

In: KSC-BC-2020-06
The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

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**Joint Defence Response to Prosecution request for the admission of W01453's
prior statements pursuant to Rule 143(2)(c) (F02708)**

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I. INTRODUCTION

1. The Defence for Messrs. Thaçi, Veseli, Selimi and Krasniqi (“the Defence”) hereby responds to the Prosecution request for the admission of W01453’s prior statements pursuant to Rule 143(2)(c).¹ The SPO requests the admission, “for the truth of their contents and for the purposes of assessing credibility”, of several prior statements of W01453² pursuant to Rule 138(1) and Rule 143(2)(c) of the Rules:³

- the entirety of W01453's 2003 ICTY Statement,⁴
- the entirety of W01453's 2005 ICTY Testimony,⁵
- the excerpts of W01453’s 2001 ICTY Statement,⁶ 2002 ICTY Testimony⁷ and 2011 SPRK Hearing,⁸ which were put to him during direct examination.

2. The SPO request to admit W01453’s 2003 ICTY Statement and 2005 ICTY Testimony in full is intrinsically flawed, given that they contradict each other in key respects. These inconsistencies mean that, in simple terms, W01453’s 2003 ICTY Statement and 2005 ICTY Testimony cannot both be true. As such, they cannot both be admitted “for the truth of their contents”. Their admission would be prejudicial for the Defence because the SPO has failed to put its case to the witness on the inconsistencies, *i.e.* to identify, at this stage, which statements or portions of

¹ KSC-BC-2020-06/F02708, Prosecution request for the admission of W01453’s prior statements pursuant to Rule 143(2)(c) with public Annex 1, 11 November 2024 (“SPO Request”).

² *Ibid.*, para. 1. See also SPO submissions at KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, p. 22060.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’).

⁴ Marked for Identification as P01816.1, P01816.1_AT, P01816.1_ET, P01816.2, P01816.2_AT, P01816.2_ET (‘2003 ICTY Statement’).

⁵ Marked for Identification as P01817.1, P01817_ET, P01114.3_AT.2, P01817.2, P01817.2_AT, P01818.1, P01818_ET, P01818.1_AT, P01818.2, P01818.2_AT, P01819, P01819_ET, P01819_AT, P01820.1, P01820_ET, P01820.1_AT, P01820.2, P01820.2_AT, P01820.3, P01820.3_AT, P01821.1, P01821_ET, P01821.1_AT, P01821.2, P01821.2_AT, P01821.3, P01821.3_AT, P01822.1, P01822_ET, P01822.1_AT, P01822.2, P01822.2_AT, P01822.3, P01822.3_AT (‘2005 ICTY Testimony’).

⁶ Marked for Identification as P01814, P01814_AT (‘2001 ICTY Statement’).

⁷ Marked for Identification as P01815, P01815_ET, P01815_AT (‘2002 ICTY Testimony’).

⁸ Marked for Identification as P01823, P01823_AT (‘2011 SPRK Hearing’).

statements it considers to be the truth. Moreover, those portions of the statements that were never put to the witness should not be admitted because the witness was not given an opportunity to comment on them, and the Accused had no notice of which portions of that evidence the SPO intends to rely on. The Defence therefore had no opportunity to properly cross-examine the witness on the propositions in his prior statements upon which the SPO intends to rely. The witness' current position with regards to the accuracy, or otherwise, of the excerpts not put to him remains unknown. The admission of the 2003 ICTY Statement and 2005 ICTY Testimony in full should be denied.

3. The Defence does not object to the admission of the portions of W01453's prior statements which were read into the record during his examination-in-chief,⁹ except that the Defence objects to the admission of any portion of the 2005 ICTY testimony for the truth of its contents if it is inconsistent with the 2003 ICTY Statement. The SPO is ethically barred from relying on evidence in the 2005 ICTY testimony that it knows or suspects to be false, and the SPO has such knowledge given the findings of the ICTY *Limaj* Trial Chamber and the submissions of the ICTY Office of the Prosecutor ("OTP").

II. Procedural background

4. On 14 December 2023, the SPO requested the admission, pursuant to Rule 154 of the Rules, of W01453's 2003 ICTY Statement and 2005 ICTY Testimony.¹⁰

⁹ While the Defence does not object to the admission of the *excerpts* of W01453's 2001 ICTY Statement, 2002 ICTY Testimony and 2011 SPRK Hearing which were put to him during his examination-in-chief, it objects to the admission of such prior statements *in their entirety*. See *contra*, SPO Response, para. 10. See also Defence submissions at KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, pp. 22063-22064.

¹⁰ KSC-BC-2020-06/F02005, Prosecution motion for admission of evidence of Witnesses W01453, W03878, W04446, W04575, and W04651 pursuant to Rule 154 with confidential Annexes 1-5, 14 December 2023, para. 8.

5. On 8 January 2024, the Defence asked the Trial Panel to deny the admission of W01453's proposed evidence through Rule 154, noting, *inter alia*, that W01453's 2003 ICTY Statement and 2005 ICTY Testimony, are "fundamentally inconsistent", and amounted to "two incompatible and irreconcilable accounts of the same relevant events".¹¹

6. On 12 February 2024, the Trial Panel issued its Decision on Prosecution Motion for Admission of Evidence of W01453, W03878, W04446, W04575, and W04651 Pursuant to Rule 154 (F02005).¹² The Panel agreed with the Defence "that there appears to be a number of contradictory statements in W01453's Statements, which renders ascertaining the probative value of those pages uncertain ("Pages")".¹³ The Panel found W01453's proposed evidence admissible, with the exception of the Pages.¹⁴

7. On 25 October 2024, the SPO informed the Panel and the parties that "[g]iven that W01453 declined to confirm the accuracy of his Rule 154 Statement or make any corrections or clarifications thereto during witness preparation, the SPO intends to lead W01453's evidence fully *viva voce*."¹⁵

8. W01453 started to testify on 4 November 2024. On 6 November 2024, at the end of its examination-in-chief, the SPO applied orally to tender several prior statements of W01453 pursuant to Rule 143(2)(c).¹⁶

¹¹ KSC-BC-2020-06/F02046, Joint Defence Response to Prosecution motion for admission of evidence of Witnesses W01453, W03878, W04446, W04575, and W04651 pursuant to Rule 154 (F02005), 8 January 2023 ("Defence Rule 154 Response"), para. 15.

¹² KSC-BC-2020-06/F02117, Decision on Prosecution Motion for Admission of Evidence of W01453, W03878, W04446, W04575, and W04651 Pursuant to Rule 154 (F02005), 12 February 2024 ("Rule 154 Decision").

¹³ *Ibid.*, para 14.

¹⁴ *Ibid.*

¹⁵ Email from the SPO dated 25 October 2024 18:57, re "Confidential – W01453 preparation session".

¹⁶ KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, p. 22053.

9. Over Defence objection, the Panel assigned MFI numbers to W01453's proposed Rule 143(2)(c) statements and invited the parties to file a response by 12 November 2024 and a reply by 14 November 2024, respectively. It ordered that W01453's cross-examination should continue,¹⁷ noting that once it is completed, and the Panel has ruled on admissibility of the relevant statements, the Defence could seek to re-call W01453.¹⁸

10. Following a request from the Veseli Defence,¹⁹ the Panel amended this briefing schedule and ordered the SPO to file its submissions on admission by 11 November 2024, and the Defence to respond by 13 November 2024, with no reply being entertained.²⁰

III. APPLICABLE LAW

11. Pursuant to Article 21(2) of the KSC Law,²¹ the Accused shall be entitled to a fair and public hearing. Pursuant to Article 21(4)(a) and (c), the Accused is further entitled to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her and to have adequate time and facilities for the preparation of his or her defence.

12. Pursuant to Rule 138(1), unless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect.

13. Pursuant to Rule 143(1), and subject to the exceptions provided by the Rules, the testimony of a witness at trial shall in principle be given in person. A Party who

¹⁷ *Ibid.*, p. 22064.

¹⁸ *Ibid.*, p. 22065.

¹⁹ *Ibid.*, p. 22103-22104.

²⁰ KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 7 November 2024, p. 22153.

²¹ Law N° 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law").

called a witness may, with the leave of the Panel, and where relevant to the witness's credibility, question that witness about whether that witness has, at any time, made a prior inconsistent statement pursuant to Rule 143(2). Any such prior inconsistent statement may be admissible for the purpose of assessing the credibility of the witness, as well as for the truth of its contents or for other purposes within the discretion of the Panel.

IV. SUBMISSIONS

A- W01453's 2003 ICTY Statement and 2005 ICTY Testimony cannot be admitted in their entirety

14. W01453's 2003 ICTY Statement and 2005 ICTY Testimony cannot be admitted in their entirety. Only the portions put to the witness in Court can be tendered through Rule 143(2)(c), except those portions of the 2005 ICTY testimony that are inconsistent with the 2003 ICTY Statement.

15. The Defence reiterates its previous submissions that the "prior inconsistent statement" admissible under Rule 143(2)(c) should only mean those portions that were put to the witness.²² The present SPO request can be distinguished from prior situations in which the Trial Panel has previously ruled,²³ given that the SPO is now trying to tender through Rule 143(2)(c), "for the truth of their contents and for the purposes of assessing credibility", two statements which are fundamentally inconsistent and irreconcilable, without distinguishing which parts it considers to be the truth and which parts it considers inconsistent.²⁴

²² KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, p. 22056-22057. See also KSC-BC-2020-06/F01940, Thaçi Defence Submissions Concerning Use of Prior Inconsistent Statements Pursuant to Rule 143(2)(c), 20 November 2023.

²³ See, *inter alia*, KSC-BC-2020-06/F02130, Decision on the Thaçi Defence's Submissions Concerning Use of Inconsistent Statements Pursuant to Rule 143(2), 15 November 2024, para. 22.

²⁴ See Defence submissions at KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, p. 22056.

16. The Defence has already highlighted several serious inconsistencies between W01453's 2003 ICTY Statement and 2005 ICTY Testimony, on issues that are central to the SPO case. These include the alleged presence of a detention site in Llapushnik,²⁵ and the alleged role of Fatmir Limaj as a coordinator with the General Staff.²⁶

17. In particular, in his 2005 ICTY Testimony, W01453 removed Fatmir Limaj from the chain of command for the Klecka area in March-July 1998, and inserted Hashim Thaçi, saying that he simply used Fatmir Limaj to help him get to Drenica to contact Hashim Thaçi.

18. In a similar vein, in his 2003 ICTY Statement, W01453 identified Fatmir Limaj as the sole point of contact between local commanders and the General Staff,²⁷ and made no mention of Jakup Krasniqi in this role.²⁸ It was only in his 2005 ICTY Testimony that W01453 retracted his previous statements about the role of Fatmir Limaj *vis-à-vis* the General Staff,²⁹ and inserted Jakup Krasniqi as the point of contact between local commanders and the General Staff after his first public appearance on 14 June 1998.³⁰ Notably, this prompted Alex Whiting, the ICTY Prosecutor who conducted W01453's direct examination in 2005, to submit:

Now, what I'm going to suggest to you through my questions, Mr. Buja, is that what you have done is you have changed your story and you have inserted Jakup Krasniqi here in the place where you previously had Fatmir Limaj.³¹

[...]

I'm going to submit to you, sir, that it's not a matter of a word or a matter of misunderstanding but in fact, as I stated at the beginning of your testimony today, you have changed your account

²⁵ Defence Rule 154 Response, para. 16.

²⁶ Defence Rule 154 Response, para. 17.

²⁷ MFI P01816.1_ET, p. 30, lines 9-11, p. 45, lines 6-8; p. 46, lines 1-6.

²⁸ In this regard, see P01819_ET, p. 3906, lines 19-25.

²⁹ MFI P01819_ET, p. 3906-3907; p. 3911, lines 15-19; pp. 3911-3912, lines 23-2.

³⁰ MFI P01819_ET, p. 3909, lines 12-17.

³¹ MFI P0182_ET, p. 3917, lines 17-20.

of the structure and you have now put Jakup Krasniqi in the place where you previously put Fatmir Limaj.³²

19. Such inconsistencies, among others, led the ICTY prosecutor to seek a ruling that W01453 be declared hostile during his testimony and to spend a considerable amount of time identifying and highlighting these discrepancies.³³ The *Limaj* Trial Chamber also concluded that it was “not able to accept the truth of the evidence of Shukri Buja given in court as to the time frame at which Fatmir Limaj first assumed a position of command of a zone or area that included the prison camp at Llapushnik/Lapusnik”.³⁴ W01453 himself, when cross-examined by the Defence in the current proceedings, could not reconcile his 2003 ICTY Statement and 2005 ICTY Testimony, particularly regarding the alleged role of Fatmir Limaj.³⁵ Thus, although W01453 clarified Jakup Krasniqi’s role during cross-examination in the current proceedings,³⁶ the 2003 ICTY Statement and the 2005 ICTY Testimony remain contradictory and irreconcilable with regard to the roles of Fatmir Limaj, Jakup Krasniqi and Hashim Thaçi, an issue which obviously lays at the centre of the Prosecution case.

20. As raised previously,³⁷ the Prosecutor has an ethical obligation not to submit evidence for the truth of its content which she knows or suspects to be false, and shall not knowingly permit the giving of false evidence and rely upon it.³⁸ This obligation is echoed in the Order on the Conduct of Proceedings, according to which the tendering Party must take reasonable steps to ensure that the evidence placed before

³² MFI P0182_ET, p. 3943, lines 13-17.

³³ MFI P01818_ET, pp. 47 & seq.

³⁴ DHT00403-DHT00403_extract, Extract from ICTY, *Prosecutor v. Fatmir et al*, Case No. IT-03-66-T, Trial Judgment dated 30 November 2005, para. 581.

³⁵ See, for instance, KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, pp. 22088-22094.

³⁶ E.g. Transcript of 7 November 2024, pp. 22176-22177; 22180-22182; 22185.

³⁷ Defence Rule 154 Response, para. 21.

³⁸ Code of Professional Conduct for Counsel, Article 14(3)(a) and 14(4).

the Trial Panel is capable of reasonable belief for the purpose for which it is being offered.³⁹

21. The Panel, in its Rule 154 Decision on W01453, also observed that:

15. Lastly, while the Panel agrees that the SPO (and the Defence) has an ethical obligation not to tender for the truth of its content evidence which it knows or suspects to be false, and shall not knowingly permit the giving of false evidence nor rely upon it, a party is not prohibited from tendering varying accounts from a witness if it makes clear that it will not seek to rely on one or more of those accounts for the truth of its content but for credibility. This will ensure that the Panel has all the information before it to assess the witness's credibility and the evidence's reliability.⁴⁰

22. Given the inconsistencies highlighted above, W01453's 2003 ICTY Statement and 2005 ICTY Testimony cannot both be true. In these circumstances, the SPO cannot ethically tender both pieces of evidence under Rule 143(2)(c) for the truth of their contents because it must know or suspect the 2005 ICTY Testimony to be false, given the findings of the ICTY *Limaj* Trial Chamber and the submissions of the ICTY OTP. As per the Trial Panel's Rule 154 Decision, the SPO must identify which of the two accounts being presented is being submitted for truth, and which for credibility. The SPO's Motion fails to do so, and accordingly the Motion should be denied.

23. Indeed, the SPO is tendering both statements "for the truth of their contents *and* for the purposes of assessing credibility",⁴¹ without specifying which portions are true or inconsistent. While the SPO is aware of the findings of the *Limaj* Trial Chamber regarding W01453's lack of credibility, and thus must suspect that part of the evidence it is tendering is false, it has not attempted to justify why the *Limaj* findings should be set aside.⁴² This is extremely prejudicial for the Defence, given that the SPO's case regarding the role of Fatmir Limaj in the area and his relationship with the General

³⁹ KSC-BC-2020-06/F01226/A01, Order on the Conduct of Proceedings, para. 46

⁴⁰ *Ibid.*, para. 15.

⁴¹ SPO Motion, para. 1.

⁴² See Defence submissions at KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, p. 22057-22058, 22062.

Staff, including Mr Thaçi, remains unclear to date. This is a core part of the SPO's case, given that Fatmir Limaj is an alleged JCE member in the Indictment.⁴³

24. In these circumstances, the limited probative value of W01453's 2003 ICTY Statement and 2005 ICTY Testimony is outweighed by their prejudicial effect, which further warrants the dismissal of SPO request to admit them in their entirety under Rule 143 and Rule 138.

B- The SPO must clarify its case regarding the material tendered through Rule 143

25. The Defence disputes the Panel's finding that there is no obligation on the SPO to reveal its case until its final submissions, stated as follow during W01453's testimony:

At the same time, the Panel agrees with the Defence that a party should be clear about what its case is and what part of a witness's testimony it relies upon to make that case. Such an assessment, however, is not one that could or should be made at the time of tender unless it is willing to make it clear that at the time of the tender a party should be permitted, in principle, to make such an assessment in light of the evidence as a whole.

Furthermore, and finally, the assessment of the credibility of a witness and his truthfulness is one to be made by the Panel, so that a party's assessment of these matters are not binding on the Panel but only serves as a guide to the Panel's assessment.

The Panel could, for instance, regard as truthful an account which the SPO regards as truthful or the other way around.

Therefore, and on that basis, the Panel considers that the SPO is not required at this stage to provide notice to the Panel or to the Defence of which part or parts of a witness statement is being offered for the truth of its content or for the credibility purposes or both.

The Panel notes, however, that the Panel expects the SPO to make this matter very clear when it will be asked to present its case at the end of these proceedings and to expect the Panel to pick and choose.⁴⁴

⁴³ KSC-BC-2020-06/F00999, Amended Indictment, para. 35.

⁴⁴ KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, pp. 22065-22066.

26. The Defence is entitled to fair notice of the evidence the SPO intends to rely on in support of the charges against the accused, and to address it in due course.⁴⁵ The accused has a right to be informed of the nature of the SPO case in due course, including at the time the SPO is tendering irreconcilable statements of a witness through Rule 143(2)(c). Any delayed notice of the SPO's case regarding such material is prejudicial and hampers efficient preparation for subsequent witnesses. The SPO cannot engage in a 'trial by ambush', whereby the Defence would be required to wait for the SPO final brief to know the SPO's case regarding a core issue addressed by a witness on the stand and in his contradictory statements, such as whether W01453 communicated with the General Staff in the spring of 1998 through Fatmir Limaj or Hashim Thaçi. This late notice would violate the accused's right to be informed promptly and in detail of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his Defence, guaranteed by Article 21(4)(a) and (c) of the Law. Indeed, the Defence would not be in a position to adjust its strategy at the time of the final pleadings, when it would be barred from calling witnesses or tendering new evidence. This is particularly so before the KSC, where the parties are expected to file their final briefs concurrently, absent authorisation for a consecutive filing. The SPO assertion that it remains unable to notify the Defence of its case on these points⁴⁶ further supports the Defence position that only the portions of a statement put to a witness in Court should be admitted through Rule 143.⁴⁷

27. The obligation of a party to put its case to a witness is reflected in the KSC Rules including Rule 143(3), which applies to the cross-examining party. Other international

⁴⁵ See Defence submissions at KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, pp. 22057-22058.

⁴⁶ See *contra*, SPO submissions at KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, p. 22060.

⁴⁷ See Defence submissions at KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, p. 22062.

courts place a similar obligation on a party to put the nature of its case to the witness.⁴⁸ Where the SPO is tendering two mutually contradictory statements from its own witness, it assumes, in effect, the position of a cross-examining party, trying to impeach its own witness on some aspect of his evidence. This obliges the SPO to clarify the nature of its case *vis-a-vis* the witness. By failing to confront W01453 with the version of the story it intends to rely on, the SPO is not putting its case to the witness, in violation of the accused's fair trial rights and of the obligation to put your case to the witness.

28. While the Panel is not bound by a party's assessment of the credibility of a witness or reliability of his evidence, this does not bar the parties from submitting their position at the time of tendering of evidence, be it under Rule 153, 154, 155 or 143. Such submissions, moreover, will undoubtedly assist the Panel in its ruling on the admissibility and probative value of such material. Indeed, requiring a Party to put its case to a witness allows the other Parties and the Panel the opportunity to test the truthfulness of the in-court testimony or prior statement while the witness is still present, enhancing the Panel's ability to establish the truth.

29. In the alternative, and as suggested by the SPO,⁴⁹ the Defence submits that if the Panel is inclined to admit W01453's 2003 ICTY Statement and 2005 ICTY Testimony in their entirety, the Pages which were denied admission through Rule

⁴⁸ ICC, *The Prosecutor v. Al Hassan AG Abdoul Aziz AG Mohamed AG Mahmoud*, Public Redacted Version of "Defence request for leave to appeal oral decision of 10 September 2021 concerning the conduct of cross-examination by the Defence", 20 September 2021, ICC-01/12-01/18-1735-Conf, Paras 21-25; ICTY, *Prosecutor v. Naser Oric*, Case No. IT-03-68-I, The Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put its Case to Witnesses Pursuant to Rule 90(h)(ii), 17 January 2006; ICTY, *Prosecutor v. Momcilo Krajisnik*, Case N° IT-00-39-A, (Appeals Chamber) Judgement, 17 March 2009, paras 367-368; ICTR, *François Ferera v. The Prosecutor*, Case N° ICTY-01-74-A, (Appeals Chamber) Judgement, 2 February 2009, paras 24-30.

⁴⁹ See SPO submissions, KSC-BC-2020-06, Transcript of hearing (W01453 testimony), 6 November 2024, pp. 22059-22060.

154⁵⁰ should also be excluded from admission under Rule 143, given their lack of probative value.

V. CONCLUSIONS

30. For these reasons, the Defence requests the Trial Panel to:

DENY the admission of W01453's 2003 ICTY Statement and 2005 ICTY Testimony in their entirety; and

GRANT the admission of the excerpts of W01453's 2001 ICTY Statement, 2002 ICTY Testimony and 2011 SPRK Hearing, which were put to him during direct examination.

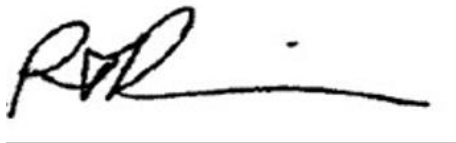
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Respectfully submitted on 13 November 2024



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⁵⁰ Rule 154 Decision, para. 14, footnote 27, and para. 25, footnote 50.



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