

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 Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr. Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

Date: 15 December 2023

Language: English

Classification: Public

Krasniqi Defence Reply

**to Prosecution Consolidated Response to Veseli, Selimi, and Krasniqi Requests
for Leave to Appeal Decision F01917**

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I. INTRODUCTION

1. The Defence for Jakup Krasniqi (“Defence”) hereby replies to the Specialist Prosecutor’s Office (“SPO”) Consolidated Response to Veseli, Selimi, and Krasniqi Requests for Leave to Appeal Decision F01917.¹

2. The Defence maintains that each of the nine issues meet the certification requirements of Rule 77 of the Rules.² The issues originate from the Decision³ and go to the core of the Accused’s privilege against self-incrimination, implicating questions of evidence admissibility and therefore significantly affecting the fair and expeditious conduct of proceedings.

II. SUBMISSIONS

3. The SPO misunderstands the Defence submissions and fails to engage with the specific concerns identified in the Request. Throughout the Response, the SPO reiterates the same unsubstantiated argument that the Defence misrepresents the Decision.⁴

4. In addition, the SPO misunderstands the test for certification by repeatedly submitting that the proposed issues are insufficiently justified,⁵ “threadbare” claims,⁶ undeveloped,⁷ or “too abstract”.⁸ The Defence, being mindful of the word-limit

¹ KSC-BC-2020-06, F01990, Specialist Prosecutor, *Prosecution Consolidated Response to Veseli, Selimi, and Krasniqi Requests for Leave to Appeal Decision F01917* (“Response”), 7 December 2023, public.

² Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”).

³ KSC-BC-2020-06, F01917, Trial Panel II, *Decision on Prosecution Motion for Admission of Accused’s Statements* (“Decision”), 9 November 2023, public.

⁴ Response, paras 15-16, 18-21.

⁵ *Idem*, paras 12-13, 17, 19-20, 22, 24.

⁶ *Idem*, para. 12.

⁷ *Idem*, para. 13.

⁸ *Idem*, paras 17, 22.

constraint, clearly identified the erroneous findings in the Decision, articulated the proposed issues, referenced the specific findings underlining the errors, and explained why they meet all the applicable requirements for certification. A request for certification is not the appropriate forum to explain why the Decision deviates from the ECtHR jurisprudence⁹ or elaborate on the Panel's assessment of the applicable jurisprudence.¹⁰ Further arguments will be developed before the Appeals Panel. The SPO's demands for further explanation misrepresent the nature of requests for certification to appeal, which are not concerned with the merits of the appeal. The question is not whether the proposed issues of appeal have merit, which is for the Appeals Panel to decide, but rather, what effect the proposed issues would have on the conduct of the proceedings.

5. The SPO submissions that the Panel did not ignore the lack of a self-incrimination warning for witnesses at the ICTY wholly misunderstands the Defence's **Fourth** and **Fifth** issues.¹¹ The Panel's error lies in the failure to consider the material difference between the protection provided by the ICTY and the SC Rules and the consequences of this legal error on Mr. Krasniqi's fair trial rights.

6. Similarly, submitting that the **Eighth Issue** "does not align with the issue as summarised",¹² the SPO misunderstands the Defence's submissions. As noted by the Panel,¹³ Rule 151 draws its inspiration from Rule 90(e) ICTY RPE. Whilst the latter does not provide for an obligation to inform witnesses about their privilege against self-incrimination, it does contain a safeguard clause preventing the subsequent use of self-incriminatory evidence against the witness. The result of a narrow

⁹ Response, para. 13.

¹⁰ *Idem*, para. 22.

¹¹ *Idem*, paras 15-16. See also KSC-BC-2020-06, F01961, Krasniqi Defence, *Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements ("Request")*, 27 November 2023, public, para. 10.

¹² Response, para. 19.

¹³ Decision, para. 204.

interpretation of Rule 90(e) ICTY RPE, given that, in contrast with Rule 151, it does not require to notify witnesses of their right against self-incrimination, is that witnesses are *de facto* deprived of any safeguards against self-incrimination. This, in turn, renders a fundamental right protected by Article 6 ECHR devoid of any practical effect. In any event, the Panel may decide to reformulate the proposed issue if considered appropriate.¹⁴

7. The SPO takes a simplistic view of the Decision and fails to grasp how the proposed issues concern the fact that read together, the decision effectively deprived the Accused of a fundamental fair trial right. It is not the failure to consider the factors listed in the Request (i.e. the absence of self-incrimination warning, the obligation to tell the truth, the related oath, and the additional pressure of having been subpoenaed as a witness)¹⁵ what constitutes the basis of **Issues 6-8**,¹⁶ but that the Panel did so in an isolated fashion, neglecting their combined effect and ultimate impact on Mr. Krasniqi's right against self-incrimination. Further, the SPO's assertion that the Defence's claims in this respect are "speculative and hypothetical"¹⁷ is without merit and in contrast with its subsequent submission that the Panel performed a "holistic assessment of the circumstances in which the statements were given".¹⁸ The SPO submissions amount to nothing more than unsubstantiated assertions.

8. The SPO submission that the Defence's concerns regarding the admission of untested evidence into the case record is "an argument about the weight to be afforded the evidence" and that "is not a proper argument in seeking appeal" offers nothing more than a narrow view of the Defence's submissions on the **Ninth Issue**. Most

¹⁴ See e.g., reformulated issues 3 and 6 in 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 43, 60, 73(a).

¹⁵ Request, para. 11.

¹⁶ Response, para. 18.

¹⁷ *Idem*, paras 18, 20.

¹⁸ *Idem*, para. 23.

importantly, it disregards the underlying problem, which is the volume of untested evidence admitted onto the case record and the impact it has on the Accused's fair trial rights.¹⁹ It also ignores the basis of the proposed issue, which is the error, in the Panel's finding, that the prejudice caused by Mr. Krasniqi's impossibility to cross-examine the other Accused did not outweigh the probative value of their evidence.

III. CONCLUSION

9. For the above reasons, the Defence respectfully requests the Trial Panel to reject the SPO objections and to grant certification on the nine issues outlined in the Request.

¹⁹ See e.g., KSC-BC-2020-06, F01865, Joint Defence, *Joint Defence Response to Prosecution Third Motion for Admission of Evidence Pursuant to Rule 155 (F01804)*, 17 October 2023, confidential, paras 1, 5.

Word count: 1,000



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