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
	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 response to THAÇI Defence's submissions on Rule 143(2)(c)

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I. INTRODUCTION

1. The Trial Panel should dismiss the THAÇI Defence's unfounded objections,[1] and - consistent with the language of the rule - should admit and use statements under Rule 143(2)(c)[2] for purposes of assessing credibility, for the truth of their contents or for other purposes within the discretion of the Panel. The THAÇI Defence misrepresents the Panel's jurisprudence,[3] fails to offer any relevant authority supporting its objection[4] and instead submits a patchwork of unauthoritative irrelevant sources.[5]

II. SUBMISSIONS

2. The SPO agrees that Rule 143(2)(c) can encompass prior statements in different forms, including oral and written statements.[6] This, however, does not inform the scope of such statements or the purpose(s) for which they can be admitted under Rule 143(2). The Defence's attempts to rely on certain selective common law cases,[7] grounded in exclusionary hearsay rules of evidence,[8] is misguided.

3. No such exclusionary hearsay rule applies before this court. Before the KSC, the triers of fact are a panel of professional judges, entrusted to freely assess all evidence submitted before them.[9] Contrary to the Defence assertion that precedents from common law jurisdictions are particularly relevant,[10] international tribunals

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[1] Thaçi Defence Submissions Concerning Use of Prior Inconsistent Statements Pursuant to Rule 143(2)(c), KSC-BC-2020-06/F01940, 20 November 2023 ('Thaçi Defence Submissions'), paras 1-2.
[2] 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.
[3] Thaçi Defence Submissions, KSC-BC-2020-06/F01940, paras 4, 16.
[4] Oral Order, Transcript 9 November 2023, pp.9705-9706.
[5] Thaçi Defence Submissions, KSC-BC-2020-06/F01940, paras 7-12.
[6] Thaçi Defence Submissions, KSC-BC-2020-06/F01940, paras 7-12.
[7] The Defence cites to two U.S. cases, one only by analogy.
[8] *See similarly Prosecutor v. Limaj and al.*, IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005 ('*Limaj* Decision'), para.18.
[9] Rule 137(2). *For example* KSC-BC-2020-06/F01901, para.83.
[10] *Prosecutor v. Popovic and al*, IT-05-88-AR73.3, Decision on Appeals against Decision on impeachment of a Party's own witness, 1 February 2008 ('*Popovic* Appeal Decision'), para.32.

explicitly moved away from the traditional common-law position regarding hearsay and its restricted admission as well as limited use of prior inconsistent statements.[11]

4. In attempting to manufacture such exclusions, the THAÇI Defence grossly mischaracterises this Panel's jurisprudence. Contrary to Defence submissions,[12] Rules 153-155 do not exhaustively circumscribe the circumstances in which witness statements may be admitted. As the Panel has unambiguously found, 'Rule 155 is not *lex specialis* vis-à-vis Rule 143(2)(c)'.[13] Rules 153-155 and Rule 143 regulate different factual scenarios,[14] and each provide circumstances in which prior statements may be admitted.

5. Rule 143(2)(c) provides an indispensable tool to allow the Panel to 'assess the credibility of a witness and make a choice between competing versions of the truth'.[15] Importantly, Rule 143(2)(c) codifies the jurisprudence of the ICTY which addressed for the first time, in the Kosovo context in the *Limaj* case, the specific challenge faced when 'witnesses who were called and gave oral evidence which canvassed the relevant events fully, but who, for reasons which appeared to the Chamber to involve to tell the truth, disavowed in part what they had previously stated during their respective out-of-court video-taped formal interviews.'[16]

6. Other international jurisprudence cited by the Defence is unavailing. As a preliminary matter, the ICC cases relied upon were decided in the specific legal framework of the ICC, where an equivalent to Rule 143(2) does not exist. In the *Ruto* case, as acknowledged by the Defence, the ICC Trial Chamber in fact admitted prior recorded testimonies of witnesses in their entirety for the truth of their content after the Prosecution had 'explore[d] the areas of divergence from the prior recorded

[11] *Limaj* Decision, paras 17-18; *Popovic* Appeal Decision, para.31,
[12] Thaçi Defence Submissions, KSC-BC-2020-06/F01940, para.16.
[13] Decision on Prosecution Request for Admission of W03827's Witness Statements Pursuant to Rule 143(2) and Defence Request for Reconsideration, KSC-BC-2020-06/F01821, 28 September 2023 ('Decision on Rule 143(2)'), paras 25, 26.
[14] Decision on Rule 143(2), KSC-BC-2020-06/F01821, paras 26-27.
[15] KSC-CC-PR-2020-09/F00006, Judgment on the Referral of Amendments to the Rules of Procedure and Evidence Adopted by the Plenary on 29 and 30 April 2020, 22 May 2020, para.80.
[16] *Limaj* Decision, para.16.

testimony, as well as the cause of such divergence'.[17] The partially concurring opinion cited is not an authoritative pronouncement of the Chamber, and has little value.[18] The *Katanga* case is also inapposite as it relates to a situation in which the Defence belatedly sought to have a statement admitted in its entirety, seemingly as general corroboration to the witness's live testimony.[19] Moreover, the decision makes clear that the practice and procedure for consideration of prior recorded testimonies is a matter falling within the discretion of the particular chamber.[20] Equally, the ICC Trial Chamber Decision in the *Yekatom* case is also irrelevant as there was no prior inconsistent statement at stake – the Defence there was seeking general guidance, in the abstract, for use of prior statements; which the Judge declined to provide.[21] Here, such circumstances are already specifically regulated in the Rules and the Decision on the Conduct of Proceedings.

7. Finally, with an absence of supporting jurisprudence, the THAÇI Defence seeks to present a hypothetical as 'best illustrating' its contention.[22] However, this is equally unilluminating - in particular because it pays no regard to the materiality (or otherwise) of the fact at issue. Clearly, one entirely irrelevant or innocuous inconsistency is unlikely to provide a basis upon which a Panel chooses to exercise its discretion under Rule 143. However, in other circumstances, the putting of one transcript page to a witness may indeed be sufficient to demonstrate a material inconsistency in the witness's account. The Defence is simply legally and factually

[17] For example, ICC, *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-1938, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, paras 73-74.
[18] Thaçi Defence Submissions, KSC-BC-2020-06/F01940, para.21.
[19] Thaçi Defence Submissions, KSC-BC-2020-06/F01940, paras 18-20 citing ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-2954, Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572, 25 May 2011, paras 2, 7.
[20] ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-2954, Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572, 25 May 2011, paras 4, 5, 7.
[21] Thaçi Defence Submissions, KSC-BC-2020-06/F01940, para.17 citing ICC, *Prosecutor v. Yekatom and Ngaissona*, ICC-01/14-01/18, Decision on the Yekatom Defence Motion for Directions Regarding Reliance on Prior Recorded Testimonies for Non-Rule 68(3) Witnesses, para.6
[22] Thaçi Defence Submissions, KSC-BC-2020-06/F01940, paras 5-6.

wrong in claiming that a statement cannot be 'inconsistent' unless it has been put to a witness.[23]

8. Moreover, admission of a prior inconsistent statement remains subject to the requirements set out at Rule 138(1) - this assessment involves considering *inter alia* whether the probative value of the evidence is not outweighed by its prejudicial effect, which provides ample latitude for the Defence to take issue with the length of any particular written statement.[24]

9. There is no legal or rational basis for limiting the application of Rule 143(2) in the manner sought by the Defence. Indeed, doing so would result in fruitless and unproductive use of time, both in conducting examinations and in litigating and fragmenting prior statements on an almost sentence by sentence basis.

10. The Defence submissions should be rejected accordingly.

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At The Hague, the Netherlands.

[23] Just by way of example, if a witness were to change his/her account in order to categorically deny ever being at a certain location, then further detail of events the witness observed or participated in at that location become inherently inconsistent, regardless of whether the witness is confronted with each prior detail.

[24] *See contra*, Thaçi Defence Submissions, KSC-BC-2020-06/F01940, para.5.