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KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2020-06/IA030**
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Fidelma Donlon
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Decision on Krasniqi and Selimi Appeals against "Decision on Prosecution Motion for Admission of Accused's Statements"

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel", "Appeals Panel" or "Panel" and "Specialist Chambers", respectively),[1] acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 169 of the Rules of Procedure and Evidence ("Rules"), is seised of two appeals filed on 12 January 2024 by Mr Jakup Krasniqi ("Krasniqi")[2] and Mr Rexhep Selimi ("Selimi")[3] (collectively, the "Accused" or "Defence") (respectively, "Krasniqi Appeal" and "Selimi Appeal", and collectively, "Appeals") against the "Decision on Prosecution Motion for Admission of Accused's Statements"("Impugned Decision").[4] The Specialist Prosecutor's Office ("SPO") responded on 25 January 2024 that the Appeals should be rejected ("SPO Consolidated Response").[5] Krasniqi and Selimi replied on 2 February 2024 (respectively, "Krasniqi Reply" and "Selimi Reply").[6]

[1] IA030/F00001, Decision Assigning a Court of Appeals Panel, 21 December 2023.
[2] IA030/F00004, Krasniqi Defence Appeal against Decision on Prosecution Motion for Admission of Accused's Statements, 12 January 2024 (confidential) ("Krasniqi Appeal").
[3] IA030/F00005, Selimi Defence Appeal against the Decision on Prosecution Motion for Admission of Accused's Statements, 12 January 2024 ("Selimi Appeal").
[4] F01917, Decision on Prosecution Motion for Admission of Accused's Statements, 9 November 2023 ("Impugned Decision"). On 22 December 2023, the Appeals Panel extended the time limits to file the Appeals against the Impugned Decision and ordered that such appeals would be filed by 12 January 2024. See IA030/F00003, Decision on Selimi's and Krasniqi's Request for Variation of Time Limit, 22 December 2023, para. 6. See also IA030/F00002, Selimi and Krasniqi Defence Request for Extension of Time Limit to Appeal Decision F01917, 21 December 2023.
[5] IA030/F00006, Consolidated Prosecution response to Krasniqi and Selimi Defence appeals of the 'Decision on Prosecution Motion for Admission of Accused's Statements', 25 January 2024 (confidential) ("SPO Consolidated Response"), para. 43.
[6] IA030/F00008, 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', 2 February 2024 (confidential) ("Krasniqi Reply"); IA030/F00007, Selimi Defence Reply to Consolidated Prosecution response to Krasniqi and Selimi Defence appeals of the 'Decision on Prosecution Motion for Admission of Accused's Statements', 2 February 2024 ("Selimi Reply").

I. BACKGROUND

1. On 8 March 2023, the SPO filed a request to admit into evidence the records of interviews and prior testimony of the four co-accused in the case KSC-BC-2020-06.[7]

2. On 9 November 2023, the Trial Panel issued the Impugned Decision, deciding *inter alia*: (i) to admit into evidence select items of Krasniqi's and Selimi's prior evidence, given as witnesses before the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the Special Prosecution Office of the Republic of Kosovo ("SPRK"), as well as associated exhibits;[8] and (ii) that the admission of the records of interviews and prior testimony of the four Accused and associated exhibits is not *per se* prejudicial to the Accused or co-Accused and that there is no bar in admitting them against the co-Accused.[9]

[7] F01351, Prosecution motion for admission of Accused's statements, 8 March 2023. See also F01473, Selimi Defence Response to SPO Motion for Admission of Accused's Statements, 24 April 2023 (confidential, reclassified as public on 7 December 2023) ("Selimi Response"); F01474/RED, Public Redacted Version of 'Thaçi Response to 'Prosecution motion for admission of Accused's statements'', 24 November 2023 (confidential version filed on 24 April 2023); F01475/RED, Public Redacted Version of Krasniqi Defence Response to Prosecution Motion for Admission of Accused's Statements, 15 November 2023 (confidential version filed on 24 April 2023) ("Krasniqi Response"); F01476/RED, Public Redacted Version of Veseli Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2023 (confidential version filed on 24 April 2023); F01509/RED, Public Redacted Version of 'Prosecution reply to Krasniqi response to "Prosecution motion for admission of Accused's statements"', KSC-BC-2020-06/F01509, 8 May 2023, 11 July 2023 (confidential version filed on 8 May 2023); F01510, Prosecution reply to Selimi response to 'Prosecution motion for admission of Accused's statements', 8 May 2023 (confidential, reclassified as public on 9 November 2023); F01511, Prosecution reply to Thaçi response to 'Prosecution motion for admission of Accused's statements', 8 May 2023 (confidential, reclassified as public on 9 November 2023); F01512, Prosecution reply to Veseli response to 'Prosecution motion for admission of Accused's statements', 8 May 2023 (confidential, reclassified as public on 9 November 2023).

[8] Impugned Decision, paras 138-164, 187-207, 221. In accordance with the Impugned Decision, the Registry assigned exhibit numbers to the admitted items. See F02023, Memorandum in compliance with the "Decision on Prosecution Motion for Admission of Accused's Statements", F01917, 19 December 2023 ("Compliance Memorandum"). See also Impugned Decision, para. 221(d).

[9] Impugned Decision, paras 215-219.

3. On 27 November 2023, Krasniqi, Selimi and their co-accused Mr Kadri Veseli ("Veseli") applied for leave to appeal the Impugned Decision.[10] The SPO filed a consolidated response on 7 December 2023,[11] and Krasniqi, Selimi and Veseli replied on 15 December 2023.[12]

4. On 19 December 2023, the Trial Panel certified the following four issues out of the 17 issues raised by Krasniqi, Selimi and Veseli (collectively, "Certified Issues"):[13]

a. "Whether the Panel erred in fact and/or law by finding that the admission of Mr Krasniqi's May 2007 ICTY witness statement, February 2005 ICTY trial testimony, and May 2007 ICTY testimony […], which were given in the absence of any self-incrimination warning or other safeguard, did not violate Mr Krasniqi's privilege against self-incrimination ('Krasniqi's First Issue')";[14]

b. "Whether the Panel erred in fact and/or law by finding that Mr Krasniqi was not entitled to the guarantees of a suspect at the time he gave evidence before the ICTY, including the right to be informed about the

[10] F01961, Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements, 27 November 2023; F01966, Selimi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements, 27 November 2023; F01964, Veseli Defence Request for Leave to Appeal the Decision on Prosecution Motion for the Admission of the Accused's Statements, 27 November 2023. Mr Hashim Thaçi ("Thaçi") did not seek certification to appeal the Impugned Decision.
[11] F01990, Prosecution consolidated response to Veseli, Selimi, and Krasniqi requests for leave to appeal Decision F01917, 7 December 2023.
[12] F02010, Krasniqi Defence Reply to Prosecution Consolidated Response to Veseli, Selimi, and Krasniqi Requests for Leave to Appeal Decision F01917, 15 December 2023; F02015, Selimi Defence Reply to Prosecution consolidated response to Veseli, Selimi, and Krasniqi requests for leave to appeal Decision F01917, 15 December 2023; F02009, Veseli Defence Reply to Prosecution Consolidated Response to Veseli, Selimi, and Krasniqi Requests for Leave to Appeal Decision F01917 (F01990), 15 December 2023 (confidential, reclassified as public on 26 January 2024).
[13] F02022, Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements, 19 December 2023 ("Certification Decision"), paras 17-22, 27-32, 48-54, 73-77, 94(a). The Trial Panel declined to certify the remainder of the issues for which certification to appeal was sought.
[14] Certification Decision, para. 6.

privilege against self-incrimination, the right to counsel, and the right to silence ('Krasniqi's Third Issue')";[15]

c. "Whether the Panel erred in law by admitting co-accused's statements and testimony against Mr Krasniqi and finding that the prejudice caused by Mr Krasniqi's impossibility to cross-examine them did not outweigh the probative value of the evidence ('Krasniqi's Ninth Issue')";[16] and

d. "Whether the Panel erred in admitting Mr Selimi's statements and testimony given as a witness in violation of Mr Selimi's subsequent rights as an Accused ('Selimi's Third Issue')".[17]

II. STANDARD OF REVIEW

5. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.[18]

6. The Panel recalls that decisions related to the admission of evidence are generally treated as discretionary, and that appellate intervention in that respect is warranted only in very limited circumstances.[19] The Panel considers that a decision on whether to admit or exclude evidence pursuant to Rule 138 of the Rules is, likewise, one within the Trial Panel's discretion in its assessment of the relevance, authenticity

[15] Certification Decision, para. 6.
[16] Certification Decision, para. 6.
[17] Certification Decision, para. 8.
[18] KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-14. See also e.g. KSC-BC-2020-04, IA001/F00005, Public Redacted Version of Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, 20 August 2021 (confidential version filed on 20 August 2021), para. 5; KSC-BC-2020-04, IA006/F00007, Decision on Shala's Appeal Against Decision Concerning Prior Statements, 5 May 2023 ("*Shala* Appeal Decision"), para. 7.
[19] See KSC-BC-2020-07, IA006/F00006, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 7 January 2022 ("*Haradinaj* Appeal Decision on Defence Witnesses"), para. 14 and jurisprudence quoted therein.

and probative value of the evidence submitted.[20] In this regard, the Panel recalls that where the decision that is being challenged is a discretionary decision, a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.[21]

III. PUBLIC FILINGS

7. The Appeals Panel notes that the Impugned Decision and the Certification Decision were filed as public, while a number of appellate filings, namely the Krasniqi Appeal, the SPO Consolidated Response, and the Krasniqi Reply were filed as confidential.[22] The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential, and that Parties shall file public redacted versions of all submissions filed before the Panel.[23] The Panel also notes that the SPO and Krasniqi do not oppose the reclassification as public of the SPO Consolidated Response and the Krasniqi Reply, respectively.[24] As these filings do not contain any confidential information, the Panel therefore finds that they can be reclassified as public. As to the Krasniqi Appeal, the

[20] See *Haradinaj* Appeal Decision on Defence Witnesses, para. 14; KSC-CA-2022-01, F00114, Appeal Judgment, 2 February 2023 ("*Gucati and Haradinaj* Appeal Judgment"), paras 35, 93; KSC-CA-2023-02, F00038/RED, Public Redacted Version of Appeal Judgment, 14 December 2023 (confidential version filed on 14 December 2023) ("*Mustafa* Appeal Judgment"), para. 37.
[21] *Haradinaj* Appeal Decision on Defence Witnesses, para. 14 and jurisprudence quoted therein; *Gucati and Haradinaj* Appeal Judgment, paras 35, 93; *Mustafa* Appeal Judgment, para. 36.
[22] Krasniqi indicates that his appeal was filed as confidential pursuant to Rule 82(3) of the Rules as it refers to confidential material. See Krasniqi Appeal, para. 6. The SPO indicates that its response was filed as confidential pursuant to Rule 82(4) of the Rules, referring to Krasniqi Appeal. See SPO Consolidated Response, para. 42. Krasniqi also indicates that his reply was filed as confidential pursuant to Rule 82(4) of the Rules as the SPO Consolidated Response is confidential. See Krasniqi Reply, para. 3.
[23] See e.g. IA008/F00004/RED, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Review of Detention, 1 October 2021 (confidential version filed on 1 October 2021), para. 8. See also KSC-CA-2022-01, F00103, Decision on Gucati Application for Reclassification or Public Redacted Versions of Court of Appeals Panel Decisions, 9 January 2023, para. 2.
[24] SPO Consolidated Response, para. 42; Krasniqi Reply, para. 3.

Panel orders Krasniqi to file a public redacted version of his appeal, or to indicate, through a filing, whether it can be reclassified as public within ten days of receiving notification of the present Decision.

IV. DISCUSSION

8. The Panel observes that the evidence that is the subject of the Krasniqi Appeal is his: (i) ICTY trial testimony dated 29 to 31 May 2007 in the *Haradinaj et al.* proceedings ("May 2007 ICTY Trial Testimony");[25] (ii) ICTY statement dated 23 and 24 May 2007 ("May 2007 ICTY Witness Statement");[26] and (iii) ICTY trial testimony dated 10 to 15 February 2005 in the *Limaj et al.* proceedings ("February 2005 ICTY Trial Testimony").[27] The Panel observes that the evidence that is the subject of the Selimi Appeal is his: (i) SPRK interview dated 22 May 2018;[28] (ii) SPRK trial testimony dated 15 January 2018;[29] (iii) SPRK interview dated 13 October 2016;[30] (iv) SPRK interview dated 3 June 2013;[31] (v) SPRK interview dated 27 September 2011;[32] (vi) ICTY trial testimony dated 27 to 31 May 2005 in the *Limaj et al*. proceedings ("May 2005 ICTY Trial Testimony");[33] and (vii) ICTY statement dated 2 April 2004.[34]

[25] P00800; P00801 (confidential); P00802.1-P00802.3; P00803.1-P00803.2; P00804.1-P00804.2; P00805.1-P00805.3; P008006.1-P00806.2. Associated exhibit: P00810. See also Impugned Decision, para. 221(b), fn.633; Compliance Memorandum, pp. 6-7.
[26] P00793. See also Impugned Decision, para. 221(b), fn. 633; Compliance Memorandum, p. 6.
[27] P00794; P00795; P00796 (confidential); P00797.1-P00797.3; P00798.1-P00798.3; P00799.1-P00799.2. Associated exhibits: P00807; P00808; P00809; P00293. See also Impugned Decision, para. 221(b), fn. 633; Compliance Memorandum, pp. 6-7.
[28] 1D00005_ET (confidential). See also Impugned Decision, para. 221(b), fn. 630; Compliance Memorandum, p. 5.
[29] P00775_ET. See also Impugned Decision, para. 221(b), fn. 630; Compliance Memorandum, p. 5.
[30] P00774_ET (confidential). See also Impugned Decision, para. 221(b), fn. 630; Compliance Memorandum, p. 5.
[31] P00773 (confidential). See also Impugned Decision, para. 221(b), fn. 630; Compliance Memorandum, p. 5.
[32] P00772 (confidential). See also Impugned Decision, para. 221(b), fn. 630; Compliance Memorandum, p. 5.
[33] P00777; P00778; P00779; P00780; P00781.1-P00781.3; P00782. Associated exhibits: P00783; P00784; P00785. See also Impugned Decision, para. 221(b), fns 630-631; Compliance Memorandum, p. 5.
[34] P00776 (confidential). See also Impugned Decision, para. 221(b), fn. 630; Compliance Memorandum, p. 5.

9. The Appeals Panel will refer to the evidence that is the subject of Krasniqi's First Issue and Krasniqi's Third Issue as "Krasniqi's ICTY Evidence". The Appeals Panel will refer to the evidence that is the subject of the Selimi's Third Issue as "Selimi's ICTY and SPRK Evidence". The Appeals Panel will refer to the evidence that is the subject of Krasniqi's Ninth Issue as the "Accused's Statements" more generally as Krasniqi challenges whether the admission by the Trial Panel of all of the records of interviews and prior testimony of the Accused and associated exhibits against the co-Accused infringes upon his fundamental rights.

10. At the outset, the Appeals Panel recalls that evidence collected in other jurisdictions may be admissible pursuant to Article 37(1) of the Law, which provides the following:

> Evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the Specialist Chambers prior to its establishment by any national or international law enforcement or criminal investigation authority or agency including the Kosovo State Prosecutor, any police authority in Kosovo, the ICTY, EULEX Kosovo or by the SITF may be admissible before the Specialist Chambers. Its admissibility shall be decided by the assigned panels pursuant to international standards on the collection of evidence and Article 22 of the Constitution. The weight to be given to any such evidence shall be determined by the assigned panels.[35]

Concerning the admissibility of evidence, in general, the Appeals Panel further recalls that Rule 138(1) and (2) of the Rules provide the following:

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[35] Article 37(3) of the Law further provides, *inter alia*:

> Subject to judicial determination of admissibility and weight in paragraphs 1 and 2,
>
> a. transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY Rules of Procedure and Evidence may be admissible before the Specialist Chambers provided that the testimony or deposition is relevant to a fact at issue in the proceedings before the Specialist Chambers;
>
> b. transcripts of testimony of witnesses given before a Kosovo court, including pre-trial testimony or testimony preserved as part of a Special Investigative Opportunity under any criminal procedure code applicable in Kosovo at the relevant time, may be admissible before the Specialist Chambers, regardless of whether the judges sitting on the Panel heard the original testimony; […].

> (1) Unless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect. In exceptional circumstances, when the Panel is satisfied that an issue was not known at the time when the evidence was submitted, it shall be raised immediately after it has become known.
>
> (2) Evidence obtained by means of a violation of the Law or the Rules or standards of international human rights law shall be inadmissible if:
>
> (a) the violation casts substantial doubt on the reliability of the evidence; or
>
> (b) the admission of the evidence would be antithetical to or would seriously damage the integrity of the proceedings.

11. As correctly observed by the Trial Panel, the Law and the Rules "do not expressly regulate the issue of admissibility of an Accused's statements".[36] The Appeals Panel adds that neither do the Law or the Rules expressly regulate the issue of admissibility of an Accused's statements given *before another jurisdiction*. In addressing these issues raised in the Appeals, the Appeals Panel recalls that Article 3(2) of the Law requires that it adjudicate and function in accordance with, *inter alia*, the Constitution of the Republic of Kosovo ("Constitution") and international human rights law. Further, the Constitution provides for the direct application of the European Convention on Human Rights ("ECHR"), including the fair trial guarantees contained in Article 6, to the human rights and fundamental freedoms guaranteed in the Constitution, and requires that they be interpreted consistently with the decisions of the European Court of Human Rights ("ECtHR").[37] The guarantees of Article 6 of the ECHR are encompassed in, *inter alia*, Articles 21 and 38(3) of the Law, Rules 42 to 44 of the Rules and Article 30 of the Constitution.

[36] Impugned Decision, para. 16.
[37] Articles 22(2) and 53 of the Constitution. See also KSC-CC-2019-05, F00012, Decision on the Referral of Mahir Hasani Concerning Prosecution Order of 20 December 2018, 20 February 2019 ("*Mahir Hasani* Constitutional Decision"), para. 25.

12. The Panel will first address Krasniqi's Third Issue. It will then address Krasniqi's First Issue and Selimi's Third Issue together as they raise the same underlying considerations. The Appeals Panel will finally turn to Krasniqi's Ninth Issue.

A. WHETHER THE PANEL ERRED IN FINDING THAT KRASNIQI WAS NOT ENTITLED TO THE GUARANTEES OF A SUSPECT AT THE TIME HE GAVE EVIDENCE BEFORE THE ICTY (KRASNIQI'S THIRD ISSUE)

1. Submissions of the Parties

13. Krasniqi submits that the Trial Panel erred in finding that Krasniqi – who was a witness at the relevant time – was not entitled to the fair trial guarantees afforded to a suspect.[38] Krasniqi argues that while the Trial Panel should itself have analysed whether the ICTY should have treated him as a suspect, with the corresponding rights, instead it erred in treating as determinative the ICTY's designation of Krasniqi as a witness.[39] He submits that no separate assessment to this effect was carried out by the Trial Panel in contrast to the approach taken in respect of a co-accused.[40] He contends that Krasniqi's ICTY Evidence should be excluded either pursuant to Rule 138(1) of the Rules, as any probative value of this evidence is outweighed by its prejudicial effect, or in the alternative, pursuant to Rule 138(2) of the Rules and Article 55 of the Constitution, as his evidence was obtained in violation of international human rights law.[41]

14. Krasniqi also argues that in determining whether guarantees under Article 6 of the ECHR apply, including the right against self-incrimination, ECtHR jurisprudence reverts to a "substantive rather than formal" approach and that it is necessary to look

[38] Krasniqi Appeal, paras 4, 28. See also Krasniqi Appeal, para. 16; Krasniqi Reply, para. 10.
[39] Krasniqi Appeal, paras 29, 33. See also Krasniqi Appeal, paras 27, 38; Krasniqi Reply, paras 12-13.
[40] Krasniqi Appeal, para. 33, referring to Impugned Decision, para. 129 (with respect to Thaçi).
[41] Krasniqi Appeal, paras 38, 52.

beyond the procedural designation given to the applicant, and to assess in substance whether the authorities possessed information incriminating them.[42]

15. Finally, Krasniqi argues that the ICTY should have treated him as a suspect in that, pursuant to Rule 2(A) of the ICTY Rules of Procedure and Evidence ("ICTY Rules"), he was "a person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction".[43] In support of this submission, Krasniqi adds that, to the extent that the SPO maintains that Krasniqi's ICTY Evidence is reliable information about his role and public statements and shows that Krasniqi may have committed crimes, it follows that, in 2005 and 2007, this same material – which the Pre-Trial Judge found was sufficient foundation for the present case – was reliable information showing that Krasniqi may have committed crimes.[44] Krasniqi further adds that the SPO's practice confirms that a person should be treated as a suspect wherever the prosecution is in possession of material suggesting the individual's involvement in crimes.[45]

16. The SPO responds that the Trial Panel correctly found that at the time Krasniqi gave evidence before the ICTY, he was not entitled to the guarantees of a suspect.[46]

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[42] Krasniqi Appeal, paras 30-32, referring to ECtHR, *Deweer v. Belgium*, no. 6903/75, Judgment, 27 February 1980 ("*Deweer* Judgment"), para. 44, ECtHR, *Kalēja v. Latvia*, no. 22059/08, Judgment, 5 October 2017 ("*Kalēja* Judgment"); paras 36-41; ECtHR, *Simeonovi v. Bulgaria*, no. 21980/04, Judgment, 12 May 2017 ("*Simeonovi* Judgment"), para. 110; ECtHR, *Ibrahim and Others v. The United Kingdom*, nos 50541/08, 50571/08, 50573/08 and 40351/09, Judgment, 13 September 2016 ("*Ibrahim and Others* Judgment"), para. 249; ECtHR, *Aleksandr Zaichenko v. Russia*, no. 39660/02, Judgment, 18 February 2010 ("*Zaichenko* Judgment"), para. 52; ECtHR, *Schmid-Laffer v. Switzerland*, no. 41269/08, Judgment, 16 June 2015 ("*Schmid-Laffer* Judgment"), para. 29. See also Krasniqi Reply, para. 11.

[43] Krasniqi Appeal, para. 34.

[44] Krasniqi Appeal, paras 36-37. See also Krasniqi Reply, para. 14, where Krasniqi argues that (i) "a substantial amount of information was available to the [ICTY prosecution] since at least 2005 and is now being used to support charges against [him]"; (ii) the subject matter of the ICTY *Limaj et al.* and *Haradinaj et al.* cases overlaps with the current proceedings; and (iii) the Trial Panel took note of the topics covered by Krasniqi's ICTY Evidence upon which the SPO intends to rely.

[45] Krasniqi Appeal, para. 35. See also Krasniqi Reply, para. 14.

[46] SPO Consolidated Response, para. 22. See also SPO Consolidated Response, para. 2.

Specifically, the SPO contends that while Krasniqi relies on ECtHR jurisprudence to support the contention that a witness should be treated as a suspect where a suspicion or incriminating evidence exists against a person, nothing suggests that the ICTY labelled, treated or should have treated Krasniqi as a suspect.[47] The SPO further contends that Krasniqi's own arguments show that there is no overt reason for the ICTY to have treated him as a suspect.[48] In its view, Krasniqi's references to this end to (i) the charges and evidence in the case and (ii) his prior statements concerning his role and public statements are insufficient to either show an error by the Trial Panel or in the status he had at the ICTY.[49]

17. Moreover, contrary to Krasniqi's submissions, the SPO responds that the Trial Panel did not find the ICTY's designation of Krasniqi as a witness to be determinative but considered this designation as one factor in its overall assessment of whether or to what extent Krasniqi had been entitled to treatment as a suspect.[50]

18. Krasniqi replies that the SPO cannot be allowed to adopt inconsistent positions and rely on evidence from the ICTY as the basis to prosecute him while, at the same time, opportunistically attempt to defeat his appeal by asserting that the same material gave rise to "no overt reason" for him to be considered a suspect.[51]

2. Assessment of the Court of Appeals Panel

19. The Appeals Panel will first turn to the conditions for the applicability of the guarantees under Article 6 of the ECHR according to the jurisprudence of the ECtHR. The Appeals Panel recalls that the protections afforded by Article 6(1) of the ECHR apply to a person who is subject to a "criminal charge".[52] The Panel notes that the

[47] SPO Consolidated Response, para. 21.
[48] SPO Consolidated Response, para. 21.
[49] SPO Consolidated Response, para. 21.
[50] SPO Consolidated Response, para. 20.
[51] Krasniqi Reply, para. 14.
[52] See *Simeonovi* Judgment, para. 110; *Ibrahim and Others* Judgment, para. 249. See also *Mahir Hasani* Constitutional Decision, para. 29.

ECtHR has taken a substantive, rather than a formal approach to the question of when a person may be considered as being subject to a criminal charge.[53] The ECtHR has confirmed that a "criminal charge" exists not only from the moment that a person is officially notified by the competent authority of an allegation that he or she has committed a criminal offence, but also from the point at which the person's situation has been "substantially affected".[54] This has been considered to be the case for instance when a person is arrested on suspicion of having committed a criminal offence,[55] when a person is questioned about his or her involvement in acts constituting a criminal offence,[56] or from the moment the person begins to self-incriminate himself or herself[57] or confesses to have committed a crime.[58] The Appeals Panel agrees with Krasniqi that this determination is made irrespective of whether the person is formally treated as a witness and that this status should not be considered a decisive factor.[59] The Panel further considers that the ECtHR's jurisprudence on the applicability of Article 6 guarantees is consistent with its maxim – which it considers of particular relevance to the rights of the defence[60] – that the ECHR "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".[61]

20. The Panel recalls the Trial Panel's holding that "an individual interviewed as a witness is not entitled to the same due process protections as those afforded to a

[53] See *Deweer* Judgment, para. 44. See also *Mahir Hasani* Constitutional Decision, para. 29; Krasniqi Appeal, para. 30.
[54] See *Deweer* Judgment, para. 46; *Ibrahim and Others* Judgment, para. 249; ECtHR, *Eckle v. Germany*, no. 8130/78, Judgment, 15 July 1982, para. 73; *Zaichenko* Judgment, para. 42. See also *Mahir Hasani* Constitutional Decision, para. 30.
[55] ECtHR, *Brusco c. France*, no. 1466/07, Arrêt, 14 October 2010, paras 47-50; *Simeonovi* Judgment, para. 121.
[56] *Zaichenko* Judgment, paras 41-43; *Schmid-Laffer* Judgment, para. 31.
[57] *Ibrahim and Others* Judgment, para. 296 (the ECtHR found that "at that point a suspicion that the [person] had committed a criminal offence had crystallised").
[58] ECtHR, *Yankov and Others v. Bulgaria*, no. 4570/05, Judgment, 23 September 2010, para. 23; ECtHR, *Shabelnik v. Ukraine*, no. 16404/03, Judgment, 19 February 2009, para. 57.
[59] *Kalēja* Judgment, paras 38, 40. See also *Schmid-Laffer* Judgment, paras 29, 31; *Ibrahim and Others* Judgment, para. 296. See Krasniqi Appeal, para. 30.
[60] ECtHR, *Artico v. Italy*, no. 6694/74, Judgment, 13 May 1980 ("*Artico* Judgment"), para. 33.
[61] *Artico* Judgment, para. 33.

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."[62] The Appeals Panel finds that this finding is consistent with the above-mentioned jurisprudence in the sense that the suspect guarantees under Article 6 of the ECHR will become applicable only from the moment a person is considered as a suspect or the moment he or she *should have been* treated as a suspect.

21. The Appeals Panel now turns to whether Krasniqi should have been treated as a suspect and in particular Krasniqi's argument that the Trial Panel erred in considering the ICTY's formal designation of him as a witness to be determinative.[63] The Appeals Panel notes that the Trial Panel foresaw a range of exceptional situations that would favour the allocation of the rights of a suspect to a person brought before the court as a witness, such as in the case of bad faith on the part of the authorities, or situations where responses provided by the person interviewed would provide clear indications of his or her involvement in the commission of a crime.[64] When deciding on the admission of some specific statements or testimony of the four co-Accused, the Trial Panel expressly engaged in considering whether the ICTY Prosecution and/or the SPRK had acted unreasonably or in bad faith in treating the co-Accused as witnesses and considered whether they should have rather been treated as suspects.[65]

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[62] Impugned Decision, para. 129, referring to *Ibrahim and Others* Judgment, para. 270; *Schmid-Laffer* Judgment, paras 29, 39.
[63] See Krasniqi Appeal, para. 29.
[64] See Impugned Decision, para. 129.
[65] See Impugned Decision, paras 129 (with respect to a statement given by Thaçi to the SPRK in November 2011, the Trial Panel stated "there is nothing to suggest that Mr Thaçi's status during the course of his interview should have changed to that of a suspect"), 135 (with respect to a statement given by Thaçi to the ICTY Prosecution in May 2004, "[t]here is no evidence of bad faith on the part of the Prosecutor of the ICTY, nor is it apparent from the record of the interview that Mr Thaçi's responses called for the Prosecutor to revise its position in relation to his status as a witness rather than a suspect"), 141 (with respect to a statement given by Selimi to the SPRK in September 2011, "there has been no showing that the SPRK had acted in bad faith or unreasonably when treating Mr Selimi as a witness rather than a suspect"), 144 (with respect to a statement given by Selimi to the SPRK in June 2013, "the Panel will not try to second guess [the] views [of the investigative authorities] insofar as [t]here is no indication that the investigative authorities acted in bad faith or unreasonably in this instance"), 156 (with respect to a statement given by Selimi to the ICTY Prosecution in April 2004, "[t]he

In the Appeals Panel's view, this demonstrates that the Trial Panel did not treat as determinative the initial designation of the co-Accused as witnesses with respect to this specific evidence.

22. The Panel notes though that the Impugned Decision does not contain such assessment with regard to Krasnqi's ICTY Evidence specifically challenged on appeal. Indeed, the Trial Panel did not elaborate on that point in its reasoning concerning Krasniqi's February 2005 ICTY Trial Testimony, Krasniqi's May 2007 ICTY Trial Testimony and Krasniqi's May 2007 ICTY Witness Statement.[66] However, in the absence of any suggestion of bad faith and/or unreasonableness on behalf of the ICTY prosecuting authorities, and in the absence of any indication that the privilege against self-incrimination was engaged in Krasniqi's interviews and/or statements when that evidence was taken, the Panel finds that the Trial Panel had no reason to elaborate on whether Krasniqi should have been treated as a suspect.

23. In this regard, the Appeals Panel notes that Krasniqi points to no instances in Krasniqi's ICTY Evidence where he was questioned about his involvement in crimes, which, according to the above-mentioned ECtHR jurisprudence, would have triggered the application of Article 6 guarantees.[67] The Panel further takes note of Krasniqi's claim that information allegedly available to the ICTY Prosecution at that time is now being used to support the charges against him and that the ICTY criminal proceedings in which he testified as a witness concern alleged crimes in locations

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Panel finds that there is no indication of bad faith or unreasonableness on the part of the Prosecutor of the ICTY when it decided to treat Mr Selimi as a witness rather than as a suspect in these circumstances"), 168 (with respect to a statement given by Veseli to the SPRK in 2010/2011, "[t]here is no indication of any of the authorities involved having acted in bad faith or unreasonably when treating him as a witness rather than a suspect in the circumstances prevailing at the time"), 191 (with respect to Krasniqi's trial testimony for the SPRK in February 2018, "[t]here is no indication of the SPRK having violated this safeguard or having acted in bad faith or unreasonably when interviewing Mr Krasniqi as a witness rather than a suspect").

[66] See Impugned Decision, paras 194, 200, 204.

[67] See above, para. 19.

overlapping with those he is charged with in the present case.[68] However, the Appeals Panel is not persuaded that this would demonstrate that Krasniqi's situation can be considered as being "substantially affected" at the time his evidence was taken at the ICTY and that he should have been regarded as a suspect at the time within the meaning of Article 6 of the ECHR.[69] Consequently, the Panel sees no error in the Trial Panel's decision not to depart from the designation adopted by the ICTY.[70]

24. In view of the above, the Appeals Panel finds that the Trial Panel did not err in concluding that Krasniqi was not entitled to the guarantees afforded to a suspect at the time he provided Krasniqi's ICTY Evidence.[71] Accordingly, the Appeals Panel dismisses Krasniqi's Third Issue.

B. WHETHER THE TRIAL PANEL ERRED IN ADMITTING KRASNIQI'S ICTY EVIDENCE AND SELIMI'S ICTY AND SPRK EVIDENCE IN VIOLATION OF THEIR RIGHT AGAINST SELF-INCRIMINATION (KRASNIQI'S FIRST ISSUE; SELIMI'S THIRD ISSUE)

1. Submissions of the Parties

25. Krasniqi first submits that his right against self-incrimination was violated due to the manner in which Krasniqi's ICTY Evidence was taken in that he "was compelled to make self-incriminatory statements at the ICTY", under threat of sanction, and without being warned about his right not to incriminate himself.[72] He alleges that nonetheless, the Trial Panel concluded that Krasniqi's ICTY Evidence was voluntary, free of coercion/compulsion and taken in a manner consistent with the standards of international human rights law and therefore admitted it.[73] More specifically, Krasniqi submits that the Trial Panel erred in finding that: (i) Krasniqi's ICTY Evidence was

[68] See Krasniqi Reply, para. 14.
[69] See e.g. *Deweer* Judgment, para. 46; *Zaichenko* Judgment, paras 42-43; *Schmid-Laffer* Judgment, para. 31. Contra Krasniqi Appeal, paras 34-37; Krasniqi Reply, para. 14.
[70] Contra Krasniqi Appeal, paras 29, 33.
[71] See Impugned Decision, paras 194, 200, 204.
[72] Krasniqi Appeal, paras 7, 11, 14, 17, 26. See also Krasniqi Appeal, para. 2; Krasniqi Reply, paras 4, 9.
[73] Krasniqi Appeal, para. 9. See also Krasniqi Appeal, paras 13-14.

voluntary because Krasniqi did not assert his right against self-incrimination;[74] (ii) "the subpoena to appear, solemn declaration and the lack of a self-incrimination warning did not affect the voluntariness of his testimony";[75] and (iii) there was no obligation for the Prosecution at the ICTY to warn Krasniqi about self-incrimination.[76] He adds that he was left in a "cruel trilemma", namely having to choose between self-incrimination, perjury or contempt.[77]

26. Krasniqi further submits that the admission and subsequent use of Krasniqi's ICTY Evidence against him at the Specialist Chambers violates his right against self-incrimination.[78] In his view, this evidence should be excluded as a result.[79] Relying on ICTY and ECtHR case law,[80] Krasniqi argues that the Trial Panel erred in concluding that the full array of warnings for a suspect is not necessary for the admission of a statement which was given by a witness who was not considered a suspect at the time.[81]

27. Krasniqi finally contends that the Trial Panel erred in justifying the admission of Krasniqi's ICTY Evidence on the ground that the protection of Rule 90(E) of the ICTY Rules does not have extra-judicial effect so as to prevent its use before the Specialist Chambers.[82] While mindful that Rule 90(E) of the ICTY Rules is not applicable before the Specialist Chambers, he claims that he is placed in a "lacuna"

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[74] Krasniqi Appeal, paras 10, 12. See also Krasniqi Reply, para. 6.
[75] Krasniqi Appeal, para. 10. See also Krasniqi Appeal, paras 13-15; Krasniqi Reply, paras 4-5, 9.
[76] Krasniqi Appeal, paras 10, 12. See also Krasniqi Reply, paras 5-7.
[77] Krasniqi Appeal, para. 14. See also Krasniqi Reply, para. 5, where Krasniqi claims that he had "no real choice" but to confirm the truthfulness of his previous testimonies.
[78] Krasniqi Appeal, paras 17, 22. See also Krasniqi Appeal, paras 4, 24.
[79] Krasniqi Appeal, paras 26, 52.
[80] Krasniqi Appeal, paras 17-21, referring to ECtHR, *Saunders v. The United Kingdom*, no. 19187/91, Judgment, 17 December 1996 ("*Saunders* Judgment"), paras 60, 68-70, 74-75; ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997 ("*Delalić et al*. Trial Chamber Decision"), paras 48-52, 55; ICTY, *Prosecutor v. Halilović*, IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005 ("*Halilović* Trial Chamber Decision"), para. 21.
[81] Krasniqi Appeal, para. 22. See also Krasniqi Appeal, paras 10, 16.
[82] Krasniqi Appeal, para. 23. See also Krasniqi Appeal, paras 24-25.

where he is not protected by that provision because he is not before the ICTY, and he is not protected by the Specialist Chambers' Rules because the evidence was not obtained by the Specialist Chambers.[83]

28. Selimi prefaces his submissions with the assertion that none of the items of Selimi's ICTY and SPRK Evidence were obtained in a manner consistent with the rights of a suspect.[84] In his view, the Trial Panel erred in law by failing to articulate the correct legal standard for situations in which the use against an individual of previous potentially self-incriminatory testimony would violate their fair trial rights.[85] He argues that this error invalidates the Impugned Decision, and asks the Appeals Panel to reverse the Impugned Decision in relation to the admission of Selimi's ICTY and SPRK Evidence, articulate the correct legal standard and apply it to the question of their admission.[86]

29. More specifically, Selimi first contends that the use of compelled self-incriminating testimony is prohibited by international criminal tribunals.[87] He adds that such use may result in a finding of violation of Article 6 of the ECHR.[88] While specifying that he is not arguing that Rule 90(E) of the ICTY Rules should be directly applied to the present proceedings, Selimi submits that the Trial Panel took an unjustifiably narrow interpretation in finding that Rule 90(E) of the ICTY Rules did

[83] Krasniqi Appeal, paras 23-24.
[84] Selimi Appeal, paras 2, 7-11. See also Selimi Appeal, paras 43-44. See further Selimi Reply, paras 6-7, where Selimi alleges that the mere fact that he was assisted by counsel does not render the admission of Selimi's ICTY and SPRK Evidence in compliance with the right to silence and the privilege against self-incrimination. He further alleges that it is the admission of evidence collected under precisely these circumstances that led the ECtHR, in *Saunders*, to find a violation of Article 6 of the ECHR.
[85] Selimi Appeal, para. 42.
[86] Selimi Appeal, paras 42-46.
[87] Selimi Appeal, paras 11-14. See also Selimi Appeal, para. 43. Selimi makes further submissions on the "standard" in the jurisprudence of the ECtHR to determine the existence of compulsion. See Selimi Appeal, paras 15-17, 20. See also Selimi Appeal, paras 18-19.
[88] Selimi Appeal, paras 16-17, referring to *Saunders* Judgment; ECtHR, *Kansal v. The United Kingdom*, no. 21413/02, Judgment, 27 April 2004 ("*Kansal* Judgment"). See also Selimi Reply, para. 14.

not and was not intended to have extra-judicial effect.[89] In his view, Rule 90(E) of the ICTY Rules and Rule 151(3)(b) of the Rules reflect a universal fair trial rights standard that "the testimony of a witness compelled to give evidence in violation of his right to silence and against self-incrimination cannot be used against that witness should they become an Accused".[90]

30. Second, Selimi argues that previous witness statements may only be used against an accused if the requisite suspect warnings and guarantees have been accorded.[91] Selimi submits that the Trial Panel erroneously discarded international jurisprudence that confirms this position on the basis of a series of distinguishing factors that are "both legally arbitrary and factually inaccurate".[92] In this regard, Selimi refers to ICTY and ECtHR jurisprudence wherein he contends that chambers determined that "in the absence of [Article 6] guarantees, […] evidence cannot be admitted."[93] Additionally, Selimi submits that a statement given as a witness may only be admitted against an individual where a valid waiver of the right against self-incrimination and the right to silence can be shown and such a waiver presupposes that the witness was "aware of the existence of this right and the consequences deriving from possible waiver of this right".[94] Further, he contends that, contrary to the Trial Panel's finding that his evidence was voluntary, free of coercion

[89] Selimi Appeal, paras 12, 21-26; Selimi Reply, paras 10-11.
[90] Selimi Appeal, paras 14, 22-23. See also Selimi Reply, para. 11.
[91] Selimi Appeal, paras 11, 27-33, 41. See also Selimi Appeal, paras 4-5, 10, 44; Selimi Reply, para. 3.
[92] Selimi Appeal, paras 34-41. See also Selimi Appeal, para. 45; Selimi Reply, para. 15.
[93] Selimi Appeal, paras 27 (referring to *Halilović* Trial Chamber Decision), 28 (referring to ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of Naletelić and Martinović, 5 September 2007 ("*Prlić et al.* Trial Chamber Decision")), 31 (referring to *Delalić et al*. Trial Chamber Decision), 32 (referring to ECtHR, *Lutsenko v. Ukraine*, no. 30663/04, Judgment, 18 December 2008 ("*Lutsenko* Judgment")), 33 (referring to *Schmid-Laffer* Judgment).
[94] Selimi Appeal, para. 29, referring to *Prlić et al.* Trial Chamber Decision, para. 19.

and improper compulsion, testifying voluntarily, without duress does not constitute a valid waiver.[95]

31. The SPO responds that Selimi fails to discharge his burden on appeal by making generalised submissions that he claims apply to all of the evidence comprising Selimi's ICTY and SPRK Evidence and by failing to adequately engage with the Panel's careful, item-by-item analysis and findings.[96] Likewise, with respect to Krasniqi, the SPO argues that his arguments frequently do not distinguish between circumstances in which different ICTY statements were taken and, at times, misstates the record.[97] The SPO submits that Krasniqi's ICTY Evidence and Selimi's ICTY and SPRK Evidence was given voluntarily, free from improper compulsion and obtained in accordance with international standards.[98] It further argues that, contrary to the Defence's submissions, the right against self-incrimination does not protect a person against the making of any incriminating statement and the use of compelled self-incriminatory evidence is not prohibited *per se* at the Specialist Chambers, international tribunals or by the ECtHR, but it is rather the existence of *improper* compulsion which raises concerns about the voluntary nature of the evidence and its impact on the right against self-incrimination.[99] The SPO adds that the ECtHR jurisprudence to which Krasniqi and Selimi refer on the topic of compulsion is further distinguishable in that it relates to self-incriminating evidence which was sought to be

[95] Selimi Appeal, para. 30, referring to Impugned Decision, paras 141, 144, 147, 150, 153, 156, 161; *Prlić et al.* Trial Chamber Decision, para. 20. See also Selimi Reply, para. 8.
[96] SPO Consolidated Response, para. 33. The SPO adds that both during his SPO interview as a suspect 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 statements, including in those provided to the ICTY. See SPO Consolidated Response, para. 33.
[97] SPO Consolidated Response, paras 6, 18.
[98] SPO Consolidated Response, paras 6, 12, 17, 27, 31, 33, 37. See also SPO Consolidated Response, paras 7-11. The SPO adds that neither the Specialist Chambers nor the SPO applied any compulsion in order to produce Selimi's ICTY and SPRK Evidence. See SPO Consolidated Response, para. 36.
[99] SPO Consolidated Response, paras 17, 36. See also SPO Consolidated Response, paras 16, 38.

used by the same judicial body or authorities which had compelled it, including in cases where the witness was or should have been treated as a suspect.[100]

32. The SPO also argues that contrary to Krasniqi's argument, Rule 90(E) of the ICTY Rules functioned independently of any prior notice to its witnesses and such notice was not required.[101] Concerning the extra-judicial effect of Rule 90(E) of the ICTY Rules, the SPO responds that the Trial Panel correctly held that this provision does not purport, nor has it been interpreted, to "offer protection against any prosecutions other than those before the ICTY".[102] The SPO adds that the Trial Panel refused to certify Selimi's proposed issue in that respect, and that his related arguments should be summarily dismissed.[103] The SPO further responds that none of the cases to which Krasniqi and Selimi refer support an international standard precluding the admission of a statement against an accused that was taken as a witness or the admission of compelled self-incriminatory evidence between jurisdictions.[104]

33. Concerning the use and admissibility of prior witness evidence, the SPO submits that Selimi's argument that the rights to which he would now be entitled as a suspect or an accused should apply retroactively to statements he made as a witness is unsupported and should fail.[105] The SPO contends that the ICTY cases cited by the Defence are "irrelevant and/or distinguishable" and that the ECtHR *Saunders* case is distinguishable from the present case in that it involved a self-incriminatory

[100] SPO Consolidated Response, paras 16, 35. See also SPO Consolidated Response, para. 14.
[101] SPO Consolidated Response, para. 13.
[102] SPO Consolidated Response, para. 35. See also SPO Consolidated Response, para. 14. The SPO adds that the same applies to Rule 151(3)(b) of the Rules. See SPO Consolidated Response, para. 35.
[103] SPO Consolidated Response, para. 34.
[104] SPO Consolidated Response, paras 14, 38. See also SPO Consolidated Response, para. 20.
[105] SPO Consolidated Response, paras 39, 41. Moreover, the SPO contends that nothing in the appeal or in the underlying facts suggests that the ICTY or the SPRK labelled, treated or should have treated Selimi as a suspect. See SPO Consolidated Response, para. 40.

deposition given by a witness which was sought to be used by the prosecution in the same case.[106]

34. Finally, the SPO submits that even if, *arguendo*, a limited violation were to be found, admission of the challenged evidence is in the interests of justice and fair.[107]

35. Concerning the SPO's argument that he failed to discharge his burden on appeal by making generalised submissions, Selimi replies that he has "identified the procedural particularities" of the Selimi's ICTY and SPRK Evidence and adds that the SPO fails to show why he would be required to address each individual statement as opposed to raising arguments that address all of their relevant shared characteristics.[108] Regarding the scope of application of Rule 90(E) of the ICTY Rules, Selimi replies that, contrary to the SPO's contention, the issue he had put forward which was denied certification dealt exclusively with the question of the resulting prejudice while the Selimi's Third Issue concerns whether the admission of that evidence comports with his rights as an Accused.[109] He claims that none of the authorities cited in the Impugned Decision suggest that a fair trial right violation would be permissible if occurring in an extra-jurisdictional context.[110]

36. Selimi also clarifies that his appeal is not arguing that he should have been accorded the relevant guarantees at the time Selimi's ICTY and SPRK Evidence was collected. Rather, he is arguing that the *admission* of this evidence against him in the present proceedings may occasion a violation.[111]

[106] SPO Consolidated Response, para. 40. See also SPO Consolidated Response, para. 14.
[107] SPO Consolidated Response, para. 3.
[108] Selimi Reply, para. 5.
[109] Selimi Reply, paras 9-10.
[110] Selimi Reply, para. 11. See also Selimi Reply, para. 12.
[111] Selimi Reply, para. 3. See also Selimi Appeal, para. 10.

37. Selimi and Krasniqi both further reply that contrary to the SPO's claim, the ECtHR *Saunders* case involved "different authorities" for the purpose of the Impugned Decision and is thus indistinguishable from the present situation.[112]

2. Assessment of the Court of Appeals Panel

38. As a preliminary matter, the Appeals Panel has considered the SPO's argument that, Selimi, and, to a certain extent, Krasniqi, have failed to engage with the Trial Panel's careful, item-by-item analysis, instead opting for generalised submissions.[113] The Appeals Panel notes that its ability to assess a party's arguments depends on the latter presenting its case clearly, logically and exhaustively.[114] While the Appeals Panel considers that it would have been preferable for the Accused to have more clearly delineated, on an item-by-item basis, the circumstances in which the individual pieces of evidence were collected that, in their view, gave rise to the Trial Panel's alleged errors, the Appeals Panel considers that their submissions are sufficient for it to conduct the necessary assessment.

39. The Appeals Panel will first address the Accused's claim that Krasniqi's and Selimi's evidence was taken in a manner inconsistent with the rights of a *suspect*.[115] At the outset, the Appeals Panel notes that Selimi does not argue that he was entitled to suspect guarantees at the time that he gave his ICTY or SPRK evidence.[116] As to Krasniqi, the Panel recalls its finding above that the Trial Panel did not err in not treating him as a suspect when he gave his ICTY Evidence.[117] Regardless of whether some or the totality of the suspect guarantees – as encompassed *inter alia* in

[112] Krasniqi Reply, para. 8; Selimi Reply, para. 13.
[113] SPO Consolidated Response, para. 33. See also SPO Consolidated Response, paras 6, 18.
[114] *Gucati and Haradinaj* Appeal Judgment, para. 29.
[115] See Krasniqi Appeal, paras 7-15; Selimi Appeal, paras 7-9.
[116] Selimi Appeal, para. 10; Selimi Reply, para. 3. See also SPO Consolidated Response, para. 32.
[117] See above, para. 24.

Article 38(3) of the Law and Rules 42 to 44 of the Rules[118] – were not accorded to Krasniqi and Selimi when they provided evidence, they were not entitled to such guarantees at the time as Article 6 of the ECHR was not applicable to them as witnesses. As a result, the fact that these guarantees were not afforded to them at the time does not constitute in itself a violation of standards of international human rights law pursuant to Rule 138(2) of the Rules. In that sense, the Appeals Panel sees no error in the Trial Panel's holding that the ICTY was under no obligation to inform Krasniqi and Selimi about their privilege against self-incrimination as they were regarded as witnesses and not suspects.[119] Consequently, it is not necessary for the Appeals Panel to engage in assessing whether the Accused were deprived of all or some of the suspects' guarantees when they gave their ICTY and SPRK evidence for each of their statements and/or testimony challenged on appeal. The Panel dismisses Krasniqi's and Selimi's arguments in that respect.

40. That being said, the Panel notes that the Trial Panel still needs to ensure that evidence was obtained in compliance with the minimal guarantees afforded to a *witness* under the relevant legal frameworks and that the witness was not improperly compelled to give evidence that may be deemed self-incriminatory, in order to be able to conclude that the first limb of the test under Rule 138(2) of the Rules is satisfied.

41. Concerning the protection afforded to witnesses under Rule 90(E) of the ICTY Rules,[120] the Panel observes that when they gave the Krasniqi's May 2007 ICTY Trial

[118] The Panel recalls that pursuant to Article 6 of the ECHR, and as encompassed *inter alia* in Article 38(3) of the Law and Rules 42 to 44 of the Rules, a suspect (i) is entitled to be informed of the nature and cause of the accusations against him or her promptly, in a language which he or she understands; (ii) has the right to be notified of the privilege against self-incrimination and the right to remain silent; and (iii) should be granted access to legal assistance from the moment there is a criminal charge against him or her. See also Impugned Decision, para. 17.

[119] The Panel recalls that guarantees under Article 6 of the ECHR become applicable only from the moment when the witness is considered as a suspect or the moment he or she should have been treated as a suspect. See above, paras 19-20.

[120] Rule 90(E) of the ICTY Rules reads: "[a] witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the

Testimony, Krasniqi's February 2005 ICTY Trial Testimony and Selimi's May 2005 ICTY Trial Testimony, it does not seem to be disputed that Krasniqi and Selimi were not expressly notified of the procedure foreseen under Rule 90(E) of the ICTY Rules.[121] On its face, the provision does not require prior notice to be given to the witnesses.[122] By contrast, the Panel observes that Rule 151(1) of the Rules as well as Article 129 of the 2012 KCPC – applicable when Selimi provided evidence to the SPRK – and Article 126 of the 2022 Kosovo Code of Criminal Procedure, contain such a requirement to notify the witnesses of the possibility to object to providing self-incriminating evidence.[123] The Panel is of the view that to ensure the full effectivity of the protections afforded under Rule 90(E) of the ICTY Rules, it would have been preferable if Krasniqi and Selimi had been notified of this provision ahead of their testimony before the ICTY. However, they point to no instances where, had they received such notification, they would have triggered the Rule and objected to the provision of evidence on the ground of potential self-incrimination. Therefore, the Appeals Panel considers that the absence of prior notification does not in itself constitute a violation of the Accused's rights as witnesses.

42. As to Krasniqi's argument that the combination of the solemn declaration and the subpoena affected the voluntariness of his evidence,[124] the Appeals Panel first

question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony".

[121] See Krasniqi Reply, para. 4; Selimi Appeal, para. 9. By contrast, the Appeals Panel notes that with regard to the SPRK evidence challenged on appeal, Selimi was notified pursuant to Articles 125 and 129 of the 2012 Kosovo Criminal Procedure Code of the Republic of Kosovo ("2012 KCPC"). See Impugned Decision, paras 141, 144, 147, 150, 153.

[122] See Impugned Decision, para. 159. See also *Prlić et al.* Trial Chamber Decision, para. 18. Contra Krasniqi Appeal, para. 12.

[123] The Appeals Panel further notes that Rule 151(3) of the Rules provides that "[w]here the Panel decides to compel a witness to testify, it may determine that an assurance with respect to self-incrimination should be provided prior to the testimony of the witness […]. It shall assure the witness that the evidence provided in response to questions: […] (b) will not be used either directly or indirectly against that person in any subsequent prosecution before the Specialist Chambers, except under Article 15(2) of the Law and Rule 65".

[124] See Krasniqi Appeal, paras 12-15.

recalls that (i) the privilege against self-incrimination does not protect against making an incriminating statement *per se* but against providing evidence by coercion or oppression,[125] and (ii) it is when the degree of compulsion involved destroys the very essence of the privilege against self-incrimination that Article 6 of the ECHR is violated.[126] In that regard, the Panel considers that the fact that a person makes a solemn declaration to tell the truth neither constitutes improper compulsion nor compels the person to renounce to his or her privilege against self-incrimination.[127] Likewise, with respect to a subpoena, the Panel considers that it clearly contains a degree of compulsion as the person must appear before the court under threat of a sanction. However, the Panel agrees with the Trial Panel that a person is not compelled to give self-incriminatory evidence by reason of the fact that he or she was subpoenaed to appear before the court.[128] On that basis, the Panel finds that the sole fact that Krasniqi was subpoenaed to appear before the ICTY and had to make a

[125] See *Ibrahim and Others* Judgment, para. 267. See also IA024/F00019, Decision on Defence Appeals against "Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant" 27 December 2022 ("*Thaçi et al.* Appeal Decision"), para. 57.

[126] See *Ibrahim and Others* Judgment, para. 267. See also *Mahir Hasani* Constitutional Decision, para. 33. The ECtHR jurisprudence has identified three kinds of situations giving rise to concerns as to improper compulsion: (i) where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify; (ii) where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the ECHR, is applied to obtain real evidence or statements; and (iii) where the authorities use subterfuge to elicit information that they were unable to obtain during questioning. See *Ibrahim and Others* Judgment, para. 267. See also *Thaçi et al.* Appeal Decision, fn. 162.

[127] See ECtHR, *Serves v. France*, no. 82/1996/671/893, Judgment, 20 October 1997, para. 47 (where the ECtHR stated that "[w]hilst a witness's obligation to take the oath and the penalties imposed for failure to do so involve a degree of coercion, the latter is designed to ensure that any statements made to the judge are truthful, not to force witnesses to give evidence" and that the main question is whether it "amounted to coercion such as to render [the applicant's] right not to incriminate himself ineffective"). See also Impugned Decision, para. 204.

[128] See Impugned Decision, para. 200. While the compulsion of an accused's testimony in his own proceedings is prohibited, there is no general prohibition of the possibility for an accused being compelled to testify in other proceedings where he would not be considered as suspect. See ICTY, *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* Appeal Decision"), para. 36.

solemn declaration before testifying did not constitute improper compulsion to give incriminating evidence.[129]

43. The Panel will now turn to determine whether the admission of Krasniqi's ICTY Evidence and Selimi's ICTY and SPRK Evidence is consistent with the fair trial rights guaranteed under Article 6 of the ECHR – as encompassed in, *inter alia*, Articles 21 and 38(3) of the Law, Rules 42 to 44 of the Rules and Article 30 of the Constitution – rights to which Krasniqi and Selimi are now entitled in their capacity as accused in the present proceedings before the Specialist Chambers.[130]

44. The Appeals Panel notes that in the *Saunders* case, which concerned compelled evidence given by a witness in a non-criminal administrative investigation later used against him once he became an accused in a criminal trial, the ECtHR considered that, while such an investigation was not subject to the fair trial guarantees of Article 6 of the ECHR, the subsequent use of that evidence against the applicant infringed his right not to incriminate himself.[131] Similarly, in the *Lutsenko* case, the ECtHR examined whether the use of a confessional witness deposition in subsequent criminal proceedings against another person was consistent with the fairness requirements under Article 6 of the ECHR and found that this evidence, obtained in the absence of procedural guarantees, should have been treated with "extreme caution".[132]

45. At the outset, the Appeals Panel is mindful that this ECtHR jurisprudence relates to the *use* of the evidence rather than its *admission*.[133] The Panel is not in a

[129] See Impugned Decision, para. 200.
[130] To the extent the Accused would draw a distinction between testimony and statements in their submissions, the Panel finds that the type of evidence concerned (whether a testimony or a statement) has no bearing on an accused's entitlement to the guarantees under Article 6 of the ECHR.
[131] *Saunders* Judgment, paras 60, 67, 69-70, 75-76.
[132] *Lutsenko* Judgment, paras 47, 50-53. The ECtHR considered that "[a]lthough the issue in the present case is not the conviction of the author of the [compelled deposition], but that of his co-accused, the Court finds that the underlying principles are broadly similar." See *Lutsenko* Judgment, para. 51.
[133] Rules governing admissibility of evidence are primarily a matter for regulation under national law and it is not the role of the ECtHR to determine, as a matter of principle, whether a particular type of evidence may be admissible. See *Lutsenko* Judgment, para. 42 and references cited therein.

position to assess how Krasniqi's ICTY Evidence and Selimi's ICTY and SPRK Evidence will ultimately be used.[134] That being said, while bearing in mind the different role of the Appeals Panel as compared to the ECtHR,[135] the Appeals Panel considers that this ECtHR jurisprudence is directly relevant to the application of Rule 138 of the Rules[136] to determine whether Krasniqi's ICTY Evidence and Selimi's ICTY and SPRK Evidence should be excluded.[137]

46. Moreover, in line with this ECtHR jurisprudence, the Appeals Panel notes that ICTY trial chambers have similarly considered situations involving the admission of evidence given by witnesses who later became accused before the ICTY, and against whom the ICTY Prosecution sought to admit the previously proffered evidence. In these cases, the ICTY trial chambers assessed whether the rights of the accused were sufficiently protected in such circumstances.[138]

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[134] The Panel observes that in deciding whether Article 6 of the ECHR had been violated, the ECtHR also took into account whether the evidence was used "to a decisive degree" in the relevant conviction, thus compromising the proceedings as a whole. See *Lutsenko* Judgment, paras 52-53. See also *Kansal* Judgment, para. 29; *Ibrahim and Others* Judgment, para. 309; *Schmid-Laffer* Judgment, paras 39-40; *Saunders* Judgment, para. 72.

[135] See similarly, *Shala* Appeal Decision, para. 77.

[136] The Panel recalls that Rule 138 of the Rules foresees the potential impact of admitting evidence in terms of fair trial rights.

[137] In the context of the Impugned Decision, the plain purpose of admitting Krasniqi's and Selimi's evidence is to allow the SPO to subsequently use this evidence in relation to allegations against the Accused. See Impugned Decision, paras 140, 143, 146, 149, 152, 155, 158, 193, 199, 203 (recalling the allegations in relation to which the SPO intends to rely on Krasniqi's ICTY Evidence and Selimi's ICTY and SPRK Evidence).

[138] *Prlić et al.* Trial Chamber Decision, paras 13-16, 21-22 (where the ICTY Trial Chamber denied the admission into evidence of Praljak's witness testimony on the ground that his minimum rights as an Accused were not sufficiently protected at the time he testified since he had not been informed of his right not to incriminate himself and of the possibility to remain silent. The Trial Chamber found that it could not assume that Praljak was aware of this right and it did not have the guarantee that he waived his right to remain silent at the time he testified); *Halilović* Trial Chamber Decision, para. 21 (where the ICTY Trial Chamber reasoned that "in order to protect the right of the Accused to a fair trial, in accordance with Article 21 of the Statute, it should be taken into account whether the safeguards of Rules 42, 43 and 63 of the Rules have been fully respected when deciding on the admission of *any* former statement of an accused irrespective of the status of the accused at the time of taking the statements"). In that case, the accused had in fact been advised of the suspect rights prior to his questioning. The ICTY Trial Chamber ultimately decided not to admit his statement, but on different grounds: since the statement was not audio or video recorded, the Trial Chamber was not satisfied that the statement

47. In the Panel's view, this jurisprudence, in particular the ECtHR jurisprudence, indicates that a decision whether to admit potentially self-incriminatory evidence previously given by a witness, and therefore in the absence of Article 6 guarantees, should take into consideration the privilege against self-incrimination to which the accused is *now* entitled.

48. However, contrary to Selimi's contention, this does not mean that witness evidence cannot be admitted if obtained in the absence of Article 6 guarantees or that previous witness statements can only be used against an accused if the requisite suspect warnings and guarantees were previously accorded.[139] In the Panel's view, what is rather required is an assessment of the consequences of the admission of evidence obtained in these circumstances in terms of the right against self-incrimination the individual now enjoys as an accused. Furthermore, the Panel considers that the ECtHR jurisprudence does not entail a general ban on the admission of a statement against an accused that was taken as a witness.

49. The Appeals Panel will now turn to whether the Trial Panel erred in finding that this ECtHR and ICTY jurisprudence is inapplicable and/or materially distinguishable from the present case.[140] The Panel observes that the Trial Panel considered that the *Halilović* Trial Chamber Decision and *Prlić et al*. Trial Chamber Decision were not precedents applicable to the present circumstances on the basis that the evidence at issue originated from the same institution being asked to admit it.[141] In the Trial Panel's view, in those instances, the tendering party would have been in a position to guarantee the rights of the persons concerned because it was involved in

represented "a full and complete record of what Sefer Halilovic said" and found that its reliability was therefore affected. See *Halilović* Trial Chamber Decision, paras 22, 24-26. See also Selimi Appeal, paras 27-28.

[139] See Selimi Appeal, paras 11, 31-33, 41.

[140] See SPO Consolidated Response, para. 40; Impugned Decision, para. 160.

[141] Impugned Decision, para. 160.

the collection and production of that evidence.[142] The Appeals Panel notes that the Trial Panel did not provide any references in support of its position and considers that such a position does not find support in the jurisprudence of the ECtHR.[143] For the same reasons, the Appeals Panel dismisses the SPO's contention that the ECtHR *Saunders* and *Lutsenko* jurisprudence would be distinguishable on the ground that it involves evidence which was sought to be used by the same authority which had compelled it.[144] In the Appeals Panel's view, despite the fact that the same authorities were involved,[145] this ECtHR jurisprudence remains entirely relevant and applicable to the present case as the fact that the evidence challenged on appeal was collected in one jurisdiction and later used by another jurisdiction should have no bearing on the rights of the Accused.

50. Moreover, as to whether the cases are materially distinguishable, the Appeals Panel notes that the Trial Panel considered that the circumstances of the *Halilović* case were distinguishable in that the concerned piece of evidence was collected after Halilović had already been charged by the ICTY.[146] The Trial Panel failed to address the *Halilović* Trial Chamber Decision – relied upon by Selimi and upheld in relevant part by the ICTY Appeals Chamber[147] – in its reasoning dismissing the Defence's submissions. The Appeals Panel observes that, contrary to the Trial Panel's finding,[148] Halilović was not a suspect when the concerned evidence in this decision was

[142] Impugned Decision, para. 160.
[143] See in this regard, *Delalić et al*. Trial Chamber Decision, paras 22-23, 43.
[144] See SPO Consolidated Response, paras 14, 16, 35, 40.
[145] Contra Krasniqi Reply, para. 8; Selimi Reply, para. 13.
[146] Impugned Decision, para. 160.
[147] ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Judgement, 16 October 2007, para. 36.
[148] See Impugned Decision, para. 160. The Appeals Panel notes that when making this finding, the Trial Panel seems to have erroneously relied on another decision in the *Halilović* case where Halilović had already been indicted, and to which Krasniqi had referred in his submissions before the Trial Panel. *Compare* Impugned Decision, fns 456-457 and Krasniqi Response, para. 25, fn. 52, both referring to ICTY, *Prosecutor v. Halilović*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005 *with* Impugned Decision, fn. 456 and Selimi Response, para. 50, fn. 45, both referring to *Halilović* Trial Chamber Decision.

collected by the ICTY Prosecution.[149] Consequently, the Appeals Panel agrees with the Defence that the Trial Panel overlooked this relevant decision when it found that the *Halilović* case was distinguishable from the present circumstances because it concerned a suspect and not a witness.[150]

51. The Panel will now assess whether the Trial Panel's decision to admit Krasniqi's ICTY Evidence and Selimi's ICTY and SPRK Evidence conformed to the principle set out above, namely the need to assess whether the admission of this evidence, obtained in the absence of Article 6 guarantees, infringes the Accused's privilege against self-incrimination to which they are now entitled.[151] The Panel recalls that when deciding to admit Krasniqi's ICTY Evidence and Selimi's ICTY and SPRK Evidence, the Trial Panel repeatedly held 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".[152] In the Panel's view, this finding reflects a misinterpretation of the relevant legal standards established by the ECtHR. While, as found above,[153] there is no requirement to provide such warnings to a witness at the time he or she gives evidence, the admission of this evidence in subsequent proceedings might still infringe the rights of the accused against self-incrimination precisely because of the circumstances under which it was taken at the time, when these warnings were not applicable.[154]

52. The Panel notes that under Rule 138(1) of the Rules, the Trial Panel found that the probative value of that evidence was not outweighed by its prejudicial effect on

[149] *Halilović* Trial Chamber Decision, para. 21. See also Selimi Appeal, paras 39-40.
[150] See Selimi Appeal, para. 40. Contra SPO Consolidated Response, para. 40. The Panel recalls however that the ICTY Trial Chamber decided not to admit Halilović statement for different reasons, namely that it lacked sufficient reliability because it had not been audio or video recorded. See *Halilović* Trial Chamber Decision, paras 22, 24-26. See also above, fn. 138.
[151] See above, paras 44-47.
[152] See Impugned Decision, paras 141, 144, 147, 150, 153, 156, 159, 194, 200, 204.
[153] See above, para. 39.
[154] See above, paras 44, 47.

the basis that "the Defence will have the opportunity to present evidence to challenge [it]".[155] As to Rule 138(2) of the Rules, the Trial Panel limited its assessment to whether the evidence was given voluntarily and free of coercion and improper compulsion.[156] The Appeals Panel observes that the Trial Panel did not examine the impact of the non-applicability of Article 6 guarantees at the time on the right against self-incrimination that Krasniqi and Selimi are now entitled to as accused before the Specialist Chambers and whether the admission of this evidence could violate this right.

53. While mindful of the broad discretion afforded to the Trial Panel in deciding whether to admit evidence,[157] the Appeals Panel considers that the Trial Panel should have assessed whether the admission against an accused of previous potentially self-incriminatory evidence that was taken as a witness and obtained in the absence of Article 6 guarantees now violates the Accused's right against self-incrimination and as such entails a violation of the standards of international human rights law under Rule 138(2) of the Rules. In failing to conduct this assessment, the Panel finds that the Trial Panel committed a discernible error in failing to apply the correct legal standard to the admission of evidence against an accused of previous potentially self-incriminatory evidence that was taken as a witness. The impact, if any, of this finding of error will be assessed below.[158]

54. Finally, with respect to the scope of application of Rule 90(E) of the ICTY Rules,[159] the Panel sees no error in the Trial Panel's finding that this provision did not

[155] Impugned Decision, paras 141, 144, 147, 150, 153, 156, 161, 196, 200, 204.
[156] See Impugned Decision, paras 141, 144, 147, 150, 153, 156, 161, 194, 200, 204.
[157] See above, para. 6.
[158] See below, para. 55.
[159] Contrary to the SPO's contention, the Panel does not find that this argument falls outside the scope of the Certified Issues. See SPO Consolidated Response, para. 34; Selimi Reply, paras 9-10. The Panel notes that Selimi's fourth issue, for which certification was denied, concerned the distinct issue of the prejudice resulting from the admission of the evidence. See Certification Decision, paras 8(4), 78-82.

and was not intended to have extra-jurisdictional effect.[160] The Panel further notes that it is not disputed by the Defence that Rule 90(E) of the ICTY Rules does not apply before the Specialist Chambers.[161] The Appeals Panel observes that, as for the ICTY, the legal frameworks of the Specialist Chambers and the International Criminal Court ("ICC") contain similar provisions providing for immunity from prosecution and the general prohibition against the subsequent use of witness evidence compelled in that way, namely when the witness is required by the chamber to answer questions which might incriminate him or her.[162] However, the present appeal involves no such situation,[163] because the application of Rule 90(E) of the ICTY Rules was never triggered in the context of Krasniqi's and Selimi's evidence before the ICTY – where none of the Accused refused to provide evidence on the ground of potential self-incrimination concerns while being compelled by a chamber to give that evidence.[164]

55. The Appeals Panel will now address the impact of the finding of error concerning the Trial Panel's admissibility assessment under Rule 138(2) of the Rules on the Impugned Decision.[165] While the Trial Panel did not engage in assessing the impact of the admission of Krasniqi's ICTY Evidence and Selimi's ICTY and SPRK Evidence on the Accused's privilege against self-incrimination to which they are now entitled, the Appeals Panel first notes that Krasniqi and Selimi point to no instances in their evidence which according to them would have triggered their privilege against self-incrimination and/or where they were questioned on their direct

[160] Impugned Decision, para. 159.
[161] See Krasniqi Appeal, para. 24; Selimi Appeal, para. 23.
[162] See Rule 151(3)(b) of the Rules; Rule 74(3) of the ICC Rules. See also *Karadžić* Appeal Decision, paras 41-45. See similarly, *Kansal* Judgment, paras 27-29.
[163] In the event of such a scenario, the Panels would find it highly concerning in terms of effectiveness of ECHR guarantees if the immunity from prosecution guaranteed under these provisions with regard to evidence compelled in these circumstances were no longer afforded on the sole basis that it would be admitted and used in criminal proceedings before a different jurisdiction. In the Panel's view, although these provisions are neither applicable nor binding on the Specialist Chambers, Judges should be mindful of these considerations when deciding whether to admit and/or rely upon evidence originating from a different jurisdiction that would have been compelled in that way.
[164] See above, para. 41.
[165] See Article 46(4) of the Law; *Gucati* Appeal Decision, paras 7, 10.

involvement in the commission of crimes they are now charged with. The Panel further observes that at no point did the Accused refuse to provide evidence on the ground of potential self-incrimination concerns. After having carefully reviewed Krasniqi's ICTY Evidence and Selimi's ICTY and SPRK Evidence and assessed whether it should be excluded in light of its impact on the right of the Accused not to incriminate themselves, the Appeals Panel is not persuaded that the admission of this evidence, in itself, amounts to a violation of Krasniqi's and Selimi's privilege against self-incrimination. Furthermore, while mindful that caution will be required when deciding what weight, if any, to give to this evidence,[166] the Appeals Panel considers that the Trial Panel, composed of professional, experienced Judges, can be expected to use the evidence with the appropriate care.

56. In light of the foregoing, the Panel concludes that the Trial Panel's error does not invalidate its overall conclusion that Krasniqi's ICTY Evidence and Selimi's ICTY and SPRK Evidence should not be excluded and does not impact the outcome of the Impugned Decision. Consequently, the Appeals Panel dismisses Krasniqi's First Issue and Selimi's Third Issue.

C. WHETHER THE TRIAL PANEL ERRED IN ADMITTING KRASNIQI'S CO-ACCUSED'S STATEMENTS (KRASNIQI'S NINTH ISSUE)

1. Submissions of the Parties

57. Krasniqi argues that the Trial Panel's admission of statements of his co-Accused violates his right to confront the evidence against him pursuant to Article 21(4)(f) of the Law.[167] He argues that as his co-Accused are not SPO witnesses, they are not required to give evidence or be cross-examined.[168] According to Krasniqi, other

[166] See *Lutsenko* Judgment, para. 51. See also Impugned Decision, paras 218-219.
[167] Krasniqi Appeal, paras 39-40, 45, 51. See also Krasniqi Reply, para. 2.
[168] Krasniqi Appeal, para. 40.

international courts and tribunals have excluded prior statements of co-accused based on these considerations.[169]

58. Krasniqi further argues that the Trial Panel, having noted the absence of any other specific rule regarding the admission of prior statements of co-accused, erred by applying Rule 138(1) of the Rules.[170] According to Krasniqi, given that Rules 141, 153 and 155 of the Rules are not applicable as the co-Accused are not SPO witnesses or unavailable, and the statements go to the acts and conduct of Krasniqi, prior statements of co-Accused should be excluded.[171] Krasniqi also contends that the Trial Panel erred by not addressing Article 55 of the Constitution, which requires that fundamental rights "may only be limited by law", and that before limiting Krasniqi's right to confront evidence against him, the Trial Panel was required to assess proportionality and "pay special attention to the essence of the right limited".[172]

59. Alternatively, Krasniqi submits that even if the Trial Panel correctly applied Rule 138(1) of the Rules, it erred in its assessment of whether the probative value of the prior statements of his co-Accused was outweighed by their prejudicial effect.[173] First, he argues that the Trial Panel failed to consider that the statements are inherently unreliable due to their internal inconsistencies and/or the way in which the information was obtained.[174] Second, Krasniqi submits that the Trial Panel erred in relying on the fact that the co-Accused gave their testimony voluntarily, as this does not cure his inability to confront the information.[175] Finally, Krasniqi submits that the Trial Panel failed to adequately assess the prejudice to Krasniqi in admitting the statements, in particular in the event that he cannot cross-examine the co-Accused,

[169] Krasniqi Appeal, para. 40.
[170] Krasniqi Appeal, para. 42. See also Krasniqi Appeal, para. 44.
[171] Krasniqi Appeal, paras 41-43.
[172] Krasniqi Appeal, para. 45. See also Krasniqi Appeal, para. 40.
[173] Krasniqi Appeal, para. 46. See also Krasniqi Appeal, para. 51.
[174] Krasniqi Appeal, para. 47.
[175] Krasniqi Appeal, para. 48.

and without any specific information from the SPO regarding how the statements will be used.[176]

60. The SPO responds first that Krasniqi's argument that the Trial Panel erred in relying on Rule 138(1) of the Rules is unfounded, as instead of citing a relevant alternative rule, he points to general rules which are not applicable to the evidence in question.[177] The SPO also submits that Krasniqi misinterprets that Article 55 of the Constitution presupposes a "right to cross-examine witnesses against him" and that admitting written evidence restricts this right, which is demonstrated by the "very Rules he cites".[178]

61. With respect to Krasniqi's argument that the Trial Panel committed multiple errors in its application of Rule 138(1) of the Rules, the SPO first contends that the Trial Panel specifically considered that while chambers have a margin of discretion in deciding to admit statements of a co-accused where it would create undue prejudice, in this case the Trial Panel assessed factors of authenticity and reliability and exercised its discretion to admit the statements after weighing their probative value with any prejudicial effect.[179] Next, the SPO argues that the Trial Panel did consider the voluntary nature of the co-Accused's statements in its assessment of authenticity and probative value as factors for admission under Rule 138(1) of the Rules.[180]

62. The SPO further submits that international criminal tribunals have held that the admission of co-accused statements does not infringe on the fair trial rights of accused

[176] Krasniqi Appeal, paras 49-50.
[177] SPO Consolidated Response, para. 24. See also SPO Consolidated Response, para. 30. The SPO submits that the Trial Panel expressly considered whether the Constitution, the Law or the Rules addressed the admissibility of co-accused's statements, and after finding no specific applicable law, the Trial Panel relied on general principles of the admission of evidence before the Specialist Chambers. See SPO Consolidated Response, para. 24.
[178] SPO Consolidated Response, para. 24, fn. 55, referring to Rules 153 and 155 of the Rules, which, according to the SPO, both allow the admission of written evidence without cross-examination.
[179] SPO Consolidated Response, para. 25. See also SPO Consolidated Response, para. 30.
[180] SPO Consolidated Response, para. 26.

where the probative value of the statements is not outweighed by any potential prejudice and second, that according to the ECtHR, there is no *per se* bar against their admission or use provided certain criteria are met.[181]

63. Moreover, according to the SPO, Krasniqi's right to test the evidence against him is not limited to cross-examination and – as confirmed by the Trial Panel – even if some of his co-Accused decide not to testify, he can still challenge the evidence through other witnesses or evidence.[182] Finally, the SPO argues that there are other safeguards available to the Trial Panel to limit the potential prejudice of this evidence and to ensure that the proper weight is afforded to it at the end of the proceedings in light of all of the evidence at trial, and in particular regarding corroborating evidence.[183]

2. Assessment of the Court of Appeals Panel

64. The Appeals Panel notes that the Trial Panel found that there was no specific provision of the Constitution, the Law or the Rules that addresses the admissibility of statements of co-accused.[184] Having determined that the Accused's Statements and associated exhibits were admissible pursuant to Rule 138(1) of the Rules, the Trial Panel found that their admission was not "*per se* prejudicial to the Accused or to the co-Accused" and that there was no bar in admitting them against the four Accused.[185]

65. The Appeals Panel will first address Krasniqi's argument that the Trial Panel erred by relying on Rule 138(1) of the Rules – a "general discretionary rule" – to admit the co-Accused's statements.[186] The Appeals Panel notes that Krasniqi himself admits that none of the other potentially applicable Rules – namely, Rules 141, 153 and 155 of

[181] SPO Consolidated Response, para. 28.
[182] SPO Consolidated Response, paras 27, 29.
[183] SPO Consolidated Response, paras 27, 29.
[184] Impugned Decision, para. 215.
[185] Impugned Decision, paras 217, 219.
[186] See Krasniqi Appeal, paras 42-45.

the Rules – are relevant to the admission of prior statements of co-accused.[187] The Appeals Panel considers that, in the absence of any specific provision in the Specialist Chambers' legal framework, the Trial Panel applied the appropriate provision which governs the admissibility of evidence generally.[188] Moreover, the Appeals Panel notes that the Trial Panel recognised the inherent limits to the admission of the co-Accused's statements under Rule 138 of the Rules, namely that findings on the Accused's guilt "cannot be based solely, or to a decisive extent, upon such statements".[189] The Appeals Panel thus finds no error in the Trial Panel's application of Rule 138(1) of the Rules in its determination of the admissibility of the co-Accused statements against the Accused.

66. The Panel turns now to Krasniqi's argument that the Trial Panel failed to address Article 55 of the Constitution and the limitation to his right to test the evidence against him. The Panel notes that any assessment pursuant to Article 55 of the Constitution[190] is similar to the one conducted by the ECtHR when assessing an infringement of a right guaranteed by the ECHR, and to the assessment conducted by the Trial Panel in paragraph 218 of the Impugned Decision.[191] Therefore, the Appeals Panel finds that Krasniqi fails to demonstrate an error in the Trial Panel not addressing specifically Article 55 of the Constitution in its determination on the admission of the co-Accused's statements.

[187] See Krasniqi Appeal, paras 42-44.
[188] See Impugned Decision, para. 215.
[189] See Impugned Decision, paras 215, 218.
[190] The Panel recalls that, pursuant to Article 31(4) of the Constitution, Article 6(3) of the ECHR and Article 21(4)(f) of the Law, an accused has a fundamental right to cross-examine witnesses and test the evidence against him or her.
[191] See below, para. 72. The Panel also notes the ECtHR found that the refusal of co-accused to give evidence relying on the right not to incriminate themselves may constitute a good reason for a court to admit into evidence the untested statements of the absent witness. See ECtHR, *Strassenmeyer v. Germany*, no. 57818/18, Judgment, 2 May 2023, paras 73-74; ECtHR, *Vidgen v. The Netherlands*, no. 29353/06, Judgment, 10 July 2012, para. 42.

67. The Appeals Panel notes that the ECtHR has held that there is no *per se* bar against the admission or use of prior statements of a co-accused, provided they meet specific criteria.[192] These criteria are that the statements must have been lawfully taken, the accused must have had the opportunity to challenge the statements and they must not form the basis for a co-accused's conviction to a "decisive" degree.[193]

68. The Appeals Panel also observes that the jurisprudence of international courts and tribunals is consistent with the Trial Panel's finding that the admission of a co-accused's statement does not infringe upon an accused's fair trial rights as long as the probative value of the statement is not outweighed by any potential prejudicial effect of its admission.[194] The Panel notes, however, that it lies within the discretion of the lower panel to deny admission of a co-accused's statement where the resulting prejudice to the accused outweighs the probative value of the statement in question.[195]

69. In this regard, the Appeals Panel considers that this careful balancing exercise must be conducted by the Trial Panel in weighing the probative value with any prejudicial effect in its decision as to whether to admit a co-accused's statement, also considering the specific circumstances of the case.[196]

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[192] See e.g. ECtHR, *Lucà v. Italy*, no. 33354/96, Judgment, 27 February 2001 ("*Lucà* Judgment"), paras 40-41.

[193] *Lucà* Judgment, paras 40-41; ECtHR, *Al-Khawaja and Tahery v. The United Kingdom*, nos 26766/05 and 22228/06, Judgment, 15 December 2011 ("*Al-Khawaja and Tahery* Judgment"), paras 126-147. See also ECtHR, *Seton v. The United Kingdom*, no. 55287/10, Judgment, 31 March 2016, para. 58.

[194] 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.* Appeal Decision"), para. 62, wherein the ICTY Appeals Chamber found that the Trial Chamber, "in light of its careful balancing exercise about the probative value of the […] Transcript and the potential prejudice to the co-accused due to its admission, has not misinterpreted or misapplied the governing law" in admitting it. See also Impugned Decision, para. 216.

[195] *Prlić et al.* Appeal Decision, para. 62; ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para. 53. See also Impugned Decision, para. 217.

[196] *Prlić et al.* Appeal Decision, para. 62. See also above, para. 6. The Appeals Panel recalls that the Trial Panel (i) has broad discretion in assessing the appropriate weight to be given to witness testimony and evidence admitted during the trial and (ii) is in the best position to assess the weight and to balance all

70. As the Appeals Panel finds no error in the admission of the Accused's Statements and associated exhibits against the co-Accused,[197] it considers that ultimately it is an issue of how much, if any, weight to give them. The Appeals Panel finds that this determination can only be made by the Trial Panel at the end of the proceedings, in light of all of the relevant evidence before it.

71. With regard to the issue of whether the Accused will have the opportunity to confront the co-Accused in the present case, the Appeals Panel notes that the Trial Panel stated that the "Accused may elect not to testify and cannot be compelled to do so under the [Specialist Chambers] legal framework" and that it was therefore aware that the co-Accused "might not be in a position to fully explore the content of statements provided by co-defendants".[198] The Appeals Panel also notes that the Trial Panel found that if that occurs, it "calls for particular caution on the part of the Panel to decide what weight, if any, to attach to such statements".[199]

72. In any event, the Panel recalls that statements of a co-accused (or witness) whom the Defence was not able to examine may not be used to support a conviction against the accused.[200] As also noted by the Trial Panel, the ECtHR has held that a conviction based solely or in decisive part on the evidence of an accused or co-accused that the accused was not able to examine is incompatible with Article 6 of the ECHR.[201] This safeguard is similarly included in the Specialist Chambers' framework in Rule 140(4)(a) of the Rules, which provides that a conviction may not be based solely or to a decisive extent on a statement of a witness whom the Defence had no

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of the evidence it heard throughout the trial – at the end of the proceedings. See *Mustafa* Appeal Judgment, para. 38 and jurisprudence cited therein.

[197] See above, para. 65.

[198] Impugned Decision, para. 218.

[199] Impugned Decision, para. 218.

[200] See above, para. 67. See also e.g. ICTY, *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 *ter* Exhibit List, 25 October 2007, paras 77-80.

[201] See *Lucà* Judgment, paras 39-45; *Al-Khawaja and Tahery* Judgment, paras 126-147. See also Impugned Decision, para. 218.

opportunity to examine. The Panel thus considers that there are sufficient safeguards in place under international human rights law and the Specialist Chambers' own legal framework[202] to protect the Accused's rights with respect to the use of the co-Accused's statements against the Accused in this case.

73. Based on the above, the Appeals Panel finds that the Trial Panel did not err in its decision on the admission and use of the co-Accused's statements in relation to the other Accused at this stage of the proceedings and therefore dismisses Krasniqi's Ninth Issue.

[202] See also Article 3(2)(e) of the Law.

V. DISPOSITION

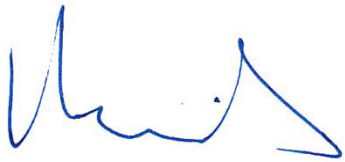
74. For these reasons, the Court of Appeals Panel:

DISMISSES the Appeals;

ORDERS the reclassification of the SPO Consolidated Response and the Krasniqi Reply pursuant to Rule 82(5) of the Rules;

ORDERS Krasniqi to file a public redacted version of the Krasniqi Appeal or indicate, through a filing, whether this filing can be reclassified as public within ten days of receiving notification of the present Decision; and

INSTRUCTS the Registry to execute the reclassification of the Krasniqi Appeal upon indication by Krasniqi, if any, that it can be reclassified.



Judge Michèle Picard,
Presiding Judge

Dated this Friday, 31 May 2024

At The Hague, the Netherlands