



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor's Office

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**Prosecution reply to Joint Defence Response to Prosecution request for admission  
of items used during the examination of W04746**

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1. In the Response<sup>1</sup> to the SPO Request<sup>2</sup> the Defence opposes the admission of W04746's prior inconsistent statements under Rule<sup>3</sup> 143(2)(c), and of one exhibit used with the witness.<sup>4</sup> The Defence submissions on Rule 143(2)(c) are logically incoherent, often irrelevant to the matters at issue in the Request,<sup>5</sup> and inconsistent both with relevant jurisprudence and the terms of the Rules.
2. In particular, the Defence simultaneously argues that every single question in a prior statement must be put to a witness while they are testifying in order for that statement to be admissible under Rule 143,<sup>6</sup> but that - when this is done - admission of the prior statement then becomes 'superfluous' as the question and answer interaction becomes the witness's evidence.<sup>7</sup> No authority is cited in support of this plainly incorrect and restrictive interpretation of Rule 143(2)(c) other than oral submissions by the THAÇI Defence in this case.<sup>8</sup>
3. The plain words of Rule 143(2) do not require a calling party to read every part of the prior inconsistent statement to the witness, and doing so would serve no purpose.<sup>9</sup> At most, the provision could be construed as requiring the calling party to

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<sup>1</sup> Joint Defence Response to 'Prosecution request for admission of items used during the examination of W04746', KSC-BC-2020-06/F01798, 18 September 2023 ('Response').

<sup>2</sup> Prosecution request for admission of items used during the examination of W04746, KSC-BC-2020-06/F01771, 17 September 2023 ('Request').

<sup>3</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

<sup>4</sup> Response, KSC-BC-2020-06/F01798, para.3.

<sup>5</sup> For example Response, KSC-BC-2020-06/F01798, para.15 (making arguments which go to credibility and weight rather than admissibility i.e. regarding how the prior statements are weighed against the in-court testimony). Notably, many of the submissions also appear designed to try and improperly advance the Defence's position in separate litigation, rather than addressing matters at issue in the Request..

<sup>6</sup> Response, KSC-BC-2020-06/F01798, para.13.

<sup>7</sup> Response, KSC-BC-2020-06/F01798, para.3.

<sup>8</sup> Response, KSC-BC-2020-06/F01798, para.13, fn.22-23, citing: Transcript (Trial), 13 September 2023, p.7965, lines 13-15; Transcript (Trial), 13 September 2023, p.7964, lines 15-18, p.7965, line 25 to p.7966, line 6.

<sup>9</sup> To take just one example, there could be no purpose to requiring Counsel to read every detail of a particular incident from a prior inconsistent statement, in order for that account to be admissible, where the witness denies that the incident occurred at all.

question the witness about whether he or she has made a prior inconsistent statement. After that, the prior inconsistent statement may be tendered.

4. This construction is consistent with established practice at the ICTY which permits the admission of entire statements and/or transcripts of testimony as prior inconsistent statements.<sup>10</sup> At least one ICTY Trial Chamber even admitted the associated exhibits of a prior inconsistent statement, as it 'would be incomprehensible or of lesser probative value without them'.<sup>11</sup>

5. The Defence's interpretation would deprive the Panel of the opportunity to assess the prior inconsistent statements in their context. This approach may be appropriate where the fact finder is a jury composed of lay persons untrained in assigning proper weight to different types of evidence, but not where this task is performed by professional judges.

6. It is also noteworthy that both THAČI and KRASNIQI have repeatedly tendered for admission entire statements after reading only short extracts into the record.<sup>12</sup>

7. Furthermore, the Defence's references to remarks from the Specialist Chamber of the Constitutional Court ('Constitutional Court Chamber') are taken out of

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<sup>10</sup> See e.g. ICTY, *Prosecutor v. Limaj et. al.*, IT-03-66-T, Decision on the Prosecution's motion to admit prior statements as substantive evidence, 25 April 2005; ICTY, *Prosecutor v. Stanišić and Simatović*, IT -03-69-T, Decision on admission into evidence of prior testimony, statement, and related documents concerning Witness JF-052, 28 January 2011 ('*Stanišić and Simatović* Decision'); ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Decision on the Prosecution's oral motion seeking the admission into evidence of witness Nebjoša Stojanović's three written statements, 11 September 2008; ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Decision on admission of evidence presented during testimony of Aleksandar Stefanović, 12 March 2009; c.f. ICTY, *Prosecutor v. Halilović*, IT-01-48-T, Decision on the admission into evidence of prior statement of a witness, 5 July 2005. See also ICTY, *Prosecutor v. Solobodan Milosević*, Decision on admissibility of Prosecution investigator's evidence, 30 September 2002, para.18, stating that a written statement may become admissible where it 'is asserted to contain a prior statement inconsistent with the witness's evidence' (emphasis added).

<sup>11</sup> *Stanišić and Simatović* Decision, para.12.

<sup>12</sup> Transcript (Trial), 20 April 2023, pp 3367-3369; Transcript (Trial), 22 May 2023, pp 4428, 4486-4487, 4491; Transcript (Trial), 23 May 2023, p.4508; Transcript (Trial), 28 August 2023, p.6846; Transcript (Trial), 29 August 2023, pp 6965-6967; Transcript, 30 August 2023, pp 6995-6996.

context.<sup>13</sup> The Constitutional Court Chamber examined whether the addition of the second sentence in Rule 143(2)(c) complies with the right of a person charged with a criminal offence to examine witnesses against him or her under Article 31(4) of the Constitution and Article 6(3)(d) of the European Convention on Human Rights ('ECHR'), which is a specific aspect of the right to a fair trial.<sup>14</sup> The Chamber noted that this right 'must be taken into account in any assessment of the fairness of proceedings'.<sup>15</sup>

8. However, the Constitutional Court Chamber's comments must be considered in the context of the relevant case law of the European Court of Human Rights ('ECtHR') on this issue, which paints a more nuanced picture than the Defence implies.<sup>16</sup> To begin with, there is no absolute right to confront every witness whose statement is admitted into evidence.<sup>17</sup> Otherwise, the admission of hearsay evidence under Rule 138(1) or written statements under Rules 153 and 155 would be incompatible with the Constitution and Article 6 of the ECHR. Rather, the relevant question is whether 'a conviction is based solely or to a decisive degree on statements that have been made by a person whom the accused has had no opportunity to examine or have examined'.<sup>18</sup> Even a conviction based solely or decisively on a witness whom the accused had no opportunity to cross-examine does not automatically lead

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<sup>13</sup> Response, KSC-BC-2020-06/F01798, paras 8, 17, citing: Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, KSC-CC-PR-2020-09/F00006, 22 May 2020 ('Constitutional Court Judgment').

<sup>14</sup> Constitutional Court Judgment, KSC-CC-PR-2020-09/F00006, para.77.

<sup>15</sup> Constitutional Court Judgment, KSC-CC-PR-2020-09/F00006, para.77.

<sup>16</sup> See Constitutional Court Judgment, KSC-CC-PR-2020-09/F00006, fn.54, citing: 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. See also: ECtHR, Third Section, *Vidgen v. the Netherlands*, 68328/17, Decision, 8 January 2019.

<sup>17</sup> ECtHR, Third Section, *Gani v. Spain*, 61800/08, Judgment, 19 February 2013 ('*Gani v. Spain*'), para.37; ECtHR, First Section, *S.N. v. Sweden*, 34209/96, 2 July 2002, para.44.

<sup>18</sup> ECtHR, Third Section, *Gani v. Spain*, 61800/08, Judgment, 19 February 2013 ('*Gani v. Spain*'), para.38, see also para.41.

to a violation of Article 6 of the ECHR, provided there are counterbalancing measures, such as strong procedural safeguards, and the evidence is sufficiently reliable.<sup>19</sup>

9. Moreover, the fairness of proceedings must be judged as a whole, which can only be done at the end of the trial, not at the stage where evidence is admitted.<sup>20</sup> The Defence's repeated pleas about fair trial rights are thus at best premature.

10. Likewise, the passages from the ICC Appeals Chamber's decision in *Ruto and Sang* cited in the Response are taken out of context.<sup>21</sup> Amongst a number of other factual and legal points of distinction, the Appeals Chamber there considered whether an amendment to the ICC Rules of Procedure and Evidence that came into effect after the commencement of the trial could be applied retroactively. The amendment made it easier to introduce prior recorded testimony instead of hearing a witness in person.<sup>22</sup> Because Article 51(4) of the ICC Statute bars the retroactive application of such amendments resulting in detriment to an accused, the Appeals Chamber had to consider whether the admission of prior recorded testimony under the amended Rule 68(2)(d)<sup>23</sup> disadvantaged the accused. The Appeals Chamber's comments about disadvantage deriving from a loss of opportunity to cross-examine must be viewed in this context. They do not have wider application, especially since the prior testimony would likely have been admissible had the amended rule been in force at the start of the trial.

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<sup>19</sup> *Gani v. Spain*, para.42; ECtHR, Grand Chamber, *Schatschaschwili v. Germany*, 9154/10, Judgment, 15 December 2015, para.128.

<sup>20</sup> *Prosecutor v. Pjetër Shala*, Public Redacted Version of the Decision on the Referral of Pjetër Shala to the Constitutional Court Panel Concerning Fundamental Rights Guaranteed by Articles 30 and 31 of the Kosovo Constitution and Article 6 of the European Convention on Human Rights, KSC-CC-2022-18/F00004, 22 August 2022, para.19; *Gani v Spain*, para.41.

<sup>21</sup> Response, KSC-BC-2020-06/F01798, para.17, citing: ICC, *Prosecutor v. Ruto & 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", 12 February 2016 ("*Ruto and Sang* Appeals Decision), para.93.

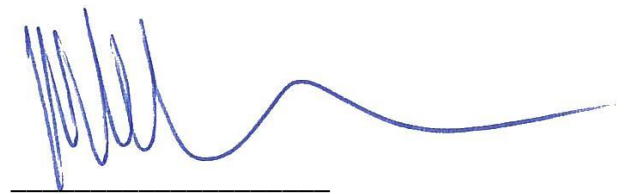
<sup>22</sup> *Ruto and Sang* Appeals Decision, para.35.

<sup>23</sup> This provision equivalent to Rule 155(2).

11. With regard to the procedural issues alleged by the Defence,<sup>24</sup> the examination took place under the control of the Panel, and the Presiding Judge authorised the presentation of prior inconsistent statements with the witness. If the Defence objected to the manner in which the prior inconsistent statements were put to the witness, the appropriate time to raise such objections was during the questioning. With regard to the citation issues raised by the Defence in para.24 of the Response, the SPO acknowledges the typos identified by the Defence,<sup>25</sup> has double-checked those instances and requests the Panel to admit the relevant portions with the amendments provided herein.<sup>26</sup>

12. Finally, with respect to item U015-8864, the tendering of this discrete page – the relevance of which is apparent from its use in questioning – is fully in accordance with the prior direction of the Panel concerning that item.<sup>27</sup>

**Word count: 1781**



**Ward Ferdinandusse**

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Monday, 25 September 2023

At The Hague, the Netherlands.

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<sup>24</sup> Response, KSC-BC-2020-06/F01798, paras 24-26.

<sup>25</sup> Response, para.24 (i)-(iii).

<sup>26</sup> With regard to Response, para.24 point (i), transcript page T.5559 was mistakenly listed as containing references to 082894-TR-ET Part 4. With regard to para.24, point (ii), the full references of the Albanian pages of 082894-TR-AT Part 3 (item 12 of the Annex) should be the following: pp.2-3, 7, 24-25, 32-33, 37-38. With regard to para.24, point (iii), in item 14 of Annex 1 the correct English pages for 082894-TR-ET Part 5 are the following: pp.11 (instead of 10), 12-13, 15, 17.

<sup>27</sup> *Contra.* Response, KSC-BC-2020-06/F01798, paras 27-28.