial Panel, *Order on the Disclosure of Application Forms Pertaining to Dual Status Witnesses*, 6 March 2023, with strictly confidential and *ex parte* Annexes 1-3.

<sup>7</sup> F01371, Victims' Counsel, *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, confidential. A public redacted version was filed on 21 March 2023 (F01371/RED).

8. The expression “exceptional circumstances” in Rule 79 indicates that reconsideration is not a remedy to be issued routinely.<sup>8</sup>

9. The party seeking reconsideration bears the burden of showing that the Chamber committed a clear error of reasoning or that reconsideration is necessary in order to avoid injustice.<sup>9</sup> Parties may not use requests for reconsideration as a “mechanism [...] to redress the imperfections contained in the parties’ motions or to challenge a decision of the Chamber and circumvent the rules of procedure governing certification to appeal decisions rendered by the Trial Chambers”.<sup>10</sup> The word “may” in Rule 79 indicates that the decision to exercise the power to reconsider is discretionary.<sup>11</sup>

10. New facts and arguments arising after the impugned order was rendered may be relevant to deciding whether t the relevant threshold (a clear error of reasoning

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<sup>8</sup> ICTY, *Prosecutor v. Mićo Stanišić & Stojan Zupljanin*, IT-08-91-A, Decision on Mico Stanišić’s Motion Seeking Reconsideration of Decision on Stanišić’s Motion for Declaration of Mistrial and Zupljanin’s Motion to Vacate Trial Judgment, 24 July 2014, para. 12. See also ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84, Trial Chamber, Decision on Prosecution Motion for Reconsideration of Majority Decision Denying Admission of Document Rule 65 ter Number 03 or in the Alternative Certification of the Majority Decision with Partly Dissenting Opinion of Judge Delvoie, 27 February 2012, para. 12, referring to ICTR, *Prosecutor v. Laurent Semanza*, ICTR-97-20-T, Decision on Defence Motion to Reconsider – Decision Denying Leave to Call Rejoinder Witnesses, 9 May 2001, para. 8.

<sup>9</sup> ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84, Trial Chamber, Decision on Prosecution Motion for Reconsideration of Majority Decision Denying Admission of Document Rule 65 ter Number 03 or in the Alternative Certification of the Majority Decision with Partly Dissenting Opinion of Judge Delvoie, 27 February 2012, para. 11, citing ICTY, *Prosecutor v. Vlastimir Džorđević*, IT-05-87/1-T, Trial Chamber, Decision on Vlastimir Džorđević’s Motion for Reconsideration or Certification to Appeal Regarding Proposed Expert Mr Aleksandar Pavić, 23 April 2010, para. 6.

<sup>10</sup> ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84, Trial Chamber, Decision on Prosecution Motion for Reconsideration of Majority Decision Denying Admission of Document Rule 65 ter Number 03 or in the Alternative Certification of the Majority Decision with Partly Dissenting Opinion of Judge Delvoie, 27 February 2012, para. 12, citing ICTY, *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 2 April 2009, p. 3.

<sup>11</sup> See ICTY, *Prosecutor v. Zoran Žigić*, IT-98-30/I-A, Appeals Chamber, Decision on Zoran Žigić’s “Motion for Reconsideration of Appeals Chamber Judgement, It-98-30/1-A Delivered on 28 February 2005”, 26 June 2006, para. 5 and footnote 11. See also ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-A, Decision on Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of “Lack of Jurisdiction”, 2 May 2002, para. 10.

or the need to avoid injustice) has been met.<sup>12</sup> Furthermore, to succeed on this basis, an applicant must demonstrate how any new facts or arguments submitted in a request justify reconsideration.<sup>13</sup>

11. Where new information provided by the moving party merely adds to arguments previously submitted, reconsideration may be refused on the basis that in submitting new information the moving party has failed to demonstrate that it was of such a nature that it constituted a new circumstance warranting reconsideration.<sup>14</sup>

12. A request for reconsideration is not an opportunity to re-litigate an issue.<sup>15</sup> The principle of finality dictates that the discretionary power to reconsider previous decisions should be exercised sparingly and a party must therefore meet a high threshold in its request for reconsideration.<sup>16</sup>

### III. SUBMISSIONS

13. Victim's Counsel's submissions are arranged into four sections, in which he argues that: (i) Trial Panel I's decisions, including one explicitly addressing Rule 113(1) that post-dates his last submissions on this issue to Trial Panel II, support the conclusion that Rule 113(1) prohibits the disclosure of application forms; (ii) this interpretation of Rule 113(1) is also consistent with the

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<sup>12</sup> KSC-BC-2020-07, F00546, Trial Panel II, *Decision on Request for Certification or Reconsideration of F00541*, 1 February 2022, para. 14; KSC-BC-2020-07, F00353, Trial Panel II, *Decision on the Defence Requests for Reconsideration of Decision F00328*, 7 October 2021, para. 14.

<sup>13</sup> See ICTY, *Prosecutor v. Jadranko Prlić et al.*, Appeals Chamber, IT-04-74, *Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence*, 3 November 2009, para. 18.

<sup>14</sup> ICTY, *Prosecutor v. Jadranko Prlić et al.*, Appeals Chamber, IT-04-74, *Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence*, 3 November 2009, para. 19.

<sup>15</sup> ICTR, *Juvénal Kajelijeli v. Prosecutor*, Appeals Chamber, ICTR-98-44A-A, *Judgment*, 23 May 2005, paras 204-205.

<sup>16</sup> MICT, *Prosecutor v. Jean de Dieu Kamuhanda*, Appeals Chamber, MICT-13-33-AR90, *Decision on Kamuhanda's Appeal of Decision on Motion for Appointment of Amicus Curiae Prosecutor to Investigate Prosecution Witness Gek*, 8 December 2015, para. 16.

understanding of that provision by the Pre-Trial Judge; (iii) 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; and (iv) the discretionary power to order disclosure of the application forms only arises once the Panel has decided not to apply Rule 113(1) on the grounds of fairness, and that stage should not be reached because of the clear prohibition in Rule 113(1).

#### IV. DISCUSSION

14. The Panel will now address the arguments of Victims' Counsel in the order in which they have been presented in the Request.

##### A. THE INTERPRETATION OF RULE 113(1) BY TRIAL PANEL I AND THE PRE-TRIAL JUDGE

15. Victims' Counsel submits that Trial Panel I's decisions, including one explicitly addressing Rule 113(1) that post-dates the last submissions on this issue before this Panel, support the conclusion that Rule 113(1) prohibits the disclosure of the application forms of Dual Status Witnesses.<sup>17</sup> He argues that one of the consequences of the Impugned Order is the creation of different approaches to this issue by different panels of the Specialist Chambers, which may lead to an "undesirable situation" because it results in "irreconcilable interpretations" of Rule 113(1).<sup>18</sup>

16. The Panel acknowledges that the practice of Trial Panel I differs from that of this Panel as regards the availability to the Parties of redacted versions of section 2 of the application forms of Dual Status Witnesses. In *Prosecutor v. Salih Mustafa*, though not the subject of litigation, Trial Panel I did not order transmission of the application forms of Dual Status Witnesses to the Parties. In *Prosecutor v. Pjetër Shala*, Trial Panel I held that "the disclosure of the identities of Dual Status

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<sup>17</sup> Request, paras 15-18.

<sup>18</sup> Request, para. 19.

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".<sup>19</sup>

17. Victims' Counsel has therefore established that Trial Panel I in two cases has taken the view that the transmission of these forms to the Defence was unnecessary, or not required in the circumstances. Victims' Counsel also argues that his interpretation of Rule 113(1) is consistent with that of the Pre-Trial Judge in this case, who found that withholding the application forms would not cause prejudice to the Defence.<sup>20</sup> This Panel has taken a different view, based on the circumstances before the Panel and, in particular, the Defence's demonstration that information in the application forms of Dual Status Witnesses might be material to its preparation. This of itself does not demonstrate the existence of a clear error of reasoning in the Impugned Order, nor that reconsideration is necessary to avoid injustice. Decisions of one Trial Panel are not binding on another, and each Panel exercises its discretion in light of the circumstances before it. Similarly, the Pre-Trial Judge's interpretation of Rule 113(1) is not binding on the Panel.

18. The practical effect of the Impugned Order is not to create a disclosure obligation on the part of Victims' Counsel or the SPO independent of the requirements of the Rules. Instead, it is intended to provide a necessary remedy to avoid possible unfairness to the Defence, which would result from the Defence being denied access to information of potential relevance to its case and to the Panel's ability to evaluate the credibility and reliability of certain witnesses. The course taken by the Panel in this case is, therefore, in line with the Law and Rules'

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<sup>19</sup> KSC-BC-2020-04, F00433, Trial Panel I, *Decision on victims' procedural rights during trial and related matters*, 24 February 2023, confidential, para. 58. This filing was reclassified as public on 6 March 2023.

<sup>20</sup> Request, paras 22-25.

general commitment to ensuring fairness of proceedings and to place the Panel in a position to arrive at the truth.<sup>21</sup>

19. The Panel set out in the Impugned Order the reasons why, in the exercise of its discretion, and to avoid an injustice to the Defence, it ordered the transmission of redacted versions of section 2 of the application forms. The Panel recalls here the salient points underlying its reasoning:

- a) Article 21(4)(f) guarantees the right of the accused to examine or have examined the witnesses against them.<sup>22</sup> This right, like all other rights under the Law, must be interpreted in a way that guarantees its effectiveness.
- b) Rule 113 is located in Chapter 8 of the Rules, which regulates the participation of victims in the proceedings. Rule 113 governs the procedure for the assessment of application forms for the admission of victims to participate in the proceedings, the ruling on those application forms, and the consequences of the admission of victims to participate for the trial as a whole. It does not address the circumstances under which application forms of Dual Status Witnesses should be made available to the Defence.<sup>23</sup>
- c) The situation of a dual status victim is distinct from that of a single status victim as the identity and prior statements of dual status victims are provided to the Defence in accordance with Rule 102 due to their status as witnesses for the prosecution.<sup>24</sup> Their credibility and reliability as witnesses are issues of direct relevance to the Defence insofar as they

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<sup>21</sup> Article 1(2), 19(2), 21(2), 39(3) and (13) and 40(2); Rules 116(1) and (3), 132, 143(2)(c).

<sup>22</sup> Impugned Order, para. 13.

<sup>23</sup> Impugned Order, para. 15.

<sup>24</sup> Impugned Order, para. 27.



may provide incriminating evidence relevant to establishing the guilt of the Accused.

- d) There is no basis to suggest that the principle of non-disclosure of application forms of participating victims in Rule 113(1) was intended to deny the Defence access to information that could be material to their ability to challenge a prosecution witness's credibility or reliability.<sup>25</sup>
- e) A witness's answers to the questions set out in section 2 of the application form may contain information that, if in the possession of the SPO, could be disclosable under Rule 103, and might be inconsistent with prior statements given by the witness or with the testimony that the witness gives at trial. Those answers might also contain information relevant to establishing a motive, that might in turn raise questions regarding a witness's credibility or reliability. With such information, the Defence may seek to impeach the witness's credibility or reliability.<sup>26</sup>
- f) The question of whether the Defence should have access to this information is not expressly addressed by the Rules, and Rule 5 is therefore applicable.<sup>27</sup>
- g) Rule 5 mandates the Panel to rule in accordance with Article 19(2) and (3) and the principles set out in Rule 4.<sup>28</sup> The Panel must resolve any ambiguity that cannot be resolved in accordance with Rule 4(1) by

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<sup>25</sup> Impugned Order, paras 16, 21, 23.

<sup>26</sup> Impugned Order, para. 22.

<sup>27</sup> Impugned Order, para. 18.

<sup>28</sup> Impugned Order, para. 18. *See also* Rule 5, which states that where, in the course of proceedings, a question arises that is not addressed by the Rules, the Panel shall rule in accordance with Article 19(2) and (3) of the Law, and the principles set out in Rule 4. Rule 4(1) states that the Rules shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law (foundational principles) and, where appropriate, the Kosovo Criminal Procedure Code. Paragraph (3) states that any ambiguity not settled in accordance with paragraph (1) shall be resolved by the adoption of the most favourable interpretation to the suspect or the Accused in the given circumstances.

adopting the most favourable interpretation to the suspect or the Accused in the given circumstances.

- h) As the ambiguity is not clearly resolved by reference to the interpretive framework in Rule 4(1), the interpretation of the Rules that is most favourable to the Accused in the given circumstances is to order the transmission of relevant portions of the application forms of Dual Status Witnesses.<sup>29</sup>
- i) Neither the SPO nor Victims' Counsel had argued, when the question was put directly to them, that the Panel did not have the authority to order the transmission to the Defence of the application forms of Dual Status Witnesses.<sup>30</sup>
- j) While noting the strict interpretation of Rule 113(1) advocated by the SPO and Victims' Counsel, the Panel accepted the suggestion of the Victims' Counsel and the SPO that a narrowly-tailored solution to the issue is provided by transmitting to the Defence the information in Section 2 of the application forms of dual status victims.<sup>31</sup>
- k) Prior to such transmission, the Panel will redact the forms following submissions by the SPO and the Victims Counsel as to appropriate redactions necessary to protect the protection, safety, physical and psychological well-being, dignity or privacy of any person or which are necessary under Rule 108.<sup>32</sup>
- l) This procedure is permitted by Article 40(2) of the Law and is necessary to give full effect to the right to examine a witness for the prosecution and, more generally, the right to a fair trial.<sup>33</sup> The Panel also considers

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<sup>29</sup> Impugned Order, para. 20.

<sup>30</sup> Impugned Order, para. 19.

<sup>31</sup> Impugned Order, para. 23.

<sup>32</sup> Impugned Order, para. 25.

<sup>33</sup> Impugned Order, para. 26.

that the Defence's ability to test the reliability and credibility of Prosecution witnesses is important to its ability to arrive at the truth, as mandated by the Rules.

20. Victims' Counsel has failed to identify any clear error in this reasoning, or that reconsideration is necessary to avoid injustice.

21. Victims' Counsel submits that another consequence of the disclosure to the Parties in this case of the material in question is that the SPO will be obliged to consider them for disclosure across all its cases. The Panel considers that it is for the SPO to make such submissions as it deems necessary before the relevant Panel if it requires guidance in order to comply with its disclosure obligations under the Rules. Furthermore, as noted above, the Panel's ruling does not create an independent basis for disclosure. It merely seeks to remedy a situation not expressly regulated by the Rules in order to ensure the fairness of the proceedings.<sup>34</sup>

B. WHETHER THERE IS AMBIGUITY IN THE RULES AS TO THE DISCLOSURE OF THE APPLICATION FORMS OF DUAL STATUS WITNESSES

22. Victims' Counsel submits that there is no ambiguity as to the scope of Rule 113(1), and there was no need to resort to Rule 4(3) and Article 40(2) in the Impugned Order.<sup>35</sup> He submits that Rule 113(1) is "crystal clear",<sup>36</sup> and argues that the prohibition on disclosure of victims' application forms is still effective after victims are admitted to participate in the proceedings.<sup>37</sup> Victims' Counsel also submits that Rule 113(9) looks prospectively to the final trial judgment and that "the Rule is therefore not limited in its scope to the modalities of admission".<sup>38</sup>

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<sup>34</sup> See, *supra*, para. 18.

<sup>35</sup> Request, para. 29.

<sup>36</sup> Request, para. 30.

<sup>37</sup> Request, para. 31.

<sup>38</sup> Request, para. 31.

23. Victim's Counsel's arguments on this point amount to an attempt to re-litigate a matter already decided. Victims' Counsel repeats arguments he has previously raised, as he had the opportunity to make submissions on this point before the Impugned Order was rendered. His submissions on this point were taken into consideration by the Panel. The Panel set out in paragraph 19 above a summary of the salient points of its reasoning, including its conclusion that the application forms of Dual Status Witnesses is not expressly addressed in the Rules. Insofar as Victims' Counsel now puts forward arguments on this point not put forward previously, Victims' Counsel has not demonstrated good cause for failing to put them before the Panel.

24. Victims' Counsel contests the Panel's observation that Rule 113(1) was intended to reduce litigation during the procedure for admitting victims. He submits that the prohibition in Rule 113(1) was not intended to reduce litigation as to which victims satisfied the conditions for participation, was intended instead to offer "maximum protection for the safety, dignity and wellbeing of the [participating victims] from the earliest stages of their engagement with the Specialist Chambers".<sup>39</sup>

25. The Panel recalls that prior to the adoption of the KSC Rules, the ICC had, for many years entertained proposals for streamlining the procedure for victims' participation due to backlogs arising at the ICC from processing very large numbers of application forms in several cases.<sup>40</sup> In contrast, at the KSC, the practical effect of Rule 113(1) is that the parties and the Panel do not devote large resources to litigating the question of whether individual applications for victim participation should be granted. Furthermore, the Impugned Order does not

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<sup>39</sup> Request, para. 35.

<sup>40</sup> See Impugned Order, para. 16 and footnote 18. See also Van den Wyngaert, C., "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge" (2011) 44 *Case Western Reserve Journal of International Law* 475; ICC, Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings, ICC-ASP/11/22 2012.

undermine the intention of Rule 113(1) to promote efficiency in the processing of victims' applications to participate, as it affects a small minority of the victims' application forms in the present case.

26. The Panel will now address Victims' Counsel argument that the application process at the KSC "offers maximum protection for the safety, dignity and wellbeing of the VPPs".<sup>41</sup> The Panel notes that there is a critical distinction between a dual status victim and a single status victim in respect of protecting the identity of the victim. While the identities and prior accounts provided by single status victims are not provided to the Defence as a result of Rule 113(1), the Defence is aware of the identity and expected evidence of a dual status victim because the SPO is required to disclose the identity (unless full anonymity is ordered) and all prior statements of dual status victims in the SPO's possession to the Defence in accordance with Rule 102(1)(b). And the Defence is no less entitled to information affecting the credibility or reliability of an SPO witness where that witness is *also* a participating victim.

27. Victims' Counsel notes that Rule 113(9) permits victims identified in the final trial judgment to request a copy of the judgment.<sup>42</sup> However, the Panel considers that this does not alter the conclusion that Rule 113 is mainly aimed at regulating the procedure for the assessment of applications for participation of victims, and not the Defence's ability to access prior accounts by witnesses for the prosecution where the Defence has established a material interest in such information. The Panel finds that Rule 113(9) regulates a direct consequence of the decision on the admission of victims to participate. No error of reasoning has been established.

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<sup>41</sup> Request, para. 35.

<sup>42</sup> Request, para. 31.

## C. VICTIM'S COUNSEL'S SUBMISSIONS CONCERNING ARTICLE 40(2) OF THE LAW

28. Victims' Counsel re-emphasises his position that Rule 113 "applies in its own terms", acknowledges that the Panel has the power to issue the Impugned Order, but adds that that is not the same as agreeing that the Panel should exercise this power.<sup>43</sup>

29. The Panel noted in the Impugned Order that Victims' Counsel had made clear his position that Rule 113 "applies in its own terms", had accepted that the Panel has the power to order submission of section 2 of the application forms, and stood ready to facilitate the Panel's proposal if it chose to do so.<sup>44</sup>

30. Victims' Counsel also submits 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. Victims' Counsel submits that that stage should not be reached because the prohibition in Rule 113(1) is clear.<sup>45</sup>

31. The Panel refers to the reasons set out in the Impugned Order, summarised in paragraph 19 above, why the Panel concluded that the question of whether relevant parts of the application forms of Dual Status Witnesses might be transmitted to the Defence was ambiguous. The Panel emphasised in the Impugned Order its duty to ensure that a trial is fair and expeditious and noted that pursuant to Article 40(2), it "may adopt such procedures and modalities as are necessary to facilitate the fair and expeditious conduct of proceedings".

32. The Panel decided to adopt the procedure set out in the Impugned Order to transmit the material in question to the Defence, while applying any redactions necessary under Rule 108 or to protect the protection, safety, physical and psychological well-being, dignity or privacy of any person. In this way, the Panel gave full effect to the right of the accused to cross-examine prosecution witnesses,

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<sup>43</sup> Request, para. 41.

<sup>44</sup> Impugned Order, para. 9.

<sup>45</sup> Request, para. 40.

while upholding the importance of the efficient conduct of the procedure for the admission of victims.

D. CONCLUSION

33. The Panel concludes that Victims' Counsel has failed to demonstrate a clear error of reasoning in the Impugned Order, or that reconsideration is necessary to avoid injustice.

V. DISPOSITION

34. For the foregoing reasons, the Panel **DENIES** the Request.



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**Judge Charles L. Smith, III**  
**Presiding Judge**

Dated this Wednesday, 12 April 2023

At The Hague, the Netherlands