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 Judge Christoph Barthe, Judge Guénaël Mettraux Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
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Selimi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements

Specialist Prosecutor's Office
Kimberly P. West

Counsel for Victims
Simon Laws

Counsel for Hashim Thaçi
Gregory Kehoe

Counsel for Kadri Veseli
Ben Emmerson

Counsel for Rexhep Selimi
Geoffrey Roberts

Counsel for Jakup Krasniqi
Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law[1] and Rule 77 of the Rules,[2] the Defence for Mr. Rexhep Selimi ("the Defence") hereby requests certification to appeal the Decision on Prosecution Motion for Admission of Accused's Statements[3] ("the Impugned Decision"). Certification is sought in relation to the following six issues:

   (i) Whether the Trial Panel erred in admitting parts of Mr. Selimi's SPO interview while finding that Mr. Selimi was not informed about his right to revoke his waiver of counsel during those portions of the interview ("First Issue");

   (ii) Whether the Trial Panel erred in finding that that there is no indication that Mr. Selimi was ever confused as to his suspect status ("Second Issue")

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

   (iv) Whether the Trial Panel erred in failing to consider the prejudice arising from the admission of Mr. Selimi's ICTY testimony during which he was not informed about his privilege against self-incrimination ("Fourth Issue")

   (v) Whether the Trial Panel erred in finding that the Kosovo Code of Criminal Procedure has no applicability in the present proceedings ("Fifth Issue");

[1] Law No.05/L-053 on SC and SPO, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.
[3] KSC-BC-2020-06/F01917, Decision on Prosecution Motion for Admission of Accused's Statements, 9 November 2023.

(vi) Whether the Trial Panel erred in relying upon the Defence's ability to challenge the Accused's Statements or the Panel's ability to assess that evidence in light of the entirety of the evidence to justify its admission ("Sixth Issue");

2. All six issues are appealable, would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and their immediate resolution may materially advance proceedings.

II. SUBMISSIONS

A. The Issues Are Appealable

1. First Issue

3. The Trial Panel determined that Mr. Selimi should have been informed about his right to revoke his waiver of counsel at the outset of his 2019 SPO interview.[4] It noted nevertheless that such information was provided to Mr. Selimi in written form during his interview,[5] referring to the attorney waiver provided to him after an entire day of questioning, [6] yet proceeded with admitting the record of that day of questioning. The finding that this notification retroactively informed Mr. Selimi of his right to revoke his waiver of counsel was essential to its admission.

4. The failure to notify a suspect of his fair trial rights constitutes a "particularly significant defect"[7] in relation to the conduct of suspect interviews. The severity of the prospective charges further elevates the degree of thoroughness expected of investigative authorities in ensuring that suspects are aware of the

[4] Impugned Decision, para. 45.
[5] *Ibid*, para. 45.
[6] 068932-068932.
[7] ECtHR, *Simeonovi v. Bulgaria*, Application no. 21980/04, Judgment of 12 May 2017, Partly Dissenting Opinion of Judges Sajó, Lazarova-Trajkovska and Vučinić Joined by Judge Turković, p. 48.

consequences of proceeding without availing themselves of their rights.[8] Further, in light of the interrelationship between the right to silence and the right to counsel, expressly acknowledged in international jurisprudence,[9] further caution would have been necessary, as not being properly informed by the latter right necessarily calls into the question the propriety of any waiver of the former[10] until such time as a proper waiver of the latter was made. Despite this importance, the Trial Panel did not explain why the relevant parts of Mr. Selimi's interview were admitted,[11] when these rights were not properly notified to him, in violation of Rule 43(4).[12]

5. The issue of whether the Trial Panel erred in admitting Mr. Selimi's entire SPO Interviews therefore derives directly from the Impugned Decision.

2. Second Issue

6. The Trial Panel determined that Mr. Selimi was properly informed of his status as a suspect during his SPO interview "[i]rrespective of whether the word "suspect" was used consistently throughout the November 2019 Interview."[13] The Panel further determined that "that there is no indication that Mr Selimi was ever confused as to his suspect status."[14] This finding was central to the admission of Mr. Selimi's SPO Interviews.

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[8] ECtHR, *Salduz v. Turkey,* Application no. 36391/02, Judgment of 27 November 2008, para. 54; *Pishchalnikov v. Russia,* Application no. 7025/04, Judgment of 24 September 2019, para. 80.
[9] ICTY, *Prosecutor v. Halilovic,* IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 15; ICC, *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11, Reasons for the Decision on Admission of Certain Evidence Cormected to Witness 495, rendered on 17 November 2014, 11 December 2014, para. 27; ECtHR, *Brusco c. France,* Requête no. 1466/07, Arrêt de 14 octobre 2010, para. 54.
[10] ECtHR, *Pishchalnikov v. Russia,* Application no. 7025/04, Judgment of 24 September 2019, para. 69; *Salduz v. Turkey,* Application no. 36391/02, Judgment of 27 November 2008, para. 54.
[11] 068933-TR-ET Parts 1-4.
[12] See also Article 9 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013.
[13] Impugned Decision, para. 43.
[14] *Ibid*, para. 46.

7. During his SPO Interview, Mr. Selimi was referred to as a witness on at least 16 separate instances,[15] yet the term "suspect" was not used even once in the same context, in contrast to other suspect interviews, where the SPO has consistently referred to the person being interviewed as "suspect".[16] Mr. Selimi was not therefore referred to by his status as a suspect "consistently", as the Trial Panel has appreciated, and indeed was not referred to by his proper status at all.

8. In these circumstances, the issue of whether Mr. Selimi was confused about his status as a suspect when being consistently referred to as a "witness" and the finding that "Mr Selimi had knowledge of his status as a suspect at the time of his November 2019 Interview and of the rights associated with that status"[17] are interlinked issues that clearly derive from the Impugned Decision.

3. Third Issue

9. With respect to Mr. Selimi's witness statements and testimony, the Trial Panel determined that the full array of warnings applicable to a suspect are not necessary for the admission of a statement given to previous investigative authorities by a witness who is not considered a suspect at the time they were interviewed.[18] The determination follows from the finding that "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".[19] On this basis, the Trial Panel found that the evidence in question was "taken in a manner consistent with the standards of international human rights law",[20] and proceeded with admitting that evidence.

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[15] See KSC-BC-2020-06/F01473, Selimi Defence Response to SPO Motion for Admission of Accused's Statements, 24 April 2023 ("Response"), fn. 16.
[16] See, for example, 083721-TR-ET Part 1, p.1 line 7, p.5 line 4, p.9 line 24; 108643-TR-ET Part 3, p.1 line 7, p.2 line 11, p.5 line 23, p.14 line 16, p.26 line 11, p.29 line 14; 108643-TR-ET Part 5, p.1 line 8.
[17] Impugned Decision, para. 43.
[18] *Ibid*, paras. 129, 141.
[19] *Ibid*, para. 129.
[20] *Ibid*, para. 141.

10. The Trial Panel's reasoning appears to equate and conflate two materially distinct questions, namely of (i) whether the *collection* of the evidence conformed with the rights accorded to *witnesses*, and (ii) whether the *admission* of the evidence would conform with the rights accorded to the *Accused.*

11. The Trial Panel's determination that an answer in the affirmative to the first question necessarily entails the same answer in respect of the second therefore constitutes an appealable issue.

4. Fourth Issue

12. With respect to Mr. Selimi's ICTY testimony, the Panel determined that neither the Prosecutor nor the Trial Chamber had any obligation to inform Mr. Selimi about his privilege against self-incrimination.[21] It furthermore held that the protections afforded under Rule 90(E) of the ICTY Rules of Procedure and Evidence have no extra-jurisdictional application.[22] These findings were crucial in admitting Mr. Selimi's ICTY testimony.

13. ICTY Rule 90(E)'s lack of extra-jurisdictional application is but a consequence of the fact that, naturally, the ICTY would have no authority to compel another national or international judicial mechanism not to admit any evidence produced before the ICTY falling under that rule. It is independent however of whether the admission of evidence falling within the purview of that Rule in an extra-jurisdictional context is unjustifiably prejudicial. The prejudice that derives from the use of witness testimony without a warning of self-incrimination against an individual who later becomes an Accused is of equal magnitude, whether adduced within the same jurisdiction or otherwise.

[21] *Ibid*, para. 159.
[22] *Id.*

14. The Panel's supporting findings, namely that (i) the testimony was produced before an institution where the SPO was not in a position to influence the protection of Mr. Selimi's rights;[23] and (ii) the SPO had no part in producing or eliciting incriminating evidence from Mr. Selimi[24] are likewise materially distinct from the intrinsic prejudice caused by the admission of self-incriminating testimony in the present proceedings. Nor can Mr. Selimi not raising any self-incrimination concerns[25] be taken as an all-encompassing safeguard against any such prejudice, when the Trial Panel itself determined that him not doing so did not constitute a proper waiver of his rights.[26]

5. Fifth Issue

15. In the Impugned Decision, the Trial Panel determined that "[p]rovisions of the KCPC regulating the admission of statements provided by a defendant […] are not part of the SC's regulatory regime and do not apply in these proceedings."[27] It then proceeded to determine that the question of admission of such statements is subject to the general rules of admissibility before the KSC.[28]

16. Instead, the Panel relied not on any enabling provision in the KSC regulatory regime that would specifically allow for the admission of the tendered evidence against the Co-Accused, but rather on the absence of a specific prohibition to the contrary.[29] The Trial Panel supported its approach by reference to a particular class of ICTY jurisprudence,[30] yet without providing any reason as to why that jurisprudence would be more dispositive than the provisions of the KCPC to the matter at hand.

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[23] *Ibid,* para. 160.
[24] *Id.*
[25] *Ibid,* para. 161.
[26] *Id.*
[27] *Ibid,* para. 215.
[28] *Id.*
[29] *Ibid,* para. 216.
[30] *Id.*

17. In this regard, the cited provisions of the KCPC, while not expressly incorporated into the KSC legal framework, nonetheless constitute interpretative guidance by virtue of Rule 4 in conjunction with Article 19(2) of the Law.[31] Such interpretation is further in line with the findings of the Appeals Panel that provisions of the KCPC not expressly incorporated into the KSC legal framework are "informative and can guide the relevant panel in determining" the issues before it.[32] The Appeals Panel in that context further seemed to dismiss an interpretation whereby a provision of the KCPC not expressly incorporated into the KSC regulatory regime may be completely ignored.[33]

18. The issue of whether the Trial Panel erred in disregarding the KCPC in favour of partial ICTY jurisprudence on this issue therefore derives directly from the Impugned Decision. That is all the more relevant in light of the fact that those KCPC provisions reflect the underlying concern that the use against an Accused of a Co-Accused's evidence who has not elected to testify, and therefore be subject to cross-examination, is prejudicial, and that very same concern is further replicated in a different set of jurisprudence relied upon by the Defence and acknowledged by the Trial Panel.[34]

6. Sixth Issue

19. In finding that the probative value of Mr. Selimi's statements is not outweighed by its prejudicial effect, the Panel consistently referred to the possibility for the Defence to challenge the evidence in question and the Panel's own assessment of that evidence in light of the entire body of evidence as factors as to why no

[31] See Response, paras. 79-81.
[32] KSC-BC-2018-01/IA001/F00005, Decision on Appeal Against "Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi", 1 October 2021, para. 22.
[33] *Ibid,* para. 20.
[34] *Ibid*, para. 217.

prejudice arises from its admission.[35] These purported safeguards appeared to be essential in admitting all of the statements and interviews.

20. The possibility for the Defence to challenge any evidence, or for the Panel to assess it in light of the entire body of evidence, cannot act as a substitute for an assessment of prejudice pursuant to Rule 138(1). If those facts are taken as decisive safeguards against any prejudice that arises from evidence admitted contrary to Rule 138(1), then the safeguard against such admission would become meaningless. The Defence should not be expected to challenge evidence that should not be admitted in the first place. Nor should the Trial Panel be able to make assessments in light of that evidence.

7. Conclusion

21. Considering the foregoing, all the above issues are identifiable and discrete, emanate directly from the Impugned Decision, and do not consist of mere disagreements with the decision.[36]

B. The Issues Affect the Fair and Expeditious Conduct of Proceedings or the Outcome of the Trial

22. All the issues identified above affect the fair and expeditious conduct of proceedings and/or the outcome of the trial. **The first three issues** call into question whether the evidence admitted by the Trial Panel was obtained in violation of the rights accorded to suspects in the context of criminal investigations. The resolution of these issues is vital to ensuring the fairness of

[35] See, for example, Impugned Decision, paras. 88, 141, 144, 161.
[36] KSC-BC-2020-06/F00172, Pre-Trial Judge, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, para. 11.

proceedings, failing which evidence adduced in violation of the Accused's right to a fair trial may potentially be used in deciding upon the Accused's guilt.

23. **The third, fourth and sixth issues** further concern the admission of evidence whose probative value is outweighed by its prejudicial effect. Proceeding without a resolution to these issues will require the Defence to challenge evidence whose admission is contrary to the rights of the Accused and would enable the Trial Panel to rely on such evidence in determining Mr. Selimi's guilt. Additionally, that evidence relates to core contested issues in the present case, including the functioning of the General Staff and Mr. Selimi's role within it,[37] Mr. Selimi's functions as minister of public order,[38] and the KLA's structure and that of its operational zones.[39] Given the centrality of the evidence to the SPO's case, the prejudice that would be caused to the Defence by requiring it to challenge evidence that ought to have been otherwise excluded is all the more exacerbated. These issues therefore directly impact the fairness of the proceedings and the outcome of the trial.

24. **The fifth issue** concerns the Trial Panel's reluctance to consider relevant legal authorities as an interpretative aid and its concomitant reliance on legal authorities that are more detrimental to the Accused. The reluctance complained of directly impacts the fairness of the proceedings as it manifests into a violation of the principle of *lex mitior*, whereby the Trial Panel has provided no explanations for its reliance on the more detrimental class of authorities in support of its findings, and nor has it alluded to any rule of construction that would have enabled the Trial Panel to discard the applicability of the KCPC.

[37] Impugned Decision, para. 79.
[38] *Id*.
[39] *Ibid*, para. 158.

25. All six issues further affect the expeditious conduct of proceedings, as the admission of the evidence complained of will require the Defence to spend extensive time in investigating and challenging it in court, including by possibly requiring the Defence to refute it through other evidence or witnesses, which thereby risks exponentially extending the duration of proceedings.

C. Immediate Resolution May Materially Advance Proceedings

26. The resolution of all the above issues would materially advance the current proceedings. The Appeal Panel's resolution would enable both the SPO and the Defence to conduct their respective cases in full knowledge of the evidence they are expected to challenge or the issues they ought to bring further evidence in respect of.

27. Furthermore, given the centrality and the complexity of the evidence admitted, a lack of resolution to the issues described will require the Defence to engage in extensive cross-examination on that evidence and/or to adduce voluminous evidence of its own so as to confront it. As the evidence spans a plethora of subject areas and is largely of a structural nature, it is only through the cross-examination of a large number of SPO witnesses or by calling several witnesses itself that the Defence will be able to attempt challenging that evidence. The above will have a conspicuous effect on the length of the proceedings as a whole.

28. Additionally, as the issues described above further concern the Trial Panel's choice of law, their resolution will ensure that the Parties are best informed about interactions between the various legal sources available to the Trial Panel and their respective degrees of persuasion, thereby enabling the Parties to make focused and informed legal submissions in the future.

III. CONCLUSION AND RELIEF REQUESTED

29. Considering the foregoing, the Defence requests that the Trial Panel grant certification for all the six issues identified in the present filing.

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Respectfully submitted on 27 November 2023,

GEOFFREY ROBERTS
Lead Counsel for Rexhep Selimi

ERIC TULLY
Co-counsel for Rexhep Selimi

RUDINA JASINI
Co-counsel for Rexhep Selimi

DAVID YOUNG
Co-counsel for Rexhep Selimi