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

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| **In:** | **KSC-BC-2020-06**<br>**Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi** |
| **Before:** | **Court of Appeals Panel**<br>Judge Michèle Picard<br>Judge Emilio Gatti<br>Judge Nina Jørgensen |
| **Registrar:** | Dr Fidelma Donlon |
| **Filing Participant:** | Specialist Prosecutor's Office |
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# Consolidated Prosecution response to Krasniqi and Selimi Defence appeals of the 'Decision on Prosecution Motion for Admission of Accused's Statements' with public Annex 1

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## I. INTRODUCTION

1. Pursuant to Rule 170(2) of the Rules,[1] the Specialist Prosecutor's Office ('SPO') responds to the appeals by the Krasniqi Defence[2] and Selimi Defence[3] (collectively, 'Appeals') of the Trial Panel's Decision admitting prior witness statements and testimony of the Accused.[4] These witness statements and testimonies are relevant, have probative value which is not outweighed by any prejudice, and were given voluntarily, free from improper compulsion, and in accordance with international standards. The Appeals fail to demonstrate an error in the Trial Panel's discretionary[5] Decision and should therefore be denied.

## II. SUBMISSIONS

2. Krasniqi's First Ground of Appeal, Krasniqi's Second Ground of Appeal, and Selimi's Appeal revolve primarily around misconceived arguments concerning the requirement to be informed of rights against self-incrimination, to remain silent, and to the assistance of counsel. This notification requirement attaches from the moment a person becomes subject to a 'criminal charge'.[6] At the time Krasniqi and Selimi

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[1] 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.

[2] Krasniqi Defence Appeal against Decision on Prosecution Motion for Admission of Accused's Statements with Public Annexes 1 and 2, KSC-BC-2020-06/IA030/F00004, 12 January 2024, Confidential ('Krasniqi Appeal').

[3] Selimi Defence Appeal against Decision on Prosecution Motion for Admission of Accused's Statements with Confidential Annex 1 and Public Annex 2, KSC-BC-2020-06/IA030/F00005, 12 January 2024 ('Selimi Appeal').

[4] Decision on Prosecution Motion for Admission of Accused's Statements, KSC-BC-2020-06/F01917, 9 November 2023 ('Decision').

[5] Decisions on admissibility of evidence are discretionary. *See Special Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023, para.35. The standards of appeal have been set out in previous decisions. *See Special Prosecutor v. Gucati and Haradinaj*, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/-F00005, 9 December 2020, paras 4-14, 41-44.

[6] Decision, KSC-BC-2020-06/F01917, paras 129; ECtHR, *Ibrahim and Others v. United Kingdom*, 50541/08, 50571/08, 50573/08 and 40351/09 et al., Judgment, 13 September 2016 ('Ibrahim Judgment'), paras 270-273, 296.

voluntarily gave the challenged statements, they were witnesses and the Accused have pointed to no facts or circumstances demonstrating that the relevant authorities did or should have considered them suspects.[7] Pursuant to Article 37 of the Law[8] and Rules 137-138, the Panel was correct to admit the statements and the Accused have failed to demonstrate any error in the Decision.

3. Indeed, consistent with findings in the Decision,[9] and even if, *arguendo*, any limited violation were to be found, admission of the Accused's witness statements is in the interests of justice and a fair trial because:[10] (i) the circumstances in which the statements were taken demonstrate their authenticity and reliability; (ii) the evidence was obtained lawfully and in compliance with procedures applicable to witness interviews in the relevant jurisdictions and international standards; (iii) the witness testimonies were given before judges required to ensure the fairness of the proceedings and mindful of relevant rights, including against self-incrimination; (iv) neither Accused was detained or particularly vulnerable at the time of the witness statements; (v) despite repeated opportunities, including during subsequent statements both as suspects and witnesses, neither Accused retracted or objected to his earlier witness statements; (vi) the Accused have already had and will have the opportunity to challenge the authenticity of the evidence and oppose its use; (vii) admission of the statements will enable a full and fair assessment of the admitted suspect statements by both Accused, which concerned many of the same matters

[7] ECtHR, *Schmid-Laffer v. Switzerland*, 41269/08, Judgment, 16 June 2015, paras 29, 39 (noting that when the applicant was first interviewed by the police, there was nothing in the case file to suggest that she should have been treated as a suspect and should have been informed of the right to silence); *Ibrahim* Judgment, para.296.
[8] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article(s)' or 'Law' herein refer to the Law, unless otherwise specified.
[9] *See, inter alia*, Decision, KSC-BC-2020-06/F01917, para.217 (making holistic observations concerning the circumstances in which the statements were given, their probative value, and prejudice); *see also* Sections IV(C)(2), IV(C)(4) (addressing each statement individually against the admissibility criteria).
[10] *Ibrahim* Judgment, para.274. *See also Specialist Prosecutor v. Shala*, Decision on Shala's Appeal Against Decision Concerning Prior Statements, KSC-BC-2020-04/IA006/F00007, 5 May 2023, paras 59, 80, 95.

addressed in the witness statements;[11] (viii) the Panel, which is composed of professional judges, will treat the evidence with appropriate caution; and (ix) there is a strong public interest in the investigation and punishment of the grave war crimes and crimes against humanity charged in this case.

## A. THE TRIAL PANEL LAWFULLY ADMITTED KRASNIQI'S ICTY EVIDENCE

4. Krasniqi's First Ground of Appeal and Second Ground of Appeal concern the admission into evidence of Krasniqi's 2007 ICTY witness statement;[12] his 2007 ICTY testimony;[13] his 2005 ICTY testimony;[14] and associated exhibits.

5. Krasniqi fails to demonstrate the existence of errors in the Decision, and the arguments and caselaw cited in support of Krasniqi's First Ground of Appeal and Second Ground of Appeal are either misstated, misplaced, or distinguishable from the present case.[15] In particular, Krasniqi misleadingly transposes frameworks and jurisprudence applicable to suspects to witness evidence provided before other authorities almost 20 years ago.[16]

### 1. The circumstances of the ICTY evidence undermine Krasniqi's arguments.

6. At the outset, before addressing Krasniqi's individual submissions, it is appropriate to address the circumstances in which the ICTY witness statements were given individually and collectively, considering that Krasniqi's arguments frequently do not distinguish between them and, at times, misstate the record.[17] As repeatedly

[11] Decision, KSC-BC-2020-06/F01917, Sections IV(A)(1)(c)-(d), IV(A)(2)(c)-(d), IV(B)(1)(b).
[12] Decision, KSC-BC-2020-06/F01917, Section III(C)(4)(b)(iii).
[13] Decision, KSC-BC-2020-06/F01917, Section III(C)(4)(b)(v).
[14] Decision, KSC-BC-2020-06/F01917, Section III(C)(4)(b)(iv).
[15] Considering that Krasniqi's First Ground of Appeal and Second Ground of Appeal are interconnected, with similar arguments being made in support of each, they are addressed together. Section II(A)(1) relates to both grounds, Sections II(A)(2)-(4) relate primarily to Krasniqi's First Ground of Appeal, and Section II(A)(5) relates to Krasniqi's Second Ground of Appeal.
[16] *See e.g.* Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, para.8.
[17] *See e.g.* Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 13 (indicating that the combined effect of a subpoena and oath affected all of his ICTY evidence), 26 (claiming that Krasniqi was compelled to

found by the Panel during its assessments of each, these statements and testimonies were given voluntarily and obtained in accordance with international standards.

7. During his 2005 ICTY testimony, Krasniqi, who was subpoenaed to appear as a prosecution witness, did not indicate any concern with self-incrimination; rather, he was 'not willing to testify against Fatmir Limaj and his comrades' and wanted to be a witness for the Defence.[18] At no point during his testimony did he refuse to answer any question and he was not compelled to provide any evidence.

8. During his 2007 ICTY statement to the OTP,[19] Krasniqi confirmed that he did so 'voluntarily', was not threatened or forced, was not offered any promises or incentives, and was willing to testify before the ICTY.[20] Krasniqi also confirmed the truthfulness of his 2005 ICTY testimony and that he would give the same answers if questioned on the same topics again.[21]

9. Five days after being voluntarily interviewed by the ICTY OTP and confirming his willingness to testify, Krasniqi testified between 29-31 May 2007, confirmed the accuracy and truthfulness of his 2005 ICTY testimony and 2007 ICTY statement, and declared that he would give the same answers if asked the same questions.[22]

10. Following his 2007 ICTY testimony, Krasniqi gave two further statements which, while not subject of the Appeals, demonstrate that even when questioned as a suspect or expressly informed of a right not to answer questions as a witness, Krasniqi willingly and freely confirmed his prior ICTY statements and/or provided evidence on the same topics.

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make self-incriminating statements under threat of criminal sanctions, and all his ICTY evidence should therefore be excluded).

[18] Exhibit P00794, pp.3291, 3292.

[19] Office of the Prosecutor ('OTP').

[20] Exhibit P00793, para.1. *See also* Exhibit P00793, p.U016-2100.

[21] Exhibit P00793, para.9.

[22] Exhibit P00801, pp.4942-4944; *see also* pp.5060-5061.

11. During an interview on 20 December 2013 with Kosovo authorities, at which he was represented by counsel and afforded suspect rights,[23] Krasniqi voluntarily provided evidence, including on topics he discussed in his ICTY statements.[24] In 2018, during a witness interview with Kosovo authorities and after being informed that he could refuse to answer any question that would subject himself or a close relative to disgrace or serious material or other harm,[25] Krasniqi was questioned about his ICTY testimony, confirmed various parts,[26] and declared, 'I don't deny a single word that I said to the Hague Tribunal'.[27]

12. Krasniqi's ICTY statements were voluntary and free from improper compulsion.

**2. The ICTY was not obligated to provide notice to its witnesses of the right against self-incrimination.**

13. As correctly explained by the Trial Panel,[28] Rule 90(E) of the ICTY Rules of Procedure and Evidence provided for a specific notice procedure which was triggered by a witness, (or counsel, or judge) objecting to the witness answering a question on the grounds of possible self-incrimination.[29] The Trial Panel correctly found that ICTY Rule 90(E) protections functioned independently of any prior notice to its witnesses and, therefore, notice was not required for a witness to effectively exercise the right.[30] Krasniqi essentially attempts to impugn the entire ICTY framework for witness testimony, and to convert the KSC Rule 151 notice provisions into a global pre-condition for admission of any witness interview, regardless of its origin.

[23] Decision, KSC-BC-2020-06/F01917, para.120.
[24] Decision, KSC-BC-2020-06/F01917, paras 190, 193, 199, 203.
[25] Exhibit, P00792-ET, p.SPOE00068089.
[26] *See e.g.* Exhibit P00792-ET, pp.SPOE00068089-SPOE00068090, SPOE00068092.
[27] Exhibit P00792-ET, p.SPOE00068093.
[28] *Contra* Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, para.8, fn.13.
[29] Decision, KSC-BC-2020-06/F01917, paras 159, 161, 200, 204.
[30] Decision, KSC-BC-2020-06/F01917, para.200.

14. Krasniqi argues that, in any event, if Rule 90(E) would have prevented self-incriminating evidence from being used against him at the ICTY, then the use of that evidence at the KSC also violates this right.[31] However, this argument and the caselaw used to support it, demonstrate a fundamental misunderstanding of the applicability of self-incrimination protections. First, Krasniqi refers to several cases, but none that support an international standard precluding the admission of a statement against an accused that was taken when s/he was a witness. The cases cited in support of these arguments, which were reached on the basis of discretionary admissibility provisions,[32] are distinguishable from the present case in that they concern the rights of suspects and accused rather than witnesses; and/or issues of self-incrimination before the same authorities (as opposed to separate courts, created by entirely different (inter)governmental entities, decades apart).[33] As correctly noted numerous times by the Trial Panel, the protections available to witnesses against prosecution for self-incriminating statements are not, nor are they intended to be, extra-jurisdictional.[34]

**3. Krasniqi was not improperly compelled to testify at the ICTY.**

15. Krasniqi wrongly argues that the subpoena to appear issued by the ICTY and the witness oath created an obligation to testify under threat of sanction which amounted to improper compulsion, thereby violating his right against self-incrimination and resulting in a prohibition of any subsequent use of his evidence.[35]

16. However, Krasniqi ignores significant differences between the cited ECtHR cases and the present. The cases cited concern either rights afforded to *suspects*, not

[31] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 23-24.
[32] *See e.g.* Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 18-19 and the sources cited therein.
[33] *See e.g.* ECtHR, *Saunders v. United Kingdom*, 19187/91, Judgment, 17 December 1996 ('*Saunders* Judgment'), para.68; ECtHR, *Bykov v. Russia*, 4378/02, Judgment, 10 March 2009, para.92.
[34] Decision, KSC-BC-2020-06/F01917, para.159; ICTY, *Prosecutor v. Perišić*, IT-04-81-T, Decision on Prosecution Motion for an Advance Ruling on the Scope of Permissible Cross Examination ('*Perišić* Decision'), 12 June 2009, para.21.
[35] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, para.9, fns 15-17.

witnesses;[36] or the improper compulsion of self-incriminating evidence by the same judicial body or authorities which sought to use the evidence.[37] These distinctions are material because, as found by the ICTY and ECtHR, the entire basis for the right against self-incrimination lies is in protecting the 'person charged' against improper compulsion by the charging authorities.[38]

17. Moreover, the right against self-incrimination does not protect a person against the making of an incriminating statement, but rather against the prosecution obtaining evidence by coercion or oppression, and it is the existence of such improper compulsion which gives rise to concerns as to whether the privilege against self-incrimination has been respected.[39] The same cases cited by Krasniqi demonstrate that under national and international laws a witness subpoena is *not* considered to be improper compulsion, nor does a witness's right against self-incrimination equate to immunity from such a subpoena.[40] Even a suspect or accused – who are generally afforded greater rights than a witness – could not refuse to comply with a lawful subpoena or to take the witness oath due only to concerns about self-incrimination, as long as it was possible for them to refuse to answer potentially self-incriminating questions.[41] As such, these circumstances did not negate Krasniqi's right against self-incrimination, nor result in 'compelled' self-incriminatory evidence.

[36] *See e.g.* ECtHR, *Heaney and McGuinness v. Ireland*, 34720/97, Judgment, 21 March 2001 (concerning the adequacy of cautions given to suspects by police).
[37] *See e.g. Saunders* Judgment (concerning statements made to UK trade inspectors used in UK criminal trials); *Ibrahim* Judgment (concerning, *inter alia*, UK police safety interviews used in UK criminal trials).
[38] *Prosecutor v. Karadžić*, IT-95-5/18-AR73.11, Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013 ('*Karadžić* Decision'), para.37; Decision, KSC-BC-2020-06/F01917, paras 159-160; *Perišić* Decision, para.21. It is noteworthy in this regard that the SPO was not involved in the taking of any of the witness statements by other authorities.
[39] *Ibrahim* Judgment, para.267. *See also Saunders* Judgment, para.68; ECtHR, *Bykov v. Russia*, Application no. 4378/02, Judgment, 10 March 2009, para.92.
[40] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 9, 13-15.
[41] *Karadžić* Decision, para.37.

**4. Krasniqi's right against self-incrimination was not limited.**

18. Krasniqi's arguments about the cumulative effects of not being notified of his right against self-incrimination, being subpoenaed to testify, and being obligated to tell the truth,[42] are unpersuasive. First, as demonstrated above, Krasniqi does not distinguish between ICTY statements when making this argument, indicating that it should result in exclusion of all three. However, he was only subpoenaed for purposes of his 2005 ICTY testimony, and was not under oath during the 2007 ICTY statement. Second, Krasniqi's claim he was placed in a 'cruel trilemma' and forced to choose between 'self-incrimination, perjury or contempt' misuses the jurisprudence cited,[43] ignores the protections provided by ICTY Rule 90(E),[44] and misstates the applicability of the crimes of contempt and perjury. Third, as explained by the Trial Panel and discussed above, a subpoena is a court order to appear, not an order to answer specific questions.[45]

19. The Trial Panel properly applied the governing law to the relevant facts and, for the reasons stated above, correctly found the admission of Krasniqi's ICTY evidence did not violate his privilege against self-incrimination. Krasniqi's First Ground of Appeal should, therefore, be denied.

**5. Krasniqi was not entitled to the rights of a suspect before the ICTY.**

20. As noted in relation to the arguments addressed above, Krasniqi's Second Ground of Appeal also relies on arguments and caselaw which are, as correctly stated by the Trial Panel, either irrelevant to or distinguishable from the issues in the present case.[46] Moreover, the Trial Panel did not find the ICTY's designation of Krasniqi to be

[42] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 13-15.
[43] *See* United States Supreme Court, *Murphy v. Waterfront Commission,* 15 June 1964, 378 U.S. 52, 55 (discussing a hypothetical dilemma in which *suspects* have been *denied* the right to remain silent).
[44] Decision, KSC-BC-2020-06/F01917, paras 200, 204; *Karadžić* Decision, para.43.
[45] Decision, KSC-BC-2020-06/F01917, para.200; *Karadžić* Decision, para.37.
[46] *See e.g.* Decision, KSC-BC-2020-06/F01917, paras 160 (distinguishing the *Halilović* and *Prlić et al.* cases), 194 (distinguishing the *Delalić* case).

determinative,[47] but instead considered it a factor in its overall assessment of whether or to what extent Krasniqi had been entitled to treatment as a suspect.[48] The Trial Panel explicitly considered whether Krasniqi *should* have been treated as a suspect when it acknowledged such designations must be more than just window dressing.[49]

21. Similarly, Krasniqi cites ECtHR jurisprudence to support the contention that where the circumstances of the case demonstrate the existence of a suspicion against or information incriminating a witness, the witness should be treated as a suspect. However, nothing in Krasniqi's Appeal or in the underlying facts suggests the ICTY either labelled, treated, or should have treated Krasniqi as a suspect. Krasniqi's own arguments show there was no overt reason either formally or substantively for him to be considered a suspect or to have the rights thereof.[50] Indeed, to support his claim that the ICTY should have treated him as a suspect, Krasniqi: (i) refers to charges and evidence in this case; and (ii) generally cites his statements about his role and public statements.[51] This, without more, is insufficient to demonstrate any error in the Panel's decision, let alone in the status he had in ICTY proceedings.

22. For these reasons, the Trial Panel correctly found that at the time he gave evidence before the ICTY, Krasniqi was not entitled to the guarantees of a suspect. Krasniqi's Second Ground of Appeal should, therefore, be denied.

### B. THE TRIAL PANEL LAWFULLY ADMITTED THE CO-ACCUSED'S STATEMENTS

23. Krasniqi's Third Ground of Appeal concerns the evidence of his co-Accused admitted by the Trial Panel.[52] Krasniqi's central argument for this ground of appeal is

[47] *Contra* Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, para.29.
[48] Decision, KSC-BC-2020-06/F01917, paras 191, 194, 200, 204.
[49] *See e.g.* Decision, KSC-BC-2020-06/F01917, paras 129, 159-160, 194, 204.
[50] *See e.g.* Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 34-38.
[51] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 34-37.
[52] Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements, KSC-BC-2020-06/F02022, 19 December 2023 ('Certification Decision'), paras 48-54.

that the admission of the co-Accused's statements violates his right to confront the evidence against him.[53]

24. Krasniqi's arguments concerning the Trial Panel's purported misuse of Rule 138(1) and its failure to use Article 55, are unfounded.[54] First, rather than citing a relevant alternative Rule which would govern the admissibility of co-accused statements, and which the Trial Panel should have used instead of Rule 138(1), Krasniqi merely points to Rules which are either also general in nature (Rule 141), or *lex specialis* for the admission of written statements of witnesses in lieu of oral testimony (Rules 153-155) – none of which are applicable to the evidence in question. Second, Krasniqi's reference to Article 55 of the Constitution presupposes a 'right to cross-examine witnesses against him' and that the admission of written evidence is a restriction of this right – neither of which is true, as evidenced by the very Rules he cites.[55] Third, contrary to Krasniqi's submissions, the Trial Panel started its analysis by expressly considering whether the Constitution, the Law, or the Rules specifically addressed the question of the admissibility of co-accused statements.[56] Having found no specific law on point, the Trial Panel, like ICTY chambers,[57] turned to the general rules and principles governing the admissibility of evidence before the KSC.[58] This decision to use Rule 138(1) was fully in accordance with the powers conferred to the Trial Panel to rule on the admissibility of evidence pursuant to Article 40(6)(h) and did not, therefore, constitute an error of law.

[53] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 39-40.
[54] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 44, 46.
[55] *See e.g.* Rules 153, 155 (each allowing admission of written evidence without cross-examination, the latter also where they go to proof of the acts and conduct of the Accused).
[56] Decision, KSC-BC-2020-06/F01917, paras 15-16, 215.
[57] *See e.g.* ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ('*Prlić et al.* Decision'), paras 40, 46.
[58] Decision, KSC-BC-2020-06/F01917, para.215.

25. Krasniqi goes on to argue that if the Trial Panel did not err in deciding to apply Rule 138(1), then it committed multiple errors in its application of this Rule.[59] Krasniqi claims the Trial Panel failed to consider statements of co-accused to be 'inherently unreliable' due to internal inconsistencies and/or the manner in which the evidence was elicited.[60] Krasniqi fails, however, to provide any factual or legal support for this assertion. In this regard, the Trial Panel specifically considered that other chambers have exercised a margin of discretion in deciding not to admit statements of a co-defendant in circumstances where doing so would create undue prejudice.[61] However, the Trial Panel in this case – as it was obligated to do under Rule 138 – assessed factors such as the authenticity and reliability in determining admissibility and exercised its discretion to admit the statements after weighing the probative value with their prejudicial effect.[62]

26. Krasniqi next alleges the Trial Panel erred in considering the voluntary nature of the co-Accused's statements as a factor in its decision to admit them.[63] Citing no supporting facts or caselaw, Krasniqi claims that the Trial Panel's consideration of the voluntary nature of the evidence was irrelevant and did nothing to cure his inability to confront the information provided. However, it is clear that the Trial Panel considered the voluntary nature of the evidence in its assessment of authenticity and probative value for the purposes of admission, which are factors expressly set out by Rule 138(1).[64]

27. Krasniqi also alleges the Trial Panel erred in failing to properly assess the prejudice resulting from the admission of the co-Accused's statements.[65] Krasniqi argues this error stems from the Trial Panel's failure to consider both the incriminating

[59] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, para.46.
[60] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, para.46.
[61] Decision, KSC-BC-2020-06/F01917, para.217.
[62] Decision, KSC-BC-2020-06/F01917, paras 215-218.
[63] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, para.46.
[64] Decision, KSC-BC-2020-06/F01917, para.215.
[65] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 49-51.

and/or hearsay nature of the evidence; and Krasniqi's limited ability to challenge the evidence, especially in light of the lack of specifics provided by the SPO with regard to how these statements will be used. [66] The first part of this argument goes to the weight to be assigned to the evidence and not to its admissibility. The Trial Panel expressly considered the weight and probative value it would ultimately assign, stating it would do so at the end of the proceedings in light of all relevant evidence, in particular corroborating evidence.[67] With respect to the second part of Krasniqi's argument, the Trial Panel also expressly considered the opportunities to challenge any aspect of the admitted statements through witnesses or other relevant evidence. [68] Regardless of Krasniqi's disagreement with this assessment, there is no foundation for his assertion that it constitutes an error of law.

28. With regard to Krasniqi's overall argument that the admission of the co-Accused's statements violates his right to confront the evidence against him, the ECtHR has held there is no *per se* bar against the admission or use of prior statements of a co-accused as long as those statements were lawfully taken, the accused is provided with an opportunity to challenge those statements, and they do not form the basis for a co-accused's conviction to a decisive degree.[69] Moreover, as correctly stated by the Trial Panel, the jurisprudence of the KSC and other international(ised) criminal tribunals establishes that the admission of co-accused statements does not infringe on the fair trial rights of accused provided the probative value of the statements is not outweighed by the potential prejudice of their admission to the accused.[70]

[66] Krasniqi Appeal, KSC-BC-2020-06/IA030/F00004, paras 49-50.
[67] Decision, KSC-BC-2020-06/F01917, para.215.
[68] Decision, KSC-BC-2020-06/F01917, para.217.
[69] *See* ECTHR, *Luca v. Italy*, 33354/96, Judgment, 27 February 2001, paras 40-41.
[70] Decision, KSC-BC-2020-06/F01917, para.216. *See e.g.* Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154, KSC-BC-2020-06/F01308, 16 March 2023, Confidential, para.50; *Prlić et al.* Decision, para.62; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgement, 15 April 2011, para.44; ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1, Decision on the Admission of the Record of Interview of the Accused Kvočka, 16 March 2001.

29. The ability of an accused to test the evidence against him is an important characteristic of a fair trial, but it is not limited to cross-examination. If some or all of his co-Accused elect not to testify, Krasniqi will still be able to challenge the evidence through adducing or using other evidence; or through the examination or cross-examination of other witnesses. Additionally, the Trial Panel will be able to observe the demeanour of the Accused where the audio/visual records are available. Lastly, Rule 140(4) ensures a conviction cannot be decisively based on the evidence of a witness whom an accused has not had an opportunity to examine. These safeguards limit the potential prejudice of this evidence and will allow for a full and proper assessment of the weight, if any, to be assigned in light of all the evidence at trial.

30. For the foregoing reasons, the Trial Panel lawfully found the probative value of the co-Accused's statements and testimony did not outweigh the potential prejudice of their admission. Krasniqi's Third Ground of Appeal should, therefore, be denied.

### C. THE TRIAL PANEL LAWFULLY ADMITTED SELIMI'S EVIDENCE

31. Selimi's Appeal concerns the admission by the Trial Panel of Selimi's prior witness statements and testimony before the ICTY and SPRK.[71] As also addressed above, in relation to the Krasniqi's Second Ground of Appeal, the Trial Panel correctly found, in relation to each of his witness statements, that (i) the statement was voluntary and free from improper compulsion; (ii) there was no showing that the relevant authorities should have treated Selimi as a suspect; and (iii) that the full array of suspect warnings and rights is not necessary for the admission of a prior witness statement against an Accused.[72]

[71] Decision, KSC-BC-2020-06/F01917, Sections IV(C)(2). The 'SPRK' refers to Special Prosecution Office of the Republic of Kosovo.
[72] Decision, KSC-BC-2020-06/F01917, paras 141, 144, 147, 150, 153, 156, 159-161.

32. As opposed to Krasniqi, Selimi concedes that he was not entitled to the rights of a suspect at the time his ICTY and SPRK evidence was given, while arguing that the subsequent admission of this evidence nonetheless violates his rights as an accused.[73] In this respect, Selimi alleges the Trial Panel erred in admitting his testimony because: i) the use of compelled self-incriminating evidence is prohibited by law;[74] and ii) prior evidence cannot be used against an accused if suspect guarantees were not provided.[75]

33. Selimi's arguments are, however, unpersuasive for the reasons given below. As a threshold matter, Selimi fails to discharge his burden on appeal by making generalised submissions that are claimed to apply to all of Selimi's witness statements, failing to adequately engage with the Panel's careful, statement-by-statement analysis and findings. For example, when Selimi was interviewed by the ICTY OTP in 2004, he was not under oath and had an attorney present.[76] Even if, *arguendo*, he should have been treated as a suspect at the time or was improperly compelled to give evidence – which he was not – the ECtHR has found that access to a lawyer would likely prevent unfairness, even in the absence of notification of, *inter alia*, rights to silence and against self-incrimination.[77] Moreover, Selimi ignores the Panel's consideration of statements he made during a suspect interview with the SPO, where he was questioned about his 2005 ICTY testimony, confirmed a part thereof and otherwise did not object to, question, or retract it.[78] Both during his SPO suspect interviews and as a witness, Selimi repeatedly provided evidence, including after being informed of his right to refuse to answer questions, on many of the same matters addressed in other

[73] Selimi Appeal, KSC-BC-2020-06/IA030/F00005, paras 7-11.
[74] Selimi Appeal, KSC-BC-2020-06/IA030/F00005, paras 12-26.
[75] Selimi Appeal, KSC-BC-2020-06/IA030/F00005, paras 27-41.
[76] Decision, KSC-BC-2020-06/F01917, para.156.
[77] *Ibrahim* Judgment, para.273.
[78] Decision, KSC-BC-2020-06/F01917, para.161. *See also* Exhibit P00761.2_ET, pp.10-11; Exhibit P00761.8_ET, p.18; Exhibit P00761.11_ET, p.11.

statements, including those provided to the ICTY.[79] These circumstances and Selimi's failure to differentiate between statements in his appeal undermine his arguments.

**1. The use of compelled self-incriminating evidence between jurisdictions is lawful.**

34. The Panel refused to certify Selimi's proposed issue pertaining to the extra-jurisdictional application of ICTY Rule 90(E).[80] His arguments in this regard therefore fall outside the scope of the certified issues and should be summarily dismissed. In any event, Selimi's submissions are also unfounded.

35. As correctly noted by the Trial Panel, and also addressed above in relation to Krasniqi's Appeal, ICTY Rule 90(E) does not purport – nor has it been interpreted – to offer protection against any prosecutions other than those before the ICTY.[81] Similarly, KSC Rule 151(3)(b) does not protect a self-incriminating witness against future prosecution in other jurisdictions, but only 'before the Specialist Chambers'; ICC Rule 74 offers self-incriminating witnesses immunity from prosecution 'by the Court;' and the ECtHR jurisprudence cited by Selimi concerns self-incriminating evidence which was sought to be used by the same authority or government which had compelled it, including in cases where the witness was or should have been treated as suspect.[82]

36. Here, neither the KSC nor the SPO applied any compulsion in order to produce these statements, and there are no cogent reasons why the Trial Panel should be inhibited in its search for the truth by not considering this highly relevant evidence, including when considering his SPO suspect interviews concerning many of the same topics. In any event, despite Selimi's claims to the contrary, the use of compelled self-

[79] Decision, KSC-BC-2020-06/F01917, paras 79, 87, 140, 143, 146, 149, 152, 155, 158.
[80] Certification Decision, KSC-BC-2020-06/F02022, paras 78-82.
[81] *Perišić* Decision, para.21.
[82] See e.g. *Ibrahim* Judgment, (concerning, *inter alia*, UK police safety interviews used in UK criminal trials); *Saunders* Judgment (concerning statements made to UK trade inspectors used in UK criminal trials); ECtHR, *Kansal v. United Kingdom*, 21413/02, Judgment, 27 April 2004 (concerning a record of examination by an official receiver in a UK bankruptcy proceeding used in UK criminal trial).

incriminating evidence is not prohibited *per se* at the KSC, international tribunals, or by the ECHR. Rather, it is evidence which is found to have been *improperly* compelled which raises concerns about the voluntary nature of the evidence and its impact on the right against self-incrimination.[83]

37. Neither Selimi's Appeal nor the circumstances in which Selimi gave his prior witness evidence suggest his evidence was improperly compelled. Instead, Selimi points to his obligation to tell the truth and the penalties he faced if he knowingly gave false testimony as a witness.[84] The jurisprudence cited does not support his contention, or the manner in which he is attempting to apply it.[85]

38. Selimi mischaracterises the Trial Panel's explanation of this jurisdictional limitation to the right against self-incrimination as a 'superficial attempt' to discard a universally recognised fair trial right.[86] Yet Selimi's own arguments and the caselaw cited in support demonstrate that – even in the case of compelled self-incriminatory evidence, which Selimi's was not – there is no prohibition against the admission of such evidence between jurisdictions, and that it would still have been within the Trial Panel's discretion to admit the statements of the Accused.[87]

[83] ICTY, *Prosecutor v Mladić,* IT-09-92-R75bis.1, Second Decision on Request for Assistance from the Court of Bosnia and Herzegovina Pursuant to Rule 75 *bis*, 21 December 2011 ('*Mladić* Decision'), para.10; *Ibrahim* Judgment, para.269; ECtHR, *Zaichenko v. Russia*, 39660/02, Judgment, 18 February 2010, para.38.
[84] Selimi Appeal, KSC-BC-2020-06/IA030/F00005, para.8.
[85] The cited Canadian caselaw is, in addition to being of limited value in the context of this court, also inapplicable for the same reasons. *See e.g.* Supreme Court of Canada, *R. v. Nedelcu,* Judgment, 7 November 2012, SCC 59, 3 S.C.R 311 (concerning evidence from an Ontario civil trial being used in an Ontario criminal trial); Supreme Court of Canada, *R. v. Henry,* Judgment, 15 December 2005, SCC 76, 3 S.C.R. 609 (concerning evidence from a criminal trial used in a second trial on the same charges by the same court); Supreme Court of Canada, *Dubois v. The Queen,* Judgment, 21 November1985, 2 S.C.R. 350 (concerning evidence from a criminal trial used in a new trial by the same court).
[86] Selimi Appeal, KSC-BC-2020-06/IA030/F00005, paras 21-26.
[87] Selimi Appeal, KSC-BC-2020-06/IA030/F00005, paras 23-26. *See e.g. Mladić* Decision, paras 9-10.

**2. Prior witness evidence can be used against an accused without suspect guarantees.**

39. Selimi submits that his prior witness evidence could be admissible in the present case only if he was afforded the rights of a suspect before he gave such evidence.[88] The gravamen of Selimi's argument is that the rights he would be entitled to now if questioned by the SPO as a suspect or accused should apply retroactively to statements he made as a witness, when he was neither considered nor treated as a suspect. As with the submissions discussed above, this argument fails because the contentions and caselaw upon which it is based are erroneous or clearly distinguishable from the present circumstances.

40. As correctly pointed out by the Trial Panel, the ICTY cases cited by Selimi to support his claim that suspect rights should apply retroactively when a witness becomes an accused are again irrelevant and/or distinguishable.[89] Similarly, the ECtHR case cited by Selimi is distinguishable from the present case in that it involved a self-incriminating deposition given by a witness which was sought to be used by the prosecution in the same case.[90] Finally, there is nothing in Selimi's Appeal or in the underlying facts which would suggest that the ICTY or SPRK labelled or treated Selimi as a suspect, or should have done so, or that he believed he was being treated that way.

41. Selimi has offered no factual or legal support for the contention that suspect rights should apply retroactively and extra-jurisdictionally. As a consequence, Selimi has failed to show the Trial Panel erred in any way when it admitted Selimi's prior witness evidence. Selimi's Appeal should, therefore, be denied.

[88] Selimi Appeal, KSC-BC-2020-06/IA030/F00005, para.27.
[89] Selimi Appeal, KSC-BC-2020-06/IA030/F00005, para.27. *See e.g.* Decision, KSC-BC-2020-06/F01917, para.160 (distinguishing the *Halilović* and *Prlić et al.* cases).
[90] ECtHR, *Lutsenko v. Ukraine,* 30663/04, 18 December 2008, paras 42-53.

## III. CLASSIFICATION

42. In light of the classification of the Krasniqi Appeal, this response is confidential pursuant to Rule 82(4). However, considering that public versions of all related filings exist, Selimi's Appeal is public, and this response does not contain any confidential information, this response should be reclassified as public.

## IV. RELIEF REQUESTED

43. For the foregoing reasons, the Panel should deny the Appeals. The SPO also requests that this response be reclassified as public.

**Word count: 5695**

**Kimberly P. West**

**Specialist Prosecutor**

Thursday, 25 January 2024

At The Hague, the Netherlands.