Case No.:	**KSC-BC-2020-04**
Before:	**Trial Panel I**
	Judge Mappie Veldt-Foglia, Presiding Judge
	Judge Roland Dekkers
	Judge Gilbert Bitti
	Judge Vladimir Mikula, Reserve Judge
Registrar:	Dr Fidelma Donlon
Date:	13 December 2022
Filing Party:	Specialist Defence Counsel
Original Language:	English
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THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala

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I. INTRODUCTION

1. Pursuant to Article 45(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") and Rule 77 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), the Defence of Mr Pjetër Shala ("Defence" and "Accused", respectively) hereby files this Request for Certification to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala.[1]

2. In the Impugned Decision, the Trial Panel rejected the Defence Motion in which the Defence requested the exclusion, by virtue of being obtained in violation of the Accused's fundamental rights as a suspect, of: (a) the statements given by the Accused during his interview conducted by the Belgian Federal Judicial Police on 14 January 2016 and his interview conducted by the Specialist Prosecutor's Office ("SPO") and the Belgian Federal Judicial Police on 11 and 12 February 2019; (b) the audio-video recordings of the said interviews; and (c) the portions of the related SPO Official Notes that refer to the interview dated 11 and 12 February 2019. The Trial Panel also granted in part the Prosecution Motion, by which the Prosecution sought the admission into evidence of the transcripts of the 2005 and 2007 interviews conducted by the

[1] KSC-BC-2020-04, F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022 (confidential)("Impugned Decision"). The original version of the Decision (F00364) was filed on 6 December 2022. *See also* KSC-BC-2020-04, F00281, Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel, 20 September 2022 (confidential)("Defence Motion"); KSC-BC-2020-04, F00288, Prosecution response to Defence Motion to exclude evidence form the case file, 30 September 2022 (confidential); KSC-BC-2020-04, F00299, Defence Reply to Prosecution Response to Defence Motion to Exclude Evidence From the Case File, 7 October 2022 (confidential); KSC-BC-2020-04, F00334, Prosecution Motion for Admission of Accused's Statements, 1 November 2022 (confidential)("Prosecution Motion"); KSC-BC-2020-04, F00358, Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022 (confidential)("Response to Prosecution Motion"); KSC-BC-2020-04, F00362, Prosecution Reply to Defence Response to Motion for Admission of the Statements of the Accused, 29 November 2022 (confidential). The Defence notes that the present Request is filed confidentially as the Impugned Decision and related filings were filed as confidential.

Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), as well as the interview records related to the 2016 and 2019 interviews in Belgium.[2] The Panel admitted into evidence the ICTY records and found the records related to the 2016 and 2019 interviews admissible.[3]

3. In so doing, the Trial Panel committed a number of errors in violation of the rights of the Accused under Article 6 of the European Convention on Human Rights ("ECHR") that warrant appellate consideration.

4. The Defence proposes the following issues for certification:

(i) *Whether the Panel erred in law by failing to acknowledge that the guarantees of Article 6 of the ECHR become applicable once a person is suspected of having committed an offence and not when such person is charged with an offence;*

(ii) *Whether the Panel erred in law by interpreting Rule 138(2) of the Rules inconsistently with the ECHR by requiring the existence of a "causal link" between the violation of a suspect's rights and the gathering of evidence;*

(iii) *Whether the Panel erred in fact and in law by considering that the Accused was sufficiently informed of the nature and cause of the suspicions against him as well as of his rights as a suspect prior to each interview;*

(iv) *Whether the Panel erred in fact and in law by considering that the Accused's rights as a suspect were not violated in the context of*

[2] Impugned Decision, paras. 52, 80, 110.
[3] Impugned Decision, para. 114.

each interview and by finding the records related to each interview admissible;

(v) *Whether the Panel erred in law and in fact by considering that the KSC legal framework is inapplicable with respect to each interview;*

(vi) *Whether the Panel erred in fact and in law by considering that the Accused had provided a well-informed and unequivocal waiver of his rights as a suspect with regard to each interview;*

(vii) *Whether the Panel erred in law in imposing the burden to show voluntariness or absence of oppressive conduct on the Defence;*

(viii) *Whether the Panel erred in law in applying an objective test as to whether the Accused was sufficiently notified of his rights as a suspect prior to each interview;*

(ix) *Whether the Panel erred in failing to consider or by applying an objective test in evaluating whether the Accused could have foreseen the consequences of his conduct with respect to each interview; and*

(x) *Whether the Panel erred by not examining the Defence Exclusion Motion and failing to give a sufficiently reasoned decision dismissing it.*

II. APPLICABLE LAW

5. Article 45(2) of the KSC Law and Rule 77 of the Rules provide the legal test for leave to interlocutory appeal through certification. The party seeking certification must demonstrate the existence of an issue which: (i) significantly

affects the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial; and (ii) the immediate resolution of which by a Court of Appeals Panel may materially advance the proceedings.

6. For an "issue" to be appealable, it must relate to a discrete matter that emanates from the Impugned Decision and does not amount to abstract questions or hypothetical concerns, or a mere disagreement with the decision.[4]

III. SUBMISSIONS

A. The issues are appealable

7. The Defence submits that the issues are precise, specific, and arise directly from the Impugned Decision.

8. All issues concern the Accused's fundamental rights, and in order to give full effect to his right to a fair trial and afford him an effective remedy that can ensure that these proceedings are conducted in a fair manner, certification to appeal the following issues must be granted.

> i. *Whether the Panel erred in law by failing to acknowledge that the guarantees of Article 6 of the Convention become applicable once a person is suspected of having committed an offence and not when such person is charged with an offence*

9. At paragraph 24 of the Impugned Decision, the Panel "recalls that, in accordance with international human rights law, a person 'charged with an offence', such as a suspect questioned about his involvement in acts constituting a criminal offence, can claim the protection of Article 6 of the

[4] KSC-BC-2020-06, F00172, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2011, para. 11.

[ECHR]". At paragraph 26 of the Impugned Decision, the Panel stated that "[t]he suspect should further be granted access to legal assistance from the moment there is a 'criminal charge' against him or her pursuant to Article 6(3)(c) of the European Convention".

10. The Panel erroneously found that the safeguards provided for in Article 6 of the ECHR, including the right to legal representation, only apply as of "the moment there is a 'criminal charge'".[5] The Grand Chamber of the ECtHR, including in the cases of *Ibrahim and Others v. the United Kingdom* and *Beuze v. Belgium*—has repeatedly held that "Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police".[6] For the guarantees of Article 6 to be effective, they need to apply in the context of any important interaction of a suspect with the authorities and particularly with regard to first interviews. This is well-established case law and the Panel's position given its importance and impact on the overall fairness of these proceedings warrants appellate consideration. This is because the Panel's position as to the moment that Article 6 becomes applicable renders the guarantees of Article 6 as to the rights of a suspect ineffective.

11. With all due respect, the Defence submits that the Panel's erroneous understanding of the applicable law has led it to commit errors in applying it and assessing the circumstances presented in the relevant motions and considering whether the Accused's rights as a suspect have been violated. These errors are developed in the arguments supporting the request for certification of the appealable issues that follow.

[5] Impugned Decision, para. 26. *See also* Impugned Decision, para. 24.
[6] ECtHR, *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008, para. 55. *See also Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, paras. 256, 258; *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018, para. 137.

ii. Whether the Panel erred in law by interpreting Rule 138(2) of the Rules inconsistently with the ECHR by requiring the existence of a "causal link" between the violation of a suspect's rights and the gathering of evidence

12. The Panel erred in requiring a "causal link" between the violation of the Accused's rights and the gathering of the impugned evidence as well as in its assessment that there was no causal link in the particular circumstances of the 2016 interview.[7]

13. The Impugned Decision interpreted Rule 138(2) of the Rules so as to require "a causal link between the violation and the gathering of evidence".[8] This requirement finds no support in international human rights law and is inconsistent with the ECHR and the jurisprudence of the European Court of Human Rights ("ECtHR") which does not provide for such a requirement of a "causal link".[9] In fact, the ECtHR has (i) consistently upheld that the rights of the Accused "will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction"; and (ii) requires "compelling reasons" to justify a restriction to the right of access to a lawyer.[10]

[7] Impugned Decision, paras. 20, 78.
[8] Impugned Decision, paras. 20, 78.
[9] ECtHR, *Salduz v. Turkey* [GC], para. 55; ECtHR, *Panovits v. Cyprus*, no. 4268/04, 11 December 2008, paras. 66, 73, 75, 77, 84, 85; *Çimen v. Turkey*, no. 19582/02, 3 February 2009, paras. 26-28; *Amutgan v. Turkey*, no. 5138/04, 3 February 2009, paras. 18-20; *Aslan and Demir v. Turkey*, nos. 39840/02 and 5197/03, 17 February 2009, paras. 9-11; *Aleksandr Zaichenko v. Russia*, no. 39660/02, 18 February 2010, para. 37; *Shabelnik v. Ukraine*, no. 16404/03, 19 February 2009, para. 52; *Merahi v. France*, no. 38288/15, 20 September 2022, paras. 76, 77, 88-90. *See also Imbrioscia v. Switzerland*, no. 13972/88, 24 November 1993, para. 36; ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, paras. 50, 51.
[10] ECtHR, *Salduz v. Turkey* [GC], para. 55; *Çimen v. Turkey*, para. 27; *Ibrahim and Others v. The United Kingdom* [GC], paras. 256-258; *Beuze v. Belgium* [GC], paras. 142, 161.

14. The Panel's reasoning provided in support of the finding that "the product of the 2016 Belgian Interview records was [not] obtained 'by means' of a violation of his right of access to a lawyer within the meaning of the chapeau of Rule 138(2) of the Rules" is solely based on the Accused's subsequent statements in 2019.[11] However, the subsequent statements by the Accused during the 2019 interview (which were also obtained when he did not have the benefit of legal representation either prior to or during the said interview) have no bearing on the issue of whether his rights as a suspect were respected in the context of the 2016 interview.[12] Therefore, both the imposition of a "requirement" as to a "causal link" as well as the manner in which the test was applied merit appellate consideration as to their compliance with Article 6 of the ECHR and the right to a fair trial.

iii. Whether the Panel erred in fact and in law by considering that the Accused was sufficiently informed of the nature and cause of the suspicions against him as well as of his rights as a suspect prior to each interview

(a) The ICTY interviews

15. At paragraph 32 of the Impugned Decision, the Panel found that the notification given at the start of the 2005 ICTY Interview that "he might be a suspect who was responsible for committing acts which may be chargeable under the statute of the ICTY" "was sufficient at that time to inform the Accused in general terms of the nature and cause of the suspicions or allegations against him, as a suspect". At paragraph 38 of the Impugned Decision, the Panel found that the Accused was fully informed of his right as a suspect in the context of the 2005 ICTY Interview. At paragraph 39, the Panel

[11] Impugned Decision, para. 78.
[12] Impugned Decision, paras. 78, 79.

found that, for the purposes of the 2005 interview, his rights as a suspect were respected.

16. At paragraph 42, the Panel acknowledged that the invitation sent to the Accused to attend the 2007 ICTY Interview merely indicated that "he was suspect of war crimes". In the same paragraph, the Panel acknowledged that it was only "during the interview" that he was informed that he was being suspected of "transferring an individual into custody where he was subsequently killed". Nonetheless, because he was informed that he was considered " a suspect" , "that his statements could be used against him, and that he would have, in the course of the interview, the opportunity to comment on them" as well as the fact that he was previously informed "of the nature and cause of the suspicions or allegations against him" at the previous ICTY interview that he was sufficiently informed of the "nature and cause of the suspicions or allegations against him".

17. At paragraph 49, the Panel found that the Accused was fully informed of his rights as a suspect in the context of the 2007 ICTY Interview. At paragraph 50, the Panel found that his rights as a suspect for the purposes of that interview were complied with.

18. There is a fundamental problem in the test applied by the Trial Panel as to whether the Accused was sufficiently informed of the suspicions and/or allegations against him. The rights of a suspect require that a suspect be given sufficient notification of the time, location, and specific conduct he is suspected of engaging in. Such notification needs to be given prior to the interview in question and not during such interview. Merely notifying a suspect that he is suspected of "war crimes" or "acts which may be chargeable under the ICTY Statute" clearly fails to meet that test. The fact that the Panel relied on the first insufficient notification for finding that subsequent notifications complied with

the Accused's rights as a suspect aggravates the error. In these circumstances, the test that should apply in assessing whether an accused has been sufficiently informed of the nature and cause of the suspicions or allegations that are being investigated merits appellate intervention.

The Belgium interviews

19. With respect, the Defence submits that the Panel erred in finding that the Accused was sufficiently informed of his rights and the nature and cause of the suspicions against him prior to the 2016 interview.[13] In addition, the notification of the investigators' suspicions against him were far from being clear and sufficient and the Accused was not informed that he had the right to legal advice and representation free of charge during such interview or prior to such interview.[14] In addition, the Panel erred by failing to acknowledge that the Accused had been informed of his rights only after the questioning had already begun during the 2016 interview.[15] The Panel failed to consider whether the Accused had been sufficiently informed of his right to be assisted by a lawyer free of charge during the interview.[16] When considering whether the Accused had waived his right to legal assistance during the said interview, the Panel failed to acknowledge that the Accused was not even informed of this right. [17]

20. The Panel also erred by limiting its assessment of the Defence submissions on this matter (and misconstruing such submissions) to the fact that the Belgian law "only provided for the right to consult confidentially with a lawyer prior

[13] Impugned Decision, para. 73.
[14] Impugned Decision, para. 77.
[15] Impugned Decision, paras. 70, 73, 77.
[16] Impugned Decision, para. 70.
[17] Impugned Decision, para. 70 (which restricted its examination to whether he was informed of "his right to consult confidentially with a lawyer" and not whether he was informed of his right to be assisted by a lawyer during the said interview).

to an interview with the police"[18] and failed to consider the Defence submissions that there was an obligation going over and above Belgian law which required a suspect to be sufficiently informed of his right to free legal representation during a police interview.[19] The Panel found that "overall the Accused was not barred from access to a lawyer"[20] without offering a reasoned justification for this position and without applying well-established case law that requires that the investigating authorities are under a clear and *positive* obligation to inform a suspect of his rights.[21] Instead of examining whether the investigating authorities complied with such obligation, the Panel found that the fact that they did not "bar access to a lawyer" was sufficient.[22] This is in breach of the standards of international human rights law. The fact remains that, even though the Accused was informed of his right to consult with a lawyer prior to the interview, he was never informed of his right to have a lawyer present with him during the said interview. The fact that in the course of the 2016 interview, he was informed of his right to a lawyer evidently fails to respect his rights in a real and effective way as that interview had already commenced in the absence of a lawyer. The Accused did not know he was entitled to a lawyer; he was not told that the interview could be interrupted and only continue in the presence of a lawyer, he was never informed of his right to legal representation during the interview and free of charge. His rights as a suspect were violated.

21. The Panel erred in finding that the Accused was sufficiently informed of the reasons why he was being interviewed as well as of his rights as a suspect prior

[18] Impugned Decision, para. 77.
[19] *See, for instance,* Response to Prosecution Motion, paras. 12, 20, 22, 29, 31, 56, 66, 84.
[20] Impugned Decision, para. 77.
[21] *See, for instance,* ECtHR, *Panovits v. Cyprus*, no. 4268/04, 11 December 2008, paras. 66, 73, 75, 77, 84, 85.
[22] Impugned Decision, para. 77.

to and during the 2019 Belgian Interview when he was notified of his rights in the form of "the usual blah blah" by the officer obliged to inform him of his rights prior to the commencement of the interview and given the explicit evidence demonstrating his confusion as to the fact that he was entitled to a lawyer free of charge.[23]

22. Although the Panel did not apply Belgian law,[24] the conduct of the Belgian authorities was in violation of the applicable Belgian law and safeguards afforded to suspects at the time.[25] As stressed in the guidelines, vague descriptions (e.g., "theft", "burglary") would not suffice for the purposes of the law. The same requirement applies to the information set out in a summons.

iv. Whether the Panel erred in fact and in law by considering that the Accused's rights as a suspect were not violated in the context of each interview and by finding the records related to each interview admissible

The ICTY interviews

[23] Impugned Decision, paras. 101, 104.
[24] Impugned Decision, para. 68 (« the Panel will thus look at Belgian law only to the extent necessary to examine whether the 2016 Belgian Interview was conducted in compliance with standards of international human rights law »).
[25] CIRCULAIRE N° 8/2011 DU COLLEGE DES PROCUREURS GENERAUX PRES LES COURS D'APPEL, 23 September 2011 issued by the President du College des Procureurs Generaux, II. A. 4. ("*Droit à une information succincte concernant les faits sur lesquels la personne sera entendue*"). The Guidelines are available at https://www.ommp.be/fr/savoir-plus/circulaires . Specifically, as stated in the Guidelines issued by the Belgian *Collège des procureurs généraux* (Head of General Prosecutors) for the interpretation of Article 47*bis*, Chapter IV, Book 9 of the Code of Criminal Procedure, which were binding on all prosecuting and police authorities in Belgium at the time of both interviews conducted in Belgium, the right of a suspect to be informed of the nature and cause of the suspicions or allegations against him or her requires that he or she be provided with a brief description ("*information succincte*") of the facts on which a person will be questioned in a manner that allows him or her to know on which matters he or she will be questioned specifying at least certain circumstances (e.g., timing, location, basic events).

23. At paragraph 52 of the Impugned Decision, the Trial Panel admitted the ICTY interviews into evidence, finding that their probative value is not outweighed by their prejudicial effect, despite the breach of the Accused's rights as a suspect.

24. The Defence respectfully submits that the Panel erred in its finding on the lack of compulsion both in terms of the legal test employed as well as in its assessment of the relevant circumstances and the complaint of a violation of the Accused's rights as a suspect with regard to each interview.[26] This is particularly the case in light of the fact that the Accused was interviewed without being given an effective opportunity to consult with a lawyer prior to each interview or during each interview, as well as the evident inequality existing when the Accused was being questioned with regard to his alleged participation in war crimes by a team of experienced investigators and prosecutors without being assisted by a lawyer.

The Belgium interviews

25. At paragraph 80, the Panel found that the Accused's rights as a suspect had been sufficiently respected for the purposes of the 2016 interview and that the said interview and related records are admissible.

26. At paragraphs 109 and 110, the Panel found that the Accused was able to exercise his rights as a suspect at the time of his 2019 interview in a practical and effective manner and that, therefore, the 2019 interview is admissible.

27. Similarly to the arguments set out above concerning the ICTY interviews, the Defence respectfully submits that the Panel erred in its finding on the lack of compulsion both in terms of the legal test employed as well as in its assessment

[26] Impugned Decision, paras. 22, 24, 30, 32, 36, 43, 49.

of the relevant circumstances and the complaint of a violation of the Accused's rights as a suspect with regard to each interview.[27] This is particularly the case in light of the fact that the Accused was interviewed without being given an effective opportunity to consult with a lawyer prior to each interview or during such interview, as well as the evident inequality existing when the Accused was being questioned with regard to his alleged participation in war crimes by a team of experienced investigators and prosecutors without being assisted by a lawyer.

v. Whether the Panel erred in law and in fact by considering that the KSC framework is inapplicable with respect to the interviews

28. At paragraph 23 of the Impugned Decision, the Trial Panel found that "the Material had not been obtained under the Law and the Rules" because "the interviews at issue were conducted either by investigators of the ICTY under the Statute and Rules of Procedure and Evidence of the ICTY, or the Belgian Federal Judicial Police under domestic law, and not by the SPO". On this basis, the Panel found that the Material had not been obtained under the [KSC] Law and the Rules and assessed "whether each interview record was obtained by means of a violation of the *standards of international human rights law*", finding as such the KSC legal framework inapplicable.

29. The Defence respectfully submits that the Panel erred in law and in fact by considering that the KSC framework is inapplicable with respect to all four interviews. This is particularly the case with regard to the 2019 interview since the Panel acknowledged that the Accused was interviewed "at the request of the KSC"[28] and that the SPO officer who was present took an active role in

[27] Impugned Decision, paras. 22, 24, 30, 32, 36, 43, 49.
[28] Impugned Decision, para. 88.

questioning the Accused. The SPO's substantive participation should have been considered when assessing the applicability of the KSC legal framework.[29] Otherwise, the guarantees set out in the KSC Law and Rules are deprived of their meaning.

30. The Defence also submits that, even if it is considered that the Panel's finding that the KSC legal framework was not applicable (which the Defence does not accept), the Panel was required to interpret the framework it applied consistently with the KSC framework and its guarantees of the rights of suspects and cannot apply lesser standards. This issue merits appellate consideration.

vi. Whether the Panel erred in fact and in law by considering that the Accused had provided a well-informed and unequivocal waiver of his rights as a suspect with regard to each interview

31. The Trial Panel erred in failing to consider whether the Accused had provided a well-informed and unequivocal waiver of his rights as suspect given the shortcomings in the notification of the rights prior to the four interviews.

32. The Panel reversed the burden of proof, which rests with the Prosecution, to demonstrate the voluntary character of the Accused's alleged waiver of his right of access a lawyer and the absence of oppressive conduct in obtaining statements from the Accused.[30]

33. The Panel erred by engaging in circular reasoning in finding that the Accused had waived his rights as a suspect with regard to each interview. For the purposes of the 2016 interview, the Panel based its finding that the Accused

[29] Impugned Decision, para. 85. *See also,* Defence Motion, para. 15; Response to Prosecution Motion, para. 41.
[30] *See, for instance,* Impugned Decision, para. 75.

had waived his rights on the fact that he had made what was described as "similar" statements in the 2019 interview.[31] The Panel then based its finding of a waiver with regard to the 2019 interview on the fact that "by that stage, the Accused had given interviews as a suspect before the ICTY and in 2016 before the Belgian Federal Judicial Police".[32] The Panel's circular reasoning which relied on the fact that the Accused had previously or subsequently participated in other interviews has no bearing on whether the Accused had provided an unequivocal waiver, either express or tacit, of his rights as suspect for the purposes of each interview.

34. At paragraph 72 of the Impugned Decision, the Trial Panel misconstrued the Defence submissions with respect to the applicable standards as to the validity of a waiver. The Defence had explicitly noted that "[n]o waiver from the Accused, either explicit or *implicit*, that unequivocally indicates that he waived his rights as a suspect exists for any of the four interviews".[33] The Defence had argued that, under the KSC legal framework, a waiver must be in writing.[34] Specifically, Rule 43(3) of the Rules ensures that "[a] waiver and the circumstances in which it was given shall be recorded in writing by the Specialist Prosecutor and shall be signed by the suspect." The Accused provided no unequivocal waiver of his rights in any explicit or implicit form for any of the four interviews.

vii. Whether the Panel erred in law in imposing the burden to show voluntariness or absence of oppressive conduct on the Defence

35. At paragraph 22 of the Impugned Decision, the Panel noted that it "is of the view that the Party bringing the motion under Rule 138(2) of the Rules bears

[31] Impugned Decision, para. 78.
[32] Impugned Decision, para. 107.
[33] Response to Prosecution Motion, para. 51 (emphasis added).
[34] *See* Rule 43(3) of the Rules; Defence Motion, paras. 24, 25.

the burden to show that the criteria for the exclusion have been met". The Defence motion for exclusion was not introduced under Rule 138(2) of the Rules. However, the fact that the Panel referred to this reversal of the applicable burden of proof in the section of the Impugned Decision setting out the Applicable Law shows that the Panel applied this rule *mutatis mutandis* in its examination of the present circumstances. The Panel's approach is confirmed by its findings in which it required the Defence to show pressure or compulsion during the interviews.[35] The Panel's decision is inconsistent with the right to a fair trial that is guaranteed by Article 31 of the Kosovo Constitution, Article 21 of the KSC Law, and Article 6 of the ECHR. Well-established case law of international criminal tribunals requires that the burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the prosecution.[36] Whether the Panel correctly set out and applied the law on this point merits appellate consideration.

viii. Whether the Panel erred in law in applying an objective test as to whether the Accused was sufficiently notified of his rights prior to each interview

36. At paragraphs 70, 73 to 74, 77, 95 to 97, 100 to 104 of the Impugned Decision, the Panel assessed whether the Accused was sufficiently notified of his rights prior to the interviews with the Belgian authorities. However, the Panel erred in applying an objective test as to whether the Accused was sufficiently notified of his rights.[37] The Panel's finding is based on the notification provided in written form within the summons and "statement of rights". The Panel considered that the Accused's statements, made in the course of the 2019

[35] Impugned Decision, paras. 75, 106.
[36] See, for instance, ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 42.
[37] Impugned Decision, para. 101.

interview which demonstrate his confusion, did not cast doubt as to whether he actually understood his rights.[38] It found that he was sufficiently informed because he was notified in written form in the documents sent to him together with the summons and without taking his statements given during the said interview at face value, which actually indicated that he had entirely failed to appreciate that he was entitled to be assisted by a lawyer free of charge. To ensure that the right of an accused to legal assistance is guaranteed in an effective manner and not merely theoretically, the assessment of whether an accused is sufficiently informed of his rights needs to apply a subjective test that takes into consideration the circumstances of the specific accused in question, his education level and background, his ability to comprehend complex legal notions, his rights, as well as any relevant explicit statements. The application of a subjective test is reinforced by the KSC legal framework. Rule 43(3) of the Rules provides that "[w]hen providing such information, the Specialist Prosecutor shall take into account the personal circumstances of the suspect, including his or her age, mental and physical condition." Had the Panel applied the correct test, it would have attributed more weight to the Accused's statements indicating his utter confusion about his situation and rights in question. The applicable test is a matter that warrants consideration by a Panel of the Court of Appeals.

ix. Whether the Panel erred in failing to consider or by applying an objective test in evaluating whether the Accused could have foreseen the consequences of his conduct with respect to each interview

37. With regard to the 2005 ICTY interview, the Panel failed to consider whether the Accused could have foreseen the consequences of his conduct for the

[38] Impugned Decision, para. 104.

purposes of assessing whether he had provided a well-informed and unequivocal waiver of his rights as a suspect.[39]

38. At paragraph 48 of the Impugned Decision, the Panel noted "that the Accused was informed of the potential consequences of giving this interview, namely, that his statements would be recorded and could be used as evidence against him" and on this basis it concluded that "the Accused could reasonably have foreseen what the consequences of his conduct would be."

39. At paragraph 74 of the Impugned Decision, the Panel considered that "the Accused was plainly informed of the potential consequences of giving the interview, namely, that his statements could be used as evidence in proceedings against him" and on this basis concluded "that the Accused could reasonably have foreseen what the consequences of his conduct would be".

40. At paragraph 105 of the Impugned Decision, the Panel assessed whether the Accused was sufficiently informed of the potential consequences of giving the 2019 interview in the absence of a lawyer and concluded that he was so informed because of the notification he received with the summons and statement of rights. On the basis of the information provided "through the summons and statement of rights", the Panel found that "therefore" the Accused "could reasonably have foreseen what the consequences of his conduct would be".

41. With respect, the Defence notes that the Panel failed to consider altogether whether the Accused had any understanding of the nature and type of charges that could be brought against him and the applicable sentence he could face in the event of a conviction.

[39] Impugned Decision, paras. 32-38.

42. In its assessment whether the Accused could foresee the consequences of his participation in interviews without legal advice, the Panel erred by applying an objective test that did not take into consideration the circumstances of the Accused who had acted without being assisted by a lawyer at any point. As stated above, the application of a subjective test is required both generally by the guarantee of a fair trial as well as by Rule 43(3) of the Rules that provides that "[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. When providing such information, the Specialist Prosecutor shall take into account the personal circumstances of the suspect, including his or her age, mental and physical condition."

43. In addition, the Panel's finding related to the 2019 interview was based on the assumption that the Accused was "sufficiently" informed of his rights "through the summons and statement of rights", without taking into consideration that neither the Belgian officer nor the SPO representative explained his rights to him before the interview had commenced, and without any consideration of the Accused's education and background, state of mind, and generally his ability to comprehend and assess the seriousness of the situation he faced.

x. Whether the Panel erred by not examining the Defence Exclusion Motion and failing to give a sufficiently reasoned decision dismissing it

44. The Panel erred in dismissing the Defence Motion without considering the Defence submissions therein or providing sufficient reasoning in support of its decision.[40]

[40] Impugned Decision, paras. 18, 114(a).

B. The issues significantly affect the fair conduct of the proceedings as well as the outcome of the trial

45. The issues identified in paragraph 4 of this Request go to the core of the fundamental rights of a fair trial protected by Article 21 of the KSC Law, Article 31 of the Kosovo Constitution, and Article 6 of the ECHR. If the Defence is correct, the trial will proceed in breach of the guarantees provided for by the Kosovo domestic law, the KSC legal framework, and the ECHR. In light of the inherent prejudicial nature of the impugned material, the prejudice suffered will be irreparable.

46. In light of the above, the Impugned Decision constitutes an unlawful interference with the Accused's right to a fair trial guaranteed by Article 21 of the KSC Law, Article 31 of the Kosovo Constitution, and Article 6 of the ECHR. The appealable issues directly impact on the fairness of the proceedings and the outcome of the trial.

C. An immediate resolution by the Appeals Panel will materially advance the proceedings

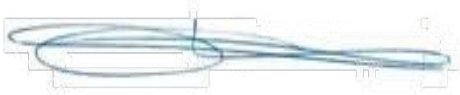
47. A prompt determination by the Appeals Panel would provide certainty on whether the proceedings are continuing in compliance with the fundamental guarantees of fairness. Appellate intervention at the present stage will ensure that the proceedings can proceed in a narrow and effective way that respects the rights of the Accused. If the Defence is right, the consequences of proceeding without determination of these issues on appeal would be irremediable.

IV. CONCLUSION

48. For these reasons, the Defence respectfully requests the Panel to grant the Request and certify the issues proposed in paragraph 4.

Word count: 6125

Respectfully submitted,



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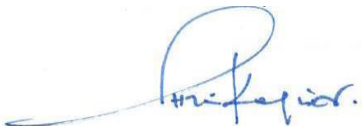

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Tuesday, 13 December 2022

The Hague, the Netherlands