



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-04**

The Prosecutor v. Pjetër Shala

Before: **Trial Panel I**

Judge Mappie Veldt-Foglia, Presiding Judge

Judge Roland Dekkers

Judge Gilbert Bitti

Judge Vladimir Mikula, Reserve Judge

Registrar: Fidelma Donlon

Date: 24 January 2023

Language: English

Classification: **Public**

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

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TRIAL PANEL I (Panel) hereby renders this decision concerning the request to grant leave to appeal the Decision concerning prior statements given by Pjetër Shala.

I. PROCEDURAL BACKGROUND

1. On 6 December 2022, the Panel issued the Decision concerning prior statements given by Pjetër Shala (Impugned Decision) in which it ruled, *inter alia*, that (i) the material relating to the Accused's 2005 and 2007 interviews by the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY Interviews) is admitted into evidence; and (ii) the material relating to the 2016 and 2019 interviews given by the Accused to the Belgian Federal Judicial Police (Belgian Interviews) is not inadmissible, may be used for the purpose of the detention review, and that a decision on admitting it is deferred.¹

2. On 13 December 2022, the Defence for Pjetër Shala (Defence and Accused, respectively) filed a request seeking leave to appeal the Impugned Decision (Request).²

3. On 14 December 2022, the Panel issued a decision varying, *inter alia*, the deadline for the Specialist Prosecutor's Office (SPO) and Victims' Counsel to respond to the Request by Tuesday, 10 January 2023.³

¹ KSC-BC-2020-04, F00364, Trial Panel I, *Decision concerning prior statements given by Pjetër Shala*, 6 December 2022, confidential, paras 52, 80, 110. A corrected version was filed on 8 December 2022, F00364/COR.

² KSC-BC-2020-04, F00369, Defence, *Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala*, 13 December 2022, public.

³ KSC-BC-2020-04, F00371, Trial Panel I, *Decision on Variation of Time Limits and Related Matters*, 14 December 2022, public, paras 6, 9(a).

4. On 10 January 2023, the SPO filed its response to the Request (SPO Response).⁴ Victims' Counsel did not file a response.

5. On 16 January 2023, the Defence filed its reply (Reply).⁵

II. SUBMISSIONS

6. The Defence requests leave to appeal the Impugned Decision on the following ten (10) issues (collectively Ten Issues):

- (i) Whether the Panel erred in law by failing to acknowledge that the guarantees of Article 6 of the [(European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)] become applicable once a person is suspected of having committed an offence and not when such person is charged with an offence (First Issue);
- (ii) Whether the Panel erred in law by interpreting Rule 138(2) of the Rules [of Procedure and Evidence before the Kosovo Specialist Chambers (Rules)] inconsistently with the ECHR by requiring the existence of a "causal link" between the violation of a suspect's rights and the gathering of evidence (Second Issue);
- (iii) Whether the Panel erred in fact and in law by considering that the Accused was sufficiently informed of the nature and cause of the suspicions against him as well as of his rights as a suspect prior to each interview (Third Issue);
- (iv) Whether the Panel erred in fact and in law by considering that the Accused's rights as a suspect were not violated in the context of each interview and by finding the records related to each interview admissible (Fourth Issue);

⁴ KSC-BC-2020-04, F00380, Specialist Prosecutor, *Prosecution response to Defence request for leave to appeal the decision concerning the prior statements of the Accused*, 10 January 2023, public.

⁵ KSC-BC-2020-04, F00385, Defence, *Defence Reply to Prosecution Response to "Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala"*, 16 January 2023, public.

- (v) Whether the Panel erred in law and in fact by considering that the Kosovo Specialist Chambers (SC) legal framework is inapplicable with respect to each interview (Fifth Issue);
- (vi) Whether the Panel erred in fact and in law by considering that the Accused had provided a well-informed and unequivocal waiver of his rights as a suspect with regard to each interview (Sixth Issue);
- (vii) Whether the Panel erred in law in imposing the burden to show voluntariness or absence of oppressive conduct on the Defence (Seventh Issue);
- (viii) Whether the Panel erred in law in applying an objective test as to whether the Accused was sufficiently notified of his rights as a suspect prior to each interview (Eighth Issue);
- (ix) Whether the Panel erred in failing to consider or by applying an objective test in evaluating whether the Accused could have foreseen the consequences of his conduct with respect to each interview (Ninth Issue); and
- (x) Whether the Panel erred by not examining the [Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel (Defence Exclusion Request)]⁶ and failing to give a sufficiently reasoned decision dismissing it (Tenth Issue).

7. The Defence submits that the Ten Issues under consideration are precise, specific, and arise directly from the Impugned Decision.⁷ In particular, the Defence avers that the Ten Issues go to the core of the fundamental rights of a fair trial protected by the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law), the Constitution of the Republic of Kosovo (Constitution) and the ECHR and that their violation would cause an irreparable prejudice to the Accused. In this respect, the Defence avers that the Ten Issues directly impact the fairness of the

⁶ KSC-BC-2020-04, F00281, Defence, *Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel*, 20 September 2022, confidential, with Annexes 1-3, confidential. A public redacted version was filed on 18 January 2023, F00281/RED.

⁷ Request, para. 7; Reply, para. 4.

proceedings and the outcome of the trial. Further, the Defence contends that a prompt determination by the Court of Appeals Panel would provide certainty on whether the proceedings are continuing in compliance with the fundamental guarantees of fairness.⁸

8. The SPO responds that the Request should be rejected as it fails to meet the certification requirements. Specifically, the SPO submits that, by extensively mischaracterising or selectively reading the findings of the Panel, the Defence has failed to identify any appealable issue that is essential for the determination of the Impugned Decision. Further, the SPO argues that the Ten Issues would not affect significantly the fair and expeditious conduct of the proceedings or the outcome of the trial. According to the SPO, the impact of the use of the Accused's statements on the fairness of the proceedings is to be assessed in the context of the proceedings as a whole and any assessment to that effect would be premature at this stage. In the SPO's view, the statements have been admitted, but no decision has yet been made about their weight, if any. The SPO submits that, as a result, the resolution of the Ten Issues would not materially advance the proceedings.⁹

9. The Defence replies that proceeding with the trial without affording the Accused the procedural safeguard of appellate interlocutory review would constitute a distinct violation of the guarantees of fair trial and the right to an effective remedy.¹⁰ The Defence further avers that the SPO Response is based on the flawed premise that the impact of the use of the Accused's statements on the fairness of the proceedings is to be assessed in the context of the proceedings as a whole. In this regard, the Defence submits that the standard of review referred to by the SPO and applied by the European Court of Human Rights (ECtHR), which intervenes only after the relevant

⁸ Request, para. 45-47; Reply, paras 4-5.

⁹ SPO Response, paras 1-2, 31-36.

¹⁰ Reply, paras 4, 10.

proceedings have been definitively concluded, cannot be employed in the context of an interlocutory request for certification to appeal a first-instance decision. The Defence argues that, in any event, the admissibility of the Accused's statements is a matter so decisive and specific that it requires assessment at an earlier stage of the proceedings.¹¹ Finally, the Defence argues that, bearing in mind the high threshold for consideration of a violation of fundamental rights applicable in the context of an appeal against a trial judgment, an interlocutory appeal is the most appropriate remedy to assess the violations complained of.¹²

III. APPLICABLE LAW

10. The Panel notes Articles 21 and 45 of the Law, Rule 77(2) of the Rules and Articles 36 and 43 of the Practice Direction on Files and Filings (Practice Direction).¹³

IV. DISCUSSION

A. PRELIMINARY REMARKS

11. Before all else, the Panel notes that the Defence chose to repeatedly misrepresent the findings of the Panel. The Panel disapproves such approach and will correct, where necessary, any such misrepresentations when analysing the Ten Issues proposed by the Defence.

12. Furthermore, the Panel points out that in the Request the Defence impermissibly exceeded significantly the prescribed word limit set out in the Practice Direction. The Panel notes that, while motions generally have a word limit of 6,000 words, requests

¹¹ Reply, paras 6-9.

¹² Reply, para. 11.

¹³ [Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers](#) (KSC-BD-15), 17 May 2019.

for certification to appeal are not to exceed 3,000 words.¹⁴ The Request is 6,125 words in length. Likewise, a reply in this litigation shall not exceed 1,000 words.¹⁵ The Reply is 2,158 words in length. The Panel observes that on both occasions the Defence has exceeded twice the amount of words as prescribed, without providing any justification whatsoever. For reasons of expediency – and on an exceptional basis – the Panel accepts the Request and Reply despite the fact that the Defence did not request an extension of the word limits before filing its submissions, pursuant to Article 36(3) of the Practice Direction. However, the Panel reminds and urges the Defence to follow the Practice Direction in the future. Failing that, the Defence risks their filings to be considered as not validly submitted.

B. LEGAL TEST

13. A right to appeal arises only if the Panel is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.¹⁶ Interlocutory appeals, interrupting the continuity of the proceedings, are the exception.¹⁷ Considerations that an interlocutory appeal would address fundamental questions or would be to the benefit of the SC do not *per se* warrant certifying the appeal.¹⁸

14. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

- a) Whether the matter is an “appealable issue”;

¹⁴ Articles 41 and 43 of the Practice Direction.

¹⁵ Article 43 of the Practice Direction.

¹⁶ KSC-BC-2020-04, F00116, Pre-Trial Judge, [Decision on Application for Leave to Appeal “Decision on Motion Challenging the Form of the Indictment”](#) (Shala Decision on Leave to Appeal), 29 November 2021, public, para. 11. See also KSC-2020-06, F00172, Pre-Trial Judge, [Decision on the Thaçi Defence Application for Leave to Appeal](#) (Thaçi Decision on Leave to Appeal), 11 January 2021, public, para. 9.

¹⁷ Thaçi Decision on Leave to Appeal, para. 9.

¹⁸ Thaçi Decision on Leave to Appeal, para. 9.

- b) Whether the issue at hand would significantly affect:
 - i. The fair and expeditious conduct of the proceedings, or
 - ii. The outcome of the trial; and
- c) Whether, in the opinion of the Panel, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁹

15. Only an “issue” may form the basis of an appealable decision. An “issue” has been described as an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.²⁰ An appealable issue requires the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to abstract questions or hypothetical concerns.²¹ It is generally insufficient to argue that the entirety of the Panel’s reasoning is erroneous.²²

16. Not every issue will be certified for appeal. The first prong of the certification test, as set out in (b), contains two alternatives: the issue must have significant repercussions on either (i) the fair and expeditious conduct of the proceedings or (ii) the outcome of the trial.²³ Use of the term “significantly” in the wording of the first prong of the certification test indicates that an applicant must not only show how the issue affects the fair and expeditious conduct of the proceedings, or the outcome of the trial, but must also demonstrate the significant degree to which these factors are

¹⁹ *Shala* Decision on Leave to Appeal, para. 12.

²⁰ *Shala* Decision on Leave to Appeal, para. 13.

²¹ *Thaçi* Decision on Leave to Appeal, para. 11. *See also Shala* Decision on Leave to Appeal, para. 13.

²² *Thaçi* Decision on Leave to Appeal, para. 11. *See also Shala* Decision on Leave to Appeal, para. 13.

²³ *Shala* Decision on Leave to Appeal, para. 13.

affected.²⁴ The issue must be one likely to have repercussions on either of the above two elements.

17. The “fair and expeditious conduct of the proceedings” is generally understood as referencing the norms of fair trial. “Proceedings” referenced in both the first and second prongs of the test for certification refer to the entirety of the judicial process before the SC.²⁵

18. Alternatively, the first prong of the certification test may be met if the issue significantly affects the outcome of the proceedings. Thus, it must be considered whether a possible error in an interlocutory decision would impact the outcome of the case.²⁶ The exercise involves a forecast of the consequence of such an occurrence.²⁷

19. The second prong of the test for certification is an additional limiting factor.²⁸ Because of the test’s cumulative nature, the failure of an applicant to establish the first prong of the test will necessarily exempt the Panel from considering whether the second prong has been met. The second prong of the test for certification requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the “judicial process of possible mistakes that might taint either the fairness of proceedings or mar the outcome of the trial” thereby moving the proceedings forward along the right course.²⁹

20. Lastly, certification is not concerned with whether a decision is correctly reasoned, but whether the standard for certification has been met. The decision examining a request for leave to appeal is not an opportunity to explain the contested

²⁴ *Thaçi* Decision on Leave to Appeal, para. 12.

²⁵ *Thaçi* Decision on Leave to Appeal, para. 13.

²⁶ *Thaçi* Decision on Leave to Appeal, para. 14.

²⁷ *Thaçi* Decision on Leave to Appeal, para. 14.

²⁸ *Thaçi* Decision on Leave to Appeal, para. 15.

²⁹ *Shala* Decision on Leave to Appeal, para. 13.

decision to the Parties. However, where necessary, the Panel will provide clarifications if it is clear that a misrepresentation of the decision so warrants.³⁰

C. ISSUES

1. First Issue

21. The Defence submits that the Panel failed to acknowledge that the safeguards provided for in Article 6 of the ECHR become applicable once a person is suspected of having committed an offence, and not only when such person is charged with an offence. According to the Defence, the Panel's position warrants appellate consideration as it impacts the overall fairness of the proceedings and renders the guarantees of Article 6 of the ECHR ineffective. The Defence further submits that, in employing an erroneous interpretation of Article 6 of the ECHR, the Panel committed errors in applying it and assessing the circumstances presented in the relevant motions.³¹

22. The SPO responds that the First Issue is premised on a plain misreading of the Impugned Decision. Accordingly, the SPO submits that the Defence has failed to identify any appealable issue.³²

23. The Panel first notes that the Defence phrases the First Issue in very broad terms ("impact on the overall fairness of these proceedings", "renders the guarantees of Article 6 as to the rights of a suspect ineffective"). Indeed, the Defence does not specify which errors the Panel has committed in applying the guarantees of Article 6 of the ECHR, but rather states generally that "[t]hese errors are developed in the arguments supporting the request for certification of the appealable issues that follow".³³ Such broad assertions express a general disagreement with the findings of the Panel, but

³⁰ *Thaçi* Decision on Leave to Appeal, para. 17; *Shala* Decision on Leave to Appeal, para. 13.

³¹ Request, paras 9-11.

³² SPO Response, paras 4-6.

³³ Request, para. 11.

are not apt to identify an issue emanating from the Impugned Decision. Be that as it may, in the Impugned Decision, the Panel in fact acknowledged and found that the Accused, at the time questioned *as a suspect* about his involvement in acts constituting a criminal offence, benefitted from the protection of Article 6 of the ECHR.³⁴ Thus, contrary to what the Defence alleges, the Panel *did* analyse the interviews in question in light of the guarantees offered in Article 6 of the ECHR for a suspect. The Panel further notes that “charge” for the purposes of Article 6(1) of the ECHR is defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [person] has been substantially affected”, as demonstrated by the ECtHR case law cited in this regard.³⁵ Therefore, the issue, as formulated by the Defence, does not arise from the decision as it is a plain misrepresentation of the Panel’s finding.

24. Accordingly, the Panel finds that the First Issue does not constitute an appealable issue. As a result, it is not necessary to address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules.

2. Second Issue

25. The Defence submits that the Panel erred in law in requiring a “causal link” between the violation of the Accused’s rights and the gathering of evidence as well as in its assessment that there was no causal link. According to the Defence, the Panel’s interpretation of Rule 138(2) of the Rules finds no support in international human rights law and is inconsistent with the ECHR and the jurisprudence of the ECtHR.³⁶

26. The SPO responds that, under the Second Issue, the Defence mischaracterised the Impugned Decision and failed to identify an issue essential for the determination

³⁴ Impugned Decision, para. 24.

³⁵ Impugned Decision, paras 25-26.

³⁶ Request, paras 12-14; Reply, para. 12.

of the matter at hand. Further, the SPO submits that the Defence failed to establish how the Second Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.³⁷

27. Even though the Defence does not accurately reflect the Panel's findings,³⁸ the Panel nevertheless considers that, as such, the Second Issue arises from the Impugned Decision as it concerns the Panel's finding that, under Rule 138(2) of the Rules, the existence of a causal link between the violation and the gathering of evidence is required.³⁹

28. A potentially erroneous interpretation of Rule 138(2) of the Rules may significantly affect the Accused's fair trial rights as the Panel may ultimately rely upon material that must be excluded.⁴⁰ This would likewise affect his right to expeditious proceedings.

29. The Panel further finds that an authoritative determination of the Court of Appeals Panel at the earliest opportunity on the Second Issue would (i) provide legal certainty regarding the interpretation of Rule 138(2) of the Rules, and (ii) minimise delays and the diverting of resources at subsequent stages of the proceedings to address claims on this subject. If not settled, the Panel considers that the Second Issue could mar the outcome of proceedings. Accordingly, the Panel finds that an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

³⁷ SPO Response, paras 7-9.

³⁸ Contrary to what the Defence asserts, the Panel did not rely solely on the 2019 Belgian Interviews to find that the Accused's rights were respected during the 2016 Belgian Interviews. The Panel in fact relied on a number of factors to reach its conclusion. Additionally, the Panel found that, even if, *arguendo*, there was a violation of the Accused's rights, a causal link between this violation and the gathering of evidence could not be established because the Accused subsequently made substantially the same statements in the context of the 2019 Belgian Interviews, during which his rights as a suspect were fully complied with (*see* Impugned Decision, paras 72-78).

³⁹ Impugned Decision, para. 20.

⁴⁰ *See also* Rule 139(1) of the Rules.

30. In light of the above, the Panel finds that the Second Issue meets the test for certification and grants leave to appeal the Impugned Decision in that respect.

3. Third, Fourth and Eighth Issues

31. As regards the Third Issue, the Defence challenges the Panel's finding that the Accused was sufficiently informed of the nature and cause of the allegations against him as well as of his rights as a suspect prior to each interview. In relation to the ICTY Interviews, the Defence submits that the rights of a suspect require that he is given sufficient notification of the time, location, and specific conduct he is suspected of having engaged in prior to, and not during, an interview with the investigative authorities.⁴¹ With respect to the Belgian Interviews, the Defence argues that the Panel failed to consider whether the Accused had been sufficiently informed of his right to be assisted by a lawyer free of charge prior to or during the interviews.⁴²

32. As regards the Fourth Issue, the Defence submits that the Panel erred by admitting the material related to the ICTY Interviews and the Belgian Interviews into evidence in light of (i) the fact that the Accused was interviewed without being given an effective opportunity to consult with a lawyer prior to or during each interview, and (ii) the evident inequality existing between the Accused and the team of experienced investigators and prosecutors in the particular circumstances of the interviews.⁴³

33. As regards the Eighth Issue, the Defence submits that the Panel erroneously applied an objective test as to whether the Accused was sufficiently notified of his rights. Furthermore, the Defence avers that the Panel's finding is based on the notification provided to the Accused in written form within the summons and

⁴¹ Request, para. 18.

⁴² Request, paras 19-22.

⁴³ Request, paras 23-27.

statement of rights, while it failed to take into consideration the Accused's personal situation, including the statements demonstrating his confusion.⁴⁴

34. As regards the Third Issue, the SPO responds that the Defence provides no authority in support of its claim that the Accused should have been informed in more detail of the nature and cause of the allegations against him as well as of his rights. Furthermore, the SPO argues that, in relation to the Belgian Interviews, the Defence selectively reads the Impugned Decision and repeats arguments already dismissed by the Panel.⁴⁵

35. As regards the Fourth Issue, the SPO responds that the Defence's submissions are broad and repetitive of the arguments already dismissed by the Panel. The SPO also submits that the Defence failed to explain how the Fourth Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.⁴⁶

36. Lastly, as regards the Eighth Issue, the SPO responds that the Defence mischaracterises the Impugned Decision and fails to identify an issue that can significantly affect the fair conduct of the proceedings or the outcome of the trial.⁴⁷

37. At the outset, the Panel notes that the Third, Fourth and Eighth Issues all relate to the Accused's right to be sufficiently informed of the nature and cause of the allegations against him as well as of his rights as a suspect, including the right to be informed of his right to have access to a lawyer. The three issues overlap and will therefore be considered together.

38. In respect of the Third Issue, the Panel observes that the Defence globally rejects all findings of the Panel in their entirety by alleging that the Panel erred in finding that the right of the Accused to be sufficiently informed of his rights in general, as well

⁴⁴ Request, para. 36.

⁴⁵ SPO Response, paras 10-14.

⁴⁶ SPO Response, paras 15-16.

⁴⁷ SPO Response, paras 25-27.

as of the nature and cause of the allegations against him, was violated. In the view of the Panel, the issue, as currently formulated by the Defence, essentially means that it seeks leave to litigate *ex novo* before the Court of Appeals Panel the entirety of the Impugned Decision both in terms of law and fact. The fact that the Defence disagrees with the Panel's conclusions is, in principle, insufficient to constitute an appealable issue.

39. In respect of the Fourth Issue, the Panel observes that it is encompassed, in part, in the Third Issue, as it equally calls for an analysis of whether the Accused's rights have been maintained at the time of questioning.⁴⁸ The Panel's concerns about the overly generic articulation of the Third Issue also pertain to the Fourth Issue.

40. Moreover, the Panel observes that in the Fourth Issue the Defence adds the Panel's alleged error in finding the records related to each interview to be admissible. This aspect is premised on the question whether a violation of the Accused's rights had occurred. At this point, the Panel observes that the Defence oversimplified the Panel's relevant judicial determinations: the Panel concluded that the Belgian Interviews are not inadmissible pursuant to Rule 138(2) of the Rules, may be used for the purpose of the review of detention, but held that it will rule in due course on the submission and admissibility of non-oral evidence.⁴⁹ As to the ICTY Interviews, the Panel recalls that an admissibility assessment was conducted, as mandated by Article 37 of the Law.⁵⁰ As the Defence mischaracterises the Impugned Decision in relation to the legal consequences of the finding that no violation has occurred, the Panel finds that the Defence failed to formulate an issue that veritably arises from the Impugned Decision.

⁴⁸ The Panel understands the Defence's generic reference to "rights as a suspect" in the Fourth Issue to include the right to be informed of the nature and cause of the suspicions against the Accused.

⁴⁹ Impugned Decision, paras 80, 110.

⁵⁰ Impugned Decision, para. 52.

41. In respect of the Eighth Issue, the Panel observes that the issue is fully encompassed in the Third and Fourth Issues, as it concerns the Panel's methodology in assessing potential violations of the Accused's rights at the relevant time of questioning. Specifically, whether an objective or subjective test should be applied, is necessarily part of the assessment of the purported violations of the Accused's rights.

42. The Panel recalls that a right to appeal arises only if the Panel is of the opinion that any such decision must receive the immediate attention of the Court of Appeals Panel. This opinion constitutes the definitive element for the genesis of a right to appeal. This means that, in essence, the Panel is vested with power to state, or more accurately still, to certify the existence of an appealable issue, despite the Defence's shortcomings in articulating the issues.⁵¹

43. It appears from the submissions in the Request that the main gist of the Defence's argumentation is that the Accused, at the occasion of the ICTY Interviews and Belgian Interviews, was allegedly not informed of two rights in particular: (i) the right to be informed of the suspicions against him; and (ii) the right to have access to a lawyer.⁵² With a view to ensuring the fair trial rights of the Accused, the Panel reformulates the issue, on the basis of the Third, Fourth and Eighth Issues as follows:

Whether the Panel erred in fact and in law by considering that the Accused at the occasion of the ICTY Interviews and Belgian Interviews was sufficiently informed of the nature and cause of the suspicions against him as well as of his right to have access to a lawyer, with respect to each interview (Reformulated Third Issue).

⁵¹ Similarly, ICC, Situation in the Democratic Republic of the Congo, ICC-01/04-168, Appeals Chamber, [Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, para. 20.

⁵² See Request, paras 18-20, 24, 27, 36.

44. The Panel considers that the Reformulated Third Issue arises from the Impugned Decision as it relates to the Panel's findings that at each interview the Accused was sufficiently informed of the allegations levied against him and his right to have access to a lawyer in compliance with the standards set in international human rights law.⁵³ Accordingly, the Panel finds that the Reformulated Third Issue constitutes an appealable issue.

45. The Panel further finds that the Reformulated Third Issue pertains to the central question of whether the Accused's rights (to be informed of the allegations levied against him and to have access to a lawyer) were respected during the interviews in question. A disregard of the Accused's rights at the time the material was collected may significantly affect the Accused's fair trial rights in the present proceedings as the Panel may ultimately rely upon material that was collected in violation of standards of international human rights law.⁵⁴ This would likewise affect the Accused's right to expeditious proceedings.

46. Further, the Panel considers that an authoritative determination of the Court of Appeals Panel at the earliest opportunity on the Reformulated Third Issue would (i) provide legal certainty regarding the interpretation and application of the Accused's right to be informed of the allegations levied against him and his right to have access to legal assistance, (ii) rid the judicial process of possible mistakes that might mar the outcome of the trial, and (iii) minimise delays and the diverting of resources at subsequent stages of the proceedings to address claims on this subject. Accordingly, the Panel finds that an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

⁵³ Impugned Decision, paras 32-33, 42, 49, 73, 103.

⁵⁴ See also Rule 139(1) of the Rules.

47. In light of the above, the Panel finds that the Reformulated Third Issue meets the test for certification and grants leave to appeal the Impugned Decision in that respect.

4. Fifth Issue

48. The Defence submits that the Panel erred in law and in fact in considering that the material related to the ICTY Interviews and the Belgian Interviews had not been obtained under the Law and the Rules. In particular, the Defence avers that the Panel failed to take into consideration the SPO's substantive participation in the 2019 Belgian Interviews as well as the fact that the latter was conducted pursuant to an SPO request for assistance. The Defence further argues that, in any event, the Panel was required to interpret the applicable framework consistently with the SC legal framework.⁵⁵

49. The SPO responds that the Defence has failed to explain why the application of international human rights law, in lieu of the SC legal framework, is an issue that significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial.⁵⁶

50. The Panel considers that the Fifth Issue arises from the Impugned Decision as it concerns the Panel's findings that: (i) the relevant material had not been obtained under the Law and the Rules; and (ii) it was only required to assess whether the material was obtained by means of a violation of the standards of international human rights law.⁵⁷

51. The Panel recalls that the use of the term "significantly" in the wording of the first prong of the certification test indicates that an applicant must not only show how the issue affects the fair and expeditious conduct of proceedings, or the outcome of

⁵⁵ Request, paras 28-30; Reply, para. 13.

⁵⁶ SPO Response, para. 17.

⁵⁷ Impugned Decision, para. 23.

the trial, but must also demonstrate the significant degree to which these factors are affected.⁵⁸

52. The Defence's position seems to be that the Panel, by not applying the Law and the Rules, applied "lesser standards"⁵⁹ when assessing the (in-)admissibility of the relevant material against standards of international human rights law. The Defence's argumentation suggests that the SC legal framework establishes somewhat higher or different standards than those under international human rights law and that the Law and the Rules are, contrary to Article 3(2)(e) of the Law and the chapeau of Rule 138(2) of the Rules, disconnected from international human rights law. Yet, the Defence does not explain how the application of the standards of international human rights law on which the Panel relied for its Impugned Decision, instead of those provided by the SC legal framework, entails a different result with regard to the ICTY and Belgian Interviews given by the Accused to an extent that the fair and expeditious conduct of the proceedings are significantly affected. As a result, the Panel is unpersuaded that the Fifth Issue affects, let alone significantly, the fair and expeditious conduct of the proceedings.

53. In light of the above, the Panel considers that the Fifth Issue does not affect the fair conduct of the proceedings, or the outcome of the trial. As a result, the remaining requirement of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed.

5. Sixth and Ninth Issues

54. As regards the Sixth Issue, the Defence avers that the Panel erred in fact and in law by failing to consider whether the Accused had provided a well-informed and unequivocal waiver of his rights as a suspect, given the shortcomings in the

⁵⁸ *Thaçi* Decision on Leave to Appeal, para. 12.

⁵⁹ Request, para. 30.

notification of the rights prior to the four interviews. More specifically, the Defence contends that the Panel erred by finding that the Accused had waived his rights during the interviews by relying on the fact that the Accused had previously or subsequently participated in other interviews. Furthermore, the Defence argues that the Panel misconstrued its submissions with respect to the applicable standard as to the validity of a waiver.⁶⁰

55. As regards the Ninth Issue, the Defence submits that the Panel failed to consider altogether whether the Accused could have foreseen the consequences of his conduct for the purposes of assessing whether the Accused had provided a well-informed and unequivocal waiver of his rights. The Defence stresses that the Panel failed to consider whether the Accused had any understanding of the nature and type of charges that could be brought against him and the applicable sentence he could face in the event of a conviction. More specifically, the Defence contends that the Panel erred by not applying in its assessment a subjective test which is required both by the guarantees of a fair trial as well as by Rule 43(3) of the Rules.⁶¹

56. As regards the Sixth Issue, the SPO responds that the Defence misrepresented the Panel's findings and, thus, failed to identify an issue which is essential to the determination of the issues at hand and may significantly affect the fairness of the proceedings.⁶²

57. As regards the Ninth Issue, the SPO submits that the Panel did consider whether the Accused could have foreseen the consequences of his participation in each of the interviews. The SPO also submits that the Defence's claims are unsubstantiated and repetitive.⁶³

⁶⁰ Request, paras 31-34.

⁶¹ Request, paras 37, 41-43.

⁶² SPO Response, paras 18-21.

⁶³ SPO Response, paras. 28-29.

58. Noting that the Sixth and Ninth Issues both relate to the question of whether the Accused relinquished his rights in compliance with the standards in international human rights law, the Panel will consider these issues together.

59. As previously held, the Panel will intervene when, in its opinion, the Defence presents issues that overlap or are repetitive. In this regard, the Panel observes that the Ninth Issue, pertaining to the Panel's methodology when assessing whether the Accused had provided a well-informed and unequivocal waiver, is an integral part of the Sixth Issue. Therefore, the Panel will not further consider the Ninth Issue as it is fully encompassed in the Sixth Issue.

60. Turning to the question whether the Sixth Issue is appealable, the Panel finds that the Defence argues summarily and generically, alleging a waiver of the Accused's "rights as a suspect".⁶⁴ However, in the Impugned Decision, the Panel only assessed a waiver in relation to the Accused's right to have access to a lawyer.⁶⁵ Hence, with a view to ensuring the issue veritably arises from the Impugned Decision and giving more clarity which could assist the Court of Appeals Panel, the Panel reformulates the Sixth Issue, despite the Defence's shortcomings in articulating it, as follows:

Whether the Panel erred in fact and in law by considering that the Accused had provided a well-informed and unequivocal waiver of his right to have access to a lawyer (Reformulated Sixth Issue).

61. The Panel considers that the Reformulated Sixth Issue arises from the Impugned Decision as it relates to the fundamental question of whether the Accused properly waived his aforementioned right voluntarily and in an unequivocal, knowing and

⁶⁴ Request, paras 31, 33-34.

⁶⁵ Impugned Decision, paras 38, 49, 76, 108.

intelligent manner.⁶⁶ Accordingly, the Panel finds that the Reformulated Sixth Issue constitutes an appealable issue.

62. The Panel further finds that the Reformulated Sixth Issue significantly affects the fair conduct of the proceedings, as it pertains to the central question of whether the Accused's right of access to legal assistance was respected. A potentially erroneous finding may significantly affect the Accused's fair trial rights as the Panel may ultimately rely upon material in breach of the Accused's fundamental rights.⁶⁷ This would likewise affect his right to expeditious proceedings.

63. The Panel also considers that an authoritative determination of the Court of Appeals Panel at the earliest opportunity on the Reformulated Sixth Issue would (i) provide legal certainty regarding the Accused's waiver to the right to have access to a lawyer, (ii) rid the judicial process of possible mistakes that might mar the outcome of the trial, and (iii) minimise delays and the diverting of resources at subsequent stages of the proceedings to address claims on this subject. Accordingly, the Panel finds that an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

64. In light of the above, the Panel finds that the Reformulated Sixth Issue meets the test for certification and grants leave to appeal the Impugned Decision in that respect.

6. Seventh Issue

65. The Defence argues that the Panel's finding, according to which the Party bringing the motion under Rule 138(2) of the Rules bears the burden to show that the criteria for the exclusion have been met, is inconsistent with well-established case-law of international criminal tribunals and with the right of the Accused to a fair trial. The

⁶⁶ Impugned Decision, paras 38, 49, 76, 108.

⁶⁷ See also Rule 139(1) of the Rules.

Defence also contends that the Defence's initial Defence Exclusion Request was not introduced under Rule 138(2) of the Rules.⁶⁸

66. The SPO responds that the Defence fails to demonstrate how the Seventh Issue is essential to the determination of the Impugned Decision. The SPO also asserts that, contrary to the Defence's submissions, the Panel did not reverse the burden of proof with regard to the voluntariness of the interviews. In this respect, the SPO submits that it has made extensive submissions on this issue, with which the Panel agreed.⁶⁹

67. The Panel understands that the Defence challenges the Panel's reliance on Rule 138(2) of the Rules to assess whether the material related to the ICTY Interviews and the Belgian Interviews should be admitted into evidence on the basis that the Defence Exclusion Request was not introduced under said Rule. However, the Panel finds the Defence's assertion to be inaccurate. Although it is true that the Defence Exclusion Request does not specifically request the Panel to assess this material under Rule 138(2) of the Rules, the Defence disregards that its argumentation included Rule 138(2) of the Rules as soon as the SPO requested the material related to the ICTY and Belgian Interviews to be admitted as evidence.⁷⁰ In any event, by proposing a legal test or provision in its submissions, the Defence cannot bind the Panel in terms of choosing the relevant provisions when assessing the questions at stake. The argument that the Defence Exclusion Request had not directed the Panel to apply Rule 138(2) of the Rules is untenable.

68. Moreover, by contending that the Panel reversed the burden of proof with regard to the voluntariness or absence of oppressive conduct during the Accused's interviews, the Defence misrepresents once more the Impugned Decision. Although a

⁶⁸ Request, para. 35.

⁶⁹ SPO Response, paras 22-24.

⁷⁰ KSC-BC-2020-04, F00358, Defence, *Defence Response to Prosecution Motion for Admission of Accused's Statements*, 24 November 2022, confidential, para. 13. A public redacted version was filed on 18 January 2023, F00358/RED.

decision examining a request for leave to appeal is not an opportunity to explain the contested decision to the Parties,⁷¹ the Panel finds it necessary to provide clarifications with respect to the Defence's submissions. As the SPO rightly notes, it has provided extensive submissions on the voluntary participation of the Accused in the interviews, on which the Panel relied to reach the conclusion that the rights of the Accused, as protected under the standards of international human rights law, were respected.⁷² The Impugned Decision confirms that the burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement lies with the SPO.⁷³ Contrary to the Defence's assertion, by merely noting that the Defence did not claim nor provide any evidence that the Accused had been under pressure during the interviews, the Panel did not reverse the burden of proof.

69. In light of the above, the Panel finds that the Seventh Issue does not constitute an appealable issue. As a result, it is not necessary to address the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules.

7. Tenth Issue

70. The Defence submits that the Panel erred in dismissing the Defence Exclusion Request without considering the relevant submissions therein or providing sufficient reasoning in support of its decision.⁷⁴

71. The SPO responds that the Tenth Issue does not meet the test for certification as the Defence provides no explanation of how this alleged failure can significantly affect the fair conduct of the proceedings or the outcome of trial, or how its resolution is

⁷¹ *Shala* Decision on Leave to Appeal, para. 13.

⁷² Impugned Decision, paras 31, 35, 41, 46, 64, 83, 106.

⁷³ Impugned Decision, paras 35, 46, 106.

⁷⁴ Request, para. 44.

essential for the determination of any of the matters involved in the Impugned Decision.⁷⁵

72. The Panel recalls its finding that, with a view to expediting the proceedings, it considered the Defence Exclusion Request and the SPO's request to admit the material related to each interview into evidence jointly in a single decision.⁷⁶ Against this background, and noting that the Defence's assertion is wholly unsubstantiated, the Panel dismisses the Tenth Issue as it does not constitute an appealable issue. As a result, the remaining requirements of the certification test arising from Article 45(2) of the Law and Rule 77(2) of the Rules need not be addressed.

V. DISPOSITION

73. For the above-mentioned reasons, the Panel hereby:

a. **GRANTS** leave to appeal the Impugned Decision on the Second Issue and the Reformulated Third and Sixth Issues, in accordance with paragraphs 43 and 60; and

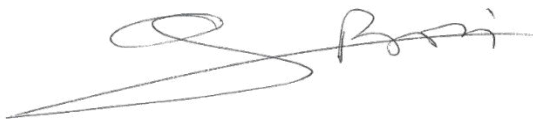
b. **REJECTS** the remainder of the Request.

⁷⁵ SPO Response, para. 30.

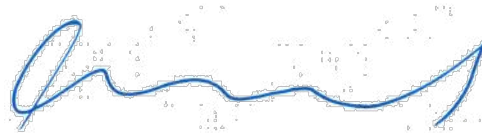
⁷⁶ Impugned Decision, para. 12.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Day, 24 January 2023

At The Hague, the Netherlands.