PUBLIC
28/09/2023 12:31:00

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 Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Fidelma Donlon
Date:	28 September 2023
Language:	English
Classification:	**Public**

Decision on Prosecution Request for Admission of W03827's Witness Statements Pursuant to Rule 143(2) and Defence Request for Reconsideration

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TRIAL PANEL II ("Panel"), pursuant to Articles 21(4)(f), and 40(2) and (6)(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 79, 138 and 143(2)(c) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby renders written reasons for its oral decision to admit exhibits P00381 and P00382.1-2, and its decision on a Defence request to reconsider that oral decision.

I. PROCEDURAL BACKGROUND

1. W03827 was interviewed by the Special Prosecution Office of the Republic of Kosovo ("SPRK") on 14 July 2014 and by the Specialist Prosecutor's Office ("SPO") on 6 December 2018 (collectively "Witness Statements").[1]

2. On 9 June 2023, the Panel issued a decision where it found, without prejudice, that W03827's proposed evidence was appropriate for admission pursuant to Rules 138 and 154 ("Second Rule 154 Decision").[2]

3. On 11 September 2023, during its examination of W03827, the SPO requested that the Witness Statements be admitted pursuant to Rule 143(2).[3] The Defence objected to the admission of the Witness Statements pursuant to that rule.[4] The Panel was satisfied that the requirements of Rule 143(2)(c) were met and admitted the Witness Statements as exhibits P00381 and P00382.1-2 with written reasons to follow ("Oral Decision").[5] The present decision sets out the Panel's reasons.

[1] *See* P00381 and P00382.1- 2.
[2] F01595/COR, Panel, *Corrected Version of Decision on Second Prosecution Motion Pursuant to Rule 154* ("Rule 154 Decision"), 9 June 2023, confidential, paras 11-17.
[3] Transcript of Hearing, 11 September 2023, p. 7695, lines 10 to 12, p. 7714, lines 2 to 7.
[4] Transcript of Hearing, 11 September 2023, p. 7695, lines 13 to 14, p. 7698, lines 15 to 17, p. 7699, lines 6-7, p. 7714, lines 9 to 12.
[5] Transcript of Hearing, 11 September 2023, p. 7706, lines 14 to 17, p. 7714, lines 13 to 14.

4. Also, on 11 September 2023, Defence for Hashim Thaçi ("Thaçi Defence") requested, and the Panel ordered, the disclosure of W03827's medical records.[6] The Panel granted an adjournment to allow the Defence to inspect the medical records.[7]

5. On 13 September 2023, after having finished its cross-examination of W03827, the Thaçi Defence requested reconsideration of the Oral Decision ("Defence Request for Reconsideration").[8] The Defence for the remaining Accused joined this request.[9] The SPO opposed the request.[10]

II. SUBMISSIONS

A. REQUEST FOR ADMISSION PURSUANT TO RULE 143(2)

6. The SPO requested the Panel to admit the Witness Statement pursuant to Rule 143(2).[11] The SPO argued that it had established that the witness was evasive and gave statements inconsistent with his prior statement, as he had previously been able to give a detailed account, but in court claimed a failure to recall any of the details.[12] The SPO, therefore, averred that it had satisfied the requirements of Rule 143(2) and requested the admission of the Witness Statements pursuant to that rule.[13]

7. The Defence responded that Rule 143 does not apply. First, the Defence argued that, as the witness claimed not to have any recollection of the events, it

[6] Transcript of Hearing, 11 September 2023, p. 7716, line 23 to p. 7717, line 8, p. 7718, lines 9 to 19.
[7] Transcript of Hearing, 11 September 2023, p. 7719, lines 11 to 15.
[8] Transcript of Hearing, 13 September 2023, p. 7946, lines 21 to 25.
[9] Transcript of Hearing, 13 September 2023, p. 7952, line 20 to p. 7953, line 20, p. 7953, line 23 to p. 7954, line 8, p. 7954, lines 12 to 18.
[10] Transcript of Hearing, 13 September 2023, p. 7954, line 21 to p. 7956, line 3.
[11] Transcript of Hearing, 11 September 2023, p. 7695, lines 10 to 12.
[12] Transcript of Hearing, 11 September 2023, p. 7696, lines 17 to 21.
[13] Transcript of Hearing, 11 September 2023, p. 7696, lines 23 to 25, p. 7714, lines 2 to 7.

was not a prior inconsistent statement.[14] Second, the Defence submitted that the *lex specialis* principle required the application of Rule 155 instead of Rule 143(2)(c) and that the requirements of Rule 155 had not be met in this case.[15] Specifically, it averred that the Accused have a fundamental right to examine the witnesses against them, and that the right is protected by the *lex specialis* of Rule 155.[16] Third, the Defence initially opposed the SPO's claim that W03827 was deliberately refusing to answer questions as he might have a medical condition, which would result in an inability to answer questions, but were not in a position to make such an assessment absent access to medical records.[17] Fourth, the Defence submitted that Rule 143 gives the calling party a right to put its case to a witness on question-by-question basis using a prior inconsistent statement; it does not give the calling party the right to put two or three matters to a witness and if he, or she, does not answer in a truthful manner, to admit the witness's entire statement.[18] The Defence, therefore, argued that if the SPO was to invoke Rule 143, it would have to put every point to the witness.[19]

8. The SPO replied that Rule 155 is inapplicable because W03827 was in court and available for questioning.[20] The SPO admitted that Rules 153-155 are *lex specialis*, but argued that the present circumstances in relation W03827 were not regulated by these rules and that, in any event, the Panel has previously admitted statements for their substance, offered by the Defence, outside of Rules 153-155, and under Rule 138.[21] The SPO also averred that, contrary to the Thaçi Defence's

[14] Transcript of Hearing, 11 September 2023, p 7697, lines 5 to 9.
[15] Transcript of Hearing, 11 September 2023, p 7697, lines 10 to 13.
[16] Transcript of Hearing, 11 September 2023, p. 7697, lines 13 to 15, p. 7698, lines 17 to 22.
[17] Transcript of Hearing, 11 September 2023, p. 7697, line 16 to p. 7698, line 12.
[18] Transcript of Hearing, 11 September 2023, p. 7699, lines 14 to 19.
[19] Transcript of Hearing, 11 September 2023, p. 7699, lines 19 to 20.
[20] Transcript of Hearing, 11 September 2023, p. 7700, lines 5 to 7.
[21] Transcript of Hearing, 11 September 2023, p. 7700, lines 8 to 12.

submissions, jurisprudence indicates that failure to recall constitutes an inconsistency or a retraction.[22]

9. The Defence responded to the SPO's reply that it disagreed with the SPO's submission that Rule 155 does not apply to witnesses that are available in the courtroom as Rule 155(2) provides that the Panel has to be satisfied that "the person has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect" and that the present case is an example of such circumstances.[23]

10. Upon questioning from the Panel, the Defence also submitted that: (i) Rule 155(1) could apply if the Panel were to obtain expert testimony under Rule 27 that confirms that W03827 has an impairment but that the SPO's position was that W03827 does not have an impairment;[24] (ii) if the Witness Statements are admitted under Rule 143(2), without the SPO having W03827 affirm them, the Accused would be deprived of the right to confront W03827, which is different from admitting them under Rule 155(2) where certain conditions have to be fulfilled by the SPO, which justifies their admission without cross-examination;[25] (iii) the Witness Statements do not have a solemn oath taken at the start and are investigative statements with no adequate safeguards protecting the rights of the Accused.[26]

11. Following on from the Panel's questions and the Defence's further submissions, the SPO responded that a review of W03827's medical records by a doctor at European Union Rule of Law Mission in Kosovo ("EULEX") Medical

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[22] Transcript of Hearing, 11 September 2023, p. 7700, lines 13 to 25 *referring to* International Criminal Tribunal for the former Yugoslavia ("ICTY"), *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, Decision on Admission of Evdience Presented During Testimony of Aleksandar Stefanovic, 12 March 2009, paras 12-13.
[23] Transcript of Hearing, 11 September 2023, p. 7701, lines 4 to 9.
[24] Transcript of Hearing, 11 September 2023, p. 7701, lines 11 to 23.
[25] Transcript of Hearing, 11 September 2023, p. 7703, lines 3 to 17.
[26] Transcript of Hearing, 11 September 2023, p. 7704, line 21 to p. 7705, line 6.

Services has led to the conclusion that there was no neurocognitive finding for W03827. The SPO argued that this was evidenced by the fact that the witness failed to recall many propositions put to him, but denied with a firm memory those propositions which directly implicated the Accused.[27]

12. After receiving the disclosure of W03827's medical records and an adjournment to review those records, as ordered by the Panel,[28] the Thaçi Defence confirmed that it no longer intended to pursue the medical issue in respect of W03827.[29]

B. REQUEST FOR RECONSIDERATION

13. The Thaçi Defence requested reconsideration of the Oral Decision pursuant to Rule 79 based on two grounds, namely: (i) that there had been a clear error of reasoning ("First Ground"); and (ii) because it was necessary in order to avoid injustice ("Second Ground").[30] In respect of the First Ground, the Thaçi Defence argued that the Panel erred when admitting the Witness Statement pursuant to Rule 143(2)(c) without first verifying whether the Accused was able to adequately and properly cross-examine W03827.[31] In respect of the Second Ground, the Thaçi Defence averred that a failure to overturn the Oral Decision would result in an injustice through violation of the fundamental fair trial rights of the Accused by

[27] Transcript of Hearing, 11 September 2023, p. 7702, lines 3 to 14.
[28] *See supra*, para. 4.
[29] Transcript of Hearing, 12 September 2023, p. 7787, lines 16 to 25.
[30] Transcript of Hearing, 13 September 2023, p. 7946, lines 21 to 25.
[31] Transcript of Hearing, 13 September 2023, p. 7947, line 7 to p. 7951, line 4 *referring to* KSC-CC-PR-2020-09/F00006, 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* ("Constitutional Court Judgment"), 26 May 2020, paras 76-81; International Criminal Court, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2024, Appeals Chamber, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony" ("*Ruto* Judgment"), 12 February 2016, para. 93.

admitting incriminating evidence against them without an adequate and proper opportunity to cross-examine that evidence.[32] Lastly, the Thaçi Defence added that the Oral Decision will serve as precedent for the remainder of this trial pursuant to which the SPO may seek again to admit witnesses' statements via Rule 143(2) without the Accused having an opportunity to adequately and properly cross-examine the witnesses.[33]

14. The Veseli Defence, Selimi Defence and Krasniqi Defence supported the submissions of the Thaçi Defence.[34]

15. The SPO responded that the request for reconsideration is premature as the Panel has not yet issued its reasoning. The SPO argued, in any event, that the jurisprudence referenced by the Thaçi Defence is either distinguishable from the present case, or supports the SPO's original request.[35]

16. The Thaçi Defence replied, in terms of timing, that it felt obliged, before the written decision, to bring their submissions before the Panel.[36] Additional submissions and authorities were put forth by the Parties in response to Judges' questioning.[37]

III. APPLICABLE LAW

17. Pursuant to Article 40(6)(h), the Panel may rule on the admissibility of evidence prior to, or during trial. Pursuant to Rule 138(1), unless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is

[32] Transcript of Hearing, 13 September 2023, p. 7951, line 5 to p. 7952, line 1.
[33] Transcript of Hearing, 13 September 2023, p. 7952, lines 2 to 8.
[34] Transcript of Hearing, 13 September 2023, p. 7952, line 20 to p. 7953, line 20, p. 7953, line 23 to p. 7954, line 8, p. 7954, lines 12 to 18.
[35] Transcript of Hearing, 13 September 2023, p. 7954, line 21 to p. 7956, line 3.
[36] Transcript of Hearing, 13 September 2023, p. 7956, lines 4 to 12.
[37] Transcript of Hearing, 13 September 2023, pp. 7957-7975 *referring* to Constitutional Court Judgment, paras 76-81; *Ruto* Judgment, para. 93.

relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect.

18. Pursuant to Rule 143(1), the testimony of a witness at trial shall be given in person. A Party who 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)(c). 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.[38]

19. Pursuant to Rule 79, 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 a Party or, where applicable, Victims' Counsel, or *proprio motu* after hearing the Parties, reconsider its own decisions.

IV. DISCUSSION

A. PRELIMINARY ISSUE

20. The Panel considers that the Thaçi Defence was authorised to seek reconsideration of the Panel's Oral Decision. It did so, however, without the benefit of a fully reasoned, written decision. Therefore, in order not to prejudice the Defence, the Panel has taken into consideration all submissions and authorities advanced by the Defence – whether prior to or after the Oral Decision – for the purpose of rendering the present decision. As discussed below, this will ensure that all Defence arguments are considered at once, without prejudice to the Defence.

[38] *See also* F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings* ("Order on the Conduct of Proceedings"), 25 January 2023, paras 106-107.

B. REQUEST FOR ADMISSION PURSUANT TO RULE 143(2)

1. Which Rule Applies?

21. The Defence has argued that Rule 155(2) should be applied in preference to Rule 143(2)(c).

22. Rule 143(2)(c) was amended in April 2020 with the addition of the following words: "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."

23. This, and other amendments to the Rules, were referred to the Constitutional Court pursuant to Article 19(5) of the Law. This amendment was one which the Constitutional Court subjected to close scrutiny at paragraphs 76 to 81 of the Judgment of the Constitutional Court of 22 May 2020 ("Constitutional Court Judgement"). It concluded: "With due regard to the above observations, the Chamber finds that the amendments to Rule 143 comply with Chapter II of the Constitution."[39]

24. Before so concluding, the Constitutional Court held:

> 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 hold 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.[40]

[39] Constitutional Court Judgement, para. 81.
[40] Constitutional Court Judgement, para. 80 *referring to* ECtHR, *Camilleri v. Malta*, no. 51760/99, 16 May 2000. *See also* ECtHR, *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.

25. The Constitutional Court did not in its analysis suggest that, where a witness at trial gives evidence materially different from a statement the witness gave during the investigation stage, Rule 155(2) is to be preferred to Rule 143(2)(c). Rather, as is evident from the Constitutional Court's analysis, the admission of a prior inconsistent statement made at the stage of investigation under Rule 143(2)(c) is a tool which is open for the Panel to use where the requirements of that rule are met. There is no support, in the Constitutional Court Judgement or elsewhere, for the suggestion that Rule 155 is *lex specialis* to Rule 143(2)(c). Furthermore, such an interpretation would render Rule 143(2)(c) irrelevant.

26. In addition, the two rules regulate different factual circumstances. As is apparent from the title of Rule 155, this rule regulates the case of "unavailable persons and of persons subjected to interference". In contrast, Rule 143 regulates "examination of witnesses". As conceded by the Defence, Rule 155(1), was not applicable to the present matter insofar as there was no definite evidence of the inability of W03827 to testify due to reasons of physical or mental impairment or other compelling reasons.[41] Regarding Rule 155(2), this provision regulates the situation where a prospective witness has been subject to improper interference, including threats, intimidation, injury, bribery, or coercion, as set out in Rule 155(2)(b). Such a factual scenario is materially different from the one regulated by Rule 143(2)(c), which does not require the existence of such an interference. It is also a circumstance for which there is no evidential basis in the present case. Based on the above, the Panel finds that Rule 155 is not *lex specialis* vis-à-vis Rule 143(2)(c).

27. Considering that Rules 143(2)(c) and 155 regulate different factual scenarios, and the conditions for the application of Rule 155 are not met in respect of the

[41] Transcript of Hearing, 12 September 2023, p. 7787, lines 16 to 25.

present circumstances, the principle referred to by the Veseli Defence as *lex mitior* is not applicable here.[42]

2. Under what conditions can a prior inconsistent statement be admitted pursuant to Rule 143(2)(c)?

28. Rule 143(2)(c) provides that a 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.[43] When doing so, the Panel would be expected to take into account any explanations offered for such inconsistencies when determining the probative value of the evidence.[44]

29. The Defence relies upon Constitutional Court Judgment to suggest that the Constitutional Court conditioned the applicability of Rule 143(2)(c) to the possibility for the Defence to have an "adequate and proper" opportunity to cross-examine a witness whose statement(s) is/are offered pursuant to that rule.[45] The Constitutional Court said that "[t]his opportunity, the Chamber observes, is

[42] *See* Transcript of Hearing, 13 September 2023, p. 7970, lines 12-18. For a definition of the *lex mitior* principle see, however, ICTY, *Prosecutor v. Dragan Nikolić*, No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para. 81, according to which this principle is commonly "understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied". *See also* Section 2(3) of the German Criminal Code of 13 November 1998 and Article 2(2) of the Swiss Criminal Code of 21 December 1937.

[43] Such a procedural possibility is consistent with the practice and jurisprudence of other internationalized criminal jurisdictions operating under a generally similar procedural and evidential regime. *See, for example,* ICTY, *Prosecutor v. Popović et al.*, No. IT-05-88-AR73.3, Decision on Appeals Against Decision in Impeachment of a Party's Own Witness, 1 February 2008, paras 31-32; *Limaj* Decision, paras 30-34; *Prosecutor v. Popović et al.*, No. IT-05-88-A, Judgment, ("*Popović* Judgment"), 30 January 2015, para. 136.

[44] *Popović* Judgment, para. 136; ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgment, 23 January 2014, para. 424; International Criminal Tribunal for Rwanda ("ICTR"), *Prosecutor v. Nchamihigo*, ITCR-2001-63-A, Judgment, 18 March 2010, para. 201.

[45] Constitutional Court Judgment, paras 76-81.

specifically provided for in Rule 143(3)."[46] As a preliminary matter, the Panel recalls that all Defence teams were offered the opportunity to cross-examine the witness pursuant to Rule 143(3), and the Thaçi Defence did proceed to cross-examine the witness. The Panel notes, furthermore, that where admission of evidence is pre-conditioned on the possibility of cross-examination the Rules expressly say so.[47] In addition, the Constitutional Court Judgment regulates the very situation presently before the Panel. Specifically, the Constitutional Court made it clear that, where a prior inconsistent statement produced outside the trial is offered, the Defence should "as a rule" or "as a general rule" have an "adequate and proper" opportunity to cross-examine the witness.[48] This caveat "[a]s a rule" or "as a general rule" acknowledges two important principles. First, that the right of the Accused to cross-examine a prosecution witness is not an absolute right.[49] The second is that there might be circumstances where cross-examination might not be possible – at all or in an effective manner. In this regard, the Panel notes that a lack of opportunity to cross-examine a witness does not automatically

[46] Constitutional Court Judgement, para. 79.
[47] *See, in particular*, Rules 149(2)(c), 154(b).
[48] Constitutional Court Judgment, paras 78-79.
[49] *See, for example,* ICTY, *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision On Appeal Against The Trial Chamber's Decision On The Evidence Of Witness Milan Babić ("*Martić* Appeal Decision"), 14 September 2006 (regarding the admission of the statement of a deceased witness), para. 12; *See also Prosecutor v. Jadranko Prlić et al*., IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief, 4 July 2006, p. 3; *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 27 (finding that the denial of the opportunity to cross-examine occasioned by the admission of hearsay evidence was tempered by the previous cross-examination of the witness in other proceedings and that any residual disadvantage was outweighed by the disadvantage which would be occasioned to the Prosecution by the exclusion of the evidence in the circumstances of the case); *Prosecutor v. Milan Milutinović et al*., IT-05-87-PT, Decision on Prosecution's Rule 92*bis* Motion, 4 July 2006, para. 11; *Prosecutor v. Blagojević et al*., IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92*bis*, 12 June 2003, para. 14 ("the right to cross-examine witnesses is not an absolute right, although the decision to accept evidence without cross-examination is one which the Trial Chamber shall arrive at only after careful consideration"); *Prosecutor v. Martić*, IT-95-11-T, Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, together with Associated Exhibits, from Evidence, 9 June 2006, para. 56.

preclude the admission of a written witness statement if the Panel is satisfied that the requirements for admission as set out in the Rules are met.[50] This is apparent not just from the jurisprudence of relevant jurisdictions, as outlined above, but from the Rules applicable to these proceedings which provide for such a possibility.[51] The right to cross-examine can, therefore, be limited by law and remains otherwise subject to the control of the Panel.[52]

30. The principle according to which the Defence should "as a (general) rule" have the ability to cross-examine witnesses whose prior statements have been tendered in evidence is reflected in the case law of the European Court of Human Rights ("ECtHR"), including in those cases which the Constitutional Court relied on for its ruling.[53] That general rule is accepted by this Panel as an important safeguard of the fundamental rights of the Accused. For instance, the ECtHR has accepted that the possibility of cross-examination could be restricted in respect of witnesses who do not attend the proceedings,[54] including co-accused, who refuse to testify at trial or to answer questions from the defence[55] protected witnesses

[50] F01603, Panel, *Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155* ("Rule 155 Decision"), 14 June 2023, para. 18 *referring to* ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater* ("Milutinović Decision"), 16 February 2007 para. 9.

[51] *See, for example,* Rule 155(2).

[52] *See, for example, Martić* Appeals Decision, para. 12; ICTY, *Prosecutor v. Tolimir et al.*, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 29. *See also* Order on the Conduct of Proceedings, paras 106, 109.

[53] *See, for example*, ECtHR, *Schatschaschwili v. Germany* [GC], no. 9154/10, Judgment ("*Schatschaschwili v. Germany* [GC]"), 15 December 2015, paras 103, 105; ECtHR, *Lucà v. Italy*, no. 33354/96, Judgment, 27 February 2001, paras 39-40; ECtHR, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, Judgment ("*Al-Khawaja and Tahery v. the United Kingdom* [GC]"), 15 December 2011, para. 118.

[54] *See, for example*, ECtHR, *Al-Khawaja and Tahery v. the United Kingdom* [GC], paras 119-147; *See also* ECtHR, *Seton v. the United Kingdom*, no. 55287/10, Judgment ("*Seton v. the United Kingdom*"), 31 March 2016, paras 58-59; ECtHR, *Dimović v. Serbia*, no, 24463/11, Judgment, 28 June 2016, paras 36-40; ECtHR, *T.K. v. Lithuania*, no. 14000/12, Judgment, 12 June 2018, paras 95-96; *Schatschaschwili v. Germany* [GC], paras 111-131.

[55] *See, for example*, ECtHR, *Vidgen v. the Netherlands*, no. 29353/06, Judgment, ("*Vidgen v. the Netherlands* (2012)"), 10 July 2012, para. 42; ECtHR, *Sofri and Others v. Italy*, no. 37235/97, ("*Sofri and Others v. Italy*"), 4 March 2003; ECtHR, *Sievert v. Germany*, no. 29881/07, Judgment ("*Sievert v. Germany*"), 19 July 2012,

who are questioned under "special examination arrangements", which in the relevant case involved "full protection of the witness's anonymity and impossibility of the defence to attend his examination."[56] The ECtHR also made it clear that there might be situations where a witness may justifiably refuse to give evidence or to answer questions, for example, if a co-accused uses his right to protection against self-incrimination;[57] if a former co-suspect is facing the charges of perjury for trying to change his initial statement inculpating the applicant;[58] where a testimonial privilege applies;[59] or where a witness refuses to give a statement due to a fear of reprisals.[60] This might, in turn, affect the right of and possibility for the Defence to cross-examine (effectively) such a witness. In such cases, the ECtHR has stated that a court must be able to "conduct a fair and proper assessment of [the witness's] reliability" and it must consider "viewing the fairness of the proceedings as a whole" whether "notwithstanding, the handicaps under which the defence laboured, there were sufficient counterbalancing factors to conclude that the admission in evidence…did not result in a breach of Article 6(1) read in conjunction with Article 6(3) of the Convention."[61] In other words, the inability of the Defence to cross-examine a witness does not, without more, render the evidence or prior statement of such a witness inadmissible.

31. It is also of note that the ECtHR has drawn a distinction between the scenarios outlined above and the situation when "the defence has had an opportunity to put

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paras 59-61; ECtHR, *Cabral v. the Netherlands*, no. 37617/10, Judgment ("*Cabral v. the Netherlands*"), 28 August 2018, para. 33.

[56] ECtHR, *Papadakis v. the Former Yugoslav Republic of Macedonia*, no. 50254/07, Judgment, 26 February 2013, para. 89; *See also* ECtHR, *Donohoe v. Ireland*, no. 19165/08, Judgment, 12 December 2013, paras 78-89 (on the impossibility for the defence to have access to sources on which a witness based his or her knowledge or belief).

[57] ECtHR, *Vidgen v. the Netherlands* (2012), para. 42.

[58] ECtHR, *Cabral v. the Netherlands*, para. 34.

[59] ECtHR, *Sofri and Others v. Italy*.

[60] ECtHR, *Breijer v. the Netherlands*, no. 41596/13, Decision ("*Breijer v. the Netherlands*"), 3 July 2018, paras 32-33.

[61] *Sievert v. Germany*, para. 67; *See also Cabral v. the Netherlands*, para. 37; *Breijer v. the Netherlands*, para. 35.

questions to the witness concerned" and where "the witness has not refused to testify but had claimed to have no longer any recollection of facts on which he was cross-examined."[62] In such instances, the ECtHR has held that the principles related to absent witnesses will not necessarily apply,[63] that it does not follow "that the opportunity to cross-examine is inadequate and ineffective"[64] and that "a change of attitude on the part of a witness does not of itself give rise to a need for compensatory measures".[65] Indeed, the ECtHR has "refused to hold 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, not even when the two are in conflict."[66] In such a situation, the ECtHR "will seek to determine whether the proceedings as a whole, including the way in which evidence was taken, were fair."[67] In such instances, other procedural guarantees may be of importance to establishing the overall fairness of proceedings such as, for instance, compliance with the principle of equality of arms.[68]

32. As summarised by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Martić ("Martić* Decision*")*, there are two core principles that derive from the jurisprudence of the ECtHR on this matter:

> The Appeals Chamber observes in any event that the two principles that the Trial Chamber derived from the jurisprudence of the ECHR, namely that (1) a complete absence of, or deficiency in, the cross-examination of a witness will not automatically lead to exclusion of the evidence, and (2) evidence which has not been

[62] ECtHR, *Vidgen v. the Netherlands*, no. 68328/17, Decision ("*Vidgen v. the Netherlands* (2019"), 31 January 2019, para. 38.
[63] ECtHR, *Vidgen v. the Netherlands* (2019), paras 37-39.
[64] ECtHR, *Vidgen v. the Netherlands* (2019), para. 41.
[65] ECtHR, *Vidgen v. the Netherlands* (2019), para. 41.
[66] ECtHR, *Vidgen v. the Netherlands* (2019), para. 39.
[67] ECtHR, *Vidgen v. the Netherlands* (2019), para. 40; *See also* ECtHR, *Makeyan and Others v. Armenia*, no. 46436/09, Judgment, 5 December 2019, para. 40.
[68] ECtHR, *Bondar v. Ukraine*, no. 18895/08, Judgment, 16 April 2019, paras 79-81.

> cross-examined and goes to the acts and conduct of the Accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction, are consistent with the jurisprudence of the International Tribunal as well as that of national jurisdictions.[69]

33. Footnote 44 of the *Martić* Decision further illuminates this issue. The *Martić* Appeals Chamber noted, with respect to the first of these principles, that the Trial Chamber in the *Brđanin* case retained in the trial record the testimony of a witness who was unable to appear for cross-examination.[70] In relation to the second principle, the *Martić* Appeals Chamber pointed to its earlier decision in the *Galić* case in which it stated that "where the witness who made the statement is not called to give the accused an adequate and proper opportunity to challenge the statement and to question that witness, the evidence which the statement contains may lead to a conviction only if there is other evidence which corroborates the statement."[71]

34. When assessing what weight, if any, can be attributed to such evidence, the Panel will therefore account for the inability of the Defence to cross-examine (or to cross-examine effectively) a witness and will carefully consider whether that evidence is corroborated by credible evidence which the Defence was able to challenge at trial.[72] When evaluating whether corroboration of such evidence exists

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[69] *Martić* Appeals Decision, para. 20 (with further references therein).
[70] *Martić* Appeals Decision, fn. 44 *referring to* ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Oral Decision, 24 February 2004, T. 25083.
[71] *Martić* Appeals Decision, fn. 44 *referring to* ICTY *Prosecutor v. Stanislav Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*, 7 June 2002, fn. 34 (referring as authority to Judgments of the ECtHR).
[72] *See, for example*, ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgment ("*Limaj* Judgment"), 30 November 2005, para. 14; *See also* Rule 155 Decision, para. 18 (with further references therein). *See also* ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Redacted Version of the "Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89(F), 92*bis*, 92*ter* and 92*quater* of the Rules of Procedure and Evidence", 21 February 2008, para. 26 (noting that the admission of a statement without cross-examination is without prejudice to the final probative value or weight which the panel might be prepared to attach to such evidence); *Milutinović* Decision, paras 9-10; ECtHR, *Seton v. the United Kingdom*, para. 58; *Sitnevskiy and Chaykovskiy v. Ukraine*, nos. 48016/06 and 7817/07, Judgment, 10 November 2016, para. 125; *See also, generally*, *Al-Khawaja and Tahery v. the United Kingdom* [GC], paras 119-147.

and when deciding upon the Accused's guilt, the Panel will also apply the principle of "sole or decisive" basis recognised by the ECtHR.[73]

35. In summary, it is apparent from the above that: (i) the right of the Defence to cross-examine a witness is not absolute; (ii) that right is subject to a variety of exceptions where there are competing good reasons to admit evidence without such a possibility; (iii) the impossibility of (effective) cross-examination of a witness does not render his/her statement inadmissible, though such a course must be based on good reasons and be a last resort;[74] (iv) admission of the statement of a witness without the possibility of (effective) cross-examination does not automatically render proceedings unfair; (v) where a statement has been admitted in those circumstances, it should not in principle serve as the sole or decisive basis for the determination of the Accused's guilt when the evidence is evaluated at the end of the trial, although the ECtHR has carved out limited exceptions thereto;[75] and (vi) corroboration of the admitted evidence will be central to the question of what weight (and probative) value can attach to it.

36. In its oral submissions, the Defence invited the Panel to adopt the Judgment of the Appeals Chamber of the International Criminal Court ("ICC") in *Prosecutor v. Ruto* ("*Ruto* Judgment") as a relevant or controlling precedent in this matter.[76] The Panel is not satisfied that this decision provides a precedent relevant to interpreting the regime applicable before the Specialist Chambers ("SC") or that it supports the Defence position in relation to that regime. First, the question which the ICC Appeals Chamber was asked to resolve in the *Ruto* Judgment was different from the one before this Panel. It was asked to determine whether amended

[73] *See, for example*, Rule 155 Decision, para. 18; *Limaj* Judgment, para. 14; ECtHR, *Al-Khawaja and Tahery v. the United Kingdom* [GC], paras 126-147, in particular, paras 146-147. *See also* Rule 140(4).
[74] *See also* ECtHR, *Al-Khawaja and Tahery v. the United Kingdom* [GC], paras 199-125; ECtHR, *Seton v. the United Kingdom*, para. 58(i)-(iii); ECtHR, *T.K. v. Lithuania*, para. 95(i)-(iii).
[75] *See, in particular*, ECtHR. *Al-Khawaja and Tahery v. the United Kingdom* [GC], paras 118-147 (and references cited).
[76] *Ruto* Judgment, para. 93.

Rule 68 of the ICC Rules which had been amended after the start of trial in that case, had been applied retroactively to the detriment of the accused and stands as a precedent for the proposition that it did.[77] Second, Rule 68(2)(c) and (d) of the ICC Rules, as amended, pertain to the scenario of a person who has been subjected to interference or who is unavailable. In this sense, it echoes and resembles in some respect Rule 155(1)-(2), not Rule 143(2)(c). Unlike Rule 143(2)(c), Rule 68 of the ICC Rules does not explicitly provide for the possibility of admitting a statement for the truth of its content "or for other purposes within the discretion of the Panel." In that sense, both the language and conditions set by Rule 68 ICC Rules are akin to those envisaged by Rule 155(2) of the Rules rather than situations regulated by Rule 143(2)(c). Third, the factual scenario that the ICC Appeals Chamber was dealing with in that case was materially different from the present one. In that case, the witnesses, addressed in paragraph 93 of the *Ruto* Judgment, to which the Defence has pointed: (i) recanted the content of their earlier statement; and (ii) the Trial Chamber determined that they had been subjected to interference. Neither of these factual considerations apply to the present case.[78] Lastly, the *Ruto* Judgment does not stand for a general legal proposition that statements of recanting witnesses could never be admitted unless (effective) cross-examination is possible. This would, in effect, allow a witness who does not want to testify, or wishes to help a defendant, to render his own evidence inadmissible by recanting his earlier account. Instead, the Appeals Chamber of the ICC only stated its view that, in the scenario before it, "even if the accused had an opportunity to question the witnesses because they appeared before the Court, in the absence of the Prosecutor eliciting incriminating evidence from the witnesses in examination-in-chief, such questioning does not amount to a meaningful cross-

[77] *Ruto* Judgment, para. 92.
[78] *Ruto* Judgment, para. 93.

examination."[79] "It follows", the Appeals Chamber of the ICC said, "evidence was admitted for the truth of its contents in circumstances in which those witnesses denied the allegations made in that evidence and meaningful cross-examination was not possible."[80] It thus did not find that (meaningful) cross-examination was a pre-condition for the admission of prior (inconsistent) statements. It found that, in the *Ruto* case, the possibility of admission of a prior inconsistent statement of a recanting witness without (meaningful) cross-examination under amended Rule 68 of the ICC Rules would not have been possible under the earlier evidential regime, and that the retroactive application of that amended rule to the circumstances of that case was prejudicial to the Accused.[81]

3. Exercise of the Panel's discretion in deciding admission

37. As noted above, the Panel is satisfied that all requirements for admission under Rules 138(1) and 143(2)(c) are met in relation to the Witness Statements. The Panel turns to consider whether to exercise its discretion to nevertheless refuse to admit those, in particular in light of the need to guarantee the fairness of proceedings.

38. In deciding whether to admit W03827's statements, the Panel has taken into account all relevant circumstances put forth by the Parties that were apparent from the record. In particular, the Panel considered the fact that the witness gave two successive statements, four years apart, which generally are consistent. The first was given on 14 July 2014 as pre-trial testimony to the SPRK in the case against *Sabit Geci et al*.[82] This record contains: (i) the personal details of the witness; (ii) the witness's initials on each page and his signature; (iii) the signature of the EULEX

[79] *Ruto* Judgment, para. 93.
[80] *Ruto* Judgment, para. 93.
[81] *Ruto* Judgement, paras 94-96.
[82] P00381.

prosecutor; (iv) warnings and acknowledgment of the witness's rights; and (v) indication of the place, date, time, name and number of the case, in which W03827 gave the statement.[83] The interview was given under a legal obligation to testify and under an obligation to tell the truth where a failure to do so was subject to potential prosecution under Articles 390-391 of the Kosovo Criminal Code.[84] An official interpreter was present and so was a recording clerk.[85] It was taken at the EULEX Executive Police Compound in Pristina, Kosovo.[86] The witness had the minutes of the interview read back to him with the assistance of the interpreter, he acknowledged the testimony as his and signed the record without objection.[87] Based on the above, the Panel had found that the relevance, *prima facie* authenticity and probative value of this document had been established.[88]

39. Furthermore, on 6 December 2018, W03827 was interviewed by the SPO.[89] This was done in the presence of an interpreter.[90] The identity of the witness was verified.[91] The interview was audio- and video-recorded.[92] The witness was given an indication of his rights and obligations in the course of this interview, which he confirmed he understood.[93] His earlier statement was carefully reviewed by the witness and adopted by him.[94] There was no significant material change to his earlier account, which he adopted with minimal corrections. He was offered the possibility to have the interviewed replayed but he declined.[95] The witness

[83] *See* P00381, in particular, pp. 1-2, 30.
[84] P00381, p. 1.
[85] P00381, pp. 1, 30.
[86] P00381, p. 1.
[87] P00381, p. 30.
[88] Rule 154 Decision, paras 11-17.
[89] P00382.1_ET-P00382.2_ET.
[90] P00382.1_ET, p. 1.
[91] P00382.1_ET, p. 1.
[92] P00382.1_ET, p. 2.
[93] P00382.1_ET, p. 2.
[94] P00382.1_ET, pp. 3-59.
[95] P00382.2_ET, p. 2.

confirmed that his account, as adopted and corrected, was true and accurate to the best of his knowledge and belief.[96] The witness said that he understood that his evidence, including the record of this interview, could be used in criminal proceedings before the SC and had no objection to the content of the record.[97] He also confirmed that he had given the interview and evidence freely and without threat, inducement or promise.[98] He also confirmed that he had no objection to the manner in which the interview had been conducted.[99] Based on the above, the Panel had found that the relevance, *prima facie* authenticity and probative value of this document had been established.

40. Other considerations were relevant to the Panel's decision to admit the Witness Statements. First, as noted above, the two records were recorded with great care by the authorities in question. All necessary safeguards were in place to guarantee the reliability of the record. At the time, the witness provided materially consistent accounts. Both records are relevant, *prima facie* authentic and have probative value.

41. The Panel accounted for the fact that the Witness Statements contain evidence pertaining to an incident that is charged in the Indictment. It contains potentially incriminating material as it places two of the Accused, Messrs Selimi and Thaçi, at relevant locations and attributes actions, statements and deeds to them that could be relevant to establishing their individual criminal responsibility. Because of the incriminating or potentially incriminating nature of this evidence, the Panel approached the admission of the Witness Statements with particular caution. Guided by the standards outlined above, the Panel therefore considered what prejudice would result to the Defence from the admission of the Witness

[96] P00382.1_ET, p. 61.
[97] P00382.2_ET, p. 2.
[98] P00382.2_ET, pp. 2-3.
[99] P00382.2_ET, p. 3.

Statements into evidence and whether overall fairness could be maintained should such evidence be admitted.

42. In this context, the Panel notes, in particular, the following. First, it accounted for the general reliability of the Witness Statements, as outlined above, as well as the (potentially incriminating) nature of the proposed evidence. The Panel notes in this respect that the formality and thoroughness of the interviews of this witness, and the care taken to record those interviews, as well as the availability of a video- and audio-recording of the SPO interview, which the Panel ordered to be produced,[100] enabled it to assess any possible influence of the questioning on the answers of the witness and to obtain additional indications of the general demeanour of the witness when he was able to fully engage with the questions asked of him.

43. Second, the Panel took into consideration the fact that the Defence was able to cross-examine this witness. The Defence is right to suggest that its ability to cross-examine the witness was not fully effective, insofar as the witness did not engage with the substance of its questions, and that it could not be expected to elicit (potentially) incriminating evidence to establish the ineffectiveness of its cross-examination. At the same time, the Defence was placed in the same position, as far as its ability to elicit *viva voce* evidence is concerned, as the SPO.

44. Third, this witness is part of a group of at least five witnesses who are to testify about the same incident.[101] The Defence will be able to cross-examine four

[100] Transcript of Hearing, 25 September 2023, p. 8183, lines 16 to 24 (Oral Order); *See also* Disclosure 953.
[101] W03821, W03825, W03827, W03832, and W04147.

of these witnesses,[102] one of whom the Defence has already cross-examined extensively about this matter.[103]

45. Fourth, should the Defence dispute any aspect of W03827's evidence, which it considers cannot fairly or effectively be tested through the evidence of other SPO witnesses, the Defence would of course have the possibility of calling its own witnesses.[104]

46. Fifth, the Panel accounted for the fact that the Defence is able to produce relevant evidence in relation to this incident, and has made use of that possibility.[105]

47. Sixth, the Defence was also able to comment upon the admission of each and all documents tendered by the SPO in respect of this incident.[106]

48. Seventh, the Defence will of course have an opportunity to make submissions regarding the issue of weight and probative value of this evidence at the end of the trial.[107]

49. Eighth, the Panel also accounted for its responsibility to contribute to the determination of the truth and to make factual determinations regarding the reliability of testimony.[108] The account of this witness will assist the Panel in evaluating not just the credibility of W03827 and the reliability of his evidence, but

[102] W03821 is said by the SPO to be unavailable due to his health condition and his evidence is, therefore, being offered under Rule 155; *See* F01691, Specialist Prosecutor, *Prosecution Second Motion for Admission of Evidence Pursuant to Rule 155*, 20 July 2023, confidential, paras 33-39.
[103] Transcript of Hearing, 28 August 2023, pp. 6787-6860; Transcript of Hearing, 29 August 2023, pp. 6866-6893, 6926-6931.
[104] Rule 119.
[105] 1D00037, 1D00038, 1D00039, and 1D00040 (tendered and admitted through W03832).
[106] *See* P00314, P00315.1-2, P00316.1-2, P00317.1-2, P00318, P00319, P00320, P00321, P00322, P00323.
[107] *See, in particular*, Rules 130 and 135.
[108] *See, generally*, IA028/F00011, Court of Appeals Panel, *Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning*, 4 July 2023, confidential, paras 32 and 34 (regarding judicial questioning of witnesses). A public redacted version was issued on the same day, IA028/F00011/RED.

also the credibility of other witnesses whose accounts corroborate or conflict with his. If given any weight, it could also assist the Panel in arriving at the truth in respect of the incident in relation to which he provided evidence. The Panel also notes, in this context, that accepting the Defence position would, in effect, render the prior statements of witnesses who refuse to engage with in-court questioning inadmissible. This would reward a failure to perform one's civic duty,[109] interfere with victims' rights to have access to justice,[110] and undermine the Panel's responsibility to contribute to the determination of the truth.[111]

50. Lastly, it will be for the Panel to decide what weight, if any, to attach to these records, and to apply in this context the "sole or decisive" principle, as outlined above and to do so in light of all relevant circumstances, including the significance of that evidence and the fact that the Defence was not able to cross-examine the witness as effectively as might have been desirable.

51. For reasons outlined above, the Panel is satisfied that any prejudice to the Defence did not outweigh the *prima facie* probative value of this evidence, that overall fairness can be maintained despite the admission of this evidence and that it is in the interests of justice to admit that evidence.[112]

[109] *See, for example*, ECtHR, *Voskuil v. the Netherlands* no. 64752/01, Judgment, 22 November 2007, para. 86.
[110] *See, generally,* Article 22 of the Law; Rules 113-114; *See also* European Convention on Human Rights, Article 13; KSC-BC-2020-04/F00433, Trial Panel I, *Decision on Victims' Procedural Rights During Trial and Related Matters*, 24 February 2023, para. 28; ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], no. 39630/09, Judgment, 13 December 2012, para. 191.
[111] *See references above*.
[112] *See also Limaj* Decision, para. 34 (interests of justice).

C. REQUEST FOR RECONSIDERATION

52. In light of the above, the Panel considers that the Defence Request for Reconsideration is moot. This is without prejudice to the possibility of the Parties seeking reconsideration of the present written decision pursuant to Rule 79 and/or seeking certification to appeal it pursuant to Rule 77.

V. DISPOSITION

53. For the above-mentioned reasons, the Panel:

a) **ADMITTED** exhibits P00381 and P00382.1-2; and

b) **DECLARES MOOT** the Defence Request for Reconsideration.

Judge Charles L. Smith, III

Presiding Judge

Dated this Thursday, 28 September 2023

At The Hague, the Netherlands.