

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 Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

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**Selimi Defence Reply to Prosecution consolidated response to Veseli, Selimi,
and Krasniqi requests for leave to appeal Decision F01917**

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1. The SPO's Response¹ neither adequately addresses arguments set forth by the Selimi Defence on the requirements for certification, nor engages with the substance of the issues put forward and should be disregarded by the Trial Panel.
2. Concerning the Third Issue, the Defence challenges the Trial Panel's finding 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'² on the basis that its effect is to discard the guarantees that a suspect/Accused benefits from at admission stage by relying on the less robust guarantees that the same individual enjoyed as a witness at collection stage as a substitute. The SPO's mere repetition of the Panel's finding fails to substantiate its bare assertion that the issue flagged by the Defence does not arise from the Decision.
3. The SPO's subsequent reference to the Trial Panel's finding that "there was no indication that the previous prosecutorial authorities acted in bad faith or unreasonably"³ is likewise immaterial, as the Defence has at no point argued the opposite, but rather that this may not displace or act as an alternative for an assessment of whether the guarantees that a suspect/Accused enjoys at admission stage had been duly observed so as to justify admission. The SPO's further reference to the fact that the Trial Panel "considered that the Defence will have the opportunity to challenge and test the evidence"⁴ is similarly inconsequential, as the Defence has challenged whether that consideration can

¹ KSC-BC-2020-06/F01990, Prosecution consolidated response to Veseli, Selimi, and Krasniqi requests for leave to appeal Decision F01917, 7 December 2023 ("Response").

² Response, para. 8; KSC-BC-2020-06/F01917, Decision on Prosecution Motion for Admission of Accused's Statements, 9 November 2023 ("Decision"), para. 141.

³ *Ibid.*

⁴ *Ibid.*

be said to effectively nullify the prejudice and/or violation of rights complained of.⁵

4. Concerning the Fourth Issue, the SPO again merely recites the Trial Panel's factual findings that the Defence does not contest,⁶ yet conspicuously fails to address the Defence's specific submissions in relation to each of these findings, which argue that those factual findings alone do not adequately counterbalance the prejudice inherent to the admission of potentially self-incriminating evidence.⁷
5. In relation to the Fifth Issue, the SPO misrepresents the issue as submitted by the Defence. The issue in question contends that, considering that the Trial Panel did not allude to any countervailing considerations to the contrary, the relevant authorities in question ought to have been accorded equal weight, and that any conflict arising therefrom should have been decided and explained on the basis of established principles of statutory construction, including that of *lex mitior*. The SPO further fails to offer any argument in support of its attempt to discard the applicability of the latter principle.⁸
6. Concerning the Sixth Issue, the SPO's arguments belie an incomplete reading of the issue as proposed by the Defence, a reading of absent passages into the Decision, or both. It suggests that the Defence ability to challenge the evidence was but one factor the Panel considered, among others, when finding that the probative value of the evidence was not outweighed by prejudice.⁹ However, the Request refers to both the presumed possibility for the Defence to challenge that

⁵ KSC-BC-2020-06/F01966, Selimi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements, 27 November 2023, paras. 19-20 ("Request").

⁶ Response, para. 9.

⁷ Request, para. 14.

⁸ Response, footnote 29.

⁹ Response, para. 11.

evidence *and* the Trial Panel's ability to assess it in light of the entire body of evidence as the two safeguards that the Trial Panel considered as mitigating the prejudice inherent to the admission of that evidence, as opposed to only the former.¹⁰ Furthermore, the SPO cites to paragraphs in the Decision wherein only these two factors are identified as specific safeguards against prejudice.¹¹ The other factors contained in the paragraphs referenced in the Response in relation to this Issue have either been considered by the Trial Panel for the purposes of assessing completely different Rule 138 criteria, and/or were otherwise challenged in the context of other issues put forward for certification.

7. As to whether the issues would significantly impact proceedings, the SPO suggests that an error on the part of the Panel in potentially admitting evidence in violation of the rights of the Accused and which is beyond doubt central to the case against the four Accused would not impact the proceedings, as the Panel may assign the appropriate weight to the evidence in question.¹² This essentially suggests that the rules relating to the admission of evidence and their role in protecting the fundamental rights of the Accused are irrelevant in the face of the Panel's duty to weigh evidence appropriately. Furthermore, the weighing of evidence at the conclusion of proceedings must be carried out with a presumption that such evidence has not been admitted in violation of the Accused's rights, thus underlining the need for the intervention of the Appeals Panel at this stage to safeguard the fairness of proceedings, contrary to the SPO's submissions.
8. Furthermore, the SPO contends that "[t]o the extent this evidence is relevant to known issues in this case [...] the Defence does not explain how the admission of these statements will result in significant, additional investigations or cross-

¹⁰ Request, paras. 19-20.

¹¹ Decision, paras. 88, 141, 144, 161.

¹² Response, para. 23.

examination.”¹³ This markedly fails to account for the plethora of unique elements inherent to this evidence, or otherwise suggests that it is entirely duplicative of extant evidence that the SPO intends to lead. If the latter is the case, then it is unexplained why the SPO sought admission of this evidence in the first place.

9. Considering the foregoing, the SPO’s arguments set out in the Response should be disregarded and leave to appeal the Impugned Decision be granted.

Word count: 996

Respectfully submitted on 15 December 2023,



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¹³ Response, para. 24.



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