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In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Trial Panel II**
	Judge Charles L. Smith III, Presiding
	Judge Christoph Barthe
	Judge Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr. Fidelma Donlon
Filing Participant:	Defence Counsel for Jakup Krasniqi
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Public Redacted Version of
Krasniqi Defence Response to Prosecution Motion for Admission of Accused's Statements

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Acting Specialist Prosecutor

Alex Whiting

Counsel for Victims

Simon Laws KC

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson KC

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. The Defence for Jakup Krasniqi ("Defence") hereby opposes[1] the Prosecution Motion for Admission of Accused's Statements.[2]

2. The prejudicial effect of admitting this evidence, some of which was obtained by violating Mr. Krasniqi's fundamental rights, outweighs any probative value. In particular, regarding Mr. Krasniqi's International Criminal Tribunal for the former Yugoslavia's ("ICTY's") testimony and statement, the Specialist Prosecutor's Office ("SPO") seeks to put Mr. Krasniqi in an invidious position. Mr. Krasniqi was subpoenaed to attend at the ICTY on 10 February 2005. He gave testimony on 10 – 15 February 2005 without being warned about his right not to incriminate himself and without the assistance of counsel. He attended the ICTY again in May 2007, signing a statement on 23 – 24 May 2007 and testifying on 29 – 31 May 2007, again without being warned about his right not to incriminate himself and without the assistance of counsel. Now, 18 years after his initial testimony at the ICTY, the very same prosecutors[3] who elicited that testimony from Mr. Krasniqi as a subpoenaed witness seek to rely upon it against him. This circumvention of the privilege against self-incrimination contravenes on the most basic level Mr. Krasniqi's right to a fair hearing. For this reason alone, the Prosecution Motion should be denied.

3. The Defence further opposes the admission of the prior statements of Mr. Krasniqi's co-Accused insofar as the SPO intends to rely upon their evidence against him.[4] Mr. Krasniqi has the fundamental right to confront the evidence against him –

[1] Save to the limited extent indicated below.
[2] KSC-BC-2020-06, F01351, Specialist Prosecutor, *Prosecution Motion for Admission of Accused's Statements* ("Prosecution Motion"), 8 March 2023, public, with Annex 1, public.
[3] Acting Specialist Prosecutor Mr. Alex Whiting led the questioning of Mr. Krasniqi in the *Limaj* case.
[4] The Defence understands that the Defence for Mr. Thaçi, Mr. Veseli and Mr. Selimi object to the admissibility of their prior statements. To the extent that they are not inconsistent with this response, the Defence joins those objections.

including the statements and prior testimony of Messrs. Thaçi, Veseli and Selimi. Their status as co-Accused and their attending right to silence means that Mr. Krasniqi will not be able to cross-examine them unless they volunteer to give evidence. Accordingly, these statements and transcripts cannot be relied upon against Mr. Krasniqi in breach of his most fundamental fair trial rights.

4. The Defence also opposes the admission of 'associated exhibits' to these statements, which appears to be a further attempt by the SPO to gain the admission of documents which would be contentious if admitted through the bar table.

5. Pursuant to Rule 82(4) of the Rules,[5] this filing is classified as confidential as it responds to a filing which bears the same classification.

II. PROCEDURAL HISTORY

6. On 9 February 2023, the SPO notified the Trial Panel and the Parties of its intention to file a motion requesting admission of prior statements of the Accused and requested an extension of the word limit from 6,000 to 12,000 words.[6]

7. On 13 February 2023, the Defence for Mr. Selimi responded to the Request.[7]

8. On 17 February 2023, the Trial Panel granted the Request and extended the word limit to 12,000 words for the Prosecution Motion and any response thereto.[8]

[5] Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules").
[6] KSC-BC-2020-06, F01273, Specialist Prosecutor, *Prosecution Request for Extension of Words to File Motion for Admission of Prior Statements of the Accused* ("Request"), 9 February 2023, public.
[7] KSC-BC-2020-06, F01282, Selimi Defence, *Selimi Defence Response to SPO Request for Extension of Words to File Motion for Admission of Prior Statements of the Accused*, 13 February 2023, public.
[8] KSC-BC-2020-06, F01304, Trial Panel II, *Decision on Prosecution Request for Extension of Words to File Motion for Admission of Prior Statements of the Accused*, 17 February 2023, public.

9. On 8 March 2023, the SPO filed the Prosecution Motion.

10. On 10 March 2023, the Defence for Messrs. Thaçi, Selimi and Krasniqi requested an extension of time to respond to the Prosecution Motion.[9]

11. On 16 March 2023, the Trial Panel extended the time-limit to respond to the Prosecution Motion to 17 April 2023.[10]

12. On 17 April 2023, the Thaçi Defence filed a request for an extension of time to respond to the Prosecution Motion.[11] On the same day, the Trial Panel granted a short extension of time to respond to the Prosecution Motion and ordered all Defence teams to file their responses by Monday, 24 April 2023.[12]

III. APPLICABLE LAW: PRIOR STATEMENT OF THE ACCUSED

A. THE RIGHT AGAINST SELF-INCRIMINATION

13. The privilege against self-incrimination is given central importance in the foundational documents of the Kosovo Specialist Chambers ("KSC"), including the Law[13] and the Rules.[14] For instance, the Law and Rules provide that during a pre-trial

[9] KSC-BC-2020-06, F01364, Thaçi, Selimi and Krasniqi Defence, *Thaçi, Selimi and Krasniqi Defence Request for an Extension of Time for Response to 'Prosecution Motion for Admission of Accused's Statements'*, 10 March 2023, public.
[10] KSC-BC-2020-06, F01378, Trial Panel II, *Decision on Thaçi, Selimi and Krasniqi Defence Request for an Extension of Time for Response to 'Prosecution Motion for Admission of Accused's Statements'*, 16 March 2023, public.
[11] KSC-BC-2020-06, F01458, Thaçi Defence, *Thaçi Defence Request for an Extension of Time for Response to 'Prosecution Motion for Admission of Accused's statements'*, 17 April 2023, public.
[12] KSC-BC-2020-06, In Court – Oral Order, Order on Thaçi Defence Request for Extension of Time (F01458), 17 April 2023, public.
[13] Article 21(4)(h), Article 38(3) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law").
[14] Rule 151(1) of the Rules.

suspect interview, the suspect shall not be compelled to incriminate himself and the SPO must inform the suspect of their right to silence.[15] Regarding testimony, a witness must be notified of the right against self-incrimination in advance and may object to providing testimony that may incriminate himself.[16]

14. The privilege against self-incrimination is a generally recognised international standard.[17] It is expressly protected by the Constitution of the Republic of Kosovo ("Constitution"),[18] the International Covenant on Civil and Political Rights ("ICCPR"),[19] and many regional human rights instruments.[20] Although not expressly protected in Article 6 of the European Convention on Human Rights ("ECHR"), numerous judgments have underlined that the privilege against self-incrimination lies at the heart of a fair trial.[21]

15. The Specialist Chambers must "adjudicate and function" in accordance with both the Constitution and international human rights law which sets criminal justice standards.[22] Human rights law, including the privilege against self-incrimination, has priority over other law of Kosovo (including the Law).[23] As regards limitations upon those rights, Article 55 of the Constitution specifically provides that fundamental

[15] Article 38 and Article 38(3)(b) of the Law, Rule 42(3) of the Rules.
[16] Rule 151(1) of the Rules.
[17] *See, e.g.,* ECtHR, *Bykov v. Russia*, no. 4378/02, *Judgment (Merits and Just Satisfaction)* ("*Bykov v. Russia*"), 10 March 2009, para. 92; *Funke v. France,* no. 10828/84, *Judgment (Merits and Just Satisfaction)*, 25 February 1993, para. 44.
[18] Article 30(6).
[19] Article 14(3)(g).
[20] Organization of American States, *American Convention on Human Rights*, 22 November 1969, Article 8(2)(g); League of Arab States, *Arab Charter on Human Rights*, 22 May 2004, Article 16(6); African Union, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, p. 15, para. 6(d).
[21] *Bykov v. Russia*, para. 92; ECtHR, *Jalloh v. Germany*, no. 54810/00, *Judgment (Merits and Just Satisfaction)*, 11 July 2006, para. 94.
[22] Article 3(2) of the Law.
[23] Article 22 of the Constitution.

rights[24] may only be limited by law and any limitation must in no way deny the essence of the guaranteed right.[25] Further, in assessing any limitation to the right against self-incrimination, the Trial Panel must pay special attention to "to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation".[26]

16. The SPO wrongly attempts to relieve itself of any obligation to comply with the Accused's right against self-incrimination and to side-step the protections offered by this privilege by asserting that during interviews of a witness, suspect rights do not apply even if that person later becomes a suspect.[27] This patently overlooks that the Rules apply the right against self-incrimination to any "person" in a pre-trial interview[28] and any "witness" in testimony.[29] The purpose of the Rule and the values it is seeking to protect cannot be any clearer. Before the KSC, the right is plainly not limited to those accorded the status of suspects.

17. In any event, the privilege against self-incrimination is not dependant on the procedural status of an individual but applies as a matter of substance as soon as the relevant authorities have reason to suspect that an individual may have committed a crime, either individually or in concert with others. This is obvious from the very cases cited by the SPO. Thus, the European Court of Human Rights ("ECtHR") has held that where the "circumstances of the case disclosed the existence of a suspicion of theft

[24] The right against self-incrimination is treated by the Constitution as a fundamental right as it appears in Chapter II of the Constitution entitled *Fundamental Rights and Freedoms*.
[25] Article 55(1) and (5).
[26] Article 55(4).
[27] Prosecution Motion, fn. 342.
[28] Rule 42(1).
[29] Rule 151(1).

against the applicant",[30] it was incumbent on the authorities to inform the applicant of the right against self-incrimination.[31] Further, in *Schmid-Laffer v. Switzerland*, the ECtHR also highlighted the issue whether the police had in their possession information incriminating the applicant at the time of the interview.[32] Consistent with human rights law and contrary to the SPO's assertion,[33] the Rules provide for a person to be treated as a suspect where the Specialist Prosecutor has "reasonable suspicion" that a person has committed or participated in a crime.[34] A similar definition applied at the ICTY.[35] The privilege against self-incrimination is thus triggered whenever the authorities have a reasonable suspicion that a person may have committed or participated in a crime.

B. THE RIGHT TO COUNSEL

18. Once a person is (or should be) regarded as a suspect, they also have the right to be assisted by counsel and to be represented during interviews. This right is expressly provided for in the Law,[36] the Rules,[37] and the Constitution.[38] The ECtHR has also repeatedly addressed this issue and concluded that "access to a lawyer should be provided as from the first interrogation of a suspect […] unless […] there are compelling reasons to restrict this right".[39]

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[30] ECtHR, *Zaichenko v. Russia*, no. 39660/02, *Judgment (Merits and Just Satisfaction)* ("*Zaichenko v. Russia*"), 18 February 2010, para. 52.
[31] *Zaichenko v. Russia* is the 'example' cited in ECtHR, *Ibrahim and Others v. the United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, *Judgment (Merits and Just Satisfaction)* ("*Ibrahim and Others v. the United Kingdom*"), 13 September 2016, para. 270, as referred to in the Prosecution Motion, fn. 342.
[32] ECtHR, *Schmid-Laffer v. Switzerland*, no. 41269/08, *Judgment (Merits and Just Satisfaction)*, 16 June 2015, para. 29, relied upon by the SPO in Prosecution Motion, fn. 342.
[33] Prosecution Motion, fn. 342.
[34] Rule 2(1).
[35] ICTY Rules of Procedure and Evidence, Rule 2(A).
[36] Article 38(3).
[37] Rule 43(3).
[38] Articles 30(5), 31(6).
[39] ECtHR, *Salduz v. Turkey*, no. 36391/02, *Judgment (Merits and Just Satisfaction)* ("*Salduz v. Turkey*"), 27 November 2008, para. 55; *Zaichenko v. Russia*, para. 37.

19. Reliance on incriminating statements made during interrogation without access to a lawyer irretrievably prejudices the rights of the defence[40] and the integrity of the judicial process. Consistent with its general position that the ECtHR assesses the fairness of proceedings as a whole rather than the admissibility of particular types of evidence,[41] the absence of compelling reasons to deny access to a lawyer does not "lead in itself" to a violation of Article 6 of the ECHR.[42] It does, however, mean that "very strict scrutiny" must be applied to the fairness assessment and the failure to provide access to a lawyer "weighs heavily in the balance; the onus is on the state to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice".[43] Accordingly, in determining admissibility, very strict scrutiny should be applied, and the SPO must demonstrate convincingly and exceptionally, why the overall fairness of this case is not irretrievably prejudiced by admitting material obtained when a suspect is denied access to counsel or was not informed of his right to legal representation before answering any questions.

C. PROVIDING NOTICE OF RIGHTS

20. Fundamental rights must be practical and effective, not theoretical and illusory.[44] In order to make the right to legal assistance and the privilege against self-incrimination practical and effective, it is crucial that a suspect is notified of those rights.[45] In principle, there can be no justification for a failure to notify a suspect of these rights; failure to notify will make it even more difficult to rebut the presumption of unfairness which arises.[46]

[40] *Zaichenko v. Russia*, para. 37.
[41] *Ibrahim and Others v. the United Kingdom*, para. 254.
[42] *Idem*, para. 262.
[43] *Idem*, para. 265.
[44] ECtHR, *Airey v. Ireland*, no. 62989/73, *Judgment (Merits)*, 9 October 1979, para. 24.
[45] *Ibrahim and Others v. the United Kingdom*, para. 272.
[46] *Idem*, para. 273.

D. ADMISSIBILITY OF PRIOR STATEMENTS OF THE ACCUSED

21. The SPO correctly acknowledges that there is no specific provision in the Law or Rules governing the admission of a prior statement by the Accused.[47] Rule 155 does not apply to evidence from the Accused; it only applies to witnesses who are deceased, can no longer be traced, are unable to testify due to a physical or mental impairment or who have been interfered with.[48] Rule 153 similarly only applies to a "witness" not an Accused or a suspect and, further, only applies to evidence "which goes to proof of a matter other than the acts and conduct of the Accused". Plainly, the SPO's position is that the prior statements of Mr. Krasniqi are probative of his acts and conduct[49] and Rule 153 therefore manifestly does not apply. Further, Mr. Krasniqi could not be called to be cross-examined.[50]

22. To the extent that the Trial Panel concludes that the admission of prior statements would erode, limit, or in any way diminish the fundamental rights against self-incrimination and to legal assistance, the Prosecution Motion should be rejected. Given the fundamental nature of these rights, they cannot be compromised. In considering this, the absence of an express provision rendering such statements admissible would be determinative. Article 55(1) of the Constitution provides that fundamental rights may only be limited by law. In the absence of express legal basis or authority to admit such statements, they would therefore be inadmissible because the limitation on fundamental rights is not "by law".

23. In any event, Article 37(1) and (3) of the Law provides that evidence collected in criminal proceedings prior to the establishment of the KSC and transcripts of

[47] Prosecution Motion, para. 90.
[48] Rule 155(1)-(2).
[49] Prosecution Motion, paras 103-110.
[50] Rule 153(3) of the Rules.

testimony at the ICTY or Kosovo Courts "may" be admissible. The Law specifically connects the admissibility of such items to "international standards on the collection of evidence". As a result, any admission of prior statements must satisfy the requirements of relevance, authenticity, probative value and that the prejudicial effect does not outweigh the probative value.[51]

24. Furthermore, Rule 138(2) of the Rules provides that evidence obtained by means of a violation of "standards of international human rights law" shall be inadmissible in two alternative situations: if the violation casts substantial doubt on the reliability of the evidence; and if the admission of the evidence would be antithetical to or would seriously damage the integrity of the proceedings.

25. The ICTY has considered requests by the prosecution to rely upon statements or transcripts which the accused had given prior to being indicted. The Appeals Chamber has held that where the accused has freely and voluntarily made statements prior to trial, and provided he was informed about his right to remain silent before giving this statement, he cannot later on choose to invoke his right against self-incrimination retroactively to shield those statements from being introduced.[52] The obvious corollary is that the statement is not admissible if the accused was not informed of his rights at the time of making that statement. Further, a Trial Chamber held that the essential question in such cases was whether the accused's rights had been sufficiently safeguarded at the time of the previous testimony.[53] The Trial Chamber held that the accused's rights had not been sufficiently safeguarded where the accused was not informed of his right not to make any statement which might

[51] Rule 138(1) of the Rules.
[52] 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, para. 15.
[53] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Chamber III, *Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of Naletelić and Martinović* ("*Prlić* Decision"), 5 September 2007, para. 14.

incriminate him and, for that reason, to remain silent at the time of his prior testimony.[54] Evidence of the prior testimony of two accused before the ICTY was therefore excluded.[55]

26. Importantly, exactly the same principles apply when the prior statement or testimony was gathered by a different institution. For example, the ICTY declared the inadmissibility of the statement of a prior interview with the accused taken in the absence of legal assistance, even though the infringement of this right came from a different entity (in that specific case, the Austrian Police) and even though the Austrian Police acted in accordance with their domestic legal framework, as legal assistance during the interview was not required under Austrian national law.[56]

IV. MR. KRASNIQI'S PRIOR STATEMENTS SHOULD NOT BE ADMITTED

27. Applying the above criteria, Mr. Krasniqi's rights were, on any view, not sufficiently safeguarded at the time his previous statements were made or his testimony given. Accordingly, the prejudicial effect of their admission outweighs any probative value. Further, the statements should be excluded pursuant to Rule 138(2).[57]

A. MR. KRASNIQI'S ICTY STATEMENT AND TRANSCRIPTS

28. On 27 April 2004, Mr. Krasniqi was interviewed by the Prosecution of the ICTY.[58] The recording equipment malfunctioned.[59] Although no tape recording of that

[54] *Prlić* Decision, para. 21.
[55] *Idem*, paras 21-22; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Chamber III, *Decision on the Prosecution Motion for the Admission into Evidence of the Testimony of Milivoj Petković Given in the Other Cases before the Tribunal*, 17 October 2007, para. 20.
[56] ICTY, *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Chamber, *Decision on Zdravko Mucic for the Exclusion of Evidence*, 2 September 1997, para. 55.
[57] *See infra*, para. 38.
[58] IT-04-84 P00340, p. 3292, lines 17-20.
[59] *Idem*, p. 3292, lines 23-26.

interview survived, the Prosecution prepared a "summary" on the basis of the notes taken by the Prosecution at the time.[60] The SPO does not seek to rely on this summary.

29. On 10 February 2005, Mr. Krasniqi was subpoenaed by the ICTY Prosecution to give testimony.[61] He had stated "that I am not willing to testify against Fatmir Limaj and his comrades"[62] and that "I refused to come of my own free will".[63] Far from giving evidence voluntarily, his testimony confirms that he was legally compelled to testify by virtue of the court ordered subpoena.

30. During his testimony, he was asked questions about matters including (i) his personal membership and role in the General Staff;[64] (ii) his role as spokesperson of the KLA;[65] (iii) the issuance and authorship of certain communiqués;[66] (iv) specific crimes alleged in this Indictment;[67] and (v) specific crimes alleged in the SPO PTB.[68] The case for which he was being called included allegations of the existence of a joint criminal enterprise. The same factual matrix is relied upon by the SPO in this case.

31. The transcript of that testimony clearly shows that Mr. Krasniqi was not advised at any stage of his right against self-incrimination.[69] He was not notified of his right not to answer questions, nor was he informed of his right to seek legal assistance.

32. On 23 and 24 May 2007, the Prosecution of the ICTY took a statement from Mr. Krasniqi. Once again, he was not notified of his right to seek legal assistance or of the

[60] IT-04-84 P00340, p. 3293, lines 7-15.
[61] *Idem*, p. 3292, lines 5-8.
[62] *Idem*, p. 3291, lines 2-4.
[63] *Idem*, p. 3291, lines 20-21.
[64] *Idem*, p. 3305, lines 12–16.
[65] *Idem*, p. 3313, lines 14-19.
[66] *Idem*, p. 3315, from line 17 onwards.
[67] *Idem*, p. 3397, line 3 to p. 3398, line 16.
[68] *Idem*, p. 3398, lines 12–24.
[69] Rule 90(E) of the ICTY Rules of Procedure and Evidence allowed him this right.

privilege against self-incrimination. It is therefore no surprise that he did not have any legal assistance during the interview. The SPO's silence on these issues appears to be an acceptance that no such warnings were given and no legal assistance was offered or provided.[70]

33. Further, the ICTY statement contains a declaration that "I have been advised that my statement may be provided to other law enforcement agencies and / or judicial authorities. I do not agree to my statement being provided to those authorities at the discretion of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia."[71] The statement has therefore been disclosed to the SPO by the ICTY without Mr. Krasniqi's consent. Indeed, it has been provided despite Mr. Krasniqi's express statement that he withheld any such consent.

34. The statement substantially consists of various newspaper articles and interviews which appear to have been put to Mr. Krasniqi with a view to obtaining confirmation that they accurately reflect certain communiqués or statements. In this regard, the Defence notes that the ICTY has held that transcripts of interviews are more reliable than statements, because they include "all questions, all answers, all pauses and requests for clarification".[72] By contrast, this statement is not a *verbatim* record of what Mr. Krasniqi said at the time and no audio-recording of the interview appears to be available. The absence of these safeguards further militates against their admission.

35. On 29 May 2007, Mr. Krasniqi attended the ICTY and gave testimony from 29 May 2007 – 31 May 2007. Once again, he was not given any notification of his right not

[70] *See* Prosecution Motion, paras 78-79, in contrast with Prosecution Motion, paras 58-60, 76.
[71] U016-2093-U016-2186, p. U016-2100.
[72] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Appeals Chamber, *Decision on Appeal Against Decision Admitting Transcripts of Jadranko Prlić's Questioning into Evidence ("Prlić* Appeals Decision"), 23 November 2007, para. 44.

to self-incriminate. He was not advised of his right to legal assistance. He was not assisted by any lawyer at the time that he gave evidence.

36. These statements and testimony were plainly obtained by violating Mr. Krasniqi's right not to self-incriminate and to legal assistance. According to the logic of this Indictment, Mr. Krasniqi should have been treated as a suspect in 2005 and 2007. The proceedings in *Limaj* and *Haradinaj* concerned crimes alleged to have occurred at Lapushnik/Lapušnik and Jabllanicë/Jablanica, which are both Indictment locations in this case; Mr. Krasniqi is now accused of committing the very crimes in relation to which he was called to give evidence in 2005 and 2007. In addition, the investigation of the ICTY Prosecution at the time obviously focused on some of the alleged members of the Joint Criminal Enterprise ("JCE") pleaded in this case, such as Fatmir Limaj. Further, in 2005 the Prosecution at the ICTY was in possession of a substantial amount of the evidence on which the SPO relies against Mr. Krasniqi. The Prosecution had in its possession material including (1) the 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 allegation of a common criminal plan;[73] (2) various media interviews attributed to Mr. Krasniqi;[74] (3) statements alleging Mr. Krasniqi's involvement in crimes alleged in this Indictment;[75] and (4) statements about Mr. Krasniqi's role in the General Staff.[76] This is the same material which the SPO now asserts is a sufficient foundation for its case. If the SPO maintains that this information provides a grounded suspicion that Mr. Krasniqi has committed crimes, it follows inexorably that this same information gave rise to a reasonable suspicion in 2005 and 2007 that Mr. Krasniqi committed the same crimes – and that he

[73] 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 and IT-04-84bis P00278.
[74] In *Limaj, see* Prosecution Exhibits IT-03-66 P139, IT-03-66 P00140.
[75] *E.g.,* K019-5141-K019-5146 RED2; 0106-8151-0106-8166.
[76] 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.

should have been provided with appropriate notifications, warnings and legal assistance. The Defence notes that Acting Specialist Prosecutor Mr. Alex Whiting signed the SPO Motion seeking to admit these statements and testimony and was also the Prosecution lawyer who subpoenaed and questioned Mr. Krasniqi in 2005, apparently without deeming it necessary to treat him as a suspect. Either that is an acknowledgement that the case against Mr. Krasniqi in this case is flimsy and the contents of the statement and testimony have no probative value against him, or it is an acknowledgement that his rights were not respected 18 years ago before the ICTY. In either case, the evidence should be excluded from the record of the present proceedings.

37. The result is that the ICTY statement and testimony should not be admitted pursuant to Rule 138(1) because any probative value they allegedly contain is outweighed by the prejudicial effect of taking his evidence without warning Mr. Krasniqi of the right not to self-incriminate, without advising him of his right to legal assistance and without him having the opportunity to consult counsel. In the language of the ICTY, his rights were not sufficiently safeguarded at the material time.

38. Alternatively, the statements and testimony should be excluded pursuant to Rule 138(2). For the reasons set out above, the evidence was obtained in violation of international human rights law. The evidence should be excluded because the admission of testimonial evidence from the Accused obtained in violation of their fundamental rights would seriously damage the integrity of the proceedings. The ECtHR recognised the severity of questioning a suspect without legal assistance by holding that it "irretrievably prejudices" the defence.[77] The existence of irretrievable prejudice is sufficient to meet the threshold of serious damage to the integrity of proceedings.

[77] *Salduz v. Turkey*, paras 55, 62; *Ibrahim and Others v. the United Kingdom*, paras 260, 265, 311.

39. In the further alternative, the statements and testimony should be excluded pursuant to Article 55 of the Constitution, which provides that fundamental rights may only be limited by law and any limitation must in no way deny the essence of the guaranteed right.[78] The admission of statements obtained in violation of the fundamental rights against self-incrimination and to legal assistance, would deny the essence of those rights; there is no point in those rights existing if evidence obtained in breach of those rights is admissible. Moreover, the importance of the right, the breach of several related rights and the absence of any counter-balancing safeguard for Mr. Krasniqi should lead to the evidence's exclusion pursuant to Article 55(4), which compels the Trial Panel to pay special attention to "to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation".

B. SPRK TRIAL TESTIMONY OF JAKUP KRASNIQI, DATED 2 FEBRUARY 2018

40. The testimony of Mr. Krasniqi in the Bellanicë/Belanica case should not be admitted. In the first place, the Defence contests the authenticity of the record. It is clear from the face of the record that the "recording equipment is missing" and the document is only in "transcription form".[79] This typed transcript is clearly not a *verbatim* record. For instance, Mr. Krasniqi's initial answers are recorded as "son of Januz and Hajrije maiden name HOTI, born on 1 January 1951 in Negroc village, Drenas municipality, currently residing in Pristina, no relation to the accused". Those answers are very unlikely to have been given in that sequence without any questions being recorded. Similarly a lawyer's intervention is recorded as "he opposes the question posed by the prosecutor to the witness to testify regarding a piece written in the newspaper Koha Ditore, and I kindly and respectfully ask the prosecutor to

[78] Article 55(1) and (5).
[79] SPOE00068088-SPOE00068094, p. SPOE0068088.

present the communique".[80] The way the record switches from the third person "he opposes" to the first person "I kindly" clearly shows that, at times, the recording is summarising what has been said, rather than recording every word spoken. It is thus not possible to discern which sections, if any, were recorded *verbatim*, and which are instead only a summary of what was spoken. Whilst the parties had the opportunity to oppose the lack of recording equipment, Mr. Krasniqi, as a witness, did not. Nor did he have any opportunity to review the transcript and confirm its accuracy.

41. Moreover, the prejudicial effect outweighs the probative value. First, before giving evidence Mr. Krasniqi was given a warning that "that he can refuse to answer any question that would subject himself or close relative to disgrace or serious material or other harm".[81] That is not consistent with the notification required by the KSC, which requires a witness to be notified of their right to object to providing testimony which might incriminate him or herself.[82] A right not to incriminate oneself is not co-extensive with a right not to expose oneself to disgrace or serious material or other harm. In addition, the already feeble scope of this warning was further compromised by the language of the notification, which at the same time warned Mr. Krasniqi that he had an "obligation to tell the truth".[83]

42. Second, this testimony was given as a witness in relation to matters which now form the subject matter of the charges against Mr. Krasniqi. More specifically, he was questioned about matters including the case of W01735 and W03170,[84] which now form part of the charges against him. He was also questioned about the Bellanicë/Belanica case which is relied on by the SPO in its Pre-Trial Brief in support

[80] SPOE00068088-SPOE00068094, p. SPOE0068090.
[81] *Idem*, p. SPOE0068089.
[82] Rule 150(1) of the Rules.
[83] SPOE00068088-SPOE00068094, p. SPOE0068089.
[84] *Idem*, p. SPOE0068090.

of the alleged common criminal purpose.[85] His status as a witness in those proceedings and the limited rights that this status entitled to him are entirely different to the more extensive rights accorded to a suspect. Had Mr. Krasniqi been called as a suspect, he would have had a chance to seek legal advice before answering, ensure that his answers would not lead to self-incrimination, and ultimately refuse to answer certain questions. It is fundamentally unfair to rely on evidence elicited without those safeguards, against Mr. Krasniqi. Rather, the breach of essential procedural safeguards strongly militates in favour of exclusion.

C. SPRK INTERVIEW OF JAKUP KRASNIQI, DATED 13 JUNE 2018

43. The June 2018 interview of Mr. Krasniqi should be similarly excluded. First, its probative value is extremely low. The interview was extremely brief and lasted only 19 minutes, commencing at 09:31 and ending at 09:50.[86] It consists of only seven substantive questions. Mr. Krasniqi said that he was the spokesman for the General Staff of the KLA, which is not in dispute. He then said that he did not know Behajdin Allaqi or the circumstances of his death. This evidence is exculpatory, adds nothing to the SPO's case and, to the limited extent it has any relevance, is duplicative of the information that Mr. Krasniqi provided to W04474. There is therefore no reason to admit this evidence.

44. Moreover, the prejudicial effect of this evidence outweighs its limited probative value. The Defence repeats its above objections to relying on evidence obtained at a time when Mr. Krasniqi was not accorded the full rights of a suspect or an Accused.

[85] KSC-BC-2020-06, F01296/A01, Specialist Prosecutor, *Annex 1 to Prosecution Submissions Pursuant to Decision F01229 with confidential Annexes 1-2 and public Annex 3, Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief'* ("SPO PTB"), 15 February 2023, confidential, paras 53-54.
[86] SPOE00213595-SPOE00213597.

D. SPRK SUSPECT INTERVIEW OF JAKUP KRASNIQI, DATED 20 DECEMBER 2013

45. The Defence also opposes the admission of the 2013 suspect interview of Mr. Krasniqi. The Defence underscores at the outset that Mr. Krasniqi was never tried for the allegations which formed the subject matter of the interview. As he did in that interview, Mr. Krasniqi absolutely denies that he ever physically attacked any man or woman. He never had the opportunity to confront and refute the allegations against him in court.

46. As to the reliability and authenticity of this interview, whilst the English version is signed and each page is initialled, the Albanian is not.[87] Mr. Krasniqi does not speak or read English. The Defence acknowledges the presence of an interpreter who read the record to Mr. Krasniqi in Albanian. Nonetheless, his ability to consider the record and make changes was obviously reduced compared to the situation if he had been able to read the document himself.

47. Furthermore, the probative value of the interview in relation to disputed issues in these proceedings is minimal. Mr. Krasniqi explains, again, that he was the spokesperson of the General Staff and gives the dates of his absence from Kosovo during and after the Rambouillet and Paris negotiations in 1999.[88] These allegations are not in dispute in these proceedings. Much of the rest of the interview consists of Mr. Krasniqi confirming that he did not know various individuals who appear to have minimal relevance to these proceedings.

48. The Trial Panel has recently excluded parts of W02652's evidence on the basis that the events to which it related are not alleged to have been part of the JCE in the

[87] SITF00364476-00364497. The Albanian version can be found at pp. SITF00364490-00364497.
[88] *Idem*, p. SITF00364485.

present case, and are not evidence of a widespread or systematic attack against opponents or of the armed conflict charged in the Indictment.[89] Taking into account the issues of reliability and probative value of the evidence, the Trial Panel found that the SPO had failed to establish the *prima facie* relevance of the incidents to which the evidence related, and that in any case, its limited probative value was outweighed by its prejudicial effect.[90] The incidents for which Mr. Krasniqi was interviewed as suspect are not charged in the Indictment and no specific time-period for their occurrence is indicated, other than "late 1998/early 1999".[91] The Defence thus submits that the current circumstances are essentially of the same nature: the SPO has failed to establish the relevance or probative value of the tendered interview to any matter which is charged in the Indictment and is effectively in dispute between the Parties.

49. Moreover, although Mr. Krasniqi was treated as a suspect and accorded the relevant rights, it is important to recognise that the context of that case and the allegations of which he was on notice were entirely different. He was interviewed in relation to an unfounded allegation that he cut the lip and hair of two female civilians in Likoc/Likovac. That he elected to speak in relation to that narrow allegation should not be equated to a waiver of his right against self-incrimination in relation to the wholly different allegations in the present case. He was not on notice of the broader and more diffuse allegations in the present case and hence his waiver of the right to silence cannot be treated as an informed one.

[89] KSC-BC-2020-06, In Court – Oral Order, Order on Selimi Defence Motion for Exclusion of Evidence (F01438), 17 April 2023, public.
[90] *Ibid*.
[91] SITF00364476-00364497, p. SITF00364478.

V. APPLICABLE LAW: USE OF PRIOR STATEMENTS OF CO-ACCUSED

50. Article 31(4) of the Constitution provides that "[e]veryone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence". A similar right is expressly incorporated in Article 21(4)(f) of the Law, which provides that Mr. Krasniqi is entitled to the minimum guarantee "to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her". This fundamental right is also reflected in major international and regional human rights instruments.[92]

51. The procedural rules also enshrine a preference for live evidence. Article 37(2) of the Law provides that "in principle, all evidence should be produced in the presence of the accused with a view to adversarial argument". The admissibility of written statements or transcripts, as an exception to this general rule, is governed by Rules 153 and 155. Rule 153 cannot apply because it only applies to a statement or a transcript which "goes to proof of a matter other than the acts and conduct of the Accused as charged in the indictment".[93] Further, under Rule 153, the Trial Panel must decide whether to request the witness to attend for cross-examination; it is only if "the requirements of a fair and expeditious trial exceptionally warrant" that a statement should be admitted without cross-examination. A co-accused cannot be called for cross-examination. Rule 155 does not apply to evidence from a co-accused; it only applies to witnesses who are deceased, can no longer be traced, are unable to testify due to a physical or mental impairment or who have been interfered with.[94] For

[92] ECHR, Article 6(3)(d); ICCPR, Article 14(3)(e).
[93] Rule 153(1) of the Rules.
[94] Rule 155(1)-(2) of the Rules.

completeness, Rule 150, subtitled "testimony of co-accused", applies where the Defence seeks to call or question a co-Accused. It does not apply to the SPO.

52. From the perspective of the case against Mr. Krasniqi, evidence of prior statements or transcripts from his co-Accused is witness evidence. As the ECtHR has emphasised, the minimum guarantee of examining the witnesses against the Accused applies to evidence from a co-Accused.[95] It follows that if the statements of Messrs. Thaçi, Veseli and Selimi are admitted, Mr. Krasniqi ought to be entitled to cross-examine them. But he cannot cross-examine them, unless they agree to give evidence,[96] because the Accused cannot be compelled to testify.

53. The International Criminal Court ("ICC") has considered exactly this scenario in relation to the admissibility of a prior statement of co-accused. It found that the fact that it contained allegations against the other accused "creat[ed] an overwhelming legal obstacle against its admission" because the author of the statement "cannot be compelled to submit to examination by, or on behalf of," his co-accused.[97] Prejudice is particularly high when one of more co-Accused testified about another co-Accused's acts and conduct, the notion of which is to be interpreted extensively, so as to comprise "any critical element of the Prosecution case" against a specific accused.[98] When such a situation arises, the Panel must perform a delicate balancing exercise between such prejudice and the probative value of these statements.[99] In *Boškoski and Tarćuloski,* the

[95] *See, for example*, ECtHR, *Vidgen v. Netherlands*, no. 29353/06, *Judgment (Merits and Just Satisfaction)*, 10 July 2012, paras 42-43; *Oddone and Pecci v. San Marino*, nos. 26581/17 and 31024/17, *Judgment (Merits and Just Satisfaction)*, 17 January 2020, para. 93.
[96] None of the Accused has indicated that they intend to testify and no Accused named themselves on a list of Defence witnesses at the time of pre-trial briefs.
[97] 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, para. 53.
[98] *Prlić* Appeals Decision, para. 59.
[99] 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* ("*Popović* Decision"), 14 December 2007, para. 51.

ICTY Trial Chamber accepted[100] the submissions by the *Boškoski* Defence that the admission of a co-accused's statements "would violate the fundamental right of Mr. Boškoski to confront evidence which may be relevant to his case".[101] This violation derives from the accused's inability to compel the author of the statement to testify, and test the reliability of the assertions made against him.[102]

54. The Kosovo Criminal Procedure Code relies on the same principles in providing that: "[s]tatements provided by a defendant in any context, if given voluntarily and without coercion, are admissible during the main trial against that defendant, but not co-defendants".[103] Though the Kosovo Criminal Procedure Code is not binding on the KSC, the solution it adopted in relation to statements of co-Accused is relevant as an application of the same human rights and constitutional norms. Moreover, it should not be the case that Mr. Krasniqi's rights to receive less protection before the KSC than they would before the Courts in Kosovo.

55. The Defence acknowledges the Trial Panel's previous finding that "[t]he admission of a record or statement made by an accused does not, without more, infringe upon the fundamental rights of his co-defendants".[104] However, it is submitted that the issue under scrutiny differs from the situation in which the finding was made, which related to the admissibility of the "Selimi Note". First, the Trial Panel recognised the distinction between the Selimi Note and a statement in observing that "the items are not tendered as a statement of one of the co-accused, but as associated exhibits to W04474's Rule 154 Statements", which led the Panel to consider the matter

[100] ICTY, *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* ("*Boškoski and Tarčulovski* Decision"), 7 December 2007, para. 46.
[101] ICTY, *Prosecutor v. Boškoski and Tarćuloski,* Transcript of Hearing, 18 September 2007, p. 5136, lines 14-23.
[102] *Ibid.*
[103] Kosovo Criminal Procedure Code, Article 123(5).
[104] KSC-BC-2020-06, F01380, Trial Panel II, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154* ("Rule 154 Decision"), 16 March 2023, confidential, para. 50.

under the guise of Rule 138(1), rather than the rules governing the admissibility of witness statements.[105] Second, in support of its finding, the Trial Panel cited two decisions which only have limited relevance in the present circumstances.[106] The decision in *Kvočka et al.* dealt with a completely different situation: as stated in the reasoning, the accused actually testified at trial,[107] which gave the other accused an opportunity for cross-examination. The issue addressed by the Trial Chamber related to the admissibility of previous written statements *in addition* to the testimony given in court, which the Trial Chamber accepted in light of the fact that the statement had been referred to extensively during the oral examination.[108] At no point did the Trial Chamber address the issue of the reliance on prior testimony against the co-accused in the absence of cross-examination.

56. The ICTY Appeals Chamber decision in *Prlić,* cited by the Trial Panel, also deserves a more in-depth analysis. While it is true that the Appeals Chamber upheld the Trial Chamber's decision to admit Mr. Prlić's prior statement, it established a large number of safeguards to limit the Trial Chamber's reliance on this evidence to enter a conviction,[109] and notably declined to elevate the admissibility of the accused's prior statements to a generally applicable principle of law. To the contrary, it held that the Trial Chamber did not err in admitting the statement *in the case before it*, and clarified that "[t]his does not mean that a trier of fact would always abuse its discretion in limiting, or even denying, the admission of certain statements of a co-accused […] depending on the circumstances of the case.[110] It even provided a non-exhaustive list of situations justifying a decision *not* to admit such statements, including whenever

[105] Rule 154 Decision, para. 50.
[106] *Idem,* fn. 87.
[107] ICTY, *Prosecutor v. Kvočka et al.,* IT-98-30/1, Trial Chamber, *Decision on the Admission of the Record of Interview of the Accused Kvočka* ("*Kvočka* Decision"), 16 March 2001, para. 4: "the oral nature of the proceedings had been respected since the accused had testified and the record of his interview was cited at the hearing to a large extent".
[108] *Kvočka* Decision, paras 4, 12.
[109] *Prlić* Appeals Decision, paras 57-60.
[110] *Idem,* para. 62.

the probative value of the statement is impacted by its "lack of sincerity".[111] On the basis of this finding, the ICTY Appeals Chamber later adopted a much stricter approach on the admissibility of the accused's prior statements.[112]

57. The Defence thus respectfully submits that the Trial Panel should adopt an equally strict approach when balancing the probative value of the co-Accused's prior statements with the prejudice that would be caused to a co-Accused who is deprived of the minimum safeguard of cross-examination.

VI. THE PRIOR STATEMENTS OF MESSRS. THAÇI, VESELI AND SELIMI SHOULD NOT BE RELIED ON AGAINST MR. KRASNIQI

58. The prior statements and testimony of Messrs. Thaçi, Veseli and Selimi must not be relied upon against Mr. Krasniqi. The SPO cannot overcome the fundamental hurdle that Mr. Krasniqi cannot confront this evidence in cross-examination.[113] Given the fundamental nature of this right, and consistent with the approach taken by the ICC[114] and the ICTY,[115] the evidence should not be relied on against Mr. Krasniqi.

59. The statements of Messrs. Thaçi, Veseli and Selimi contain passages relevant to the acts and conduct of Mr. Krasniqi, including his alleged presence at certain locations at the relevant time, his alleged role in the drafting and issuing of communiqués and other public statements, and, more in general, the meetings and

[111] *Prlić* Appeals Decision, fn. 104.
[112] *E.g., Popović* Decision, paras 48, 51-52. *See also*, *Boškoski and Tarčulovski* Decision, para. 46; ICTY, *Prosecutor v. Haraqija and Morina,* IT-04-84-R77.4-A, Appeals Chamber, *Judgment,* 23 July 2009, paras 61-62.
[113] Should Messrs. Thaçi, Veseli or Selimi decide to give evidence, the SPO could seek at that stage to adduce their prior statements. Only then would the right to confront evidence and cross-examine witnesses be preserved because Mr. Krasniqi too would be able to ask them questions.
[114] *Supra,* para. 53.
[115] 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* ("*Blagojević and Jokić* Decision"), 18 September 2003, paras 25-27; *Boškoski and Tarčulovski* Decision, para. 46.

functioning of the General Staff, which, according to the SPO, are relevant to Mr. Krasniqi's role and the alleged common criminal purpose.[116] The reliance on these statements against Mr. Krasniqi, who is not afforded a chance to confront this evidence through cross-examination, would thus be extremely prejudicial. Such prejudice is not remedied by the "considerable safeguards and counterbalancing factors" trumpeted by the SPO,[117] which are no more than generic platitudes which are not capable of counterbalancing the specific prejudice to Mr. Krasniqi. For instance, the SPO asserts that it will "present corroborative testimonial and documentary evidence on the same matters", without identifying any specific testimony or document capable of corroborating specific aspects of the testimony.[118] The reality is that the SPO intends to call very few witnesses from the General Staff of the KLA so that the opportunity to confront evidence from Messrs. Thaçi, Veseli or Selimi is extremely limited.

60. Further, the prejudice outlined above greatly outweighs the probative value of this evidence, which is severely limited. First, there is good reason to be cautious about the reliability of evidence obtained during a suspect interview. As a Trial Chamber of the ICTY observed:-

> It is reasonable to expect that any person appearing at such a questioning session may minimise his role in any criminal activities while highlighting or even exaggerating the role of others in order to deflect attention from himself. A suspect appearing for questioning is not required to make a solemn declaration, as is a witness testifying before this Tribunal […] the veracity of any such interview is inherently suspect.[119]

[116] SPO PTB, paras 1, 19, 81, 105, 107, 111(d), 195.
[117] Prosecution Motion, para. 91.
[118] *Ibid*.
[119] *Blagojević and Jokić* Decision, para. 24.

61. Second, some of the statements that the SPO seeks to have admitted, and in particular those of Mr. Selimi, are vague, contradictory, unreliable, and speculative. The most relevant examples are outlined below.

A. MR. SELIMI'S STATEMENTS ABOUT THE ALLEGED ROLE OF JAKUP KRASNIQI IN THE DRAFTING OF COMMUNIQUÉS

62. Mr. Selimi's assertions about who was drafting communiqués are speculative and contradictory. In his SPO interview, he alleged that [REDACTED].[120] However, he later admitted that [REDACTED].[121] [REDACTED][122] and [REDACTED].[123] What is more, during his live testimony before the Basic Court of Gjakovë/Đakovica in 2018, Mr. Selimi had already been asked whether, to his knowledge, Mr. Krasniqi was involved in drafting communiqués. At the time, he replied: "[n]o, I don't know about this. […] I don't know whether he wrote communiqués at the time. It wasn't my responsibility to deal with this."[124] This blatant contradiction demonstrates the limited probative value of Mr. Selimi's statements. Further, it is of note that Mr. Thaçi, in his SPO interview, gave diametrically opposite information on the same matter. He explained that [REDACTED][125] as well as [REDACTED]. Mr. Krasniqi was instead [REDACTED].[126] The SPO is thus effectively seeking to introduce two statements from two co-Accused which contain irreconcilable information, while at the same time ignoring the resulting issues in terms of their probative value.

63. In addition, it must be considered that a General Staff member facing a suspect interview, aware of the role that the communiqués had played in earlier trials at the

[120] 068933-TR-ET Part 7, p. 5, lines 16-22; p. 17, lines 7-13.
[121] 074459-TR-ET Part 3, p. 5, lines 10-13.
[122] *Idem*, p. 3, lines 18-20.
[123] *Idem*, p. 3, lines 1-4. *See also* 074459-TR-ET Part 3, p. 7, lines 11-16.
[124] SPOE00068075-SPOE00068087-ET, p. SPOE00068083.
[125] 071840-TR-ET Part 5, p. 7, lines 6-20; p. 9, lines 24-25; p. 10, lines 10-14.
[126] 071840-TR-ET Part 5, p. 7, lines 7-8.

ICTY and desiring to avoid being charged, might well consider that it was in their interests to push responsibility for the communiqués onto another, even when the objective basis for doing so was lacking.

64. Such evidence has extremely limited probative value against a co-Accused. At the same time, if admitted, it would be extremely prejudicial to Mr. Krasniqi, who would have no opportunity to confront the author of the statement and further expose the absence of any factual basis for the statement. Mr. Selimi's statements relating to the alleged role of Mr. Krasniqi in drafting communiqués should not be relied upon against Mr. Krasniqi.

B. MR. SELIMI'S STATEMENTS ABOUT JAKUP KRASNIQI'S ALLEGED VISITS TO THE OPERATIVE ZONES

65. In his SPO interview, Mr. Selimi also made two vague allegations that Mr. Krasniqi [REDACTED]. Both are unreliable and should not be relied upon against Mr. Krasniqi. In his 2019 SPO interview, Mr. Selimi stated that [REDACTED].[127] In his second statement to the SPO, he clearly stated that he [REDACTED].[128] Similarly, Mr. Selimi mentioned that [REDACTED].[129] The extremely low probative value of these statements mitigates against relying on them against Mr. Krasniqi.

C. OTHER STATEMENTS OF MR. SELIMI CONCERNING GENERAL STAFF MEETINGS AND ACTIVITIES

66. Although they do not describe Mr. Krasniqi's acts and conduct directly, Mr. Selimi's statements about the functioning and meetings of the General Staff, including

[127] 068933-TR-ET Part 6, p. 6, lines 18-19 (emphasis added).
[128] 074459-TR-ET Part 2, p. 2, lines 11-12.
[129] 074459-TR-ET Part 6, p. 21, lines 12-13.

their attendees and topics of discussion, should also not be relied upon against Mr. Krasniqi.

67. In line with the jurisprudence of the ICC, the concept of acts and conduct should be interpreted broadly, so as to encompass "the acts and conduct of individuals in an organisation that the accused was an integral member of"[130] or the acts and conduct of other persons where this is relied upon to prove the acts and conduct of the Accused.[131]

68. The SPO alleges that (i) Mr. Krasniqi was a member of the General Staff;[132] (ii) the Accused, as members of the General Staff, "issued directions, instructions, and orders regarding Opponents";[133] (iii) the General Staff met regularly, and important decision were taken during General Staff meetings, including regarding KLA policy, strategy, and objectives;[134] and (iv) Mr. Krasniqi was involved in the drafting of public statements and communiqués, which "reported on, and claimed responsibility for, actions taken against Opponents, and were often issued shortly after decisions reached at General Staff meetings".[135]

69. Mr. Selimi's statements about General Staff meetings, and particularly the topics of discussion, thus go to the heart of the SPO's case against Mr. Krasniqi. It would be utterly unfair to rely on these statements against Mr. Krasniqi without affording him

[130] ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, Appeals Chamber, *Judgment on the Appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution Request for the Introduction of P-0113's Evidence Pursuant to Rule 68(2)(b) of the Rules"*, 13 May 2022, para. 54.
[131] ICC, *Prosecutor v. Said Abdel Kani*, ICC-01/14-01/21-507-Red, Trial Chamber VI, *Public Redacted Version of the Decision on the Prosecution's First, Second and Fourth Requests Pursuant to Rule 68(2)(b) of the Rules*, 21 October 2022, para. 19; *Prosecutor v. Said Abdel Kani*, ICC-01/14-01/21-506-Red, Trial Chamber VI, *Public Redacted Version of Decision on the Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses*, 26 October 2022, para. 21.
[132] KSC-BC-2020-06, F00999/A01, Specialist Prosecutor, *Annex 1 to Submission of Confirmed Amended Indictment, Amended Indictment* ("Indictment"), 30 September 2022, confidential, para. 11.
[133] Indictment, para. 39.
[134] SPO PTB, para. 107(c).
[135] *Idem*, paras 18-19.

the chance to cross-examine the author, and ultimately test the reliability of these assertions. This is all the more concerning due to the vague, speculative and sometimes contradictory nature of Mr. Selimi's statements, as well as the SPO's constant practice throughout the interview of asking leading questions, which further diminish any alleged probative value of these statements.

70. To give but one example, Mr. Selimi initially stated that [REDACTED].[136] Unsatisfied with the answer, the SPO investigators asked Mr. Selimi the same question not less than four times, with different formulations, in the hope for a different answer.[137] The investigator went so far as to assert that Mr. Selimi's initial answer was inconsistent with his testimony,[138] which prompted Mr. Selimi to give nuance to his account, and ultimately state: [REDACTED].[139] Mr. Selimi's SPO interviews are replete with this type of witness-pressuring or relentless questioning until an "acceptable" answer to the SPO is received. All this diminishes and adversely impacts the reliability of the statement and exemplifies the prejudice that would be caused to Mr. Krasniqi if these assertions were relied upon without being tested through cross-examination.

VII. THE ASSOCIATED EXHIBITS SHOULD NOT BE ADMITTED

71. The Defence submits that if, despite all the arguments advanced above, the Trial Panel ultimately decides to admit the prior statements of the Accused, it should not *automatically* admit the associated exhibits.

72. The Trial Panel has already recognised that associated exhibits can be admitted only if they form an inseparable and indispensable part of the statement, meaning that

[136] 068933-TR-ET Part 7, p. 16, lines 24-25.
[137] *Idem*, p. 18, lines 16-17, 21-22, 24-25; p. 19, lines 7-11.
[138] *Idem*, p. 19, lines 7-11.
[139] 068933-TR-ET Part 7, p. 19, lines 12-15.

without them, "the witness's testimony would become incomprehensible or of lesser probative value".[140] Exhibits that do not fall within this category must be tendered either orally through a witness or through the bar table.[141] Further, the Panel held that the admission of associated exhibits is subject to the general requirements of Rule 138.[142]

73. While some of the associated exhibits meet this test, others fall short of the admissibility requirements. Certain documents, albeit shown to one of the Accused, were actually not commented upon, or the comments provided are essentially unsubstantial, thus rendering the exhibits not "inseparable and indispensable" to the statement. Other documents are either already the subject of admissibility litigation, or do not meet the requirements of Rule 138.

74. The SPO also seeks the admission of entire documents, in situation in which only a small passage of the tendered document was put to and commented upon by one of the Accused. In this regard, the Defence notes the submissions of Prosecution Counsel at the hearing of 19 April 2023, who objected to the admission of a document tendered through a witness "because the only thing the witness was asked in relation to this document is whether he sees the information in it. So I'm not sure that's an appropriate vehicle for admission. By that standard, anything shown to a witness would be admitted."[143] Despite admitting that documents touched upon only marginally by a witness – without more – do not meet the standard for admission, the SPO now seeks the admission of several documents which were barely used with any of the Accused, without providing any information on their authenticity, relevance, or probative value.

[140] Rule 154 Decision, para. 24.
[141] *Ibid.*
[142] *Idem,* para. 25.
[143] KSC-BC-2020-06, Draft Transcript of Hearing, 19 April 2023, confidential, p. 3208, line 24 to p. 3209, line 3 (emphasis added).

75. The Defence hereby includes submissions on certain categories or discrete items:

a. Documents already tendered through the bar table: As noted by the SPO, three associated exhibits were already tendered by the SPO through the first bar table motion.[144] The Defence opposed their admission[145] and a decision is currently pending. In this context, any determination on the admissibility of these associated exhibits should be postponed until the Panel has issued a decision on the admissibility of these documents through the bar table.

b. Communiqués and political declarations: Among the associated exhibits, the SPO seeks the admission of a number of communiqués, political declarations, and other public documents purported to originate from the KLA. The Defence opposes their admission and incorporates by reference its previous submissions in response to the first bar table motion.[146]

c. KLA Rules and Regulations: The associated exhibits include KLA Rules and Regulations.[147] The Defence opposes their admission and incorporate by reference its previous submissions in response to the first bar table motion.[148]

d. 076565-076565-ET: The document purports to be a "Communique of the Military Police Department of Kosovo Liberation Army" dated 23

[144] Prosecution Motion, Annex 1, fns. 1-3.
[145] KSC-BC-2020-06, F01387/A01, Joint Defence, *Annex 1 to Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table*, 21 March 2023, confidential, item nos. 2; 34A; and all items extracted from U003-8552-U003-8690.
[146] KSC-BC-2020-06, F01387, Joint Defence, *Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table* ("Response to SPO BTM"), 21 March 2023, confidential, paras 14-19.
[147] *E.g.* 071794-071839, pp. 071797-071815.
[148] Response to SPO BTM, paras 102-105.

September 1998. When shown to Mr. Thaçi during his SPO interview, he simply commented that [REDACTED].[149] Not only is the document not "inseparable and indispensable" to the statement, but it also falls short of the requirements of Rule 138. The document is unstamped, unsigned, and purports to have been issued by an entity which did not come into existence until months after the date of the document.[150]

e. 076565-076705, p. 076596:[151] The document is a screenshot of a Facebook post by an account bearing the name of "Jakup Krasniqi". Mr. Thaçi [REDACTED].[152] The document falls far short of any admissibility standard: it is a simple screenshot from an unverified account, with no *indicia* of authenticity whatsoever, which could have been written and posted by anyone. In the absence of further information and verification of source, it should not be admitted into evidence.

f. 076565-076705, pp. 076597-076599: The document is a newspaper article reporting on the Facebook post above. Mr. Thaçi [REDACTED][153] and the same submissions on authenticity apply.

g. 074440-074458A, pp. 074450-074453: The document is a two-page extract of Mr. Krasniqi's book "Kthesa e Mahde".[154] The document should not be admitted as an associated exhibit at this stage. In Mr. Selimi's interview, the document is only briefly touched upon and the questions relate only to two

[149] 076563-TR-ET Part 4, p. 8, line 5, 17-18; p. 10, lines 8-9.
[150] EULEX, *People v. F.L.*, PKR. Nr 154/16, Basic Court of Gjakovë/Đakovica, *Judgment*, 9 March 2018, p. 40; Court of Appeals, *People v. F.L.*, PAKR. No. 206/2018, *Judgment*, 30 October 2018, p. 4.
[151] The document can also be found at 074440-074458A, p. 074447.
[152] *Idem*, p. 13, lines 6-7.
[153] *Idem*, p. 13, lines 5-7.
[154] The Defence notes that p. 074452, which was shown to Mr. Selimi, is missing from document 074440-074458A.

distinct paragraphs,[155] [REDACTED].[156] In this context, the document should be tendered through a witness who can testify to its accuracy.

h. 074440-074458A, pp. 074458-074459: The document purports to be an interview with Mr. Krasniqi published by "Koha Ditore" on 12 July 1998. The document should not be admitted into evidence through this motion. First, although the interview extends for two full pages, Mr. Selimi was only asked about one question and answer relating to the events at Bardh i Madh, amounting to four lines in total.[157] To SPO's attempt to have the full interview admitted is essentially an attempt to circumvent the rules applicable to the admissibility of documents. Second, Mr. Selimi did not comment on the interview itself, but only discussed the events at Bardh i Madh from his own perspective; as concerning the relevant excerpt, he simply answered that [REDACTED].[158] The document is thus not "inseparable and indispensable" to the underlying statement. Third, the Defence recalls its previous submissions on the authenticity issues associated with interviews and media articles attributing statements to the Accused.[159] Suffice it to say that, as previously found by the ICTY, interviews "may be subject to journalistic analysis or interpretation or may have been manipulated in some other way",[160] which calls for a high level of scrutiny and caution before accepting that the purported statements actually emanate from the Accused and that the Accused's words are properly reflected in the published version of the interview. Finally, should the SPO intend to rely on the full interview, they should tender the

[155] 074459-TR-ET Part 6, p. 10, lines 21-23; p. 11, lines 3-7; p. 12, lines 9-10.
[156] *Idem,* p. 10, lines 21-25.
[157] The relevant part is highlighted in yellow in 074440-074458A, p. 074458.
[158] 074459-TR-ET Part 8, p. 15, lines 8-9.
[159] Response to SPO BTM, paras 56-60, fn. 105.
[160] ICTY, *Prosecutor v. Karadžić,* IT-95-5/18-T, Trial Chamber, *Decision on Prosecution's Bar Table Motion for the Admission of Documents Related to the Sarajevo Component*, 11 May 2012, paras 19-20.

document through a witness who can authenticate its background and content, or include it in a bar table motion.

i. IT-03-66 P140: The document purports to be an interview with Mr. Krasniqi published by "Der Spiegel" on 6 July 1998. The document is problematic and should not be admitted as an associated exhibit. In his witness interview in the *Limaj* case, Mr. Krasniqi explained that the journalist twisted his words with the aim to "give another direction of the policy and war of the KLA".[161] This casts substantial doubt on the accuracy of the document. Further, the reporter who took and published this interview remains unknown,[162] which prevents any verification of its accuracy. Another relevant consideration is that the interview was given in Albanian, translated (and published) in German, and then again translated into English, which almost inevitably dooms the language to be an inaccurate reflection of Mr. Krasniqi's statements. Considering that the original Albanian is not available, no verification in this sense is possible.

VIII. CONCLUSION

76. For all the above, the Defence for Mr. Jakup Krasniqi respectfully requests the Trial Panel to reject the Prosecution Motion.

[161] IT-03-66 T3285-T3365, p. 3360, lines 17-18.
[162] The associated description to the document in the Prosecution Motion is: "Exhibit P140 in ICTY case no. IT-03-66 Limaj: Interview with Jakup KRASNIQI by unidentified Der Spiegel reporter, dated 06 July 1998" (emphasis added).

Word count: 10,962

Venkateswari Alagendra

Monday, 24 April 2023

Kuala Lumpur, Malaysia.

Aidan Ellis

Monday, 24 April 2023

London, United Kingdom.

Victor Băieșu

Monday, 24 April 2023

The Hague, the Netherlands.