



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

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 16 December 2024

Language: English

Classification: **Public**

**Decision on Prosecution Request for the Admission of W01453's Prior Statements
Pursuant to Rule 143(2)(c)**

Specialist Prosecutor
Kimberly P. West

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Counsel for Kadri Veseli
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TRIAL PANEL II (“Panel”), pursuant to Articles 21 and 40(2) and (6)(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 137, 138(1) and 143(2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. Between 4 and 7 November 2024, W01453 (“Witness”) testified in these proceedings.¹
2. On 11 November 2024, as directed by the Panel,² the Specialist Prosecutor’s Office (“SPO”) filed a request for the admission of W01453’s prior statements pursuant to Rule 143(2)(c) (“Request”).³
3. On 13 November 2024, the Defence teams for Mr Thaçi, Mr Veseli, Mr Selimi, and Mr Krasniqi (“Defence”) filed a joint response to the Request (“Response”).⁴

II. SUBMISSIONS

4. The SPO requests the admission, for the truth of their contents and for the purposes of assessing credibility, of the prior statements, or portions thereof, listed in Annex 1 to the Request (“W01453’s Prior Statements”),⁵ which the SPO put to W01453 during direct examination, following the Panel’s authorisation to do so,

¹ Transcript of Hearing, 4-7 November 2024, p. 21733, line 13, to p. 22274, line 7.

² Transcript of Hearing, 7 November 2024, p. 22153, lines 14-20.

³ F02708, Specialist Prosecutor, *Prosecution Request for the Admission of W01453’s Prior Statements Pursuant to Rule 143(2)(c)*, 11 November 2024, with Annex 1.

⁴ F02716, Specialist Counsel, *Joint Defence Response to Prosecution Request for the Admission of W01453’s Prior Statements Pursuant to Rule 143(2)(c)*, 13 November 2024.

⁵ W01453’s Prior Statements include his 2003 ICTY Statement, 2005 ICTY Testimony, 2001 ICTY Statement, 2002 ICTY Testimony, and 2011 SPRK Hearing. *See* Annex 1 to the Request.

pursuant to Rule 143(2).⁶ In particular, the SPO submits that two of those prior statements (the 2003 ICTY Statement and 2005 ICTY Testimony) should be admitted in full given the extensive references thereto during the SPO's examination, and the need to properly consider them in their full context relative to W01453's testimony in this case.⁷ Regarding three other prior statements (the 2001 ICTY Statement, 2002 ICTY Testimony, and 2011 SPRK Hearing), the SPO tenders only the excerpts it used with W01453 given that it put relatively fewer excerpts to W01453 during its examination, and considering that the non-tendered excerpts of those statements generally concern matters of limited relevance to the present case.⁸ The SPO submits that W01453's Prior Statements are relevant and authentic, have probative value, and their admission would cause no undue prejudice to the Accused.⁹

5. The Defence objects to the admission of the 2003 ICTY Statement and 2005 ICTY Testimony in full.¹⁰ The Defence argues that, given the serious inconsistencies between them, the 2003 ICTY Statement and 2005 ICTY Testimony cannot both be true, and cannot in any event be admitted in their entirety, as only the portions put to the Witness in court can be tendered through Rule 143(2)(c).¹¹ The Defence contends that, due to those serious inconsistencies, the SPO cannot ethically tender both prior statements for the truth of their contents, and must identify which accounts are being submitted for truth, and which for credibility.¹² According to the Defence, the limited probative value of the 2003 ICTY Statement

⁶ Request, para. 1, referring to Annex 1 to the Request. See also Request, para. 15. See also Transcript of Hearing, 6 November 2024, p. 22051, line 20 to p. 22053, line 23, p. 22054, line 21 to p. 22055, line 17, p. 22058, line 21 to p. 22061, line 3.

⁷ Request, para. 6. See also Request, para. 8.

⁸ Request, para. 10.

⁹ Request, para. 2, 5, 11. See also Request, paras. 12-14.

¹⁰ Response, paras 2, 30. See also Transcript of Hearing, 6 November 2024, p. 22054, lines 1-2, p. 22056, line 4 to p. 22058, line 19, p. 22061, line 14 to p. 22062, line 18.

¹¹ Response, paras 14-15. See also Transcript of Hearing, 6 November 2024, p. 22064, lines 3-7.

¹² Response, paras 2, 16-23. See also Response, paras 25-28.

and 2005 ICTY Testimony is outweighed by their prejudicial effect.¹³ In the alternative, the Defence submits that, if the Panel is inclined to admit the 2003 ICTY Statement and 2005 ICTY Testimony in their entirety, the pages which the Panel denied admission when they were tendered by the SPO through Rule 154 (“Pages”) should also be excluded from admission under Rule 143, given their lack of probative value.¹⁴ 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, but 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.¹⁵

III. APPLICABLE LAW

6. The applicable law regarding the admission of evidence pursuant to Rules 138 and 143 has been laid out extensively in previous decisions issued by the Panel.¹⁶

IV. DISCUSSION

7. At the outset, the Panel will address the Defence’s argument that only the portions of the 2003 ICTY Statement and 2005 ICTY Testimony put to the Witness

¹³ Response, para. 24.

¹⁴ Response, para. 29, referring to F02117, Panel, *Decision on Prosecution Motion for Admission of Evidence of W01453, W03878, W04446, W04575, and W04651 Pursuant to Rule 154 (F02005)* (“Rule 154 Decision”), 12 February 2024, confidential, para. 14, footnote 27, para. 25, footnote 50 (a public redacted version was issued on the same day, F02117/RED).

¹⁵ Response, paras 3, 30.

¹⁶ See F01821, Panel, *Decision on Prosecution Request for Admission of W03827’s Witness Statements Pursuant to Rule 143(2) and Defence Request for Reconsideration*, 28 September 2023, paras 17-18; F01409, Panel, *Decision on Specialist Prosecutor’s Bar Table Motion*, 31 March 2023, confidential, paras 8-13. See also F02130, Panel, *Decision on the Thaçi Defence’s Submissions Concerning Use of Prior Inconsistent Statements Pursuant to Rule 143(2)*, 15 February 2024, para. 22(b).

in court can be tendered through Rule 143(2)(c).¹⁷ The Panel has already found that there is no basis in Rule 143(2)(c) that requires the calling party to read the entire prior statement to the witness for the Panel to admit it in its entirety.¹⁸ The Panel is of the view that admitting prior inconsistent statements in their entirety when they have been extensively put to a witness, as the 2003 ICTY Statement and 2005 ICTY Testimony have been, is appropriate as it allows for the Panel to assess the Witness's prior statements in their proper context. The Defence's argument is therefore dismissed. The Panel further notes that, once admitted, it can rely on any part or sections of an admitted statement, whether or not that part has been explicitly discussed with the witness. Whether the witness was asked a question about specific aspects of a prior statement may, however, affect the weight that the Panel may be prepared to give to that part of the statement.

8. As regards the relevance of W01453's Prior Statements, the Panel recalls that it has already found that the 2003 ICTY Statement and 2005 ICTY Testimony are relevant to the charges in the Indictment.¹⁹ The Panel further notes that, during the course of its examination of the Witness, the SPO extensively used W01453's Prior Statements in order to confront W01453 with alleged inconsistencies and changes in his description of various circumstances, affording him a fair opportunity to comment upon, explain, or deny, any alleged inconsistencies between his prior statements and his testimony in court.²⁰ The Panel therefore finds that W01453's Prior Statements are relevant to these proceedings both in respect of the

¹⁷ See Response, paras 14-15.

¹⁸ F01903, Panel, *Decision on Prosecution Request for Admission of Items Used During the Examination of W04746*, 3 November 2023, para. 22.

¹⁹ Rule 154 Decision, para. 12. See also Rule 154 Decision, para. 25.

²⁰ See e.g. Transcript of Hearing, 4 November 2024, p. 21822, line 16 to p. 21826, line 22, p. 21839, line 10 to p. 21854, line 19; Transcript of Hearing, 5 November 2024, p. 21926, line 13 to p. 21927, line 20; Transcript of Hearing, 6 November 2024, p. 22019, lines 6-18, p. 22022, line 16 to p. 22024, line 3, p. 22035, line 19 to p. 22036, line 11. The Panel observes that, after his Prior Statements were put to him, W01453 adopted some of them but primarily rejected the content thereof. See e.g. Transcript of Hearing, 4 November 2024, p. 21839, line 10 to p. 21847, line 5; Transcript of Hearing, 5 November 2024, p. 21879, line 22 to p. 21887, line 21, p. 21923, line 13 to p. 21926, line 12.

information which they contain and as evidence relevant to assessing the credibility of the witness.

9. As regards the *prima facie* authenticity and probative value of W01453's Prior Statements, the Panel recalls that it has already found that the 2003 ICTY Statement and 2005 ICTY Testimony, including the Pages, contain multiple indicia of authenticity and reliability.²¹ The Panel then concluded that, save for certain issues in the Pages, which the SPO was directed to address *viva voce*,²² the 2003 ICTY Statement and 2005 ICTY Testimony were *prima facie* authentic and also probative.²³ The Panel notes the Defence's submission that several serious inconsistencies in the 2003 ICTY Statement and 2005 ICTY Testimony, including in the Pages, bar the SPO from tendering both statements under Rule 143(2)(c) for the truth of their contents, without specifying which portions are true or inconsistent.²⁴ The Panel is satisfied that the SPO provided the Defence with timely and sufficient notice of the evidence to be elicited from the Witness,²⁵ including from his 2003 ICTY Statement and 2005 ICTY Testimony.²⁶ The Panel is also satisfied that the SPO's questioning of W01453 concerning the 2003 ICTY Statement and 2005 ICTY Testimony, including the Pages, was sufficiently detailed to enable the Panel to properly assess the inconsistencies set out therein, and to determine in due course which parts to accept as the truth. Also, the Defence was afforded a full and fair opportunity to investigate these matters with the witness insofar as was thought to be relevant to the question of probative value

²¹ Rule 154 Decision, para. 13.

²² Rule 154 Decision, para. 14.

²³ Rule 154 Decision, paras 16, 25.

²⁴ Response, paras 2, 16-23. *See also* Response, paras 25-28.

²⁵ F01594/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Updated Witness List and Confidential Lesser Redacted Version of Pre-Trial Brief*, 9 June 2023, confidential, pp. 87-88; F01594/A03, Specialist Prosecutor, *Annex 3 to Prosecution Submission of Updated Witness List and Confidential Lesser Redacted Version of Pre-Trial Brief*, 9 June 2023, paras 65, 92, 112, 168-171, 173-176, 240-250, 260, 267, 310, 366, 481, 519-535 (a public redacted version was filed on 3 April 2023, F01415/A01).

²⁶ F02005, Specialist Prosecutor, *Prosecution Motion for Admission of Evidence of Witnesses W01453, W03878, W04446, W04575, and W04651 Pursuant to Rule 154*, 14 December 2023, confidential, with Annexes 1-5, confidential, paras 3-7 (a public redacted version was filed on the same day, F02005/RED).

of that evidence.

10. Regarding the Defence's argument that the 2003 ICTY Statement and the 2005 ICTY Testimony cannot both be true,²⁷ the Panel recalls that Rule 143(2)(c), which expressly contemplates the admission of prior inconsistent statements, offering competing versions of the truth, imposes on the Panel a duty to assess which of those competing versions to prefer. When upholding the constitutionality of the procedure set out in Rule 143(2)(c), the Specialist Chamber of the Constitutional Court stated:

In so far as the amended Rule 143(2)(c) entails a possibility for a panel to use a prior inconsistent statement as evidence, the ECtHR has clarified that, in convicting an accused, a court may use statements which a witness made at the stage of investigation and later retracted in open court, provided that the defence had the opportunity to cross-examine the witness at the trial. Indeed, it cannot be held in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, even when the two are in conflict. It is for a panel to assess the credibility of a witness and make a choice between competing versions of the truth, subject to the constitutional requirement that the trial be fair.²⁸

11. It will therefore be for the Panel at a later stage to assess the witness's credibility and the reliability of his statements in light of the entire body of evidence admitted before it at trial, in accordance with Rule 139(2), and informed by the arguments contained in the briefs of the Parties. What matters, therefore, is that the Panel has all the relevant information before it to assess the Witness's credibility and the reliability of his evidence.²⁹ The Panel is satisfied that the admission of the two statements will enable the Panel to make that assessment and will contribute to the establishment of the truth in this case.

²⁷ Response, paras 14-15. *See also* Transcript of Hearing, 6 November 2024, p. 22064, lines 3-7.

²⁸ KSC-CC-PR-2020-09, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020*, 22 May 2020, para. 80; referring to ECtHR, *Camilleri v. Malta*, no. 51760/99, 16 May 2000; *Bosti v. Italy (dec.)*, no. 43952/09, 13 November 2014, paras 35-47; *Berardi and Others v. San Marino (dec.)*, nos. 24705/16, 24818/16 and 33893/16, 1 June 2017, paras 73-79.

²⁹ *See* Rule 154 Decision, para. 15.

12. Turning to the 2001 ICTY Statement, 2002 ICTY Testimony, and 2011 SPRK Hearing, from which excerpts were put to the Witness during his testimony, the Panel is satisfied that they contain multiple indicia of authenticity and reliability, including: (i) they are presented in official ICTY or SPRK formats, and the transcripts of the ICTY testimony have also been audio-video recorded; (ii) the dates of the statement or testimony and the identification of the attendees are clear; (iii) the Witness's personal details are present; (iv) that the Witness was under an obligation to tell the truth; and (v) the Witness made acknowledgements that he had been truthful in his statements and testimony.³⁰ The Panel also notes that the Defence does not object to the admission for the truth of their contents of the portions of the 2001 ICTY Statement, 2002 ICTY Testimony, and 2011 SPRK Hearing, which were read into the record during W01453's examination-in-chief.³¹

13. In light of the above, the Panel finds that W01453's Prior Statements, including the Pages, are *prima facie* authentic and probative. Finally, the Panel has also taken into consideration when assessing any potential prejudicial effect that: (i) after W01453's Prior Statements had been tendered by the SPO and marked for identification by the Panel, the Panel suggested that, in its cross-examination of the Witness, the Defence consider that any of them could be admitted;³² and (ii) the Defence made extensive use and reference to W01453's Prior Statements during its cross-examination of the Witness.³³ The Panel is of the view that the Defence was afforded ample opportunity to challenge W01453's Prior Statements and to challenge any part of those statements with which an issue was taken. The Defence

³⁰ See Request, paras 12-14, footnotes 25-28, 30-32, referring to relevant parts of the 2001 ICTY Statement, 2002 ICTY Testimony, 2011 SPRK Hearing, and W01453's testimony in these proceedings.

³¹ See Response, paras 3, 30.

³² Transcript of Hearing, 6 November 2024, p. 22064, line 24 to p. 22065, line 2.

³³ See e.g. Transcript of Hearing, 6 November 2024, p. 22074, line 10 to p. 22075, line 11, p. 22078, line 23 to p. 22084, line 11, p. 22085, lines 8-16, p. 22086, line 21 to p. 22098, line 12, p. 22109, line 21 to p. 22110, line 13, p. 22113, line 22 to p. 22115, line 1, p. 22116, line 6 to p. 22119, line 5; Transcript of Hearing, 7 November 2024, p. 22176, line 13 to p. 22178, line 1, p. 22183, line 1 to p. 22184, line 25, p. 22186, line 18 to p. 22189, line 8, p. 22190, line 14 to p. 22191, line 16.

will, furthermore, have a full opportunity to make submissions regarding the weight to be given to W01453's Prior Statements to the Panel should it elect to file an application pursuant to Rule 130, and again in final briefs, should the Panel decide not to dismiss all charges pursuant to Rule 130. The Panel is therefore satisfied that the probative value of W01453's Prior Statements is not outweighed by their prejudicial effect.

14. For these reasons, the Panel is satisfied that W01453's Prior Statements are admissible pursuant to Rules 138(1) and 143(2).

V. DISPOSITION

15. For the above-mentioned reasons, the Panel hereby:

- a) **GRANTS** the Request;
- b) **ADMITS** into evidence W01453's Prior Statements as identified in Annex 1 to the Request; and
- c) **DIRECTS** the Registrar to assign W01453's Prior Statements: (i) exhibit numbers; and (ii) the classification indicated in Annex 1 to the Request.



Judge Charles L. Smith, III
Presiding Judge

Dated this Monday, 16 December 2024

At The Hague, the Netherlands.