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Case No.:	**KSC-BC-2020-04**
	Specialist Prosecutor v. Pjetër Shala
Before:	**Trial Panel I**
	Judge Mappie Veldt-Foglia, Presiding Judge
	Judge Roland Dekkers
	Judge Gilbert Bitti
	Judge Vladimir Mikula, Reserve Judge
Registrar:	Dr Fidelma Donlon
Date:	7 June 2023
Filing Party:	Specialist Defence Counsel
Original Language:	English
Classification:	Public

THE SPECIALIST PROSECUTOR

v.

PJETËR SHALA

Public Redacted Version of "Defence Reply to Prosecution Response to Defence Request for Reconsideration of the 'Decision Concerning Prior Statements Given by Pjetër Shala'"

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I. INTRODUCTION

1. On 18 May 2023, the Defence for Mr Pjetër Shala ("Defence" and "Accused", respectively) sought reconsideration of the Trial Panel ("Panel")'s "Decision Concerning Prior Statements Given by Pjetër Shala" in light of the Court of Appeals Panel ("Appeals Panel")'s finding, in its "Decision on Shala's Appeal Against Decision Concerning Prior Statements",[1] that the right of the Accused to access a lawyer for the purposes of his interview with the Belgian Federal Judicial Police on 14 January 2016 ("2016 Belgian Interview") was violated.

2. The Defence had requested an expedited ruling on this matter because of the manner in which the use of the prior statements obtained in breach of the Accused's rights would influence the further conduct of the proceedings and in particular the manner in which the Defence would confront Witness TW4-01, who was scheduled to testify in the evidentiary block scheduled to begin on 30 May 2023.[2] On 23 May 2023, the Panel rejected the Defence's request for an expedited ruling.[3]

3. On 30 May 2023, the Prosecution filed its response to the Request.[4]

4. The Defence hereby replies to the Response and invites the Panel to reconsider the Impugned Decision. While this Reply is limited to the issues raised in the

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[1] KSC-BC-2020-04, F00515, Defence Request for Reconsideration of the "Decision Concerning Prior Statements Given by Pjetër Shala", 18 May 2023 ("Request"), paras. 1, 12; KSC-BC-2020-04, F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022 (confidential) ("Impugned Decision"); KSC-BC-2020-04, IA006, F00007, Decision on Shala's Appeal Against Decision Concerning Prior Statements, 5 May 2023 ("Appeal Decision"). All further references to filings in this Reply concern Case No. KSC-BC-2020-04 unless otherwise indicated.
[2] Request, para. 11; [REDACTED].
[3] F00520, Decision on the Defence Request for an Expedited Ruling on its Request for Reconsideration of the "Decision Concerning Prior Statements Given by Pjetër Shala", 23 May 2023, para. 10(a).
[4] F00527, Prosecution Response to Defence Request for Reconsideration of the "Decision Concerning Prior Statements Given by Pjetër Shala", 30 May 2023 ("Response").

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Response, the Defence maintains its original submissions in full and rejects all submissions made by the Prosecution in their entirety.

II. SUBMISSIONS

5. Reconsideration of the Impugned Decision pursuant to Rule 79(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules") is essential in these circumstances, following the Appeals Panel's confirmation that the rights of the Accused have been violated in the context of the 2016 Belgian Interview.

6. Contrary to the Prosecution's submissions, the Defence has demonstrated that the requirements of Rule 79(1) of the Rules are met.[5] Although these requirements are alternative rather than cumulative, the Defence has specifically demonstrated both "*clear error[s] of reasoning*" in the Impugned Decision, which were confirmed by the Appeals Panel, as well as important reasons warranting reconsideration as "*necessary to avoid injustice*".[6]

7. The admission into evidence and further use of incriminating statements obtained in breach of the Accused's rights to legal assistance will result in impermissible and irreperable injustice.[7] As stressed, reconsideration is warranted to protect the Accused's fundamental right to a fair trial as guaranteed by Article 31 of the Constitution of Kosovo, Article 21(2) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office and Article 6 of the European Convention on Human Rights ("ECHR").[8]

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[5] Response, para. 1; *contra,* Request, paras. 5, 6.
[6] Request, paras. 4-11.
[7] Request, para. 10. *See also* relevant analysis, at paras. 7-9.
[8] Request, para. 10.

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8. The Prosecution misrepresents the jurisprudence of the European Court of Human Rights ("ECtHR") as well as the ICTY decision in the *Delalić et al.* case.[9]

9. In arguing that the latter "*was based on the specific provisions of the ICTY rules; it was not a general assertion regarding violation of the right to legal assistance*",[10] the Prosecution purports to interpret *Delalić et al.* in a vacuum ignoring, for instance, the ICTY Trial Chamber's analysis at paragraph 43 of the same decision , which explicitly acknowledged the intrinsic link between Rule 95 and Rule 42, embodying "*the essential provisions of the right to a fair hearing as enshrined in […] and Article 6(3)(c) of the [ECHR]*", namely "*internationally accepted basic and fundamental rights accorded to the individual*".[11] Similarly, the *necessity* to exclude evidence obtained by means contrary to international human rights is evident in the wording of the Trial Chamber's findings.[12]

10. Furthermore, the Prosecution's submission that "*the relevant assessment pursuant to the ECtHR jurisprudence relates to the overall fairness of the proceedings as a whole, in the particular circumstances of the case, and the use to which the evidence is ultimately put; [n]either of which can be assessed at this point in the trial*" fails to take into account the analysis by the Appeals Panel.[13] Importantly, the Prosecution ignores the Appeals Panel's findings at paragraphs 76 and 77 of the Appeal Decision,

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[9] Response, para. 3 *referring* to ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997 ("*Delalić et al.*").
[10] Response, para. 3, n. 12.
[11] *Delalić et al.*, paras. 43 ("*It seems to us extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95 which protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on its reliability*") and 44 ("*The Trial Chamber is of the opinion that the surest way to protect the integrity of the proceedings is to read both Rules 42 and 95 together. We read Rule 95 as a summary of the provisions in the Rules, which enable the exclusion of evidence antithetical to and damaging, and thereby protecting the integrity of the proceedings. We regard it as a residual exclusionary provision*.").
[12] *See, for* instance, *Delalić et al.*, paras. 35 ("to be excluded by Rule 95, is evidence obtained by means contrary to internationally protected human rights") and 55 ("violation of Sub-rules 42A(i) and 42(B) by themselves would be sufficient by virtue of Rule 5 to render the statements […] null and inadmissible in proceedings before us and is to be excluded") (emphasis added).
[13] Appeal Decision, paras. 74-78.

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where the Appeals Panel explicitly concluded that: "*[t]he Panel's role is however different [to that of the ECtHR], 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*" (emphasis added).[14]

11. In essence, the Prosecution fails to respond to the Request. Instead, it impermissibly purports to equate "*a violation of the standards of international human rights law as per Rule 138(2) of the Rules*"[15] with mere "*discrete, limited errors that are incapable of impacting the conclusions of the Trial Panel with respect to the 2016 Belgian Interview*" and does not address the substance of the arguments of the Defence.[16]

12. In fact, the Prosecution has entirely failed to show "compelling reasons" purportedly justifying the failure to ensure the availability of adequate legal assistance to the Accused for the purposes of the impugned interview.[17] In the absence of such compelling reasons, the Prosecution failed to show circumstances that can be accepted when reviewed under the applicable "strict scrutiny" test which must be applied under binding ECtHR case law. In the absence of such showing, the admission and further use of the incriminating statements made in the context of the 2016 Belgian Interview violate Article 6(1) and Article 6(3)(c) of the ECHR.[18]

13. Contrary to the Prosecution's allegations, the Defence is not embarking on "*a second appellate route*" nor is it attempting "*to address imperfections in a decision or*

[14] Appeal Decision, para. 77.
[15] Appeal Decision, para. 78.
[16] Response, para. 4.
[17] ECtHR, *Bayram Koç v. Turkey*, no. 38907/09, 5 December 2017, para. 23; *İzzet Çelik v. Turkey*, no. 15185/05, 23 April 2018, para. 38; *Ibrahim and Others v. the United Kingdom [GC]*, nos. 50541/08 et. al., 13 September 2016, para. 274; *Salduz v. Turkey*, no. 36391/02, 27 November 2008, para. 55.
[18] ECtHR, *Ömer Güner v. Turkey*, no. 28338/07, 4 December 2018, para. 36 and jurisprudence cited therein.

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to circumvent the unfavourable consequences of a ruling".[19] Reconsideration is warranted on the basis of the unequivocal finding that the Accused's right to a fair trial has been violated because of the unavailability of legal assistance for the purposes of the 2016 Belgian Interview. There is a clear need to stop and prevent further injustice, a need which has been catered for within the context of the KSC framework by the avenue of reconsideration of a prior ruling as envisaged in Rule 79(1) of the Rules.

14. During the 2016 Belgian Interview, the Accused was interviewed as a suspect in relation to "[s]erious violations of humanitarian law occurring in Albania in 1999, in the context of the war in KOSOVO".[20] The interview statements are relied upon by the Prosecution in support of their allegations contained in the Indictment and Pre-Trial Brief.[21] Examples of such statements, are the following:

[REDACTED][22]

[REDACTED][23]

[REDACTED][24]

15. Clearly, prejudice arises from using these statements which were obtained in breach of the Accused's fair trial rights. Their admission into evidence and use in these proceedings undoubtedly "substantially affects" the Accused's

[19] Response, paras. 1, 4.
[20] ERN 074117-074129-ET Revised, pp. 074118, 074119.
[21] F00139, Submission of the Confidential Version of the Pre-Trial Brief, Witness List, and Exhibits List, 8 February 2022, Annex 1 (confidential), paras. 2, 9, 12, 13, 16, 18, 23, 27, 28, 45, 73. *See also* F00281, Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel with Confidential Annexes 1-3, 20 September 2022 (confidential with confidential annexes 1-3), para. 4, *referring to* F00002, Submission of Indictment for confirmation and related requests with strictly confidential and *ex parte* Annexes 1-3, 11 February 2020 (confidential), paras. 7, 9, 10, *referring, inter alia,* to ERN 074117-074129-ET Revised.
[22] ERN 074117-074129-ET Revised, pp. 074124, 074125.
[23] ERN 074117-074129-ET Revised, p. 074125.
[24] ERN 074117-074129-ET Revised, p. 074126.

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position.[25] The breach of the Accused's rights for the purposes of the 2016 Belgian Interview contaminates the lawfulness of the use of statements made in the subsequent interview given in 2019. The Defence has consistently contested the admission of all incriminatory statements as a result of the violation of the Accused's right to adequate legal assistance in the context of his interviews. The breach of the Accused's rights for the purposes of the 2016 interview renders the admission of incriminatory statements made in the context of the subsequent 2019 interview also unfair and unacceptable. This is indeed required by the application of the doctrine of the fruit of the poisonous tree. Had it not been for the position taken in 2016, the Accused may have well responded to the investigators' questions differently in the context of the 2019 interview, particularly had he been given the opportunity to obtain legal advice as he was entitled to. In any event, the circumstances in which the statements were taken, especially in light of the fact that the Accused was not afforded a real and effective opportunity to receive legal assistance prior and during the relevant interviews, inevitably cast doubt on the statements' reliability and accuracy for the purposes of their use in evidence.[26] These statements cannot be used in these proceedings.

III. CLASSIFICATION

16. Pursuant to Rule 82(3) of the Rules, this Reply is filed as confidential as it contains confidential information. The Defence will file a public redacted version of this Reply in due course.

[25] ECtHR, *Beuze v. Belgium [GC]*, no. 71409/10, 9 November 2018, para. 178 where the Grand Chamber rejected the Belgian Government's position that the interviews and examinations at issue were "not incriminating" and noted that "*the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position*".

[26] *See also* circumstances acknowledged in the Appeals Decision, paras. 75, 76, 78, 79, 103.

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IV. RELIEF REQUESTED

17. The Request raises issues that go to the core of the guarantees of fair trial. If the Defence is right, the Accused's trial will proceed in violation of these guarantees and irreparable prejudice will be caused.

18. The Defence respectfully requests the Panel to grant the Request and reconsider the Impugned Decision pursuant to Rule 79(1) of the Rules. The Panel must exclude from the record and further use in these proceedings the incriminating statements made by the Accused in his 2016 and 2019 interviews. As stated above, these statements were obtained in breach of the Accused's right to a fair trial and the principle against self-incrimination. Their exclusion is warranted to avoid a miscarriage of justice.

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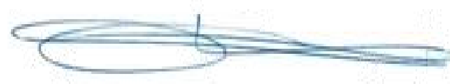
Respectfully submitted,



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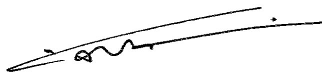
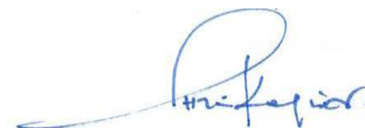
Jean-Louis Gilissen

Specialist Defence Counsel





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