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 Christoph Barthe Judge Guénaël Mettraux Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Hashim Thaçi
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Thaçi Defence Submissions Concerning Use of Prior Inconsistent Statements Pursuant to Rule 143(2)(c)

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I. INTRODUCTION

1. On 7 November 2023, the Specialist Prosecutor's Office ("SPO") moved for admission of two witness statements of W03825 pursuant to Rule 143(2)(c)[1] of the Rules.[2] The Defence for Mr Hashim Thaçi ("Thaçi Defence") did not object to the admission of the statements in light of their extensive use during the SPO's direct examination, but noted its continuing objection to the Trial Panel's use, as substantive evidence, of those portions of witness statements admitted under Rule 143(2)(c) that were not put to the witness in direct examination.[3] The Trial Panel proceeded to admit the 2014 and 2001 statements as Exhibits P680 and P681, respectively, pursuant to Rule 143(2)(c).[4]

2. On 9 November 2023, the Trial Panel invited the Thaçi Defence to confirm its objection to the Trial Panel's use of statements admitted pursuant to Rule 143(2)(c). The Thaçi Defence again reiterated its position that once a witness statement is admitted pursuant to Rule 143(2)(c), the Panel can only rely on it for the truth of its content in relation to those parts which were put to the witness during the *viva voce* testimony, and which are inconsistent with that *viva voce* testimony.[5] The Panel then invited the Thaçi Defence to prepare a written submission, citing authorities in support of its position, by 20 November 2023.[6]

3. In response to the Panel's invitation, the Thaçi Defence herein provides its arguments and authorities in support of its position that the Panel can only rely on

[1] KSC-BC-2020-06, Transcript of Hearing (W03825 Testimony), 7 November 2023 ("Transcript of 7 November 2023"), p. 9509, line 24 to p. 9510, line 9.
[2] KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 ("Rules").
[3] Transcript of 7 November 2023, p. 9510, line 19 to p. 9511, line 5.
[4] Transcript of 7 November 2023, p. 9511, line 21 to p. 9512, line 14.
[5] KSC-BC-2020-06, Transcript of Hearing (Procedural Matters), 9 November 2023 ("Transcript of 9 November 2023"), p. 9705, lines 12-23.
[6] Transcript of 9 November 2023, p. 9705, line 24 to p. 9706, line 6.

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. The Thaçi Defence further clarifies that its position is not limited to the Trial Panel's use of prior inconsistent statements for the truth of their contents. Rather, as set forth below, the Trial Panel cannot for any purpose use portions of witness statements admitted under Rule 143(2)(c) that were never put to a witness in direct (or redirect) examination (including for impeachment or corroboration purposes, or as substantive evidence).

4. The Trial Panel has already held that witness statements that constitute a record of an interview or a transcript of evidence are inadmissible as evidence unless they satisfy the *lex specialis* requirements of Rules 153-155 of the Rules.[7] Accordingly, because the SPO did not satisfy the requirements of Rules 153-155 for W03825, everything in his 2001 and 2014 witness statements is inadmissible, except those portions that satisfy the requirements of Rule 143(2)(c).

5. The issue now before the Panel is best illustrated by the following hypothetical. Assume that a witness has given a lengthy interview to the SPO that covers multiple days and 300 pages of transcript. On direct examination, the SPO uses one page of that 300-page transcript to establish one fact that the witness now says he does not remember and does not accept. Does the SPO's use of that one page of transcript now transform the remaining 299 pages of otherwise inadmissible testimony under Rules 153-155, into testimony that the Trial Panel can use as substantive evidence (or impeachment evidence or corroboration evidence) under Rule 143(2)(c) even though nothing in the remaining 299 pages of transcript was put to the witness?

[7] KSC-BC-2020-06/F01380, Trial Panel II, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154*, 16 March 2023, Confidential ("First Rule 154 Decision"), para. 15, noting: "Rules 153-155 operate as lex specialis in relation to Rule 138 so that a record of an interview that qualifies as a written statement or as a transcript of evidence cannot be offered other than pursuant to Rules 153-155."

6. As set forth below, the legal authorities make clear that the Panel cannot do so. The SPO's use of one page of transcript does not transform the remaining 299 pages of otherwise inadmissible testimony under Rules 153-155, into substantive evidence. Matters in a witness statement that were never put to a witness are, by definition, not "inconsistent" with anything the witness said in court and cannot be used by the Trial Panel unless a party establishes an independent basis for admission under the *lex specialis* provisions of Rules 153-155.

II. DISCUSSION

A. "Prior Inconsistent Statement" should be understood to mean a prior inconsistent assertion or representation, not a prior inconsistent *witness statement*

7. The text of Rule 143(2)(c) states:

> With leave of the Panel, a Party who called a witness may question that witness about the following matters, where relevant to the witness's credibility: whether the witness has, at any time, made a **prior inconsistent statement**. 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.[8]

8. Notably, the KSC Rules do not define the terms "statement," "witness statement" or "prior inconsistent statement." The ICTY has held that the term "prior inconsistent statement" is derived from adversarial, or common-law, systems.[9] Accordingly, this Trial Panel should look to the law in adversarial systems to adopt a definition of the term "prior inconsistent statement" in Rule 143(2)(c).

9. In federal courts in the United States, admission of prior inconsistent statements is governed by Rule 801(d)(1)(A) of the Federal Rules of Evidence. Rule 801(a) defines what a "statement" is for purposes of the Rule: "*'Statement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an*

[8] Emphasis added.
[9] ICTY, *Prosecutor v. Limaj*, IT-03-66, Trial Chamber II, *Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence*, 25 April 2005, paras. 18-19.

assertion." Accordingly, in federal courts in the United States, a "prior inconsistent statement" means a prior inconsistent *assertion*, not a prior inconsistent *witness statement*.

10. In Australia, Section 101(1) of the Evidence Act 1977 (Qld) similarly provides that a previous inconsistent "*statement shall be admissible as evidence of any fact stated therein of which direct oral evidence … would be admissible*." Schedule 3 of the Act defines the term "statement" as "*any representation of fact, whether made in words or otherwise and whether made by a person, computer or otherwise.*" Likewise, Section 60(1) of Australia's federal Evidence Act 1995 (Cth) provides: "*The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation*."[10] Accordingly, at both state and federal level in Australia, a prior inconsistent statement refers to a prior inconsistent *representation,* not a prior inconsistent *witness statement.*

11. The law in the United Kingdom is similar. Section 119 of the Criminal Justice Act 2003 provides that a prior inconsistent "*statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible*." Section 115 of the same Act defines "statement" as "*any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form*."[11] Accordingly, a prior inconsistent statement in the United Kingdom refers to a prior inconsistent *representation,* not a prior inconsistent *witness statement.*

12. The Thaçi Defence submits that the Trial Panel should adopt a similar definition of "prior inconsistent statement" for the purposes of Rule 143(2)(c) of the Rules. What is admissible for use under Rule 143(2)(c) is a prior inconsistent *assertion*

[10] Emphasis added.
[11] Emphasis added.

or representation made by a witness, and not the entire *witness statement* in which that assertion or representation can be found.

B. Both domestic and international legal precedents restrict the use of parts of witness statements that were never put to the witness

13. Case law from both domestic and international criminal courts supports the view that a trial court can only use (whether as substantive evidence or for purposes of impeachment) those portions of a witness statement that were put to the witness and which are inconsistent with the witness's in-court testimony.

14. As explained above, because the phrase "prior inconsistent statement" is a term of art arising from common law jurisdictions, precedent from common law jurisdictions is particularly relevant. In *People v. Lawrence,* an Illinois appellate court held that a trial court cannot admit entire witness statements as substantive evidence where only a portion was inconsistent with a witness's evidence at trial:

> The first and foremost criteria for admissibility pursuant to this statute is that the witness's trial testimony be inconsistent with his prior statement. Thus it was not only proper, but required, for the trial court to determine whether the written statement, which defendant sought to have admitted as substantive evidence, was inconsistent with his trial testimony and to admit only those portions which were actually inconsistent.[12]

15. In *United States v. Finch,* the United States Court of Appeals for the Armed Forces addressed a similar and related question concerning the use of prior consistent statements. It found that the trial court erred when it admitted an entire video into evidence even though only a portion of the video established a prior consistent statement for purposes of rehabilitation of a witness: "*To the extent a prior statement contains substantive information inconsistent with the declarant's in-court testimony, those material inconsistent aspects of the statement are hearsay and are not admissible under M.R.E. 801(d)(1)(B).*"[13] By analogy, where a trial court admits a prior inconsistent statement,

[12] *People v. Lawrence*, 268 Ill. App.3d 327, 333 (1994). Emphasis added.
[13] *United States v. Finch,* No. 19-0298-AR (C.A.A.F. 2020).

those material aspects that are not inconsistent with the witness's in court testimony constitute inadmissible evidence in U.S. courts.

16. Although this court does not exclude hearsay testimony, the Rules do prohibit admission of testimony that does not comply with the requirements of Rules 153-155. Accordingly, those portions of witness statements that are not inconsistent with a witness's in-court testimony, and do not otherwise meet the requirements of Rules 153-155, are inadmissible before the Kosovo Specialist Chambers and should be excluded.

17. Precedent from international criminal courts supports this view. In the *Yekatom* case, Trial Chamber V of the International Criminal Court ("ICC") recalled the guidance given by the Chamber on numerous occasions with regard to the limited use of prior recorded testimony, including the use of prior inconsistent statements.[14] The Chamber underlined that when a witness is presented with their non-Rule 68(3)[15] prior statement to refresh their memory or to allow the examining counsel to develop an inconsistency, only that portion of the statement discussed with the witness will be considered by the court: *"For the sake of clarity, [the Single Judge] also emphasises that prior recorded testimonies will not be considered as sworn evidence in their entirety merely because Non-Rule 68(3) Witnesses accept to stand by them, as alleged by the Yekatom Defence.* ***Rather, these prior recorded testimonies will only be considered for the deliberations on the judgment where the 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****".*[16]

[14] ICC, *Prosecutor v. Yekatom & 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*, 9 November 2022 ("*Yekatom* Decision"), para. 5 and fn. 7.
[15] Rule 68(3) of the ICC Rules of Procedure and Evidence ("ICC Rules") is the equivalent provision to Rule 154 of the KSC Rules.
[16] *Yekatom* Decision, para. 6. Emphasis added.

18. Likewise, in the *Katanga* case,[17] a witness was asked in court to read a passage of his prior recorded testimony in silence. The Prosecution subsequently asked the witness questions in relation to this passage, which were intended to expose a supposed inconsistency between the prior recorded statement and the testimony of the witness given in court. The next day the extract of the passage was admitted into evidence and the Defence then moved to have the entire prior recorded statement admitted into evidence. The Prosecution argued that there was no legal basis for the admission into evidence of the entire written statement, as this would violate the principle of orality and would upset the equality of arms between itself and the Defence if the written statement were to be admitted, because the statement contained many details on which the witness was not questioned by the Defence.

19. The starting point of the *Katanga* Chamber's analysis was the principle of orality. The Chamber was of the view that compliance with the requirements of Rule 68(2)(b) of the ICC Rules does not automatically create a sufficient ground to deviate from the orality principle. The simple assertion that a written statement of a witness who has appeared for testimony provides the broader context in which a specific statement was made, or allegedly corroborates the oral testimony given at trial, does not qualify as a sufficient reason for admitting it into evidence. Consequently, the Chamber saw no reason to deviate from its established practice to not allow prior recorded statements of witnesses who appear before it into evidence.[18]

20. Like *Katanga,* this Trial Panel has ruled that the principle of orality "underpins the SC's regulatory regime," but has noted that this principle is "*qualified by a variety of provisions (in particular, Rules 100, 153, 154, 155) that provide for the possibility of witness evidence being elicited and tendered by means other than calling a witness to testify viva voce*

[17] *See* ICC, *Prosecutor v. Katanga & 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*, 25 May 2011, paras. 1-4, 7.
[18] *Ibid,* para. 7.

in court."[19] The Panel did not list Rule 143(2) as one of the Rules that qualifies the principle of orality. Moreover, as in *Katanga,* the admission of testimony in a witness statement that is not inconsistent with a witness's in-court testimony, and does not otherwise satisfy the requirements of Rules 153-155, would violate the principle of orality that underpins the KSC's regulatory regime and should not be admitted under Rule 143(2)(c).

21. In the *Ruto* case at the ICC, the Trial Chamber admitted by majority the prior recorded testimonies of witnesses for the truth of their contents and in their entirety.[20] However, in his partly concurring opinion, the Presiding Judge Eboe-Osuji noted the following limitation on such testimony: as regards those of the witnesses who had appeared in court and given testimony, prior inconsistent statements would be considered for their truth "*only to the extent that counsel for the Prosecution and the Defence asked specific questions of the [REDACTED] witnesses and received answers to the questions asked (including in relation to documentary and other materials put to the particular witness while on the stand)*."[21] Judge Eboe-Osuji noted that there is "reason and persuasive authority" for this limitation, citing to the ICTY Trial Chamber's decision in *Prosecutor v. Halilović*.[22]

[19] First Rule 154 Decision, para. 18.
[20] ICC, *Prosecutor v. Ruto & Sang,* ICC-01/09-01/11-1938-Corr-Red2, Trial Chamber V(A), *Decision on Prosecution Request for Admission of Prior Recorded Testimony,* 19 August 2015.
[21] ICC, *Prosecutor v. Ruto & Sang*, ICC-01/09-01/11-1938-Anx-Red, Trial Chamber V(A), *Public redacted version of 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. [The ICC Appeals Chamber later reversed on other grounds the Trial Chamber's decision, leaving unaddressed the question of whether the Trial Chamber could properly admit statements in their entirety for the truth of the matters asserted therein. See 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].
[22] ICTY, *Prosecutor v. Halilović*, IT-01-48-T, Trial Chamber I(A), *Decision on Admission into Evidence of Prior Statement of a Witness*, 5 July 2005.

III. CONCLUSION

22. Accordingly, the Thaçi Defence submits that the Trial Panel should find that Rule 143(2)(c) authorises a Trial Panel to admit and rely on a prior inconsistent *assertion or representation* made by a witness that is inconsistent with the witness's *viva voce* testimony, and not the entire *witness statement* in which that assertion or representation can be found, unless the requirements of Rules 153-155 have been satisfied.

[Word count: 2,827words]

Respectfully submitted,

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At Tampa, United States