

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

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**Selimi Defence Reply to “Prosecution Response to Preliminary
Motions Concerning the Status of the Kosovo Specialist
Chambers and Allegations of Rights Violations”**

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I. INTRODUCTION

1. The Defence of Mr Selimi (“Defence”) hereby replies¹ to the SPO Response² to the Selimi Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction - Discrimination (“Motion”),³ in which the Defence respectfully requested the Pre-Trial Judge to: (i) to grant the Motion and confirm that the Kosovo Specialist Chambers “KSC” does not have jurisdiction over the crimes as charged in the Indictment, as the KSC applies an unlawful and discriminatory employment policy towards Kosovo Albanians; (ii) dismiss the Indictment against Mr. Rexhep Selimi; and, (iii) schedule an oral hearing on this Application and grant the Defence the opportunity to be heard on these issues.
2. While this reply is limited to addressing the issues raised in the SPO Response, the Defence maintains its original submissions in full. Further, the absence of a specific submission in reply to any aspect of the Response is not indicative of a concession as to the validity of the SPO submission.

II. SUBMISSIONS IN REPLY

a) Discrimination impacts the KSC’s exercise of jurisdiction over the Accused

3. Ground B of the Motion argued that the discriminatory employment practice applied by the KSC, in which Kosovo Albanians are excluded from employment by this Court not only undermines the legitimacy of this purported domestic judicial institution, but it exceeds the authority given to it by the Constitution of the Republic of Kosovo and the Law governing its functioning, thus calling into question the very legality of the KSC as a judicial institution and its jurisdiction.⁴ In its Response, the SPO made cursory and unsubstantiated arguments pointing at the alleged lack of clarity of the legal basis upon which the Selimi Defence’s application was made, and the persons whose rights are purportedly at issue, questioning the relevance of the

¹ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (‘Rules’), Rule 170(1). All references to ‘Rule’ or ‘Rules’ herein refer to the Rules, unless otherwise specified.

² KSC-BC-2020-06/F00260, Prosecution response to preliminary motions concerning the status of the Kosovo Specialist Chambers and allegations of rights violations, 23 April 2021 (‘Response’).

³ KSC-BC-2020-06/F00219, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction – Discrimination, 15 March 2021.

⁴ Ibid, paras 5- 16.

argument to the jurisdiction of the KSC.⁵ As explained below, this Motion relates to the Mr. Selimi's fundamental right to a fair trial.

4. Under Article 6(1) of the European Convention on Human Rights:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

5. The 'Discrimination Argument' made on behalf of Mr Selimi goes directly to the issue as to whether the KSC itself, by reason of the manner in which it has been set up, and by reason of the manner in which it operates and functions, is a "independent and impartial tribunal established by law." This goes to the fundamental issue as to whether the KSC itself, in its present form, is capable of providing the Accused with their right to a fair trial, namely whether the KSC is incapable of compliance with the pre-requisite requirements of 'impartiality' and 'independence'.
6. As the SPO is fully aware, the KSC was not designed as an international criminal tribunal or an extraordinary court for that matter. The KSC is, technically and for all intended purposes purports to be a domestic court of Kosovo, bound by the Kosovo Constitution. The *sui generis* nature and the peculiar set-up of this Court does not obscure the fact that the foundational source of law upon which this institution was established and now functions, is under the Constitution. Under the Kosovo legal order, the provisions of the Constitution are superior to any other source of law, including international law.⁶ In line with the principles enshrined in the Constitution, the purported domestic nature of the KSC would mean that those who stand accused should have the right to be treated in full compliance with the principles of fairness and justice, as applied in a domestic court of Kosovo.
7. The manner in which the KSC is structured and the way the employment practice is devised, whereby Kosovo Albanians are excluded from employment, renders this justice mechanism

⁵ Response, para 23.

⁶ Article 19(2) of the Constitution of the Republic of Kosovo states, "Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo."

into a de facto extraordinary court, as opposed to a specialised domestic one, thus violating Article 103(7)⁷ of the Constitution. In its judgment the Constitutional Court of the Republic of Kosovo considered that a specialized court, as foreseen by the Constitutional provision, “means a court with a specifically defined scope of jurisdiction, and which remains within the existing framework of the judicial system of the Republic of Kosovo and operates in compliance with its principles. Unlike a specialized court, an “extraordinary court” would be placed outside the structure of the existing court system and would operate without reference to the existing systems.”⁸ In this respect, the KSC has exceeded the authority given to it by the Constitution of the Republic of Kosovo and the Law governing its functioning, and has failed to uphold the principles of fairness enshrined in the Constitution and in international human rights instruments, which guarantee an individual the right to have a criminal charge against him determined by a court established by law.⁹

8. The phrase “established by law” comprises two fundamental notions. First, it governs the “legal basis for the very existence of a Tribunal.”¹⁰ That is the establishment must be in accordance with the principles enshrined in the Constitution and the Rule of Law.¹¹ Second, the Court “must provide all the guarantees of fairness, justice and even-handedness, in full conformity with the internationally recognised human rights instruments.”¹² The KSC’s failure to operate within the parameters of legality set by the Constitution, and its failure to uphold fundamental principles of fairness and impartiality enshrined in the Constitution further challenges the jurisdiction of the KSC as a purported specialised domestic court.
9. The employment regime, which has its basis on the Exchange of Letters,¹³ specifies explicitly that, “employment at Kosovo Specialist Chambers and Specialist Prosecutor's Office is ONLY open to nationals of the EU Member States and contributing third States (Canada, Norway,

⁷ Article 103(7) of the Constitution of the Republic of Kosovo states, “Specialized courts may be established by law when necessary, but no extraordinary court may ever be created.”

⁸ Constitutional Court of the Republic of Kosovo, Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318, Judgment in Case No. KO26/15, (‘KCC Judgment’), paras 42-53.

⁹ See Article 14, ICCPR; Article 6, ECHR; Article 8, ACHR.

¹⁰ *Posokhov v. Russia*, ECtHR, Judgment, Application no. 63486/00, 4 March 2003, para. 39; *Coëme and Others v. Belgium*, ECtHR, Judgment, Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000 (‘Coëme’), para. 107.

¹¹ *Prosecutor v. Tadić*, ICTY, IT-94-1-AR72 ‘Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction’, 2 October 1995, para. 45.

¹² Ibid.

¹³ The Exchange of Letters can be found at https://www.scp-ks.org/sites/default/files/public/04-l-274_a.pdf.

Switzerland, Turkey and the United States of America).”¹⁴ It also states that, “[the policy is] respecting the principle of non-discrimination and striving for gender balance.”¹⁵ The contradiction between these two assertions could not be more glaring. The KSC cannot be said to genuinely uphold and espouse the principles of non-discrimination while, at the very same time, it openly practices a discriminatory employment policy against Kosovo Albanians.

10. Furthermore, the choice of location and personnel of the KSC was justified as necessary to ensure the Court’s impartiality and guard against intimidation.¹⁶ This warped notion of “impartiality” implies that Albanians and Kosovo-Albanians cannot, in and of themselves, be considered impartial due to their ethnicity. This is unquestionably discriminatory and prejudicial to the foundational principles of a fair and just justice system. Contrary to the SPO’s claims that the ‘Discrimination’ submission has no relevance to the jurisdiction of the Court, it has an obvious relevance because a court which operates on an inherently discriminatory basis violates the fundamental right of an accused to be adjudicated upon in a court established by law which complies with rules and principles of fairness applicable to a domestic court established under the Constitution of the Republic of Kosovo.
11. Indeed, the SPO deliberately misconstrues the Motion to challenge its standing by making the peculiarly ironic argument, that “clearly, in the circumstances, SELIMI would not be eligible for employment at the KSC. It must therefore be the rights of others which are at issue.”¹⁷ As the SPO is well aware, the Selimi Defence is not raising an issue of general principle on behalf of Kosovo Albanians, but a challenge to the legality of the KSC based on the impact of the court’s discriminatory policy on Mr. Selimi’s right to a fair trial. It is indeed the right of Mr Selimi to make the argument because it is his right as an accused before the KSC which has been violated here.
12. Further, the SPO incorrectly concludes that, “all relevant matters were before the Kosovo Constitutional Court (“KCC”) at the time of its judgment¹⁸ and there can be no basis for

¹⁴ See KSC&SPO Employment Regime, can be found at <https://www.scp-ks.org/en/employment/staffing>.

¹⁵ Ibid.

¹⁶ See BIRN Report at:

<https://balkaninsight.com/wp-content/uploads/2019/01/step-towards-justice-or-potential-timebomb.pdf> p.4.

BIRN Kosovo is an independent, non-governmental organisation, whose goals are providing information to the citizens and contributing to the democratic transition process in the country, promoting accountability, rule of law and policy reform.

¹⁷ Response, fn. 83, p. 14.

¹⁸ Constitutional Court of the Republic of Kosovo, Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the

reconsideration or review of that decision.”¹⁹ Yet when analysing the KCC judgment, the Court clearly held that, “...a specialized court...remains within the existing framework of the judicial system of the Republic of Kosovo and operates in compliance with its principles.”²⁰ In addition, the Court held “...the structure, scope of jurisdiction and method of functioning of such a court need to be in compliance with the rights provided [by the Constitution] and its letter and spirit as established in the Court’s case law related to the overall framework of the judicial system of the Republic of Kosovo.”²¹ Therefore, it cannot be the case that the KSC, as a court staffed entirely by foreign personnel, is operating in accordance with the principles of the existing framework of the judicial system of the Republic of Kosovo.

b) Discrimination violates the European Convention of Human Rights (ECHR), impacting the way the KSC’s exercise of jurisdiction over the Accused

13. The SPO dismissively maintains that the Selimi Defence fails to indicate precisely which rights under the ECHR the alleged discrimination relates to, and how any such discrimination impacts the KSC’s exercise of jurisdiction over the Accused.²² The SPO argument rests on the assumption that the Defence has failed to identify how the particular discrimination alleged is connected to any of the rights and freedoms protected by the ECHR, since there is no right to employment guaranteed by the ECHR.²³ In light of the principles enshrined in Article 14 of the ECHR, the employment policy applied at the KSC has disproportionate prejudicial effects on Kosovo Albanians and thus directly impacts upon Mr. Selimi’s right to a fair trial before the KSC.
14. Article 14 of the European Convention on Human Rights, which was drafted to set out the different forms of discrimination people have a right to be protected against, states as follows:

Article 14 of the Convention – Prohibition of discrimination

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318, Judgment in Case No. KO26/15, (“KCC Judgment”), paras 42-53.

¹⁹ Response, para. 8.

²⁰ KCC Judgment, para 43. Emphasis added.

²¹ Ibid, para. 44. Emphasis added.

²² Response, para. 23.

²³ Ibid, fn. 83, p. 14

15. Mr. Selimi has an inherent right as an accused to be tried in a court of law which upholds the principles of fairness and impartiality, and to be tried by a judicial institution which respects his rights both to a fair trial, and to be treated in a non-discriminatory way. The ‘Discrimination Argument’ goes directly to the issue as to Mr Selimi’s right to a fair trial under Article 6 of the ECHR, and to his right not to be discriminated against under Article 14 of the ECHR. The right to a fair trial in Article 6(1) requires that a case be heard by an “independent and impartial tribunal” established by law. There is a close link between the concepts of independence and objective impartiality. For this reason, the Court commonly considers the two requirements together.²⁴ The principles applicable when determining whether a tribunal can be considered “independent and impartial” apply equally to professional judges, lay judges and jurors.²⁵ There are certain general principles as well as criteria for assessing both independence and impartiality that come at play.
17. In relation to the requirement of “independence”, the ECHR Guide on Article 6 of the Convention²⁶ opines that compliance with the requirement of independence is assessed, in particular, on the basis of statutory criteria.²⁷ In determining whether a body can be considered to be “independent” the Court has had regard to the following criteria:²⁸
- i. the manner of appointment of its members and
 - ii. the duration of their term of office;
 - iii. the existence of guarantees against outside pressures;
 - iv. whether the body presents an appearance of independence
18. When opining on the ‘Appearance of Independence’ the authors of the Council of Europe’s Guide on Article 6 ECHR stated as follows²⁹: “In order to determine whether a tribunal can be considered to be “independent” as required by Article 6 § 1, appearances may also be of importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (*Şahiner v. Turkey*, § 44).”

²⁴ Guide on Article 6 of the ECHR, updated to 31 December 2020.

²⁵ *Holm v. Sweden*, ECtHR, Judgment, Application no. 14191/88, 25 November 1993, para. 30.

²⁶ Guide on Article 6 of the ECHR, updated to 31 December 2020.

²⁷ *Mustafa Tunç and Fecire Tunç v. Turkey*, ECtHR, Grand Chamber, Judgment, Application no. 24014/05, 25 June 2013, para. 221.

²⁸ *Findlay v. the United Kingdom*, ECtHR, Judgment, Application no. 22107/93, 25 February 1997, para. 73.

²⁹ See Guide on Article 6 of the ECHR, updated to 31 December 2020, para. 98.

19. With regards to impartiality, the Court has distinguished between: *a subjective approach*, that is, endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and *an objective approach*, that is, determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect.³⁰
20. In addition to this, the European Court of Human Rights (ECtHR) has found in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. In *Hugh Jordan v. the United Kingdom*,³¹ the ECtHR stated: “Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group”. Such a situation may amount to “indirect discrimination”, which does not necessarily require a discriminatory intent.
21. Further, in *D.H. and Others v. the Czech Republic*,³² the ECtHR stated: “The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group (*see Hugh Jordan, cited above, § 154, and Hoogendijk, cited above*)”.
22. This is only the case, however, if such policy or measure has no “objective and reasonable” justification.³³ There is no justification whatsoever regarding the employment regime that the KSC has implemented. Other than the mere acknowledgment of the personnel being ‘international’ on the KSC website, the Exchange Letters,³⁴ and some brief information on fact

³⁰ *Kyprianou v. Cyprus*, ECtHR, Grand Chamber, Judgment, Application no. 73797/01, 15 December 2005, para. 118; *Piersack v. Belgium*, ECtHR, Judgment, Application no. 8692/79, 1 October 1986, para. 30; *Grievs v. the United Kingdom*, ECtHR, Grand Chamber, Judgment, Application no. 57067/00, 16 December 2003, para. 69; *Morice v. France*, ECtHR, Grand Chamber, Judgment, Application no. 29369/10, 23 April 2015, para. 73.

³¹ *Hugh Jordan v. the United Kingdom*, ECtHR, Judgment, Application no. 24746/94, 4 May 2001, para. 154.

³² *D.H. and Others v The Czech Republic*, ECtHR, Judgment, Application no. 57325/00, 13 November 2007, para. 184.

³³ *Ibid*, para. 196.

³⁴ See The Exchange of letters, no. (Error! Bookmark not defined.).

sheets,³⁵ there appears to be no formal official record or public statement justifying this unworthy and abhorrent practice.

23. The ECtHR has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.³⁶

24. Furthermore, there are several other relevant ECtHR cases. In *Lavents v. Latvia*, the court explicitly states:

"Indeed, an organ that has not been established in accordance with the will of the legislator would necessarily lack the legitimacy required in a democratic society to hear the cause of individuals. The expression "established by law" concerns not only the legal basis for the very existence of the tribunal, but also the composition of the seat in each case. The "law" referred to in this provision is therefore not only the legislation relating to the establishment and competence of judicial bodies, but also any other provision of domestic law the failure to comply with which renders the participation of one or more judges examining the case irregular. This concerns in particular the provisions relating to the mandates, incompatibilities and disqualification of magistrates."³⁷

25. In *Fatulle v. Azerbaijan*³⁸, the court reiterates that the object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament". The phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the composition of the bench in each case.

26. Even in cases when there were EULEX panels trying crimes in Kosovo, the composition of the bench in each case was comprised of both international and national judges. Article 3, para 7 of the Law no. 03/L-053 on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, explicitly states: "Panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of *a majority of EULEX judges (emphasis added)*, and presided by one EULEX judge. However, the President of the Assembly of EULEX Judges will have the authority, in derogation to this rule and for grounded reasons, to decide that a panel is composed with a majority or a total composition of Kosovo judges, or

³⁵ SPO at a Glance, page 2, as found at https://www.scp-ks.org/sites/default/files/public/content/ksc_spo_en_online.pdf.

³⁶ *D.H. and Others v The Czech Republic*, ECtHR, Application no. 57325/00, 13 November 2007, para. 176.

³⁷ *Lavents v. Latvia*, ECtHR, Judgment, Application no. 58442/00, 28 November 2002, para. 11.

³⁸ *Fatullayev v. Azerbaijan*, ECtHR, Judgment, Application no. 40984/07, 4 October 2010, para. 144.

can decide that particular stages of the proceeding are not assigned to EULEX judges."³⁹ Furthermore, this rule becomes even more particular under Law no. 05/L-103 on amending and supplementing the laws related to the mandate of the European Union Rule of Law Mission in the Republic of Kosovo. Article 3, par. 3 of the law states that *panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of local judges and presided by a local judge (emphasis added)*.⁴⁰ Paragraph 4 of the same article maintains: "In extraordinary circumstances upon reasoned request of the President of the Supreme Court, the Judicial Council may decide that the panel be composed of majority of EULEX judges" (ibid.).

27. The Case No. P 938/13 dated 27 May 2015 and tried by the Basic Court of Mitrovica, para. 15 appears to be an exception to the usual EULEX practice. In the Basic Court of Mitrovica, cases may be tried by panels composed exclusively of EULEX Judges. In an agreement⁴¹ between the Head of the EULEX Kosovo and the Kosovo Judicial Council (regarding aspects of the cooperation between EULEX and Kosovo Judges working in the local courts, section 5 (a) of the Agreement states that "EULEX Judges will ensure that the Basic Court of Mitrovica remains operational, until the multi-ethnic court system in the North is implemented and operational." The local issue in Mitrovica concerned a fragile and problematic practice based in the North of Kosovo where different systems were waiting to become properly implemented and operational, due to the internal freezing of relations between Kosovo Albanians and Kosovo Serbs. It would appear therefore that the Mitrovica Basic court practice (which responded to this discreet regional issue) was an exception to the general rule which fully embraced the importance of the combination of both Local and International Judges. Given that the KSC is said to be a court of Kosovo, completely immersed in Kosovo's national legal system, it is a striking feature that none of its 30 or so Judges are from Kosovo.
28. Consistent with the general practice in Kosovo, International Missions⁴² which came to Kosovo to try war crimes (amongst other crimes), considered it to be discriminatory to exclude the local

³⁹ Kosovo, Law no. 03/L-053 on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, 13 March 2008, Article 3, para. 7.

⁴⁰ Ibid, Article 3, para. 3.

⁴¹ Agreement between the Head of the EULEX Kosovo and the Kosovo Judicial Council on relevant aspects of the activity and cooperation of EULEX Judges with the Kosovo Judges working in the local courts, 18 June 2014.


⁴² Examples include Kosovo War and Ethnic Crimes Court (KWECC), United Nations Mission in Kosovo and European Union Rule of Law Mission in Kosovo. See more details here: https://reliefweb.int/sites/reliefweb.int/files/resources/BB23F2270DB9884F492573DF00282FD0-Full_Report.pdf.

Judges from being a part of the trial bench. The requirements for local judges to sit on panels were honoured. There is therefore absolutely no justification for a technically domestic court such as KSC to exclude and discriminate against all Kosovo Albanians.

29. In summary, the KSC's practice of discriminating against Kosovo Albanians violates both national Kosovo law as well as the law of the ECHR. The discriminatory policy violates Mr. Selimi's right to a fair trial under Article 6, both directly and indirectly. Mr. Selimi has the right to be tried by a panel which includes Judges from Kosovo. Given that the KSC Judges decide upon all aspects of the proceedings and ultimately will have to decide whether the prosecution have or have not proved their case, the omission or absence of Judges from Kosovo is a fundamental irregularity which compromises the fairness of the proceedings. Mr. Selimi has the right to be tried by a court which does not discriminate against people of his own ethnic origin. By excluding Judges from Kosovo, the KSC takes on the mantle of an institution wielding an open policy of discrimination.
30. The policy to exclude all Kosovo Albanians from the KSC in practice concretely means that no members of Mr Selimi's ethnic group are permitted to be a part of any of the court's component parts, precluded from working in the Registry, the Victim's unit, the SPO, or even the Defence Office. This invites the potential for prejudice, and possible bias, be it conscious or subconscious bias, by creating an environment emasculated from the people and legal culture of Kosovo. If the appearance of justice is anyway important, as we contend it is, then it is not being seen to be done at the KSC.
31. In light of the foregoing, the Defence therefore reiterates its request to the Pre-Trial Judge to:
 - a. GRANT this Motion and confirm that the KSC applies an unlawful and discriminatory policy towards Kosovo Albanians generally, and our client specifically;
 - b. DISMISS the Indictment against Mr. Rexhep Selimi; and,
 - c. SCHEDULE an oral hearing on this Application and grant the Defence the opportunity to be heard on these issues.

Word count: 4266

Respectfully submitted on 14 May 2021,

A handwritten signature in blue ink that reads "David A. Young". The signature is written in a cursive style with a large, stylized "D" and "Y".

DAVID YOUNG
Lead Counsel for Rexhep Selimi

A handwritten signature in blue ink that reads "Geoffrey Roberts". The signature is written in a cursive style with a large, stylized "G" and "R".

GEOFFREY ROBERTS
Co-counsel for Rexhep Selimi