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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
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THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Public Redacted Version of
Defence Response to Prosecution Motion for Admission of Accused's Statements

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I. INTRODUCTION

1. The Defence for Mr Pjetër Shala ("Defence" and "Accused", respectively) files this response to the "Prosecution motion for admission of Accused's statements".[1]

2. The Defence rejects all submissions made by the Specialist Prosecutor's Office ("SPO") in the Prosecution Motion and maintains the position presented in the Defence "Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel" in its entirety.[2]

3. The Defence requests the Panel to reject the Prosecution Motion and declare inadmissible all items identified in Annex 1 to the Prosecution Motion, which are collectively named as the "Interview Records".[3] These include the records of interviews with the Accused conducted by the ICTY's Office of the Prosecutor ("OTP"), the Belgian Federal Judicial Police, and the Belgian Federal Judicial Police and the Specialist Prosecutor's Office ("SPO"). In addition, the Defence

[1] KSC-BC-2020-04, F00346, Decision on the Defence Request for an Extension of Time (F00342), 11 November 2022 (confidential), para. 13(b); KSC-BC-2020-04, F00334, Prosecution motion for admission of Accused's statements with confidential Annex 1, 1 November 2022 (confidential) ("Prosecution Motion"). All further references to filings in this Response concern Case No. KSC-BC-2020-04 unless otherwise indicated. Pursuant to Article 36 of the Practice Direction on Files and Filings, the Defence requests the Trial Panel to extend the word limit for its Response by up to 6,000 words. Good cause exists for the requested variation in light of the seriousness and complexity of the matters concerned and the need to be afforded sufficient opportunity to properly respond to the SPO allegations with regard to all four interviews. The requested extension will enable the Defence to submit a meaningful response to the Prosecution's submissions that will assist the Panel in its determination of the issues at stake. *See also* F00330, Decision on Specialist Prosecutor's Request for Extension of Word Limit, 28 October 2022 (confidential).

[2] F00281, Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel, 20 September 2022 (confidential) ("Motion"); F00299, Defence Reply to Prosecution Response to Defence Motion to Exclude Evidence from the Case File, 7 October 2022 (confidential) ("Reply").

[3] Prosecution Motion, para. 1, Annex 1. The "Interview Records" include: (i) the records of the Accused's 2005 ICTY Interview, 2007 ICTY Interview, 2016 Belgian Interview, and 2019 Belgian and SPO Interview; (ii) associated exhibits; and (iii) related procedural information. See Prosecution Motion, para. 1, Annex 1.

requests the Panel to grant the relief requested in its "Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel".[4]

II. PROCEDURAL HISTORY

4. On 20 September 2022, the Defence filed the Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel.

5. On 30 September 2022, the SPO filed its response to the Motion, requesting the Panel to dismiss it summarily and set a schedule for the submission of the interviews into evidence.[5]

6. On 7 October 2022, the Defence filed its reply to the Prosecution Response, requesting the Panel to grant the relief requested in its Motion.[6]

7. On 20 October 2022, the Panel ordered the SPO to file submissions on the merits of the Defence Motion.[7] On 28 October 2022, the Panel granted the Prosecution's request for a considerable extension of the applicable word limit.[8]

8. On 1 November 2022, the SPO filed its motion for admission of the Accused's statements, requesting the Panel to reject the Defence Motion and admit into

[4] Motion, paras. 1, 2, 53, 54 ("the exclusion from the case file of the statements of the Accused during his interview conducted by the Belgian Federal Judicial Police on 14 January 2016 and his interview conducted by the SPO and the Belgian Federal Judicial Police on 11 and 12 February 2019, their associated audio-video recordings, and all references to the statements in related SPO Official Notes; the SPO to strike out from its Pre-Trial Brief all submissions based on and/or references to the statements; and the Parties to strike out from all filings and material submitted through the electronic management system, all references to the Accused's statements during the two interviews.")
[5] F00288, Prosecution response to Defence motion to exclude evidence from the case file, 30 September 2022 (confidential) ("Prosecution Response"), paras. 1, 7.
[6] Reply, para. 11.
[7] T. 20 October 2022 p. 495, lines 4-18.
[8] KSC-BC-2020-04, F00330, Decision on Specialist Prosecutor's Request for Extension of Word Limit, 28 October 2022 (confidential).

evidence the Interview Records as identified in Annex 1 of the Prosecution Motion.[9]

9. On 9 November 2022, the Defence requested an extension of time for its response to the Prosecution Motion until 24 November 2022.[10] The SPO did not oppose the request.[11]

10. On 11 November 2022, the Panel granted the Defence request for an extension and ordered the Defence, if the Accused wishes to waive his right to have his detention reviewed as currently scheduled, to request postponement of the review until the Panel has issued its decision on the Defence Motion.[12]

11. On 16 November 2022, the Defence notified the Panel that the Accused agreed to waive his right to periodic review of the lawfulness of his detention until 6 December 2022.[13]

III. SUBMISSIONS

12. The Accused objects to the admission of the Interview Records as the circumstances in which the four interviews were conducted violated his rights as a suspect, including his right to be assisted by counsel of his choosing free of charge both prior to and during such interviews, his right to free and effective assistance of an interpreter, and his right to protection against self-incrimination.

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[9] Prosecution Motion, paras. 1, 65, Annex 1. *See also* F00327, Prosecution request for extension of word limit, 27 October 2022 (confidential); F00330, Decision on Specialist Prosecutor's request for extension of word limit, 28 October 2022 (confidential).
[10] F00342, Defence Request for an Extension of Time for its Response to the Prosecution Motion for the Admission of Statements, 9 November 2022 (confidential), para. 8.
[11] F00343, Prosecution response to Defence request for an extension of time, 10 November 2022 (confidential), para. 2.
[12] F00346, Decision on the Defence Request for an Extension of Time (F00342), 11 November 2022 (confidential), para. 13.
[13] F00352, Defence Notice of Waiver by the Accused of his Right to Periodic Review of the Lawfulness of his Detention for 20 Days with Confidential Annex 1, 16 November 2022 (confidential), para. 1.

13. In this respect the Defence relies on Rule 138(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules") as the contested materials amount to "evidence obtained in violation of the Law and Rules and standards of international human rights law", the said violations cast substantial doubt on the reliability of such materials, and their admission to evidence would be antithetical to and seriously damage the integrity of the proceedings.

14. In the alternative, in the event that the Panel finds that the impugned materials were not obtained in violation of the KSC Law, Rules, or international human rights law, the Defence objects to their admission under Rule 138(1) of the Rules. Given the circumstances in which they were obtained, the impugned materials are unreliable, and any probative value is outweighed by their prejudicial effect.

15. The SPO alleges that, before each interview, the Accused was properly informed of his rights; he knowingly and intelligently waived his right to remain silent and to be assisted by counsel; he had access to the free assistance of an interpreter; and there are no grounds to doubt the fairness of the proceedings.[14]

16. The SPO's submissions are false and misleading. In response, the Accused will: (A) present his complaints of a violation of his defence rights in the manner in which the interview statements were obtained; (B) underline that he did not waive his rights with respect to any of these interviews; (C) address the lack of effective assistance by an interpreter in breach of his defence rights during the 2016 and 2019 interviews; (D) address the violations of the KSC legal framework during the interviews; and (E) challenge the proposed admission of the unreliable and highly prejudicial materials which would irreparably damage the integrity of these proceedings and render them unfair.

[14] Prosecution Motion, para. 2.

17. In the alternative, the Accused in section (F) will object to the admission of the Interview Records under Rule 138(1) of the Rules, as given the circumstances in which his statements were obtained, they are unreliable, and any probative value is clearly outweighed by their prejudicial effect.

(A) The Accused's Rights as Suspect were Violated in Each of the Four Interviews

(i) ICTY interview of 22 January 2005

18. In the course of the Accused's interview, the OTP advised him of his rights as a possible suspect in general terms.[15] The OTP informed him of the right to the free assistance of an interpreter if he does not speak or understand the language used for questioning, the right to remain silent and that anything he says will be recorded and can be used in evidence against him in a later ICTY proceeding, the right to be assisted by a legal representative or a lawyer of his own choice, the right to free legal representation if he cannot afford it, and the right to suspend the interview should he require legal assistance.[16]

19. On 30 October 2007, before the Accused testified as a witness for the OTP in the ICTY case of *Haradinaj et al.*, the Defence for Haradinaj raised concerns as Mr Shala had not been administered caution by an independent counsel, which was considered crucial as Mr Shala would be answering questions without clearly understanding the nature of the OTP's allegations against him and without independent legal advice.[17] Counsel for Haradinaj submitted that it was important for Mr Shala to be appropriately cautioned as the he had the right against self-incrimination and the right against compelled testimony in the

[15] ERN T000-2742-T000-2742-Alb and Eng Transcript – A, p. 5.
[16] ERN T000-2742-T000-2742-Alb and Eng Transcript – A, pp. 2, 5-7.
[17] ERN IT-04-84 T9920-T9983, pp. 4-6, 8.

absence of a knowing and intelligent waiver, particularly given his delicate position as a person who has potential criminal liability.[18]

20. The Accused did not provide an informed and valid waiver of his right to legal assistance free of charge. Although he was informed generally of such possibility, at no point was he put on notice of the complex and difficult situation he was in and that legal assistance in such circumstances was absolutely required for the process to be fair. The fact that Mr Shala is an adult[19] does not change the fact that, as a person who only completed lower secondary education, he could not appreciate the gravity of the situation and its potential consequences without specialised legal advice. Reciting such rights as a matter of practice without making sure that an accused is fully aware of the consequences of his actions and the difficulty of the situation he is facing is clearly insufficient. His stated consent cannot be interpreted to constitute an informed and valid waiver of his right to legal assistance.

21. The reality is that any suspicions against the Accused involved complex charges potentially committed in the course of a long armed conflict. He was not given any information as to what particular crimes he was being suspected of. He was not informed that he may have been suspected of or charged with alleged crimes taking place at Kukës in 1999. He was not informed particularly of the fact that any criminal liability could be based on physical perpetration, as an accomplice or on more complex forms of liability. He was not informed that any statements he makes could be used against him not only in the context of ICTY proceedings but of any subsequent domestic or international proceedings. He had no way of

[18] ERN IT-04-84 T9920-T9983, pp. 10, 11.
[19] The SPO suggests that "as an adult", the Accused "could be expected to inform himself of the representation options available to him in advance of the interviews". See Prosecution Motion, para. 42. This fails to appreciate the Accused's capacity to appreciate the gravity of the situation and the fact that he was not properly informed of his rights to effective and free legal representation both before and during the interviews in question as well as how to obtain such representation.

knowing that, shortly after the events forming the subject-matter of the said interview, the ICTY Appeals Chamber issued a judgment holding that criminal liability for war crimes and crimes against humanity is possible through participation in a joint criminal enterprise, even when such crimes are not directly intended.

22. The reality is that when Mr Shala agreed to cooperate with the ICTY investigators he had no idea of how complex any potential liability he may be suspected of might be or that he may be facing criminal proceedings not by the ICTY but by an entity established long thereafter, namely the KSC. In light of the complexity of the situation, fairness required that he is provided with legal assistance and that, given his indigent status, such assistance should be provided free of charge. He was not sufficiently informed that such legal assistance should have been made available to him prior to any questioning as suspect. In light of the inequality of power and awareness of the situation between Mr Shala and the team of ICTY prosecutors and investigators that questioned him, fairness and equity required giving him an effective and real opportunity to assistance by counsel prior to and during such questioning. The disparity between Mr Shala representing himself and the team of ICTY prosecutors and investigators entailed such degree of compulsion that the privilege against self-incrimination requires that any statements obtained from him in such circumstances cannot be used at trial.

(ii) ICTY interview of 21-22 May 2007

23. On both days of this interview, the OTP informed the Accused of his rights as a suspect in general terms.[20] The OTP informed him of the right to be assisted by a lawyer of his own choice, the right to free legal representation if he did not have the means to pay for it, the right to the free assistance of an interpreter, the right

[20] ERN T001-0105-1-A-TR, p. 1; ERN T001-0105-3-A-TR, p. 1.

to remain silent and to be cautioned that any statement he makes will be recorded and can be used in evidence, and the right to stop the interview should he require legal assistance.[21]

24. The statements given during the ICTY 2007 interview were obtained in circumstances where the Accused had not provided a well-informed and valid waiver of his right to legal assistance. The Defence refers to the arguments set out in relation to the first ICTY interview that apply equally to the second. In light of the great disparity between Mr Shala and the team of ICTY prosecutors and investigators he had to face by himself without prior legal advice, without being put on notice of the seriousness of his situation or of what crimes he was being suspected (at least in general in terms of time and location), entailed such degree of compulsion that any statements given in such circumstances cannot be used against him. When the OTP asked the Accused if he would be available to come back the next day for the interview, he responded that he has "no other choice" and "what else can I do?", which further shows the unequal position between the Accused and the OTP team, his lack of understanding of the situation he was in, and that his participation was not voluntary.[22]

(iii) Belgian interview of 14 January 2016

25. The Accused was not sufficiently informed about his rights as suspect prior to the 2016 Belgian interview. The summons informed Mr Shala that "during the interview" he may not be "forced" to incriminate himself; that he may choose to give a statement, answer the questions or remain silent, and that he has the right to consultation with counsel of his own choosing prior to the first interview.[23] He was also informed that "when [he] appears for the interview it will be assumed

[21] ERN T001-0105-1-A-TR, pp. 1, 2; ERN T001-0105-3-A-TR, pp. 1, 2.
[22] ERN T001-0105-1-A-TR, p. 5; ERN T001-0105-2-A-TR, pp. 5, 6.
[23] Prosecution Motion, para. 13.

that [he] consulted with an attorney".[24] The summons was accompanied by a "statement of rights". The latter contained in summary form his rights under Belgian law as noted in the Belgian Official Gazette of 23 December 2011.[25]

26. Notably, he was not informed that he had the right to assistance by counsel both prior to as well as during the said interview. He was not provided with any assistance in the event that he had any queries as to the incomplete presentation of his rights. He was informed of the arbitrary assumption that will be made once he does appear for such interview namely that, without any query as to whether he was in fact aware of his rights, it will be "assumed" that he had consulted with an attorney. The unfairness in this set-up is evident. The SPO claim that Mr Shala was sufficiently informed of his rights as a suspect by the pre-edited text sent to him by post containing an incomplete and misleading account of his rights is clearly misleading. With regard to the purported waiver, the statement states that he "may waive this right voluntarily and upon consideration if he signs and dates a document to this effect." Mr Shala did not sign any such document.

27. The interview record suggests that the Accused was requested to sign a text that the SPO refers to as "declaration of rights" which noted that he "cannot be forced to incriminate him/herself", he can choose to give a statement, answer posed questions, or remain silent, he has the right to consult confidentially with a lawyer of his choice prior to the interview, he can waive the right to confidential legal assistance in a duly dated and signed document, and that he is not subject to any restrictions on his liberty.[26] Although the SPO relies on the pre-edited text of this notice to claim that it was given to the Accused prior to the interview, the

[24] Prosecution Motion, para. 13.
[25] ERN 101747-101751-ET RED, pp. 101750, 101751.
[26] ERN 074117-074129-ET Revised, p. 074119.

date and time of the signatures on this document make clear that this is not what happened.

28. The interview records indicate that the *handwritten* time of signing the relevant statement was at 10.48 hours whereas the commencement of the interview was at 9.22 hours.[27] This shows that the Accused was shown and signed the declaration of rights *after* the questioning had commenced, contrary to Article 38(3) of the KSC Law and Rule 43(2) of the Rules. The SPO claims that the declaration of rights was provided "prior to the commencement of the interview" (and relies in this respect on its pre-edited text). However, the SPO fails to provide any evidence in support of its claim or explain why the *handwritten* time of the declaration clearly reads 10.48 hours when the time of the commencement of the interview reads 9.22 hours.[28]

29. In any event, the above declaration did not at all inform Mr Shala of his right to have a lawyer *during* the interview. It did not at all inform Mr Shala of his right to have a lawyer free of charge during that interview and that such interview could be interrupted at any moment should he require legal assistance which would be provided free of charge. He was not informed as to how he could seek free legal assistance. It was signed after the said interview had begun and Mr Shala had already responded to various questions. Lastly, it did not inform Mr Shala at all that he had the right to free interpreter if he felt the need that he needed one.

30. The disparity between Mr Shala representing himself and the team of Belgian prosecutors and investigators entailed such degree of compulsion, particularly in light of the fact that the questions related to events that took place more than 16 years before that interview, that the privilege against self-incrimination

[27] ERN 074117-074129-ET Revised, pp. 074119, 074120.
[28] Prosecution Motion, paras. 16, 43; Motion, paras. 16, 18.

requires that any statements obtained from him in such circumstances cannot be used at trial.

(iv) Belgian and SPO interview of 11 and 12 February 2019

31. Prior to this interview the Accused received a summons which informed him of his rights in similar terms as in the previous summons. He also received the pre-edited form described as the "declaration of rights".[29] As argued above, the notification of his rights in this manner cannot be considered effective. In addition, it was incomplete. For instance, he was not informed that he had the right to be assisted by counsel during the interview. Contrary to the 2016 interview, he was not requested to sign a statement of his rights prior to the commencement of this interview.[30] Although he was informed that the interview was being conducted in the presence of KSC officials and at the request of KSC prosecutor, he was not informed of his right to be assisted by specialist defence counsel who would be familiar with proceedings before the KSC. Depriving him of possibility of knowing of his right of free legal assistance by counsel admitted on the KSC list of counsel who would be competent to provide such legal assistance constitutes in itself a serious breach of his defence rights. The "general" reminder as to his rights – as the SPO puts it- which took place during and at the end of the questioning did not provide specific notice of his rights in a manner that sufficiently ensured that the Accused himself understood the gravity of the situation he faced, the complexity of the matters at hand, and the evident fact that he needed legal assistance.

32. The disparity of the position between the Accused who was not aware of the gravity of the situation and his rights and the team of Belgian and SPO prosecutors and investigators when being interviewed about events taking place

[29] Prosecution Motion, paras. 21, 42; ERN 101747-101751-ET RED, pp. 101750, 101751.
[30] ERN 066843-066855-ET Revised RED, p. 066845; ERN 066866-066822-ET Revised RED, p. 066868.

20 years prior to the said interview is evident. Normally, investigators are reluctant to hear suspects in the absence of lawyers assisting them in serious criminal cases. This is because it is generally appreciated that the interests of fairness and effective prosecution of cases require providing suspects in complex cases legal assistance. In the context of this case, Mr Shala was heard as a suspect by experienced Belgian and SPO prosecutors and investigators and no one considered it appropriate to enquire whether he needed legal assistance, whether fairness required that he does consult with a lawyer before being interviewed for the second time as a suspect for war crimes committed 20 years prior to the purported interview. This situation constitutes compulsion; compulsion that makes it a breach of the principle against self-incrimination to admit statements obtained in such circumstances in evidence.

33. The SPO acknowledges that the Accused was not aware of his right to free legal representation. It refers to him explaining that he had not "engaged a lawyer" because "a lawyer has to be paid" and that, as he did not have the means to do so, he was going to defend himself.[31] The Accused also demonstrated his confusion when he stated that "[e]ven in the days of the ICTY I defended myself without engaging a lawyer". He was not aware of the difference between being heard as a suspect strictly speaking but in essence as a potential insider witness and being questioned as a suspect with a view of being charged. Fairness would require the investigators and prosecutors that were present, especially the representatives of the KSC, to interrupt the interview and ensure that he was aware of his rights. However, no one did this. The interview went on.

34. In addition, the meaningless recitation of the theoretical rights Mr Shala was entitled to was no more than paying lip service. For instance, even though he was informed that "[d]uring the interview *he may ask* that all of the questions put

[31] Prosecution Motion, para. 24.

to him and his answers be recorded verbatim" (emphasis added) the investigators failed to record his answers verbatim properly.

35. Contrary to the SPO submissions,[32] the Accused was not sufficiently informed of his rights as a suspect prior to the 2019 interview. He was also not given an effective opportunity to exercise them. When his confusion and the fact that he was not aware of such rights became evident, no one clarified the situation, no one explained him his rights, no one interrupted that interview and ensured that he was given specialist legal assistance by counsel.

36. Admitting the statements obtained in such circumstances is unfair. It would constitute a breach of Mr Shala's right to a fair trial.

(B) Lack of Valid Waiver

37. The SPO has the burden of showing that the Accused had waived his defence rights for the purposes of the relevant interviews.[33]

38. Contrary to the SPO's assertions, the statements of all four interviews were obtained from the Accused in violation of his rights as suspect, including his right to be assisted by counsel, and in the absence of any unequivocal waiver of his rights, as required by the KSC legal framework and international human rights law.

[32] Prosecution Motion, para. 42.
[33] ECtHR, *Barberà, Messegué and Jabardo v. Spain*, no. 10590/83, 6 December 1988, para. 77; *Janosevic v. Sweden*, no. 34619/97, 21 May 2003, para. 97; ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004, para. 22; *Prosecutor v. Mitar Vasiljevic*, IT-98-32-T, Judgement, 29 November 2002, para. 12.

39. Mr Shala was not properly informed of his rights as a suspect and was not given an effective opportunity to exercise such rights. He did not provide a "knowing and intelligent waiver", either express or tacit.[34]

40. The SPO does not demonstrate the unequivocal character of a waiver by the Accused of his rights guaranteed by Article 6 of the ECHR nor does it show that he had unequivocally, knowingly, and intelligently waived his rights under Article 6.[35]

41. Well-established ECtHR case law provides that a waiver of fundamental rights is valid when it is "established in an unequivocal manner".[36] Mr Shala never provided any such waiver in an unequivocal manner for any of the four interviews. In fact, his statements during the 2019 Belgian and SPO interview, that he had not engaged a lawyer because he did not have the means, demonstrate that he was not sufficiently informed and therefore could not have waived his right to free legal assistance.[37] This also shows his understanding of his rights with regard to all four interviews.

42. A waiver must also "be attended by minimum safeguards commensurate to it importance".[38] Again, as shown by the transcript of the ICTY hearings as well as the Accused's confusion during the Belgian interviews, there were no sufficient

[34] ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], nos 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 272 *referring to Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2015, para. 101; *Pishchalnikov v. Russia*, no. 7025/04, 24 September 2009, para. 77.
[35] ECtHR, *Bozkaya v. Turkey*, no. 46661/09, 5 September 2017, para. 48 *referring to Savaş v. Turkey*, no. 9762/03, 8 December 2009, para. 69 and *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017, para. 115; *Rodionov v. Russia*, no. 9106/09, 11 December 2018, para. 155.
[36] ECtHR, *Bozkaya v. Turkey*, para. 48, referring to *Savaş v. Turkey*, no. 9762/03, 8 December 2009, para. 69 and *Simeonovi v. Bulgaria* [GC], para. 115; *Rodionov v. Russia*, para. 155; *Volkov and Adamskiy v. Russia*, no. 30863/10, 26 March 2015, para. 53; *Ogorodnik v. Ukraine*, no. 29644/10, 5 February 2015, para. 104; *Aleksandr Dementyev v. Russia*, no. 43095/05, 28 November 2013, para. 41; *Tarasov v. Ukraine*, no. 17416/03, 31 October 2013, para. 93.
[37] ERN 066888-TR-ET Part 1 Revised, p. 95.
[38] ECtHR, *Simeonovi v. Bulgaria* [GC], para. 115; *Aleksandr Dementyev v. Russia*, para. 41; *Tarasov v. Ukraine*, para. 93; *Ogorodnik v. Ukraine*, para. 104

safeguards to ensure that any perceived waiver of his right not to have a lawyer was informed and real.

43. A waiver of the right to be assisted by counsel must be voluntary.[39] However, in light of the degree of compulsion given the unequal position between the Accused and the persons interviewing him, the lack of adequate information as to his rights, and the circumstances described above, the fact that he appeared without a lawyer – since he was never informed that he could appear at those interviews with a lawyer – cannot be considered in any circumstances voluntary.

44. A waiver must be clear in that the person should reasonably be able to foresee the consequences of his conduct.[40] No one ever attempted to explain to the Accused the potential consequences of providing statements to interviewers and prosecutors about his potential criminal liability for war crimes in practical terms that would be of assistance, let alone proceeding to give such statements without competent legal assistance.

45. A waiver must not run counter to any important public interest.[41] The manner in which these interviews were conducted in the Netherlands and Belgium, respectively, is shameful and in breach of established European human rights law that should in no circumstances be permitted.

46. In *Pavlenko v. Russia*, the European Court of Human Rights ("ECtHR") held that:

> "an accused often finds himself in a particularly vulnerable position at [the investigation] stage of the proceedings, the effect of which is amplified by the fact

[39] ECtHR, *Pishchalnikov v. Russia*, para. 77; *Šarkiene v. Lithuania*, para. 34.
[40] ECtHR, *Simeonovi v. Bulgaria* [GC], paras. 119, 126; *Rodionov v. Russia*, para. 156; *Pishchalnikov v. Russia*, para. 80; *Akdağ v. Turkey*, no. 75460/10, 17 September 2019, paras. 50-51, 55-59; T*rymbach v. Ukraine,* no. 44385/02, 12 January 2012, paras. 64-65; *Hakan Duman v. Turkey*, no. 28439/03, 23 March 2010, para. 50; *Talat Tunç v. Turkey,* no. 32432/96, 27 March 2007, paras. 56-62.
[41] ECtHR, *Simeonovi v. Bulgaria* [GC], para. 115 *referring to Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, para. 86; *Dvorski v. Croatia* [GC], para. 100; *Akdağ v. Turkey*, no. 75460/10, 17 September 2019, para. 46. *Aleksandr Dementyev v. Russia*, para. 41; *Volkov and Adamskiy v. Russia*, para. 53; *Tarasov v. Ukraine*, para. 93; *Ogorodnik v. Ukraine*, para. 104.

> that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of the accused not to incriminate himself. […] Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. […] a waiver of a right guaranteed by the Convention – in so far as it is permissible – […] must be established in an unequivocal manner".[42]

47. Where an accused has not promptly received information about his right to legal assistance, he or she cannot be found to have "waived" his or her right thereto.[43] A practice where a pre-printed phrase such as "No lawyer sought" is used, without a comment or an individualised explanation ("d' un commentaire ou d' une explication individualisée") of his or her procedural rights, cannot be equated to a situation where "the applicant had unequivocally, knowingly and intelligently waived his rights under Article 6".[44] Importantly, the ECtHR has further held that where the case materials do not contain a waiver of legal assistance, it is not necessary to establish whether the suspect or accused made requests to have a legal aid lawyer appointed, because "the applicant's conduct could not in itself relieve the authorities of their obligation to provide him with an effective defence".[45]

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[42] ECtHR, *Pavlenko v. Russia*, no. 42371/02, 1 April 2010, paras. 101, 102 *referring to Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006, para. 101, *Sejdovic v. Italy* [GC], para. 86.
[43] ECtHR, *Simeonovi v. Bulgaria* [GC], para. 118.
[44] ECtHR, *Bozkaya v. Turkey*, para. 48; *Rodionov v. Russia,* para. 155. *See, contra, Sklyar v. Russia*, paras. 22-25 (where the ECtHR provided an example of assessment of "authenticity and lawfulness of […] two waivers" and held that they were established in a manner compatible with the requirements of domestic law and the Convention).
[45] ECtHR, *Volkov and Adamskiy v. Russia*, para. 58. At paragraph 59 of the same judgment, the ECtHR added that "in the absence of a written waiver from the applicant, domestic law required the authorities to appoint a legal aid counsel for him […]. Moreover, it was brought to their attention that the applicant had no retainer agreement with his trial lawyer, Ms D., when the representative of the Golovinskiy

48. As stated in the Motion, the fact that the Accused was given and signed a pre-edited text containing an incomplete description of his rights one hour after the 2016 interview had begun is not sufficient.[46] A waiver of the right to a lawyer by signing a pre-printed phrase such as "no lawyer sought" is of questionable value "in demonstrating the unequivocal character of the waiver by the [person] of a right guaranteed by the Article 6 of the [European Convention on Human Rights]" and in showing that he "had unequivocally, knowingly and intelligently waived his rights under Article 6".[47]

49. The SPO relies on the ECtHR decision in *Šarkienė v. Lithuania*.[48] In that case, the Accused signed an official notice listing her procedural rights but unlike the Accused had not complained in the subsequent court proceedings that she had not been properly informed of her right to a lawyer. The waiver she had signed had been explicit, unequivocal and drawn up in accordance with domestic law, and her allegations that she had been pressured to waive her right to a lawyer were found not credible.[49]

50. In *Sklyar v. Russia*, a decision which the SPO also relied on, the applicant signed an acknowledgment that he has been notified of his rights as well as signed an "unequivocal waiver of legal aid" containing the words "I refuse legal representation".[50] The waiver also bore the stamp of the court.[51] In contrast, in

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District Court of Moscow called to inform her of the upcoming appeal hearing […]. Thus, in such circumstances it was up to the domestic authorities to intervene and appoint a legal aid counsel for the appeal hearing or to adjourn the hearing until such time as the applicant could be adequately represented […]. However, they failed to do so."

[46] Motion, para. 33.

[47] ECtHR, *Bozkaya v. Turkey*, para. 48 *referring to Savaş v. Turkey*, para. 69 and *Simeonovi v. Bulgaria* [GC], para. 115; *Rodionov v. Russia*, para. 155.

[48] Prosecution Motion, para. 2.

[49] ECtHR, *Šarkienė v. Lithuania*, no. 51760/10, 24 February 2016, paras. 35-37.

[50] ECtHR, *Sklyar v. Russia*, no. 45498/11, 18 July 2017, paras. 23-24.

[51] ECtHR, *Sklyar v. Russia*, no. 45498/11, 18 July 2017, para. 24.

this case, the Accused did not sign any written waiver clearly stating that he wishes to waive his right to be assisted by counsel.

51. No waiver from the Accused, either explicit or implicit, that unequivocally indicates that he waived his rights as suspect exists for any of the four interviews. The interviews were conducted in breach of the Accused's fundamental rights as guaranteed by Article 31 of the Kosovo Constitution, Article 21 of the KSC Law, and Article 6 of the ECHR.

(i) ICTY interviews

52. The SPO fails to show that the Accused had provided an informed and unequivocal waiver of his rights as a suspect for the purposes of those interviews.[52]

(ii) Belgian interview of 14 January 2016

53. The SPO falsely asserts that a written waiver record exists as the Accused had signed a pre-written statement that provided an incomplete description of his rights (notably it excluded the right to legal assistance free of charge during the interview) after the said interview had begun.[53]

54. In addition, no waiver of his "right to confidential legal consultation in a duly dated and signed document", as required in the declaration itself, is accompanying the record or can be found among the evidentiary material disclosed to the Defence by the SPO.[54] In addition, as argued above, the Accused was not adequately informed of all of his rights and therefore cannot be considered to have waived rights he did not know that he had.

[52] *See* Response, paras. 38, 39, 42.
[53] Prosecution Motion, para. 47.
[54] ERN 074117-074129-ET Revised, p. 074119.

55. The SPO fails to demonstrate that the Accused had waived his rights as a suspect for the purposes of this interview.

(iii) Belgian and SPO interview of 11 and 12 February 2019

56. The SPO fails to demonstrate that the Accused provided an unequivocal and informed waiver of his right as a suspect for the purposes of the 2019 Belgian interview. The pre-edited text which was signed by the Accused evidently did not constitute a well-informed and unequivocal waiver.[55] The Accused was never offered specialised legal advice. The SPO fails to demonstrate that he was sufficiently informed of his all his rights. The pre-edited text which was signed by Mr Shala evidently did not constitute a well informed and unequivocal waiver. Mr Shala was never offered specialised legal advice. Mr Shala was never told he had the right to legal assistance during the interview and free of charge. When the Belgian and SPO authorities became aware of the fact that Mr Shala was not aware of his right to free legal assistance and the gravity of the situation he was facing they still failed to inform him that the interview could be interrupted and continued only in the presence of specialist counsel. Importantly, the Accused provided absolutely no statement signed and dated expressing his alleged wish to waive his right to free legal assistance prior to and during that interview.

(C) Ineffective Assistance by Interpreter

57. The Defence notes that the Accused's right to an effective interpretation was violated in the conduct of the two Belgian and SPO interviews.

[55] ERN 066843-066855-ET Revised RED, p. 066845; ERN 066866-066822-ET Revised RED, p. 066868.

58. With regard to both interviews, the SPO misleadingly states that "there is nothing on the record suggesting the Accused had concerns over the interpreter's independence or ability".[56]

59. Contrary to the SPO's suggestion, the records confirm the Accused's concerns and dissatisfaction as to how his answers were translated and recorded.[57]

60. As the SPO acknowledges the Accused often "objected when he did not agree with the manner in which questions were being put" and attempted to correct

[56] Prosecution Motion, para. 52.

[57] *See, for example,* 066864-TR-ET Part 1 Revised, p. 79 (Interpreter: "People, not volunteers, from the popular movement throughout the country and in the Diaspora. They have been operating illegally for a long time, in complete illegally and' -- if I translate it literally -- 'in deep illegality'. 'The clandestine units can carry out various actions such as, for example, killing spies and traitors, officers and policemen, stealing weapons and transporting those weapons to secret bases, the destruction of military infrastructure using explosives. The organization…'." The Accused: "Sorry to interrupt. This is not my statement, for the record. This is not my statement, but that of some researcher, in quotation marks". Interpreter: "The gentleman is intervening to say that -- this is not my declaration, but that of a person who has carried out this 'study' - in quotation marks". Prosecutor: "Yes, but it is necessary to put it into the minutes, in French, in order to be able to ask the gentleman questions". The Accused: "But it has nothing to do with me!"). 066864-TR-ET Part 2 Revised, pp. 4, 5 (Interpreter: "In Peqin". The Accused: "In Peqin?" […] The Accused: "Peqin! I don't know where did they get this" Interpreter: "Peqin, PE QIN". The Accused: "Not Peqin! I don't know where they took this from… I don't know". Interpreter: "He's saying: I don't know the name /of this place/, I don't know where you found it". The Accused: "No, the name, I don't know where you found it, in which statement…?"); pp. 108, 109 (Prosecutor: "I wanted to know if these were people who had entered the zones voluntarily or did you, as the military police, did you have to go out looking for them?" The Accused: "No, no. Let me explain!"). 066888-TR-ET Part 1 Revised, p. 14 (the Accused: "And there was [REDACTED], who was the KLA [REDACTED]". Interpreter: "Of the [REDACTED]". The Accused: "[REDACTED], but he didn't recognise that… it was a gang, a group". Prosecutor: "How would you have characterized the relations between the two armed forces?" The Accused: "I'm getting to that". Prosecutor: "I mean the KLA and the FARK". The Accused: "I'm getting to that"); p. 54 (Interpreter: "Regardless of religious affiliation and regardless of his ideology, I could give him weapons". The Accused: "I would have given him five, not one". Interpreter: "I would…" The Accused: "Five"); p. 57 (Prosecutor: "There was a reference to [REDACTED]…" The Accused: "He was the commander of the military police of the village; I know him personally. But you're talking about somebody else -- but it's nonsense!"); p. 38 (Interpreter: "Yes, it's a form of Albanian that is a bit mixed with Serbian, and so…" The Accused: "No, it's a dialect, a dialect…"); p. 120 (The Accused: "Everybody was dancing and singing. And I left". Interpreter: "[REDACTED]?" The Accused: "Everybody". Interpreter: "Yes, lots of people, including [REDACTED]…" The Accused: "Not [REDACTED]. Everybody".); p. 153 (Interpreter: "Godfather means the brother-in-law?" The Accused: "No, no!! /The godfather/ is the person who…" Interpreter: "The godfather, the one who cuts the hair…" The Accused: "The godfather who bears witness when you are baptised in church".).

the interpreter throughout the interview, which clearly shows his concerns about the interpreter's independence and competence.[58]

61. In relation to the right to interpretation, the ECtHR has repeatedly held that

> "interpretation assistance should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events […]. In view of the need for that right to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided."[59]

62. In *Knox v. Italy*, as well as *Ucak v. the United Kingdom*, to which the SPO refers, the ECtHR held that the interpreter's services must provide the accused with effective assistance in the conduct of his defence and his conduct must not be such as to prejudice the fairness of the trial.[60] The ECtHR found that the role the interpreter played while the applicant was formulating her version of events went beyond the duties of interpreter and that the initial failure of the authorities to assess the interpreter's conduct, to evaluate whether her duties as an interpreter had been carried out in accordance with the guarantees provided for in Article 6(1) and 6(3)(e) affected other rights and undermined the fairness of the proceedings as a whole.[61]

63. Due to the numerous material discrepancies and errors in the transcript (which are described in paragraphs 71 to 72 below), the interpretation assistance

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[58] Prosecution Motion, paras. 25, 34, 36, 46 *referring to* ERN 066864-TR-ET Part 1 Revised, p. 79; ERN 066864-TR-ET Part 2 Revised, pp. 108, 109; ERN 066888-TR-ET Part 1 Revised, p. 14, 53, 54, 57; Annex 3 to the Motion, n. 21, 33, 36, 37.
[59] ECtHR, *Hermi v. Italy* [GC], no. 18114/02, para. 70, *referring to Güngör v. Germany*, no. 31540/96, 17 May 2001; *Kamasinki v. Austria*, no. 9783/82, 19 December 1989, para. 74. *See also Knox v. Italy*, no. 76577/13, 24 January 2019, para. 182; *Vizgirda v. Slovenia*, no. 59868/08, 28 August 2018, paras. 79, 83; *Baytar v. Turkey*, no. 45440/04, 14 October 2014, para. 49; *Diallo v. Sweden*, no. 13205/07, 5 January 2010, para. 23.
[60] ECtHR, *Knox v. Italy*, para. 184; *Ucak v. the United Kingdom*, no. 44234/98, 24 January 2002, p. 10.
[61] ECtHR, *Knox v. Italy*, paras. 184-187.

provided for the purposes of the 2019 interview was clearly inadequate and cannot be considered as "effective assistance in the conduct of [the accused's] defence".[62] In the interview, the interpreter went beyond her role and duties, asking questions to the Accused herself and adding, changing, or even suggesting answers in place of the Accused.[63] The interpreter often obstructed, instead of assisting, the Accused's attempts to defend himself in conveying his version of the events, in clear violation of the procedural rules and the Accused's rights to an effective defence.[64] The inadequacy of the interpretation and the improprieties and misconduct of the interpreter during the 2019 interview are compounded by the fact that the transcript contains incriminatory statements provided by the Accused in breach of his right protecting him from self-incrimination.[65] Any use of the 2019 interview statements against the Accused at

[62] Motion, paras. 42-44.
[63] *See, for example,* 066864-TR-ET Part 1 Revised, p. 77 (The interpreter did not translate the part of the answer given by the Accused. Interpreter: "This sentence here, when I read it with you, you said that this past here…" The Accused: "Yes, it did not exist. The part with Serbs and Montenegrins and Macedonians". Interpreter: "This did not exist".); p. 89 (The interpreter poses a different question from the investigator and changes the answer given by the Accused. Investigator: "At that time I knew of the existence of the [REDACTED] from the newspaper… was it a clandestine newspaper?" Interpreter: "Did you know it through the newspaper or also through?" The Accused: "No, through the newspaper!" Interpreter: "Oh yes. Yes, it was a clandestine newspaper".) 066864-TR-ET Part 2 Revised, p. 3 (The interpreter changes the Accused's answer. The Accused: "They were freer, they lived in freedom aboard, so when they came they would claim to be great patriots!" Interpreter: "They were more free, they had more liberty abroad than in the country, and when they came, of course we spoke more freely".); p. 30 (The interpreter changes the Accused's answer. The Accused: "Seeing the massacred family, any normal person, not only those who know him, would be moved". Interpreter: "He says, which normal person could remain insensitive to the massacre of children? It doesn't matter if we didn't know each other, to have seen children massacred, that affected us a lot".); p. 98 (The interpreter changes the Accused's answer. Accused: "Artillery, they would contact them and indicate the positions of the columns". Interpreter: "Since they were more powerful in terms of the weapons they had, they had the possibility…"). 066888-TR-ET Part 1 Revised, p. 20 (The interpreter changes the Accused's answer. The Accused: "You have this skill, you will take part in meetings". Interpreter: "Okay. It's your job… it's your job to do propaganda, it's your job to take part in meetings".).
[64] Motion, para. 43.
[65] ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-3216, Decision on the Defence for Mathieu Ngudjolo Chui's application for a complete review of the transcripts of his evidence, 13 December 2011, para. 5.

trial will result in serious prejudice and irreparably violate the Accused's right to a fair trial.

64. The fact that Mr Shala is able to communicate in French to some extent does not negate the need for an interpreter for the purposes of questioning as suspect for serious crimes under complex forms of liability. It remains a fact that, as the SPO acknowledged, he stated that he understood French very well but "preferred to have an interpreter." In addition, he was not able to appreciate the consequences of proceeding without a lawyer and without an independent and competent interpreter. Lastly, the Defence notes that the redaction code for the interpreter's name reveals her links with the investigators.

(D) The Interview Records were Obtained in Breach of the KSC Framework

65. At paragraph 55 of the Motion, the SPO acknowledges that the safeguards and standards to ensure respect for the rights of suspects and accused are to be respected. It adds that "[h]owever, human rights standards do not require any particular procedure or means to be employed, as long as those that are used are practical and effective." The Defence urges the Panel to correct the SPO's understanding of the need to ensure that the procedural rights of suspects and accused not as minimum standards but as *procedural* rights. While the SPO alleges that the KSC cannot impose the requirement of Specialist Counsel on domestic authorities, it can ensure that Specialist Counsel is assigned and present and can even ensure that Specialist Counsel who is also admitted to practise in the jurisdiction concerned is present. No effort was made to ensure that the Accused would have effective legal assistance during the interview requested and conducted in the presence of SPO officials. This is a fact that the SPO does not contest. This demonstrates the breach of the Accused's procedural rights.

66. Contrary to the SPO's allegations, the interviews were not conducted in compliance with the KSC procedural rules. Mr Shala was not sufficiently informed of all his rights as suspect. He did not waive his rights as a suspect. The SPO failed to record the entirety of the 2019 Belgian and SPO interview and also failed to prepare a verbatim record or transcript of such interview. As to the alleged "absence of any specific request by the accused to be assisted by a lawyer at the time", the Prosecution misconstrues the standard of an unequivocal and informed waiver.[66] It is the waiver that needs to be clear, specific, and well informed, not the request to exercise the right in question. In addition, how could it be expected that the Accused would know of his right to be assisted by a lawyer free of charge at the time, given that he was not informed of that right. As demonstrated by his expressly stated confusion, he was simply not aware that he could obtain specialist legal assistance free of charge.

(E)The Interview Records Are Unreliable and Irreparably Prejudicial

(i) The Interview Records are Unreliable

(a) Unreliable audio-video recording and transcript of the 11 and 12 February 2019 Belgian and SPO interview

67. The SPO alleges that the fact that there is no complete audio-video recording and transcript of the 2019 Belgian and SPO interview does not affect the reliability of the material available that are related to the 2019 interview. The SPO also maintains that no objection of the Accused as to the manner in which his statement was taken and the conduct of the interpreter can be found.[67]

68. The Accused's objections expressed during the last part of the interview cannot be found as the recording and transcript are incomplete and leave no record of

[66] Prosecution Motion, para. 57.
[67] Prosecution Motion, paras. 33, 34, 52.

them.[68] Explicit signs of the Accused's objections to the manner the interview was conducted as well as his concerns about the interpreter are evident in the parts of the record that are available.[69] In fact, the SPO acknowledges that the Accused had to interrupt the interview and "object when he did not agree with the manner in which questions were being put" and repeatedly tried to correct the interpreter throughout the interview.[70]

69. The part of the record of the interview that is available cannot be considered accurate nor reliable. The fact remains that this interview was not properly recorded in audio form and was not properly transcribed. This is despite the right of the Accused to have a complete verbatim record of this interview. The manner that the SPO attempts to portray the interview, as "conducted in a cooperative and respectful manner", is false.[71] As the SPO acknowledges, the Accused regularly intervened objecting to what he considered inappropriate questions or interpretations of his statements. It is the SPO's obligation to comply with the procedural framework and ensure that when it conducts interviews with suspects it intends to prosecute, it complies fully with the procedures that offer safeguards for the rights of such persons. The SPO cannot rely on its blatant failure to record a suspect's interview in a proper and fair manner and claim that the interview was conducted smoothly and that the Accused did not raise concerns or objections to it. The Defence has clear instructions that the Accused objected to the manner in which this statement was taken. The Accused had no capability to record the interview. The Accused was not aware of the "malfunctioning equipment" the interviewers purportedly chose to use, nor was

[68] Motion, paras. 21, 27.
[69] *See* n. 58.
[70] Prosecution Motion, paras. 25, 34, 36, 46 *referring to* ERN 066864-TR-ET Part 1 Revised, p. 79; ERN 066864-TR-ET Part 2 Revised, pp. 108, 109; ERN 066888-TR-ET Part 1 Revised, p. 14, 53, 54, 57; Annex 3 to the Motion, n. 21, 33, 36, 37.
[71] Prosecution Motion, para. 34.

he aware that none of the interviewers were keeping a verbatim record despite being obliged to do so. The fact that it was confirmed that "no incident" was recorded does not mean that the Accused did not object to questions or express his concerns with the interpretation.[72] The SPO does not come with clean hands given its failure to record the parts of the interview where such objections were made. The SPO fails to show that this interview was conducted in conditions that respected the rights of the Accused.

(b) Translation discrepancies in the 2016 Belgian interview

70. The SPO claims that the fact that the records of the 2016 Belgian interview are available in the original language, which can be used to correct related translations, ensures the reliability of the interview records.[73]

71. In the case of *Chui* at the International Criminal Court ("ICC"), a Trial Chamber found that "transcript reliability is a *sine qua non* condition to fair trial and that the existence of discrepancies between, on the one hand, the statements in Lingala made by Mathieu Ngudjolo Chui when giving evidence, and the French and English transcripts on the other, may cause serious difficulties to the Chamber, which would thus be unable to rule promptly on important factual issues".[74] This is despite the fact that the original statements in Lingala were available.[75] In *Lubanga*, a Trial Chamber found that the discrepancies between transcripts indicate that "the Chamber is potentially faced with a markedly flawed court record, which may well provide an unsatisfactory basis for any final

[72] Prosecution Motion, para. 33.
[73] Prosecution Motion, para. 35.
[74] ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-3216, Decision on the Defence for Mathieu Ngudjolo Chui's application for a complete review of the transcripts of his evidence, 13 December 2011, para. 5.
[75] ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-3216, Decision on the Defence for Mathieu Ngudjolo Chui's application for a complete review of the transcripts of his evidence, 13 December 2011, para. 5.

judgment […] one of the essential prerequisites of a fair trial [is] full and accurate record of the evidence".[76] The original recordings in Swahili and Lingala were also available in that case.[77]

72. The discrepancies in the French and English transcripts of the 2016 Belgian interview first, are real and second, they are not "inconsequential" but include numerous material errors.[78]

(c) Translation discrepancies in 2019 Belgian and SPO interview

73. The SPO claims that the fact that the records of the 2019 Belgian interviews are available in the original language, which can be used to correct related translations, ensures the reliability of the interview records.[79]

74. Contrary to what the SPO claims, significant discrepancies exist between the Accused's answers and the interpreter's translation in the English transcript of the 2019 Belgian and SPO interview.[80] The translations of wide-ranging and substantial parts of the interview are incorrect and inaccurately reflect the Accused's answers, with the interpreter often altering, adding to, omitting parts of the Accused's answers or answering in place of the Accused; at other times, the interpreter went beyond her role and acted like a prosecutor, asking questions and making comments on her own initiative.[81] These are not "legitimate attempts by the interpreter to better understand the Accused's

[76] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1974, Decision on discrepancies between the English and the French Transcripts and related issues, 18 June 2009, para. 36.
[77] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1974, Decision on discrepancies between the English and the French Transcripts and related issues, 18 June 2009, paras, 4, 19.
[78] Prosecution Motion, para. 35; Annex 2 to the Motion.
[79] Prosecution Motion, para. 35.
[80] Prosecution Motion, para. 36; Motion, paras. 42, 43.
[81] Motion, para. 43. *See, for example,* Annex 3 to the Motion, nn. 1-8, 10- 14, 16-25, 27-39.

answers" nor simply paraphrasing an answer.[82] Therefore, the English transcripts of the 2019 Belgian and SPO interview, which the SPO is seeking to admit as evidence, are unreliable.[83]

75. The availability of the interview records of the 2016 and 2019 Belgian interviews in the original language does not remedy the inaccuracy and unreliability contained in the different versions of the records. This is particularly the case given that the SPO seeks to admit into evidence the translated versions of the statements given during the 2019 Belgian and SPO interview while claiming that the discrepancies between the Accused's answers and the interpreter's translations are "minimal", when the errors are in fact substantial and widespread, amounting to almost 50 instances.[84]

(ii) Admission of the Interview Records will Cause Irreparable Prejudice

76. Due to the seriousness of the multiple violations of the Accused's rights under both domestic law and international human rights law, the Interview Records are fundamentally prejudicial. Their admission into evidence or inclusion in the case file, will not only irretrievably violate the Accused's fair trial rights and cause serious prejudice to the Defence, but also cause irreparable damage to the fairness and integrity of the proceedings.

77. The SPO erroneously claims that, even if the Accused's rights were violated during the 2016 and 2019 interviews, any such restriction would not violate Rule 138(2) of the Rules nor the Accused's right to a fair trial on the basis of a list of factors.[85] Some of these factors, including that the Accused was correctly

[82] Prosecution Motion, para. 36.
[83] Annex 1 to Prosecution Motion, nn. 12, 13, 18.
[84] Prosecution Motion, paras. 35, 36; Annex 1 to Prosecution Motion, n. 11, 12, 13, 18; Motion, paras. 42-44, Annex 3.
[85] Prosecution Motion, para. 61.

informed about all of his rights as a suspect, that he voluntarily waived his right to counsel, that the interview records are reliable and accurate, and that the records were not obtained unlawfully, are fundamentally false, as demonstrated above.[86]

78. To support the argument that the admission of the 2016 and 2019 Belgian interview records specifically will not violate the right to a fair trial, the SPO relies on the fact that "[t]he KSC framework provides avenues for the Accused to fully challenge the admissibility and evidential weight of the Interviews" and that the Defence will have the opportunity to challenge this evidence at trial.[87]

79. The SPO repeatedly seeks to argue that the interviews are "interconnected" and therefore potentially admissible.[88] They are in fact not "interconnected" in any meaningful sense; each of them was conducted in different circumstances and all of them were conducted in breach of the Accused's fair trial rights and in the absence of a valid waiver.

80. In Strasbourg case law, the fairness of the proceedings is normally assessed as a whole.[89] This is because of the nature of the ECtHR's review that takes place after such proceedings are completed. This is not to be confused with the assessment of fairness that takes place in the context of domestic proceedings which takes place at every procedural step to ensure their overall fairness. In addition, the nature of the ECtHR overall review of the fairness of proceedings does not mean that particular procedural steps or features of criminal proceedings do not in themselves have the capacity to taint the proceedings and render them unfair. In *Çimen v. Turkey*, the ECtHR found that the adversarial nature of the ensuing proceedings could not cure the defects caused by the restrictions on the

[86] Prosecution Motion, para. 61(a), 61(c), 61(d).
[87] Prosecution Motion, paras. 38, 61(f).
[88] See, e.g., Prosecution Motion, para. 29.
[89] The SPO appears to rely on this notion at paragraph 39 of the Prosecution Motion.

applicant's access to a lawyer. The ECtHR also held that "even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights".[90] Similarly, the ECtHR adopted in *Panovits v. Cyprus* the doctrine of the fruit of the poisonous tree; the ECtHR found that although the applicant had the benefit of adversarial proceedings in which he was represented by the lawyer of his choice, given the breach of due process at the pre-trial stage of the proceedings, including the applicant not being sufficiently informed of his right to receive legal representation or of his right to remain silent, his defence rights were "irreparably undermined" and were also not remedied by the subsequent proceedings, in which his confession was treated as voluntary and held to be admissible as evidence.[91]

81. In the case of *Delalić* at the International Criminal Tribunal for the former Yugoslavia, the Trial Chamber held that the violation of the rights to be assisted by counsel and assistance of an interpreter by themselves, is inconsistent with the fundamental principles of fairness and damages the integrity of the proceedings, and thus, render the police statements "null and inadmissible in the proceedings" which ought to be excluded.[92]

82. The ECtHR has repeatedly emphasised the crucial importance of the investigation stage of the criminal proceedings, "as the evidence obtained at this

[90] ECtHR, *Çimen v. Turkey*, no. 19582/02, 3 February 2009, paras. 26, 27. See also *Panovits v. Cyprus*, no. 4268/04, 11 December 2008, paras. 75, 84-86.
[91] *Panovits v. Cyprus*, no. 4268/04, 11 December 2008, paras. 75, 84-86.
[92] 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. 55.

stage determines the framework in which the offence charged will be considered at the trial".[93] In *Atristain Gorosabel v. Spain*, the ECtHR held that:

> "[t]he fairness of the proceedings requires that an accused should be able to obtain the whole range of services specifically associated with legal assistance. […] counsel has to be able to secure without restriction the fundamental aspects of that person's defence […] the lack of an individual decision on the part of the investigating judge on the specific consequences for the applicant of the impossibility to have access to his lawyer before the interviews, coupled with the absence of appropriate remedial measures during the trial, undermined the fairness of the criminal proceedings […] when considered as a whole, and irretrievably prejudiced his defence rights […] in so far as the applicant's incriminating initial statement was admitted in evidence".[94]

83. An ICC Trial Chamber held that "the accuracy and reliability of the Court's fact-finding […] require[es] that evidence of questionable credibility be excluded" and that "the moral integrity and the legitimacy of the proceedings […] require[es] that the process of collecting and presenting evidence is fair towards the accused and respects the procedural and human rights of all those who are involved in the trial."[95]

84. The violation of the Accused's rights as suspect, including his right to effective and free legal assistance prior to and during the said interviews, has caused irretrievable damage to his defence rights. The SPO has repeatedly referred to and relied on the "incriminatory statements" or "voluntary confessions" made during such interviews. The prejudice that would result from the admission of

[93] ECtHR, *Atristain Gorosabel v. Spain*, no. 15508/15, 18 January 2022, para. 68 *referring to Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008, para. 54. *See also A.T. v. Luxembourg*, no. 30460/13, 9 April 2015, para. 72; *Mehmet Şerif Öner v. Turkey*, no. 50356/08, 13 September 2011, para. 21; *Pavlenko v. Russia*, para. 101; *Dayanan v. Turkey*, no. 7377/03, 13 October 2009, para. 32.
[94] ECtHR, *Atristain Gorosabel v. Spain*, paras. 68, 71, 72 *referring to Dvorski v. Croatia* [GC], paras. 108, 111.
[95] ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para. 39.

such statements which were obtained in flagrant disregard of the Accused's rights as an accused is irreparable.

85. As previously stated, even a finding that the interview statements are inadmissible does not remedy the prejudice stemming from the fact that they continue to form part of the case file and continue to be repeatedly relied on by the SPO which falsely presents them as voluntary confessions, in violation of Rule 45 of the Rules for all purposes, including for justifying the Accused's protracted detention on remand for 20 months.[96]

86. Furthermore, the SPO submits that the Interview Records should be admitted "in the interests of justice" and that a strong public interest exists in the prosecution and punishment of the crimes charged in this case.[97] However, the ECtHR has repeatedly held that:

> "when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully. **However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention"**.[98] (emphasis added)

87. The interview statements were obtained unlawfully in flagrant denial of the Accused's rights as suspect. The manner in which the interviews were conducted violates the essence of the Accused's defence rights. These violations cannot be justified by any public interest relied upon by the SPO. This is a matter of principle. There is clear international human rights law regulating this mater.

[96] Reply, paras. 6, 8-10. *See also* F00341, Defence Response to "Prosecution submissions for eighth review of detention", 8 November 2022 (confidential), para. 2.
[97] Prosecution Motion, paras. 28, 61(h), 63.
[98] ECtHR, *Jalloh v. Germany* [GC], para. 97 *referring to Heaney and McGuinness v. Ireland*, no. 34720/97, 21 December 2000, paras. 57, 58. *See also Bykov v. Russia* [GC], no. 4378/02, 10 March 2009, para. 93; *Aleksandr Zaichenko v. Russia*, no. 39660/02, 18 February 2010, para. 39.

There is clear Strasbourg case law prohibiting the conduct followed by the SPO, ICTY, and Belgian investigators and prosecutors. Such conduct took place in the heart of Europe. Accepting it by the KSC would undermine respect for fundamental rights with unprecedented consequences. Extinguishing fundamental fair trial guarantees can never be accepted. This is particularly the case for Specialist Chambers that have been established and take pride in ensuring the highest standards of international justice.[99] Article 1(2) of the KSC Law provides that the Specialist Chambers shall "guarantee the protection of the fundamental rights and freedoms enshrined in the Constitution of the Republic of Kosovo, and to ensure secure, independent, impartial, fair and efficient criminal proceedings".

88. For all the above reasons, the Interview Records, which are unreliable, were obtained through multiple violations of the Accused's rights as suspect under both the KSC legal framework and international human rights law. Admitting the Interview Records as evidence will cause irretrievable prejudice to the fairness and integrity of these proceedings. It would breach the Accused's right to a fair trial guaranteed under Article 21 of the KSC Law, Article 31 of the Kosovo Constitution, and Article 6(1) of the ECHR.[100] The statements' continued inclusion in the case file of the present proceedings as well as their proposed admission into evidence will irreparably damage the fairness and integrity of the proceedings.

(F) The Prejudicial Effect of the Interview Records Outweighs Their Probative Value

[99] Press Release, Statement by President Trendafilova on the Second Judgement of the Specialist Chamber of the Constitutional Court, 27 June 2017 ("referring to the highest standards of human rights").
[100] Motion, paras. 29, 41; ECtHR, *Panovits v. Cyprus*, paras. 75, 84-86.

89. Contrary to the SPO's assertions, the Interview Records are not reliable and their probative value, if any, is grossly outweighed by their prejudicial effect.[101] It is apparent from the above that any use of the Interview Records against the Accused at trial will violate the Accused's right to a fair trial and result in serious prejudice that outweighs any claimed probative value. The Interview Records should be declared inadmissible under Rule 138(1) of the Rules and excluded from the case file with immediate effect.

IV. CLASSIFICATION

90. Pursuant to Rule 82(4) of the Rules, the Response is filed as confidential as it relates to the confidential Prosecution Motion.

V. RELIEF REQUESTED

91. For the above reasons, the Defence respectfully requests the Panel to:

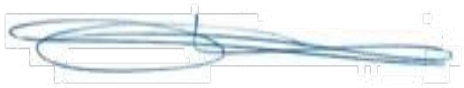
(i) reject the Prosecution Motion and declare inadmissible all the items identified in Annex 1 to the Prosecution Motion; and

(ii) grant the relief requested in the Defence Motion.

Word count: 11562

[101] Prosecution Motion, para. 27.

Respectfully submitted,



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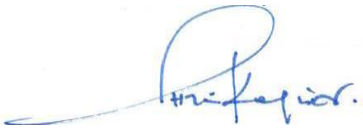

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Wednesday, 18 January 2023

The Hague, the Netherlands