



In: **KSC-BC-2020-06**

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi**

Before: **Trial Panel II**

Judge Charles L. Smith III, Presiding Judge

Judge Christoph Barthe

Judge Guénaél Mettraux

Judge Fergal Gaynor, Reserve Judge

Registrar: Fidelma Donlon

Date: 11 October 2023

Language: English

Classification: **Public**

**Decision on Krasniqi Defence Request to Admit Additional Document
Related to W02153**

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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 and 138(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 18 and 19 July 2023, W02153 testified in these proceedings.¹
2. On 17 August 2023, the Defence Counsel for Jakup Krasniqi (“Mr Krasniqi” and “Krasniqi Defence”) filed a request for the admission into evidence of one additional document related to W02153 (“Request”).²
3. On 25 August 2023, the Specialist Prosecutor’s Office (“SPO”) responded to the Request (“Response”).³
4. The Krasniqi Defence did not file a reply.

II. SUBMISSIONS

5. The Krasniqi Defence requests that a note recording a post-testimony meeting between W02153 and representatives of the SPO (“Official Note”)⁴ be admitted in evidence pursuant to Rule 138. The Krasniqi Defence submits that: (i) the SPO does not oppose the admission of the document pursuant to Rule 138;⁵ and (ii) the Official Note is relevant, authentic, and has probative value which is not outweighed by any prejudicial effect.⁶ In the alternative, the Krasniqi Defence

¹ Transcript of Hearing, 18 and 19 July 2023.

² F01723, Specialist Counsel, *Krasniqi Defence Request to Admit Additional Document Related to W02153*, 17 August 2023, confidential.

³ F01742, Specialist Prosecutor, *Prosecution Response to Krasniqi Request to Admit Additional Document Related to W02153*, 25 August 2023, confidential.

⁴ Item ERN 114335-114335.

⁵ Request, para. 8.

⁶ Request, paras 9-12.

submits that the Official Note should be admitted as an associated exhibit pursuant to Rule 154 as the document: (i) meets the requirements of Rule 154 for admission; and (ii) forms an indispensable and inseparable part of the record related to W02153.⁷

6. The SPO does not oppose the admission of the Official Note pursuant to Rule 138. The SPO does, however, oppose its admission under Rule 154 and argues that the document does not meet the requirements set out therein.⁸ In particular, the SPO submits that the Official Note cannot be admitted as an associated exhibit because it is not an inseparable and indispensable part of W02153's Rule 154 statement, having been created subsequent to such statement.⁹ The SPO notes that, while the Official Note would ordinarily constitute a written statement taken in the context of legal proceedings and should therefore be admitted pursuant to Rules 153-155, admission under Rule 138 by agreement of the Parties is permissible, notwithstanding non-compliance with Rules 153-155.¹⁰

III. APPLICABLE LAW

7. The applicable law regarding the admission of evidence pursuant to Rules 138 and 154 has been laid out extensively in previous decisions issued by the Panel.¹¹

IV. DISCUSSION

8. At the outset, the Panel recalls its previous findings on the notion of 'witness

⁷ Request, para. 13.

⁸ Response, para. 1.

⁹ Response, para. 4.

¹⁰ Response, para. 5.

¹¹ F01409, Panel, *Decision on Specialist Prosecutor's Bar Table Motion*, 31 March 2023, confidential, paras 8-13; F01380, Panel, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154* ("Rule 154 Decision"), 16 March 2023, confidential, paras 11-25.

statement' for the purpose of Rules 153-155.¹² The Panel finds that the Official Note is a statement given by a witness in the context of, or in connection with, legal proceedings and, as such, constitutes a written statement within the meaning of Rules 153-155. These operate as *leges speciales* to Rule 138 and their requirements cannot in principle be circumvented by seeking to tender through Rule 138 what, in effect, is a statement.¹³ In particular, the Panel is of the view that the admissibility of the Official Note should generally be assessed under Rule 154, since the Official Note constitutes a witness statement, goes to proof of the acts and conduct of one of the Accused, and W02153 is not unavailable or otherwise unable to testify orally as understood in Rule 155.¹⁴ The Panel notes that admission of a statement pursuant to Rule 154 requires the witness to: (i) be present in court; (ii) be available for cross-examination and questioning by the Panel; and (iii) attest that the written statement accurately reflects his or her declaration and what he or she would say if examined.

9. The Panel finds that, since the Official Note was created after W02153 concluded his testimony, the criteria for admission under Rule 154 cannot be fulfilled unless the witness is recalled to attest to the content of the Official Note. The Panel further finds that the Official Note is not admissible as an exhibit associated to W02153's Rule 154 statement or to his testimony insofar as an item created after the admission of a witness's prior statements and after the conclusion of his or her testimony was not discussed therein and therefore cannot be said to form an indispensable and inseparable part of those statements or of that testimony.

¹² Rule 154 Decision, paras 12, 26. *See also* F01700, Panel, *Decision on Prosecution Motion for Admission of Evidence of W03724, W03832, W03880, W04368, W04566, and W04769 Pursuant to Rule 154*, 24 July 2023, confidential, para. 68; KSC-BC-2020-07, F00334, Panel, *Decision on the Prosecution Request for Admission of Items Through the Bar Table*, 29 September 2021, paras 84-87.

¹³ F01631, Panel, *Decision on Veseli Defence Request for Admission of Evidence Associated with W04748's Testimony*, 30 June 2023, para. 12 and references cited in fn. 36 (a public redacted version was filed on the same day, F01631/RED). *See also* Rule 154 Decision, para. 15.

¹⁴ Rule 154(1).

10. The *lex specialis* nature of Rules 153-155 is intended to ensure that a Party cannot circumvent the particular safeguards provided for the admission of witness evidence by offering such evidence as an exhibit. To the extent, however, that the opposing Party does not object to the admission of a witness statement without the formalities of Rules 153-155 and that the Panel sees no cogent reason to refuse admission of this evidence, it may be exceptionally admitted as an exhibit pursuant to Rule 138(1). While Parties should generally refrain from circumventing the more stringent requirements of Rules 153-155, in the present circumstances, given that these Rules are not applicable and the Parties agree to the admission of the Official Note pursuant to Rule 138, the Panel will decide the admission of the proposed evidence pursuant to Rule 138(1).¹⁵

11. Regarding relevance, the Panel notes that the statement is directly connected to Mr Krasniqi's presence at the Malishevë/Mališevo detention site and to his knowledge of the conditions of detentions and alleged incidents at the site. The Panel is thus satisfied that the evidence is relevant to charges pleaded in the indictment.

12. With respect to authenticity, the Panel is satisfied that the document is *prima face* authentic as it is an official document authored by the SPO, is dated and signed by representatives of the SPO and notes various details of the meeting, such as its date and duration.

13. Turning to probative value, the Panel finds that the Official Note relates to an issue relevant to the case, to which the witness himself had originally testified, specifically Mr Krasniqi's presence, role and degree of involvement in the Malishevë/Mališevo detention site. The Official Note has not been signed by the witness and his account on this issue was only subject to limited *viva voce*

¹⁵ Transcript of Hearing, 23 May 2023, p. 4602, lines 8-9, confidential. *See also* International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Milošević*, IT-02-54-AR73.2, Appeals Chamber, Decision on the Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 18.

questioning. The Panel notes, however, that the SPO does not dispute the accuracy of the record it contains. In light of this, the Panel is satisfied that the Official Note has *prima facie* probative value, which is not outweighed by any prejudicial effect.

14. For these reasons, the Panel finds that the Official Note is admissible pursuant to Rule 138(1).

V. CLASSIFICATION

15. The Panel notes that both the Request and the Response were filed confidentially. The Panel also notes that the SPO does not object to the reclassification as public of the Response.¹⁶ The Panel directs the Registry to reclassify the Response as public by Friday, 13 October 2023, and orders the Krasniqi Defence to file a public redacted version of the Request, or to request its reclassification as public, by Friday, 20 October 2023.

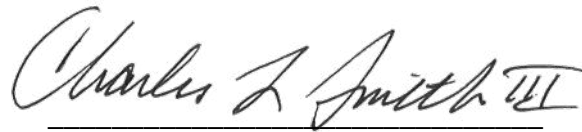
VI. DISPOSITION

16. For the foregoing reasons, the Panel hereby:

- a) **GRANTS** the Request;
- b) **ADMITS** the Official Note into evidence pursuant to Rule 138(1);
- c) **DIRECTS** the Registry to assign an exhibit number to the Official Note and to reclassify the Response as public by **Friday, 13 October 2023**; and
- d) **ORDERS** the Defence to file a public redacted version of the Request, or

¹⁶ Response, para. 6.

to request its reclassification as public, by **Friday, 20 October 2023**.

A handwritten signature in black ink, reading "Charles L. Smith, III". The signature is written in a cursive style and is positioned above a horizontal line.

Judge Charles L. Smith, III

Presiding Judge

Dated this Wednesday, 11 October 2023

At The Hague, the Netherlands.