SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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
	Judge Christoph Barthe
	Judge Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor's Office
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Prosecution consolidated response to Veseli, Selimi, and Krasniqi requests for leave to appeal Decision F01917

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law[1] and Rule 77 of the Rules,[2] the Defence Requests for certification to appeal[3] the 'Decision on Prosecution Motion for Admission of Accused's Statements'[4] ('Decision') should be denied. The Defence does not carry its burden of demonstrating that the Issues[5] merit the exceptional relief of interlocutory appeal.[6]

II. SUBMISSIONS

A. NONE OF THE ISSUES ARE APPEALABLE

1. Veseli First Issue

2. Veseli's First Issue does not arise from the Decision. Specifically, Veseli claims the Panel committed error by not addressing Kosovo Code of Criminal Procedure ('KCPC') 'Article 123'.[7] From context, and his previous submissions,[8] it is clear that Veseli is referring to Article 123(5) of the 2012 version of the KCPC.[9] It is also clear from context that, where the Panel addresses KCPC Articles 119(5), 256(1) and 272 in

[1] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all references to 'Rule' or 'Rules' are to the Rules.
[3] Veseli Defence Request for Leave to Appeal the Decision on Prosecution Motion for the Admission of the Accused's Statements, KSC-BC-2020-06/F01964, 27 November 2023 ('Veseli Request'); Selimi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements, KSC-BC-2020-06/F01966, 27 November 2023 ('Selimi Request'); Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Accused's Statements, KSC-BC-2020-06/F01961, 27 November 2023 ('Krasniqi Request'; collectively with the Veseli Request and Selimi Request, 'Requests').
[4] KSC-BC-2020-06/F01917, 9 November 2023.
[5] The issues are defined in the Requests and are also referred to herein as the 'Issue' or 'Issues'.
[6] The applicable has been set out in previous decisions. *See, for example,* Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses, KSC-CC-2020-06/F01237, 30 January 2023, para.7; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect, KSC-BC-2020-07/F00423, 8 November 2021, paras 13-21.
[7] Veseli Request, KSC-BC-2020-06/F01964, paras 2(a), 12, 17-18.
[8] Veseli Defence Response to Prosecution Motion for Admission of Accused's Statements, KSC-BC-2020-06/F01476, 24 April 2023, paras 14, 17.
[9] Kosovo, Procedure Code, Criminal No.04/L-123, 2012.

paragraph 215 of the Decision, it is referencing the article designations in the 2022 version[10] of the KCPC.[11]

3. Veseli's claim that the Panel was 'completely ignoring'[12] 'Article 123' is therefore not true, as the Panel referenced the equivalent provision of the 2022 KCPC: Article 119(5). Regardless, this issue does not qualify for certification because Rule 4(1), on which Veseli rests his argument, invites the Panel to consider the KCPC 'where appropriate', which is primarily a reference to articles that have been incorporated into the Rules.[13] Article 123 has not been expressly incorporated.

2. Veseli Second Issue

4. Veseli's Second Issue does not merit leave to appeal as it does not arise from and misrepresents the Decision. Veseli fails to show that his preferred sources—even if they represent what Veseli claims they do[14]—would result in a different outcome. Veseli also does not show that his preferred sources identify a general principle of law.[15] Further, contrary to Veseli's claims that the Decision 'ignores' the sources he raised, it, in fact, acknowledges them.[16]

5. In addition, as with Krasniqi's Ninth Issue addressed below, Veseli cherry picks only a portion of the Decision's analysis on this point. He fails to engage with the Panel's observation that 'the jurisprudence of other international(ised) criminal tribunals according to which the admission of the statements of an accused against his or her co-defendant(s) does not infringe upon the fair trial rights of the latter, provided that the probative value of the statements is not outweighed by the potential prejudice

[10] Kosovo, Criminal Procedure Code, Code No.08/L-032, 17 August 2022.
[11] Decision, KSC-BC-2020-06/F01971, para.215.
[12] Veseli Request, KSC-BC-2020-06/F01964, para.12.
[13] Decision on Defence Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/F00413, 22 July 2021, para.46.
[14] Veseli Request, KSC-BC-2020-06/F01964, para.14.
[15] Decision, KSC-BC-2020-06/F01964, para.13.
[16] *Compare* Decision, KSC-BC-2020-06/F01917, para.212, fn.604, *with* Veseli Request, KSC-BC-2020-06/F01964, para.13, fn.14.

of their admission to the co-defendant.'[17] This principle, and the cited jurisprudence, is further demonstration of a lack of a general principle of law or human rights obligation rendering such evidence inadmissible.

3. Selimi First Issue

6. Selimi's First Issue misrepresents the Decision. Selimi argues that 'the Trial Panel did not explain why the relevant parts of Mr. Selimi's interview were admitted, when [certain] rights were not properly notified to him, in violation of Rule 43(4).'[18] The Panel did, however, explain why it admitted Selimi's interview transcript that preceded the notification that he could revoke his waiver of counsel. Specifically, the Panel explained that: Selimi was informed of this right in written form after the interview had begun; that there was no impact on Selimi's right to silence; and, that after being informed of his right to revoke his waiver of counsel, Selimi did not raise any objection to the record of his already-provided interview.[19] Moreover, the Decision did not find that there was a violation of Rule 43(4).[20]

4. Selimi Second Issue

7. Selimi's Second Issue does not merit leave to appeal because it constitutes a mere disagreement with the Panel's conclusion that Selimi was aware of his status as a suspect. Selimi does not reference any evidence that indicates that Selimi was confused about his status as a suspect, and merely reiterates arguments in his prior response and the Panel's own acknowledgement that Selimi was not referred to as a suspect consistently.[21]

5. Selimi Third Issue

8. Selimi's Third Issue does not arise from the Decision. Selimi argues that the Panel 'appears to equate and conflate two materially distinct questions, namely of (i)

[17] Decision, KSC-BC-2020-06/F01917, para.216.
[18] Selimi Request, KSC-BC-2020-06/F01966, para.4.
[19] Decision, KSC-BC-2020-06/F01917, para.45.
[20] Decision, KSC-BC-2020-06/F01917, para.45.
[21] Selimi Request, KSC-BC-2020-06/F01966, para.7.

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*.'[22] But the Decision does no such thing. Rather, the Panel: (i) recalled that the 'full array of warnings for 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 and through the course of his or her interview or testimony';[23] (ii) found that there was no indication that the previous prosecutorial authorities acted in bad faith or unreasonably; and (iii) considered that the Defence will have the opportunity to challenge and test the evidence.[24] The Panel was therefore clearly analysing whether admission was consistent with Selimi's rights.

6. Selimi Fourth Issue

9. Selimi's Fourth Issue does not merit certification to appeal. The crux of this issue as formulated is that the admission of Selimi's ICTY statements given in the absence of Selimi being informed of the privilege against self-incrimination is unduly prejudicial.[25] Selimi does not contest the Panel's finding that there was no error in the procedures employed at the ICTY when Selimi gave his testimony, that the SPO had no ability to influence the proceedings at the ICTY, that the SPO played no part in obtaining the evidence from Selimi at the ICTY, and that Selimi never raised any self-incrimination concerns.[26] In effect, Selimi merely disagrees with the Panel's assessment that the probative value of these statements outweighs any prejudicial effect.

[22] Selimi Request, KSC-BC-2020-06/F01966, para.10 (emphasis in original).
[23] Decision, KSC-BC-2020-06/F01917, para.141.
[24] Decision, KSC-BC-2020-06/F01917, para.141.
[25] Selimi Request, KSC-BC-2020-06/F01966, paras 12-14.
[26] Selimi Request, KSC-BC-2020-06/F01966, para.14.

7. Selimi Fifth Issue

10. Selimi's Fifth Issue misrepresents the Decision. As noted above in relation Veseli's First Issue, the Panel did not disregard the KCPC[27] as Selimi claims.[28] Selimi's Fifth Issue is otherwise an abstract claim that the Panel should have weighed various authorities differently, with no concrete claims of how that should be done other than that Selimi would prefer a different outcome.[29]

8. Selimi Sixth Issue

11. Selimi's Sixth Issue does not merit appeal. Selimi misrepresents the Decision when he argues that '[t]he 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).'[30] The Panel did not treat Selimi's ability to challenge the evidence as a substitute for assessing prejudice.[31] Rather, it was one factor the Panel considered, among others, when finding that the probative value of the evidence was not outweighed by prejudice.[32]

9. Krasniqi First Issue

12. Krasniqi's First Issue does not merit appeal because it is not formulated in a manner that allows the Panel to assess whether the Issue meets the requirements for an issue to be certified. It is not sufficient to merely state that the Decision 'misunderstood the nature and scope of the privilege against self-incrimination'[33] without more. The burden is on the Defence to justify their issues for appeal. The First

[27] Selimi Request, KSC-BC-2020-06/F01966, para.215.
[28] Selimi Request, KSC-BC-2020-06/F01966, para.18.
[29] Selimi's reference to the principle of *lex mitior* (*see* Selimi Request, KSC-BC-2020-06/F01966, para.24) is also misplaced. *See e.g.* Decision on Prosecution Request for Admission of W03827's Witness Statements Pursuant to Rule 143(2) and Defence Request for Reconsideration, KSC-BC-2020-06/F01821, 28 September 2023, fn.42.
[30] Selimi Request, KSC-BC-2020-06/F01966, para.20.
[31] Selimi Request, KSC-BC-2020-06/F01966, para.20.
[32] *See e.g.* Decision, KSC-BC-2020-06/F01917, paras 88, 141, 144, 161.
[33] Krasniqi Request, KSC-BC-2020-06/F01961, para.6.

Issue's threadbare claim does not allow assessment of whether the issue is sufficiently substantial, or just a hypothetical concern.

10. Krasniqi Second and Third Issues

13. Krasniqi's Second and Third Issues do not merit appeal. Both of these Issues are insufficiently explained to be certifiable for appeal. Regarding the Second Issue, Krasniqi merely states that the standard for admission of prior witness statements against a suspect that he claims the Panel applied 'is erroneous and significantly departs from the applicable tests defined in ECtHR jurisprudence.'[34] Krasniqi does not state how he believes the standard is erroneous, or explain how he believes the Decision deviates from the single ECtHR case[35] he cites.[36] The Third Issue merely consists of the application of the undeveloped error Krasniqi claims in the Second Issue, and is therefore in actuality one and the same issue.

11. Krasniqi Fourth and Fifth Issues

14. Krasniqi's Fourth and Fifth Issues do not merit appeal. As with Krasniqi's Second and Third Issues, the Fourth and Fifth Issues are effectively one issue.

15. The Fourth Issue does not merit appeal as it misrepresents the Decision. Krasniqi argues that 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.'[37] A full reading of the Decision shows that the Panel did not 'ignore' the lack of warning regarding self-incrimination for witnesses before the ICTY, but rather addressed the issue squarely.[38]

16. Krasniqi's Fifth Issue does not merit appeal because it is premised on the Fourth Issue which, as explained above, misreads the Decision. It further does not

[34] Krasniqi Request, KSC-BC-2020-06/F01961, para.8.
[35] Krasniqi Request, KSC-BC-2020-06/F01961, fn.18.
[36] Krasniqi's citation does not concern admission of witness statements, but the reasonableness of the length of proceedings. *See* ECtHR, *Kalēja v. Latvia*, 22059/08, Judgment, 5 January 2018, paras 36-41.
[37] Krasniqi Request, KSC-BC-2020-06/F01961, para.10.
[38] Decision, KSC-BC-2020-06/F01917, paras 159-160. *See also* para.194, fn.555.

merit appeal because it independently misrepresents the Decision in claiming that the Panel did not assess whether the standards applied at the ICTY 'fell short of the minimum guarantees required by the SC's regime.'[39] The Panel made that assessment and held that the KSC's requirements were met.[40]

12. Krasniqi Sixth Issue

17. Krasniqi's Sixth Issue is too abstract to qualify as an appealable issue. Krasniqi does not explain with sufficient detail what the requested appealable issue is; he merely quotes two passages from the Decision concerning self-incrimination,[41] and then states that the Sixth Issue 'relate[s] to the interpretation of the right against self-incrimination and the Decision's failure to consider the rationale behind the warning against self-incrimination […].'[42] Krasniqi nowhere explains why he believes the quoted passages from the Decision to be in error.

13. Krasniqi Seventh Issue

18. Krasniqi's Seventh Issue misrepresents the Decision. Krasniqi argues that the Panel 'failed to consider' that an 'undue burden' was placed on Krasniqi due to a combination of factors that purportedly impeded his right against self-incrimination.[43] The Panel in fact considered all of the factors that Krasniqi lists.[44] Krasniqi's claim that, in effect, the Panel addressed each of these issues but did not consider them cumulatively is speculative and hypothetical.

14. Krasniqi Eighth Issue

19. Krasniqi's Eighth Issue does not merit appeal. At the outset, the SPO notes that the body of Krasniqi's argument on the Eighth Issue does not align with the issue as summarised. Krasniqi initially states: '**Eight [sic] Issue**: *Whether the Panel erred in law*

[39] Krasniqi Request, KSC-BC-2020-06/F01961, para.10.
[40] Decision, KSC-BC-2020-06/F01917, para.194.
[41] Krasniqi Request, KSC-BC-2020-06/F01961, para.11.
[42] Krasniqi Request, KSC-BC-2020-06/F01961, para.12.
[43] Krasniqi Request, KSC-BC-2020-06/F01961, para.11.
[44] Decision, KSC-BC-2020-06/F01917, para.200.

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.'[45] This formulation both under- and over-states Krasniqi's argument on this Issue in significant ways. It understates it because Krasniqi argues in the body of his Request that the error resulted from a combination of the Panel's reading of ICTY RPE Rule 90(e) *and* the lack of a requirement for a self-incrimination warning for witnesses.[46] It overstates Krasniqi's argument because Krasniqi nowhere fleshes out in relation to his Eighth Issue his claim that the ICTY process 'render[s] ineffective a fundamental right protected by Article 6 of the Convention.'

20. Furthermore, as with Krasniqi's Seventh Issue, Krasniqi misrepresents the Decision in alleging that points that the Panel explicitly addressed in the Decision were not considered in combination.[47] Krasniqi also does not explain how he believes ICTY RPE Rule 90(e)'s explicit right against self-incrimination as combined with its lack of extra-jurisdictional effect 'results in witnesses being effectively deprived of any safeguards against self-incrimination.'[48] At base, and even if given a generous reading, this is merely a disagreement with the Panel.

15. Krasniqi Ninth Issue

21. Krasniqi's Ninth Issue does not merit appeal. At the outset, the SPO observes that Krasniqi's claims that the statements of Krasniqi's co-Accused are 'untested evidence of low reliability and probative value, which may taint the record of the proceedings'[49] is an argument about the weight to be afforded the evidence, was not addressed in the Decision, and is not a proper argument in seeking appeal.

22. Further, the formulation of the Ninth Issue is too abstract. Krasniqi correctly notes that the Panel held that 'there is no general principle of law or human rights

[45] Krasniqi Request, KSC-BC-2020-06/F01961 p.3 (emphasis in original).
[46] Krasniqi Request, KSC-BC-2020-06/F01961, paras 13-14.
[47] Decision, KSC-BC-2020-06/F01917, paras 159, 200.
[48] Krasniqi Request, KSC-BC-2020-06/F01961, para.13.
[49] Krasniqi Request, KSC-BC-2020-06/F01961, para.19.

obligation that would render [statements of co-accused] inadmissible or its admission unfair to an accused in a criminal case.'[50] But, as with Veseli's Second Issue, Krasniqi fails to acknowledge that the Panel went on to note the jurisprudence of other criminal tribunals finding that statements of co-accused are, in principle, admissible.[51] Krasniqi does not attempt to indicate how this is an incorrect assessment of the applicable jurisprudence, instead merely gesturing at legal instruments without addressing their implementation or providing an indication that he has a plausible claim of error.

B. NONE OF THE ISSUES WOULD SIGNIFICANTLY IMPACT THE PROCEEDINGS

23. After assessing each statement individually, the Panel made an overall observation that: (i) all four Accused gave statements and testimony voluntarily and repeatedly over a long period of time, including, at various points, with the assistance and advice of counsel; and (ii) the probative value of the evidence was not outweighed by its prejudicial effect against any Accused.[52] Thus, even if the Panel erred on any specific point, based on a holistic assessment of the circumstances in which the statements were given and the lack of prejudice, none of the issues, on their own, would demonstrate unreliability or damage to the integrity of the proceedings justifying exclusion.[53] Importantly, the Panel also stressed that, at the end of the proceedings and in light of all relevant (and in particular, corroborating and tested) evidence, it would assign appropriate weight to the evidence admitted in the Decision and in doing so, would exercise the utmost caution.[54] Thus, the Defence's Issues would not have a significant impact on the fairness or expeditiousness of the proceedings or

[50] Decision, KSC-BC-2020-06/F01917, para.216.
[51] Decision, KSC-BC-2020-06/F01917, para.216.
[52] Decision, KSC-BC-2020-06/F01917, para.217.
[53] *See, similarly*, *Specialist Prosecutor v. Shala*, Decision on Shala's Appeal Against Decision Concerning Prior Statements, KSC-BC-2020-04/IA006/F00007, 5 May 2023, paras 79-81, 92.
[54] Decision, KSC-BC-2020-06/F01917, paras 217-219.

outcome of the trial, and appellate resolution at this stage would not advance the proceedings.[55]

24. Defence submissions otherwise are hypothetical and unsubstantiated. For example, the Veseli Defence's submissions about impact depend on speculations that none of the Accused will testify.[56] Meanwhile, the Krasniqi and Selimi Defence wrongly imply – without further explanation – that all issues allegedly impacting the Accused's rights or evidence admissibility necessarily and significantly impact the proceedings.[57] The Selimi Defence's claim that it will be required to spend extensive time and resources investigating and challenging the evidence admitted in the Decision is likewise undeveloped.[58] To the extent this evidence is relevant to known issues in this case – including, as highlighted by the Defence, the Accused's roles and KLA structure[59] – the Defence does not explain how the admission of these statements will result in significant, *additional* investigations or cross-examination.

III. RELIEF REQUESTED

25. For the foregoing reasons, the Panel should deny the Requests.

Word Count: 2995

Kimberly P. West

Specialist Prosecutor

Thursday, 7 December 2023

At The Hague, the Netherlands.

[55] *See, similarly*, ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Decision on Defence requests for leave to appeal two decisions related to the submission into evidence of Mr Al Hassan's statements, 24 June 2021, para.26.
[56] Veseli Request, KSC-BC-2020-06/F01964, para.16.
[57] Krasniqi Request, KSC-BC-2020-06/F01961, paras 16-20; Selimi Request, KSC-BC-2020-06/F01966, paras 22-25.
[58] Selimi Request, KSC-BC-2020-06/F01966, paras 23, 25, 27.
[59] Selimi Request, KSC-BC-2020-06/F01966, para.27.