PUBLIC
Date original: 25/11/2024 23:47:00
Date correction: 26/11/2024 16:27:00
Date public redacted version: 13/01/2025 16:49:00

In:	**KSC-CA-2024-03**
	The Specialist Prosecutor v. Pjetër Shala
Before:	**A Panel of the Court of Appeals Chamber**
	Judge Michèle Picard
	Judge Kai Ambos
	Judge Nina Jørgensen
Registrar:	Fidelma Donlon
Date:	25 November 2024
Filing Party:	Counsel for Pjetër Shala
Original language:	English
Classification:	Public

Public Redacted Version of Corrected Version of Defence Appeal Brief with confidential Annexes 1 and 2

Specialist Prosecutor's Office

Kimberly P. West

Counsel for Victims

Simon Laws

Maria Radziejowska

Specialist Defence Counsel

Jean-Louis Gilissen

Hédi Aouini

Leto Cariolou

Table of Contents

I. INTRODUCTION 4
II. GROUND 1: ALLEGED ERRORS CONCERNING THE PANEL'S RELIANCE ON MR SHALA'S STATEMENTS 4
III. GROUND 2: PREJUDICE CAUSED BY UNCERTAINTY AS TO THE EVIDENTIARY RECORD 11
IV. GROUND 3: BREACH OF THE PRINCIPLE OF LEGALITY 4
A. JOINT CRIMINAL ENTERPRISE 19
B. ARBITRARY DETENTION IN A NIAC 23
V. GROUND 4: DEFECTIVE INDICTMENT 26
A. LACK OF SUFFICIENT PARTICULARS 27
B. CUMULATIVE CHARGING 30
C. REMEDY FOR PREJUDICE CAUSED DUE TO DEFECTIVE INDICTMENT 30
VI. GROUND 5: ERROR DUE TO CONVICTION FOR CRIMES WHICH WERE NOT CHARGED 31
VII. GROUND 6: ABUSE OF DISCRETION IN THE ASSESSMENT OF KEY PROSECUTION WITNESSES 34
A. TW4-01 34
B. W04733 37
C. W01448 41
D. CONTAMINATION 42
E. DOUBLE STANDARDS 44
VIII. GROUND 7: UNFAIR RELIANCE ON UNTESTED EVIDENCE 46
A. ARBITRARY DETENTION 47
B. TORTURE 50
C. DECISIVENESS OF UNTESTED EVIDENCE 55
IX. GROUNDS 8 AND 11: PLACING AN UNATTAINABLE BURDEN OF PROOF ON THE DEFENCE 58
A. DRAWING INFERENCES WHICH WERE NOT THE ONLY REASONABLE INFERENCES 58
B. ASSESSMENT OF MR SHALA'S STATEMENTS 66
X. GROUND 9: VIOLATION OF DEFENCE RIGHTS 66

A. DISCLOSURE VIOLATIONS 67
B. UNDUE RESTRICTIONS ON WHICH WITNESSES TO CALL 68
C. STARTING THE TRIAL BEFORE THE DEFENCE WAS TRIAL-READY 70
D. THE IMPACT OF THE PASSAGE OF TIME 70
XI. GROUND 10: ABUSE OF DISCRETION CONCERNING DEFENCE WITNESSES 72
XII. GROUND 12: ERRORS RELATED TO THE CONVICTION FOR ARBITRARY DETENTION 76
A. ELEMENTS OF THE CRIME 76
B. ERRORS REGARDING FACTUAL AND LEGAL FINDINGS 76
1. Arbitrary Finding About Lack of Security Concerns 79
2. Requisite *Mens Rea* 81
3. Mr Shala's Contribution 83
C. LACK OF COMPETENT AUTHORITY 85
XIII. GROUND 13: ERRORS RELATED TO THE CONVICTION FOR MURDER 88
XIV. GROUND 14: ERRORS IN SENTENCING 92
A. ERRORS IN ESTABLISHING THE SENTENCING REGIME 93
B. ERRORS IN THE APPLICATION OF SENTENCING REGIME 96
XV. CONCLUSION 97

I. INTRODUCTION

1. Pursuant to the Appeals Panel's Decision,[1] Rule 179(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules") and Article 48(1) of the Practice Direction on Files and Filings, the Defence for Pjetër Shala files this Appeal Brief against the Judgment issued by Trial Panel I ("Panel"), which convicted Mr Shala of the war crimes of arbitrary detention (Count 1), torture (Count 3), and murder (Count 4) and sentenced him to 18 years of imprisonment.[2]

2. This Appeal Brief follows the Revised Notice of Appeal filed by the Defence on 30 October 2024.[3]

3. The Defence requests the Appeals Panel to quash the convictions entered and/or remit the case for retrial and/or impose, if required, an appropriate sentence.

II. GROUND 1: ALLEGED ERRORS CONCERNING THE PANEL'S RELIANCE ON MR SHALA'S STATEMENTS

4. The Panel admitted into evidence and heavily relied for its verdict on statements made by Mr Shala when questioned as a suspect without receiving legal assistance either prior to or during questioning. This violated Mr Shala's right to a fair trial.

5. Mr Shala's incriminatory statements were given in interviews with the ICTY Prosecutor in 2005 and 2007, to the Belgian Federal Judicial Police in 2016, and to the Belgian Federal Judicial Police and SPO in 2019.[4] For the purposes of the ICTY and Belgian interviews, Mr Shala was questioned without a lawyer being present and without being afforded an opportunity to consult with a lawyer prior to or during his

[1] KSC-CA-2024-03, F00021, paras. 13, 16.
[2] F00847, paras. 1122-1125.
[3] KSC-CA-2024-03, F00017/COR.
[4] F00364/COR, paras. 52, 114(b).

questioning.[5] At the time of these interviews, Mr Shala, who never completed schooling, was vulnerable and unable to appreciate the severity of the situation.[6] He was not informed of the significance of the right to legal assistance, that he could have legal assistance free of charge, and the potential consequences of proceeding without legal assistance.[7] In addition, he felt compelled not to rely on the interpreter and preferred to communicate in French despite his limited command of the language and the complexity of the issues discussed.[8] The interpreters at both Belgian interviews were not independent but associates of the Belgian police which further undermined his trust in the process.[9] All statements obtained in this manner were obtained in breach of Mr Shala's rights to legal assistance and protection against self-incrimination.[10]

6. The Appeals Panel accepted that Mr Shala's right to legal assistance was violated when he was barred from accessing legal advice for the purposes of the 2016 interview with the Belgian Federal Judicial Police.[11] Nonetheless, the Panel persisted that the 2016 statements should be "available for consideration" for its deliberations and judgment.[12] The statements were admitted into evidence with the delivery of the Judgment.

7. The Panel carefully avoided openly relying on the 2016 statements in its findings. These remained "available for consideration" in its deliberations and therefore, in the absence of evidence to the contrary, were duly considered for the

[5] Defence FTB, para. 302; T000-2742-T000-2742-Alb and Eng Transcript–A, pp. 2, 5-7; T001-0105-1-A-TR, pp. 1-2; T001-0105-3-A-TR, pp. 1-2; 074117-074129-ET Revised, p. 3; 066843-066855-ET Revised RED, p. 3; 066888-TR-ET Part 1 Revised, p. 95.
[6] Defence FTB, para. 274; F00358, para. 20.
[7] Defence FTB, para. 306; IA006-F00004, paras. 32, 36, ns. 11, 40.
[8] Defence FTB, para. 303; F00358, para. 64.
[9] Defence FTB, para. 303; 066864-TR-ET Part 1 RED, p. 1; 074117-074129-ET RED, p. 3; F00358, paras. 58, 60, 64.
[10] Defence FTB, paras. 302-310; T. 17 April 2024 pp. 4290-4293; F00281; F00299; F00358; F00369; F00385; IA006-F00004; IA006-F00006; F00515; F00533; KSC-CC-2023-21, F00001.
[11] IA006-F00007, paras. 75-76, 78, 103.
[12] F00364/COR, para. 80.

purposes of the Panel's conclusions. The Panel heavily relied on Mr Shala's statements from the two ICTY interviews and the 2019 Belgian interview to make findings regarding: (i) Mr Shala's membership in the KLA in 1998 and 1999; (ii) the presence of a KLA base at Kukës in May to June 1999; (iii) the use of the Kukës Metal Factory ("KMF"); (iv) the layout of the KMF compound; (v) KLA detention operations at the KMF; (vi) Mr Shala's encounters with TW4-01, [REDACTED], [REDACTED], and W04733 at the KMF; (vii) Mr Shala's presence at the KMF during the Indictment Period; (viii) Mr Shala's degree of autonomy and authority within the KLA at the KMF; (ix) Mr Shala's participation in crimes; and (x) Mr Shala's alleged lack of remorse and empathy for the victims.[13] The statements therefore were decisive for the outcome of the proceedings. They played a prominent role in the Judgment and formed an "integral" part of the probative evidence upon which the conviction was based.[14]

8. Relying on the 2005 and 2019 statements, the Panel found that "Mr Shala himself acknowledged that he was present at the KMF during the timeframe of the charges".[15] Relying on his statement that he saw TW4-01, the Murder Victim, [REDACTED], and W04733 at the KMF sometime in 1999, the Panel found that "he was at the KMF on two separate occasions, between approximately [REDACTED] May 1999 and 5 June 1999, when the four detainees were held there" and that he participated in crimes against these persons.[16] Mr Shala's statements were also untested and unsworn. Not only did the Panel rely on them but also used them to assess his credibility:

> [t]he Panel would expect Mr Shala, as an experienced KLA member, to volunteer more information and more details about his time at the frontline. Instead, he deflected attention away from the questions or provided generic

[13] Judgment, paras. 281, 284-293, 297-299, 306-310, 338-340, 348, 352-353, 361, 376-379, 451-455, 850-874, 881-882, 895-903, 910-914, 923-924, 929-931, 951-956, 1010-1011, 1014, 1104, 1107, 1116-1118.
[14] *Gäfgen v. Germany* [GC], para. 164; *Bykov v. Russia* [GC], para. 89; *Jalloh v. Germany* [GC], para. 96; *Leka v Albania*, paras. 107-118; *Ayetullah Ay v. Turkey*, paras. 123-130. *For instance*, Judgment, paras. 850-874, 896-897, 910-914.
[15] Judgment, para. 853.
[16] Judgment, paras. 865-870.

> answers, which do not convince the Panel that he spoke truthfully or from his personal experience.[17]

9. The right to a fair trial guarantees a suspect's rights to legal assistance and protection against self-incrimination.[18] According to the doctrine of the fruit of the poisonous tree, which has been endorsed by the European Court of Human Rights ("ECtHR"), evidence obtained unlawfully, particularly in breach of defence rights, cannot be admitted and, if it does, it taints the fairness of the entire proceedings.[19]

10. In his separate opinion in *Dvorski v. Croatia*, Judge Zupančič agreed with the finding of a violation of the applicant's fair trial rights as the applicant was not informed of the availability of the lawyer of his choice to represent him, he confessed to crimes during police questioning and his confession was admitted in evidence, while the national courts failed to take remedial measures to ensure fairness.[20] Judge Zupančič was concerned about how to remedy the violation in a retrial and, in this context, he aptly noted:

> [w]hat to do with the evidence, which would not have been obtained by the police, were it not for the absence of the suspect's legitimate counsel during these interrogations? The question will also be to what extent the evidence obtained during the trial of the applicant is the fruit of the poisonous tree of the obvious primary violation of the applicant's Convention rights. As implied above, the test to be applied is a *sine qua non*, namely, the query applies to all of the evidence stemming directly or indirectly from the irregular interrogation at the crucial beginning of this domestic procedure.
>
> The issue, therefore, is the exclusionary rule. In the new trial, for the right to counsel to have any meaning, the previously obtained contaminated evidence–"contaminated" because it was obtained in the absence of legitimate counsel–should be conscientiously expunged from the dossier

[17] Judgment, para. 869; *see also* para. 913.
[18] *Salduz v. Turkey* [GC], paras. 54-55; *Öcalan v. Turkey* [GC], para. 148; *Lanz v. Austria*, para. 50; *John Murray v. The United Kingdom* [GC], para. 45; *Funke v. France*, para. 44. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, Article 3.
[19] *Panovits v. Cyprus*, paras. 85-86; *Yaremenko v. Ukraine (No. 2)*, paras. 66-67; *Gäfgen v. Germany* [GC], para. 168; *K.S. and M.S. v. Germany*, Concurring Opinion of Judge Vehabović; *Dvorski v. Croatia* [GC], para. 111. *See also Dvorski v. Croatia* [GC], Concurring Opinion of Judge Zupančič, paras. 5-6.
[20] *Dvorski v. Croatia* [GC], Concurring Opinion of Judge Zupančič, paras. 5-6, 11-13.

> concerning the applicant and, moreover, the new court dealing with the case ought to have no knowledge of the contaminated evidence on which to rely during the subsequent trial.
>
> […]
>
> Clearly, this presents us with the problem of excluding the contaminated evidence, that is with the exclusionary rule, during the given trial, because once the evidence has been presented, there is no way to exclude it from the cognitive range of the sitting judges.
>
> The German rule to the effect that the judge cannot rely on such evidence in his or her reasoning and motivation of his or her judgment is, to say the least, naïve to the extent that this presupposes the ability of the judges to ignore the contaminated or otherwise inadmissible evidence.
>
> The wrong assumption… to the effect that the description of the proof of an idea explains the means by which the very idea was arrived at, underlies the proscription of citing in the motivation of the judgment the evidence subject to exclusionary rule. This is obviously not going to prevent the judge from *ex post facto* rationalising his "*intime conviction*", as the French call it.[21]

11. What we have in this case illustrates well how Judge Zupančič's fears materialize in criminal proceedings. In this case, not only the fruit of the poisonous tree itself was admitted in the proceedings and remained available for the Panel's deliberations, but the fruits of the poisonous tree which took the form of subsequent statements, contaminated as they were by the failings of the primary violation, were also admitted. They were not only admitted but also heavily relied upon for the purposes of the conviction. The fact that no explicit reference was made to the 2016 statements does not remedy the primary violation nor does it render the trial fair. The fact that the 2016 statements were not cited by the professional judges of the Panel does not mean that they were prevented from "*ex post facto* rationalising [their] '*intime conviction*', as the French call it" which was based on or at least coloured by the 2016 statements which do not appear in the "formal" description of their decision-making process.

[21] *Dvorski v. Croatia* [GC], Concurring Opinion of Judge Zupančič, paras. 5-6, 11-13 (emphasis added).

12. In the joint concurring opinion of Judges Kalaydjieva, Pinto de Albuquerque, and Turković, it is recalled that:

> In criminal procedure, there are some procedural rights so basic to a fair trial that their infringement can never be viewed as fair. The infringement of these rights results in a structural error, which affects the framework within which the trial proceeds.
>
> The Court has already accepted that such structural errors may arise in relation to […] evidence obtained as a direct result of […] the erroneous denial of access to a lawyer. As the Court underlined in *Salduz*, the evidence obtained during the investigation stage determines the framework within which the offence charged will be considered at the trial, and therefore any such procedural errors committed during this stage will necessarily have an impact on the fairness of the proceedings. Since the "exclusionary rule" has been established for the protection of the privilege against self-incrimination, the use of evidence collected in breach of this basic privilege will always render a trial unfair, irrespective of any other circumstances of the case. Thus, the Court found in *Salduz* that any conviction based on an admission or statement given in violation of the right of access to a lawyer constituted a violation of the general right to a fair trial guaranteed under Article 6 § 1 of the Convention. In other words, *Salduz* introduced an automatic exclusionary rule for self-incriminatory statements obtained without a lawyer being present during questioning when there were no compelling reasons for denying access to a lawyer (that is, in situations of unjustified denial of access to a lawyer).
>
> […] If a tainted self-incriminatory statement is not excluded prior to trial, such an error in itself should be seen as a violation of the Convention without there being any need to assess the overall fairness of the proceedings. If that tainted evidence comes to the knowledge of the judges sitting in the case, the conviction should automatically be quashed. No other legal remedy could rectify such errors and ultimately ensure the fundamental right to a fair trial.[22]

13. Similarly, the ICTY and ICTR Chambers held that a statement taken in violation of the fundamental right to legal assistance would require its exclusion; its admission into evidence would be "antithetical to and seriously damage the integrity of the proceeding[s]".[23]

[22] *Dvorski v. Croatia* [GC], Joint Concurring Opinion of Judges Kalaydjieva, Pinto de Albuquerque and Turković, paras. 16-18, 21 (emphasis added).
[23] *Karemera et al.* Decision on Admission into Evidence, paras. 23-32; *Bagosora et al.* Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(c), para. 21; *Delalić et al.* Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, paras. 43, 55.

14. None of the incriminatory statements obtained in breach of Mr Shala's rights should have been admitted or used by the Panel in its deliberations. Even accepting that only the 2016 statements were obtained in breach of Mr Shala's rights, the doctrine of the fruit of the poisonous tree precludes use of the statements made in the 2019 interview. The breach of Mr Shala's rights for the purposes of the 2016 interview renders the use of statements made in the 2019 interview unfair and impermissible. The 2019 statements were substantially affected by what took place and what was already stated in the context of the 2016 interview which violated Mr Shala's rights. Mr Shala's statements as recorded in 2016 inevitably shaped the answers given in the course of the 2019 interview in which additional self-incriminatory statements were made without having the benefit of legal advice.[24] Had the 2016 interview been conducted in accordance with the law, Mr Shala's answers in 2019 might have been substantially different, especially had he been afforded the legal representation he was entitled to. As the ECtHR stated in *Panovits v. Cyprus*, the second statement made by the applicant was "tainted by the breach of his rights of defence due to the circumstances in which the [first] confession had been taken".[25]

15. The Panel erred in law and fact when admitting the statements of Mr Shala and relying on them to a decisive extent when entering convictions against him. This caused irretrievable prejudice to the fairness of the trial. The Panel also erred in law by denying the violation and refusing to make any effort to remedy it in the course of the trial.[26] The only appropriate remedy is vacating all convictions and remitting the case for re-trial in which the incriminatory statements by Mr Shala are excluded.

[24] Defence FTB, para. 307.
[25] *Panovits v. Cyprus*, para. 85.
[26] Judgment, paras. 73, 1119.

III. GROUND 2: PREJUDICE CAUSED BY UNCERTAINTY AS TO THE EVIDENTIARY RECORD

16. The Panel erred in law and in fact by failing to ensure that there is certainty regarding the evidentiary record of the proceedings as the trial proceeded.

17. Article 40(6)(h) of the KSC 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". 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".

18. The clear wording of Article 40(6)(h), read together with Rule 138(1), *requires* the Panel to decide on the admissibility of evidence.[27] This is clearly indicated by the use of the words "shall" and "admit" in Rule 138(1), which demonstrates that the KSC legal framework was intended to require issuing decisions on the admissibility of evidence.[28]

19. The use of the word "shall" can be contrasted to the use of the word "may" in the equivalent provision of the ICC legal framework. Article 69(4) of the Rome Statute provides that "[t]he Court *may* rule on the relevance or admissibility of any evidence".[29] Similarly, 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*" and, therefore, not only on evidence admitted on the evidentiary record.[30] Rule 63(2) of the ICC Rules of Procedure and Evidence states that "[a] Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to

[27] Emphasis added. *See* Defence FTB, para. 335; T. 17 April 2024 pp. 4292-4293.
[28] Defence FTB, para. 335; T. 17 April 2024 p. 4293.
[29] Emphasis added. *See also Bemba et al.* Appeal Judgment, paras. 576-577, 579.
[30] Emphasis added.

assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69".[31] The Chamber's power therefore is to discuss all evidence submitted freely and can rule on admissibility or even proceed and deal directly with relevance. These provisions show that admissibility is not required in the ICC framework unlike the KSC framework which does not allow similar discretion and requires admissibility decisions.

20. As to the timing of such decisions, a plain reading of Article 40(6)(h) 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 in light of the purpose of the Rules, which is to ensure a fair procedure that allows an effective opportunity to confront the evidence presented by the other Party as well as to respond to it and proceed with certainty in making submissions on the basis of the evidentiary record of the proceedings.[32] The phrase "during the course of trial" cannot be reasonably interpreted to mean in the trial judgment itself.

21. Evidently, the right time for issuing admissibility decisions is at any time prior to the close of the evidentiary proceedings as the trial unfolds in order to allow the parties an effective opportunity to address the evidentiary record as it unfolds, decide how to develop their case accordingly, and discuss the evidence on record and its impact on the merits of an issue in dispute in closing submissions. The second part of Rule 138(1) of the Rules provides that "[i]n exceptional circumstances, when the Panel is satisfied that an issue was not known at the time when the evidence was submitted, it shall be raised immediately after it has become known". This 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 the essence

[31] *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 suggests the exercise of discretion.
[32] Defence FTB, para. 336.

when it comes to the evidentiary record and decisions on admissibility or exclusion of evidence need to be issued as soon as possible.

22. The discretion allowed in the ICC framework has resulted in different approaches by different trial chambers as to admissibility decisions.[33] However, as Judge Henderson stated in his Dissenting Opinion:

> With 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.[34]

23. In *Bemba*, Judge Ozaki stated in her Dissenting Opinion that "[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 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".[35]

24. The KSC provisions are analogous to the relevant rules in the framework of the ICTY, ICTR, MICT, STL, and SCSL,[36] 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. Rule 87(4) of the Internal Rules of the ECCC

[33] *Contrast* ICC, *Lubanga* Corrigendum of Decision on the 'Prosecution's Second Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)' with *Gbagbo* Decision on the submission and admission of evidence; *Bemba et al.* Appeal Judgment, paras. 552-628.
[34] *Gbagbo* Dissenting Opinion of Judge Henderson, para. 12.
[35] *Bemba* Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the Prosecution's list of evidence, para. 16 (emphasis added).
[36] 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". *See also* 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.

provides that the Trial Chamber will determine the merit of any request for the admission of evidence and admit any new evidence *during* the trial.[37]

25. Thus, the Panel erred by failing to apply correctly the KSC legal framework and opting to depart from well-established practice in international criminal proceedings which requires decisions on the admissibility of evidence to be made in the course of trial. The Panel chose to issue admissibility decisions for 360 items, including core evidential material tendered by the Prosecution at the time of issuing its Judgment. The Panel considered that it is not obliged to render admissibility rulings on each piece of evidence submitted and that, generally, it could and would defer consideration of the admissibility of each item of evidence to the judgment stage, except where it is required to render discrete decisions prior to that.[38] The Panel reassured that the parties would have "absolute clarity, at the closing of the evidentiary proceedings, which evidentiary items may be considered by the Panel for the purpose of its judgment".[39]

26. Despite its reassurances, the Defence had no clarity whatsoever as to the Panel's intention regarding highly incriminating evidentiary material tendered by the Prosecution. The prejudice caused to the Defence by the lack of certainty as to the evidentiary record as the trial unfolded is perhaps best illustrated by the impact of the Panel's decision on the ability of the Defence to comment on the merits of incriminatory statements made by Mr Shala in circumstances that violated his rights to legal assistance and protection from self-incrimination.[40] In the course of the proceedings, the Panel found that the 2016 and 2019 Belgian interview statements were "not inadmissible" pursuant to Rule 138(2) of the Rules and "therefore [could] be considered by the Panel in accordance with Rule 139(1)".[41] It held that

[37] Rule 87(4), Internal Rules (Rev. 10) of the ECCC, as revised on 27 October 2022.
[38] F00461, paras. 17, 20-22, 57.
[39] F00461, para. 16.
[40] Defence FTB, paras. 304, 340, 342.
[41] F00364/COR, paras. 80, 110.

"[c]oncerning the question of whether to admit into evidence" the 2016 and 2019 statements, "it will issue in due course a decision on the submission and admissibility of non-oral evidence" and deferred its decision.[42] Similarly, its decision concerning the objections to the admissibility of statements made by Mr Shala in support of his asylum applications[43] was deferred to its deliberations.[44] No reasoning has ever been provided by the Panel for the admission of these statements as well as of other evidentiary material admitted with the delivery of the Judgment, contrary to the requirement to provide a reasoned decision when dismissing a party's arguments. In its verdict, the Panel heavily relied on Mr Shala's statements to make adverse findings underlying the conviction.[45] The statements formed an integral part of the evidence upon which the conviction was based. Mr Shala was deprived of an effective opportunity to respond to the merits of the issues raised in the evidence tendered but not yet admitted throughout the trial, could not shape the presentation of his case accordingly in an exercise of his right not to incriminate himself any further and had to proceed without knowing whether the incriminatory evidence would form part of the evidentiary record to be relied on for the judgment. Taking a stance on the statements before knowing whether they were admitted would further undermine the right of Mr Shala not to incriminate himself.

27. In the Judgment, the Panel failed to consider, address or provide any reasoned opinion on the Defence complaints regarding the uncertainty as to the admission of the statements.[46] The Panel erroneously held that the arguments in the Defence FTB had previously been considered in the Framework Decision on Evidence,[47] when they had never been addressed. In attempting to support its reasoning, the Panel

[42] F00364/COR, paras. 80, 110, 114(c).
[43] Defence FTB, para. 747; F00615, paras. 4, 14-16, 20.
[44] T. 25 August 2023 pp. 2442-2443.
[45] Judgment, paras. 281, 284-293, 297-299, 306-310, 338-340, 348, 352-353, 361, 376-379, 451-455, 850-874, 881-882, 895-903, 910-914, 923-924, 929-931, 951-956, 1010-1011, 1014, 1104, 1107, 1116-1118.
[45] Judgment, paras. 63-65; Defence FTB, paras. 331-343.
[46] Judgment, paras. 63-65; Defence FTB, paras. 331-343.
[47] Judgment, para. 63.

misleadingly stated that "the Defence abided by that system [on the admission of written evidence] throughout the trial, including by making submissions in the Defence FTB and in its closing statements on the evidence available for consideration by the Panel".[48] However, the Defence had no option but to accept the Panel's practice, which was clearly a matter falling within its discretion and could not be challenged in an interlocutory appeal.

28. The fact that Mr Shala was only given notice of the evidence against him at the close of the proceedings cannot be reconciled with his right to be informed promptly and in detail of the cause and content of the charges against him. Not being given prompt notice of the evidence against him has impacted his right to adequate time and facilities to prepare his defence. The Defence was also forced to perform investigations with a view to countering all factual allegations contained in the evidence tendered by the Prosecution, without knowing whether any of it would have been excluded for lack of authenticity or reliability which substantially increased the scope of investigations and its ability to manage the trial.

29. The Panel's decision to keep the evidentiary record uncertain during the course of the proceedings caused significant prejudice to the Defence and breached Mr Shala's right to know the evidence that had been admitted in the case against him, provided under Article 21 of the KSC Law and Article 6(3) of the ECHR.[49]

30. The Panel's decision to proceed outside the scope of its powers as determined in the KSC framework was an error of law that violated Mr Shala's rights, has caused prejudice in the manner of presenting his defence, which is best illustrated by the fact that the Defence could not comment on Mr Shala's incriminatory statements in the course of the trial without knowing whether the Panel would exclude, admit or rely on them for the purposes of its Judgment. The Panel's error has resulted in a

[48] Judgment, para. 64.
[49] F00364/COR.

miscarriage of justice and the only appropriate remedy is for the case to be remitted for retrial.

IV. GROUND 3: BREACH OF THE PRINCIPLE OF LEGALITY

31. The Panel erred in law in entering convictions based on liability under a joint criminal enterprise ("JCE") and for the war crime of arbitrary detention in a non-international armed conflict ("NIAC").[50] Both JCE liability as well as the crime of arbitrary detention in NIAC did not form part of the Kosovo law or customary international law ("CIL") in 1999 and were not foreseeable nor accessible to Mr Shala.[51]

32. The principle of legality as guaranteed in Article 33 of the Kosovo Constitution, Article 7 of the ECHR, and Article 15 of the ICCPR prohibits the retroactive application of substantive criminal law, including modes of liability that were not applicable or binding in Kosovo at the time the alleged offences were committed.[52]

33. Article 7(1) of the ECHR contains the general rule of non-retroactivity in criminal law. The ECtHR has repeatedly held that only law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) from which it follows that an offence must be clearly defined in the law, be it national or international.[53] Article 7(2) of the ECHR, as interpreted by ECtHR, was a time-limited clarification intended to ensure the validity of prosecutions for war crimes committed during the Second World War after the Second World War and does not constitute a general exception to the rule of retroactivity.[54] As such, it cannot be applied to conflicts that occurred since the Second World War.[55] The Appeals Panel has also recognized that the principle of legality, "as enshrined in Article 7(1) of the ECHR and Article 33(1) of the Constitution

[50] Judgment, paras. 934-956, 995-997, 1027-1030, 1035-1039, 1124.
[51] Judgment, paras. 934-956, 995-1039, 1124; F00117, paras. 7, 28, 34.
[52] F00054, para. 4.
[53] *Vasiliauskas v. Lithuania* [GC], para. 154.
[54] *Vasiliauskas v. Lithuania* [GC], paras. 187-190; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], para. 72; *Kononov v. Latvia* [GC], para. 186.
[55] *Ibid.*

of Kosovo, embodies, among others, the requirement that a crime must be clearly defined in law",[56] and that "criminal law must always provide individuals with sufficient notice of what is criminal behaviour and what is not".[57]

34. None of these principles were respected by the Panel when it entered convictions on the basis of JCE liability as well as for the crime of arbitrary detention in a NIAC. This error was amplified by the breach of Mr Shala's right to have a sufficiently reasoned opinion on this matter. Whether the specific alleged conduct had amounted to a crime in Kosovo, under CIL or otherwise, was a matter that ought to have been determined in the course of the criminal proceedings.[58]

35. Within the legal order of Kosovo, international law, including norms related to criminal matters, did not have direct effect and could not be directly applied by Kosovo Courts unless they satisfied the duality test.[59] Neither the Kosovo Constitution nor the 1974 Constitution of the Socialist Federal Republic of Yugoslavia ("SFRY"),[60] which applied at the material time,[61] allowed Kosovo courts to enforce criminal prohibitions deriving from international law, including CIL, without domestic incorporation in the form of a domestic statutory provision. Article 181 of the SFRY

[56] KSC-BC-2020-06, IA009-F00030, para. 142; KSC-BC-2020-06, F00412, para. 193 and references cited therein.
[57] KSC-BC-2020-06, IA009-F00030, para. 142; *Blagojević and Jokić* Judgment, para. 625; *Ojdanić* Appeal Decision, para. 10.
[58] KSC-CC-2022-14, F00009, para. 80.
[59] *See* Article 19(1) of the Constitution which limits the direct effect only to ratified international agreements of a "self-applicable" nature and Article 55 of the Constitution requiring that fundamental rights and freedoms guaranteed by the Constitution may only be limited by law. *See also Case against Gj.K.*, pp. 8-9.
[60] The relationship between the principle of legality in criminal matters and the principle of direct applicability of international law in the internal legal order did not change with the 1992 FRY Constitution (see Article 16 and Article 27 of the FRY Constitution).
[61] *See* Article 1 of the UNMIK regulation 1999/24 on the Law Applicable in Kosovo (as amended by 2000/59) ("UNMIK Regulation") which established the legal framework relevant to crimes committed during the Kosovo War, holding that the law in force in Kosovo on 22 March 1989 was the law applicable, unless the later criminal law was more favourable to the defendant. *See also Case against Bešović*, p. 18.

Constitution provided that "[c]riminal offences and criminal law sanctions may only be established by statute".[62]

36. In contrast, a different regime was provided for in Article 3(2)(d) of the KSC Law, accords superiority to CIL "over domestic laws by Article 19(2) of the Constitution". This provision erroneously equates the incorporation of international law into domestic law with its direct applicability. In any event, Article 3(2)(d) had to be interpreted consistently with the principle of legality which is guaranteed by Article 7 of the ECHR and Article 33 of the Kosovo Constitution. As the Supreme Court of Kosovo held "criminal offences and punishments must be provided for in specific domestic legislation".[63] According to its case-law concerning the application of CIL, the constitutional principle of legality in criminal matters operates as *lex specialis* with regard to the principle of direct applicability of international law in the internal legal order, requiring as such a domestic statutory provision to establish a criminal offence.[64] The lack of clarity arising out of the discrepancy within the domestic law violated the accessibility, foreseeability and precision requirements of Article 7(1) of the ECHR.[65]

37. Given the different legal regimes that could be applied, the Panel ought to consider the various options and apply the regime most favourable to Ms Shala; namely, that a specific CIL norm needs to satisfy the principle of duality before it can be considered a norm of domestic criminal law. Its failure to do so violated the principle of *lex mitior*.

A. JOINT CRIMINAL ENTERPRISE

[62] *Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 94.
[63] *Case against Bešović*, p. 18.
[64] *Ibid*., pp. 18-19.
[65] *Vasiliauskas v. Lithuania* [GC], paras. 154, 185-186.

38. The Panel convicted Mr Shala based on the doctrine of JCE for the war crimes of arbitrary detention, torture and murder.[66] However, by construing Article 16(1) of the KSC Law to include JCE liability, the law was interpreted to Mr Shala'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 should have adopted the reading most favourable to the Accused, which means excluding any mode of liability not expressly stated. 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".[67] JCE I is not akin to any mode in the FRY law.

39. Liability under JCE was not foreseeable or accessible to Mr Shala 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.

40. The conviction of Mr Shala through a JCE is contrary to the principle of legality since the mode of liability: (i) did not exist under the criminal law in force in Kosovo at the time the crimes were allegedly committed;[68] (ii) was specifically excluded from the KSC Law; (iii) was not established under CIL in 1999;[69] and (iv) was not foreseeable or accessible to Mr Shala.[70]

41. Article 16(1)(a) of the KSC Law provides for individual criminal responsibility for a person "who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of crimes within the KSC's jurisdiction. The language is clear and does not include JCE as a form of liability.[71] Given that the KSC Law was enacted almost 15 years after the ICTY Appeals

[66] Judgment, paras. 1037-1039.
[67] KSC-BC-2020-06, F00412, para. 178; F00054, paras. 26-27.
[68] F00054, paras. 25-28.
[69] F00054, paras. 33-43.
[70] Judgment, para. 995; Defence FTB, paras. 266-274; T. 17 April 2024 pp. 4285-4287; F00054, paras. 44-45.
[71] F00054, para. 30.

Chamber's Judgment in *Tadić,* the lack of an explicit reference to the mode of liability of a JCE in the KSC Law must be seen as a deliberate decision of the legislator to omit this controversial mode of liability from the jurisdiction of the KSC.[72] Furthermore, interpreting the word "committing" in Article 16(1)(a) to include JCE unreasonably stretched the scope of Article 16(1)(a), to the detriment of Mr Shala, violating as such the *lex mitior* principle, Article 7(1) of the ECHR and Article 33 of the Kosovo Constitution.[73]

42. Whilst the Pre-Trial Judge found JCE liability established in CIL at the material time,[74] he acknowledged that it "was systematised" by the *Tadić* Appeal Judgment.[75] The *Tadić* Appeals Judgment was issued one month after the alleged JCE in this case had come to an end.[76] It is entirely unfair to conclude that JCE-liability was foreseeable and accessible to Mr Shala. The Panel erred when entering convictions on the basis of JCE-liability. One judgment issued after the end of the alleged JCE in this case could not be deemed to have made JCE liability sufficiently established or accessible.[77]

43. Article 7 of the ECHR requires that "the criminal law must not be extensively construed to an accused's detriment, for instance by analogy".[78] Pushing the interpretation of the word "committing" in Article 16(1)(a) so to include JCE stretched the language of Article 16(1)(a) beyond breaking point to the detriment of the Accused, and violated Article 7(1) of the ECHR and Article 33 of the Constitution.[79] In addition, not only *Tadić* but also post-WWII judgments related to JCE were entirely inaccessible

[72] F00054, para. 31.
[73] F00054, para. 32.
[74] F00088, para. 95.
[75] KSC-BC-2020-06, F00412, para. 184.
[76] Defence FTB, paras. 269-270.
[77] *Sürmeli v. Germany* [GC], para. 113; *Abramiuc v. Romania*, para. 128
[78] *Kokkinakis v. Greece*, para. 52; *Vasiliauskas v. Lithuania* [GC], para. 154.
[79] F00054, para. 32; F00084, para. 29.

to Mr Shala. Some of the complete case records were unavailable while a number of those judgments only existed in original languages.[80]

44. The ECtHR has held that criminal law must be accessible and foreseeable in the sense that an accused can know (with the benefit of legal advice if necessary) what acts constitute crimes.[81] In *Vasiliauskas v. Lithuania*, the ECtHR found that the international law on genocide was accessible because it was codified in the 1948 Genocide Convention, but the applicant's rights had been violated because it was not foreseeable that his conduct would have been found to fall within the scope of definition of genocide.[82] The principle of *nullum crimen sine lege* applies also to forms of liability.[83] In the context of the KSC, it must be demonstrated that JCE as a mode of liability was part of binding and applicable law in Kosovo at the time of the alleged crimes, as well as sufficiently foreseeable and accessible to Mr Shala. This was clearly not the case at the material time.

45. In *Thaçi et al.*,[84] when determining whether JCE liability was accessible and foreseeable to the accused, it was considered that the accused held "high ranking positions within the KLA with a vast set of responsibilities and powers",[85] noting that they "allowed them to access a variety of public information and knowledge".[86] As confirmed by the Panel, Mr Shala did not have a high-ranking or any official position, or any access to public information and knowledge.[87] Mr Shala only attained minimal education. Considering the complexity of JCE-liability, no reasonable trier of fact would conclude that JCE-liability was foreseeable or accessible to him at the material

[80] *Prlić et al.*, Dissenting Opinion of Judge Antonetti., p. 148.
[81] *G.I.E.M. S.R.L. and Others v. Italy* [GC], para. 242; *Jorgic v. Germany*, paras. 109-113.
[82] *Vasiliauskas v. Lithuania* [GC], paras. 148, 170-186.
[83] *Milutinovic et al.*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction — Joint Criminal Enterprise, paras. 37-38.
[84] KSC-BC-2020-06, F00412.
[85] KSC-BC-2020-06, F00412, para. 103.
[86] KSC-BC-2020-06, F00412, para. 103. *See also* Defence FTB, para. 273.
[87] Judgment, paras. 899-900.

time.[88] Mr Shala could not have anticipated that he would be charged and convicted on the basis of a judicially constructed rule of CIL inferred from a small number of post-World War II cases which were inaccessible, issued in languages he did not understand, and, in any event, inconclusive as to their scope and application. The convictions on all three counts should be vacated.

B. ARBITRARY DETENTION IN A NIAC

46. Arbitrary detention in a non-international armed conflict did not constitute a criminal offence under the applicable law in Kosovo at the material time.[89] Article 14(1)(c) of the KSC Law enumerates specific acts as war crimes in a NIAC. It does not list arbitrary detention. The exhaustiveness of this list is clear from the different qualifier used in the immediately preceding paragraph of the Law, Article 14(1)(b), where the legislator specifically provided "including, *but not limited to*, any of the following acts".[90] The Panel's expansive interpretation of Article 14 violates Articles 6 and 7 of the ECHR.

47. The war crime of arbitrary detention in a NIAC was not explicitly recognized under international law in 1999. Arbitrary detention is not a serious violation of Common Article 3 of the 1949 Geneva Conventions.[91] As of 1999, there was no settled state practice which deemed arbitrary detention a crime under CIL.[92] The first time that the ICRC suggested that international humanitarian law prohibits arbitrary detention was in 2005, six years after the alleged events.[93] In 2015, the ICRC acknowledged that there is no agreement among States or scholars as to what amounts to arbitrary detention in a NIAC.[94] If this notion was unclear in 2015, it is evident that

[88] Defence FTB, para. 274.
[89] F00054, paras. 4, 46-51; Defence PTB, paras. 53-55.
[90] F00054, para. 51.
[91] F00054, paras. 52-54.
[92] *North Sea Continental Shelf cases*; State practice must be "extensive", "virtually uniform" and "settled".
[93] F00054, para. 56.
[94] ICRC, Detention in non-international armed conflict - Meeting of all States, 27-29 April 2015, 30 April 2015.

it was even more vague in 1999. It is also commonly accepted that deprivation of liberty is an inevitable but lawful occurrence in armed conflicts.[95] The ICRC Study of 2005 acknowledges that detention of civilians will not be considered arbitrary under international humanitarian law and human rights law if based on security imperatives.[96] Criminal law needs to be clear before it can form the basis of a conviction. In this case, what is clear is that arbitrary detention in NIAC cannot be considered to have constituted criminal conduct in 1999, especially when detention is deemed required on security grounds.

48. Despite the above, the Panel found "established" that arbitrary detention in NIAC is "committed through an act or omission resulting in depriving a person who is not taking an active part in hostilities of his or her liberty without legal basis or without complying with basic procedural safeguards".[97] The Panel also elaborated detailed requirements as to what would constitute "basic procedural safeguards".[98]

49. With the number of uncertainties surrounding the notion of arbitrariness when it comes to detention and in the absence of any domestic or international rule prohibiting arbitrary deprivation in a NIAC at the time relevant for the Indictment, Mr Shala could not have foreseen that he could be convicted for it.

50. To date there is no general agreement as to what can be considered arbitrary and which basic guarantees are required for detention to be lawful in a NIAC. The lack of certainty as to the basic guarantees and the precise elements of arbitrary

[95] Knut Dormann, 'Detention in Non-International Armed Conflicts', in International Law Studies (US Naval College), Vol. 88, p. 349. See also Robert Barnsby, 'Yes We Can: The Authority to Detain as Customary International Law' (2009) 202 Military Law Review, p. 69; Ryan Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 AJIL, pp. 55-56.
[96] Henckaerts J.-M., Doswald-Beck L., *Customary International Humanitarian Law*, Vol. I (Rules), Rule 99, p. 344.
[97] Judgment, para. 936.
[98] Judgment, para. 938.

detention in a NIAC deprives the law of the requisite quality which is expected from criminal provisions.

51. The Panel erred in law by finding such the elements of such crime sufficiently certain. Despite relying on the ICRC's Study published in 2005 to support its establishment of each of the three safeguards,[99] it failed to consider the ICRC's position in its 2020 Commentary on the Third Geneva Convention, which states that:

> [i]n international armed conflicts, the Third and Fourth Conventions regulate such detention in considerable detail. In non-international armed conflicts, neither common Article 3 nor Additional Protocol II contain a similar framework for internment. […] As the time of writing, however, the question of which standards and safeguards are required in non-international armed conflict to prevent arbitrariness is still subject to debate and needs further clarification […].
>
> […]
>
> [Common Article 3] is silent, however, on the grounds and procedural safeguards for persons interned in non-international armed conflict […]. Additional Protocol II […] likewise does not refer to the grounds for internment or the procedural rights.[100]

52. Even in 2020, there was no clear nor settled definition of which safeguards are required in a NIAC to prevent arbitrariness, let alone in 1999. The evidence in this case showed 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 gathered together to defend their families and villages spontaneously in response to the intense attacks and deliberate ethnic cleansing conducted by the Serbian military forces and paramilitaries.

53. 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 which

[99] Judgment, paras. 941-943, ns 1916-1918.
[100] ICRC, 2020 Commentary on the Third Geneva Convention, Common Article 3, paras. 756, 758.

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 considered by the Panel as elements of the crime of arbitrary detention, particularly with regard to persons detained on suspicion of being a threat to national security.

54. 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 and its members at the KMF were able to foresee the Panel's requirements as to detailed rules on detention, lawful power to detain, periodic review of the lawfulness of detention and other procedural guarantees which by far exceeded whatever capacities the KLA possessed in mid-1999.

55. The Panel erred in establishing in an arbitrary manner that such standards and safeguards were elements of a crime applicable in NIAC and acted in breach of the principle of legality, violating as such Articles 6 and 7 of the ECHR.[101] The conclusion that the crime was accessible and foreseeable to Mr Shala, who had no official role or power with the KLA at the relevant time is flawed and the conviction on Count 1 should be vacated.

V. GROUND 4: DEFECTIVE INDICTMENT

56. The Panel erred in law when convicting Mr Shala on Counts 1, 3, and 4, on the basis of a defective Indictment which failed to provide sufficient particulars as to the members of the alleged JCE and the victims of the alleged criminal activities, depriving thus Mr Shala of an effective opportunity to answer to the Prosecution's allegations.[102]

[101] Judgment, paras. 935-936, 938-943.
[102] Judgment, paras. 945, 977, 1005; IA004-F00008.

57. The Panel also erred in law when permitting the trial to go ahead on the basis of a defective Indictment that contained cumulative charging of cruel treatment and torture, failing to comply with the principle of reciprocal speciality and ultimately only upholding the Defence objections when issuing its Judgment.[103]

58. The Panel has caused irreparable prejudice to the Defence which was deprived of an effective opportunity to respond to core aspects of the Prosecution's case and had to unnecessarily deal with cumulative charges while operating in conditions that breached Mr Shala's right to adequate time and facilities to present his defence.

A. LACK OF SUFFICIENT PARTICULARS

59. The Indictment is the primary accusatory instrument and an accused should not have to decipher the alleged basis of his criminal responsibility from scattered factors read together.[104] An indictment is defective if it does not present in a sufficiently clear and precise manner the factual and legal elements of a crime and does not allow an accused to fully understand the nature and cause of the charges brought against him.[105]

60. The lack of sufficient particulars about the number and identity of all or at least most individuals who allegedly took part in the JCE created impermissible ambiguity.[106] While a broader description of the charges may be acceptable where the extent of the criminality is of a larger scale and the accused in further removed from the scene of crimes,[107] as the Appeals Panel has found, "[w]hen the proximity of an accused to the alleged criminal conduct is high, the pleading requirements are more rigorous".[108] The scale of this case did not justify the vagueness in the Indictment,

[103] Judgment, paras. 961-964, 1037-1039.
[104] KSC-BC-2020-07, IA004-F00007, para. 49; *Nyiramasuhuko et al*. Appeal Judgment, para. 2538.
[105] *Karemera et al.* Decision pursuant to Rule 72, para 16; F00003, paras. 9-10; *Kupreškić et al.* Appeal Judgment, para. 88; *Bemba* Judgment, para 33.
[106] Indictment, paras. 9-10.
[107] *Said* Decision on Prosecution Notification regarding the Charges, para. 15.
[108] IA004-F00008, para. 17.

particularly given that the missing information as to the identity of JCE members and victims was known to the Prosecution at the time of charging. The use of open language in identifying the victims as well as the JCE members which were described as "certain other KLA soldiers, police, and guards", rendered the Indictment defective and the Defence unable to conduct proper investigations and answer to the Prosecution's allegations, breaching Article 6 of the ECHR and Article 30 of the Kosovo Constitution.[109]

61. The Trial Panel found that Fatmir Limaj was a member of the alleged JCE despite his name never appearing in the Indictment or the Prosecution's Pre-Trial Brief.[110] If it was sufficiently clear to the Panel on the basis of the Prosecution's evidence that Limaj formed part of the alleged JCE, it should have been equally clear to the Prosecution who should have included his name in the Indictment.[111] The Panel also found that the JCE included Osman Kryeziu (W04848), who was a Prosecution witness since the beginning of the proceedings.[112] Yet at no point did the Prosecution plead that he was part of the JCE. Similarly, the Panel found that KLA member Sokol Dobruna was interrogating detainees at the KMF, and therefore was part of the alleged JCE, although his name did not appear in the Indictment, the Prosecution's Pre-Trial Brief or Final Brief.[113] Failure to specifically identify these individuals in the Indictment was in breach of the well-established principle that an indictment must identify members of a JCE and provide their specific identities when known.[114] The failure to identify them in the Prosecution's Pre-Trial Brief prevented the Defence from

[109] Indictment, para. 10.
[110] Judgment, paras. 357, 363, 1003.
[111] The Prosecution does not refer to Fatmir Limaj in relation to charged crimes until filing of its Final Trial Brief (*see* Prosecution Final Trial Brief, paras. 74, 213). The Defence was prejudiced by the lack of notice and could not have foreseen the necessity to challenge the evidence W04733 with contradictory evidence of W01448 regarding the presence of Fatmir Limaj during 20 May 1999 incident.
[112] F00135/A02, p. 17.
[113] Judgment, paras. 341, 354-356, 363.
[114] KSC-BC-2020-07, IA004-F00007, para. 45.

having an effective opportunity to conduct required investigations in time and challenge the Prosecution's case.

62. Furthermore, it is well-established that an indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offense and the means by which the offence was committed.[115] The ICTY Appeals Chambers in *Ntakirutimana* and *Kupreškić et al.* unequivocally held that "if the Prosecution is in a position to name the victims, it should do so".[116] While the massive scale of crimes may make it impracticable to require a high degree of specificity in matters such as the identity of the victims, it is clear that this case does not involve massive scale and given that more specific information could have been provided the Prosecution had to include such information in the Indictment.[117] Mere general identification of victims in the Indictment where specific information could be provided renders an indictment defective.[118]

63. The Indictment mentions "at least nine persons" as victims of "Illegal or Arbitrary Arrest and Detention" without identifying a single victim.[119] Paragraphs 18-20, 24 and 26 of the Indictment fail to provide any number or identity of the alleged victims of cruel treatment or torture. Paragraph 21 fails to identify the female victim.

64. In this case, it is not alleged that Mr Shala participated as member of an execution squad or as a member of a military force that conducted extensive number of attacks on civilians on a massive scale over a prolonged period of time.[120] The limited nature and scale of the allegations as well as the fact that the identity of these

[115] *Krnojelac* Decision on the Defence Preliminary Motion on the Form of the Indictment, para. 12; *Kvočka et al.* Decision on the Form of the Indictment, para. 15.
[116] *Ntakirutimana* Appeal Judgment, para. 25; *Kupreškić et al.* Appeal Judgment, para. 90.
[117] *Kvočka et al.* Decision on the Form of the Indictment paras. 15, 17.
[118] *Kvočka et al.* Appeal Judgment, para. 31.
[119] Indictment, para. 14.
[120] *Kupreškić et al.* Appeal Judgment, paras. 89-90.

victims was known or was largely known to the Prosecution at the time of charging Mr Shala warranted full identification of victims in the Indictment.

65. The lack of sufficient particulars as to the victims of the Accused's alleged criminal activities violated the Prosecution's obligation to give sufficient notice of its case and deprived Mr Shala of an effective opportunity to prepare and present his defence.

B. CUMULATIVE CHARGING

66. Despite objections by the Defence,[121] the Indictment charged Mr Shala with cruel treatment and torture cumulatively, failing to comply with the *Blockburger* test and the principle of reciprocal speciality.[122] It is well-established principle that cumulative charging is detrimental to the rights of the Defence, and only distinct crimes protecting distinct values may justify cumulative charging.[123] While the Panel ultimately upheld the Defence's objections, noting in the Judgment that the facts underlying the change of cruel treatment were identical to those of torture and thus cruel treatment was fully consumed in the charge of torture,[124] there was real prejudice suffered by Mr Shala who faced trial with limited time available for investigations, preparation, and scarce resources and had to unnecessarily answer the Prosecution's allegations under both Counts 2 and 3 in breach of his fair trial rights.

C. REMEDY FOR PREJUDICE CAUSED DUE TO DEFECTIVE INDICTMENT

67. The ICTY Appeals Chamber found that an indictment must be pled with sufficient details the essential aspects of the prosecution case and if it fails to do so, it

[121] F00055COR, paras. 14-26; F00094, paras. 2, 7-8.
[122] *Blockburger v. US*, 284 U.S 299 (1932); *Rutledge v. US*, 517 U.S. 292 (1996)("the test for determining whether there are two offences is whether each of the statutory provisions requires proof of a fact which the other does not"); *Kupreškić et al.* Judgment, paras. 684-685.
[123] *Bemba* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 202; *Ayyash et al.* Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, paras. 298-299.
[124] Judgment, paras. 963-964.

suffers from a material defect which if not cured at trial may require reversing a conviction.[125]

68. The defective indictment was not cured in this case. The Prosecution did not provide specific information in its possession as to the identity of JCE members in the Prosecution Pre-Trial Brief or in the course of the trial. The Prosecution never claimed that Limaj and Kryeziu and Dobruna were members of the alleged JCE. Clarity as to the identity of the victims concerned at the earliest possible stage would have enabled crucial time to be spend in proper investigations.

69. The uncured prejudiced suffered as a result of the defective Indictment, prevented Mr Shala from having timely notice of important elements of the case against him and therefore breached his right to have sufficient time and facilities to defend himself as well as to know to the fullest possible extent the Prosecution's case against him. The Appeals Panel should acknowledge the violation of Mr Shala's fair trial rights in this respect and remedy the prejudice caused by quashing the convictions or alternatively by taking into consideration the said violation as a mitigating factor in sentencing.

VI. GROUND 5: ERROR DUE TO CONVICTION FOR CRIMES WHICH WERE NOT CHARGED

70. An important element of a fair trial is that judges can only convict an accused of crimes that are charged in the indictment.[126] This well-established principle was recognized in Article 74(2) of the ICC Statute which provides that "[t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges".[127] The Panel erred by exceeding the charges in convicting Mr Shala of

[125] *Kupreškić et al.* Appeal Judgment, para. 114.
[126] KSC-BC-2020-07, IA004-F00007, para. 36 and references cited therein; *Mladić* Appeal Judgment, para. 36; *Karadžić* Appeal Judgment, para. 441.
[127] Article 74(2) of the ICC Rome Statute.

crimes committed against double the number of the victims referred to the Indictment. Specifically, the Panel erred in law when it convicted Mr Shala of the crimes of arbitrary detention and torture in respect of *eighteen* individuals, when he was charged with these crimes in respect of *nine* individuals.[128]

71. The Prosecution charged Mr Shala with having physically committed the crimes of arbitrary detention, cruel treatment and torture over a period of three weeks at one site.[129] In this regard, the KSC Appeals Chamber recalled established jurisprudence that "when the proximity of an accused to the alleged criminal conduct is high, the pleading requirements are more rigorous".[130] Further, as stated by the ICTY Appeals Chamber in Kupreškić *et al.*:

> in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.[131]

72. Both the scale of the pleaded criminal activity as well as the mode of individual criminal liability (physical perpetration) demonstrates that the Panel went beyond what can be considered fair in these circumstances. Given the nature of the charges, the scale of the case and the proximity of Mr Shala to the crimes he was convicted for, each victim of a crime in respect of which Mr Shala was convicted should have been identified in the Indictment. The fate of the additional victims featuring in the Panel's conviction was factually distinct and fell outside the factual scope of the charges for both the crimes of arbitrary detention and torture (including the circumstances in which the additional victims were arrested, the manner in which they were provided for the reasons of their arrest or not, the dates and individual circumstances of any questioning by KLA officers, the reasons for their release as well as the incidents and the manner in which they were allegedly ill-treated). The manner in which these

[128] Indictment, para. 14; Judgment, paras. 1037-1038.
[129] Indictment, paras 30-31; Judgment, para. 19.
[130] KSC-BC-2020-07, IA004-F00007, para. 43 and references cited therein.
[131] *Kupreškić et al.* Appeal Judgment, para. 89.

crimes were described in the Indictment did not sufficiently identify the victims and, given the scale of the case, mere reference to the "detainees at the KMF" cannot be considered sufficiently identifiable.

73. As was noted by the ICTY Trial Chamber in the *Trbić* Decision on Further Amendments and Challenges to the Indictment:

> the introduction of a factual allegation not previously reflected in the indictment also amounts to the inclusion of a new charge, but only where such allegation exposes the accused to an additional basis for conviction. Thus, where an amended indictment alleges, for example, that the accused bears liability for the murder of a certain victim that is nowhere alleged in the original indictment, such murder constitutes a new charge.[132]

74. In view of the nature and circumstances of this case, the Panel should have ordered the amendment of the Indictment when the case file was transferred to it so as to include additional victims, or, in the alternative, should have excluded the evidence outside the scope of the Indictment for the purposes of the Judgment.[133]

75. By convicting Mr Shala for crimes committed against additional victims that were not identified in the Indictment, the Panel inappropriately relied on new allegations that were not pleaded or charged and introduced at the very end of the proceedings, without prior notice of its intentions, a basis for conviction distinct from the charges confirmed.

76. Thus, the Panel erred in law when it convicted Mr Shala and found him liable for the crimes of arbitrary detention and torture for the nine additional victims who were not identified in the Indictment.

77. In light of the nature of this error and its impact, the Defence requests the Appeals Panel to quash Mr Shala's convictions of the crimes of arbitrary detention and

[132] *Trbić* Decision on Further Amendments and Challenges to the Indictment, para. 11; *Halilović* Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, para. 30.
[133] *Muvunyi* Appeal Judgment, para. 19.

torture relating to the eight additional victims and to reconsider and adjust the sentence imposed in that respect.[134]

VII. GROUND 6: ABUSE OF DISCRETION IN THE ASSESSMENT OF KEY PROSECUTION WITNESSES

78. The Panel's evaluation of the evidence of key Prosecution witnesses was "wholly erroneous" as it accepted their evidence in circumstances where no reasonable trier of fact would have done so and heavily relied upon them to secure Mr Shala's convictions.[135]

A. TW4-01

79. The Panel erred in finding TW4-01 credible, despite the abundance of evidence undermining his credibility, the implausibility, contradictions and inconsistencies in his evidence, and his history of [REDACTED].[136]

80. The Panel's findings regarding the traumatic nature of events and its effects on TW4-01's memory are inconsistent. On the one hand, the Panel found that trauma did not affect TW4-01's memory or testimony, rejecting the Defence objections and finding TW4-01's evidence "clear, coherent and focused".[137] On the other hand, the Panel relied on his trauma selectively to justify inconsistencies and "discrete aspects" in his

[134] *See also* GROUND 14.
[135] Judgment, paras. 98-119, 169-188, 363, 368-379, 384-407, 410, 412-414, 419-420, 423, 447-473, 477-488, 491-494, 501, 504-505, 510-512, 522-525, 558, 562-563, 565-592, 596-605, 629-638, 640-663, 669-683, 688-699, 706-726, 728, 730-753, 757-796, 799-807, 819, 830-847, 851-852, 895-897, 903-914, 945-949, 951-956, 971-978, 980-984, 1004, 1007-1008, 1010-1018, 1025-1029, 1031-1039.
[136] Judgment, paras. 98-119.
[137] Judgment, para. 106: "the witness was clear, coherent and focused, and he distinguished between what he could remember and what he could not. In case discrete aspects of the witness's account appeared to be affected by trauma, the Panel has discussed it in its evidentiary analysis. Accordingly, the Panel does not find merit in the Defence's submission".

evidence.[138] [REDACTED]. The Panel found that TW4-01's [REDACTED].[139] [REDACTED]. [REDACTED], it is manifestly unreasonable to consistently rely on or prefer his evidence over that of other witnesses. The Panel selected which parts of TW4-01's evidence fitted the narrative they wished to present and *ex post facto* adjusted its credibility assessment of this witness.

81. For instance, the Panel erroneously accepted TW4-01's testimony [REDACTED],[140] even though TW4-01's evidence in this regard was implausible and contradicted by the evidence of other witnesses. [REDACTED] the Panel found their evidence on this point unreliable and preferred TW4-01 for unconvincing reasons, [REDACTED].[141] The Panel's acceptance of TW4-01's unreliable evidence [REDACTED]. [REDACTED].[142] [REDACTED].[143] TW4-01 also changed his evidence regarding Mr Shala's involvement in his transfer to the KMF following the publication of Mr Shala's arrest by the KSC in 2021.[144] The Panel failed to address the impact to TW4-01's credibility or his evident willingness to keep changing his account depending on other available evidence on record.[145]

82. The Panel accepted TW4-01's testimony that from a window in Room 1 where he was detained he could see the entrance gate. In doing so, it disregarded without providing sufficient reasoning the testimony of Zijadin Hoxha, who testified that you

[138] Judgment, paras. 104 ("The Panel is mindful that there are certain discrepancies between TW4-01's testimony and his prior statements, but also takes into account: […] (iii) the particularly traumatic nature of the events TW4-01 experienced during his detention, [REDACTED][…] On balance, the Panel does not find that the inconsistencies affect the witness's overall credibility"), 106.
[139] Judgment, para. 111.
[140] T. 31 May 2023 pp. 1526-1528; [REDACTED].
[141] [REDACTED]; T. 3 May 2023 pp. 1245-1246; SITF00013848-00013851 RED2, p. 1; SITF00013852-00013869 RED6, p. 8; SITF00013736-SITF00013800 RED5, p. 20; SITF00016221-00016285 RED4, pp. 18-19. TW4-011 was found credible, *see* Judgment, para. 168.
[142] T. 31 May 2023 pp. 1531-1534; SITF00016019-00016023. *See also* [REDACTED].
[143] F00680, para. 2-5; 115958-115960, pp. 1-3.
[144] Defence FTB, para. 204.
[145] *See also* Defence FTB, para. 205.

could not see the entrance gate from that window.[146] Hoxha's account was supported by which the Panel failed to refer to or analyze.[147]

83. The Panel found that most of the Defence examples and arguments pertaining to TW4-01's credibility was "immaterial to the charges".[148] However, a reasonable trier of fact would acknowledge that, although "immaterial to the charges", the inconsistencies and plain lies in his evidence have an impact on TW4-01's credibility.

84. During his testimony, TW4-01 denied his earlier claim that [REDACTED] and claimed that this never happened.[149] TW4-01 testified that [REDACTED],[150] and repeated this assertion a couple of times in his testimony whereas [REDACTED].[151] TW4-01 also lied before the Panel [REDACTED].[152]

85. TW4-01 testified that [REDACTED] he was later released. TW4-01's account of the circumstances surrounding his release was entirely implausible and contradicted by other evidence [REDACTED].[153] The Panel analyzed the circumstances of TW4-01's release, finding that the relevant inconsistencies there were "of secondary importance" and "minor" and did not affect his overall credibility.[154] However, given the witness's evident propensity to fabricate stories, no reasonable trier of fact would have concluded that his implausible accounts do not impact his credibility.

86. The Panel further erred in its assessment of TW4-01's credibility by not taking into consideration his prior convictions and record, [REDACTED].[155] [REDACTED].[156]

[146] Judgment, para. 890.
[147] SPOE00330365-00330365, p. 1.
[148] Judgment, para. 117.
[149] T. 5 June 2023 pp. 1749-1751.
[150] T. 6 June 2023 p. 1863.
[151] T. 2 June 2023 p. 1617; T. 6 June 2023 pp. 1862-1863; 058583-058585 RED2, p. 2.
[152] T. 5 June 2023 pp. 1852-1854, 1863-1865.
[153] Defence FTB, paras. 225-226.
[154] Judgment, paras. 399-400 (e.g. TW4-01 doubled the number of detainees [REDACTED]).
[155] *Prlić* Appeal Judgment, 29 November 2017, para. 200.
[156] T. 31 May 2023 p. 1557.

[REDACTED].[157] [REDACTED].[158] [REDACTED].[159] At the same time, the Panel considered that it "does not find that his criminal record, as such, affects his credibility or reliability as a matter of principle. It must be shown that the criminal record of the witness is indicative of untruthfulness on the part of the witness, which the Defence did not demonstrate".[160] First, no reasonable trier of fact would have excluded "as a matter of principle" a witness's criminal record when assessing the witness's credibility. [REDACTED]. In any event, no reasonable trier of fact would have considered that a witness [REDACTED] was an absolutely truthful, reliable, and credible witness and that his evidence did not even have to be treated with caution.[161]

87. The Panel found that "it had not found support that TW4-01 had a motive to falsely implicate Mr Shala".[162] No reasonable trier of fact would have reached this conclusion, particularly in these circumstances where TW4-01 [REDACTED].[163] [REDACTED].[164] No reasonable trier of fact would have ignored the witness's concession that he wanted to harm the defendant [REDACTED].

88. The Panel's findings regarding TW4-01's credibility were so unfair and unreasonable as to constitute an abuse of discretion. At the very least, the Panel's decision not to treat TW4-01's evidence with caution was manifestly unreasonable and exceeded the lawful bounds of its discretion.

B. W04733

89. No reasonable trier of fact would have concluded that the untested evidence of W04733 could be relied upon to a decisive extent as a basis for conviction given the

[157] Judgment, paras. 113-114.
[158] Judgment, para. 114.
[159] [REDACTED].
[160] Judgment, para. 107.
[161] Judgment, para. 107.
[162] Judgment, para. 115.
[163] T. 6 June 2023 pp. 1936-1937.
[164] Judgment, paras. 108-112.

multiple and substantial contradictions and inconsistencies in his evidence as well as the entirely wrong identification of the Accused.[165] The Panel further erred by finding W04733's evidence corroborated by the evidence of his family members, who simply relayed information conveyed to them by W04733, without applying caution to their evidence.[166]

90. W04733 gave an entirely wrong description of Mr Shala as having a "dark complexion", being "almost black".[167] The Panel found that "it does not matter whether the witness described Mr Shala's physical appearance accurately, as appearances change over time and a witness's memory may be affected by the passage of time".[168] The Panel's decision to rely upon W04733's identification evidence was unreasonable and rendered the conviction unsafe.[169] Evidently a person being "almost black" cannot be considered an "appearance" susceptible to "change over time".

91. The Panel stated that it was mindful of the discrepancies across W04733's statements, but considered "the effects of time on W04733's memory, coupled with his advanced age […] and the increasingly deteriorating health of the witness from [REDACTED] onwards".[170] The Panel, however, failed to engage with the Defence argument that the deterioration in W04733's health since [REDACTED] makes it implausible that W04733 would be able to provide additional and more specific details of the alleged events in [REDACTED] than in his earlier statements.[171] A reasonable trier of fact would have reached the conclusion that W04733's evidence given after [REDACTED] should be treated with caution.

[165] Judgment, paras. 180-181.
[166] Judgment, para. 180.
[167] 082892-TR-AT-ET Part 1 RED3, p. 38.
[168] Judgment, paras. 451, 455.
[169] *Kupreškić et al*. Appeal Judgment, para. 40; *Limaj* Appeal Judgment, para. 30.
[170] Judgment, para. 181.
[171] Defence FTB, para. 242.

92. The Panel found that Mr Shala was known to W04733 through his police work before the war, that W04733 "had seen a photograph of Mr Shala in a police photo album […] and that he recognized Mr Shala 'as soon as he saw him' in the bus"[172] transferring him to the KMF. W04733's first statement to the [REDACTED] was given in 2002, and there was no mention of Mr Shala as being involved in W04733's transfer to the KMF, despite W04733 describing the transfer in considerable detail.[173] W04733 only implicated Mr Shala in it in 2010, despite having had ample opportunities to refer to him earlier, especially given his allegation that he had known Mr Shala prior to the war from police records.[174] The Panel failed to give adequate reasoning as to why W04733 failed to refer to Mr Shala as present during his transfer earlier, particularly given the details provided by the witness that Mr Shala had tortured him at the KMF. The Panel also failed to explain why it considered plausible that W04733 would immediately recognize in those circumstances an individual he did not personally know but had only seen in a photograph in police files.

93. The Panel applied a much more rigorous standard in assessing inconsistencies of witnesses whose evidence did not match the Panel's preferred narrative. For instance, the inconsistencies in TW4-02 and TW4-04's evidence were seen by the Panel as a conspicuous element warranting caution,[175] while the inconsistencies in W04733's evidence were disregarded.[176]

[172] Judgment, para. 451. SITF00018740-00018767 RED, p. 2; SITF00019824-00019876 RED2, pp. 13-14; 082892-TR-AT-ET Part 3 RED2, p. 11.
[173] SITF00013181-SITF00013189 RED3, p. 2.
[174] SITF00018740-00018767 RED, p. 2.
[175] Judgment, paras. 124, 126: "the witness presented implausible and inconsistent statements with regard to certain aspects of his evidence […] in light of the foregoing, the Panel treats TW4-02's evidence with caution"; paras. 134, 136 ("Third, the Panel notes that, over the years, the witness has been inconsistent in his statements, downplaying, especially as of [REDACTED], what has happened to other detainees at the KMF […]. In light of the above, noting the striking incompatibility between large parts of TW4-04's evidence and the rest of the reliable evidence on record, the Panel finds that his evidence has very limited value").
[176] Judgment, para. 181.

94. The Panel erred in considering that "with the exception of the statement he provided in 2010, W04733 has consistently provided evidence in 2002, [REDACTED], [REDACTED] and 2019 that the person that forced the baton into his mouth [breaking his teeth] was Xhemshit Krasniqi".[177] W04733 was not consistent in this regard.[178] W04733 had also stated that it was not Xhemshit Krasniqi but Mr Shala who broke his teeth, blaming the discrepancy on an interpretation issue.[179] Not long thereafter, in [REDACTED], W04733 went back to his initial claim that, in fact, it was Krasniqi who broke his teeth.[180] In 2009, in reference to the 20 May 1999 incident, W04733 stated that he had seen [REDACTED] being ill-treated, [181] while in 2010, W04733 stated he had not seen [REDACTED] being ill-treated. [182] The Panel exceeded the lawful bounds of its discretion when it applied a more rigorous standard to assess the evidence of other witnesses, for instance of TW4-10's evidence. [183]

95. The Panel erred by finding that "the evidence of W04733 and that of his family is consistent and mutually corroborative"[184] and by not applying the required caution considering the hearsay nature of the relayed evidence and the inconsistencies between those accounts.[185]

96. TW4-06 testified that Mr Shala broke W04733's teeth,[186] even though the Panel found that, in fact, Xhemshit Krasniqi did it. This confirmed that the inconsistent accounts as to what W04733 experienced were also relayed to his family members, depriving as such of much weight as to what they considered had happened to

[177] Judgment, para. 699, fn. 283.
[178] Defence FTB, para. 235.
[179] SITF00018740-00018767 RED, pp. 4-5.
[180] 106978-107020, p. 5; SPOE00013793-SPOE00013847 RED2, pp. 51-52.
[181] SPOE00185335-00185363 RED3, pp. 6-7.
[182] SITF00018740-00018767 RED, p. 5.
[183] Judgment, para. 159.
[184] Judgment, para. 449.
[185] Judgment, para. 154.
[186] T. 28 March 2023 p. 818.

W04733. [REDACTED].[187] [REDACTED],[188] [REDACTED].[189] No reasonable trier of fact would have relied on the evidence of W04733 and his family members without applying caution.[190]

C. W01448

97. The Panel erred by failing to consider W01448's evidence with caution and ultimately finding his evidence credible and corroborative of other evidence, despite the fact that W01448 had falsely identified Mr Shala in a photo board identification procedure and that the identification was based on information given to him by [REDACTED].[191]

98. According to W01448, [REDACTED],[192] which contradicts TW4-01's testimony [REDACTED].[193] [REDACTED].[194] No reasonable trier of fact would have discarded the evidence of W01448 on this crucial point, given that W01448 was found credible, [REDACTED].[195]

99. W01448 stated that he identified Mr Shala on the basis of what [REDACTED] told him.[196] The Panel found that [REDACTED] "accurately conveyed Mr Shala's identity to W01448".[197] W01448 stated that he was mistreated by Mr Shala but identified someone else as being Mr Shala.[198] The Panel found that "the fact that W01448 identified another individual as Mr Shala amongst a series of photos – none

[187] T. 28 March 2023 p. 822.
[188] T. 27 March 2023 pp. 648, 752; T. 28 March 2023 p. 752.
[189] SPOE00013793-SPOE00013847 RED2, pp. 15-16, 52-53.
[190] Judgment, paras. 144-154.
[191] Judgment, paras. 712-713.
[192] SITF00013848-00013851 RED2, p. 1; SITF00013852-00013869 RED6, p. 8; SITF00016221-00016285 RED4, pp. 18-19.
[193] T. 31 May 2023 pp. 1526-1528.
[194] [REDACTED].
[195] Judgment, paras. 678-683.
[196] SITF00013736-SITF00013800 RED5, pp. 8-9, 11.
[197] Judgment, para. 713.
[198] SITF00374534-00374534; SITF00374536-SITF00374541 RED, p. 1.

of which actually depicted Mr Shala – does not have any bearing on the Panel's finding".[199] No reasonable trier of fact would have come to this conclusion.[200] Not only is W01448's identification evidence based on hearsay, but also he erroneously identified Mr Shala. The unreasonableness is amplified by the fact that W01448's evidence was untested. The Panel erred in attaching considerable weight to W01448's identification of Shala, and its findings relying on or corroborated by W01448's evidence should be overturned.

D. CONTAMINATION

100. The Panel erred when it accepted the evidence of W04733, W04733's family members, W01448, TW4-01, TW4-10, and TW4-04 without applying caution despite strong indications that these witnesses' evidence was contaminated, as they had exchanged views with regard to issues in the case.[201]

101. First, the Panel erred by finding that W04733's family members' evidence "show that the witnesses did not align or memorise their accounts prior to their testimonies before the Panel".[202] It failed to acknowledge the similarities in their testimonies which suggested jointly rehearsing their forthcoming testimony (for instance all family members strangely referred to a certain "Imer Imeri" – that was never mentioned by W04733).[203] The Panel also unreasonably dismissed the possibility of TW4-08 being influenced by being present at an interview given by W04733.[204]

102. While the evident contamination of the evidence of W04733's family members was not an issue for the Panel, the same lenient standard was not applied to the evidence of Defence witnesses, Bedri Dervishaj and Kocinaj, whose evidence was

[199] Judgment, para. 713.
[200] Judgment, para. 713.
[201] Judgment, paras. 147-154, 174-175, 187-188, 374, 519, 522.
[202] Judgment, para. 147.
[203] 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. *See* Defence FTB, 254.
[204] Judgment, para. 152.

approached with caution.[205] The Panel found that "Mr Kocinaj also has familial ties with Mr Dervishaj and admitted having met him before his upcoming testimony".[206] The Panel erred by applying double standards and unreasonably selecting the evidence to treat with caution.

103. Second, there are strong indications that [REDACTED] exchanged views with regard to disputed issues in the case. W01448 admitted that he was in contact with W04733 after their release from the KMF.[207] In 2011, W01448 stated that he had met [REDACTED], together with W01448's children and [REDACTED]'s children.[208] TW4-09, one of the sons of W04733, [REDACTED].[209]

104. TW4-02 stated that he met with [REDACTED].[210] TW4-02 also stated that he met [REDACTED] and they discussed [REDACTED].[211] [REDACTED] confirmed that, after the war, he [REDACTED].[212] It is more than likely that the two exchanged information on the events in Kukës.

105. TW4-04 also confirmed that he had met with [REDACTED] and discussed with him the events at the KMF.[213] Despite the evidence of TW4-04, [REDACTED] denied even remembering his name which also raises doubts about the credibility of his account and his motives in denying knowing TW4-04.[214]

106. Until 2011, W04733 denied having had contact with anyone other than W01448, including [REDACTED].[215] When [REDACTED], he confessed to having seen

[205] Judgment, paras. 154, 232-234, 268.
[206] Judgment, para. 266.
[207] SITF00013833-00013847 RED4, p. 6.
[208] SITF00016140-00016220 RED3, p. 13.
[209] T. 30 March 2023 p. 982.
[210] 060664-TR-ET Part 5 RED4, p. 2.
[211] 060664-TR-ET Part 5 RED4, p. 6.
[212] 064716-TR-ET Part 5 RED4, p. 32.
[213] SITF00013262-00013315 RED, p. 15; SITF00015825-00015925 RED, p. 28; SPOE00014669-00014751 RED, pp. 28-29; 064716-TR-ET Part 5 RED4, pp. 13-14.
[214] [REDACTED].
[215] 106978-107020, p. 20.

[REDACTED].[216] [REDACTED] in 2011.[217] In addition, W04733 evidently had regular conversations with his family members, TW4-06, TW4-07, TW4-08 and TW4-09 about his detention.[218]

107. The Panel failed to consider that TW4-10 discussed disputed issues in this case with [REDACTED].[219] Moreover, the Panel failed to consider that [REDACTED] and that they admittedly discussed disputed issues, [REDACTED].[220]

108. In these circumstances, erred by failing to apply caution to the evidence of witnesses who discussed disputed issues in this case.[221] The Panel also erred when applying a different standard and applying caution to Defence witnesses despite the lack of concrete evidence that they had discussed "disputed issues".[222] No reasonable trier of fact would have approached contaminated Prosecution evidence in this manner.

E. DOUBLE STANDARDS

109. The Panel's errors were further compounded by using double standards in assessing exculpatory and incriminating evidence, which violated the principle of *in dubio pro reo* and constituted abuse of discretion.

110. The principle of *in dubio pro reo* principle, which is an expression of the presumption of innocence, requires that doubts should benefit the accused.[223] The Panel's assessment of evidence violated this principle.

[216] 106978-107020, pp. 20-21. His explanation that he did not communicate with him is not credible.
[217] [REDACTED].
[218] 106419-106419, p. 1.
[219] T. 1 May 2023 p. 1077; [REDACTED].
[220] T. 2 May 2023 pp. 1170-1171.
[221] Judgment, paras. 174, 187.
[222] Judgment, paras. 154, 174, 232-234, 268.
[223] *Barberà, Messegué and Jabardo v. Spain*, para. 77; *Tsalkitzis v. Greece* (no. 2), para. 60.

111. For instance, the Panel approached TW4-02, TW4-04, and TW4-05's evidence with caution due to inconsistencies in their respective evidence while at the same time inconsistencies in the accounts of TW4-01 and W04733 were deemed justified. For TW4-04, for instance, the Panel found that the "deliberate shift in the witness's evidence" was an "effort to avoid providing any information which could link KLA members, including Xhemshit Krasniqi, with the commission of any crimes at the KMF".[224] In contrast, W04733 naming and adding KLA members in various incidents throughout the years was unreasonably considered normal. Further, while TW4-04's inability to remember details was considered problematic,[225] TW4-01 and W04733's lapses of memory were considered a genuine effort to be accurate.[226]

112. TW4-01 testified that [REDACTED].[227] TW4-02's evidence contains minor inconsistencies on the date of his arrest, as either 9 or 11 June 1999.[228] The Panel found that it could not "rely on any of TW4-02's statements to accurately determine when he was apprehended".[229] For TW4-01, however, the Trial Panel allowed such inconsistencies regarding the date of arrest.[230] The same standard was not applied to TW4-02, who committed an analogous mistake and was considered unreliable on the topic.[231] It is important to note that, despite uncertainty as to the date of his arrest, TW4-02 provided a temporal marker to be more accurate, as he attested to have spent [REDACTED] with his family on 6 June 1999 before being taken to the KMF.[232] To the Panel, W01448's provision of temporal markers such as public holidays or days of the week was perceived as an attempt to be accurate,[233] but it declined to do the same for

[224] Judgment, para. 134.
[225] Judgment, para. 135.
[226] Judgment, paras. 102, 148.
[227] [REDACTED]; [REDACTED].
[228] SITF00374903-00374904 RED4, p. 2; 060664-TR-ET Part 3, p. 26; 060664-TR-ET Part 4, p. 7; 060664-TR-ET Part 5 RED4, p. 2; 108850-TR-ET Part 1 RED, p. 5.
[229] Judgment, para. 534.
[230] Judgment, para. 378.
[231] Judgment, para. 534.
[232] 060664-TR-ET Part 5 RED4, pp. 4-5.
[233] Judgment, para. 378.

TW4-02 whose evidence did not fit with the preferred narrative. This finding is important since, if TW4-02 arrived at the KMF after the charged incidents, his evidence for incriminating purposes would carry limited weight. The Panel applied caution only to the portions of TW4-02's evidence that were exonerating.

113. In conclusion, the Panel has applied double standards in its assessment of the evidence, allowing leniency for problems in incriminatory evidence and vigorously scrutinizing exculpatory evidence.

114. The Panel's evaluation of the evidence of key Prosecution witnesses was "wholly erroneous" and it erred by accepting their evidence in circumstances where no reasonable trier of fact would have done so and heavily relied upon them to secure Mr Shala's convictions.[234]

VIII. GROUND 7: UNFAIR RELIANCE ON UNTESTED EVIDENCE

115. It is a fundamental right of an accused "to examine, or have examined, the witnesses against him". According to established jurisprudence, a conviction may not be based solely or to a decisive extent on the evidence of a witness whom the Defence had no opportunity to examine.[235]

116. The MICT Appeals Chamber stated in the *Karadžić* case that:

> [a] conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial. This principle applies "*to any fact which is indispensable for a conviction*", meaning "the findings that a trier of fact has to reach beyond reasonable doubt". It is considered to "run

[234] Judgment, paras. 98-119, 169-188, 363, 368-379, 384-407, 410, 412-414, 419-420, 423, 447-473, 477-488, 491-494, 501, 504-505, 510-512, 522-525, 558, 562-563, 565-592, 596-605, 629-638, 640-663, 669-683, 688-699, 706-726, 728, 730-753, 757-796, 799-807, 819, 830-847, 851-852, 895-897, 903-914, 945-949, 951-956, 971-978, 980-984, 1004, 1007-1008, 1010-1018, 1025-1029, 1031-1039.
[235] Rule 140(4)(a) KSC RPE; Judgment, para. 87.

> counter to the principles of fairness [...] to allow a conviction based on evidence of this kind without sufficient corroboration.[236]

117. The Panel admitted into evidence written statements of deceased Prosecution witnesses W04733,[237] W01448,[238] Kryeziu,[239] and Asllan Elezaj.[240] The Panel admitted the written evidence of Prosecution witnesses TW4-02 and TW4-04 without cross-examination,[241] despite the availability of both witnesses to testify.[242] The Panel breached Mr Shala's fair trial rights by impermissibly making crucial findings in support of Mr Shala's convictions which were based solely or at least to a decisive extent on untested evidence.[243]

A. ARBITRARY DETENTION

118. The Panel found that Mr Shala was involved in the transfer of W04733 from Romanat to the KMF around 20 May 1999.[244] It based this finding solely on the written statements of deceased witness W04733.[245] While the Panel considered that certain aspects of W04733's transfer were corroborated by his family members, it failed to address altogether that this crucial finding for the purposes of the conviction for arbitrary detention was solely based on the untested and uncorroborated evidence of W04733.[246]

---

[236] *Karadžić* Appeal Judgment, para. 449 and references cited therein; *Ntaganada* Appeal Judgment, paras. 629-630.
[237] F00562, paras. 40-42, 70.
[238] F00562, paras. 28, 29, 70.
[239] F00562, paras. 50, 70.
[240] F00562, paras. 67, 70.
[241] F00556; F00523; F00550; F00559; F00592.
[242] F00482CONFRED; F00497.
[243] Judgment, paras. 69, 96, 285, 341-342, 352-356, 378-379, 385-388, 390-394, 401, 408, 411-414, 441-582, 587- 608, 614-627, 629-753, 756, 830, 842-848, 851, 864, 897, 903-909, 912, 919, 921, 945-949, 952-956, 971-973, 977-978, 980-984, 1003-1004, 1007, 1014-1018, 1025-1028, 1031-1039.
[244] Judgment, para. 455.
[245] Judgment, paras. 447-449.
[246] Judgment, para. 449, fn. 814.

119. The Panel's finding that Mr Shala possessed the necessary intent for the crime of arbitrary detention was based on his involvement in W04733's transfer.[247] Moreover, it also formed the basis of the findings regarding the common purposes of the JCE as well as Mr Shala's membership of and significant contribution to the JCE, which was inferred from his personal participation in the transfer of detainees, specifically W04733.[248]

120. The Panel's finding that Dobruna was a KLA member who played a role in the interrogation of detainees at the KMF and was involved in establishing and maintaining the conditions of detention at the KMF was solely based on W04733's evidence.[249]

121. The Panel found that [REDACTED] and another female detainee were deprived of their liberty and all basic procedural guarantees and were mistreated solely or to a decisive extent on the basis of the untested evidence by W01448.[250] W01448's evidence was decisive for the Panel's finding that [REDACTED] and another woman were arbitrarily detained.[251] Subsequently, the Panel convicted Mr Shala of arbitrary detention of [REDACTED] and another female detainee.[252]

122. The Panel was "satisfied" that [REDACTED] was arbitrarily detained at the KMF within the Indictment Period based on the evidence of TW4-01, W01448 and TW4-02.[253] TW4-01 testified that a man from Suva Reka/Suharekë was one of his co-detainees but could not remember the name.[254] Both W01448 and TW4-02, whose evidence remained untested, stated that a man called [REDACTED] was detained

[247] Judgment, paras. 952, 955-956, 1029.
[248] Judgment, paras. 1004-1005, 1007, 1008, 1011, 1025.
[249] Judgment, paras. 354-356, 363.
[250] Judgment, paras. 571-572, 587, 591, 716.
[251] Judgment, para. 945.
[252] Judgment, para. 945, 1037.
[253] Judgment, paras. 575, 577, 587, 591.
[254] Judgment, para. 573.

with them and originated from Suva Reka/Suharekë.[255] The finding related to the lack of procedural guarantees was based on TW4-01's statement that this person was held on allegations of "keeping company with the Serbs", and the evidence of TW4-02 that [REDACTED] was detained as he was suspected of collaborating with the Serbs.[256] The Panel further found that since [REDACTED]'s detention followed "the same pattern as others who were detained at the KMF on allegations of being spies or collaborators [...] the only reasonable conclusion based on the evidence taken as a whole is that [REDACTED] was likewise not properly informed of the reasons for his arrest" and that he was not brought before a judge or competent authority.[257] Thus, the untested evidence of W01448 and TW4-02 was decisive for this finding and Mr Shala's conviction of arbitrary detention of [REDACTED].[258]

123. The Panel found that [REDACTED] was arbitrarily detained at the KMF.[259] It based this finding on the evidence provided by W01448, as well as TW4-02 and TW4-04 that [REDACTED] was detained in Rooms 1 and 3.[260] The Panel also considered the only reasonable conclusion based on the evidence of W01448 was that [REDACTED] was liberated from the MUP building in Prizren by KFOR on 18 June 1999 and "considering that all co-detainees were arrested and kept in similar conditions of detention, following the same operational pattern", that he was also not provided with the basic procedural guarantees.[261] The untested evidence of W01448, TW4-02 and TW4-04 was the sole basis for this factual finding which form the basis of Mr Shala's conviction of arbitrarily detaining [REDACTED].[262]

[255] Notably, TW4-02 provided evidence that he was not detained at the KMF within the indicted period. Judgment, para. 573.
[256] Judgment, para. 576.
[257] Judgment, para. 576.
[258] Judgment, paras. 945, 1037.
[259] Judgment, paras. 587, 591.
[260] judgment, paras. 578-579.
[261] Judgment, paras. 580-581.
[262] Judgment, paras. 945, 1037.

124. The Panel found that [REDACTED] and [REDACTED] were arbitrarily detained.[263] This was based on the evidence provided by TW4-01, W01448 and TW4-02. TW4-01 and W01448 stated that "[REDACTED]" and [REDACTED] were detained in Room 1, and TW4-02 referred to "[REDACTED] *aka* [REDACTED]" as his co-detainee.[264] The Panel noted that it did not receive any evidence as to the circumstances surrounding their arrest, duration of detention or release, but that TW4-02 stated that [REDACTED] told him he had been mistreated.[265] The Panel found this evidence "consistent with the pattern of mistreatment of all other detainees" and therefore similar to other detainees that they were not awarded with basic procedural safeguards.[266] The untested evidence of W01448 and TW4-02 were decisive for this factual finding which formed the basis of Mr Shala's conviction for arbitrary detention related to [REDACTED] and [REDACTED].[267]

B. TORTURE

125. The Panel found that the living and sleeping conditions in the Command Building Room, were wholly inadequate and degrading.[268] In making this finding, the Panel relied on evidence provided by W04733 and W01448.[269] Thus, the Panel relied solely on untested evidence to make this factual finding which in turn formed the basis for its findings on the material elements of torture.[270]

126. The Panel found that the living and sleeping conditions in Room 3, were wholly inadequate and degrading.[271] The Panel based this finding on the evidence provided

[263] Judgment, paras. 587, 591.
[264] Judgment, para. 582.
[265] Judgment, para. 582, n. 1095.
[266] Judgment, para. 583.
[267] Judgment, paras. 945, 1037.
[268] Judgment, paras. 613, 748.
[269] Judgment, paras. 596-599.
[270] Judgment, para. 971.
[271] Judgment, paras. 613, 748.

by [REDACTED] and [REDACTED].[272] The Panel relied exclusively on untested evidence to make this finding.[273]

127. The Panel found that during the mistreatment on 20 May 1999 in the Office in the Command Building at the KMF "TW4-01 and the Murder Victim were interrogated and accused of collaborating with Serbs and of being spies".[274] Regarding the interrogation of the Murder Victim, the Panel relied on the evidence provided by W01448, who stated that both TW4-01 and the Murder Victim were accused of being collaborators with the Serbs that night.[275] TW4-01 testified that he was questioned by [REDACTED] and [REDACTED] that night, forced to make a confession and was called a spy.[276] [REDACTED] did not provide evidence regarding a similar questioning of the Murder Victim, despite [REDACTED], he could still hear what happened inside the Office when the Murder Victim was mistreated.[277]

128. Further, the Panel found that the detainees were taken for interrogations and accused of being spies and that during these interrogations, detainees including the Murder Victim were subject to brutal beatings.[278] Moreover, it found that "the inhumane conditions of detention and the physical and psychological assaults were inflicted on the detainees for the purpose of obtaining information or a confession from them". With regard to the Murder Victim, the Panel relied only on W01448's evidence to make this finding.[279]

129. The Panel relied on these factual findings when it found the material elements of torture to be met.[280] In particular, it relied on its finding that detainees including the

[272] Judgment, paras. 606-608.
[273] Judgment, para. 971.
[274] Judgment, para. 688.
[275] Judgment, para. 659.
[276] Judgment, para. 656.
[277] Judgment, para. 658.
[278] Judgment, para. 750.
[279] Judgment, para. 740, n. 1513; *see also* para. 656.
[280] Judgment, para. 977.

Murder Victim were "interrogated and accused of collaborating with the Serbs".[281] It similarly relied on this fact when it found the subjective element of torture to be met,[282] specifically, that KLA members interrogated the detainees about different matters"[283] and inflicted the pain or suffering on the detainees for the purpose of obtaining information or a confession.[284] Additionally, the Panel relied on these facts when it made its finding regarding the common purpose of the JCE, holding that "detainees were singled out prior to their arrest for being perceived to collaborate with, be associated with, or sympathize with the Serbian authorities",[285] and that they were systematically interrogated about their relationship with the Serbian authorities.[286]

130. The Panel found that the detainees were physically and psychologically abused by several KLA members, including being forced to pretend to have sexual intercourse with each other.[287] The Panel based this finding solely on W01448's evidence.[288] No other witness provided evidence corroborating W01448's account on this point. To the contrary, when asked about this, W04733 denied it ever happened, which the Panel failed to address.[289]

131. The Panel found that "while being mistreated by other KLA members, Mr Shala questioned and demanded from [REDACTED] to make a confession identifying [REDACTED] and [REDACTED] as Serb collaborators".[290] It based this finding on evidence provided by W04733 and W01448. W04733 stated that Mr Shala and Xhemshit Krasniqi questioned and forced [REDACTED] to confess that [REDACTED] and [REDACTED] were collaborating with the Serbs.[291] W01448 stated that an

[281] Judgment, para. 972.
[282] Judgment, para. 984.
[283] Judgment, para. 982.
[284] Judgment, para. 983.
[285] Judgment, para. 1011.
[286] Judgment, para. 1014.
[287] Judgment, para. 749.
[288] Judgment, paras. 648, 653.
[289] SITF00018740-00018767 RED, p. 7; 106978-107020, p. 31.
[290] Judgment, para. 720.
[291] Judgment, para. 718.

"interrogator" questioned [REDACTED] and wanted her to confess that [REDACTED] and [REDACTED] were collaborators of the Serbs and that Xhemshit Krasniqi severely beat her.[292] This finding was based on untested and inconsistent evidence. The Panel relied on this finding to conclude that Mr Shala committed the crime of arbitrary detention and torture.[293] It particularly relied on this fact in finding that Mr Shala knew that arbitrary detention and other crimes were committed and intended them by his participation,[294] and in finding that Mr Shala had no reasonable grounds to believe that security concerns made the detention absolutely necessary and inflicted pain on detainees to obtain confessions.[295] It also relied on this for the purposes of its findings concerning the existence and purpose of a JCE and Mr Shala's significant contribution to it.[296]

132. The Panel found that on 20 May 1999 Mr Shala participated in the interrogation and accused W04733 of being a spy.[297] This finding was solely based on the evidence of W04733.[298] The Panel relied on this fact for its finding that Mr Shala had the necessary intent for the crime of torture and that Mr Shala inflicted pain on the detainees for obtaining information or a confession.[299] It also relied on this finding to conclude that Mr Shala was a member of and had significantly contributed to the JCE.[300]

133. The Panel found that on 20 May 1999, [REDACTED] was mistreated and accused of having relationships with Serbs.[301] In making this finding, the Panel relied on evidence provided by W01448 who stated that [REDACTED] was severely beaten

[292] Judgment, para. 718.
[293] Judgment, paras. 955-956, 973, 981, 983-984, 1029.
[294] Judgment, para. 952.
[295] Judgment, para. 953.
[296] Judgment, paras. 1014, 1007-1008, 1025, 1028.
[297] Judgment, paras. 706, 741.
[298] Judgment, para. 692.
[299] Judgment, paras. 981, 983-984.
[300] Judgment, paras. 1004, 1007, 1025.
[301] Judgment, para. 720.

and accused of having relationships with Serbs.[302] TW4-01 only provided evidence on hearing [REDACTED] being mistreated as he was outside the Office; he did not mention another female detainee.[303] The Panel's finding about [REDACTED] rested solely on the untested evidence of W01448. The Panel convicted Mr Shala of torture against [REDACTED}.[304]

134. The Panel found that TW4-04 was mistreated at the KMF.[305] The Panel based this finding on the evidence of [REDACTED], who stated that "he learned that TW4-04 was heavily mistreated during his detention at the KMF, but did not provide the source of this information".[306] On the other hand, TW4-04 stated that he was not mistreated at the KMF at all, which the Panel found not credible and relied instead on the evidence provided by [REDACTED] in this respect.[307] The Panel relied exclusively on the untested evidence of [REDACTED] and convicted Mr Shala of torture in respect of TW4-04.[308]

135. The Panel found that [REDACTED] was abused by KLA members only on the basis of evidence provided by TW4-02.[309] The Panel convicted Mr Shala of torture with respect of [REDACTED].[310]

136. Similarly, the Panel found that [REDACTED] was mistreated during his detention relying only on W01448 and TW4-02.[311] The Panel convicted Mr Shala of torture in respect of [REDACTED].[312]

[302] Judgment, para. 716.
[303] Judgment, para. 715.
[304] Judgment, paras. 977, 1038.
[305] Judgment, paras. 731, 749.
[306] Judgment, para. 728.
[307] Judgment, para. 729.
[308] Judgment, paras. 973, 1038.
[309] Judgment, paras. 728, 731, 749.
[310] Judgment, paras. 977, 1037.
[311] Judgment, paras. 728, 731, 749.
[312] Judgment, para. 1037.

C. DECISIVENESS OF UNTESTED EVIDENCE

137. The Panel found that "at the time relevant to the charges, Mr Shala […] had a certain degree of autonomy and authority, especially in mistreating and interrogating detainees", that he "engaged actively with members of the KLA Military Police and other KLA members […] who held positions of authority and control at the KMF" and that he "actively participated in the transfer, interrogation and mistreatment of detainees without (fear of) consequence".[313]

138. To reach this conclusion, the Panel relied first on the evidence of W04733 on Mr Shala's involvement in W04733's transfer to the KMF.[314] Second, it relied on the evidence provided by TW4-01, W01448 and W04733 regarding Mr Shala's alleged involvement in the mistreatment of detainees in the Command Building on 20 May 1999.[315] Third, it relied on evidence provided by W04733 that Mr Shala called him a spy and that Mr Shala questioned and demanded a confession from [REDACTED] that night.[316] No other witness who was found to be present that night provided evidence in corroboration of W04733 on either of these two allegations regarding Mr Shala. TW4-01 and W01448 only provided evidence that W04733 was interrogated about his police work, accused of being a Serb collaborator and raping a woman.[317] W01448 provided evidence that [REDACTED] was questioned by an "interrogator" who demanded a confession and she was beaten by Xhemshit Krasniqi,[318] and TW4-01 testified that he did not witness [REDACTED]'s mistreatment but only heard her screaming.[319] Fourth, the Panel relied on evidence provided by W04733 that Mr Shala and Xhemshit Krasniqi ordered [REDACTED] to hit W04733.[320] [REDACTED] that he

[313] Judgment, para. 914.
[314] Judgment, para. 903.
[315] Judgment, para. 690. Notably, W01448 only identified Mr Shala based on information he received from [REDACTED], Judgment, paras. 712-713.
[316] Judgment, paras. 692, 720, 905.
[317] Judgment, para. 694.
[318] Judgment, paras. 716, 718.
[319] Judgment, para. 715.
[320] Judgment, paras. 690, 905.

was ordered by [REDACTED] and other KLA members present to beat W04733.[321] Fifth, it relied on evidence provided by W04733 that Mr Shala told him they were going to kill W04733.[322] Sixth, the Panel relied on its finding that Mr Shala participated together with other KLA members in the beating [REDACTED] the Murder Victim on 4 June 1999.[323] Based on this evidence, the Panel observed that "when beating detainees together with other KLA members, including Sabit Geci and Xhemshit Krasniqi, Mr Shala participated freely and without any constraints, in the same manner as the aforementioned KLA officials", which it considered supported by the evidence provided by TW4-01 that Mr Shala "collaborated really closely" with Xhemshit Krasniqi in "everything".[324]

139. The above analysis demonstrates the decisive nature of the untested evidence provided by W04733 and W01448 on which the Panel relied to make its findings about Mr Shala's opposition of autonomy.

140. The Panel found that "the crimes charged were committed by certain KLA members, including […] Mr Shala".[325] As to Mr Shala, it found that he "was directly involved in the transfer of detainees to the KMF, their questioning and their mistreatment, and made accusations against them".[326] Mr Shala's involvement in transfers is based solely on the untested evidence of W04733.[327] The same applies to Mr Shala's alleged involvement in interrogations.[328] Thus, the untested evidence provided by W04733 was decisive for the Panel's finding.

[321] Judgment, para. 694.
[322] Judgment, para. 906. Notably, W04733 only provided this detail in his 2018 statement and not his numerous statements prior to that date.
[323] Judgment, para. 907.
[324] Judgment, para. 908.
[325] Judgment, para. 1003.
[326] Judgment, para. 1004.
[327] *See above* Section A.
[328] *See above* Section B.

141. For its assessment of Mr Shala's individual criminal responsibility through the JCE, the Panel found that "Mr Shala contributed significantly to the crimes charged by, *inter alia*, physically committing and participating in the arbitrary detention, interrogation and severe and brutal mistreatment of detainees" and that he "enjoyed a certain degree of autonomy and authority at the KMF, especially when mistreating detainees".[329]

142. This was based on the findings that (i) Mr Shala participated in W04733's transfer from Romanat to the KMF; (ii) Mr Shala continued and enforced the arbitrary detention on TW4-01, the Murder Victim, W04733 and W01448 by "physically mistreating them on or about 20 May 1999" thereby upholding the detention regime established by the JCE Members at the KMF; (iii) Mr Shala personally mistreated TW4-01, the Murder Victim, W04733 and W01448 on 20 May 1999; (iv) Mr Shala accused W04733 of being a "spy" on 20 May 1999; (v) Mr Shala ordered [REDACTED] and/or [REDACTED] to beat W04733 on 20 May 1999; (vi) Mr Shala questioned and demanded that [REDACTED] make a confession regarding [REDACTED] and[REDACTED] on 20 May 1999; and (vii) Mr Shala personally mistreated [REDACTED] the Murder Victim on 4 June 1999.[330] As established in the above paragraphs, findings (i),[331] (iv),[332] (v)[333] and (vi)[334] are based either solely or to a decisive extent on untested evidence.

143. The Panel violated Mr Shala's fair trial rights by impermissibly relying solely or decisively on untested evidence to convict Mr Shala's on all counts. These violations render all convictions unsafe and the case must be remitted for re-trial.

[329] Judgment, para. 1028.
[330] Judgment, para. 1025.
[331] *See above* A.
[332] *See above* B.
[333] *See above* C.
[334] *See above* B.

IX. GROUNDS 8 AND 11: PLACING AN UNATTAINABLE BURDEN OF PROOF ON THE DEFENCE

144. The Panel erred in law and fact and breached the principle of *in dubio pro reo* when: (i) drawing inferences which were not the only reasonable inferences from the available evidence, including from Mr Shala's statements; and (ii) assessing whether his statements "discredit[ed]" the Prosecution's evidence.[335]

145. The Panel erred in law and fact when it drew unwarranted inferences and failed to give sufficient weight to relevant considerations as to its finding that there was a common plan to "arbitrarily detain, interrogate, torture and murder detainees at the KMF who were perceived to collaborate with, be associated with, or sympathize with the Serbian authorities or who were considered not sufficiently supportive of the KLA effort",[336] particularly given the existence of other reasonable inferences not foreclosed by Prosecution evidence.[337]

A. DRAWING INFERENCES WHICH WERE NOT THE ONLY REASONABLE INFERENCES

146. Rule 140(3) provides that "the standard of proof beyond reasonable doubt is only satisfied if the inference from that evidence is the only reasonable one that could be drawn from the evidence presented".[338] If no reasonable Trial Chamber could have ignored an inference which favours the accused, the Appeals Chamber must vacate

[335] Judgment, paras. 405, 412-413, 439, 472, 493, 496, 511, 553, 562, 565, 572, 576, 581, 583, 610, 638, 730, 747, 853-873, 910-914.
[336] Judgment, paras. 1010-1011, 1017-1024.
[337] Judgment, paras. 834, 1010-1011, 1016-1019, 1021-1024.
[338] *Mustafa* Judgment, para. 29; *Gucati and Haradinaj* Judgment, para. 37; *Stanišić and Simatović* Appeal Judgment, para. 121; ICTY, *Đorđević* Appeal Judgment, para. 296; *Stakić* Appeal Judgment, para. 219; *Kvočka et al.* Appeal Judgment, para. 237; *Bemba* Judgment, para. 239; *Ntagerura et al.* Appeal Judgment, para. 306; *Merhi and Oneissi* Appeal Judgment, para. 48; *Ntaganda* Judgment, para. 70; *Bemba et al.* Appeal Judgment, paras. 840, 868; *Gbagbo* Reasons of Judge Geoffrey Henderson, para. 51; *Šešelj* Appeal Judgment, para. 63; *Karadžić* Appeal Judgment, para. 599; *Mladić* Appeal Judgment, para. 252; *Stanišić and Simatović* Judgment, para. 8; *Kvočka et al.* Judgment, para. 237; *Prlić et al.* Appeal Judgment, para. 1709; *Vasiljević* Appeal Judgment, para. 128.

the Panel's factual inference and reverse any conviction dependent on it.[339] When faced with evidence of inherently low probative value (such as out-of-court evidence or hearsay evidence), the reasoning of the Panel will be of great significance for the determination of whether that conclusion was reasonable.[340]

147. Based on its finding that the detainees were liberated not as a result of due process [REDACTED], the Panel found that the only reasonable conclusion on the evidence was that TW4-01 was not brought before a judge or other competent authority nor was he provided with an opportunity to challenge the lawfulness of his detention.[341] However, this inference was not the only reasonable conclusion. [REDACTED] could not preclude the possibility that his detention had been lawful (on security grounds) particularly given his record and [REDACTED]

148. The Panel established that members of the KLA Military Police took the Murder Victim, [REDACTED] into custody and, based on W01448's evidence, that the Murder Victim was accused of collaborating with Serbs.[342] The Panel noted that it had not received evidence that demonstrates that the Murder Victim was informed of the reasons for the deprivation of his liberty. [REDACTED], the Panel was satisfied that the Murder Victim was not properly informed of the reasons for his arrest or detention.[343] The Panel erred when making this inference since another reasonable possibility is that the Murder Victim was duly informed of legitimate reasons for detention, particularly given his prior criminal history.[344] Similarly by relying on a "pattern" that detainees were deprived of procedural guarantees, it concluded that the Murder victim was also deprived of procedural guarantees.[345] In the absence of

[339] *Stakić* Appeal Judgement, para. 219.
[340] *Chea and Samphan* Appeal Judgment, para. 90; *Bemba* Appeal Judgment, paras. 42-44.
[341] Judgment, para. 405.
[342] Judgment, para. 412.
[343] Judgment, para. 412.
[344] T. 31 May 2023 p. 1588.
[345] Judgment, para. 413.

specific evidence suggesting the contrary, another reasonable conclusion was that the Murder Victim was lawfully detained and that procedural guarantees were respected.

149. With regard to the TW4-11's release, the witness asserted that when NATO entered Kosovo, "the doors opened and I just left".[346] The Panel inferred from the circumstances of his release that TW4-11 was not provided with an opportunity to challenge the lawfulness of his detention.[347] This however was not the only reasonable inference. TW4-11 had confirmed being interviewed by Kryeziu, and could neither confirm nor deny whether his release came about as a result of this interview.[348] The Panel failed to provide sufficient reasons supporting its conclusion was the inference drawn, and could not reasonably exclude the possibility that the release was based on a decision made by Kryeziu or other competent authority following the said interview.

150. The Panel considered that Dobruna interrogated W04733 together with Xhemshit Krasniqi, who was directly involved in W04733's mistreatment and forced confessions and that this indicated that Dobruna did not exercise any kind of independent oversight over the lawfulness of detention. However, even assuming that W04733 or other detainees were mistreated during an interview, that does not *per se* suggest that there was no independent oversight over the lawfulness of their detention in the relevant circumstances. Moreover, the Panel found that the release of W04733 was the result of an external intervention and not a decision by a judge or other competent authority.[349] It deduced from the finding that other detainees were also not brought before a judge or any other competent authority that the only reasonable conclusion was that W04733 was not provided with an opportunity to challenge the lawfulness of his detention.[350] However, the release of W04733 by an external entity did not preclude the possibility that he had been lawfully detained prior to his release.

[346] T. 3 May 2023 pp. 1260, 1306.
[347] Judgment, para. 439.
[348] T. 3 May 2023 pp. 1305-1306.
[349] Judgment, para. 472.
[350] Judgment, para. 472.

Moreover, the conclusion that TW4-01, the Murder Victim and TW4-11 did not have an opportunity to challenge the lawfulness of their detention was based on adverse inferences that were not the only reasonable conclusions.

151. As to whether W01448 had an opportunity to challenge the lawfulness of his detention, the Panel noted that W01448 was told that he would be released after his interview, that no trial took place, and that he was severely mistreated while detained.[351] Considering its finding that detainees were treated in a similar manner, the Panel found the only reasonable conclusion based on the evidence was that W01448 was not provided with an opportunity to challenge the lawfulness of his detention.[352] However, the conclusion that TW4-01, TW4-11 and W04733 did not have an opportunity to challenge the lawfulness of their detention was based on adverse inferences that were not the only reasonable conclusion. In any event, it cannot be excluded that W01448 was differently treated particularly given the fact that he was told that he was suspected of undermining the KLA efforts and that he would have to face trial.

152. Similarly, the Panel found that TW4-05 did not have an opportunity to challenge the lawfulness of his detention as he had suffered mistreatment similar to other detainees, was subject to forced labour and [REDACTED].[353] However, [REDACTED] did not preclude the possibility that his detention was legitimate in the first place particularly given that he was interviewed as to his links with "Serbs" by someone who presented himself as a lawyer or judge. Moreover, the conclusion that TW4-01, the Murder Victim, TW4-11, W04733 and W01448 did not have an opportunity to challenge the lawfulness of their detention was also based on adverse inferences that were not the only reasonable conclusions.

[351] Judgment, para. 493.
[352] Judgment, para. 493.
[353] Judgment, para. 511.

153. The Panel noted that TW4-02 was never shown any documents containing allegations or charges levelled against him and that, during his detention, he was questioned on a number of occasions by Kryeziu, whom he personally knew.[354] Kryeziu informed TW4-02 that he had been subject to a verification procedure "completely in vain" and then let him go.[355] The Panel inferred from TW4-02's account that Kryeziu did not exercise the function of a judge or other competent authority *vis-à-vis* TW4-02, but rather that of a friend or acquaintance.[356] It cannot be excluded that regardless of the familiarity between the two, Kryeziu exercised the function of a judge or other competent authority or facilitated a favourable decision made by a competent authority.

154. The Panel inferred that [REDACTED] and a third Roma musician were not afforded any basic guarantees based on its inference that all detainees were detained under similar conditions as well as its finding that TW4-01, TW4-11, the Murder Victim, W04733, W01448, TW4-05, TW4-04 and TW4-02 were deprived of their liberty without any basic guarantees.[357] However, it cannot be excluded that these three individuals were treated differently particularly given how little information regarding the reasons for the arrest and detention is included in the evidence.

155. The Panel took note of TW4-01's testimony that [REDACTED] was detained because of "keeping company with Serbs", while "his own son was a member of the KLA".[358] TW4-02 stated that [REDACTED] was detained as "supposedly he had collaborated with the Serbs". Based on these accounts and considering that [REDACTED] detention followed the same "pattern" as others, the Panel found that the only reasonable conclusion based on the evidence was that [REDACTED] was not

[354] Judgment, para. 552.
[355] Judgment, para. 552.
[356] Judgment, para. 553.
[357] Judgment, para. 562.
[358] Judgment, para. 576.

properly informed of the reasons for his arrest or detention.[359] The Panel erred in failing to consider alternative reasonable possibilities, for instance, that [REDACTED] was treated differently because his son was a KLA member.

156. Similarly, the Panel inferred from its conclusion that all detainees were arrested and detained in similar conditions, that the only reasonable conclusion on the evidence was that [REDACTED] was also not informed of the reasons for his detention and not provided with an opportunity to challenge the lawfulness of his detention.[360] However, another reasonable inference on the evidence was that he was treated differently and that were lawful grounds for his detention, that he was given an opportunity to challenge his detention given the little information about these matters in the evidence. In addition, his release by an external entity does not preclude that the detention was legitimate in the first place.

157. The Panel noted that it had not received any evidence regarding the circumstances surrounding the arrest of [REDACTED], the duration of their detention or any details about their release, but that one witness (TW4-02) stated that [REDACTED] was mistreated during his detention.[361] The Panel relied on its views about the treatment of the other detainees to infer that [REDACTED] were not informed of the reasons for their arrest and detention, were not brought before a judge or other competent authority, and were not provided with an opportunity to challenge the lawfulness of their detention.[362] However, there was simply no evidence demonstrating to the requisite standard the Panel's inference.

158. The Panel noted that it had not received specific evidence pertaining to the mistreatment of [REDACTED].[363] Nonetheless, it relied on the evidence of TW4-01,

[359] Judgment, para. 576.
[360] Judgment, para. 581.
[361] Judgment, para. 583.
[362] Judgment, para. 583.
[363] Judgment, para. 730.

TW4-11, W04733 and W01448, according to whom all detainees held in Room 1 were subjected to mistreatment, and that [REDACTED] was held in Room 1, to conclude the only reasonable inference was that the [REDACTED] was mistreated.[364] If "all" detainees were mistreated in everyone's presence, it is surprising that none spoke about witnessing [REDACTED] mistreatment. It cannot be excluded that the witnesses cited by the Panel were speaking in general terms about their overall perception of the abuse. Moreover, TW4-02, TW4-04 and TW4-05 suggested that not all detainees were mistreated.[365] The Panel unreasonably rejected the reasonable possibility that [REDACTED] was not mistreated.

159. The Panel noted that it had not received specific evidence pertaining to the interrogation of [REDACTED].[366] However, it found that, based on the evidence of TW4-11, W04733, W01448 and TW4-05, all detainees were taken for interrogation.[367] On this basis, the Panel considered that the only reasonable conclusion on the evidence was that [REDACTED] were also interrogated.[368] However, in the absence of any evidence to the contrary, another reasonable inference is that these individuals were not interrogated.

160. The Panel inferred the common purpose of the JCE from the pattern and *modus operandi* followed regarding the apprehension of detainees,[369] the institutionalisation of detention,[370] the systemic mistreatment of detainees;[371] and for murder (i) the intentional manner in which some detainees were mistreated; (ii) statements made by JCE Members, including Mr Shala, taken to show intent to kill detainees; and (iii) the denial of medical treatment to the Murder Victim.[372] However, as shown above the

[364] Judgment, para. 730.
[365] 060664-TR-ET Part 3, p. 26; SITF00013336-00013347 RED, pp. 4-5; SITF00372498-00372510 RED4, p. 4.
[366] Judgment, para. 747.
[367] Judgment, para. 747.
[368] Judgment, para. 747.
[369] Judgment, para. 1011.
[370] Judgment, paras. 1012-1013.
[371] Judgment, para. 1015.
[372] Judgment, para. 1016.

finding as to the pattern and modus operandi was itself based on a number of inferences that were not the only reasonable inferences on the evidence.

161. The Panel found that "[g]iven the manner in which TW4-01, the Murder Victim and W04733 were mistreated, […] murder was part of the common purpose already on or about 20 May 1999".[373] The Panel erred in inferring from that incident that there was an intent to kill on or about 20 May 1999, when guns were present that day but never fired.[374] The Panel unreasonably excluded the possibility that the persons who mistreated [REDACTED] only intended to mistreat them and not kill them or any other detainee for that matter.

162. The Panel found the JCE members "all linked to each other by the fact that their activities revolved around the KMF and they participated together in the apprehension, transfer and/or mistreatment of detainees".[375] It also found that "arbitrary detention and mistreatment at the KMF were not random, haphazard and isolated events, but instead followed the same pattern".[376]

163. However, another reasonable inference on the evidence was that there was no collective decision—making process about arrests and detention but persons were detained because of personal grievances with particular KLA members with authority at the KMF.[377] For instance, TW4-01 stated he considered that he had been detained because [REDACTED] wanted to take revenge on him.[378] His explanation was supported by additional evidence.[379] Yet, the Panel unreasonably considered that "it [was] entirely improbable that all JCE Members acted individually".[380]

[373] Judgment, para. 1017.
[374] Judgment, paras. 1016-1017.
[375] Judgment, para. 1005.
[376] Judgment, para. 1010.
[377] Judgment, paras. 1010-1011; Defence FTB, para. 80.
[378] Judgment, para. 1022.
[379] Defence FTB, para. 80.
[380] Judgment, para. 1022.

164. As a result of the Panel's inferences that were not the only reasonable possibility on the evidence, the convictions on all counts rest on findings drawn from inferences that were not the only reasonable inferences on the evidence, and thus, all convictions must be vacated and the case remitted for retrial.

B. ASSESSMENT OF MR SHALA'S STATEMENTS

165. The Panel found that:

> neither Mr Shala's 2005 Statement nor his 2019 Statement *discredit* the consistent, coherent and mutually corroborative evidence on record emanating, in particular, from TW4-01, W04733 and W01448, as well as Mr Elezaj, that Mr Shala was at the KMF on several occasions between the approximate dates of [REDACTED] May 1999 and 4 June 1999, taking part in the mistreatment of detainees.[381]

166. It further held that "[h]is statements *do not cast doubt on* the highly consistent and mutually corroborative evidence given by witnesses TW4-01, W04733 and W01448 who were detained at the KMF and were mistreated by him".[382]

167. The Panel erred by shifting the burden of proof to the Defence to disprove the finding regarding his presence at the KMF during the timeframe of the charges and his participation in mistreating detainees. The language the Panel used in its assessment of the statements, requiring the statements to "discredit" and to " cast doubt on" the Prosecution's evidence, demonstrate the reversal of the burden of proof.[383]

168. The Panel's errors have resulted in a significant violation of Mr Shala's defence rights which require vacating the convictions on all counts and remitted the case for re-trial.

X. GROUND 9: VIOLATION OF DEFENCE RIGHTS

[381] Judgment, para. 873 (emphasis added).
[382] Judgment, para. 913 (emphasis added).
[383] *Zigiranyirazo* Appeal Judgement, para. 19.

169. The Panel erred in law by failing to acknowledge that Mr Shala's right to present an effective defence was violated, *inter alia*, due to the Prosecution's repeated delayed disclosures and refusals to disclose relevant evidence, the restrictions on which Defence witnesses to call, starting the trial before the Defence was trial-ready and failing to acknowledge the impact of the passage of time between the Indictment events and the trial on Mr Shala's ability to defend himself. [384]

A. DISCLOSURE VIOLATIONS

170. The Prosecution has continuously delayed disclosing exculpatory as well as incriminatory material.[385]

171. The Panel erred in law by failing to consider that (i) Rule 103 calls for immediate disclosure of exculpatory evidence; (ii) the delayed disclosures concerned documents in the Prosecution's possession for years prior to the disclosure; and that (iii) the Prosecution failed to respect applicable disclosure deadlines. [386] The delayed disclosures had significantly impacted the ability of the Defence to investigate as well as its trial-readiness.

172. The late disclosure of items relating to W02540 caused serious prejudice to the Defence. [387] Had the Prosecution disclosed his identity and evidence timely, the Defence would have called him to testify and ensured that this exculpatory evidence was presented. W02540's evidence would have informed the Defence cross-examination of Prosecution witnesses, in particular, TW4-01, and the direct examination of Defence witnesses for eliciting further information.

[384] Judgment paras. 29-35, 42-47, 51-62, 1037-1039; F00218; F00813, F00813; F00830, .
[385] Defence FTB, paras. 294-300.
[386] Judgment, para. 44.
[387] [REDACTED]; F00803.

173. The Panel erred in law by disregarding the Defence arguments regarding the importance of this evidence for the evaluation of the credibility of TW4-01 and by failing to reconsider this in combination with prior disclosure violations.

B. UNDUE RESTRICTIONS ON WHICH WITNESSES TO CALL

174. The Panel erred in law when exercising undue restrictions on which witnesses the Defence could call. The fairness of the proceedings is preserved when participants have a genuine opportunity to present their case.[388] In addition, the principle of equality of arms implies an obligation to provide each party with a reasonable opportunity to present his case and does not place him at a substantial disadvantage *vis-à-vis* the opposing party.[389]

175. During the Defence Preparation Conference, the Panel instructed the Defence to remove W04454, DW4-04, W02517, W02549, and W04751 from its witness list.[390]

176. W04454 was expected to testify about his time at the KMF in April-May 1999, the presence of KLA members and their roles, and state that he never saw or heard about Mr Shala.[391] The Panel found his expected testimony to fall outside of the scope of the charges and it would not assist in establishing the facts of the case and its determination of the truth.[392]

177. DW4-04 was expected to testify about his time and role at the KMF, including the discipline of soldiers, the organisation and hierarchy of the 128th Brigade, and that Mr Shala was not a member of the Brigade and that he never saw Mr Shala in Kukës.[393]

---

[388] *Situation in Uganda* Decision on Prosecutor's application for leave to appeal and to suspend or stay consideration of leave to appeal, para. 24.
[389] *Katanga* Judgment, para. 1572; *Lubanga* Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation, p. 7; *Beheer v. The Netherlands,* para. 33.
[390] T. 25 August 2024 pp. 2428-2431.
[391] Email from Defence on 24 August 2023, 14:46.
[392] T. 25 August 2024 p. 2430.
[393] Email from Defence on 24 August 2023, 14:46.

Similarly, the Panel found his expected testimony as falling outside the scope of the charges.[394]

178. W04751 and W02549 were [REDACTED] soldiers deployed to Kosovo under the KFOR mandate in 1999.[395] W04751 was expected to provide information on the [REDACTED].[396] W02549 signed the report drafted by KFOR [REDACTED] and was expected to provide relevant information.[397] The Panel held that their expected evidence was repetitive of [REDACTED] and would not be useful.[398]

179. W04751 was deputy commander of the 128th Brigade and was responsible for the mobilisation of incoming soldiers.[399] His evidence would explain the movements of the 128th Brigade, the different KLA members he met and saw in and around Kukës and their positions and duties.[400] The Panel found his evidence as falling outside the temporal scope of the charges.[401]

180. The Panel erred in law by overstepping its discretion and excessively restricting witnesses the Defence could call, resulting in a violation of Mr Shala's right to present an effective defence.

181. The Pre-Trial Judge permitted the Prosecution to add four witnesses to its witness list after the expiry of applicable time-limit, despite the fact that their evidence was repetitive and mostly falling outside of the scope of the charges.[402] In contrast, the Panel ordered the Defence to remove W04454, DW4-04, W02517, W02549, and W04751 from its witness list.[403]

---

[394] T. 25 August 2024 p. 2430.
[395] Email from Defence on 24 August 2023, 14:46.
[396] Email from Defence on 24 August 2023, 14:46.
[397] Email from Defence on 24 August 2023, 14:46.
[398] T. 25 August 2024 pp. 2430-2431.
[399] Email from Defence on 24 August 2023, 14:46.
[400] Email from Defence on 24 August 2023, 14:46.
[401] T. 25 August 2024, p. 2431.
[402] F00205; F00216CONFRED/A01, pp. 19-22.
[403] T. 25 August 2024, pp. 2428-2431; F00205; F00216CONFRED/A01, pp. 19-22.

182. A different standard was applied when the expected evidence of W02517 and W02549 was precluded as the Panel considered it would have been "repetitive". Additionally, the Prosecution was permitted to present extensive evidence regarding events taking place in 1998 which fell outside the scope of the charges, while the Defence was ordered to remove W04454, DW4-04, and W04751 from its witness list as their evidence concerned events taking place outside the scope of the Indictment.[404]

C. STARTING THE TRIAL BEFORE THE DEFENCE WAS TRIAL-READY

183. The Panel erred in law and violated Mr Shala's right to present an effective defence by pressuring the Defence to proceed to trial before the Defence had a fair opportunity to complete or at least significantly advance its investigations.[405] The Defence continuously expressed the difficulties it faced regarding investigations and the impact this had on its trial-readiness.[406]

184. The Defence had even warned that it would be "unable to complete its investigations before the start of the trial".[407]

185. The Prosecution's late disclosures, including of exculpatory material, as well as the withdrawal of witnesses obliged the Defence to conduct new investigations.[408] Nonetheless, no additional time was granted and the trial went ahead.

D. THE IMPACT OF THE PASSAGE OF TIME

[404] F00216CONFRED/A01, pp. 19-22; T. 25 August 2024 pp. 2430-2431.
[405] Judgment, paras. 56-58.
[406] Defence FTB, paras. 322-326. F00129, para. 13; F00153, para. 14; T. 14 January 2022 pp. 178-179; F00813, para. 21.
[407] F00183, para. 21; F00305, para. 4.
[408] T. 18 October 2022 pp. 311-314, 316, 318-319, 374-375.

186. The Panel erred in law by failing to acknowledge the impact of the passage of time between the Indictment events and the trial on Mr Shala's ability to defend himself.[409]

187. In *Nicolaou v. Cyprus*, the ECtHR found that the passage of time had undermined the effectiveness of investigations commenced ten years after the relevant events as "the mere passage of time can work to the detriment of the investigation".[410]

188. The Indictment concerns events that took place almost 25 years ago. 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. During the 25 years following the alleged events, documents have been definitively lost and important witnesses have died, disappeared or became unavailable or unwilling to come testify in his favour.

189. The Panel erred in law by failing to acknowledge the impact of the passage of time between the Indictment events and the trial on Mr Shala's ability to defend himself. To the contrary, the Panel used the passage of time to the detriment of Mr Shala when assessing inconsistencies in the evidence of Prosecution witnesses and that of W04280.[411]

190. The Panel excused the imprecision of TW4-01's account regarding [REDACTED], the presence of Mr Shala during the second incident in the Office, [REDACTED] due to the passage of time.[412] The Panel excused the inability of TW4-11 to provide the date of his arrest, his inconsistent accounts as to the number of detainees in Room 1 and failing to mention of W01448 as a co-detainee due to the

[409] Judgment, paras. 34-35.
[410] *Nicolaou v. Cyprus*, para. 150.
[411] Judgment, paras. 83, 397, 418, 427, 431, 451, 485, 597, 599, 665, 784, 893.
[412] Judgment, paras. 397, 665, 784.

passage of time.[413] The Panel excused W04733's flawed description of Mr Shala[414] due to the passage of time.[415]

191. As a result of these errors, Mr Shala's defence rights were violated, resulting in real prejudice to his ability to defend himself. The convictions on all counts should be vacated.

XI. GROUND 10: ABUSE OF DISCRETION CONCERNING DEFENCE WITNESSES

192. The Panel considered irrelevant factors and gave them determining weight in assessing the evidence of Defence witnesses. It inappropriately placed determining weight on witnesses' support for the KLA, political opinions and hostility towards the KSC.

193. Witnesses who had ties with or sympathized with the KLA were automatically treated with distrust and discredited. Out of a total of twelve Defence witnesses, the only three who were found credible were those who had no ties to the KLA.[416] W04280, Dervishaj, Hoxha, Kocinaj and Mark Shala were approached with caution or extreme caution.[417] Safet Gashi, Safete Hadergjonaj, Time Kadrijaj, Bardhyl Mahmuti were found wholly unreliable.[418]

194. Kocinaj's evidence was treated with "extreme caution" as the Panel found that he was reluctant to give evidence on key points including detention practices or his knowledge of Mark Shala.[419] The Panel decided to treat W04280, Dervishaj, Hoxha and

[413] Judgment, paras. 418, 427, 431, 485.
[414] 082892-TR-AT-ET Part 1 RED3, p. 38.
[415] Judgment, para. 451.
[416] DW4-09, DW4-03 and W03881.
[417] Judgment, paras. 225, 234, 254, 268, 283.
[418] Judgment, paras. 244, 248, 259, 276.
[419] Judgment, paras. 263-268.

Mark Shala's evidence with caution due to their reluctance, in the Panel's words, to provide evidence on Mr Shala and/or the charges.[420]

195. The Panel found that Dervishaj and Kocinaj maintained ongoing ties to the KLA.[421] It took note of Facebooks posts from Dervishaj and Kocinaj's acquaintances to support this, even though the witnesses could not control the actions of others. The Panel has not applied the same strict standard for W04733, his family members, W01448, TW4-01, TW4-10 and TW4-04, nor has it considered their evidence to warrant caution.[422] The Panel erred by placing undue weight on Dervishaj and Kocinaj's relationship and concluding that their "reluctance to provide evidence" might be related to their ties to or support for the KLA.[423]

196. The above suggests that the Panel's tendency to consider Defence witnesses' evidence with caution stems from the witnesses' failure to provide incriminating evidence that would fit the Panel's preferred narrative or because of their political opinions or openly expressed sympathy towards the KLA. This selective scepticism not only undermines the Panel's evidentiary assessment but also creates an appearance of bias, suggesting that its evaluation was influenced by a preconceived expectation of guilt instead of an impartial consideration of the evidence.

197. The Panel found Gashi's testimony wholly unreliable, claiming he was self-contradictory and reluctant to provide meaningful information concerning the charges.[424] Hadergjonaj's testimony was found wholly unreliable as, in the view of the Panel, she was reluctant to provide any meaningful information on the charges and Mr Shala and because of her negative views towards the KSC and the SPO and support for the KLA.[425] Kadrijaj's testimony was found wholly unreliable, as the Panel found

[420] Judgment, paras. 225, 234, 254, 283.
[421] Judgment, paras. 232, 266.
[422] *See* GROUND 6.
[423] Judgment, paras. 232, 266.
[424] Judgment, paras. 242-244.
[425] Judgment, paras. 247-248.

her to have an evasive attitude especially regarding her presence at the KMF, which she denied, her support for the KLA and negative views towards the KSC and SPO.[426] Lastly, Mahmuti's testimony was found wholly unreliable as in the view of the Panel he had provided no relevant evidence and had negative views towards the KSC and SPO.[427]

198. The Panel erroneously disregarded all the evidence provided by those witnesses without considering whether any of it was reliable. Certain aspects of the evidence of Mahmuti, for instance, was relevant, as they cast doubt on W04733's credibility. The Panel failed to acknowledge the entries in Mahmuti's passport that demonstrate that he was not at the KMF while W04733 claimed that Mahmuti was there.[428]

199. The Panel's treatment of the evidence offered by Defence witnesses creates an appearance of bias putting into question the Panel's impartiality. The ICTY and ICTR Appeal Chambers in *Furundžija* and *Rutaganda* held that "there is an unacceptable appearance of bias if […] the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias".[429]

200. The Panel erroneously found that the lack of knowledge of some witnesses meant they were "strategically directed to protect Mr Shala's interests".[430] It found that all witnesses who were KLA members, including Prosecution witnesses Elezaj and Kryeziu, had an incentive not to implicate KLA members including Mr Shala.[431]

201. The Panel erroneously found that Defence witnesses were reluctant to provide meaningful information, simply because they testified that they did not know Mr

[426] Judgment, paras. 257-259.
[427] Judgment, paras. 271-273.
[428] T. 20 September 2023 pp. 2490-2514.
[429] *Furundžija* Appeals Judgment, para. 189; *Rutaganda* Decision on Request, para 28.
[430] Judgment, paras. 210, 233, 247, 253, 258, 272, 282, 888, 891, 894.
[431] Judgment, paras. 195, 210.

Shala or had no knowledge of crimes committed.[432] However, a reasonable trier of fact would have allowed for the legitimate possibility that the witnesses either did not know the required information or may not have known or have met Mr Shala.

202. The Panel also failed to place proper weight on evidence which showed that Mr Shala was not part of the alleged JCE and that he did not share the requisite intent for the crimes found to fall within the JCE's common purpose.[433] The Panel erred by discrediting portions of their evidence that favored Mr Shala, while using other portions to support his conviction or to establish aggravating circumstances in sentencing.[434]

203. The Panel treated the vast majority of Defence witnesses with distrust, failed to provide proper reasons for dismissing their evidence, wrongly relied on their sympathy towards the KLA or hostility towards this tribunal to infer that their whole testimony would be untruthful. A reasonable trier of fact would have disregarded any personal feelings or political opinions and assessed a witness's evidence with an open mind. The Panel however focused on findings in support of the narrative it wished to present, disregarding Defence evidence going against such narrative while failing to provide adequate reasons in support of its conclusions. A reasonable observer would be justified to question the Panel's impartiality in these circumstances.

204. Lastly, the Panel erred in law and fact when refusing to hear the evidence of potential Defence witness W02540 and then making adverse findings on issues to which the witness could have testified.[435]

[432] Judgment, paras. 222-224, 231, 233, 244, 253-254, 264-268, 271-273, 280-283.
[433] Judgment, paras. 222, 231, 247, 253, 266, 271, 281-282, 874-897, 910-914, 950-956, 1020-1039.
[434] Judgment, para. 1087; *See* GROUND 6.
[435] F00813; F00830; Judgment, paras. 98-119, 395-401.

205. W02540 was a [REDACTED], who [REDACTED].[436] His proposed evidence directly contradicted TW4-01's evidence on several aspects [REDACTED].[437] And [REDACTED].[438] No reasonable trier of fact would have deprived the Defence the opportunity to call W02540 to discredit the most important Prosecution witness.

The Panel's errors have resulted in a miscarriage of justice and warrant a retrial.

XII. GROUND 12: ERRORS RELATED TO THE CONVICTION FOR ARBITRARY DETENTION

206. The Panel erred in law and fact in the manner in which it set out and applied the law and convicted Mr Shala of Count 1.[439]

A. ELEMENTS OF THE CRIME

207. The Panel erred in law when requiring: (i) as an objective element of the war crime of arbitrary detention in a NIAC that detainees be brought promptly before a judge or other competent authority and given an opportunity to challenge the lawfulness of their detention;[440] (ii) a high standard as to the characteristics to constitute a "competent authority" ;[441] and (iii) "[w]hen assessing the compliance with basic procedural safeguards, it is irrelevant whether [….] the perpetrator is personally responsible for the failure to have the detainee's procedural rights respected".[442] In addition, the Panel misconstrued the authorities it applied concerning the offence of unlawful confinement of civilians in the context of an *international* armed conflict and the conduct of persons having the authority to release civilian detainees.[443]

[436] 069539-TR-ET Part 1 Revised 1 RED, pp. 13, 19-20.
[437] [REDACTED]. T. 31 May 2023 p. 1540; T. 2 June 2023 p. 1697; T. 5 June 2023 p. 1734; [REDACTED].
[438] [REDACTED]; T. 2 June 2023 pp. 1697-1698; [REDACTED].
[439] Defence Revised Notice of Appeal, para. 22.
[440] Judgment, paras. 938, 942-943, 948.
[441] Judgment, paras. 942-943, 948.
[442] Judgment, para. 940.
[443] Judgment, paras. 940, *referring to Delalić et al.* Appeal Judgement, 20 February 2001, para. 379; 941-942, ns. 1916-1917.

208. In setting out the obligations to bring a detained person promptly before a competent authority and provide an opportunity to challenge the lawfulness of detention, the Panel simply referred to institutional guidelines, including an ICRC Study, and one ECtHR decision.[444] In holding that the guarantee to be brought promptly before a competent authority "requires, at a minimum, that an independent authority from the one ordering the detention reviews the detention and is capable of assessing its lawfulness", the Panel erroneously referred to Article 75 of Additional Protocol I, which applies in an international armed conflict and not a NIAC.[445]

209. The Panel also erred in law when applying an overly high standard as to the characteristics required to constitute such "competent authority", ignoring the time when the alleged offences took place and the relevant context of a NIAC. It found that:

> [r]egarding the obligation to be brought promptly before a judge or other competent authority, the Panel notes that this guarantee requires, at a minimum, that an independent authority from the one ordering the detention reviews the detention and is capable of assessing its lawfulness, whether it continues to be necessary and whether the detainee is to be released. […].
>
> Regarding the obligation to provide a detained person with an opportunity to challenge the lawfulness of their detention […]. This is fostered through ensuring that an initial review of detention is conducted and that continued oversight is exercised during the course of the person's detention.[446]

210. The ICRC 2020 Commentary states that:

> [i]n an effort to address the uncertainty resulting from the silence of humanitarian treaty law on the procedure for deprivation of liberty in non-international armed conflict, the ICRC issued guidelines […]. The guidelines are based on law and policy and are meant to be implemented in a manner that takes into account the specific circumstances at hand.[447]

[444] Judgment, paras. 942-943.
[445] Judgment, para. 942, n. 1917.
[446] Judgment, paras. 942-943.
[447] International Committee of the Red Cross, 2020 Commentary on the Third Geneva Convention, Common Article 3, para. 760.

What amounts to a competent authority in a NIAC should be context-specific. It depends on the circumstances and the resources available to the armed group in question.

211. The evidence shows that the KLA emerged as an armed resistance group over time without the organisation or resources of a conventional state army nor established local administration.[448] During the Indictment Period, although some structures were established within the KLA, it is clear it still operated as a people's army, a voluntary army in makeshift facilities with scarce resources.[449] The conditions in which it operated in 1999 entailed no organisation akin to that of a local administration which would have enabled it to ensure and apply all the safeguards normally expected to protect against arbitrary detention.[450] In light of the largely informal structures of command and the limitations of the KLA's capacity to ensure effective respect for all the humanitarian norms, it cannot be inferred that it was capable of having competent authorities meeting the high standards expected by the Panel and ensuring full respect for detailed rules regarding detention, periodic review of its lawfulness, and other procedural guarantees normally expected for the benefit of persons detained on suspicion of being a threat to national security.[451] It is unreasonable to expect that the KLA had such capacities in mid-1999 when operating extraterritorially, outside Kosovo, in Albania in the middle of a war and an unprecedented flow of refugees.[452] It is unreasonable to infer that the KLA commanders or soldiers that had effective power to detain or release persons suspected of treason could fully exercise the function of a judge or other independent authority having continued oversight capable of assessing the lawfulness of detention. Therefore, the Panel erred in law by failing to consider the specific circumstances of

[448] Defence FTB, para. 29; T. 16 April 2024 p. 4271.
[449] Defence FTB, para. 30; T. 16 April 2024 p. 4271.
[450] T. 16 April 2024 p. 4272.
[451] Defence FTB, para. 30; T. 16 April 2024 p. 4274.
[452] T. 16 April 2024 p. 4272.

the KLA, the context of a NIAC and setting such a high standard for "competent authority".

212. The Panel erred in law in establishing in an arbitrary manner that "[w]hen assessing the compliance with basic procedural safeguards, it is irrelevant whether [….] the perpetrator is personally responsible for the failure to have the detainee's procedural rights respected".[453] For this finding, it relied on paragraph 379 of the ICTY Appeal Judgement in *Delalić et al.*,[454] which it misapplied as it pertains to the offence of unlawful confinement of civilians in the context of an international armed conflict and not a NIAC.[455]

B. ERRORS REGARDING FACTUAL AND LEGAL FINDINGS

213. The Panel erred in law and fact in finding that: (i) persons detained "were not held at the KMF pursuant to any criminal charges and no security concerns made it absolutely necessary for any of them to be detained"; (ii) Mr Shala was aware and/or sufficiently informed that detainees were arbitrarily detained and had the requisite *mens rea* for the crime of arbitrary detention; and (iii) he made a significant contribution to upholding the detention regime by physically mistreating victims.[456]

1. Arbitrary Finding About Lack of Security Concerns

214. In its legal findings regarding the *actus reus* of the crime of arbitrary detention, the Panel found that none of the detainees were held "pursuant to any criminal charges and no security concerns made [the detention] absolutely necessary".[457]

[453] Judgment, para. 940.
[454] Judgment, para. 940, *referring to Delalić et al.*Appeal Judgement, para. 379; F00007, para. 52; KSC-BC-2020-05, F00494/RED3/COR, para. 650.
[455] *Delalić et al.*Appeal Judgement, paras. 33, 50-51.
[456] Defence Revised Notice of Appeal, para. 24.
[457] Judgment, para. 947.

215. In contrast with its above finding, the Panel also found that the detainees were detained due to suspected collaboration with Serbian forces.[458] There is an inherent paradox in finding that persons were detained due to suspected collaboration with *enemy* forces and at the same time they were detained arbitrarily. The Panel found that the detainees were detained in what it described as "an operational pattern", they were apprehended and interrogated on allegations of "sympathizing or otherwise being associated with Serbia, 'Serbs', or Serbian authorities, or being 'traitors' or 'collaborators' or not being sufficiently supportive of the KLA effort, be it financially, militarily or politically".[459] Subsequently, the Panel based its legal finding on the *actus reus* of the crime on its determination that detainees "were not held at the KMF pursuant to any criminal charges and no security concerns made it absolutely necessary" and that to the contrary "were arrested and detained on vague allegations of being 'collaborators', 'spies', or 'traitors', or of not being sufficiently supportive of the KLA effort".[460]

216. This inconsistency is further demonstrated by the Panel's findings regarding the common purpose of the JCE as including arbitrary detention.[461] According to the Panel, "detainees were singled out prior to their arrest for being perceived to collaborate with, be associated with, or sympathize with the Serbian authorities or for not being sufficiently supportive of the KLA effort" and were "not arrested at random, but were targeted, as evidenced by searches for specific individuals conducted by KLA members prior to [the] arrest[s]".[462] Further, the Panel found that detainees were systematically questioned regarding their relationship with Serbian authorities and their knowledge of "collaborators".[463] Yet the Panel qualified these findings as fulfilling the requirement of arbitrariness, as opposed to accepting another, or in the

[458] Judgment, paras. 590, 947.
[459] Judgment, paras. 590, 947.
[460] Judgment, para. 947.
[461] Judgment, paras. 1009-1014, 1023.
[462] Judgment, para. 1011.
[463] Judgment, para. 1014.

Defence submission, the only reasonable inference in the circumstances, that the KLA officers had detained the individuals as security concerns made it absolutely necessary.[464] The Panel did not receive nor analyse any evidence going to whether the concerns were genuine.[465] This exceeded the bounds of its discretion, as the genuineness and necessity of the security concerns had to be assessed to conclude that no security concerns justified the detention of any detainee.

2. Requisite *Mens Rea*

217. According to the Panel, the *mens rea* of the war crime of arbitrary detention, with the meaning of Article 14(1)(c) of the KSC Law requires the perpetrator to have "acted intentionally".[466] Such intent may be inferred from the accused's knowledge that crimes are being committed and his participation in their perpetration.[467] 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 detainees have not been afforded the requisite procedural guarantees, or be reckless as to whether those guarantees have been afforded".[468]

218. In its findings regarding the *mens rea* of arbitrary detention, the Panel found that perpetrators, including Mr Shala, acted intentionally in relation to their conduct, that they apprehended, mistreated and interrogated the detainees and made decisions regarding their release at will.[469] The Panel held that Mr Shala knew that arbitrary detention and other crimes were committed and intended them by participating in their perpetration.[470] It held that, specifically, he participated in the transfer of W04733

[464] Judgment, para. 1014; Defence FTB, paras. 72-73.
[465] T. 16 April 2024 p. 4274; notably, as mentioned by the Defence, these questions must be separated from any treatment that these persons received while detained.
[466] Judgment, para. 944.
[467] Judgment, para. 944.
[468] Judgment, para. 944.
[469] Judgment, para. 951.
[470] Judgment, para. 952.

from Romanat to the KMF.[471] In addition, the Panel found Mr Shala was present at the KMF on multiple occasions in May and June 1999, including (i) on or about 20 May 1999, mistreating TW4-01, [REDACTED], W04733, and W01448 and questioning [REDACTED] to make a confession; and (ii) on 4 June 1999, mistreating [REDACTED] during the shooting incident which led to the latter's death.[472] The Trial Panel held that Mr Shala "had no reasonable grounds to believe that security concerns made the detention of these persons absolutely necessary".[473]

219. As stated in *Delalić et al.*, to establish that an accused committed arbitrary detention, "something more must be proved than mere knowing 'participation' in a general system or operation" and "[s]uch responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense".[474]

220. The Panel found that Mr Shala was present at the KMF on several instances, including, "at a minimum" (i) between approximately [REDACTED] and [REDACTED] May 1999; (ii) on or about 20 May 1999; (iii) on or about 28 or 29 May 1999; (iv) on or about 31 May 1999; and (v) on or about 4 June 1999.[475] His alleged presence on two occasions was founded either entirely or to a decisive extent on the untested evidence of deceased witnesses. Only W04733 provided evidence on Mr Shala's presence on or about 28 or 29 May 1999,[476] and the Panel relied to a decisive extent on the evidence of Elezaj to find that Mr Shala was present on 31 May 1999.[477] The Appeals Chamber in *Limaj et al.* held that "while the Accused's 'proximity to an area of criminal activity can be a factor from which an Accused's knowledge of the crimes can be inferred', the 'occasional presence' of Mr Limaj was not enough to prove

[471] Judgment, para. 952.
[472] Judgment, paras. 952, 954.
[473] Judgment, para. 953.
[474] *Delalić et al.*, Appeal Judgment, para. 342.
[475] Judgment, para. 897.
[476] Judgment, paras. 845-847, 897.
[477] Judgment, paras. 848-851, 897.

his knowledge of the existence of a prison or his participation in it".[478] Similarly, Mr Shala's knowledge cannot be inferred by mere presence at the KMF alone.

221. The Panel found that Mr Shala was present during some of the interrogations and questioning of detainees.[479] It did not explain why Mr Shala, who "did not have an official position or particular rank in the KLA",[480] could be expected to know that persons who were accused of being collaborators of the Serbian regime were not detained due to valid security concerns.

222. Further, the Panel found that Mr Shala shared the intent to commit arbitrary detention with other alleged JCE members.[481] However, as the ICTY Appeals Chamber stressed, a JCE "is not an open-ended concept that permits convictions based on guilt by association".[482]

223. Based on the foregoing, the Panel erred in law and fact when it found that Mr Shala was aware and/or sufficiently informed that detainees were arbitrarily detained and had the requisite *mens rea* for arbitrary detention.

3. Mr Shala's Contribution

224. Within its assessment of the JCE criteria, the Panel found that Mr Shala made a significant contribution to the crime of arbitrary detention by "upholding the detention regime established by the JCE Members" as he "physically committ[ed] and participat[ed] in the arbitrary detention, interrogation and severe and brutal mistreatment of detainees".[483]

---

[478] Defence FTB, para. 88 and references contained therein.
[479] The Panel's finding that Mr Shala questioned detainees himself is based exclusively on untested evidence of W04733; *see* GROUND 7.
[480] The Panel found Mr Shala was "able to move freely in and out of the KMF and had a certain degree of autonomy and authority, especially in mistreating and interrogating detainees". Judgment, paras. 899-900, 902, 914.
[481] Judgment, para. 1029.
[482] Defence FTB, para. 87, *referring to Brđanin* Appeal Judgement, para. 428.
[483] Judgment, paras. 1025, 1028.

225. The Panel based the above finding on its findings that (i) Mr Shala had participated in the transfer of W04733 to the KMF; (ii) he continued and enforced the arbitrary detention of TW4-01, [REDACTED], W04733, and W01448 by mistreating them on or about 20 May and 4 June 1999; (iii) he mistreated TW4-01, [REDACTED], W04733, and W01448 on or about 20 May 1999; iv) he accused W04733 of being a spy on or about 20 May 1999; (v) he ordered [REDACTED] and/or [REDACTED] to beat W04733 on or about 20 May 1999; (vi) he questioned [REDACTED] to make a confession on or about 20 May 1999; and (vii) he mistreated [REDACTED] on or about 4 June 1999.[484] The Panel found Mr Shala's contribution was "significant in furthering the common plan to detain, interrogate, mistreat and murder detainees".[485] In making findings related to (i), (iv), (v), and (vi), the Panel relied either exclusively or to a decisive extent on the untested evidence of W04733.[486]

226. The Panel erred in law when it found "it is irrelevant whether Mr Shala had any position of responsibility, authority or control, or whether he was under a duty to act in any specific manner towards the detainees".[487] Established case law provides that responsibility is "more properly allocated to those who are responsible for the detention in a more direct or complete sense".[488]

227. The Panel did not find that Mr Shala possessed the power to arrest, detain or release individuals; having autonomy to move freely in and out of the premises and what the Panel called "autonomy in mistreating and interrogating detainees" on two separate occasions[489] do not imply such power.

[484] Judgment, para. 1025.
[485] Judgment, para. 1025.
[486] *See* GROUND 7.
[487] Judgment, para. 1027; Defence Revised Notice of Appeal, para. 26. Defence FTB, paras. 73, 76, 86, 122, 128-129; T. 16 April 2024 pp. 4275-4277.
[488] Defence FTB, para. 74, *referring to Delalić et al*. Appeal Judgement, para. 342. *See also Mustafa* Judgment, para. 657 (Mr Mustafa's command position placed upon him "the responsibility to ensure that the detainees were afforded the basic guarantees").
[489] Judgment, paras. 902, 914.

228. On the contrary, the Panel found that Xhemshit Krasniqi was in charge of detainees and "played a prominent role in the apprehension, transfer, interrogation and mistreatment of detainees" and he together with other members of "this group" was under the authority of Sabit Geci.[490]

C. LACK OF COMPETENT AUTHORITY

229. The Panel found that the detainees were "not brought promptly before a judge or other competent authority".[491] In particular, it found that neither Kryeziu, who presented himself as a judge or prosecutor, nor Sokol Dobruna or any other KLA member exercised the function of a judge or competent authority, as neither of them "exercise[d] the functions of an independent authority having oversight over the lawfulness of the persons' detention".[492] The Panel reasoned that both Kryeziu and Sokol Dobruna participated in interrogations but lacked a position which would allow them to independently order someone's release.[493] Moreover, the Panel found that several detainees were "seriously mistreated" by KLA members and one detainee was killed.[494] Thus, the Panel found that the second material element of the war crime of arbitrary dentition was met.[495]

230. The Panel found that Kryeziu was a KLA member working with its Military Police and exercised "the function of interrogating detainees".[496] Kryeziu stated that he worked as a prosecutor in Pristina until 1990 and joined the KLA in 1999.[497] The evidence shows that during the relevant time he was tasked with conducting investigations and "hearing sessions" related to offences allegedly committed by KLA

[490] Judgment, para. 1004.
[491] Judgment, para. 948.
[492] Judgment, para. 948.
[493] Judgment, para. 948.
[494] Judgment, para. 948.
[495] Judgment, para. 948.
[496] Judgment, para. 353.
[497] SITF00016908-00016964 RED, p. 3; SITF00014088-00014120 RED, pp. 4, 13.

members,[498] and was primarily involved in desertion cases,[499] a position to which he was appointed by Xhemshit Krasniqi and Sabit Geci.[500] The Panel found Kryeziu credible as to his presence and function at the KMF.[501] Another task that Kryeziu provided evidence on is the arrest, interrogation and detention of suspected "collaborators" with the Serbian forces at the KMF.[502] However, the Panel found Kryeziu not credible regarding the exercise of his functions in relation to detainees as it assessed that he attempted to deny his involvement in the interrogation of persons suspected to be collaborators.[503]

231. TW4-11 testified that he was questioned by Kryeziu, who identified himself as a "judge or prosecutor", which the Panel found credible.[504] Kryeziu provided corroborative evidence of having questioned an "official [REDACTED] person".[505] According to TW4-11, Kryeziu asked him questions on his occupation and whereabouts during the war,[506] which the Panel found credible.[507] TW4-11 did not deny (or confirm) that his release was a result of this interview, yet he testified that Kryeziu told him "he was sorry that he had not arguments against [TW4-11]"[508] and that his release happened after the questioning[509] and before other detainees were released.[510]

[498] SITF00014088-00014120 RED, pp. 7-8; SITF00016908-00016964 RED, pp. 5-7. *See also* Judgment, n. 341.
[499] SITF00014088-00014120 RED, pp. 8-9; SITF00016908-00016964 RED, pp. 6-7. *See also* Judgment, para. 351.
[500] SITF00014088-00014120 RED, pp. 10-11; SITF00016908-00016964 RED, pp. 5, 13.
[501] Judgment, para. 205.
[502] SITF00014088-00014120 RED, pp. 13-14.
[503] Judgment, paras. 206-207.
[504] T. 2 May 2023 p. 1222; T. 3 May 2023 pp. 1260-1261; Judgment, paras. 422, 424, 433.
[505] SITF00014088-00014120 RED, p. 13; SITF00016908-00016964 RED, p. 9.
[506] T. 3 May 2023 p. 1266.
[507] Judgment, para. 436.
[508] T. 3 May 2023 pp. 1265-1266.
[509] T. 3 May 2023 pp. 1305-1306.
[510] TW4-11 testified that he stayed at the KMF until NATO forces entered Kosovo, thus he was released before several other detainees were transferred to Prizren on 18 June 1999, T. 2 May 2023 p. 1199; T. 3 May 2023 pp. 1260, 1306. *See also* W01448 who stated that TW4-11 was released before others due to connection to KLA members, SITF00013736-SITF00013800 RED5, p. 22; SITF00016140-00016220 RED3, p. 3.

232. TW4-04 stated that during his detention he was brought to see a "judge", whom he identified as Kryeziu, and was asked to provide a statement regarding his past and arrest, which the Panel found credible.[511] 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,[512] which the Panel found credible.[513] According to TW4-04, Xhemshit Krasniqi required a formal release order from a judge before he could release him, who was told he would receive a certificate.[514] Yet, TW4-04 received a note from Kryeziu stating that he was "clean",[515] and Kryeziu told TW4-04 that he was "proven innocent".[516] TW4-04 stated that after he went to see Kryeziu and provided the statement, he was released days later.[517] Kryeziu also stated that he questioned TW4-04 and "ordered" his release.[518]

233. TW4-02 stated that he was questioned by Kryeziu on several occasions, which the Panel found credible.[519] TW4-02 stated that Kryeziu told him to stay quiet and play "the role of the stupid".[520] TW4-02 stated that there was no senior KLA commander who ordered his release and that Kryeziu informed him that he was to be released, that "this is a procedure that we have to undergo, some verification, completely in vain".[521] The Panel found this credible and inferred that Kryeziu did not exercise the function of a judge or competent authority but a friend.[522]

---

[511] 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; Judgment, paras. 529-530.
[512] 064716-TR-ET Part 5 RED4, pp. 9-10.
[513] Judgment, paras. 529-530.
[514] 064716-TR-ET Part 4 RED3, p. 19.
[515] 064716-TR-ET Part 1 RED3, p. 17.
[516] SITF00015825-00015925 RED, p. 30.
[517] SITF00013262-00013315 RED, pp. 12-13; SITF00015825-00015925 RED, p. 30; SPOE00014669-00014751 RED, pp. 23-30; 064716-TR-ET Part 5 RED4, p. 10.
[518] SITF00014088-00014120 RED, pp. 13-14; SITF00016908-00016964 RED, p. 9.
[519] 060664-TR-ET Part 2, pp. 11-12; 060664-TR-ET Part 3, p. 26; 060664-TR-ET Part 4, pp. 18-19; 108850-TR-ET Part 1, pp. 10-11; Judgment, paras. 541-542.
[520] 060664-TR-ET Part 5 RED4, p. 17.
[521] 060664-TR-ET Part 5 RED4, p. 17.
[522] Judgment, para. 553.

234. TW4-05 stated upon his arrival at the KMF that he was questioned by [REDACTED] and "someone who posed as a lawyer or a judge" and was requested to write a statement,[523] which the Panel found credible.[524] TW4-05 stated he was questioned three times by [REDACTED] and [REDACTED].[525]

235. The Panel did not properly examine the evidence of W04733 regarding his release. He stated that he was released earlier than other detainees on 1 June 1999 by [REDACTED], which the Panel found credible.[526] Yet the Panel declined to analyse this authority, stating "it does not have to establish this fact".[527] Moreover, it found W04733's release was "not as a result of a judicial decision, but following an external intervention" and thus did not fulfil the requirement of a competent authority.[528]

236. Four out of the seven detainees who provided evidence stated that they were questioned and/or provided a statement to a person who acted as a judge or prosecutor, who was identified by three of them as Kryeziu. The Panel found these witnesses credible on this point. Kryeziu himself stated that he interviewed two civilians and conducted investigations into KLA members, which the Panel found credible and based on which it found that he was a KLA member who exercised "the function of interrogating detainees".[529] The evidence clearly demonstrates that Kryeziu exercised the functions of a competent authority. No reasonable trier of fact would have come to the same conclusion as the Panel that there was no person who exercised such functions.

XIII. GROUND 13: ERRORS RELATED TO THE CONVICTION FOR MURDER

[523] SITF00013123-SITF00013153 RED, pp. 5-6, 9.
[524] Judgment, paras. 497-499, 509.
[525] SITF00013123-SITF00013153 RED, pp. 7-9.
[526] Judgment, para. 496.
[527] Judgment, para. 468.
[528] Judgment, para. 468.
[529] Judgment, para. 353.

237. The Panel found Mr Shala liable for the murder of a victim whom, according to the Panel, was "intentionally killed" by two others: the KLA member who shot him and the KLA member who denied his transfer to the hospital.[530]

238. The Panel considered the *actus reus* for murder fulfilled as "Xhemshit Krasniqi and the KLA member who denied the Murder Victim's transfer to the hospital caused the Murder Victim serious bodily harm and denied him (appropriate) medical care, resulting in his death".[531] As for the required *mens rea*, the Panel considered that "both Xhemshit Krasniqi and the KLA member who denied the Murder Victim's transfer to the hospital desired the death of the Murder Victim to be the result of their acts and omissions and committed the crime of murder with direct intent".[532]

239. Mr Shala was not a perpetrator of murder and his alleged acts – as considered established by the Panel – did not play an integral part in the murder. The acts and intent of others cannot be imputed on a group.

240. The Panel considered Mr Shala's individual criminal responsibility for murder to be captured by his alleged participation in a JCE that had murder as a purpose.[533]

241. Specifically, it found that murder was part of the JCE common plan based on (i) the "manner in which (some of the) detainees were mistreated; (ii) statements made by JCE Members, including Mr Shala, that clearly show the intent to kill detainees; and (iii) the purposeful denial of the medical treatment to the Murder Victim".[534]

242. As to the first,[535] the Panel found that "several JCE Members brutally assaulted TW4-01, the Murder Victim and W04733, using dangerous objects and taking turns in

[530] Defence Revised Notice of Appeal, para. 26.
[531] Judgment, para. 989.
[532] Judgment, paras. 990-991.
[533] Judgment, paras. 994, 998.
[534] Judgment, para. 1016.
[535] Judgment, para. 1017.

beating them, working as a group".[536] It also relied on the facts that "on or about [REDACTED] on or about 4 June 1999, Xhemshit Krasniqi [REDACTED] shot [REDACTED] the Murder Victim" [REDACTED].[537]

243. Even though guns were "brandished" on 20 May 1999 by several KLA members, but not Mr Shala, they were not fired.[538] No one died as a result of the beating during this incident. They were never fired in the presence of or against detainees [REDACTED] allegedly [REDACTED] June 1999 in an incident that Mr Shala did not attend. [REDACTED], [REDACTED] "[REDACTED]" that any person not present could not have foreseen the criminal conduct that ensued.[539] There was also no intent to kill before or during the shooting incident on or around 4 June 1999. The Murder Victim was shot in the leg and returned to his room alive.

244. Second, the Panel found the "statements made by JCE Members – including Mr Shala – plainly reveal their intent to commit murder".[540] The Panel relied on the evidence of W04733, who stated that "Mr Shala himself told [him] […] at one point: 'We're going to kill you. We're going to execute you'".[541] This evidence is untested and uncorroborated. No other evidence was presented that Mr Shala made any statement along these lines. Even accepting the flawed statement attributed to Mr Shala by W04733, at most this could indicate intent to kill W04733 and not other detainees including the Murder Victim. No evidence was presented based on which the Panel could have reasonably inferred his desire to kill [REDACTED].[542]

[536] Judgment, para. 1017.
[537] Judgment, para. 1017.
[538] Judgment, para. 1032.
[539] [REDACTED], para. 237.
[540] Judgment, para. 1018.
[541] Judgement, paras. 906, 1018.
[542] Defence FTB, para. 183.

245. The Panel also relied on [REDACTED] that Xhemshit Krasniqi told [REDACTED] the Murder Victim following [REDACTED] that "[REDACTED]".[543] It is important to note that [REDACTED] did not implicate Mr Shala in this incident, which the Panel found reliable.[544] It cannot be excluded that although threats to kill may have been made, these were only intended to intimidate and there was never any intention to act upon them. The Panel relied on an insufficient evidentiary basis to establish there were threats to kill, including by Mr Shala.[545]

246. Third, the Panel found that "the intent to kill is also manifested by the fact that the Murder Victim was purposefully denied medical treatment".[546] It relied on [REDACTED] that "'Xhemshit and the likes' […] did not allow for his transfer, stating: 'We did not maltreat him to this point to send him to the hospital then'".[547] While [REDACTED] did not remember who denied the transfer, he stated it was "the people in charge", "Xhemshit and the likes" and "the staff, the headquarters".[548] Mr Shala had nothing to do with such order, nor was he informed of it or in a position to affect either the decision or execution. No evidence demonstrates Mr Shala was aware of such order. The intent of the person who gave such order could not be imputed to a group of others. The evidence suggests that KLA members regretted the death of the Murder Victim and immediately took measures to improve the conditions at the KMF so that this would not be repeated.[549]

247. The "highly unusual character" of the events on [REDACTED] June 1999 and the ensuing circumstances suggest that the murder of detainees was not part of the

[543] Judgment, para. 1018. As explored in Ground 6, the evidence provided by [REDACTED] needs to be approached with caution; *see* GROUND 6.
[544] [REDACTED].
[545] *See* GROUND 11.
[546] Judgment, paras. 1019.
[547] Judgment, paras. 760, 1019.
[548] Judgment, para. 760.
[549] Judgment, para. 1023; Defence FTB, para. 184.

common plan. No reasonable trier of fact would have concluded in these circumstances that a JCE existed having as common plan to kill detainees.

248. In addition, the Panel erred in law when it failed to identify which form of intent Mr Shala possessed and provide its definition. It simply stated that it inferred his "intent to kill".[550] As stated by the Appeals Panel in *Mustafa*, "given the combination of acts and omissions and range of circumstances from which the intent was inferred", a clear indication of the type of intent and its definition would be expected to appear in a trial judgment.[551] The need for a precise finding and definition of the intent to kill is emphasized by jurisprudence.[552]

249. There is no evidence that Mr Shala intended or ever accepted the risk that detainees would be shot and may die as a result.

250. The ICTY Appeals Chamber in *Kvočka et al*. found "the significance and scope of the material participation of an individual in a [JCE] may be relevant in determining whether that individual had the requisite *mens rea*".[553] The actions that the Panel considered caused the death cannot be attributed to Mr Shala but only to Xhemshit Krasniqi and another unnamed KLA soldier.[554]

251. The Panel erred in law and fact when it inferred that Mr Shala possessed the *mens rea* for murder and failed to specify and provide adequate reasoning as to what type of intent it considered Mr Shala to have possessed.

252. In light of the above, the Appeals Panel should quash the conviction for murder.

XIV. GROUND 14: ERRORS IN SENTENCING

[550] Judgment paras. 1031-1032, 1034.
[551] *Mustafa* Appeal Judgment, para. 389.
[552] *See, for example,* the discussion on negligence and gross negligence at *Orić* Judgment, para. 348.
[553] *Kvočka et al*. Appeal Judgment, para. 188.
[554] This is opposed to findings regarding Mr Mustafa to whom the acts and omissions that lead to the Murder Victim's death were solely attributable to, *Mustafa* Appeal Judgment, para. 390.

253. The sentence of 18 years' imprisonment is manifestly unreasonable and excessive.

A. ERRORS IN ESTABLISHING THE SENTENCING REGIME

254. The Panel failed to give relevant weight to the purposes of rehabilitation and reintegration to society. It found "while rehabilitation has gained prominence in both national jurisdictions and some regional human rights instruments, considerations of rehabilitation cannot be given undue weight, given the gravity of the crimes".[555] The Panel erred by failing to give due weight to the purpose of rehabilitation.

255. ECtHR case law provides that "the emphasis on rehabilitation and reintegration has become a 'mandatory factor' that member states need to take into account when designing their penal policies".[556] The Panel erred by disregarding the rehabilitation component and not striking a proper balance between punishment and rehabilitation.[557]

256. *Applicable sentencing range*: The Panel erred in law when it found it was not bound to consider the punishments provided for crimes under the Kosovo law at the time of the crimes and any subsequent more lenient punishment, as required by Article 44(2) of the KSC Law.[558]

257. Article 44(2)(a)-(c) requires that in considering the punishment to be imposed, the Specialist Chambers shall take into account: (a) the sentencing range for the crime under Kosovo Law at the time of commission; (b) any subsequent more lenient sentencing range for the crime in Kosovo Law; and (c) Article 7(2) of the ECHR and Article 15(2) of the ICCPR, and the extent to which the punishment of any act or

[555] Judgment, para. 1061.
[556] *Khoroshenko v. Russia* [GC], para. 12; *Vinter and others v. the United Kingdom* [GC], paras. 114–116; *Harakchiev and Tolumov v. Bulgaria*, paras. 243–246; *Murray v. The Netherlands* [GC], para. 102.
[557] *Khoroshenko v. Russia* [GC], para. 121; *Mastromatteo v. Italy* [GC], para. 72; *Schemkamper v. France*, para. 31; *Maiorano and Others v. Italy*, para. 108.
[558] Judgment, para. 1068.

omission according to general principles of law would be prejudiced by the application of paragraph 2(a) and (b).

258. The Supreme Court Chamber held "the Specialist Chambers are *bound* to consider which of the relevant sentencing ranges under Kosovo law contains the most lenient sentencing range in accordance with the *lex mitior* principle. The sentencing panel shall thereafter take this range into account".[559]

259. The Panel erred as it failed to (i) identify the relevant Kosovo law in accordance with Article 44(2)(b) of the KSC Law and the principle of *lex mitior*; and (ii) identify the more lenient sentencing range; and (iii) provide adequate reasons for arriving at the sentence.[560]

260. As acknowledged by the Panel, the CCSFRY was the applicable law in Kosovo at the time of the alleged crimes.[561] The CCSFRY established a sentencing range of 5 to 15 years of imprisonment for "war crime against the civilian population" under Articles 38 and 142.[562] Mr Shala was sentenced to 18 years' for analogous crimes.[563] The Panel erred by not considering the applicable sentencing range and applying the most lenient one.[564]

261. *Failure to ensure equality*: A sentence may be considered "capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences".[565] Mr Shala's sentence is unreasonably disproportionate when compared to similar cases.

[559] *Mustafa* Protection of Legality Decision, para. 87.
[560] *Mustafa* Protection of Legality Decision, para. 75.
[561] Judgment, para. 1069.
[562] Judgment, para. 1069.
[563] Judgment, para. 1122.
[564] Judgment, paras. 1066-1070, 1083.
[565] *Kvočka et al*. Appeal Judgement, para. 681; *Nikolić* Sentencing Appeal Judgement, para. 39; *Prlić et al*. Appeal Judgement, para. 3340; *Karadžić* Appeal Judgement, para. 767.

262. The Panel erred in law by failing to ensure equality in sentencing, by failing to attach appropriate weight to sentences in comparable and related cases, as well as failing to provide a reasoned opinion as to why it chose to significantly depart from those sentences.[566] The *Geci* and *Krasniqi* cases concern individuals who, according to the Panel's findings, had commanding roles at the KMF[567] with greater responsibility than Mr Shala for the indicted crimes.

263. The Panel found that "sentencing practices of other courts, international or domestic, are not binding on the Panel", as it must "reach its determination taking into account a variety of case-specific factors".[568] It referred to the *Mustafa* Appeal Judgment, stating that it incorporated domestic and international sentencing practices.[569] The Panel failed to acknowledge, however, that the "the disparity between Mustafa's sentences and those sentences it has analysed, shows that the Trial Panel has ventured outside of its discretionary bounds by imposing sentences on Mustafa which are out of reasonable proportion with a line of sentences imposed in similar circumstances for similar offences, and thereby committed a discernible error".[570] It made the same error in this case, venturing outside its discretionary bounds and imposing a disproportionate sentence.

264. Sabit Geci was sentenced to 15 years' imprisonment for inhumane treatment, violation of bodily integrity, and torture in Kukës but also in Cahan.[571] Xhemshit Krasniqi was initially sentenced to 8 years' imprisonment for illegal detention, torture, violation of bodily integrity or health of witnesses and unknown civilians, which was reduced to 7 years on appeal.[572]

[566] Judgment, paras. 1004, 1070.
[567] Judgment, paras. 345, 349. The Panel admitted that Mr Shala did not hold a commanding role, Judgment, paras. 1104, 1108.
[568] Judgment, para. 1070.
[569] *Mustafa* Appeal Judgment, para. 478, ns. 1292-1293.
[570] *Mustafa* Appeal Judgment, para. 479.
[571] SPOE00248405-00248500, p. 10; *Geci et al.* Judgment.
[572] SPOE00248071-00248128, p. 8; *Xhemshit Krasniqi* Judgment.

265. Considering the position of Sabit Geci and Xhemshit Krasniqi in the KLA command structure, as recognized by the Panel, as well as their greater involvement and control over the indicted crimes, the sentence for Mr Shala is disproportionate to his alleged involvement.

B. ERRORS IN THE APPLICATION OF SENTENCING REGIME

266. *Proportionality*: The Panel erred in law when imposing a sentence for arbitrary detention and torture of eighteen victims and not nine as charged in the Indictment.[573] While this was a factor that could have been considered as aggravating, the Panel instead sentenced Mr Shala for crimes allegedly committed against individuals which were not charged.

267. *Failure to give sufficient weight to mitigating factors*: The Panel erred in law when declining to consider as a mitigating factor the infringement of Mr Shala's rights not to incriminate himself and to legal assistance.[574] It failed to acknowledge that the Appeals Panel found a violation of Mr Shala's rights in this respect.[575] The refusal of the Panel to consider the violation as a mitigating factor violated Mr Shala's right to an effective remedy provided in Article 13 of the ECHR.

268. The Panel failed to give sufficient weight to the fact that Mr Shala had no leadership role or position within the KLA's hierarchy at the KMF; the passage of time since the Indictment events; the health of his former spouse and exceptional family circumstances[576] which left him to be the sole guardian for their children; and his

[573] Judgment, paras. 1087-1088, 1091-1092, 1121.
[574] Judgment, para. 1119; IA006-F00007, paras. 78-79, 103; *Menelaou v. Cyprus*; *Ndindiliyimana et al.* Appeal Judgement, para. 23 (*Where an accused's fair trial rights have been violated, a reduction in sentence may be an appropriate remedy if the accused is convicted at trial*); *Barayagwiza*, Decision on Prosecutor's Request for Review or Reconsideration, Separate Opinion of Judge Shahabudden, para. 39.
[575] *See* GROUND 1.
[576] *Katanga* Sentencing Decision, paras. 88, 144; *Ntabakuze* Appeal Judgement, para. 284; *Babić* Judgement on Sentencing Appeal, paras. 50-51.

PUBLIC
Date original: 25/11/2024 23:47:00
Date correction: 26/11/2024 16:27:00
Date public redacted version: 13/01/2025 16:49:00

compliance with court orders and absence of obstruction to the procedures conducted against him by the SPO.[577]

269. The Panel also failed to sufficiently weigh other personal circumstances in mitigation. Mr Shala's actions demonstrate that he is someone driven solely by a sense of duty, devoid of any ulterior personal motive.

270. The Panel erred by not considering the passage of time since the Indictment events and the fact that Mr Shala is not the same person he was 25 years ago.

271. Based on the above, the sentence imposed on Mr Shala must be reduced accordingly.

XV. CONCLUSION

272. As a result of the Panel's errors, the Appeals Panel should vacate the 18-year sentence of imprisonment and, if it upholds any convictions, impose a new sentence taking all the applicable mitigating circumstances into account.

273. Pursuant to Rule 180 of the Rules, the Defence requests the Appeals Panel to hold an appeal hearing. In the view of the Defence, a hearing is necessary to allow the Defence to develop, complement, and clarify Mr Shala's case on appeal, as well as to afford Mr Shala an opportunity to address the Panel.

Word count: 30654

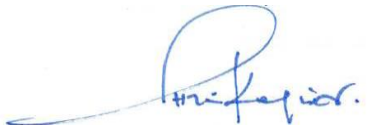
Respectfully submitted,

[577] Impugned Judgment, para. 1072.

PUBLIC
Date original: 25/11/2024 23:47:00
Date correction: 26/11/2024 16:27:00
Date public redacted version: 13/01/2025 16:49:00

Jean-Louis Gilissen

Specialist Defence Counsel



Hédi Aouini

Defence Co-Counsel

Leto Cariolou

Defence Co-Counsel

Monday, 25 November 2024

The Hague, the Netherlands

PUBLIC
Date original: 25/11/2024 23:47:00
Date correction: 26/11/2024 16:27:00
Date public redacted version: 13/01/2025 16:49:00

Explanatory Note

An inadvertent clerical error regarding the numbering of paragraphs 33, 70, 72, 131, and 266 has been corrected.