In: **KSC-BC-2020-06/IA030**

The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Court of Appeals Panel**
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

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Selimi Defence Appeal against the Decision on Prosecution Motion for Admission of Accused's Statements with Confidential Annex 1 and Public Annex 2

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I. INTRODUCTION

1. Pursuant to Article 45(1) of the Law[1] and Rule 170(2) of the Rules,[2] the Defence for Mr. Rexhep Selimi ("the Defence") hereby submits its appeal against the Trial Panel's Decision on Prosecution Motion for Admission of Accused's Statements[3] ("Impugned Decision").

2. In the Impugned Decision, the Trial Panel admitted six records of statements and/or testimony attributed to Mr. Selimi which were given in his capacity as a witness ("Selimi Witness Statements"),[4] despite the fact Mr. Selimi was not considered a suspect during the course of that questioning and therefore did not benefit from the suspect rights codified in Rules 43 and 44.[5] In so doing, the Trial Panel held that "the full array of warnings for a suspect not being necessary for the admission of a statement given to previous investigative authorities by a witness who is not considered a suspect at the time and through the course of his or her interview or testimony."[6] This finding, frequently recited by the Trial Panel throughout the Impugned Decision, "follows" from the determination that "an individual interviewed as a witness is not entitled to the same due process protections as those afforded to a suspect if he or she is not regarded or treated as a suspect at the time of the interview, regardless of whether he or she later becomes a suspect, or an accused."[7]

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[1] Law No. 05/L-053 on SC and SPO, 3 August 2015 ('Law').
[2] Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').
[3] KSC-BC-2020-06/F01917, Decision on Prosecution Motion for Admission of Accused's Statements, 9 November 2023 ("Impugned Decision")
[4] Impugned Decision, para. 221; SITF00009289-00009298; SITF00371392-00371396; SPOE00067168-SPOE00067174-ET; SPOE00213583-SPOE00213586; T000-2344-T000-2345; IT-03-66 T6583-T6589; IT-03-66 T6590-T6679; IT-03-66 T6680-T6699; IT-03-66 20050527; IT-03-66 20050530 Parts 1-3; IT-03-66 20050531.
[5] KSC-BC-2020-06/F01473, Selimi Defence Response to SPO Motion for Admission of Accused's Statements, 24 April 2023, para. 49.
[6] Impugned Decision, paras. 141, 144, 147, 150, 153, 156, 159.
[7] *Ibid*, para. 129.

3. On 19 December 2023, the Trial Panel granted certification in respect of the Third Issue put forward by the Defence,[8] concerning *whether the Trial 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.* As such, the present Appeal will demonstrate that the Trial Panel has committed an error of law in admitting into evidence the Selimi Witness Statements and thereby disregarding the robust rights that suspects/Accused benefit from in the context of criminal proceedings.

4. The Trial Panel's decision misleadingly suggests that if an individual provides a witness statement, then the rights of the same individual are not prejudiced should they become an Accused and the same statement is used against them – notwithstanding that they now benefit from much more robust guarantees as an Accused. Instead, in the Trial Panel's view, an issue may arise only insofar as the investigative authorities who collected that statement acted in bad faith or treated the individual unreasonably as a witness.[9]

5. The Trial Panel has failed to provide any basis either in law or logic, as indeed there is none, for that determination. In fact, the finding in question is oblivious to the wealth of authorities which posit that, notwithstanding the proper conduct of the authorities at the time a witness statement is recorded, the subsequent *use* of that statement against the same individual who is now an Accused can violate that individual's rights as such, and in particular, the right against self-incrimination, the right to silence and the right to counsel.

[8] KSC-BC-2020-06/F02029, Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements, 19 December 2023, paras. 77, 94.
[9] Impugned Decision, paras. 129, 141.

II. APPLICABLE LAW

6. The Defence incorporates by reference the applicable standard for interlocutory appeals concerning errors of law developed upon in previous appellate jurisprudence and submissions.[10]

III. SUBMISSIONS

A. None of the Selimi Witness Statements were obtained in a manner consistent with the rights available to a suspect

7. The right to remain silent and the right not to incriminate oneself are universally recognized international standards which are at the very heart of the notion of a fair trial.[11] The right to counsel is further inextricably linked to the above two rights,[12] as the presence of counsel acts as a guarantee that the Accused may fully and effectively avail themselves of such rights.[13] This right is all the more crucial in the context of international criminal proceedings given the complexity inherent to modes of liability under international criminal law. As such, structural evidence independent of an individual's acts and conduct may appear to a lay individual as completely innocuous, albeit the highly incriminatory risks that such evidence nonetheless bears – and it is only through the presence of

[10] See KSC-BC-2020-07/ IA001-F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras. 4-14; KSC-BC-2020-06/IA025/F00002, Selimi Defence Appeal against "Decision on Prosecution Request to Add Two Witnesses and Associated Material", KSC-BC-2020-06/F01058, dated 27 October 2022, 2 December 2022, paras. 4-6.

[11] ECtHR, *Saunders v. United Kingdom*, Application no. 19187/91, Judgment of 17 December 1996, para. 68; *Allan v. United Kingdom,* Application no. 48539/99, Judgment of 5 November 2002, para. 44; *Jalloh v. Germany,* Application no. 54810/00, Judgment of 11 July 2006, para. 100; *Schmid-Laffer v. Switzerland,* Application no. 41269/08, Judgment of 16 June 2015, para. 37.

[12] ICTY, *Prosecutor v. Halilovic*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 15; ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Reasons for the Decision on Admission of Certain Evidence Connected to Witness 495, rendered on 17 November 2014, 11 December 2014, para. 27; ECtHR, *Brusco c. France*, Requête no. 1466/07, Arrêt de 14 octobre 2010, para. 54.

[13] ECtHR, *Pishchalnikov v. Russia,* Application no. 7025/04, Judgment of 24 September 2019, para. 69; *Salduz v. Turkey*, Application no. 36391/02, Judgment of 27 November 2008, para. 54.

qualified counsel that these risks may be avoided. However, in none of the Selimi Witness Statements have these guarantees been duly respected.

8. Throughout his SPRK statements and testimony, Mr. Selimi was informed that he is under an obligation to tell the truth and that giving false testimony is a criminal offence. He was informed that he has a right not to answer specific questions on grounds that it will incriminate him, yet not that he might assert his right to silence and refuse to answer any questions put to him. During his 27 September 2011 statement,[14] he was not informed of the right to counsel. In the other SPRK statements, he was informed that he might hire and consult an attorney only if he believes he needs one as a result of answering a particular question, as opposed to being provided one free of charge and for the entire duration of the questioning if so requested. The above circumstances demonstrate that the SPRK witness statements and testimony were not collected in compliance with the rights accorded to suspects provided for in Rules 43 and 44.

9. During his ICTY statement and testimony, Mr. Selimi was provided with virtually no notice as to neither his right to silence, counsel, nor his privilege against self-incrimination. Even though it was open to him to object to making any statement which might tend to incriminate him under Rule 90(E) of the ICTY Rules, he was not informed at any point of this possibility, and the Trial Panel specifically found that Mr. Selimi not availing himself of this possibility did not "constitute a waiver of Mr Selimi's right to silence and/or against self-incrimination in respect of the present proceedings."[15] Therefore, Mr. Selimi was not accorded any of the relevant suspect guarantees during his ICTY evidence.

[14] SITF00009289-00009298.
[15] Impugned Decision, para. 160.

10. The Defence contends that the sole fact that Mr. Selimi was not entitled to these guarantees as a witness does not exclude that the subsequent *admission* of that evidence against his interests as an Accused would violate the rights in question.

11. In that respect, international jurisprudence has made specific provisions for situations where a statement or testimony of an individual that has not been taken in conformity with these robust guarantees applicable to a suspect, but was taken in conformity with the applicable provisions for a witness, cannot be subsequently used against an Accused for it would amount to a violation of these rights. These situations, namely (i) use immunity for compelled self-incriminating testimony; and (ii) inadmissibility of statements where the requisite suspect warnings and guarantees have not been accorded, are described below.

B. The Trial Panel erred by admitting the Selimi Witness Statements in violation of Mr. Selimi's Rights as an Accused

1. The use of compelled self-incriminating testimony is prohibited under the procedural rules of international criminal tribunals and constitutes a universal fair trial rights standard

12. ICTY Rule 90(E) specifically provides that "[a] witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony." The very same standard is reflected in Rule 151(3)(b) of the KSC Rules, in Rule 74(3) of the ICC Rules, in

Rule 90(E) of the SCSL Rules, in Rule 150(F) of the STL Rules, and in numerous other domestic provisions.[16]

13. The fact that the *use* of evidence of this nature against an individual may constitute a violation of that individual's fair trial rights is further confirmed in the jurisprudence of the ECtHR, directly binding on the KSC pursuant to Article 3(2)(e) of the Law. The latter determined that (in the context of statements given by a witness who subsequently become an Accused), "the use to which evidence obtained under compulsion is put in the course of the criminal trial" may constitute a violation of Article 6 of the ECHR.[17] The Court thus found that the elements to be examined in assessing whether a procedure has infringed an applicant's right against self-incrimination are, *inter alia,* "the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and *the use to which any material so obtained is put* [emphasis added]."[18]

14. The principle enshrined in ICTY Rule 90(E) and KSC Rule 151(3)(b) therefore constitutes a universal fair trial rights standard that reflects the principle that the testimony of a witness compelled to give evidence in violation of his right to silence and against self-incrimination cannot be used against that witness should they become an Accused.

a. The standard for "compelled" testimony

15. As to the circumstances that would render such testimony "compelled", while ICTY Rules 90(E) and KSC Rule 151(3)(b) establish that the requisite compulsion may only arise insofar as a specific objection is made and overruled by a judicial

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[16] *See, for example,* United States, 18 U.S. Code § 6002; *Kastigar v. United States* (1972) 406 U.S. 441, p. 447; Australia, Sections 128 and 132 of the Australia Evidence Act of 1995; New Zealand, Section 63(3) of the Evidence Act of 2006; Section 15(2) of the Secret Commissions Act of 1910; Section 267(2) of the Companies Act of 1993; Section 49(4) of the Gas Act of 1992; Canada, Section 13 of the Canadian Charter of Rights and Freedoms.

[17] ECtHR, *Ibrahim and Others v. United Kingdom,* Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09, Judgment of 13 September 2016, paras. 267, 269.

[18] ECtHR, *Jalloh v. Germany,* Application no. 54810/00, Judgment of 11 July 2006, para. 101.

order mandating an answer, the jurisprudence of the ECtHR suggests that the protection is instead broader. In *Saunders v. United Kingdom*, the applicant was interviewed, in the presence of his legal advisor, by inspectors with investigative functions appointed by the Secretary of State for Trade and Industry, during which a refusal on the part of the applicant to answer the questions put to him could have led to a conviction for contempt of court.[19] The transcripts thus obtained were subsequently used against the applicant by the prosecution in the course of criminal proceedings.[20]

16. Significantly, the ECtHR did not analyse the extent to which the relevant Article 6 guarantees had been respected in the context of the interviews conducted by the inspectors, stating that "the Court's sole concern in the present case is with the use made of the relevant statements at the applicant's criminal trial."[21] It furthermore specifically found that "the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right."[22] Ultimately, the ECtHR found a violation of the right against self-incrimination under Article 6 occasioned by the use against the applicant of the relevant transcripts obtained by virtue of the exercise of compulsory powers.

17. The ECtHR determined the existence of compulsion on the basis of the threat of sanctions that the applicant was confronted with at the time he gave the interview, reflected in the prospect that the applicant might be held in contempt had he not complied with the summons for the interview. The finding that a violation of Article 6 of the ECHR may result from the prosecutorial use of

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[19] ECtHR, *Saunders v. United Kingdom,* Application no. 19187/91, Judgment of 17 December 1996, para. 70.
[20] *Ibid*, para. 72.
[21] *Ibid*, para. 67.
[22] *Ibid*, para. 74.

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statements obtained under compulsion of this nature in subsequent criminal proceedings was confirmed in subsequent ECtHR jurisprudence.[23]

18. The above interpretation is further supported by domestic law and practice. Section 13 of the Canadian Charter of Rights and Freedoms states that "[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence." Of note is that that protection is engaged likewise only in cases of "compelled" testimony, yet there is likewise no need for a specific order compelling that testimony to be issued. As formulated by the Supreme Court of Canada,

> "[t]he focus of the s. 13 analysis should be on compulsion. Evidence should be treated as compelled where there is a statutory route by which the witness could be compelled to give evidence. Whether or not that route is actually taken does not change the fact that it was available and could have been taken. It would be unprincipled to give a lesser degree of Charter protection to a witness who testifies willingly than to a witness who must be subpoenaed or otherwise forced to give evidence, if both could have been statutorily compelled to testify in any event."[24]

19. In that regard, the Supreme Court of Canada clarified that Section 13 "does not depend on any objection made by the witness giving the evidence. It is applicable and effective without invocation, and even where the witness in question is unaware of his rights."[25] As such, it determined that "[w]hen the evidence given in a judicial proceeding by a witness who subsequently becomes an accused was

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[23] See, for example, ECtHR, *Kansal v. United Kingdom,* Application no. 21413/02, Judgment of 27 April 2004.
[24] Canada, *R. v. Nedelcu*, 2012 SCC 59, [2012] 3 S.C.R. 311.
[25] Canada, *R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76, para. 23; *Dubois v. The Queen*, [1985] 2 S.C.R. 350, McIntyre J. dissenting, para. 69.

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incriminating at the time it was given, such that the witness could have been granted the statutory protection of s. 5 of the Canada Evidence Act, but did not know to ask, the focus should shift to the use that the Crown proposes to make of that evidence at the subsequent trial of the accused. Clearly, the Crown is precluded from introducing it as part of its case in chief."[26]

20. As such, national legislation and practice further supports the ECtHR's determination that the principle protected under ICTY Rule 90(E) and KSC Rule 151(3)(b) has a broader scope, and the rights of the Accused may be instead infringed by the admission of evidence proffered pursuant to a threat of sanctions as opposed to a specific judicial order compelling that evidence.

b. The Trial Panel wrongly discarded the applicability of the standard laid out in ICTY Rule 90(E) and KSC Rule 151(3)(b)

21. In the Impugned Decision, the Trial Panel determined that ICTY Rule 90(E) did not and was not intended to have extra-jurisdictional effect, and the safeguards against self-incrimination provided by Rule 90(E) therefore only applied before the ICTY.[27]

22. The Trial Panel's finding to that effect constitutes a superficial attempt at discarding the applicability of a universally recognized fair trial rights standard in favour of an overly narrow reading of the ICTY jurisprudence concerned. The *Perišić* Decision referenced by the Trial Panel reads that "[t]he Trial Chamber accepts the Prosecution's argument that the safeguards provided by Rule 90(E) to the witness only apply before the Tribunal, and do not bind the BiH authorities."[28] It is undisputed that ICTY Rules cannot bind a domestic court as there is no mechanism in those rules through which the ICTY could ensure

[26] Canada, *R. v. Noël*, [2002] 3 S.C.R. 433, 2002 SCC 67, para. 45.
[27] Impugned Decision, para. 159.
[28] ICTY, *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.

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compliance by such courts with their provisions, and, in the case in issue, compel the court in question to deny the admission of the potentially self-incriminating evidence concerned. As such, at no point did the ICTY determine, as indeed it had no authority to, whether the subsequent admission of that evidence before the BiH courts would comport with the privilege against self-incrimination of the individual concerned, as the competence to rule on that matter rested exclusively with those courts.

23. Similarly, the Defence does not suggest that the Selimi Witness Statements in the present case should be denied admission on the basis of the direct application of Rule 90(E) in the present proceedings. Rather, as demonstrated above, and as explicitly acknowledged by the ICTY Appeals Chamber,[29] Rule 90(E) reflects a universal fair trial rights standard. It is by operation of that standard that the admission of the Selimi Witness Statements is called into question, and not by a direct imputation of Rule 90(E) into the jurisdictional framework of the KSC.

24. With respect to the Trial Panel's ancillary finding that "the ICTY also made it clear that testimony compelled before a national court was not necessarily rendered inadmissible for that reason before the ICTY,"[30] the jurisprudence cited by the Trial Panel likewise does not suggest at any point that the admission of self-incriminating evidence collected before national authorities would not infringe the Accused's privilege against self-incrimination protected under Article 21(4)(g) of the ICTY Statute. The *Mladić* Decision referenced reads that "[w]hile it would be open to the Chamber deciding on a request for admission of the compelled testimony of Mr. Mladić to exclude it pursuant to Rule 89(D) of the Rules, this rule does not guarantee exclusion."[31] This finding indeed accepts

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[29] ICTY, *Prosecutor v. Karadzic,* IT-95-5/18-AR73.11, Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013, paras. 34-45.
[30] Impugned Decision, para. 159.
[31] ICTY, *Prosecutor v. Mladić,* IT-09-92-R75bis.1, Second Decision on Request for Assistance from the Court of Bosnia and Herzegovina Pursuant to Rule 75 bis, 21 December 2011, para. 10.

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that there is no mechanism for automatic exclusion of potentially self-incriminating evidence obtained in the course of proceedings before authorities other than the ICTY owing to (i) the discretionary character of Rule 89(D), according to which "[a] Chamber *may* exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial [emphasis added];" and (ii) the fact that the procedure envisaged in Rule 90(E) can only be triggered when self-incrimination concerns arise during the course of testimony before the ICTY.

25. However, the ICTY Trial Chamber in that case, recognizing the shortcomings of the ICTY legal framework in adequately protecting Mr. Mladić's privilege under Article 21(4)(g) of the Statute, elected to impose additional measures should it grant the request for him to testify before the courts of BiH, including requiring that an ICTY judge be empowered to rule on objections on grounds of the risk of self-incrimination during that testimony.[32] Therefore, this Decision reflects the concern attached by ICTY judges to mitigating the potential risks of self-incrimination arising out of the compelled testimony of an accused and the importance of additional safeguards when the relevant procedural framework is devoid of sufficient avenues for protecting the statutory right concerned - as opposed to condoning a *carte blanche* for the introduction of compelled self-incriminating testimony before the ICTY, as the Trial Panel's finding suggests.

26. Considering the foregoing, the principle that prior compelled testimony is inadmissible against an Accused was wrongly discarded by the Trial Panel wrongly in favour of an unjustifiably narrow reading of the jurisprudence discussed.

[32] *Ibid*, para. 11.

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2. International jurisprudence confirmed that previous witness statements may only be used against an Accused insofar as the requisite suspect guarantees have been provided

a. ICTY jurisprudence

27. In addition to prohibiting the admission of compelled self-incriminating testimony against an Accused, the ICTY further determined that previous witness statements would only be admissible against an Accused if the necessary suspect warnings for a suspect were provided before the evidence was given. As such, in *Halilović,* the ICTY ruled that:

> "[W]here 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 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.[33]

28. In *Prlić,* the ICTY Trial Chamber ruled that the Accused Praljak's "minimum rights as an Accused" to remain silent and not to incriminate himself had not been sufficiently protected at the time he testified as a witness in the *Naletilić* case inasmuch as he was not "duly cautioned about the possibility of not making any

[33] ICTY, *Prosecutor v. Halilović*, IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005, para. 21 ("*Halilović* Decision").

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statements which might incriminate himself and, thus, to the possibility of his remaining silent".[34]

29. Importantly, the Chamber likewise ruled that invoking the privilege against self-incrimination is not dependent on the procedure embedded in Rule 90(E) being employed – as "there is no doubt that a witness who makes statements without a Chamber's specific intervention, as provided for in Rule 90(E), has the right not to testify against himself".[35] In that respect, the Trial Chamber found that a statement given in a witness capacity may only be admitted against that individual insofar as a valid waiver of the right against self-incrimination and the right to silence can be shown, and that presupposes that the witness was "aware of the existence of this right and the consequences deriving from a possible waiver of this right."[36] As such, the Trial Chamber ruled that Mr. Praljak was never cautioned as to his right not to make statements about the facts which would expose him to possible prosecution and the consequences deriving from a possible waiver of his right to remain silence, and denied admission of that statement.[37]

30. Furthermore, the Trial Chamber determined that the fact that Mr. Praljak "testified voluntarily, without duress" in the *Naletilić* case did not constitute a valid waiver and was insufficient for the purposes of justifying that the admission of that statement.[38] This finding stands therefore in sharp contrast with the Trial Panel using the finding that the Selimi Witness Statements were "voluntary, free of coercion and improper compulsion and, hence, taken in a

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[34] ICTY, *Prosecutor v. Prlić*, Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of Naletelic and Martinovic, 5 September 2007, para. 22 ("*Prlić* Decision").
[35] *Ibid*, para. 17.
[36] *Ibid*, para. 19.
[37] *Ibid*, para. 21.
[38] *Ibid*, para. 20.

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manner consistent with the standards of international human rights law" as a determinative basis for their admission.[39]

31. The same overarching principle is evidenced by the ICTY Trial Chamber's Decision in *Mucić*.[40] In that instance, Mr. Mucić was interviewed as a *suspect* by the Austrian authorities, and the ICTY Prosecution tendered that record for admission. The ICTY determined that, notwithstanding that Mr. Mucić was treated as a suspect, "the Austrian rights of the suspect are so fundamentally different from the rights under the International Tribunal's Statute and Rules as to render the statement made under it inadmissible."[41] This reveals that the protection accorded to the Accused does not hinge on the status under which they were interviewed – but rather on whether the substantive guarantees that they enjoy as Accused have been duly respected in the context of giving evidence. In the absence of those guarantees, and regardless of the categorization of the individual when interviewed, that evidence cannot be admitted.

b. ECtHR jurisprudence

32. The findings above are further confirmed by the jurisprudence of the ECtHR. In *Lutsenko v. Ukraine*, the ECtHR found a violation of Article 6 on the basis of the use in criminal proceedings of one of the accused's depositions given as a witness, noting that "unlike a suspect or an accused, who enjoyed a right to remain silent according to the applicable law, a witness was under obligation to reveal all information known to him on pain of criminal punishment. Moreover, unlike a suspect or an accused, a witness had no statutory right to consult a lawyer before the first interrogation."[42]

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[39] Impugned Decision, paras. 141, 144, 147, 150, 153, 156, 161.
[40] ICTY, *Prosecutor v. Mucić et al*, IT-96-21, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997.
[41] *Ibid*, para. 52.
[42] ECtHR, *Lutsenko v. Ukraine*, Application no. 30663/04, 18 December 2008, para. 50.

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33. In *Schmid-Laffer v. Switzerland,* the ECtHR determined that an individual interviewed as a witness, even where the authority had no information in their possession incriminating the applicant to such an extent that she should have been treated as a suspect, and who was neither detained nor suspected of having committed a crime, could still avail herself of the guarantees of Article 6 as that statement was likely to affect her position in the subsequent proceedings.[43] As the above findings confirm, it is only when the relevant warnings and Article 6 guarantees have been provided that a statement can be admitted against the individual who offered it.

c. The Trial Panel wrongly discarded the applicability of the relevant jurisprudence

34. The Trial Panel rejected the applicability of the above ICTY jurisprudence in the present case on the basis of a series of distinguishing factors that are both legally arbitrary and factually inaccurate.

35. First, the Trial Panel identified that in both decisions identified above, the "Chambers were dealing with prior statements/testimony that had originated from the same institution (the ICTY) as was then being asked to admit them."[44] On that basis, "[t]he impugned statements were produced before the ICTY, i.e., another jurisdiction, not before the KSC or by the SPO. The SPO had no part in the production of these documents and was not in a position to influence or affect in any way the protection of the rights of the individuals concerned."[45] Likewise, with respect to the *Prlić* Decision, the Trial Panel noted that in that case Mr, Praljak was subject to cross-examination by the ICTY Prosecutor, making that situation materially distinguishable from the present case given that "the SPO

[43] ECtHR, *Schmid-Laffer v. Switzerland,* Application no. 41269/08, 16 June 2015, paras. 29-32.
[44] Impugned Decision, para. 160.
[45] Id.

has had no part in producing or eliciting incriminating evidence from the Accused in the statements and records concerned."[46]

36. At the outset, this finding is called into question by the wealth of authorities recounted above where the tribunals concerned found a violation of an accused's right occasioned by the admission of a statement provided to completely different investigative authorities.[47] That suggestion was also explicitly rejected in *Mucić,* where the ICTY determined that whether a different investigative authority collected the evidence is immaterial to the question of whether that evidence complies with the rights accorded to the Accused under the legal framework of the institution before which that individual is prosecuted.[48]

37. Furthermore, the ECtHR has established that "[t]he right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused."[49] It is therefore the SPO's burden to prove its case by means of adducing evidence that conforms with the Accused's fair trial rights and, should it have intended to adduce the evidence proffered during the course of the Selimi Witness Statements, it would have been incumbent upon it to, for example, elicit evidence of that nature during the course of an SPO interview where the appropriate suspect warnings have been duly provided, or procure the same evidence from other witnesses in a manner consistent with the Accused's rights.

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[46] *Id*.

[47] See, for example, *Saunders v. United Kingdom, Kansal v. United Kingdom, supra* para. 15; New Zealand domestic legislation, *supra* fn. 16.

[48] ICTY, *Prosecutor v. Mucić et al,* IT-96-21, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 43.

[49] ECtHR, *Jalloh v. Germany,* Application no. 54810/00, Judgment of 11 July 2006, para. 100; *J.B. v. Switzerland,* Application no. 31827/96, Judgment of 3 May 2001, para. 64; *Heaney and McGuinness v. Ireland*, Application no. 34720/97, Judgment of 21 December 2010, para. 40; *Allan v. the United Kingdom*, Application no. 48539/99, Judgment of 4 November 2002, para. 42.

38. However, with the SPO having not done so, the Trial Panel has proceeded with relieving the SPO of its burden and admitted evidence that is incompatible with the Accused's fair trial rights. As such, the suggestion emanating from the Trial Panel's finding is that evidence violating the rights of the Accused can be freely deployed against that Accused, and their rights dispensed with, inasmuch as the tendering party had no role in its production. Such reasoning effectively erodes the very essence of an Accused's procedural rights.

39. Second, with respect to the *Halilović* Decision, the Trial Panel noted that "Mr Halilović had already been charged […] and was being detained by the ICTY. Those circumstances are not present here. Furthermore, it is of note that the Appeals Chamber of the ICTY quashed the decision of the Trial Chamber to admit Mr Halilović's record of interview with the ICTY Prosecutor based on circumstances entirely foreign to the present case, namely: the existence of an inducement and promise of an 'agreement' with the Accused on the part of the Prosecutor and the ineffectiveness of counsel who had represented Mr Halilović during those interviews."[50] These findings are premised on an inapposite assessment of the factual circumstances underlying the *Halilović* Decision.

40. In support of the above findings, the Trial Panel cites to an Appeals Chamber decision quashing a completely different Trial Chamber decision issued on a different date than the *Halilović* Decision referenced by the Defence.[51] The referenced Trial Chamber decision quashed by the Appeals Chamber concerned a statement collected between 11 October 2001 and 12 December 2001, when indeed Mr. Halilović had been charged and was being detained by the ICTY, and

[50] Impugned Decision, para. 160.
[51] ICTY, *Prosecutor v. Halilović*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, quashing *Prosecutor v. Halilović*, IT-01-48-T, Decision on Admission into Evidence of Interview of the Accused, 20 June 2005, *contra Prosecutor v. Halilović*, IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005 (referred to as "*Halilović* Decision").

likewise the Decision in question did concern the existence of an inducement and the ineffectiveness of Mr. Halilović's counsel.[52] In contrast, the *Halilović* Decision referenced by the Defence concerned a completely different statement collected between 23 February and 6 May 1996, at a time when Mr. Halilović was neither charged nor detained, and where none of the above circumstances were mentioned.[53] Therefore, the Trial Panel's rejection of the *Halilović* ruling was premised on a confused reading of two distinct decisions.

41. Considering the foregoing, in addition to the scenario prohibiting the admission of compelled self-incriminating evidence; international jurisprudence, erroneously discarded by the Trial Panel, further prohibits the admission of witness statements offered by a now Accused where the requisite suspect rights and the relevant warnings were not provided.

C. The error complained of invalidates the Impugned Decision

42. In light of the above, the Trial Panel erred in law by failing to articulate the correct legal standard for situations in which the use against an individual of previous potentially self-incriminating testimony would violate that individual's fair trial rights. This failure has precipitated the admission of evidence that would have otherwise been excluded under the tests detailed above.

43. Concerning the use immunity scenario described in the first section, all the Selimi Witness Statements should have been excluded, as Mr. Selimi provided those statements pursuant to summons issued by the authorities concerned, wherein a failure to comply with such summons would have resulted in the imposition of sanctions pursuant to Article 132 of the Kosovo Code of Criminal Procedure and Rule 77 of the ICTY Rules of Procedure and Evidence, and the

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[52] *Prosecutor v. Halilović*, IT-01-48-T, Decision on Admission into Evidence of Interview of the Accused, 20 June 2005

[53] *Prosecutor v. Halilović*, IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005.

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very text of summons issued by these institutions contains such warnings.[54] His evidence was therefore compelled within the meaning of the ECtHR jurisprudence detailed above.

44. Concerning the absence of requisite suspect guarantees and warnings, the Selimi Witness Statements should have been excluded on grounds that in none of them was Mr. Selimi offered the complete requisite warnings provided for in Rule 44, as established above.[55]

45. As such, had the Trial Panel engaged in an analysis of the relevant authorities as outlined above, and constructed the appropriate legal standard accordingly, the Selimi Witness Statements should have been denied admission. It is only by virtue of the Trial Panel's creation of an arbitrary legal standard devoid of any jurisprudential support, and in defiance of all the relevant authorities on the matter, that the evidence in question was admitted. Therefore, intervention by the Appeals Panel is necessary in order to articulate the correct legal standard and apply it to the question of the admission of the Selimi Witness Statements.

IV. CONCLUSION AND RELIEF REQUESTED

46. Considering the foregoing, the Defence respectfully requests the Appeals Panel to GRANT the Appeal and REVERSE the Impugned Decision in relation to the admission of the Selimi Witness Statements.

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[54] SITF00328072-00328086, p. SITF00328075 (Annex 1), referring to Article 135 of the 2012 version of the Code, which corresponds to Article 132 of the version currently in force; ICTY, *Prosecutor v. Milutinović et al*, IT-05-87-T, Summons Pursuant to Rules 54 and 98, 25 June 2008 (Annex 2).
[55] Supra paras. 8-9.

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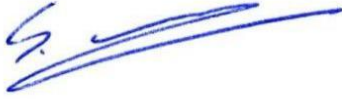
Respectfully submitted on 12 January 2024,



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