

**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:** 25 March 2024

**Filing Party:** Specialist Defence Counsel

**Original Language:** English

**Classification:** Public

**THE SPECIALIST PROSECUTOR**  
**v.**  
**PJETËR SHALA**

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**Public Redacted Version of Defence Final Trial Brief with Annex 1**

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## A. Introduction

1. The Defence for Pjetër Shala files its Final Brief as instructed by the Panel.<sup>1</sup>

## B. Narrative of Shala

### 1. Shala fighting at the front to protect his people

2. In the early spring of 1999, after the KLA's call for general mobilisation, the Accused travelled to Durrës, Albania. At Durrës, he received purported instructions to take command of Brigade 128 at the frontline of the Pashtrik region, along the border between Kosovo and Albania.<sup>2</sup> At Durrës, a member of the KLA requested the Accused to present himself at Kukës and join the Brigade.
3. Upon arrival at Kukës, the Accused learnt that there was no position for him within Brigade 128 and understood that the written instructions presented to him were forged. In fact, according to multiple witnesses, Brigade 128 did not even exist on the date noted on that document,<sup>3</sup> and Witness Mark Shala, who was the chief of logistics at the Factory and was stationed there during the whole Indictment Period,<sup>4</sup> testified that, despite bearing seemingly-official signatures, the document did not appear "accurate"<sup>5</sup> for multiple reasons: first, it was impossible that the person whose signature the document bore was in Pristina on 20 March 1999,<sup>6</sup> the language used in the document did not correspond with that which typically

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<sup>1</sup> KSC-BC-2020-04, F00795, Decision on the Defence motion for a crime site visit, closing the evidentiary proceedings and giving directions on final briefs, request for reparations and closing statements.

<sup>2</sup> U009-9398-U009-9398-ET.

<sup>3</sup> T. 23 October 2023 pp. 2971, 2975-2978. *See further* DW4-02, explaining that the Brigade was given its name after Kalimash. The Brigade was in Burrel for two weeks until the killing of Halil Gashi on 2 May 1999, when the Brigade left and went back to Kukës. They spent 6-7 days in Kukës with their families before being mobilized to Kalimash. The Brigade stayed in Kalimash for a bit more than two weeks, see T. 2 October 2023 pp. 2753, 2762, 2764-2766, 2773.

<sup>4</sup> T. 23 October 2023 pp. 2920, 2921, 2982.

<sup>5</sup> T. 23 October 2023 p. 2971.

<sup>6</sup> W04754 met with Azem Sylja in Tirana a few days before, and testified it would not be possible for Azem Sylja to travel from Pristina to Tirana in a short period of time. *See* T. 23 October 2023 pp. 2976, 2977.

appeared in such documents;<sup>7</sup> the Accused's appointment was unlikely given that he lacked the required education and experience to lead a brigade.<sup>8</sup>

4. Finding himself alone in Kukës, with no assigned unit or soldiers under his command, nor tasks to execute, the Accused decided to go to the frontline, which was his intention when responding to the general mobilisation. Before leaving Kukës, the Accused told Witness Shala that he was heading to the frontline.<sup>9</sup> Witness Shala gave him a sniper gun before he departed,<sup>10</sup> and the Accused left Kukës travelling northeast towards the frontline.<sup>11</sup>
5. The Accused had therefore travelled to Kukës from Durrës under false pretences, and as soon as he understood there was no place for him within any formal KLA structure, he left for the frontline, without ever assuming any form of responsibility or role in Kukës.
6. During the Indictment period, the Accused was not a member of Brigade 128 nor of any other brigade. Tellingly, the name of the Accused does not appear on the list of members of Brigade 128,<sup>12</sup> and five witnesses, all members of Brigade 128, testified that they did not know, nor had they ever heard of Pjetër Shala or "Ujku".<sup>13</sup>

## 2. Shala's presence at the Kukës Metal Factory

7. In its Indictment and Pre-Trial Brief, the Prosecution alleges that the Accused "was present at the Kukës Metal Factory during the Indictment Period", specifically

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<sup>7</sup> T. 23 October 2023 pp. 2971, 2972.

<sup>8</sup> T. 23 October 2023 pp. 2971, 2972: "I think you should have someone who is more qualified and professional because a brigade is a difficult thing to lead."

<sup>9</sup> T. 23 October 2023 pp. 2967-2969.

<sup>10</sup> T. 23 October 2023 pp. 2967-2969.

<sup>11</sup> T. 23 October 2023 p. 2984.

<sup>12</sup> 058048-058112-ET.

<sup>13</sup> T. 2 October 2023 p. 2753. *See further* T. 9 January 2024 p. 3911; T. 3 October 2023 p. 2831; T. 20 November 2023 p. 3219, 3220; T. 28 November 2023 p. 3778, 3779.

“between approximately 17 May 1999 and 5 June 1999” and participated in the charged crimes.<sup>14</sup>

8. The Accused only visited the Factory on a few isolated occasions during the war when he returned from the front for obtaining supplies. His visits were brief as he rushed to return to the front.<sup>15</sup> The Accused was not present at the Factory in late May and/or June 1999.<sup>16</sup> Importantly, he had no role, authority, official position, place in any hierarchy of the organization managing the KLA base at the Kukës Metal Factory or any involvement whatsoever with the administration and operation of KLA activities at the Factory.
9. The Accused denies the Prosecution’s allegations above which seek to place him at the Factory for prolonged periods of time. It is very convenient to allege that he was there “when it mattered” without attempting to show any reason or need for him to be there or any duty or link with the officers stationed there. The Prosecution alleges that the Accused “participated in the transfer of Witness W04733 and other prisoners” to the Factory “on or about 18 May 1999”.<sup>17</sup> The Prosecution also alleges that the Accused was present throughout and/or participated in “routine” assaults and beatings of alleged detainees, including those that took place between 20 and 21 May 1999, and that the Accused beat detainees every night after 21 May 1999 as well as in June 1999, including the beating surrounding the shooting of [REDACTED] on 4 June 1999.<sup>18</sup>
10. Only two Prosecution witnesses, TW4-01 and TW4-10, testified live that the Accused was present at the Factory.
11. On 31 May 2023, TW4-01 alleged before this Panel that the Accused mistreated him together with many others in the incidents around 20 May 1999 and

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<sup>14</sup> Indictment, paras 8, 14, 18, 19, 21, 23, 24, 26, 28, 31; Prosecution Pre-Trial Brief, paras 1, 3, 4, 18, 30, 42, 52, 61, 66, 71, 78, 79.

<sup>15</sup> Defence Pre-Trial Brief, paras 8, 48.

<sup>16</sup> Defence Pre-Trial Brief, paras 49, 61, 68, 77.

<sup>17</sup> Indictment, para 15; Prosecution Pre-Trial Brief, paras 14, 31.

<sup>18</sup> Indictment, paras 21, 23, 26, 28; Prosecution Pre-Trial Brief, paras 1, 3, 4, 18, 30, 33, 37, 45, 47-52, 54, 55, 59, 61, 63, 66, 68, 69, 71, 73, 75, 76, 78, 79.

[REDACTED] June 1999.<sup>19</sup> However, TW4-01's evidence is demonstrably untruthful and dishonest. It has all the characteristics of being fabricated with the intent to deceive. He has shown flagrant disregard [REDACTED] in his testimony before this Panel. He has admitted to providing [REDACTED] to "take revenge" without any hesitation. He has even [REDACTED] in his testimony before the Panel. Notably, he is [REDACTED] and has shown to be capable of going a long way to take revenge on others when he feels betrayed. On two occasions before his testimony before this Panel he listed [REDACTED] without referring to Mr Shala, [REDACTED] and whom he knew well.<sup>20</sup> His explanation as to why he had previously failed to identify the Accused as present, was poor and self-serving. With regard to his first inconsistent statement,<sup>21</sup> he simply denied not mentioning the Accused, which is evidently a lie given the clear record of what he had stated at the time.<sup>22</sup> With regard to the second, he blamed the [REDACTED] for allegedly manipulating the file and "betraying" him.<sup>23</sup> His evidence is clearly unreliable and must be rejected in its entirety.

12. TW4-10, who was a member of the KLA and worked as a guard at the logistics headquarters in Kukës during the Indictment Period,<sup>24</sup> testified that he saw the Accused at the Factory "twice, not more than that".<sup>25</sup> TW4-10's evidence confirms the Accused's account that he was only there on a few isolated occasions and does not substantiate the Prosecution's allegations.

13. In addition to the above witnesses, two persons who are now deceased provided evidence concerning the alleged presence of the Accused at the Factory. Their

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<sup>19</sup> T. 31 May 2023 pp. 1526, 1527, 1531.

<sup>20</sup> T. 2 June 2023 pp. 1677-1683.

<sup>21</sup> T. 2 June 2023 pp. 1676-1678.

<sup>22</sup> T. 2 June 2023 p. 1678.

<sup>23</sup> T. 2 June 2023 pp. 1679-1683.

<sup>24</sup> T. 1 May 2023 pp. 1032, 1034-1036, 1080, 1097.

<sup>25</sup> T. 1 May 2023 pp. 1081, 1083, 1084. The witness could not endorse a prior statement he gave in which he suggested that he had seen the Accused on more occasions during the time that the witness spent at the Kukës Metal Factory. *See* T. 1 May 2023 pp. 1081-1083.

evidence was admitted before the Panel in writing and therefore remained untested.

14. W01448 stated that when he was detained at the Kukës Metal Factory he was ill-treated by the Accused.<sup>26</sup> However, on two subsequent occasions he confirmed that he identified the Accused, whom in fact he did not know, on the basis of what “those from [REDACTED]” had told him, those from [REDACTED] being none others than the [REDACTED].<sup>27</sup> W01448’s confusion as to who is Pjetër Shala was demonstrated when he identified someone else as Pjetër Shala in an official photoboard identification.<sup>28</sup>
15. W04733 asserted that the Accused ill-treated him at the Factory on 20 May 1999.<sup>29</sup> However, he gave an entirely inaccurate physical description of the Accused, admitted confusion as to who the Accused is,<sup>30</sup> his assertion of memory regarding the Accused allegedly being present at his transfer to Kukës was considerably delayed despite having had ample opportunities to implicate him earlier,<sup>31</sup> and it was demonstrated that his identification was influenced by suggestions from at least TW4-01.<sup>32</sup> W04733 described the Accused as of dark complexion, almost black with dark eyebrows,<sup>33</sup> which does not match the physical appearance of the Accused. Despite the fact that he described the Accused in an evidently flawed manner he was never asked to identify the Accused in an official photo board identification procedure.<sup>34</sup> W04733 also alleged that he had recognized the

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<sup>26</sup> SITF00013852-00013869 RED6, p. 6.

<sup>27</sup> SITF00013736-SITF00013800 RED5, pp. 8, 9, 11;

<sup>28</sup> SITF00374534-00374534; SITF00374536-SITF00374541 RED, p. 1.

<sup>29</sup> SITF00018740-00018767 RED, pp. 4, 5; SPOE00013793-SPOE00013847 RED2, pp. 51, 52.

<sup>30</sup> 082892-TR-AT-ET Part 1 RED3, p. 38.

<sup>31</sup> SITF00018740-00018767 RED, p. 2. The witness mentions the Accused participating in his transfer for the first time in 2010.

<sup>32</sup> T. 5 June 2023 pp. 1786, 1787 (“no one knew Sabit’s name or other names at the time, including Pjetër Shala”).

<sup>33</sup> 082892-TR-AT-ET Part 1 RED3, p. 38.

<sup>34</sup> 082892-TR-AT-ET Part 1 RED3, p. 38. *See also Kupreškić et al.* Appeal Judgement, para. 40 (“[c]ourts in domestic jurisdictions have identified the following factors as relevant to an appellate court’s determination of whether a fact finder’s decision to rely upon identification evidence was unreasonable or renders a conviction unsafe: [...] inconsistent or inaccurate testimony about the defendant’s physical



Accused when he heard him howl, which is inconsistent with his prior evidence that he had previously only seen the Accused in photographs in police files.<sup>35</sup> No evidence was presented demonstrating that the practice of “howling like a wolf” was a unique feature of the Accused that could serve to reliably recognize him.

16. The Prosecution’s reliance on the evidence of family members of W04733 to convey the information allegedly given to them by W04733 did not remedy the infringement of Mr Shala’s right to confront an important witness against him, as these witnesses could only convey what they remembered that they were told by W04733.
17. The Panel cannot safely rely on the untested evidence of the two deceased witnesses. There are no reliable witnesses who directly corroborate TW4-01’s account of events as to the presence of the Accused during the alleged beatings at the Kukës Metal Factory and [REDACTED] and no reasonable trial chamber would rely on the evidence of TW4-01.
18. The Prosecution has failed to present credible evidence that is capable of supporting the actual presence of the Accused at the Kukës Factory between 20 May 1999 and 5 June 1999, including on the incidents on 20 May [REDACTED] June 1999.
19. In fact, many witnesses gave consistent evidence that the Accused was not present at the Factory at the times material for the Indictment.
20. Several Prosecution witnesses who were allegedly detained at the Factory provided evidence that they did not know anyone with the Accused’s name at the material time. TW4-11, who was allegedly detained from mid-May 1999 for around

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characteristics at the time of the event; [...] and a witness’ delayed assertion of memory regarding the defendant coupled with the “clear possibility” from the circumstances that the witness had been influenced by suggestions from others); *Fatmir Limaj* Appeal Judgment, para. 30; *DPP v. Cox*, 28th April 1995, (CCA) 4/93; *R. v Burke* [1996] 1 S.C.R. 474, para. 53 (the appellate court found it unacceptable that the trial judge “made no comment on the frailty of the identification evidence” other than the general statement that she found the witness’ evidence credible and therefore accepted it).

<sup>35</sup> 082892-TR-AT-ET Part 3 RED2, p. 12; U003-2283-U003-2289 RED2, p. 2; 082892-TR-AT-ET Part 1 RED3, p. 37.

a month and five days and thus, during the whole Indictment Period,<sup>36</sup> testified that when he was at the Factory in 1999, he did not know anyone called Pjetër Shala.<sup>37</sup> Similarly, TW4-02, who was allegedly detained at the Factory stated that he did not know “a man by the name Pjetër Shala”.<sup>38</sup> This is supported by TW4-04, who was also allegedly detained at the Factory, and stated that he did not know anybody named Pjetër Shala.<sup>39</sup>

21. In 2019, W04379, the former owner of the Factory who was present at the Factory during the Indictment Period,<sup>40</sup> stated that he met the Accused after the war ended when he came and brought in wounded soldiers to Kukës.<sup>41</sup> When questioned about the Accused’s role and activities in Kukës, he stated that the Accused “stayed for a very short period in Kukës before he went to the frontline, like all the other soldiers I knew” and that “I knew him just a little because, after arriving, he stayed for only two or three days before going to the frontline.”<sup>42</sup>
22. On 3 October 2023, Witness Kocinaj, who joined the KLA at Kukës and was continuously stationed at the Factory during the whole Indictment Period,<sup>43</sup> testified that he did not know or meet anyone named Pjetër Shala at the time.<sup>44</sup> He testified that, during his time at the Factory in 1999, he did not know or meet “a person named Pjetër Shala” and did not hear of a person “who had a nickname Ujku or Ujki, or something like that, Wolf”.<sup>45</sup>
23. Witness Shala, who was stationed at the Factory during the whole Indictment Period,<sup>46</sup> testified that he met the Accused there only twice during the war.<sup>47</sup> He

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<sup>36</sup> T. 2 May 2023 pp. 1185-1187,1199.

<sup>37</sup> T. 3 May 2023 p. 1271.

<sup>38</sup> 060664-TR-ET Part 5 RED4, p. 13.

<sup>39</sup> 064716-TR-ET Part 5 RED4, p. 22; 107743-107743, para. 2.

<sup>40</sup> 060124-TR-ET Part 1 Revised RED, pp. 5, 25, 26, 36.

<sup>41</sup> 060124-TR-ET Part 2 Revised RED4, pp. 139, 141, 143, 144.

<sup>42</sup> 060124-TR-ET Part 2 Revised RED4, pp. 142, 143.

<sup>43</sup> T. 3 October 2023 pp. 2814-2817, 2835, 2839, 2847, 2848, 2884, 2885.

<sup>44</sup> T. 3 October 2023 p. 2831.

<sup>45</sup> T. 3 October 2023 pp. 2831, 2882.

<sup>46</sup> T. 23 October 2023 pp. 2920, 2921, 2982.

<sup>47</sup> T. 23 October 2023 p. 2966; T. 24 October 2023 p. 3069.

testified that the first occasion “could be somewhere between 10<sup>th</sup> and 15<sup>th</sup> April” of 1999, when the Accused came to meet him at the Factory from a facility outside Kukës.<sup>48</sup> He met the Accused on the second occasion “towards the end of the war, just before the war ended in June” “by chance” not at the Factory but “in a café in downtown Kukës”.<sup>49</sup>

24. On 20 November 2023, Witness Hoxha, who stayed at Kukës during the whole Indictment Period repairing and supplying weapons at the Factory,<sup>50</sup> testified that he did not know the Accused, had never met the Accused in his life, and “never heard” the nickname “Ujku”.<sup>51</sup>

25. On 28 November 2023, W04280, who worked as a [REDACTED] at the Factory from [REDACTED] June 1999 until [REDACTED] June 1999,<sup>52</sup> testified that he had never seen or heard of the Accused or the nickname “Ujku”.<sup>53</sup>

26. The lack of sufficient evidence demonstrating the presence of the Accused at the Kukës Metal Factory as alleged in the Indictment can be contrasted with the evidence on record concerning Xhemshit Krasniqi’s continuous presence or at least presence “when it mattered” at the Factory. For example, many Prosecution witnesses, including TW4-01, TW4-02, TW4-04, TW4-10, TW4-11, W04733, W01448, and W04848 consistently confirmed Krasniqi’s presence at the Factory.<sup>54</sup>

<sup>48</sup> T. 23 October 2023 pp. 2966-2969; T. 24 October 2023 p. 3069.

<sup>49</sup> T. 23 October 2023 p. 2969, 2970; 24 October 2023 p. 3069.

<sup>50</sup> T. 20 November 2023 pp. 3174-3176.

<sup>51</sup> T. 20 November 2023 pp. 3219, 3220.

<sup>52</sup> T. 28 November 2023 pp. 3750, 3751, 3777, 3788.

<sup>53</sup> T. 28 November 2023 pp. 3778, 3779.

<sup>54</sup> See e.g., Witness TW4-01: T. 30 May 2023 pp. 1453, 1477; T. 31 May 2023 pp. 1498, 1512, 1523-1527, 1529, 1530, 1539, 1557, 1559; T. 2 June 2023 pp. 1650, 1652, 1679, 1682, 1695, 1722. Witness TW4-10: T. 2 May 2023 p. 1167; T. 1 May 2023 pp. 1062, 1068, 1104. Witness TW4-11: T. 2 May 2023 p. 1187; T. 3 May 2023 pp. 1241, 1265, 1289, 1290, 1292, 1294, 1295, 1324. Witness TW4-02: 060664-TR-ET Part 2, pp. 5, 10; 060664-TR-ET Part 3, pp. 15, 18, 22; 060664-TR-ET Part 5 RED4, p. 8. Witness TW4-04: SITF00013262-00013315 RED, pp. 11, 13, 16; SITF00015825-00015925 RED, p. 19; 064716-TR-ET Part 5 RED4, pp. 17, 18, 20; 108826-TR-ET Part 1 RED, p. 11. Witness W04733: SITF00013181-SITF00013189 RED3, pp. 3, 6, 7; SPOE00013793-00013847 RED2, pp. 6, 8-12, 18-20, 22, 25-30, 33, 41, 42, 44-46, 48, 51, 53; 082892-TR-AT-ET Part 1 RED3, p. 14; 082892-TR-AT-ET Part 2 RED3, pp. 19, 20; 082892-TR-AT-ET Part 4 RED3, pp. 24-28; 082892-TR-AT-ET Part 5 RED2, pp. 11-13; 082892-TR-AT-ET Part 6, pp. 5, 6, 9, 11, 12, 28; 082892-TR-AT-ET Part 9 RED2, p. 17; 106978-107020, pp. 2, 3, 5, 32; SITF00018740-00018767 RED, pp. 2-4, 7; SITF00019824-00019876 RED2, pp. 11, 12, 18, 19, 21-23; U003-2283-U003-2289 RED2, pp. 2, 4;

27. The Prosecution failed to prove beyond reasonable doubt the presence of the Accused at the Factory “whenever it mattered” and at the time that the alleged crimes were committed.

### C. Gaps in the Prosecution's Case

1. COUNT 1: Lack of sufficient evidence to demonstrate Mr Shala's involvement in any detention regime<sup>55</sup>

28. The Defence reiterates that arbitrary detention in a non-international armed conflict did not constitute a criminal offence under the applicable law in Kosovo at the material time.<sup>56</sup> In fact, the Defence stresses that this is the first time that an international tribunal has charged persons with the war crime of arbitrary detention in a non-international armed conflict. Mr Shala’s prosecution for this war crime is a clear breach of the principle of legality that violates his rights under Article 6 and 7 of the European Convention on Human Rights.

29. The evidence shows that the KLA emerged as an armed resistance group over time without the organisation, structures, facilities or resources of a conventional army of a state or an established local administration. In many locations, the KLA emerged as groups of persons able to defend their families and villages gathered together spontaneously in response to the intense attacks and deliberate ethnic cleansing conducted by the Serbian military forces and paramilitaries.

30. During the Indictment period, although some formal structures were established within the KLA, it is clear that the KLA still operated as a people’s army, a voluntary army in makeshift facilities with scarce resources. The conditions in

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SITF00013200-00013229 RED2, p. 10. Witness W01448: SITF00013852-00013869 RED6, pp. 5, 6, 8, 9; SITF00013736-SITF00013800 RED5, pp. 9, 10; SITF00016221-00016285 RED4, pp. 12, 13; SITF00016140-00016220 RED3, p. 9. Witness W04848: SITF00431831-SITF00431886 RED2, p. 33; 083219-TR-ET Part 2 Revised RED, pp. 23-26; 083219-TR-ET Part 3, pp. 1, 2.

<sup>55</sup> Indictment, para. 31.

<sup>56</sup> F00054, Preliminary Motion of the Defence of Pjetër Shala to Challenge the Jurisdiction of the KSC, 12 July 2021, paras. 4, 46-51; Defence Pre-Trial Brief, paras. 53-55.

which the KLA operated in 1999 entailed no organisation akin to that of a local administration which would have enabled it to ensure express authority to detain, applicable rules regarding detention, periodic review of the lawfulness of detention, and other procedural safeguards for the benefit of persons detained on suspicion of being a threat to national security. In light of the largely informal structures of command and control and the lack of capacity to ensure effective respect for basic humanitarian norms it cannot be inferred that the KLA was capable of ensuring detailed rules on detention, express power to detain, period review of the lawfulness of detention and other procedural guarantees against arbitrary detention. It is not reasonable to expect that the KLA had such capacities in mid-1999 and, therefore, and it is not reasonable to infer that KLA commanders or soldiers that had effective power to arrest, detain or release persons suspected of treason could foresee that the war crime of arbitrary detention in a non-international armed conflict existed at the time and they could be found liable for it. In any event, the evidence relied upon by the Prosecution shows that Mr Shala was not a KLA commander or soldier who had the power to order the arrest, detention, or release of any person.

31. Without prejudice to its position, the Defence will proceed to analyse why the Prosecution has failed to meet its burden and demonstrate the elements of this crime.
32. The Panel has found in the *Mustafa* case that the crime of arbitrary detention requires an “act or omission resulting in depriving a person not taking active part in hostilities of his or her liberty without legal basis or without complying with basic procedural safeguards”.<sup>57</sup> It also requires the perpetrator to have acted with intent in relation their conduct. Moreover, the perpetrator “must have no reasonable grounds to believe that security concerns of the parties to the conflict make the detention absolutely necessary, or the perpetrator must know that the

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<sup>57</sup> *Mustafa* Judgement, para. 646.

detainees have not been afforded the requisite procedural guarantees, or be reckless as to whether those guarantees have been afforded or not".<sup>58</sup>

33. The Prosecution has not proved *any* of the elements of the crime of arbitrary detention as established by this Panel in the *Mustafa* case.

*a. Deprivation of Liberty*<sup>59</sup>

*i. Arrests*

34. The Prosecution has entirely failed to demonstrate that Mr Shala arrested or was in any way involved in the arrest of any person. In addition, no evidence was presented showing that Mr Shala could exercise any authority, power or control over others who arrested any person that was allegedly detained at the Kukës Metal Factory.

35. TW4-01 testified that he got arrested, [REDACTED] and [REDACTED] at the time by the [REDACTED] in [REDACTED], [REDACTED], and was brought to Albania.<sup>60</sup> He testified that in Albania they met [REDACTED] who brought them to the Kukës Metal Factory.<sup>61</sup> [REDACTED] arrested by KLA members on [REDACTED] third night at the Kukës Metal Factory by three to four unidentified members of the KLA's military police.<sup>62</sup> Witness TW4-01 testified that the Accused was not present during their arrest.<sup>63</sup>

36. W01448 stated that on 14th May 1999<sup>64</sup> he was about to disembark a ferry in Durrës, Albania,<sup>65</sup> when men dressed in civilian clothing approached him inside the ferry,

<sup>58</sup> *Mustafa* Judgement, para. 651; *See also* Confirmation Decision, para. 53.

<sup>59</sup> Indictment, para. 14; *See also* Prosecution Pre-Trial Brief, para. 30.

<sup>60</sup> T. 30 May 2023 p. 1387-1389, 1562.

<sup>61</sup> T. 30 May 2023 p. 1397, 1401, 1402. This is supported by TW4-10, *see* T. 1 May 2023 p. 1074.

<sup>62</sup> T. 30 May 2023 pp. 1418.

<sup>63</sup> T. 30 May 2023 p. 1420.

<sup>64</sup> SITF00013736-SITF00013800 RED5, p. 2; SITF00016221-00016285 RED4, p. 7; *Contrast*, in 2003, he stated it was 12 May 1999, SITF00013852-00013869 RED6, p. 3.

<sup>65</sup> SITF00013852-00013869 RED6, p. 3; SITF00013736-SITF00013800 RED5, p. 2; SITF00016221-00016285 RED4, p. 7.

asking for his name and forced him into a car.<sup>66</sup> Witness W01448 later learned that one of these men was Haki Drencia,<sup>67</sup> who accused Witness W01448 of not supporting the KLA.<sup>68</sup>

37. TW4-11 testified that at around mid-May 1999<sup>69</sup> two men in civilian clothing approached him at [REDACTED] in Kukës.<sup>70</sup> They told him that he had to provide a statement at the Kukës Metal Factory, and accompanied him there.<sup>71</sup> Witness TW4-11 testified that he did not feel obliged, threatened or pressured to go with the two men.<sup>72</sup> He also testified that at a later point one of these men identified himself as [REDACTED].<sup>73</sup>

38. W04733, a former police officer,<sup>74</sup> stated that on 18 May 1999, he was arrested in Durrës, Albania, by four armed persons wearing black KLA uniforms with insignias, who introduced themselves as “KLA police”;<sup>75</sup> he identified one as Commandant “Locka” and his son, Witness TW4-08, identified the other as Bashkim Lama.<sup>76</sup>

39. Witness TW4-05 stated that he and his family arrived in Kukës “on [REDACTED] May” 1999, and around “4 or 5 day[s] after arriving”, he was approached by

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<sup>66</sup> SITF00013736-SITF00013800 RED5, p. 2; SITF00013852-00013869 RED6, p. 3; SITF00016221-00016285 RED4, p. 7.

<sup>67</sup> SITF00013736-SITF00013800 RED5, p. 2; SITF00013852-00013869 RED6, p. 3; SITF00016221-00016285 RED4, p. 7.

<sup>68</sup> SITF00013736-SITF00013800 RED5, pp. 2, 3; SITF00013852-00013869 RED6, p. 4; SITF00016221-00016285 RED4, p. 8.

<sup>69</sup> T. 2 May 2023 pp. 1185-1187.

<sup>70</sup> T. 2 May 2023 pp. 1186-1187.

<sup>71</sup> T. 2 May 2023 p. 1187.

<sup>72</sup> T. 3 May 2023 pp. 1329, 1330.

<sup>73</sup> T. 2 May 2023 pp. 1187, 1190, 1191; T. 3 May 2023 pp. 801, 1329.

<sup>74</sup> SITF00013181-SITF00013189 RED3, p. 2; U003-2283-U003-2289 RED2, p. 1; SPOE00185335-00185363 RED3, p. 4; SITF00018740-00018767 RED, p. 2; SPOE00013793-SPOE00013847 RED2, p. 6; 082892-TR-AT-ET Part 1 RED3, p. 7; *See also* T. 28 March 2023 pp. 777, 771; T. 29 March 2023 p. 888.

<sup>75</sup> SITF00013181-SITF00013189 RED3, p. 4; SITF00019824-00019876 RED2, pp. 4, 6; SPOE00013793-SPOE00013847 RED2, pp. 12-13, 15; 082892-TR-AT-ET Part 2 RED3, pp. 27, 28; T. 27 March 2023 p. 662,664; *See also* hearsay evidence T. 28 March 2023 p. 791, 792, 801; T. 29 March 2023 pp. 903, 906; T. 30 March 2023 pp. 978, 979.

<sup>76</sup> SITF00013181-SITF00013189 RED3, p. 4; SPOE00185335-00185363 RED3, p. 7; SPOE00013793-SPOE00013847 RED2, p. 13; 082892-TR-AT-ET Part 2 RED3, pp. 28, 29, 33-37; T. 27 March 2023 pp. 659-661; T. 30 March 2023 p. 979.



[REDACTED], who identified himself as such, and was accompanied by two other persons.<sup>77</sup> They showed Witness TW4-05 their KLA identification documents,<sup>78</sup> and asked for his name.<sup>79</sup> Witness TW4-05 provided conflicting accounts as to what happened subsequently; first in 2009, Witness TW4-05 stated that he was told that he “had been friendly with the Serbs” and thus needed to go to the KLA headquarters;<sup>80</sup> yet, in 2010, he stated that he was “taken” by them for a short and “informative conversation” where he was asked questions.<sup>81</sup>

40. Witness TW4-04 stated that at some time between [REDACTED] to [REDACTED] April 1999,<sup>82</sup> he was arrested in Durrës,<sup>83</sup> by [REDACTED] and another unidentified KLA member, both dressed in civilian clothing.<sup>84</sup>

41. The Prosecution failed to present any evidence suggesting that the Accused had arrested or was in any way involved in the arrest of *any* person.

*ii. Transfers*<sup>85</sup>

42. W04733 stated that after his arrest in Durrës, Albania, he was taken to a place called “Romanat”,<sup>86</sup> where he was detained for three days.<sup>87</sup> He stated that he was then transferred to Kukës by four or five KLA soldiers.<sup>88</sup> He claimed that the soldiers

<sup>77</sup> SITF00013123-SITF00013153 RED, pp. 4, 5.

<sup>78</sup> SITF00013123-SITF00013153 RED, p. 4.

<sup>79</sup> SITF00372498-00372510 RED4, p. 3; SITF00013123-SITF00013153 RED, p. 5.

<sup>80</sup> SITF00372498-00372510 RED4, p. 3.

<sup>81</sup> SITF00013123-SITF00013153 RED, p. 4.

<sup>82</sup> SITF00013336-00013349 RED, p. 3; SITF00013262-00013315 RED, p. 2; SITF00015825-00015925 RED, p. 4; SPOE00014669-00014751 RED, p. 6; 064716-TR-ET Part 4 RED3, p. 2.

<sup>83</sup> SITF00013336-00013347 RED, p. 3; SITF00013262-00013315 RED, p. 2; SITF00015825-00015925 RED, p. 4; SPOE00014669-00014751 RED, p. 6; 064716-TR-ET Part 4 RED3, p. 2.

<sup>84</sup> SITF00013336-00013347 RED, p. 3; SITF00013262-00013315 RED, pp. 2, 3; SITF00015825-00015925 RED, pp. 4, 5, 46; SPOE00014669-00014751 RED, pp. 6, 8, 9; 064716-TR-ET Part 1 RED3, p. 9; 064716-TR-ET Part 2 RED3, pp. 8, 9.

<sup>85</sup> Indictment, para. 15; Prosecution Pre-Trial Brief, para. 31.

<sup>86</sup> SITF00013181-SITF00013189 RED3, pp. 4, 5; SPOE00185335-00185363 RED3, p. 5; SITF00019824-00019876 RED2, p. 5; SPOE00013793-SPOE00013847 RED2, p. 13; 082892-TR-AT-ET Part 2 RED3, pp. 30, 39, 42. *See also* T. 27 March 2023 p. 668; T. 28 March 2023 p. 814.

<sup>87</sup> SPOE00013793-SPOE00013847 RED2, p. 16; 082892-TR-AT-ET Part 2 RED3, p. 50; SITF00019824-00019876 RED2, pp. 5-6; SPOE00185335-00185363 RED3, p. 5; SITF00018740-00018767 RED, p. 2. SITF00019824-00019876 RED2, p. 6.

<sup>88</sup> SITF00019824-00019876 RED2, pp. 5, 6; 106978-107020, p. 25; 082892-TR-AT-ET Part 2 RED3, p. 50.



who transferred him included the Accused.<sup>89</sup> In 2018, he stated that, during the transfer, the Accused did “nothing” and did not speak with him.<sup>90</sup> Moreover, Witness W04733 stated that he was not mistreated during the transfer.<sup>91</sup> No evidence was presented to support the Prosecution’s allegation<sup>92</sup> that the witness was transferred under “threat of death”.

43. No reliable evidence was presented that suggests that the Accused had any knowledge that W04733 had been unlawfully arrested and was being transferred to the Kukës Metal Factory to be detained arbitrarily. In any event, W04733’s identification of the Accused is unreliable. He alleged for the first time that the Accused was present during his transfer in 2010 and his claim was not corroborated by other witnesses. Importantly, the purported identification of the Accused by W04733 is entirely unreliable. In addition, none of W04733’s family members who testified could confirm that W04733 had told them about the Accused being present during W04733’s transfer to Kukës. The Prosecution has failed to demonstrate to the requisite standard the Accused’s alleged involvement in the transfer of W04733 to the Kukës Metal Factory.

44. TW4-04 stated that towards the “the beginning of June, or end of May” 1999,<sup>93</sup> he was transferred by [REDACTED] and [REDACTED], to the Kukës Metal Factory.<sup>94</sup> There was no suggestion in his evidence that the Accused was in any way involved in his arrest, transfer, or detention at Kukës.

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<sup>89</sup> 082892-TR-AT-ET Part 3 RED2, pp. 3, 5, 7, 11, 26, 27; SITF00018740-00018767 RED, pp. 2, 3; SITF00019824-00019876 RED2, pp. 13, 17; 106978-107020, pp. 31, 32; SPOE00185335-00185363 RED3, p. 3.

<sup>90</sup> 082892-TR-AT-ET Part 3 RED2, pp. 11, 12.

<sup>91</sup> 082892-TR-AT-ET Part 3 RED2, pp. 13, 16, 17.

<sup>92</sup> Indictment, para. 15; Prosecution Pre-Trial Brief, para. 31.

<sup>93</sup> SPOE00014669-00014751 RED, p. 22; 108826-TR-ET Part 1 RED, p. 4.; *See also* In 2019, Witness TW4-04, stated that it was in “June”, 064716-TR-ET Part 4 RED3, p. 2.

<sup>94</sup> SITF00013262-00013315 RED, p. 10; SITF00013316-00013335 RED, pp. 2, 5; SITF00015825-00015925 RED, p. 19; SPOE00014669-00014751 RED, pp. 19, 33; 064716-TR-ET Part 3 RED4, p. 6; 064716-TR-ET Part 4 RED3, pp. 16-18; 108826-TR-ET Part 1 RED, p. 11.

45. Apart from the evidence of W04733, no other evidence was presented linking the Accused with the transfer of any detained person to or from the Kukës Metal Factory.

*iii. Removal of Detainees' Travel Documents and Money*<sup>95</sup>

46. The only evidence presented that money and documents was taken from any person present at the Kukës Metal Factory concerned W01448. The latter stated that after arriving at the Kukës Metal Factory, Agim Ceku took his money from him, around 7,000 or 7,200 Deutschmark.<sup>96</sup> W01448 also stated that Bedri Halimi subsequently returned the entire sum of money taken.<sup>97</sup> He provided inconsistent evidence as to whether his passport was taken.<sup>98</sup> The Prosecution failed to demonstrate its allegation that the detainees were "relieved of their travel documents and money".<sup>99</sup> In any event, no evidence was presented linking the Accused with such conduct.

*iv. Alleged Acts of Cruel Treatment and Torture Enforcing and Continuing Arbitrary Detention*<sup>100</sup>

47. No credible evidence has been presented showing that the Accused participated in any acts enforcing and continuing arbitrary detention at the Kukës Metal Factory.<sup>101</sup> The evidence relied upon by the Prosecution does not show that the Accused was aware of a regime in which persons were deprived of their liberty

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<sup>95</sup> Indictment, para. 14; Prosecution Pre-Trial Brief, para. 34.

<sup>96</sup> SITF00013852-00013869 RED6, p. 5; SITF00013736-SITF00013800 RED5, p. 5; SITF00016221-00016285 RED4, p. 9. See also T. 31 May 2023 pp. 1555, 1556; SITF00013181-SITF00013189 RED3, p. 5; SPOE00013793-SPOE00013847 RED2, p. 18; 082892-TR-AT-ET Part 4 RED3, pp. 7, 8, 18.

<sup>97</sup> SITF00013852-00013869 RED6, pp. 5, 7; SITF00016221-00016285 RED4, p. 9. Notably, in 2009, Witness W01448 stated that some money was returned to him while he was still in Kukës and he received the rest later in Prizren by "Bedri Halili", SITF00013736-SITF00013800 RED5, p. 5.

<sup>98</sup> SITF00013852-00013869 RED6, p. 5. SITF00013736-SITF00013800 RED5, p. 5. SITF00016221-00016285 RED4, p. 9.

<sup>99</sup> Indictment, para. 14.

<sup>100</sup> Indictment, para. 16; See also Prosecution Pre-Trial Brief, paras. 30, 72, 73; T. 21 February 2023 pp. 527, 528, 531.

<sup>101</sup> Defence Pre-Trial Brief, para. 59.

arbitrarily and were detained arbitrarily at the Kukës Metal Factory. No evidence has been presented that the Accused had any knowledge that any person was arbitrarily detained at the Kukës Metal Factory or participated or was in any way involved in the unlawful arrest, transfer, arbitrary detention or continued arbitrary detention of any person at the Kukës Metal Factory. Mr Shala had no position of power or authority to arrest, detain and decide on the continued detention or release of any person and no control over any person who had the authority to arrest, detain or release at the Kukës Metal Factory or indeed elsewhere. No evidence has been presented that suggests that Mr Shala had any power over the decision to arrest, detain or release any detainee or otherwise any control, either directly or indirectly over these matters.

*v. Release*<sup>102</sup>

48. TW4-01 testified that he stayed at the Kukës Metal Factory until [REDACTED] June 1999 when he was [REDACTED], [REDACTED], [REDACTED] on [REDACTED] June 1999.<sup>103</sup> He testified that he was [REDACTED], and others.<sup>104</sup> TW4-01 stated that [REDACTED].<sup>105</sup> According to TW4-01, there were “[REDACTED]” [REDACTED], including “[REDACTED]”.<sup>106</sup> TW4-01 saw [REDACTED] in [REDACTED].<sup>107</sup>
49. W01448 stated that he stayed at the Kukës Metal Factory until 17 June 1999,<sup>108</sup> when he [REDACTED], [REDACTED], [REDACTED], [REDACTED],<sup>109</sup> [REDACTED].

<sup>102</sup> Prosecution Pre-Trial Brief, para. 41; *See also* T. 21 February 2023 pp. 524, 525.

<sup>103</sup> T. 30 May 2023 p. 1476; T. 31 May 2023 pp. 1539, 1540; T. 2 June 2023 p. 1697.

<sup>104</sup> T. 30 May 2023 p. 1440; T. 31 May 2023 pp. 1540-1542; T. 2 June 2023 p. 1694.

<sup>105</sup> T. 2 June 2023 pp. 1696-1698.

<sup>106</sup> T. 2 June 2023 pp. 1697, 1698.

<sup>107</sup> T. 31 May 2023 p. 1542.

<sup>108</sup> SITF00013852-00013869 RED6, p. 10; SITF00013736-SITF00013800 RED5, p. 21.

<sup>109</sup> Notably, Witness W01448 only names [REDACTED] as present for this [REDACTED] in 2003, SITF00013852-00013869 RED6, p. 10; SITF00013736-SITF00013800 RED5, pp. 21, 23.

According to W01448, [REDACTED]<sup>110</sup> or [REDACTED]<sup>111</sup> [REDACTED] from [REDACTED]. Further, W01448 provided inconsistent evidence as to who [REDACTED] Prizren, and referred to Alush, Sukri, and Atom Krasniqi,<sup>112</sup> Xhemshit Krasniqi, “Hoxha” and Agron Krasniqi.<sup>113</sup> In Prizren, he stated that [REDACTED] stayed at a [REDACTED]<sup>114</sup> until [REDACTED] released by KFOR on 18 June 1999.<sup>115</sup>

50. TW4-05 stated that he stayed at the Kukës Metal Factory for around three weeks,<sup>116</sup> until he was [REDACTED] together with [REDACTED] and two or three [REDACTED].<sup>117</sup> He gave conflicting accounts as to [REDACTED] released: according to the first [REDACTED] released by the [REDACTED] “[REDACTED]”,<sup>118</sup> while according to the second [REDACTED] told that [REDACTED] free to go once [REDACTED] in [REDACTED].<sup>119</sup>

51. W03881, a [REDACTED],<sup>120</sup> stated that [REDACTED] who were [REDACTED].<sup>121</sup> [REDACTED].<sup>122</sup>

52. The Prosecution did not present any evidence linking to or implicating the Accused in the transfer of any detainees from Kukës to Prizren or their release.

53. In their Pre-Trial Brief, the Prosecution alleges that W04733 was released by “[REDACTED]”.<sup>123</sup>

<sup>110</sup> SITF00013852-00013869 RED6, p. 10.

<sup>111</sup> SITF00013736-SITF00013800 RED5, p. 23; SITF00016140-00016220 RED3, p. 9.

<sup>112</sup> SITF00013852-00013869 RED6, p. 11.

<sup>113</sup> SITF00013736-SITF00013800 RED5, p. 21.

<sup>114</sup> SITF00013852-00013869 RED6, p. 11; SITF00013736-SITF00013800 RED5, p. 28; SITF00016140-00016220 RED3, p. 13.

<sup>115</sup> SITF00013852-00013869 RED6, p. 12; SITF00013736-SITF00013800 RED5, p. 29; SITF00016140-00016220 RED3, p. 9.

<sup>116</sup> SITF00372498-00372510 RED4, p. 3.

<sup>117</sup> SITF00372498-00372510 RED4, pp. 4, 5; SITF00013123-SITF00013153 RED, p. 13.

<sup>118</sup> SITF00372498-00372510 RED4, p. 5.

<sup>119</sup> SITF00013123-SITF00013153 RED, p. 13.

<sup>120</sup> 071136-TR-ET Part 1 RED, pp. 4, 5; 071136-TR-ET Part 2 RED, p. 11.

<sup>121</sup> 071136-TR-ET Part 2 RED, pp. 11, 12, 14, 16, 17, 23, 24; *See also* 071142-071313-ET Revised 1 RED, p. 39.

<sup>122</sup> DPS00125-DPS00141, pp. 1, 17.

<sup>123</sup> Prosecution Pre-Trial Brief, para. 31. *See also* Opening Statement, T. 21 February 2023 p. 525.

54. W04733 stated that he was released on 1 June 1999 from the Kukës Metal Factory.<sup>124</sup>

The witness provided conflicting and inconsistent evidence as to the circumstances of his release. In [REDACTED], W04733 provided elaborate evidence on an incident connected to his release for the first time. This was developed in 2018. He stated that around four to six days after arriving at the Kukës Metal Factory<sup>125</sup> (or three to four days before his release)<sup>126</sup> he was questioned by Sokol Dobruna and Xhemshit Krasniqi in the “lawyers office” on either the first<sup>127</sup> or ground floor<sup>128</sup>. In 2018, W04733 he stated that this was at Sokol Dobruna’s office.<sup>129</sup> Through the window, W04733 saw Hashim Thaci, Azem Syla, whom he recognized from the media,<sup>130</sup> arriving by car at the courtyard of the Kukës Metal Factory.<sup>131</sup> In 2018, for the first time W04733 stated that he had seen the Accused leave the premises through the gate a few minutes before the arrival of Thaci and Zyla and then returning with them.<sup>132</sup> His account on this matter is implausible as it was impossible to see from the window of the room where he was allegedly detained or questioned the gate of the Kukës Metal Factory. It is also not credible given that he mentioned this incident allegedly implicating the Accused for the first time in 2018 despite having ample opportunity to refer to it earlier. Notably, the Prosecution did not find this description credible and omitted any reference to it in the Indictment or its Pre-Trial Brief. In any event, W04733 stated that while “senior officers” including [REDACTED]<sup>133</sup> [REDACTED].<sup>134</sup> In 2018, W04733

<sup>124</sup> SITF00013181-SITF00013189 RED3, p. 7; SITF00018740-00018767 RED, pp. 6, 7; SITF00019824-00019876 RED2, p. 7; 106978-107020, p. 13; SPOE00013793-SPOE00013847 RED2, pp. 31, 34; *See also* 082892-TR-AT-ET Part 7, p. 6; T. 27 March 2023 p. 666; T. 28 March 2023 pp. 808, 809; T. 29 March 2023 p. 903.

<sup>125</sup> 082892-TR-AT-ET Part 6, pp. 16, 17.

<sup>126</sup> SPOE00013793-SPOE00013847 RED2, pp. 33, 34.

<sup>127</sup> SPOE00013793-SPOE00013847 RED2, pp. 33, 34.

<sup>128</sup> 082892-TR-AT-ET Part 6, pp. 7, 10, 17, 20.

<sup>129</sup> 082892-TR-AT-ET Part 6, p. 24.

<sup>130</sup> 082892-TR-AT-ET Part 6, pp. 8, 10.

<sup>131</sup> SPOE00013793-SPOE00013847 RED2, pp. 33-35.

<sup>132</sup> 082892-TR-AT-ET Part 6, pp. 7, 8, 18, 19; 082892-TR-AT-ET Part 9, p. 5.

<sup>133</sup> SPOE00013793-SPOE00013847 RED2, p. 35; 082892-TR-AT-ET Part 6, pp. 9, 20.

<sup>134</sup> SPOE00013793-SPOE00013847 RED2, pp. 33-35; 082892-TR-AT-ET Part 6, pp. 11-12, 19.

further stated that Hashim Thaci instructed “them” to ensure W04733’s safety,<sup>135</sup> yet, he also admitted that he could not hear their conversation.<sup>136</sup>

55. W04733 stated that after these three or four persons left, three new persons entered the room W04733 was questioned in.<sup>137</sup> In 2018, W04733 identified these three individuals as two [REDACTED], “[REDACTED]”, and [REDACTED], the [REDACTED] of [REDACTED].<sup>138</sup> The three [REDACTED] gave Sokol Dobruna and Xhemshit Krasniqi instructions regarding W04733,<sup>139</sup> after which W04733 was not mistreated until his release.<sup>140</sup> In 2018, W04733 stated that these three [REDACTED] had come to release him however, he did not want his family to see him injured.<sup>141</sup>

56. W04733 stated that on the day of his release, three<sup>142</sup> or four<sup>143</sup> [REDACTED] came and “picked [him] up” from the Kukës Metal Factory.<sup>144</sup> W04733’s evidence is inconsistent in who these officials were, describing them as members of the “[REDACTED]”,<sup>145</sup> “[REDACTED]”,<sup>146</sup> or [REDACTED] “[REDACTED]”.<sup>147</sup> [REDACTED] had taken W04733 from his detention room to the car.<sup>148</sup> These [REDACTED] had a disagreement with the KLA present and “demanded”

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<sup>135</sup> 082892-TR-AT-ET Part 6, pp. 9, 10; W04733 explained that he did not testify to this detail before as he wanted to keep them “confidential”, 082892-TR-AT-ET Part 6, p. 10.

<sup>136</sup> 082892-TR-AT-ET Part 6, p. 21.

<sup>137</sup> SPOE00013793-SPOE00013847 RED2, p. 36; *See also* in 2010, W04733 stated that three [REDACTED] arrived while he was being interrogated by Xhemshit Krasniqi and Azem Sylja in the “lawyers office”, SITF00018740-00018767 RED, p. 7.

<sup>138</sup> 082892-TR-AT-ET Part 6, pp. 13-15, 26.

<sup>139</sup> SPOE00013793-SPOE00013847 RED2, p. 36; 082892-TR-AT-ET Part 6, pp. 13-15.

<sup>140</sup> SPOE00013793-SPOE00013847 RED2, p. 37; 082892-TR-AT-ET Part 6, p. 15; 082892-TR-AT-ET Part 7, pp. 5, 6; *See also* SITF00018740-00018767 RED, p. 7.

<sup>141</sup> 082892-TR-AT-ET Part 6, pp. 15, 16.

<sup>142</sup> 082892-TR-AT-ET Part 7, p. 7.

<sup>143</sup> SITF00013181-SITF00013189 RED3, p. 7; *See also* 082892-TR-AT-ET Part 7, pp. 2, 8.

<sup>144</sup> U003-2283-U003-2289 RED2, p. 4; SITF00013181-SITF00013189 RED3, p. 7; 082892-TR-AT-ET Part 7, p. 7; *See also* 082892-TR-AT-ET Part 7, pp. 2, 8.

<sup>145</sup> SITF00013181-SITF00013189 RED3, p. 7; *See further* T. 27 March 2023 p. 668.

<sup>146</sup> U003-2283-U003-2289 RED2, p. 4.

<sup>147</sup> 082892-TR-AT-ET Part 6, pp. 13-15, 26.

<sup>148</sup> SPOE00013793-SPOE00013847 RED2, p. 37; 082892-TR-AT-ET Part 7, p. 12.



W04733's release.<sup>149</sup> In 2018, W04733 stated the persons having an argument with the [REDACTED] included Fatmir Limaj, Jakup Krasniqi, DW4-06, and Xhevat Ibraj in the courtyard.<sup>150</sup> In [REDACTED] only, W04733 [REDACTED] that he saw Sabit Geci in the yard as well,<sup>151</sup> whereas in [REDACTED] he mentioned Gani Geci.<sup>152</sup> In any event, he stated that subsequently the [REDACTED] took him directly to his family.<sup>153</sup>

57. The evidence of W04733 relied upon by the Prosecution taken at its highest suggests that the Accused was allegedly seen at the courtyard with some persons who allegedly intervened to secure W04733's release. Even on this account, which is implausible, there is no suggestion that Mr Shala had anything to do with W04733's release or indeed any connection to the persons who allegedly secured W04733's release. The Prosecution has entirely failed to demonstrate that the Accused had anything to do with W04733's release, or indeed with the decision to detain him.

58. TW4-11 testified that he stayed at the Kukës Metal Factory, until KFOR and NATO entered Kosovo, "Kosovo was freed", the doors of the Kukës Metal Factory were opened and he "just left".<sup>154</sup> In contrast, W01448 stated that TW4-11 was released before the others in Kukës, due to connections to KLA members.<sup>155</sup>

59. The Prosecution has failed to demonstrate that the Accused had any involvement in deciding or executing any decision related to the release of any of the detainees at the Kukës Metal Factory or any control or authority over any person who decided or executed any decision related to the release of any of the detainees at the Kukës Metal Factory.

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<sup>149</sup> U003-2283-U003-2289 RED2, p. 4; SITF00013181-SITF00013189 RED3, p. 7; *See also* 082892-TR-AT-ET Part 7, pp. 2, 8.

<sup>150</sup> 082892-TR-AT-ET Part 7, pp. 8, 11.

<sup>151</sup> 106978-107020, p. 14.

<sup>152</sup> SPOE00013793-SPOE00013847 RED2, p. 37.

<sup>153</sup> SITF00013181-SITF00013189 RED3, p. 7; *See also* 082892-TR-AT-ET Part 7, pp. 2, 13.

<sup>154</sup> T. 2 May 2023 p. 1199; T. 3 May 2023 pp. 1260, 1306.

<sup>155</sup> SITF00013736-SITF00013800 RED5, p. 22; SITF00016140-00016220 RED3, p. 3.

***b. No Role of the Accused in any detention Regime or Interrogations***

60. No evidence was presented that the Accused had any role in the alleged detention regime or any role in the decision-making as to who should be arrested and for how long. TW4-04 provided conflicting evidence as to how long he was detained at the Kukës Metal Factory, ranging from two days to a week.<sup>156</sup> He stated that during his detention he was questioned and asked to provide a written statement to a “judge”, identified by TW4-04 as W04848.<sup>157</sup> A few days later, TW4-04 was released by W04848,<sup>158</sup> and Xhemshit Krasniqi, who had told him he would “fight” for his release.<sup>159</sup>
61. W01448 provided inconsistent evidence as to the information he received concerning the grounds for his arrest. In 2003, he stated that upon his arrest in Durrës, he was questioned by Haki Drenica as he was suspected of not supporting the KLA. Haki Drenica informed W01448 that he would face trial in three to four days.<sup>160</sup> In 2009, W01448 stated that non-identified men told him on several occasions that he was going to participate in a trial or an interview since someone had reported him as not contributing financially to the KLA.<sup>161</sup> In contrast, W04733 stated that W01448 told him he was accused of “helping the Serbs”,<sup>162</sup> whereas TW4-01 testified that W01448 was accused of transporting goods from Serbia to Kosovo.<sup>163</sup>

<sup>156</sup> SITF00013262-00013315 RED, pp. 12, 13; SITF00015825-00015925 RED, p. 30; SPOE00014669-00014751 RED, pp. 21, 22, 29; 064716-TR-ET Part 1 RED3, p. 27; 108826-TR-ET Part 1 RED, pp. 7, 10; 107743-107743, para. 2.

<sup>157</sup> SITF00013262-00013315 RED, p. 13; SITF00015825-00015925 RED, p. 30; SPOE00014669-00014751 RED, p. 23; 064716-TR-ET Part 5 RED4, pp. 9, 10.

<sup>158</sup> SITF00372810-00372850, p. 2; SITF00013316-00013335 RED, p. 2; SITF00015825-00015925 RED, p. 30; SPOE00014669-00014751 RED, p. 23; 064716-TR-ET Part 1 RED3, pp. 17, 18; 064716-TR-ET Part 4 RED3, p. 16; 064716-TR-ET Part 5 RED4, p. 10; 108826-TR-ET Part 1 RED, pp. 7, 10.

<sup>159</sup> SPOE00014669-00014751 RED, pp. 30, 37; 064716-TR-ET Part 1 RED3, pp. 16, 19; 064716-TR-ET Part 4 RED3, pp. 16, 18; 064716-TR-ET Part 5 RED4, p. 10.

<sup>160</sup> SITF00013852-00013869 RED6, p. 4.

<sup>161</sup> SITF00013736-SITF00013800 RED5, pp. 3, 4.

<sup>162</sup> SITF00013181-SITF00013189 RED3, p. 5.

<sup>163</sup> T. 31 May 2023 pp. 1555, 1556.



62. TW4-05 stated that upon arrival at the Metal Factory, he was accused of possessing a gun and having expelled his village.<sup>164</sup> Further, he was accused of having friendly relations with “Serbs”.<sup>165</sup> Xhemshit Krasniqi, “someone who posed as a lawyer or a judge” and a third person questioned him for around 20 minutes.<sup>166</sup> Xhemshit was “very tough” and “threatening” during the questioning and asked TW4-05 to write a statement on the accusations against him.<sup>167</sup> TW4-05 stated he was questioned three times at night during his stay at the Kukës Metal Factory in “offices of the factory” by Xhemshit Krasniqi and Ise Balaj.<sup>168</sup>
63. TW4-04 stated that he was questioned and asked to provide a statement to a judge, identified as W04848.<sup>169</sup> TW4-04 was told in advance that he was taken to Kukës to “see the judge”, who according to TW4-04 was “making something official that had already been decided” by KLA commanders.<sup>170</sup> According to TW4-04, Xhemshit Krasniqi required a formal release order from a judge before he could release TW4-04, who was told he would receive a certificate to that end back in Kosovo.<sup>171</sup> However, the witness received a note from the judge, W04848, stating that he was “clean”.<sup>172</sup> The judge, W04848, told TW4-04 that he was “proven innocent”,<sup>173</sup> TW4-04 was released after appearing before the judge, W04848.<sup>174</sup> W04848 confirmed that he questioned TW4-04 and “ordered” his release.<sup>175</sup>
64. TW4-05 stated that he was questioned by “someone who posed as a lawyer or a judge”.<sup>176</sup>

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<sup>164</sup> SITF00013123-SITF00013153 RED, p. 5.

<sup>165</sup> SITF00372498-00372510 RED4, p. 3; SITF00013123-SITF00013153 RED, pp. 5, 8, 9.

<sup>166</sup> SITF00013123-SITF00013153 RED, pp. 5, 6.

<sup>167</sup> SITF00013123-SITF00013153 RED, pp. 5, 6, 9.

<sup>168</sup> SITF00013123-SITF00013153 RED, pp. 7-9.

<sup>169</sup> SITF00013262-00013315 RED, p. 13; SITF00015825-00015925 RED, p. 30; SPOE00014669-00014751 RED, p. 23; 064716-TR-ET Part 1 RED3, pp. 18, 19; 064716-TR-ET Part 5 RED4, pp. 9, 10.

<sup>170</sup> 064716-TR-ET Part 5 RED4, pp. 9, 10.

<sup>171</sup> 064716-TR-ET Part 4 RED3, p. 19.

<sup>172</sup> 064716-TR-ET Part 1 RED3, p. 17.

<sup>173</sup> SITF00015825-00015925 RED, p. 30.

<sup>174</sup> 064716-TR-ET Part 5 RED4, p. 10.

<sup>175</sup> SITF00014088-00014120 RED, pp. 13, 14; SITF00016908-00016964 RED, p. 9.

<sup>176</sup> SITF00013123-SITF00013153 RED, p. 5.

65. TW4-10 testified that people were “questioned” at the Kukës Metal Factory, however, he provided no details on the contents or nature of such questioning beyond noting that he was told that the questions were limited to whether the individual had been sent from Serbia to gather information or otherwise had ties to Serbia.<sup>177</sup> Further, TW4-10 testified that this questioning was done prior to an individual being allowed to join the KLA.<sup>178</sup> TW4-10 explicitly testified that he did not have knowledge of how the questioning was conducted,<sup>179</sup> but that the commanders, Xhemshit Krasniqi, Sali Saramati and Hafir Hoxha, knew what verification was and testified that the questioned individuals were simply referred to as “a suspicious person, or a suspect”.<sup>180</sup>
66. TW4-11 testified that he was questioned at the Kukës Metal Factory by W04848 who said he as a “judge or prosecutor”.<sup>181</sup>
67. W04848, a former prosecutor,<sup>182</sup> stated that he did not conduct interviews “with people accused of being collaborators with the Serbs”, as it was the routine that the person who brought an individual “in” would further work “on the case”, including in Kukës.<sup>183</sup> His responsibility were “problems between soldiers” or “disciplinary violations committed by soldiers”.<sup>184</sup> Yet, W04848 also confirmed that there were some cases where persons suspected of being collaborators were presented to him for “further discussion[s]” or “hearings”.<sup>185</sup> W04848 only interviewed two civilians, an “[REDACTED]”, and TW4-04.<sup>186</sup>
68. Three of the alleged detainees stated that they were questioned, and/or provided a statement to a person who acted as a judge or a prosecutor, who was identified

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<sup>177</sup> T. 1 May 2023 pp. 1053, 1054, 1057, 1064, 1067-1069.

<sup>178</sup> T. 1 May 2023 p. 1091.

<sup>179</sup> T. 1 May 2023 p. 1068 (“Look, the bigger guys, the commanders, know what the verification is. As far as I’m concerned, this is all I know and I don’t know anything else”).

<sup>180</sup> T. 1 May 2023 p. 1068.

<sup>181</sup> T. 3 May 2023 p. 1261.

<sup>182</sup> SITF00014088-00014120 RED, p. 2; SITF00016908-00016964 RED, p. 3.

<sup>183</sup> SITF00014088-00014120 RED, p. 9.

<sup>184</sup> SITF00014088-00014120 RED, pp. 7, 8; SITF00016908-00016964 RED, pp. 5-7.

<sup>185</sup> SITF00014088-00014120 RED, p. 13.

<sup>186</sup> SITF00016908-00016964 RED, p. 9; SITF00014088-00014120 RED, pp. 9, 13, 14.

by two of these witnesses as W04848. W04848 stated that he interviewed two civilians and was mainly responsible for disputes involving soldiers.

*c. Modes of Liability*

69. The Prosecution alleges that the Accused committed the crime of arbitrary detention as a physical perpetrator, or by being a participant in a JCE with the common purpose of, *inter alia*, the commission of the crime of arbitrary detention or as an aider and abettor.<sup>187</sup>

*i. Physical Perpetration*

70. Direct commission requires that the perpetrator physically carries out the objective elements of a crime, or omits to act when required to do so under the law,<sup>188</sup> and that he intended to commit the crime or acted in the awareness of the substantial likelihood that the crime would occur as a consequence of his or her conduct.<sup>189</sup>

71. The sole evidence directly involving the Accused in any form of detention regime was provided by W04733 who claimed that the Accused was present during his transfer from Romanat to Kukës and that he was briefly seen at the Kukës courtyard with persons who arrived and intervened to secure W04733's release. The evidence of W04733 is unreliable not only because it is implausible and inconsistent but also because it fails to meet the strict requirements for reliability of purported identification evidence. Even if accepted however it fails to demonstrate that Mr Shala had any involvement whatsoever with the arbitrary arrest or detention of any person allegedly detained at the Kukës Metal Factory.

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<sup>187</sup> Indictment, paras. 9, 13, 17, 30; *See also* Prosecution Pre-Trial Brief, paras. 71-73, 75, 78, 79; Opening Statements, T. 21 February 2023 p. 505.

<sup>188</sup> F00007CONFRED, Confidential Redacted Version of the Decision on the Confirmation of the Indictment against Pjetër Shala, 12 June 2020, para. 64. *See also* *Tadić* Appeal Judgment, para. 188; *Blagojević and Jokić* Judgment, para. 694; *Lukić* Judgment, para. 897; *Nahimana et al.* Appeal Judgment, para. 478; *Kayishema and Ruzindana* Appeal Judgment, para. 187.

<sup>189</sup> Confirmation Decision, para. 65. *See also* *Lukić* Judgment, para. 900; *Kayishema and Ruzindana* Appeal Judgment, para. 187.

72. The Prosecution has presented no evidence and has entirely failed to demonstrate that the Accused physically perpetrated the crime of arbitrary detention in the manner described in the Indictment. The Prosecution presented no evidence whatsoever suggesting that the Accused was aware that any person at Kukës had been deprived of their liberty without legal basis or without complying with basic procedural safeguards. The Prosecution failed altogether to show that the Accused knew that any person was detained at Kukës without being formally charged or without a determination that there were reasonable grounds to believe that security concerns made his or her detention absolutely necessary. The Prosecution provided no evidence demonstrating to the requisite standard that the Accused knew that any person at Kukës had been arrested without being informed of the reasons of such arrest, without being brought promptly before a judge or other competent authority, without being given an opportunity to challenge the lawfulness of the detention. The Prosecution has equally failed to present any evidence suggesting that the Accused was reckless as to whether any person at Kukës was detained without being afforded basic procedural rights.

73. The Prosecution presented no evidence suggesting that the Accused had any authority or control over any decision concerning the arrest, continued detention, release or conditions of detention of any person at the Kukës Metal Factory. In fact, the Prosecution presented no evidence showing that the Accused was aware that persons were detained at the Kukës Metal Factory. The Prosecution's case is that the Accused had no role in the hierarchy of the Brigade stationed at Kukës and was not consistently stationed there but was operating on an individual basis visiting the Kukës Metal Factory occasionally. The Prosecution failed to demonstrate that the Accused had knowledge that any person was detained at Kukës without a sufficient legal basis, without being charged or without there being reasonable grounds to suspect criminal conduct or that the security situation rendered their detention absolutely necessary or without being afforded basic procedural guarantees.

74. The Prosecution's allegation that the Accused enforced and continued the arbitrary detention of the detainees through the act of cruel treatment does not satisfy the elements that need to be met before commission of the crime of arbitrary detention through any of the pleaded forms of liability is demonstrated. As stated by the ICTY Appeals Chamber in *Delalic et al.*, to establish that the Accused committed arbitrary detention,

“something more must be proved than mere knowing ‘participation’ in a general system or operation pursuant to which civilians are confined. [...] Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers over the place of detention, accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable grounds for their detention exist, or that any such reasons have ceased to exist.”<sup>190</sup>

75. Furthermore, the Panel concluded in the *Mustafa* case that Mustafa had committed the crime of arbitrary detention due to his “position as the overall and only BIA commander to be of particular importance” and the fact that “by virtue of that position” Mr. Mustafa “had the responsibility to ensure that the detainees were afforded the basic guarantees”.<sup>191</sup> The Panel's findings are to be distinguished and cannot be applied in the present case.

76. No evidence was presented that the Accused held a position of responsibility or authority over any person's arrest, detention or release. In fact, Witness Mark Shala testified that the Accused was a “just simple soldier”.<sup>192</sup> The Prosecution failed to demonstrate how the allegations concerning cruel treatment committed against detainees demonstrate the objective elements of the crime of arbitrary detention.

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<sup>190</sup> *Delalic et al.*, Appeal Judgement, para. 342.

<sup>191</sup> *Mustafa* Judgement, para. 657.

<sup>192</sup> T. 23 October 2023 p. 2981.

*ii. JCE*

77. The Prosecution failed to provide any evidence showing that a group of persons, which included the Accused, had agreed to adopt a common criminal plan. The fact that some organisational structure existed at the Kukës Metal Factory cannot support an inference that any crime committed there must have been part of a common criminal plan. No evidence was tendered showing any direct or indirect communications between the alleged JCE members. No evidence has been presented that Mr Shala had “close association” or indeed any association with the other persons identified in the Indictment as allegedly participating in a JCE.
78. The evidence relied upon by the Prosecution showed that there was no unison but certain KLA members, other than the Accused, acted individually to settle personal grievances with the alleged detainees.
79. Several persons allegedly detained at the Kukës Metal Factory asserted that their detention was motivated by personal revenge taken against them by specifically Xhemshit Krasniqi, Sabit Geci and Shani Berisha. The evidence presented in this case portrays a clear line of personal revenge taken against persons detained at the Kukës Metal Factory, instead of actions pursuing any common purpose.
80. [REDACTED].<sup>193</sup> [REDACTED].<sup>194</sup> [REDACTED].<sup>195</sup> [REDACTED].<sup>196</sup>  
[REDACTED].<sup>197</sup> [REDACTED].<sup>198</sup> [REDACTED].<sup>199</sup> [REDACTED].<sup>200</sup>
81. The Prosecution failed to demonstrate that a group of persons had agreed to commit the crime of arbitrary detention.
82. The Prosecution failed to demonstrate that the Accused was a member of a JCE. No evidence has been presented that he had participated, either directly or

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<sup>193</sup> [REDACTED].

<sup>194</sup> [REDACTED].

<sup>195</sup> [REDACTED].

<sup>196</sup> [REDACTED].

<sup>197</sup> [REDACTED].

<sup>198</sup> [REDACTED].

<sup>199</sup> [REDACTED].

<sup>200</sup> [REDACTED].

indirectly, in the commission of the crime of arbitrary detention of any person. As analysed above, the only evidence on the Accused's direct participation in arbitrary detention emanates from W04733, whose evidence is manifestly unreliable, including on the identification of the Accused.

83. In addition, the evidence the Prosecution relied upon with regard to the alleged arrests discussed above, needs to be read in light of W04848's allegation that the KLA member who arrested a person would work on his or her case and be responsible for the said person.<sup>201</sup> Similarly, TW4-04 stated that KLA members were responsible for persons from their own region or municipality, "the people that they knew", which is why TW4-04 believed that Xhemshit Krasniqi was responsible for him.<sup>202</sup> No witness named the Accused as involved in their arrest or be in any manner "responsible" for them.

84. Moreover, several witnesses provided evidence as to who had authority or was in charge of the detainees and the detention building at the Kukës Metal Factory. No witness named the Accused as one of the persons who had authority over the detainees or was in any way in charge.

85. TW4-01 testified that Xhemshit Krasniqi and Sabit Geci were the "main ones"; while Xhemshit Krasniqi was "responsible for the prison" and "in charge [of] [...] the detainees and the room", when Sabit Geci was present "nobody could do anything or say anything because he was in charge".<sup>203</sup> W01448 stated that Kadri Veseli, Sabit Geci, Xhemshit Krasniqi and Bedri Halili were in charge of the detention facilities and headquarters, including Kukës,<sup>204</sup> and that Driton Krasniqi was in charge of the detention room.<sup>205</sup> In [REDACTED], W01448 confirmed this statement and [REDACTED] that Xhemshit Krasniqi was in charge of the of this

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<sup>201</sup> SITF00014088-00014120 RED, p. 9.

<sup>202</sup> SITF00013262-00013315 RED, p. 10; 064716-TR-ET Part 5 RED4, pp. 32, 33.

<sup>203</sup> T. 31 May 2023 pp. 1530, 1559.

<sup>204</sup> SITF00013736-SITF00013800 RED5, p. 28.

<sup>205</sup> SITF00013852-00013869 RED6, p. 7.



“camp”.<sup>206</sup> Similarly, TW4-05 stated that Sabit Geci and Xhemshit Krasniqi had authority over the detainees and that they were in charge of the whole headquarters.<sup>207</sup> W04733 stated that “Commander Hoxha”, whom he identified as Ruzhdi Saramati, was “the head, or the supervisor of the prison” where W04733 was detained.<sup>208</sup> No evidence was presented of any association let alone a close association of the Accused with these persons.

86. The Prosecution has failed to demonstrate that Mr Shala was under a duty to act in any specific manner towards persons allegedly detained at the Kukës Metal factory. No evidence whatsoever was presented that suggested that Mr Shala had any authority over the persons who allegedly committed the crimes of arbitrary detention charged in the Indictment. The Prosecution equally failed to demonstrate that Mr Shala made “a significant contribution” to the commission of the crime of arbitrary detention as charged in the Indictment.

87. To incur liability under JCE I, the Accused “must share the intent with the other participants to carry out the crimes forming part of the common purpose, including the special intent”.<sup>209</sup> As stressed by the ICTY Appeals Chamber a JCE is “not an open-ended concept that permits convictions based on guilt by association.”<sup>210</sup> The Prosecution must demonstrate that the accused had the intent to commit a crime, joined others to achieve this goal and made a significant contribution to the crime’s commission.<sup>211</sup> The Prosecution failed to demonstrate that Mr Shala intended to commit the crime of arbitrary detention charged in the Indictment in concert with others.

88. Moreover, as held by the Appeals Chamber in *Limaj et al.*, while the Accused’s “proximity to an area of criminal activity can be a factor from which an Accused’s

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<sup>206</sup> SITF00016140-00016220 RED3, p. 9.

<sup>207</sup> SITF00013123-SITF00013153 RED, pp. 12, 14.

<sup>208</sup> 082892-TR-AT-ET Part 6, p. 28.

<sup>209</sup> *Mustafa* Judgment, para. 741, referring to *Dorđević* Appeal Judgement, para. 468.

<sup>210</sup> *Brđanin* Appeal Judgement, para. 428.

<sup>211</sup> *Brđanin* Appeal Judgement, para. 431.



knowledge of the crimes can be inferred”, the “occasional presence” of Mr. Limaj was not enough to prove his knowledge of the existence of a prison or his participation in it.<sup>212</sup> Similarly in this case, the Accused’s presence at the Kukës Metal Factory was “occasional” at best, thus, knowledge of the commission of the crime of arbitrary detention cannot be inferred.

89. No evidence was presented that would establish beyond reasonable doubt that the Accused was aware of any detention regime at the Kukës Metal Factory. In addition, no evidence was presented that suggested that the Accused had the requisite *mens rea* to commit the crime of arbitrary detention. For the reasons stated above, intent to commit the crime of arbitrary detention as charged cannot be inferred given the evidence presented by the Prosecution.

90. The Prosecution failed to show that the Accused participated in a JCE aimed at committing the crime of arbitrary detention and significantly contributed to the realisation of this aim, as charged in the Indictment.

*iii. Aiding and Abetting*<sup>213</sup>

91. No credible evidence was presented showing that the Accused assisted, encouraged or provided support which had a substantial effect on the commission of the war crime of arbitrary detention by the alleged principal perpetrators. The only direct evidence the Prosecution presented that tried to present the Accused as involved in a detention regime at the Kukës Metal Factory was provided by W04733, an unavailable witness who stated that the Accused was present when he was transferred from the place he had been arrested (by persons other than the Accused) to the factory. The evidence relied upon by the Prosecution, even if accepted, does not prove that Mr Shala had any knowledge or participation in the alleged arrest or detention of W04733 or, generally, the alleged existence of a detention regime at Kukës. No reliable evidence was presented that the Accused

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<sup>212</sup> *Fatmir Limaj* Appeal Judgement, para. 218.

<sup>213</sup> Indictment, paras. 11, 12.

may have been aware of the probability that his alleged presence during the transfer of W04733 to Kukës could have contributed to the commission of the war crime of arbitrary detention. Importantly, the untested evidence of W04733 is manifestly unreliable, especially given his flawed identification of the Accused.

92. The Prosecution has not proved beyond reasonable doubt that the Accused can be held criminally liable under any of the pleaded modes of liability for the crime of arbitrary detention.

2. COUNTS 2 and 3: Lack of sufficient evidence as to Shala's involvement in in the alleged cruel treatment and torture of detainees described in the Indictment<sup>214</sup>

93. The war crime of cruel treatment requires an act or omission which caused serious mental or physical suffering or injury or constituted a serious attack on human dignity which is carried out with intent, or alternatively with knowledge that the act or omission was likely to cause serious mental or physical suffering or a serious attack on human dignity and the perpetrator was reckless as to whether such consequences would result from his act or omission.<sup>215</sup>

94. The war crime of torture requires the infliction upon another by an act or omission of severe pain or suffering, whether physical or mental, which is intentional and aimed at obtaining information or a confession, or at punishing, intimidating, coercing or discriminating against, on any ground, the victim or a third person.<sup>216</sup>

95. The Prosecutions' allegations purporting to implicate the Accused in cruel treatment and torture of detainees are based on the evidence of TW4-01, W04733

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<sup>214</sup> Indictment, paras. 11, 8-13.

<sup>215</sup> *Mladić* Judgment, para. 3233; *Haradinaj et al.* Appeal Judgment, para. 94; *Orić* Judgment, para. 351.

<sup>216</sup> *Haradinaj et al.*, Appeal Judgment, para. 290; *Kunarac et al.* Appeal Judgment, paras. 142, 153; *Limaj et al.* Judgment, paras 235, 239; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Gombo*, 15 June 2009, para. 292; ECCC, *Duch* Trial Judgment, paras. 354, 356.

and W01448. As shown in section above, the evidence of these witnesses cannot be accepted.

96. TW4-01's evidence is demonstrably untruthful and dishonest. It has all the characteristics of being fabricated with the intent to deceive.

97. W04733 gave an entirely inaccurate physical description of the Accused, admitted confusion as to who the Accused is,<sup>217</sup> his assertion of memory regarding the Accused allegedly being present at his transfer to Kukës was considerably delayed despite having had ample opportunities to implicate him earlier,<sup>218</sup> and it was demonstrated that his identification was influenced by suggestions from at least TW4-01.<sup>219</sup>

98. W04733's evidence was admitted in writing without Mr Shala having had any possibility to confront him and verify his assertions.<sup>220</sup> The Prosecution's reliance on the evidence of family members of W04733 to convey the information allegedly given to them by W04733 did not remedy the infringement of Mr Shala's right to confront an important witness against him, as these witnesses could only convey what they remembered that they were told by W04733. TW4-08, the son of W04733, testified that he did not know the Accused, and was only able to provide his name on the basis of information conveyed to him by his deceased father, certain unidentified "neighbours" and unidentified "other people".<sup>221</sup> In fact, his neighbours only "specifically mentioned the pseudonym "Ujku" as present at an unrelated event rather than identifying the Accused by name or linking him to the alleged mistreatment of the father at Kukës.<sup>222</sup> The pseudonym "Ujku" was quite common among Kosovo Albanians at the time.<sup>223</sup> TW4-08 further did not refer to

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<sup>217</sup> 082892-TR-AT-ET Part 1 RED3, p. 38.

<sup>218</sup> SITF00018740-00018767 RED, p. 2. The witness mentions the Accused participating in his transfer for the first time in 2010.

<sup>219</sup> T. 5 June 2023 pp. 1786, 1787 ("no one knew Sabit's name or other names at the time, including Pjetër Shala").

<sup>220</sup> KSC-BC-2020-07, F00611RED, Trial Judgment, 18 May 2022, para. 25.

<sup>221</sup> T. 27 March 2023 p. 649.

<sup>222</sup> T. 27 March 2023 p. 649.

<sup>223</sup> T. 2 October 2023 pp. 2754, 2755.

the Accused in the statement he provided to the [REDACTED] in 2010, and when asked by the Prosecution why he had not mentioned the Accused, he explained that there were other people “of interest” for the investigators and trials<sup>224</sup> – suggesting that he did not provide a truthful account but a tailored one focusing on the persons “of interest” for the investigators. His delayed assertion of remembering the Accused undermines the credibility of his account implicating the Accused. His manifestly false account that his father was tortured with electricity by the Accused at Kukës is not even supported by the evidence of his father himself who explicitly denied the use of electricity to torture him at Kukës.<sup>225</sup>

99. TW4-07, another son of W04733, could only place the Accused at the Kukës Metal Factory based on information received from his deceased father.<sup>226</sup> Just like his brother, TW4-07 did not mention the Accused in a prior statement.<sup>227</sup> His belated assertion of remembering the Accused not only undermines the credibility of his account but also suggests that his evidence may have been influenced by TW4-08 and information conveyed to him by unidentified others.<sup>228</sup> In a similar vein, TW4-09 could only refer to the alleged mistreatment of his father by the Accused at Kukës solely on the basis of information which was conveyed to him by others.<sup>229</sup> Importantly, in his view, his father did not know the Accused from his work as a police officer.<sup>230</sup>

100. The evidence of W04733 presented either in his untested statements or through information he and others gave to his family members which was conveyed to the

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<sup>224</sup> T. 27 March 2023 p. 651.

<sup>225</sup> SPOE00013793-SPOE00013847 RED2, pp. 15-16 “It started in Durres and the same torture continued in Kukës but in Kukës they didn't use electroshock.”

<sup>226</sup> T. 29 March 2023 pp. 907, 928.

<sup>227</sup> T. 29 March 2023 pp. 945-947.

<sup>228</sup> Witness TW4-07 never explained the link between “Commander Uki” and the Accused. T. 29 March 2023 p. 927.

<sup>229</sup> T. 30 March 2023 p. 981.

<sup>230</sup> T. 30 March 2023 p. 1007.

Panel over 20 years after the relevant events cannot be accepted and must be treated with the utmost caution.<sup>231</sup>

101. W01448's purported identification of the Accused is equally problematic and unreliable. In 2003, he stated that he was beaten by "Pjetër Shala aka 'Ujku', meaning the 'wolf' from Dushanovë village near Prizren".<sup>232</sup> Importantly however, W01448 explained that "[a]t the [material] time [he] [...] did not know him, but the [REDACTED] knew him because he was from Prizren".<sup>233</sup> Moreover, he stated that Commander Wolf "could be Pjeter Shala, but [he] [...] cannot remember" and reiterated that the "[REDACTED] knew him because they live in a [REDACTED]".<sup>234</sup> Similarly, he testified [REDACTED] that he "was beaten by Commander Ujku", whom he did not know but "those from [REDACTED] [...] knew".<sup>235</sup> He therefore confirmed that his identification of the Accused was in fact influenced by the suggestions of [REDACTED] and his account on this was actually supported by [REDACTED].<sup>236</sup> His identification was demonstrated to be entirely unreliable when in 2010, he purported to identify "Commander Wolf" or Pjetër Shala in a photo board used for identification as a man who in fact was not Pjetër Shala and bore no resemblance to the Accused.<sup>237</sup>

102. In light of the above, the evidence of W01448's purportedly identifying the Accused and implicating him in the charged crimes cannot be relied upon. The risks are amplified by the fact that his evidence is untested; as he is deceased the Panel only has before it his written statements and the Defence had no opportunity to cross-examine him and elicit evidence that would shed further light into why he thought that the man mistreating him was the Accused. As noted by the ICTY

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<sup>231</sup> *Lukić and Lukić* Appeal Judgement, paras. 387, 577; *Karera* Appeal Judgement, para. 39; *Popović et al.*, Appeal Judgement, para. 329; *Renzaho* Appeal Judgement, para. 534.

<sup>232</sup> SITF00013852-00013869 RED6, p. 6; SITF00013736-SITF00013800 RED5, pp. 8, 11; SITF00013833-00013847 RED4, p. 4.

<sup>233</sup> SITF00013736-SITF00013800 RED5, p. 8.

<sup>234</sup> SITF00013736-SITF00013800 RED5, p. 8.

<sup>235</sup> SITF00016221-00016285 RED4, pp. 11, 12.

<sup>236</sup> T. 5 June 2023 pp. 1786, 1787.

<sup>237</sup> SITF00374536-SITF00374541 RED, p. 1.

Appeals Chamber in *Lukić and Lukić*, “where the source of identification evidence is hearsay, a trial chamber must duly consider the relevant criteria in assessing the weight or the probative value to be accorded to this evidence”.<sup>238</sup> “[C]aution is warranted in the consideration of hearsay evidence, particularly where such evidence constitutes the primary basis for the identification of an [A]ccused”.<sup>239</sup> Moreover, as stated by the ICTY Appeals Chamber in *Popović et al.*, “identification hearsay evidence may, depending on the circumstances of the case, require other credible or reliable evidence in order to support a finding of fact beyond a reasonable doubt”.<sup>240</sup>

103. W01448’s identification of the Accused cannot be considered as corroborative of the evidence of any other witness, given that the source of the identification by W01448 is none other than [REDACTED]. Information stemming from [REDACTED] cannot be used to corroborate his own evidence.<sup>241</sup>

104. Considering Rule 140(4)(a), whereby a “conviction may not be based solely or to a decisive extent on [...] the statement of a witness whom the Defence had no opportunity to examine”,<sup>242</sup> the Defence underlines that any finding on the alleged involvement of the Accused in the alleged ill-treatment of detainees cannot be based solely or decisively on the evidence of [REDACTED], even if that is conveyed through other witnesses.

105. The evidence of TW4-01, W04733 and W01448 cannot be relied upon as any findings based on it will be unsafe.

***a. Deprivation of liberty without due process***

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<sup>238</sup> *Lukić and Lukić* Appeal Judgement, para. 387; *Karera* Appeal Judgement, para. 39 and references cited therein.

<sup>239</sup> *Lukić and Lukić* Appeal Judgement, para. 577.

<sup>240</sup> *Popović et al.*, Appeal Judgement, 2015, para. 329, referring to *Renzaho* Appeal Judgement, para. 534; See also *Lukić and Lukić* Appeal Judgement, paras. 387, 577.

<sup>241</sup> See for example ICC, *The Prosecutor v. Gbagbo and Blé Goudé*, Reasons of Judge Geoffrey Henderson, ICC-02/11-01/15-1263-AnxB-Red, 16 July 2019, para. 46 (“Corroboration or corroborative evidence [...] must come from a source independent of any evidence which is to be supported by it”).

<sup>242</sup> KSC Rules, Rule 140(4)(a).

106. For the reasons set out in section above, the Prosecution has failed to demonstrate that the Accused was involved in establishing or maintaining a regime of arbitrary detention or that he had any involvement in, or authority or power over the decisions concerning the deprivation of liberty of any person, or any knowledge, direct or indirect, that any person was deprived of his or her liberty without due process of law and without procedural safeguards.

*i. Detention conditions*

107. The Prosecution claims that the detainees at the Kukës Metal Factory were detained in poor conditions.<sup>243</sup> Witness Mark Shala, KLA logistics officer, explained that the accommodation conditions for KLA soldiers was poor: “[t]here was very little there in terms of beds. Mostly mattresses on the floor. So mattresses. And then there were sleeping bags as well for -- which the military personnel used on the ground. Perhaps some blankets, pillows.”<sup>244</sup> TW4-10, KLA member, testified, that, in the circumstances, the condition of the rooms people were kept in “really weren’t too bad. They were okay.”<sup>245</sup>

108. Evidence presented suggests that the sanitary facilities were poor for everyone at the Kukës Metal Factory.<sup>246</sup> Witness Mark Shala described that “a lot of” the toilets at the Kukës Metal Factory “didn't even have doors”, but they were just open, which is why they were “somewhat separate from the remainder of the facility”. He explained that “there were just some holes, basically, in there, and then some pieces of planks, and that's how it worked, as a makeshift one, without any water -- or the conditions were very bad”.<sup>247</sup>

109. There is conflicting evidence between witnesses as to the quantity of food that was available at the Kukës Metal Factory. Witness Mark Shala testified “[t]here

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<sup>243</sup> Prosecution Pre-Trial Brief, para. 44.

<sup>244</sup> T. 23 October 2023 p. 2958.

<sup>245</sup> T. 1 May 2023 p. 1056.

<sup>246</sup> T. 2 May 2023 pp. 1168, 1169.

<sup>247</sup> T. 23 October 2023 pp. 2959, 2960.



were cases when our soldiers who, for several days, had to deal with dry food, for instance. So they didn't really have the opportunity to have proper cooked food but eating out of tins or whatever there was in our warehouses.”<sup>248</sup> TW4-10 confirmed the conditions were difficult for the soldiers at Kukës. As he explained “in terms of food, we didn’t have much. There was not enough food. Sometimes they would bring food, sometimes they wouldn’t. The conditions were very bad.”<sup>249</sup> When asked about the conditions of the people allegedly detained in Building 1, he replied “the conditions were the same, both for those persons there and for us. And I meant the food. Because when we had something to eat, they would have something to eat. Some days we would have something to eat and some days we wouldn't.”<sup>250</sup> TW4-05 explained that the detainees were fed the same as the soldiers.<sup>251</sup> W04733 stated he was given fish “once a day or sometimes twice a day”.<sup>252</sup> TW4-01 also stated that Witness Naser Kocinaj (DW4-05) “used to bring the detainees a can of fish once a week”.<sup>253</sup>

110. Regarding medical care, the evidence shows that medical care was provided for at the Kukës Metal Factory. Many witnesses testified to the presence of at least one doctor.<sup>254</sup> W04733 stated that a doctor came every day to change his bandages.<sup>255</sup> W01448 stated he was [REDACTED] and had his blood pressure checked.<sup>256</sup> W04733 stated that [REDACTED] told him he was a doctor and [REDACTED].<sup>257</sup>

111. In contrast to the detention conditions assessed by the Panel in the *Mustafa* case,<sup>258</sup> the detainees at the Kukës Metal Factory did not live in “animal-like”

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<sup>248</sup> T. 25 October 2023 p. 3143.

<sup>249</sup> T. 2 May 2023 p. 1168.

<sup>250</sup> T. 2 May 2023 pp. 1168, 1169.

<sup>251</sup> SITF00372467-00372497 RED4, p.8.

<sup>252</sup> 106978-107020, p.13; 082892-TR-AT-ET Part 4 RED3, p. 21.

<sup>253</sup> 115958-115960, p. 2.

<sup>254</sup> T. 31 May 2023 p. 1529; SPOE00185335-00185363 RED3, p. 11.

<sup>255</sup> 082892-TR-AT-ET Part 6, p. 16.

<sup>256</sup> SITF00013736-SITF00013800 RED5, pp. 24, 25.

<sup>257</sup> SPOE00013793-SPOE00013847 RED2, p. 37.

<sup>258</sup> *Mustafa* Judgment, para. 526.



conditions. They had access to sanitary facilities, drinking water, and nutrition when available. They had access to medical care. They were not “urinated upon when asking for water”.<sup>259</sup> Their conditions were poor, but similar to those of the KLA soldiers. The Trial Panel in *Prlić* found that “[t]he conditions of confinement must be assessed in light of the circumstances at the time, taking into account the state of communications that might affect the supply of food, water and medication as well as the livelihood of the civilian population, particularly if there are shortages”.<sup>260</sup> According to a daily report from the Kukës team to the European Union Monitoring Mission Headquarters, dated 24 May 1999, there were supply issues in the city of Kukës, including shortages of water and electricity.<sup>261</sup>

ii. *Alleged physical and psychological mistreatment*

112. TW4-01 testified that he witnessed many beatings.<sup>262</sup> He added that they were “maltreated virtually every day. Every time the important people came, Xhemshit and Sabit and others came, they would come into the room and maltreat us. They would come with people, soldiers, and do this”.<sup>263</sup> TW4-01 does not mention the Accused when he describes “routine” beatings. There is no reference suggesting that the Accused was present during any of these alleged beating incidents. In fact, TW4-01 confirmed that he had not seen the Accused between the first alleged mistreatment incident at the office and [REDACTED].<sup>264</sup> TW4-01 also accepted that “[the Accused] certainly did not beat me 10 or 12 times”.<sup>265</sup>

113. TW4-11 testified he was beaten “twice during the day-time”.<sup>266</sup> TW4-11 made no reference to the Accused being present during any of the mistreatment incidents

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<sup>259</sup> *Mustafa* Judgment, para. 526.

<sup>260</sup> *Prlić* Judgement, 29 May 2013, para. 118; *Aleksovski* Judgement, paras. 213, 214; Commentary on Additional Protocol II, para. 4573; Compilation of Customary Law, p. 430; *Čelebići* Judgement, paras. 1099, 1100.

<sup>261</sup> SPOE00305297-00305298, p. 2.

<sup>262</sup> T. 31 May 2023 p. 1512.

<sup>263</sup> T. 31 May 2023 p. 1524.

<sup>264</sup> T. 31 May 2023 p. 1537.

<sup>265</sup> T. 6 June 2023, p. 1933.

<sup>266</sup> T. 2 May 2023 pp. 1229, 1230.

he described. In fact, when asked, he confirmed that he did not know the Accused.<sup>267</sup>

114. W01448 mentioned that “every night at midnight they came drunk and were beating us” talking about “[a]nyone coming, this Sabit Geci and Xhemshit Krasniqi, would just come sometimes, but not too often. The others, including the guy I mentioned in my statement to the [REDACTED]”.<sup>268</sup> W01448 also stated that he recognised Liman Geci amongst the KLA soldiers who mistreated the detainees at night at the Kukës Metal Factory.<sup>269</sup> W01448 made no reference to the Accused being present during any of the beating incidents he described.

115. W01448 testified that he saw TW4-05 being mistreated,<sup>270</sup> but TW4-05 testified that he never witnessed any torture and that he was treated well.<sup>271</sup>

116. TW4-04 stated he was never tortured in Kukës.<sup>272</sup>

117. TW4-02 was not present during the Indictment Period but only arrived after. He was not mistreated and did not witness any mistreatment.<sup>273</sup> TW4-02 was told by [REDACTED] that he was tortured, but TW4-02 did not see any injuries or signs of mistreatment.<sup>274</sup> TW4-02 made no reference to the Accused being present during any of the beating incidents he described.

118. TW4-10 testified that he did not see or hear “even a tiny voice” while at the Kukës Metal Factory<sup>275</sup> but only heard from soldiers about some mistreatments of people detained in building 1.<sup>276</sup>

119. In all the examples given by detainees related to psychological mistreatment, the Accused is only mentioned once by W04733 in his 2018 statement where he

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<sup>267</sup> T. 3 May 2023 p. 1271.

<sup>268</sup> SITF00013736-SITF00013767 RED4, p. 15.

<sup>269</sup> SITF00013736-SITF00013800 RED5, p. 19.

<sup>270</sup> SITF00013736-SITF00013767 RED4, p. 23; SITF00016140-00016220 RED3, p. 3.

<sup>271</sup> SITF00372498-00372510 RED4, pp. 4, 5.

<sup>272</sup> SITF00013336-00013347 RED, p. 4.

<sup>273</sup> 060664-TR-ET Part 2, p. 4; 060664-TR-ET Part 3, p. 26.

<sup>274</sup> 060664-TR-ET Part 4, p. 7.

<sup>275</sup> T. 1 May 2023 p. 1102.

<sup>276</sup> T. 1 May 2023 p. 1102; T. 2 May 2023 p. 1170.

alleged that the Accused said to him “[w]e’re going to kill you. We’re going to execute you.”<sup>277</sup> W04733 only mentioned this allegation for the first time 19 years after the events. W04733 also alleged that the Accused “made the three Roma brothers clean the toilets all night long”.<sup>278</sup> This allegation was never corroborated by any other evidence and it was made for the first time in 2018, 19 years after the relevant events. For the reasons set out in paragraphs above, his evidence cannot be relied upon. For the same reasons, and as developed in paragraphs above, W04733’s evidence presented through his family members cannot be relied upon.<sup>279</sup>

120. Therefore, the Prosecution’s case that the Accused ill-treated detainees is based on the unreliable evidence of the three witnesses discussed in paragraphs above: TW4-01, W04733, and W01448.

iii. *The Accused could not take measures to prevent or curtail violence, or ensure humane treatment*

121. The Prosecution alleges in its Indictment that the detainees at the Kukës Metal Factory were beaten on an almost daily basis, and that the Accused took no measures to prevent or curtail the violence, or to otherwise assist or ensure the humane treatment of the detainees.<sup>280</sup>

122. The Prosecution failed to provide any evidence whatsoever indicating that the Accused had any position of authority or power over any decision to detain or release anyone at Kukës, or any authority or power over the conditions of detention of any detainees. The Prosecution presented evidence to the effect that Xhemsit Krasniqi, Sabit Geci, Driton Krasniqi and Ruzdhi Saramati were in charge

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<sup>277</sup> 082892-TR-AT-ET Part 9 RED2, p. 5.

<sup>278</sup> 082892-TR-AT-ET Part 9 RED, pp. 5-7.

<sup>279</sup> T. 29 March 2023 pp. 903, 929–933; T. 28 March 2023 pp. 809, 810; T. 30 March 2023 pp. 978, 979; T. 27 March 2023 p. 668.

<sup>280</sup> Indictment, para. 20.

of the detention facilities but failed to provide any evidence suggesting that the Accused had any links, relationship, hierarchical or otherwise with such persons.<sup>281</sup>

123. Specifically, TW4-01 testified that Xhemshit Krasniqi and Sabit Geci were the “main” persons at Kukës”; while Xhemshit Krasniqi was “responsible for the prison” and “in charge [of] [...] the detainees and the room”, when Sabit Geci was present “nobody could do anything or say anything because he was in charge”.<sup>282</sup>

124. When asked to name the commanders at Kukës Metal Factory, TW4-10 made no reference to the Accused, but to “Xhemshit Krasniqi, Sali Saramati, [and] Hafir Hoxha”.<sup>283</sup>

125. Similarly, TW4-01 did not mention the Accused when explaining the regular mistreatment: “[e]very time the important people came, Xhemshit and Sabit and others came, they would come into the room and maltreat us. They would come with people, soldiers, and do this.”<sup>284</sup>

126. W01448 stated that Kadri Veseli, Sabit Geci, Xhemshit Krasniqi and Bedri Halili were in charge of the detention facilities and headquarters, including the ones at Kukës.<sup>285</sup> In [REDACTED], W01448 confirmed this statement and testified that Xhemshit Krasniqi was in charge of this “camp”.<sup>286</sup> Similarly, TW4-05 stated that Sabit Geci and Xhemshit Krasniqi had authority over the detainees and that they were in charge of the entire headquarters.<sup>287</sup> W04733 stated that “Commander Hoxha”, who he identified as Ruzhdi Saramati, was “the head, or the supervisor of the prison” where W04733 was detained.<sup>288</sup>

127. W04848 stated that the KLA member who arrested a person would work on his or her case and be responsible for the said person.<sup>289</sup> Similarly, TW4-04 stated that

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<sup>281</sup> T. 31 May p. 1559.

<sup>282</sup> T. 31 May 2023 pp. 1530, 1559.

<sup>283</sup> T. 1 May 2023 p. 1068. *See further* T. 1 May 2023 p. 1104.

<sup>284</sup> T. 31 May 2023 p. 1524.

<sup>285</sup> SITF00013736-SITF00013800 RED5, p. 28.

<sup>286</sup> SITF00016140-00016220 RED3, p. 9.

<sup>287</sup> SITF00013123-SITF00013153 RED, pp. 12, 14.

<sup>288</sup> 082892-TR-AT-ET Part 6, p. 28.

<sup>289</sup> SITF00014088-00014120 RED, p. 9.

KLA members were responsible for persons from their own region or municipality, “the people that they knew”, which is why TW4-04 believes that Xhemshit Krasniqi was responsible for him.<sup>290</sup>

128. No witness named the Accused as one of the persons who had authority over the detainees. Moreover, several of the Prosecution witnesses who were allegedly detained at the Factory provided evidence that they did not know anyone with the name of the Accused at the material time. Witnesses TW4-02, TW4-04, TW4-11 who were all at the factory during the Indictment Period testified that they did not know any person called Pjetër Shala.<sup>291</sup> TW4-05 did not provide any evidence implicating the Accused. In fact, only TW4-01, W04733 and W01448 referred to the Accused in relation to their detention at the Kukës Metal Factory and in none of these references is there a suggestion that the Accused had any power over their arrest, detention, conditions of detention or release.

129. No evidence was provided suggesting that the Accused had any position of authority at the Kukës Metal Factory which would have enabled him to exercise control, or made any decision concerning any person detained at the Kukës Metal Factory, including any decision aimed at preventing violence or protecting them.

***b. Alleged ill-treatment of 6 detainees on 20 May 1999*<sup>292</sup>**

130. The Prosecution failed to demonstrate that on or around 20 May 1999 the Accused was present and/or participated in the alleged assaults of TW4-01, [REDACTED], W04733, W01448 and two female detainees.

***i. Alleged ill-treatment of the [REDACTED]***

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<sup>290</sup> SITF00013262-00013315 RED, p. 10; 064716-TR-ET Part 5 RED4, pp. 32, 33.

<sup>291</sup> 060664-TR-ET Part 5 RED4, p. 13; 064716-TR-ET Part 5 RED4, p. 22; 107743-107743, para. 1; T. 3 May 2023 p. 1271.

<sup>292</sup> Indictment, paras. 21, 26.

131. TW4-01 alleged that after W04733 was removed from the room, he was ill-treated and that Mr Shala was the first to hit him.<sup>293</sup> He claimed that he was then taken outside and [REDACTED] was taken into that same room where he was beaten.<sup>294</sup>
132. W04733 provided conflicting evidence on the beating of the [REDACTED]. In 2009, he alleged that “[t]hey both were tortured and I was present. They were present when I was tortured.”<sup>295</sup> In 2010, he stated that while they saw him being beaten, W04733 did not see them being beaten,<sup>296</sup> and in 2018, he stated that while he was being taken out of the room, he saw the beating of [REDACTED].<sup>297</sup>
133. W01448 confirmed that he saw [REDACTED] being beaten.<sup>298</sup> He identified Xhemshit Krasniqi and Sabit Geci as the ones giving orders and added that “Xhemshit was beating [REDACTED]”.<sup>299</sup> Only when asked about ‘Wolf’ he stated that he was present but did not identify him as one of the perpetrators of the ill-treatment of [REDACTED]. In another statement, he confirmed that [REDACTED] were ill-treated by “mainly Xhemshit”.<sup>300</sup>
134. Only TW4-01 identified the Accused as one of the persons who were beating him and [REDACTED]. His evidence must be rejected in its entirety and cannot be accepted without independent and reliable corroboration.

*ii. Alleged ill-treatment of W04733*

135. The Prosecution alleged in the Indictment that the Accused had ordered [REDACTED] to hit W04733.<sup>301</sup> However, the Prosecution abandoned this position

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<sup>293</sup> T. 30 May 2023 p. 1457.

<sup>294</sup> T. 30 May 2023 p. 1458.

<sup>295</sup> SPOE00185335-00185363 RED3, pp. 7, 8.

<sup>296</sup> SITF00018740-00018767 RED, p. 6.

<sup>297</sup> 082892-TR-AT-ET Part 5 RED2, pp. 12, 13.

<sup>298</sup> SITF00013852-00013869 RED6, p. 6.

<sup>299</sup> SITF00013736-SITF00013767 RED4, pp. 8, 10. “And I came to know Geci was the commander there. Yes, Geci was the commander” [...] “The commander was Sabit Geci; also Xhemshit Krasniqi was high ranked there. They were giving orders.”

<sup>300</sup> SITF00016221-00016285 RED4, p. 12.

<sup>301</sup> Indictment, para. 21.

in its Pre-Trial Brief where it stated that, in fact, this was a request made by Sabit Geci and not the Accused. [REDACTED].<sup>302</sup>

136. W04733 stated that the Accused beat him with a rubber baton and baseball bat on the head, on the chest, on the back as well and on the soles of his feet.<sup>303</sup> W04733's flawed identification of the Accused was repeated before this Panel by his family members. TW4-08 testified that his father, W04733, had told him that the Accused mistreated him using electricity, baseball bats, axe handles, and beatings.<sup>304</sup> When confronted with his father's prior statement noting that electroshock was not used in Kukës, TW4-08 was adamant that "they [did use] electroshocks there", and proceeded to inflate the evidence he had previously provided.<sup>305</sup> TW4-06, the spouse of W04733, first identified Sabit Geci and Xhemshit Krasniqi as the individuals who mistreated her husband. She then referred to the Accused.<sup>306</sup> Although she independently named both Sabit Geci and Xhemshit Krasniqi in her statement to the SPO, she did not refer the Accused as a perpetrator in Kukës until an investigator suggested his name to her.<sup>307</sup> The fact remains that W04733's family members only conveyed what they understood and remembered from what W04733 shared with them 24 years ago and what they learnt since.

137. No reliable and independently corroborated evidence was presented that demonstrates to the requisite standard that the Accused mistreated W04733.

*iii. Alleged ill-treatment of W01448*

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<sup>302</sup> [REDACTED].

<sup>303</sup> 082892-TR-AT-ET Part 5 RED, pp. 9-12; SITF00018740-00018767 RED, p. 4; 106978-107020, pp. 3, 5.

<sup>304</sup> T. 27 March 2023 p. 648.

<sup>305</sup> T. 28 March 2023 p. 752.

<sup>306</sup> T. 28 March 2023 pp. 817-818.

<sup>307</sup> T. 29 March 2023 pp. 859-863 ("Q. Now, ma'am, do you -- do you remember at the beginning, we talked about when the KLA came to your house in May 1998? A. Yes. Q. And you mentioned a man by the name Pjeter SHALA? A. Yes. Q. Did your husband ever mention Pjeter SHALA to you in relation to 25 the events that happened in Kukes? A. Yes, yes. Yes, he was there.").



138. W01448 named the Accused as one of the persons who beat him.<sup>308</sup> However, just like W04733, W01448 accepted that he did not know the identity of the person he referred to as Commander Wolf and subsequently identified as Pjetër Shala; he accepts that he only provided his name as others told him that the person mistreating him was Pjetër Shala.<sup>309</sup> W01448 was never requested to verify his identification, for instance by identifying the Accused on a photo board. His identification cannot be relied upon as accurate given that it relies on information given by others and specifically [REDACTED] who has fabricated evidence with a clear intent to deceive. In any event, his untested evidence cannot be accepted without corroboration. [REDACTED] made no reference to W01448 as present in the incident of 20 May 1999 and therefore his evidence does not corroborate that of W01448.

*iv. Alleged ill-treatment of two female detainees<sup>310</sup>*

139. No evidence has been presented on the alleged presence and participation of the Accused during the alleged ill-treatment of two female detainees.

*v. Alleged interrogation of TW4-11 and TW4-05<sup>311</sup>*

140. TW4-11 testified that he did not know the Accused.<sup>312</sup> TW4-05 stated that he was questioned three times by Xhemshit Krasniqi and Ise Balaj and that once Sabit Geci was present.<sup>313</sup> TW4-05 identified those who conducted these questionings and the Accused was not one of them. The Prosecution failed to demonstrate that

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<sup>308</sup> SITF00013852-00013869 RED6, p.6; SITF00013736-SITF00013800 RED5, p. 11; SITF00016221-00016285 RED4, p. 11; SITF00018740-00018767 RED, p. 5.

<sup>309</sup> SITF00016221-00016285 RED4, p. 12.

<sup>310</sup> Indictment, para. 21.

<sup>311</sup> Prosecution Pre-Trial Brief, para. 70.

<sup>312</sup> T. 3 May 2023 p. 1271.

<sup>313</sup> SITF00013123-SITF00013153 RED, p. 7.

the Accused was in any way involved in the alleged interrogation of TW4-05 and TW4-11.

*vi. Alleged ill-treatment prior to or during [REDACTED]*

141. No reliable evidence was presented showing that the Accused was present either prior to or during [REDACTED]. In fact, the Prosecution accepted that he was not present during this incident. [REDACTED].<sup>314</sup> [REDACTED]. [REDACTED]. [REDACTED].

*iv. Alleged ill-treatment during and after [REDACTED]*

142. The Defence reiterates that the Accused was not present during this alleged incident. [REDACTED].<sup>315</sup> [REDACTED].

***c. Modes of liability***

*i. Physical Perpetration*

143. As described above, the Prosecution failed to demonstrate that the Accused was present during the events and alleged incidents of ill-treatment described in the Indictment. The Prosecution's allegations implicating the Accused are based on the evidence of three witnesses TW4-01, W04733 and W01448. Their evidence is unreliable and cannot be accepted. The Prosecution has failed to demonstrate to the requisite standard that on or around 20 May, [REDACTED] and 4 of June 1999 the Accused physically ill-treated or tortured TW4-01, [REDACTED], W04733, W01448 and two female detainees, or that he participated in routine mistreatments of other detainees.

*ii. JCE*

144. The Prosecution must demonstrate that the Accused had the intent to commit a crime, joined others to achieve this goal and made a significant contribution to

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<sup>314</sup> [REDACTED].

<sup>315</sup> [REDACTED].

the crime's commission.<sup>316</sup> No evidence has been presented showing that Mr Shala had agreed to adopt any criminal plan together with others, including a criminal plan aiming at the commission of cruel treatment and/or torture. No evidence whatsoever has been presented showing that Mr Shala had any association, communication, or indeed any links with the persons identified as members in the alleged JCE.

145. As set out above, the Prosecution failed to demonstrate that the Accused significantly contributed to achieving the alleged common purpose of the joint criminal enterprise pleaded in the Indictment. No reliable and credible evidence has been presented showing that he knowingly contributed and significantly to an alleged common purpose to ill-treat and torture detainees at Kukës.

*iii. Aiding and abetting*

146. No reliable evidence was presented showing that the Accused assisted, encouraged or provided support which had a substantial effect on the commission of the war crime of cruel treatment or torture by the alleged principal perpetrators.

3. COUNT 4: Lack of sufficient evidence as to the Accused's involvement in the murder of [REDACTED]

147. The war crime of murder requires an act or omission resulting in the death of a person and that such act or omission was committed with intent to kill the victim or to wilfully cause serious bodily harm which the perpetrator should have reasonably have known that might lead to death.<sup>317</sup>

*a. [REDACTED]*

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<sup>316</sup> *Brđanin* Appeal Judgement, para. 431.

<sup>317</sup> *Mladić* Judgment, para. 3050; *Kvočka et al.* Appeal Judgement, paras. 261, 270-271; *Setako* Appeal Judgement, para. 257; ECCC, *Duch* Trial Judgment, para. 333.

148. The Prosecution alleged that on or about [REDACTED] June 1999, certain KLA members, excluding Mr Shala, [REDACTED].<sup>318</sup> It maintained that subsequently [REDACTED].<sup>319</sup>
149. [REDACTED].<sup>320</sup> [REDACTED].<sup>321</sup> [REDACTED]. No evidence was presented that the Accused was in any way involved in this incident.
150. [REDACTED].<sup>322</sup> [REDACTED].<sup>323</sup> [REDACTED].<sup>324</sup> [REDACTED].<sup>325</sup> [REDACTED].<sup>326</sup>
151. [REDACTED].<sup>327</sup> [REDACTED].<sup>328</sup> [REDACTED].
152. [REDACTED].<sup>329</sup> [REDACTED].<sup>330</sup> [REDACTED]. [REDACTED]. [REDACTED].
153. [REDACTED].<sup>331</sup> [REDACTED]. In any event, the Prosecution failed to demonstrate any link between the Accused and this incident.

***b. The shooting incident leading to [REDACTED] death***

*i. Alleged presence of KLA members, including Sabit Geci*

154. The Prosecution alleged that “[o]n or about 4 June 1999, certain KLA members, including [the Accused] severely beat [REDACTED]”.<sup>332</sup> In its Pre-Trial Brief, the

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<sup>318</sup> Indictment, paras. 22, 28 (emphasis added); T. 21 February 2023 p. 524; Prosecution Pre-Trial Brief, para. 57.

<sup>319</sup> Prosecution Pre-Trial Brief, para. 57.

<sup>320</sup> [REDACTED]; [REDACTED].

<sup>321</sup> [REDACTED].

<sup>322</sup> [REDACTED].

<sup>323</sup> [REDACTED]; *See also* [REDACTED].

<sup>324</sup> [REDACTED].

<sup>325</sup> [REDACTED].

<sup>326</sup> [REDACTED].

<sup>327</sup> [REDACTED]; [REDACTED].

<sup>328</sup> [REDACTED].

<sup>329</sup> [REDACTED].

<sup>330</sup> [REDACTED].

<sup>331</sup> [REDACTED].

<sup>332</sup> Indictment, para. 28; *See also* T. 21 February 2023 p. 524.

Prosecution further alleged that the Accused and other KLA members ill-treated [REDACTED], at times using various instruments.<sup>333</sup>

155. [REDACTED], after [REDACTED] was returned to the detention room, Xhemshit Krasniqi and another unidentified person came to [REDACTED] room and Xhemshit said “[REDACTED]”.<sup>334</sup> The evidence of [REDACTED] on this matter is not corroborated by any other witness. In light of the evident concerns as to [REDACTED]’s credibility, the Panel cannot accept [REDACTED]’s uncorroborated evidence on this matter.

156. [REDACTED].<sup>335</sup> [REDACTED].<sup>336</sup> [REDACTED].<sup>337</sup> [REDACTED].

157. [REDACTED],<sup>338</sup> [REDACTED],<sup>339</sup> [REDACTED].<sup>340</sup> [REDACTED].<sup>341</sup>  
[REDACTED].<sup>342</sup>

158. W01448 stated in [REDACTED] that he did not see Sabit Geci from 3 to 5 June 1999.<sup>343</sup> Furthermore, W04733 stated that after he was released on 1 June 1999,<sup>344</sup> Sabit Geci had a car accident.<sup>345</sup> W01448 provided inconsistent evidence as to who took [REDACTED], stating first that [REDACTED] taken by Xhemshit Krasniqi,<sup>346</sup> and in subsequent statements that [REDACTED] was taken out of [REDACTED] room by *Liman Geci*.<sup>347</sup>

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<sup>333</sup> Prosecution Pre-Trial Brief, para. 59.

<sup>334</sup> [REDACTED].

<sup>335</sup> [REDACTED].

<sup>336</sup> [REDACTED].

<sup>337</sup> [REDACTED].

<sup>338</sup> [REDACTED]; SITF00016019-00016023.

<sup>339</sup> [REDACTED].

<sup>340</sup> [REDACTED].

<sup>341</sup> [REDACTED].

<sup>342</sup> [REDACTED].

<sup>343</sup> SITF00016140-00016220 RED3, p. 19.

<sup>344</sup> SITF00013181-SITF00013189 RED3, p. 7; SITF00018740-00018767 RED, pp. 6, 7; SITF00019824-00019876 RED2, p. 7; 106978-107020, p. 13; SPOE00013793-SPOE00013847 RED2, pp. 31, 34; *See also* 082892-TR-AT-ET Part 7, p. 6; T. 27 March 2023 p. 666; T. 28 March 2023 pp. 808, 809; T. 29 March 2023 p. 903.

<sup>345</sup> 082892-TR-AT-ET Part 8 RED2, p. 10.

<sup>346</sup> SITF00013833-00013847 RED4, p. 5.

<sup>347</sup> SITF00013848-00013851 RED2, p. 1; SITF00013736-SITF00013800 RED5, p. 20.

159. [REDACTED]'s allegation that the [REDACTED] were forged is unsubstantiated and undermined by the evidence of W01448. Moreover, [REDACTED]. [REDACTED] was therefore unable to establish whether Sabit Geci was present at the time of shooting.<sup>348</sup> [REDACTED]'s untruthful evidence on both the alleged presence of Geci as well as that the [REDACTED] were forged was [REDACTED] unreliable.

ii. *The alleged presence of the Accused during the shooting*

160. The Prosecution maintained on the one hand that on 4 June 1999 "KLA members, other than [the Accused], shot and wounded [REDACTED]",<sup>349</sup> and that the Accused was "present throughout and participated in the beatings" on the other.<sup>350</sup>

161. [REDACTED] that the Accused was present during the shooting incident.<sup>351</sup> In a prior statement he gave in [REDACTED] however he listed those present referring to "[REDACTED]" without making any reference to the Accused.<sup>352</sup> It is recalled that [REDACTED] the Accused and the fact that he did not refer to him cannot be explained as anything but a deliberate omission. [REDACTED] that he did not know "[REDACTED]", and that he always named the Accused as present during this incident.<sup>353</sup> A plain reading of his prior statement suffices to show that he was not telling the truth before the Panel on this crucial issue.<sup>354</sup>

162. This was not the only time that [REDACTED] did not refer to the Accused when listing those present during the shooting incident. Just like in his statement of [REDACTED] in [REDACTED] he identified specifically "[REDACTED]"<sup>355</sup> as

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<sup>348</sup> [REDACTED].

<sup>349</sup> Indictment, para. 23; *See also* [REDACTED].

<sup>350</sup> Indictment, para. 23.

<sup>351</sup> [REDACTED].

<sup>352</sup> [REDACTED].

<sup>353</sup> [REDACTED].

<sup>354</sup> [REDACTED]. [REDACTED]. *See* [REDACTED]; [REDACTED].

<sup>355</sup> [REDACTED].

present during the shooting incident and did not refer to the Accused.<sup>356</sup> This time he specifically added that “[REDACTED]”.<sup>357</sup> He therefore explicitly excluded the presence of the Accused, for the second time. When confronted with this prior statement [REDACTED] he gave a poor explanation that makes his intent to deceive obvious. Specifically, he alleged that “[REDACTED]”, and that “[REDACTED]”.<sup>358</sup>

163. The uncorroborated account of [REDACTED] as to the presence of the Accused at the shooting incident is further undermined by [REDACTED], [REDACTED].<sup>359</sup> [REDACTED] “[REDACTED]”.<sup>360</sup> [REDACTED] “[REDACTED]” [REDACTED] “[REDACTED]” [REDACTED] “[REDACTED]”.<sup>361</sup>

164. [REDACTED] adjusted his evidence to implicate the Accused as present during the alleged ill-treatment that led to the death of [REDACTED]. His evidence on this point, which is not corroborated, was deliberately fabricated and must be rejected. Any findings based on it will be entirely unsafe.

*iii. Inadequate medical treatment*

165. According to the Indictment, [REDACTED] “received inadequate medical treatment”.<sup>362</sup> In its Opening Statement, the Prosecution alleges that [REDACTED] “was only provided very basic medical care”.<sup>363</sup>

166. [REDACTED] shot and returned to “[REDACTED]” the doctor was called.<sup>364</sup> He added that “[REDACTED]” who “[REDACTED]” and “[REDACTED]”.<sup>365</sup>

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<sup>356</sup> [REDACTED].

<sup>357</sup> [REDACTED].

<sup>358</sup> [REDACTED].

<sup>359</sup> [REDACTED]; [REDACTED].

<sup>360</sup> [REDACTED].

<sup>361</sup> [REDACTED].

<sup>362</sup> Indictment, para. 28; Prosecution Pre-Trial Brief, para. 61.

<sup>363</sup> T. 21 February 2023 p. 524.

<sup>364</sup> [REDACTED]; [REDACTED].

<sup>365</sup> [REDACTED].



[REDACTED] what medical intervention the doctor performed to assist [REDACTED], [REDACTED] “[REDACTED]”.<sup>366</sup>

167. TW4-11 also confirmed that “[REDACTED]”, after [REDACTED] had been returned to their room.<sup>367</sup> According to TW4-11, the “[REDACTED]”, as he was in the corner of the room and the doctor was “[REDACTED]”.<sup>368</sup> He clarified that he was not able to “understand” if [REDACTED] “[REDACTED]” pursuant to the doctor’s intervention.<sup>369</sup> TW4-11 testified that he recognized the doctor as such, due to his “white coat” and because he was treating the wound.<sup>370</sup>

168. Witness Gasior further testified that the body allegedly belonging to [REDACTED] had a gypsum plaster applied “on the right lower limb”,<sup>371</sup> as documented in his autopsy report.<sup>372</sup> Further, Witness Gasior testified that the exhumed body had a “catheter, together with a container, a bag, [...] for urine collection”,<sup>373</sup> as also documented in his autopsy report.<sup>374</sup> Witness Horne confirmed that the autopsy report did not refer to the presence of bullet holes in the plaster cast, which confirms that the plaster must have been added after the incident.<sup>375</sup>

169. From the above, it appears that medical treatment was provided to [REDACTED], after he had been shot. The Prosecution’s case is that one of the factors that led to [REDACTED] death was the insufficient medical treatment he was provided with after he was shot. No position is taken as to the adequacy of the medical treatment given. What needs to be stressed is that the Accused was in no position to provide, authorize, instruct, or allow the provision of medical

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<sup>366</sup> [REDACTED].

<sup>367</sup> T. 3 May 2023 pp. 1253, 1257.

<sup>368</sup> T. 3 May 2023 p. 1257.

<sup>369</sup> T. 3 May 2023 p. 1257.

<sup>370</sup> T. 3 May 2023 p. 1346.

<sup>371</sup> T. 26 June 2023 pp. 2075, 2076.

<sup>372</sup> T. 26 June 2023 pp. 2076-2078; T. 3 July 2023 p. 2164; 031049-031095 RED2, pp. 9, 14, 15; Exhibit REG00959-REG00959.

<sup>373</sup> T. 3 July 2023 p. 2165.

<sup>374</sup> T. 3 July 2023 p. 2166; 031049-031095 RED2, p. 15.

<sup>375</sup> T. 27 November 2023 p. 3659.

assistance to any person present at the Kukës Metal Factory. In these circumstances, he cannot be held liable for the death of a person present at the Kukës Metal Factory due to the provision of inappropriate or insufficient medical care.

170. The Indictment alleges that “even though a doctor advised the KLA members that the detainee needed to be taken to a hospital”, [REDACTED] died to due to his fatal injuries.<sup>376</sup>

171. [REDACTED] that the doctor suggested for [REDACTED] to be taken to the Kukës hospital “[REDACTED]”. [REDACTED], “[REDACTED]”.<sup>377</sup> When asked to clarify who denied the doctor’s advice, [REDACTED] “[REDACTED]”.<sup>378</sup>

172. No other person who was allegedly present in the room, specifically [REDACTED], confirmed [REDACTED]’s allegation that KLA members refused to transfer [REDACTED] to the hospital. [REDACTED] on this point, given the serious concerns about his credibility, should be rejected. In any event, [REDACTED] made no allegation implicating the Accused in the alleged decision to decline transferring [REDACTED] to the hospital.

*iv. Defence challenge to the purported identification of the body of  
[REDACTED]*

173. The Prosecution relied on DNA kinship analysis to demonstrate that the exhumed body actually belonged to [REDACTED]. The Defence reiterates its submissions that the expert reports and evidence of Witness Dolejsi cannot be relied upon.<sup>379</sup>

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<sup>376</sup> Indictment, para. 28; *See also* T. 21 February 2023 p. 524.

<sup>377</sup> [REDACTED].

<sup>378</sup> [REDACTED].

<sup>379</sup> SITF00012453-00012464; SITF00012456-SITF00012458-ET; 110670-110674; *See further* F00575, Defence Response to the Prosecution Request for Admission of the Expert Reports of W04887 (DNA Analysis), dated 7 July 2023 (confidential), paras. 5-20.

174. First, the Prosecution failed to provide any information as to whether and how the alleged biological parents were identified prior to sampling, no copies of any their consent forms have been presented, it is not known if such identification took place and how it was done, it is not known who took the samples from the parents, when such samples were taken and in what circumstances and there is no information as to how and by whom those samples were given to Witness Dolejsi's laboratory. Witness Dolejsi was unable to provide any further information in this respect.<sup>380</sup> The identification and sampling is one of the most important steps of kinship analysis. The Prosecution failed to provide any information as to who obtained and processed the bone fragment tested, where and in what conditions it was kept prior to being transported to Witness Dolejsi's laboratory. The Prosecution failed to provide adequate information on the chain of custody of the samples from the parents as well as of the bone fragment that can guarantee that the DNA testing was reliable. In the absence of clear chain of custody and proof that the process was done with integrity and professionalism, the results of the analysis are unreliable.

175. The Prosecution failed to show that Witness Dolejsi had sufficient experience in kinship analysis in [REDACTED].<sup>381</sup> The methodology described in his reports lacks scientific rigour which would warrant the reliability of the statistics presented. The first report was deliberately misleading as to the method used to reach its findings (specifically suggesting that the DNA typing kit Power Plex 16 was used). In fact, Witness Dolejsi had the audacity to confirm before the Panel no less than five times during his testimony that for the purpose of the report's findings, the DNA typing kit Power Plex 16 was used.<sup>382</sup> It was only in cross-examination, that he conceded that, in fact, he had used repeatedly and several times additional STR DNA typing kits, which he was unable to identify and which,

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<sup>380</sup> T. 16 June 2023 pp. 1988, 1989.

<sup>381</sup> T. 16 June 2023 pp. 1953, 1985; *See also* 108634-108634 RED.

<sup>382</sup> T. 16 June 2023 pp. 1962, 1966, 1972, 1981, 1997.

in any event, he did not find appropriate to refer to in his report.<sup>383</sup> Evidently, as conceded by Witness Goodwin (who was called by the Prosecution), this was a sign of unprofessionalism that demonstrates that his [REDACTED] report cannot be reasonably relied upon to extract any conclusions as to identification.<sup>384</sup> Witness Goodwin, who is a known expert in DNA kinship analysis confirmed that it is customary that all typing kits used would be referred to in a report's methodology.<sup>385</sup> Witness Dolejsi also offered a poor justification as to why he did not use the Y-chromosome analysis for statistical results, a position he abandoned in his evidence in chief and a position which was again discredited by Witness Goodwin.<sup>386</sup> In addition, contrary to relevant professional protocols, Witness Dolejsi did not preserve the electropherograms as would be expected from a forensic laboratory performing kinship analysis on judicial instruction and which could have assisted in determining whether the typing and interpretation of these electropherograms was correct, accurate, and therefore reliable.<sup>387</sup> Witness Goodwin unequivocally confirmed that "there [...] would certainly be an expectation that the laboratory would keep or transfer the data".<sup>388</sup> Whatever the reason for not preserving the raw material which would have enabled independent verification it is clear that the findings of Witness Dolejsi cannot be relied upon. Witness Goodwin accepted that assuming the alleles not present in the profiles of the alleged mother and father, kinship analysis would "very likely" lead to an exclusion of parentage.<sup>389</sup> Witness Goodwin also confirmed that it is possible that Witness Dolejsi could have incorrectly interpreted heterozygote loci as homozygote.<sup>390</sup> To ensure that the electropherograms have been interpreted and

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<sup>383</sup> T. 16 June 2023 pp. 1999-2002.

<sup>384</sup> T. 4 July 2023 p. 2237.

<sup>385</sup> T. 4 July 2023 p. 2237.

<sup>386</sup> T. 16 June 2023 pp. 1971, 1978, 2014, 2015; 111160-111162, p. 2.

<sup>387</sup> T. 4 July 2023 pp. 2240, 2241.

<sup>388</sup> T. 4 July 2023 p. 2239.

<sup>389</sup> T. 4 July 2023 p. 2231.

<sup>390</sup> T. 4 July 2023 pp. 2231- p. 2233.

transcribed correctly an independent review would be required.<sup>391</sup> Witness Dolejsi ensured that no such review is possible.

176. Notably, the analysis performed by Witness Dolejsi was found by the Special Prosecution of Kosovo insufficient as “[b]ased on the DNA sample provided, for technical reasons the laboratory was not able to perform the required DNA identification” and it was deemed “necessary to carry out a new exhumation of the body and collect a new DNA sample on the spot for the purpose of a new attempt to establish the identity of the deceased”.<sup>392</sup> The Special Prosecution requested an order “authorizing ONLY specialists from OMPF (such as OMPF archaeologists and anthropologists) to carry out the excavation and exhumation, on order to avoid damages to the exhumation scene and to the remains (emphasis in the original)”.<sup>393</sup> In the absence of complete chain of custody information, the emphasis in the request that “only” “specialists” should be allowed to carry out the excavation, exhumation, and taking of samples “to avoid damages” should be taken into consideration as it indicates that this is not what was followed in the course of the first exhumation and taking of samples. This concern is amplified by the communication dated [REDACTED] between the [REDACTED] and the [REDACTED] which confirms that the laboratory used “[REDACTED]” and they would send the sample to another reliable one.<sup>394</sup> To the knowledge of the Defence, no second exhumation actually took place. It is therefore extraordinary that the testing which according to the second report by Witness Dolejsi gives a likelihood probability ratio of 99.99998% was found insufficient and it was deemed “necessary” to repeat the process.<sup>395</sup>

177. For all these reasons, the Panel cannot rely on the DNA identification reports produced by the laboratory of Witness Dolejsi. The Panel cannot safely conclude

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<sup>391</sup> T. 4 July 2023 p. 2234.

<sup>392</sup> SITF00017285-00017294, p. 1.

<sup>393</sup> SITF00017285-00017294, p. 3.

<sup>394</sup> SITF00017285-00017294, pp. 9, 10.

<sup>395</sup> 110670-110674, p. 1.

on the basis of these reports that the body presented as [REDACTED] body is the body of [REDACTED].

*c. Modes of liability*

*i. Alleged existence and membership of a JCE intending to kill detainees*

178. The Prosecution alleged that the Accused committed the war crime of murder through participating in a JCE, which existed approximately from 17 May 1999 to 5 June 1999, which *inter alia* involved the commission of murder and that he shared the intent for the commission of the crimes within the common purpose, which included murder.<sup>396</sup> In the alternative, the Indictment alleged that the crime of murder was reasonably foreseeable to the Accused and with the “awareness that murder was a possible consequence of the implementation of the common purpose of the JCE, [the Accused] [...] participated in the JCE and thus willingly took that risk”.<sup>397</sup>

179. No evidence has been presented to establish that a plurality of persons acted in concert to achieve a common purpose that included the murder of [REDACTED]. Nor could such purpose or agreement be inferred from the evidence presented. The only evidence linking the Accused to certain other KLA members, emanates from TW4-01, W04733, and W01448, whose evidence cannot be considered reliable, particularly their evidence purporting to identify the Accused. The Prosecution accepted that the Accused was not involved in [REDACTED]. Their claim that he was involved in beatings surrounding the shooting incident on [REDACTED] June 1999 (but not the [REDACTED])<sup>398</sup> is based on the sole account [REDACTED] cannot be accepted.

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<sup>396</sup> Indictment, paras. 8-9.

<sup>397</sup> Indictment, para. 9.

<sup>398</sup> As confirmed by the Prosecution’s choice not to charge Mr Shala with direct perpetration.

180. Several witnesses provided evidence that any “beatings of the detainees lasted until 5 June 1999, the day [REDACTED] died. After that date a new officer, [REDACTED] [...] was put in charge of the persons who continued to be arrested and held at the site”.<sup>399</sup> TW4-01 testified that [REDACTED], [REDACTED] the Kukës Metal Factory upon [REDACTED] death and ensured better conditions and with his arrival the alleged ill-treatment ceased.<sup>400</sup> W01448 similarly stated that new trained guards arrived,<sup>401</sup> and that “the usual beatings stopped” after the death of [REDACTED].<sup>402</sup> He further stated that Xhemshit Krasniqi played a significant role in the immediate improvement of the detention conditions.<sup>403</sup> W01448 stated in [REDACTED] that, after [REDACTED] death, Xhemshit Krasniqi “was nervous and using bad words against the KLA soldiers, like [...] ‘This is not going to happen again here’”.<sup>404</sup> Moreover, TW4-04 also stated that new professional “prison guards” arrived immediately after [REDACTED] death, including [REDACTED], and that they improved the conditions for the detainees.<sup>405</sup>

181. The evidence presented suggests that after the death of [REDACTED] measures were taken by those in charge to ensure that the detainees are treated humanely. There was an immediate improvement of their conditions of detention to ensure that, in the words of Xhemshit Krasniqi “[REDACTED]”.<sup>406</sup> This evidence directly contradicts the Prosecution’s allegation that the group in charge of the detainees at Kukës (and the Defence reiterates that Mr Shala was never a member of such group) shared the intent to kill detainees at the Kukës Metal Factory. In fact, it demonstrates that the persons in charge of detainees did not want to kill any

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<sup>399</sup> Prosecution Pre-Trial Brief, para. 63.

<sup>400</sup> T. 31 May 2023 pp. 1537, 1539.

<sup>401</sup> SITF00013852-00013869 RED6, p. 9; SITF00013736-SITF00013800 RED5, pp. 21, 25.

<sup>402</sup> SITF00013852-00013869 RED6, p. 9; SITF00013736-SITF00013800 RED5, p. 21.

<sup>403</sup> SITF00013852-00013869 RED6, p. 9; SITF00013736-SITF00013800 RED5, p. 21.

<sup>404</sup> SITF00013736-SITF00013800 RED5, p. 21.

<sup>405</sup> SITF00013262-00013315 RED, pp. 12, 15; SITF00015825-00015925 RED, pp. 23, 30; SPOE00014669-00014751 RED, p. 29.

<sup>406</sup> As reported by W01448 in SITF00013736-SITF00013800 RED5, p. 21.



detainee, regretted what happened to [REDACTED], and immediately took measures to ensure this did not happen again. In addition, the evidence relied upon by the Prosecution suggests that whatever medical treatment was available was provided to [REDACTED] when he was allegedly injured, which is also consistent with the allegation that the said group did not want to kill him or let him die.

182. The Prosecution's case concerning the presence and alleged involvement of the Accused in the shooting incident and surrounding ill-treatment on [REDACTED] June 1999 rests only on the inconsistent and unreliable evidence of [REDACTED]. He deliberately did not refer to the Accused in two prior statements when listing those present. It is not credible to allege that he implicitly referred to Mr Shala when he vaguely alluded to the additional presence of "others" given that [REDACTED], it is not plausible that he merely forgot to refer to him as present in the shooting incident that killed [REDACTED] not merely once but twice. As developed in paragraphs above, [REDACTED]'s evidence is manifestly unreliable. [REDACTED] was deliberately fabricated and intended to deceive and implicate the Accused in the events that led to [REDACTED] death. He was shown to be motivated by his desire to harm and take revenge on the Accused.<sup>407</sup>

183. Lastly, no evidence was presented which demonstrates that the Accused wanted to kill [REDACTED]. On the contrary, the Accused was not aware of and had no role in the alleged murder of [REDACTED]; he was only informed of this death at a much later stage and long after the termination of the war.

*ii. Alleged existence of and participation in a JCE that was likely to lead to the death of [REDACTED]*

184. No evidence has been presented that the death of [REDACTED] was foreseeable to the Accused. [REDACTED]'s evidence that the Accused was present

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<sup>407</sup> *Kordić and Čerkez Appeal Judgement*, para. 274; *Haradinaj et al. Appeal Judgement*, para. 145.

is untruthful and unreliable. Regarding whether the death of [REDACTED] was foreseeable, [REDACTED], the death did not follow the type of ill-treatment that witnesses allegedly experienced at the Kukës Metal Factory.<sup>408</sup> Notwithstanding the implausibility of [REDACTED]'s evidence, the [REDACTED] was "[REDACTED]",<sup>409</sup> that the Accused, who did not participate in this incident, could not have foreseen the criminal conduct that allegedly followed including the shooting that led to the death. Equally, the Accused could also not have foreseen that [REDACTED] would be shot and injured by KLA soldiers at Kukës. No evidence was presented that suggests otherwise, in fact the death of [REDACTED] appears to have been an isolated incident and the Prosecution's evidence suggests that it was regretted and measures were immediately taken to ensure that this would not be repeated. All of these elements show how unlikely it was that the Accused could have foreseen that [REDACTED] would be shot and die.

*iii. Aiding and Abetting*

185. For accessory liability it must be shown that the Accused was aware that the crime will probably be committed, that it was committed and that he intended to facilitate its commission.<sup>410</sup> None of these elements were demonstrated by the Prosecution.

186. The only evidence presented involving the Accused in the alleged circumstances that led to the death of [REDACTED] is based on [REDACTED], whose evidence is not fabricated and entirely unreliable.

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<sup>408</sup> [REDACTED], para. 237.

<sup>409</sup> [REDACTED], para. 237.

<sup>410</sup> *Stanišić and Simatović* Appeal Judgement, para. 109, and references cited therein.

#### 4. TW4-01's credibility

187. The Defence submits that the evidence of TW4-01 is not truthful, credible nor reliable and must be rejected in its entirety. TW4-01 has shown complete disregard for [REDACTED], he continuously developed and adapted his evidence to fit an account that would be detrimental for the Accused. His evidence is flawed, false and full of discrepancies on core disputed issues, including the alleged involvement of the Accused in the charged crimes. TW4-01 had no hesitation to exaggerate and provide a completely fictional account of his experiences, he had no hesitation to openly discuss aspects of the case with other witnesses in an attempt to influence their evidence, he had no hesitation to [REDACTED]. Any reliance on his evidence will lead to unsafe and unjust findings, risking a serious miscarriage of justice.

##### *a. Inability to Provide Reliable Evidence on Traumatic Experiences*

188. Witnesses Duhne-Prinsen and Lozano Parra, having had the opportunity to assess TW4-01,<sup>411</sup> confirmed that he suffers, *inter alia*, from untreated and severe post-traumatic stress disorder ("PTSD").<sup>412</sup> Witness Duhne-Prinsen confirmed that PTSD can influence both the way that the traumatic event is perceived as well as the way in which the traumatic event is recalled.<sup>413</sup> Witness Lozano Parra also testified that trauma made it "usually harder to recall" the time and date of traumatic events and "sometimes also who else was present in the room" and that "the memory in itself is not the most reliable"; during the traumatic event "the mind is also going in a survival mode and then just focuses on the one thing that's the most threatening; for example, a gun, or a sound, or a smell that stays with a person."<sup>414</sup> Their evidence on this matter is consistent with settled case law

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<sup>411</sup> T. 21 August 2023 pp. 2274, 2275.

<sup>412</sup> T. 21 August 2023 pp. 2267- 2271, 2312; V4010023-V4010044, pp. 2, 14, 15, 17-19, 21.

<sup>413</sup> T. 21 August 2023 pp. 2313, 2331, 2332.

<sup>414</sup> T. 21 August 2023 pp. 2331-2332.

providing that the “effects of time and trauma on a witness’s memory” can impact their “ability to reconstruct events” for the purposes of their testimony.<sup>415</sup>

189. TW4-01 went through traumatic events and [REDACTED]. However, the serious discrepancies in his statements as well as the inconsistencies between his account and other evidence cannot be explained as innocent errors due to his diagnosis. TW4-01 has consistently presented poor and implausible excuses when confronted with such inconsistencies and discrepancies.<sup>416</sup>

190. He made up excuses for allegedly poor translation, poor interpretation, or even alleged manipulation by investigators and others. For instance, he noted that: “I don't know what went wrong with the translation”,<sup>417</sup> “[REDACTED]”,<sup>418</sup> “[m]aybe they did not understand me at the time clearly”,<sup>419</sup> “I don't know what went wrong with the translation”,<sup>420</sup> “[REDACTED].”<sup>421</sup> His purported justifications cannot reasonably be considered genuine nor honest.

***b. TW4-01's [REDACTED]***

191. Although the complete criminal record of TW4-01 was not disclosed to the Defence,<sup>422</sup> it is clear that he has a long record which includes convictions for violent offences[REDACTED].<sup>423</sup> He has previously been [REDACTED].<sup>424</sup> He was also prosecuted for [REDACTED], [REDACTED].

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<sup>415</sup> *Mustafa* Judgment, para. 35 and authorities cited therein.

<sup>416</sup> *See, e.g.*, T. 5 June 2023 pp. 1741, 1742 (when confronted with the discrepancy as to whether he had medical records from his stay at the [REDACTED]); T. 6 June 2023 pp. 1864, 1865 (when confronted with the inconsistency about never going to [REDACTED]); T. 5 June 2023 p. 1751 (whether he placed a soldier in the boot of his car to take him to Albania).

<sup>417</sup> T. 2 June 2023 p. 1667.

<sup>418</sup> T. 2 June 2023 p. 1681.

<sup>419</sup> T. 2 June 2023 p. 1652.

<sup>420</sup> T. 2 June 2023 pp. 1667, 1668.

<sup>421</sup> T. 2 June 2023 p. 1678.

<sup>422</sup> Specifically, the Defence was never given and could not obtain his criminal record dating from the period before the war.

<sup>423</sup> [REDACTED].

<sup>424</sup> DPS00073-DPS00077, p. 3; 091331-091333-ET RED, p. 2.

192. During his testimony [REDACTED], TW4-01 [REDACTED]. He testified before this Panel that this was because, in his own words, he wanted [REDACTED].<sup>425</sup>

193. Before the Panel, TW4-01 testified that [REDACTED].<sup>426</sup> This is to be contrasted with his evidence [REDACTED], when TW4-01 denied ever seeing [REDACTED] at the Kukës Metal Factory.<sup>427</sup> TW4-01 purported to explain the change in this crucial aspect of his evidence, maintaining that [REDACTED].<sup>428</sup> He states that he felt [REDACTED].<sup>429</sup> He explicitly confirmed that [REDACTED].<sup>430</sup> He openly admitted before this Panel not only [REDACTED] but that he is capable of [REDACTED] further his personal incentives. [REDACTED]. In this case, to take revenge on the Accused.

194. He also explicitly confirmed before this Panel [REDACTED].<sup>431</sup> He seems deliberately oblivious as to the consequences of what he states in a court room, of the consequences of being under oath and the importance of being truthful.

195. He tried to explain serious gaps in his evidence by trying to lay blame on [REDACTED]:

“[REDACTED]”,<sup>432</sup> “[REDACTED]”,<sup>433</sup> “[REDACTED]”,<sup>434</sup> “[REDACTED]”,<sup>435</sup>  
 “[REDACTED]”.<sup>436</sup>

196. [REDACTED] for [REDACTED]. The fact that [REDACTED], and the Prosecution nonetheless chose to rely on him as witness suggests that the Prosecution did not find TW4-01 credible.

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<sup>425</sup> T. 6 June 2023 pp. 1882, 1883 “[REDACTED]”.

<sup>426</sup> T. 31 May 2023 pp. 1527, 1529; T. 2 June 2023 p. 1679.

<sup>427</sup> SPOE00248405-00248500, para. 79.

<sup>428</sup> T. 31 May 2023 pp. 1557-1559.

<sup>429</sup> T. 31 May 2023 p. 1594; T. 6 June 2023 p. 1881.

<sup>430</sup> T. 6 June 2023 p. 1867.

<sup>431</sup> T. 6 June 2023, pp. 1882, 1883.

<sup>432</sup> T. 31 May 2023 p. 1534.

<sup>433</sup> T. 31 May 2023 p. 1560.

<sup>434</sup> T. 2 June 2023 p. 1681.

<sup>435</sup> T. 2 June 2023 p. 1682.

<sup>436</sup> T. 2 June 2023 p. 1682.

197. Another instance demonstrating [REDACTED] is his evidence concerning [REDACTED]. In [REDACTED], TW4-01 stated that he had seen [REDACTED], explained [REDACTED], and described how people were [REDACTED].<sup>437</sup> In [REDACTED], TW4-01, at the time “[REDACTED]” stated that he was willing to [REDACTED] and provide a statement to [REDACTED].<sup>438</sup> Yet, in his evidence before this Panel TW4-01 denied having any knowledge about this issue noting that his prior statements on this matter were “[REDACTED].”<sup>439</sup>

*c. Personal Grievance Against the Accused*

198. Witness TW4-01 testified he knew the Accused from [REDACTED], since approximately [REDACTED].<sup>440</sup> [REDACTED]. He testified that the Accused knows him [REDACTED] “[REDACTED]”.<sup>441</sup> He attributed his detention at Kukës to a past “problem” with [REDACTED], who according to the witness took revenge against him at Kukës.<sup>442</sup> He testified that he “[REDACTED].”<sup>443</sup> He unambiguously expressed fact that he felt that the Accused had failed to [REDACTED] and had betrayed [REDACTED].

199. Witness TW4-01 [REDACTED] during his testimony before this Panel, on 6 June 2023. When asked by the Panel if [REDACTED], Witness TW4-01 testified “[REDACTED]”.<sup>444</sup>

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<sup>437</sup> SITF00012854-00012864 RED4, para. 49; 083219-TR-ET Part 12 Revised RED, p. 27. In the same statement, he subsequently denied ever stating that he had knowledge of [REDACTED]. 083219-TR-ET Part 12 Revised RED, pp. 18, 28.

<sup>438</sup> 5007244-5007250 RED, p. 2

<sup>439</sup> T. 31 May 2023 p. 1588. *See also* SITF00372735-00372746 RED2, pp. 6, 7.

<sup>440</sup> TW4-01 also provided the dates [REDACTED] and [REDACTED], T. 30 May 2023 p. 1407; T. 31 May 2023 p. 1495.

<sup>441</sup> T. 30 May 2023 p. 1460.

<sup>442</sup> T. 30 May 2023 pp. 1460, 1461.

<sup>443</sup> T. 30 May 2023 p. 1461.

<sup>444</sup> T. 6 June 2023 pp. 1936, 1937.

200. [REDACTED] Witness TW4-01's criminal record, which includes convictions for aggressive and violent behaviour. In addition, as he admitted before this Panel [REDACTED].<sup>445</sup>
201. Witness TW4-01 had in fact "[REDACTED]" the Accused in [REDACTED].<sup>446</sup> Witness TW4-01 testified that he "[REDACTED]" and he [REDACTED] "[REDACTED]".<sup>447</sup> Witness TW4-01 explained that he "[REDACTED]" and he did not use "[REDACTED]".<sup>448</sup>
202. TW4-01 openly discussed these proceedings with other potential witnesses<sup>449</sup> and provided the name of the Accused as one of the persons who allegedly mistreated detainees.<sup>450</sup> TW4-01 deliberately made efforts to fabricate evidence and incriminate the Accused.

*d. Adapting his account concerning core disputed facts*

203. TW4-01 had access to public documents from these proceedings, including the Indictment and the Pre-Trial Brief. He could follow, and did in fact follow,<sup>451</sup> the public parts of hearings, which enabled him to adapt his evidence on various issues, to falsely incriminate the Accused.
204. It is telling that, as soon as the Accused got arrested in 2021, he offered new incriminatory information against him. For the first time, he identified the Accused as the person who allegedly transferred him [REDACTED] to Kukës despite the fact that by 2021 he had already given evidence on the material facts on multiple occasions. At trial, he abandoned this new allegation.<sup>452</sup> A plain reading of the Official Note prepared by the Prosecution reporting on that telephone

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<sup>445</sup> T. 31 May 2023 p. 1599; T. 5 June 2023 pp. 1844, 1847. See also SITF00012758-SITF00012789 RED2, p. 15.

<sup>446</sup> T. 31 May 2023 pp. 1597, 1598; T. 6 June 2023 p. 1937.

<sup>447</sup> T. 31 May 2023 p. 1597.

<sup>448</sup> T. 31 May 2023 p. 1597.

<sup>449</sup> [REDACTED]; 060664-TR-ET Part 5 RED4, p. 3.

<sup>450</sup> SITF00016221-00016285 RED4, pp. 11, 12; SITF00013852-00013869 RED6 p. 6.

<sup>451</sup> See, e.g., [REDACTED]; 115958-115960, pp. 1, 3.

<sup>452</sup> T. 30 May 2023 p. 1402; T. 2 June 2023 pp. 1636, 1637.



conversation demonstrates that this is [REDACTED] TW4-01 was lying under oath.<sup>453</sup> The Prosecution's deliberate choice not to rely on his evidence on this point confirms this.

205. [REDACTED], [REDACTED], [REDACTED].<sup>454</sup> [REDACTED],<sup>455</sup> [REDACTED]. This shows how he develops and adjusts his story when he receives new information to serve his motives: on this occasion to discredit and harm a Defence witness.

*e. Discrepancies in the various accounts given by TW4-01*

206. In assessing the credibility of a witness, the Panel must consider the coherence and consistency of the witness's account, including the consistency of their testimony with their written statements and the explanations provided by the witness for any inconsistencies.<sup>456</sup> The evidence of TW4-01 is filled with serious inconsistencies for which he failed to provide plausible justifications.

207. TW4-01's account as to the [REDACTED] has been entirely inconsistent. Specifically, contrary to his evidence before this Panel, in at least two prior statements he had [REDACTED].<sup>457</sup> He explained this discrepancy by blaming [REDACTED].<sup>458</sup>

208. TW4-01 also provided inconsistent evidence over the years as to who had [REDACTED]. In [REDACTED], he named [REDACTED] as the person who [REDACTED].<sup>459</sup> Subsequently, on four different occasions he named

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<sup>453</sup> 093591-093591 RED2, p. 1; T. 2 June 2023 pp. 1633-1637.

<sup>454</sup> [REDACTED]; 115958-115960, pp. 1, 3.

<sup>455</sup> T. 30 May 2023 p. 1414.

<sup>456</sup> *Mustafa* Judgement, para. 35 and authorities cited therein.

<sup>457</sup> T. 2 June 2023 p. 1678; T. 2 June 2023 pp. 1679-1681.

<sup>458</sup> T. 2 June 2023 p. 1681.

<sup>459</sup> SITF00012854-00012864 RED4, para. 24.

“[REDACTED]”.<sup>460</sup> Before this Panel, he stated that the person who [REDACTED] was [REDACTED].<sup>461</sup>

209. TW4-01 stated that at the [REDACTED], [REDACTED].<sup>462</sup> Before this Panel, he changed his evidence. This time, he claimed [REDACTED].<sup>463</sup> This explanation would make more sense with the fact that on his account he [REDACTED].<sup>464</sup> When confronted with his prior statement in cross-examination, he suggested that the record was flawed, or there was a translation or interpretation issue.<sup>465</sup>

210. These are just a few examples to illustrate the discrepancies between his various accounts and the poor explanations he gave in his attempts to justify them.

***f. Discrepancies between the evidence of TW4-01 and other evidence***

211. TW4-01’s testimony is inconsistent on various important issues in dispute with other evidence, including the evidence of expert witnesses.<sup>466</sup>

212. Witness TW4-01 testified that he was with [REDACTED] when [REDACTED]. However, his evidence on this point cannot be reconciled with that of Witnesses W01448 and TW4-11 who confirmed that [REDACTED].<sup>467</sup> W01448 specifically stated that TW4-01 “[REDACTED]”. TW4-01’s explanation for this discrepancy was that W01448 “[REDACTED]”.<sup>468</sup>

213. No witness provided evidence corroborating TW4-01’s account that [REDACTED].

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<sup>460</sup> SITF00012879-SITF00012884 RED2, p. 3; SITF00012758-SITF00012789 RED2, p. 20; SITF00018804-00018807 RED3, p. 2; 083219-TR-ET Part 7 Revised RED, p. 23.

<sup>461</sup> SITF00431831-SITF00431886 RED2, p. 45; T. 31 May 2023 p. 1529; T. 2 June 2023 pp. 1678, 1679.

<sup>462</sup> SITF00012854-00012864 RED4, p. 6.

<sup>463</sup> T. 31 May 2023 p. 1523.

<sup>464</sup> [REDACTED].

<sup>465</sup> T. 2 June 2023 p. 1656.

<sup>466</sup> *Mustafa* Judgment, para. 35 and authorities cited therein; ICTY, *Prlić et al.* Appeal Judgement, para. 200; ICTR, *Kanyarukiga* Appeal Judgement, para. 121.

<sup>467</sup> T. 3 May 2023 pp.1245, 1246; SITF00016221-00016285 RED2, p. 19; SITF00013848-00013851 RED, p. 1; SITF00013848-00013851 RED2, p. 1; SITF00013852-00013869 RED6, p. 8; SITF00013736-SITF00013800 RED5, p. 20; SITF00016221-00016285 RED4, pp. 18, 19; SITF00016221-00016285 RED4, p. 19; T. 3 May 2023 pp. 1245, 1246.

<sup>468</sup> T. 5 June 2023 pp. 1788, 1789.

214. [REDACTED].<sup>469</sup> [REDACTED].<sup>470</sup> [REDACTED].<sup>471</sup>
215. [REDACTED].<sup>472</sup> [REDACTED].
216. The abundance of evidence contradicting the account of TW4-01 that he was [REDACTED] demonstrates that his account is not truthful.
217. Furthermore, [REDACTED], W01448 stated that [REDACTED] told him that [REDACTED].<sup>473</sup> In [REDACTED], W01448 had correctly identified [REDACTED] in a formal photo board identification procedure.<sup>474</sup> According to TW4-01, W01448's evidence was "[REDACTED]".<sup>475</sup>
218. TW4-01 testified that on or around [REDACTED] June 1999 [REDACTED] was taken to "[REDACTED]".<sup>476</sup> TW4-02 could not have seen [REDACTED] as according to TW4-02's account he was not at the Kukës Metal Factory at that time.<sup>477</sup>
219. [REDACTED].<sup>478</sup> [REDACTED].<sup>479</sup> [REDACTED].<sup>480</sup> [REDACTED].<sup>481</sup> [REDACTED].<sup>482</sup> [REDACTED].<sup>483</sup> [REDACTED].<sup>484</sup>
220. TW4-01 maintained that, before the war, DW4-01 had lived [REDACTED].<sup>485</sup> This is to be contrasted with the evidence of DW4-01 himself who denied

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<sup>469</sup> [REDACTED].

<sup>470</sup> [REDACTED].

<sup>471</sup> [REDACTED].

<sup>472</sup> [REDACTED].

<sup>473</sup> SITF00013852-00013869 RED6, p. 8; SITF00013833-00013847 RED4, p. 5.

<sup>474</sup> SITF00013909-00013914 RED, pp. 2, 5.

<sup>475</sup> T. 5 June 2023 p. 1787.

<sup>476</sup> T. 31 May 2023 p. 1523.

<sup>477</sup> [REDACTED].

<sup>478</sup> [REDACTED].

<sup>479</sup> [REDACTED].

<sup>480</sup> [REDACTED].

<sup>481</sup> [REDACTED].

<sup>482</sup> [REDACTED].

<sup>483</sup> [REDACTED].

<sup>484</sup> [REDACTED].

<sup>485</sup> T. 5 June 2023 p. 1796.

[REDACTED].<sup>486</sup> When confronted with this evidence, TW4-01 stated “[REDACTED].”<sup>487</sup>

221. Before this Panel, TW4-01 identified [REDACTED].<sup>488</sup> This was despite the fact that during [REDACTED], [REDACTED], [REDACTED].<sup>489</sup> When TW4-01 was confronted with this information, he maintained that [REDACTED].<sup>490</sup>

222. TW4-01 testified that from the detention room where he was allegedly held, “you would see the gate, the barrier where cars would come in”.<sup>491</sup> However, an aerial photo of the Kukës Metal Factory demonstrates that the line of sight from the detention building is blocked by another building, making it as such impossible to see the front gate from the windows of that room.<sup>492</sup>

*g. Exaggerations, Implausible and Manifestly Untruthful Evidence*

223. The plausibility of a witness’s account must be considered when assessing the witness’s credibility.<sup>493</sup> Many elements of the account given before this Panel by TW4-01 are entirely implausible.

224. TW4-01 grossly exaggerated and fabricated evidence when he testified. For instance, he maintained that he was able to recognize [REDACTED] which had been [REDACTED] adding that “[REDACTED].”<sup>494</sup> He repeated this account with conviction a few times throughout his testimony.<sup>495</sup> [REDACTED] confirmed the implausibility and false nature of TW4-01’s evidence when he testified that

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<sup>486</sup> SITF00015437-00015510 RED2, p. 16.

<sup>487</sup> T. 5 June 2023 p. 1797.

<sup>488</sup> T. 31 May 2023 p. 1531.

<sup>489</sup> SITF00016019-00016023, p. 1; SPOE00248405-00248500, p. 86.

<sup>490</sup> T. 31 May 2023 p. 1534.

<sup>491</sup> T. 30 May 2023 p. 1424; T. 6 June 2023 p. 1920.

<sup>492</sup> SPOE00330365-00330365, p. 1.

<sup>493</sup> *Mustafa* Judgment, para. 35 and authorities cited therein.

<sup>494</sup> T. 31 May 2023 pp. 1546-1547.

<sup>495</sup> T. 31 May 2023 pp. 1546-1547.

“[REDACTED], [REDACTED], [REDACTED]”.<sup>496</sup> This is confirmed by [REDACTED].<sup>497</sup>

225. As to his release, TW4-01 explained that from Kukës he was [REDACTED], where he was detained in a room with others and then “[REDACTED]”.<sup>498</sup> TW4-01 was asked about how he had concluded that this person was [REDACTED], and he replied “[REDACTED]”.<sup>499</sup> TW4-01 also testified that he had seen [REDACTED].<sup>500</sup> The medical report made by [REDACTED], however states that [REDACTED], discrediting, again, the testimony of TW4-01.<sup>501</sup> The [REDACTED] states that [REDACTED], there was no other person found in that room and there is no reference to any detainees [REDACTED], which are all elements that are inconsistent with the evidence of TW4-01.<sup>502</sup>

226. TW4-01 also vividly described in his testimony how, shortly before his release from [REDACTED], he managed to [REDACTED].<sup>503</sup> This was, on his own account, after he had been mistreated for days and [REDACTED]. Evidently, TW4-01 has reconstructed a version of what has happened to him that cannot be trusted. His evidence is entirely unreliable.

#### *h. Hearsay evidence Presented as Direct*

227. In prior statements, TW4-01 identified a certain prosecutor who was present when he was being ill-treated as “Selmani”.<sup>504</sup> Subsequently, he referred to this

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<sup>496</sup> [REDACTED].

<sup>497</sup> [REDACTED].

<sup>498</sup> T. 31 May 2023 pp. 1540-1541.

<sup>499</sup> T. 31 May 2023 p. 1542.

<sup>500</sup> T. 2 June 2023 p. 1710; *See further* 083219-TR-ET Part 10 RED3, p. 12.

<sup>501</sup> DPS00125-DPS00141, p. 15.

<sup>502</sup> 069550-069593 RED2, pp. 13, 24.

<sup>503</sup> T. 2 June 2023 p. 1712.

<sup>504</sup> SITF00012854-00012864 RED4, p. 5; SITF00012758-SITF00012789 RED2, p. 12. [REDACTED], TW4-01 [REDACTED] and was given a list with witness names, including the name of W04848 (SITF00019279-SITF00019312 RED2, p. 4). That day, TW4-01 mentioned the name of W04848 for the first time (SITF00019279-SITF00019312 RED2, p. 17). In [REDACTED], he reiterated that Selmani and W04848 were the same person (083219-TR-ET Part 2 RED2, p. 24).

person as Osman Kriezu, W04848. When TW4-01 was asked by the Defence in cross-examination to explain how he had learnt the name of the person he had called “Selmani” in his early statements, TW4-01 explained “[REDACTED].”<sup>505</sup> This shows that TW4-01 added elements to his testimony, presenting them as elements for which he had direct knowledge whereas it was information emanating from unidentified others. Although the name of W04848 is only one instance where this was done, given the flaws in his entire account it is clear that TW4-01 fails to appreciate the importance of conveying accurate information.

*i. Wish to Secure a Conviction for [REDACTED]*

228. [REDACTED].<sup>506</sup> The evidence relied upon by the Prosecution showed that both of these individuals were much more implicated in the ill-treatment of [REDACTED] and death of [REDACTED].

229. Witness TW4-01 [REDACTED]. He is also very well aware that [REDACTED]. This could serve as an additional incentive to do everything in his power to worsen the accused’s role and alleged liability, regardless of whether Mr Shala is actually responsible.

*j. Conclusion on TW4-01’s credibility*

230. Witness TW4-01 has no reservations to misuse his status as a witness and tailor his evidence to serve his personal motives. He has expressed his feelings of betrayal in relation to the Accused, and his evidence shows a clear pattern of fabricating evidence with an intent to deceive regarding the events at Kukës in 1999. The Panel cannot accept his evidence, particularly where his evidence is the sole or decisive evidence on a particular incident or issue. Witness TW4-01 has a

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<sup>505</sup> T. 5 June 2023 pp. 1820, 1821.

<sup>506</sup> SPOE00248405-00248500, p. 5; SPOE00248071-00248128, pp. 2, 3.

demonstrated “incentive or motive to lie, fabricate, distort or withhold information”.<sup>507</sup>

#### 5. W04733’s credibility

231. W04733’s written statements were admitted under Rule 155 of the Rules *in lieu* of oral testimony as the witness is deceased.<sup>508</sup> For the reasons set out below, W04733’s evidence is not credible nor reliable.

##### *a. Transfer to Kukës*

232. W04733 referred to the Accused as present during his transfer from Durrës to Kukës for the first time in [REDACTED].<sup>509</sup> In his first statement to [REDACTED] in 2002, W04733 did not mention the Accused as being involved in his transfer to Kukës, despite describing his transfer in great detail.<sup>510</sup> In the same statement, W04733 referred to the Accused as being present during an incident in May 1998 when KLA members allegedly went to the [REDACTED] family house (“1998 incident”) as well as during his alleged ill-treatment at the Kukës Metal Factory.<sup>511</sup> In a subsequent statement in 2003, W04733 also did not mention the Accused as being involved in his transfer to Kukës.<sup>512</sup> This allegation is not corroborated by any of his family members,<sup>513</sup> or other witnesses.

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<sup>507</sup> *Mustafa* Judgement, para. 35, *See similarly Gucati and Haradinaj* Judgment, para. 44; *Ntaganda* Appeal Judgment, para. 17; *Ongwen* Judgment, para. 258; *Ntaganda* Trial Judgment, para. 77; *Prlić et al.* Appeal Judgment, para. 200; ICTR, *Kanyarukiga* Appeal Judgment, para. 121.

<sup>508</sup> F00562, Decision on the Specialist Prosecutor’s motion for admission of evidence pursuant to Rule 155 of the Rules, 4 July 2023 (confidential), paras. 31-36 (“Rule 155 Decision”); F00505, Prosecution submission of Amended Exhibit List with confidential Annex 1, 10 May 2023.

<sup>509</sup> SITF00019824-00019876 RED2, p. 13; 082892-TR-AT-ET Part 3 RED2, pp. 3, 8, 9.

<sup>510</sup> SITF00013181-SITF00013189 RED3, pp. 3, 4.

<sup>511</sup> SITF00013181-SITF00013189 RED3, pp. 2, 6.

<sup>512</sup> U003-2283-U003-2289 RED2, pp. 3, 4.

<sup>513</sup> T. 28 March 2023, pp. 737-759; T. 28 March 2023, pp. 775-831; T. 29 March 2023, pp. 832-879; T. 29 March 2023, pp. 886-954; T. 30 March 2023, pp. 960-962; T. 30 March 2023, pp. 963-1020.



***b. Alleged Ill-Treatment on or about 20 May 1999***

233. According to the Indictment, on or about 20 May 1999, W04733 was allegedly taken to a room in Kukës Metal Factory, where he was ill-treated by KLA members.<sup>514</sup> W04733 constantly changed his narrative on this incident, presenting new variations and different alleged perpetrators as time elapsed.

234. In his initial statement to [REDACTED] in 2002, W04733 listed Daut Haradinaj, Sabit Geci, Xhemshit Krasniqi, Fatmir Limaj, Milaim Zeka, Bardhyl Mahmuti, and the Accused as the persons who ill-treated him without providing any details as to the individual actions of the Accused.<sup>515</sup> In [REDACTED], W04733 went on to cite many other KLA members as being involved in his mistreatment, adding names to his account of events from people he saw on television. For instance, in [REDACTED], W04733 identified Witness Bardhyl Mahmuti, whom he claimed was involved in his mistreatment at Kukës,<sup>516</sup> after seeing Mahmuti on television.<sup>517</sup> Witness Mahmuti testified that he has not been in Kukës at all during the Indictment period.<sup>518</sup>

235. In 2003, W04733 described how the Accused participated in his ill-treatment,<sup>519</sup> even though in 2002 he did not provide any details as to the individual actions of the Accused. In his 2002 statement, W04733 also affirmed that Krasniqi broke his teeth with a rubber baton.<sup>520</sup> In 2010, W04733 changed his evidence maintaining this time that the Accused was the one to force a police baton in his mouth, causing the prosthesis on his upper teeth to break.<sup>521</sup> When confronted with this discrepancy,<sup>522</sup> W04733 blamed the discrepancy on an interpretation issue and

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<sup>514</sup> Indictment, para. 21.

<sup>515</sup> SITF00013181-SITF00013189 RED3, p. 6.

<sup>516</sup> 082892-TR-AT-ET Part 5 RED2, p. 6.

<sup>517</sup> SITF00019824-00019876 RED2, p. 12.

<sup>518</sup> T. 20 September 2023, p. 2514.

<sup>519</sup> U003-2283-U003-2289 RED2, p. 4; 106978-107020, pp. 3, 4; SITF00019824-00019876 RED2, pp. 18-23.

<sup>520</sup> SITF00013181-SITF00013189 RED3, p. 7.

<sup>521</sup> SITF00018740-00018767 RED, p. 4.

<sup>522</sup> SITF00013181-SITF00013189 RED3, pp. 6, 7.

categorically affirmed that Mr Shala had broken his teeth.<sup>523</sup> Not long thereafter, in [REDACTED], he went back to his initial claim that, in fact, it was Krasniqi who broke his teeth.<sup>524</sup> He also claimed that the Accused burnt him with a cigarette, later on stating once more that in fact it was Krasniqi who had burnt him with a cigarette.<sup>525</sup>

236. W04733's evidence is further tainted by his inability to differentiate what he personally experienced from what he learnt from others.<sup>526</sup> In 2009, W04733 affirmed to have seen the [REDACTED] ill-treatment.<sup>527</sup> However, in 2010, W04733 stated that he did not see them or others being ill-treated during 20 May 1999 incident.<sup>528</sup>

*c. Issues with the identification of the Accused and other KLA members*

237. In his first statement to [REDACTED] in 2002, W04733 listed the Accused as among the KLA members who allegedly came to his house in 1998.<sup>529</sup> However, his wife and son testified that W04733 was hiding inside the family's house, which means that W04733 did not personally see any of the alleged KLA members.<sup>530</sup> He did not explain in the 2002 statement why he believed that Mr Shala was among the KLA members who went to his house.

238. In 2010, W04733 stated that he knew the Accused and Xhemshit Krasniqi from before the war.<sup>531</sup> He stated that he recognized the Accused due to his police work in [REDACTED],<sup>532</sup> even though he had not mentioned this before. W04733's

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<sup>523</sup> SITF00018740-00018767 RED, pp. 4, 5.

<sup>524</sup> 106978-107020, p. 5; SPOE00013793-SPOE00013847 RED2, pp. 51, 52.

<sup>525</sup> 106978-107020, p. 3.

<sup>526</sup> *Mustafa* Trial Judgment, para. 35; see also ICC, *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-1989-Red, Judgment pursuant to Article 74 of the Statute, 19 October 2016, para. 203.

<sup>527</sup> SPOE00185335-00185363 RED3, pp. 6, 7.

<sup>528</sup> SITF00018740-00018767 RED, p. 5.

<sup>529</sup> T. 27 March 2023, p. 698; T. 28 March 2023, pp. 784, 785; SITF00013181-SITF00013189 RED3, p. 2.

<sup>530</sup> T. 27 March 2023, p. 698; T. 28 March 2023, pp. 784, 785.

<sup>531</sup> SITF00018740-00018767 RED, p. 2.

<sup>532</sup> SITF00018740-00018767 RED, p. 2; SITF00019824-00019876 RED2, pp. 13, 14; 082892-TR-AT-ET Part 3 RED2, p. 11.

affirmation that he knew the Accused due to police work is contradicted by his family members, who testified that they did not know of the Accused before associating him with the 1998 incident,<sup>533</sup> and that W04733 in fact had never mentioned knowing the Accused due to his policework.<sup>534</sup>

239. W04733 was never shown any photos of the Accused for identification. W04733 described him as being of “dark complexion, almost black”.<sup>535</sup> As noted by the ICTY Appeals Chamber, “a trial chamber should consider whether there is inconsistent or inaccurate testimony concerning an accused physical characteristics, or any other evidence regarding an accused’s identity which may be decisive in a trial chamber’s decision to rely on the identification evidence”.<sup>536</sup> The clearly flawed description of the Accused’s characteristics demonstrates that, in fact, W04733 had no idea what Pjetër Shala looked like.<sup>537</sup> His evidence cannot be relied on for identifying the Accused.<sup>538</sup>

240. Regarding his identification of other KLA members, W04733 mentions many people as being present at the Kukës Metal Factory: the Accused,<sup>539</sup> Xhemshit

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<sup>533</sup> T. 29 March 2023 pp. 853, 854; T. 27 March 2023 p. 649.

<sup>534</sup> T. 30 March 2023 p. 1007.

<sup>535</sup> 082892-TR-AT-ET Part 1 RED3, p. 38.

<sup>536</sup> ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Appeal Judgement, 4 December 2012, (*‘Lukić and Lukić Appeal Judgement’*), para. 135.

<sup>537</sup> ICTY, *Prosecutor v. Zoran Kupreskic et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 40.

<sup>538</sup> *Lukić and Lukić Appeal Judgement*, para. 387, referring to *Karera Appeal Judgement*, para. 39.

<sup>539</sup> SITF00013181-SITF00013189 RED3, pp. 6, 7; U003-2283-U003-2289 RED, p. 4; SITF00018740-00018767 RED, pp. 2, 4, 5; 106978-107020, p. 3, 4; 082892-TR-AT-ET Part 3 RED2, pp. 11-12; 082892-TR-AT-ET Part 5 RED2, pp. 9-12; SPOE00013793-SPOE00013847 RED2, p. 26; SITF00019824-00019876 RED2, pp. 11, 21, 23.

Krasniqi,<sup>540</sup> Fatmir Limaj,<sup>541</sup> Daut Hardinaj,<sup>542</sup> Milaim Zeka,<sup>543</sup> Bardhyl Mahmuti,<sup>544</sup> Sabit Geci,<sup>545</sup> Nazmi Ibrahimaj,<sup>546</sup> Agron Krasniqi,<sup>547</sup> Ruzdhi Saramati,<sup>548</sup> Xhevat Ibraj,<sup>549</sup> Sokol Dobruna,<sup>550</sup> Locka,<sup>551</sup> Azem Syla.<sup>552</sup> He also names Time Kadria and Safete Hadergjonaj as nurses in Kukës,<sup>553</sup> and Hashim Thaqi,<sup>554</sup> Jakup Krasniqi<sup>555</sup> and Rexhep Selimi.<sup>556</sup> Many were only mentioned in W04733's latest statements, 19 years after the alleged facts. In addition, some of these names were only mentioned by W04733 and never by other witnesses. For instance, Daut Haradinaj, Bardhyl Mahmuti, Nazmi Ibrahimaj, Xhevat Ibraj, Sokol Dobruna, Rexhep Selimi, Time Kradijaj and Safete Hadergjonaj have only been mentioned by W04733.

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<sup>540</sup> SITF00013181-SITF00013189 RED3, pp. 6, 7; U003-2283-U003-2289 RED, p. 4; SITF00018740-00018767 RED, pp. 2, 3, 4; SPOE00185335-00185363 RED3, p. 10; 106978-107020, p. 5; SPOE00013793-00013847 RED2, pp. 48, 51.

<sup>541</sup> SITF00013181-SITF00013189 RED3, pp. 6, 7; U003-2283-U003-2289 RED, p. 4; SITF00018740-00018767 RED, p. 2, 4; 082892-TR-AT-ET Part 5 RED2, pp. 4, 5; 082892-TR-AT-ET Part 4 RED3, pp. 10, 12, 13; SITF00019824-00019876 RED2, p. 12; 106978-107020, p. 35; 082892-TR-AT-ET Part 6, p. 9; 082892-TR-AT-ET Part 8, p. 18.

<sup>542</sup> SITF00013181-SITF00013189 RED3, pp. 6, 7; SITF00018740-00018767 RED, pp. 2, 5; 082892-TR-AT-ET Part 5 RED2, p. 2, 10, 29; ERN SITF00019824-00019876 RED2, p. 12.

<sup>543</sup> SITF00013181-SITF00013189 RED3, pp. 6, 7; SITF00018740-00018767 RED, pp. 2, 4. The witness got the name of Milaim Zeka by W01448; SITF00019824-00019876 RED2, pp. 12, 16; SITF00018740-00018767 RED, p. 3; ERN SPOE00013793-SPOE00013847 RED2, p. 19; 082892-TR-AT-ET Part 5, p. 21.

<sup>544</sup> SITF00013181-SITF00013189 RED3, pp. 6, 7; SITF00018740-00018767 RED, pp. 2, 3; SITF00019824-00019876 RED2, p. 12; 082892-TR-AT-ET Part 4 RED3, p. 10; 082892-TR-AT-ET Part 5 RED2, pp. 5, 6; 082892-TR-AT-ET Part 6, p. 9; 082892-TR-AT-ET Part 8 RED2, p. 18.

<sup>545</sup> U003-2283-U003-2289 RED, p. 4; SITF00018740-00018767 RED, pp. 2, 4; 106978-107020, p. 17, 18, 19, 22, 23-24; SPOE00013793-SPOE00013847 RED2, p. 19, 27.

<sup>546</sup> SITF00018740-00018767 RED, p. 2; SITF00019824-00019876 RED2, p. 12; 082892-TR-AT-ET Part 8 RED2, pp. 19, 20.

<sup>547</sup> SITF00018740-00018767 RED, p. 6; ERN SPOE00013793-00013847 RED2, p. 49.

<sup>548</sup> 082892-TR-AT-ET Part 8 RED2, p. 24.

<sup>549</sup> 082892-TR-AT-ET Part 5 RED2, pp. 15, 16, 20, 21.

<sup>550</sup> 082892-TR-AT-ET Part 6, pp. 2, 4, 7; SPOE00013793-SPOE00013847 RED2, p. 31.

<sup>551</sup> SITF00018740-00018767 RED, p. 2.

<sup>552</sup> SITF00018740-00018767 RED, p. 7; 082892-TR-AT-ET Part 6, p. 8.

<sup>553</sup> 082892-TR-AT-ET Part 4 RED3, p. 30; 082892-TR-AT-ET Part 5 RED2, pp. 27, 28, 082892-TR-AT-ET Part 8 RED2, p. 7.

<sup>554</sup> 082892-TR-AT-ET Part 6, pp. 6, 9.

<sup>555</sup> 082892-TR-AT-ET Part 6, p. 9.

<sup>556</sup> 082892-TR-AT-ET Part 6, pp. 10, 11.

Among these, there are three defence witnesses, who denied being present at Kukës during the Indictment Period.<sup>557</sup>

241. W04733 openly accepted that to identify the KLA members he lists he relied on information from [REDACTED], the television, and/or other detainees.<sup>558</sup> Thus, his identification of KLA members is based on hearsay and names disclosed through the media. In *Gucati and Haradinaj*, Trial Panel II excluded hearsay evidence “where it unfairly interfered with the Accused’s right to confrontation”.<sup>559</sup> W04733 is deceased, the Accused did not have an opportunity to confront him, test or challenge his evidence. For this reason, W04733’s evidence on the identification of the Accused and other KLA members should be approached with the utmost caution.<sup>560</sup>

242. W04733’s confusion and deteriorating health was noted [REDACTED], who stated that “bearing in mind the age of the witness and that he is a diabetic, during his last answer [REDACTED] said he is becoming confused”.<sup>561</sup> In [REDACTED], W04733 claimed that he was tired, sick and needed therapy.<sup>562</sup> The deterioration in W04733’s health, makes it implausible that W04733 would be able to provide more details of the events in [REDACTED] and 2018, than in 2002.

243. The Defence acknowledges the possible effects of time and trauma on a witness’s memory.<sup>563</sup> However, the lack of coherence and consistency in W04733’s evidence, as well as his demeanour, including his deliberate failure to disclose to a court that he had seen TW4-01,<sup>564</sup> as well as his inability to differentiate what he personally experienced from what he learnt from others, strongly support the conclusion that his evidence is not credible and cannot be reliable upon.

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<sup>557</sup> T. 20 September 2023 p. 2514; T. 23 November 2023 p. 3556; T. 22 November 2023 p. 3484.

<sup>558</sup> SITF00013181-SITF00013189 RED3, p. 6; 082892-TR-AT-ET Part 6, pp. 2, 4; SITF00019824-00019876 RED2, pp. 12, 13, 14; 082892-TR-AT-ET Part 4 RED3, p. 17; SITF00018740-00018767 RED, pp. 2, 3, 6.

<sup>559</sup> KSC-BC-2020-07, F00611, Trial Judgment, 15 May 2022, para. 25.

<sup>560</sup> *Lukić and Lukić* Appeal Judgement, para. 387; *Karera* Appeal Judgement, para. 39.

<sup>561</sup> SITF00019824-00019876 RED2, p. 23.

<sup>562</sup> SITF00019824-00019876 RED2, p. 23.

<sup>563</sup> *Mustafa* Judgment, para. 35 and authorities cited therein.

<sup>564</sup> 106978-107020, pp. 20-21.

d. W04733's family

244. W04733's family members, TW4-06, TW4-07, TW4-08, and TW4-09 testified before this Panel between 27 and 30 March 2023.<sup>565</sup> Their evidence was characterized by lack of coherence and consistency.

245. Records show that TW4-07 was present when W04733 gave a statement in The Hague,<sup>566</sup> which likely influenced his own account and would be a good reason to exclude his evidence. There are good grounds to interview potential witnesses separately to prevent them from tailoring their testimonies to match.<sup>567</sup> TW4-07's presence during his father's statement provided an opportunity for aligning his testimony with his father's statement, affecting the credibility and reliability of his evidence and compromising the fairness of this trial.

246. Many facts described by W04733 are uncorroborated or contradicted by his family. The testimonies of the family members cast further doubt on W04733's credibility as they show that he did not know the Accused before or after the war.

247. W04733 claimed that he knew the Accused due to his police work, which came to an end in 1997.<sup>568</sup> TW4-06 and TW4-08 testified to have heard the name and alleged pseudonym "*Ujku*" only a while after the 1998 incident.<sup>569</sup> In fact, the family and even W04733 made their own enquiries to find who were the KLA members who visited their house. TW4-09 testified that he never heard the Accused's name, or pseudonym, from his father due to his police work.<sup>570</sup> TW4-08 heard about the Accused's alleged involvement through W04733, who did not mention knowing the Accused due to previous police work.<sup>571</sup> Hence, the testimonies of the family

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<sup>565</sup> T. 28 March pp. 737-759, 775-831; T. 29 March 2023 pp. 832-879, 886-954; T. 30 March 2023 pp. 960-962, 963-1020.

<sup>566</sup> 106978-107020, p. 39.

<sup>567</sup> US, Federal Rules of Evidence, adopted by order of the Supreme Court on 20 November 1972, amended 1 December 2023, Rule 615.

<sup>568</sup> T. 28 March 2023 p. 777, 778; also TW4-07, T. 29 March 2023 p. 888.

<sup>569</sup> T. 29 March 2023 pp. 853, 854; TW4-08, T. 27 March 2023 p. 648.

<sup>570</sup> T. 30 March 2023 p. 1007.

<sup>571</sup> T. 27 March 2023 p. 649.



members demonstrate that W04733's claim that he knew the Accused from before the war due to his police work is false.

248. W04733 and his family relied on hearsay evidence to identify the Accused amongst the KLA members who visited their house. TW4-09 testified that W04733 did not know who the KLA members were at the time.<sup>572</sup> TW4-09, TW4-07, TW4-08 and TW4-06 testified that they learnt the Accused's name through W04733,<sup>573</sup> and from unidentified sources.<sup>574</sup> Further, W04733 stated that TW4-06 told him that the son of *Ujku* was present in the 1998 incident,<sup>575</sup> which she denied in court<sup>576</sup> casting further doubt on the reliability of his evidence.

249. The family members testified that the Accused personally told W04733, while mistreating him at the Kukës Metal Factory, that he had visited their house in 1998.<sup>577</sup> The family members also mentioned an incident in 1997 ("1997 incident"), in which the family business was attacked, claiming that the Accused assumed responsibility for this incident to W04733.<sup>578</sup> The family's allegations concerning the 1997 and 1998 incidents, which are not covered by the Indictment, are relevant to assess their credibility and reliability.<sup>579</sup>

250. W04733's allegation that the Accused personally confessed his involvement in the two incidents is at odds with the timeline of events. W04733 was allegedly detained at the Kukës Metal Factory from mid-May to 1 June 1999.<sup>580</sup> TW4-08 testified that in September 1999, he sought information from neighbours and other sources in regards to the 1998 incident and the ill-treatment of his father at

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<sup>572</sup> T. 30 March 2023 pp. 1000, 1001.

<sup>573</sup> T. 30 March 2023 p. 1001; T. 29 March 2023 pp. 863, 892.

<sup>574</sup> T. 27 March 2023 p. 648; T. 30 March 2023 p. 1007.

<sup>575</sup> 082892-TR-ET, Part 1, RED3, p. 36.

<sup>576</sup> T. 29 March 2023 pp. 857, 858.

<sup>577</sup> T. 27 March 2023 p. 652; T. 28 March 2023 p. 818; T. 29 March 2023 pp. 851, 858, 908, 929; T. 30 March 2023 p. 983.

<sup>578</sup> T. 27 March 2023 p. 652; T. 28 March 2023 p. 818; T. 29 March 2023 pp. 851, 858; 908, 929; T. 30 March 2023 p. 983.

<sup>579</sup> *Mustafa* Judgment, para. 346.

<sup>580</sup> Rule 155 Decision, para. 32.



Kukës.<sup>581</sup> Had W04733 known that the Accused was responsible for those incidents, his son would not have been making enquiries from neighbours.<sup>582</sup> In addition, TW4-08 did not mention the Accused's name in his statement to [REDACTED],<sup>583</sup> and when asked by the Prosecution to explain this omission, he responded that "[m]aybe it wasn't important to mention it at the time".<sup>584</sup> Had the Accused assaulted W04733 with the aggression described, it is highly improbable that he would not have considered it important to identify him as a perpetrator when giving evidence to investigators. His account is also highly improbable given that as a police officer, W04733 was very well aware of the importance of conveying everything he knew about the perpetrators.

251. W04733 often added people, some of whom had never been to the Kukës Metal Factory, to his recollection of events as time elapsed. For instance, W04733 mentioned [REDACTED],<sup>585</sup> who allegedly saved his life by preventing him to be transferred from Kukës to [REDACTED].<sup>586</sup> W04733's family members testified that they had never heard of [REDACTED] role in helping W04733,<sup>587</sup> nor did they hear anything about a yellow house.<sup>588</sup> It is unlikely that W04733 would have omitted to mention someone allegedly so crucial to his family.

252. Regarding W04733's allegation that the Accused was involved in his transfer from Durrës to Kukës, the testimonies of his family members do not corroborate this assertion.<sup>589</sup> It is highly unlikely that the family would not have heard from W04733 that the Accused was involved in his transfer, especially if the father knew the Accused was due to his earlier police work and the family was interested to

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<sup>581</sup> T. 27 March 2023 pp. 719, 720.

<sup>582</sup> T. 27 March 2023 p. 720.

<sup>583</sup> T. 27 March 2023 p. 650.

<sup>584</sup> T. 27 March 2023 p. 651.

<sup>585</sup> 082892-TR-AT-ET Part 3 RED2, p. 21.

<sup>586</sup> 082892-TR-AT-ET Part 3 RED2, pp. 25, 26.

<sup>587</sup> T. 29 March 2023 pp. 938-940; T. 30 March 2023 p. 1010.

<sup>588</sup> T. 29 March 2023 p. 864; T. 29 March 2023 p. 940; T. 30 March 2023 pp. 1009, 1010.

<sup>589</sup> T. 28 March 2023, pp. 737-759; T. 28 March 2023, pp. 775-831; T. 29 March 2023, pp. 832-879, 886-954; T. 30 March 2023, pp. 960-962, 963-1020; T. 30 March 2023 pp. 979, 980.

find out the identity of the persons involved in their father's detention and were making their own enquiries as to what had happened.<sup>590</sup>

253. As to W04733's ill-treatment while at Kukës, TW4-06 testified that the Accused broke W04733's teeth,<sup>591</sup> even though W04733 claimed it was Xhemshit Krasniqi who did it.<sup>592</sup> TW4-06 also claimed that the Accused had tortured her husband in Durrës adding that the Accused "himself admitted to my husband that".<sup>593</sup> Not even the Prosecution claimed that the Accused was at any point in Durrës. Similarly, TW4-08 testified that the Accused used electricity on W04733,<sup>594</sup> whereas W04733 explicitly denied that electroshocks were used in Kukës.<sup>595</sup>

254. Nearly twenty-five years after the alleged facts, it is safe to assume that W04733's family had ample opportunity to discuss the events among themselves and others. The similarities in their testimonies<sup>596</sup> demonstrate the caution required to be exercised in assessing their evidence. For instance, all family members identified a person called "[REDACTED]"<sup>597</sup> as a detainee at Kukës. [REDACTED] was not mentioned by W04733, which suggests the possibility of TW4-06, TW4-07, TW4-08 and TW4-09 coming to an agreement on names to mention in their testimonies.

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<sup>590</sup> SITF00018740-00018767 RED, p. 2; SITF00019824-00019876 RED2, pp. 13, 14; 082892-TR-AT-ET Part 3 RED2, p. 11.

<sup>591</sup> T. 28 March 2023 p. 818.

<sup>592</sup> SITF00013181-SITF00013189 RED3, p. 7; 106978-107020, p. 5; SPOE00013793-SPOE00013847 RED2, pp. 51, 52.

<sup>593</sup> T. 28 March 2023 p. 822, lines 3-10.

<sup>594</sup> T. 27 March 2023 pp. 648, 752; T. 28 March 2023 p. 752.

<sup>595</sup> SPOE00013793-SPOE00013847 RED2, pp. 15, 16, 52, 53.

<sup>596</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Case No. ICC-01/05-01/13, Trial Judgment, 19 October 2016, para. 318; ICTR, *Prosecutor v. François Karera*, Case No. ICTR-01-74-A, 2 February 2009, para. 234, and references mentioned therein.

<sup>597</sup> T. 27 March 2023 pp. 670, 671; T. 28 March 2023 p. 824; T. 29 March 2023 pp. 908, 909; T. 30 March 2023 p. 992.

## 6. Collusion

255. In assessing the credibility of witnesses, the Trial Panel must consider “any indications that the witness may have been intimidated, threatened, pressured or influenced, or whether colluded with other witnesses”.<sup>598</sup>

256. There is concrete evidence before the Panel suggesting that, after the war, witnesses met and discussed material facts in this case. There is also evidence suggesting that TW4-01, who as discussed in paragraphs above, deliberately fabricated evidence to deceive and falsely incriminate the Accused had several discussions with several witnesses on material facts in this case.

257. There are several indications that W01448 was in contact with other witnesses, most crucially W04733. W01448 stated that the only person he had contact with after their alleged release from the Kukës Metal Factory was W04733.<sup>599</sup> He did not provide any evidence as to what they talked about during their meeting, or when this meeting took place. W04733 similarly stated that he “spoke to” W01448, around [REDACTED] when W01448 was living in Germany.<sup>600</sup> In [REDACTED], W01448 testified that he had met TW4-05, together with W01448’s children and TW4-05’s children.<sup>601</sup> TW4-09, one of the sons of W04733, testified that he contacted W01448 and had a conversation with him about the events in Kukës.<sup>602</sup>

258. There are also indications that TW4-07 the son of W04733, was present when W04733 gave a witness statement.<sup>603</sup> TW4-07’s presence during his father’s interview evidently influenced his evidence despite the serious inconsistencies in their respective accounts which undermine the credibility of both.

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<sup>598</sup> Mustafa Trial Judgement, para. 35; Katanga Judgment, para. 87.

<sup>599</sup> SITF00013833-00013847 RED4, p. 6.

<sup>600</sup> SITF00013200-00013229 RED 2, pp. 7, 9.

<sup>601</sup> SITF00016140-00016220 RED3, p. 13.

<sup>602</sup> T. 30 March 2023 p. 982.

<sup>603</sup> 106978-107020, p. 39.

259. TW4-01 openly discussed these proceedings with other potential witnesses<sup>604</sup> and provided the name of the Accused as being among the persons who allegedly mistreated them and others.<sup>605</sup>
260. [REDACTED].<sup>606</sup> [REDACTED].<sup>607</sup> [REDACTED].<sup>608</sup> [REDACTED].<sup>609</sup> [REDACTED].
261. [REDACTED].<sup>610</sup> [REDACTED].<sup>611</sup>
262. TW4-01 stated that “the guy from Drenica”,<sup>612</sup> referring to W01448, came to see him after the war, and they had a few conversations together.<sup>613</sup>
263. Until [REDACTED], W04733 denied having had contact with anyone other than W01448, including TW4-01.<sup>614</sup> When [REDACTED] he confessed to having seen TW4-01 two months before [REDACTED].<sup>615</sup> TW4-01 confirmed having met with W04733 in [REDACTED].<sup>616</sup> In addition, W04733 evidently had regular conversations with his family members, TW4-06, TW4-07, TW4-08 and TW4-09 between 1999 and 2021 when he died.<sup>617</sup>
264. There is clear evidence of collusion between TW4-01 and [REDACTED]. [REDACTED].<sup>618</sup> Prior to these proceedings, TW4-01 had consistently stated that [REDACTED] had brought him to the Kukës Metal Factory.<sup>619</sup> However, when the

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<sup>604</sup> [REDACTED]; 060664-TR-ET Part 5 RED4, p. 3.

<sup>605</sup> SITF00016221- 00016285 RED4, pp. 11, 12; SITF00013852-00013869 RED6 p. 8.

<sup>606</sup> [REDACTED].

<sup>607</sup> [REDACTED].

<sup>608</sup> [REDACTED].

<sup>609</sup> [REDACTED].

<sup>610</sup> [REDACTED].

<sup>611</sup> [REDACTED].

<sup>612</sup> From the evidence of both TW4-01 and W01448, it is evident that the person referred to as the ‘guy from Drenica’ is W01448: TW4-01, T. 30 May 2023 p. 1440, T. 31 May 2023 p. 1540, T. 2 June 2023 pp. 1717-1719.

<sup>613</sup> ERN 083219-TR-ET Part 9 Revised RED, p. 20.

<sup>614</sup> ERN 106978-107020, p. 20.

<sup>615</sup> ERN 106978-107020, pp. 20, 21. His explanation that he did not communicate with him is not credible.

<sup>616</sup> TW4-01, T. 31 May 2023 p. 1492.

<sup>617</sup> 106419-106419, p. 1.

<sup>618</sup> [REDACTED].

<sup>619</sup> 104837-104855-TR Revised RED2, pp. 6, 16; SITF00019279-SITF00019312 RED2, p. 10 ; 059730-TR-ET Part 2 Revised RED, p. 12.

Accused was arrested in 2021, TW4-01 changed his story and claimed that it was in fact the Accused that had taken him to Kukës.<sup>620</sup> Similarly, in a statement soon thereafter in 2022, [REDACTED] also stated that it was the Accused who had brought TW4-01, [REDACTED] to Kukës.<sup>621</sup> When [REDACTED] came to testify however he said that, in fact, [REDACTED].<sup>622</sup> When confronted with his prior statement by the Prosecution, he explained that he simply made a “correction” to his evidence.<sup>623</sup> [REDACTED] explained that “either [he] was wrong or the interpreter was wrong”. [REDACTED].<sup>624</sup> Approximately [REDACTED], when TW4-01 came to testify he similarly abandoned the allegation that Mr Shala had taken him to Kukës and returned to his original version that he was taken there by [REDACTED].<sup>625</sup> Evidently, TW4-01 attempted to influence the testimony of [REDACTED] in order to falsely incriminate the Accused and when [REDACTED] spoke the truth before the Panel TW4-01 also abandoned this particular allegation.

265. The evidence clearly establishes that TW4-01 who deliberately fabricated evidence implicating the Accused met with many other witnesses and discussed issues related to their evidence in an attempt to influence their evidence. There is also sufficient evidence showing that several witnesses, including W04733 had talked among themselves about disputed issues in this case. The regular discussions about the events at Kukës among the witnesses is a factor requiring the Panel to approach their evidence with caution.

#### D. Fair Trial Complaints

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<sup>620</sup> 093591-093591 RED2, p. 1.

<sup>621</sup> [REDACTED].

<sup>622</sup> [REDACTED].

<sup>623</sup> [REDACTED].

<sup>624</sup> [REDACTED].

<sup>625</sup> T. 30 May 2023 p. 1402.

## 1. Jurisdiction over JCE

266. By construing Article 16(1) to include JCE liability, the law has been interpreted to the Accused's detriment in violation of Article 6 and Article 7(1) of the ECHR. When determining whether JCE is within the scope of the KSC Law, the Panel must adopt the most favourable reading, which means excluding any mode of liability not expressly stated.<sup>626</sup>

267. Liability under JCE was not foreseeable or accessible to the Accused as it had not been codified into the domestic framework, not specified in the international framework, nor clearly or sufficiently established under CIL during the time.

268. The modes of liability in Articles 22, 25(1), and 26 of the FRY, as the Pre-Trial Judge accepted, "provide for a structurally different system of liability".<sup>627</sup> JCE I and JCE III are not akin to any mode in the FRY law.

269. Whilst the Pre-Trial Judge found JCE liability was established in CIL at the time of the alleged JCE,<sup>628</sup> it was only after the *Tadić* Appeal Judgment that JCE "was systematised"<sup>629</sup> and "set ... [in] its three forms".<sup>630</sup>

270. Because the Judgment was issued on 15 July 1999, only one month after the alleged JCE had come to an end, it is unfair to conclude that the findings from were foreseeable and accessible to the Accused.

271. It would be unfair for the KSC to apply JCE liability as the law and scope were not clearly outlined in domestic or international law during the time, and any

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<sup>626</sup> KSC-BC-2020-06, F00198, Rexhep Selimi, Selimi Defence Reply to SPO Response to Defence Challenge to Jurisdiction – Joint Criminal Enterprise, 14 May 2021, paras 13-18.

<sup>627</sup> KSC-BC-2020-06, F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021, para. 178.

<sup>628</sup> F00088, Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 18 October 2021, para. 95.

<sup>629</sup> KSC-BC-2020-06, F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021, para. 184.

<sup>630</sup> KSC-BC-2020-06, F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021, para. 184.

references to JCE liability during that time were imprecise and inaccessible. This is particularly for JCE III.<sup>631</sup>

272. In the event that the Panel reaffirms that JCE liability was established in CIL before *Tadić* with reference to post-WWII cases, these were entirely inaccessible to the Accused. Some of the complete case records were unavailable.<sup>632</sup> In addition, some cases relied on in the *Tadić* Appeal Judgement were only available in original languages.<sup>633</sup>

273. The Panel must consider the Accused's insignificant position in the KLA at the time. In *Thaçi et al.*,<sup>634</sup> when determining whether JCE liability was accessible and foreseeable to the accused, the Pre-Trial Judge considered that the accused held "high ranking positions within the KLA with a vast set of responsibilities and powers",<sup>635</sup> noting that they "allowed them to access a variety of public information and knowledge".<sup>636</sup> The Accused did not have wide access to public information and knowledge.

274. Furthermore, the Accused did not complete schooling and only attained minimal education. Considering the impreciseness and inaccessible nature of JCE liability, it would be unfair to conclude that JCE liability was both foreseeable and accessible to him at the time.

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<sup>631</sup> F00088, Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 18 October 2021, para. 95.

<sup>632</sup> ICTY, *The Prosecutor v Jadranko Prlić et al.*, Case No. IT-04-64-T, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 29 May 2013, p. 148.

<sup>633</sup> ICTY, *The Prosecutor v Jadranko Prlić et al.*, Case No. IT-04-64-T, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 29 May 2003, p. 148.

<sup>634</sup> KSC-BC-2020-06, F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021.

<sup>635</sup> KSC-BC-2020-06, F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021, para. 103.

<sup>636</sup> KSC-BC-2020-06, F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021, para. 103.



## 2. Insufficient Notice and Changes in the Prosecution's Case

275. The SPO has been impermissibly changing their case as the evidence unfolded. The lack of consistency has impacted the Defence investigations and preparation of its case, as a result of which the Accused could not prepare an effective defence. This arose particularly on four key issues: the allegations regarding the presence of the Accused at the Kukës Metal Factory during the Indictment period,<sup>637</sup> the allegation that the Accused was a member of Brigade 128,<sup>638</sup> the presence and participation of the Accused during the [REDACTED] incident,<sup>639</sup> the number and identity of alleged detainees,<sup>640</sup> and finally the identity of alleged co-perpetrators 'Bedri' and Van Damme' remained unknown.

## 3. Unfair Investigation

276. The Prosecution investigations were not balanced or focused on the establishment of the truth. This is demonstrated by the deliberate choices made in conducting investigations and calling witnesses, including not calling persons with potentially very relevant evidence after interviewing them as well as withdrawing potentially valuable witnesses.

277. Based on the Prosecution's allegations, [REDACTED] was on any account a core witness who was able to provide direct evidence on central aspects of the case. She was the only direct witness of the arrest of [REDACTED] and transfer to the Factory as well as the only person allegedly present during their mistreatment.<sup>641</sup>

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<sup>637</sup> Prosecution Pre-Trial Brief, para. 18. *Contrast* Prosecution Opening Statement, T. 21 February 2023 p. 528.

<sup>638</sup> Prosecution Pre-Trial Brief, paras. 9, 17.

<sup>639</sup> KSC-BC-2020-04, F00010, Annex 2 to Submission of confirmed indictment with strictly confidential and ex parte Annexes 1-2 (confidential), para. 28. *Contrast* T. 31 May 2023 pp. 1526, 1527; T. 31 May 2023 p. 1531. See also T. 21 February 2023 p. 524.

<sup>640</sup> Corrected Indictment, para. 14 Indictment, para. 14; Prosecution Pre-Trial Brief, paras. 1, 30, 42; T. 21 February 2023 p. 511.

<sup>641</sup> Prosecution Pre-Trial Brief, para. 32.

278. Although she was interviewed by [REDACTED] and the contents of her statements warranted further investigation by the Prosecution, the Prosecution did not even conduct an official interview with her.<sup>642</sup> An official note disclosed by the Prosecution to the Defence shows that on 16 July 2019, [REDACTED] had agreed to answer questions from the Prosecution. No evidence has been presented of any follow up by the Prosecution.<sup>643</sup> [REDACTED] requested not to share her contact details with the Defence.<sup>644</sup> Despite considerable efforts, the Defence was unable to locate [REDACTED] by itself.

279. There are numerous other persons whose importance warranted further investigation by the Prosecution whom, as far as the Defence is aware, the Prosecution did not further investigate or question. For instance, the alleged perpetrators “Bedri”, “Van Damme”, “Loqka” and Liman Geci clearly warranted further investigation by the Prosecution. To the knowledge of the Defence, this matter was not further investigated for unclear reasons.

280. The Prosecution’s conduct demonstrates how they cherry-picked the evidence in their investigation. It has refused to investigate exonerating circumstances and pursue exculpatory lines of inquiry.

281. There were two instances when core Prosecution witnesses misidentified the Accused. Both W04733 as well as W01448 had a very confused idea as to what Mr Shala looked like.<sup>645</sup> The fact that these two witnesses falsely identified the Accused did not prevent the Prosecution from relying on their evidence to prove its theory.

282. The most striking example of the unfair manner in which the Prosecution elected to present its case is its reliance on the evidence of TW4-01 [REDACTED].

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<sup>642</sup> The Defence notes that it is unable to refer to the documents as they have not been admitted into evidence.

<sup>643</sup> The Defence notes that it is unable to refer to the document as it has not been admitted into evidence. Following the disclosure of the document dated [REDACTED], the Defence had asked the Prosecution if they had anything else relating to [REDACTED].

<sup>644</sup> Email from the Prosecution to the Defence, 29 November 2022 at 15:56; Email from the Prosecution to the Defence, 6 December 2022 at 16:57.

<sup>645</sup> 082892-TR-AT-ET Part 1 RED3, p. 38; SITF00374534-00374534; SITF00374536-SITF00374541 RED, p. 1.

283. Moreover, the Defence challenges the reliability of the sources of the Prosecution's investigations and evidence. Much evidence from the Prosecution comes from unreliable sources and in many cases, suggests that evidence was fabricated.
284. As the Defence previously submitted,<sup>646</sup> there are serious and substantiated complaints about the corruption of EULEX investigators and prosecutions.
285. [REDACTED].<sup>647</sup> [REDACTED].<sup>648</sup> [REDACTED].<sup>649</sup> [REDACTED].<sup>650</sup>
286. [REDACTED].<sup>651</sup> [REDACTED].<sup>652</sup>
287. The Prosecution was interested in demonstrating its own version of the truth rather than "contribut[ing] to the establishment of the truth. Its investigation and ultimately presentation of its case did not represent the truth.
288. Lastly, the undue delay with which this case has been investigated and prosecuted by the Prosecution is highly prejudicial. In *Nicolaou v. Cyprus*, the ECtHR found that the passage of time had undermined the effectiveness of investigations commenced ten years after the relevant event and "certain failings could no longer be remedied" and that "the mere passage of time can work to the detriment of the investigation".<sup>653</sup> The Prosecution's Indictment and Pre-Trial Brief relate to alleged events that took place in 1999, almost 25 years ago. The length of time and delay in bringing forward the charges set out in the Indictment is extreme and unjustified. Because of the lapse of time between the alleged events and decision to prosecute Mr Shala, he was deprived of an effective opportunity to conduct proper investigations to demonstrate the flaws in the Prosecution's case. In the 25 years that followed the alleged events documents have been definitively

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<sup>646</sup> Defence Pre-Trial Brief, para. 20.

<sup>647</sup> [REDACTED].

<sup>648</sup> [REDACTED].

<sup>649</sup> [REDACTED].

<sup>650</sup> [REDACTED].

<sup>651</sup> [REDACTED].

<sup>652</sup> [REDACTED].

<sup>653</sup> ECtHR, *Nicolaou v. Cyprus*, para. 150.

lost and important witnesses have died, disappeared or in any event became unavailable or unwilling to come forth and testify in his favour.

289. The Prosecution's investigations have prejudiced the proceedings to such degree that the fairness of the whole trial is tainted.

#### 4. [REDACTED] Immunity from Prosecution

290. [REDACTED] testified before the Panel that, during [REDACTED] in relation to the same events as in this case, [REDACTED].<sup>654</sup> [REDACTED].<sup>655</sup>

291. [REDACTED].<sup>656</sup> [REDACTED]. [REDACTED] the Prosecution requested that the proceedings be urgently deferred and transferred to the Specialist Chambers.<sup>657</sup> The Single Judge granted the request.<sup>658</sup> The proceedings in case KSC-BC-2021-08 related to in connection with events falling within the scope of case KSC BC-2020-04".<sup>659</sup>

292. The Defence was notified for the first time of the existence of case KSC-BC-2021-08 only in November 2021.<sup>660</sup> The Defence notes that the Prosecution and Single Judge had been aware of this material for a considerable period prior to its disclosure.

293. The fair trial rights of the Accused were violated when access to exculpatory material in case KSC-BC-2021-08 was denied and the Defence was prevented from making public reference to the fact that [REDACTED] and the Prosecution had

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<sup>654</sup>[REDACTED].

<sup>655</sup>[REDACTED].

<sup>656</sup> KSC-BC-2021-08, F00001, Urgent request for order of deferral with strictly confidential and *ex parte* Annex 1, 19 January 2021 (strictly confidential and *ex parte*), para. 1.

<sup>657</sup> KSC-BC-2021-08, F00001, Urgent request for order of deferral with strictly confidential and *ex parte* Annex 1, 19 January 2021 (strictly confidential and *ex parte*), paras 1, 9.

<sup>658</sup> KSC-BC-2021-08, F00003, Decision on Specialist Prosecutor's Request for an Order of Deferral, 20 January 2021 (strictly confidential and *ex parte*), paras 17, 18.

<sup>659</sup> KSC-BC-2021-08, F00001, Urgent request for order of deferral with strictly confidential and *ex parte* Annex 1, 19 January 2021 (strictly confidential and *ex parte*), para. 6. *See also* KSC-BC-2021-08, RAC001, F00005, Decision on Request for Access to Confidential and *Ex Parte* Material, 13 April 2022 (confidential), para. 1.

<sup>660</sup> Email from the Prosecution to Defence Counsel, 12 November 2021, at 17:43.

terminated the proceedings against him. Moreover, the Prosecution's decision to terminate the proceedings in case KSC-BC-2021-08 breached the Accused's right to a fair trial by depriving him of a crucial finding on the credibility of a [REDACTED].<sup>661</sup>

## 5. Disclosure Violations

294. On 14 April 2022, the Pre-Trial Judge ordered the Prosecution to complete all pre-trial disclosures by 27 May 2022, with the exception of material subject to protective measures or otherwise requiring judicial authorisation.<sup>662</sup>

295. Throughout these proceedings, the Prosecution has continuously delayed disclosing exculpatory as well as incriminatory material in its possession.

296. For instance, regarding the disclosure of the criminal records of central Prosecution TW4-01, despite repeated requests for disclosure as a matter of urgency, copies of TW4-01's criminal records were only disclosed on 8 July 2022.<sup>663</sup> The delay in disclosure of clearly exculpatory material was noted by the Pre-Trial Judge who described it as "significant". He ordered the Prosecution "to put in place control mechanisms within the Office that will ensure that evidence is processed and disclosed in a timely manner".<sup>664</sup>

297. Despite the Pre-Trial Judge's instructions, the Prosecution continuously failed to fulfil its disclosure obligations.

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<sup>661</sup> KSC-CC-2022-19, F00003, Revised Version of Referral to the Constitutional Court Panel Concerning the Violation of Mr Shala's Fundamental Rights Guaranteed by Articles 31 and 32 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, 10 November 2022 (confidential), paras 1, 6.

<sup>662</sup> T. 14 April 2022 pp. 298, 299. Despite the Pre-Trial Judge's instructions, the Prosecution has repeatedly disclosed key incriminatory and exculpatory evidence late. For instance, on 24 February 2023, the Prosecution disclosed an updated DNA report related to expert witness W04887, 110670-110674. On 11 August 2022, the Prosecution disclosed Disclosure Package 77 under Rule 103 of the Rules consisting of 57 items.

<sup>663</sup> See, for example, Email from the Defence to the Prosecution on 16 November 2021 at 20:17; Email from the Defence to the Prosecution on 7 December 2021 at 13:06; *Inter-partes* meeting between the Defence and SPO on 15 February 2022; Email from the Defence to the Prosecution, 26 July 2022 at 18:22.

<sup>664</sup> F00234, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 20 July 2022 (confidential), para. 30.

298. Throughout the pre-trial phase, the Defence repeatedly complained about the insufficiency of the descriptions of items listed in the Prosecution's Rule 102(3) notice.<sup>665</sup> On many occasions, the descriptions provided were so vague that they prevented the Defence from assessing the relevance of the listed material. On numerous occasions important material for the Defence was only identified following persistent requests addressed to the Prosecution for the provision of additional information.<sup>666</sup>
299. Important exculpatory material was disclosed as late as three working days before the Defence Pre-Trial Brief was due.<sup>667</sup> Only on 31 August 2022, the Prosecution disclosed to the Defence the transcript of the Prosecution interview with W04440.<sup>668</sup> The delay prejudiced the Defence investigations and presentation of its case and was entirely unjustified given that the requested transcript was in the hands of the Prosecution since September 2019, almost three years before it was finally disclosed to the Defence.
300. Additionally, on 24 November 2023, the Prosecution disclosed previously undisclosed video footage of the liberation of the MUP building in Prizren and the associated English transcript.<sup>669</sup> Despite the evident importance of material related

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<sup>665</sup> See, for example, Email from the Defence to the Prosecution, 29 September 2021 at 11:23; Email from the Defence to the Prosecution, 29 September 2021 at 12:49; Email from the Defence to the Prosecution, 1 October 2021 at 12:50.

<sup>666</sup> F00129, Submissions Pursuant to the Pre-Trial Judge's Order Dated 20 December 2021 Concerning the Fifth Status Conference, 12 January 2022, para. 9; F00153, Submissions Pursuant to the Pre-Trial Judge's Order Dated 9 February 2022 Concerning the Sixth Status Conference, 22 February 2022, para. 11; T. 23 September 2021 pp. 82, 83; T. 15 November 2021 p. 110; T. 14 January 2022 pp. 143, 144, 146, 153-158, 160, 161, 164, 169; T. 4 March 2022 pp. 204, 207, 210; T. 14 April 2022 pp. 256, 265, 266.

<sup>667</sup> F00234, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 20 July 2022 (confidential), para. 46. See also, e.g., late disclosure of: exculpatory note of 16 April 2022 which confirmed that TW4-10, [REDACTED] did not know the Accused (ERN 108350-108350 RED; F00135, ANNEX 2 to Submission of Pre-Trial Brief, with witness and exhibit lists - List of Witnesses, 28 January 2022 (confidential) p. 18); SPO Official Note dated 18 May 2021 concerning a phone call with Witness W04733 in which he raised concerns regarding his wife's health and threatened to refuse to testify should the Prosecution not do anything about it (ERN 108352-108352 RED); internal document dated [REDACTED] concerning Witness [REDACTED] explaining that the witness failed to [REDACTED] (ERN 108353-108353 RED).

<sup>668</sup> 064869-TR-ET Parts 1-3 RED.

<sup>669</sup> 072508-01; ERN 072508-01-TR-ET.



to the liberation of the MUP building in Prizren and the Defence specific requests for disclosure of related material, it was only after the close of the Defence case.<sup>670</sup> Evidently, this material ought to have been disclosed earlier enabling the Defence to properly investigate and prepare its case prior to or at least during the trial.

301. In addition, the investigations and trial preparation of the Defence has suffered significant prejudice due to the Prosecution's delayed disclosures. For instance, the Defence was prevented from knowing the identity of four out of 15 Prosecution witnesses, until 8 February 2022 and 28 October 2022.<sup>671</sup> The severe redactions applied to the original witness statements of the delayed disclosure witnesses made it impossible for the Defence to analyse their content in any meaningful way.<sup>672</sup> The Defence was unable to properly investigate the allegations of these witnesses until lesser redacted versions were disclosed as late as 23 November 2022.<sup>673</sup> Generally, a vast amount of documents disclosed by the Prosecution was in a heavily redacted form that severely inhibited the preparation of the defence case. To illustrate the extent to which the redactions prevented the Defence from properly furthering its investigations prior to and during the trial, it was only on 9 February 2023 that an unredacted version of the Prosecution's Pre-Trial Brief was disclosed.<sup>674</sup> This was highly prejudicial as it was only on 9 February 2023 that the Defence was given notice of important details of the Prosecution's case regarding

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<sup>670</sup> Email from the Prosecution to the Defence, 20 February 2024 at 14:46; F00803, Defence Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Recently Disclosed in Breach of the Prosecution's Disclosure Obligations, 29 February 2024 (confidential).

<sup>671</sup> F00139, ANNEX 2 to Submission of Lesser redacted version of the 'Confidential Redacted Version of the Prosecution Pre-Trial Brief', dated 31 January 2022, 8 February 2022 (confidential); F00331, Annex 1 to Prosecution notice of filing of amended witness list and request to amend its exhibit list, 28 October 2022 (confidential).

<sup>672</sup> See, for instance, 064716-TR-ET Parts 1-5 RED2.

<sup>673</sup> 059351-TR-ET Part 1 RED3. Another example showing prejudice due to extensive redactions was the non-disclosure of the identity of [REDACTED], whose statement the Prosecution used in the cross-examination of Witness W04280. T. 27 November 2023, pp. 3722-3724, 3730-3731.

<sup>674</sup> Prosecution Pre-Trial Brief.



[REDACTED] and the night before he allegedly died.<sup>675</sup> The trial was set to start on 21 February 2023.

6. Breach of Mr Shala's Right to Effective Legal Assistance and to Protection Against Self-Incrimination

302. The Prosecution has tendered into evidence four transcripts of interviews of the Accused as a suspect held by prosecuting and investigative authorities without the Accused having had the benefit of legal assistance either prior to or during such interviews.<sup>676</sup> These concerned the interviews of the Accused conducted by the Belgian Federal Judicial Police on 14 January 2016 and by the SPO and the Belgian Federal Judicial Police on 11 and 12 February 2019, as well as two interviews conducted by the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY") on 22 January 2005 and on 21 and 22 May 2007, respectively. The Panel has admitted into evidence the transcripts of the ICTY interviews and found the transcripts related to the 2016 and 2019 Belgian interviews admissible.<sup>677</sup>

303. For all these interviews, the Accused was questioned without a lawyer being present and without being afforded an opportunity to obtain legal assistance prior to being questioned, as demonstrated by the interview records and statements.<sup>678</sup> In addition, although the Accused has a limited command of the French language, which is particularly concerning when he is required to comprehend or consider complex legal notions, he found the assistance of the interpreter at each interview problematic and felt compelled to communicate in French to the best of his

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<sup>675</sup> Prosecution Pre-Trial Brief), para. 37.

<sup>676</sup> F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022 (confidential), paras. 52, 80, 110.

<sup>677</sup> F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022 (confidential), paras. 52, 80, 110.

<sup>678</sup> 074117-074129-ET Revised, p. 3; 066843-066855-ET Revised RED, p. 3; 066888-TR-ET Part 1 Revised, p. 95.

ability.<sup>679</sup> In addition, the interpreters at both Belgian interviews were not independent but were associates of the Belgian police.<sup>680</sup> All these interviews included questioning on highly incriminatory matters, to which the Accused gave answers.

304. The Defence consistently contested the admission of the ICTY and Belgian interview transcripts given the violation of the Accused's rights to effective legal assistance and not to incriminate himself.<sup>681</sup> The Defence repeatedly argued that the Panel's reliance on and use of statements obtained from the Accused in breach of his rights would render the continuation of the proceedings unfair.<sup>682</sup>

305. Despite the Defence objections and acknowledgment by the KSC Appeals Panel that Mr Shala's right to effective legal assistance for the purposes of the 2016 Belgian Interview has been violated,<sup>683</sup> the statements at present have been deemed to be "available" to the Panel for its deliberations and trial judgments.<sup>684</sup>

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<sup>679</sup> F00358, Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022 (confidential), para. 64.

<sup>680</sup> 066864-TR-ET Part 1 RED, p. 1; 074117-074129-ET RED, p. 3; F00358, Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022 (confidential), paras. 58, 60, 64.

<sup>681</sup> F00281, Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel, 20 September 2022 (confidential); F00299, Defence Reply to Prosecution Response to Defence Motion to Exclude Evidence from the Case File, 7 October 2022; F00358, Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022 (confidential); F00369, Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala, 13 December 2022; F00385, Defence Reply to Prosecution Response to "Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala", 16 January 2023; IA006, F00004, Defence Appeal Against the "Decision Concerning Prior Statements Given by Pjetër Shala", 13 February 2023; IA006, F00006 Defence Reply to Prosecution Response to Appeal Against "Decision Concerning Prior Statements Given by Pjetër Shala", 6 March 2023; F00515, Defence Request for Reconsideration of the "Decision Concerning Prior Statements Given by Pjetër Shala", 18 May 2023; F00533 Defence Reply to Prosecution Response to Defence Request for Reconsideration of the "Decision Concerning Prior Statements Given by Pjetër Shala", 5 June 2023 (confidential); KSC-CC-2023-21, F00001, Referral to the Constitutional Court Panel Concerning the Violation of Mr Shala's Fundamental Rights Guaranteed by Articles 31, 32, and 54 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, 10 July 2023.

<sup>682</sup> Ibid.

<sup>683</sup> IA006, F00007, Decision on Shala's Appeal Against the Decision Concerning Prior Statements, 5 May 2023, paras. 78, 79, 103.

<sup>684</sup> F00799, A01, Annex A to Preliminary Exhibit List (Annex A – Confidential), 23 February 2024 (confidential).

306. The Appeals Panel confirmed that the Accused's right to adequate legal assistance was violated during his interview with the Belgian Federal Judicial Police on 14 January 2016.<sup>685</sup> Mr Shala was neither informed of his right to legal assistance nor did he have the right to access a lawyer during the 2016 interview.<sup>686</sup> The Appeals Panel also found that the infringement further raised doubts as to whether the Accused was able to waive knowingly and intelligently his right to legal assistance.<sup>687</sup> The Appeals Panel concluded that this procedural failure constituted a violation of the standards of international human rights law.<sup>688</sup>

307. 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 not permissible. Had the 2016 interview been conducted in accordance with the law, the Accused's answers to the investigators' questions in 2019 might have been substantially different, especially in the event that Mr Shala had been afforded the legal representation he was entitled to. According to the doctrine of the fruit of the poisonous tree,<sup>689</sup> the breach of Mr Shala's rights during the 2016 Belgian Interview taints the legitimacy of admitting the statements he made in the subsequent 2019 interview. The Prosecution in any event has entirely failed to show that all these statements were given voluntarily and in the absence of oppressive conduct. The privilege against self-incrimination requires that any statements obtained from him in such circumstances cannot be used in evidence against him. Apart from the prejudice resulting from the violation of Mr Shala's rights, the circumstances in which the

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<sup>685</sup> IA006, F00007, Decision on Shala's Appeal Against Decision Concerning Prior Statements, 5 May 2023, paras. 70-78.

<sup>686</sup> Ibid.

<sup>687</sup> Ibid, para. 76.

<sup>688</sup> Ibid, para. 78. Nevertheless, the Appeals Panel determined that this violation was limited and "no indicia of unreliability or possible damage to the integrity of the proceedings if the interview is admitted" was detected. Therefore, the Appeals Panel considered the 2016 Belgian Interview as not inadmissible pursuant to Rule 138(2) of the Rules: Ibid, paras. 79-81.

<sup>689</sup> ECtHR, *Panovits v. Cyprus*, paras. 75, 84-86.

statements were obtained evidently cast doubt on their reliability or accuracy.<sup>690</sup>

The statements must be excluded from the evidentiary record in these proceedings.

308. The Defence reiterates its submissions that any reliance by the Panel for the purposes of its judgment on incriminatory statements obtained in breach of the Accused's right to effective legal assistance and right against self-incrimination would render the proceedings unfair and any outcome of these proceedings unsafe.<sup>691</sup>

309. Any statement obtained from the Accused in breach of his right to legal assistance cannot be used as evidence against him as required by his right against self-incrimination.<sup>692</sup> In the absence of any unequivocal "knowing and intelligent waiver" of his right to legal assistance under Article 6 of the ECHR, either express or tacit,<sup>693</sup> the incriminatory statements were obtained from Mr Shala in violation of his right to remain silent and against self-incrimination.<sup>694</sup> The statements obtained in conditions that extinguished the very essence of Mr Shala's defence rights must be excluded from the evidentiary record.<sup>695</sup> No probative value can be accorded to any statement made by the Accused in the four interviews conducted without effective legal assistance to avoid further prejudice.<sup>696</sup>

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<sup>690</sup> ECtHR, *Polednová v. The Czech Republic*, , pp. 29, 30; *Bykov v. Russia* [GC], para. 90; *Gäfgen v. Germany* [GC], para. 164.

<sup>691</sup> F00281, Motion to Exclude Evidence from the Case File to be Transmitted to the Trial Panel, 20 September 2022 (confidential), paras. 3, 30, 48; IA006, F00004, Defence Appeal Against the "Decision Concerning Prior Statements Given by Pjetër Shala", 13 February 2023, para. 11; F00515, Defence Request for Reconsideration of the "Decision Concerning Prior Statements Given by Pjetër Shala", 18 May 2023, paras. 7, 8.

<sup>692</sup> ECtHR, *Pavlenko v. Russia*, paras. 101, 102 referring to *Jalloh v. Germany* [GC], para. 101; *Sejdovic v. Italy* [GC], para. 86.

<sup>693</sup> F00358, Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022 (confidential), para. 38; ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], para. 272 referring to *Dvorski v. Croatia* [GC], para. 101; *Pishchalnikov v. Russia*, para. 77.

<sup>694</sup> ICC, *The Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, paras. 63-65.

<sup>695</sup> *Jalloh v. Germany* [GC], para. 95; *Heaney and McGuinness v. Ireland*, paras. 57, 58.

<sup>696</sup> ECtHR, *Çimen v. Turkey*, para. 27; ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 55; ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C), 14 October 2004, paras. 16, 21; ICC, *The Prosecutor v. Katanga*, Case No. ICC-

310. In light of the above, the Panel should exclude from the evidentiary record the transcripts of all interviews conducted in breach of Mr Shala's fair trial rights and not rely on them for its deliberations and in the trial judgement to avoid a miscarriage of justice.

## 7. Inequality of Arms

311. The right to a fair trial is enshrined in Article 21 of the KSC Law and "covers the principle of equality of arms between the [Prosecution] [...] and [the A]ccused".<sup>697</sup>

### *a. The Prosecution's advantage in time and resources to prepare and present its case*

312. The Prosecution has had considerably more time and resources to prepare and present its case. While equality of arms does not require actual equality in terms of means and resources, nonetheless the length the Prosecution's investigations have lasted can be contrasted to the time the Defence had available to familiarise itself with the Prosecution evidence and prepare the response by the Accused.

313. The ECtHR held that "the passage of time will inevitably erode the amount and quality of the evidence available" and that "any tests carried out on physical evidence after so many years, in the absence of proper storage, could not be reliable".<sup>698</sup> Many important Prosecution witnesses are deceased (W01448, W04733, W04848, W04379) or were unavailable to testify (TW4-05),<sup>699</sup> and thus,

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01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, paras. 63-65; STL, *Prosecutor v. Akhbar Beirui*, Case No. STL-14-06/PT/CJ, Decision on *amicus curiae* Prosecutor's Motion for Admission of Records of Suspect Interviews and Related Documents, 11 December 2015, paras. 6, 20.

<sup>697</sup> *Gucati and Haradinaj* Appeal Judgment, para. 50; *See also Mustafa* Appeal Judgment, fn. 389; ECtHR, *Dombo Beheer B.V.* Judgment, para. 33; *Kaufman* Decision, p. 115; *Delcourt* Judgment, para. 34; *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, 27 April 2004, para. 56; *Kress v. France*, no. 39594/98, 7 June 2001, para. 72.

<sup>698</sup> ECtHR, *Nicolaou v. Cyprus*, para. 150.

<sup>699</sup> F00562, Decision on the Specialist Prosecutor's motion for admission of evidence pursuant to Rule 155 of the Rules, 4 July 2023 (confidential), paras 19, 33, 46, 54, 62, 70.

their evidence could not be challenged by the Defence in cross-examination. Given that so many years have passed since the alleged events in the Indictment, many people that could have testified for the Defence are also deceased, and evidence that could have been relied upon has been lost or destroyed. The mere amount of time that lapsed between the alleged events and this trial has deprived the Accused of a reasonable opportunity to defend himself. No fair trial can be held in these circumstances.

*b. Extensive redactions*

314. The Defence reiterates its submissions as stated in its Pre-Trial Brief that “due to excessive redactions in the versions of the Prosecution’s filings that [were] [...] disclosed to the Defence”, it was prevented from providing an “effective response” and adequate preparation of its case,<sup>700</sup> especially regarding the protective measures requested by the Prosecution.<sup>701</sup> This is particularly at odds with the principle of equality of arms and specifically the procedural equality that must be ensured under the Law.

315. Moreover, the excessive redaction of material disclosed to the Defence in combination with, or based on, the delayed disclosure or non-disclosure of the identity of a number of witnesses, including those called to testify in this case, prevented the Defence from being properly informed of the Prosecution’s case.

316. Therefore, the Defence submits that the redactions applied in this case were excessive to the point that they violated the principle of equality of arms. Additionally, this caused a fundamental delay in the Defence investigations.

*c. Protective measures*

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<sup>700</sup> Defence Pre-Trial Brief, para. 33 and references contained therein.

<sup>701</sup> F00208, Defence Response to the Confidential Redacted Version of ‘Request for protective measures for certain information requested by the Defence pursuant to Rule 102(3)’, 2 June 2022 (confidential), paras. 7, 13.



317. Further, the Defence submits that the protective measures adopted restricted its access to relevant information and prevented it from effectively confronting Prosecution witnesses.
318. As stated in its Pre-Trial Brief, the Defence reiterates that the measure of delayed disclosure of the identity of a number of witnesses deprived it of an effective opportunity to prepare its case, resulting in prejudice which the Pre-Trial Judge refused to remedy.<sup>702</sup> The identity of Prosecution Witnesses TW4-02, TW4-04, TW4-05, and TW4-11 was only disclosed to the Defence on 8 February 2022.<sup>703</sup> Effectively, this prevented the Defence from completing its investigations prior to the commencement of the trial.
319. The automatic continuation of protective measures issued in other cases pursuant to Rule 81(1) of the Rules deprived the Defence of any realistic opportunity to address the Prosecution's submissions as to the particular circumstances in this case and any alleged specific risk to the proposed witnesses and the unidentified persons concerned that may result from the disclosure of identifying information to the Accused and/or his Defence team.<sup>704</sup> This resulted in restricted access of the Defence to exculpatory material.<sup>705</sup>
320. This approach has had a detrimental effect on the ability of the Defence to effectively confront witnesses against the Accused.<sup>706</sup>
321. The application of the excessive and often unjustified protective measures in this case in its effect violated the principle of equality of arms and put the Defence at a serious disadvantage.

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<sup>702</sup> Defence Pre-Trial Brief, para. 35, and decisions cited therein.

<sup>703</sup> F00139, A02, ANNEX 2 to Submission of Lesser redacted version of the 'Confidential Redacted Version of the Prosecution Pre-Trial Brief', dated 31 January 2022, 8 February 2022 (confidential).

<sup>704</sup> Defence Pre-Trial Brief, para. 36.

<sup>705</sup> F00195, Confidential Redacted Version of Decision on Request for Protective Measures for Documents Containing Exculpatory Information, 11 May 2022 (confidential).

<sup>706</sup> See, e.g., F00694, Defence, Defence Request for the Variation of W04748's Protective Measures, 20 October 2023 (confidential), paras. 10, 11; F00712, Decision on the Defence request for the variation of W04748's protective measures, 9 November 2023 (confidential); T. 28 November 2023 p. 3730, line 7 - p. 3731, line 12.



*d. Pressure to proceed to trial before completion of Defence investigations*

322. The Defence was pressured to proceed to the trial stage before it had completed its investigations, leading to another infringement of the principle of equality of arms. The Defence continuously expressed the difficulties it faced regarding investigations and the impact this had on its readiness to commence the trial.

323. On several occasions, the Defence noted “serious difficulties” encountered during its investigations “in the field” due to circumstances out of its control, namely the restrictions and policies related to the pandemic.<sup>707</sup> Moreover, as pointed out by the Pre-Trial Judge during the Status Conference on 14 January 2022, at that point in time, the Prosecution had only reviewed half of the Rule 102(3) material in its possession which is “fundamental for the Defence investigations”.<sup>708</sup>

324. In its submissions prior to the Status Conference on 14 April 2022, the Defence noted that the significant delays in the Prosecution’s disclosures and substantial redactions in the disclosed material “severely impede[d] the Defence investigations”.<sup>709</sup> Moreover, the Defence expressed its concern that it will be “unable to complete its investigations before the start of the trial”.<sup>710</sup> Additionally, as pointed out by the Defence Counsel during the Status Conferences on 4 March and 14 April 2022, the passage of time since the material events severely burdened the Defence’s investigations, particularly regarding witness availability and reliability.<sup>711</sup> Considering that the Prosecution’s investigations preceded the case for “some years” including access to years of evidence gathered by missions and

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<sup>707</sup> F00129, Submissions Pursuant to the Pre-Trial Judge’s Order Dated 20 December 2021 Concerning the Fifth Status Conference, 12 January 2022, para. 13; F00153, Submissions Pursuant to the Pre-Trial Judge’s Order Dated 9 February 2022 Concerning the Sixth Status Conference, 9 February 2022, para. 14; T. 14 January 2022, p. 178, line 22 - p. 179, line 6.

<sup>708</sup> T. 14 January 2022, p. 147, line 25 - p. 148, line 20.

<sup>709</sup> F00183, Submissions Pursuant to the Pre-Trial Judge’s Order Dated 31 March 2022 Concerning the Seventh Status Conference, para. 21.

<sup>710</sup> F00183, Submissions Pursuant to the Pre-Trial Judge’s Order Dated 31 March 2022 Concerning the Seventh Status Conference, para. 21.

<sup>711</sup> T. 4 March 2022, p. 226, lines 13-17; T. 14 April 2022, p. 282, lines 15-19.

investigations, and against the background of difficult conditions, the Defence Counsel expressed the need for more time.<sup>712</sup> Moreover, the Defence pointed out that more names and corresponding evidentiary material were included in the Prosecution's Pre-Trial Brief, than witnesses it chose to call which also impacted the scope of Defence investigations.<sup>713</sup>

325. On 10 October 2022, the Defence submitted, prior to the Pre-Trial Conference, that it had not completed its investigations, due to various practical difficulties.<sup>714</sup> During the Pre-Trial Conference on 18 October 2022, the Defence submitted that there was newly disclosed material, including exculpatory material, as well as the withdrawal of certain witnesses which obliged the Defence to endeavour in new investigations.<sup>715</sup> The trial nonetheless went ahead as planned.

326. The above manifold violations of the principle of equality of arms have prejudiced the proceedings as a whole and irreparably affected the fairness of the trial.

## 8. Breach of Right to Public Proceedings

327. Pursuant to Article 21(2) of the KSC Law, Article 31(2) of the Kosovo Constitution and Article 6(1) of the ECHR, in determination of criminal charges against them, everyone is entitled to a public hearing by a tribunal.<sup>716</sup> Binding ECtHR case law requires that holding proceedings in private must be strictly required by the circumstances of the case.<sup>717</sup>

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<sup>712</sup> T. 4 March 2022, p. 226, line 18 - p. 227, line 2; T. 14 April 2022, p. 286, lines 3-13.

<sup>713</sup> T. 4 March 2022, p. 229, lines 9-16; T. 14 April 2022, p. 283, lines 2-6, p. 289, lines 8-25; *See, for example*, Prosecution Pre-Trial Brief, paras. 30, 31, 38.

<sup>714</sup> F00305, Defence Submissions Pursuant to Order on Trial Preparation Conferences, 10 October 2022 (strictly confidential and *ex parte*), para. 4.

<sup>715</sup> T. 18 October 2022 p. 311, line 9 - p. 312, line 20, p. 313, lines 3-7, p. 314, line 17 - p. 316, line 2, p. 318, line 18 - p. 319, line 13, p. 374, lines 6 - p. 375, line 17.

<sup>716</sup> ECtHR, *Yam v. The United Kingdom*, para. 52; *Martinie v. France* [GC], para. 39; *Stefanelli v. San Marino*, para. 19.

<sup>717</sup> ECtHR, *Welke and Białek v. Poland*, para. 74; *Martinie v. France* [GC], para. 40; *Yam v. The United Kingdom*, para. 54.

328. The Prosecution called seven fact witnesses to testify, all of whom benefited from protective measures, including non-disclosure to the public of any records identifying the witnesses.<sup>718</sup> As a result, a large proportion of the proceedings have been held in private sessions. As an example, Defence calculations suggest that 81% of the Prosecution's examination of TW4-01 on 31 May 2023 was held in private session.
329. The Defence has repeatedly highlighted its concerns about failure to respect Mr Shala's right to a public hearing.<sup>719</sup> The excessive number of private sessions has been too severe and restrictive. For instance, on 6 June 2023, the Panel rejected the Defence request to continue the hearing in open session, merely because a group of visitors was at the public gallery.<sup>720</sup> The restrictions to the public nature of these proceedings are aggravated by the substantial redactions in court transcripts following the hearings.<sup>721</sup>
330. Lastly, the Defence has been unable to present important elements of its case in public. For instance, the Defence was prevented from publicly referring to [REDACTED].<sup>722</sup>

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<sup>718</sup> See e.g., F00247, Decision on Specialist Prosecutor's Request for Protective Measures for W04276, W04880, W04881, and W04882, 8 August 2022 (confidential).

<sup>719</sup> T. 29 March 2023, pp. 834-838.

<sup>720</sup> T. 6 June 2023, pp. 1874-1878.

<sup>721</sup> See, for instance, F00631, A01, Annex 1 to Third decision on the lifting of redactions or application of new redactions in trial hearing transcripts and their reclassification, 31 August 2023 (confidential); F00579, A01, Annex 1 to Second decision on the lifting of redactions or application of new redactions in trial hearing transcripts and their reclassification, 11 July 2023 (confidential); F00541, A01, Annex 1 to Decision on the lifting of redactions or application of new redactions in trial hearing transcripts and their reclassification, 12 June 2023 (confidential).

<sup>722</sup> ERN 091331-091333-ET RED, pp. 1, 3; ERN 104130-104133 RED2; ERN 104134-104140 RED; ERN 104141-104146 RED2; ERN 104147-104149; ERN 108602-108608. See also redactions to transcript in T. 22 February 2023, p. 591.

## 9. Prejudicial Uncertainty as to the Evidence on Record Against the Accused

331. On 10 October 2022, the Defence objected to the proposed practice of deferring rulings on the admissibility of evidence until the trial judgment,<sup>723</sup> noting that “the Parties would not be able to know in advance of closing submissions the scope of the evidence before the Trial Panel”.<sup>724</sup> The Defence insisted that the “admissibility of non-oral evidence should be decided at the time of its submission at trial when such evidence is tendered through witnesses in court”.<sup>725</sup>

332. On 17 March 2023, the Panel issued its decision on the timing of admissibility decisions considering that it is not obliged to render admissibility rulings on each piece of evidence submitted and finding that generally it will defer consideration of the admissibility of each item of evidence tendered to the judgement stage, except where it is required to render discrete decisions prior to that.<sup>726</sup> The Panel noted that, for its deliberations, it will only consider evidence that has “properly entered the evidentiary record”.<sup>727</sup> In its view, at the time of the close of the evidentiary proceedings, there would be “absolute clarity” as to which items may be considered for the purposes of the Panel’s judgment.<sup>728</sup>

333. On 9 February 2023, the Panel closed the evidentiary proceedings in this case.<sup>729</sup> In its Decision, it ordered the Registry to file on the case record a consolidated list of all items admitted or considered to be available for the purpose of its

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<sup>723</sup> F00305, Defence Submissions Pursuant to Order on Trial Preparation Conferences, 10 October 2022 (confidential), para. 19. The Prosecution agreed that the admissibility decisions should not be deferred. Trial Preparation Conference, T. 18 October 2022, p. 381.

<sup>724</sup> F00305, Defence Submissions Pursuant to Order on Trial Preparation Conferences, 10 October 2022 (confidential), para. 19.

<sup>725</sup> F00305, Defence Submissions Pursuant to Order on Trial Preparation Conferences, 10 October 2022 (confidential), para. 19. *See also* T. 18 October 2022, p. 382.

<sup>726</sup> Framework Decision on Evidence, paras. 21, 22, 57, 67.

<sup>727</sup> Framework Decision on Evidence, para. 16.

<sup>728</sup> Framework Decision on Evidence, paras. 15, 16.

<sup>729</sup> F00795, Decision on the Defence motion for a crime site visit, closing the evidentiary proceedings and giving directions on final briefs, request for reparations and closing statements, 9 February 2023 (confidential), paras. 22, 23, 52(b).

deliberations and judgement.<sup>730</sup> Subsequently, on 23 February 2023, the Court Management Unit (“CMU”) filed the *Preliminary* Exhibit List, in which 360 items out of a total of 640 items are presented as “marked for identification”, suggesting that these are the items for which the Panel has not as yet issued a decision on admissibility.<sup>731</sup>

334. Article 40(6)(h) of the Law provides that “[p]rior to a trial or during the course of a trial, the Trial Panel may, as necessary [...] rule on any matters, including the admissibility of evidence”.<sup>732</sup> Rule 138(1) of the Rules provides that “[u]nless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect”.<sup>733</sup>

335. Similarly, Article 40(6)(h) of the Law and Rule 138(1) require the Panel to decide on the admissibility of evidence. This is made clear by the use of the word “shall” in Rule 138(1) of the KSC Rules, which can be contrasted to the use of the word “may” in the equivalent provision of the ICC framework. Article 69(4) of the Rome Statute provides that “[t]he Court *may* rule on the relevance or admissibility of any evidence” [emphasis added].<sup>734</sup> In a similar manner, Article 74(2) of the Rome Statute provides that “[t]he Court may base its decision only on *evidence submitted and discussed before it at the trial*” [emphasis added] while Rule 63(2) of the ICC Rules of Procedure and Evidence state that “[a] Chamber shall have the authority,

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<sup>730</sup> F00795, Decision on the Defence motion for a crime site visit, closing the evidentiary proceedings and giving directions on final briefs, request for reparations and closing statements, 9 February 2023 (confidential), paras. 25, 52(d).

<sup>731</sup> F00799, Preliminary Exhibit List (Annex A- Confidential), 23 February 2023 (confidential); F00799, A01, Annex A EXHIBIT LIST [Confidential], 23 February 2023 (confidential).

<sup>732</sup> KSC Law, Article 40(6)(h).

<sup>733</sup> KSC Rules, Rule 138(1).

<sup>734</sup> *Similarly* Article 74(2) (“The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on *evidence submitted and discussed before it at the trial*” [emphasis added]); ICC RPE Rule 63(2) (“A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to *assess freely all* evidence submitted in order to determine its relevance or admissibility in accordance with article 69” [emphasis added]); *See further Bemba* Appeal Judgment, paras. 576, 577, 579.

in accordance with the discretion described in Article 64, paragraph 9, to assess freely all evidence *submitted* in order to determine its *relevance or admissibility* in accordance with Article 69” [emphasis added]. The use of the word “admit” in Rule 138(1) of the KSC Rules can be contrasted with the use of the word “submit” and more generally the text of Rule 64 of the ICC Rules and Article 74(2) of the Rome Statute,<sup>735</sup> which demonstrate that the KSC framework was intended to require issuing of admissibility decisions.<sup>736</sup> In fact, the KSC framework is similar to the analogous provisions in the Rules of the ICTY, ICTR, MICT, STL and SCSL,<sup>737</sup> where the use of the word “admit” required trial chambers to issue decisions on the admissibility of evidence, and these were issued as the trial progressed so that the parties had a clear understanding of the trial record by the close of the evidentiary proceedings.

336. As to the timing of such decisions, a plain reading of Article 40(6)(h) of the KSC Law suggests that this can be either prior to or during the course of the trial. The phrase “during the course of the trial” must be interpreted according to the purpose of the Rules, which is to ensure a fair procedure that allows an effective opportunity to confront the evidence presented by a party’s opponent as well as an effective opportunity to respond to it. Therefore, the right time for issuing admissibility decisions is at any time *prior* to the close of the evidentiary proceedings. This would allow the parties to know with certainty at the time of presenting their final submissions the evidence on the record that is available to the Panel for its deliberations and judgment. This interpretation is further

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<sup>735</sup> See also Article 64(9) of the Rome Statute which refers to the trial chamber’s “power” to rule on the admissibility and relevance of evidence, which shows the existence of discretion.

<sup>736</sup> Notably, other trial panels have taken the view that admissibility decisions must be issued in the course of the proceedings. See, e.g., KSC-BC-2020-06, F01226, A01, Annex 1 to Order on the Conduct of Proceedings, 25 January 2023 paras. 48-56, 60-62; KSC-BC-2020-07, F00267, Annex to Order for Submissions and Scheduling the Trial Preparation Conference, 21 July 2021, paras. 15-23.

<sup>737</sup> Rule 89(C) of the ICTY Rules of Procedure and Evidence (“A Chamber may admit any relevant evidence which it deems to have probative value”); Rule 89(C) of the ICTR Rules of Procedure and Evidence; Rule 105 of the MICT Rules of Procedure and Evidence; Rule 149(C) of the STL Rules of Procedure and Evidence; Rule 89(C) of the SCSL Rules of Procedure and Evidence.



reinforced by the second sentence of Rule 138(1) of the Rules which shows the drafters' intent that, in the event that a previously unknown issue arises that concerns an item of evidence presented to the bench, such issue must be raised "immediately" once it becomes known. The use of the word "immediately" shows that time is of essence and decisions on admissibility or exclusion of evidence need to be made as soon as possible to enable the parties to know the case of their opponent as the evidence unfolds in order to be able to effectively respond to it.

337. In light of the above, the KSC applicable framework requires admissibility decisions to be made at the time that the evidence is presented by the parties so that there is a clear evidentiary record by the end of the proceedings. The ICC framework, which unlike the KSC framework, confers discretion on this matter resulted in different approaches by different trial chambers as to admissibility decisions.<sup>738</sup> However, as Judge Henderson correctly stated in his Dissenting Opinion that

"[w]ith the exception of the *Bemba et al* case (a case of limited scope and anticipated duration), issuing admissibility decisions *before* the closure of evidence has been the settled and uncontroversial practice in international criminal proceedings, both at the Court and the *ad hoc* tribunals. This includes both those international and hybrid courts founded on the common law tradition, as well as those applying a primarily inquisitorial system."<sup>739</sup>

338. The Panel's approach in this case caused undue prejudice to the rights of the Accused. As Judge Ozaki stated in a Dissenting Opinion during the *Bemba* trial, "[t]he defence has a right to know with certainty what the evidence against the accused actually is. The principle of judicial certainty militates in favour of

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<sup>738</sup> Contrast ICC, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2589-Corr, Corrigendum of Decision on the 'Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)', 25 October 2010 with *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-405, Decision on the submission and admission of evidence, 29 January 2016; *The Prosecutor v Bemba et al.*, ICC-01/05-01/13-2275-Red, Appeal Judgment, 8 March 2018, paras. 552-628.

<sup>739</sup> ICC, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-405-Anx, Dissenting Opinion of Judge Henderson, 1 February 2016, paras. 12-13.



providing the defence with focussed, clearly delineated evidence so that it can exercise its rights from the commencement of the trial, rather than only at the end of it.”<sup>740</sup>

339. Obtaining clarity as to which evidence “has properly entered the evidentiary record” after the presentation of the final briefs and submissions is of little use and results in real prejudice as it deprives the Defence of an effective opportunity to properly confront the evidence against the Accused that is admitted on the trial record and respond to it in the way that best serves the Accused and his defence case. This is a major issue that taints the fairness of the proceedings. The lack of certainty as to what is actually on the trial record at the time of presenting the Defence’s final submissions, creates uncertainty as to how the Defence can approach particular pieces of evidence. This in turn results in actual prejudice that interferes with the fairness of the trial and prevents the Defence from being able to present an effective defence on matters related to particular pieces of evidence.

340. The resulting prejudice is illustrated well by the significant uncertainty that exists even at present with the admissibility of the prior statements given by the Accused in 2016 and 2019 which contain incriminatory information. The Panel has previously found that these statements are “not inadmissible”.<sup>741</sup> At present, the four statements, whose admissibility has been heavily contested by the Defence, are described in the Registry’s Preliminary Exhibit List as “marked for identification”.<sup>742</sup> Even at the present stage the Defence is not aware of whether these controversial statements will be used in the Panel’s deliberations or excluded

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<sup>740</sup> ICC, *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1028, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the Prosecution’s list of evidence, 23 November 2010, para. 16; *See also* the majority decision in *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1022, Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 19 November 2010.

<sup>741</sup> F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022 (confidential), paras. 80, 110, 114; IA006, F00007, Decision on Shala’s Appeal Against Decision Concerning Prior Statements, 5 May 2023, paras. 81, 109.

<sup>742</sup> F00799, A01, ANNEX A EXHIBIT LIST [Confidential], 23 February 2024 (confidential), pp. 69-75.

as they should due to the serious violations of the Accused's fair trial rights that underlie the manner in which they were taken.<sup>743</sup>

341. The lack of certainty means that the Accused can only reiterate the reasons as to why these statements cannot be admitted in evidence or considered by the Panel for the purposes of the trial judgment. In terms of presenting his defence case therefore, the Accused can only reiterate his complaints that the possible admission of the said statements and any reliance on them by the Panel would violate his fair trial rights and taint the fairness of the whole proceedings. The Accused cannot prejudice himself by commenting any further on the contents of those statements, as his position is that they should be excluded from the trial record for all the reasons set out in his previous submissions on the matter.<sup>744</sup>

342. The Panel has also deferred its decision on the admissibility of two [REDACTED] applications of the Accused.<sup>745</sup> The Defence has previously argued that these applications cannot be used in criminal proceedings and would be

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<sup>743</sup> See also IA006, F00007, Decision on Shala's Appeal Against Decision Concerning Prior Statements, 5 May 2023, paras. 74- 81, 109.

<sup>744</sup> See 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); F00299, Defence Reply to Prosecution Response to Defence Motion to Exclude Evidence from the Case File, 7 October 2022 (confidential); F00358, Defence Response to Prosecution Motion for Admission of Accused's Statements, 24 November 2022 (confidential); F00364COR, Corrected version of Decision concerning prior statements given by Pjetër Shala, 6 December 2022 (confidential); F00369, Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala, 13 December 2022; F00385, Defence Reply to Prosecution Response to "Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala", 16 January 2023; F00401, Decision on Request for Leave to Appeal the Decision Concerning Prior Statements Given by Pjetër Shala, 24 January 2023; IA006, F00004, Defence Appeal Against the "Decision Concerning Prior Statements Given by Pjetër Shala", 13 February 2023; IA006, F00006, Defence Reply to Prosecution Response to Appeal Against "Decision Concerning Prior Statements Given by Pjetër Shala", 6 March 2023; IA006, F00007, Decision on Shala's Appeal Against Decision Concerning Prior Statements, 5 May 2023; F00515, Defence Request for Reconsideration of the "Decision Concerning Prior Statements Given by Pjetër Shala", 18 May 2023; Oral Order, T. 6 June 2023 pp. 1938-1939; 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; F00533, Defence Reply to Prosecution Response to Defence Request for Reconsideration of the "Decision Concerning Prior Statements Given by Pjetër Shala", 5 June 2023 (confidential).

<sup>745</sup> T. 25 August 2023, pp. 2442-2443.

prejudicial to the Accused.<sup>746</sup> The Panel declined to entertain the matter at that stage and deferred its decision to its deliberations.<sup>747</sup> The applications contain statements by the Accused that can be considered incriminatory. They are also “marked for identification” in the Registry’s Preliminary Exhibit List, which shows further uncertainty as to what has been properly admitted on the trial record and puts the Accused in a very difficult position as to effectively preparing his defence case.

343. The uncertainty as to what is on the evidentiary record violates the Accused’s right to know with certainty the evidence against him and have an effective opportunity to respond to it at the very least in his final trial brief and closing submissions. The Panel’s approach also creates an undue and excessive burden for the Defence that needs to address all evidence that is considered “available” for the purposes of the judgment.

#### 10. Unjustified Limitations on the Right to Confront Witnesses Against the Accused

344. Despite the clear limitations provided in Article 31(4) of the Kosovo Constitution and Rules 141 and 153 as to the admission of the evidence of available witnesses in writing, the evidence of two witnesses that, in the view of the Defence, did concern the alleged acts and conducts of the Accused as well as a number of important matters in dispute between the Parties was admitted in writing. The evidence of TW4-02 and TW4-04 concerned facts on which the Prosecution relies to substantiate the alleged criminal liability of the Accused including the use of the Kukës Metal Factory as a detention facility by the KLA, the crimes allegedly committed there as well as and the presence and conduct of other alleged

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<sup>746</sup> F00615, Defence Response to Prosecution Motion for Admission of Documentary Evidence Relating to the Accused (F00565), 22 August 2023 (confidential).

<sup>747</sup> T. 25 August 2023, pp. 2442-2443; *See also* F00615, Defence Response to Prosecution Motion for Admission of Documentary Evidence Relating to the Accused (F00565), 22 August 2023 (confidential).

participants in the JCE that the Prosecution maintains that existed.<sup>748</sup> In the view of the Defence, the “acts and conduct of the accused” is not limited to “what the accused is alleged to have done and may include the acts and conduct of other persons where this is relied upon to prove the acts and conduct of the accused.”<sup>749</sup> In assessing the prejudice resulting from the admission of the evidence of available witnesses untested and in writing, “the centrality or importance of the testimony to the case against the accused” is a fundamental consideration.<sup>750</sup>

345. The evidence of TW4-02 and TW4-04, was admitted in writing and the Defence was not able to confront them or test their evidence.<sup>751</sup> This resulted in undue prejudice as the Defence was deprived of the opportunity to confront these witnesses with the number of contradictions and inconsistencies in their prior statements and other evidence as well as to explore the accuracy of the account presented before the Panel.<sup>752</sup>

346. In addition to the above, the evidence of W04733 and W01448 has been admitted in writing. Both W04733 and W01448 are deceased. However, given the

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<sup>748</sup> F00523, Defence Response to the Prosecution Application for the Admission of TW4-02’s Evidence Pursuant to Rule 153, 25 May 2023 (confidential); F00550, Defence Response to the Prosecution Application for the Admission of TW4-04’s Evidence Pursuant to Rule 153, 19 June 2023 (confidential); F00559, Defence Request for Certification to Appeal the “Decision on the Specialist Prosecutor’s requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules”, 30 June 2023 (confidential).

<sup>749</sup> ICC, *Prosecutor v Mahamat Said Abdel Kani*, Case No. ICC-01/14-01/21, Public Redacted Version of Decision on the Prosecution’s First, Second and Fourth Request Pursuant to Rule 68(2)(b) of the Rules, filed on 20 October 2022, 21 October 2022, para. 19.

<sup>750</sup> ICC, *Prosecutor v Mahamat Said Abdel Kani*, Case No. ICC-01/14-01/21, Public Redacted Version of Decision on the Prosecution’s First, Second and Fourth Request Pursuant to Rule 68(2)(b) of the Rules, filed on 20 October 2022, 21 October 2022, para. 19.

<sup>751</sup> F00556, Decision on the Specialist Prosecutor’s requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules, 23 June 2023 (confidential); F00592, Decision on the Defence request for certification to appeal the “Decision on the Specialist Prosecutor’s requests to admit the evidence of TW4-02 and TW4-04 under Rule 153 of the Rules”, 17 July 2023.

<sup>752</sup> See F00523, Defence Response to the Prosecution Application for the Admission of TW4-02’s Evidence Pursuant to Rule 153, 25 May 2024 (confidential) and F00550, Defence Response to the Prosecution Application for the Admission of TW4-04’s Evidence Pursuant to Rule 153, 19 June 2023 (confidential).

importance of exercising caution when it comes to identification evidence<sup>753</sup> and the fact that, for W04733 the description he gave of the Accused is evidently flawed,<sup>754</sup> and W01448 merely relied on information conveyed to him by the [REDACTED]. The prejudice resulting from the admission of their untested evidence violates the right of the Accused to confront important evidence against him. In order to remedy this infringement with the Accused's fair trial rights, the Panel should accord little if any probative value to his evidence that was admitted on the record untested and not accept it on any matter which is not corroborated by other independent and reliable evidence. The evidence of W04733's family members that merely conveyed information given by him should also be excluded as unreliable for the same reasons that W04733's evidence should be excluded as unreliable.

347. Furthermore, the Panel's instructions as to how cross-examination could be conducted, namely "by way of neutral questioning" through open questions,<sup>755</sup> significantly limited the right of the Accused to confront the witnesses against him.

348. For instance, when cross-examining TW4-01, the Defence was prevented from confronting him with the prior testimony of [REDACTED] which was inconsistent with TW4-01's evidence.<sup>756</sup>

349. Importantly, the Defence was not allowed to confront TW4-01 in a full and complete manner about the important evidence that he had [REDACTED]. Specifically, the Defence was prevented from confronting the witness with the source of the information that he had [REDACTED]. Confronting the witness not only with the information that he had acted in this manner but also with the source of this information, which would show to him that it was in fact credible, would

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<sup>753</sup> *Lukić and Lukić* Appeal Judgement, para. 387; *Karera* Appeal Judgement, para. 39 and references cited therein, para. 577; *Popovic et al.* Appeal Judgement, para. 329, referring to *Renzaho* Appeal Judgement, para. 534.

<sup>754</sup> ERN 082892-TR-AT-ET Part 1 RED3, p. 38. Witness W04733 claimed that the Accused "was of dark complexion, almost black, a dark complexion, yes, with dark eyebrows and a big face".

<sup>755</sup> F00434, Decision on the conduct of the proceedings, 24 February 2023 (confidential), para. 41.

<sup>756</sup> T. 5 June 2023, pp. 1800-1804.

have made for a much more powerful confrontation than that allowed by the Panel.<sup>757</sup> A full confrontation that provided substantiation to the accusation that he had [REDACTED] was crucial to the Defence case and vital to show that this witness's evidence is false and fabricated. The limits imposed by the Panel in the manner in which the Defence could confront the witness resulted in prejudice, which was amplified by the fact that the prior statements of TW4-02 were admitted through Rule 153 of the Rules, and the Defence was unable to properly explore the matter in an effective way with him. In addition, the Defence was not allowed to confront TW4-01 with further evidence suggesting that he had [REDACTED]. Specifically, the Defence was prevented from confronting the witness using directly the Official Note from [REDACTED] suggesting that TW4-01 had [REDACTED].<sup>758</sup> The fact that this information came from [REDACTED] and was set out in an official note was important to put to the witness in cross-examination.

350. The Panel's approach and limits on the ability of the Defence to confront witnesses against the Accused can be contrasted with the manner in which the Panel dealt with the examination of Defence witnesses by the Prosecution. Despite objections from the Defence, the Prosecution was allowed on multiple occasions to use witness statements of other witnesses in cross-examination, as well as statements by persons who were not witnesses in the case. The Panel accepted such statements tendered by the Prosecution and considered them as properly admitted on the trial record.<sup>759</sup> The Panel also intervened on a number of occasions with the manner in which the Defence chose to confront witnesses against the Accused for instance by rephrasing the questions put in cross-examination.<sup>760</sup>

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<sup>757</sup> T. 5 June 2023, pp. 1768-1776.

<sup>758</sup> T. 6 June 2023, pp. 1865-1878.

<sup>759</sup> For instance, in their cross-examination of Witness W04440, the Prosecution used the prior testimony of Milaim Zeka. The Defence objected, its objection was rejected and the Prosecution was allowed to proceed regardless. T. 23 November 2023, pp. 3577-3579.

<sup>760</sup> T. 27 March 2023, pp. 727, 728.



351. The differences in the manner that the parties were allowed to confront witnesses infringes the principle of equality of arms. The Defence had to operate in conditions of clear disadvantage compared to its opponent.<sup>761</sup>

352. As a result of these unjustified limitations on the Defence to confront the witnesses against the Accused, the Defence suffered prejudice as it was unable to put its case in an effective way and as it was instructed to do so by the Accused.

## E. Sentencing

353. The Defence reiterates that the Accused is innocent of all counts set out in the Indictment. In the event of a conviction, the Defence reiterates that rehabilitation and reintegration to society have become mandatory factors to be considered in sentencing and indeed the focus in European penal policy.<sup>762</sup>

### 1. Gravity of the alleged crimes and their consequences

354. While undoubtedly serious, the crimes charged are limited in scope, scale, number of victims affected and therefore they are of a very different gravity compared to other cases heard by international criminal tribunals. The alleged crimes took place within a period of 20 days, at one site, with 8 victims participating in these proceedings, and one person allegedly murdered.

### 2. The nature and extent of the Accused's involvement in the alleged crimes

355. The Accused was not a leader, commander or otherwise had any authority or control or senior position within the hierarchy of the KLA or any brigade or group stationed at the Kukës Metal Factory. He was a simple KLA soldier who assisted

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<sup>761</sup> *Katanga* Judgment, para. 1572.

<sup>762</sup> *Bagosora et al.*, Judgement and Sentence, para. 2260; *Kalimanzira* Judgement, para. 741; *Delalić et al.*, Judgement, para. 1233. ECtHR, *Vinter and Others v. the United Kingdom* [GC], paras. 111-116; *Tolomov v. Bulgaria*, paras. 243-246; *Khoroshenko v. Russia*, [GC], para. 121; *Dickson v. the United Kingdom* [GC], para. 28; *Murray v. The Netherlands* [GC], paras. 101-102; Article 10 § 3 of the ICCPR, ICCPR General Comment on Article 10 § 3; Rules 6, 102.1 and 103.8 of the 2006 European Prison Rules, Resolution (76) 2 and Recommendations Rec(2003)23 and Rec(2003)22 of the CoE Committee of Ministers.



his people through fighting at the front on an individual basis, with no membership in any organized group or participation in any common criminal plan.

### 3. Individual circumstances

356. It is established practice that any penalty must reflect the individual circumstances of the accused.<sup>763</sup> The Defence refers the Trial Panel to the report of Ms Vanessa Milazzo,<sup>764</sup> a certified psychological expert, which contains an assessment of the Accused's individual circumstances, mental health, and conduct after the alleged events until the present.

357. At the time of the alleged events, the Accused was a 36-year-old<sup>765</sup> who grew up in insecurity and precariousness in Kosovo.<sup>766</sup> His schooling was sparse – although he never displayed behavioral or learning problems – leading to an early “uneasy” start in life.<sup>767</sup> His sense of duty, altruism, and patriotism led into the armed conflict.<sup>768</sup> The Accused grew up with both parents being absent during critical moments of his childhood. His mother died when he was six.<sup>769</sup> His father was [REDACTED].<sup>770</sup>

358. Between [REDACTED], the Accused was [REDACTED],<sup>771</sup> where he was relentlessly interrogated and tortured.<sup>772</sup> All of his siblings (one brother and three sisters) as well as a nephew were massacred during the war.<sup>773</sup> The harm sustained

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<sup>763</sup> *Stanišić and Simatović*, Judgement, paras. 610, 611; *Popović et al.*, Judgement, paras. 2157-2225; *Kunarac et al.* Appeal Judgment, para. 362; *Erdemović* Sentencing Judgement, para. 16(i); *Delić* Judgement, para. 587; *Krajišnik* Judgement, para. 1164; *Mustafa* Judgment, para. 791.

<sup>764</sup> DPS01735-DPS01757.

<sup>765</sup> DPS01735-DPS01757, pp. 3, 4.

<sup>766</sup> DPS01735-DPS01757, p. 10.

<sup>767</sup> DPS01735-DPS01757, p. 4; T. 22 February 2023 p. 582.

<sup>768</sup> DPS01735-DPS01757, pp. 2, 5, 15.

<sup>769</sup> DPS01735-DPS01757, pp. 4, 10.

<sup>770</sup> DPS01735-DPS01757, p. 3.

<sup>771</sup> U009-9230-U009-9235-ET, p. 1.

<sup>772</sup> DPS01735-DPS01757, pp. 4, 5; T000-2742-T000-2742-Alb and Eng Transcript-A, p. 19.

<sup>773</sup> DPS01735-DPS01757, pp. 4, 10.

by the Accused and his family as a direct consequence of the war cannot be overstated.<sup>774</sup>

359. Despite major depression, generalized anxiety, and post-traumatic disorders, the Accused took responsibility for the living conditions of his family.<sup>775</sup> The Accused also applied for [REDACTED] in Belgium in [REDACTED].<sup>776</sup>

360. Exceptional family circumstances have been considered by tribunals as mitigating factors.<sup>777</sup> The Accused is a faithful and trustworthy man and could not be prouder of the two children he raised with his wife. He was able to build an honorary life through hard work without ever requesting or receiving any social, unemployment or other benefits in Kosovo or Belgium.

361. He has real concerns for his wife and his children's well-being.<sup>778</sup> His partner is in a fragile state and was hospitalized in [REDACTED].<sup>779</sup> Furthermore, his family was affected by the traumatizing way the Accused was arrested, which led to social stigma for his family in the very small community they live in. He was never given the option of collaborating with the authorities to avoid this event, which he would have done, as shown by his prior voluntary cooperation with the ICTY and SPO.

362. Poor health has been accepted by international tribunals as a mitigating factor.<sup>780</sup> The Accused's physical health has declined due to his past injuries from the war and has further deteriorated seriously since his arrest. Today, the Accused, at 61 years of age, suffers from, *inter alia*, anxiety and low self-esteem as stated in

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<sup>774</sup> DPS01735-DPS01757, p. 18.

<sup>775</sup> DPS01735-DPS01757, pp. 5, 10, 11, 17.

<sup>776</sup> DPS01735-DPS01757, p. 5; U009-9284-U009-9293-ET, p. 8; U009-9404-U009-9412; U009-9284-U009-9293-ET, p. 8; U009-9245-U009-9258-ET, p. 12; U009-9414-U009-9427-ET, p. 12; SITF00372354-00372354.

<sup>777</sup> *Blagojević and Jokić* Judgement, para. 855; *Kordić and Čerkez* Judgement, para.1090; *Mladić* Appeal Judgment, para. 555.

<sup>778</sup> DPS01735-DPS01757, pp. 5-6.

<sup>779</sup> F00594, Defence Urgent Request for Interim Release of Mr Shala on Humanitarian Grounds, 18 July 2023 (confidential), paras. 4, 11.

<sup>780</sup> *Mladić* Appeal Judgment, para. 554; *Stanišić and Simatović* Appeal Judgment, para. 329; *Gotovina* Judgment, para. 2610.

the report of Ms Milazzo. He further suffers from various somatic problems for which he is treated with medication.<sup>781</sup>

#### 4. Mitigating circumstances

363. If the Panel were to find the Accused guilty on any of the counts in the Indictment, it should consider mitigating circumstances when imposing a sentence.<sup>782</sup> Such mitigating circumstances need only be established on a balance of probabilities.<sup>783</sup>

364. The alleged events are exceptional and should be considered in the context of suffering and injustice that the Accused had to go through on a daily basis for his entire life.

365. These alleged events occurred in a world marked by an inhuman and cruel policy imposed by the Serbian state and armed forces which has polluted and degraded the morality of the population. The Accused was personally targeted and persecuted,<sup>784</sup> before joining the resistance in Kosovo.<sup>785</sup>

366. The good behavior of an accused during trial proceedings has been considered a mitigating circumstance by international tribunals.<sup>786</sup> The Accused responded to all the summonses to appear as witness or suspect before the ICTY and the KSC. He has never violated any orders from the Panel and has cooperated with the KSC, including by being interviewed with the SPO. In accordance with Rule 163(1)(a)(ii)

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<sup>781</sup> DPS01735-DPS01757, pp. 6, 17, 18.

<sup>782</sup> The Accused's advanced age and health (ICTY, *Krajišnik* Appeal Judgement, para. 816; *Simić* Appeal Judgement, para. 266; *Babić* Sentencing Appeal Judgement, para. 43; *Blaškić* Appeal Judgement, para. 696;) and family circumstances qualify as mitigating circumstances (ICTY, *Krajišnik* Appeal Judgement, para. 816; *Hadžihasanović and Kubura* Appeal Judgement, para. 325; *Simić* Appeal Judgement, para. 266; *Kordić and Čerkez* Judgement, para. 1090; *Blaškić* Appeal Judgement, para. 696; *Kunarac et al.*, Appeal Judgment, paras. 362, 408.

<sup>783</sup> *Mrkšić et al.*, Appeal Judgement, para. 352.

<sup>784</sup> DPS01735-DPS01757, p. 3; DPS01735-DPS01757, pp. 4, 10; DPS01735-DPS01757, pp. 4, 5; T000-2742-T000-2742-Alb and Eng Transcript-A, p. 19; U0009-9230-U009-9235-ET, p. 1; 118557-118562-ET, where the [REDACTED]; DPS01735-DPS01757, p. 18.

<sup>785</sup> U0009-9230-U009-9235-ET, p. 1.

<sup>786</sup> *Blagojević & Jokić* Appeal Judgement, para. 344; *Popović et al.*, Judgement, para. 2155; *Hadžihasanović et al.*, Appeal Judgement, para. 325.

of the Rules, the Panel shall take into account the convicted person's conduct after the act, including any cooperation with the Specialist Prosecutor and the Specialist Chambers.<sup>787</sup>

367. Good behavior during detention has also been deemed a mitigating circumstance by international tribunals.<sup>788</sup> During detention, regardless of the challenges of contact with his family, the Accused patiently awaited the progression of the procedure. The Accused's good conduct in detention should be considered.

368. Under the principle that a reduction of sentence may be granted as a remedy for violation of the rights of the accused,<sup>789</sup> the Accused requests that the Panel consider the violation of the Accused's right to a fair trial<sup>790</sup> as a mitigating circumstance. The substantial misconduct on the part of the Prosecution needs remedy because of the exceptional character of the violation sustained.<sup>791</sup> The Prosecution's conduct should shape the Panel's finding in that a significant mitigating factor exists as the Accused's right to a fair trial was violated.

369. Furthermore, under the same principle, the Defence requests that the Panel consider the prosecution's repeated violations of its disclosure obligations as a mitigating circumstance.

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<sup>787</sup> See also ICC, *The Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, para. 91.

<sup>788</sup> *Mladić* Judgement, para. 5194; *Popović et al.*, Judgement, para. 2140; *Krajišnik* Appeal Judgement, para. 816; *Hadžihasanović and Kubura* Appeal Judgement, para. 325; *Simić* Appeal Judgement, para. 266; *Babić* Sentencing Appeal Judgement, para. 43; *Kordić and Čerkez* Judgement, para. 1091; *Blaškić* Appeal Judgement, para. 696.

<sup>789</sup> ICTR, *Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, paras. 24-27.

<sup>790</sup> As guaranteed by Article 31 of the Kosovo Constitution, Article 21(2) of the KSC Law, and Article 6 of the ECHR as well as the right to an effective legal remedy under Articles 32 and 54 of the Kosovo Constitution and Article 13 of the ECHR.

<sup>791</sup> *Mustafa* Judgment, para. 824.

370. The Panel should also consider in mitigation the length of time that elapsed between the alleged events described in the Indictment and the present proceedings.

371. The Defence respectfully submits that the Panel should also credit the Accused for the time served in detention.<sup>792</sup>

#### 5. Proposed sentence pursuant to Rule 163(4) of the Rules

372. Under Article 44(2)(a) to (c) of the KSC Law, when imposing a sentence for an international crime, the Specialist Chambers shall take into account: (a) the sentencing range for the crime provided under Kosovo law at the time of commission; (b) any subsequent more lenient sentencing range for the crime provided in Kosovo law; and (c) Article 7(2) of the ECHR and Article 15(2) of ICCPR, and the extent to which the punishment of any act or omission which was criminal according to general principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2(a) and (b)".

373. The implementation of the principle of equality before the law constitutes a purpose of sentencing.<sup>793</sup> The Defence notes the limitation it faces in further comparing and individualizing the proposed sentence seeing how no guilty verdict has been reached.

374. Previous sentencing decisions in other cases for similar alleged conduct, including in Kosovo courts, should provide guidance if they relate to the same offences committed in substantially similar circumstances.<sup>794</sup> The Panel should

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<sup>792</sup> *Mustafa* Judgment, para. 830.

<sup>793</sup> *Mustafa* Judgment, para. 777; ICTY, *Stakić* Judgment, para. 901; *Nikolić* Sentencing Judgement, para. 124; ECtHR, *Findlay v. the United Kingdom* [GC], para. 69; *Eckle v. Germany* [GC], paras. 76-77; *Phillips v. the United Kingdom*, para 39 [these cases discuss the applicability of Article 6(1) of the ECHR throughout the criminal proceeding, including during sentencing].

<sup>794</sup> ICTY, *Strugar* Appeal Judgement, para. 348; *Prosecutor v. Jelisić* Appeal Judgement, paras. 96, 101; *Karadžić* Appeal Judgment, para. 767.

refer to domestic sentencing practice relating to sentencing ranges.<sup>795</sup> The Defence submits that the Panel cannot, without committing “a discernible error in sentencing”,<sup>796</sup> impose sentences “which are out of reasonable proportion with a line of sentences imposed in similar circumstances for similar offences”.<sup>797</sup>

375. There are two judgments against alleged members of the same alleged JCE that relate to acts and omissions at the Kukës Metal Factory in the same time frame as the Indictment.

376. In *Sabit Geci et al.*,<sup>798</sup> based on alleged facts at the Kukës Metal Factory and at different locations in Pristina and Cahan, Albania, the District Court of Mitrovica<sup>799</sup> found that Sabit Geci, in his capacity as a member of the KLA with a command position in the improvised prison within a KLA military compound in Kukës, jointly with other KLA members, was guilty of inhumane treatment.<sup>800</sup> He was also found guilty of torturing civilian prisoners while holding a position of command in the KLA HQ in Kukës, in co-perpetration with other KLA members.<sup>801</sup> He was further found guilty of violating the bodily integrity of an undefined number of civilian prisoners.<sup>802</sup> Sabit Geci was acquitted on the charge of the murder of [REDACTED].<sup>803</sup> He was sentenced to 15 years of imprisonment for three counts of war crimes that took place at Kukës, a count of war crime in Cahan and a count of unauthorized possession of weapon – the last two counts relating to completely

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<sup>795</sup> KSC-CA-2023-02, F00038RED, Public Redacted Version of Appeal Judgment, 14 December 2023, paras. 477-479.

<sup>796</sup> KSC-CA-2023-02, F00038RED, Public Redacted Version of Appeal Judgment, 14 December 2023, para. 479.

<sup>797</sup> KSC-CA-2023-02, F00038RED, Public Redacted Version of Appeal Judgment, 14 December 2023, para. 479.

<sup>798</sup> SPOE00248405-00248500, p. 10; *Geci et al.*, Judgment.

<sup>799</sup> See SPOE00248405-00248500, District Court of Mitrovica, P. nr. 45/2020, 29 July 2011.

<sup>800</sup> SPOE00248405-00248500, p. 3.

<sup>801</sup> SPOE00248405-00248500, p. 3.

<sup>802</sup> SPOE00248405-00248500, p. 4.

<sup>803</sup> SPOE00248405-00248500, p. 5.

different facts and situation than the Accused. He was issued a fine of 4,000.00 euros.<sup>804</sup>

377. In *Xhemshit Krasniqi et al.*,<sup>805</sup> based on alleged facts at the Kukës Metal Factory, the Basic court of Mitrovica<sup>806</sup> found Xhemshit Krasniqi guilty of illegal detention. In his capacity as a KLA member, in co-perpetration with Sabit Geci and other KLA members, Xhemshit Krasniqi was found guilty of arresting and illegally detaining witnesses and other unknown civilians.<sup>807</sup> He was also found guilty of inhumane conditions, torture, and violation of bodily integrity or health.<sup>808</sup> He was acquitted for the murder of [REDACTED].<sup>809</sup> He was sentenced to an aggregate punishment of 8 years of imprisonment and a fine of 1,500.00 Euro.<sup>810</sup> Xhemshit Krasniqi was released in September 2020, after spending 5 years in prison.<sup>811</sup>

378. Unlike Sabit Geci, the Accused did not hold a command position at any time during the Indictment Period. While the Defence does not accept TW4-01's evidence and has demonstrated that the Accused was not present at the material time, when asked about who was interrogating him on [REDACTED] or [REDACTED] May 1999, TW4-01 replied "[t]hese questions mostly asked by Sabit Geci and Xhemshit Krasniqi. This one was their soldier. He was behind them", referring to the Accused,<sup>812</sup> which shows that even TW4-01 accepted that the Accused had no position of authority and was not involved in interrogations. Witness Mark Shala (W04754) also stated that the Accused was "just a simple soldier."<sup>813</sup>

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<sup>804</sup> SPOE00248405-00248500, p. 10.

<sup>805</sup> SPOE00248071-00248128, p. 8; Basic Court of Mitrovica of Kosovo, *Case against Xhemshit Krasniqi*, Case P. No. 184/15, 8 August 2016.

<sup>806</sup> See SPOE00248071-00248128, Basic Court of Mitrovica, P. no. 184/15, 8 August 2016.

<sup>807</sup> SPOE00248071-00248128, p. 3.

<sup>808</sup> SPOE00248071-00248128, pp. 4, 5.

<sup>809</sup> SPOE00248071-00248128, p. 2.

<sup>810</sup> SPOE00248071-00248128, p. 8.

<sup>811</sup> DPS01783-ET.

<sup>812</sup> TW4-01, T. 30 May 2023, p. 1477.

<sup>813</sup> T. 23 October 2023, p. 2981.



379. Any sentence imposed should reflect the lesser role attributed to the Accused in the Indictment and evidence presented by the Prosecution. The Accused's lack of actual authority over the alleged perpetrators should mitigate the sentence. Any sentence should be the lowest statutorily mandated minus the years reflecting the above-mentioned mitigating circumstances. Furthermore, if the Panel finds that the Accused took part in the alleged JCE, the Defense requests the Panel to take into account his low position in comparison to the other members of the alleged JCE as a mitigating circumstance. The Defence submits that the sentence in the *Krasniqi* case should serve as a guiding reference for the practice of Kosovo courts with regard to similar charges while noting Krasniqi's command position and much larger participation than that alleged for the Accused in this case.

#### 6. Other relevant factors

380. The Defence reiterates that the right to a fair trial continues to apply throughout the entirety of the proceedings, including at sentencing.<sup>814</sup> A sentence should be proportionate to the crime and reflect the culpability of the perpetrator and all relevant factors of the specific case.<sup>815</sup> In addition, a disparity between an impugned sentence and another sentence rendered in a like case can constitute an error if the former is out of reasonable proportion with the latter.<sup>816</sup> The Defence urges the Panel that in the event of a conviction, any sentence imposed need to be fair and proportionate. Lastly, the Defence reserves the right to make further submissions on sentencing upon a conviction.

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<sup>814</sup> ECtHR, *Phillips v. the United Kingdom*, para. 39; *Aleksandr Dementyev v. Russia*, para. 23; *Findlay v. the United Kingdom*, para. 69.

<sup>815</sup> *Lubanga* Appeal Judgment, paras. 40, 77.


<sup>816</sup> ICTY, *Strugar* Appeal Judgement, para. 349.

## F. Conclusion

381. For all the above reasons, the Defence submits that the Trial Panel should return verdicts of not guilty of all counts on the Indictment.

**Word Count: 44974**

Respectfully submitted,



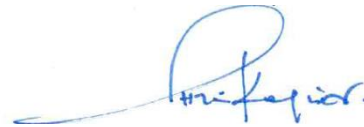
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Monday, 25 March 2024

The Hague, the Netherlands