



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: KSC-BC-2020-04/IA006

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Emilio Gatti
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 5 May 2023

Original language: English

Classification: Public

Decision on Shala's Appeal Against Decision Concerning Prior Statements

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively)¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”) is seised of an appeal filed on 13 February 2023 by Mr Pjetër Shala (“Appeal” and “Shala” or “Accused” or “Defence”, respectively),² against the “Decision concerning prior statements given by Pjetër Shala” (“Impugned Decision”).³ The Specialist Prosecutor’s Office (“SPO”) responded on 24 February 2023.⁴ Shala replied on 6 March 2023.⁵

I. BACKGROUND

1. On 20 September 2022, Shala filed a request seeking, *inter alia*, the exclusion from the case file of all prior statements given by him to the Belgian Federal Judicial

¹ IA006/F00001, Decision Assigning a Court of Appeals Panel, 26 January 2023.

² IA006/F00004, Defence Appeal Against the “Decision Concerning Prior Statements Given by Pjetër Shala”, 13 February 2023 (“Appeal”). The Panel struck Shala’s first appeal for failing to comply with the word limit requirements of Article 46(2) of the KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019, and further ordered Shala to refile his appeal in compliance with the word limit of 6,000 words. See IA006/F00003, Decision on Shala Request for Extension of Word Limit, 8 February 2023. See also IA006/F00002, Defence Appeal Against the “Decision Concerning Prior Statements Given by Pjetër Shala”, 6 February 2023.

³ F00364/COR/RED, Public redacted version of Corrected version of Decision concerning prior statements given by Pjetër Shala, 26 January 2023 (strictly confidential and *ex parte* version filed on 6 December 2022, corrected confidential version filed on 8 December 2022) (“Impugned Decision”).

⁴ IA006/F00005, Prosecution response to Defence appeal against ‘Decision Concerning Prior Statements Given by Pjetër Shala’, 24 February 2023 (“Response”).

⁵ IA006/F00006, Defence Reply to Prosecution Response to Appeal Against “Decision Concerning Prior Statements Given by Pjetër Shala”, 6 March 2023 (“Reply”).

Police in 2016 and in 2019 as well as other related items.⁶ On 30 September 2022, the SPO responded.⁷ On 7 October 2022, Shala replied.⁸

2. On 1 November 2022, following the Trial Panel's request,⁹ the SPO filed additional submissions requesting the Trial Panel to admit into evidence the transcripts of the interviews given by Shala to the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in 2005 and 2007 ("2005 ICTY Interview" and "2007 ICTY Interview", respectively) (collectively, "ICTY Interviews") in addition to Shala's statements collected by the Belgian Federal Judicial Police in 2016 and 2019 ("2016 Belgian Interview" and "2019 Belgian Interview", respectively) (collectively, "Belgian Interviews") with associated material and related procedural documents.¹⁰ On 24 November 2022, Shala responded¹¹ and, on 29 November 2022, the SPO replied.¹²

3. On 6 December 2022, the Trial Panel issued the Impugned Decision deciding, *inter alia*: (i) to admit into evidence the ICTY Interviews; (ii) that the Belgian Interviews together with associated material and related procedural documents were "not

⁶ F00281/RED, Public Redacted Version of Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel, 18 January 2023 (confidential version filed on 20 September 2022) ("Shala Exclusion Request").

⁷ F00288, Prosecution response to Defence motion to exclude evidence from the case file, 30 September 2022 (confidential, reclassified as public on 23 January 2023).

⁸ F00299, Defence Reply to Prosecution Response to Defence Motion to Exclude Evidence from the Case File, 7 October 2022 (confidential, reclassified as public on 23 January 2023).

⁹ Transcript, 20 October 2022 (confidential and *ex parte*), p. 495, lines 4-18.

¹⁰ F00334/RED, Public redacted version of 'Prosecution motion for admission of Accused's statements with confidential Annex 1', dated 1 November 2022, 18 January 2023 (confidential version filed on 1 November 2022) ("SPO Admissibility Request").

¹¹ F00358/RED, Public Redacted Version of Defence Response to Prosecution Motion for Admission of Accused's Statements, 18 January 2023 (confidential version filed on 24 November 2022) ("Shala Response to SPO Admissibility Request").

¹² F00362, Prosecution reply to Defence response to motion for admission of the statements of the Accused, 29 November 2022 (confidential, reclassified as public on 23 January 2023).

inadmissible” as they may be used for the purpose of detention review; and (iii) to defer to a later stage its decision on the admissibility of the Belgian Interviews.¹³

4. On 13 December 2022, Shala applied for leave to appeal the Impugned Decision.¹⁴ The SPO responded on 10 January 2023¹⁵ and Shala replied on 16 January 2023.¹⁶

5. On 24 January 2023, the Trial Panel certified the following three issues out of the total ten issues raised by Shala (collectively, “Certified Issues”):¹⁷

- (a) Whether the Trial Panel erred in law by interpreting Rule 138(2) of the Rules inconsistently with the European Convention on Human Rights (“ECHR”) by requiring the existence of a “causal link” between the violation of a suspect’s rights and the gathering of evidence (“First Certified Issue”);
- (b) Whether the Trial 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 (“Second Certified Issue”); and

¹³ Impugned Decision, paras 52, 80, 110, 114.

¹⁴ F00369, Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala, 13 December 2022 (confidential, reclassified as public on 23 January 2023) (“Shala Certification Request”).

¹⁵ F00380, Prosecution response to defence request for leave to appeal the decision concerning the prior statements of the Accused, 10 January 2023 (confidential, reclassified as public on 23 January 2023).

¹⁶ F00385, Defence Reply to Prosecution Response to “Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala”, 16 January 2023 (confidential, reclassified as public on 23 January 2023).

¹⁷ F00401, Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala, 24 January 2023 (“Certification Decision”), paras 6(ii)-(iii), (vi), 43, 60, 73(a).

- (c) Whether the Trial 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 (“Third Certified Issue”).

6. In the Appeal, Shala requests the Court of Appeals Panel to set aside the Impugned Decision and declare that the ICTY Interviews and the Belgian Interviews are inadmissible.¹⁸ Shala underlines that the statements are incriminatory, “taken in conditions that violate the Accused’s fair trial rights”, and cannot be used for a conviction.¹⁹ The SPO responds that the Appeal should be rejected in its entirety.²⁰

II. STANDARD OF REVIEW

7. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.²¹

8. The Panel stresses that decisions related to the admission of evidence are generally treated as discretionary, and that appellate intervention in that respect is warranted only in very limited circumstances.²² The Panel considers that a decision on whether to admit or exclude evidence pursuant to Rule 138 of the Rules is, likewise, one within the Trial Panel’s discretion in its assessment of the relevance, authenticity and probative value of the evidence submitted. In this regard, the Panel recalls that where the decision that is being challenged is a discretionary decision, a party must

¹⁸ Appeal, para. 44. See also Appeal, para. 43.

¹⁹ Appeal, para. 11. See also Appeal, para. 43.

²⁰ Response, paras 1, 43.

²¹ KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020, paras 4-14. See also e.g. IA001/F00005, Public Redacted Version of Decision on Pjetër Shala’s Appeal Against Decision on Provisional Release, 20 August 2021 (confidential version filed on 20 August 2021), para. 5.

²² See KSC-BC-2020-07, IA006/F00006, Decision on Nasim Haradinaj’s Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 7 January 2022 (“*Haradinaj* Decision on Defence Witnesses”), para. 14 and jurisprudence quoted therein. See also KSC-CA-2022-01, F00114, Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj, Appeal Judgment, 2 February 2023 (“*Gucati and Haradinaj* Appeal Judgment”), paras 35, 93.

demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.²³

III. SCOPE OF THE CERTIFIED ISSUES

9. The Court of Appeals Panel recalls that the scope of its review lies strictly within the confines of the issues certified by the lower panel and that it may thus decline to consider arguments of an appellant that go beyond the issues in relation to which certification has been granted.²⁴ The Panel also recalls the limited scope of the Certified Issues.²⁵

10. First, the Court of Appeals Panel notes that the Appeal contains arguments alleging that the Law and Rules of the Specialist Chambers, in addition to international human rights law, should apply to the assessment of whether the 2019 Belgian Interview was conducted in compliance with Shala's rights as a suspect.²⁶ The SPO submits, *inter alia*, that these arguments are not intrinsically linked to the Certified Issues and should therefore be summarily dismissed.²⁷ The Panel recalls that the Trial Panel expressly denied certification to appeal this specific issue.²⁸ The Panel therefore declines to consider these submissions and formally dismisses them.

²³ *Haradinaj* Decision on Defence Witnesses, para. 14 and jurisprudence quoted therein; *Gucati and Haradinaj* Appeal Judgment, paras 35, 93.

²⁴ See KSC-BC-2018-01, IA002/F00005/RED, Public Redacted Version of Decision on Appeal Against "Decision on Second Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi", 14 February 2023 (confidential version filed on 14 February 2023), para. 10; KSC-BC-2020-07, IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021, para. 20. See also e.g. IA004/F00008/RED, Public Redacted Version of Decision on Pjetër Shala's Appeal against Decision on Motion Challenging the Form of the Indictment, 22 February 2022 (confidential version filed on 22 February 2022), para. 10.

²⁵ Certification Decision, paras 27, 43, 60.

²⁶ Appeal, paras 33, 42.

²⁷ Response, paras 36-37.

²⁸ Certification Decision, paras 6(v), 48-53.

11. Second, the Panel observes that, in relation to the 2016 Belgian Interview, Shala makes arguments on appeal concerning the requirements of the applicable Belgian law at the time.²⁹ The SPO responds that the Defence fails to substantiate its argument and that, in any event, Article 37(5) of the Law specifically provides that, in “deciding on the relevance or admissibility of evidence collected by a State or State authorities other than Kosovo or its authorities, the Specialist Chambers shall not rule on the application of another State’s national law”.³⁰

12. The Trial Panel expressly stated in the Impugned Decision, that, being mindful of Article 37(5) of the Law, it considered 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.”³¹ The Panel considers that the question as to whether the notification the suspect received during the 2016 Belgian Interview was in breach of the applicable Belgian law at the time falls outside the scope of the Second Certified Issue. The Appeals Panel therefore declines to consider these submissions and formally dismisses them.³²

13. Third, the Panel notes that the Trial Panel issued in the meantime a separate general decision on the procedure according to which non-oral evidence would be submitted and admitted in this case.³³ The Panel further notes that, in a more recent decision, the Trial Panel stated that, having regard to the system established in the

²⁹ Appeal, para. 28; Reply, para. 15.

³⁰ Response, para. 18.

³¹ Impugned Decision, para. 68 (*italics omitted*).

³² Certification Decision, para. 43. The Panel also notes that the SPO argues that arguments related to the level of information provided for the Belgian Interviews are raised for the first time on appeal. See SPO Response, para. 17, fn. 49. The Panel however notes that these arguments were raised in the Shala Certification Request in paragraphs 19-22, and that they clearly fall within the scope of the Second Certified Issue. See Certification Decision, para. 43. The Panel therefore disagrees with the SPO’s assertion that Shala’s arguments related to the level of information provided for the Belgian Interviews are raised for the first time on appeal.

³³ F00461, Decision on the submission and admissibility of non-oral evidence, 17 March 2023 (“Framework Decision on Evidence”). See also Impugned Decision, paras 18, 80, 110.

Framework Decision on Evidence, the Belgian Interviews were “available to the Panel for the purposes of its judgment”.³⁴

14. The Trial Panel further acknowledged the specific provision of Article 37(1) of the Law according to which assigned panels shall decide on the admissibility of evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the Specialist Chambers prior to its establishment by authorities or agencies including the ICTY.³⁵ The Trial Panel decided on the admissibility of the ICTY Interviews under this provision and admitted them both into evidence.³⁶

15. The Trial Panel assessed both the ICTY Interviews and the Belgian Interviews with reference to the requirements of Rule 138(2) of the Rules which 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.³⁷ In this context, the Appeals Panel recalls that the scope of this appeal is limited to the Certified Issues and that it will therefore not address provisions within the Law and Rules of the Specialist Chambers regarding admissibility of evidence in general.

³⁴ F00491/RED, Public Redacted Version of Decision on the Specialist Prosecutor’s motion for admission of documentary evidence, 20 April 2023 (confidential version filed on 20 April 2023) (“Decision on Admission of Documentary Evidence”), para. 41.

³⁵ Impugned Decision, para. 18. See also Article 37(1) of the Law according to which: “Evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the Specialist Chambers prior to its establishment by any national or international law enforcement or criminal investigation authority or agency including the Kosovo State Prosecutor, any police authority in Kosovo, the ICTY, EULEX Kosovo or by the SITF may be admissible before the Specialist Chambers. Its admissibility shall be decided by the assigned panels pursuant to international standards on the collection of evidence and Article 22 of the Constitution. The weight to be given to any such evidence shall be determined by the assigned panels”.

³⁶ Impugned Decision, paras 51-52.

³⁷ Impugned Decision, paras 19-20, 39, 50, 80, 109. See also Rule 138(2) of the Rules according to which: “Evidence obtained by means of a violation of the Law or the Rules or standards of international human rights law shall be inadmissible [...]”.

IV. DISCUSSION

16. The Panel will address first the Second Certified Issue and the Third Certified Issue before turning to the First Certified Issue.

A. SECOND AND THIRD CERTIFIED ISSUES

1. Submissions of the Parties

17. Shala argues that the Trial Panel erred in finding that for each interview, he was sufficiently informed of the nature and cause of the suspicions against him and of his right to have access to a lawyer in compliance with human rights standards.³⁸ Shala further submits that the Trial Panel erred in finding that he properly waived his right to access a lawyer voluntarily and in an unequivocal, knowing and intelligent manner.³⁹

18. Regarding the 2005 ICTY Interview, Shala argues that he was merely notified, at the start of the interview, that he was suspected of “committing acts which may be chargeable under the statute of the ICTY”. According to him, this notification was not timely and overly broad as it failed to include any information on what particular crimes he was being suspected of and when such crimes were allegedly committed.⁴⁰

19. In addition, Shala argues that he was not properly and adequately informed of his right to be assisted by a lawyer and of the right to free legal representation both prior to and during the interview. In that regard, Shala submits that the assessment of whether an accused is sufficiently informed of this right requires the application of a

³⁸ Appeal, paras 4, 16-34. See also Reply, paras 2, 12-16.

³⁹ Appeal, paras 4, 35-42. See also Reply, paras 2, 17.

⁴⁰ Appeal, para. 18. In his Reply, Shala argues that Article 6(3)(c), read in conjunction with Article 6(1) of the ECHR, requires access to a lawyer before police questioning unless there are particular and compelling reasons to retract that right. See Reply, para. 14.

subjective test and that the Trial Panel failed to appreciate that he only completed lower secondary education.⁴¹

20. Regarding the 2007 ICTY Interview, Shala argues that the Trial Panel erred in finding that he was sufficiently informed of the suspicions against him since he 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”.⁴² He contends that the information he received was not sufficient because, before the interview, and as acknowledged by the Trial Panel, he was only informed that he was suspected of war crimes and that the ICTY Prosecutor provided him with further information only during the interview.⁴³ Shala further claims that the Trial Panel erred in basing its finding as to the sufficient notification of the suspected conduct for the purposes of the 2007 ICTY Interview on the notification given for the purposes of the 2005 ICTY Interview.⁴⁴

21. Shala develops similar arguments as those related to the 2005 ICTY Interview in support of his argument that the Trial Panel erred in finding that he was sufficiently informed of his right to access a lawyer.⁴⁵

22. For both the 2005 ICTY Interview and the 2007 ICTY Interview, Shala argues that the investigators failed to inform him of the precarious situation he was in and that legal assistance in such circumstances was essential for the process to be fair and was available to him free of charge if required.⁴⁶ He further argues that the Trial Panel should have applied a subjective test and should have considered, in light of the degree of compulsion imposed on Shala by a team of experienced investigators,

⁴¹ Appeal, paras 19-20, referring to Impugned Decision, para. 33.

⁴² Appeal, paras 21-22, referring to Impugned Decision, para. 42.

⁴³ Appeal, paras 21- 22, referring to Impugned Decision, para. 42.

⁴⁴ Appeal, para. 23.

⁴⁵ Appeal, paras 24-26, referring to Impugned Decision, paras 44-45.

⁴⁶ Appeal, para. 36.

whether he could reasonably have foreseen the consequences of his conduct in assessing whether he had provided a valid waiver in an “unequivocal manner”.⁴⁷

23. Regarding the 2016 Belgian Interview, Shala argues that the notification of the investigators’ suspicions against him was overly broad and insufficient.⁴⁸ He further submits that the Trial Panel erred in finding that he was sufficiently informed of his right to access a lawyer while he was informed of his right to access a lawyer only after the questioning had commenced and was never informed of his right to legal assistance during the interview.⁴⁹

24. In addition, Shala claims that the Trial Panel failed to address the Defence’s submission that there is an obligation, under international human rights law, for a suspect to be informed of his right to legal assistance during an interview.⁵⁰

25. Shala further submits that no waiver of the Accused’s “right to confidential legal consultation in a duly dated and signed document”, as required in the declaration of the interview records, was disclosed to the Defence.⁵¹ In addition, he contends that he was not properly informed of potential consequences of proceeding without legal assistance during the interview.⁵² According to Shala, the Trial Panel also erred by relying on the 2019 Belgian Interview in support of its findings regarding the 2016 Belgian Interview.⁵³

⁴⁷ Appeal, paras 37-38.

⁴⁸ Appeal, para. 28. Shala submits that the Trial Panel erred in finding that he was sufficiently informed of the nature and cause of the suspicions against him based on: (i) the summons he received prior to the interview stating that he would be interviewed with regard to “[s]erious violations of humanitarian law in Albania in 1999”; and (ii) the procès-verbal of the interview indicating that he was informed, prior to the commencement of the interview, of a similar general information. See Appeal, para. 27, referring to Impugned Decision, para. 73.

⁴⁹ Appeal, para. 29.

⁵⁰ Appeal, para. 30.

⁵¹ Appeal, para. 39.

⁵² Appeal, para. 40.

⁵³ Appeal, para. 40.

26. Regarding the 2019 Belgian Interview, Shala argues that the Trial Panel erred in finding that the Accused was sufficiently informed of his right to legal assistance prior to as well as during the interview.⁵⁴ Shala also submits that the investigator failed to inform him of his right to access a lawyer free of charge and that the language used during the interview referring to “the usual blah blah” is not an appropriate notification.⁵⁵

27. According to the Defence, the Accused’s own words that he had not “engaged a lawyer” because “a lawyer has to be paid”, showed that he was never properly informed that he had the right to free legal assistance for the four interviews.⁵⁶

28. Shala further submits that the Trial Panel erred in finding that “by that stage, the Accused had given interviews as a suspect before the ICTY and in 2016 before the Belgian Federal Judicial Police”.⁵⁷ Furthermore, he claims that the Trial Panel erred in failing to apply the Specialist Chambers’ legal framework and especially Rule 43(3) and (4) of the Rules in its assessment of the existence of a waiver in relation to the 2019 Belgian Interview.⁵⁸

29. The SPO responds that Shala’s arguments should be dismissed because they are based on inapplicable standards, misrepresentations of the Impugned Decision, and submissions falling outside the scope of the Certification Decision.⁵⁹

30. The SPO argues that the Trial Panel rightly found that Shala was sufficiently informed of the nature of the allegations against him before providing each of the impugned interviews.⁶⁰ According to the SPO, the information Shala received was

⁵⁴ Appeal, para. 31. Shala claims that, contrary to this finding, he was only provided with general information through a written summons.

⁵⁵ Appeal, para. 32, referring to Impugned Decision, para. 101.

⁵⁶ Appeal, para. 32.

⁵⁷ Appeal, para. 41, referring to Impugned Decision, para. 107.

⁵⁸ Appeal, para. 42.

⁵⁹ Response, para. 14.

⁶⁰ Response, paras 15-16.

sufficient, taking into consideration that he was a suspect and was being interviewed prior to the filing of an indictment against him.⁶¹

31. Regarding the information Shala received on his right to legal assistance, the SPO submits that the Trial Panel correctly found that he was sufficiently informed of his right to have access to a lawyer before the interviews.⁶² In relation to the ICTY Interviews, the SPO argues that there is no requirement, under international human rights law, to provide notification of the right to counsel in writing in advance of an interview.⁶³ Further, the SPO argues that the Defence failed to demonstrate that the Trial Panel should have applied a “subjective standard” in assessing whether the information conveyed to Shala was sufficiently articulated. Relying on ICTY jurisprudence, the SPO argues that the right to be represented by counsel is “neither ambiguous nor difficult to understand”.⁶⁴

32. The SPO argues that the Trial Panel properly considered that Shala was duly informed before the start of each interview and that he understood his rights that were further repeated to him on each interview day.⁶⁵

33. In relation to the 2016 Belgian Interview, the SPO underlines that Shala was an adult, was not detained, had prior experience as a suspect in criminal proceedings and had access to an interpreter.⁶⁶ The SPO argues that contrary to Shala’s arguments, the Trial Panel rightly concluded that he had been afforded the opportunity to seek legal advice before and during the interview.⁶⁷

⁶¹ Response, para. 17.

⁶² Response, para. 19.

⁶³ Response, para. 20.

⁶⁴ Response, para. 21.

⁶⁵ Response, paras 21-23.

⁶⁶ Response, para. 11.

⁶⁷ Response, paras 25-27.

34. According to the SPO, the Trial Panel properly assessed the European Court of Human Rights (“ECtHR”) case law on the right to legal assistance during interviews in the context of the 2016 Belgian Interview. Addressing the contention that the jurisprudence of the ECtHR requires access to a lawyer “as a rule” in instances where a suspect is interrogated by the police, the SPO responds that the ECtHR cases relied upon by the Defence concern very different circumstances (including minors or detained persons) and are not applicable to this case.⁶⁸ The SPO underlines that as opposed to the suspects in the ECtHR cases quoted by the Defence, Shala was not under compulsion, was not detained and was not particularly vulnerable.⁶⁹

35. In relation to the 2019 Belgian Interview, the SPO contends that the Trial Panel correctly found, based on a holistic consideration of the relevant circumstances, that the Accused was informed of his right to be represented by counsel, including through the legal aid scheme.⁷⁰ The SPO notably adds that, by the time of this interview, Shala had acquired a certain familiarity with the interview process and that such experience is regarded as a relevant factor by the ECtHR.⁷¹

36. Commenting on Shala’s claim, during the interview, that he had not engaged a lawyer because he could not afford it, the SPO submits that considered in context, as correctly done by the Trial Panel, this statement does not constitute a request for legal assistance.⁷²

37. The SPO further responds that in finding that Shala had provided a well-informed and unequivocal waiver of his right to counsel with respect to all the interviews, the Trial Panel applied the correct legal standard.⁷³ The SPO argues that

⁶⁸ Response, para. 11.

⁶⁹ Response, para. 11.

⁷⁰ Response, para. 30.

⁷¹ Response, para. 33.

⁷² Response, para. 34. See also Response, para. 35.

⁷³ Response, para. 39.

the Defence failed to demonstrate any error in the Trial Panel's assessment and that the arguments presented in relation to the Third Certified Issue largely amount to a request for a *de novo* review of arguments already rejected in the Impugned Decision.⁷⁴

38. Regarding the 2005 ICTY Interview and the 2007 ICTY Interview, Shala replies that the SPO does not even respond to his submissions that, in view of the circumstances in which the Accused was interviewed, a degree of compulsion evidently existed, "in light of the great inequality of the Accused and his interviewers during their questioning".⁷⁵

39. Regarding the 2016 Belgian Interview and the right to legal assistance during police interviews, Shala replies that whether the applicants in the ECtHR cases referred to in the Appeal were detained or not is irrelevant. The essence is that they provided statements in circumstances that violated their right to legal assistance and those statements were used at trial against them.⁷⁶

2. Assessment of the Court of Appeals Panel

(a) 2005 ICTY Interview

40. The Panel recalls that under Article 6(3)(a) of the ECHR, a person charged with a criminal offence is entitled to be "informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him".⁷⁷

41. The Trial Panel observed that during the 2005 ICTY Interview, before the start of the questioning, Shala was informed that the Prosecutor of the ICTY believed that he might be a suspect responsible for committing acts which may be chargeable under the statute of the ICTY.⁷⁸ The Trial Panel found that, at this early stage of the

⁷⁴ Response, para. 41. See also Response, para. 42.

⁷⁵ Reply, para. 10.

⁷⁶ Reply, para. 9.

⁷⁷ ECHR, Article 6(3)(a). See also Impugned Decision, para. 24 and references quoted therein.

⁷⁸ Impugned Decision, para. 32.

investigation, “it was sufficient at that time to inform the Accused in general terms of the nature and cause of the suspicions or allegations against him, as a suspect”.⁷⁹

42. The Panel notes that the ECHR 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.⁸⁰ Contrary to the Defence’s assertion, there is no general or standard requirement to notify a suspect of the time, location, and specific conduct he or she is suspected of.⁸¹ The ECtHR jurisprudence quoted by the Defence in support of this assertion does not demonstrate otherwise.⁸²

43. The Panel finds that the level of detail expected to be provided during a suspect interview, especially at an early stage of investigations into a situation, is generally not as high as the one expected to be provided when the person interviewed has been charged following the issuance of an indictment against him or her. The Panel recalls that the object of questioning a suspect is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest or, in the

⁷⁹ Impugned Decision, para. 32. More precisely, the ICTY investigator informed Shala that he “may be a suspect who is responsible for committing acts which may be chargeable under the Tribunal’s statute”. See T000-2742-Albanian and English Transcript/A-side, pp. 4-5.

⁸⁰ Impugned Decision, para. 24, fn. 28, and references quoted therein.

⁸¹ Appeal, paras 22 (in relation to the 2007 ICTY Interview), 28 (in relation to the 2016 Belgian Interview). See also Appeal, para. 18.

⁸² See e.g. Appeal, para. 22, fn. 28, referring to fn. 20, quoting ECtHR, *Panovits v. Cyprus*, no. 4268/04, Judgment, 11 March 2009 (“*Panovits*”) (this case is about access to legal representation where the Court found that lack of provision of sufficient information on the applicant’s right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant’s defence rights); ECtHR, *Penev v. Bulgaria*, no. 20494/04, Judgment, 7 April 2010 (“*Penev*”) (this case concerns very specific circumstances where the accused had been indicted for having exceeded his powers and could not have been aware that the Supreme Court of Cassation might adopt an alternative verdict for deliberately entering into a disadvantageous contract); ECtHR, *Mattoccia v. Italy*, no. 23969/94, Judgment, 25 July 2000 (“*Mattoccia*”) (in this case, the person was already accused - of rape - and the “cause” of the accusation had changed at a stage in the proceedings. Upon reception of the judgment, the applicant was faced with a different “cause” of the accusation from that which had been presented at trial). The Defence is also referring to Shala Response to SPO Admissibility Request, para. 22, fn. 25. See Appeal, para. 28, fn. 36. However, this reference seems erroneous as paragraph 22 of Shala’s Response to SPO Admissibility Request does not contain any footnotes.

present case, the interview. Thus, “facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation”.⁸³ This is consistent with the ECtHR’s observation that the manner in which Article 6(3)(a) of the ECHR is to be applied during the investigation stage,⁸⁴ as well as the extent of the information referred to in this provision, varies depending on the particular circumstances of each case.⁸⁵

44. The Panel notes that when the interview started, Shala was informed that he was interviewed by investigators of the Office of the Prosecutor of the ICTY.⁸⁶ In response to Shala’s request, as to whether he was being interviewed as an accused or as a witness, the ICTY investigator clarified that he was being heard as a suspect.⁸⁷ Shala’s status was further mentioned by the investigator, a second time when Shala was informed that he was suspected of having committed acts punishable under the ICTY’s statute,⁸⁸ and a third time when the investigator requested Shala to confirm that he understood that he was a suspect, which Shala did confirm.⁸⁹ In addition, Shala was informed that he had the right to remain silent and that anything he said would be recorded and could be used in evidence against him in a later tribunal proceeding, including a trial.⁹⁰ Accordingly, Shala was clearly put on notice promptly that he was

⁸³ See e.g. ECtHR, *Erdagöz v. Turkey*, no. 127/1996/945/746, Judgment, 22 October 1997, para. 51 (although this finding was made in the context of Article 5(1)(c) of the ECHR with regard to a suspect questioned during detention, the Panel considers that the same reasoning applies even when the suspect is not detained).

⁸⁴ ECtHR, *Ibrahim and Others v. The United Kingdom*, nos 50541/08, 50571/08, 50573/08 and 40351/09, Judgment, 13 September 2016 (“*Ibrahim and Others*”), para. 253; ECtHR, *Imbrioscia v. Switzerland*, no. 13972/88, Judgment, 24 November 1993, para. 38.

⁸⁵ *Mattoccia*, paras 59-60; *Penev*, paras 33, 42.

⁸⁶ T000-2742-Albanian and English Transcript/A-side, pp. 1-2.

⁸⁷ T000-2742-Albanian and English Transcript/A-side, p. 2 (“We will come to that later, but you are a suspect. Officially you are a suspect”).

⁸⁸ T000-2742-Albanian and English Transcript/A-side, pp. 4-5 (“the Prosecutor of the Tribunal believes that you may...you may be a suspect...who is responsible for committing acts...which may be chargeable under the Tribunal’s statute”).

⁸⁹ T000-2742-Albanian and English Transcript/A-side, p. 5.

⁹⁰ T000-2742-Albanian and English Transcript/A-side, pp. 5-6.

considered a suspect and that his statements could be used as evidence against him in criminal proceedings.

45. In the course of the interview, the ICTY investigator provided further details to Shala about allegations against him and Shala freely commented on these allegations.⁹¹ Although the information provided to Shala at the beginning of the interview could have been more precise, the Panel has identified no error in the Trial Panel's finding that, at this very early stage of the investigation, "it was sufficient at that time to inform the Accused in general terms of the nature and cause of the suspicions or allegations against him, as a suspect".⁹²

46. Turning to Shala's right to legal assistance, the Trial Panel observed that, at the time of the interview, Shala was informed that he had the right to be assisted by a lawyer of his own choosing and, if he could not afford legal representation, by a court-appointed lawyer at no cost.⁹³ He was further informed that if he changed his mind at any time, the interview would be suspended for the necessary arrangements to be made.⁹⁴

47. The Panel notes that the Defence raises similar arguments in relation to both ICTY Interviews regarding the Trial Panel's alleged failure to acknowledge that Shala should have been informed of his right to legal representation both prior to and during the interviews as well as the Trial Panel's alleged failure to apply a subjective test in assessing whether Shala was sufficiently informed of his rights.⁹⁵

48. In support of its assertion that Shala should have been informed of his right to access a lawyer, both prior to and during the interview,⁹⁶ the Defence relies on the

⁹¹ See e.g. T000-2748-Albanian and English Transcript/A-side, pp. 5-11.

⁹² Impugned Decision, para. 32.

⁹³ Impugned Decision, para. 33; T000-2742-Albanian and English Transcript/A-side, p. 6.

⁹⁴ Impugned Decision, para. 33; T000-2742-Albanian and English Transcript/A-side, p. 7.

⁹⁵ Appeal, paras 20, 25-26. See also Reply, para. 14.

⁹⁶ Appeal, paras 20, 25. See also Reply, para. 14.

ECtHR cases *Beuze*, *Ibrahim and Others* and *Salduz* that are indeed key cases on the applicability of Article 6 of the ECHR.⁹⁷ All these cases emphasise the importance of prompt access to a lawyer.⁹⁸ Although a suspect needs to be informed of his right to access to a lawyer, none of the cases quoted by the Defence supports the assertion that Shala should have been informed of his or her right to access a lawyer, *both* prior to and at the beginning of the interview. Accordingly, Shala fails to show that the Trial Panel erred in concluding that he was promptly informed of his right to legal assistance including free legal assistance.

49. The Panel turns to assess whether the Trial Panel should have applied a subjective test to establish whether the Accused understood the significance of the right to legal assistance and the potential consequences of proceeding without legal aid.⁹⁹ The Defence notably argues that the Trial Panel should have considered the Accused's background, education, and ability to comprehend complex legal notions.¹⁰⁰ The Panel notes that the reference quoted by the Defence does not support its assertion,¹⁰¹ and that the sole personal circumstance of the Accused put forward by the Defence is that Shala only completed lower secondary education.¹⁰²

⁹⁷ See Appeal, para. 25, fn. 31.

⁹⁸ The Panel notes that in the *Beuze* case, the Court held that Article 6(3)(c) of the ECHR must be "interpreted as safeguarding the right of persons charged with an offence to be informed immediately of the content of the right to legal assistance [...]". See ECtHR, *Beuze v. Belgium*, no. 71409/10, Judgment, 9 November 2018 ("*Beuze*"), para. 129. In the *Ibrahim and Others* case, the Court held that "[p]rompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody". See *Ibrahim and Others*, para. 255. In the *Salduz* case, the Court held that "access to a lawyer should be provided as from the first interrogation of a suspect by the police". See ECtHR, *Salduz v. Turkey*, no. 36391/02, Judgment, 27 November 2008 ("*Salduz*"), para. 55.

⁹⁹ Appeal, paras 20, 25-26.

¹⁰⁰ Appeal, para. 20.

¹⁰¹ Appeal, para. 20, fn. 23, referring to the Preamble to the EU Directive 2012/13/EU on the right to information in criminal proceedings, para. 26. The Panel notes that paragraph 26 of the preamble reads as follows: "When providing suspects or accused persons with information in accordance with this Directive, competent authorities should pay particular attention to persons who cannot understand the content or meaning of the information, for example because of their youth or their mental or physical condition".

¹⁰² Appeal, para. 20.

50. The Panel notes in this regard that, in the *Beuze* case, the ECtHR rejected the applicant's argument that his limited intellectual capacities exacerbated his vulnerability.¹⁰³ Further, in the *Bagosora et al.* Decision, the ICTR Trial Chamber held that "a suspect may be taken to comprehend what a reasonable person would understand".¹⁰⁴ As pointed out by the SPO, in the *Delalić et al.* case, the ICTY Appeals Chamber declared that the right to be represented by counsel is "neither ambiguous nor difficult to understand" and rejected the suggestion that a subjective standard for informed consent be applied.¹⁰⁵ The Panel further notes that nothing in the transcript of the 2005 ICTY Interview suggests that Shala's level of education prevented him from fully understanding his rights.

51. Turning to the Parties' submissions as to whether the Accused had properly waived his right to access a lawyer voluntarily and in an unequivocal manner in relation to both the 2005 ICTY Interview and the 2007 ICTY Interview,¹⁰⁶ the Trial Panel acknowledged the relevant ECtHR jurisprudence on this matter and further stressed that 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.¹⁰⁷

¹⁰³ *Beuze*, paras 167-168.

¹⁰⁴ ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C), 14 October 2004 ("*Bagosora et al.* Decision"), para. 17.

¹⁰⁵ Response, para. 21, referring to ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, paras 551-553.

¹⁰⁶ See Appeal, paras 36-38; Response, paras 39-42; Reply, para. 17.

¹⁰⁷ Impugned Decision, para. 27 referring to ECtHR, *Pishchalnikov v. Russia*, no. 7025/04, Judgment, 24 September 2009 ("*Pishchalnikov*"), paras 77-79. According to the ECtHR jurisprudence: "[A] waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance [...]. A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be [...]. See *Pishchalnikov*, para. 77. See also ECtHR, *Dvorski v. Croatia*, no. 25703/11, Judgment, 20 October 2015, para. 100.

52. Regarding the 2005 ICTY Interview, the Trial Panel found 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”.¹⁰⁸ A review of the transcript of the interview confirms that Shala, despite being informed that legal representation could be provided to him and that this could be organised by the tribunal free of cost if he could not afford it,¹⁰⁹ expressly declined to have a legal representative present.¹¹⁰ The Panel further notes that Shala never claimed that his waiver had been obtained against his will. He further did not ask any questions about his right to legal assistance during the interview. In that regard, the Panel notes that the demeanour of an accused during questioning and especially whether or not he or she asked any questions about his or her right to legal assistance is a factor taken into consideration by judges of both the ECtHR and international courts to assess whether an accused voluntarily waived his or her rights.¹¹¹

¹⁰⁸ Impugned Decision, para. 38.

¹⁰⁹ When informing Shala about his right to legal assistance during the 2005 ICTY Interview, the ICTY investigator underlined: “If you cannot afford legal representation the Tribunal will arrange this for you at no cost”. Shala responded immediately “I don’t need”. See T000-2742-Albanian and English Transcript/ T000-2742 A-side, pp. 6-7.

¹¹⁰ Impugned Decision, para. 37; T000-2742-Albanian and English Transcript/A-side, p. 7.

¹¹¹ Compare e.g. *Bagosora et al.* Decision, para. 19 (the accused asked repeatedly to be informed of the charges against him and told the investigators that as soon as he would be informed of the case against him, he would then exercise his right to counsel. The investigators responded that “standard procedure” is that disclosure would happen later and conducted the interview. The Judges found that the waiver was not voluntary); ICTR, *Prosecutor v. Nchamihigo*, ICTR-01-63-T, Decision on the Prosecutor’s Application to Admit into Evidence the Transcript of the Accused’s Interview as a Suspect and the Defense’s Request to Hold a *Voir Dire*, 5 February 2007, paras 17, 18-24 (the suspect was interviewed in the absence of counsel. Although he requested the assistance of two attorneys that had previously assisted him, the Prosecution investigator told him the attorneys could only come to assist him if he had sufficient means to pay them and conducted the interview. The Judges found that the waiver was not voluntary) with e.g. ECtHR, *Ahmadov v. Azerbaijan*, no. 40321/07, Judgment, 14 April 2021, paras 54-55 (the Court observed that throughout the pre-trial investigation the applicant did not complain or claim in any other way that the waiver and his statements had been obtained against his will and under pressure from the police. Furthermore, he did not allege that he had been induced to waive his right to counsel. The applicant also never argued that he had not understood the meaning of the waiver of his right to be assisted by a lawyer. The Court concluded that the applicant waived his right to be legally assisted in a knowing manner and voluntarily).

53. Regarding the assertion that the Trial Panel should have considered whether the Accused could reasonably have foreseen the consequences of his conduct and that it should have applied a subjective test to consider the degree of compulsion imposed on Shala,¹¹² the Defence fails to point to any specific circumstances that would demonstrate the Accused's vulnerability at the time of the interviews. The ECtHR has acknowledged that a police interview is inevitably a stressful event from a suspect's perspective, but this is insufficient in itself to attribute a particular vulnerability to a suspect.¹¹³ The Panel further observes that Shala is an adult, that he was not detained during any of the impugned interviews, that he was assisted by an interpreter and that the interviews were not excessively long. Although the Trial Panel did not explicitly refer to the Accused's personal circumstances, the Panel is satisfied that it did not abuse its discretion in reaching its finding.

54. Accordingly, the Panel upholds the Trial Panel's decision to admit the 2005 ICTY Interview into evidence.¹¹⁴

(b) 2007 ICTY Interview

55. Turning to the 2007 ICTY Interview, the Panel recalls that the Trial Panel found that the Accused was informed of the nature and cause of the suspicions or allegations against him.¹¹⁵ The Trial Panel observed that during the interview, Shala was informed that the ICTY investigators were in possession of a statement which suggested that he was responsible for transferring an individual into custody where he was subsequently killed.¹¹⁶ The Trial Panel further observed that:

[A]lthough the Accused was not informed of these allegations at the start of the interview, he was put on notice that he was a suspect [...]
The Panel also notes that the Accused was made aware in 2005 at the

¹¹² Appeal, paras 37-38; Reply, para. 10.

¹¹³ See e.g. ECtHR, *Doyle v. Ireland*, no. 51979/17, Judgment, 23 August 2019 ("*Doyle*"), para. 85.

¹¹⁴ Impugned Decision, para. 52.

¹¹⁵ Impugned Decision, para. 42.

¹¹⁶ Impugned Decision, para. 42.

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.¹¹⁷

56. Regarding Shala's argument that the Trial Panel erred in reaching this finding despite acknowledging that he was not informed of these allegations at the start of the interview,¹¹⁸ a review of the transcript of the 2007 ICTY Interview shows that Shala mentioned at the beginning of the interview that he had received an "invitation" from the ICTY indicating that he was suspected of war crimes.¹¹⁹ His status as a suspect was further clearly notified to him as the first information he received when the interview started.¹²⁰

57. In addition, before any substantial question was put to him, Shala was informed that "other people" may have made accusations against him and that he would be able to respond or comment.¹²¹ These accusations were brought to his attention, in the course of the interview, in unambiguous terms. As underlined by the Trial Panel, Shala was informed that the ICTY Prosecution was in possession of statements which suggested that he was responsible for transferring an individual into custody where he was subsequently killed.¹²²

58. The Panel finds that Shala was clearly informed that he was being interviewed as a suspect of war crimes punishable under the ICTY Statute. The Panel is further satisfied that during the interview, the investigators put forward evidence to substantiate their allegation. That Shala was only provided with specific details on the nature of the allegations at a later stage, during the interview, does not invalidate the

¹¹⁷ Impugned Decision, para. 42.

¹¹⁸ Appeal, para. 25.

¹¹⁹ T001-0105-1-A-TR, pp. 11-12.

¹²⁰ T001-0105-1-A-TR, p. 1.

¹²¹ T001-0105-1-A-TR, p. 11.

¹²² T001-0105-3-A-TR, pp. 62-66. See also Impugned Decision, para. 42.

Trial Panel's finding that Shala was informed of the nature and cause of the suspicions or allegations against him.

59. The Panel further notes that the Trial Panel considered the procedure surrounding the interview as a whole and observed that Shala was informed that: (i) he had the right to the assistance of an interpreter; (ii) he had the right to remain silent or to request at any time the questioning to stop; (iii) his questioning was being recorded; (iv) any statement made by him may be used in evidence against him in proceedings at the ICTY; (v) at the end of the interview, he would have the opportunity to clarify, supplement or amend anything he said during the interview; and (vi) a copy of the recording would be given to him.¹²³

60. The Panel also notes that Shala challenges the Trial Panel's alleged reliance on the 2005 ICTY Interview "as a determining factor" to ground its findings that the Accused was sufficiently informed of the nature and cause of the suspicions against him for the purposes of the 2007 ICTY Interview.¹²⁴

61. The Panel observes that it is only after having reviewed the transcript of the 2007 ICTY Interview in detail and after having found that Shala had been informed of the allegations against him both before - through a summons - and during the interview, that the Trial Panel "also note[d]" 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".¹²⁵ Therefore, the 2005 ICTY Interview was not used "as a determining factor" and the Defence takes this reference out of its context.¹²⁶ Overall, the Panel is satisfied that the Trial Panel did not err in finding that Shala was

¹²³ Impugned Decision, para. 43.

¹²⁴ Appeal, para. 23.

¹²⁵ Impugned Decision, para. 42.

¹²⁶ Contra Appeal, para. 23.

sufficiently informed of the nature and cause of the suspicions against him at the occasion of the 2007 ICTY Interview.

62. Turning to the challenges related to Shala being sufficiently informed of his right to have access to a lawyer, the Panel recalls that pursuant to Article 6(3)(c) of the ECHR, a person charged with a criminal offence is entitled “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.¹²⁷ The Trial Panel stated that, in accordance with standards of international human rights law, a person “charged with an offence” within the autonomous meaning of the ECHR, such as a suspect questioned about his involvement in a criminal offence, can claim the protection of Article 6 of the ECHR.¹²⁸ The Trial Panel further underlined that a suspect should 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 ECHR.¹²⁹

63. The Trial Panel further observed that, at the beginning of the interview, Shala was notified of his rights including the right to legal assistance and that “if he could not afford legal representation, a lawyer would be assigned to him at no cost”¹³⁰. Shala 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. In addition, the Trial Panel underlined that on the second day of the interview, Shala was reminded that he was interviewed as a suspect and of the abovementioned rights.¹³¹

¹²⁷ ECHR, Article 6(3)(c). See also Impugned Decision, para. 26 and references quoted therein.

¹²⁸ Impugned Decision, para. 24 and references quoted therein.

¹²⁹ Impugned Decision, para. 26 and references quoted therein.

¹³⁰ Impugned Decision, para. 44; T000-2742-Albanian and English Transcript/A-side, p. 6.

¹³¹ Impugned Decision, para. 45. See also T001-0105-1-A-TR, p. 1; T001-0105-3-A-TR, pp. 1-4.

64. The Panel has already addressed above the Defence's arguments regarding the Trial Panel's alleged failure to acknowledge that Shala should have been informed of his right to legal representation both prior to and during the interviews as well as the Trial Panel's alleged failure to apply a subjective test in assessing whether Shala was sufficiently informed of his rights.¹³²

65. In light of the above, the Panel finds that the Defence failed to demonstrate that the Trial Panel erred or abused its discretion in finding that Shala 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, including free of charge.

66. Turning to whether the Accused had properly waived his right to access a lawyer voluntarily and in an unequivocal manner in relation to the 2007 ICTY Interview,¹³³ the Panel recalls that the Trial Panel acknowledged the relevant ECtHR jurisprudence on this matter and further stressed that a suspect may be said to have waived this right implicitly.¹³⁴

67. Regarding Shala's assertion that the Trial Panel should have considered whether the Accused could reasonably have foreseen the consequences of his conduct,¹³⁵ the Panel finds that the Trial Panel clearly conducted this assessment. After having found that the Accused was informed of the allegations against him and that he was informed of his right to legal assistance,¹³⁶ the Trial Panel observed that on the second day of the interview, the Accused was reminded of his rights and confirmed that the interview could continue.¹³⁷ In that regard, the Panel observes that Shala did

¹³² See above, paras 47-50. See also Appeal, paras 20, 25-26; Reply, para. 14.

¹³³ See Appeal, paras 36-38; Response, paras 39-42; Reply, para. 17.

¹³⁴ See above, para. 51.

¹³⁵ Appeal, para. 37.

¹³⁶ Impugned Decision, paras 42-44.

¹³⁷ Impugned Decision, para. 45.

not appear to want to be reminded about his rights.¹³⁸ The Panel further notes that nothing in the transcript of the 2007 ICTY Interview indicates that Shala misunderstood his rights. Rather, Shala claimed to “know them well”¹³⁹ and appeared to have voluntarily decided to cooperate with the ICTY investigators.¹⁴⁰

68. The Trial Panel noted that the Accused did not invoke his right of access to a lawyer throughout the interview despite being informed that his statements would be recorded and could be used as evidence against him.¹⁴¹ The Trial Panel found that the Accused could reasonably have foreseen what the consequences of his conduct would be and concluded that he waived his right of access to a lawyer implicitly through his conduct, voluntarily, and in an unequivocal, knowing and intelligent manner.¹⁴²

69. In light of the above, the Panel finds that the Defence failed to demonstrate that the Trial Panel erred in concluding that at the occasion of the 2007 ICTY Interview, the Accused implicitly waived his right to have access to a lawyer. Accordingly, the Panel upholds the Trial Panel’s decision to admit the 2007 ICTY Interview into evidence.¹⁴³

(c) 2016 Belgian Interview

70. The Panel recalls that the Trial Panel found that the Accused was informed of the nature and cause of the suspicions or allegations against him.¹⁴⁴ In support of its finding, the Trial Panel observed that the Accused received a summons from the

¹³⁸ On the second day of the 2007 ICTY Interview, the investigator informed Shala that he had to remind him of his rights and noted the following: “I know and we also raised with Mr SHALA the fact that I’ll have to read his rights to him under the rules. Mr SHALA said he did not want that, he knows them well, and I said I did not want that, but I think it’s best in our circumstances that we cover that again, so I’ll do that now [...]”. See T001-0105-3-A-TR, p. 1.

¹³⁹ *Ibid.*

¹⁴⁰ T001-0105-1-A-TR, pp. 5-6. In response to being told that he had the right to go and to refuse to continue the interview, Shala responded “We Albanians, as...as people are very, um, welcoming and, uh, cooperate with the international community”.

¹⁴¹ Impugned Decision, paras 47-48.

¹⁴² Impugned Decision, paras 48-49.

¹⁴³ Impugned Decision, para. 52.

¹⁴⁴ Impugned Decision, para. 73.

Belgian Federal Judicial Police prior to the interview informing him that he “will be interviewed about acts that [he] could be charged with, more specifically [...] serious violations of humanitarian law in Albania in 1999”.¹⁴⁵ In addition, the Trial Panel noted that the first part of the procès-verbal of the 2016 Belgian Interview indicates that: “[p]rior to the commencement of the interview”, the Accused was informed of the facts on which he would be questioned.¹⁴⁶

71. For the same reasons as those developed in relation to the 2007 ICTY Interview, the Panel finds that the Defence failed to demonstrate that the Trial Panel erred or abused its discretion in finding that Shala was sufficiently informed of the nature and cause of the suspicions against him with regard to the 2016 Belgian Interview.¹⁴⁷

72. As to the Trial Panel’s conclusion that “overall the Accused was not barred from access to a lawyer”, the Trial Panel supported its finding as follows:

To the contrary, the Accused was informed of his right to consult confidentially with a lawyer prior to the 2016 Belgian Interview through the summons addressed to him, and before the start of said interview, and was therefore afforded the opportunity to seek legal advice before attending such interview.¹⁴⁸

73. Shala claims that the Trial Panel failed to address the Defence’s arguments that there is an obligation under international human rights law, “which goes over and above Belgian law as applied at the time”, that requires a suspect to be informed of his right to legal assistance during an interview.¹⁴⁹ The Panel observes that Shala’s argument before the Trial Panel was that, at the time of the 2016 Belgian Interview,

¹⁴⁵ Impugned Decision, para. 58.

¹⁴⁶ Impugned Decision, para. 64.

¹⁴⁷ See above, paras 43 (finding that the status of suspect may explain and justify that, at the investigation stage of criminal proceedings, the level of information provided be more limited than the level of information that can be expected for an accused person), 56-57 (considering that Shala was informed prior to the 2007 ICTY Interview that he was suspected of war crimes and that he was informed, at the beginning of the interview, that he was a suspect and that “other people” may have made accusations against him).

¹⁴⁸ Impugned Decision, para. 77 (footnotes omitted).

¹⁴⁹ Appeal, para. 30.

Belgian law only provided for the right to consult confidentially with a lawyer *prior* to an interview with the police but did not provide the right for a lawyer to be present *during* such interview.¹⁵⁰ The Panel finds that the Trial Panel's conclusion that "overall the Accused was not barred from access to a lawyer" does not address the submissions of the Defence and is insufficiently reasoned.¹⁵¹

74. The jurisprudence of the ECtHR on this matter is instructive and confirms that access to a lawyer also encompasses the right to be assisted by a lawyer *during* a police interrogation.¹⁵² The Panel notes that at the occasion of the *Salduz* case, the ECtHR stated that "Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation".¹⁵³ The Court found that "in order for the right to a fair trial to remain sufficiently 'practical and effective' [...], Article [6(1) of the ECHR] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right."¹⁵⁴ The right of access to a lawyer also applies in instances where a person was not deprived of liberty but is summonsed for questioning by the police concerning the suspicion of his or her involvement in a criminal offence.¹⁵⁵

¹⁵⁰ Shala Exclusion Request, paras 30-33; Shala Response to SPO Admissibility Request, paras 26, 29, 53-54, cited at Impugned Decision, para. 77, fn. 126.

¹⁵¹ Impugned Decision, para. 77.

¹⁵² *Panovits*, para. 66 ("As regards the applicant's complaints which concern the lack of legal consultation at the pre-trial stage of the proceedings, the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation. The lack of legal assistance during an applicant's interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings"); ECtHR, *Brusco v. France*, no. 1466/07, Judgment, 14 January 2011 ("*Brusco*"), para. 54.

¹⁵³ *Salduz*, para. 52. See also *Beuze*, para. 134; *Ibrahim and Others*, para. 253.

¹⁵⁴ *Salduz*, para. 55. See also *Beuze*, para. 137; *Ibrahim and Others*, para. 256.

¹⁵⁵ ECtHR, *Dubois v. France*, no. 52833/19, Judgment, 28 July 2022, paras 45-46, 69-75. See also *Brusco*, para. 47.

75. Accordingly, the Panel finds that the Defence demonstrated that the Trial Panel's position that Shala was not overall barred from access to a lawyer is erroneous since access to a lawyer was not provided for *during* police interviews at the time of the 2016 Belgian Interview. The Accused was not informed of the right to legal representation *during* the interview and this right was not available to him. The jurisprudence of the ECtHR quoted by the Trial Panel and detailed above further supports the finding that, as a rule, the right to legal representation should be provided as from the first interrogation of a suspect by the police.

76. The Panel considers that the fact that Shala was not informed of his right to legal assistance and did not have the right to access to a lawyer *during* the 2016 Belgian Interview further raises doubts as to whether: (i) Shala understood fully the extent of his right to legal assistance; and (ii) he was in an informed position to waive his right to counsel. Therefore, the Panel finds that the Trial Panel erred by considering that the Accused at the occasion of the 2016 Belgian Interview was sufficiently informed of his right to have access to a lawyer and that this finding necessarily impacts the Trial Panel's findings on whether the Accused was able to waive knowingly and intelligently his right to legal assistance.¹⁵⁶

77. The Panel acknowledges that, according to the ECtHR, compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole.¹⁵⁷ The Panel's role is however different,¹⁵⁸

¹⁵⁶ Appeal, paras 39-40.

¹⁵⁷ See *Beuze*, para. 121; *Salduz*, para. 50; *Ibrahim and Others*, para. 251. In the *Beuze* case, relying on the *Ibrahim and Others* case, the ECtHR held that the principles developed in a prior case, the *Salduz* case, require a two-stage test of analysis and ruled out that systematic statutory restriction of a general and mandatory nature would in itself constitute an automatic violation of Article 6(3)(c) of the ECHR. See *Beuze*, paras 141-150. The Court explained that the two-stage test of analysis consists in: (i) looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer; and (ii) examining the overall fairness of proceedings. See *Beuze*, paras 142-144. See also *Ibrahim and Others*, paras 257-262; *Doyle*, paras 75-103.

¹⁵⁸ The Panel is addressing an interlocutory appeal under the legal provisions of the Specialist Chambers for the purpose of ruling on alleged violations of standards of international human rights law occurring

and requires that a determination on an alleged violation of standards of international human rights law be conducted at this early stage of the proceedings.

78. Having found that the Trial Panel's conclusion that Shala was not overall barred from access to a lawyer during the 2016 Belgian Interview was erroneous, the Panel is of the view, that this procedural failure identified in relation to the 2016 Belgian Interview constitutes a violation of the standards of international human rights law as per Rule 138(2) of the Rules.

79. That being said, although a violation of the standards of human rights law has been established and therefore the first prong of the test under Rule 138(2) of the Rules has been met, the violation is limited.

80. The Panel observes in that regard that, in the context of the 2016 Belgian Interview, although the summons Shala received prior to the interview warned him that "when you appear for the interview it will be assumed that you consulted with an attorney", he did not ask any questions about his right to legal representation during the interview.¹⁵⁹ Second, although the right to access to a lawyer was not provided for *during* police interviews at the time of the 2016 Belgian Interview, all the other procedural guarantees were provided for in the context of this interview. As underlined by the Trial Panel, Shala was assisted by an interpreter.¹⁶⁰ In addition, Shala received comprehensive information about his rights as part of the summons and the statements of rights. The Trial Panel further noted that the procès-verbal of the 2016 Belgian Interview, which Shala signed, clearly states, on the same page, that he was given information about his rights "prior to the commencement of the

at an early stage of the proceedings while the case law of the ECtHR on fair trial rights addresses questions of whether the proceedings as a whole had been fair after their completion. See KSC-CC-2022-15, F00010, Decision on the Referral of Hashim Thaçi Concerning the Right to an Independent and Impartial Tribunal Established by Law and to a Reasoned Opinion, 13 June 2022, paras 61-63.

¹⁵⁹ See Impugned Decision, para. 58, fn. 91. See also Impugned Decision, paras 60, 95.

¹⁶⁰ Impugned Decision, para. 69.

interview” and that Shala confirmed having received the declaration of rights. Furthermore, the Trial Panel underlined that, prior to the questioning, Shala indicated, in the presence of the interpreter, that he was aware of his rights.¹⁶¹

81. Accordingly, the Panel finds no indicia of unreliability or possible damage to the integrity of the proceedings if the interview is admitted. This was also the finding of the Trial Panel and the Panel notes that the precise issue of the assessment of the two alternative conditions set out in Rule 138(2)(a)-(b) of the Rules does not fall within the scope of the certified issues.¹⁶² Therefore, the Panel upholds the Trial Panel’s decision to consider the 2016 Belgian Interview as not inadmissible pursuant to Rule 138(2) of the Rules”.¹⁶³

(d) 2019 Belgian Interview

82. Turning to whether Shala was sufficiently informed of his right to have access to a lawyer, the Panel already rejected the Defence’s assertion that, according to the jurisprudence of the ECtHR, the Accused should have been informed of this right, *both* prior to and during the interview.¹⁶⁴

83. The Trial Panel found that Shala’s right to legal assistance was unequivocally conveyed to him in the summons addressed to him which he had the opportunity to read and consider before attending the interview.¹⁶⁵ Shala however disagrees and argues that he was only provided with general information through a written summons.¹⁶⁶

¹⁶¹ Impugned Decision, para. 70.

¹⁶² Impugned Decision, para. 79 (“[...] the [Trial] 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 [Trial] 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 Rules”).

¹⁶³ Impugned Decision, para. 80.

¹⁶⁴ See above, para. 48. See also Appeal, para. 31.

¹⁶⁵ Impugned Decision, para. 103.

¹⁶⁶ Appeal, para. 31.

84. The Panel finds that the summons provided an appropriate level of information regarding notably Shala's right to legal assistance prior to and during questioning and further informed him of the possibility to receive free legal assistance through legal aid. The summons also explicitly advised Shala to consult with a lawyer. In that regard, the Panel observes that, as summarised by the Trial Panel, the summons received by Shala before the interview indicated that he "should carefully read his rights" and mentioned notably that:

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. [...]

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).¹⁶⁷

85. As recalled by the Trial Panel, that the Accused received information about his rights was further recorded in the *procès-verbal* of the 2019 Belgian Interview, which the Accused reread and signed. Further, at the start of the interview, on both 11 and 12 February 2019, Shala was reminded of his right to remain silent and that he could not be forced to incriminate himself. Shala confirmed that he understood.¹⁶⁸

86. The Trial Panel further acknowledged that the Accused was not reminded of his right of access to a lawyer at the start of the interview,¹⁶⁹ but nonetheless, found

¹⁶⁷ Impugned Decision, para. 83 and references quoted therein.

¹⁶⁸ Impugned Decision, para. 100 and references quoted therein.

¹⁶⁹ Impugned Decision, para. 103.

that the Accused was adequately informed of his rights as a suspect.¹⁷⁰ In light of all the relevant circumstances assessed by the Trial Panel, the Panel finds that the Trial Panel did not err in its assessment.

87. The Trial Panel also acknowledged the investigator's reference to "the usual blah blah" when informing Shala of his rights.¹⁷¹ Although the Panel agrees that this is not adequate information,¹⁷² the Panel also recalls that compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident.¹⁷³

88. The Trial Panel further acknowledged that Shala claimed 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. In the view of the Trial Panel, this statement of the Accused did not "cast doubt as to whether the Accused actually understood his rights".¹⁷⁴ In support of its finding, the Trial Panel emphasised that Shala had clearly been informed of his rights and that he referred to his past experience at the ICTY, noting that he had the same rights before the ICTY as a suspect.¹⁷⁵ The Defence challenges this finding and argues that this statement shows that Shala was never properly informed that he had the right to legal assistance free of charge.¹⁷⁶

¹⁷⁰ Impugned Decision, para. 101.

¹⁷¹ Impugned Decision, para. 101. The Panel notes that the complete relevant reference is "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". See 066864-TR-ET Part 1 Revised, p. 3.

¹⁷² Appeal, para. 32.

¹⁷³ See *Ibrahim and Others*, para. 251.

¹⁷⁴ Impugned Decision, para. 104. See also Impugned Decision, paras 105-106.

¹⁷⁵ Impugned Decision, para. 104.

¹⁷⁶ Appeal, para. 32.

89. At the outset, the Panel recalls that a suspect may be taken to comprehend what a reasonable person would understand.¹⁷⁷ However, when there are indications that a person is confused, steps must be taken in order to ensure that the suspect actually does understand the nature of his or her rights.¹⁷⁸ In that regard, the Panel considers it regrettable that the investigators and prosecutors who were present did not interrupt the interview to clarify Shala's right to free legal assistance.

90. That being said, the Panel notes that the Defence reiterates arguments presented to the Trial Panel and that, although the Defence disagrees with the Trial Panel's finding, it fails to demonstrate that it is so unreasonable that it warrants the Appeals Panel's intervention.

91. In reaching this finding, the Appeals Panel has also considered the Accused's demeanour during questioning and notes that on the second day of the 2019 Belgian Interview, when reminded about his rights, Shala merely responded "Oh that is becoming a habit",¹⁷⁹ therefore suggesting that he was well aware of these rights. Shala further did not press the issue of legal assistance during the interview.¹⁸⁰

92. In light of all the circumstances highlighted by the Panel above, the Panel finds that the Defence failed to demonstrate that the Trial Panel erred or abused its discretion in finding that the Accused was sufficiently informed of his right to have access to a lawyer.

93. Turning to the Parties' submissions as to whether the Accused had properly waived his right to access a lawyer, the Appeals Panel recalls that the Trial Panel

¹⁷⁷ See above, para. 50 and references quoted therein.

¹⁷⁸ *Bagosora et al.* Decision, para. 17.

¹⁷⁹ See 066888-TR-ET Part 1, p. 3.

¹⁸⁰ The Panel notes that it appears that Shala felt comfortable to question the investigators since he asked questions about other matters such as the reimbursement of his travel fees. He explained that he was reimbursed during his interviews at the ICTY and added "I'm not going to pay out of my own pocket [...] I am a suspect: until otherwise proven, I am innocent!". See 066888-TR-ET Part 1 Revised, p. 94.

found that the Accused waived his right to access to a lawyer implicitly through his conduct, voluntarily and in an unequivocal, knowing and intelligent manner.¹⁸¹

94. The Court of Appeals Panel declined, elsewhere in this Decision, to address whether the Specialist Chambers' legal framework should apply to the assessment of whether the 2019 Belgian Interview was conducted in compliance with the Accused's rights as a suspect.¹⁸² For the same reasons, the Panel declines to address whether the Trial Panel erred in failing to apply the Specialist Chambers' legal framework to the existence of a waiver in relation to the 2019 Belgian Interview.¹⁸³

95. Finally, the Panel disagrees with Shala's submission that the Trial Panel engaged in circular reasoning by basing its finding of a waiver with regard to this interview on the fact that "by that stage, the Accused had given interviews as a suspect before the ICTY and in 2016 before the Belgian Federal Judicial Police".¹⁸⁴ As underlined by the SPO,¹⁸⁵ the ECtHR has considered prior experience with a similar situation as a relevant factor to assess an accused's knowledge of his right to legal assistance.¹⁸⁶ In any event, the Panel notes that in order to reach its finding, the Trial Panel also considered other factors including the Accused's demeanour during the interview as well as the detail of the information he received regarding his rights.¹⁸⁷

96. In light of the above, the Panel finds that the Defence failed to demonstrate that the Trial Panel erred in concluding that at the occasion of the 2019 Belgian Interview Shala implicitly waived his right to have access to a lawyer.

¹⁸¹ Impugned Decision, para. 108.

¹⁸² See above, para. 10.

¹⁸³ See also Appeal, para. 42.

¹⁸⁴ Appeal, para. 41, referring to Impugned Decision, para. 107.

¹⁸⁵ Response, para. 35.

¹⁸⁶ See ECtHR, *Ahmadov v. Azerbaijan*, no. 40321/07, Judgment, 14 January 2021, para. 54 (The Court observed that "the applicant had two previous convictions and that, therefore, is unlikely to have been unaware of the benefits of being defended by a lawyer").

¹⁸⁷ Impugned Decision, paras 104-106.

B. FIRST CERTIFIED ISSUE

1. Submissions of the Parties

97. Shala submits that the Trial Panel violated his right to a fair trial by requiring a “causal link” between the violation of the Accused’s rights and the gathering of the impugned evidence, as well as in its assessment that there was no such link in relation to the 2016 Belgian Interview.¹⁸⁸

98. According to Shala, the Trial Panel erred in finding that the use of the words “by means of” in the phrase referring to evidence obtained “by means of a violation” in Rule 138(2) of the Rules, requires a causal link between the violation and the gathering of evidence and that it is distinguishable from the requirement under Rule 138(3) of the Rules.¹⁸⁹

99. According to Shala, the Trial Panel further erred in finding that even if there was a violation of his right to legal assistance during the 2016 Belgian Interview, no causal link could be established between such violation and the gathering of the impugned evidence “because the Accused subsequently made substantially the same statements in the context of the 2019 Belgian Interview, during which his rights as a suspect were fully complied with”.¹⁹⁰ Shala argues that the Trial Panel improperly

¹⁸⁸ Appeal, paras 5-15. See also Reply, paras 2, 4-11.

¹⁸⁹ Appeal, para. 6, referring to Impugned Decision, para. 20. See also Reply, para. 7, elaborating on the “causal chain referred to in [the ECtHR, *Gäfgen v. Germany*, no. 22978/05] judgment is that linking tainted evidence and a conviction and sentence. It is different to the impugned requirement as to a ‘causal link’ between the gathering of evidence and the violation of the rights of a suspect.” Shala further argues that the Trial Panel erred in finding that the provision under Rule 138(2) of the Rules is distinguishable from the use of the word “under” in the phrase referring to evidence obtained “under torture or any other inhumane or degrading treatment” in Rule 138(3) of the Rules. See Appeal, para. 6. In Shala’s view, the Trial Panel’s interpretation of Rule 138(2) of the Rules so as to impose an additional test of causation that applies only with respect to certain but not all violations of the ECHR is so unreasonable that it invalidates the Impugned Decision. See Appeal, para. 7. The Panel observes that, in the section on “Applicable Law”, the Trial Panel discussed whether Rule 138(3) of the Rules regarding evidence obtained “under torture or any other inhumane or degrading treatment” requires a causal link. See Impugned Decision, para. 20. The Trial Panel’s interpretation of Rule 138(3) of the Rules is irrelevant to the present Decision and the Panel declines to address it.

¹⁹⁰ Appeal, para. 13, referring to Impugned Decision, para. 78.

relied on the 2019 Belgian Interview to find that his rights were respected during the 2016 Belgian Interview.¹⁹¹

100. The SPO responds that the Trial Panel concluded that the rights of the Accused were fully respected during the 2016 Belgian Interview and that it only conducted the assessment of the existence of a causal link “*arguendo*”, as a further observation. According to the SPO, the Defence has failed to demonstrate any error in the Trial Panel’s assessment regarding the Accused’s rights, therefore any potential error in findings made “*arguendo*” would not materially affect the outcome of the Impugned Decision and the First Certified Issue could be dismissed on this basis.¹⁹²

101. On the merits of Shala’s arguments, the SPO responds that the Trial Panel correctly interpreted Rule 138(2) of the Rules in accordance with its plain language and ordinary meaning and that the First Certified Issue should be dismissed.¹⁹³ This interpretation, according to the SPO, is consistent with that of Article 69(7) of the Statute of the International Criminal Court (“ICC” and “Rome Statute”) and with the jurisprudence of the ECtHR.¹⁹⁴ The SPO further argues that, in addition to the assessment of the causal link, the Trial Panel also rightly found “*arguendo*” that even if there was a causal link between that violation and the gathering of the evidence, any hypothetical violation did not cast substantial doubt on the reliability of the evidence

¹⁹¹ Appeal, para. 14.

¹⁹² Response, paras 5-7.

¹⁹³ Response, paras 8, 10, 13.

¹⁹⁴ Response, paras 8-11. The SPO is notably relying in its Response on the ICC *Al Hassan* case in which, according to Shala in his Reply, the Trial Chamber adopted a narrow interpretation of the exclusionary rule that could potentially allow the admission of evidence obtained under torture that is inconsistent with European Human Rights case law and the absolute prohibition of torture that is binding on the Specialist Chambers. See Response, para. 8, fn. 24, referring to ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-1475-Red, Public redacted version of ‘Decision on requests related to the submission into evidence of Mr Al Hassan’s statements’, 20 May 2021 (confidential version filed on 17 May 2021) (“*Al Hassan Decision*”), paras 34, 40-41. See also Reply, para. 5.

or damage the integrity of the proceedings. The SPO submits that Shala fails to demonstrate any error.¹⁹⁵

102. The SPO further argues that “there may be circumstances [...] where failure to respect an Accused’s right to the presence of counsel *during* an interview does not amount to a violation of fair trial rights, even if the related interview records are later relied upon at trial”.¹⁹⁶

2. Assessment of the Court of Appeals Panel

103. Having found a violation of the standards of international human rights law in relation to the 2016 Belgian Interview,¹⁹⁷ the Panel turns to address the question as to whether the Trial Panel erred in law by interpreting Rule 138(2) of the Rules inconsistently with the ECHR by requiring the existence of a “causal link” between the violation of a suspect’s rights and the gathering of evidence.

104. The Trial Panel found that Shala was sufficiently informed of his right to legal assistance during the 2016 Belgian Interview and that he validly waived his right to access a lawyer.¹⁹⁸ Subsequently, applying, as an alternative finding, a “causal link” requirement to the circumstances of the case, the Trial Panel found that:

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 in the context of the 2019 Belgian Interview, during which his rights as a suspect were fully complied with. 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

¹⁹⁵ Response, paras 12-13.

¹⁹⁶ Response, para. 27.

¹⁹⁷ See above, para. 78.

¹⁹⁸ Impugned Decision, paras 70-77.

to a lawyer within the meaning of the chapeau of Rule 138(2) of the Rules.¹⁹⁹

105. The Trial Panel's reference to a "causal link" is borrowed from the ICC jurisprudence interpreting Article 69(7) of the Rome Statute which is identical to the relevant part of Rule 138(2) of the Rules.²⁰⁰ Under the scope of the First Certified Issue, the Panel is not requested to determine whether the Trial Panel erred in law by interpreting Rule 138(2) of the Rules inconsistently with the ICC jurisprudence. Rather, the Panel is requested to look at the Trial Panel's interpretation of Rule 138(2) of the Rules through the prism of the ECtHR jurisprudence.

106. In essence, the Panel notes that under this ICC jurisprudence, in order to determine whether "the evidence was obtained by means of a violation",²⁰¹ it needs to determine whether "the evidence in question was gathered, or its gathering was facilitated by such a breach or violation".²⁰² The Panel agrees with this assessment only to the extent that the violation of a suspect's rights must be linked to the gathering of

¹⁹⁹ Impugned Decision, para. 78 (footnotes omitted).

²⁰⁰ Article 69(7) of the Rome Statute provides that "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings". See Impugned Decision, para. 20. See also Impugned Decision, paras 77-78.

²⁰¹ Rome Statute, Article 69(7).

²⁰² *Al Hassan* Decision, paras 33 ("The *chapeau* of Article 69(7) of the Statute [*sic*] provides that the provision applies where evidence was 'obtained *by means* of a violation' (emphasis added). The Chamber observes that this, by its plain wording, requires not only a breach of the Statute or internationally recognised human rights but also, and importantly, a causal link between the violation and the gathering of the evidence"), 41. In this case, the Panel notes that the Defence alleged that Mr Al Hassan's interview with ICC investigators was obtained while he was subjected to continuous torture and cruel, inhuman and degrading treatment ("CIDT") by the Malian authorities, constituting violations of both the Statute and internationally recognised human rights law. Al Hassan was arguing that the evidence taken during those interviews was consequently tainted. See *Al Hassan* Decision, para. 39. In conclusion, the Trial Chamber found that the Defence had not shown a real risk that the statements were obtained by means of torture or CIDT and therefore it had failed to substantiate its arguments that the statements were obtained by means of a violation of the Statute or internationally recognised human rights. See *Al Hassan* Decision, para. 71.

the evidence at issue, and not as an additional test to assess allegations of violations under Rule 138(2) of the Rules.²⁰³

107. Notwithstanding the above, in the Panel's view, the Trial Panel's finding that this "causal link" requirement was met because Shala made substantially the same statements in the context of the 2019 Belgian Interview, during which his rights as a suspect were fully complied with,²⁰⁴ is not correct. This finding, in itself, is insufficient to demonstrate that there is no causal link between the violation of Shala's right and the gathering of evidence in the 2016 Belgian Interview.

108. In sum, although the Panel disagrees with the way the requirement for a causal link between a violation of a suspect's rights and the gathering of evidence was applied by the Trial Panel and considers that such a requirement is not expressly provided for by the ECtHR jurisprudence, the Panel has not identified an error of law and accordingly dismisses the First Certified Issue.

²⁰³ See Appeal, para. 7.

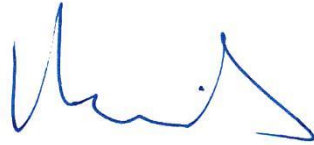
²⁰⁴ Impugned Decision, para. 78.

V. DISPOSITION

109. For these reasons, the Court of Appeals Panel:

GRANTS the Second Certified Issue in part regarding the 2016 Belgian Interview but upholds the Trial Panel's decision to consider the 2016 Belgian Interview as "not inadmissible pursuant to Rule 138(2) of the Rules"; and

DENIES the Appeal in all other aspects.



**Judge Michèle Picard,
Presiding Judge**

Dated this Friday, 5 May 2023

At The Hague, the Netherlands