



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-04
Specialist Prosecutor v. Pjetër Shala

Before: Trial Panel I
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti
Judge Vladimir Mikula, Reserve

Registrar: Dr Fidelma Donlon

Filing Party: Specialist Prosecutor

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Public redacted version of

**'Prosecution motion for admission of Accused's statements with confidential
Annex 1', dated 1 November 2022**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. Following the Order,¹ and pursuant to Article 37 of the Law² and Rules 137 and 138 of the Rules,³ the Specialist Prosecutor's Office ('SPO') requests the Panel to admit into evidence the records of the Accused's 2005 ICTY Interview, 2007 ICTY Interview, 2016 Belgian Interview, and 2019 Belgian Interview,⁴ together with associated exhibits and related procedural information (collectively, 'Interview Records').⁵ The Interview Records are relevant, authentic, reliable, and have probative value, which is not outweighed by any prejudice.

2. Before each of the Interviews, the Accused was informed: (i) of his suspect status, including a brief statement of the relevant facts and law; (ii) of the rights to remain silent and against self-incrimination, and that any statement he made would be recorded and could be used in evidence; (iii) of the right to be assisted by counsel of his choosing and, if he was unable to afford counsel, to have counsel provided free of charge; and (iv) of the right to free assistance of an interpreter if he could not understand or speak the language used for questioning. The Accused knowingly and intelligently waived his rights to remain silent and to be assisted by counsel and had access to the free assistance of an interpreter throughout the Interviews. Accordingly,

¹ Order to the SPO to file observations by 1 November 2022, 20 October 2022, page 495 of the trial transcript. *See also* Decision on Specialist Prosecutor's request for extension of word limit, KSC-BC-2020-04/F00330, 28 October 2022, Confidential.

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' are to the Law, unless otherwise specified.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ The term '2005 ICTY Interview' refers to the interview conducted by the Office of the Prosecutor ('OTP') of the International Criminal Tribunal for the former Yugoslavia ('ICTY') on 22 January 2005. The term '2007 ICTY Interview' refers to the interview conducted by the ICTY OTP on 21-22 May 2007. The term '2016 Belgian Interview' refers to the interview conducted by the Belgian authorities on 14 January 2016. The term '2019 Belgian Interview' refers to the interview conducted by the Belgian authorities, with participation of SPO representatives, on 11-12 February 2019. The 2005 ICTY Interview, 2007 ICTY Interview, 2016 Belgian Interview, and 2019 Belgian Interview are collectively referred to herein as the 'Interviews'.

⁵ The complete Interview Records, which the SPO seeks to admit, are identified in Annex 1.

contrary to the selective and inaccurate submissions in the Defence Motion,⁶ there are no grounds for doubting the fairness of the proceedings,⁷ which complied with international human rights standards.

II. THE INTERVIEWS

3. The facts relating to the background and contents of the Interviews are set out below. The Interviews are interconnected. During the 2019 Belgian Interview, the Accused confirmed that he gave, *inter alia*, the 2005 ICTY Interview, 2007 ICTY Interview, and 2016 Belgian Interview.⁸ These Interviews were referenced and used during the 2019 Belgian Interview⁹ and, in discussions concerning his rights, the Accused referred to the rights he had before the ICTY.¹⁰

A. 2005 ICTY INTERVIEW

4. On 22 January 2005, the ICTY OTP interviewed the Accused. He was informed that he was a suspect,¹¹ of the nature and cause of the charges against him,¹² and of his rights to:

- a. the assistance of an interpreter free of charge;¹³
- b. remain silent and that anything he did say would be recorded and could be used against him;¹⁴ and

⁶ Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel, KSC-BC-2020-04/F00281, 20 September 2022, Confidential ('Defence Motion'). This filing addresses the submissions made in the Defence Motion. However, as previously submitted, the relief requested in the Defence Motion is not available in the framework of the Kosovo Specialist Chambers ('KSC') and should be denied. *See* Prosecution Response to Defence motion to exclude evidence from the case file, KSC-BC-2020-04/F00288, 30 September 2022, Confidential.

⁷ *See, similarly*, ECtHR, *Šarkiene v. Lithuania*, 51760/10, Decision, 27 June 2017, paras 35-38; ECtHR, *Sklyar v. Russia*, 45498/11, Judgment, 18 July 2017, paras 22-26.

⁸ 066864-TR-ET Part 1 Revised, pp.5-9.

⁹ *See e.g.* 066843-066855-ET Revised, p.066846.

¹⁰ *See e.g.* 066888-TR-ET Part 1 Revised, p.95.

¹¹ T000-2742-T000-2742-Albanian and English Transcript, p.2.

¹² T000-2742-T000-2742-Albanian and English Transcript, pp.4-5.

¹³ T000-2742-T000-2742-Albanian and English Transcript, pp.2-4 (explaining also how the interpretation would work).

¹⁴ T000-2742-T000-2742-Albanian and English Transcript, pp.5-6.

c. a lawyer of his choice and if he could not afford legal representation, a court-appointed lawyer at no cost.¹⁵

5. The Accused confirmed his understanding of each of these rights and expressly declined legal representation.¹⁶ He was informed that, if he changed his mind at any time, the interview would be suspended for the necessary arrangements to be made.¹⁷

6. At the end of the interview, the Accused was asked whether he would like to clarify anything. He declined the opportunity.¹⁸ The Accused was then asked whether he had answered the questions of his own free will. He confirmed, 'Yes, I've come here of my own free will'.¹⁹ The Accused also confirmed that there was no promise, threat, or inducement made to him to give the answers as recorded²⁰ and he did not have any complaints about his treatment before or during the interview.²¹

7. During the 2005 ICTY Interview, the Accused voluntarily answered questions and provided evidence about events related to the Kosovo conflict, the Accused's role in the KLA, and his knowledge of and involvement in arrests and detentions. In particular, the Accused acknowledged: (i) his alias, 'Ujku';²² (ii) his positions in 1998, including with the military police in Jabllanicë/Jablanica, Gjakovë/Đakovica;²³ (iii) the fact that civilians were arrested and detained at Jabllanicë/Jablanica;²⁴ (iv) his involvement in and observation of arrests, detention, and mistreatment in Gllogan/Glodane, Deçane/Dečani;²⁵ and (v) that, when he was drunk, he may have hit

¹⁵ T000-2742-T000-2742-Albanian and English Transcript, p.6.

¹⁶ T000-2742-T000-2742-Albanian and English Transcript, pp.2-7.

¹⁷ T000-2742-T000-2742-Albanian and English Transcript, p.7.

¹⁸ T000-2748-T000-2748-Albanian and English Transcript, p.6.

¹⁹ T000-2748-T000-2748-Albanian and English Transcript, p.6.

²⁰ T000-2748-T000-2748-Albanian and English Transcript, pp.6-7.

²¹ T000-2748-T000-2748-Albanian and English Transcript, p.7.

²² T000-2742-T000-2742-Albanian and English Transcript, p.10.

²³ T000-2745-T000-2745-Albanian and English Transcript-1, p.34; T000-2742-T000-2742-T000-2742-Albanian and English Transcript-3, pp.6, 8, 18.

²⁴ T000-2745-T000-2745-Albanian and English Transcript, pp.45-48; T000-2748-T000-2748-Albanian and English Transcript-1, pp.14-15.

²⁵ T000-2745-T000-2745-Albanian and English Transcript, pp.10-31.

persons in Kukës,²⁶ where he had returned in spring 1999 after having left Kosovo for Belgium in August 1998.²⁷

B. 2007 ICTY INTERVIEW

8. On 21-22 May 2007, the ICTY OTP again interviewed the Accused. At the start of the interview, he was informed that he was a suspect²⁸ and of his rights to:

- a. assistance by counsel of his choice and if he could not afford it, assigned counsel free of charge;²⁹
- b. stop the interview at any point if he decided to exercise his right to counsel;³⁰
- c. assistance of an interpreter if he did not understand or speak the language used for questioning;³¹ and
- d. remain silent and that the recorded interview may be used in evidence.³²

9. The Accused confirmed that, before the interview, he received an 'invitation' stating that he was suspected of war crimes.³³ He was informed that he was free to come and go as he pleased and his cooperation was voluntary.³⁴ The Accused stated that he was prepared to answer any questions.³⁵

10. At the start of the second day of the interview, on 22 May 2007, the ICTY OTP attorney conducting the interview informed the Accused that he would again read him his rights. The Accused 'said he did not want that, he knows them well'.³⁶ The

²⁶ T000-2748-T000-2748-Albanian and English Transcript-1, pp.36-37.

²⁷ T000-2748-T000-2748-Albanian and English Transcript-1, pp.28-29.

²⁸ T001-0105-1-A-TR, p.1.

²⁹ T001-0105-1-A-TR, p.1.

³⁰ T001-0105-1-A-TR, p.2.

³¹ T001-0105-1-A-TR, p.1.

³² T001-0105-1-A-TR, p.2.

³³ T001-0105-1-A-TR, p.11.

³⁴ T001-0105-1-A-TR, pp.5-6.

³⁵ T001-0105-1-A-TR, p.12.

³⁶ T001-0105-3-A-TR, p.1.

ICTY OTP attorney nevertheless reiterated that the Accused was a suspect³⁷ and informed him of his rights to:

- a. a lawyer and if he could not afford one, an assigned lawyer free of charge;³⁸
- b. stop the interview at any point and request an attorney;³⁹
- c. free assistance of an interpreter;⁴⁰
- d. remain silent and that any statement he did make would be recorded and could be used in evidence.⁴¹

11. The Accused was also reminded that (i) he could clarify anything he said at any point in the interview and would also be given that opportunity at the end;⁴² and (ii) his presence and cooperation were voluntary.⁴³ The Accused confirmed that the interview could continue.⁴⁴

12. [REDACTED].⁴⁵[REDACTED].⁴⁶

C. 2016 BELGIAN INTERVIEW

13. On 23 November 2015,⁴⁷ the Accused received a summons from the Belgian police. The summons informed the Accused (i) that '[y]ou will be interviewed about acts that you could be charged with, more specifically, serious violations of humanitarian law in Albania in 1999' and (ii) of the following rights:⁴⁸

1. During the interview, you may not be forced to incriminate yourself.
2. After identifying yourself, you may choose to give a statement, to answer the questions put to you or to remain silent.

³⁷ T001-0105-3-A-TR, p.1.

³⁸ T001-0105-3-A-TR, p.1.

³⁹ T001-0105-3-A-TR, p.2.

⁴⁰ T001-0105-3-A-TR, p.2.

⁴¹ T001-0105-3-A-TR, p.2.

⁴² T001-0105-3-A-TR, p.3.

⁴³ T001-0105-3-A-TR, p.4.

⁴⁴ T001-0105-3-A-TR, p.4.

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ 101752-101763-ET, p.101762.

⁴⁸ 101752-101763-ET, p.101760.

3. Prior to this first interview regarding the above acts, you have the right to a confidential consultation with an attorney of your choosing. You are free to do this. If you consult an attorney, please show him this summons so that he may be informed about the acts regarding which you will be interviewed. In any event, when you appear for the interview it will be assumed that you consulted with an attorney.

14. Attached to the summons was a declaration of rights,⁴⁹ including detailed explanations of the rights of the Accused, who was being interviewed 'without being arrested regarding offences with which you may be charged'.⁵⁰ The information in the declaration concerned, *inter alia*: (i) the right to remain silent; (ii) the right to consultation with an attorney of the suspect's choosing or through the legal aid system; (iii) waiver of the right to counsel; (iv) the right to review the record (which may be used in evidence) at the end of the interview and to make corrections and clarifications; and (v) the right to assistance of a sworn interpreter free of charge.⁵¹

15. On 14 January 2016, the Accused was interviewed by the Belgian police and informed of the facts on which he would be questioned and his rights in the presence of an Albanian interpreter, including that he:⁵²

1. cannot be forced to incriminate him/herself;
2. may chose, after having confirmed his / her identity, to make a statement, to answer the questions posed, or to remain silent;
3. has the right, prior to his/her first interview, to consult confidentially with a lawyer of his/her own choice.
[...] may voluntarily waive, in a considered manner and in writing, the above-mentioned right to confidential legal consultation in a duly dated and signed document.
[...]
4. is not subject to any restrictions on his / her liberty and, as such, can come and go at any moment.

16. Both the Accused and interpreter signed this declaration of rights.⁵³ While the handwritten time on this declaration is 10.48 and the interview commenced at 9.22, the declaration states that the information therein was provided 'prior to the

⁴⁹ 101747-101751-ET, p.101747 (indicating that this declaration of rights was attached to the summonses for both the 2016 Belgian Interview and 2019 Belgian Interview).

⁵⁰ 101747-101751-ET, p.101750.

⁵¹ 101747-101751-ET, p.101750-101751.

⁵² 074117-074129-ET Revised, p.074119.

⁵³ 074117-074129-ET Revised, p.074119.

commencement of the interview'.⁵⁴ Further, before the commencement of questioning, the Accused confirmed the following in the presence of the interpreter:⁵⁵

I wish to express myself in the French language and I wish to use this language in court.

At the start of my interview, I was again briefly informed of the facts about which I will be interviewed.

I am aware that:

- a) I may request that all questions put to me and all answers given by me be written down in the terms used;
- b) I have the right to request that other investigative acts be carried out or that other witnesses be interviewed;
- c) my statements may be used as evidence in court; and
- d) I cannot be forced to incriminate myself.

17. At the conclusion of the interview, the Accused was permitted to read the statement, confirmed that he did not wish to correct or add anything, and confirmed that he had received a copy. Both the Accused and interpreter – who was present and available throughout the interview⁵⁶ – signed the PV⁵⁷ and initialled each page.⁵⁸

18. [REDACTED]. [REDACTED],⁵⁹ [REDACTED].⁶⁰ [REDACTED].⁶¹

D. 2019 BELGIAN INTERVIEW

19. On 30 January 2019,⁶² the Accused received a summons to attend a further interview with the Belgian police. The summons informed the Accused of the nature and cause of the charges against him and that he should carefully read his rights, set out as follows:⁶³

1. You will be interviewed as a suspect and before the interview about the aforementioned acts you have the right to a confidential consultation with an attorney of your choosing or an attorney assigned to you (see number 9). You are free to do so but at your own initiative. Should you consult an attorney, please show him this summons so that he may be informed about the acts you will be interviewed about. You also have the right to be accompanied by your attorney and to have him assist you during your interview. You are advised to consult

⁵⁴ 074117-074129-ET Revised, p.074119.

⁵⁵ 074117-074129-ET Revised, p.074120.

⁵⁶ 074117-074129-ET Revised, pp.074120, 074129.

⁵⁷ The term 'PV' is used to refer to the *procès-verbale*.

⁵⁸ 074117-074129-ET Revised, p.074129.

⁵⁹ 074117-074129-ET Revised, p.074123.

⁶⁰ 074117-074129-ET Revised, pp.074124-074126.

⁶¹ 074117-074129-ET Revised, p.074126.

⁶² 066843-066855-ET Revised, p.066845; 066866-066882-ET Revised, p.066868.

⁶³ 101752-101763-ET, p.101758-101759.

with your attorney on this matter. In any event, when you appear for the interview it will be assumed that you consulted with an attorney.

2. After identifying yourself, you may choose to give a statement, to answer the questions put to you or to remain silent.

3. During the interview, you may not be forced to incriminate yourself.

4. Your statements may be used as evidence in court and consequently against you or another person.

5. During the interview, you may ask that all of the questions put to you and your answers be recorded verbatim.

6. You are not under arrest and consequently you are free to go at any time. Please note however that, in light of the circumstances, the Crown Prosecutor may order your arrest as part of the investigation. You are therefore advised to comply with this invitation.

7. During the interview you may request that a specific investigative measure or interview be conducted.

8. You may use the documents in your possession, however this must not delay the interview, and during or subsequent to the interview you may request that these documents be included with the procès-verbal of the interview or the case-file.

9. If you do not have sufficient means to pay for an attorney, Articles 508/13 to 508/18 of the Judicial Code regarding full or partial legal aid to an individual may apply. In that case, you are advised to contact the office for legal aid at the courthouse and request to be assigned an attorney.

20. Like the summons for the 2016 Belgian Interview,⁶⁴ attached to the 2019 Belgian Interview summons was a declaration of rights,⁶⁵ including detailed explanations of the rights of the Accused, who was being interviewed 'without being arrested regarding offences with which you may be charged'.⁶⁶

21. On 11 and 12 February 2019, the Accused was interviewed by the Belgian police, in the presence and with the participation of a Belgian court-certified French-Albanian interpreter, an SPO prosecutor, and an SPO investigative advisor. The PVs for both interview days confirm that a statement of facts and rights, including the declaration of rights, was received by the Accused on 30 January 2019.⁶⁷

22. At the start of the interview on 11 February 2019, the Accused was informed that an interpreter was present; he responded that he understood French 'very well', but preferred to have an interpreter.⁶⁸ He was instructed to tell the interviewers if

⁶⁴ See para.14 above.

⁶⁵ 101747-101751-ET, p.101747.

⁶⁶ 101747-101751-ET, pp.101750-101751.

⁶⁷ 066843-066855-ET Revised, p.066845; 066866-066882-ET Revised, p.066868.

⁶⁸ 066864-TR-ET Part 1 Revised, pp.1-2.

anything was unclear and if so, a break would be taken for explanation.⁶⁹ The Accused was informed that he was being heard at the KSC's request, which also requested that the interview be audio-video recorded.⁷⁰ He was reminded that he had been informed of his rights at the time of the summons⁷¹ and was informed again of his rights to make a statement, reply to questions, remain silent, and not incriminate himself.⁷² The Accused confirmed that he understood.⁷³ During⁷⁴ and at the end of questioning,⁷⁵ the Accused was generally reminded of his rights. At the end of the day, the interview was suspended so that the PV could be finalised and to ensure they were all 'fresh' and could efficiently and effectively close the interview.⁷⁶

23. On 12 February 2019, the interview continued and the Accused was reminded that he had the same rights, including to make a statement, reply to questions or remain silent, and not be compelled to incriminate himself.⁷⁷ After the rights were read, the Accused responded, 'Oh, that is becoming a habit'⁷⁸ and decided to express himself in French during the interview on 12 February 2019.⁷⁹ He confirmed that he spoke French and had taken language courses.⁸⁰ Nevertheless, the French-Albanian interpreter was available throughout the 2019 Belgian Interview, including on 12 February 2019, when the interview was conducted in French and the Accused occasionally utilised her services.⁸¹

⁶⁹ 066864-TR-ET Part 1 Revised, p.2.

⁷⁰ 066864-TR-ET Part 1 Revised, p.2.

⁷¹ 066864-TR-ET Part 1 Revised, p.3.

⁷² 066864-TR-ET Part 1 Revised, p.3; 066843-066855-ET Revised, p.066845.

⁷³ 066864-TR-ET Part 1 Revised, p.3.

⁷⁴ 066864-TR-ET Part 1 Revised, pp.44-45.

⁷⁵ 066864-TR-ET Part 2, p.128.

⁷⁶ 066864-TR-ET Part 2, pp.125-126, 128.

⁷⁷ 066888-TR-ET Part 1 Revised, p.3; 066866-066882-ET Revised, p.066868.

⁷⁸ 066888-TR-ET Part 1 Revised, p.3.

⁷⁹ 066866-066882-ET Revised, 066869.

⁸⁰ 066888-TR-ET Part 1 Revised, p.8.

⁸¹ 066866-066882 RED, p.066868-066869. *See also* 066888-TR-ET Part 1 Revised.

24. Before the start of the second session on 12 February 2019, the Accused noted, 'I have a right to ask, because at the ICTY, every time I went there, I was paid.'⁸² The Accused confirmed he understood he was being interviewed as a suspect, declaring that, 'until otherwise proven, I am innocent!'⁸³ The Accused stated that he should not pay out of pocket for his expenses because he is unemployed.⁸⁴ The Accused further explained:⁸⁵

Me, I haven't engaged a lawyer. Because it's normal that a lawyer has to be paid. I don't have the means. For that reason I am going to defend myself. Even in the days of the ICTY I defended myself without engaging a lawyer.

He went on to confirm that he had the same rights before the ICTY as a suspect.⁸⁶ The Accused then reiterated that he would like to be reimbursed expenses for the interview.⁸⁷ He repeated this request at the end of the interview.⁸⁸

25. During the last interview session, the recording cut due to malfunctioning equipment at 16.44.⁸⁹ However, the PV reflects the full session, which ended, 'without incident', at around 19.00 for a final 'reread', after which the Accused left the premises at 20.00.⁹⁰ During the 2019 Belgian Interview, the PV was being actively compiled, with pauses and questions throughout to ensure the accuracy thereof.⁹¹ At the end of each day, the Accused read the PV, initialled each page, including the pages concerning his

⁸² 066888-TR-ET Part 1 Revised, pp.92-93 ('At the ICTY every time I got there, I was paid [...] Yes, reimbursed'), 96.

⁸³ 066888-TR-ET Part 1 Revised, pp.92, 94.

⁸⁴ 066888-TR-ET Part 1 Revised, p.94.

⁸⁵ 066888-TR-ET Part 1 Revised, p.95.

⁸⁶ 066888-TR-ET Part 1 Revised, p.95.

⁸⁷ 066888-TR-ET Part 1 Revised, p.96.

⁸⁸ 066866-066882-ET Revised, pp.066881-066882.

⁸⁹ 066888-TR-ET Part 1 Revised, p.191. The audio-video records were delivered to the SPO on 15 October 2019. In late January 2020, the SPO determined that the corrupted digital files relating to part of the last interview session on 12 February 2019 were unreadable on any media player. Accordingly, the SPO contacted the Belgian authorities on 2 February 2020 and shortly thereafter, it was determined that the digital files had been corrupted at the point of recording and that no working copy of these files exists. See 084260-084266 RED, disclosed to the Defence on 19 May 2021 as part of Disclosure 5 (and later re-disclosed without standard redactions). The transcripts pertaining to the 2019 Belgian Interview, which specifically indicate when recording cuts, were also disclosed in May 2021.

⁹⁰ 066866-066882-ET Revised, pp.066867.

⁹¹ See e.g. 066864-TR-ET Part 2, pp.67, 88, 125, 128; 066888-TR-ET Part 1 Revised, pp.6, 43-52, 60.

summons and rights, as well as those pages corresponding to the portion of the interview that was not audio-video recorded,⁹² requested reimbursement of his expenses, confirmed that he had reread his statement and did not wish to correct or add to it, and signed the last page.⁹³ Throughout the 2019 Belgian Interview, the Accused freely objected when he did not agree with the manner in which questions were being put and provided clarifications and explanations ‘for the record’.⁹⁴ There were breaks in the interview on both days for food and refreshments, including upon the Accused’s request.⁹⁵

26. [REDACTED].⁹⁶ [REDACTED].⁹⁷ [REDACTED].⁹⁸ [REDACTED].⁹⁹
[REDACTED],¹⁰⁰ [REDACTED].¹⁰¹

III. SUBMISSIONS

27. The Interview Records are relevant, authentic, reliable, have probative value, and such probative value is not outweighed by any prejudicial effect.¹⁰² In this respect, the Interviews were conducted in accordance with the applicable legal framework and international human rights standards.¹⁰³

28. The submissions made below must be considered at all times in light of the strong public interest in the prosecution and punishment of the war crimes charged

⁹² 066866-066882-ET Revised, pp.066879-066881 (roughly corresponding with the portions of the interview that were not audio-video recorded).

⁹³ 066866-066882-ET Revised, pp.066881-066882; 066843-066855-ET Revised, p.066855.

⁹⁴ See e.g. 066864-TR-ET Part 1 Revised, p.79; 066888-TR-ET Part 1 Revised, p.14.

⁹⁵ 066864-TR-ET Part 1 Revised, pp.97-98; 066864-TR-ET Part 2, p.78; 066888-TR-ET Part 1 Revised, pp.90-91; 066866-066882-ET Revised, p.066867.

⁹⁶ 066888-TR-ET Part 1 Revised, pp.146-159, 161-165, 169.

⁹⁷ 066888-TR-ET Part 1 Revised, pp.60-61, 180.

⁹⁸ 066888-TR-ET Part 1 Revised, pp.132-133. See also W04733, 082892-TR-ET Part 1 RED2, p.79.

⁹⁹ 066888-TR-ET Part 1 Revised, pp.185-186. See also W04733, 082892-TR-ET Part 2, p.13.

¹⁰⁰ 066888-TR-ET Part 1 Revised pp.124-126, 131;

¹⁰¹ See e.g. 066888-TR-ET Part 1 Revised, pp.80, 89, 103.

¹⁰² Rule 138(1). For the 2005 ICTY Interview, 2007 ICTY Interview, and 2016 Belgian Interview, Article 37 applies.

¹⁰³ Rule 138(2).

in this case.¹⁰⁴ A strict application of procedural rules – without regard to the public interest, the specific circumstances of a case, the interests such rules are intended to protect, and victim rights – threatens to put disproportionate difficulties in the way of authorities obliged to effectively investigate and prosecute serious crimes.¹⁰⁵ As the admissibility criteria under the Law and Rules are satisfied, it is essential that the Prosecution have the opportunity to rely upon – and the Panel, consider – the Interview Records, which constitute compelling evidence of the commission of serious international crimes and the Accused’s responsibility therefor.¹⁰⁶

A. THE INTERVIEW RECORDS ARE RELEVANT

29. The Interviews – which are interconnected¹⁰⁷ – are highly relevant. They concern the Accused’s position, observations, and involvement in the KLA and the arrest, detention, and mistreatment of civilians, including named victims and as charged in this case.¹⁰⁸ The associated exhibits¹⁰⁹ were used in and form an integral part of the Interviews.¹¹⁰ Likewise, related procedural documents,¹¹¹ including summonses and rights notifications, are necessary to a full assessment of the Interviews and the circumstances in which they were made.¹¹²

¹⁰⁴ ECtHR, *Ibrahim and Other v. UK* [GC], 50541/08 et al., Judgment, 13 September 2016 (*Ibrahim Judgment*), para.252 and the sources cited therein; ECtHR, *Marguš v Croatia* [GC], 4455/10, Judgment, 25 May 2014, paras 124-127.

¹⁰⁵ *Ibrahim Judgment*, para.252. See also ECtHR, *R.B. v. Estonia*, 22597/16, Judgment, 22 June 2021, para.102 (see also paras 78-104).

¹⁰⁶ *Ibrahim Judgment*, para.252 and the sources cited therein.

¹⁰⁷ See para.3 above.

¹⁰⁸ See Section II above.

¹⁰⁹ See Annex 1. The SPO does not seek to admit all exhibits referenced in the Interviews; rather, it tenders only those used during questioning and directly relevant to the Accused and the charges in this case.

¹¹⁰ *Specialist Prosecutor v. Mustafa*, Public redacted version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other materials, KSC-BC-2020-05/F00281RED, 13 December 2021, (*Case 05 Second Admissibility Decision*), fn.35.

¹¹¹ See Annex 1.

¹¹² *Case 05 Second Admissibility Decision*, KSC-BC-2020-05/F00281RED, fn.35.

B. THE INTERVIEW RECORDS ARE AUTHENTIC AND RELIABLE

30. The 2005 ICTY Interview and 2007 ICTY Interview were audio-video recorded and copies of the interview recordings and associated exhibits were provided by the International Residual Mechanism for Criminal Tribunals. Likewise, the records relating to the 2016 Belgian Interview and 2019 Belgian Interview were provided by the Belgian authorities. The Interview Records include complete PVs for both the 2016 Belgian Interview and 2019 Belgian Interview, which are an accurate record of such interviews, identify those present and the relevant dates, times, and locations, and were signed by the Accused.¹¹³ Further, the 2019 Belgian Interview was also audio-video recorded, with the exception of part of one session.¹¹⁴ During all Interviews, the Accused was given the opportunity to clarify and add to his statements.¹¹⁵

31. The Defence Motion questions the reliability of the 2016 Belgian Interview and 2019 Belgian Interview records due to malfunctioning equipment during the 2019 Belgian Interview and certain, alleged translation discrepancies. Such submissions fail. These records are authentic, accurate, and reliable.

1. Technical recording failure

32. During the last session of the 2019 Belgian Interview, the recording equipment malfunctioned at 16.44, and no audio-video recording is available for the remainder of the interview, which was concluded at around 19.00.¹¹⁶ As set out above,¹¹⁷ the recordings were not delivered to the SPO until several months after the interview. Once received, the issue with the recording of the interview session on the last day was discovered and verified. The SPO promptly contacted the Belgian authorities to attempt to recover the missing part, but without success.¹¹⁸

¹¹³ See paras 13-24 above. See, similarly, Case 05 Second Admissibility Decision, KSC-BC-2020-05/F00281RED, para.16.

¹¹⁴ See para.25 above.

¹¹⁵ See paras 17, 25 above.

¹¹⁶ See para.25 above.

¹¹⁷ See fn.89 above.

¹¹⁸ 084260-084266.

33. This circumstance, however, does not undermine the reliability of the available recordings or PV. As noted above, the PV reflects the full session, which ended, 'without incident', at 19.00 for a final 'reread'.¹¹⁹ During the 2019 Belgian Interview, the PV was being actively compiled, with pauses and questions throughout to ensure the accuracy thereof.¹²⁰ At the end of each day, the Accused read the PV, initialled each page, including those pages corresponding to the portion of the interview that was not audio-video recorded,¹²¹ confirmed that he had reread his statement and did not wish to correct or add to it, and signed the last page.¹²²

34. The Defence attempts to take advantage of this circumstance by claiming that, during 'the last part of the interview' – coincidentally the part that was not audio-video recorded – he had set out his objections to the manner in which the statement was taken and the interpreter.¹²³ However, no objection can be found in the PV or transcript. In fact, it is clear from the record that the interview was conducted in a cooperative and respectful manner.¹²⁴ Throughout the 2019 Belgian Interview, the Accused – who was not in custody and was aware that his presence and cooperation were voluntary – freely objected when he did not agree with the manner in which questions were being put and provided clarifications and explanations 'for the record'.¹²⁵ Accordingly, the unsubstantiated and general submissions in the motion concerning the last 2019 Belgian Interview session do not affect the reliability of the related records.

¹¹⁹ 066866-066882-ET Revised, pp.066867.

¹²⁰ See e.g. 066864-TR-ET Part 1 Revised p.26; 066864-TR-ET Part 2, pp.67, 88, 125, 128; 066888-TR-ET Part 1 Revised, pp.6, 41-52, 60.

¹²¹ 066866-066882-ET Revised, pp.066879-066881 (roughly corresponding with the portions of the interview that were not audio-video recorded).

¹²² 066866-066882-ET Revised, pp.066881-066882; 066843-066855 RED, p.066855.

¹²³ Defence Motion, KSC-BC-2020-04/F00281, para.21.

¹²⁴ See para.25 above.

¹²⁵ See e.g. 066864-TR-ET Part 1 Revised, p.79; 066864-TR-ET Part 2 Revised, pp.108-109; 066888-TR-ET Part 1 Revised, p.14, 53-54, 57.

2. Translation discrepancies

35. The Defence claims certain translation discrepancies between the different language versions of the 2016 Belgian Interview¹²⁶ and 2019 Belgian Interview.¹²⁷ The fact that these records are available in the original language, which can be used to verify and as appropriate, correct related translations, in and of itself, demonstrates the reliability of the Interview Records. Such discrepancies do not detract from the reliability of the original records and identification and correction thereof ensure the reliability of the translations. A review of Annex 2 of the Motion, where the alleged discrepancies in the 2016 Belgian Interview are listed, reveals that the discrepancies are inconsequential, if they exist at all. The SPO has only identified one discrepancy, which concerns the translation of a question posed by the police to the Accused and will be corrected in a revised translation.¹²⁸ This translation was created after the interview took place and the error had no bearing on the Accused's answers during the interview.

36. In relation to the 2019 Belgian Interview, the Defence alleges the existence of issues, including discrepancies with the answers provided by the Accused, with the assistance of the interpreter. According to the Defence, these issues make the 2019 Belgian Interview record unreliable.¹²⁹ This claim should be rejected. The discrepancies identified by the Defence are minimal and had no impact on the participants' ability to understand questions and answers. Some of the issues identified by the Defence as improper behaviour are actually legitimate attempts by the interpreter to better understand the Accused's answers.¹³⁰ Other times, the interpreter paraphrased an answer, which does not impact the reliability of the

¹²⁶ Defence Motion, KSC-BC-2020-04/F00281, para.42.

¹²⁷ Defence Motion, KSC-BC-2020-04/F00281, para.43.

¹²⁸ Annex 2 to the Defence Motion, KSC-BC-2020-04/F00281/A02, n.7.

¹²⁹ Defence Motion, KSC-BC-2020-04/F00281, paras 43-44.

¹³⁰ See e.g. Annex 3 to the Defence Motion, KSC-BC-2020-04/F00281/A03, n.14.

record.¹³¹ When the Accused – who has a good command of French¹³² – disagreed with the way one of his answers was interpreted, he intervened to correct it.¹³³

37. The Defence identified one translation error in the English transcript¹³⁴ and in the Albanian translation of the 2019 Belgian Interview.¹³⁵ The Defence also identified one part which was transcribed as ‘inaudible’, but which the Defence states can be understood.¹³⁶ The SPO is reviewing the relevant transcripts and will, as appropriate, file corrected versions. To the extent the ‘inaudible’ indication is verified, this does not necessarily impact on the reliability of the transcripts, for the reasons given above.¹³⁷

C. THE INTERVIEW RECORDS HAVE PROBATIVE VALUE, WHICH IS NOT OUTWEIGHED BY ANY PREJUDICE

38. As the interviews are relevant, authentic, and reliable, for the reasons set out above, they also have probative value,¹³⁸ which is not outweighed by any prejudicial effect. The statements were given by the Accused following knowing and intelligent waivers of his rights to counsel and remain silent.¹³⁹ The Defence will have the opportunity to challenge this evidence and the Panel, composed of professional judges, will be able to appropriately assess the entirety of the evidence presented at

¹³¹ See e.g. Annex 3 to the Defence Motion, KSC-BC-2020-04/F00281/A03, n.24, 33.

¹³² See paras 22, 23, 53.

¹³³ See e.g. Annex 3 to the Defence Motion, KSC-BC-2020-04/F00281/A03, n.21, 33, 36, 37.

¹³⁴ Annex 3 to the Defence Motion, KSC-BC-2020-04/F00281/A03, n.35.

¹³⁵ Annex 3 to the Defence Motion, KSC-BC-2020-04/F00281/A03, n.9, 15.

¹³⁶ Annex 3 to the Defence Motion, KSC-BC-2020-04/F00281/A03, n.26.

¹³⁷ See, similarly, ICTR, *Prosecutor v. Ndayambaje et al.*, ICTR-98-42-T, Decision on Kanyabashi’s Oral Motion to Cross-Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997, 15 May 2006, para.64.

¹³⁸ The probative value of a document is determined by two primary factors: (i) the *prima facie* reliability of the tendered evidence; and (ii) the measure by which that evidence is likely to influence the determination of a particular issue in dispute in the case. See Case 05 Second Admissibility Decision, KSC-BC-2020-05/F00281RED, para.13.

¹³⁹ See paras 45-49 below.

the conclusion of the trial and assign, *inter alia*, the Interview Records appropriate weight.¹⁴⁰

D. THE 2016 BELGIAN INTERVIEW AND 2019 BELGIAN INTERVIEW COMPLIED WITH THE KSC FRAMEWORK AND INTERNATIONAL HUMAN RIGHTS STANDARDS

39. Contrary to the Defence's selective and inaccurate submissions, which focus primarily on the rights to counsel and assistance of an interpreter, the 2016 Belgian Interview and 2019 Belgian Interview complied with international human rights standards.¹⁴¹

40. Compliance with fair trial requirements cannot be the subject of a single unvarying rule and must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident.¹⁴² Minimum rights are not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the proceedings as a whole.¹⁴³ The authorities of each State have the choice of the procedures and means use to ensure the right to counsel, so long as such means are practical and effective.¹⁴⁴

41. As addressed below in relation to the specific circumstances of the 2016 Belgian Interview and 2019 Belgian Interview, the Belgian authorities ensured that the accused had practical and effective means of exercising and waiving his rights: (i) the authorities were required to and did inform the Accused of his rights; (ii) the

¹⁴⁰ Rule 139. *See also* ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeal Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ('*Prlić Appeal Decision*'), para.46.

¹⁴¹ As the Defence has not challenged the manner in which the 2005 ICTY Interview and 2007 ICTY Interview were conducted, and such interviews, on their face, were compliant with international human rights standards (*see* paras 4-12 above), the submissions below focus on the 2016 Belgian Interview and 2019 Belgian Interview. However, the 2005 ICTY Interview and 2007 ICTY Interview are referenced where relevant in assessing the procedures surrounding the 2016 Belgian Interview and 2019 Belgian Interview.

¹⁴² ECtHR, *Doyle v. Ireland*, 51979/17, Judgment, 23 August 2019 ('*Doyle Judgment*'), paras 70-71.

¹⁴³ *Doyle Judgment*, para.72. *See also* para.61 below.

¹⁴⁴ *Doyle Judgment*, para.73.

Accused's waiver was knowing and intelligent;¹⁴⁵ and (iii) the Accused had access to an interpreter free of charge. Further, contrary to the Defence Motion, (iv) there is no violation of the Law or Rules¹⁴⁶ and (v) even if there was an unjustified restriction on discrete aspects of the Accused's rights – which there was not – admission of the 2016 Belgian Interview and 2019 Belgian Interview will not violate the right to a fair trial.¹⁴⁷

1. The Accused was informed of his rights.

42. Before the 2016 Belgian Interview and 2019 Belgian Interview, the Accused received summonses and rights declarations which informed him in detail of: (i) the right to remain silent; (ii) the right to consultation with an attorney of the suspect's choosing or through the legal aid system; (iii) waiver of the right to counsel; (iv) the right to review the record (which may be used in evidence) at the end of the interview and to make corrections and clarifications; and (v) the right to assistance of a sworn interpreter free of charge.¹⁴⁸ As an adult, the Accused could be expected to inform himself of the representation options available to him in advance of the interviews.¹⁴⁹ Before each interview commenced, the Accused was reminded of his rights,¹⁵⁰ in particular, against self-incrimination and to remain silent.¹⁵¹ The Accused noted that the rights statements by the Belgian authorities were similar to those before the ICTY,¹⁵² which he confirmed his understanding of and unequivocally waived.¹⁵³

¹⁴⁵ ECtHR, *Simeonovi v. Bulgaria* [GC], 21980/04, Judgment, 12 May 2017 ('*Simeonovi Judgment*'), para.115; ECtHR, *Pishchalnikov v. Russia*, 7020/04, Judgment, 24 December 2009 ('*Pishchalnikov Judgment*'), paras 77-78.

¹⁴⁶ See Rule 138(2).

¹⁴⁷ See Section 5 below.

¹⁴⁸ 101747-101751-ET, p.101751.

¹⁴⁹ ECtHR, *Lloyd and others v. UK*, 29798/96 et al., Judgment, 6 July 2005 ('*Lloyd Judgment*'), para.142.

¹⁵⁰ According to Article 47bis(3) of the Code of Criminal Procedure ('Belgian CPC'), as amended in 2016 and applicable at the time of the 2019 Interview, if the interrogation of an adult suspect is conducted pursuant to written invitation, suspect rights were included in that invitation, and the suspect is not assisted by a lawyer on the day of the interview, he or she shall, before the interrogation begins, be informed of the rights to remain silent and against self-incrimination.

¹⁵¹ See paras 42-44 above.

¹⁵² 066888-TR-ET Part 1 Revised, p.95.

¹⁵³ See paras 5, 10-11 above.

43. The Defence observes that, in the PV of the 2016 Belgian Interview, the time on the declaration of rights reads 10.48, while the interview commenced at 09.22.¹⁵⁴ However, the declaration, which both the Accused and interpreter signed, states that the information therein was provided 'prior to the commencement of the interview'.¹⁵⁵ Further, the Accused (i) received clear and detailed information about his rights as part of his summons;¹⁵⁶ (ii) prior to questioning, stated, in the presence of the interpreter, *inter alia*, that he was aware of his right against self-incrimination and that his statements may be used in evidence.¹⁵⁷ Finally, the interview continued for almost four hours after the time on the statement of rights. At the conclusion of the interview, the Accused was permitted to read the PV, confirmed that he did not wish to correct or add anything, and confirmed that he had received a copy. Both the witness and interpreter signed the statement and initialled each page.¹⁵⁸

44. The Accused was clearly informed of his rights, including to counsel, to remain silent, and against self-incrimination before the 2016 Belgian Interview and 2019 Belgian Interview.

2. The Accused knowingly and intelligently waived his rights to counsel and remain silent.

45. Fully aware of his rights,¹⁵⁹ the Accused – just as he had done during the 2005 ICTY Interview and 2007 ICTY Interview – agreed to proceed with the 2016 Belgian Interview and 2019 Belgian Interview, thereby knowingly and intelligently waiving his rights to counsel and to remain silent.¹⁶⁰ The Accused had been repeatedly and expressly informed of the potential consequences of such waivers, namely, that his

¹⁵⁴ Defence Motion, KSC-BC-2020-04/F00281, para.18.

¹⁵⁵ 074117-074129-ET Revised, p.074119. *See also* para.16 above.

¹⁵⁶ *See* para.42 above.

¹⁵⁷ 074117-074129-ET Revised, p.074120. *See also* para.43 above.

¹⁵⁸ 074117-074129-ET Revised, p.074129. *See also* paras 43 above.

¹⁵⁹ *Simeonovi* Judgment, paras 119, 128.

¹⁶⁰ A waiver can be explicit or implicit so far as it is voluntary and constitutes a knowing and intelligent relinquishment of that right. *See Simeonovi* Judgment, para.115; *Pishchalnikov* Judgment, paras 77-78.

statements would be recorded and could be used as evidence.¹⁶¹ Use of the Interviews in a case such as this was a foreseeable consequence.

46. The manner in which the Accused was informed of and waived his rights is consistent with his personal circumstances.¹⁶² The Accused was an adult, was not detained, was not particularly vulnerable (considering also his mental and physical health), had experience as a suspect in criminal proceedings, and both spoke French, the language of the interviewers, and had access to an Albanian-French interpreter.¹⁶³ The Accused was repeatedly informed that his presence at and participation in the Interviews were voluntary.¹⁶⁴ Neither the 2016 Belgian Interview, nor the 2019 Belgian Interview, were particularly long and breaks were regularly taken, including at the Accused's request.¹⁶⁵ Throughout the Interviews, the Accused freely objected when he did not agree with the manner in which questions were being put and provided clarifications and explanations.¹⁶⁶ The Accused was therefore not vulnerable and under no compulsion, beyond that inevitable in any police interview.¹⁶⁷

47. Contrary to Defence arguments,¹⁶⁸ a written waiver record does exist insofar as the Accused, on the record, confirmed, with his handwritten initials and signatures, both (i) that he had received information concerning his rights; and (ii) the accuracy of the statements he gave thereafter.¹⁶⁹ In any event, international human rights standards do not require a written waiver; rather, a knowing and intelligent waiver can be either express or tacit.¹⁷⁰ Likewise, in Belgium, signing of a written waiver is

¹⁶¹ See paras 13-16 above.

¹⁶² See Rule 43(3) (when providing information concerning rights and the consequences of waiver, account should be given to personal circumstances of the suspect, including his or her age, mental and physical condition).

¹⁶³ See Section 3 below.

¹⁶⁴ See paras 18, 26 above.

¹⁶⁵ See paras 22, 25 above.

¹⁶⁶ See paras 18, 25 above.

¹⁶⁷ See, similarly, *Doyle* Judgment, para.85.

¹⁶⁸ Defence Motion, KSC-BC-2020-04/F00281, para.17.

¹⁶⁹ See paras 14-17, 21, 25 above.

¹⁷⁰ *Simeonovi* Judgment, para.115.

not required when a suspect is informed of his right to counsel through a statement of rights attached to his summons.¹⁷¹ Even if there was a violation of Belgian law, the application of such law is not a matter to be ruled upon by the Panel in deciding admissibility;¹⁷² rather, the Panel need only confirm that the Interviews conformed to international human rights standards.¹⁷³ They did.

48. Finally, the Accused did not revoke his waiver. At no point during the 2016 Belgian Interview or 2019 Belgian Interview did the Accused exercise his right to silence or make an explicit request to access a lawyer.¹⁷⁴ At one point, in the midst of a discussion concerning reimbursement for expenses the Accused incurred by attending the 2019 Belgian Interview, the Accused stated that he had not engaged a lawyer because he did not have the means.¹⁷⁵ While, on its face and in isolation, this statement may indicate some uncertainty or confusion, when considered in context, it does not constitute a request for legal assistance¹⁷⁶ and in fact, further demonstrates that the Accused was fully aware of his right to counsel and had waived it.

49. Immediately after this statement, the Accused declared that ‘even in the days of the ICTY, I defended myself without a lawyer’.¹⁷⁷ During both the 2005 ICTY Interview and 2007 ICTY Interview, the Accused was specifically informed of and clearly waived his right to court-appointed counsel if he did not have the necessary means.¹⁷⁸ Moreover, the Accused – who is an adult and could be expected to inform

¹⁷¹ Belgian CPC, Article 47bis(3). *See also* Belgium, Court of Cassation, 21 October 2014, AR P.14.1512.N, para.11 (*‘Il résulte de l’article 47bis, § 2, alinéa 4, du Code d’instruction criminelle, que, si l’audition a lieu sur convocation écrite et que les droits énoncés à l’alinéa 1er, ainsi que l’information succincte des faits sur lesquels la personne à interroger sera entendue ont déjà été communiqués dans cette convocation, la personne concernée est présumée avoir consulté un avocat avant de se présenter à l’audition. En pareille occurrence, une renonciation écrite, datée et signée par la personne concernée, n’est pas requise’*) (emphasis added).

¹⁷² Article 37(5).

¹⁷³ *See, similarly*, ICC, Appeals Chamber, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Judgment, 8 March 2018, para.330.

¹⁷⁴ *Compare* ECtHR, *Parkhomenko v. Ukraine*, 40464/05, Judgment, 16 February 2017 (*‘Parkhomenko Judgment’*), para.81.

¹⁷⁵ 066888-TR-ET Part 1 Revised, p.95. *See also* para.24 above.

¹⁷⁶ *Compare* *Parkhomenko* Judgment, para.81; *Pishchalnikov* Judgment, paras 7, 72-73.

¹⁷⁷ 066888-TR-ET Part 1 Revised, p.95. *See also* para.24 above.

¹⁷⁸ *See* paras 4-12 above.

himself of the representation options available in advance of the interview¹⁷⁹ – was informed of his right to legal aid and proceeded with the 2019 Belgian Interview without it.¹⁸⁰ Finally, the Accused indicated, immediately before and after making the statement concerning his means, and at the conclusion of the interview, that he was primarily concerned with reimbursement for expenses incurred.¹⁸¹ The fact that he thought he was entitled to expenses related to the 2019 Belgian Interview demonstrates both his general understanding that such expenses – which may include legal representation – could be paid and his ability to request such reimbursement. Despite repeated opportunities, the Accused did not raise the issue relating to counsel at any other point; however, he did maintain his request for his expenses to be reimbursed. In the context of all of the Interviews, the Accused did not avail himself of his right to counsel because he did not want to, not because he could not afford one.

3. The Accused had free assistance of an interpreter.

50. In full compliance with international human rights standards,¹⁸² the Accused was informed of his right to interpretation before all Interviews, including the 2016 Belgian Interview and 2019 Belgian Interview.¹⁸³ The right to interpretation can, like the right to counsel, be waived.¹⁸⁴

51. During the 2016 Belgian Interview, the Accused chose to be interviewed in French, despite the availability of the interpreter throughout the interview.¹⁸⁵ On 11 February 2019, the Accused chose to participate in the interview with Albanian interpretation.¹⁸⁶ On 12 February 2019, he chose to be interviewed in French.¹⁸⁷ The

¹⁷⁹ *Lloyd* Judgment, para.142.

¹⁸⁰ See paras 19-26 above.

¹⁸¹ See para.24 above.

¹⁸² ECtHR, *Baytar v. Turkey*, 45440/04, Judgment, 14 October 2014, paras 46-50.

¹⁸³ 101752-101763 RED, pp.101758, 101760.

¹⁸⁴ ECtHR, *Kamasinski v. Austria*, 9783/82, Judgment, 19 December 1989, para.80.

¹⁸⁵ 074117-074129 RED, p.074120

¹⁸⁶ 066864-TR-ET Part 1 Revised, pp.1-2.

¹⁸⁷ 066866-066882, pp.066868-066869.

record shows, however, that despite this choice, the interpreter remained available to him throughout the interview, and the Accused made use of her services.¹⁸⁸

52. The Defence claims – without further explanation – that the Accused was distrustful of the interpreters at the 2016 Belgian Interview and 2019 Belgian Interview because ‘they were not independent but associated with the Belgian police’.¹⁸⁹ First, there is nothing on the record suggesting that the Accused had concerns over the interpreter’s independence or ability. Second, an interpreter is not part of the court or tribunal within the meaning of ECHR¹⁹⁰ Article 6(1) and there is no formal requirement of independence or impartiality as such. What matters is that the interpreter provides effective assistance in a manner that does not infringe the fairness of the proceedings. The fact that an interpreter was provided by the police does not amount to any irregularity.¹⁹¹

53. Moreover, the Accused’s claims concerning his understanding of French – which were only raised in the Defence Motion, despite repeated prior opportunities – contradict his express statements otherwise and should be dismissed.¹⁹² The Accused has been a Belgian citizen since 2006;¹⁹³ to attain citizenship, proficiency in one of the official languages, including French, is required.¹⁹⁴ During the 2007 ICTY Interview, the Accused confirmed that he spoke ‘some pretty good French’¹⁹⁵ and, despite the presence of an interpreter, communicated in French with one of the ICTY OTP representatives, including about logistics.¹⁹⁶ Likewise, during the 2019 Belgian Interview, the Accused confirmed that he spoke French well and had taken language

¹⁸⁸ See 066888-TR-ET Part 1 Revised.

¹⁸⁹ Defence Motion, KSC-BC-2020-04/F00281, paras 16, 39, 45.

¹⁹⁰ European Convention on Human Rights (‘ECHR’).

¹⁹¹ ECtHR, *Ucak v. UK*, 44234/98, Final Decision, 24 January 2002, p.10.

¹⁹² Defence Motion, KSC-BC-2020-04/F00281, paras 16, 21, and 45.

¹⁹³ 101752-101763 RED2, p.101757.

¹⁹⁴ See Belgium, Code de la nationalité belge, 1984-06-28/35 (as amended in 2018), Article 1(5). The Accused has never indicated any knowledge of Flemish or German, which are the two other official languages.

¹⁹⁵ T001-0105-1-A-TR, p.15.

¹⁹⁶ T001-0105-2-A-TR, pp.8, 10.

courses.¹⁹⁷ Nevertheless, as noted above, a French-Albanian interpreter was available throughout the 2016 Belgian Interview and 2019 Belgian Interview, and the Accused availed himself of the interpreter's services.¹⁹⁸

4. There is no violation of the KSC framework.

54. The Defence Motion broadly asserts violations of the Law and Rules relating to the 2016 Belgian Interview and 2019 Belgian Interview.¹⁹⁹ The KSC adjudicates and functions in accordance with, *inter alia*, international human rights standards, which are given superiority over domestic laws.²⁰⁰ The Law and Rules reflect these minimum guarantees – including to counsel, to remain silent, against self-incrimination, and to an interpreter – which must be respected.²⁰¹ As set out throughout this motion, the Accused was able to practically and effectively exercise and as appropriate, waive his rights during the Interviews.

55. Insofar as the Defence refers to the specific provisions governing investigative acts conducted by the SPO – in particular, concerning written waivers and interview recording²⁰² – such provisions represent the means employed at the KSC to ensure that a suspect's rights are respected. However, human rights standards do not require any particular procedure or means to be employed, so long as those that are used are practical and effective.²⁰³ When domestic authorities act on requests for assistance from the KSC or SPO, they necessarily do so pursuant to their own procedures.²⁰⁴ For example, as a matter of logic, a suspect – like the Accused – interviewed in a third state at the request of the KSC or SPO is entitled to effective legal assistance, but the KSC

¹⁹⁷ 066888-TR-ET Part 1 Revised, p.8. *See also* 093486-093487, p.1 (during the search of his residence, the Accused expressed his wish to communicate in French, despite the presence of an interpreter).

¹⁹⁸ 066866-066882 RED, pp.066868-066869; 066888-TR-ET Part 1 Revised.

¹⁹⁹ Defence Motion, KSC-BC-2020-04/F00281, paras 25-28.

²⁰⁰ Article 3(2)(e).

²⁰¹ Article 38(3); Rule 43(1).

²⁰² *See* Rules 43(3)-(4), 44.

²⁰³ *Doyle Judgment*, para.73.

²⁰⁴ Articles 37(5), 55; Rule 208.

cannot impose the requirement of Specialist Counsel on domestic authorities.²⁰⁵

Where, as here, the Accused's fundamental rights were fully respected, there can be no complaint concerning the application of the Rules in interviews conducted by domestic authorities in a third state.²⁰⁶

56. The only interview conducted at the request of the SPO and with the SPO's participation was the 2019 Belgian Interview. While the Belgian authorities were not required to strictly comply with the KSC's procedural Rules, the interviews were nevertheless conducted in a manner consistent therewith. The Accused was fully informed of his rights – consistent with Article 38(3) and Rule 42(2)-(3) – and waived the right to counsel and to remain silent.²⁰⁷ Further, at the SPO's request, the Belgian authorities supplemented their standard procedure and audio-video recorded the 2019 Belgian Interview.²⁰⁸ This recording was made in a manner consistent with Rule 44(1). Part of the last session of the interview was not audio-video recorded due to malfunctioning equipment.²⁰⁹ In such circumstances, the procedure that was followed by the Belgian authorities was consistent with Rule 44(2)-(3), as the PV, which was signed by the suspect, covered the entire interview, including the part that was not audio-video recorded.²¹⁰

57. Finally, when addressing alleged violations of, *inter alia*, the KSC framework, the Defence also refers to the fact that, at the time of the 2016 Interview, Article 47*bis* of the Belgian CPC only provided for the right to a confidential consultation with a

²⁰⁵ Article 38(3)(c).

²⁰⁶ Even where there are violations of the Rules – which the Defence Motion has not substantiated – such violations do not require exclusion under Rule 138(2) unless, upon consideration of all relevant circumstances, it is found that the integrity of the proceedings would be severely damaged. *See* ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion to Exclude Intercepted Conversations, 30 September 2010 ('*Karadžić Decision*'), paras 7-8.

²⁰⁷ *See* paras 42-49 above.

²⁰⁸ *See* para.22 above.

²⁰⁹ *See* paras 32-34 above.

²¹⁰ While the PV was not signed by all persons present, as required in Rule 44(3), this is not required in Belgian procedure and, in any event, does not impact on admissibility (*see* fn.206 above).

lawyer before the interview.²¹¹ This provision changed on 27 November 2016 to include the assistance of counsel during the interview.²¹² However, in the absence of any specific request by the Accused to be assisted by a lawyer at the time, which made it sufficiently clear of his intention to be assisted by counsel,²¹³ this circumstance does not amount to a violation of his right to counsel.²¹⁴

58. Moreover, there is no dispute that the Accused was repeatedly informed of his rights to remain silent before the Interviews, including the 2016 Belgian Interview.²¹⁵ He nevertheless waived this right and chose to answer questions and provide evidence. At any point, the Accused could have exercised his right to remain silent. Further, the Accused's choice not to consult with an attorney before the interview, and to agree to be interviewed as a suspect without one, are entirely consistent with those he made before the 2005 ICTY Interview and 2007 ICTY Interview. On both those occasions, he chose to not to be assisted by counsel, clearly stating that he did not need one, even after being advised that a lawyer could be present at the interview and provided to him free of charge.²¹⁶

59. Nevertheless, even if the state of domestic law at the time of the 2016 Belgian Interview did in fact result in an unjustified restriction on discrete aspects of the Accused's rights, admission of the 2016 Belgian Interview will not violate the right to a fair trial, as set out below.

²¹¹ Defence Motion, KSC-BC-2020-04/F00281, paras 26, 28.

²¹² Article 3 of the Law of 21 November 2016 regarding certain rights of persons who are interrogated, B.S. 24/11/2016. *See also* Belgian CPC, Article 47bis(2)(1). This change is reflected in the language of the summons sent before the 2019 Belgian Interview, which provides for assistance of counsel before and during the interview. *See* 101752-101763 RED2, p.101758. *See also* Defence Motion, KSC-BC-2020-04/F00281, paras 26, 28.

²¹³ There is no record in the PV that at any point in time he requested a lawyer, nor is it stated anywhere in the Defence Motion that such request was ever made.

²¹⁴ *Pishchalnikov* Judgment, paras 7, 72-73 (considering that the Accused had a made a specific request for access to a lawyer).

²¹⁵ *See* paras 42-49 above.

²¹⁶ *See* paras 4-12 above.

5. Admission of the 2016 Belgian Interview and 2019 Belgian Interview will not violate the right to a fair trial.

60. Even if, *arguendo*, aspects of the Accused's rights were restricted – which they were not – any such restriction in the circumstances of the Interviews, the Accused, and this case cannot rise to the level of a Rule 138(2) violation.²¹⁷

61. The aims pursued by the right of access to a lawyer and the related right of interpretation include equality of arms, a counterweight to the vulnerability of suspects in police custody, a safeguard against coercion and ill-treatment, and respect for the rights to remain silent and against self-incrimination.²¹⁸ The 2016 Belgian Interview and the 2019 Belgian Interview were conducted in accordance with these aims. Admission into evidence of these interviews will not violate the right to a fair trial based on a holistic consideration of the following factors.²¹⁹

- a. The Accused was repeatedly informed of his rights, including to remain silent and against self-incrimination, before and during the Interviews and waived these rights, voluntarily proceeding without counsel and providing incriminating information.²²⁰
- b. The Accused was neither detained nor vulnerable, never requested access to counsel, and was aware that his presence at and participation in the Interviews were voluntary.²²¹
- c. The Interviews were recorded and such records are reliable and accurate.²²²
- d. The Interview Records were not obtained unlawfully.²²³

²¹⁷ *Karadžić* Decision, paras 7-8.

²¹⁸ ECtHR, *Beuze v. Belgium* [GC], 71409/10, Judgment, 8 November 2018 ('*Beuze* Judgment'), paras 125-130. See also *Doyle* Judgment, para.74.

²¹⁹ These factors are consistent with those set out by the ECtHR when assessing the overall fairness of the proceedings, notwithstanding a violation of the Accused's right to counsel. See *Parkhomenko* Judgment, paras 88-90; *Beuze* Judgment, para.150.

²²⁰ See Section II and paras 42-49 above.

²²¹ See para.46 above.

²²² See paras 30-37 above. See also *Doyle* Judgment, para.99; *Prlić* Appeal Decision, para.44.

²²³ See paras 39-58 above.

- e. The Interviews have never been retracted and the procedure followed was not challenged until the Defence Motion, despite repeated prior opportunities.²²⁴
- f. The KSC framework provides avenues for the Accused to fully challenge the admissibility and evidential weight of the Interviews.²²⁵
- g. The trial is being conducted by professional judges.²²⁶
- h. The Interviews are being tendered in proceedings concerning serious international crimes and there is a strong public interest in the prosecution and punishment of such crimes.²²⁷

62. This combination of factors was not present in any of the cases referred to in the Defence Motion,²²⁸ where the ECtHR found a violation of ECHR Articles 6(1) and 6(3). All such cases concerned suspects, who, *inter alia*, were detained and vulnerable, had explicitly requested access to a lawyer, were not informed of their rights, and/or were subject to compulsion and mistreatment. None of these factors are present in this case. Instead, the multiple and reinforcing indicia of fairness set out above are consistent with and in fact, exceed²²⁹ those relied upon by the ECtHR in *Doyle v. Ireland*, where the court concluded that there was no violation of ECHR Articles 6(1) or 6(3) despite (i) an unjustified restriction on the suspect's right to a lawyer during questioning and (ii) the 'central part' his statements played in his conviction.²³⁰

²²⁴ See Section II above. See also 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, para.15 (where an Accused has voluntarily and freely made statements prior to trial, he cannot later on choose to invoke rights to retroactively shield those statements from admission).

²²⁵ See, *inter alia*, Rule 138.

²²⁶ See para.38 above.

²²⁷ See para.28 above.

²²⁸ Defence Motion, KSC-BC-2020-04/F00281, paras 30-38, 46-47 and the sources cited therein.

²²⁹ For example, as opposed to the current circumstances, the applicant in *Doyle v. Ireland* was detained, was unaccustomed to police interviews, and had exercised his right to legal assistance. Moreover, the applicant was convicted by a lay jury. See *Doyle* Judgment, paras 81, 85, 94-95.

²³⁰ See *Doyle* Judgment, paras 85-103. Similar to the circumstances described in para.57 above, this case concerned a restriction arising from applicable domestic procedure, meaning that, generally, no suspect in the relevant jurisdiction benefitted from the assistance of counsel during questioning. See *Doyle* Judgment, paras 81-84.

63. The Interview Records are not only admissible, but in the interests of justice and a proper determination of the charges in this case, should be admitted.

IV. CLASSIFICATION

64. This filing is confidential pursuant to Rule 82(4).

V. RELIEF REQUESTED

65. For the foregoing reasons, the Panel should (i) reject the Defence Motion; and (ii) admit the Interview Records into evidence.

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Alex Whiting

Acting Specialist Prosecutor

Wednesday, 18 January 2023

At The Hague, the Netherlands.