



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA 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:** 6 December 2022

**Language:** English

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**Public redacted version of**

**Corrected version of Decision concerning prior statements given by Pjetër Shala**

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**TRIAL PANEL I** (Panel) hereby renders this decision concerning prior statements given by Pjetër Shala.

## I. PROCEDURAL BACKGROUND

1. On 20 September 2022, the Defence for Pjetër Shala (Defence and Accused, respectively) filed a request seeking, *inter alia*, the exclusion from the case file of all prior statements given by the Accused to the Belgian Federal Judicial Police in 2016 and 2019 as well as other related items (Defence Exclusion Request).<sup>1</sup>
2. On 30 September 2022, the Specialist Prosecutor's Office (SPO) responded to the Defence Exclusion Request (SPO Response to Exclusion Request).<sup>2</sup>
3. On 7 October 2022, the Defence filed its reply (Defence Reply to SPO Response to Exclusion Request).<sup>3</sup>
4. On 20 October 2022, the Panel requested the SPO to file additional submissions on the merits of the Defence Request by 1 November 2022.<sup>4</sup>
5. On 28 October 2022, the Panel granted the SPO request<sup>5</sup> for extension of word limit in relation to its upcoming submissions.<sup>6</sup>

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<sup>1</sup> 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, para. 1, with Annexes 1-3, confidential.

<sup>2</sup> KSC-BC-2020-04, F00288, Specialist Prosecutor, *Prosecution response to Defence motion to exclude evidence from the case file*, 30 September 2022, confidential.

<sup>3</sup> KSC-BC-2020-04, F00299, Defence, *Defence Reply to Prosecution Response to Defence Motion to Exclude evidence from the Case File*, 7 October 2022, confidential.

<sup>4</sup> KSC-BC-2020-04, Transcript of Hearing, 20 October 2022, confidential, p. 495, line 4 to p. 495, line 18.

<sup>5</sup> KSC-BC-2020-04, F00327, Specialist Prosecutor, *Prosecution request for extension of word limit*, 27 October 2022, confidential.

<sup>6</sup> KSC-BC-2020-04, F00330, Trial Panel I, *Decision on Specialist Prosecutor's request for extension of word limit*, 28 October 2022, confidential.

6. On 1 November 2022, the SPO filed its submissions (SPO Further Submissions).<sup>7</sup>
7. On 11 November 2022, the Panel granted the Defence request<sup>8</sup> for a ten-day extension of time to respond to the SPO Further Submissions, and ordered, *inter alia*, the Defence to file its response by Thursday, 24 November 2022, and the SPO to file its reply, if any, by Tuesday, 29 November 2022.<sup>9</sup>
8. On 24 November 2022, the Defence filed the “Defence Response to Prosecution Motion for Admission of Accused’s Statements”.<sup>10</sup>
9. On 29 November 2022, the SPO filed the “Prosecution reply to Defence response to motion for admission of the statements of the Accused”.<sup>11</sup>

## II. PRELIMINARY REMARKS

10. At the outset, the Panel notes the SPO’s contention that the Defence Exclusion Request should be summarily dismissed for untimeliness and lack of a legal basis and that the Defence arguments should instead be considered in the context of challenges to the admissibility of the evidence.

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<sup>7</sup> KSC-BC-2020-04, F00334, Specialist Prosecutor, *Prosecution motion for admission of Accused’s statements*, 1 November 2022, confidential, with Annex 1, confidential.

<sup>8</sup> KSC-BC-2020-04, F00342, Defence, *Defence Request for an Extension of Time for its Response to the Prosecution Motion for the Admission of Statements*, 9 November 2022, confidential.

<sup>9</sup> KSC-BC-2020-04, F00351, Trial Panel I, *Decision on Defence Request for Variation of Time Limit (F00349) (Variation Time Limit Decision)*, 15 November 2022, confidential.

<sup>10</sup> KSC-BC-2020-04, F00358, Defence, *Defence Response to Prosecution Motion for Admission of Accused’s Statements (Defence Response to SPO Admissibility Request)*, 24 November 2022, confidential. The Panel notes that the Defence Response to SPO Admissibility Request was submitted after the time limit prescribed in the Variation Time Limit Decision. However, given that the delay was limited to no more than 9 minutes, the Panel accepts the Defence Response to the SPO Admissibility Request as properly submitted pursuant to Rule 9(5) of the Rules (See KSC-BC-2020-04, F00360, Defence, *Defence Notice Related to Filing F00358*, confidential).

<sup>11</sup> KSC-BC-2020-04, F00362, Specialist Prosecutor, *Prosecution reply to Defence response to motion for admission of the statements of the Accused (SPO Reply to Defence Response to SPO Admissibility Request)*, 29 November 2022, confidential.

11. The Panel further notes that, in the SPO Further Submissions, the SPO requests (SPO Admissibility Request) the Panel to admit into evidence: (i) the two Accused's statements collected by the Belgian Federal Judicial Police in 2016 and 2019, respectively, together with associated material and related procedural documents (respectively, the 2016 Belgian Interview Records<sup>12</sup> and the 2019 Belgian Interview Records<sup>13</sup>), of which the Defence seeks the exclusion; and (ii) two other prior statements of the Accused taken by the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), the 2005 Interview Transcript<sup>14</sup> and the 2007 Interview Transcript.<sup>15</sup>

12. In light of the foregoing, for the expediency of proceedings the Panel finds it appropriate to consider the Defence Exclusion Request and the SPO Admissibility Request jointly in a single decision. The Panel will thus not further address the Parties' submissions on the issue of legal basis, made in the Defence Exclusion Request and SPO Response to Exclusion Request.

13. In addition, considering that the Panel has yet to issue a decision on the submission and admissibility of non-oral evidence, it will limit its legal and factual analysis below to the issues raised in the two requests. The above-mentioned framework decision will be issued in due course.

### III. SUBMISSIONS

14. The SPO seeks the admission into evidence of the 2005 and 2007 ICTY Interview Transcripts and the 2016 and 2019 Belgian Interview Records (altogether Material).<sup>16</sup>

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<sup>12</sup> Annex 1 to the SPO Admissibility Request, item 10.

<sup>13</sup> Annex 1 to the SPO Admissibility Request, items 11 to 26.

<sup>14</sup> Annex 1 to the SPO Admissibility Request, items 1 to 6.

<sup>15</sup> Annex 1 to the SPO Admissibility Request, items 7 to 9.

<sup>16</sup> SPO Admissibility Request, paras 1, 65.

The SPO submits that the Material is relevant, authentic, reliable, and have probative value, which is not outweighed by any prejudice.<sup>17</sup> The SPO further avers that the interviews were conducted in accordance with standards of international human rights law.<sup>18</sup>

15. The Defence submits that it opposes the admission of said material because, in its view, it was obtained in violation of the Accused's rights as a suspect, including the 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.<sup>19</sup>

16. As regards the relief sought, the Defence submits that it requests, on top of the exclusion of the 2005 and 2007 ICTY Interview Transcripts and the 2016 and 2019 Belgian Interview Records,<sup>20</sup> that the Panel: "(...) strike out from the SPO's Pre-Trial Brief all submissions based on and/or referring to [the 2016 and 2019 Belgian Interview Records]; and "(...) strike out from all filings and material submitted through the electronic court management system in this case, all references to the [2016 and 2019 Belgian Interview Records]".<sup>21</sup>

#### IV. APPLICABLE LAW

17. The Panel notes Articles 37(1) and (5), and 40(2) and 6(h) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law) and Rules 137-139 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (Rules).

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<sup>17</sup> SPO Admissibility Request, paras 1, 27.

<sup>18</sup> SPO Admissibility Request, para. 27.

<sup>19</sup> Defence Response to SPO Admissibility Request, para. 12.

<sup>20</sup> Defence Exclusion Request, paras 1, 53; Defence Response to SPO Admissibility Request, paras 3, 91.

<sup>21</sup> Defence Exclusion Request, paras 2, 54; Defence Response to SPO Admissibility Request, paras 2-3, 91.

18. The Panel has yet to establish the procedure according to which non-oral evidence will be admitted or accepted to be part of the evidentiary record in the case. That being said, Article 37(1) of the Law instructs the Panel to decide on the admissibility of evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the SC prior to their establishment by any national or international law enforcement or criminal investigation authority or agency, including the ICTY. Likewise, the Rules stipulate that the Panel shall rule on the exclusion of evidence pursuant to Rule 138(2) of the Rules.<sup>22</sup> As a result, regardless of the procedure to be adopted, the Panel is duty-bound to decide whether the Material is (in)admissible.

19. Rule 138(2) of the Rules provides an exclusionary rule for evidence obtained by means of a violation of the Law or the Rules or standards of international human rights law. When conducting an enquiry under Rule 138(2) of the Rules, the Panel applies a two-prong test.<sup>23</sup> At first, the evidence must have been obtained by means of either a violation of the Law or the Rules, or standards of international human rights law. Only if such a violation is established in the affirmative will the Panel proceed to consider the two alternative conditions: (i) the violation casts substantial doubt on the reliability of the evidence; or (ii) the admission of the evidence would be antithetical to or would seriously damage the integrity of the proceedings.

20. According to Rule 138(2) of the Rules the evidence must have been “obtained by means of a violation” (emphasis added), suggesting a causal link between the violation and the gathering of evidence.<sup>24</sup> This is in contrast with the language used in Rule

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<sup>22</sup> See KSC-BC-2020-05, F00169, Trial Panel I, *Decision on the submission and the admissibility of evidence (Mustafa Admissibility Decision)*, 25 August 2021, public, paras 22, 25.

<sup>23</sup> *Mustafa Admissibility Decision*, para. 23 and references therein.

<sup>24</sup> Similarly, ICC, *Prosecutor v. Al Hassan AG Abdoul Aziz AG Mohamed AG Mahmoud*, ICC-01/12-01/18-1475, Trial Chamber X, *Decision on requests related to the submission into evidence of Mr Al Hassan's statements (Al Hassan Admissibility Decision)*, 20 May 2021, public, para. 33; *Prosecutor v. Paul Gicheru*, ICC-01/09-01/20-284-Red2, Trial Chamber II, *Decision on the Request to Exclude Audio Recordings Pursuant to Article 69(7) of the Statute*, 18 February 2022, public, para. 45.

138(3) of the Rules regarding evidence obtained “under torture or any other inhumane or degrading treatment” which does not require any such causal link.

21. In addition, Rule 138(3) of the Rules contains a further exclusionary rule according to which evidence obtained under torture or any other inhumane or degrading treatment is inadmissible and shall be excluded.

22. Lastly, the Panel is of the view that 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.<sup>25</sup>

## V. DISCUSSION

23. The Panel notes that the interviews at issue were conducted either by investigators of the ICTY under the Statute and Rules of Procedure and Evidence of the ICTY, or the Belgian Federal Judicial Police under domestic law, and not by the SPO.<sup>26</sup> In other words, the Material had not been obtained under the Law and the Rules. As a result, the Panel will assess whether each interview record was obtained by means of a violation of the *standards of international human rights law*.

24. The Panel further notes that, during all interviews, the Accused has been interviewed as a suspect. The Panel recalls that, in accordance with standards of international human rights law, a person “charged with an offence”, such as a suspect questioned about his involvement in acts constituting a criminal offence, can claim the

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<sup>25</sup> Similarly, ICC, *Al Hassan* Admissibility Decision, para. 37 and references therein.

<sup>26</sup> The Panel notes that, in 2019, the Accused was interviewed by the Belgian Federal Judicial Police, comprised of a police investigator, and in the presence and with the participation of a court-certified interpreter Albanian to French, an SPO prosecutor, and an SPO investigative advisor (*See* 066843-066855-ET Revised, pp. 066844-066845; 066866-066882-ET Revised, pp. 066867-066868), pursuant to an SPO request for assistance. However, the interview was conducted pursuant to Belgian law as attested by the documents provided to the Accused and the procès-verbal of the 2019 Belgian Interview.



protection of Article 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).<sup>27</sup> More specifically, a person charged with an offence is entitled to be informed of the nature and cause of the accusations against him promptly, in a language which she or he understands (Article 6(3)(a) of the European Convention).<sup>28</sup>

25. The Panel further recalls that the right to a fair trial under Article 6 of the European Convention includes that a person interviewed as a suspect by the police has the right to be notified of the privilege against self-incrimination and the right to remain silent.<sup>29</sup> The privilege against self-incrimination protects against the obtaining of evidence by coercion or oppression.<sup>30</sup>

26. The suspect should further be granted access to legal assistance from the moment there is a “criminal charge” against him or her pursuant to Article 6(3)(c) of the European Convention:<sup>31</sup> “although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial”.<sup>32</sup> While the European Convention

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<sup>27</sup> ECtHR, *Aleksandr Zaichenko v. Russia*, Application no. 39660/02, Judgment, 18 February 2010, paras 41-43. See also UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 14.

<sup>28</sup> This article does not impose any specific formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (See ECtHR, *Giosakis v. Greece* (no. 3), Application no. 5689/08, 15 September 2011, para. 29.

<sup>29</sup> ECtHR, *O’Halloran and Francis v. the United Kingdom*, Applications nos. 15809/02 and 25624/02, Judgment, 29 June 2007, para. 45; *John Murray v. The United Kingdom*, Application no. 14310/88, Judgment, 25 January 1996, para. 45; *Ibrahim and Others v. The United Kingdom*, Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09, Judgment (*Ibrahim and Others v. The United Kingdom*), 13 September 2016, para. 272.

<sup>30</sup> ECtHR, *Ibrahim and Others v. The United Kingdom*, para. 267.

<sup>31</sup> ECtHR, *Beuze v. Belgium*, Application no. 71409/10, Judgment (*Beuze v. Belgium*), 9 November 2018, para. 119; *Ibrahim and Others v. The United Kingdom*, para. 249; *Simoenovi v. Bulgaria*, Application no. 21980/04, Judgment (*Simoenovi v. Bulgaria*), 12 May 2017, paras 110-111.

<sup>32</sup> ECtHR, *Salduz v. Turkey*, Application no. 36391/02, Judgment (*Salduz v. Turkey*), 27 November 2008, para. 51; *Beuze v. Belgium*, para. 119; *Ibrahim and Others v. The United Kingdom*, para. 249; *Simoenovi v. Bulgaria*, paras 110-111; *Soytemiz v. Turkey*, 27 November 2018, Application no. 57837/09, Judgment, paras 43-44.

leaves it open how this right is guaranteed in domestic systems, it is recalled that the rights under the European Convention are not theoretical or illusory, but practical and effective.<sup>33</sup>

27. A person may waive of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, any waiver of a right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. Given that the right to counsel constitutes a fundamental guarantee of a fair trial, the waiver must be voluntary, and must constitute a knowing and intelligent relinquishment of said right.<sup>34</sup> This means that the suspect must be aware of his rights, including his right of access to a lawyer.<sup>35</sup> A suspect may be said to have implicitly, through his conduct, waived his or her right to counsel, if it is shown that he or she could reasonably have foreseen what the consequences of his or her conduct would be.<sup>36</sup>

28. Furthermore, pursuant to Article 6(3)(e) of the European Convention, a person who does not understand or speak the language used in court has the right to have the free assistance of an interpreter.

#### A. 2005 ICTY INTERVIEW

##### 1. Submissions

29. The Defence opposes the admission of the 2005 ICTY Interview Transcript, because, in its view, the Accused did not provide an informed and valid waiver of his right to legal assistance free of charge, given that he was not sufficiently put on notice

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<sup>33</sup> ECtHR, *Salduz v. Turkey*, para. 51.

<sup>34</sup> ECtHR, *Pishchalnikov v. Russia*, Application no. 7025/04, Judgment (*Pishchalnikov v. Russia*), 24 December 2009, paras 77-79; ECtHR, *Dvorski v. Croatia*, Application no. 25703/11, Judgment, 20 October 2015, para. 101.

<sup>35</sup> ECtHR, *Ibrahim and Others v. The United Kingdom*, para. 272.

<sup>36</sup> ECtHR, *Pishchalnikov v. Russia*, paras 77-79.

of the charges he could potentially face at the ICTY or elsewhere, or understood the legal consequences of his words.<sup>37</sup>

30. The SPO submits that the Accused's rights were respected during the 2005 ICTY Interview: the Accused was fully informed of his rights before the interview; he knowingly and intelligently waived his rights to remain silent and to legal assistance; and had access to the free assistance of an interpreter.<sup>38</sup>

31. The SPO adds that the Accused's participation in the 2005 ICTY Interview was voluntary<sup>39</sup> and that it is sufficient that a suspect is informed of the "nature of the investigation" prior to the interview in order to make an informed decision about the waiver of his rights.<sup>40</sup>

## **2. Determination by the Panel**

32. As to whether the Accused, at the time, was informed of the allegations against him before the start of the questioning, during the interview of 22 January 2005, the Panel notes that the Accused was told that the Prosecutor of the ICTY believed that he might be a suspect who was responsible for committing acts which may be chargeable under the statute of the ICTY.<sup>41</sup> The Panel is of the view that, given that, at the stage of the investigation, charges are yet to be defined and the contours of the case are yet to be drawn, it was sufficient at that time to inform the Accused in general terms of

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<sup>37</sup> Defence Response to SPO Admissibility Request, paras 18-22.

<sup>38</sup> SPO Reply to Defence Response to SPO Admissibility Request, paras 1-7. *See* SPO Admissibility Request, paras 4-12.

<sup>39</sup> SPO Reply to Defence Response to SPO Admissibility Request, paras 10-11.

<sup>40</sup> SPO Reply to Defence Response to SPO Admissibility Request, para. 6. *See* SPO Admissibility Request, para. 3.

<sup>41</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), pp. 4-5.

the nature and cause of the suspicions or allegations against him, as a suspect,<sup>42</sup> in order for the Accused to make an informed decision about the waiver of his rights.<sup>43</sup>

33. As to his rights, the Panel observes that, at the time, the Accused was informed that: (i) he had the right to remain silent;<sup>44</sup> (ii) he had the right to be assisted by a lawyer of his own choosing and, if he could not afford legal representation, a court-appointed lawyer at no cost;<sup>45</sup> (iii) if he changed his mind at any time, the interview would be suspended for the necessary arrangements to be made;<sup>46</sup> (iv) his questioning was being recorded;<sup>47</sup> and (v) any statement made by him could be used in evidence against him in proceedings at the ICTY.<sup>48</sup> Regarding the latter, the Panel does not find any merit in the Defence's argument that the Accused was not informed specifically that the interview could be used in proceedings *other than before the ICTY*, since he was clearly put on notice promptly that he was considered a suspect and that his statements could be used as evidence against him in criminal proceedings. This information was clearly articulated in the context in which it arose.

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<sup>42</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), pp. 2, 5.

<sup>43</sup> See similarly KSC-BC-2020-05/F00281RED, Trial Panel I, *Public redacted version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other materials (Mustafa Article 37 & Other Material Decision)*, 13 December 2021, public, para. 22.

<sup>44</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), p. 5. See Rule 42(A)(iii) of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, The Hague, 11 February 1994, as amended 17 December 2004 (ICTY 2005 Rules).

<sup>45</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), p. 6. See Rule 42(A)(i) of the ICTY 2004 Rules.

<sup>46</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), p. 7. See Rule 42(B) of the ICTY 2004 Rules.

<sup>47</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), pp. 5-6. See Rule 42(A)(iii) and 43(i) of the ICTY 2004 Rules.

<sup>48</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), pp. 5-6. See Rule 42(A)(iii) of the ICTY 2004 Rules.

34. Moreover, during his questioning, the Accused was assisted by an interpreter whose Albanian the Accused confirmed that he understood.<sup>49</sup>

35. Furthermore, at the end of the interview, the Accused confirmed that his statement was given voluntarily<sup>50</sup> and he was not given any promises or guarantees in return.<sup>51</sup> He also indicated that he did not have any objections to the manner by which his statement was taken.<sup>52</sup> The Accused's interview was recorded and subsequently transcribed, including by providing the Accused, at the conclusion of the questioning, the opportunity to clarify, supplement or amend anything he said during the interview.<sup>53</sup>

36. The Accused confirmed that he understood his rights.<sup>54</sup> In addition, the Accused was instructed that if he did not understand a question, he should tell the interviewer to repeat or rephrase it.<sup>55</sup> As such, the Panel is not persuaded by the Defence's assertions that the Accused was not able to fully comprehend the gravity of his situation and that he was exposed to "such a degree of compulsion" given the unequal position between the Accused and the ICTY Investigators.<sup>56</sup> The Accused was afforded the means to enquire about his situation and choose of his own free will not to avail himself of this opportunity.

37. Lastly, the Accused expressly declined to have a legal representative present for the interview.<sup>57</sup>

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<sup>49</sup> T000-2742-T000-2742-Albanian and English Transcript, pp. 2-3. *See* Rule 42(A)(ii) of the ICTY 2004 Rules.

<sup>50</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), p. 6.

<sup>51</sup> T000-2748-T000-2748-Albanian and English Transcript (B side), p. 6.

<sup>52</sup> T000-2748-T000-2748-Albanian and English Transcript (B side), pp. 6-7.

<sup>53</sup> T000-2748-T000-2748-Albanian and English Transcript (B side), p. 6.

<sup>54</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), pp. 2-7.

<sup>55</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), p. 4.

<sup>56</sup> *See* Defence Response to Admission Request, paras 20-23.

<sup>57</sup> T000-2742-T000-2742-Albanian and English Transcript (A side), p. 7.

38. Considering the above, the Panel finds that the Accused was fully informed of his right as a suspect, and his relinquishment of the right of access to a lawyer was provided, voluntarily and in an unequivocal, knowing and intelligent manner.

39. In light of the aforementioned, the Panel finds that the Accused's rights as a suspect at the time of his 2005 Interview were respected. As no violation of standards of human rights law has been established, the first prong of the test under Rule 138(2) of the Rules has not been met and the Panel does not need to proceed to consider the two alternative conditions set out in Rule 138(2)(a)-(b) of the Rules with respect to the Accused's 2005 Interview.

## B. 2007 ICTY INTERVIEW

### 1. Submissions

40. In support of its challenge to the admission of the 2007 Interview Transcript, the Defence refers to its arguments set out in relation to the 2005 ICTY Interview and contends that the Accused did not provide a "well-informed and valid waiver of his right to legal assistance" and his participation to the interview was not voluntary, in light of the Accused's lack of understanding of the issues at stake.<sup>58</sup>

41. The SPO makes the same arguments as for the 2005 ICTY Interview.<sup>59</sup>

### 2. Determination by the Panel

42. As to whether the Accused, at the time, was informed of the allegations against him before the start of the questioning, the Panel notes that, during the interview of 21 and 22 May 2007, the Accused clarified that he had received an invitation from the ICTY indicating that he was suspect of war crimes.<sup>60</sup> During the interview, the

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<sup>58</sup> Defence Response to Admission Request, para. 24.

<sup>59</sup> See paragraphs 30-31 above.

<sup>60</sup> T001-0105-1-A-TR, p. 11, lines 17, to p. 12, line 20.

investigators of the ICTY indicated that they wanted to ask him about allegations made against him and informed the Accused that they were in possession of a statement which suggested that he was responsible for transferring an individual into custody where he was subsequently killed. The Accused denied these allegations.<sup>61</sup> The Panel observes that, although the Accused was not informed of these allegations at the start of the interview, he was put on notice that he was a suspect,<sup>62</sup> as allegations had been made against him, that his statements could be used as evidence against him,<sup>63</sup> and that he would have in the course of the interview, the opportunity to comment on them, which he did. The Panel also notes that the Accused was made aware in 2005 at the previous ICTY Interview in general terms of the nature and cause of the suspicions or allegations against him. The Panel is thus satisfied that the Accused was informed of the nature and cause of the suspicions or allegations against him and that he was considered a suspect.<sup>64</sup>

43. As to his rights, the Panel first observes that, at the time, the Accused was informed that he: (i) had the right to the assistance of an interpreter if he did not understand or speak the language used for questioning;<sup>65</sup> (ii) he had the right to remain silent<sup>66</sup> or to request at any time the questioning to stop;<sup>67</sup> (iii) his questioning was being recorded;<sup>68</sup> (iv) any statement made by him may be used in evidence against him in proceedings at the ICTY;<sup>69</sup> (v) at the end of the interview, he would have the

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<sup>61</sup> T001-0105-3-A-TR, p. 62, line 8 to p. 66 line 25.

<sup>62</sup> T001-0105-1-A-TR, p. 1, lines 9-10, p. 11, lines 5-6.

<sup>63</sup> T001-0105-1-A-TR, p. 2, lines 5-7.

<sup>64</sup> T001-0105-1-A-TR, p. 1, lines 9-10, p. 11, lines 5-6.

<sup>65</sup> T001-0105-1-A-TR, p. 1, lines 23-24. *See* Rule 42(A)(ii) of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, The Hague, 11 February 1994, as amended 13 September 2006 (ICTY 2006 Rules).

<sup>66</sup> T001-0105-1-A-TR, p. 2, line 4.

<sup>67</sup> T001-0105-1-A-TR, p. 2, line 10.

<sup>68</sup> T001-0105-1-A-TR, p. 2, lines 4-5.

<sup>69</sup> T001-0105-1-A-TR, p. 2, lines 5-7. *See* Rule 42(A)(iii) of the ICTY 2006 Rules.



opportunity clarify, supplement or amend anything he said during the interview;<sup>70</sup> and (vi) a copy of the recording would be given to him.<sup>71</sup>

44. The Accused was told that he had the right to be assisted by a lawyer of his own choosing and, if he could not afford legal representation, a lawyer would be assigned to him at no cost.<sup>72</sup> He was also told that, if he changed his mind at any time and wished to be assisted by a lawyer, the interview would be suspended for the necessary arrangements to be made.<sup>73</sup>

45. On the second day of the interview, the Accused was reminded that he was interviewed as a suspect<sup>74</sup> and of the abovementioned rights.<sup>75</sup> After the enumeration of his rights, the Accused confirmed that the interview could continue.<sup>76</sup>

46. Second, the Panel notes that the Accused was reminded several times that he was free to come and go as he pleased and that his participation to the interview was voluntary.<sup>77</sup> The Panel notes in this regard that the Defence's references to the

<sup>70</sup> T001-0105-1-A-TR, p. 3, lines 20-21.

<sup>71</sup> T001-0105-1-A-TR, p. 3, lines 24-25. *See* Rule 43(iii) and (iv) of the ICTY 2006 Rules.

<sup>72</sup> T001-0105-1-A-TR, p.1, lines 17-20. *See* Rule 42(A)(i) of the ICTY 2006 Rules.

<sup>73</sup> T001-0105-1-A-TR, p. 2, lines 14-20. *See* Rule 42(B) of the ICTY 2006 Rules.

<sup>74</sup> T001-0105-3-A-TR, p. 1, line 17.

<sup>75</sup> T001-0105-3-A-TR, p. 1, line 17 to p. 4, line 24.

<sup>76</sup> T001-0105-3-A-TR, p. 4, lines 18-21.

<sup>77</sup> T001-0105-1-A-TR, p. 5, lines 11-21:

11 TRIAL ATTORNEY [...]: Would you be available to come back tomorrow? [...]

14 INTERPRETER: What else can I do? I will come.

15 TRIAL ATTORNEY [...]: Ok, I, uh, you, it's very kind of you to do that. [...]

17 TRIAL ATTORNEY [...]: I want to make it clear that of course that it is your choice. [...]

19 TRIAL ATTORNEY [...]: You are free to come and go as you please, all right? [...]

21 TRIAL ATTORNEY [...]: But, if you could cooperate with us, of course we would be very grateful.

T001-0105-1-A-TR, p. 6, lines 15-20:

15 TRIAL ATTORNEY [...]: All right, ok, look I just wanted to make that clear, that... [...]

17 TRIAL ATTORNEY [REDACTED]: That, you know, you are free to come and attend if you wish. And we're

18 not forcing you here.

20 TRIAL ATTORNEY [...]: But we're very grateful to you that you have agreed to come and assist us.



transcript of interview, namely that when the ICTY investigators asked whether the Accused could return the next day to continue the interview, he responded that he had “no other choice” and “what else can I do”,<sup>78</sup> are partial and misleading. Thus, the Defence’s conclusion that the Accused’s participation to the interview was not voluntary is plainly not supported by the facts. Neither does the Panel discern any evidence supporting the fact the Accused was unable to understand the situation he was in.

47. Third, the Panel notes that the Accused did not invoke his right of access to a lawyer throughout the interview.

48. Fourth, the Panel notes that the Accused was informed of the potential consequences of giving this interview, namely, that his statements would be recorded and could be used as evidence against him. Therefore, the Panel is of the view that the Accused could reasonably have foreseen what the consequences of his conduct would be.

49. Considering the above, the Panel is of the view that the Accused was fully informed of his rights as a suspect and waived his right of access to a lawyer implicitly through his conduct, voluntarily, and in an unequivocal, knowing and intelligent manner.

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T001-0105-3-A-TR, p. 4, lines 18-21:

7 TRIAL ATTORNEY [...]: are you happy to continue with the interview? [...]

10 INTERPRETER What else can I do?

11 TRIAL ATTORNEY [...]: Oh ok, all right, I understand from the way you mentioned that, that

12 that’s sort of a rhetorical question, but it’s ... you’ve got a real right to stop this interview/ You don’t have

13 to be here just because we’ve asked you to come here today. [...]

16 TRIAL ATTORNEY [...]: You just bear... that in mind and if you...

18 TRIAL ATTORNEY [...]: if you want to stop this you, you let me know ok? [...]

21 INTERPRETER: No we can continue.

<sup>78</sup> See Defence Response to Admission Request, para. 24 referring to T001-0105-1-A-TR, p. 5 (“what else can I do”) and T001-0105-2-A-TR, p. 6, line 5 (“no other choice”).

50. In light of the aforementioned, the Panel finds that the Accused's rights as a suspect at the time of his 2007 ICTY Interview were complied with. As no violation of standards of international human rights law has been established, the first prong of the test under Rule 138(2) of the Rules has not been met and the Panel does not need to proceed to consider the two alternative conditions set out in Rule 138(2)(a)-(b) of the Rules with respect to the Accused's 2007 ICTY Interview.

51. The Panel will thus proceed with assessing whether the requirements pursuant to Article 37 of the Law are met, vis-à-vis the 2005 and 2007 ICTY Interview Transcripts.

#### C. EVIDENCE COLLECTED PRIOR TO THE ESTABLISHMENT OF THE SC

52. The Panel finds that the 2005 and 2007 ICTY Interview Transcripts are relevant<sup>79</sup> to the charges in the present case as they pertain to the Accused's role in the KLA and his knowledge of or involvement in arrests, detentions, and mistreatments of civilians in various locations, in the period relating to the charges, and therefore may be relevant to establishing his involvement, if any, in the crimes charged. Furthermore, the 2005 and 2007 Interview Transcripts appear to be authentic,<sup>80</sup> as they constitute a record of the Accused's questioning as a suspect before ICTY investigators, and indicate, among others, the dates when they were taken and the names of the individuals involved in the process. The Panel therefore finds that the 2005 and 2007 Interview Transcripts have clear

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<sup>79</sup> See *Mustafa Article 37 & Other Material Decision*, para. 11. See KSC-BC-2020-07, F00334, Trial Panel II, *Decision on the Prosecution Request for Admission of Items Through the Bar Table (Gucati and Haradinaj Bar Table Decision)*, 29 September 2021, public, para.12 and the references contained therein.

<sup>80</sup> See *Mustafa Article 37 & Other Material Decision*, para. 12. See *Gucati and Haradinaj Bar Table Decision*, para.13 and the references contained therein.

probative value<sup>81</sup> and, moreover, pertain to core matters in the present case. As to whether their probative value may be outweighed by their prejudicial effect,<sup>82</sup> the Panel notes that the 2005 and 2007 Interview Transcripts were provided by the Accused at the time as a suspect with full respect of his rights. In these circumstances, considering, in particular: (i) the 2005 and 2007 ICTY Interview Transcripts' clear probative value; and (ii) the fact that, when giving those interviews, the Accused was, in his capacity as a suspect, informed of the privilege against self-incrimination, thereby minimizing any potential prejudicial effect, the Panel finds that the 2005 and 2007 Interview Transcripts' probative value is not outweighed by their prejudicial effect. In light of the foregoing, the Panel admits the 2005 and 2007 Interview Transcripts into evidence.

#### D. 2016 AND 2019 BELGIUM INTERVIEWS

##### 1. Submissions

53. The Defence submits that, for both the interview in 2016 and 2019, the Accused was questioned without a lawyer being present and without being afforded an opportunity to obtain legal advice prior to being questioned in violation of the Accused's rights as a suspect.<sup>83</sup>

54. The Defence argues in particular that, for the 2016 Belgian Interview, the Accused was shown and signed the declaration of rights after the questioning had already started.<sup>84</sup>

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<sup>81</sup> See *Mustafa* Article 37 & Other Material Decision, para. 13. See *Gucati and Haradinaj* Bar Table Decision, para.14 and the references contained therein.

<sup>82</sup> See *Mustafa* Article 37 & Other Material Decision, para. 14. See *Gucati and Haradinaj* Bar Table Decision, para.15 and the references contained therein.

<sup>83</sup> Defence Exclusion Request, para. 16, 19, 26-27, 30-34. Defence Response to SPO Admissibility Request, paras 25- 36.

<sup>84</sup> Defence Exclusion Request, para. 18. See Defence Response to SPO Admissibility Request, paras 25-28.

55. The Defence further argues that for both the interview in 2016 and the one in 2019, the Accused did not validly waive his right to be assisted by counsel.<sup>85</sup>

56. Furthermore, the Defence submits that the Accused found the interpreter who assisted him for both the 2016 and 2019 Belgian Interview very problematic and felt compelled to communicate in French to the best of his ability, although he had limited command of this language.<sup>86</sup> The Defence adds that the interpreter at both interviews “were not independent but associates of the Belgian police”.<sup>87</sup> In the Defence Response to the SPO Admissibility Request, the Defence further contends that the Accused’s right to an effective interpretation was violated during the 2016 and 2019 Belgian Interviews.<sup>88</sup>

57. The SPO submits that the 2016 and 2019 Belgian Interview complied with standards of international human rights law: (i) the Accused was informed of his rights as a suspect; (ii) he knowingly and intelligently waived his rights to counsel and to remain silent; and (iii) he was provided with the free assistance of an interpreter.<sup>89</sup> There was no violation of the Law and Rules nor did the interviews violate the right to a fair trial.

## **2. Determination by the Panel regarding the 2016 Belgian Interview**

### ***i. Relevant Facts***

58. The Panel observes that the Accused received a summons from the Belgian Federal Judicial Police for a *first* interview to take place on 9 December 2015 “with

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<sup>85</sup> Defence Response to SPO Admissibility Request, paras 37-56.

<sup>86</sup> Defence Exclusion Request, para. 16.

<sup>87</sup> Defence Exclusion Request, para. 16.

<sup>88</sup> Defence Response to SPO Admissibility Request, paras 57-64.

<sup>89</sup> SPO Admissibility Request, paras 39-53; SPO Reply to Defence Response to SPO Admissibility Request, paras 8-11.

an adult liable of having committed an offence, with a notice of rights”.<sup>90</sup> The summons informed the Accused that: “[y]ou will be interviewed about acts that you could be charged with, more specifically [...] serious violations of humanitarian law in Albania in 1999”. Moreover, it informed him that:

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

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

Prior to this first interview regarding the above acts, you have the right to a confidential consultation with an attorney of your choosing. You are free to do this. If you consult an attorney, please show him this summons so that he may be informed about the acts regarding which you will be interviewed. In any event, when you appear for the interview it will be assumed that you consulted with an attorney.”<sup>91</sup>

59. The summons also specifies that, if the Accused wishes to speak at the interview in another language than French, he may contact the Belgian Federal Judicial Police.<sup>92</sup>

60. Together with the written summons, the Accused received a document entitled “Statement of your rights” (statement of rights or declaration of rights)<sup>93</sup> with information on the rights of the suspect interviewed “without being arrested

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<sup>90</sup> 101752-101763-ET RED, p. 101760. The Panel notes that the actual interview took place on 14 January 2016 (074117-074129-ET RED, p. 074119).

<sup>91</sup> 101752-101763-ET RED, p. 101760).

<sup>92</sup> 101752-101763-ET RED, p. 101760.

<sup>93</sup> In the email exchanges from 8 June 2021 to 1 July 2021 between the SPO and Belgian Federal Judicial Police, the latter indicates that a summons with a notice of rights together with a *statement of the suspect's rights* was sent to the residence of the Accused for both the 14 January 2016 interview and 11 and 12 February 2019 interview and that a copy of such as statement is attached to the email exchange (101752-101763-ET RED, p. 101753). See 101747-101751-ET or 101747-101751 RED, pp. 101750-101751, for a copy of this type of statement. The procès-verbal of the 14 January 2016 also indicates that the statements of rights was given to the Accused (074117-074129-ET Revised, p. 074119).

regarding offences with which [he] may be charged”.<sup>94</sup> It comprises, *inter alia*: (i) the right to be informed about the acts which the suspect will be interviewed; (ii) the right to remain silent and not incriminate himself; and (iii) the right to a confidential consultation with an attorney of the suspect’s own choosing and, in certain conditions, through the legal aid system.<sup>95</sup>

61. The statement of rights also specifies that the right to have a confidential consultation with an attorney can be waived (voluntarily and upon consideration, if the suspect is an adult and has signed and dated a document to that effect).<sup>96</sup> Moreover, if the suspect has received a *written summons* to attend the interview, which enumerates the abovementioned rights and states that “it is assumed that [the suspect] [has] consulted with an attorney before appearing for the interview”, the suspect may no longer seek a postponement of the interview, as he has already had the possibility to consult with an attorney.<sup>97</sup>

62. The statement of rights further states that, at the start of the interview, the suspect: (i) will be briefly informed about the acts, which the suspect will be interviewed about, and the right to remain silent; (ii) is entitled to request the verbatim transcription of all the questions put to him and his answers and to request a specific investigative measure or the conducting of any interview; and (iii) will be informed that his or her statements may be used as evidence in court. Moreover, it states that, at the end of the interview, the suspect has the right to review the record of the interview — including the right to make corrections and clarifications to his or her

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<sup>94</sup> 101747-101751-ET, p. 101750.

<sup>95</sup> 101747-101751-ET, pp. 101750-101751.

<sup>96</sup> 101747-101751-ET, p. 101750.

<sup>97</sup> 101747-101751-ET, p. 101750.

statements. Lastly, it indicates that the suspect has the right to assistance of an interpreter, free of charge.<sup>98</sup>

63. The Panel further observes that, on 14 January 2016, the Accused was interviewed by the Belgian Federal Judicial Police,<sup>99</sup> comprised of a police investigator and a police commissioner, and in the presence of an interpreter.<sup>100</sup> The procès-verbal of the 2016 Belgian Interview contains the Accused's statement.<sup>101</sup>

64. The first part of the procès-verbal of the 2016 Belgian Interview records the following time and date: Thursday, 14 January 2016, at 10:48 hours.<sup>102</sup> It then indicates that: "[p]rior to the commencement of the interview", and in the presence of an interpreter, the Accused was informed of the facts on which he would be questioned and that he: (i) cannot be forced to incriminate him/herself; (ii) may choose, after having confirmed his/her identity, to make a statement, answer the questions posed, or remain silent; (iii) has the right, prior his/her first interview, to consult confidentially with a lawyer of his/her own choice, and that such a right may be waived, in a considered manner and in writing, in a duly dated and signed document; and (iv) is not subject to any restrictions on his liberty and, as such, can come and go at any moment.<sup>103</sup> It further indicates that, prior to the first interview, the suspect is given a written declaration of his/her rights.<sup>104</sup> The same page of the procès-verbal ends with the text "You have given me the declaration of rights" and the Accused's and the interpreter's signatures.<sup>105</sup>

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<sup>98</sup> 101747-101751-ET, p. 101751.

<sup>99</sup> 074117-074129-ET RED, p. 074119.

<sup>100</sup> 074117-074129-ET RED, pp. 074119-074120.

<sup>101</sup> 074117-074129-ET RED, p. 074120-74129.

<sup>102</sup> The Panel notes that the timestamp 9h18 in the French version of the document has been strikethrough and replaced by the timestamp 10h48 (074117-074129, p. 074119).

<sup>103</sup> 074117-074129-ET RED, p. 074119.

<sup>104</sup> 074117-074129-ET RED, p. 074119.

<sup>105</sup> 074117-074129-ET RED, p. 074119.

65. In its second part, the procès-verbal of the 2016 Belgian Interview records the following date and time: Thursday, 14 January 2016, at 09:22 hours.<sup>106</sup> It then indicates that, at the start of the interview, the Accused expressed the wish to speak in French and to use that language in court.<sup>107</sup> It also states that the Accused confirmed at the start of the interview that he was again briefly informed of the facts about which he will be interviewed and that he was aware that: (i) he may request that all questions put to him and all answers given by him be written down in the terms used; (ii) he has the right to request that other investigative acts be carried out or that other witnesses be interviewed; (iii) his statements may be used as evidence in court; and (iv) he cannot be forced to incriminate himself.<sup>108</sup>

66. The Panel notes that the procès-verbal of the 2016 Belgian Interview concludes by indicating that the Accused: reread his statement; did not wish to correct or add to it; and confirmed that he received a copy.<sup>109</sup> The procès-verbal is signed by both the Accused and the interpreter and each page of the procès-verbal is initialled by the Accused and the interpreter.<sup>110</sup>

*ii. Findings*

67. At the outset, the Panel notes that the Accused was interviewed by the Belgian Federal Judicial Police as a suspect under Belgian law.

68. Mindful of Article 37(5) of the Law, the Panel will thus look at Belgian law only to the extent necessary to examine whether the 2016 Belgian Interview was conducted in compliance with *standards of international human rights law*.<sup>111</sup>

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<sup>106</sup> 074117-074129-ET RED, p. 074120.

<sup>107</sup> 074117-074129-ET RED, p. 074120.

<sup>108</sup> 074117-074129-ET RED, p. 074120.

<sup>109</sup> 074117-074129-ET RED, p. 074128.

<sup>110</sup> See 074117-074129.

<sup>111</sup> See also paragraph 23 above.



69. Concerning the Defence's claims regarding the Accused's distrust of the interpreter and dissatisfaction with her services, the Panel notes first that the Accused was informed via the summons that, if he wished to speak at the interview in another language than French, he was free to contact the Belgian Federal Judicial Police.<sup>112</sup> At the start of the interview, the Accused indicated that he wished to speak in French.<sup>113</sup> Notwithstanding his choice, an interpreter was present and remained available throughout the interview.<sup>114</sup> The procès-verbal of the 2016 Belgian Interview, which the Accused had the opportunity to read (he confirmed that he did not wish to correct or add anything) and signed,<sup>115</sup> does not contain any indication as to the purported language difficulties experienced by the Accused nor in relation to the interpreter's performance or independence.<sup>116</sup> Neither did the Defence provide any evidence that would question the veracity of the contents of the procès-verbal of the 2016 Belgian Interview. In light of the above, the Panel is satisfied that the Accused was able to comprehend the information received at all times and his right to the assistance of an interpreter free of charge was fully respected.

70. As to whether the Accused was sufficiently informed of his rights as a suspect before the start of the interview, the Defence argues that the Accused was shown and signed the declaration of rights after the questioning had already started by referring to the times specified in the first and second part of the procès-verbal of the 2016

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<sup>112</sup> 101752-101763-ET RED, p. 101760).

<sup>113</sup> See paragraph 65 above.

<sup>114</sup> 7074117-074129-ET RED, p. 074119 ("In the presence of [REDACTED] interpreter"), p. 074120 ("In the presence of [REDACTED] interpreter"). The Panel also notes that each page of the procès-verbal of the 2016 Interview is signed by the interpreter (and the Accused) (see 074117-074129, pp. 074119-074129).

<sup>115</sup> See paragraph 66 above.

<sup>116</sup> The sole fact that the interpreter was provided through the Belgian police – even assuming that this could be considered a procedural irregularity which, in the view of the Panel, cannot – does not demonstrate that the interpretation was conducted in manner as to affect the fairness of the proceedings (see ECtHR, *Ucak v. United Kingdom*, Application no. 44234/98, Judgment, 24 January 2002, p. 10).

Belgian Interview.<sup>117</sup> The Panel notes first that the Accused received comprehensive information about his rights as part of the summons and the statements of rights.<sup>118</sup> Second, the Panel notes that the procès-verbal of the 2016 Belgian Interview, which the Accused signed, clearly states, on the same page, that the Accused was given information about his rights “prior to the commencement of the interview” and that the Accused confirmed having received the declaration of rights.<sup>119</sup> Third, prior to the questioning, the Accused indicated, in the presence of the interpreter, that he was aware of his rights.<sup>120</sup> Lastly, the Panel does not discern any evidence supporting the Defence’s allegations or insinuations regarding the authenticity or the truth of the contents of the procès-verbal.<sup>121</sup> Thus, the Panel finds that the Accused was sufficiently informed of his rights as a suspect in the context of the 2016 Belgian Interview.

71. As to whether the Accused waived his right of access to a lawyer, the Panel recalls that it is only called upon to determine whether the circumstances of the interview comply with standards of international human rights law.

72. At the outset, the Panel finds that, according to standards of international human rights law, a waiver in writing is not required in order for it to be valid,<sup>122</sup> contrary to what the Defence asserts.<sup>123</sup>

73. Moreover, the Panel finds, based on the information at hand, that the Accused was informed of the nature and cause of the suspicions or allegations against him,<sup>124</sup>

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<sup>117</sup> Defence Exclusion Request, para. 18. *See* Defence Response to SPO Admissibility Request, paras 25-28.

<sup>118</sup> *See* paragraph 58-62 *above*.

<sup>119</sup> *See* paragraph 64 *above*.

<sup>120</sup> *See* paragraph 65 *above*.

<sup>121</sup> Defence Response to SPO Admissibility Request, para. 28.

<sup>122</sup> *See* paragraph 27 *above*.

<sup>123</sup> *See* Defence Exclusion Request, paras 24-26.

<sup>124</sup> *See* paragraphs 58 and 64 *above*.

of his rights to remain silent and not to be compelled to self-incriminate,<sup>125</sup> and of his right to consult confidentially with a lawyer, through the summons addressed to him and, again, at the start of the interview.

74. Further, the Accused was plainly informed of the potential consequences of giving the interview, namely, that his statements could be used as evidence in proceedings against him. Therefore, the Panel is of the view that the Accused could reasonably have foreseen what the consequences of his conduct would be.

75. Additionally, the Panel notes that the Defence has not claimed that during that interview the Accused had been under any pressure by the Belgian Federal Judicial Police which could signal that the Accused did not participate in the interview voluntarily.

76. Thus, the Panel finds that under the above-described circumstances the Accused waived his right of access to a lawyer implicitly and through his conduct, voluntarily and in an unequivocal, knowing and intelligent manner.

77. As to the Defence's argument that the Accused did not validly waive his right to have free legal assistance *during* the 2016 Belgian Interview, given that, at the time, Belgian law only provided for the right to consult confidentially with a lawyer *prior* to an interview with the police,<sup>126</sup> the Panel finds that overall the Accused was not barred from access to a lawyer.<sup>127</sup> To the contrary, the Accused was informed of his right to

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<sup>125</sup> See on the importance of the right to remain silent and the privilege against self-incrimination, ECtHR, *Bykov v. Russia*, Application no. 4378, Judgment, 10 March 2009, 02, para. 93; *Beuze v. Belgium*, paras 128-129, 134.

<sup>126</sup> See Defence Exclusion Request, paras 30-33; Defence Reponse to SPO Admissibility Request, paras 26, 29, 53-54.

<sup>127</sup> The Panel notes that, at the time of the 2016 Belgian Interview, the jurisprudence of the ECtHR did not expressly provide that the right of access to a lawyer, demanded the presence of a lawyer during every interview and interrogation with the police for individuals interviewed as suspects, but not arrested and in detention. Although the ECtHR held in a number of cases that suspects have the right for their lawyer to be physically present during their initial police interviews (see ECtHR, *Adamkiewicz*

consult confidentially with a lawyer prior to the 2016 Belgian Interview through the summons addressed to him,<sup>128</sup> and before the start of said interview,<sup>129</sup> and was therefore afforded the opportunity to seek legal advice before attending such interview.

78. Even if, *arguendo*, there was a violation of his right of access to a lawyer, insofar as he was not notified of his right to the free assistance of a lawyer during the 2016 Belgian Interview, the Panel considers that no causal link between the hypothetical violation of said right and the gathering of the evidence at issue is established. This is because the Accused subsequently made substantially the same statements<sup>130</sup> in the context of the 2019 Belgian Interview, during which his rights as a suspect were fully complied with.<sup>131</sup> Therefore, it cannot be concluded that the product of the 2016 Belgian Interview Records was obtained “by means” of a violation of his right of access to a lawyer within the meaning of the chapeau of Rule 138(2) of the Rules.

79. Furthermore, even if, *arguendo*, that said evidence was obtained “by means” of a violation of his right of access to a lawyer, the Panel finds that such a hypothetical violation does not cast substantial doubt on the reliability of the product of the 2016 Belgian Interview Records as provided in Rule 138(2)(a) of the Rules. Equally, the Panel does not find that the admission of this evidence would be antithetical to or would seriously damage the integrity of the proceedings as provided in Rule 138(2)(b) of the

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*v. Poland*, Application no. 54729/00, Judgment, 2 March 2010 para. 87; *Brusco v. France*, para. 54; *Mader v. Croatia*, Application no. 56185/07, Judgment, 21 June 2011, paras 151 and 153), these concerned suspects (including minors) who had been taken into custody, had not been provided with access to a lawyer at all, and were not informed of their right to remain silent and the privilege against self-incrimination. Therefore, the Panel is not convinced that the absence of notification of the right to have a lawyer present during the Accused’s 2016 Belgian Interview was in violation of standards of international human rights law, as applicable at the time.

<sup>128</sup> See ECtHR, *Rodionov v. Russia*, Application no. 9106/09, 11 December 2018, para. 155 (that notification of the procedural rights is to be conveyed in an individualised manner).

<sup>129</sup> See paragraph 64 *above*.

<sup>130</sup> Compare for instance 074117-074129-ET, p. 074124 with 066888-TR Part 1, pp. 146-159, 161-165, 169.

<sup>131</sup> See paragraph 109 *below*.

Rules. This is because, as stated above, the Accused provided substantially the same evidence during the 2019 Belgian Interview, in a context where he was duly notified of his rights, including the right to have a lawyer present during the interview.

80. In light of the aforementioned, the Panel concludes that the 2016 Belgian Interview is not inadmissible pursuant to Rule 138(2) of the Rules and therefore can be considered by the Panel in accordance with Rule 139(1). As such, the 2016 Belgian Interview Records can be used at this stage for the purpose of the detention review. Concerning the question of whether to admit into evidence the 2016 Belgian Interview Records, the Panel recalls that it will issue in due course a decision on the submission and admissibility of non-oral evidence.

### **3. Determination by the Panel regarding the 2019 Belgian Interview**

#### *i. Relevant Facts*

81. The Panel notes that the Accused received a summons on 30 January 2019<sup>132</sup> to attend an interview with the Belgian Federal Judicial Police on 11 and 12 February 2019.<sup>133</sup> The summons stated that the Accused would be interviewed about:

“acts related to an offence punishable by imprisonment which [he] may be charged with, more specifically [...] at the request of the prosecutor of the Kosovo Specialist Chambers, in connection with serious violations of humanitarian law:

That occurred at the KLA detention camp in JABLLANICË or in any other location between May and September 1998;

That occurred at the KLA detention centre in KUKËS or in any other location between March and June 1999.”<sup>134</sup>

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<sup>132</sup> 066843-066855-ET Revised, p. 066844/ 066843-066855 RED, p. 066845.

<sup>133</sup> 101752-101763-ET, p. 101758.

<sup>134</sup> 101752-101763-ET, p. 101758.

82. The summons indicated that the Accused was required to inform the Belgian Federal Judicial Police as soon as possible about the language in which he wished to communicate at the interview.<sup>135</sup>

83. The summons further indicated that the Accused should carefully read his rights, which are reproduced below:

- You will be interviewed as a suspect and before the interview about the aforementioned acts you have the right to a confidential consultation with an attorney of your choosing or an attorney assigned to you [...]. You are free to do so but at your own initiative. Should you consult an attorney, please show him this summons so that he may be informed about the acts you will be interviewed about. You also have the right to be accompanied by your attorney and to have him assist you during your interview. You are advised to consult with your attorney on this matter. In any event, when you appear for the interview it will be assumed that you consulted with an attorney.
- After identifying yourself, you may choose to give a statement, to answer the questions put to you or to remain silent.
- During the interview, you may not be forced to incriminate yourself.
- Your statements may be used as evidence in court and consequently against you or another person.
- During the interview, you may ask that all of the questions put to you and your answers be recorded verbatim.
- You are not under arrest and consequently you are free to go at any time. Please note however that, in light of the circumstances, the Crown Prosecutor may order your arrest as part of the investigation. You are therefore advised to comply with this invitation.
- During the interview you may request that a specific investigative measure or interview be conducted.
- You may use the documents in your possession, however this must not delay the interview, and during or subsequent to the interview you may

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<sup>135</sup> 101752-101763-ET, p. 101758.

request that these documents be included with the procès-verbal of the interview or the case-file.

- If you do not have sufficient means to pay for an attorney, Articles 508/13 to 508/18 of the Judicial Code regarding full or partial legal aid to an individual may apply. In that case, you are advised to contact the office for legal aid at the courthouse and request to be assigned an attorney (relevant directions are given).<sup>136</sup>

84. As for the 2016 Belgian Interview, the Accused received, together with the summons, a statement of rights<sup>137</sup> with information on the rights of the suspect.

85. On 11 and 12 February 2019, the Accused was interviewed by the Belgian Federal Judicial Police, comprised of a police investigator, and in the presence and with the participation of a court-certified interpreter for Albanian to French, an SPO prosecutor, and an SPO investigative advisor.<sup>138</sup> Both interview forms included in the procès-verbaux of 11 and 12 February 2019 indicate that the summons contained a brief statement of the facts and rights and that the “declaration of rights was sent with the summons”.<sup>139</sup>

86. The Panel notes that on 11 February 2019, before the commencement of the interview, the Belgian police investigator informed the Accused: “[t]hat he may choose, after having confirmed his identity, to make a statement, to answer the questions posed, or to remain silent; [and] [t]hat he cannot be forced to incriminate himself”.<sup>140</sup>

87. The procès-verbal mentions that, at the start of the interview on 11 February 2019, the Accused expressed the wish to speak in Albanian and to use that language

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<sup>136</sup> 101752-101763-ET, pp. 101758-101759.

<sup>137</sup> See footnote 93 above.

<sup>138</sup> 066843-066855-ET Revised, pp. 066844-066845; 066866-066882-ET Revised, pp. 066867-066868.

<sup>139</sup> 066843-066855-ET Revised, p. 066845; 066866-066882-ET Revised, p. 066868.

<sup>140</sup> 066843-066855-ET Revised, p. 066845; 066866-066882-ET Revised, p. 066868; 066864-TR-ET Part 1 Revised, p. 3, lines 2-7.



in court.<sup>141</sup> The Accused was informed that an interpreter was present at his request and he replied that, even though he understands French well, he preferred to be assisted by an interpreter.<sup>142</sup>

88. The Panel also observes that the SPO prosecutor told the Accused to inform them if something was unclear or if he needed a break.<sup>143</sup> The Accused was then reminded that he was being heard at the request of the KSC, which also requested that the interview be audio-video recorded.<sup>144</sup>

89. The Belgian police investigator stated:

So, you have been informed of your rights, which were sent to you at the same time as the summons. It's the usual blah- blah. You have the right, once you have confirmed your identity, to make a statement, to reply to the questions or to remain silent, and you cannot be compelled to incriminate yourself.<sup>145</sup>

90. The Accused confirmed that he understood.<sup>146</sup>

91. The Panel observes that, on 12 February 2019, before the commencement of the interview, the Belgian police investigator reminded the Accused that: "[he] still ha[s] the same rights, so once [he] ha[s] confirmed [his] identity [he] ha[s] the right to make a statement, to reply to the questions or to remain silent, and [he] cannot be compelled to incriminate [him]self".<sup>147</sup> The Accused replied: "Oh, that is becoming a habit".<sup>148</sup>

92. The Panel takes note that the procès-verbal mentions that, at the start of the interview on 12 February 2019, the Accused expressed the wish to speak in French and

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<sup>141</sup> 066843-066855-ET Revised, p. 066845.

<sup>142</sup> 066864-TR-ET Part 1 Revised, p. 1, lines 21 to, p. 2, lines 1-2, 21-22.

<sup>143</sup> 066864-TR-ET Part 1 Revised, p. 2, lines 4-5.

<sup>144</sup> 066864-TR-ET Part 1 Revised, p. 2, lines 16-18.

<sup>145</sup> 066864-TR-ET Part 1 Revised, p. 3, lines 2-7.

<sup>146</sup> 066864-TR-ET Part 1 Revised, p. 2, lines 24-25, p. 3, lines 8-9.

<sup>147</sup> 066888-TR-ET Part 1 Revised, p. 3, lines 3-7; 066866-066882-ET Revised, p. 066868.

<sup>148</sup> 066888-TR-ET Part 1 Revised, p. 3, line 8.



to use that language in court.<sup>149</sup> It is noted, however, that at times the Accused spoke in Albanian and was assisted by the interpreter present throughout the interview.<sup>150</sup>

93. The Panel is also mindful that the procès-verbal concludes by indicating that, at the end of each day, the Accused: (i) reread his statement; (ii) did not wish to correct or add to it; and (iii) requested a copy of the text of his interview.<sup>151</sup>

94. The procès-verbaux are signed by the Accused and each page of the procès-verbal is initialled by the Accused.<sup>152</sup>

## *ii. Findings*

95. Concerning the Defence's claims regarding ineffective interpretation, the Panel finds that the Accused was informed via the summons to contact the Belgian Federal Judicial Police regarding the language in which he wished to communicate at the interview.<sup>153</sup> Having expressed, at the start of the interview on 11 February 2019, the wish to speak in Albanian and to use that language in court,<sup>154</sup> the Accused was clearly informed that an interpreter was present at his request. Importantly, he replied that, even though he understood French well, he preferred to be assisted by an interpreter.<sup>155</sup> Conversely, at the start of the interview on 12 February 2019, the Accused expressed the wish to speak in French and to use that language in court.<sup>156</sup> Nevertheless, the Accused spoke at times in Albanian and was assisted by an interpreter throughout the interview.<sup>157</sup>

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<sup>149</sup> 066866-066882-ET Revised, pp. 066868-066869. *See also* 066888-TR-ET Part 1 Revised, p. 8, line 4.

<sup>150</sup> *See for instance* 066888-TR Part 1, p. 11, lines 9 to p. 15, line 23.

<sup>151</sup> 066843-066855-ET Revised, pp. 066855; 066866-066882-ET Revised, pp. 066881.

<sup>152</sup> 066843-066855-ET Revised, pp. 066855 (066843-066855 RED, p. 066855); 066866-066882-ET Revised, p. 066881 (066866-066882, p. 066882).

<sup>153</sup> 101752-101763-ET, p. 101758.

<sup>154</sup> 066843-066855-ET Revised, p. 066845.

<sup>155</sup> 066864-TR-ET Part 1 Revised, p. 1, lines 21 to, p. 2, lines 1-2, 21-22.

<sup>156</sup> 066866-066882-ET Revised, pp. 066868-066869. *See also* 066888-TR-ET Part 1 Revised, p. 8, line 4.

<sup>157</sup> *See for instance* 066888-TR Part 1, p. 11, lines 9 to p. 15, line 23.

96. Like for the 2016 Belgian Interview, the Panel concludes that neither the procès-verbal of the 2019 Interview, which the Accused had the opportunity to read (he confirmed that he did not wish to correct or add anything) and signed,<sup>158</sup> or the transcript of the 2019 Interview, contain any indication as to the purported language difficulties experienced by the Accused nor in relation to the interpreter's performance or independence. To the contrary, the Accused responded to questions in French.

97. The Defence claims that it is during the last session of the 2019 Interview, which was not recorded due to malfunctioning equipment,<sup>159</sup> that the Accused objected to the manner in which his statement was taken by the interpreter.<sup>160</sup> The Panel is not persuaded by this claim given that the procès-verbal of that day, which the Accused reread and signed, records the full session of the 12 February 2019, from 10:00 until 19:02, and it reads that it terminated "without incident" "after a final reread" by the Accused who left the offices of the Belgian Federal Judicial Police at 20h that day.<sup>161</sup> The Defence did not provide any evidence that would cast doubt on the veracity of the contents of the procès-verbal of the 2019 Interview and even less that the Belgian Federal Judicial Police or the SPO acted in an inappropriate manner.

98. Furthermore, the examples given by the Defence to demonstrate the Accused's concerns and dissatisfaction with the services of the interpreter<sup>162</sup> rather suggest, in the Panel's estimation, (i) the Accused's frustration with the questions formulated by the interviewers; (ii) attempts by the interpreter to understand the Accused's statements better; or (iii) that the interpreter resorted to paraphrasing. The fact that, at times, the Accused did not fully agree with the interpretation of his statements and he

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<sup>158</sup> See paragraph 9493 above.

<sup>159</sup> See 084260-084266 RED, p. 084261. The transcript of the interview session ends at 16h44. Compare 066866-066882-ET Revised, p. 066867 with 066888-TR-ET Part 1 Revised, p. 191, line 25.

<sup>160</sup> Defence Exclusion Request, para. 21; Defence Response to SPO Admissibility Request, para. 67-69.

<sup>161</sup> 066866-066882-ET Revised, pp. 066867, 066882.

<sup>162</sup> See Defence Response to SPO Admissibility Request, footnotes 58, 63. See also Annex 3 to Defence Exclusion Request.

intervened to correct them, further illustrates the Accused's overall good command of French. In any event, the Panel notes that these limited interventions do not demonstrate that the interpretation provided to the Accused during the interview was ineffective.

99. Consequently, the Panel is satisfied that the Accused was able to comprehend the information received at all times and his right to the assistance of an interpreter free of charge was complied with.

100. As to whether the Accused was sufficiently informed of his rights as a suspect,<sup>163</sup> the Panel recalls that he received information as to his rights through the summons and the statements of rights, including the right to assistance of a lawyer before and during the interview.<sup>164</sup> This was recorded in the procès-verbal of the 2019 Interview,<sup>165</sup> which the Accused reread and signed.<sup>166</sup> Further, at the start of the interview, on both 11 and 12 February 2019, the Accused was reminded of his right to remain silent and that he could not be forced to incriminate himself.<sup>167</sup> The Accused confirmed that he understood.<sup>168</sup> On the second day of the interview, after the information about his rights, the Accused even replied "Oh, that is becoming a habit".<sup>169</sup>

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<sup>163</sup> Defence Response to SPO Admissibility Request, para. 35.

<sup>164</sup> 101752-101763-ET, pp. 101758-101759. The Panel notes that, by that time, the 2019 Belgian law provided for the assistance of a lawyer during an interview.

<sup>165</sup> 066843-066855-ET Revised, p. 066845; 066866-066882-ET Revised, p. 066868.

<sup>166</sup> 066843-066855-ET Revised, pp. 066855 (066843-066855 RED, p. 066855); 066866-066882-ET Revised, p. 066881 (066866-066882, p. 066882).

<sup>167</sup> 066843-066855-ET Revised, p. 066845; 066866-066882-ET Revised, p. 066868; 066864-TR-ET Part 1 Revised, p. 3, lines 2-7.

<sup>168</sup> 066864-TR-ET Part 1 Revised, p. 2, lines 24-25, p. 3, lines 8-9.

<sup>169</sup> 066888-TR-ET Part 1, p. 3, line 8.

101. Despite the language used by one of the interviewers when informing the Accused of his rights (“usual bla-blah”),<sup>170</sup> the Panel is satisfied that the Accused was adequately informed of his rights as a suspect.

102. As to whether the Accused waived his right of access to a lawyer, the Panel recalls that to be valid according to standards of international human rights law, a waiver does not need to be in writing.<sup>171</sup>

103. The Panel finds that, based on the information at hand, the Accused was informed of the nature and cause of the suspicions or allegations against him,<sup>172</sup> and of his rights to remain silent, not to be compelled to self-incriminate, and of his right of access to a lawyer free of charge, through the summons and the statements of rights. Although the Accused was not reminded of his right of access to a lawyer at the start of the interview, this right was unequivocally conveyed to him in the summons addressed to him which he had the opportunity to read and consider before attending the interview. That said, the Panel is persuaded, on the facts presented, that the Accused at the time was aware of his right of access to a lawyer before attending the interview.

104. The Panel observes that the Accused alleges not to have “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, like he did before the ICTY.<sup>173</sup> In the view of the Panel, this statement of the Accused does not cast doubt as to whether the Accused actually understood his rights. The Accused clearly had been informed of his rights and consciously dispensed with them. Further, the Accused, referring to his past

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<sup>170</sup> 066864-TR-ET Part 1 Revised, p. 3, lines 2-7.

<sup>171</sup> See paragraph 27 *above*.

<sup>172</sup> 101752-101763-ET, p. 101758.

<sup>173</sup> 066866-TR-ET Part 1 Revised, p. 95, lines 1-4.

experience at the ICTY, noted that he had the same rights before the ICTY as a suspect, including the right not to incriminate himself.<sup>174</sup>

105. Further, through the summons and statement of rights, the Accused was informed of the potential consequences of giving the interview, namely, that his statements could be used as evidence in proceedings against him. Therefore, the Panel is of the view that the Accused could reasonably have foreseen what the consequences of his conduct would be.

106. Additionally, the Defence has not claimed nor provided any evidence that during that interview the Accused had been under any pressure by the Belgian police which could signal that the Accused was not able to express himself freely during the interview and would question the manner by which the Accused's statement was taken. This is supported by the transcript of the 2019 Interview which does not contain any such indication, but rather shows that the Accused voluntarily answered the questions posed by the interviewers.

107. The Panel also takes into account that, by that stage, the Accused had given interviews as a suspect before the ICTY and in 2016 before the Belgian Federal Judicial Police.

108. Thus, the Panel finds that the Accused waived his right to access to a lawyer implicitly through his conduct, voluntarily and in an unequivocal, knowing and intelligent manner.

109. In light of the aforementioned, the Panel finds that the Accused was able to exercise his rights as a suspect at the time of his 2019 Belgian Interview in a practical and effective manner. As no violation of standards of international human rights law has been established, the first prong of the test under Rule 138(2) of the Rules has not

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<sup>174</sup> 066888-TR-ET Part 1 Revised, p. 95, lines 12-16.

been met and the Panel does not need to proceed to consider the two alternative conditions set out in Rule 138(2)(a)-(b) of the Rules with respect to the 2019 Belgian Interview Records.

110. Consequently, the Panel concludes that the 2019 Belgian Interview is not inadmissible and therefore can be considered by the Panel in accordance with Rule 139(1) of the Rules. As such the 2019 Belgian Interview Records can be used at this stage for the purpose of the detention review.<sup>175</sup> Concerning the question of whether to admit into evidence the 2019 Belgian Interview Records, the Panel reiterates that it will issue in due course a decision on the submission and admissibility of non-oral evidence.

#### E. ALLEGED TRANSLATION DISCREPANCIES IN THE 2016 AND 2019 BELGIAN INTERVIEW RECORDS

111. The Defence submits that there are numerous discrepancies between the French and English version of the statement of the 2016 Belgian Interview and between the Albanian and English version of the transcripts of the 2019 Belgian Interview.<sup>176</sup>

112. The SPO submits that, among the discrepancies highlighted by the Defence, it has identified a couple of errors.<sup>177</sup> It indicates that it is reviewing the relevant records and will, as appropriate, file corrected versions.

113. The Panel finds that the accuracy of the translations is not a consideration affecting the admissibility of the interview transcripts. In any event, these records are available in their original language which can be used to verify and correct the related translations. Any Defence challenge to the reliability and probative value of these

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<sup>175</sup> See paragraph 80 *above*.

<sup>176</sup> Defence Exclusion Request, para. 42; Annex 2 and Annex 3 to Defence Exclusion Request. See also Defence Response to SPO Admissibility Request, paras 70-75.

<sup>177</sup> SPO Admissibility Request, paras 35-37.

records can be raised during the trial. In this context, the Panel welcomes also the SPO's proposition to review the relevant records and file corrected versions, if need be.

## VI. DISPOSITION

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

- a. **REJECTS** the Defence Exclusion Request;
- b. **GRANTS** the SPO Admissibility Request concerning the 2005 and 2007 ICTY Interview transcripts as set out in paragraph 52 of this decision;
- c. **DEFERS** its decision as the admissibility of the 2016 and 2019 Belgian Interview Records in accordance with paragraphs 80 and 110 of this decision; and
- d. **ORDERS** the Registrar to assign exhibit numbers to the items listed in Annex 1 to the SPO Admissibility Request, for the sole purpose of maintaining an accurate record of the proceedings pursuant to Article 40(5) of the Law and Rule 24(1) of the Rules.



**Judge Mappie Veldt-Foglia**  
**Presiding Judge**



**Judge Gilbert Bitti**



**Judge Roland Dekkers**

Dated this Tuesday, 6 December 2022

At The Hague, the Netherlands.



### Explanatory Note

The introductory sentence of the decision has been moved to the top of page 2 of the decision.