



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-06
The 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

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Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements

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TRIAL PANEL II (“Panel”), pursuant to Article 45(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 9 November 2023, the Panel issued the Decision on Prosecution Motion for Admission of Accused’s Statements (“Impugned Decision”).¹
2. On 13 November 2023, the Panel granted the Defence an extension of time to file any request for certification to appeal the Impugned Decision, setting the deadline on 27 November 2023.²
3. On 27 November 2023, the Defence teams for Mr Krasniqi (“Krasniqi Defence”), Mr Veseli (“Veseli Defence”), and Mr Selimi (“Selimi Defence”) (collectively, “Defence”) filed requests for certification to appeal the Impugned Decision (“Krasniqi Request”, “Veseli Request”, and “Selimi Request”, respectively; collectively, “Defence Requests”).³ The Defence for Mr Thaçi did not seek certification to appeal the Impugned Decision.
4. On 7 December 2023, the Specialist Prosecutor’s Office (“SPO”) filed a consolidated response to the Defence Requests (“SPO Response”).⁴

¹ F01917, Panel, *Decision on Prosecution Motion for Admission of Accused’s Statements*, 9 November 2023.

² Transcript of Hearing, 13 November 2023, pp. 9823-9824, 9881.

³ F01961, Specialist Counsel, *Krasniqi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused’s Statements*, 27 November 2023; F01964, Specialist Counsel, *Veseli Defence Request for Leave to Appeal the Decision on Prosecution Motion for the Admission of the Accused’s Statements*, 27 November 2023; F01966, Specialist Counsel, *Selimi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused’s Statements*, 27 November 2023.

⁴ F01990, Specialist Prosecutor, *Prosecution Consolidated Response to Veseli, Selimi, and Krasniqi Requests for Leave to Appeal Decision F01917*, 7 December 2023.

5. On 15 December 2023, the Defence filed replies to the Response (“Krasniqi Reply”, “Veseli Reply”, and “Selimi Reply”, respectively).⁵

II. SUBMISSIONS

6. The Krasniqi Defence requests leave to appeal the Impugned Decision in respect of the following issues (collectively, “Krasniqi’s Issues”):

- 1) Whether the Panel erred in fact and/or law by finding that the admission of Mr Krasniqi’s May 2007 ICTY witness statement, February 2005 ICTY trial testimony, and May 2007 ICTY testimony (“Mr Krasniqi’s ICTY Evidence”), which were given in the absence of any self-incrimination warning or other safeguard, did not violate Mr Krasniqi’s privilege against self-incrimination (“Krasniqi’s First Issue”);
- 2) 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 (“Krasniqi’s Second Issue”);
- 3) 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 privilege against self-incrimination, the right to counsel, and the right to silence (“Krasniqi’s Third Issue”);
- 4) 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 Specialist Chambers’ (“SC”) legal framework, thereby ignoring that unlike ICTY Rules, Rules 41(1)(a) and (2) and 151 of the KSC Rules require that witnesses be notified of their rights against self-incrimination before their testimony or statement is given (“Krasniqi’s Fourth Issue”);
- 5) 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

⁵ F02009, Specialist Counsel, *Veseli Defence Reply to Prosecution Consolidated Response to Veseli, Selimi, and Krasniqi Requests for Leave to Appeal Decision F01917 (F01990)*, 15 December 2023, confidential; F02010, Specialist Counsel, *Krasniqi Defence Reply to Prosecution Consolidated Response to Veseli, Selimi, and Krasniqi Requests for Leave to Appeal Decision F01917*, 15 December 2023; F02015, Specialist Counsel, *Selimi Defence Reply to Prosecution consolidated response to Veseli, Selimi, and Krasniqi requests for leave to appeal Decision F01917*, 15 December 2023.

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 ("Krasniqi's Fifth Issue");

- 6) 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" ("Krasniqi's Sixth Issue");
- 7) 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 not to self-incriminate, and that therefore Mr Krasniqi's testimony was given voluntarily and free of coercion/compulsion ("Krasniqi's Seventh Issue");
- 8) Whether the Panel erred in law and/or fact by finding that the protection of Rule 90(E) of the ICTY Rules does not extend to prosecution before the SC, thereby rendering ineffective a fundamental right protected by Article 6 of the European Convention on Human Rights ("Convention") ("Krasniqi's Eighth Issue"); and
- 9) 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 ("Krasniqi's Ninth Issue").⁶

7. The Veseli Defence requests leave to appeal the Impugned Decision in respect of the following issues (collectively, "Veseli's Issues"):

- 1) Whether the Panel erred in law in its application of Article 19(2) and Rule 4(1) by ignoring Article 123 of the Kosovo Code of Criminal Procedure ("KCPC"), after having found that the admissibility of statements of co-accused was not specifically addressed in the SC's legal framework ("Veseli's First Issue"); and
- 2) Whether the Panel erred in law by failing to adopt the most favourable interpretation to the Accused, pursuant to Rules 4(3) and 5 of the Rules ("Veseli's Second Issue").⁷

⁶ Krasniqi Request, paras 2, 23.

⁷ Veseli Request, paras 2, 21.

8. The Selimi Defence requests leave to appeal the Impugned Decision in respect of the following issues (collectively, “Selimi’s Issues”):

- 1) Whether the 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 (“Selimi’s First Issue”);
- 2) Whether the Panel erred in finding that that there is no indication that Mr Selimi was ever confused as to his suspect status (“Selimi’s Second Issue”);
- 3) Whether the 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 (“Selimi’s Third Issue”);
- 4) Whether the Panel erred in failing to consider the prejudice arising from the admission of Mr Selimi’s April 2004 ICTY witness statement and May 2005 ICTY trial testimony (“Mr Selimi’s ICTY Evidence”), during which he was not informed about his privilege against self-incrimination (“Selimi’s Fourth Issue”);
- 5) Whether the Panel erred in finding that the KCPC has no applicability in the present proceedings (“Selimi’s Fifth Issue”); and
- 6) Whether the 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 (“Selimi’s Sixth Issue”).⁸

9. The Defence submits that: (i) the Krasniqi’s Issues, Veseli’s Issues, and Selimi’s Issues (collectively, “Issues”) originate from the Decision, are sufficiently specific and identifiable, and do not amount to mere disagreements;⁹ (ii) the Issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial;¹⁰ and (iii) an immediate resolution of the Issues by the Court of Appeals Panel would materially advance the proceedings.¹¹

⁸ Selimi Request, paras 1, 29.

⁹ Krasniqi Request, paras 4-15; Veseli Request, paras 10-15; Selimi Request, paras 2-21.

¹⁰ Krasniqi Request, paras 4, 16-20; Veseli Request, paras 10, 16-19; Selimi Request, paras 2, 22-25.

¹¹ Krasniqi Request, paras 4, 21-22; Veseli Request, paras 10, 20; Selimi Request, paras 2, 26-28.

10. The SPO responds that the Defence Requests should be denied as the Defence has not demonstrated that the Issues merit the exceptional relief of interlocutory appeal.¹² The SPO submits that: (i) the Issues are not appealable;¹³ (ii) they would not have a significant impact on the fairness or expeditiousness of the proceedings or outcome of the trial; and (iii) their appellate resolution at this stage would not advance the proceedings.¹⁴ In particular, the SPO contends that a number of issues for which certification to appeal is sought do not arise from the Impugned Decision and that the Defence misrepresents the content of the Impugned Decision in respect of some others.¹⁵

11. The Krasniqi Defence replies that each of the Krasniqi's Issues meet the certification requirements of Rule 77 as they originate from the Impugned Decision 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.¹⁶ The Krasniqi Defence submits that, in its Response, the SPO misunderstands: (i) the Krasniqi Defence's submissions; and (ii) the test for certification.¹⁷ The Krasniqi Defence respectfully requests the Panel to reject the SPO's objections and to grant certification on the Krasniqi's Issues.¹⁸

12. The Veseli Defence replies that the SPO Response ought to be disregarded and leave to appeal the Impugned Decision granted.¹⁹

13. The Selimi Defence replies that the SPO Response neither adequately addresses arguments set forth by the Selimi Defence on the requirements for

¹² SPO Response, paras 1, 25.

¹³ SPO Response, paras 2-22.

¹⁴ SPO Response, paras 23-24.

¹⁵ *See e.g.* SPO Response, paras 2, 4, 6, 10-11, 15, 18.

¹⁶ Krasniqi Reply, para. 2.

¹⁷ Krasniqi Reply, paras 3-4.

¹⁸ Krasniqi Reply, para. 9.

¹⁹ Veseli Reply, para. 5.

certification, nor engages with the substance of the issues put forward.²⁰ The Selimi Defence therefore submits that the SPO Response should be disregarded by the Panel and leave to appeal the Impugned Decision be granted.²¹

III. APPLICABLE LAW

14. Pursuant to Article 45(2) and Rule 77(2), a right to appeal only arises if the standard of certification set forth therein has been met.

15. Rule 77(2) provides:

The Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

16. The Panel incorporates by reference the applicable law on the legal standard for certification to appeal set out in its past decisions.²²

IV. DISCUSSION

A. KRASNIQI'S ISSUES

1. Krasniqi's First Issue

17. The Krasniqi Defence submits that, by dismissing the Defence's argument that the admission of Mr Krasniqi's ICTY Evidence in the present trial would violate his

²⁰ Selimi Reply, para. 1. *See also* Selimi Reply, paras 7-8.

²¹ Selimi Reply, paras 1, 9.

²² F01237, Panel, *Decision on Thaçi Defence Request for Leave to Appeal Decision on Disclosure of Dual Status Witnesses*, 30 January 2023, paras 7-8; KSC-BC-2020-07, F00423, Trial Panel II, *Decision on SPO Requests for Leave to Appeal F00413 and Suspensive Effect ("Gucati and Haradinaj Decision on Leave to Appeal")*, 8 November 2021, paras 13-21; F00372, Trial Panel II, *Decision on Haradinaj Defence's Application for Certification of F00328*, 15 October 2021, paras 15-17; F00484, Trial Panel II, *Decision on Defence Request for Leave to Appeal F00470*, 8 December 2021, paras 4-14. *See also* F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal*, 11 January 2021, paras 6-7, 9-17.

privilege against self-incrimination, the Panel misunderstood the nature and scope of the privilege against self-incrimination.²³ The Krasniqi Defence contends that Krasniqi's First Issue is concerned with the violation of Mr Krasniqi's privilege against self-incrimination, which is a fundamental component of fair trial, and therefore affects the overall fairness of the proceedings and the outcome of the trial.²⁴ The Krasniqi Defence further argues that an immediate resolution by the Court of Appeals Panel of Krasniqi's First Issue would materially advance the proceedings by: (i) providing certainty regarding the nature and scope of the privilege against self-incrimination; (ii) clarifying the applicable standard to determine when an individual is entitled to the status and guarantees of a suspect; (iii) avoiding the admission of evidence into the case record in violation of the Accused's fair trial rights; and (iv) informing the position of witnesses and suspects who are yet to testify, with inevitable repercussions on their credibility and the reliability of their evidence.²⁵

18. The SPO responds that 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.²⁶

19. In the Impugned Decision, the Panel found, *inter alia*, that Mr Krasniqi's ICTY Evidence, elicited in the absence of express self-incrimination warnings, was voluntary, free of coercion and improper compulsion and, hence, taken in a manner consistent with the standards of international human rights law.²⁷ The Panel further found Mr Krasniqi's ICTY Evidence to be probative and that its probative value was not outweighed by its prejudicial effect, and, having found that evidence to be also relevant and authentic, admitted it into evidence.²⁸ The Panel took the view that the full array of warnings for a suspect was not a legal pre-requisite for the admission of

²³ Krasniqi Request, paras 5-6, *referring to, inter alia*, Impugned Decision, para. 184.

²⁴ Krasniqi Request, paras 16-18. *See also* Krasniqi Request, para. 20.

²⁵ Krasniqi Request, para. 21.

²⁶ SPO Response, para. 12.

²⁷ Impugned Decision, paras 194, 200, 204.

²⁸ Impugned Decision, paras 193, 196, 198-199, 200, 202-204, 206-207, 221(b).

a statement given to previous investigative authorities by an individual who was not considered a suspect at the time and through the course of his interview or testimony.²⁹ The Panel is of the view that, contrary to the SPO's submissions,³⁰ whether the admission in the present trial of Mr Krasniqi's ICTY Evidence, which was given in the absence of express self-incrimination warnings, violated Mr Krasniqi's privilege against self-incrimination constitutes a discrete topic emanating from the Impugned Decision. The Panel accordingly finds that Krasniqi's First Issue arises from the Impugned Decision.

20. As to the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel notes that whether the admission of Mr Krasniqi's ICTY Evidence violated Mr Krasniqi's privilege against self-incrimination might affect Mr Krasniqi's fair trial rights. The Panel is therefore satisfied that the Krasniqi Defence has demonstrated that Krasniqi's First Issue would impact the fair and expeditious conduct of the proceedings.

21. As to whether an immediate resolution of the issue by the Court of Appeals Panel may materially advance the proceedings, the Panel considers it important to the fair conduct of the proceedings and the rights of the Accused that there be clarity on whether the admission in the present trial of Mr Krasniqi's ICTY Evidence violated Mr Krasniqi's privilege against self-incrimination. Considering the importance of this evidence, a resolution of this matter would also enable the Defence and Prosecution to prepare the presentation of their cases and final submissions on evidence that is validly before this Panel. The Panel is therefore satisfied that immediate resolution of Krasniqi's First Issue by the Court of Appeals Panel will materially advance the proceedings.

22. In light of the above, the Panel grants leave to appeal Krasniqi's First Issue.

²⁹ Impugned Decision, paras 194, 200, 204. *See also* Impugned Decision, paras 129, 159-160.

³⁰ SPO Response, para. 12.

2. Krasniqi's Second Issue

23. The Krasniqi Defence submits that the standard applied by the Panel to determine that Mr Krasniqi was not entitled to the status and guarantees of a suspect when he gave evidence as witness is erroneous and significantly departs from the applicable tests defined in the jurisprudence of the European Court of Human Rights ("ECtHR").³¹ The Krasniqi Defence contends that Krasniqi's Second Issue is concerned with the violation of Mr Krasniqi's privilege against self-incrimination, rights to silence, to legal representation, and to be notified of these rights, which are fundamental components of fair trial, and therefore affects the overall fairness of the proceedings and the outcome of the trial.³² The Krasniqi Defence further argues that an immediate resolution by the Court of Appeals Panel of Krasniqi's Second Issue would materially advance the proceedings in the manner described in paragraph 17.³³

24. The SPO responds that Krasniqi's Second Issue does not merit appeal as it is insufficiently explained to be certifiable for appeal.³⁴

25. The Panel recalls that, in the Impugned Decision, the Panel found that Mr Krasniqi's ICTY Evidence, given in his capacity of witness, was voluntary, free of coercion and improper compulsion and, hence, taken in a manner consistent with the standards of international human rights law.³⁵ The Panel based this finding on the premise that the full array of warnings for a suspect is 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 interview or testimony.³⁶ The Panel further noted, in relation to statements other

³¹ Krasniqi Request, paras 7-8, referring to, *inter alia*, Impugned Decision, para. 129.

³² Krasniqi Request, paras 16-18. See also Krasniqi Request, para. 20.

³³ Krasniqi Request, para. 21.

³⁴ SPO Response, para. 13.

³⁵ See above para. 19.

³⁶ See above para. 19.

than those given by Mr Krasniqi before the ICTY, that there was no indication of impropriety on the part of the prosecuting authorities eliciting the Accused's evidence.³⁷ This assessment was not determinative of the Panel's findings regarding the voluntariness of the evidence given by the Accused and its compliance with international human rights standards. It merely signified that the Panel was satisfied that there was no indication that the ICTY had taken these statements, or heard Mr Krasniqi's testimony, in a manner inconsistent with the legal framework regulating the process before that jurisdiction. The Panel is therefore of the view that, contrary to the Krasniqi Defence's submissions,³⁸ Krasniqi's Second Issue misrepresents the Panel's findings. The Panel accordingly finds that the Krasniqi Defence has failed to establish that Krasniqi's Second Issue constitutes a discrete topic arising from the Impugned Decision.

26. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Krasniqi's Second Issue is therefore rejected.

3. Krasniqi's Third Issue

27. The Krasniqi Defence submits that, by applying the wrong standard to determine that Mr Krasniqi was not entitled to the status and guarantees of a suspect when he gave evidence to the ICTY, the Panel 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.³⁹ The Krasniqi Defence contends that Krasniqi's Third Issue is concerned with the violation of Mr Krasniqi's privilege against self-incrimination, rights to silence, to legal representation, and to be notified of these rights, which are fundamental components of fair trial, and therefore affects

³⁷ See e.g. Impugned Decision, para. 191.

³⁸ Krasniqi Request, para. 8.

³⁹ Krasniqi Request, paras 7-8, referring to, *inter alia*, Impugned Decision, para. 129.

the overall fairness of the proceedings and the outcome of the trial.⁴⁰ The Krasniqi Defence further argues that an immediate resolution by the Court of Appeals Panel of Krasniqi's Third Issue would materially advance the proceedings in the manner described in paragraph 17.⁴¹

28. The SPO responds that Krasniqi's Third Issue does not merit appeal as it is insufficiently explained to be certifiable for appeal.⁴²

29. The Panel recalls that, in the Impugned Decision, it found that the full array of warnings for a suspect was not a legal pre-requisite for the admission of a statement given to other investigative or judicial authorities by a witness who was not considered a suspect by those authorities at the time and through the course of his interview or testimony.⁴³ The Panel further determined that Mr Krasniqi's ICTY Evidence, given in the capacity of a witness, was voluntary, free of coercion and improper compulsion and, hence, taken in a manner consistent with the standards of international human rights law.⁴⁴ The Panel is of the view that, contrary to the SPO's submissions,⁴⁵ whether Mr Krasniqi was entitled to the guarantees of a suspect at the time he gave evidence to the ICTY constitutes a discrete topic emanating from the Impugned Decision. The Panel accordingly finds that Krasniqi's Third Issue arises from the Impugned Decision.

30. As to the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel notes that whether Mr Krasniqi was entitled to the guarantees of a suspect at the time he gave evidence to the ICTY might affect the admissibility of his ICTY Evidence and therefore his fair trial rights. For this reason,

⁴⁰ Krasniqi Request, paras 16-18. *See also* Krasniqi Request, para. 20.

⁴¹ Krasniqi Request, para. 21.

⁴² SPO Response, para. 13.

⁴³ *See above* para. 19.

⁴⁴ *See above* para. 19.

⁴⁵ SPO Response, para. 13.

the Panel is satisfied that the Krasniqi Defence has demonstrated that Krasniqi's Third Issue would impact the fair and expeditious conduct of the proceedings.

31. As to whether an immediate resolution of the issue by the Court of Appeals Panel may materially advance the proceedings, the Panel considers it beneficial for the conduct of the proceedings and the rights of the Accused that there be clarity on whether Mr Krasniqi was entitled to the guarantees of a suspect at the time he gave evidence to the ICTY. Furthermore, as already noted in relation to Krasniqi's First Issue, a resolution of this matter would also enable the Defence and Prosecution to prepare the presentation of their cases and final submissions on evidence that is validly before this Panel. The Panel is therefore satisfied that immediate resolution of Krasniqi's Third Issue by the Court of Appeals Panel will materially advance the proceedings.

32. In light of the above, the Panel grants leave to appeal Krasniqi's Third Issue.

4. Krasniqi's Fourth and Fifth Issues

33. The Krasniqi Defence submits that, by finding that there is no material distinction between the protections afforded to Mr Krasniqi under the ICTY's legal framework and the SC's regime, the Panel: (i) ignored the material difference that in 2007 Mr Krasniqi was not given any warning at the ICTY concerning self-incrimination, which is required by the SC Rules; and (ii) as a result, declined to assess whether this diminished protection fell short of the minimum guarantees required by the SC's regime.⁴⁶ The Krasniqi Defence contends that Krasniqi's Fourth and Fifth Issues are concerned with the violation of Mr Krasniqi's privilege against self-incrimination, which is a fundamental component of fair trial, and therefore affects the overall fairness of the proceedings and the outcome of the trial.⁴⁷ The Krasniqi Defence further

⁴⁶ Krasniqi Request, paras 9-10, *referring to* Impugned Decision, paras 194, 200.

⁴⁷ Krasniqi Request, paras 16-18. *See also* Krasniqi Request, para. 20.

argues that an immediate resolution by the Court of Appeals Panel of Krasniqi's Fourth and Fifth Issues would materially advance the proceedings in the manner described in paragraph 17.⁴⁸

34. The SPO responds that: (i) Krasniqi's Fourth Issue misrepresents the Impugned Decision; and (ii) Krasniqi's Fifth Issue is premised on Krasniqi's Fourth Issue, which misreads the Impugned Decision, and therefore does not merit appeal.⁴⁹

35. The Krasniqi Defence replies that 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.⁵⁰

36. The Panel recalls that, in the Impugned Decision, it found that the full array of warnings for a suspect was not a legal pre-requisite for the admission of a statement given to previous judicial or investigative authorities by a witness who was not considered a suspect at the time and through the course of his interview or testimony.⁵¹ The Panel also determined that the Office of the Prosecutor of the ICTY was under no legal obligation to inform Mr Krasniqi about his privilege against self-incrimination as he was not regarded as a suspect, but as a witness, and that there was no *material* distinction between the protection he was entitled to under the ICTY's regime and the SC's legal framework.⁵² The Panel further found that Mr Krasniqi's ICTY Evidence, given in the capacity of a witness, was voluntary, free of coercion and improper compulsion and, hence, taken in a manner consistent with the standards of international human rights law.⁵³ Contrary to the Krasniqi Defence's submissions,⁵⁴ compliance by the ICTY with its own standards and procedure was not determinative of the Panel's decision to

⁴⁸ Krasniqi Request, para. 21.

⁴⁹ SPO Response, paras 14-16.

⁵⁰ Krasniqi Reply, para. 5.

⁵¹ *See above* para. 19.

⁵² Impugned Decision, paras 194, 200, 204.

⁵³ *See above* para. 19.

⁵⁴ Krasniqi Request, paras 9-10.

admit that evidence. Similar to the question of compliance by a national authority with its national laws, the question of whether the ICTY complied with its own standards is merely a factual consideration that might weigh in the Panel's admission decision.⁵⁵ There was no indication in this case that the ICTY had failed to comply with its own standards. The Panel is therefore of the view that Krasniqi's Fourth and Fifth Issues misrepresent the Panel's above-mentioned findings and constitute a mere disagreement with them. The Panel accordingly finds that the Krasniqi Defence has failed to establish that Krasniqi's Fourth and Fifth Issues constitute discrete topics arising from the Impugned Decision.

37. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Krasniqi's Fourth and Fifth Issues are therefore rejected.

5. Krasniqi's Sixth and Seventh Issues

38. The Krasniqi Defence submits that the Panel failed to consider that the absence of a 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 and made it impossible for him to meaningfully exercise his right against self-incrimination.⁵⁶ The Krasniqi Defence contends that Krasniqi's Sixth and Seventh Issues are concerned with the violation of Mr Krasniqi's privilege against self-incrimination, which is a fundamental component of fair trial, and therefore affects the overall fairness of the proceedings and the outcome of the trial.⁵⁷ The Krasniqi Defence further argues that an immediate

⁵⁵ See e.g. ICTY, *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Appeals Chamber, [Judgement](#), 23 July 2009, para. 28; *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Chamber, [Decision on Accused's Motion to Exclude Intercepted Conversations, 30 September 2010](#), paras 7, 10, 11.

⁵⁶ Krasniqi Request, paras 11-12, referring to Impugned Decision, paras 200, 204.

⁵⁷ Krasniqi Request, paras 16-18. See also Krasniqi Request, para. 20.

resolution by the Court of Appeals Panel of Krasniqi's Sixth and Seventh Issues would materially advance the proceedings in the manner described in paragraph 17.⁵⁸

39. The SPO responds that: (i) Krasniqi's Sixth Issue is too abstract to qualify as an appealable issue; and (ii) Krasniqi's Seventh Issue misrepresents the Impugned Decision in alleging that points that the Panel explicitly addressed were not considered in combination.⁵⁹

40. The Krasniqi Defence replies that the SPO fails to grasp how Krasniqi's Sixth and Seventh Issues concern the fact that the Impugned Decision effectively deprived the Accused of a fundamental fair trial right.⁶⁰ In the Krasniqi Defence's view, the SPO's submissions amount to nothing more than unsubstantiated assertions.⁶¹

41. In the Impugned Decision, the Panel found that a subpoena is merely the procedural instrument used to bring a witness before the court to hear his evidence and that there was no indication that Mr Krasniqi being subpoenaed resulted in his providing incriminating information that he would not otherwise have been prepared to give to the ICTY during his May 2007 trial testimony.⁶² The Panel also found that: (i) failure to expressly notify a witness of his privilege against self-incrimination when there are no grounds for such warning and failure to expressly notify a witness of the possibility of seeking legal assistance does not affect the voluntariness or reliability of the witness testimony; and (ii) the oath under which Mr Krasniqi testified as a witness at the ICTY did not compel him to renounce his right against self-incrimination, but subjected its exercise to a particular procedure provided for under the Rules of the ICTY.⁶³ The Panel further held, *inter alia*, that Mr Krasniqi's ICTY Evidence, given in his capacity of witness,

⁵⁸ Krasniqi Request, para. 21.

⁵⁹ SPO Response, paras 17-18. *See also* SPO Response, para. 20.

⁶⁰ Krasniqi Reply, para. 7.

⁶¹ Krasniqi Reply, para. 7.

⁶² Impugned Decision, para. 200.

⁶³ Impugned Decision, para. 204.

was voluntary, free of coercion and improper compulsion and, hence, taken in a manner consistent with the standards of international human rights law.⁶⁴ Krasniqi's Sixth and Seventh Issues are mere disagreement with the Panel's findings rather than demonstration of an error within the meaning of Rule 77(2). The Panel duly considered the absence of express self-incrimination warnings and the fact that Mr Krasniqi was subpoenaed to testify and whether these factors affected the voluntariness of his ICTY Evidence.⁶⁵ It came to the view that they did not, for the reasons outlined above. The Panel is therefore of the view that Krasniqi's Sixth and Seventh Issues constitute a mere disagreement with the Panel's findings regarding the voluntariness of Mr Krasniqi's ICTY Evidence. The Panel accordingly finds that the Krasniqi Defence has failed to establish that Krasniqi's Sixth and Seventh Issues constitute discrete topics arising from the Impugned Decision.

42. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Krasniqi's Sixth and Seventh Issues are therefore rejected.

6. Krasniqi's Eighth Issue

43. The Krasniqi Defence submits that the Panel erred in law and/or fact by finding that the protection of Rule 90(E) of the ICTY Rules did not extend to proceedings before the SC, thereby rendering ineffective a fundamental right protected by Article 6 of the Convention.⁶⁶ The Krasniqi Defence contends that Krasniqi's Eighth Issue is concerned with the violation of Mr Krasniqi's privilege against self-incrimination, which is a fundamental component of fair trial, and therefore affects the overall

⁶⁴ See *above* para. 19.

⁶⁵ *Contra* Krasniqi Request, para. 11.

⁶⁶ Krasniqi Request, para. 2(viii). See also Krasniqi Request, paras 13-14, *referring to* Impugned Decision, para. 159.

fairness of the proceedings and the outcome of the trial.⁶⁷ The Krasniqi Defence further argues that an immediate resolution by the Court of Appeals Panel of Krasniqi's Eighth Issue would materially advance the proceedings in the manner described in paragraph 17.⁶⁸

44. The SPO responds that Krasniqi's Eighth Issue does not merit appeal as: (i) the body of the Krasniqi Defence's argument does not align with the issue as summarised; and (ii) the Krasniqi Defence misrepresents the Impugned Decision in alleging that points that the Panel explicitly addressed were not considered in combination.⁶⁹

45. The Krasniqi Defence replies that, as a result of the Panel's narrow interpretation of Rule 90(E) of the ICTY Rules, witnesses are *de facto* deprived of any safeguards against self-incrimination.⁷⁰

46. In the Impugned Decision, the Panel: (i) found that the full array of warnings to which a suspect is entitled do not apply in the same way to an individual who is questioned as a witness;⁷¹ and (ii) referred to ICTY jurisprudence stating that the safeguards against self-incrimination provided by Rule 90(E) of the ICTY Rules only applied before the ICTY and were not intended to have extra-jurisdictional effect.⁷² The Panel accordingly found, *inter alia*, that Mr Krasniqi's ICTY Evidence, given in his capacity of witness, was voluntary, free of coercion and improper compulsion and, hence, taken in a manner consistent with the standards of international human rights law.⁷³ Contrary to the Krasniqi Defence's submissions,⁷⁴ the Panel did not fail to consider how the lack of an obligation in

⁶⁷ Krasniqi Request, paras 16-18. *See also* Krasniqi Request, para. 20.

⁶⁸ Krasniqi Request, para. 21.

⁶⁹ SPO Response, paras 19-20.

⁷⁰ Krasniqi Reply, para. 6. *See also* Krasniqi Reply, para. 7.

⁷¹ *See above* para. 19.

⁷² Impugned Decision, para. 159, *referring to* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR73.11, Appeals Chamber, [Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir](#), 13 November 2013, para. 43; *Prosecutor v. Perišić*, IT-04-81-T, [Decision on Prosecution Motion for an Advance Ruling on the Scope of Permissible Cross Examination](#), 12 June 2009, para. 21.

⁷³ *See above* para. 19.

⁷⁴ *Contra* Krasniqi Request, paras 13-14.

the ICTY Rules to expressly and pre-emptively inform witnesses about their privilege against self-incrimination affected Mr Krasniqi's safeguards against self-incrimination. Furthermore, as already noted, the Panel's consideration of the ICTY's compliance with its own regime was not determinative of the question of admissibility of the evidence but one of a series of considerations relevant to that determination.⁷⁵ The Panel therefore considers that Krasniqi's Eighth Issue constitutes a mere disagreement with the Panel's above-mentioned findings. The Panel accordingly finds that the Krasniqi Defence has failed to establish that Krasniqi's Eighth Issue constitutes a discrete topic arising from the Impugned Decision.

47. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Krasniqi's Eighth Issue is therefore rejected.

7. Krasniqi's Ninth Issue

48. The Krasniqi Defence seeks certification to appeal the Panel's decision to admit the previous statements of Mr Thaçi, Mr Veseli and Mr Selimi in respect, potentially, of Mr Krasniqi.⁷⁶ The Krasniqi Defence contends that Krasniqi's Ninth Issue is concerned with the violation of Mr Krasniqi's privilege against self-incrimination and right to an adversarial hearing and to examine, or have examined, the witnesses against him, which are fundamental components of fair trial, and therefore affects the overall fairness of the proceedings and the outcome of the trial.⁷⁷ The Krasniqi Defence further argues that an immediate resolution by the Court of Appeals Panel of Krasniqi's Ninth Issue would materially advance the proceedings in the manner described in paragraph 17 as well as by providing clarity on: (i) the Panel's authority

⁷⁵ See *above* para. 36 (and references cited therein).

⁷⁶ Krasniqi Request, para. 15, *referring to* Impugned Decision, paras 216-217.

⁷⁷ Krasniqi Request, paras 16-19. See also Krasniqi Request, para. 20.

to admit untested evidence outside the specific instances provided for by the Rules; and (ii) the correctness of the balancing exercise between the probative value of the evidence and the prejudice caused by its admission.⁷⁸

49. The SPO responds that Krasniqi's Ninth Issue does not merit appeal as its formulation is too abstract.⁷⁹

50. The Krasniqi Defence replies that, in its Response, the SPO disregards: (i) the volume of untested evidence admitted onto the case record and the impact it has on the Accused's fair trial rights; and (ii) 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.⁸⁰

51. In the Impugned Decision, the Panel found that there is no bar under the applicable legal regime to the admission of an Accused's statement against co-defendants and that the admission of an Accused's statement is not *per se* prejudicial to the Accused or to the co-Accused.⁸¹ The Panel is of the view that, contrary to the SPO's submissions,⁸² whether the Panel erred in law in reaching such findings and admitting the Accused's statements against the four Accused constitutes a discrete topic emanating from the Impugned Decision. The Panel accordingly finds that Krasniqi's Ninth Issue arises from the Impugned Decision.

52. As to the significant effect on the fair and expeditious conduct of the proceedings or the outcome of the trial, the Panel notes that whether the Panel erred in admitting the Accused's statements against the four Accused might affect Mr Krasniqi's fair trial rights. The Panel is therefore satisfied that the Krasniqi Defence has demonstrated that Krasniqi's Ninth Issue would impact the fair and expeditious conduct of the proceedings.

⁷⁸ Krasniqi Request, paras 21-22.

⁷⁹ SPO Response, paras 21-22.

⁸⁰ Krasniqi Reply, para. 8.

⁸¹ Impugned Decision, paras 217, 219.

⁸² SPO Response, para. 22.

53. As to whether an immediate resolution of the issue by the Court of Appeals Panel may materially advance the proceedings, the Panel considers it beneficial for the conduct of the proceedings and the rights of the Accused that there be clarity on whether the Panel erred in admitting the Accused's statements against the four Accused. Considering the importance of this evidence, a resolution of this matter would also enable the Defence and Prosecution to prepare the presentation of their cases and final submissions on evidence that is validly before this Panel. The Panel is therefore satisfied that immediate resolution of Krasniqi's Ninth Issue by the Court of Appeals Panel will materially advance the proceedings.

54. In light of the above, the Panel grants leave to appeal Krasniqi's Ninth Issue.

B. VESELI'S ISSUES

1. Veseli's First Issue

55. The Veseli Defence submits that the Panel considered three provisions relevant to the admission of statements of a defendant whilst ignoring the principal provision on the use of such statements against a co-accused – namely, Article 123 of the KCPC.⁸³ The Veseli Defence contends that Veseli's First Issue concerns a fundamental error of law that will directly affects the fairness of the proceedings and the outcome of this trial.⁸⁴ The Veseli Defence further argues that a positive resolution from the Court of Appeals Panel of Veseli's First Issue would materially advance the proceedings by preserving Mr Veseli's right to confront those who have provided evidence against him.⁸⁵

56. The SPO responds that Veseli's First Issue does not arise from the Impugned Decision as: (i) the Veseli Defence's claim that the Panel completely ignored

⁸³ Veseli Request, para. 12, *referring to* Impugned Decision, para. 215.

⁸⁴ Veseli Request, paras 16-18, *referring to* Impugned Decision, para. 216.

⁸⁵ Veseli Request, para. 20.

Article 123 of the KCPC is not true; and (ii) Article 123 of the KCPC has not been expressly incorporated in the Rules.⁸⁶

57. The Veseli Defence replies that Veseli's First Issue arises from the Impugned Decision, despite reference being made to an outdated version of the KCPC.⁸⁷

58. In the Impugned Decision, the Panel found that neither the Kosovo Constitution, the Law, nor the Rules, specifically address the question of the admissibility of statements of co-defendants.⁸⁸ The Panel also considered that the provisions of the KCPC regulating the admission of statements provided by a defendant, in particular Articles 119(5), 256(1) and 257(2) of the KCPC, are not part of the SC's regulatory regime and do not apply in these proceedings.⁸⁹ The Panel therefore concluded that the question of admission of statements of co-defendants is subject to the general rules and principles regarding admission of evidence before the SC, first of all Rule 138(1). The Panel found that, as stipulated by Rule 140(4) and reflected in Articles 119(5), 256(1) and 257(2) of the KCPC, the accused's guilt may not be based solely, or to a decisive extent, upon such statements.⁹⁰ As correctly noted by the SPO and acknowledged by the Veseli Defence,⁹¹ the Panel understands that the provision referred to by the Veseli Defence in its submissions is Article 123 of the 2012 version of the KCPC, which has been renumbered as Article 119 in the version of the KCPC actually in force and duly considered by the Panel in its assessment of the applicable legal regime. It is therefore apparent that, contrary to the Veseli Defence's submissions,⁹² the Panel did not ignore any provision of the KCPC regarding accused's statements. The Panel is of the view that Veseli's First Issue misrepresents the Panel's findings

⁸⁶ SPO Response, paras 2-3.

⁸⁷ Veseli Reply, para. 2.

⁸⁸ Impugned Decision, para. 215.

⁸⁹ Impugned Decision, para. 215.

⁹⁰ Impugned Decision, para. 215. *See also* Impugned Decision, paras 16, 218.

⁹¹ SPO Response, paras 2-3; Veseli Reply, para. 2.

⁹² Veseli Request, para. 12.

on the legal regime applicable to the admission of the Accused's statements against the co-Accused, and constitutes a mere disagreement with them. The Panel accordingly finds that the Veseli Defence has failed to establish that Veseli's First Issue constitutes a discrete topic arising from the Impugned Decision.

59. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Veseli's First Issue is therefore rejected.

2. Veseli's Second Issue

60. The Veseli Defence submits that, by allowing the use of the Accused's statements against their co-Accused, the Panel erred in law by failing to apply the interpretation most favourable to the Accused, as required by Rules 4(3) and 5.⁹³ The Veseli Defence contends that Veseli's Second Issue concerns a fundamental error of law that will directly affect the fairness of the proceedings and the outcome of this trial.⁹⁴ The Veseli Defence further argues that a positive resolution from the Court of Appeals Panel of Veseli's Second Issue would materially advance the proceedings by preserving Mr Veseli's right to confront those who have provided evidence against him.⁹⁵

61. The SPO responds that Veseli's Second Issue does not merit leave to appeal as it does not arise from and misrepresents the Impugned Decision.⁹⁶ The SPO submits that: (i) the Veseli Defence fails to show that its preferred sources identify a general principle of law and would result in a different outcome; and (ii) the Veseli Defence cherry picks only a portion of the Impugned Decision's analysis on this point.⁹⁷

⁹³ Veseli Request, paras 13-15.

⁹⁴ Veseli Request, paras 16, 19.

⁹⁵ Veseli Request, para. 20.

⁹⁶ SPO Response, para. 4.

⁹⁷ SPO Response, paras 4-5.

62. The Veseli Defence reiterates in its Reply that the Panel did not consider Rule 4(3) and 5 of the Rules and, therefore, rendered a Decision which was predicated upon an interpretation of the Rules that was the least favourable to the accused.⁹⁸

63. In the Impugned Decision, the Panel found that: (i) neither the Kosovo Constitution, the Law, nor the Rules, specifically address the question of the admissibility of statements of co-defendants;⁹⁹ and (ii) the question of admission of such statements is therefore subject to the general rules and principles regarding the admission of evidence before the SC.¹⁰⁰ In reaching such a conclusion, the Panel noted: (i) the absence of a general principle of law or human rights obligation that would render such evidence inadmissible or its admission unfair to an accused in a criminal case;¹⁰¹ and (ii) the jurisprudence of other international(ised) criminal tribunals according to which the admission of the statements of an accused against his 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 of their admission to the co-defendant(s).¹⁰² Contrary to the Veseli Defence's submissions,¹⁰³ the Panel did not find that the SC's legal framework was silent on the issue of the admission of the Accused's statements so as to trigger the application of Rules 4(3) and 5. The Panel was not, therefore, obliged to decide which of two interpretations of the Rules was more favourable to the Accused. The Panel is of the view that Veseli's Second Issue misrepresents the Panel's findings on the legal regime applicable to the admission of the Accused's statements against the co-Accused, and constitutes a mere

⁹⁸ Veseli Reply, para. 4.

⁹⁹ Impugned Decision, para. 215.

¹⁰⁰ Impugned Decision, paras 16, 215.

¹⁰¹ Impugned Decision, para. 216.

¹⁰² Impugned Decision, para. 216, referring to ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Appeals Chamber, [Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning Into Evidence](#), 23 November 2007, para. 62; *Prosecutor v. Gotovina et al.*, IT-06-90-T, Trial Chamber I, [Judgement](#), 15 April 2011, para. 44; *Prosecutor v. Kvočka et al.*, IT-98-30/1, Trial Chamber, [Decision on the Admission of the Record of Interview of the Accused Kvočka](#), 16 March 2001.

¹⁰³ Veseli Request, paras 14-15.

disagreement with its conclusions. The Panel accordingly finds that the Veseli Defence has failed to establish that Veseli's Second Issue constitutes a discrete topic arising from the Impugned Decision.

64. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Veseli's Second Issue is therefore rejected.

C. SELIMI'S ISSUES

1. Selimi's First Issue

65. The Selimi Defence submits that the failure to notify a suspect of his fair trial rights constitutes a particularly significant defect in relation to the conduct of suspect interviews, yet the Panel did not explain why the relevant parts of Mr Selimi's interview were admitted, when these rights were not properly notified to him, in violation of Rule 43(4).¹⁰⁴ The Selimi Defence contends that Selimi's First Issue calls into question whether the evidence admitted by the Panel was obtained in violation of the rights accorded to suspects in the context of criminal investigations, so that the resolution of this issue is vital to ensuring the fairness and expeditiousness of proceedings.¹⁰⁵ The Selimi Defence further argues that the resolution of Selimi's First Issue would materially advance the current proceedings by enabling 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 on which they ought to bring further evidence.¹⁰⁶

66. The SPO responds that Selimi's First Issue misrepresents the Impugned Decision as the Panel: (i) did explain why it admitted Mr Selimi's interview transcript that

¹⁰⁴ Selimi Request, paras 3-5, *referring to, inter alia*, Impugned Decision, para. 45. *See also* Selimi Request, para. 21.

¹⁰⁵ Selimi Request, paras 22, 25.

¹⁰⁶ Selimi Request, para. 26. *See also* Selimi Request, paras 27-28.

preceded the notification that he could revoke his waiver of counsel; and (ii) did not find that there was a violation of Rule 43(4).¹⁰⁷

67. In the Impugned Decision, the Panel noted that, before his November 2019 SPO interview, Mr Selimi was informed that: (i) the interview was being recorded; (ii) he had the right to remain silent; (iii) he had the right to be assisted by a lawyer; (iv) any statement made could be used as evidence against him before the SC; and (v) he had the right to an interpreter free of charge.¹⁰⁸ The Panel also found that: (i) Mr Selimi was provided with a written record of his rights and obligations, including the indication that he may revoke his attorney waiver and request the assistance of an attorney at any time; and (ii) the delayed notification to Mr Selimi of the right to revoke his waiver of counsel did not affect his understanding of his right to revoke his right to silence as there is no textual requirement in the Rules to be explicitly informed of the possibility to revoke one's right to remain silent.¹⁰⁹ The Panel concluded that Mr Selimi was fully informed of his rights as a suspect, and his relinquishment of the right to access a lawyer was provided voluntarily and in an unequivocal, knowing and intelligent manner.¹¹⁰ Contrary to the Selimi Defence's submissions,¹¹¹ the Panel did not fail to explain why the relevant parts of Mr Selimi's November 2019 SPO interview were admitted. The Panel is of the view that Selimi's First Issue constitutes a mere disagreement with the Panel's above-mentioned findings. The Panel accordingly finds that the Selimi Defence has failed to establish that Selimi's First Issue constitutes a discrete topic arising from the Impugned Decision.

¹⁰⁷ SPO Response, para. 6.

¹⁰⁸ Impugned Decision, para. 45.

¹⁰⁹ Impugned Decision, para. 45.

¹¹⁰ Impugned Decision, para. 47.

¹¹¹ Selimi Request, para. 4.

68. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Selimi's First Issue is therefore rejected.

2. Selimi's Second Issue

69. The Selimi Defence challenges the Panel's 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" in light of the fact that Mr Selimi was consistently referred to as a 'witness' during such interview.¹¹² The Selimi Defence contends that Selimi's Second Issue calls into question whether the evidence admitted by the Panel was obtained in violation of the rights accorded to suspects in the context of criminal investigations, so that the resolution of this issue is vital to ensuring the fairness and expeditiousness of proceedings.¹¹³ The Selimi Defence further argues that the resolution of Selimi's Second Issue would materially advance the current proceedings, by enabling 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 on which they ought to bring further evidence.¹¹⁴

70. The SPO responds that Selimi's Second Issue does not merit leave to appeal because it constitutes a mere disagreement with the Panel's conclusion that Mr Selimi was aware of his status as a suspect.¹¹⁵

71. In the Impugned Decision, the Panel found that: (i) before his November 2019 SPO interview, Mr Selimi was clearly informed that he was suspected of having been involved in the commission of a crime; and (ii) Mr Selimi therefore had knowledge of his status as a suspect at the time of his November 2019 interview

¹¹² Selimi Request, paras 6-8, referring to, *inter alia*, Impugned Decision, para. 43. See also Selimi Request, para. 21.

¹¹³ Selimi Request, paras 22, 25.

¹¹⁴ Selimi Request, para. 26. See also Selimi Request, paras 27-28.

¹¹⁵ SPO Response, para. 7.

and of the rights associated with that status.¹¹⁶ The Panel also noted that Mr Selimi was fully informed of his rights as a suspect,¹¹⁷ and confirmed that he understood this rights.¹¹⁸ The Panel accordingly found no indication that Mr Selimi was ever confused as to his suspect status.¹¹⁹ The Panel is therefore of the view that Selimi's Second Issue merely reiterates arguments previously made before the Panel,¹²⁰ and constitutes a mere disagreement with the Panel's above-mentioned findings. The Panel accordingly finds that the Selimi Defence has failed to establish that Selimi's Second Issue constitutes a discrete topic arising from the Impugned Decision.

72. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Selimi's Second Issue is therefore rejected.

3. Selimi's Third Issue

73. The Selimi Defence submits that the Panel's reasoning in the Impugned Decision appears to equate and conflate two materially distinct questions, namely: (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.¹²¹ The Selimi Defence contends that Selimi's Third Issue directly impacts the fairness and expeditiousness of the proceedings and the outcome of the trial as it calls into question whether: (i) the evidence admitted by the Panel was obtained in violation of the rights accorded to suspects in the context of criminal investigations; and (ii) its probative value is outweighed by its prejudicial effect.¹²² The Selimi

¹¹⁶ Impugned Decision, para. 43.

¹¹⁷ See above para. 67.

¹¹⁸ Impugned Decision, para. 46.

¹¹⁹ Impugned Decision, para. 46.

¹²⁰ See e.g. F01473, Specialist Counsel, *Selimi Defence Response to SPO Motion for Admission of Accused's Statements*, 24 April 2023, paras 2, 14-15, 17-20, 22, 26, 30, 37.

¹²¹ Selimi Request, paras 9-11, referring to Impugned Decision, paras 129, 141. See also Selimi Request, para. 21.

¹²² Selimi Request, paras 22-23, 25.

Defence further argues that the resolution of Selimi's Third Issue would materially advance the current proceedings by enabling 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 on which they ought to bring further evidence.¹²³

74. The SPO responds that Selimi's Third Issue does not arise from the Impugned Decision as the Panel clearly analysed whether admission of Mr Selimi's statements was consistent with Mr Selimi's rights.¹²⁴

75. The Selimi Defence replies that the SPO's mere repetition of the Panel's finding fails to substantiate its bare assertion that the issue flagged by the Selimi Defence does not arise from the Impugned Decision.¹²⁵

76. The Panel recalls that it granted leave to appeal Krasniqi's First and Third Issues on whether: (i) the admission of evidence given in the absence of express self-incrimination warnings violated the Accused's privilege against self-incrimination;¹²⁶ and (ii) the Accused was entitled to the guarantees of a suspect at the time he gave evidence before the ICTY.¹²⁷ The Panel is of the view that, contrary to the SPO's submissions,¹²⁸ the same considerations underlying the decision to grant leave to appeal Krasniqi's First and Third Issues apply to Selimi's Third Issue on whether the 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. The Panel accordingly finds that: (i) Selimi's Third Issue arises from the Impugned Decision;¹²⁹ (ii) it would impact the fair and expeditious conduct of the proceedings;¹³⁰ and (iii) its immediate resolution by the Court of Appeals Panel will materially advance the proceedings.¹³¹

¹²³ Selimi Request, para. 26. *See also* Selimi Request, paras 27-28.

¹²⁴ SPO Response, para. 8.

¹²⁵ Selimi Reply, para. 2. *See also* Selimi Reply, para. 3.

¹²⁶ *See above* paras 19-22.

¹²⁷ *See above* paras 29-32.

¹²⁸ SPO Response, paras 8, 12-13.

¹²⁹ *See above* paras 19, 29.

¹³⁰ *See above* paras 20, 30.

¹³¹ *See above* paras 21, 31.

77. In light of the above, the Panel grants leave to appeal Selimi's Third Issue.

4. Selimi's Fourth Issue

78. The Selimi Defence submits that the Panel's finding that Rule 90(E) of the ICTY Rules has no extra-jurisdictional application is independent of whether the admission of evidence falling within the purview of that Rule in an extra-jurisdictional context is unjustifiably prejudicial.¹³² The Selimi Defence contends that Selimi's Fourth Issue directly impacts the fairness and expeditiousness of the proceedings and the outcome of the trial as it calls into question whether the probative value of the evidence admitted by the Panel is outweighed by its prejudicial effect.¹³³ The Selimi Defence further argues that the resolution of Selimi's Fourth Issue would materially advance the current proceedings by enabling 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 on which they ought to bring further evidence.¹³⁴

79. The SPO responds that Selimi's Fourth Issue does not merit certification to appeal as the Selimi Defence merely disagrees with the Panel's assessment that the probative value of Mr Selimi's ICTY Evidence outweighs any prejudicial effect.¹³⁵

80. The Selimi Defence replies that the SPO merely recites the Panel's factual findings, yet conspicuously fails to address the Selimi Defence's specific submissions in relation to each of these findings.¹³⁶

81. The Panel recalls that, in the Impugned Decision, it found that the full array of warnings for a suspect was not a legal pre-requisite for the admission of a statement given to previous investigative or judicial authorities by a witness who

¹³² Selimi Request, paras 12-14, *referring to, inter alia*, Impugned Decision, para. 159. *See also* Selimi Request, para. 21.

¹³³ Selimi Request, paras 23, 25.

¹³⁴ Selimi Request, para. 26. *See also* Selimi Request, paras 27-28.

¹³⁵ SPO Response, para. 9.

¹³⁶ Selimi Reply, para. 4.

was not considered a suspect at the time and through the course of his interview or testimony.¹³⁷ The Panel further found that Mr Selimi's ICTY Evidence, given in his capacity of witness: (i) was voluntary, free of coercion and improper compulsion and, hence, taken in a manner consistent with the standards of international human rights law; and (ii) has probative value which is not outweighed by its prejudicial effect.¹³⁸ Having found Mr Selimi's ICTY Evidence to be also relevant and authentic, the Panel admitted it into evidence.¹³⁹ Contrary to the Selimi Defence's submission,¹⁴⁰ the Panel did not fail to consider the claimed prejudice arising from the admission of Mr Selimi's ICTY Evidence, during which he was not expressly informed about his privilege against self-incrimination. The Panel is of the view that Selimi's Fourth Issue misrepresents the Panel's findings and constitutes a mere disagreement with them. The Panel accordingly finds that the Selimi Defence has failed to establish that Selimi's Fourth Issue constitutes a discrete topic arising from the Impugned Decision.

82. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Selimi's Fourth Issue is therefore rejected.

5. Selimi's Fifth Issue

83. The Selimi Defence submits that the Panel erred in disregarding the KCPC on the issue of the admission of statements provided by a defendant against the co-Accused.¹⁴¹ The Selimi Defence contends that Selimi's Fifth Issue concerns the Panel's reluctance to consider relevant legal authorities as an interpretative aid and its

¹³⁷ See above para. 19.

¹³⁸ Impugned Decision, paras 156, 161.

¹³⁹ Impugned Decision, paras 155-158, 161, 163, 221(b).

¹⁴⁰ Selimi Request, paras 13-14.

¹⁴¹ Selimi Request, paras 15-18, referring to, *inter alia*, Impugned Decision, paras 215-216. See also Selimi Request, para. 21.

concomitant reliance on legal authorities that are more detrimental to the Accused, thereby impacting the fairness and expeditiousness of the proceedings.¹⁴² The Selimi Defence further argues that the resolution of Selimi's Fifth Issue would materially advance the current proceedings by enabling 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 on which they ought to bring further evidence.¹⁴³

84. The SPO responds that Selimi's Fifth Issue misrepresents the Impugned Decision as the Panel did not disregard the KCPC.¹⁴⁴

85. The Selimi Defence replies that the SPO misrepresents the issue as submitted by the Defence and fails to offer any argument in support of its attempt to discard the applicability of the *lex mitior* principle.¹⁴⁵

86. The Panel recalls that, in the Impugned Decision, it considered that the provisions 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.¹⁴⁶ The Panel also recalls that it therefore found that the question of admission of such statements is subject to the general rules and principles regarding admission of evidence before the SC, first of all Rule 138(1).¹⁴⁷ However, the Panel also found that the core concern reflected in the KCPC – that the accused's guilt should not be based solely, or to a decisive extent, upon such statements – forms an integral part of the evidential regime applicable before this court.¹⁴⁸ Therefore, contrary to the Selimi Defence's submissions,¹⁴⁹ the Panel did not disregard the KCPC when interpreting the SC's legal framework but found

¹⁴² Selimi Request, paras 24-25.

¹⁴³ Selimi Request, para. 26. *See also* Selimi Request, paras 27-28.

¹⁴⁴ SPO Response, para. 10.

¹⁴⁵ Selimi Reply, para. 5.

¹⁴⁶ *See above* para. 58.

¹⁴⁷ *See above* para. 58.

¹⁴⁸ Impugned Decision, para. 215.

¹⁴⁹ Selimi Request, para. 18.

that the core principles relevant to this matter were already reflected therein. The Panel is of the view that Selimi's Fifth Issue misrepresents the Panel's findings on the legal regime applicable to the admission of the Accused's statements and constitutes a mere disagreement with them. The Panel accordingly finds that Selimi Defence has failed to establish that Selimi's Fifth Issue constitutes a discrete topic arising from the Impugned Decision.

87. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Selimi's Fifth Issue is therefore rejected.

6. Selimi's Sixth Issue

88. The Selimi Defence submits that 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).¹⁵⁰ The Selimi Defence contends that Selimi's Sixth Issue directly impacts the fairness and expeditiousness of the proceedings and the outcome of the trial as it calls into question whether the probative value of the evidence admitted by the Panel is outweighed by its prejudicial effect.¹⁵¹ The Selimi Defence further argues that the resolution of Selimi's Sixth Issue would materially advance the current proceedings by enabling 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 on which they ought to bring further evidence.¹⁵²

89. The SPO responds that Selimi's Sixth Issue does not merit certification to appeal as the Panel did not treat Mr Selimi's ability to challenge the evidence as a substitute

¹⁵⁰ Selimi Request, paras 19-20, *referring to* Impugned Decision, paras 88, 141, 144, 161. *See also* Selimi Request, para. 21.

¹⁵¹ Selimi Request, paras 23, 25.

¹⁵² Selimi Request, para. 26. *See also* Selimi Request, paras 27-28.

for assessing prejudice, but as a factor the Panel considered, among others, when finding that the probative value of the evidence was not outweighed by prejudice.¹⁵³

90. The Selimi Defence replies that the SPO's arguments belie an incomplete reading of the issue as proposed by the Defence and/or a reading of absent passages into the Decision.¹⁵⁴

91. In the Impugned Decision, the Panel found, *inter alia*, that the probative value of the Accused's statements is not outweighed by their prejudicial effect.¹⁵⁵ The Panel based this finding upon three main considerations: (i) the Defence will have the opportunity to challenge any aspect of the Accused's statements if the SPO puts them to one or more witnesses during trial; (ii) the Defence may call witnesses at trial to challenge any aspect of the Accused's statements; and (iii) the Panel will assess the Accused's statements in light of the entire body of evidence admitted at trial.¹⁵⁶ Having found the Accused's statements to also be relevant, authentic and probative, the Panel admitted them into evidence.¹⁵⁷ Contrary to the Selimi Defence's submissions,¹⁵⁸ the Panel did not rely on these considerations as an alternative to assessing the requirements of admission of that evidence but as part of its assessment of the probative value and prejudicial effect of the admission of these statements in accordance with Rule 138(1). The Panel is of the view that Selimi's Sixth Issue misrepresents the Panel's findings and constitutes a mere disagreement with them. The Panel accordingly finds that the Selimi Defence has failed to establish that Selimi's Sixth Issue constitutes a discrete topic arising from the Impugned Decision.

¹⁵³ SPO Response, para. 11.

¹⁵⁴ Selimi Reply, para. 6.

¹⁵⁵ See *e.g.* Impugned Decision, paras 88, 141, 144, 161.

¹⁵⁶ See *e.g.* Impugned Decision, paras 88, 141, 144, 161.

¹⁵⁷ See *e.g.* Impugned Decision, paras 87-88, 90, 140-142, 143-145, 158, 161, 163, 221(b).

¹⁵⁸ Selimi Request, para. 19.

92. In light of the above, the remaining requirements of the certification test arising from Article 45(2) and Rule 77(2) need not be addressed. The request for leave to appeal Selimi's Sixth Issue is therefore rejected.

V. CLASSIFICATION

93. The Panel notes that the Veseli Reply has been filed confidentially. The Panel orders the Veseli Defence to submit a public redacted version or request the reclassification of the Veseli Reply by Friday, 12 January 2023.

VI. DISPOSITION

94. For the above-mentioned reasons, the Panel hereby:

- a) **GRANTS** leave to appeal: (i) Krasniqi's First, Third and Ninth Issues; and (ii) Selimi's Third Issue; and
- b) **REJECTS** leave to appeal: (i) Krasniqi's Second, Fourth, Fifth, Sixth, Seventh, and Eighth Issues; (ii) Veseli's Issues; and (iii) Selimi's First, Second, Fourth, Fifth, and Sixth Issues; and
- c) **ORDERS** the Veseli Defence to submit a public redacted version or request the reclassification of the Veseli Reply by Friday, 12 January 2023.



Judge Charles L. Smith, III
Presiding Judge

Dated this Tuesday, 19 December 2023

At The Hague, the Netherlands.