KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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 Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Fidelma Donlon
Date:	15 February 2024
Language:	English
Classification:	**Public**

Decision on the Thaçi Defence's Submissions Concerning Use of Prior Inconsistent Statements Pursuant to Rule 143(2)

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TRIAL PANEL II ("Panel"), pursuant to Articles 3, 21, and 40(2) and 6(h) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 4, 137, 138 and 143(2)(c) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 7 November 2023, upon the request of the Specialist Prosecutor's Office ("SPO"),[1] the Panel admitted into evidence two prior statements of W03825 pursuant to Rule 143(2).[2] The Defence for Hashim Thaçi ("Thaçi Defence") did not object to their admission but noted its continuous objection to the use, as substantive evidence, of portions of a witness's prior statement admitted under Rule 143(2) that have not been put to the witness in direct examination. [3]

2. On 9 November 2023, the Panel invited the Thaçi Defence to confirm and expand in writing upon its objection in relation to the permissible use of statements admitted under Rule 143(2).[4]

3. On 20 November 2023, the Thaçi Defence filed submissions concerning the use of prior inconsistent statements admitted pursuant to Rule 143(2)(c) ("Thaçi Defence Submissions").[5]

4. On 27 November 2023, the SPO responded to the Thaçi Defence Submissions ("Response").[6]

[1] Transcript of Hearing, 7 November 2023, p. 9509, line 24 to p. 9510, line 16.
[2] Transcript of Hearing, 7 November 2023, p. 9511, line 21 to p. 9512, line 1.
[3] Transcript of Hearing, 7 November 2023, p. 9510, line 19 to p. 9511, line 5.
[4] Transcript of Hearing, 9 November 2023, p. 9705, line 24 to p. 9706, line 1.
[5] F01940, Specialist Counsel, *Thaçi Defence Submissions Concerning Use of Prior Inconsistent Statements Pursuant to Rule 143(2)(c)*, 20 November 2023.
[6] F01962, Specialist Prosecutor, *Prosecution Response to Thaçi Defence's Submissions on Rule 143(2)(c)*, 27 November 2023.

5. On 1 December 2023, having been granted leave to reply by the Panel,[7] the Thaçi Defence replied to the Response ("Reply").[8]

6. On 1 February 2024, the Thaçi Defence requested that the Panel give some guidance on its interpretation of Rule 143.[9] The Defences for Messrs Selimi and Krasniqi supported this request.[10]

II. SUBMISSIONS

7. The Thaçi Defence submits that the Panel can only admit and rely on those parts of a witness statement admitted pursuant to Rule 143(2)(c), which were put to the witness during the *viva voce* testimony, and which are inconsistent with that *viva voce* testimony.[11] The Thaçi Defence argues that: (i) "prior inconsistent statement", a term which is not defined in the Rules, should be understood to mean a prior inconsistent assertion or representation, not a prior inconsistent witness statement; and (ii) international and domestic jurisprudence restricts the use of parts of witness statements never put to a witness and which do not otherwise meet the requirements of Rules 153-155.[12] To support this contention, the Thaçi Defence suggests that precedents from common law jurisdictions are particularly

[7] F01974, Panel, *Decision on Thaçi Defence's Request to Reply to F01962*, 1 December 2023.
[8] F01978, Specialist Counsel, *Thaçi Defence Reply to Prosecution Response to Thaçi Defence's Submissions on Rule 143(2)(c)*, 1 December 2023.
[9] Transcript of Hearing, 1 February 2024, p. 12497, lines 10 to 17.
[10] Transcript of Hearing, 1 February 2024, p. 12497, lines 18 to 23.
[11] Request, paras 3, 22.
[12] Thaçi Defence Submissions, paras 7-13, 16, 22 *referring to* the International Criminal Tribunal for the former Yugoslavia ("ICTY"), *Prosecutor v. Fatmir Limaj et al.*, IT-03-66-T, Trial Chamber II, *Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence* ("*Limaj* Decision"), 25 April 2005, paras 18-19; United States, Federal Rules of Evidence, as amended on 1 December 2020, Rule 801(a) and (d)(1)(A); Australia, Evidence Act 1977 (Queensland), as amended on 1 August 2023, Section 101(1) and Schedule 3; Australia, Evidence Act 1995 (Commonwealth), as amended on 1 May 2016, Section 60(1); United Kingdom, Criminal Justice Act 2003, as amended on 1 February 2015, Sections 115 and 119.

relevant as the term arises from these jurisdictions,[13] and that precedents from the International Criminal Court ("ICC") confirm its view.[14]

8. The SPO responds that the Panel should dismiss the Thaçi Defence Submissions and, consistent with the language of Rule 143(2)(c), admit and use statements under this rule for purposes of assessing credibility, for the truth of their contents or for other purposes within the discretion of the Panel.[15] The SPO argues that the Thaçi Defence seeks to rely on selective common law cases, grounded in exclusionary hearsay rules, which are not applicable before the Specialist Chambers where the triers of fact are professional judges, as opposed to a jury.[16] The SPO contends that, contrary to the Thaçi Defence's submissions, international tribunals have moved away from the common law position regarding hearsay and its restricted admission; this jurisprudence of the international tribunals, in particular the International Criminal Tribunal for the former Yugoslavia ("ICTY"), has been codified in Rule 143(2)(c).[17] Lastly, the SPO submits that the ICC precedents, relied upon by the Defence, were decided in the specific legal

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[13] Thaçi Defence Submissions, paras 14-15 *referring to* United States, *People v. Lawrence*, No. 1-93-2767, Appellate Court of Illinois (First District, Fifth Division), 18 November 1994; *United States v. Finch*, No. 19-0298, Court of Appeals for the Armed Forces, 3 March 2020, pp. 14-15.

[14] Thaçi Defence Submissions, paras 17-21 *referring to* the International Criminal Court ("ICC"), *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-1659, Trial Chamber V, *Decision on the Yekatom Defence Motion for Directions Regarding Reliance on Prior Recorded Testimonies for Non-Rule 68(3) Witnesses* ("*Yekatom* Decision"), 9 November 2022, para. 5, fn. 7; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-2954, Trial Chamber II, *Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572* ("*Katanga* Decision"), 25 May 2011, paras 1-4, 7; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1938-Corr-Red2, Trial Chamber V(A), *Decision on Prosecution Request for Admission of Prior Recorded Testimony*, ("*Ruto* Decision"), 19 August 2015; ICC-01/09-01/11-1938-Anx-Red, Trial Chamber V(A), *Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'*, 19 August 2015, para. 48; 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* Judgement"), 12 February 2016; ICTY, *Prosecutor v. Sefer Halilović*, IT-01-48-T, Trial Chamber I(A), *Decision on Admission into Evidence of Prior Statement of a Witness* ("*Halilović* Decision"), 5 July 2005.

[15] Response, paras 1, 10.

[16] Response, paras 2-3.

[17] Response, paras 3, 5 *referring to* *Limaj* Decision, paras 16-18; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR73.3, Appeals Chamber, *Decision on Appeals against Decision on Impeachment of a Party's Own Witness* ("*Popović* Decision"), 1 February 2008, para. 32.

framework of the ICC, where no equivalent to Rule 143(2) exists and, in any event, does not support the Thaçi Defence's position.[18]

9. The Thaçi Defence replies that Rule 143(2)(c) makes clear that a Party may question a witness about a "prior inconsistent statement" and that "such" prior inconsistent statement may be admissible.[19] The Thaçi Defence avers that the word "such" refers to the prior inconsistent statement discussed in the first sentence, namely a prior inconsistent statement which has been the subject of a "question" by a Party.[20] Accordingly, it argues that only a prior inconsistent assertion or representation put to the witness is admissible, not the entire prior witness statement, which contains such prior inconsistent assertion or representation.[21] Lastly, the Thaçi Defence notes that it never suggested that an exclusionary hearsay rule applies, but rather that the principle of orality prevents the Panel from admitting prior testimony that was not put to the witness in the form of questioning per the terms of Rule 143(2)(c).[22]

III. APPLICABLE LAW

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

11. 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 called a witness may, with the leave of the Panel, and where relevant to the

[18] Response, para. 6 *referring to* *Ruto* Decision, paras 73-74.
[19] Reply, paras 1-3.
[20] Reply, para. 3.
[21] Reply, para. 3.
[22] Reply, para. 5.

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.[23]

IV. DISCUSSION

12. The Panel has admitted, pursuant to Rule 143(2)(c), in whole or in part, prior inconsistent statements of SPO witnesses W03827, W04746 and W03825.[24]

13. The question now before the Panel, and in relation to which the Defence is seeking guidance, is whether the Panel can only rely on those parts of a witness statement admitted into evidence pursuant to Rule 143(2)(c), which were put to the witness during the *viva voce* testimony, and which are said or shown to be inconsistent with that *vica voce* testimony, or whether the Panel can rely on the entirety of a witness statement.[25] The Panel will normally decline to render a decision of an advisory sort. In the present case, however, the Panel considers that fairness demands that it should provide guidance on an issue that might have implications both in respect of the Parties' presentation of their case and upon their understanding of what evidence is relevant to the Panel's fact-finding responsibilities.

14. At the outset, the Panel recalls that it has already addressed the Thaçi Defence's argument that Rules 153-155 are *leges speciales* to Rule 143(2) and

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[23] Rule 143(2)(c). *See also* F01226/A01, Panel, *Annex 1 to Order on the Conduct of Proceedings*, 25 January 2023, paras 106-107.
[24] F01821, Panel, *Decision on Prosecution Request for Admission of W03827's Witness Statements Pursuant to Rule 143(2) and Defence Request for Reconsideration* ("Decision on the Admission of W03827's Statements Pursuant to Rule 143(2)"), 28 September 2023, paras 37-51; F01903, Panel, *Decision on Prosecution Request for Admission of Items Used During the Examination of W04746* ("Decision on Admission of Items Used During the Examination of W04746"), 3 November 2023, para. 22; Transcript of Hearing, 7 November 2023, p. 9511, line 21 to p. 9512, line 1.
[25] Thaçi Defence Submissions, para. 3.

rejected it.[26] The Panel reiterates that the two sets of provisions provide for different circumstances in which statements of witnesses could be admitted into evidence.[27]

15. Turning to the Thaçi Defence's argument that the term "a prior inconsistent statement" in Rule 143(2)(c) refers to a prior inconsistent "assertion" or "representation", and not a prior witness statement in its entirety,[28] the Panel notes that the word "statement" is not expressly defined in the Rules but is used in a number of provisions in Section III, notably in Rules 153-155. The Panel has previously clarified that a "written statement" or "statement", within the context of Rules 153-155, is a record, in whatever form, of what a witness had said in respect of facts and circumstances relevant to the case that was taken in the context of a criminal investigation or proceedings.[29] There is no indication that the word "statement" used in Rule 143(2)(c) was intended to have a different and more narrow meaning than in Rules 153-155. Instead, consistency of terminology suggests that where the other provisions refer to (written) "statements", a common and uniform meaning was intended lest it would have used other expressions such as "assertions" or "representations". The interpretation advanced by the Thaçi Defence would also result in a situation where the Panel would be permitted to consider as evidence less (i.e., inconsistent "assertions" or "representations") than what has been admitted (i.e., a whole witness statement).

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[26] *See* Decision on the Admission of W03827's Statements Pursuant to Rule 143(2), paras 21-27.
[27] *Ibid*.
[28] Thaçi Defence Submissions, paras 7-11.
[29] Regarding the definition of what constitutes a "statement" for the purpose of deciding admission of evidence, *see e.g*. F01963, Panel, *Decision on Admission of Documents Shown to W04769*, 27 November 2023, para. 15, fn. 35; F01852, Panel, *Decision on Krasniqi Defence Request to Admit Additional Document Related to W02153*, 11 October 2023, para. 8; F01380, Panel, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154* ("First Rule 154 Decision"), 16 March 2023, confidential, paras 12, 26 (a public redacted version was issued on 7 November 2023, F01380/RED). *See also* F01700, Panel, *Decision on Prosecution Motion for Admission of Evidence ofW03724, W03832, W03880, W04368, W04566, and W04769 Pursuant to Rule 154*, 24 July 2023, confidential, para. 68 (a public redacted version was issued on 7 November 2023, F01700/RED); 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.

The Rules do not have a rule or principle that limits the Panel's ability to rely, for the purpose of fulfilling its fact-finding function, on any evidence that has been found to be admissible.

16. In addition, the Panel notes that while *questioning* upon a prior inconsistent statement is limited to issues of credibility (Rule 143(2), introductory paragraph), the *admission* of such a statement is regulated by Rule 143(2)(c), second sentence, which is not limited to issues of credibility on which the witness has been questioned but could also be admitted for the truth of its content or for other purposes within the discretion of the Panel.

17. A literal and systematic reading of the Rules, therefore, leads to the conclusion that a "statement" in Rule 143(2)(c) refers to the whole of the statement concerned (and/or the tendered part thereof if not tendered in its entirety) rather than to individual claims, utterances or propositions contained therein that have been put to a witness as being inconsistent.

18. The Panel further notes that this interpretation appears to be supported by the Judgement of the Constitutional Court which, when discussing the amendment to Rule 143(2)(c), refers to "statements made by the same witness in the course of criminal proceedings".[30] It is also one that is entirely consistent with the principle of orality, which the Panel has already determined is not absolute, but qualified by certain provisions, including Rule 143(2)(c).[31]

19. Lastly, the Panel is not persuaded by the relevance of the jurisprudence from common law jurisdictions, or the ICC, relied upon by the Thaçi Defence.[32] First, the Panel is primarily guided by the Law and the Rules, and, in the interpretation

[30] 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*, 26 May 2020, para. 80.
[31] *See* F01250, Panel, *Decision on Thaçi Defence Motion Regarding the Preservation of Evidence*, 2 February 2023, paras 30-31; First Rule 154 Decision, para 18 (with further references); *See also* Limaj Decision, paras 29-30.
[32] Thaçi Defence Submissions, paras 7-21.

of those instruments, by international jurisprudence and Kosovo law.[33] A selective sample of common law jurisdictions is not, therefore, normatively relevant in principle to interpreting the Rules, all the more so when it does not reflect a general approach to the matter. The Panel notes, in this respect, that the ICTY, on which the Defence relies to suggest that the concept of "prior inconsistent statements" is of common law origin, has not adopted the narrow understanding of this notion propounded by the Thaçi Defence. Instead, in those cases where prior inconsistent statements were admitted, the ICTY did not restrict the permissible use of those to utterances expressly put to a witness as inconsistent.[34] Second, regarding the decisions from the ICC on which the Thaçi Defence relies, the Panel notes that the ICC does not have a provision similar or comparable to Rule 143(2)(c). Therefore, jurisprudence from the ICC would, at best, have limited relevance to the present matter.[35] In addition, the ICC jurisprudence referred to by the Thaçi Defence does not appear to support a consistent understanding of this notion and reflects, at best, diverging jurisprudence on this point and/or different approaches to the exercise of their discretion by different trial chambers (and judges) of the ICC.[36]

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[33] Article 3(2)-(4).

[34] *See e.g.*, *Limaj* Decision (where the trial chamber admitted, as substantive evidence, two video-recordings of prior inconsistent interviews of two witnesses); ICTY, *Prosecutor v. Goran Hadžić*, IT-05-75-T, Trial Chamber, *Decision on Defence Submissions in Support of Admission of Prior Inconsistent Statements of a Witness for Purpose of Impeachment*, 6 May 2013, paras 7-8 (where the trial chamber recalled that the appeals chamber had held that prior inconsistent statements may be admitted as hearsay evidence for the truth of their content, that it is a matter of discretion for the trial chamber whether to admit a prior inconsistent statement and concluded that to prevent being burdened by the admission of superfluous materiel, the cross-examination of the witness was sufficient to assess her credibility); *See also* *Popović* Decision, paras 31-32 (where the appeals chamber held that the contents of a previous inconsistent statement may be admitted as hearsay evidence for the truth of its content when it fulfils the criteria under the Tribunal's rules of being relevant and sufficiently reliable to be accepted as probative).

[35] *See also* Decision on the Admission of W03827's Statements Pursuant to Rule 143(2), para. 36.

[36] In the *Yekatom* and *Katanaga* Decisions, the relevant trial chambers noted that prior (inconsistent) statements will not be allowed into evidence but will enter the record by being shown, or read, to the witness, while in the *Ruto* Decision, the trial chamber admitted prior recorded testimonies in their entirety. *See* *Yekatom Decision*, paras 1, 5-7 (where the trial chamber rejected the defence's request for detailed directions on prior statements, including those which are inconsistent with *viva voce* evidence,

20. In light of the above, the Panel reiterates that Rule 143(2)(c) does not require the calling party to read the entire statement said to contain inconsistencies to the witness concerned.[37] Instead, Rule 143(2)(c) merely requires the calling party to establish that the offered statement is "inconsistent" with the witness's *viva voce* evidence. If the prior inconsistent statement meets the criteria of Rules 138 and 143(2)(c), it is a matter of discretion for the Panel to decide whether to admit the prior inconsistent statement in its entirety, in part, or to direct the Party calling the witness to only read discrete parts into the trial record,[38] and for what purpose(s).[39] In making such an assessment, the Panel notes, however, that a relevant consideration is whether the Party calling the witness has afforded the

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and reiterated that prior recorded testimony (not prior *inconsistent* recorded testimony) will only be considered for the deliberations on the judgment where the trial chamber allowed their use, and only with regard to those limited portions which have entered the record of the case by way of reading and/or showing to a witness); *Katanga* Decision, paras 1-2, 4, 6-7 (where the trial chamber admitted an extract of a prior recorded testimony, which was put to a witness to expose inconsistencies, but rejected a request to admit the prior recorded statement in its entirety, noting that the extract was only allowed because it was not read aloud and that the established practice was to not allow prior recorded statements of witnesses who appear before it into evidence); *Ruto* Decision, para. 151 (where the trial chamber, in majority, admitted the prior recorded testimonies of witnesses in their entirety for the truth of their contents); *Ruto Judgment*, paras 95-96, 98 (where the appeals chamber reversed the trial chamber's decision in the *Ruto* Decision to admit prior recorded testimonies in their entirety for the truth of their content on the basis that amended Rule 68 of the ICC Rules had been amended after the start of trial in that case, and had been applied retroactively to the detriment of the accused); *See also* Decision on the Admission of W03827's Statements Pursuant to Rule 143(2), para. 36.

[37] Decision on Admission of Items Used During the Examination of W04746, para. 22.

[38] *See for example*, *supra*, fn. 34; *See also* International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Baptiste Gatete*, ICTR-2000-61-T, Trial Chamber III, *Decision on Defence Motion to Admit MFI/3 into Evidence Pursuant to Rule 89(C) of the Rules of Procedure and Evidence*, 15 December 2009, paras 2, 6 (where the trial chamber rejected a request to admit a *pro-justitia* statement, allegedly signed by the witness, into evidence, noting that it had broad discretion under Rule 89(C) to admit the document but that the defence had failed to provide sufficient indicia of reliability); *See also* Decision on Admission of Items Used During the Examination of W04746, para. 22 (exercising its discretion to admit extracts from W04746's prior statements which the witness was confronted with during his examination, as well as those further portions necessary to understand their context).

[39] The Panel notes that Rule 143(2)(c) provides wide discretion in admitting prior inconsistent statements, the rule reading that it can admit such a statement "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***".

witness a fair opportunity to explain, or deny, any alleged inconsistencies between his statement and the evidence given in court.[40]

21. It will ultimately be for the Panel to determine what weight, if any, to attach to prior inconsistent statements of witnesses admitted pursuant to Rule 143(2)(c) in light of that witness's *viva voce* evidence, including any explanation offered for the inconsistency,[41] and any other relevant evidence.

[40] *See for example*, *Limaj* Decision, para. 23 (where the trial chamber took into account that the relevant portions of the respective videos were played in court before admitting two video-recordings into evidence); *Halilović Decision*, p. 5 (where the trial chamber did not admit into evidence the prior statement of a witness as the prosecution, *inter alia*, did not confront the witness with the material passages of his prior statement).

[41] *See for example*, ICTY, *Prosecutor v. Popović et al.*, No. IT-05-88-A, Judgement, 30 January 2015, para. 136 (where the appeals chamber held that a trial chamber must take into account any explanation offered for inconsistencies when determining the probative value of evidence); *Prosecutor v. Limaj et al.*, No. IT-03-66-T, Judgement, 30 November 2005, para. 14 (where the trial chamber, while not relying on the prior video-recorded interviews of two prosecution witnesses, which revealed material inconsistencies with the oral evidence in court and had been admitted as substantive evidence, noted that prior inconsistent statements may possibly have some positive probative force, at least if they corroborate other apparently credible evidence adduced from other witnesses during trial) ; *Prosecutor v. Lukić et al.*, No. IT-98-32/1-A, Judgement (where the appeals chamber held that *viva voce* testimony is generally more reliable than prior statements and that a trial chamber preferring a witness's prior statement to his, or her, *viva voce* testimony should provide reasons for doing so), 4 December 2012, para. 614.

V. DISPOSITION

22. For these reasons, the Panel hereby,

(a) **REJECTS** the Thaçi Defence Submissions; and

(b) **CLARIFIES**, for the benefit of the Parties, that the Panel can admit, in whole or in part, a prior inconsistent statement of a witness pursuant to Rule 143(2)(c) and rely, for the purposes of fulfilling its fact-finding responsibilities, upon any part or parts of the admitted statement, and is not limited to the part, or parts, of the statement that have been put to the witness in court as being inconsistent with the witness's *viva voce* testimony.

Judge Charles L. Smith, III
Presiding Judge

Dated this Thursday, 15 February 2024
At The Hague, the Netherlands.