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In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Emilio Gatti
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Defence Counsel for Jakup Krasniqi
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Public Redacted Version of "Krasniqi Defence Appeal against Decision on Prosecution Motion for Admission of Accused's Statements with Public Annexes 1 and 2 (IA030-F00004)"

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I. INTRODUCTION

1. The Defence for Jakup Krasniqi ("Defence") appeals, with leave,[1] against the 'Decision on Prosecution Motion for Admission of Accused's Statements' ("ID").[2] Appellate intervention is necessary because the ID failed to give effective protection to Mr. Krasniqi's fundamental fair trial rights against self-incrimination and to confront the evidence against him.

2. Mr. Krasniqi was subpoenaed to attend the ICTY on 10 February 2005. He testified on 10-15 February 2005 without being warned about his right not to self-incriminate and without the assistance of counsel. He signed a statement to the ICTY on 23-24 May 2007 and testified on 29-31 May 2007, again without any self-incrimination warning and without the assistance of counsel. In short, he was compelled to testify and the resulting evidence is now being used against him. The violation of his right against self-incrimination is stark.

3. The privilege against self-incrimination is a recognised international standard which lies at the heart of a fair trial.[3] It is protected by the Constitution,[4] the Law,[5] the Rules,[6] and international human rights law - in accordance with which the Specialist Chambers must adjudicate and function[7] - including the ICCPR[8] and numerous

[1] KSC-BC-2020-06, F02022, Trial Panel, *Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements*, 19 December 2023, public.
[2] KSC-BC-2020-06, F01917, Trial Panel, *Decision on Prosecution Motion for Admission of Accused's Statements*, 9 November 2023, public.
[3] ECtHR, *Bykov v. Russia,* no. 4378/02, *Judgment (Merits and Just Satisfaction)*, 10 March 2009, para. 92; *Jalloh v. Germany,* no. 54810/00, *Judgment (Merits and Just Satisfaction)* ("*Jalloh v. Germany*"), 11 July 2006, para. 94; *John Murray v. U.K.* ("*John Murray v. U.K.*"), no. 18731/91, *Judgment (Merits and Just Satisfaction),* 8 February 1996, para. 45.
[4] Article 30(6) of the Constitution of the Republic of Kosovo ("Constitution").
[5] Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Articles 21(4)(h), 38(3).
[6] Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), 42(1)(a), 151(1).
[7] Constitution, Article 22.
[8] International Covenant on Civil and Political Rights ("ICCPR"), Article 14(3)(g).

regional human rights instruments.[9] Further, the ECtHR has consistently held that the right not to self-incriminate goes to the very essence of a fair procedure.[10]

4. The First and Second Certified Issues demonstrate that the ID erred in admitting the ICTY evidence. The First Issue shows that the admission of this evidence violates Mr. Krasniqi's right against self-incrimination. Further or alternatively, the Second Issue establishes that the ID erred in finding that Mr. Krasniqi was not entitled to the guarantees afforded to a suspect at the time of the ICTY evidence.

5. The ID admitted the prior statements of Mr. Krasniqi's co-Accused and permitted their use against him. Mr. Krasniqi cannot fairly confront this evidence because his co-Accused cannot be compelled to testify. The Third Issue demonstrates that the admission of this evidence, absent any express statutory authorisation, violates Mr. Krasniqi's fundamental right to confront the evidence against him. Further, in weighing the probative value of the evidence against its prejudicial effect, the ID failed to balance the concrete prejudice to Mr. Krasniqi in being unable to confront this specific evidence against the inherently limited probative value of the evidence of a co-Accused.

6. This filing is confidential because it refers to confidential material.[11]

II. SUBMISSIONS

A. FIRST CERTIFIED ISSUE

[9] American Convention on Human Rights, Article 8(2)(g); Arab Charter on Human Rights, Article 16(6); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, p. 15, para. 6(d).
[10] *John Murray v. U.K.*, para. 45.
[11] Rule 82(3).

Whether the Panel erred in fact and/or law by finding that the admission of the ICTY Evidence, which was given in the absence of any self-incrimination warning or other safeguard, did not violate Mr. Krasniqi's privilege against self-incrimination

7. The ICTY evidence was given without Mr. Krasniqi being warned about his right not to incriminate himself.

8. In order for the right against self-incrimination to be "practical and effective",[12] an individual entitled to this privilege must be notified of his rights.[13] Given the stressful context of an investigative interview or in-court testimony, a lay person cannot exercise their rights unless they are told of their existence. The ECtHR has held that there is no justification for a failure to provide notification of these rights and a presumption of unfairness arises if notification is not given.[14]

9. Nonetheless, the ID concluded that the 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.[15] This conclusion was determinative of admissibility, since Article 37(1) of the Law provides that "international standards on the collection of evidence apply" and Rule 138(2) provides for the exclusion of evidence obtained in violation of international human rights standards. Similarly, the ICTY determined that prior evidence of the Accused would be admissible only if freely and voluntarily given, and provided he was informed about his right to remain silent before giving the statement.[16] Similarly, the ECtHR has

[12] ECtHR, *Airey v. Ireland,* no. 62989/73, *Judgment (Merits)* ("*Airey v. Ireland*"), 9 October 1979, para. 24
[13] ECtHR, *Ibrahim and Others v. U.K.*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, *Judgment (Merits and Just Satisfaction)* ("*Ibrahim and Others v. U.K.*"), 13 September 2016, para. 272.
[14] *Idem,* para. 273.
[15] ID, paras 194, 200, 204.
[16] ICTY, *Prosecutor v. Halilović,* IT-01-48-AR73.2, Appeals Chamber, *Decision on Interlocutory Appeal Concerning Admission of Record of the Interviews of the Accused from the Bar Table,* 19 August 2005, paras. 15, 34-46, 63, 65. *See also Prosecutor v. Halilović,* IT-01-48-T, Trial Chamber I, *Decision on Motion for Exclusion of Statement of Accused* ("*Halilovic* Decision"), 8 July 2005, para. 18.

held that compulsion - including an obligation to testify under threat of sanctions - violates the privilege against self-incrimination, resulting in the prohibition to use evidence so obtained in a criminal trial.[17]

10. The ID considered that (i) Mr Krasniqi did not raise self-incrimination concerns and did not make use of his right not to answer questions on grounds of self-incrimination;[18] (ii) the *subpoena* to appear,[19] the solemn declaration[20] and the lack of a self-incrimination warning did not affect the voluntariness of his testimony;[21] (iii) 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; and (iv) the ICTY OTP was not obliged to warn Mr. Krasniqi about self-incrimination.[22]

11. Contrary to the essence of the right against self-incrimination,[23] the effect of the ID is to emasculate this right by admitting against Mr. Krasniqi evidence which he was compelled to give. Article 55 of the Constitution, with which the KSC must adjudicate and function in accordance,[24] governs limitations on fundamental rights, including the right against self-incrimination. The ID disregarded Article 55. It failed to consider whether the limitation it imposed on Mr. Krasniqi's right against self-incrimination denied the essence of the right.[25] It further failed to assess the

[17] *Ibrahim and Others v. U.K.*, para. 267, 269, citing ECtHR, *Saunders v. U.K.*, no. 19187/91, *Judgment* ("*Saunders v. U.K.*"), 17 December 1996 and *Brusco v. France*, no. 1466/07, *Judgment (Merits and Just Satisfaction)* ("*Brusco v. France*"), 14 October 2010.
[18] ID, para. 200
[19] ID, para. 200.
[20] ID, para. 204;
[21] ID, para. 204;
[22] ID, paras 194, 200, 204.
[23] ECtHR, *Heaney and McGuinness v. Ireland*, no. 34720/97, *Judgment* ("*Heaney and McGuinness v. Ireland*"), 21 March 2001, para. 48, citing *Funke v. France*, no. 10828/84, *Judgment*, 25 February 1993, para. 44.
[24] Article 3(2)(a) of the Law.
[25] Article 55(5) of the Constitution.

proportionality of such limitation, failing to "pay special attention to the essence of the right limited".[26]

12. First, the ID erred in finding that the ICTY evidence was voluntary because Mr. Krasniqi did not assert his right against self-incrimination.[27] Mr. Krasniqi is not a lawyer. For his fair trial rights to be practical and effective, not theoretical and illusory,[28] he should have been warned about his right not to answer questions, which is precisely why Rule 151 of the Rules prescribes that witnesses be notified of this right *in advance* of their testimony, so that they can object to any question which might incriminate them.[29] Where a person has not been notified of their right against self-incrimination, it is futile to argue that their failure to exercise that right means that their evidence was voluntary.

13. Second, contrary to the ID, the combined effect of the *subpoena* and the solemn oath/obligation to tell the truth does mean that the ICTY evidence was not voluntary, free of coercion or improper compulsion. The ECtHR has identified three instances which give rise to improper compulsion to self-incriminate: physical or psychological pressure;[30] the use of subterfuge to elicit information;[31] and being obliged to testify under threat of sanctions.[32]

14. The ID held that neither the *subpoena*,[33] nor the obligation to tell the truth when testifying,[34] limit the right of a witness to refuse to answer incriminating questions.

[26] Article 55(4) of the Constitution.
[27] ID, para. 200.
[28] *Airey v. Ireland*, para. 24.
[29] Rule 151. *See also,* Rule 42(1)(a).
[30] *Jalloh v. Germany*; *Gäfgen v. Germany*, no. 22978/05, *Judgment,* 1 June 2010.
[31] ECtHR, *Allan v. U.K.*, no. 48539/99, *Judgment,* 5 November 2002.
[32] *Saunders v. U.K.*; *Brusco v. France*; *Heaney and McGuinness v. Ireland*; *Weh v. Austria*, no. 38544/97, *Judgment,* 8 April 2004.
[33] ID, para. 200.
[34] ID, para. 204.

The ID erred in failing to consider the combined effect of these measures. Mr. Krasniqi was legally compelled to testify by virtue of a *subpoena* (in *Limaj* he stated that "I refused to come of my own free will"[35]). In both 2005 and 2007, Mr. Krasniqi had to take an oath that he would "speak the truth, the whole truth, and nothing but the truth".[36] Given no warning about self-incrimination, he was placed in a position where if he refused to answer or his answers were deemed untruthful he could face prosecution.[37] He was left in a "cruel trilemma",[38] *i.e.* the choice between self-incrimination, perjury or contempt. The combined effect of the *subpoena*, the solemn declaration and the absence of any notification of rights, resulted in improper compulsion.

15. Regarding Mr. Krasniqi's 2005 ICTY testimony, the ID "agree[d]" that the subpoena "affected the voluntariness of his appearance" but held that "there is no indication that this resulted in his providing incriminating evidence that he would not otherwise have been prepared to give to the court".[39] The reverse is true. Mr. Krasniqi "refused to come of [his] own free will".[40] The *subpoena* resulted in providing incriminating evidence that he would not otherwise have given, because without the *subpoena* he would not have attended at all and would have given no evidence.

16. Third, the ID wrongly held 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 and the ICTY OTP was under no obligation to warn Mr. Krasniqi about self-incrimination.[41]

[35] IT-04-84 P00340, p. 3291, lines 20-21.
[36] IT-03-66 T3285-T3365, p. 2; IT-04-84bis P00064, p. 1 (emphasis added).
[37] Rule 77(A)(i) of the ICTY Rules of Procedure and Evidence ("ICTY RPE").
[38] United States Supreme Court, *Murphy v. Waterfront Commission,* 378 U.S. 52, 15 June 1964.
[39] ID, para. 200.
[40] IT-04-84 P00340, p. 3291, lines 20-21.
[41] ID, paras 194, 200, 204.

17. The Defence emphasises that the violation of the right against self-incrimination occurs not only due to the manner in which the ICTY evidence was taken, but also its admission against Mr. Krasniqi at the KSC. Whether the ICTY complied with its own rules is not determinative of the first issue; what matters is whether the admission of this evidence at the KSC is consistent with the right against self-incrimination as protected by this institution. Even if failing to notify Mr. Krasniqi before his testimony complied with ICTY law at that time, this does not render the subsequent use of resulting evidence against him less of an infringement of his right not to self-incriminate. As stressed by the ECtHR, the only remedy to safeguard fair trial rights is to "prevent the use of the statement[s] in the subsequent criminal proceedings".[42]

18. This is demonstrated by *Delalic,* in which the ICTY declared inadmissible a prior statement of the accused given to national police without any legal assistance, although the national police had acted in accordance with their domestic legal framework.[43] The ID distinguished *Delalic* because Mr. Delalic was considered a suspect when he was interviewed by national police, [44] while Mr. Krasniqi was not, holding that there was no material distinction between the protection Mr. Krasniqi was entitled to under the ICTY's regime and the SC's legal framework. However, the different *status* of Mr. Delalic and Mr. Krasniqi at the time of their prior statement is not determinative. Both were afforded lesser protections during the prior interview than those required by the institution where the statement was tendered for admission. Mr. Delalic was not afforded legal assistance during questioning, as the ICTY framework required; Mr. Krasniqi was not warned about his privilege against self-incrimination, as Rules 42(1)(a) and 151 of the KSC Rules require. The ICTY correctly held that the critical question is whether the diminished safeguards in the

[42] *Saunders v. U.K.*, para. 75.
[43] ICTY, *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, *Decision on Zdravko Mucic for the Exclusion of Evidence* ("*Delalic* Decision"), 2 September 1997, para. 55.
[44] ID, para. 194.

prior statement infringed on the rights of the Accused, rendering the statement inadmissible.[45]

19. The ICTY took the same approach in *Halilovic,* regarding the admission of a statement given by Mr. Halilovic as a witness before he became an accused, and therefore in the absence of suspect safeguards. The Trial Chamber – validated by the ICTY Appeals Chamber[46] - rejected the admission and found that:

> [W]here a now accused person has been interviewed as a witness, the admission of that statement during trial could violate the rights of the accused to a fair trial, in particular his right to remain silent. The fundamental difference between an accused and a witness may result in an inadmissibility of a statement of an accused taken at the time when he was still considered to be a witness, insofar as the statement was not taken in accordance with Rule 42, 43 and 63 of the Rules. The Trial Chamber finds 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 statement.[47]

20. Moreover, in *Saunders v. U.K.*, Article 6 of the European Convention was found to have been violated by the admission against the defendant of previous statements given in separate proceedings on the same matters.[48] As in Mr. Krasniqi's case, when giving these statements before becoming a suspect in subsequent criminal proceedings, the applicant had no choice but to respond to the questions, or else he would have faced prosecution for contempt.[49]

21. In *Saunders*, emphasising the importance of the right against self-incrimination,[50] the ECtHR established that the right not to self-incriminate applies to all answers compulsorily obtained, even in non-judicial proceedings, if used to incriminate the

[45] *Delalic* Decision, paras 48-52.
[46] ICTY, *Prosecutor v. Halilovic,* IT-01-48-A, Appeals Chamber, *Judgment,* 16 October 2007, para. 36.
[47] *Halilovic* Decision, para. 21.
[48] *Saunders v. U.K.*, paras 60, 69.
[49] *Idem*, para. 70.
[50] *Idem*, para. 68.

accused during trial.[51] It dismissed the relevance of the individual's status at the time he gave these statements, finding that "the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right [not to incriminate oneself]".[52]

22. The conclusion 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, is thus wrong and inconsistent with relevant authorities. No relevant warning was given to Mr. Krasniqi *at all*. Regardless of whether he *should* have been treated as a suspect at the ICTY,[53] he was not granted any safeguards to prevent compulsion and allow him to exercise his right not to answer questions. Applying the KSC framework to assess whether the admission of the evidence in this trial violates Mr. Krasniqi's right against self-incrimination, it is clear that it does.

23. Fourth, the ID erred in justifying the admission of Mr. Krasniqi's ICTY evidence on the basis that the protection of Rule 90(e) of the ICTY RPE does not have extra-jurisdictional effect so as to prevent its use before the KSC.[54] The ID thus placed Mr. Krasniqi in a *lacuna* where he is not protected by Rule 90(e) because he is not before the ICTY, and he is not protected by the KSC Rules because the evidence was not obtained by the KSC.[55]

24. Whilst Rule 90(e) of the ICTY RPE is not applicable before the KSC, if Rule 90(e) would have prevented the ICTY evidence being used against Mr. Krasniqi at the ICTY, then the use of the same evidence against him at the KSC equally violates his right

[51] *Saunders v. U.K.*, para. 74.
[52] *Idem*, para. 74.
[53] *See* issue two below.
[54] ID, para. 159.
[55] Rules 42(1)(a) and 151(1).

against self-incrimination. As the ECtHR made clear in *Saunders*, regardless of whether statements were made in prior proceedings, the right against self-incrimination applies when the evidence is sought to be admitted against Mr. Krasniqi. This is all the more so given the overlap between the temporal and geographic scope of the KSC and the ICTY. The same alleged events, crimes, locations and JCE members in *Limaj* and *Haradinaj* now feature in the indictment against Mr. Krasniqi.[56] Much of the evidence relied upon against Mr. Krasniqi was used in these ICTY cases.[57] Finding that Mr. Krasniqi is not protected by the privilege against self-incrimination because his statements are now being used at the KSC and not the ICTY reduces fair trial rights protections to the *mere label* of the prosecuting authority.

25. Further, none of the authorities cited in the ID support this finding.[58] *Perisić* concerned a very different situation, *i.e.* precluding the Defence from cross-examining a witness on matters for which he was under investigation in Bosnia and Herzegovina ("BiH").[59] The ICTY found that although the BiH authorities were not bound by Rule 90(e), the witness' rights were protected because he would be assisted by counsel before answering any question.[60] The ICTY did not leave the witness without protection against self-incrimination, nor determine that evidence so obtained would have been admitted in BiH. *Mladić* instead relates to Article 84 of the CPC of BiH, not to Rule 90(e) and thus is wholly misplaced. The ICTY made no finding on extra-jurisdictional effect, but held that if the Prosecution tendered Mladic's statements given before BiH authorities, it would be open to the Chamber to exclude them

[56] KSC-BC-2020-06, F01475, Krasniqi Defence, *Krasniqi Defence Response to Prosecution Motion for Admission of Accused's Statements* ("Response"), 24 April 2023, confidential, para. 36.
[57] *Ibid.*
[58] ID, para. 159.
[59] ICTY, *Prosecutor v. Perišić*, IT-04-81-T, *Decision on Prosecution Motion for an Advance Ruling on the Scope of Permissible Cross Examination*, 12 June 2009, para. 1.
[60] *Idem*, para. 21.

pursuant to Rule 89(D).[61] That is correct, just as it is open to this Court to exclude the Mr. Krasniqi's ICTY evidence.

26. In conclusion, Mr. Krasniqi was compelled to make self-incriminatory statements at the ICTY under threat of criminal sanctions. If the privilege against self-incrimination is to be effective, this constitutes a bar to the admission and use of these statements against him in subsequent criminal proceedings. In admitting Mr. Krasniqi's ICTY evidence, the ID infringed his fair trial rights and committed an error, which must be redressed through the exclusion of the ICTY evidence.

B. SECOND CERTIFIED ISSUE

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 privilege against self-incrimination, the right to counsel, and the right to silence

27. The ICTY RPE distinguished between "suspects", who were entitled to legal assistance and to be informed of the right to remain silent,[62] and "witnesses", who were not. Mr. Krasniqi was treated as the latter.

28. The ID found that the ICTY evidence was admissible because Mr. Krasniqi was not entitled to fair trial guarantees, which must be afforded to a *suspect*, because he was interviewed and testified as a *witness*.[63]

[61] ICTY, *Prosecutor v Mladić*, IT-09-92-R75bis.1, Trial Chamber I, *Second Decision on Request for Assistance from the Court of Bosnia and Herzegovina Pursuant to Rule 75 bis*, 21 December 2011, para. 10.
[62] Rule 42(A)
[63] ID, paras 194, 200, 204.

29. The ID erred in law in treating the ICTY's designation of Mr. Krasniqi as a witness as determinative.[64] The correct test is whether Mr Krasniqi should have been treated as a suspect by the ICTY – a test of substance not of form.

30. In determining whether Article 6 guarantees (including the right against self-incrimination) apply, the ECtHR applies a 'substantive' rather than a 'formal' approach.[65] A person who has been questioned about their suspected involvement in an offence – irrespective of the fact that they were formally treated as a witness – could be regarded as "charged with a criminal offence" within Article 6.[66] In *Kalēja v. Latvia*, the applicant's witness status was not a decisive factor whilst the actions of the police indicated that they considered her a suspect regardless of her procedural status.[67]

31. Regarding the right against self-incrimination, the ECtHR held that where the "circumstances of the case disclosed the existence of a suspicion of theft against the applicant", the authorities were required to inform the applicant of the right against self-incrimination.[68] In *Schmid-Laffer v. Switzerland*, the test applied was whether the police had in their possession information incriminating the applicant to an extent that the applicant should have been treated as an accused.[69]

32. These authorities show that it is necessary to look beyond the procedural designation given to the applicant, and to assess in substance whether the authorities possessed information incriminating them.

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[64] ID, paras 194, 200, 204.
[65] ECtHR, *Deweer v. Belgium*, no. 6903/75, *Judgment (Merits and Just Satisfaction)*, 27 February 1980, para. 44.
[66] ECtHR, *Kalēja v. Latvia*, no. 22059/08, *Judgment (Merits and Just Satisfaction)* ("*Kalēja v. Latvia*"), 5 January 2018, paras 36-41.
[67] *Kalēja v. Latvia*, para. 40. *See also* ECtHR, *Simeonovi v. Bulgaria*, no. 21980/04, *Judgment (Merits and Just Satisfaction)*, 12 May 2017, para. 110; *Ibrahim and Others v. U.K.*, para. 249.
[68] ECtHR, *Zaichenko v. Russia*, no. 39660/02, *Judgment (Merits and Just Satisfaction)*, 18 February 2010, para. 52.
[69] ECtHR, *Schmid-Laffer v. Switzerland*, no. 41269/08, *Judgment (Merits and Just Satisfaction)*, 16 June 2015, para. 29.

33. The ID failed to analyse whether Mr. Krasniqi should have been treated by the ICTY as a suspect; instead relying on his formal designation as a witness.[70] A different approach was taken regarding other accused, for instance the ID considered that "there is nothing to suggest that Mr Thaci's status during the course of his interview should have changed to that of a suspect".[71] No such assessment was carried out in relation to Mr. Krasniqi. The ID thus erred in law, invalidating the decision, because the ICTY procedural designation of Mr. Krasniqi as a witness was relied on repeatedly in the ID to find that there was no violation of the right against self-incrimination.[72] The Court of Appeals Panel ("Appeals Panel") should reverse the error and apply the correct test to the facts.

34. Mr. Krasniqi should have been treated as a suspect by the ICTY. 'Suspect' was defined by the ICTY Rules as "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".[73] 'Committed' includes committed pursuant to a Joint Criminal Enterprise ("JCE").[74] *Limaj* and *Haradinaj* concerned crimes alleged at Lapushnik/Lapušnik and Jabllanicë/Jablanica, which Mr. Krasniqi is now accused of committing pursuant to a JCE. The ICTY prosecuted named members of the alleged JCE in this case, including Fatmir Limaj and Lahi Brahimaj. The overlap of the subject matter of these proceedings with ICTY prosecutions shows that Mr. Krasniqi should have been treated as a suspect.

[70] ID, paras 194, 200, 204.
[71] ID, para. 129.
[72] ID, paras 194, 198, 200, 202, 204, 206-207.
[73] Rule 2(A).
[74] KSC-BC-2020-06, IA009/F00030, Court of Appeals Panel, *Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers"*, 23 December 2021, public, para. 139.

35. The Specialist Prosecutor's Office ("Prosecution") has treated an individual as a suspect wherever it possesses material suggesting his involvement in crimes, and interviewed many individuals as suspects, without ever formally charging them, on this basis. For instance, the Prosecution explained to W04576 that "[i]f at this stage we had information that would lead you to being summonsed as a suspect, we would have done so."[75] The same approach was taken during interview with W04746.[76] Prosecutorial practice before the SC confirms that a person should be treated as a suspect wherever the Prosecution possesses material suggesting their involvement in crimes.

36. In 2005, the ICTY OTP was in possession of a substantial amount of evidence now relied on by the Prosecution against Mr. Krasniqi, including (i) communiqués, political declarations and other public statements attributed to the General Staff which, both in this case and at the ICTY, formed the basis for the alleged common criminal plan;[77] (ii) media interviews attributed to him;[78] (iii) statements alleging his involvement in crimes alleged in this Indictment,[79] including the very statements which now found an Indictment allegation of personal participation;[80] and (iv) statements about his role in the General Staff.[81] This is the same material which, in confirming the Indictment, the Pre-Trial Judge has found constitutes a sufficient foundation for this case. If the Prosecution maintains that this is reliable information which shows that Mr. Krasniqi may have committed crimes, it follows that in 2005

[75] 074301-TR-ET Part 2, pp. 4-5.
[76] 082894-TR-ET Part 6, pp. 1-2.
[77] In *Limaj,* Prosecution Exhibit IT-03-66 P49 is a collection of KLA communiqués, political declarations and other statements. *See also* Prosecution Exhibit IT-03-66 P138. In *Haradinaj, see* Prosecution Exhibits IT-04-84bis P00126 IT-04-84 P00240; IT-04-84bis P00278.
[78] In *Limaj, see* Prosecution Exhibits IT-03-66 P139; IT-03-66 P00140.
[79] *E.g.,* K019-5141-K019-5146 RED2; 0106-8151-0106-8166.
[80] KSC-BC-2020-06, F00999/A01, Specialist Prosecutor, *Annex 1 to Submission of confirmed amended Indictment*, 30 September 2022, confidential, para. 44.
[81] In *Haradinaj, see* IT-04-84bis P00160; IT-04-84bis P00161; T000-5325-TR-ET; T000-5326-TR-ET; T000-5327-TR-ET; SITF00223845-SITF00223934.

and 2007 it was reliable information which tended to show that Mr. Krasniqi *may have* committed a crime and should therefore have been treated as a suspect.

37. Even if Mr. Krasniqi was not initially treated as a suspect, given the nature of his responses in his ICTY statement and testimony, particularly about his role and public statements, the potential for self-incrimination became clear and the appropriate warnings should have been given.

38. The Appeals Panel should find that Mr. Krasniqi should have been treated as a suspect by the ICTY in 2005 and 2007 and should have been notified of his right not to incriminate himself and his right to legal assistance. Since neither right was respected, the ICTY evidence is inadmissible: pursuant to Rule 138(1), any probative value they allegedly contain is outweighed by the prejudicial effect of taking his evidence without these due process protections; alternatively, pursuant to Rule 138(2) and Article 55 of the Constitution, as Mr. Krasniqi was deprived of these safeguards, his evidence was obtained in violation of international human rights law.[82]

C. THIRD CERTIFIED ISSUE

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.

39. The ID admitted the statements of Mr. Krasniqi's co-Accused. It found that the question of admissibility of those statements is "subject to the general rules and principles regarding admission of evidence before the SC, first of all Rule 138(1),"[83]

[82] *See* Response, paras 37-39.
[83] ID, para. 215

and that the statements are probative of important issues, and that their probative value is not outweighed by their prejudicial effect.[84]

40. The core problem with the admission of these statements is that it violates Mr. Krasniqi's right to confront the evidence against him. Article 21(4)(f) of the Law states that an accused may "examine, or have examined, the witnesses against him or her".[85] Mr. Krasniqi's co-accused are not Prosecution witnesses, meaning they cannot be required to give evidence or be cross-examined, preventing him from confronting the evidence against him. These considerations have led other international courts and tribunals to exclude prior statements of co-Accused.[86]

41. The importance that the KSC attaches to cross-examination is demonstrated by the strictures placed on evidence admitted *absent* the ability to cross-examine. Any information going to proof of the acts and conduct of the Accused as charged in the Indictment, militates against admission under Rule 155.[87] These statements *do go* to Mr. Krasniqi's acts and conduct. Reliance on them against Mr. Krasniqi in circumstances where he cannot confront the evidence, breaches his fair trial rights.

42. The ID erred in law in concluding that, absent any specific rule about the prior statements of co-Accused, it should apply Rule 138(1). The legal framework of the KSC does not specifically address the statements of co-Accused.[88] Rule 141 provides that testimony will ordinary be given orally. Rules 153 and 155 provide exceptions to this Rule, allowing admission of testimonial material in writing if safeguards are met. Rule

[84] ID, para. 217.
[85] *See also* Constitution, Article 31(4); European Convention, Article 6(3)(d); ICCPR, Article 14(3)(e).
[86] ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR73.1, Appeals Chamber, *Decision on Appeals Against Decision Admitting Material Relating to Borovcanin's Questioning*, 14 December 2007; *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Trial Chamber II, *Decision on Prosecution's Motion for Admission into Evidence of Documents MFI P251, P379 and P435*, 7 December 2007; ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, Trial Chamber II, *Decision on the Prosecutor's Bar Table Motions*, 17 December 2010.
[87] Rules 153, 155.
[88] ID, para. 215.

153 governs the admissibility of witness statements and transcripts *in lieu* of oral testimony. Rule 155 governs the admissibility of evidence of unavailable persons or persons subject to interference. This detailed framework for admission of witness evidence should not be circumvented by reference to a general discretionary rule.

43. Mr. Krasniqi's co-Accused are not Prosecution witnesses to be heard orally, pursuant to Rule 141. Rule 155 is inapplicable because the co-Accused are not unavailable. Rule 153 is inapplicable because the statements go to the acts and conduct of Mr. Krasniqi.[89] That should be the end of the matter and the prior statements of co-Accused should be excluded.

44. The Panel previously held that Rules 153–155 are *lex specialis* for admitting testimonial materials and rejected attempts to admit witness statements pursuant to any general discretionary rule.[90] It is inconsistent with that previous finding for the Panel to resort to the general discretionary rule in relation to the prior statements of the co-Accused.

45. Furthermore, the admission of witness evidence in writing is a restriction on Mr. Krasniqi's right to cross-examine witnesses against him. As such, Article 55 of the Constitution, which the ID did not address, applies. Article 55(1) requires that fundamental rights "may only be limited by law". Absent an enacted provision in the Law or Rules limiting Mr. Krasniqi's right to cross-examine, the ID erred in admitting this evidence. Pursuant to Article 55(4), before the ID limited Mr. Krasniqi's right to confront evidence against him, it was required to assess proportionality and "pay special attention to the essence of the right limited". No such assessment was carried out.

[89] Response, para. 21.
[90] KSC-BC-2020-06, F01733, Trial Panel II, *Decision on Veseli Defence Request Regarding Items Associated with W03165's Testimony*, 23 August 2023, confidential, para. 7.

46. Alternatively, if the ID was correct to apply Rule 138(1), it erred in failing to correctly assess whether the probative value of the prior statements was outweighed by their prejudicial effect.

47. First, regarding probative value, the ID failed to consider that statements of co-Accused are inherently unreliable. Mr. Krasniqi's co-Accused gave testimony that go to the heart of the Prosecution's case against Mr. Krasniqi, while simultaneously lacking reliability due to their internal inconsistencies, the manner in which the information was solicited, or both.[91] The ID did not consider this submission.

48. Second, the ID relied upon the voluntary testimony of the Accused and their "willingness to give their own account of relevant facts and circumstances."[92] This conclusion might be relevant to the admission of an Accused's prior statements against himself in a single Accused case. It is irrelevant to the admission of a statement of a co-Accused. Whether or not his co-Accused gave evidence voluntarily, repeatedly and wished to give their own account of relevant matters, does not in any way cure Mr. Krasniqi's inability to confront the information provided.

49. Third, the ID failed to assess the prejudice to Mr. Krasniqi arising from the admission of these statements. The Defence noted that Mr. Selimi's statement that Mr. Krasniqi [REDACTED] is prejudicial. However, it is also baseless, since [REDACTED], and inconsistent with other evidence, including Mr. Thaci's prior statement.[93] The authorship of communiques is an important issue, being cited approximately fourteen times in the Prosecution's Pre-Trial Brief. The ID ignored these submissions. The

[91] Response, paras 69-70; ICTY, *Prosecutor v. Blagojević and Jokić,* Trial Chamber I, *Decision on Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement*, 18 September 2003, para. 24.
[92] ID, para. 217.
[93] Response, para. 62.

prejudicial effect of admitting this evidence, in circumstances where Mr. Krasniqi cannot cross-examine Mr. Selimi, plainly outweighs any probative value that such a self-serving assertion possesses.

50. Fourth, the ID erred in finding that prejudice is limited because the Defence may assemble its own evidence and call witnesses to challenge the admitted statements.[94] The ability to call evidence is no substitute for the ability to confront the maker of a prejudicial statement. Further, the volume of untested evidence already admitted is vast.[95] Absent specifics from the Prosecution as to the ways the Accused's statements will be used, the prejudice caused to the Defence in permitting their admission, outweighs their probative value.

51. As a Judge in this trial noted as ICTY Defence counsel, permitting the use of a co-Accused's statement would "violate the fundamental right of [the Accused] to confront evidence which may be relevant to his case."[96] The ID erred in finding that the prejudicial effect does not exceed the probative value of this evidence. The Appeals Panel should overturn the ID and order that the prior statements of his co-Accused should not be relied upon against Mr. Krasniqi.

[94] ID, para. 217.
[95] KSC-BC-2020-06, F01865, Specialist Counsel, *Joint Defence Response to Prosecution Third Motion for Admission of Evidence Pursuant to Rule 155 (F01804)*, 17 October 2023, confidential, para. 5. *See also* F01380, Trial Panel II, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154*, 16 March 2023, confidential, para. 30.
[96] ICTY, *Prosecutor v. Boškoski and Tarćuloski*, IT-04-82, Transcript of Hearing, 18 September 2007, p. 5136, lines 21-22.

III. CONCLUSION

52. For all the above reasons, the Defence respectfully requests the Appeals Panel to:

REVERSE the ID;

EXCLUDE the ICTY evidence; and

ORDER the Trial Panel not to rely on Mr. Krasniqi's co-Accused's statements against him.

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