In:	**KSC-BC-2020-06** **Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi**
Before:	**Court of Appeals Panel** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Defence Counsel for Jakup Krasniqi
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Krasniqi Defence Reply

to Consolidated Prosecution Response to Krasniqi and Selimi Defence Appeals of the 'Decision on Prosecution Motion for Admission of Accused's Statements'

Specialist Prosecutor

Kimberly P. West

Counsel for Victims

Simon Laws KC

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson KC

Counsel for Rexhep Selimi

Geoffrey Roberts

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Jakup Krasniqi ("Defence") hereby replies to the Specialist Prosecutor's Office ("Prosecution") Consolidated Response to Krasniqi and Selimi Defence Appeals of the 'Decision on Prosecution Motion for Admission of Accused's Statements' Appeal'.[1]

2. Unable or unwilling to engage with the substance of the Appeal,[2] the Response[3] mischaracterises the arguments at the core of the appeal and conveniently overlooks the relevant authorities which demonstrate the Impugned Decision's errors. The Appeal highlights discernible errors which invalidate the Impugned Decision and, unless remedied, will result in the violation of Mr. Krasniqi's fundamental fair trial rights. The Defence replies below on the First and Second Certified Issues; the Third Certified Issue requires no reply and the Defence maintains its Appeal submissions.[4]

3. Pursuant to Rule 82(4) of the Rules of Procedure and Evidence on the Kosovo Specialist Chambers ("Rules"), this filing is submitted confidentially because it replies to a filing with the same classification. The Defence has no objection to this filing being reclassified as public.

[1] KSC-BC-2020-06, IA030/F00006, Specialist Prosecutor, *Consolidated Prosecution Response to Krasniqi and Selimi Defence Appeals of the 'Decision on Prosecution Motion for Admission of Accused's Statements'* ("Response"), 25 January 2024, confidential, with Annex 1, public.
[2] KSC-BC-2020-06, IA030/F00004, Krasniqi Defence, *Krasniqi Defence Appeal against Decision on Prosecution Motion for Admission of Accused's Statements* ("Appeal"), 12 January 2024, confidential, with Annexes 1-2, public.
[3] KSC-BC-2020-06, F01917, Trial Panel II, *Decision on Prosecution Motion for Admission of Accused's Statements* ("Impugned Decision"), 9 November 2023, public.
[4] Appeal, paras 39-51.

II. SUBMISSIONS

A. FIRST CERTIFIED ISSUE

4. At the outset, the Response seeks to draw an artificial distinction between the individual circumstances surrounding Mr. Krasniqi's 2005 testimony in *Limaj*, his 2007 witness statement, and his 2007 testimony in *Haradinaj* (altogether "ICTY Evidence").[5] In so doing, it fails to acknowledge the common features of the ICTY Evidence: in no instance was Mr. Krasniqi given a self-incrimination warning, informed about his right not to answer potentially incriminating questions, or allowed to consult a lawyer. Instead, in all instances, Mr. Krasniqi was compelled, under threat of criminal sanctions, to answer questions concerning his role in the same events and alleged crimes for which he is now indicted. These are the central characteristics of the evidence which must be considered by the Court of Appeals Panel ("Appeals Panel").

5. That Mr. Krasniqi confirmed the truthfulness of his previous testimonies[6] does not assist the Prosecution. Mr. Krasniqi was asked to do so by the Prosecution during his testimony in *Haradinaj*, under oath, without legal advice and without any self-incrimination warning. He had no real choice but to say that he had stated the truth: otherwise he would have exposed himself to prosecution for giving false evidence. If anything, this only emphasises that Mr. Krasniqi operated in the 'cruel trilemma' outlined in the Appeal.[7]

6. In arguing the voluntary nature of the ICTY evidence, the Response further stresses that "[a]t no point during his testimony did [Mr. Krasniqi] refuse to answer

[5] Response, paras 6-9.
[6] *Idem*, paras 8-9.
[7] Appeal, para. 14.

any question […]".[8] The Response falls into the same error as the Impugned Decision:[9] in the absence of any self-incrimination warning or legal advice, a lay person such as Mr. Krasniqi is simply not in a position to exercise his right to refuse to answer questions.[10] That is why a warning is essential; an issue which the Response fails to address.

7. The Response wrongly asserts that the Defence ignored "the protections provided by ICTY Rule 90(E)",[11] although this very issue was addressed squarely in the Appeal.[12] The safeguards against self-incrimination of Rule 90(e) of the ICTY RPE are rendered ineffective if the witness is not advised of his rights, and if the statements taken in the absence of any such warnings are then used against him in subsequent criminal proceedings.

8. Moreover, the Response seeks to summarily dismiss the relevant case-law cited in the Appeal, arguing in general terms that the authorities cited either relate to suspects and not witnesses, or to "improper compulsion of self-incriminating evidence by the same judicial body or authorities which sought to use the evidence".[13] This Response is wrong. To give just one example, *Saunders v. U.K.* concerned the admission against the Accused in subsequent criminal proceedings of several statements given as a witness before a different authority.[14] It is thus indistinguishable from the situation of Mr. Krasniqi and should have been followed by the Impugned Decision. Furthermore, the Appeal clearly explained the relevance of every cited

[8] Response, para. 7.
[9] Impugned Decision, paras 200, 204.
[10] Appeals, para. 12. *See also*, para. 8.
[11] Response, para. 18.
[12] Appeals, para. 12.
[13] Response, paras 14, 16-17.
[14] *See* Appeal, para. 20; ECtHR, *Saunders v. U.K.*, no. 19187/91, *Judgment* ("*Saunders v. U.K.*"), 17 December 1996, paras 60, 69, 70.

case;[15] the Response's failure to engage with the substance of *any* of these cases exposes the weakness of its position.

9. Finally, the Response misunderstands the Appeal submission concerning the *subpoena* which compelled Mr. Krasniqi to give evidence before the ICTY in 2005. Arguing that "a witness subpoena is not considered to be improper compulsion"[16] and that "a subpoena is a court order to appear, not an order to answer specific questions",[17] both the Response and the Impugned Decision[18] considered the *subpoena* in isolation. Instead, to assess whether the ICTY evidence was given voluntarily, the Impugned Decision should have considered the cumulative effect of every element of compulsion, including the *subpoena,* the solemn oath to tell the whole truth and the lack of any self-incrimination warning.[19] In relation to Mr. Krasniqi's 2005 interview specifically,[20] the Appeal further demonstrates that contrary to the Impugned Decision, the subpoena was determinative in Mr. Kransiqi's self-incrimination.[21] As explicitly stated in 2005,[22] had he not been *subpoenaed,* he would not have testified.[23] Considering that Mr. Krasniqi was subject to subpoena, required to swear that he would tell the whole truth, asked questions which go to his role and responsibility in alleged events considered to be criminally relevant, and not advised of his right to refuse to answer such questions, the ICTY evidence cannot be considered voluntary.

[15] *See* Appeal, paras 18-21.
[16] Response, para. 17.
[17] *Idem*, para. 18.
[18] Impugned Decision, para. 200.
[19] Appeal, para. 14.
[20] *See* Appeal, para. 15, contrary to Response, para. 18.
[21] Appeal, paras 13-15.
[22] IT-04-84 P00340, p. 3291, lines 2-4, 20-21.
[23] *Idem*.

B. SECOND CERTIFIED ISSUE

10. The Appeal provides compelling reasons why Mr. Krasniqi should have been considered a suspect at the time he gave evidence before the ICTY and was erroneously deprived of the safeguards contemplated in Article 6 of the European Convention on Human Rights ("ECHR").[24]

11. The Response misconstrues and/or disregards the case-law cited in the Appeal in relation to the Second Issue. First, the Response fails to address the ECtHR's finding in *Kalēja v. Latvia* that the applicant's procedural status was irrelevant to the Court's determination of whether she was entitled to the Article 6 ECHR safeguards.[25] Second, the Response further neglects to address the ECtHR's finding in *Zaichenko v. Russia* that the right to be informed of the privilege against self-incrimination materialises from the moment there is suspicion of criminal activity.[26] Third, whilst the Response correctly notes that nothing in the *Schmid-Laffer v. Switzerland* case file indicated that the applicant should have been treated as a suspect,[27] what it fails to grasp is that the existence or lack of incriminating information was *key* to the ECtHR's consideration as to whether she should have been informed of her right to remain silent. The Response's assertion that the Defence relies on arguments and case-law that are irrelevant to or distinguishable from the issues in the present case[28] is thus without merit; the cases relied upon in the Appeal are relevant and decisive.

[24] *Contra* Response, para. 2.
[25] Appeal, para. 30; ECtHR, *Kalēja v. Latvia*, no. 22059/08, *Judgment (Merits and Just Satisfaction)* ("*Kalēja v. Latvia*"), 5 January 2018, para. 40.
[26] Appeal, para. 30. ECtHR, *Zaichenko v. Russia*, no. 39660/02, *Judgment (Merits and Just Satisfaction)* ("*Zaichenko v. Russia*"), 18 February 2010, para. 52.
[27] Response, fn. 7. *See also* ECtHR, *Schmid-Laffer v. Switzerland*, no. 41269/08, *Judgment (Merits and Just Satisfaction)* ("*Schmid-Laffer v. Switzerland*"), 16 June 2015, para. 29.
[28] Response, para. 20.

12. In submitting that the Trial Panel did not find the ICTY's designation of Mr. Krasniqi as a witness as determinative,[29] the Response wholly misunderstands the Impugned Decision. The Trial Panel held that "an individual interviewed as a witness is not entitled to the same due process protections as those afforded to a suspect if he or she is not regarded or treated as a suspect at the time of the interview, regardless of whether he or she later becomes a suspect, or an accused."[30] The Trial Panel subsequently used the wording "[i]t follows" to find that "the full array of warnings for a suspect is not normally necessary for the purpose of admission in subsequent proceedings of a statement given as a witness".[31] This very finding was referenced throughout the Impugned Decision in the Trial Panel's findings that the Accused were not entitled to the suspects guarantees.[32]

13. Furthermore, in the Certification Decision, the Trial Panel recalled its previous finding that Mr. Krasniqi's ICTY Evidence "given in his capacity of witness" was "voluntary, free of coercion and improper compulsion and, hence, taken in a manner consistent with the standards of international human rights law".[33] It added that this finding was "based" on the premise that the full array of warnings for a suspect is not necessary for the admission of a statement given to previous investigative authorities by a witness who is not considered a suspect at the time.[34] Therefore, there is no question that Mr. Krasniqi's designation as a witness at the ICTY was not a mere contributing factor to the Panel's assessment. Indeed, it was a determinative factor leading to an error of law on the part of the Trial Panel, as illustrated in the Appeal.[35]

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[29] Response, para. 20.
[30] Impugned Decision, para. 129.
[31] *Ibid*.
[32] *Idem*, paras 132, 135, 141, 144, 147, 150, 153, 156, 159, 191, 194, 200, 204.
[33] KSC-BC-2020-06, F02022, Trial Panel II, *Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements* ("Certification Decision"), 19 December 2023, public, paras 25, 29 (emphasis added).
[34] *Idem*, para. 25 (emphasis added).
[35] Appeal, paras 29-32.

14. The Response's assertion that "nothing in Krasniqi's Appeal or in the underlying facts suggests the ICTY either labelled, treated, or should have treated Krasniqi as a suspect" is misconceived[36] and contrasts with the Prosecution's own approach to the treatment of individuals as suspects regardless of their formal status.[37] The Response fails to engage with the substance of the Defence argument[38] and appears to ignore that: (i) the Trial Panel took note of the topics covered by Mr. Krasniqi's ICTY evidence which the Prosecution intends to rely upon[39] and that the Prosecution reduces to Mr. Krasniqi's role and public statements;[40] (ii) the subject matter of these proceedings overlaps with the *Limaj* and *Haradinaj* ICTY cases;[41] and (iii) a substantial amount of information was available to the OTP ICTY since at least 2005 and is now being used to support the charges against Mr. Krasniqi.[42] Fundamentally, the Prosecution must not be allowed to adopt inconsistent positions: it cannot rely upon evidence from the ICTY as the basis to prosecute Mr. Krasniqi, whilst at the same time, opportunistically, attempting to defeat this appeal by asserting that this same material gave rise to "no overt reason" for Mr. Krasniqi to be considered a suspect.[43]

III. CONCLUSION

15. For the reasons set out above, the Defence requests that the relief sought in the Appeal be granted.

[36] Response, para. 21.
[37] Appeal, para. 35.
[38] *Idem*, paras 34-37.
[39] Impugned Decision, paras 193, 199, 203.
[40] Response, para. 21.
[41] Appeal, para. 34.
[42] *Idem*, para. 36.
[43] Response, para. 21.

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Venkateswari Alagendra

Friday, 2 February 2024

Kuala Lumpur, Malaysia.

Aidan Ellis

Friday, 2 February 2024

London, United Kingdom.

Victor Băieșu

Friday, 2 February 2024

The Hague, the Netherlands.