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| **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<br>Judge Emilio Gatti<br>Judge Nina Jørgensen |
| **Registrar:** | Dr Fidelma Donlon |
| **Filing Participant:** | Counsel for Rexhep Selimi |
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# Selimi Defence Reply to Consolidated Prosecution response to Krasniqi and Selimi Defence appeals of the 'Decision on Prosecution Motion for Admission of Accused's Statements'

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## I. INTRODUCTION

1. The Defence for Mr. Rexhep Selimi ("the Defence") hereby files its reply to the Consolidated Prosecution response to Krasniqi and Selimi Defence appeals of the 'Decision on Prosecution Motion for Admission of Accused's Statements'[1] ("the Response"). The Response merely restates the findings of the Trial Panel in the Impugned Decision[2] that the Defence Appeal[3] challenges while failing to address the Defence arguments to that effect; or otherwise misrepresents the substance of the Defence submissions and the jurisprudence it offers in support.

## II. SUBMISSIONS

2. At the outset of its Response, the SPO erroneously argues that the requirement to be informed of a suspect's rights attaches from the moment a person becomes subject to a "criminal charge".[4] On that basis, the SPO further states that the Trial Panel was correct to admit the statements complained of as they were produced upon Mr. Selimi being interviewed as a witness, and thereby not entitled to receiving the relevant notifications.[5] This flawed reasoning is employed throughout the remainder of the SPO's submissions.

3. Nevertheless, the Defence Appeal has not submitted that Mr. Selimi should have been accorded the relevant guarantees at the time the Selimi Witness Statements were collected. It instead argued that the *admission* of those statements against him in the present proceedings may occasion such violation. The SPO's continued reliance on the automaticity established by the Trial Panel between

[1] KSC-BC-2020-06/IA030/F00006, Consolidated Prosecution response to Krasniqi and Selimi Defence appeals of the 'Decision on Prosecution Motion for Admission of Accused's Statements', 25 January 2024.
[2] KSC-BC-2020-06/F01917, Decision on Prosecution Motion for Admission of Accused's Statements, 9 November 2023 ("Impugned Decision").
[3] KSC-BC-2020-06/IA030/F00005, Selimi Defence Appeal against Decision on Prosecution Motion for Admission of Accused's Statements, 12 January 2024 ("Appeal").
[4] Response, para. 2.
[5] *Id.*

whether an individual was entitled to those guarantees at collection stage and the propriety of admission in subsequent criminal proceedings demonstrates a failure to engage with the Defence arguments challenging this automaticity, and with the jurisprudence the SPO itself cites in support of its argument.[6]

4. The SPO further argues that, "even if, *arguendo,* any limited violation were to be found, admission of the Accused's witness statements is in the interests of justice and a fair trial because" of a number of randomly selected factors, for which the SPO has provided no legal foundation as to why they would be capable of displacing the rights of the Accused or the requirements for admission.[7] The SPO is therefore attempting to rewrite international criminal procedure by claiming that a range of "holistic observations" may render the rigours of Rule 138 inconsequential, while also suggesting that clear violations of the rights of the Accused can somehow still be conducive to his fair trial, provided they serve the Prosecution's end goal.

5. Furthermore, the SPO suggests that the Defence "failed to discharge its burden on appeal by making generalised submissions that are claimed to apply to all of Selimi's witness statements", exemplifying with Mr. Selimi's ICTY witness statement.[8] The Defence has identified the procedural particularities of the Selimi Witness Statements by reference to the authorities before which they were offered, and outlined the characteristics that they share.[9] The SPO has failed to substantiate that the Defence made any misrepresentation in the way it has outlined these particularities,[10] nor has it adduced any authorities or reasoning

[6] ECtHR, *Schmid-Laffer v. Switzerland,* Application no. 41269/08, Judgment, 16 June 2015, paras. 37-38, noting that statements made in the absence of the relevant guarantees must be treated with extreme caution, and that the use to which such statements are put may result in a violation of Article 6 of the ECHR.
[7] Response, para. 3.
[8] *Ibid,* para. 4.
[9] Appeal, paras. 8-9.
[10] In particular, at no point did the Defence suggest that Mr. Selimi did not avail himself of the presence of counsel during his ICTY evidence.

as to why the Defence would be required to address each individual statement as opposed to raising arguments that address all their relevant shared characteristics.

6. Additionally, the mere fact that Mr. Selimi was assisted by counsel does not automatically render the admission of those statements in compliance with the right to silence and the privilege against self-incrimination. The finding in *Ibrahim,* referenced by the SPO, suggests that it is "likely" that the presence of counsel during an interview will prevent an unfairness occasioned by the absence of notification of the individual's procedural rights.[11] However, the presence of counsel would have no bearing in a situation where that individual would not benefit from those procedural rights to begin with. That finding therefore relates to a situation where the individual actually benefits from those rights yet is not notified of them.

7. In contrast to the above, at the ICTY, there is no provision establishing a possibility for a witness to assert their right to silence or against self-incrimination during an interview with the ICTY OTP, as those protections only extend to that individual's in-court testimony pursuant to Rule 90(E). Therefore, the presence of counsel cannot obviate the unfairness stemming from the admission of that statement given that counsel could not have ensured that Mr. Selimi's procedural rights were respected - for he did not possess any such rights under the ICTY's legal framework. It is in these exact circumstances that, in *Saunders,* the ECtHR determined the existence of a violation of Article 6 precipitated by the admission of evidence given by an individual who was assisted by his legal representatives at the time he offered that evidence.[12]

[11] ECtHR, *Ibrahim and Others v. United Kingdom*, Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09, Judgment of 13 September 2016, para. 273.
[12] *Saunders v. United Kingdom*, Application no. 19187/91, Judgment of 17 December 1996, para. 25; Appeal, para. 15.

8. The SPO further argues that the Defence ignored the fact that Mr. Selimi was asked questions about his 2005 ICTY testimony during his SPO interview, confirmed a part thereof and otherwise did not object to, question or retract it.[13] However, the Trial Panel explicitly found that Mr. Selimi not making objections to that testimony did not constitute a retroactive waiver of his right to silence and against self-incrimination.[14] Neither the Trial Panel in the Impugned Decision, nor the SPO, have adduced any authority justifying that the admission of evidence where those rights have been vitiated can still be lawful without a valid waiver. The mere fact that a witness gave evidence voluntarily is not sufficient neither for the purposes of establishing such waiver, and nor for admission.[15]

9. Concerning compelled self-incriminating evidence, the SPO argues that the Trial Panel refused to certify the issue related to the extra-jurisdictional application of Rule 90(E), and therefore the arguments contained therein should be summarily dismissed.[16] However, the Fourth Issue put forward by the Defence dealt exclusively with the prejudice of that evidence outweighing its probative pursuant to Rule 138(1),[17] and the Trial Panel, in denying certification, likewise concerned itself exclusively with the question of prejudice.[18]

10. In contrast, the certified issue deals with whether the Impugned Evidence comports with Mr. Selimi's rights as an Accused. As the operation of ICTY Rule 90(E) in the present case inevitably impacts upon the rights of the Accused for it is a provision aimed at safeguarding the privilege against self-incrimination, the

[13] Response, para. 33.
[14] Impugned Decision, para. 161.
[15] 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. 20.
[16] Response, para. 34.
[17] KSC-BC-2020-06/F01966, Selimi Defence Request for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements, 27 November 2023, paras 1, 12-14.
[18] KSC-BC-2020-06/F02022, Decision on Defence Requests for Certification to Appeal the Decision on Prosecution Motion for Admission of Accused's Statements, 19 December 2023, para. 81.

consideration of its scope of application is integral to any assessment on the way the admission of that evidence comports with the rights in question. It is therefore inextricably linked to the certified issue, and the SPO has provided no basis for why the Defence should be prevented from relying on all authorities relevant to this issue in its submissions.

11. The SPO further argues that that the Trial Panel "correctly noted" that ICTY Rule 90(E) does not offer protection against any prosecutions other than those before the ICTY, and nor do the analogous rules from the KSC and ICC legal frameworks respectively.[19] In doing so, the SPO has merely repeated the Impugned Decision while concomitantly failing to engage with the Defence arguments. The Defence maintains that the protection against self-incrimination laid down in those provisions is a universal fair trial rights standard that transcends jurisdictional boundaries.[20] The authorities cited in the Impugned Decision are exclusively concerned with the legal difficulties associated with the extra-jurisdictional enforcement of that principle.[21] However, none of those authorities suggest that the protection afforded to an Accused would wane in the event of a forum change, for there is no reason why a fair trial rights violation may only be impermissible if occurring before one jurisdiction, but permissible in an extra-jurisdictional context. The violation still persists regardless, and finding otherwise would unduly relativize the fundamental rights of the Accused by making these rights contingent upon the number of authorities that decide to take an interest in his case.

12. The SPO further argues in that respect that the ECtHR jurisprudence adduced by the Defence is not dispositive as it concerns self-incriminating evidence used by "the same authority or government which had compelled it, including in

[19] Response, para. 35.
[20] Appeal, paras. 11-26.
[21] *Ibid,* paras. 21-26.

cases where the witness was or should have been treated as a suspect."[22] The Defence recalls its position *vis-à-vis* the immateriality of the number of authorities involved in the violation complained of.[23]

13. However, even if one was to employ that distinction, the SPO argues, by reference to the *Saunders* and *Kansal* ECtHR judgments, that UK trade inspectors and bankruptcy investigators on the one hand and UK crown prosecutors constitute the "same authority or government." Nevertheless, the Impugned Decision established the distinction of "different authorities" by reference to the extent to which one authority could influence the respect for the rights of the Accused by the other.[24] In that respect, the SPO had offered no plausible basis for the suggestion that crown prosecutors could influence the conduct of proceedings by trade inspectors or bankruptcy investigators so as to render them the same authority for the purposes of the Impugned Decision.

14. Additionally, the SPO argues that the use of self-incriminating evidence is not prohibited by international jurisprudence, as it is only "improperly compelled" evidence which is impermissible.[25] Notwithstanding that the SPO fails to provide any authorities as to what "improperly compelled" evidence constitutes, its arguments avoid engaging with the authorities establishing that self-incriminating evidence is inadmissible insofar as it is obtained pursuant to a threat of sanctions, irrespective of the conformity with international standards of the procedure by which that evidence was compelled.[26] The SPO therefore attempts to rewrite this jurisprudence by alluding to requirements that it fails to

[22] Response, para. 35.
[23] Appeal, paras. 11-26, *supra* para. 11.
[24] Impugned Decision, para. 160.
[25] Response, para. 36.
[26] Appeal, para. 16.

define and which are expressly rejected by the application of the relevant standards by the courts concerned in the cited case-law.[27]

15. Finally, on the issue of suspect guarantees, the SPO argues that the ICTY and ECtHR cases cited in the Appeal fail to support the claim that suspect rights should apply retroactively when a witness becomes an accused because they are irrelevant and/or distinguishable.[28] This is yet another mere recitation of the Trial Panel's finding that the Appeal challenges,[29] and the SPO likewise fails to engage with the Defence counter-arguments as to the applicability of that jurisprudence.

## III. CONCLUSION

16. Considering the foregoing, the Defence respectfully requests the Appeal Panel to REJECT the SPO's arguments and GRANT the Appeal.

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Respectfully submitted on 2 February 2024,

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[27] ECtHR, *Saunders v. United Kingdom*, Application no. 19187/91, Judgment of 17 December 1996, para. 67.
[28] Response, para. 40.
[29] Appeal, paras. 34-41.

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