

In: KSC-BC-2020-06
Specialist 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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr. Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

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Krasniqi Defence Request

for Certification to Appeal the Decision on Prosecution Motion for Admission of

Accused's Statements

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I. INTRODUCTION

1. On 9 November 2023, Trial Panel II (“Panel”) issued its “Decision on Prosecution Motion for Admission of Accused’s Statements”,¹ which admitted, *inter alia*, Mr. Krasniqi’s ICTY² witness statement dated 23-24 May 2007,³ the transcript of Mr. Krasniqi’s ICTY testimony dated 10-15 February 2005,⁴ and the transcript of Mr. Krasniqi’s ICTY testimony dated 29-31 May 2007⁵ (collectively “ICTY Evidence”).

2. The Defence for Mr. Krasniqi (“Defence”) seeks certification to appeal the following issues:

- (i) **First Issue:** *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;*
- (ii) **Second Issue:** *Whether the Panel erred in law by adopting a standard of “bad faith” or “unreasonableness” in considering whether Mr. Krasniqi was entitled to the status of suspect at the time he gave evidence before the ICTY;*
- (iii) **Third 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*

¹ KSC-BC-2020-06, F01917, Trial Panel II, *Decision on Prosecution Motion for Admission of Accused’s Statements* (“Decision”), 9 November 2023, public.

² International Criminal Tribunal for the former Yugoslavia (“ICTY”).

³ IT-04-84 P00328.

⁴ IT-03-66 T3285-T3365; IT-03-66 T3366-T3447; IT-03-66 T3448-T3540, pp. 1-46.

⁵ IT-04-84bis P00063 Confidential.

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

- (iv) **Fourth Issue:** *Whether the Panel erred in law and/or fact by finding that there is no material distinction between the protection offered to witnesses under the ICTY's regime and the SC's⁶ legal framework, thereby ignoring that unlike ICTY Rules, Rules 41(1)(a) and (2) and 151 of the KSC RPE require that witnesses be notified of their rights against self-incrimination before their testimony or statement is given;*
- (v) **Fifth Issue:** *Whether the Panel erred in law and/or fact by justifying the admission of Mr. Krasniqi's ICTY Evidence on the basis that they were compliant with the ICTY's legal framework, thereby adopting the standard of a different institution instead of that of the SC, and failing to consider whether the fact that Mr. Krasniqi was not notified about his privilege against self-incrimination before testifying fell short of the minimum guarantees envisioned for witnesses at the SC;*
- (vi) **Sixth Issue:** *Whether the Panel erred in law and/or fact by finding that despite the absence of a self-incrimination warning, the fact that Mr. Krasniqi was warned that he had an obligation to tell the truth and had to take the related oath "did not compel [him] to renounce his right against self-incrimination";*
- (vii) **Seventh Issue:** *Whether the Panel erred in law and/or fact by finding that the subpoena which compelled Mr. Krasniqi to testify did not restrict his right*

⁶ Kosovo Specialist Chambers ("SC").

not to self-incriminate, and that therefore Mr. Krasniqi's testimony was given voluntarily and free of coercion/compulsion.

(viii) Eight Issue: *Whether the Panel erred in law and/or fact by finding that the protection of Rule 90(e) of the ICTY RPE does not extend to prosecution before the SC, thereby rendering ineffective a fundamental right protected by Article 6 of the Convention;*⁷

(ix) Ninth 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.*

II. SUBMISSIONS

3. The Defence incorporates by reference its previous submissions on the relevant legal standard for certification to appeal.⁸

4. The issues satisfy the test for certification. They originate from the Decision, are sufficiently specific and identifiable, do not amount to mere disagreements, affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their immediate resolution by the Court of Appeal's panel would materially advance the proceedings.

⁷ European Convention on Human Rights ("Convention").

⁸ See e.g., KSC-BC-2020-06, F01624, Joint Defence, *Veseli and Krasniqi Defence Request for Certification to Appeal the "Second Decision on Specialist Prosecutor's Bar Table Motion"*, 23 June 2023, public, paras 11-14.

A. THE PROPOSED ISSUES ARE APPEALABLE ISSUES

First Issue

5. The **First Issue** goes to the heart of the Decision. The Panel held that, when Mr. Krasniqi gave evidence before the ICTY, the Prosecution was under no obligation to inform him about his privilege against self-incrimination.⁹ Accordingly, the Panel dismissed the Defence's submission that the admission of the ICTY Evidence would violate his privilege against self-incrimination, and that the evidence should be excluded pursuant to Rule 138(1) or alternatively Rule 138(2) of the Rules, or Article 55 of the Constitution of the Republic of Kosovo ("Constitution").¹⁰ The Panel considered the ICTY Evidence to be voluntary, free of coercion and improper compulsion, and taken in compliance with the standards of international human rights law¹¹ and, therefore, ruled in favour of its admission.¹²

6. The Decision misunderstood the nature and scope of the privilege against self-incrimination, laying the foundation for the Decision to admit the ICTY Evidence. The **First Issue** stems from the Decision, constitutes an identifiable topic and challenges the specific findings which led to the admission of the ICTY evidence. It is not a mere disagreement with the Decision – rather, it questions the correctness of the Panel's understanding of a fundamental component of fair trial, thus deserving the scrutiny of the Appeals Panel.

⁹ Decision, paras 194, 200, 204.

¹⁰ Decision, para. 184. *See also* KSC-BC-2020-06, F01475, Krasniqi Defence, *Krasniqi Defence Response to Prosecution Motion for Admission of Accused's Statements* ("Defence Response"), 24 April 2023, confidential, paras 28-39.

¹¹ Decision, paras 194, 198, 200, 202, 204, 206, 207.

¹² Decision, paras 198, 202, 206, 221(b)(x).

Second and Third Issues

7. **Issues 2-3** concern whether Mr. Krasniqi was entitled to the status and guarantees of a suspect when he gave the ICTY evidence. The Panel held “an individual interviewed as a witness is not entitled to the same due process protections as those afforded to a suspect if he or she is not regarded or treated as a suspect at the time of the interview, regardless of whether he or she later becomes a suspect, or an accused”.¹³ The only exceptions considered by the Panel were: (i) in case of bad faith, or (ii) where responses provided by the interviewee provided clear indication of his involvement in the commission of a crime,¹⁴ also expressed as “bad faith” and “unreasonableness”.¹⁵ This standard – which is unsupported by any authority - was applied to determine that Mr. Krasniqi was not entitled to the *status* and guarantees of a suspect when he gave evidence as witness.¹⁶

8. The **Second Issue** contends that the above standard is erroneous and significantly departs from the applicable tests defined in ECtHR¹⁷ jurisprudence.¹⁸ The **Third Issue** asserts that by applying the wrong standard, the Decision erroneously concluded that Mr. Krasniqi was not entitled to be informed about the privilege against self-incrimination, access legal advice, and exercise his right to silence. **Both issues** stem from the Decision and challenge specific findings. They are not mere disagreement, but rather question the Decision’s unjustified departure from the applicable standard, which led to a prejudicial finding on the fundamental guarantees to which Mr. Krasniqi was entitled when he testified before the ICTY.

¹³ Decision, para. 129.

¹⁴ *Ibidem*.

¹⁵ Decision, paras 141, 144, 156, 168, 191.

¹⁶ Decision, paras 129, 135, 141, 144, 156, 168, 191, 194, 200, 204.

¹⁷ European Court of Human Rights (“ECtHR”).

¹⁸ *E.g.*, ECtHR, *Kalēja v. Latvia*, no. 22059/08, *Judgment (Merits and Just Satisfaction)*, 5 January 2018, paras 36-41.

Fourth and Fifth Issues

9. **Issues 4-5** concern the interrelationship between the ICTY's legal framework and the SC. The **Fourth Issue** challenges the Panel's finding that there is "no material distinction"¹⁹ between the protections afforded to Mr. Krasniqi under ICTY's legal framework and the SC's regime. The **Fifth Issue** challenges the Decision's determination of the admissibility of the ICTY evidence on the basis of the ICTY RPE, rather than assessing whether diminished safeguards afforded at the ICTY could be reconciled with the minimum requirements at the SC.²⁰

10. **Both Issues** arise from the Decision and are identifiable. In stating that there is no material difference between the protections Mr. Krasniqi would have been entitled to in 2007 before the ICTY, and those encapsulated in the KSC's legal framework, the Panel ignored the material difference that in 2007 Mr. Krasniqi was not given *any* warning concerning self-incrimination, which is *required* by the SC Rules.²¹ The Decision provided no substantiation for finding no material difference between the relevant Rules at the two institutions. The legal error underpinning the **Fourth Issue** is thus closely intertwined with Mr. Krasniqi's diminished safeguards when he gave evidence at the ICTY, a fundamental difference which was effectively ignored by the Decision. The **Fifth Issue** addresses the practical result of this legal error, namely the Panel declining to assess whether such diminished protection fell short of the minimum guarantees required by the SC's regime.

¹⁹ Decision, para. 194.

²⁰ Decision, para. 200.

²¹ Rule 151(1) of the Rules of Procedure and Evidence ("Rules"). *See also* Rules 42(1)(a) and (2).

Sixth and Seventh Issues

11. **Issues 6-7** concern the protection afforded by the privilege against self-incrimination. The **Sixth Issue** addresses the Panel's finding that "the oath under which Mr Krasniqi testified did not compel him to renounce his right against self-incrimination" but "[i]t merely subjected its exercise to a particular procedure".²² The **Seventh Issue** addresses the impact of the subpoena on the restriction of Mr. Krasniqi's right not to self-incriminate. The Panel found that "there is no indication that this [subpoena] resulted in [Mr. Krasniqi] providing incriminating information" that he would not otherwise have given. The Panel continued that "a subpoena does not constitute a limitation on the right of a witness to refuse to answer incriminating questions" and erroneously found that Mr. Krasniqi "was not forced to give incriminating evidence" as a result of the subpoena to appear.²³ The Panel thus failed to consider that the absence of self-incrimination warning, together with the obligation to tell the truth, the related oath, and the additional pressure of having been subpoenaed as a witness, placed an undue burden on Mr. Krasniqi to make an appropriate legal assessment of the circumstances and decline to respond to questions, effectively making it impossible for him to meaningfully exercise his right against self-incrimination.²⁴

12. **Issues 6-7** are not merely disagreements. They relate to the interpretation of the right against self-incrimination and the Decision's failure to consider the rationale behind the warning against self-incrimination, namely to allow lay witnesses to understand that they can refuse to answer incriminating questions without incurring in criminal sanctions.

²² Decision, para. 204.

²³ Decision, para. 200.

²⁴ Decision, para. 204.

Eighth Issue

13. The **Eighth Issue** challenges the Decision's interpretation of the guarantees provided by Rule 90(e) of the ICTY Rules ("Rule 90(e)"). The Panel found that Rule 90(E) "did not and was not intended to have extra-jurisdictional effect", and that the safeguards therein only have effect before the ICTY.²⁵ The Decision failed to consider the combined effect of the lack of an obligation in the ICTY Rules to inform witnesses about their privilege against self-incrimination and the Panel's narrow interpretation of Rule 90(e), which results in witnesses being effectively deprived of any safeguards against self-incrimination.

14. The **Eighth Issue** is sufficiently specific, as it addresses the extent of the protection afforded by Rule 90(e) and the interplay between the lack of a self-incrimination warning for witnesses and the narrow interpretation of Rule 90(e). Moreover, the **Eighth Issue** is not a mere disagreement, but rather relates to the Panel's interpretation of the ICTY rules and jurisprudence regarding the privilege against self-incrimination.

Ninth Issue

15. Finally, the Defence seeks certification to appeal the Panel's decision to admit the previous statements of Messrs. Thaci, Veseli and Selimi against Mr. Krasniqi. The Decision concluded that there is no general principle of law which renders such evidence inadmissible against the co-accused and that the admission of evidence from an accused does not, without more, infringe upon the fundamental rights of his co-defendants.²⁶ Further, the Panel found that the probative value of the evidence was

²⁵ Decision, para. 159.

²⁶ Decision, para. 216.

not outweighed by Mr. Krasniqi's impossibility to cross-examine his co-Accused.²⁷ The **Ninth Issue** thus originates from the Decision, is sufficiently identifiable, and is not a mere disagreement; instead, it goes to the correctness of the Panel's approach to a potential limitation of the Accused's right to cross-examination and to the admission of untested evidence into the case record.

B. THE PROPOSED ISSUES SIGNIFICANTLY AFFECT THE FAIRNESS OF THE PROCEEDINGS OR THE OUTCOME OF THE TRIAL

16. **Issues 1-8** are all concerned with the violation of Mr. Krasniqi's privilege against self-incrimination, which is a fundamental component of fair trial, explicitly protected by the Constitution,²⁸ the ICCPR,²⁹ and regional human rights instruments.³⁰ The ECtHR considers that the privilege against self-incrimination lies at the heart of a fair trial and that its protection is instrumental to avoid miscarriages of justice.³¹ Issues concerning fair trial rights affect the fairness of the proceedings and thus meet the standard for certification.³² **Issues 1-8** question the Decision's understanding of the nature and scope of the privilege against self-incrimination, the Decision's assessment of whether Mr. Krasniqi's rights were respected when he gave evidence before the ICTY, and the concrete violation of Mr. Krasniqi's fair trial rights caused by the admission of the ICTY evidence.

²⁷ Decision, para. 217.

²⁸ Article 30(6).

²⁹ Article 14(3)(g) of the International Covenant on Civil and Political Rights ("ICCPR").

³⁰ 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).

³¹ 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)*, 11 July 2006, para. 94; *John Murray v. the United Kingdom*, no. 18731/91, *Judgment (Merits and Just Satisfaction)*, 8 February 1996, para. 45.

³² KSC-BC-2020-06, F00546, Pre-Trial Judge, *Decision on Applications for Leave to Appeal "Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused"*, 25 October 2021, public, para. 64. See also, KSC-BC-2020-04, F00401, Trial Panel I, *Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala*, 24 January 2023, public, paras 45, 62.

17. In addition to the privilege against self-incrimination, **Issues 2-3** additionally relate to three fundamental and generally recognised³³ components of fair trial rights: the rights to silence, to legal representation, and to be notified of these rights.³⁴ For these reasons, **Issues 1-8** significantly affect the overall fairness of the proceedings, as they concern both the protection of general principles of due process and Mr. Krasniqi's fair trial guarantees.

18. Moreover, **Issues 1-8** significantly affect the outcome of the trial. The ICTY Evidence relates to Mr. Krasniqi's acts and conduct, and is relevant to key contested issues in the case.³⁵ Once admitted, the Panel may rely on these materials in determining the outcome of the case. As such, issues of admissibility potentially impact the outcome of the trial and therefore satisfy the test for certification.³⁶

19. The **Ninth Issue** instead concerns Mr. Krasniqi's right to an adversarial hearing and to examine, or have examined, the witnesses against him. Article 21(4)(f) of the Law, Article 31(4) of the Constitution and other international human rights instruments explicitly protect these fundamental safeguards.³⁷ The **Ninth Issue** relates to the admission and evaluation of evidence in violation of Mr. Krasniqi's fair trial rights, thus affecting the overall fairness of the proceedings. Moreover, it also relates to the admission of untested evidence of low reliability and probative value, which may taint the record of the proceedings.

³³ Article 6(c) of the Convention; Article 14(3)(d), (g) of the ICCPR; and Articles 30(5)-(6), 31(6) of the Constitution.

³⁴ ECtHR, *Ibrahim and Others v. the United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, *Judgment (Merits and Just Satisfaction)*, 13 September 2016, paras 270-273.

³⁵ Decision, paras 193, 199, 203.

³⁶ KSC-BC-2020-06, F01678, Trial Panel II, *Decision on Veseli and Krasniqi Defence Request for Certification to Appeal the Second Decision on Specialist Prosecutor's Bar Table Motion* ("July Decision"), 17 July 2023, public, para. 16.

³⁷ Convention, Article 6(3)(d); ICCPR, Article 14(3)(e).

20. Furthermore, both Mr. Thaci and Mr. Selimi's evidence covers the acts and conduct of Mr. Krasniqi, including on contentious issues.³⁸ The admission of these statements against Mr. Krasniqi would thus have a significant effect on the outcome of the trial.

C. IMMEDIATE RESOLUTION OF THE PROPOSED ISSUES WOULD MATERIALLY ADVANCE THE PROCEEDINGS

21. Immediate resolution by the Appeals Panel of **Issues 1-8** would materially advance the proceedings. In particular, it would (i) provide certainty regarding the nature and scope of the privilege against self-incrimination (ii) clarify the applicable standard to determine when an individual is entitled to the status and guarantees of a suspect; (iii) avoid the admission of evidence into the case record in violation of the Accused's fair trial rights, which might mar the outcome of trial, and (iii) inform the position of witnesses and suspects who are yet to testify, with inevitable repercussions on their credibility and the reliability of their evidence. Further, as previously held by the Panel in relation to issues of admissibility, delaying any remedy until after the trial proceedings is unsatisfactory as it would come too late to help the Panel determine what evidence can be lawfully considered in the trial judgment.³⁹

22. Finally, immediate resolution of the **Ninth Issue** would materially advance the proceedings, it would provide clarity on the Panel's authority to admit untested evidence outside the specific instances provided for by the Rules, as well as on the correctness of the balancing exercise between the probative value of the evidence and the prejudice caused by its admission.

³⁸ Defence Response, paras 62-70.

³⁹ July Decision, para. 17.

III. CONCLUSION

23. The Defence respectfully seeks leave to appeal the stated issues.

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Respectfully submitted on Monday, 27 November 2023.



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