In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Trial Panel II**
	Judge Charles L. Smith III, Presiding Judge Judge Christoph Barthe, Judge Guénaël Mettraux Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Rexhep Selimi
Date:	24 April 2023
Language:	English
Classification:	Confidential

Selimi Defence Response to SPO Motion for Admission of Accused's Statements

---

Acting Specialist Prosecutor

Alex Whiting

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. INTRODUCTION

1. Pursuant to Articles 21, 37 and 40 of the Law[1] and Rules 43, 44 and 138 of the Rules,[2] the Defence for Mr. Rexhep Selimi hereby opposes the Prosecution motion for admission of Accused's statements ("SPO Motion").[3]

2. The two SPO Interviews of Mr. Selimi ("Selimi SPO Transcripts")[4] provide ample reasons why they, along with the notification of rights and attorney waiver signed by Rexhep Selimi ("associated procedural documents") should not be admitted into evidence.[5] The interviews were conducted: (1) without properly informing Mr. Selimi as his status as a suspect under Rule 43; and, (2) in violation of Mr. Selimi's rights to counsel and to remain silent as well and to be informed of the consequences of giving such an interview to the SPO as well as his right to revoke the waiver of his rights.

3. As for the other statements, interviews or testimony given by Mr. Selimi as a witness in prior proceedings before the Kosovo Court, the SPRK or the ICTY, ("Selimi Witness Statements") and tendered associated exhibits[6] are similarly inadmissible in these proceedings as he was not a suspect or accused when he provided such interviews, and therefore did not receive the necessary warnings or notifications about his rights, at the time these interviews or statements were provided.

---

[1] Law No.05/L-053 on SC and SPO, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.
[3] KSC-BC-2020-06/F01351, Prosecution motion for admission of Accused's statements with public Annex 1, 8 March 2023. Collectively "Accused's Statements".
[4] 068933-TR-AT Parts 1-14, 12, 13 and 14 November 2019. 074459-TR-ET Parts 1-9, 18 and 19 February 2020.
[5] 068932-068932, 068932-068932-ET, 13 November 2019 and 074439-074439, 074439-074439-ET, 18 February 2020 ("associated procedural documents").
[6] IT-03-66 P1.7, IT-03-66 P24, IT-03-66 P248 ("ICTY witness testimony associated exhibits").

4. Finally, if any of the Accused's Statements are considered admissible by the Trial Panel, they may (1) only be admitted against the accused who provided the statement or gave the interview and not against his co-accused in this case; and (2) may not be admitted for evidence in relation to the acts and conduct of accused or as evidence of any critical element of the SPO case, unless corroborated accordingly.

II. SUBMISSIONS

A. Admission of Selimi SPO Transcripts

5. The Defence opposes the admission into evidence of the Selimi SPO Transcripts due to the SPO's failure to fully respect his rights as a suspect under the KSC legal framework.

6. Article 38(3) provides that if a person is questioned as the suspect by the SPO, he "shall not be compelled to incriminate himself or herself or to confess guilt" and also that:

> "he or she shall have the following rights of which he or she shall be informed prior to questioning, in a language he or she speaks and understands:
>
> a. The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Specialist Chambers;
>
> b. The right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he or she makes shall be recorded and may be used in evidence;

c. The right to be assisted by Specialist Counsel of his or her own choosing and to be questioned in the presence of Specialist Counsel, including the right to have legal assistance provided by the Specialist Chambers without payment by him or her where he or she does not have sufficient means to pay for it;

d. The right to have the free assistance of an interpreter if he or she cannot understand or speak the language used for questioning.

7. These rights, which reflect the same or similar procedures before other international courts, are supplemented by Rules 42, and in particular, Rule 42(2) which specifically sets out that the SPO "shall notify the person of his or her rights as set out in paragraph (1) in a language that he or she understands" and 43(2) which clarifies that in relation to a suspect interview, these rights shall be notified "prior to any questioning."

8. Moreover, Rules 43(3) and (4) further provide for the right to counsel during interviews and the circumstances in which that right can be waived and also when the waiver can be revoked. Finally, Rule 44 provides that suspect interviews should be video-recorded and transcribed, copied, sealed and transcribed if an indictment is filed against the suspect.[7]

9. Interviews of suspects must therefore follow specific and detailed procedures to ensure that their rights were adequately and thoroughly protected during this process.

10. The SPO seeks to admit the Selimi SPO Transcripts from two interviews which occurred on 12, 13 and 14 November 2019 ("November 2019 Interview") and 18 and 19 February 2020 ("February 2020 Interview"). In support of its application,

[7] Rule 44(1)(d)-(f).

the SPO asserts that it had fulfilled its obligations under the Rules as Mr. Selimi was informed that there was a criminal investigation and that there were grounds to believe that he had been involved in the commission of a crime within the jurisdiction of the KSC; told that he had the right to remain silent but that if he did make a statement, the questioning was being recorded in its entirety and could be used in evidence; and, informed that he had the right to the assistance of the interpreter free of charge and to be assisted by an attorney and to have the attorney present during this questioning.[8] Essentially the same assertions are made in relation to the February 2020 Interview,[9] except for the addition that during this interview, Mr. Selimi "received a written version of his rights and obligations in Albanian to review and sign."[10]

11. What the SPO does not explain however, is that Mr. Selimi was never explicitly informed during either the November 2019 Interview or the February 2020 Interview, that he was a suspect according to Rule 2. This conspicuous failure to alert him to this most basic fact, severely calls into the voluntariness of the waiver of his rights in the context of the interview.

1. Failure to notify Mr. Selimi that he was a suspect during the SPO interview

12. The SPO did not unequivocally notify Mr. Selimi that he was a suspect rather than a witness during the SPO Interviews.

13. Under Rule 2 of the Rules, a suspect is defined as a "person whom the Specialist Prosecutor has grounds to believe committed or participated in the commission of a crime within the jurisdiction of the Specialist Chambers". By contrast, the

[8] SPO Motion, paras 14-16.
[9] SPO Motion, paras 18-20.
[10] SPO Motion, para. 20.

term "witness" finds no definition in the Law or Rules despite its repeated use throughout the Law and Rules.

14. At the beginning of the November 2019 Interview, Mr. Selimi was referred to initially as a witness, with Prosecutor Harbach explaining that he "will ask everybody in the room, including the witness, to identify themselves for the record."[11] Subsequently, Mr. Selimi was informed as follows:

> "Q. […] The Specialist Prosecutor's Office is investigating allegations of serious international and transboundary crimes in Kosovo and parts of the Republic of Albania between 1998 and 2000. I will now read you your rights and obligations in English and our interpreter will translate them for you into Albanian.
>
> This is a criminal investigation and any statement you make may be used in proceedings before the Kosovo Specialist Chambers. As there are grounds to believe that you have been involved in the commission of a crime within the jurisdiction of the Kosovo Specialist Chambers, you have the following rights.
>
> You do not have to answer any questions and you have the right to remain silent. Such silence will not be considered in any assessment of guilt or innocence.
>
> This questioning is being recorded in its entirety and any statements you do make may be used in evidence and you may be called as a witness.
>
> If you do make a statement, we expect you to tell the truth during this interview. If you give a statement that is untruthful, you could be

[11] 068933-TR-ET Part 1, p. 1.

> prosecuted before the Kosovo Specialist Chambers pursuant to Article 15(2) of the law establishing the Kosovo Specialist Chambers.
>
> You have the right to be assisted by an attorney and to have the attorney present during this questioning.
>
> So I'll ask you now, Mr. Selimi, can you please acknowledge for the record that you understand this right and that you've chosen to waive it and that you do not have an attorney with you today?
>
> A. I do understand my rights and obligations. I didn't consider that I needed to have my lawyer with me here today.
>
> Q. You also have the right to the assistance of an interpreter free of charge if you cannot understand or speak the language of the person conducting this questioning. And indeed, as you know, we have an interpreter present today. Have you understood the rights and obligations that I've just read to you?
>
> A. Yes, I did. I did understand my rights and obligations.[12]

15. At no point in this exchange was Mr. Selimi therefore informed that he was a "suspect" within the meaning of Rule 2 and notified explicitly of this status. Nor was Mr. Selimi informed of this status throughout the entire November 2019 Interview.

16. The same applied to the February 2020 Interview, where Mr. Selimi's rights were read to him but he was not specifically informed that he was either a suspect or that he was suspected to have committed crimes under the jurisdiction of the Court.[13]

[12] 068933-TR-ET Part 1, pp. 2-3.
[13] 074459-TR-ET Part 1, pp. 2-3.

17. The Defence does note that Mr. Selimi was informed in both SPO interviews that the interview was conducted in the context of a criminal investigation, and also that he was informed that "there are grounds to believe that you have been involved in a commission of a crime within the jurisdiction of the Kosovo Specialist Chambers." However, at no stage does that SPO explicitly notify Mr. Selimi that he was essentially the subject of the criminal investigation and indeed had officially reached the status of a suspect within it.

18. Further, at no point throughout the SPO Selimi Transcripts was Mr. Selimi specifically informed of any allegations against him, whether based on his own direct physical conduct or his positions of authority over other individuals who allegedly were responsible for committing crimes. Indeed, the general nature of the questioning in both interviews appeared specifically to seek to obtain information from Mr. Selimi without specifying what he was actually suspected of having done himself. Given that the Indictment against Mr. Selimi was submitted to the Pre-Trial Judge merely two months after the second SPO interview,[14] this cannot be excused by the stage in the SPO's investigation at which the interview occurred.

19. Moreover, Mr. Selimi was confusingly specifically referred to as a witness by the SPO at the outset of both interviews in the context of the same warning where he was informed that "[a]ny statements you do make may be used in evidence and you may be called as a witness."[15]

20. However, it was not just at the outset of the SPO interview that this ambiguity was present. Throughout both SPO interviews, Mr. Selimi was referred to

[14] KSC-BC-2020-06/F00002, Submission of Indictment for Confirmation, 25 April 2020, strictly confidential and ex parte, with Annexes 1-3, strictly confidential and *ex parte*.
[15] 068933-TR-ET Part 1, p. 2 lines 23-25 and 074459-TR-ET Part 1, p. 2 lines 20-21.

repeatedly as a "witness" by the Prosecutors interviewing him rather than as a suspect.[16]

21. To further complicate matters, the term suspect under the Kosovo Criminal Procedure Code ("KCPC") refers to "a person whom the police or state prosecutor suspects committed a criminal offence, but against whom an investigation has not been initiated."[17] Given the evident overlap between the jurisdiction and legal framework of the KSC and that of normal Kosovo courts, the SPO was therefore under an enhanced duty to clarify the nature of Mr. Selimi's status before the KSC and the consequences of speaking to the SPO and waiving his rights.

22. Further, there is no indication from the transcripts of either of the Selimi SPO Transcripts that Mr. Selimi was provided with a complete copy of the Law or the Rules in Albanian which would have potentially assisted him in understanding the nature of his position even if the SPO did not specifically inform him of it. While Mr. Selimi received written versions of his rights and obligations in Albanian to review and sign in November 2019[18] and February 2020[19], these also didn't confirm his specific status as a suspect as they merely repeated the rights and obligations that had previously been read out by the SPO. No reference to Mr. Selimi being a "suspect" was included in either of these documents.

[16] Mr. Selimi is repeatedly referred to as a witness throughout the SPO Interviews. The following instances are illustrative: 068933-TR-ET Part 1, p.1 lines 16-18, p. 4 lines 13-14, p.6 lines 19-20, 068933-TR-ET Part 8, p. 13 lines 17-19, 068933-TR-ET Part 9, p. 11 lines 3-4, 068933-TR-ET Part 10, p. 16 lines 17-19, 068933-TR-ET Part 11 , p. 16, lines 2-23, 068933-TR-ET Part 11, p. 20 lines 13-14, 068933-TR-ET Part 12, p.1 lines 17-18, 068933-TR-ET Part 12, p.6 lines 5-6, 068933-TR-ET Part 12 p. 6, lines 5-6 and p.8 line 13, and p.14 line 25, 068933-TR-ET Part 14 p. 14 line 6 and p. 20 line 8. 074459-TR-ET Part 6, p.10 lines 13-16.
[17] Kosovo Criminal Procedure Code, Article 19 (1) 1.3.
[18] 068932-068932, 13 November 2019.
[19] 074439-074439, 18 February 2020

23. The confusion that derives from his status is accentuated by Mr. Selimi's previous involvement when interviewed by ICTY investigators. In that ICTY interview, Mr. Selimi was accompanied by a lawyer even though he was not interviewed as a suspect.[20] Indeed, despite being interviewed repeatedly by the ICTY, UNMIK, EULEX and domestic SPRK authorities, Mr. Selimi had never previously been interviewed as a suspect.

24. There can therefore be no implicit notification that Mr. Selimi was fully aware he was a suspect simply because he was accorded the right to a lawyer or informed of the right to remain silent. No explicit reference was made in the November 2019 Interview by the SPO either to Rule 43 or Rule 44.[21] Any assumption by the SPO that Mr. Selimi was fully informed of his status as a suspect under the KSC legal framework is not therefore borne out by reality.

25. The importance of Mr. Selimi's knowledge of his suspect status at the time of either interview cannot be overstated. As recognised by the Trial Chamber in *Sesay*, confusion as to the status of an individual being interviewed by the Prosecution may be relevant in determining the voluntariness of the interview that was conducted, especially when cooperation with the interviewer is implicitly suggested as a way to avoid prosecution.[22]

26. This is inherently logical. An individual interviewed as a witness, against whom no prosecution is sought by the interviewing party, may assess his situation very differently as opposed to unequivocally being a suspect. As set out below, the ambiguity of Mr. Selimi's situation directly contributed towards his purported waiver of fundamental rights during the interview.

---

[20] T000-2344-T000-2345, 2 April 2004.
[21] See 068933-TR-ET Part 1, pp. 2-3.
[22] SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15, T. Ch. I, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008, para. 46.

2. Mr. Selimi did not knowingly and intelligently waive his rights to legal assistance and silence during the SPO Interviews

27. The SPO's assertion that Mr. Selimi confirmed his understanding of his rights and agreed to answer questions; voluntarily and intelligently waived his right to silence and to have an attorney present during questioning and finally confirmed that he attended the interview and provided information voluntarily[23] is not demonstrated by the Selimi SPO Transcripts.

28. In this regard, Rule 43(3) provides, in pertinent part:

> "any investigative act requiring the presence of a suspect, in particular any questioning, […] shall not proceed without the presence of Specialist Counsel. A suspect may waive this right provided that the Specialist Prosecutor ensures that the suspect understands the nature of this right and the consequences of waiving it."

29. Rule 43(4) similarly provides that:

> "a suspect shall be informed that he or she may revoke the waiver at any point during his or her interview. Where a suspect revokes a waiver, the questioning shall cease and shall only resume in the presence of Specialist Counsel. Questioning or any other act carried out prior to the revocation of the waiver shall be valid and shall not be repeated.

30. In light of the ambiguity of Mr. Selimi's status during the SPO Interviews, these mandatory provisions were not respected by the SPO.

[23] SPO Motion, paras 14-16.

a. Mr. Selimi did not voluntarily and intelligently waive the right to counsel.

31. As confirmed by the ICTR, the right to counsel is "rooted in the concern that an individual, when detained by officials for interrogation is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation."[24] This principle applies equally to interviews by a prosecutorial authority in which the suspect is not detained but is obliged to respond to a summons for interview under Article 42(3) of the Law.

32. The ECtHR time and again has found in numerous cases that the right to counsel it "is a prime example of those rights which require the special protection of the 'knowing and intelligent waiver.'"[25] This standard was upheld at the ICTR in *Bagasora,* where the Trial Chamber stated that the waiver must be shown "convincingly and beyond reasonable doubt"[26] and must be "express and unequivocal".[27] It is further incumbent upon the Prosecution to correct any misperceptions that may have affected the voluntariness of the waiver in question and the burden weighs squarely on the SPO to demonstrate the proof of voluntariness and absence of oppressive conduct in waiving the right to counsel. [28]

[24] ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, T. Ch. I, Decision on the Prosecutor's Motion for the Admission of Certain Materials, 14 October 2004, para. 16 ("Bagasora Decision").
[25] ECtHR, *Dvorski v. Croatia*, App no 25703/11 [GC], 20 October 2015, para 101; *Ibrahim and Others v. the United Kingdom*, App nos 50541/08, 50571/08, 50573/08, 40351/09 [GC], 13 September 2016, para. 272.
[26] ICTR, Bagasora Decision, para. 17.
[27] *Id.*
[28] ICTY, *Prosecutor v. Delalic et al.*, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997, para. 42.

33. In *Krajisnik*, the ICTY Trial Chamber found that such a waiver implies that the accused is able to make a rational appreciation of the effects of proceeding without a lawyer.[29] The Chamber also held that in interpreting "unequivocal and voluntary waiver", the word "equivocal" ought to mean unclear in meaning or intention, ambiguous.[30] The word "voluntary" was interpreted as "…including requirements of being informed as well as knowing and intelligent."[31]

34. Within the requirement of being informed in order for the waiver to be deemed voluntary, Justice Benjamin Mutanga Itoe in his Separate Concurring and Partially Dissenting opinion in *Prosecutor v Sesay et al* before the SCSL held as follows:

> "It is clear that for the waiver to be deemed to have been voluntarily given, the Prosecution must show and prove that it fully and comprehensively explained not only the nature of the document but also the consequences that go with its signature by the suspect. It is not just enough to rattle through the textual reading of the waiver but to really make a comprehensive explanation of its contents and implications if signing of the waiver by the suspect has to be considered voluntary and informed."[32]

35. Moreover, as held in *Bagasora*, if there are indications that the suspect is confused, additional steps must be taken to ensure that the suspect understands the nature of his or her rights.[33] The waiver can have an explicit or implicit nature

[29] ICTY, *Prosecutor v. Krajišnik*, Reasons for Oral Decision Denying Mr. Krajišnik's Request to Proceed Unrepresented by Counsel, 18 August 2005, para. 17 ("Krajišnik Decision").
[30] *Ibid*, para. 6.
[31] *Ibid*, para. 5.
[32] SCSL, *Prosecutor v. Sesay*, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Decision on the Admissibility of Certain prior Statements of the Accused given to the Prosecution, 30 June 2008, para. 43.
[33] ICTR, Bagosora Decision, paras 19-20.

and, for the latter, the requirement is that the person waiving it could reasonably have foreseen the consequences of such conduct.[34]

36. During the November 2019 Interview, when asked by Prosecutor Harbach whether he could confirm that he had chosen to waive his right to counsel and that he did not have his attorney with him that day, Mr. Selimi responded:

> "I didn't consider that I needed to have my lawyer with me here today."[35]

37. The absence of direct notification of Mr. Selimi of his status as a suspect set out above, is directly relevant in this regard. As a witness, who is not facing potential criminal charges, it may indeed appear to be less important to be represented by Counsel. As a suspect, that calculation would likely have been very different. The language used by Mr. Selimi in the November 2019 Interview gives rise to a positive obligation on the SPO to ensure that there is no doubt as to his intention and understanding of his legal situation. None was forthcoming from the SPO. As such, Mr. Selimi cannot have reasonably been considered as having waived his rights unequivocally.

38. Even if the Trial Panel considers that the waiver was unequivocal, for both the 2019 and 2020 interviews, the SPO has failed to demonstrate that Mr. Selimi was properly informed of the consequences of waiving his rights as required by Rule 43(3). In both interviews, the Prosecutors failed to take any steps to explain to Mr. Selimi the consequences of his waiver. This requirement is further supported by ICTY jurisprudence:

> "in order to be able to determine whether a witness has voluntarily waived the right to remain silent if there is a risk of self-incrimination, it

[34] ECtHR, *Fariz Ahmadov v Azerbaijan*, App no 40321/07, 14 January 2021, para. 52.
[35] 068933-TR-ET Part 1, p. 3 lines 11-12.

> is not sufficient to establish that the witness gave evidence voluntarily, without duress. The witness would have to know of the existence of this right and the consequences deriving from waiving it ."[36]

39. There can be no presumption that Mr. Selimi had anticipated nor understood the consequences when he signed the waiver and indeed there is no evidence from either transcript that Mr. Selimi was otherwise aware of these consequences, especially in light of the ambiguity of his status as a witness or suspect set out above and the failure by the SPO to ensure additional safeguards in the absence of counsel to ensure to Mr. Selimi a full understanding.[37]

40. In *Bagosora,* the ICTR Trial Chamber found that in case the suspect, following the waiver, expresses a desire to have counsel, questioning shall thereupon cease, and can only resume when the suspect has obtained or has been assigned counsel.[38] However, a suspect cannot express such a desire if the right to revoke the waiver has not been made clear by the interrogators as was the case with Mr. Selimi.

41. Moreover, Rule 43(4) requires that the suspect is informed that he or she may revoke the waiver at any point during his interview. The moment the suspect revokes the waiver, he or she cannot be questioned without the presence of Specialist Counsel. [39]

42. There is in fact no mention of a "right to revoke" his waiver of counsel in either November 2019 Interview or the February 2020 Interview despite the positive obligation upon the SPO to do so. Indeed, at the beginning of both SPO

[36] ICTY, *Prosecutor v. Prlic et al,* Decision on Prosecution Motion for the Admission into Evidence of the Testimony of Milivoj Petkovic Given in Other Cases Before the Tribunal, 17 October 2007, para. 15.
[37] ECtHR, *Pishchalnikov v. Russia,* App no 7025/04, 24 December 2009, para. 78
[38] ICTR, *Prosecutor v. Bagosora et al.,* Decision on the Prosecutor's Motion for the Admission of Certain Materials, 14 October 2004, para. 11.
[39] Rule 43(4) of the Rules.

interviews, Mr. Selimi is asked to acknowledge for the record that he had chosen to waive the right for the attorney for the whole day of interview[40] thereby running directly contrary to the obligation to inform him of his right to revoke his waiver. In addition, on the second day of the November 2019 Interview when the SPO requested Mr. Selimi to sign a more formal notification of his rights and obligations, including his right to an attorney and an attorney waiver, the SPO again deliberately chose not to mention to Mr. Selimi his "right to revoke" his waiver of counsel.[41]

b. Mr. Selimi did not voluntarily and intelligently waive the right to silence.

43. Mr. Selimi was informed of his right to silence at the outset of the November 2019 interview when he was informed that he did "not have to answer any questions and you have the right to remain silent. Such silence shall not be considered in any assessment of guilt or innocence."

44. However, although confirming that he understood his rights and obligations, at no point did Mr. Selimi formally confirm that he had waived his right to silence. Instead, the SPO proceeded to list other practical considerations regarding the conduct of the interview and then started to ask other questions regarding his identity. It was simply assumed that he had voluntarily and intelligently waived this right.

45. The right to silence is inextricably linked to the right to legal counsel. While Mr. Selimi responding to questions in the presence of counsel, who could have intervened on Mr. Selimi's behalf to confirm the waiver of this right, the absence of counsel for Mr. Selimi throughout both interviews means that the SPO should

[40] 074459-TR-ET Part 1, p. 3 lines 3-6 and 068933-TR-ET Part 1, p.3 lines 8-10.
[41] See 068933-TR-ET Part 5, p. 1 lines 12-17.

have exercised a higher level of caution in ensuring this right had been voluntarily waived.

46. At no point over the following three days of interviews did the SPO seek to verify whether Mr. Selimi wanted to revoke this right and exercise his right to silence. While there is no textual requirement in the rules for Mr. Selimi to be explicitly informed of his right to revoke his right to silence akin to the right to counsel in Rule 43(4) the direct link between the right to silence and the right to counsel means that such a verification should have occurred.

3. Exclusion of the SPO Selimi Transcripts

47. Right to counsel is one of the fundamental rights of a suspect during investigation. Mr. Selimi was not properly informed of his status as a suspect and he did not therefore make a knowing and intelligent waiver of his right to counsel during the interview and that he was not given the right to revoke such a waiver freely.

48. In *Karemera, Ngirumpatse and Nzirozera,* the ICTR Trial Chamber held that because the Prosecutor had not established beyond reasonable doubt that Joseph Nzirorera waived his right to be silent and to be assisted by counsel in an express and unequivocal manner, there were substantial doubts as to the reliability of the interview and that as a result, its admission into evidence would be antithetical to and seriously damage the integrity of the proceedings.[42] The breach of Rule 42 of the ICTR and ICTY RPEs usually leads to exclusion under

[42] ICTR, *Prosecutor v Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44-T, T Ch III, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirera and Mathieu Ngirumpatse, 2 November 2007, paras 31 and 32.

Rule 95.[43] By analogy and considering their almost identical content, a violation of Rule 43 of the KSC RPE ought to lead to exclusion of evidence under Rule 138.

B. Selimi Witness Statements

49. The SPO seeks to tender statements, transcripts of interview and testimony of Mr. Selimi before the ICTY, Kosovo Court and SPRK and associated exhibits ("Selimi witness statements and associated exhibits").[44] In none of these interviews was Mr. Selimi considered to be a suspect and therefore benefitted from rights equivalent to Rules 43 and 44. The Defence therefore opposes the admission of the Selimi Witness Statements in this case.

50. This specific issue was addressed by a Trial Chamber in *Halilovic*. It held as follows:

> "The Trial Chamber notes that where a now accused person has been interviewed as a witness, the admission of that statement during trial could violate the rights of the accused to a fair trial, in particular his right to remain silent. The fundamental difference between an accused and a witness may result in an inadmissibility of a statement of an accused taken at the time when he was still considered to be a witness, insofar as the statement was not taken in accordance with Rule 42, 43 and 63 of the Rules. The Trial Chamber finds that in order to protect the right of the

[43] ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(c), 14 October 2004, paras 20-21. ICTY, *Prosecutor v. Delalic et. al.*, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997, Paras 43-44 and 55.

[44] T000-2344-T000-2345, 2 April 2004 ("ICTY witness statement"), IT-03-66 T6583-T6589, IT-03-66 T6590-T6679, IT-03-66 T6680-T6699 dated 2-31 May 2005, IT-03-66 20050527, IT-03-66 20050530 Parts 1-3, IT-03-66 20050531, 27-32 May 2005 ("ICTY witness testimony"), IT-03-66 P1.7, IT-03-66 P24, IT-03-66 P248 ("ICTY witness testimony associated exhibits"), SPOE00068075-SPOE00068087- ET, SPOE00068075-00068087, dated 15 January 2018 ("Kosovo Court testimony"), SITF00009289-00009298, 27 September 2011, SITF00371392-00371396, 3 June 2013, SPOE00213583-SPOE00213586, SPOE00213583-SPOE00213586- ET, 22 May 2018 ("SPRK Witness Statements").

> Accused to a fair trial, in accordance with Article 21 of the Statute, it should be taken into account whether the safeguards of Rules 42, 43 and 63 of the Rules have been fully respected when deciding on the admission of *any* former statement of an accused irrespective of the status of the accused at the time of taking the statement."[45]

51. Similarly, other Chambers of the ICTY have addressed the same issue when determining whether an accused's prior testimony as a witness is admissible. In a separate decision in Prlic, relating to the admission of Praljak's prior testimony as a witness in *Naletelic* and *Martinovic*

> 20. […] the circumstance after which Slobodan Praljak testified voluntarily, without duress, before the Naletilić and Martinović Chamber is not sufficient to allow the admission of the Praljak evidence insofar as this circumstance does not make it possible to conclude that Slobodan Praljak expressly waived his right to remain silent. In fact, as mentioned above, in order to waive that right he would have to know of its existence and the consequences deriving from waiving it. The Chamber considers that the only way it can be certain that the witness expressly waived his right to remain silent is to have a guarantee that he was duly informed of and cautioned about that right at the time of his testimony.
>
> 21. In the case at hand, the Chamber notes that the Accused Praljak was not informed of his right not to make any statement which might incriminate him and, for that reason, to remain silent when he testified in the Naletilić and Martinović case. […]

[45] ICTY, *Prosecutor v. Halilović,* Decision on Motion for Exclusion of Statement of Accused, 8 July 2005, para. 21.

52. As a consequence of this finding, the Trial Panel did not admit Praljak's prior witness testimony as to admit his evidence "would seriously infringe the Accused Praljak's right to a fair trial."[46]

53. Applying this reasoning to the present case, although it is theoretically possible to admit statements given to previous investigative authorities on in previous criminal proceedings as a witness, they would only be admissible if the necessary warnings for a suspect were given before the witness testified or proceeded with the interview or statement. In none of the Selimi Witness Statements which the SPO is seeking to tender, whether given directly to Prosecutorial authorities, or otherwise in court proceedings, did this actually occur.

54. In Mr. Selimi's 27 September 2-11 SPRK Interview, he was not informed of the right to a lawyer nor the right to remain silent and was given confusing instructions regarding the right not to answer certain questions.[47]

55. In Mr. Selimi's 3 June 2013 SPRK Interview, he was notified of the right to have a counsel though only if he believes he needs one as a result of answering a question and was also informed of his obligation to testify[48] in direct contradiction of his right to silence as a suspect. The same applies to Mr. Selimi's 13 October 2016[49] and 22 May 2018[50] SPRK Interviews.

56. In his ICTY statement given on 2 April 2004 to Prosecution investigators,[51] Mr. Selimi was not informed of his right to silence, nor his right to counsel, although he was accompanied by counsel during the interview.

---

[46] ICTY, *Prosecutor v. Prlic*, Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of Naletelic and Martinovic", 5 September 2007, para. 22.
[47] SITF00009289-00009298.
[48] SITF00371392-00371396.
[49] SPOE00067168-SPOE00067174.
[50] SPOE00213583-SPOE00213586.
[51] T00-2344-T000-2345.

57. Finally, as both a witness before Gjakova Basic Court on 15 January 2018[52] and before the ICTY on 27, 30 and 31 May 2005,[53] Mr. Selimi gave testimony under oath but was not notified of his right to counsel nor of his right to silence.

58. In these circumstances, there is no other option for the Trial Panel but to exclude the Selimi Witness Statements.

C. Limitations on admission and use of statements of Mr. Selimi

59. Even if either of the Selimi SPO Transcripts or Selimi Witness Statements are considered admissible by the Trial Panel, or indeed any of the Accused Statements tendered by the SPO, there are direct limitations on their use which derive from their specific status. These are glossed over or ignored by the SPO, despite directly recognising that co-accused will be unable to examine the person who provided the prior statement if some or all of the Accused elect not to testify.[54]

60. The SPO simplistically asserts that "as there is no specific provision governing the admissibility of an accused's statement, the general admissibility provisions apply."[55] While Article 37 and 40 of the Law and Rule 137 allow for the Trial Panel to rule generally upon the admissibility of evidence, and provide general guidelines for doing so, the Defence agrees that none specifically regulates the issue of how evidence of a suspect or accused should be assessed.

61. The absence of a specific provision regulating the admission of suspect interviews, was faced in *Prlic* relied upon by the SPO.[56] In that case, the ICTY Appeals Chamber held that the rules did not provide explicitly for the case of a

[52] SPOE00068075-SPOE00068087
[53] IT-03-66 T6583-T6589, IT-03-66 T6590-T6679 & IT-03-66 T6680-T6699.
[54] SPO Motion, para. 90.
[55] SPO Motion, para. 90.
[56] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ('Prlić Appeal Decision').

transcript of the questioning of a suspect to be admitted into evidence in the trial of that person and other accused. Therefore, a Chamber is called in such a case to apply rules of evidence that "will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".[57]

62. However, this finding was directly based on ICTY Rule 89(B) which is conspicuously missing from the KSC legal framework. Under the KSC legal framework, where specific rules are silent on the admission of suspect evidence, there is no direct guidance to the Trial Panel as to how the admission of these statements should be regulated. The burden rests squarely on the SPO to firmly demonstrate that such evidence is admissible rather than simply presuming this to be the case. It must also demonstrate how such evidence may be used when admitted.

63. Statements made by one accused in relation another accused have been approached with caution by international criminal tribunals. For example, in *Katanga*, one of the co-accused, *Ngudjolo*, gave two statements to the DRC authorities, containing accusations against Katanga. The Trial Chamber determined that "these documents are unmistakably testimonial" and that, given that they contain direct allegations against Katanga, there is "an overwhelming legal obstacle against its admission"[58] as Ngudjolo cannot be compelled to submit to cross-examination by Katanga.[59] As such, these statements were rejected for the allegations against Katanga, but admitted for the admissions made by Ngudjolo.[60] The same conclusion was reached in early

[57] ICTY, Prlić Appeal Decision, para. 40.
[58] ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Case No. ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para. 53.
[59] *Id.*
[60] *Id.*

ICTY jurisprudence, finding that the impossibility of cross-examination is a bar to the admission of a co-accused statements.[61] The ICTY OTP originally also endorsed this view.[62]

64. At the ICTY, there has been a divergence in approaches in *Prlic* and *Popovic*. In *Prlic,* the Trial Chamber admitted the transcript of his testimony into evidence also against his co-accused in the proceedings.[63] On appeal, the Appeals Chamber determined that there is no discernible general principle that may be inferred from domestic practice on the point in question[64] and that under ECtHR jurisprudence exceptions to the adversarial principle may be accommodated insofar as they do not result in unacceptable infringements of the rights of the defence.[65] The Appeals Chamber concluded that the transcript could be tendered into evidence even if the co-accused could not avail themselves of the possibility to cross-examine Prlic, "since as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination".[66]

65. By contrast, in *Popovic,*[67] the ICTY reached a completely different conclusion with regards to the opposability of Borovcanin's statements to the other co-accused. It highlighted that "the ECHR has repeatedly emphasized that as a supranational court of review, it does not examine the propriety of admission"[68] and

[61] ICTY, *Prosecutor v. Blagojević & Jokić,* Case No. IT-02-60-T, 22 May 2003, Transcript pages 735–736.
[62] ICTY, *Prosecutor v. Milutinovic et al,* Case No. IT-05-87-T, Prosecution Reply to Defence Responses to Motion for Admission of Documentary Evidence, 18 August 2006, para. 22.
[63] ICTY, *Prosecutor v. Prlic et al,* Case No. IT-04-74, Decision on Request for Admission of the Statement of Jadranko Prlic, 22 August 2007, para. 32.
[64] ICTY, Prlic Appeals Decision, para. 50.
[65] ECtHR, *A.M. v. Italy,* no. 37019/97, para. 25, 14 December 1999, *Luca v. Italy,* no. 33354/96, 27 February 2001, paras 39-45.
[66] ICTY, Prlic Appeals Decision, para. 55.
[67] ICTY, *Prosecutor v. Popovic et al,* Case No. IT-05-88-T, Decision on the Admissibility of the Borovcanin Interview and the Amendment of the Rule 65 *ter* Exhibit List, 25 October 2007, fn. 167.
[68] *Ibid,* para. 52.

reemphasised that "the duty to decide whether to exercise our discretion under Rules 89(C) and (D) to admit or exclude the statements of an accused against co-accused falls squarely on [the Chamber]."[69] It then determined that statements of Borovcanin that the OTP was seeking to tender, constitute hearsay that is "special" for two reasons, namely that they were rendered by an accused with powerful incentive to shift blame to others and were collected by the Prosecution in anticipation of legal proceedings[70] which pose fundamental problems with using the statements of an accused against co-accused.[71]

66. The Appeals Chamber overturned the Trial Chamber's decision in *Popovic*[72] recalling the determination that "as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination"[73] and noted that there is a fundamental distinction between *admitting* a statement into evidence and *according weight* to it.[74]

67. Further, this is consistent with the finding in *Prlic,* that even in case of admission of statements of co-accused, it was found that they cannot be relied upon for any critical element of the SPO case unless corroborated accordingly.[75]

68. The KSC has not decided this issue as yet. Neither Gucati nor Haradinaj were interviewed by the SPO. One of Mustafa's previous statements was deemed admissible under Art 37 of the Law and held to be "available for consideration by the Panel for the purpose of its deliberations and judgment."[76]. However, as

[69] *Ibid,* para. 53.
[70] *Ibid,* para. 62.
[71] *Ibid,* para. 65.
[72] ICTY, *Prosecutor v. Popovic et al.*, Decision on Appeals Against Decision Admitting Material Related to Borovcanin's Questioning, 14 December 2007 ("*Popovic* Appeals Decision").
[73] *Ibid,* paras. 55-61.
[74] ICTY, *Popovic* Appeals Decision, para. 50.
[75] ICTY, *Prlic* Appeals Decision, para 59.
[76] KSC-BC-2020-05/F00281, *Prosecutor v. Mustafa,* Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material, 13 December 2021, paras 20-23.

a single accused, the issue of whether it can be used against a co-accused has not arisen. The same applies to *Shala* where the Trial Panel admitted the statement of the sole accused.[77]

69. Under the KSC legal framework, the Defence notes that statements and interviews of witnesses are not admitted for the truth of their contents pursuant to Rule 138, but instead follow a detailed procedure for admission pursuant to Rules 153, 154 and 155. Each of these rules requires specific criteria to be applicable to determine whether the tendered statements are admissible or not.

70. Most directly relevant for the purposes of admission of statements of accused is Rule 155 which regulates the admission of statements or records of interview of persons who for a "compelling reason" are unable to testify orally. The parallels between Rule 155 and statements of the accused are instructive.[78] Both relate to situations where evidence has been provided by individuals to the SPO or to other national or international law enforcement or criminal investigation authority or agency and who are unavailable to testify, whether through death or medical impairment in the sense of Rule 155, or due to the prohibition on compelling an accused to testify in relation to the evidence of accused in the sense that the right against self-incrimination protected by Article 21 of the Law, prevents the SPO from compelling them to testify.

71. Notably in this regard, Rule 155(5) provides that "if the evidence goes to proof of the acts and conduct of the Accused as charged in the indictment, this may be a factor against the admission of such evidence, in whole or in part."

[77] KSC-BC-2020-04/F00364/COR/RED, *Prosecutor v. Shala*, Public redacted version of Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022.
[78] See KSC-BC-2020-06/F01417, Joint Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts with Confidential Annex I, 3 April 2023, paras. 22-25.

72. The Trial Chamber in *Popovic* drew similar parallels between use of statements of co-accused and the equivalent provisions to Rules 153-155. It underscored that while "[e]vidence may thus potentially be admitted under Rule 92 bis absent cross-examination", such evidence is "limited to proof of a matter other than the acts and conduct of an accused."[79] It further found instructive that Rule 92ter permits for the admission of statements that attest to the acts and conduct of an accused only insofar as the witnesses to which said statements correspond are available for cross-examination.[80] Additionally, with regards to Rule 92quater, it found compelling that only the exceptional circumstances referenced in said rule (i.e. the death or unavailability of the witness) may allow for untested evidence going to the acts and conduct of the accused, and even then, "the fact that evidence goes to proof of acts and conduct is a factor against the admission of the evidence or that part of the evidence".[81] Based on the foregoing, "[e]xercising discretion informed by analogy, the Trial Chamber decides that, absent cross-examination, Borovcanin's statements to the Prosecution cannot be used as proof of the acts and conduct of his co-accused."[82]

73. This finding by the Trial Panel in *Popovic*, is also consistent with the finding by the Appeals Chamber in *Prlic,* that even in case of admission of statements of an accused against a co-accused, they cannot be relied upon for any critical element of the SPO case unless corroborated accordingly.[83]

74. The findings above are further in line with the reasoning of the ICTY Trial Chamber in *Boskoski,* where the Chamber determined that prior statements made by the Accused Johan Tarculovski cannot be admitted in evidence for the truth

[79] *Ibid,* para. 70.
[80] *Ibid,* para. 73.
[81] *Ibid,* para. 74.
[82] *Ibid,* para. 77. See paras 77-80 for how the Chamber interprets the meaning of "acts and conduct of the accused".
[83] ICTY, Prlic Appeals Decision, para 59.

of its contents vis-à-vis the acts and conduct of the other Accused Ljube Boskoski.[84] The Chamber reached this determination on the basis of, *inter alia*, the fact that Ljube Boskoski would not have been in a position to cross-examine Johan Tarculovski on the assertions contained therein.[85] Furthermore, the Chamber determined that exclusion is further warranted when such statements are inconsistent with respect to the acts and conduct of co-accused since such inconsistencies cannot be challenged through cross-examination.[86]

75. Finally, Article 119(5) of the CPC[87] is also directly relevant to this question as it provides that:

> "Statements of the defendant given in any context, given voluntarily and without coercion, cannot serve as evidence against the co-accused in the same criminal process or in a separate process, except for when this Code expressively provides that this statement can be admissible as evidence.

76. The only instance where the CPC provides for the possibility that the previous statements or testimonies of an Accused might be used in relation to the other Co-Accused is when the former elects to testify and the latter are entitled to challenge said statements or testimonies pursuant to Articles 345 and 256(1). It follows, therefore, that at this stage, any determination on the admissibility of the Accused where none of them have testified, or even notified their intention to do so pursuant to Rule 142(4) is, at the very least, premature.

---

[84] IRMCT, *Prosecutor v. Boskoski and Tarculovski*, Case No. MICT-14-84, Decision on Application to Lift the Confidentiality of the 7 December 2007 Decision in the *Boskoski and Tarculovski* Case, Annex I, 27 January 2015, para. 46.
[85] *Id.*
[86] *Id.*
[87] The references to the Kosovo Code of Criminal Procedure in the extracts below are based on the newly updated version of the CPC (Code No. 08/L-032 of 17 August 2022). The numbering and substance of the provisions therefrom will thus differ from the references made by the SPO, which relied on the outdated 2013 version (Code No. 04/L-123, of1 January 2013.)

77. The position that such statements are inadmissible against Co-Acussed at this stage is further strengthened by other provisions in the CPC. For example, Article 125(1)(1.1) establishes that a statement shall be inadmissible if the person it is attributed to "may not be examined as a witness". In that respect, Article 123(1)(1.3) specifies that "a co-defendant, while joint proceedings are being conducted" is a privileged witness and therefore cannot be examined. While such privilege may inevitably cease should the Accused in question elect to testify, it follows that until such time, the statements of a Co-Accused may not be admitted against the other Accused for the former cannot be examined on account of privilege.

78. While the SPO referred to Article 119(5) of the CPC recounted above, it discounted its applicability as "Article 123(5) [*sic*] of the CPC was not expressly incorporated in the Law or Rules and therefore does not apply."[88] This position entirely misrepresents the relationship between the KSC Rules and the CPC.

79. Article 3(2) of the Law referenced by the SPO in support of the above position provides that the Specialist Chambers shall adjudicate and function in accordance with "c. other provisions of Kosovo law as expressly incorporated and applied by this Law". In that respect, the Law and the Rules make reference to the CPC consistently throughout their respective texts. In particular, Article 19(2) of the Law establishes that "[i]n determining its Rules of Procedure and Evidence the Specialist Chambers shall be guided by the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123." Furthermore, Rule 4 provides that "[t]he Rules shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law and, where appropriate, the Kosovo Criminal Procedure Code."

[88] SPO Motion, fn. 308.

80. As such, requiring that a specific provision be expressly incorporated in the Law for it to be considered by the Trial Panel, as advanced by the SPO, is entirely unsubstantiated. That is even more so given that the SPO makes specific references to articles in the CPC which are not specifically incorporated in the KSC legal framework throughout its motion,[89] while then proceeding to claim that provisions of this kind may not be considered for they have not been individually incorporated.

81. In addition, Rule 4 read in conjunction with Article 19 of the Law clearly establish that the Rules ought to be interpreted in line with the CPC. This does not imply that CPC provisions may be imputed into the KSC legal framework haphazardly when their imputation risks creating tensions with other provisions in the Rules or the Law.

82. However, as the SPO accepts, (i) "there is no specific provision governing the admissibility of an accused's statement" in the KSC legal framework[90], (ii) the provisions of the CPC are unambiguous on the matter at hand and likewise do not create any tension with other provisions in the KSC legal framework, and (iii) international jurisprudence does not provide any unequivocal answer owing to the multiple discrepancies in the identified sources, the CPC should be employed at least as an interpretative tool of these provisions pursuant to Rule 4 and Article 19 of the Law.

83. From the foregoing, the admission of statements, interviews and testimony of Mr. Selimi is a complex issue which requires a detailed, nuanced and thorough analysis. Simplistic rules of admission proposed by the SPO are inapposite.

[89] See, for example, SPO Motion, paras 23, 24, 27, 28, 33, 34, 41, 42, 48, 51, 52, 54, 55, 58, 59, 104.
[90] SPO Motion, para. 90.

84. In applying the principles that derive from the foregoing, if the Trial Panel decides to admit into evidence any of the Accused Statements it should do so subject to the following limitations:

> (1) they may only be admitted against the accused who provided the statement or gave the interview and not against his co-accused in this case; and, in any event, if used against co-accused,
>
> (2) may not be admitted for evidence in relation to the acts and conduct of these co-accused or as evidence of any critical element of the SPO case unless corroborated accordingly

85. This is the only way to effectively implement the requirement in Article 37(1) that the Trial Panel apply international standards on the collection of evidence and Article 22 of the Constitution.

D. Confidentiality

86. These submissions are filed confidentially pursuant to Rule 82 as they relate to potentially confidential aspects Mr. Selimi's interviews. The Defence will file a public redacted version of the present submissions in due course.

III. CONCLUSION AND RELIEF REQUESTED

87. For the reasons set out above, the Defence for Mr. Selimi requests the Trial Panel to:

- DENY the admission into evidence of the Selimi SPO Transcripts and associated procedural documents;
- DENY the admission into evidence of the Selimi Witness Statements and associated exhibits;

AND, if the Trial Chamber decides to admit any of the Accused Statements into evidence;

- LIMIT the use of such statements against the Accused who provided them unless and until the particular Accused gives evidence and may be cross-examined on the contents of these statements; or otherwise,

- EXCLUDE from such statements:

  (i) evidence relating to acts and Conduct of co-accused or

  (ii) evidence relating to other critical elements of the SPO case unless corroborated accordingly.

Word count: 8801

Respectfully submitted on 24 April 2023,

GEOFFREY ROBERTS

Co-counsel for Rexhep Selimi

ERIC TULLY

Co-counsel for Rexhep Selimi

RUDINA JASINI

Co-counsel for Rexhep Selimi