



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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Before: Court of Appeals Panel
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen
Registrar: Dr Fidelma Donlon
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I. OVERVIEW

1. Pjetër SHALA was a willing participant in the commission of heinous crimes against defenceless persons arbitrarily detained in deplorable conditions at the KMF. His participation included regular and brutal beatings of multiple detainees, which culminated in the fatal attack upon the Murder Victim.
2. SHALA's responsibility for arbitrary detention, torture, and murder is established beyond reasonable doubt by the evidence considered by the Panel. His contribution to the JCE was more than just significant, and his intent emerges unequivocally from mutually corroborative witness evidence. His crimes were particularly grave and the victims exceedingly vulnerable. The sentence he received reflects the scale of his criminal responsibility.
3. On appeal, SHALA bears the burden of showing that the Panel erred in law or that no reasonable trier of fact could have reached the same factual findings; and to explain how any such errors invalidate the Judgment or occasion a miscarriage of justice. He fails to meet this burden. Throughout his brief, SHALA fundamentally misstates what is required to overturn his conviction, instead seeking to relitigate arguments made at trial without meeting the standard of review.
4. Across multiple grounds, particularly in Grounds 1-5, SHALA makes procedurally inapposite arguments, failing to acknowledge decisions in his own case. He ignores the presumptive finality of appeal decisions and advances no cogent reasons for the Appeals Panel to depart from them.
5. The factual parts of the Appeal, almost without exception, are replete with mischaracterisations of the evidence and the Judgment, and overlook salient findings, many related to witness credibility. To escape liability as a member of the JCE, SHALA ignores the totality of the evidence, including his own Prior Statements, and advances an alternative narrative that is neither grounded in reason nor based on the evidence.

6. For the reasons set out in this brief, all of his arguments fail. His appeal should be dismissed in its entirety.

II. STANDARD OF REVIEW

7. The Appeals Panel has previously set out the standards of review for alleged errors of law and fact, and abuses of discretion.¹ An appellant alleging a violation of their fair trial rights ‘must demonstrate that this violation caused prejudice amounting to an error of law which, in turn, invalidates the challenged decision.’² If the alleged fair trial violation concerns a discretionary decision, the appellant must show that the Panel ‘committed a discernible error resulting in prejudice.’³

8. The appellant is expected to present their case clearly, logically, and exhaustively, with precise references to the trial record and jurisprudence cited in support.⁴ Submissions that are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies are not to be considered in detail.⁵ The Appeals Panel has previously recognised 10 categories of submissions warranting summary dismissal without detailed analysis.⁶ Additionally, the Appeals Panel may decline to consider arguments supported exclusively by the appellant’s own filings.⁷

9. In the interests of legal certainty and predictability, the Appeals Panel will only depart from its previous decisions when there are cogent reasons in the interests of justice to do so.⁸ Interlocutory appeal decisions are ‘binding in continued proceedings

¹ *Gucati & Haradinaj* AJ, paras 21-26; *Mustafa* AJ, paras 17-26,36.

² *Mustafa* AJ, para.22.

³ *Mustafa* AJ, para.39.

⁴ *Gucati & Haradinaj* AJ, para.29; *Mustafa* AJ, para.29; Practice Direction on Filings, Arts 48(1)(b)(1)-(2), 49(1)(b)(1)-(2).

⁵ *Gucati & Haradinaj* AJ, para.29; *Mustafa* AJ, para.29.

⁶ *Gucati & Haradinaj* AJ, para.32; *Mustafa* AJ, para.33.

⁷ *Nahimana* AJ, para.231; *Ongwen* AJ, paras 91-97.

⁸ *Gucati & Haradinaj* AJ, para.37; *Mustafa* AJ, para.41.

in the same case as to all issues definitively decided by those decisions' in order to prevent endless relitigation of the same issues.⁹

III. SUBMISSIONS

A. Ground 1: The Panel was entitled to rely upon SHALA's Prior Statements¹⁰

1. SHALA's attempt to relitigate the admissibility of his Prior Statements warrants summary dismissal

10. SHALA attempts to re-litigate the admissibility of his Prior Statements¹¹ without addressing the presumptive finality of interlocutory appeal decisions.¹² Crucially, SHALA does not address: (i) the Panel's admission of his 2005 and 2007 Statements into evidence;¹³ (ii) that his 2016 and 2019 Statements were deemed 'not inadmissible';¹⁴ or, (iii) that these findings were upheld on appeal.¹⁵ SHALA does not acknowledge that he is, in fact, seeking reconsideration of these decisions. In repeatedly asserting that his Prior Statements are inadmissible,¹⁶ SHALA fails to discharge his burden on appeal.

⁹ *Gucati & Haradinaj* AJ, para.37; *Kajelijeli* AJ, paras 202-203. Reconsideration under Rule 79 is the sole exception to this principle, which cannot be invoked as a 'second appellate route to redress imperfections in a decision or to circumvent the unfavourable consequences', see *Decision Denying Defence Leave to Appeal F00538*, para.23; *Thaçi* Reconsideration Decision, para.12.

¹⁰ 'Prior Statements' is used herein to refer collectively to SHALA's 2005, 2007, 2016, and 2019 Statements, unless otherwise specified. In line with the usage of ERNs to identify exhibits in the Judgment, the SPO has provided ERNs for exhibits referenced in this Response Brief.

¹¹ T000-2742-T000-2742-AlbandEngTranscript-A; T000-2742-T000-2742-AlbandEngTranscript-3-B; T000-2745-T000-2745-AlbandEngTranscript-A; T000-2745-T000-2745-AlbandEngTranscript-B; T000-2748-T000-2748-AlbandEngTranscript-1; T000-2748-T000-2748-AlbandEngTranscript; T001-0105-1-A-TR; T001-0105-2-A-TR; T001-0105-3-A-TR; 074117-074129-ETRevised1; 066864-TR-ETPart1Revised1; 066864-TR-ETPart2Revised1; 066866-066882-ETRevised; 066888-TR-ETPart1Revised.

¹² See Section II.

¹³ *Prior Statements* Decision, para.52.

¹⁴ *Prior Statements* Decision, paras 80,110.

¹⁵ *Prior Statements* Appeal Decision, paras 54,69,81,109.

¹⁶ *Appeal*, paras 5,14.

11. SHALA identifies no error, instead repeating arguments rejected by the Panel and the Appeals Panel,¹⁷ by citing his own previous submissions,¹⁸ and referring to select paragraphs of the Statements Appeal Decision, but ignoring its ultimate finding.¹⁹ These arguments should be dismissed *in limine*.²⁰

2. The Statements Appeal Decision is the superior authority regarding the admissibility of SHALA's Prior Statements

12. SHALA's arguments ignore pertinent findings in the Statement Appeals Decision, in which the Appeals Panel comprehensively adjudicated the certified issues.²¹ The Appeals Panel thoroughly analysed whether there was any rights violation in respect of the Prior Statements, provided a reasoned opinion on the same,²² and concurred that the 2016 Statement was 'not inadmissible' under Rule 138(2).²³ SHALA offers no cogent reason to depart from this decision. Accordingly, the Panel could have relied on the 2016 Statement, had it chosen to do so.²⁴ However, it did not,²⁵ and (as SHALA acknowledges) no references to this statement are found in the Judgment. These arguments should therefore be dismissed *in limine* as SHALA's complaint amounts to unfounded speculation about the deliberative process,²⁶ and mere repetition of rejected arguments.

¹⁷ *Contra* Appeal, para.5. See Prior Statements Appeal Decision, paras 48,52-53,63-65,84-85,90-92.

¹⁸ Appeal, para.5, n.5-10.

¹⁹ Appeal, para.6, n.11. Compare Statement Appeals Decision, para.81.

²⁰ *Gucati & Haradinaj* AJ, paras 32(vii),(ix),37. See Section II.

²¹ Prior Statements Appeal Decision, para.5.

²² Prior Statements Appeal Decision, paras 44-96.

²³ Prior Statements Appeal Decision, paras 79-81.

²⁴ *Contra* Appeal, para.6.

²⁵ *Contra* Appeal, para.7.

²⁶ Appeal, para.11.

3. SHALA's 2019 Statement was not tainted by his 2016 Statement

13. SHALA's argument that his 2019 Statement was tainted by his 2016 Statement is untenable.²⁷ The jurisprudence cited by SHALA does not support his assertion.²⁸ Rather, Rule 138(2) necessitates an individualised assessment of evidence which the Panel deems to have been obtained by means of a violation of the Law, Rules, or international human rights law. Therefore, even if the Appeals Panel had found the 2016 Statement inadmissible, there is no basis under the KSC legal framework, except pursuant to Rule 138(2), to allege that the 2019 Statement is inadmissible.²⁹ The Rule 138(2) assessment conducted by the Panel³⁰ and upheld on appeal,³¹ governs the admissibility of the 2019 Statement. SHALA expresses mere disagreement with the admission and assessment of a single piece of evidence, a matter firmly within the Panel's discretion,³² and fails to explain why his convictions cannot stand on the basis of the remaining evidence.³³

14. SHALA's insistence that he 'might' have given different answers in his 2019 Statement is purely speculative.³⁴ SHALA does not articulate how his 2016 Statement 'substantially impacted' his 2019 Statement,³⁵ especially considering that his right to

²⁷ See also Defence Reply to Request for Reconsideration of Prior Statements Decision, para.15. The Panel dismissed SHALA's request for reconsideration, see 6 June 2023, pp.1938-1939.

²⁸ Appeal, paras 9-13, n.18-23. The ECtHR has explicitly recognised that its role is not to determine 'as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully under domestic law – may be admissible', see *Bykov v. Russia*, para.89; *Jalloh v. Germany*, para.95. This approach was followed in *Dvorski v. Croatia*, para.117. Rule 95 of both the ICTR and ICTY Rules of Procedure and Evidence mirror Rule 138(2), only requiring the exclusion of evidence 'if obtained by methods which cast doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of proceedings.' It is in applying this test that the Trial Chamber excluded the accused's prior statements in *Karemera Accused Interviews Decision*, paras 32,47; *Bagosora et al. Rule 89(C) Decision*, para.21; *Delalić Evidence Exclusion Decision*, para.55 (*contra* Appeal, para.13).

²⁹ *Contra* Appeal, para.14.

³⁰ Prior Statements Decision, paras 100-110.

³¹ Prior Statements Appeal Decision, paras 92,96.

³² *Gucati & Haradinaj* AJ, para.35; *Mustafa* AJ, paras 37-38.

³³ *Martić* AJ, para.21.

³⁴ Appeal, para.14.

³⁵ Appeal, para.14.

counsel was fully respected during the latter.³⁶ SHALA thus fails to demonstrate that the admission of his Prior Statements violated his right to a fair trial, nor how the alleged violation caused prejudice amounting to an error of law invalidating the Judgment.³⁷

4. SHALA mischaracterises the Panel's treatment of his Prior Statements

15. SHALA mischaracterises the Judgment in asserting that the Panel 'heavily relied' upon his Prior Statements³⁸ in reaching its verdict.³⁹ Citing over 90 paragraphs of the Judgment, SHALA contends that this alone demonstrates the Panel's reliance on his statements was 'decisive.'⁴⁰ Such vague and imprecise references warrant summary dismissal.⁴¹ The merits of this argument are nevertheless addressed below.

16. First, the matters that SHALA identifies as prejudicial concern the Panel's reliance on his Prior Statements in respect of background facts, which he explicitly admitted, did not contest at trial, and/or had limited bearing on his criminal responsibility. For example, SHALA acknowledged his KLA membership throughout the proceedings,⁴² referring to himself as a 'simple fighter for freedom'.⁴³ SHALA also did not contest his presence at Kukës in 1999,⁴⁴ or the KLA's use of the KMF as a military base.⁴⁵ On these topics, the Panel had regard to documentary evidence,⁴⁶ the

³⁶ Prior Statements Decision, para.103.

³⁷ See Section II.

³⁸ 'Prior Statements' in this section does not include reference to SHALA's 2016 Statement, which, as noted above at para.12, is not cited in the Judgment.

³⁹ Appeal, paras 4,7.

⁴⁰ Appeal, para.7, n.13.

⁴¹ *Gucati & Haradinaj* AJ, para.29; *Mustafa* AJ, para.29; *Martić* AJ, para.18.

⁴² DefenceFTB, paras 2-5; 22 February 2023, p.580.

⁴³ 22 February 2023, p.603. See also p.575 where Defence counsel referred to SHALA as a 'freedom fighter'.

⁴⁴ 22 February 2023, p.575; DefenceFTB, paras 2-5.

⁴⁵ 22 February 2023, pp.583-584; DefenceFTB, paras 3,8.

⁴⁶ Judgment, n.479.

evidence of other witnesses,⁴⁷ and adjudicated facts.⁴⁸ The Panel did not rely ‘heavily’ or ‘decisively’ upon SHALA’s Prior Statements in making these findings.

17. Second, the Panel treated SHALA’s Prior Statements with appropriate caution, engaged in detailed analysis, and clearly indicated when, and in what circumstances, it relied upon a particular admission.⁴⁹ In several instances, the Panel deemed certain evidence in the Prior Statements unreliable.⁵⁰ In respect of SHALA’s criminal responsibility, the Panel only relied upon his Prior Statements when corroborated.⁵¹

18. SHALA takes particular umbrage with the Panel’s findings regarding his presence at the KMF.⁵² However, in the sole paragraph SHALA cites in support of this argument, the Panel simply acknowledged the contents of his 2005 and 2019 Statements.⁵³ SHALA ignores the subsequent detailed analysis of the Statements on this topic,⁵⁴ and the Panel’s extensive reference to other evidence both corroborating and contradicting this admission, including Defence witnesses whose evidence, directly⁵⁵ or indirectly,⁵⁶ placed SHALA at the KMF.

19. SHALA misrepresents the Judgment in asserting that the Panel relied solely or decisively upon his admission about seeing TW4-01, [REDACTED], [REDACTED], and W04733 at the KMF in concluding that he was present at the KMF and participated in the mistreatment of detainees.⁵⁷ In fact, the Panel expressly detailed why it found this admission reliable,⁵⁸ and that it was considered in the context of all

⁴⁷ Judgment, paras 297,306,331,848-849,n.492-495,504-506,550,1736-1740.

⁴⁸ Judgment, para.296.

⁴⁹ See e.g. Judgment, paras 286-289,292-293,338-340,853-864.

⁵⁰ Judgment, paras 850,865-872,910-913.

⁵¹ Judgment, paras 84,872. See also paras 899-901,910-913. The Panel consistently adopted this approach throughout the Judgment.

⁵² Appeal, para.8.

⁵³ Appeal, para.8,n.15. See Judgment, para.853.

⁵⁴ Judgment, paras 854-873.

⁵⁵ Judgment, paras 855,860.

⁵⁶ Judgment, para.849.

⁵⁷ Appeal, para.8.

⁵⁸ Judgment, paras 863-864.

other available evidence regarding his whereabouts.⁵⁹ Notably, the Panel found the evidence of TW4-01, TW4-10, W04733, W01448, and Asllan ELEZAJ ‘highly consistent and mutually corroborative’ in this regard, *before* recalling SHALA’s own statements that he was regularly present at the KMF.⁶⁰

20. SHALA’s arguments are thus insufficient to overcome the deference afforded to the Panel in the assessment of evidence when making findings of fact.⁶¹ Although Ground 1 concludes that the Panel ‘erred in law *and* fact’,⁶² SHALA does not identify any particular error of fact or resulting miscarriage of justice, beyond a bare list of factual findings in which the Panel relied upon his Prior Statements.⁶³ SHALA also fails to explain: (i) why no reasonable trier of fact could have reached these conclusions;⁶⁴ or (ii) why these findings should not stand on the basis of the remaining evidence besides the Prior Statements.⁶⁵ SHALA fails to meet his burden and Ground 1 should be dismissed.

B. Ground 2: SHALA was indisputably on notice that his Prior Statements were available for the Panel’s consideration

1. SHALA’s submissions beyond the scope of his Notice warrant summary dismissal

21. SHALA exceeds the scope of his Notice, which limited Ground 2 to the alleged uncertainty of the evidentiary record in respect of his Prior Statements.⁶⁶ SHALA now challenges the Framework Decision on Evidence,⁶⁷ and the timing of admissibility

⁵⁹ Judgment, paras 874-895.

⁶⁰ Judgment, para.895.

⁶¹ *Delalić* AJ, para.330; *Prlić* AJ, para.22.

⁶² Appeal, para.15.

⁶³ Appeal, para 8-9.

⁶⁴ Article 46(5); *Gucati & Haradinaj* AJ, paras 25-26.

⁶⁵ *Martić* AJ, para.21.

⁶⁶ Notice, para.4.

⁶⁷ Framework Decision.

decisions in general,⁶⁸ referring to his Prior Statements as the sole example of the Panel's alleged error.⁶⁹ The Appeals Panel should decline to consider arguments that go beyond the scope of the Notice and dismiss the ground in its entirety.⁷⁰

2. SHALA waived his right to challenge the Framework Decision

22. In failing to seek reconsideration or certification to appeal the Framework Decision, SHALA has waived his right to challenge it on appeal.⁷¹ The discretionary nature of the Framework Decision did not preclude appellate review,⁷² provided the certification requirements were met,⁷³ as SHALA was well aware.⁷⁴

23. Contrary to SHALA's submissions,⁷⁵ in the Framework Decision the Panel addressed his concerns.⁷⁶ Having failed to appeal or seek re-consideration before the trial began, SHALA cannot simply recycle rejected arguments in an attempt to relitigate the issue on appeal.⁷⁷ His arguments should be dismissed accordingly.

⁶⁸ Appeal, paras 16-25, 28-29.

⁶⁹ Appeal, paras 26-27.

⁷⁰ See e.g. *Gucati & Haradinaj* AJ, para.30; *Mustafa* AJ, paras 31,132,433. See also *Marijačić & Rebić* AJ, para.18; *Galić* AJ, para.78.

⁷¹ *Mustafa* AJ, para.30; *Karadžić* AJ, para.25; *Nyiramasuhuko* AJ, para.128. Failure to raise any issue about the Framework Decision was also noted in the Judgment, para.64.

⁷² *Contra* Appeal, para.27.

⁷³ Article 45(2).

⁷⁴ SHALA has routinely sought to appeal discretionary decisions, see e.g. Defence Appeal against Prior Statements Decision; Defence Request for Certification to Appeal Rule 153 Decision. With respect to the Framework Decision, SHALA actually argues that Article 40(6)(h), read together Rule 138(1), left no discretion to the Panel about the timing of evidentiary rulings, see Appeal, paras 18-20.

⁷⁵ Appeal, para.26. Contrary to the Appeal (in which no authority is cited), the extent to which the Panel is to provide a reasoned opinion must be determined on a case-by-case basis, and the Panel is not obliged to give a detailed answer to every argument, see *Kayishema & Ruzindana* AJ, para.165; *Furundžija* AJ, para.69.

⁷⁶ Framework Decision, paras 15-17. See Defence Trial Preparation Submissions, para.19. The Defence has then repeated the same arguments in DefenceFTB, paras 331-343; Appeal, paras 16-25.

⁷⁷ Defence Trial Preparation Submissions, para.19; 18 October 2022, p.382; DefenceFTB, paras 331-343; Appeal, paras 17-21; Framework Decision, paras 9-20; Judgment, paras 63-65.

3. The Framework Decision was issued properly within the discretion of the Panel and in line with established jurisprudence

24. Decisions on the admissibility of evidence, including the timing thereof, fall within the discretion of the Panel.⁷⁸ SHALA fails to demonstrate that, in the exercise of this discretion, the Panel incorrectly applied Article 40(6)(h) and Rule 138(1). In making this argument, SHALA proffers an alternate interpretation which is itself erroneous and actively contorts the plain meaning of these provisions.⁷⁹ SHALA's attempt to support his interpretation by reference to the dissenting opinions of two ICC Trial Chamber judges is misguided,⁸⁰ as subsequent jurisprudence has confirmed that Trial Chambers have the discretion to defer admissibility rulings to the judgment phase.⁸¹

25. Contrary to SHALA's suggestion, there is no 'well-established practice' requiring admissibility rulings to be made during trial,⁸² as different international tribunals, and frequently different trial chambers within these tribunals, have adopted different approaches.⁸³

26. SHALA has thus failed to demonstrate any error or unfairness warranting reversal of the Framework Decision.⁸⁴

⁷⁸ *Prlić* Interlocutory Appeal Decision, para.8; *Muvunyi* Interlocutory Appeal Decision, para.5. See also *Kanyarukiga* AJ, para.52; *Gucati & Haradinaj* AJ, para.35; *Mustafa* AJ, para.37.

⁷⁹ Appeal, paras 17-21. SHALA made the same argument in DefenceFTB, paras 334-337.

⁸⁰ Appeal, paras 22-23.

⁸¹ See e.g. *Bemba* Appeal Judgment against TC Decision, paras 36-37; *Bemba et al.* AJ, paras 584-599; *Ongwen* AJ, paras 499-505.

⁸² Appeal, para.25.

⁸³ In certain circumstances, ICTY trial chambers deferred admissibility decisions until later in the proceedings, see e.g. *Popović* Admission of Written Evidence Decision, para.103; *Perišić* Expert Status Decision, para.8. The ICTR also acknowledged the ability to defer admissibility considerations until the deliberation phase, see *Kanyarukiga* AJ, para.52. Practice at the ICC has consistently varied between trial chambers, see *Bemba* Documentary Evidence Decision, para.9; *Ongwen* Conduct of Proceedings, para.24; *Said* Conduct of Proceedings, para.17; *Lubanga* Admissibility Decision, paras 41-42; *Ntaganda* Conduct of Proceedings, para.35.

⁸⁴ *Kanyarukiga* AJ, para.52. See also *Gucati & Haradinaj* AJ, para.35; *Mustafa* AJ, para.37.

4. The evidentiary record regarding SHALA's Prior Statements was certain

27. Throughout the proceedings, the Panel repeatedly stated that SHALA's Prior Statements were available for consideration in the Judgment. SHALA's claims that there was uncertainty on this matter are simply untenable.⁸⁵

28. The Panel expressly admitted SHALA's 2005 and 2007 Statements into evidence on 6 December 2022,⁸⁶ well before the commencement of trial.⁸⁷ This decision was upheld on appeal.⁸⁸

29. On 6 December 2022, the Panel also found the 2016 and 2019 Statements 'not inadmissible'.⁸⁹ On 23 April 2023, following the issuance of the Framework Decision, the Panel found the 2016 and 2019 Prior Statements '*to be available to the Panel for the purposes of its judgment*, subject to the determination by the Court of Appeals Panel as to the admissibility of such material.'⁹⁰ SHALA fails to address, or even acknowledge, this decision, which he did not seek leave to appeal.⁹¹

30. On 5 May 2023, the Appeals Panel issued the Statements Appeal Decision, in which it upheld the finding that the 2016 and 2019 Statements were 'not inadmissible'.⁹² The Panel subsequently took note of this in the context of a Detention Review.⁹³

31. In light of this unequivocal string of judicial decisions, SHALA's claim to have had 'no clarity whatsoever as to the Panel's intention' in respect of his Prior Statements

⁸⁵ Appeal, paras 26-27.

⁸⁶ Prior Statements Decision, paras 52,114(b). *See also* Admission of Documentary Evidence Decision, n.61.

⁸⁷ Opening Statements commenced on 21 February 2023, pp.497-568.

⁸⁸ Prior Statements Appeal Decision, paras 54,69.

⁸⁹ Prior Statements Decision, paras 80,110,114(c). *See also* Admission of Documentary Evidence Decision, para.40.

⁹⁰ Admission of Documentary Evidence Decision, para.41(emphasis added).

⁹¹ The SPO also drew the parties' attention to this passage of the Admission of Documentary Evidence Decision in the course of its closing statement, *see* 15 April 2024, p.4127. The Defence did not address this decision in their closing statement.

⁹² *See* Section III(A)(1)-(2).

⁹³ Eleventh Detention Review Decision, para.19.

is patently false.⁹⁴ This is further demonstrated by his failed attempt to seek reconsideration of the Prior Statements Decision,⁹⁵ which confirms his awareness of the status of the Prior Statements.

5. SHALA chose not to address his Prior Statements and cannot now claim a consequent breach of his rights

32. With no uncertainty as to their status, it was open to SHALA, as with any piece of evidence, to address the Prior Statements' substance during the trial, or not at all. Indeed, counsel made clear during closing statements that SHALA contests the contents of his Prior Statements.⁹⁶ SHALA cannot now claim to suffer consequent breaches of his fair trial rights.⁹⁷

33. SHALA fails to explain why counsel could not comment on his Prior Statements without risking his protection against self-incrimination.⁹⁸ Both the Panel and Appeals Panel held that in the course of making the Prior Statements, SHALA was properly informed of his right to remain silent.⁹⁹ Indeed, SHALA exercised this right during trial by electing not to give evidence. It is unclear how any submission by counsel on the contents of the Prior Statements would change that.¹⁰⁰

34. Therefore, in light of the presumptive finality of the Statements Appeal Decision and having failed to demonstrate that the Panel erred in rejecting these same arguments regarding the availability of his Prior Statements for its deliberations,¹⁰¹

⁹⁴ Appeal, para.26.

⁹⁵ Defence Prior Statements Decision Reconsideration Request; 6 June 2023, pp.1938-1939.

⁹⁶ 16 April 2024, pp.4217-4218.

⁹⁷ *Contra* Appeal, paras 26,28-29.

⁹⁸ Appeal, para.26. Counsel did in fact address this evidence, *see* 16 April 2024, pp.4217-4218, thereby undermining SHALA's claim that any such comment risked self-incrimination.

⁹⁹ Prior Statements Decision, paras 33,43,73,100,103; Prior Statements Appeal Decision, paras 44,85.

¹⁰⁰ An analogy can be drawn to circumstances in which a prior statement of the accused is used to cross-examine a witness, but not otherwise admitted into evidence. It is the oral evidence of the witness about the contents and making of the statement which would constitute evidence in the trial, not the statement itself, *see Mrkšić* Accused Statements Decision, para.9.

¹⁰¹ DefencePTB, paras 23-24; 17 April 2024, p.4293; DefenceFTB, paras 331-343.

SHALA cannot now seek appellate intervention for his choice not to address this evidence.¹⁰² Ground 2 should be dismissed accordingly.

C. Ground 3: The Panel did not breach the principle of legality by applying settled KSC law on JCE and arbitrary detention

35. Ground 3 is an amalgamation of SHALA's previous failed challenges to: (i) the direct applicability of CIL under the KSC legal framework; (ii) JCE¹⁰³ as an available mode of liability under Article 16(1)(a); and (iii) the existence of arbitrary detention in a NIAC as a war crime under CIL and Kosovo law in 1999.¹⁰⁴

1. The direct applicability of CIL at the KSC is settled law

36. The Constitutional Court dismissed SHALA's referral on the direct applicability of CIL before the KSC, finding that it revealed no appearance of a violation under either the Kosovo Constitution or the ECHR.¹⁰⁵ SHALA is thus precluded from attempting to re-litigate this issue, which may be considered settled law before the KSC.¹⁰⁶

¹⁰² *Contra* Appeal, para.30.

¹⁰³ SHALA was convicted under JCE in its basic form (JCE I), *see* Judgment, para.994. Accordingly, all references herein to 'JCE' refer to JCE I, unless otherwise specified.

¹⁰⁴ *See* Defence Jurisdiction Challenge, paras 13,16-19,20-35,44-60; Defence Reply to SPO Response to Defence Jurisdiction Challenge, paras 17-30,32-39,41-45; Defence Jurisdiction Appeal, paras 7-23; Defence Reply to SPO Response to Defence Jurisdiction Appeal, paras 3-34; Shala Constitutional Court Referral, paras 10-32,33-42,47-51,58-75; DefencePTB, paras 38-46,53-55,86-88,90; DefenceFTB, paras 28,266-274; 16 April 2024, pp.4268-4271,4285-4287.

¹⁰⁵ Shala Constitutional Court Referral Decision, para.73.

¹⁰⁶ Article 49(1) provides that, 'the Specialist Chamber of the Constitutional Court shall be the **final authority** for the interpretation of the Constitution as it relates to the subject matter jurisdiction and work of the Specialist Chambers and the Specialist Prosecutor's Office', (emphasis added). *See also* JCE and Jurisdiction Constitutional Court Decision (Case 6), para.81; *Thaçi* Jurisdiction Challenges Appeal Decision, paras 22-29,35-40,44-47,52-59; Defence Jurisdiction Appeal Decision, paras 18-21,24-31.

2. There are no cogent reasons in the interests of justice to reconsider Appeals Panel decisions on JCE and arbitrary detention

37. The Appeals Panel has confirmed JCE as a legitimate mode of liability included under Article 16(1)(a),¹⁰⁷ and the existence of arbitrary detention in a NIAC as a war crime, which may be charged under Article 14(1)(c).¹⁰⁸ These findings are presumptively final and SHALA fails to raise a single cogent reason to depart from them.¹⁰⁹ SHALA fails to address, or even acknowledge, his own unsuccessful interlocutory appeal on JCE and arbitrary detention.¹¹⁰ Instead, SHALA merely repeats previously rejected arguments by citing his own prior filings,¹¹¹ and, with respect to arbitrary detention, makes unsubstantiated submissions regarding the organisation of the KLA,¹¹² which directly contradict the Panel's factual findings.¹¹³ In essence, SHALA seeks to challenge two Appeals Panel decisions upon which the Panel was entitled to base its findings.¹¹⁴ SHALA fails to explain how the Panel erred by applying settled KSC law. Consequently, Ground 3 should be dismissed entirely.

3. JCE liability was foreseeable to SHALA

38. SHALA's assertion, newly introduced on appeal, that JCE liability was not foreseeable to him on account of his position within the KLA is likewise unfounded.¹¹⁵ SHALA mischaracterises the decision of the Pre-Trial Judge in *Thaçi et al.*, which refers

¹⁰⁷ *Thaçi* Jurisdiction Challenges Appeal Decision, paras 135-144, 152-158, 163-172, 211-221, 224; Defence Jurisdiction Appeal Decision, paras 35-38, 40.

¹⁰⁸ *Thaçi* Jurisdiction Challenges Appeal Decision, paras 87-89, 94-102, 106-110; Defence Jurisdiction Appeal Decision, paras 44-47; *Mustafa* AJ, paras 430-434.

¹⁰⁹ See Section II.

¹¹⁰ Defence Jurisdiction Appeal Decision.

¹¹¹ Appeal, n.52, 68-74, 76, 79, 88-91, 93.

¹¹² Appeal, paras 52-54. See Section II; *Gucati & Haradinaj* AJ, para.32(ix); *Mustafa* AJ, para.33(ix). These submissions are largely repeated in Ground 12 (Appeal, paras 211-212) with regard to the Panel's assessment of the requisite elements of arbitrary detention as a war crime, and are dealt with substantively in that context below, see Section III(L)(2).

¹¹³ See e.g. Judgment, paras 209, 339, 834-835, 919.

¹¹⁴ See *Mustafa* AJ, paras 429-431.

¹¹⁵ Appeal, para.45.

to the position of the accused as one of several factors to be considered in assessing the foreseeability of JCE liability.¹¹⁶ Other factors include: (i) the post-World War II general legal framework; (ii) that JCE was part of CIL during the Indictment period; (iii) that the ICTY first applied JCE liability in December 1998 in *Furundžija*; (iv) the ongoing ICTY prosecutions at the time of the relevant events; and (v) the existence of comparable modes of common purpose liability in domestic law at the relevant time.¹¹⁷

39. The Appeals Panel endorsed this approach, concurring that JCE liability will be foreseeable to the accused if, 'at the time of the alleged crimes, they could know, with the assistance of the courts' interpretation and with informed legal advice, that [CIL] or Kosovo law made their intentional participation in a common plan or enterprise criminally liable.'¹¹⁸ While the Appeals Panel observed that the foreseeability standard 'is even stricter in relation to persons with higher responsibilities',¹¹⁹ there is no suggestion that satisfaction of the foreseeability requirement is contingent upon the position of the accused.

40. SHALA's claim that he had no access to public information or knowledge on account of his 'minimal education' and lack of official position within the KLA is untenable.¹²⁰ SHALA himself acknowledged his familiarity with the Geneva Conventions, suggesting that this was one of the reasons he was appointed to a KLA military police unit in 1998.¹²¹ This claim must also be placed in the context of events at the time. As recognised by the Appeals Panel, Articles 22 and 26 of the SFRY Code

¹¹⁶ *Thaçi Jurisdiction Challenges Decision*, paras 193-200.

¹¹⁷ *Thaçi Jurisdiction Challenges Appeal Decision*, paras 213,219-220; *Defence Jurisdiction Appeal Decision*, para.36.

¹¹⁸ *Thaçi Jurisdiction Challenges Decision*, para.193; *Thaçi et al Jurisdiction Challenges Appeal Decision*, para.212.

¹¹⁹ *Thaçi Jurisdiction Challenges Appeal Decision*, para.215.

¹²⁰ *Appeal*, para.45.

¹²¹ T000-2742-T000-2742-AlbandEngTranscript-3-B,p.16.

mirror the concept of common purpose liability and bear resemblance to JCE.¹²² Furthermore, SHALA could not have ignored ongoing ICTY prosecutions during the Indictment period.¹²³ Having considered the relevant factors and jurisprudence, it was entirely reasonable for the Panel to conclude that JCE liability was sufficiently accessible and foreseeable to SHALA.¹²⁴ SHALA has thus failed to demonstrate an error of law.

D. Ground 4: The Indictment is not defective

1. SHALA's attempts to bypass the Appeals Panel's prior authoritative decision on the Indictment must fail

41. SHALA's submissions on alleged defects in the Indictment are largely repetitive of those previously adjudicated by the Appeals Panel.¹²⁵ SHALA essentially ignores this,¹²⁶ and, in respect of the identity and number of alleged JCE members and victims,¹²⁷ repeats previously rejected arguments in their entirety.¹²⁸ SHALA fails to show how these arguments meet the standard of review given the presumptive finality of the Indictment Appeal Decision.¹²⁹

42. SHALA's remaining argument regarding cumulative charging,¹³⁰ which failed to meet the standard for certification to appeal,¹³¹ was considered and rejected by the Pre-

¹²² *Thaçi Jurisdiction Challenges Appeal Decision*, para.217. *See also* para.220.

¹²³ *Thaçi Jurisdiction Challenges Appeal Decision*, para.217. *See also* para.221.

¹²⁴ *Judgment*, para.996. *See also* *Defence Jurisdiction Appeal Decision*, para.36.

¹²⁵ *Indictment Appeal Decision*.

¹²⁶ SHALA acknowledges the existence of the Indictment Appeal Decision, *see* *Appeal*, n.102,108. The reference at n.102 is inapposite, as his argument alleges that the Panel erred in the Judgment. The reference at n.108 is a selective quotation from the Indictment Appeal Decision, which does not concern the binding nature of the decision or explain SHALA's procedural posture in requesting appellate relief against an Appeals Panel decision.

¹²⁷ *Appeal*, paras 60,63-64.

¹²⁸ *Indictment Appeal Decision*, paras 15-21,26-30.

¹²⁹ *See* Section II.

¹³⁰ *Appeal*, para.66.

¹³¹ *Decision Declining Defence Leave to Appeal Indictment Decision*, paras 21-22.

Trial Judge.¹³² SHALA fails to articulate how the Pre-Trial Judge's finding on the permissibility of cumulative charging constitutes an error warranting appellate intervention.¹³³ For the foregoing reasons, Ground 4 should be dismissed.

2. The Indictment provided sufficient particulars, as confirmed by the Appeals Panel

a) JCE Members and Victims were sufficiently specified

43. SHALA's attempt to bolster his failed arguments using the Panel's identification of Fatmir LIMAJ and Osman KRYEZIU as JCE members, is misconceived.¹³⁴ The Indictment specifies that, in addition to Sabit GECI, Xhemshit KRASNIQI, 'Bedri' and 'Van Damme', 'certain other KLA soldiers, police, and guards' present at the KMF during the Indictment period were members of the JCE.¹³⁵ Both KRYEZIU and LIMAJ fall within this category, which the Appeals Panel deemed sufficiently specific for SHALA to understand the factual allegations underpinning the charges against him.¹³⁶ SHALA ignores this finding and the Appeals Panel's conclusion that 'the identification of each and every JCE member specifically by name is not warranted in this case.'¹³⁷

44. Furthermore, no notice violation can be found in respect of these individuals.¹³⁸ SHALA knew that witnesses placed LIMAJ and KRYEZIU at the KMF.¹³⁹ His counsel

¹³² Indictment Decision, paras 38-51.

¹³³ See Section II; *Gucati & Haradinaj* AJ, para.32(ix); *Mustafa* AJ, para.33(ix).

¹³⁴ *Contra* Appeal, para.61. Although the Panel identified Sokol DOBRUNA as being involved in the interrogation of detainees at the KMF, it did not specifically name DOBRUNA as part of the plurality of persons constituting the JCE, see Judgment, paras 354-356, 363, 1003-1005.

¹³⁵ Indictment, para.10; Indictment Appeal Decision, para.18.

¹³⁶ Indictment Appeal Decision, para.18.

¹³⁷ Indictment Appeal Decision, para.18.

¹³⁸ *Contra* Appeal, paras 61, 69. See *Kupreškić* AJ, para.114.

¹³⁹ See e.g. SITF00013852-00013869 RED6, p.SITF00013860; SITF00014088-00014120 RED, p.SITF00014099.

questioned several witnesses regarding their presence there, including their role in the questioning or mistreatment of detainees.¹⁴⁰

45. The identification of additional JCE members in the Judgment does not render the Indictment retrospectively defective, and finds precedent in other international criminal judgments.¹⁴¹ Beyond a general assertion that he was deprived of ‘an effective opportunity to conduct required investigations’,¹⁴² SHALA does not show how the fact that KRYEZIU and LIMAJ were not identified by name in the Indictment materially affected his ability to prepare his defence, let alone rendered the trial unfair.¹⁴³

46. Further, SHALA introduces no new arguments regarding the specification of victims, instead repeating previous submissions.¹⁴⁴ In doing so, SHALA ignores previous appellate holdings.¹⁴⁵ He also fails to acknowledge the provision of information on victims through pre-trial disclosure, in line with established jurisprudence and practice.¹⁴⁶ Any claim of uncertainty and resulting prejudice in

¹⁴⁰ See e.g. 29 March 2023, pp.945-946; 3 May 2023, pp.1302-1306; 5 June 2023, pp.1818-1826; 20 September 2023, pp.2518,2527-2531; 3 October 2023, p.2827; 23 October 2023, pp.2998,3000.

¹⁴¹ See e.g. *Stanišić & Župljanin* TJ, para.314, where the Trial Chamber identified a number of additional JCE members to those named in the indictment, see *Stanišić & Župljanin* Indictment, para.8. On appeal, the Appeals Chamber noted the Trial Chamber’s findings without finding any error or fair trial right violation, see *Stanišić & Župljanin* AJ, paras 72-87. See also *Krajišnik* TJ, paras 6,1086-1088, naming dozens of additional individuals as JCE members than those pleaded in the Indictment. This finding was not directly challenged on appeal. Conversely, *Krajišnik* took issue with the inclusion of persons in the JCE merely by reference to the ‘JCE rank and file consisted of local politicians, military and police commanders, paramilitary leaders, and others.’ The Appeals Chamber agreed that identification of JCE members in this manner by the Trial Chamber was ‘impermissibly vague’, but did not censor the naming of additional JCE members by the Trial Chamber, see *Krajišnik* AJ, para.157.

¹⁴² Appeal, para.61.

¹⁴³ See *Brima* AJ, para.45; *Simić* AJ, para.25. The suggestion in Appeal, n.111 that SHALA would have challenged the evidence of W04733 with that of W01448 regarding the presence of LIMAJ during the 20 May 1999 incident is unclear, given both witnesses’ evidence was tendered in writing pursuant to Rule 155, see Rule 155 Decision, para.70(b).

¹⁴⁴ Defence Indictment Challenge, paras 32,34,63-64; Defence Reply to SPO Response to Defence Indictment Challenge, para.16; Defence Indictment Appeal, paras 26-33; Defence Reply to SPO Response to Defence Indictment Appeal, paras 8-13.

¹⁴⁵ Indictment Appeal Decision, paras 28-29.

¹⁴⁶ See Indictment Appeal Decision, para.19. See also *Thaçi* Defence Indictment Appeals Decision, para.20; *Kupreškić* AJ, para.88.

respect of the number and identity of the victims is unsustainable, as the SPO Pre-Trial Brief referred to the arbitrary detention and mistreatment of ‘at least eighteen victims’,¹⁴⁷ and included a list of these individuals with references to the relevant evidence.¹⁴⁸ This number of victims was consistently reiterated by the SPO throughout trial.¹⁴⁹ SHALA’s ability to prepare an effective defence was not impacted by any alleged lack of information. SHALA’s attempt to claim otherwise, by identifying certain paragraphs of the Indictment as lacking particulars¹⁵⁰ takes individual paragraphs out of context and ignores that the Indictment must be read as a whole.¹⁵¹

b) Cumulative charging is permissible

47. Neither the Law nor the Rules prohibit cumulative charging,¹⁵² including of charges arising from the same acts.¹⁵³ Likewise, there is no support for SHALA’s claim that it is ‘well-established principle’ that cumulative charging is detrimental to defence rights.¹⁵⁴ Cumulative charging has been upheld repeatedly at other international tribunals since it was endorsed by the ICTY in *Tadić*.¹⁵⁵ SHALA’s reliance on *Bemba* in this respect is misguided.¹⁵⁶ It fails to acknowledge the specific legal framework at the ICC, as well as subsequent practice recognising that trial chambers

¹⁴⁷ SPO PTB, paras 1,30,42.

¹⁴⁸ SPO PTB, para.30.

¹⁴⁹ 21 February 2023, p.511; SPO FTB, paras 1,327,390; 15 April 2024, pp.4088,4162,4167.

¹⁵⁰ Appeal, para.63.

¹⁵¹ Indictment Appeal Decision, para.18; *Gucati & Haradinaj* Preliminary Motions Appeal Decision, para.56.

¹⁵² Indictment Decision, para.44.

¹⁵³ *Kupreškić* AJ, para.385; *Naletilić & Martinović* AJ, para.103.

¹⁵⁴ *Contra* Appeal, para.66.

¹⁵⁵ *Tadić* Indictment Decision, para.17. *See also* Indictment Decision, para.45; *Thaçi* Defence Indictment Appeals Decision, n.173.

¹⁵⁶ *Contra* Appeal, n.123. The remaining jurisprudence cited by SHALA does not support the existence of a well-established principle as it surveys the approaches taken by different trial chambers and notes the different legal framework between the ICC and other courts, *see Ayyash* Interlocutory Decision on Applicable Law, paras 287-293, 298-299.

are ‘better-placed to resolve questions of concurrence of offences’ after the presentation of all the evidence.¹⁵⁷

48. Further, SHALA’s claims of prejudice as a result of the confirmation of charges of torture and cruel treatment are general and unsupported.¹⁵⁸ The underlying facts in respect of these charges, as plead in the Indictment,¹⁵⁹ are identical¹⁶⁰ and therefore no additional investigatory burden was placed on SHALA.

49. SHALA wrongly asserts that his objections were upheld in the Judgment.¹⁶¹ Cumulative charges are distinct from cumulative convictions, which are only permitted in respect of distinct crimes where ‘each statutory provision involved has a materially distinct element not contained in the other.’¹⁶² The Panel applied this test in its treatment of the charges of cruel treatment and torture,¹⁶³ following the approach adopted at the ICTY.¹⁶⁴ Ground 4 should therefore be dismissed.

E. Ground 5: The Panel properly convicted SHALA for the arbitrary detention and torture of 18 victims

1. SHALA wilfully ignores the plain meaning of the Indictment

50. SHALA’s claim that the Panel erred in law by ‘exceeding the charges’ ignores the plain language of the Indictment.¹⁶⁵ SHALA fails to acknowledge that the Indictment states that ‘at least’ nine persons were subjected to arbitrary arrest and detention and to acts of cruel treatment and torture.¹⁶⁶ In furtherance of his argument,

¹⁵⁷ *Ongwen* Confirmation Decision, paras 30-33; *Ruto & Sang* Confirmation Decision, paras 279-281. See also *Delalić* AJ, para.400; Indictment Decision, para.47.

¹⁵⁸ Appeal, paras 58,66.

¹⁵⁹ Indictment, para.26 pleads the facts underlying the allegation of torture, by reference to the facts plead in respect of cruel treatment at paras 18-24.

¹⁶⁰ Judgment, para.963.

¹⁶¹ Appeal, paras 57,66.

¹⁶² *Delalić* AJ, paras 412-413; *Naletilić & Martinović* AJ, para.584; *Ongwen* AJ, paras 24,1631,1635.

¹⁶³ Judgment, paras 961-964.

¹⁶⁴ See e.g. *Stanišić & Župljanin* TJ, para.914.

¹⁶⁵ Appeal, paras 70,76.

¹⁶⁶ Indictment, para.14. See also Indictment Appeal Decision, para.28.

SHALA restates his position, ventilated in Ground 4 and rejected by Appeals Panel,¹⁶⁷ that each victim needed to be identified in the Indictment, all without acknowledging the Indictment Appeal Decision.

51. Contrary to SHALA's claim,¹⁶⁸ the detention and torture of the additional victims fell squarely within the factual scope of arbitrary detention and torture, as plead in the Indictment. This is borne out by their contemporaneous detention, often in the same locations within the KMF as other victims, several of whom gave evidence at trial that they witnessed the mistreatment suffered by additional victims.¹⁶⁹ SHALA does not explain how the Panel erred in its assessment of each of these victims, the detention and mistreatment of whom reflected the 'same operational pattern' established 'based on the evidence as a whole.'¹⁷⁰

2. SHALA was indisputably on notice of the number of victims alleged by the SPO

52. SHALA misstates the record concerning his notice of the number of victims. From the Pre-Trial Brief onwards, the SPO consistently referred to the arbitrary detention and mistreatment of 18 victims.¹⁷¹ This did not amount to the introduction of 'new allegations' or expose SHALA to any additional risk of conviction.¹⁷² The jurisprudence cited by SHALA is inapposite in this regard, referring to situations in which the appellant alleged a conviction based on conduct not charged in the operative indictment.¹⁷³

¹⁶⁷ See Section III(C)(1).

¹⁶⁸ Appeal, paras 72,75.

¹⁶⁹ Judgment, paras 558-560,570-575,578-579,582,716,728,733-734.

¹⁷⁰ See e.g. Judgment, paras 581,583,590,747.

¹⁷¹ SPO PTB, paras 1,30,42; 21 February 2023, p.511; SPO FTB, paras 1,327,390; 15 April 2024, pp.4088,4162,4167. *Contra* Appeal, para.75.

¹⁷² Appeal, para.75; *Halilović* Leave to Amend Indictment Decision, para.35; *Prlić* Indictment Amendment Decision, para.13.

¹⁷³ *Mladić* AJ, para.34; *Karadžić* AJ, paras 442-445.

53. SHALA cites no authority requiring the SPO to file an amended indictment to specify the identity of additional victims already identified in its Pre-Trial Brief. The Panel was entitled, based on the evidence presented at trial, to convict SHALA of the arbitrary detention and torture of the 18 victims it identified.¹⁷⁴ These findings were consistent with the Indictment, which plead a *minimum* of nine victims. The Panel also clearly outlined the evidence upon which it relied in reaching these findings,¹⁷⁵ none of which SHALA challenged during trial on the basis that it fell outside the scope of the Indictment.¹⁷⁶ Accordingly, Ground 5 should be dismissed in its entirety.

F. Ground 6: The Panel properly assessed the evidence of SPO witnesses

54. The Panel carefully evaluated the credibility of witnesses and the reliability of their testimony before relying on their evidence. While SHALA disagrees with the Panel's assessment of the evidence of SPO witnesses, he does not show that it was so unfair or unreasonable that no reasonable trier of fact could have reached the same conclusions.¹⁷⁷

55. SHALA's submissions ignore that an appeal is not a trial *de novo*.¹⁷⁸ The question for the Appeals Panel is not whether it agrees with a discretionary decision of the Panel, but whether the Panel 'has correctly exercised its discretion in reaching that decision.'¹⁷⁹ Mere disagreement with conclusions drawn by the Panel from available facts or the weight accorded to particular factors is insufficient to establish a clear error.¹⁸⁰ This Appeals Panel confirmed that a trial panel retains full discretionary power over the appropriate weight and credibility to be accorded to witness

¹⁷⁴ Judgment, paras 591,749,945,977,1037-1038.

¹⁷⁵ Judgment, paras 589-590.

¹⁷⁶ *Furundžija* AJ, para.147.

¹⁷⁷ Article 46(5); *Gucati & Haradinaj* AJ, paras 25-26.

¹⁷⁸ Article 46(2); *Gucati & Haradinaj* AJ, para.21; *Mustafa* AJ, para.30.

¹⁷⁹ *Popović* AJ, para.131.

¹⁸⁰ *Mustafa* AJ, para.24.

testimony.¹⁸¹ Such discretionary power also covers the manner in which the trier of fact decides to deal with apparent contradictions.¹⁸² Moreover, a margin of deference is afforded to a trial panel's assessment of witnesses as the trial panel undertakes the hearing, assessing, and weighing of the evidence.¹⁸³ For these reasons, the ICTR Appeals Chamber has previously noted that it 'is loathe to disturb such credibility assessments.'¹⁸⁴

56. SHALA's unfounded claims about particular witnesses and alleged contamination are repetitive of arguments dismissed by the Panel. SHALA's vague claims of 'double standards' are not supported by the record and no error or abuse of discretion is shown.¹⁸⁵

1. The Panel properly assessed the credibility of TW4-01

57. SHALA's criticism of the Panel's treatment of TW4-01's evidence ignores that the Panel assessed the evidence before it in line with Rule 137(2) and clarified at the outset that it did not explicitly address all the arguments raised by the Parties, nor did it explicitly evaluate each and every potential inconsistency.¹⁸⁶ In providing a reasoned opinion, the Panel is not required to address every detail that influences its conclusion,¹⁸⁷ or all challenges raised by the parties.¹⁸⁸ In respect of TW4-01 in particular, the Panel:

'[E]valuated the evidence elicited from TW4-01 in light of the totality of the evidence available for judgment, and against the backdrop of the Parties'

¹⁸¹ *Mustafa* AJ, para.267; Judgment, para.82 and references therein.

¹⁸² *Kayishema & Ruzindana* AJ, para.230.

¹⁸³ *Kayishema & Ruzindana* AJ, paras 230,237 and references therein; *Mustafa* AJ, para.24. See also *Dorđević* AJ, para.17, citing *Kupreškić* AJ, para.30.

¹⁸⁴ *Nizeyimana* AJ, para.56; *Hategekimana* AJ, para.202; *Dorđević* AJ, para.17, citing *Kupreškić* AJ, para.30; *Šainović* AJ, para.1384.

¹⁸⁵ *Contra*, Appeal, paras 99,106-110.

¹⁸⁶ Judgment, para.79.

¹⁸⁷ *Ntakiruimana* AJ, para.432.

¹⁸⁸ *Mustafa* AJ, para.34.

submissions on this witness, and has attached to it the weight it considered appropriate in the present Judgment.¹⁸⁹

In carrying out this assessment, the Panel had the benefit of TW4-01's extensive *viva voce* testimony.¹⁹⁰ SHALA fails to demonstrate that the Panel erred or abused its discretion in finding TW4-01 credible.

a) TW4-01's PTSD did not prevent him from providing a truthful and accurate account of his detention

58. SHALA's arguments regarding TW4-01's PTSD and the consequent unreliability of his evidence¹⁹¹ were explicitly rejected in the Judgment with the Panel noting that SHALA conflated the related but distinct issues of the impact of trauma and consistency of testimony.¹⁹² On appeal, SHALA resurrects this failed argument and manufactures an alleged inconsistency, suggesting that the Panel could not find that TW4-01 suffered from the effects of trauma and also rely on his evidence, including where it conflicted with the evidence of others.¹⁹³ SHALA ignores settled jurisprudence that there is no recognised rule of evidence that traumatic circumstances necessarily render witness evidence unreliable. Rather, it is for the Panel to provide a reasoned opinion adequately balancing the relevant factors that may impact the evidence given by a witness.¹⁹⁴ This is precisely what the Panel did.

59. In attempting to frame the Panel's analysis as an appealable error, SHALA disregards the evidence of DUHNE-PRINSEN and LOZANO PARRO¹⁹⁵ as summarised by the Panel, namely that: (i) trauma does not render a witness's account automatically or entirely not credible or not reliable, and (ii) the experts observed no

¹⁸⁹ Judgment, para.71.

¹⁹⁰ Judgment, paras 101-104.

¹⁹¹ DefenceFTB, paras 163,188.

¹⁹² Judgment, para.106,n.169. *See also* para.795.

¹⁹³ Appeal, para.80.

¹⁹⁴ *Kunarac* AJ, para.324; *Rutaganda* AJ, para.219.

¹⁹⁵ SHALA did not challenge the expertise of DUHNE-PRINSEN and LOZANO PARRO.

signs of memory problems in TW4-01. SHALA also attempts to conflate two distinct issues: the experts did not find that [REDACTED]. Rather, they found that TW4-01 [REDACTED].¹⁹⁶ Finally, SHALA’s statement that the Panel ‘*ex post facto*’ assessed TW4-01’s credibility to match a ‘narrative,’ repeated in Ground 10,¹⁹⁷ is unsupported by any evidence.¹⁹⁸

b) SHALA misstates the Panel’s analysis of [REDACTED] and ignores the Panel’s findings on Defence witness credibility

60. SHALA’s challenges to the Panel’s findings concerning TW4-01 reflect mere disagreement with the analysis of the Panel and misrepresent the Judgment. For example, in challenging the Panel’s reliance on TW4-01 [REDACTED], SHALA claims that the Panel accepted the evidence of TW4-01 for ‘unconvincing reasons, namely that “[REDACTED].”’¹⁹⁹ SHALA fails to explain how the Panel’s reasoning is unconvincing.

61. Furthermore, contrary to SHALA’s claim, the Judgment not only outlines the differences in the evidence of [REDACTED], but also explores, in the directly preceding passage to that quoted by SHALA, how many of the specific differences between witnesses align with the facts of [REDACTED].²⁰⁰ [REDACTED].²⁰¹ SHALA ignores this analysis and likewise omits to mention that the Panel further credited [REDACTED] evidence based on his vivid, detailed, and consistent account.²⁰² [REDACTED].²⁰³ [REDACTED].²⁰⁴ [REDACTED].

¹⁹⁶ Judgment, paras 106, 111. [REDACTED].

¹⁹⁷ See below Section III(J)(6).

¹⁹⁸ Appeal, para. 80.

¹⁹⁹ Appeal, para. 81.

²⁰⁰ [REDACTED]

²⁰¹ [REDACTED].

²⁰² [REDACTED]

²⁰³ [REDACTED].

²⁰⁴ [REDACTED].

62. [REDACTED].²⁰⁵

63. SHALA further misstates the Judgment when claiming [REDACTED] SHALA's presence [REDACTED].²⁰⁶ The Panel explicitly held that [REDACTED] was not required for his responsibility [REDACTED] arise.²⁰⁷ Given the Panel's findings on SHALA's membership in the JCE,²⁰⁸ and his significant contribution thereto,²⁰⁹ the Panel reasonably found that it did not need to reach a conclusion on the identities of all other persons in [REDACTED].²¹⁰ This is consistent with the Panel's general approach to the assessment of evidence²¹¹ and SHALA fails to show an error caused by this assessment, let alone one capable of invalidating the Judgment or causing a miscarriage of justice.

64. The Panel analysed SHALA's contentions about [REDACTED] on who was present [REDACTED],²¹² all other evidence on the record, and considered numerous factors before crediting his account. In addition to explaining how SHALA's claims [REDACTED] were unpersuasive,²¹³ the Panel noted the following features of [REDACTED]: (i) [REDACTED];²¹⁴ (ii) [REDACTED];²¹⁵ (iii) [REDACTED];²¹⁶ (iv) [REDACTED];²¹⁷ and, (v) [REDACTED].²¹⁸ It was within the Panel's discretion to give weight to these factors and SHALA fails to show that the Panel unreasonably found [REDACTED] credible on this matter.

²⁰⁵ [REDACTED].

²⁰⁶ [REDACTED].

²⁰⁷ Judgment, para.1035.

²⁰⁸ Judgment, para.1007. SHALA's membership is not dependent on [REDACTED].

²⁰⁹ Judgment, para.1025. SHALA's personal involvement in beating [REDACTED] and the Murder Victim [REDACTED] is but one of seven named factors establishing his significant contribution.

²¹⁰ Judgment, para.807. *Contra* Appeal, para.81.

²¹¹ Judgment, para.79.

²¹² [REDACTED].

²¹³ [REDACTED].

²¹⁴ [REDACTED].

²¹⁵ [REDACTED].

²¹⁶ [REDACTED].

²¹⁷ [REDACTED]. *See also* paras [REDACTED].

²¹⁸ [REDACTED].

65. In claiming that the Panel erroneously accepted TW4-01's evidence about the view from Room 1 and wrongly disregarded Zijadin HOXHA's evidence, SHALA ignores the Panel's analysis on the Detention Building and incorrectly claims that the Panel overlooked relevant evidence.²¹⁹ After assessing all relevant evidence, the Panel extensively explained that HOXHA provided untruthful evidence on the Detention Building, as he claimed not to know of the building, sitting in the middle of the courtyard²²⁰ where he worked,²²¹ and which five victims and a former KLA guard described as the location where victims were detained.²²²

c) SHALA ignores the Panel's detailed assessment of TW4-01's credibility and fails to show no reasonable Panel could have reached the same determination

66. SHALA's argument that the Panel did not address certain submissions or items of evidence²²³ is refuted by the Judgment and is based on the flawed premise that the Panel must explicitly comment on every argument or piece of evidence.²²⁴ It is presumed that a trial chamber evaluated all the evidence presented to it, as long as there is no indication that the trial chamber completely disregarded any particular piece of evidence.²²⁵

67. SHALA's claim that the Panel failed to consider information suggesting that TW4-01 changed his evidence and implicated SHALA in taking him to the KMF²²⁶ ignores that the Panel fully considered this submission and found that it did not cast doubt on the truthfulness of TW4-01's testimony.²²⁷ SHALA's remaining claim that the

²¹⁹ *Contra Appeal*, para.82. SPOE00330365-00330365 is discussed in Judgment, para.466, n.842.

²²⁰ Judgment, para.253, 315-316, n.526.

²²¹ 20 November 2023, p.3197.

²²² See Judgment, paras 253, 312-318.

²²³ Appeal, paras 81-82.

²²⁴ *Mustafa AJ*, para.34.

²²⁵ *Mustafa AJ*, para.34; *Prlić AJ*, para.187; *Kvočka AJ*, para.23; *Karadžić AJ*, para.396.

²²⁶ Appeal, para.81.

²²⁷ Judgment, para.372.

Panel did not address a purported ‘change’ in TW4-01’s account related to [REDACTED], ignores that the Panel is not required to address every submission put forward by the parties.²²⁸

68. The Panel made findings on TW4-01’s accuracy and memory, specifically that he made clear attempts to provide an accurate account and admitted when he could not remember certain details.²²⁹ Certain issues raised by SHALA were fully ventilated during testimony, including with pointed judges’ questions.²³⁰ Any attempt to suggest that the Panel failed to consider matters that it directly questioned the witness on is unsustainable. SHALA’s suggestion that TW4-01’s explanations were ‘plain lies’, ‘implausible accounts’ or ‘fabricate[d] stories’ is unsubstantiated.²³¹ TW4-01 was confronted with relevant matters on cross-examination and explained that certain discrepancies or errors were due to memory lapses.²³² The Panel was entitled to find that such minor discrepancies, or matters which were forgotten over time, were simply that, and not indicators of dishonest testimony.²³³ Finally, any suggestion that the Panel should have negatively assessed TW4-01’s credibility based on his account of his release [REDACTED]²³⁴ should be dismissed as SHALA’s mere disagreement with the Judgment.²³⁵ [REDACTED].²³⁶ SHALA did not confront him with any contradictory evidence, despite claiming to have it.²³⁷

69. SHALA fails to explain how the Panel erred in rejecting his claim that TW4-01 had a motive to falsely incriminate him.²³⁸ The Panel found that it was without basis

²²⁸ *Mustafa AJ*, para.34.

²²⁹ Judgment, para.102.

²³⁰ *Contra Appeal*, para.84. See e.g. 6 June 2023, pp.1861-1864.

²³¹ Appeal, paras 83,85.

²³² 6 June 2023, pp.1861-1865; 5 June 2023, pp.1746-1752.

²³³ *Contra Appeal*, paras 83-85.

²³⁴ [REDACTED].

²³⁵ See Judgment, paras 397-401.

²³⁶ [REDACTED]. See Judgment, [REDACTED].

²³⁷ Appeal, para.85.

²³⁸ Appeal, para.87.

and refuted by other evidence.²³⁹ The Panel specifically found that TW4-01 made clear attempts to give accurate answers, and that his measured responses included, notably, his admissions about SHALA.²⁴⁰ The Panel noted that TW4-01 stated clearly when he could not recall SHALA's presence,²⁴¹ gave a nuanced account of SHALA's role,²⁴² and did not overstate SHALA's participation at the KMF.²⁴³ [REDACTED].²⁴⁴ While expressions of a desire to never see SHALA again, made in a threatening manner, are entirely inappropriate remarks, they do not demonstrate a motive to falsely incriminate SHALA, and are compatible with SHALA being responsible for TW4-01 [REDACTED]'s plight. These findings—numerous, detailed and logical—contradict and undermine SHALA's attempt to characterise TW4-01 as motivated to falsely accuse SHALA for the purpose of revenge. As shown by the Panel's analysis, the evidence does not support such a claim.

70. SHALA's argument about TW4-01's criminal record²⁴⁵ misrepresents the factual findings,²⁴⁶ omits key aspects of the Panel's reasoning in an effort to undermine these findings, and as such, should be summarily dismissed.²⁴⁷ SHALA distorts the Judgment in claiming that TW4-01's criminal record was excluded as a matter of principle.²⁴⁸ Conversely, the Panel stated plainly that TW4-01's criminal record, as such, did not affect his credibility or reliability as a matter of principle.²⁴⁹ This is consistent with established jurisprudence which confirms that a criminal record is but one of many potential factors relevant to assessing witness credibility, and that the

²³⁹ Judgment, paras 115,791-794.

²⁴⁰ Judgment, paras 102,791,795.

²⁴¹ Judgment, paras 102,791-792.

²⁴² Judgment, paras 102,795.

²⁴³ Judgment, paras 102,795.

²⁴⁴ Judgment, paras 108-114.

²⁴⁵ Appeal, para.86.

²⁴⁶ Judgment, paras 107-114.

²⁴⁷ See Section II; *Gucati & Haradinaj* AJ, para.32(i); *Mustafa* AJ, para.33(i).

²⁴⁸ Appeal, para.86.

²⁴⁹ Judgment, para.107

application of such factors in an assessment varies according to the specific circumstances of each case.²⁵⁰ Ultimately, ‘it is for the trier of fact to take into account criminal convictions and any other relevant evidence concerning the witness’s character along with all the other relevant factors—for instance, the witness’s demeanour, the content of [his] testimony, and its consistency with other evidence—in determining whether the witness is credible.’²⁵¹ As amply shown by the analysis in the Judgment, the Panel did so and reasonably found that TW4-01’s criminal record did not constitute a reason to doubt the truthfulness of his testimony.²⁵²

71. Contrary to SHALA’s claim,²⁵³ the Panel fully assessed TW4-01’s [REDACTED].²⁵⁴ The Panel noted that [REDACTED]²⁵⁵ [REDACTED].²⁵⁶ SHALA’s appellate arguments consist of: (i) a bald assertion that the Panel ‘[REDACTED],’ unsupported by any evidence; and (ii) a misrepresentation of the factual findings, namely an excerpt from the Judgment, taken entirely out of context.²⁵⁷ These arguments do not merit detailed consideration and should be summarily dismissed.²⁵⁸

72. [REDACTED]²⁵⁹ [REDACTED].²⁶⁰ [REDACTED].²⁶¹ [REDACTED].²⁶² [REDACTED].²⁶³ [REDACTED],²⁶⁴ [REDACTED].

73. SHALA has failed to show that the Trial Panel abused its discretion in finding TW4-01 credible.

²⁵⁰ *Popović* AJ, para.132.

²⁵¹ *Kamuhanda* AJ, para.142; *Kajelijeli* AJ, paras 36,168-170; *Kajelijeli* TJ, paras 128-131,467.

²⁵² Judgment, para.107.

²⁵³ [REDACTED].

²⁵⁴ Judgment, paras 108-114.

²⁵⁵ Judgment, para.109.

²⁵⁶ Judgment, para.109, citing *Bemba et al.* TJ, para.202.

²⁵⁷ [REDACTED].

²⁵⁸ See Section II; *Gucati & Haradinaj* AJ, para.32(i),(ix); *Mustafa* AJ, para.33(i),(ix).

²⁵⁹ [REDACTED]

²⁶⁰ [REDACTED]

²⁶¹ [REDACTED]

²⁶² [REDACTED]

²⁶³ [REDACTED]

²⁶⁴ [REDACTED]

2. The Panel properly assessed the credibility of W04733

74. SHALA claims that the Panel erred in fact in finding that inconsistencies in W04733's statements did not affect his overall credibility.²⁶⁵ SHALA takes issue with several findings, but frequently misstates the Judgment and ignores the Panel's detailed reasoning. SHALA's arguments about these findings demonstrate his disagreement with the Panel's conclusions, but do not show that the Panel's assessment was one that could not be reached by any reasonable trier of fact. SHALA thus fails to meet the standard for appellate intervention. SHALA also does not demonstrate that any error had an impact on the Judgment. Even with regard to W04733's identification of SHALA during his transfer to the KMF, SHALA fails to demonstrate that, in the absence of this finding, any aspect of his conviction would be vacated.

a) SHALA fails to develop his arguments regarding the Panel's assessment of W04733's credibility, which should be dismissed as impermissibly vague

75. SHALA's complaints about factual findings on W04733's mistreatment on 20 May 1999 and the Panel's favourable assessment of his credibility on this incident should be dismissed.²⁶⁶ SHALA fails to show an error of fact and merely restates the findings in the Judgment.²⁶⁷ The Panel fully considered SHALA's arguments on W04733's teeth, and explained why it did not consider a discrepancy in one statement to affect his overall credibility on his mistreatment—mistreatment it found explained consistently and in detail.²⁶⁸ SHALA's undeveloped assertions about the Panel's

²⁶⁵ Appeal, paras 89-96. SHALA cites Judgment, paras 180-181 but does not identify the exact finding he appeals. The SPO has concluded by process of elimination that he could be referring to the finding addressed herein. SHALA's claims about reliance on untested evidence is repetitive of Ground 7 and addressed there, *see* Section III(G). Challenges to other witnesses in Appeal, paras 89-96 are addressed below, *see* Section III(F)(3).

²⁶⁶ Appeal, para. 94.

²⁶⁷ Appeal, para. 94; Judgment, para. 699.

²⁶⁸ Judgment, para. 699.

assessment of W04733's evidence concerning other detainees he saw on 20 May 1999, which do not contain any citations, should be dismissed as vague.²⁶⁹ Nevertheless, the SPO notes that the Panel provided a reasoned assessment of W04733's evidence on this matter in the Judgment.²⁷⁰

b) SHALA ignores the Panel's detailed assessment of W04733's credibility and fails to show no reasonable Panel could have reached the same determination

76. SHALA's argument that the Panel should have given 'adequate reasoning as to why W04733 failed to refer to Mr Shala as present during his transfer'²⁷¹ in his initial statements is illogical and ignores that the Panel addressed the related Defence claim concerning his transfer to the KMF.²⁷² His claim that the Panel failed to address perceived discrepancies or omissions in W04733's statements is false and refuted by the Judgment.²⁷³

77. Similarly, SHALA's claim that the Panel should have treated W04733's [REDACTED] evidence with caution is based on an incorrect interpretation of the Panel's assessment.²⁷⁴ That the Panel noted W04733's deteriorating health from [REDACTED] as a relevant factor in its assessment of alleged discrepancies or omissions²⁷⁵ does not mean that the Panel was bound to treat his evidence with caution.²⁷⁶ SHALA cites no authority for this claim. Nor does it mean that W04733 was unreliable as of [REDACTED] or progressively thereafter. The Panel's assessment, having evaluated W04733's evidence holistically, and in light of the entire body of

²⁶⁹ *Krajišnik* AJ, paras 18,26.

²⁷⁰ Judgment, para.662.

²⁷¹ Appeal, para.92.

²⁷² Judgment, paras 450,453.

²⁷³ Judgment, paras 181,184,453. *See also* para.83.

²⁷⁴ Judgment, para.181. *Contra* Appeal, para.91.

²⁷⁵ Judgment, para.181.

²⁷⁶ SHALA's pleadings in this regard are deficient as he does not identify with precision which parts of W04733's evidence should have been approached in this manner.

evidence,²⁷⁷ indicates that it found him credible and that one factor it bore in mind was that where discrepancies exist, they may be attributable to passage of time, and that some inconsistencies may be understood as coming from a period in the life of a witness with medical conditions who was of an advanced age.²⁷⁸ SHALA identifies no specific finding as erroneous based on the Panel's alleged disregard of the effects of W04733's age and health.²⁷⁹ While neither the SPO nor Appeals Panel should be required to deduce the impugned findings, the SPO notes that the Panel specifically found that W04733's reliability was not diminished notwithstanding information he provided about identifications of KLA members and his basis therefor. The Panel found that any identifications are matters related to weight²⁸⁰ and the Panel's findings on KLA members at the KMF are not based solely or decisively on W04733's evidence.²⁸¹

c) SHALA misstates the Panel's analysis of W04733's identification evidence

78. As SHALA observed, reliance upon identification evidence where a witness has given inconsistent or inaccurate testimony about the defendant's physical characteristics is a relevant factor for an appellate court's assessment on reasonableness.²⁸² However, the careful analysis of the Panel, which thoroughly assessed all evidence on the record concerning W04733's ability to identify SHALA at the time (including from SHALA's statements relevant to W04733), combined with the evaluation and weighing of alleged countervailing evidence, discussed herein, shows that the Panel made a reasonable finding on W04733's credibility.

²⁷⁷ Judgment, para.183.

²⁷⁸ Judgment, para.181, n.293.

²⁷⁹ See *Mustafa* AJ, para.29.

²⁸⁰ Judgment, para.183.

²⁸¹ Judgment, para.183.

²⁸² Appeal, para.90, citing *Kupreskic* AJ, para.40; *Limaj* AJ, para.30.

79. SHALA's claim that the Panel accepted W04733's identification evidence based on a 'wrong identification'²⁸³ misstates the Panel's assessment of the evidence, which amply supported the finding that W04733 realised who SHALA was based on: (i) his previous work as a police officer; and (ii) distinctive aspects of SHALA's behaviour linked to his nickname, known to W04733 from his employment.²⁸⁴ By SHALA's own account, he served four years' imprisonment in the 1980s for separatist activities and, in the 1990s, participated in armed actions against police installations.²⁸⁵ This conduct made him a person of interest to the police.²⁸⁶ The Panel reasonably relied on W04733's evidence about his police duties and knowledge of SHALA,²⁸⁷ which is further supported by SHALA's statements confirming that he was a KLA member [REDACTED].²⁸⁸ SHALA's evidence that he [REDACTED],²⁸⁹ [REDACTED]²⁹⁰ supports the reasonableness of the Panel's finding that W04733 knew of SHALA: he had reason to know of him—it was his job to know. As a police officer, he was a potential target of persons like SHALA engaged in armed provocations against police.²⁹¹

80. SHALA's identity was confirmed to W04733 when he heard other KLA members in the vehicle en route to the KMF refer to him as 'Ujku' and observed SHALA howling like a wolf.²⁹² SHALA's statements and those of other witnesses reinforce this

²⁸³ Appeal, paras 89-90.

²⁸⁴ Judgment, paras 451, 455.

²⁸⁵ T001-0105-1-A-TR, p.22; 066864-TR-ET Part1 Revised1, pp.46-51, 65-70; U009-9230-U009-9235-ET, p.U009-9230.

²⁸⁶ Judgment, para.451. *Contra* Appeal, para.92.

²⁸⁷ Judgment, para.451.

²⁸⁸ In 1998, SHALA operated in the Jablanica/Jabllanicë area (Judgment, para.286), where W04733 [REDACTED] (27 March 2023, pp.629-630) and where he frequently operated when he worked for the police (U017-4058-U017-4062 RED2, p.U0174059). *See also* 27 March 2023, p.650.

²⁸⁹ 066864-TR-ET Part 1 Revised 1, pp.60-63, 67.

²⁹⁰ 066888-TR-ET Part 1 Revised, p.60.

²⁹¹ *See* 066864-TR-ET Part1 Revised1, pp.65-70.

²⁹² Judgment, para.451.

identification, as noted by the Panel, since SHALA admitted that his nickname was 'Ujku' and that he made 'wolf-like' sounds.²⁹³

81. The Panel noted the significance of W04733's testimony on how he knew SHALA and contrasted it with the lesser weight it gave to W04733's description of SHALA's physical appearance.²⁹⁴ The Panel considered the description provided in 2018, noting that factors related to the passage of time may have impacted the way W04733 described perpetrators at the KMF almost twenty years later.²⁹⁵ The Panel further considered SHALA's submissions alleging errors in W04733's identification²⁹⁶ and found that these arguments did not detract from the fact that it credited W04733's accurate identification of SHALA on the basis of his police work, SHALA's nickname, and distinctive howl.²⁹⁷ The Panel fully considered SHALA's arguments and accounted for its finding and attribution of greater weight to W04733's accurate identification at the time of the events than to a description from many years later.²⁹⁸

82. The Panel's evaluation of W04733's initial apprehension and transfer demonstrates its careful analysis and reasoned conclusions. The Panel attributed weight to W04733's manner in recounting his experience, particularly his readiness to admit when he did not know the identity of his captors.²⁹⁹ The Panel found that his provision of minute details about his journey, and that he volunteered information involving a multitude of third-parties—thus exposing his account to additional potential scrutiny—reinforced its conviction that his account was truthful and based on personal experience.³⁰⁰ The reliability of W04733's identification of SHALA during his transport to the KMF on 20 May 1999 is supported by W04733's further

²⁹³ Judgment, para.451. *See also* para.285.

²⁹⁴ Judgment, para.451.

²⁹⁵ Judgment, para.451. *See also* paras 181,184.

²⁹⁶ Judgment, para.452.

²⁹⁷ Judgment, para.452. *See also* para.86.

²⁹⁸ Judgment, paras 450-452.

²⁹⁹ Judgment, paras 179,184,442.

³⁰⁰ Judgment, paras 179,442,448.

identification of SHALA as one of his tormentors in the Office, on the same day, which is corroborated by both TW4-01 and W01448.³⁰¹ The Panel specified that it had assessed all of W04733's prior statements, together with and in light of other testimony given in court³⁰² and found his evidence reliable³⁰³ and bearing similarities to the evidence of other victims.³⁰⁴ The Panel considered, and rejected as unfounded, suggestions of collusion³⁰⁵ or fabrication.³⁰⁶

3. The Panel properly assessed the credibility of TW4-06, TW4-07, TW4-08, TW4-09

83. Contrary to SHALA's claim that the Panel unreasonably relied on these witnesses without exercising caution,³⁰⁷ the Judgment reflects the Panel's close assessment of their credibility and a careful determination of the weight afforded to their evidence, including examining whether matters were within their personal knowledge or from another source.³⁰⁸ This is evident in the alleged error raised by SHALA that, in respect of W04733's transfer, the Panel found that the family members' evidence was hearsay and based mostly on what W04733 stated after his release.³⁰⁹ The Panel assessed whether this hearsay had indicia of reliability,³¹⁰ and finding that it did, accorded 'some weight' to this evidence.³¹¹ SHALA's further examples demonstrate that the Panel did not blindly accept the family members' evidence, where it found other evidence more credible and reliable.³¹² In his remaining

³⁰¹ Judgment, para.694.

³⁰² Judgment, paras 183,442.

³⁰³ Judgment, para.442.

³⁰⁴ Judgment, para.448.

³⁰⁵ Judgment, para.187.

³⁰⁶ Judgment, para.448.

³⁰⁷ Appeal, paras 89,95-96.

³⁰⁸ Judgment, paras 144-154.

³⁰⁹ Judgment, para.449.

³¹⁰ See Section III(F)(4) for the assessment of hearsay evidence.

³¹¹ Judgment, para.449.

³¹² Appeal, para.96. See also Judgment, para.452.

arguments, SHALA fails to identify the finding he challenges.³¹³ His claims that the witnesses were wrong on certain matters,³¹⁴ which were not relied on by the Panel, does not alter the careful calculus evident in the Panel's assessment of their evidence.

4. The Panel properly assessed the credibility of W01448

84. SHALA's argument that the Panel erroneously assessed the credibility of W01448 fail to identify an appealable error. Despite alleging that the Panel erred in finding W01448 credible, SHALA appears to argue that no reasonable trier of fact would have discarded W01448's evidence.³¹⁵ Such convoluted arguments should be dismissed *in limine*.³¹⁶

85. In his remaining claim concerning the reliability of W01448's evidence,³¹⁷ SHALA disregards that the Panel extensively analysed the evidence and specifically addressed the same Defence submissions before reaching its conclusions.³¹⁸ SHALA again repeats his previously rejected arguments without showing an error, and ignores relevant jurisprudence, in particular that a trial panel may rely on evidence, including hearsay evidence, provided it is reliable and credible.³¹⁹ It is settled law that the source of the information, the precise character of the information, and the existence of corroborative evidence are relevant criteria in assessing the weight or probative value of hearsay evidence.³²⁰ This applies equally to hearsay evidence which

³¹³ Appeal, paras 89,96.

³¹⁴ Appeal, para.96. SHALA's submission that he was never in Durrës is not only unsupported by any evidence, but contradicted by SHALA's own statements, *see* 066888-TR-ET Part 1 Revised, p.183.

³¹⁵ Appeal, para.98. If SHALA is arguing the Panel erred by not accepting W01448's account of the events of [REDACTED], this is mere disagreement with the Panel's finding or a request for the Panel to substitute its evaluation of the evidence with SHALA's and should be summarily dismissed. *Krajišnik AJ*, para.27.

³¹⁶ *See* Section II.

³¹⁷ SHALA's claim (Appeal, para.99) regarding untested evidence is developed in Ground 7 and addressed there, *see* Section III(G)(3).

³¹⁸ *See* Judgment, paras 712-714, referring to Defence FTB, paras 101-102,138.

³¹⁹ *Stanišić & Župljanin AJ*, para.510; *Popović AJ*, para.1276; *Karadžić AJ*, para.598; Judgment, para.91.

³²⁰ *Lukić & Lukić AJ*, para.577; *Karera AJ*, para.39.

is the basis for the identification of an accused.³²¹ As shown below, the Panel considered each criterion.

86. SHALA does not demonstrate, or even argue, that W01448 was unreliable in explaining his source of information—[REDACTED] who knew SHALA previously³²²—and ignores that the Panel affirmatively rejected any suggestion that [REDACTED] falsely identified SHALA at the time of their detention as there was no reason to do so.³²³ SHALA does not show, or even argue, that W01448 testified unreliably about SHALA’s identifying personal details, and the Panel found the opposite, noting W01448’s detailed recollection.³²⁴ In line with established jurisprudence on hearsay,³²⁵ the Panel carefully assessed the individual circumstances, including corroborating evidence relating to SHALA’s presence during the mistreatment of detainees,³²⁶ in determining the weight attributable to W01448’s evidence. SHALA fails to demonstrate that W01448’s evidence was devoid of reliability and credibility.

87. SHALA repeats that the Panel erred by not discounting his identification based on a photoboard procedure in 2010.³²⁷ The photoboard procedure, which occurred years after the mistreatment and after W01448 reported his detention experience and information in his possession identifying SHALA to competent authorities, does not call into question the Panel’s finding that W01448 was informed [REDACTED] of the true identity of one of his abusers.³²⁸ Given his previous unfamiliarity with SHALA and the passage of time, the Panel found that the photoboard procedure did not render

³²¹ *Lukić & Lukić* AJ, para.577.

³²² Judgment, para.713.

³²³ Judgment, para.713.

³²⁴ Judgment, para.713. The precise character of the information is a relevant factor in assessing the weight or probative value to be assigned to hearsay evidence, *see Karera* AJ, para.39.

³²⁵ Judgment, para.91 and citations therein.

³²⁶ Judgment, para.713. Corroboration is a relevant criterion in assessing the weight or probative value of hearsay evidence, *see Karera* AJ, para.39; *Stanišić & Župljanin* AJ, para.510.

³²⁷ Appeal, para.99; Judgment, para.713.

³²⁸ *Contra* Appeal, para.99.

W01448's evidence unreliable.³²⁹ At most it shows that, in 2010, W01448 was not able to definitively identify SHALA, who he never saw again after his imprisonment, in a photo array without SHALA's photo.³³⁰

88. SHALA's request for relief, stating that the Appeals Panel should overturn the Panel's findings relying on or corroborated by W01448's evidence, without citation to any relevant parts of the Judgment, is without basis and impermissibly vague. The Panel extensively assessed W01448's credibility³³¹ and the reasoning refutes any argument that no reasonable trier of fact could have reached the same conclusion.

5. The Panel correctly found that there was no evidence of witness 'contamination'

89. SHALA fails to demonstrate that the Panel erred in relying on the testimony of nine witnesses.³³² SHALA transparently repeats the exact arguments he made at trial,³³³ without showing that the Panel failed to consider them or erred in their assessment thereof.³³⁴ Such practice has been found 'unacceptable' where, as here, the appellant identifies no error warranting appellate intervention.³³⁵

³²⁹ Judgment, para.713. See also para.86; *Limaj* AJ, para.30.

³³⁰ See SITF00374534-00374534, admitted *proprio motu* in KSC-BC-2020-04/F00562, para.30, on the basis that it provides context for W01448's 19 April 2010 EULEX statement and contains a record of what W01448 said; SITF00374536-00374541 RED, pp.1,5 (referred to in Judgment, para.713). The SPO maintains, as submitted in SPO FTB, para.221, that the person identified by W01448 is the one most resembling SHALA amongst the nine individuals in the photoboard, see SITF00374536-SITF00374541 RED, p.4, and 059118-059144 RED2, p.7. See also *Renzaho* AJ, paras 530-532, where uncertainty in identifying of a perpetrator thirteen years later was found to be not demonstrative of a lack of knowledge of the perpetrator or capable of undermining an identification at the time.

³³¹ Judgment, paras 169-175, 713-714.

³³² Appeal, paras 100-108.

³³³ SHALA's submissions on appeal are verbatim or nearly verbatim as those in the Defence FTB. See (i) Appeal, para.101/Defence FTB, para.254, as corrected by Judgment, n.243; (ii) Appeal, para.103/Defence FTB, para.257; (iii) Appeal, para.104/Defence FTB, para.260; (iv) Appeal, para.105/Defence FTB, para.261; (v) Appeal, para.106/Defence FTB, para.263. The argument in Appeal, para.107 is an abridged version of Defence FTB, para.264.

³³⁴ Judgment, paras 115, 454 (TW4-01), 147-154 (TW4-06, TW4-07, TW4-08, TW4-09), 174-175 (W01448), 187-188 (W04733), 371-375 (TW4-10), 522, n.965 (TW4-04).

³³⁵ *Mrkšić* AJ, para.214. See also Section II; *Gucati & Haradinaj* AJ, para.32(ix); *Mustafa* AJ, para.33(ix).

90. SHALA fails to support his claim that the evidence of nine witnesses is ‘contaminated’³³⁶ or that ‘strong indications’ of such contamination exist.³³⁷ SHALA ignores that for certain witnesses, off-hand remarks or answers to completely unrelated questions reveal that at the time they identified SHALA as a perpetrator at the KMF, they had not been in contact with other witnesses. W04733’s identification of SHALA cannot be attributed to any hypothetical conversation with [REDACTED] as W04733 identified SHALA as a perpetrator as early as 2002,³³⁸ explaining to ICTY investigators shortly thereafter that, as of that time, he lacked information about [REDACTED].³³⁹ SHALA’s precise allegations are unclear, but W04733 evidently did not speak to [REDACTED] prior to giving his statements implicating SHALA, by name, in his mistreatment.

91. In response to similar arguments, the Panel specified that while SHALA characterised interactions between witnesses after their release as conversations about ‘disputed issues in this case’, no evidence supports this claim.³⁴⁰ The record does not show that the witnesses discussed this case, or any other case, but rather that infrequently, over the course of 23 years, certain witnesses, including those who live in the same town, spoke and/or met and discussed events in their lives,³⁴¹ including tragic events, such as the death of the Murder Victim.

92. The Judgment refutes any allegation that the Panel unreasonably rejected claims of contamination.³⁴² The Panel made explicit findings on each of SHALA’s

³³⁶ Appeal, para.100.

³³⁷ Appeal, para.108.

³³⁸ SITF00013181-SITF00013189 RED3,p.6.

³³⁹ [REDACTED].

³⁴⁰ See e.g. Judgment, paras 174,187.

³⁴¹ Obvious exceptions to frequency are TW4-06, TW4-07, TW4-08, TW4-09.

³⁴² *Contra* Appeal, paras 100-108. This sub-ground alleges two errors: (i) an error in finding the witnesses credible (Appeal, paras 100-101,103-107) and (ii) an error in applying a ‘double standard’ to Defence witnesses (Appeal, para.102). Appeal, para.102 is addressed below, see Section III(F)(6).

challenges³⁴³ and analysed the testimonies and statements, finding that no indication of collusion or contamination exists in the content or nature of the witnesses' evidence, having considered the manner of giving statements and the language used to describe overlapping facts.³⁴⁴ That witnesses freely admitted having spoken further supported the conclusion that allegations of collusion or contamination were unfounded.³⁴⁵ There is no evidence that witness evidence was influenced by any discussions and the Panel correctly found that the fact that a witness talked with or met another witness is not sufficient, in and of itself, to demonstrate collusion or improper influence.³⁴⁶

93. For W04733's family members, the Panel assessed their testimony and found no sign of improper influence or alignment suggesting contamination or coordination of testimony.³⁴⁷ SHALA's argument that W04733's family members' mention of a certain individual is a tell-tale sign that they rehearsed their testimony, because W04733 had never mentioned that name,³⁴⁸ misstates the evidence. W04733 specifically referred to that individual as having been detained.³⁴⁹ No error was made in finding these witnesses credible.

6. SHALA's nebulous claim about 'double standards' fails to demonstrate an error or abuse of discretion

94. SHALA's argument about 'double standards' is misguided as it ignores relevant jurisprudence, wrongly presumes that *in dubio pro reo* applies to individual pieces of

³⁴³ SHALA's claim that the Panel failed to consider possible collusion or contamination between TW4-01 [REDACTED]. See Judgment, paras 371-375.

³⁴⁴ See e.g. Judgment, paras 174,187,374,522,n.965.

³⁴⁵ See e.g. Judgment, paras 174,187,522,n.965.

³⁴⁶ See e.g. Judgment, paras 174,187. See also Judgment, para.374.

³⁴⁷ Judgment, paras 144-154.

³⁴⁸ Appeal, para.101.

³⁴⁹ 082892-TR-AT-ET Part 7,p.27.

evidence, and misrepresents the Judgment.³⁵⁰ The SPO has responded to certain claims, but not all, as these arguments lack specificity and ignore relevant findings.³⁵¹

a) SHALA ignores relevant jurisprudence

95. SHALA's complaint that the Panel did not assess credibility factor by factor across witnesses would, if entertained, result in disjointed and piecemeal evaluations of credibility, in contravention of established jurisprudence on the individualised nature of credibility assessments which require analysis of all relevant factors, including the entire body of evidence.³⁵² SHALA's approach further ignores the holistic nature of assessing credibility, as no assessment hinges on a single factor (whether capable of comparison or not), such as difficulty recalling dates or familial relationships.³⁵³ Merely stating that two witnesses, who testified about two different events, were accorded different weight by the trier of fact does not meet the standard of appeal.³⁵⁴

96. The jurisprudence establishes that the fact that a criterion for assessing the credibility of certain defence witnesses was not equally applicable to all witnesses does not invalidate the application of that factor.³⁵⁵ In *Bikindi*, the ICTR Appeals Chamber rejected claims of error based on the fact that the trial chamber treated particular defence witnesses with caution for a specific reason and did not apply that criterion to prosecution witnesses.³⁵⁶ The ICTR Appeals Chamber reiterated the broad discretion that a trial panel has to consider all relevant factors and concluded that the right to have defence witnesses examined under the same conditions as prosecution

³⁵⁰ Appeal, paras 93,94,102,109-113,195.

³⁵¹ See e.g. Appeal, paras 93-94,102. See Section II; *Gucati & Haradinaj* AJ, para.32(i); *Mustafa* AJ, para.33(i).

³⁵² See e.g. Appeal, para.111; *Ntagerura* AJ, para.174.

³⁵³ Appeal, paras 102,112,195.

³⁵⁴ *Lukić & Lukić* AJ, para.112.

³⁵⁵ *Bikindi* AJ, para.116.

³⁵⁶ *Bikindi* AJ, para.116.

witnesses 'does not encompass the factors that a Trial Chamber may consider relevant in assessing the credibility of those witnesses.'³⁵⁷

97. This same principle is reflected in *Mustafa*, wherein the Appeals Panel specified that in assessing credibility and reliability of witnesses including in relation to identified factors, the relevance of these factors must be assessed on a case-by-case basis – as such, the Panel's *consideration and application* of the factors used to determine a witness's credibility will vary *according to each witness's testimony*.³⁵⁸

98. Further, SHALA's invocation of *in dubio pro reo* is misplaced. The principle, a corollary of the proof beyond a reasonable doubt standard, applies to findings required for a conviction, including elements of the crimes charged.³⁵⁹ It does not apply to individual pieces of evidence and findings of fact on which the judgment does not rely.³⁶⁰

b) SHALA misrepresents the Judgment

99. In claiming that the Panel allowed for inconsistencies in the date of his arrest for TW4-01, but did not allow the same for TW4-02, SHALA fails to show that the two witnesses were treated differently.³⁶¹ As noted above, the Panel is not required to assess credibility factors in exactly the same manner across witnesses. However, even on SHALA's interpretation, this example fails to support his claim and suggests the opposite. After fully reviewing TW4-02's statements and identifying irreconcilable internal inconsistencies, and then considering other relevant evidence,³⁶² the Panel determined that it could not rely on his evidence concerning the commencement of his detention.³⁶³ Regarding TW4-01, the Panel also found that it could not rely on his

³⁵⁷ *Bikindi* AJ, para.116.

³⁵⁸ *Mustafa* AJ, para.233(emphasis added); Judgment, para.82.

³⁵⁹ *Limaj* AJ, para.21.

³⁶⁰ *Limaj* AJ, para.21, citing *Kvočka* AJ, paras 623-624. See also *Mustafa* AJ, para.368; Judgment, para.75.

³⁶¹ Appeal, para.112.

³⁶² Judgment, paras 534-538. See para.537 (TW4-04's evidence placed TW4-02 [REDACTED]).

³⁶³ Judgment, para.539.

evidence concerning the date he was apprehended in light of other evidence.³⁶⁴ In both instances, the Panel considered the witnesses' statements and other relevant evidence, and was unable to rely on the witnesses' statements concerning the apprehension dates. No 'double standard' in assessing the evidence is shown.

100. SHALA's claim that the Panel applied a 'double standard' by accepting a temporal marker as helpful for W01448 and not for TW4-02 ignores that the two witnesses are dissimilar in the degree of uncertainty surrounding their respective apprehension dates.³⁶⁵ Further, the attempt to compare these two witnesses and deduce the application of a 'double standard' ignores that a factor that may be significant or helpful for one witness may not be for another.³⁶⁶ In this regard, the Panel provided a lengthy explanation that TW4-02 selectively offered 'implausible and inconsistent' evidence and then reasonably relied on other evidence, to determine the apprehension date.³⁶⁷ SHALA's remaining arguments about TW4-02 should be dismissed as bare assertions of a 'preferred narrative',³⁶⁸ insufficiently precise claims about the effect on unidentified 'evidence for incriminating purposes' and misrepresentations.³⁶⁹

101. The Panel's determinations on witness credibility are not reflective of 'double standards' between witnesses. The Panel's decision to treat certain witnesses with caution is the consequence of its evaluation of the totality of the evidence presented. No error is shown by SHALA and Ground 6 should be dismissed.

³⁶⁴ Judgment, para.378.

³⁶⁵ *Compare* Judgment, paras 475,534.

³⁶⁶ *Mustafa AJ*, para.233.

³⁶⁷ Judgment, paras 124-126,534-539.

³⁶⁸ *See* Sections III(F)(1), (J)(6).

³⁶⁹ Appeal, para.112.

G. Ground 7: The Panel properly relied on evidence admitted pursuant to Rules 153 and 155³⁷⁰

102. SHALA's claim that his rights were breached due to the Panel's treatment of Rule 153 and Rule 155 evidence misrepresents the Judgment, and ignores established jurisprudence.

103. None of the factual findings identified by SHALA as based solely or to a decisive extent on untested evidence played a decisive role in the Panel's determinations on his responsibility. In addition to not being 'decisive', the majority of these findings are corroborated by evidence that SHALA fails to acknowledge.

104. Consistent with Rule 140(4)(a), international human rights jurisprudence proscribes convictions based solely or decisively on the evidence of a witness whom the defence could not confront,³⁷¹ but permits such evidence to be considered in the presence of corroboration.³⁷² As such, there is no prohibition against relying on Rule 155 witnesses to establish aspects of an accused's conduct, provided they are not the sole or a decisive basis upon which the accused's responsibility is determined.³⁷³ Equally, when a conviction under one count is rooted in a number of different incidents, a panel can legitimately establish some of them through written evidence.³⁷⁴ SHALA's failure to acknowledge these principles is a fatal shortcoming warranting dismissal of Ground 7 in its entirety.³⁷⁵

Notice, paras 13-15 characterise the errors alleged under Ground 7 as errors of law and fact, but the Appeal contains no submissions on the standard applicable to factual errors.

³⁷¹ See e.g. *Al-Khawaja and Thaery v. UK*, para.131, interpreting the 'decisive' requirement as evidence of such importance that is likely to be determinative of the outcome of the case; *Lucà v. Italy*, paras 43-45; *Saidi v. France*, para.44.

³⁷² *Al-Khawaja and Thaery v. UK*, para.156; *Artner v. Austria*, paras 22-24. See also *Doorson v. The Netherlands*, para.80.

³⁷³ *Popović AJ*, para.106.

³⁷⁴ *Popović AJ*, paras 103-104; *Ntaganda AJ*, paras 629-630. Rule 140(4) prohibits a conviction based solely or to a decisive extent on the statement of a witness whom the Defence could not cross-examine.

³⁷⁵ *Gucati & Haradinaj AJ*, para.32; *Mustafa AJ*, para.33.

105. SHALA's challenges, examined below, can be divided into two categories: the first concerns some of the factual determinations considered by the Panel in relation to his JCE liability, and relate mainly to the evidence of Rule 155 witness W04733.³⁷⁶ The other concerns selected facts underlying the Panel's determinations on arbitrary detention and torture,³⁷⁷ and relate to the evidence of Rule 155 witness W01448, and Rule 153 witnesses TW4-02 and TW4-04. Throughout the Judgment, as demonstrated below, the Panel took great care in ensuring that reliance on the evidence of these witnesses was never in breach of SHALA's rights.³⁷⁸

1. The Panel made no findings on SHALA's responsibility based exclusively or to a decisive extent on untested evidence

a) W04733's evidence was not impermissibly relied on by the Panel to establish SHALA's JCE responsibility

106. SHALA singles out five findings concerning his conduct – as described by W04733 – claiming that they were decisive for his conviction:³⁷⁹

- Accusing W04733 of being a spy,³⁸⁰ which SHALA argues was relied on by the Panel to establish his *mens rea* for torture, JCE membership, and his significant contribution to the JCE.³⁸¹
- Ordering [REDACTED] to beat W04733,³⁸² which SHALA argues was used to establish his position of autonomy³⁸³ and his significant contribution to the JCE.³⁸⁴

³⁷⁶ Appeal, paras 118-119, 129, 131-132, 137-143.

³⁷⁷ Appeal, paras 121-128, 130, 133-136.

³⁷⁸ Judgment, paras 52, 87, 183; Rule 155 Decision, paras 29, 42, 70; Rule 153 Decision, paras 40, 51, 54.

³⁷⁹ Appeal, paras 142-143.

³⁸⁰ Judgment, para. 1025(iv); Appeal, paras 132, 142(iv).

³⁸¹ Appeal, para. 132.

³⁸² Judgment, para. 1025(v); Appeal, paras 138, 142(v).

³⁸³ Appeal, para. 139.

³⁸⁴ Appeal, paras 141-142.

- Demanding that [REDACTED] identify [REDACTED] as Serb collaborators,³⁸⁵ which SHALA argues was used to establish his intent for arbitrary detention, the JCE common purpose, and his significant contribution thereto.³⁸⁶
- Participating in W04733's transfer to the KMF, only a few hours before the 20 May 1999 incident,³⁸⁷ which SHALA argues was used to establish his intent for arbitrary detention, the JCE common purpose, his membership in the JCE, and his significant contribution thereto.³⁸⁸
- Telling W04733 that he would be executed,³⁸⁹ which, under this ground, SHALA only considers in relation to the findings on his position of autonomy at the KMF.³⁹⁰

107. SHALA does not demonstrate that these findings were either individually or collectively indispensable to any aspect of his conviction. They represent only some of the evidence the Panel reasonably relied upon, and SHALA's responsibility would stand firmly even in their absence.

³⁸⁵ Judgment, para. 1025(vi); Appeal, paras 131, 142(vi).

³⁸⁶ Appeal, para. 131.

³⁸⁷ Appeal, paras 118-119, 142(i).

³⁸⁸ *Contra* Appeal, paras 119, 142-143.

³⁸⁹ Appeal, para. 138.

³⁹⁰ Appeal, paras 138-139.

(1) *The existence and scope of the JCE is established irrespective of W04733's evidence on SHALA's interrogation of [REDACTED],³⁹¹ and his participation in his transfer to the KMF³⁹²*

108. The Panel's reasoning leaves no doubt that neither W04733's transfer to the KMF,³⁹³ nor the interrogations of either [REDACTED]³⁹⁴ or the Murder Victim,³⁹⁵ were the sole or decisive basis on which the JCE common purpose was established.

109. In fact, the Panel based its findings on the common plan on extensive and mutually corroborative evidence of the systematic detention, interrogation, and mistreatment of 18 victims, the murder of one of them, and the unified acts and statements of the JCE members, including SHALA.³⁹⁶

(2) *SHALA's membership in the JCE is established irrespective of his participation in the transfer of W04733 and of SHALA calling W04733 a spy*

110. SHALA participating in W04733's transfer to the KMF³⁹⁷ and calling W04733 a spy³⁹⁸ are just two factors considered by the Panel to establish SHALA's membership in the JCE.³⁹⁹ The Panel also considered SHALA's membership in the KLA, his presence at the KMF on several occasions, where he could enter and leave without restriction, and – importantly – his free and unconstrained participation in the

³⁹¹ *Contra* Appeal, para.131.

³⁹² *Contra* Appeal, paras 118-119.

³⁹³ *See* Judgment, para.1011, where W04733's arrest is listed as one of many arrests which followed the same pattern and *modus operandi*.

³⁹⁴ Judgment, para.1014.

³⁹⁵ Appeal, paras 128-129. SHALA claims that evidence of the interrogation of the Murder Victim comes exclusively from W01448. However, as demonstrated below under Section III(G)(3)(b), this is incorrect, and W01448's evidence is strongly corroborated [REDACTED].

³⁹⁶ Judgment, paras 1003-1019, 1021, 1037-1038.

³⁹⁷ Appeal, para.119.

³⁹⁸ Appeal, paras 132, 138-139, 225.

³⁹⁹ Judgment, para.1007.

mistreatment of detainees alongside other JCE members, including Sabit GECI and Xhemshit KRASNIQI.⁴⁰⁰

(3) *SHALA's significant contribution to the JCE is established on the mutually corroborating evidence of TW4-01, W01448, and W04733, and SHALA's own statements*

111. Contrary to SHALA's claim,⁴⁰¹ W04733's evidence alone was not indispensable, nor did it play a decisive role, in the Panel's determination that he significantly contributed to the JCE.⁴⁰² This finding was based, *inter alia*, on SHALA continuing and enforcing the arbitrary detention of a number of detainees on or around 20 May and 4 June 1999, and his participation in their mistreatment.⁴⁰³ These findings were based on the mutually corroborative evidence of multiple witnesses, including TW4-01, whom SHALA extensively cross-examined,⁴⁰⁴ in addition to SHALA's own partial admissions about his mistreatment of [REDACTED].⁴⁰⁵

112. Three of the Panel's findings claimed by SHALA to be based solely on the evidence of W04733,⁴⁰⁶ are simply specific manifestations of SHALA's broader participation in the mistreatment of 20 May 1999.⁴⁰⁷ They are only a fraction of the factual determinations underpinning his JCE liability.⁴⁰⁸ The fourth finding concerns SHALA's participation in W04733's transfer to the KMF on 20 May 1999,⁴⁰⁹ which took

⁴⁰⁰ Judgment, paras 1007-1008.

⁴⁰¹ Appeal, paras 142-143.

⁴⁰² *Contra* Appeal, paras 142-143.

⁴⁰³ Judgment, para.1025(ii)-(iii),(vii).

⁴⁰⁴ Judgment, paras 688,706,714,786-796,856.

⁴⁰⁵ Judgment, para.862.

⁴⁰⁶ Appeal, para.142(iv)-(vi); Judgment, para.1025(iv)-(vi).

⁴⁰⁷ *See e.g.* Judgment, paras 655-661, where the Panel analysed the mutually corroborating evidence of TW4-01 and W01448 that the beatings lasted 'the whole night' (para.655), that TW4-01 was interrogated and mistreated for 'several hours' (para.657), and that TW4-01 and the Murder Victim were mistreated until the morning (para.660).

⁴⁰⁸ Judgment, para.1025.

⁴⁰⁹ Judgment, para.1025(i).

place shortly before the mistreatment began.⁴¹⁰ Even without these actions, SHALA's participation in the 20 May 1999 mistreatment of detainees was extensive, characterised by high levels of cruelty and violence, and based on the evidence of multiple witnesses:⁴¹¹

- TW4-01 witnessed SHALA beating W04733⁴¹² while he was crying, traumatised,⁴¹³ and covered in blood,⁴¹⁴ thereby corroborating W04733's own characterisation of SHALA's violence as 'inhumane',⁴¹⁵
- TW4-01 testified that SHALA was the first one to hit him with a rubber bar, and continued to beat him 'as much as he could,' smiling as he mistreated him and the other detainees.⁴¹⁶ SHALA partly admitted his responsibility in this regard.⁴¹⁷
- W01448, another victim, stated that SHALA was the one who beat him the most during that night,⁴¹⁸ an account corroborated by TW4-01 and W04733, who both saw SHALA that night actively engaged in the beatings.⁴¹⁹

113. SHALA's contribution to the JCE is further based on his participation in the 4 June 1999 mistreatment, when SHALA and other KLA members interrogated and beat [REDACTED] the Murder Victim until they were unable to walk, shot them, and continued beating them after the shooting, with the Murder Victim dying of his wounds the following day.⁴²⁰ This was the 'hardest night' for [REDACTED] and the

⁴¹⁰ SITF00013852-00013869 RED6,pp.SITF00013856-SITF00013857. *See also* 30 May 2023,p.1455, where TW4-01 testified that W04733's mistreatment in the Office happened the same night that he was brought to the KMF from Durrës.

⁴¹¹ Judgment,paras 694,697,709-711,911.

⁴¹² Judgment,para.697.

⁴¹³ 30 May 2023,p.1454.

⁴¹⁴ 30 May 2023,p.1452.

⁴¹⁵ Judgment,paras 690-691,694,707,904.

⁴¹⁶ Judgment,paras 655,660,663.

⁴¹⁷ Judgment,para.862.

⁴¹⁸ Judgment,para.707.

⁴¹⁹ Judgment,paras 655 (where the Panel considered TW4-01's testimony that SHALA beat 'us' as much as he could),709-711.

⁴²⁰ Judgment,paras 674-677,782,830-832.

Murder Victim, with SHALA and the other perpetrators doing ‘unimaginable things’ to them.⁴²¹

114. A JCE member’s contribution need not be necessary or substantial, but at least ‘significant’,⁴²² requiring a case-by-case assessment of the facts.⁴²³ While the contribution need not be criminal *per se*,⁴²⁴ SHALA’s conduct on both 20 May and 4 June 1999 was plainly criminal. Ultimately, the Panel found that SHALA’s contribution ‘went far beyond’ the threshold required for a conviction.⁴²⁵

115. In this context, SHALA utterly fails to demonstrate that, if he had not participated in W04733’s transfer to the KMF; accused W04733 of being a spy; ordered [REDACTED] to beat W04733; and demanded that [REDACTED] implicate [REDACTED] as Serb collaborators,⁴²⁶ his conduct would not amount to a significant contribution to the JCE. Indeed, the events of 20 May 1999 and 4 June 1999, in which SHALA willingly participated, were extremely harmful forms of torture, wherein KLA members mistreated detainees by inflicting head-splitting blows with batons and guns, waterboarding,⁴²⁷ throwing salt on their wounds,⁴²⁸ extinguishing cigarettes on their bodies,⁴²⁹ and firing shots at two of them.⁴³⁰ The consequences on the mental and physical health of those who survived this ordeal were long lasting and devastating.⁴³¹

⁴²¹ Judgment, para.674.

⁴²² *Mustafa* TJ, para.740; *Mustafa* AJ, para.418; *Brdanin* AJ, para.430; *Simba* AJ, para.303.

⁴²³ *Krajišnik* AJ, para.696.

⁴²⁴ *Krajišnik* AJ, para.695.

⁴²⁵ Judgment, para.1028.

⁴²⁶ Appeal, para.142(i),(iv)-(vi).

⁴²⁷ Judgment, para.655.

⁴²⁸ Judgment, paras 655,694.

⁴²⁹ Judgment, para.690.

⁴³⁰ Judgment, paras 675-678.

⁴³¹ Judgment, paras 684-687,700-705,753.

(4) *SHALA's intent for arbitrary detention and torture is established irrespective of his involvement in W04733's transfer and his questioning of the victims while he was beating them*⁴³²

116. The Panel established that SHALA possessed intent for arbitrary detention based on his repeated participation in mistreatments, coupled with his knowledge that detainees were held at the KMF.⁴³³ In reaching this conclusion, the Panel considered, *inter alia*, his participation in the mistreatment of W04733 and W01448 on 20 May 1999, and of [REDACTED], in addition to his presence at the KMF, where the victims were arbitrarily detained, on multiple occasions.⁴³⁴ Based on SHALA's participation in the mistreatment of multiple detainees 'on at least two separate occasions', the Panel found that 'the Defence proposition that he was not aware of their detention is untenable'.⁴³⁵ It follows that, while the Panel also considered SHALA's participation in W04733's transfer and his interrogation of [REDACTED] during the 20 May 1999 mistreatments, it did not deem these facts indispensable to establish SHALA's *mens rea*.

117. SHALA's intent for torture is similarly based on his participation in the mistreatment of W04733 and W01448 on 20 May 1999, and of [REDACTED],⁴³⁶ which satisfied the Panel that he intended to inflict severe pain or suffering on the detainees.

118. To establish the special purpose required for the war crime of torture, the Panel did not only rely on W04733's evidence about SHALA's personal accusations against W04733 and his questioning of [REDACTED].⁴³⁷ It also considered that, as SHALA was beating W04733 and other victims, the perpetrators accused them of collaborating

⁴³² *Contra* Appeal, paras 119, 131-132.

⁴³³ Judgment, para. 955.

⁴³⁴ Judgment, para. 952.

⁴³⁵ Judgment, para. 954.

⁴³⁶ Judgment, para. 978.

⁴³⁷ Judgment, para. 981. While not indispensable for SHALA's conviction, these findings are strongly corroborated, as demonstrated below under Section G(2).

with the Serbs, raping women and burning houses, and forced them to witness the mistreatment of their co-detainees.⁴³⁸ On 20 May 1999, as SHALA was beating W04733, TW4-01, and W01448 were forced to watch while they waited their turn.⁴³⁹ That same night, in SHALA's presence, Sabit GECI and Xhemshit KRASNIQI accused TW4-01 of being a spy and forced him to make confessions.⁴⁴⁰ On or about 4 June 1999, SHALA participated in the mistreatment of [REDACTED] the Murder Victim while they were accused of being spies and asked to confess [REDACTED],⁴⁴¹ a circumstance corroborated by SHALA.⁴⁴²

119. These findings demonstrate that SHALA knew that the mistreatment he was participating in was being inflicted for the special purpose required by torture, irrespective of his participation in W04733's transfer,⁴⁴³ or of SHALA calling W04733 a spy.⁴⁴⁴ This knowledge, coupled with SHALA's continued participation in mistreatment, formed an entirely legitimate basis to establish SHALA's intent for torture.⁴⁴⁵

(5) The Panel's finding that SHALA enjoyed a position of autonomy at the KMF was not decisive for SHALA's conviction, and is based on a wider evidentiary basis than that acknowledged by SHALA⁴⁴⁶

120. W04733's evidence was not decisive to establish that SHALA enjoyed a position of autonomy at the KMF.⁴⁴⁷ This is not a material element of SHALA's responsibility

⁴³⁸ Judgment, paras 981-983.

⁴³⁹ Judgment, para.694.

⁴⁴⁰ Judgment, para.656.

⁴⁴¹ Judgment, para.404.

⁴⁴² Judgment, paras 862-863.

⁴⁴³ Appeal, para.119.

⁴⁴⁴ Appeal, para.132.

⁴⁴⁵ See e.g. *Kvočka* AJ, para.243; *Dorđević* AJ, para.512; *Krajišnik* AJ, paras 202,697.

⁴⁴⁶ Appeal, paras 138-139.

⁴⁴⁷ *Contra* Appeal, paras 137-139,141.

through JCE,⁴⁴⁸ nor did the Panel consider it as such.⁴⁴⁹ To the extent that the Panel considered, in assessing his contribution to the JCE,⁴⁵⁰ that SHALA enjoyed a certain degree of *de facto* autonomy and authority, these findings are based on several examples of SHALA's conduct,⁴⁵¹ which he fails to acknowledge.⁴⁵²

121. The Panel considered, for instance, SHALA's behaviour during the mistreatments as it emerged from the evidence of TW4-01, W04733, and W01448.⁴⁵³ It considered TW4-01's evidence that SHALA was the first to hit him,⁴⁵⁴ that he collaborated closely with Xhemshit KRASNIQI and Sabit GECI,⁴⁵⁵ who were the highest-ranking KLA officials at the KMF in relation to detentions,⁴⁵⁶ and that he actively participated in the mistreatments without fear of consequences.⁴⁵⁷ It also considered the evidence of TW4-01 and TW4-10 that SHALA was able to move freely in and out of the KMF, when all the other soldiers had to request permission to do so.⁴⁵⁸

122. SHALA himself boasted about enjoying a 'superior' or 'senior officer' status within the KLA when he met [REDACTED] at the KMF.⁴⁵⁹ SHALA repeated these claims, after the war, in his Belgian asylum applications.⁴⁶⁰

⁴⁴⁸ Judgment, paras 998-1002, 1007.

⁴⁴⁹ Judgment, para. 1027.

⁴⁵⁰ Judgment, paras 1025-1028.

⁴⁵¹ Judgment, para. 914.

⁴⁵² Appeal, paras 138-139.

⁴⁵³ Judgment, paras 903-909.

⁴⁵⁴ Judgment, para. 904.

⁴⁵⁵ Judgment, para. 909, *citing* 6 June 2023, p. 1928, where TW4-01 testified that SHALA collaborated 'really closely together in everything, including the mistreatments' with Xhemshit KRASNIQI.

⁴⁵⁶ Judgment, paras 343-349.

⁴⁵⁷ Judgment, para. 914.

⁴⁵⁸ Judgment, paras 370, 841, 846-847, 901-902, 914.

⁴⁵⁹ 30 May 2023, p. 1477.

⁴⁶⁰ U009-9245-U009-9258-ET, p. U009-9256.

(6) *Sokol DOBRUNA's participation in the interrogation of W04733 is not determinative of any aspect of SHALA's conviction*

123. SHALA identifies a further finding which he avers was based solely on the evidence of W04733, without arguing that it had any decisive role in any aspect of his conviction: Sokol DOBRUNA's involvement in W04733's interrogation. Absent any submission on how reversal of this finding is capable of affecting SHALA's conviction, this part of Ground 7 should be summarily dismissed.

124. To the extent that this finding is relevant to establishing that KMF detainees were interrogated, it plays a minimal role, as the Panel established that interrogations took place based on the evidence of numerous detainees⁴⁶¹ and of KLA members.⁴⁶² It also made extensive findings on the interrogations that took place on 20 May 1999,⁴⁶³ on 4 June 1999,⁴⁶⁴ and other occasions.⁴⁶⁵ The Panel was fully entitled to make this corroborative finding based on W04733's evidence.⁴⁶⁶

(7) *W04733's evidence was not decisive for SHALA's conviction*

125. None of the findings claimed by SHALA to be based solely or decisively on the untested evidence of W04733 were decisive in establishing any element of SHALA's responsibility. Therefore, even if – as SHALA claims – these findings were based solely on the evidence of W04733, their consideration by the Panel in its overall assessment of the evidence would be entirely legitimate.⁴⁶⁷ However, as outlined below, SHALA's

⁴⁶¹ See e.g. Judgment, paras 122,129,139,165,171,178,341.

⁴⁶² Judgment, paras 157,203-204.

⁴⁶³ See e.g. Judgment, paras 385,471,480,688.

⁴⁶⁴ Judgment, para.688.

⁴⁶⁵ See e.g. Judgment, paras 423-424.

⁴⁶⁶ SHALA fails to acknowledge that the Panel considered W04733's evidence on this point corroborated by W04848, see Judgment, paras 354-355.

⁴⁶⁷ The significance of the untested evidence will need to be assessed against the background of all the other evidence in a case, *Al-Khawaja and Thaery v. UK*, paras 131,134.

claims in this regard are also incorrect, and W04733's evidence is corroborated by other evidence that SHALA fails to acknowledge.

2. W04733's evidence is corroborated

126. SHALA accused W04733 of being a spy on or around 20 May 1999.⁴⁶⁸ Contrary to SHALA's submissions,⁴⁶⁹ this finding is not only based on the evidence of W04733, but is corroborated by that of TW4-01 and W01448, who stated that the perpetrators on 20 May 1999 repeatedly accused W04733 of collaborating with Serbs and raping women.⁴⁷⁰ Similar accusations were wielded against most victims that night, including TW4-01 and the Murder Victim,⁴⁷¹ and against all those who were detained at the KMF.⁴⁷² SHALA himself stated that there were rumours that W04733, as a policeman, had tortured people,⁴⁷³ further corroborating W04733's evidence that SHALA accused him of being a spy.

127. SHALA questioned [REDACTED] and demanded [REDACTED] make a confession regarding [REDACTED] on 20 May 1999.⁴⁷⁴ This finding is not only based on the evidence of W04733.⁴⁷⁵ It is corroborated by TW4-01, who testified that [REDACTED] was in the same room that night,⁴⁷⁶ a circumstance which SHALA did not confront TW4-01 with during cross-examination. It is also corroborated by W01448, who stated

⁴⁶⁸ Judgment, paras 692,905,1025(iv).

⁴⁶⁹ Appeal, paras 132,142(iv).

⁴⁷⁰ Judgment, para.694, citing 30 May 2023, p.1455, where TW4-01 testified that on 20 May 1999, the perpetrators questioned W04733 about his role as a policeman and accused him of rapes and of the burning of Albanian houses; SITF00013852-00013869 RED6, pp.SITF00013856-SITF00013857; SITF00013736-SITF00013800 RED5, p.SITF00013744, where W01448 stated that during his mistreatment, the perpetrators accused W04733 of continuing to work for Serbian institutions after all the other Albanians had been fired. See also *Khawaja and Thaery v. UK*, paras 156-158.

⁴⁷¹ Judgment, paras 656,659. See also 066888-TR-ET Part 1 Revised, pp.153,155,157, where he levied similar accusations against TW4-01 and the Murder Victim.

⁴⁷² Judgment, para.648, citing 30 May 2023, p.1466. See also 2 May 2023, p.1231. Evidence demonstrating a similar pattern of conduct may be used as corroborative evidence, see *Popović* AJ, paras 103-104.

⁴⁷³ 066888-TR-ET Part 1 Revised, p.183.

⁴⁷⁴ Judgment, paras 718,720,905,1025(vi).

⁴⁷⁵ *Contra* Appeal, paras 131,142(vi).

⁴⁷⁶ 30 May 2023, pp.1452,1454.

that an ‘interrogator’ and Xhemshit KRASNIQI asked [REDACTED] to admit that [REDACTED] used to help the Serbs.⁴⁷⁷ Finally, it is consistent with the findings, recalled above, that SHALA was heavily involved in the mistreatment of detainees on 20 May 1999.

128. *SHALA ordering [REDACTED] to beat W04733.*⁴⁷⁸ In reaching this finding, the Panel considered that W04733 repeated ‘in a consistent manner across his statements’⁴⁷⁹ that SHALA had ordered either [REDACTED] to beat him. The Panel considered this evidence to be corroborated by [REDACTED].⁴⁸⁰ Although [REDACTED] remembered that it was Sabit GECI who imparted that order, he added that the other perpetrators, including SHALA, were also present.⁴⁸¹ It was within the Panel’s discretion to believe the recollection of W04733 on who had imparted the order, considering his consistency over time with respect to this detail.

129. *SHALA’s participation in W04733’s transfer from Romanat to the KMF.*⁴⁸² SHALA’s claim that this finding was based ‘solely’ on the written statements of W04733⁴⁸³ ignores corroborating evidence for multiple elements of this account as explicitly considered by the Panel.

130. The Panel specifically considered that, during the transport, W04733 heard others persons in the car refer to SHALA as ‘Ujku’,⁴⁸⁴ which was SHALA’s *nom de guerre*, as established by TW4-01, W04754, documentary evidence, and confirmed by SHALA himself.⁴⁸⁵ The Panel further considered SHALA’s evidence, as corroborated by witness Asllan ELEZAJ, that SHALA used to make wolf-like howls during the

⁴⁷⁷ SITF00013852-00013869 RED6,p.SITF00013857.

⁴⁷⁸ Judgment,paras 690,905.

⁴⁷⁹ Judgment,para.690.

⁴⁸⁰ Judgment,para.694.

⁴⁸¹ Judgment,para.694, *citing* 30 May 2023,p.1454.

⁴⁸² Judgment,paras 446-447.

⁴⁸³ Appeal,para.118.

⁴⁸⁴ Judgment,paras 447,451.

⁴⁸⁵ Judgment,para.285,n.473.

war.⁴⁸⁶ This evidence, in fact, corroborates W04733's account that, during the transport, SHALA was howling.⁴⁸⁷ This is powerful corroboration, as it concerns a uniquely identifying behaviour of SHALA.

131. W04733's evidence on SHALA's involvement in his transport finds further corroboration when contextualised and assessed holistically.⁴⁸⁸ After being transported to the KMF on or around 20 May 1999, on the same day, W04733 was moved to the Office where SHALA and other KLA members severely beat him and other detainees.⁴⁸⁹ W01448 recalled that this beating began approximately one hour after W04733 had arrived at the KMF.⁴⁹⁰ SHALA's presence at the KMF at this time, and his involvement in W04733's mistreatment, corroborate W04733's account that he had travelled to the KMF earlier that day, and that SHALA was involved with his transfer.

132. Finally, Romanat is a small town located approximately 18 km from the centre of Durrës,⁴⁹¹ where W04733 was detained before his transfer to the KMF.⁴⁹² In Romanat, there was a former Albanian army facility used by the KLA, where a KLA officer accused W04733 of having killed people and raped women.⁴⁹³ In his 2019 statement, when asked about W04733, SHALA stated that he learned accusations about W04733 in "the Durrës camp",⁴⁹⁴ which lends further corroboration to the fact that SHALA picked up W04733 near Durrës and transferred him to the KMF.

⁴⁸⁶ Judgment, paras 285,912.

⁴⁸⁷ Judgment, paras 447,451-452,454. *See also* para.912.

⁴⁸⁸ *Halilović* AJ, paras 125,128.

⁴⁸⁹ Judgment, paras 903-904.

⁴⁹⁰ SITF00013852-00013869 RED6,p.SITF00013856. *See also* 30 May 2023,p.1455, where TW4-01 testified that W04733 was brought to the Office where he was mistreated the same night that he was brought to the KMF from Durrës.

⁴⁹¹ The distance can be verified on [Google Maps](#).

⁴⁹² Judgment, para.446.

⁴⁹³ Judgment, para.446.

⁴⁹⁴ 066888-TR-ET Part 1 Revised,p.183.

3. The Panel committed no error in relying on the evidence of W01448, TW4-02, and TW4-04⁴⁹⁵

133. SHALA's grievances with the Panel's reliance on the evidence of W01448, TW4-02, and TW4-04 are premised on an incorrect understanding of the law. The Panel could legitimately rely on the written evidence of these witnesses to establish some of the criminal acts upon which the commission of arbitrary detention and torture was established.⁴⁹⁶ SHALA fails to explain how the Panel erred in admitting the evidence of TW4-02 and TW4-04 pursuant to Rule 153,⁴⁹⁷ two purely crime-base witnesses whose evidence does not go to SHALA's acts and conduct.

134. SHALA, in fact, takes issue with selected factual findings, which he claims were based on untested evidence of W01448, TW4-02, and TW4-04,⁴⁹⁸ without acknowledging that they only represent a small fraction of the factual basis on which the convictions for arbitrary detention and torture rest.⁴⁹⁹

a) The Panel's findings on arbitrary detention are not based solely or to a decisive extent on untested evidence

135. Findings on the detention of the six individuals indicated by SHALA are corroborated by evidence that SHALA fails to acknowledge.⁵⁰⁰ Further, they are not indispensable to SHALA's conviction for arbitrary detention, which is based on the detention of 18 people.⁵⁰¹

⁴⁹⁵ *Contra Appeal*, para.117.

⁴⁹⁶ See e.g. *Popović AJ*, paras 103-104, citing *Stakić AJ*, para.201(8); *Ntaganda AJ*, paras 629-630; *Galić Rule 92bis(C) Decision*, para.12,n.34; *Schatschaschwili v. Germany*, paras 106-107; *Al-Khawaja and Thaery v. UK*, para.147; *Lucà v. Italy*, paras 43-45; *Saidi v. France*, para.44.

⁴⁹⁷ *Appeal*, para.117.

⁴⁹⁸ *Appeal*, paras 121-126,128-136.

⁴⁹⁹ See e.g. *Judgment*, paras 415-473,495-512,558,587,785.

⁵⁰⁰ *Contra Appeal*, paras 121-124.

⁵⁰¹ *Judgment*, paras 587,945. See also *Popović AJ*, para.103.

136. The detention of [REDACTED] and another female detainee is corroborated by TW4-01 who, in addition to [REDACTED], saw two other women who had been detained and beaten at the KMF.⁵⁰²

137. The finding that [REDACTED]⁵⁰³ was arbitrarily detained was based, as conceded by SHALA, on the mutually corroborative evidence of TW4-01, W01448, and TW4-02.⁵⁰⁴ The Panel also found these witnesses' evidence in relation to [REDACTED] consistent with the treatment of other persons detained at the KMF.⁵⁰⁵

138. The finding on [REDACTED]'s⁵⁰⁶ arbitrary detention was based on the evidence of three mutually corroborating witnesses.⁵⁰⁷ Even though their evidence was admitted pursuant to Rules 155 (W01448) and 153 (TW4-02 and TW4-04), the Panel was not prevented from relying on them, since [REDACTED]'s detention did not form the sole basis for SHALA's arbitrary detention conviction. The Panel's determinations were also reinforced by other evidence demonstrating a similar pattern of conduct with respect to other detainees.⁵⁰⁸

139. Findings on [REDACTED]'s detention⁵⁰⁹ were based on the evidence of TW4-01, TW4-02, and W01448,⁵¹⁰ with TW4-02 stating that [REDACTED] was mistreated during his detention.⁵¹¹ The Panel correctly considered the evidence of these witnesses holistically, finding it consistent with other evidence on the treatment of those detained in the Detention Building.⁵¹²

⁵⁰² 31 May 2023, pp.1561,1565-1566. *Contra Appeal*, para.121.

⁵⁰³ *Appeal*, para.122.

⁵⁰⁴ *Judgment*, paras 390,485,543-544,573-577.

⁵⁰⁵ *Judgment*, para.576.

⁵⁰⁶ *Appeal*, para.123.

⁵⁰⁷ *Judgment*, paras 578-581.

⁵⁰⁸ *Popović AJ*, paras 103-104, *citing Kupreškić AJ*, para.321.

⁵⁰⁹ *Appeal*, para.124.

⁵¹⁰ *Judgment*, para.582.

⁵¹¹ *Judgment*, para.583.

⁵¹² *Judgment*, para.583.

b) The Panel's findings on torture are not based solely or to a decisive extent on untested evidence

140. SHALA takes issue with isolated factual findings which he claims are based on untested evidence, and formed the basis for the Panel's findings on the *actus reus*⁵¹³ and *mens rea*⁵¹⁴ of torture, and for the JCE's common purpose.⁵¹⁵ SHALA simply points out that these findings were considered by the Panel in relation to torture, without demonstrating that they were indispensable, or played a decisive role in SHALA's conviction thereof. His submissions should be dismissed accordingly.⁵¹⁶

141. SHALA fails to acknowledge that the Panel's findings on the *actus reus* for torture are based on a wide array of circumstances and incidents, established on the basis of the mutually corroborative evidence of several witnesses. They include the living, hygienic, and sleeping conditions for those detained at the KMF,⁵¹⁷ not only in the Command Building Detention Room and Room 3,⁵¹⁸ but also in Room 1.

142. Room 1 was the holding space hosting the largest number of detainees,⁵¹⁹ where those initially detained in the Command Building Detention Room were eventually relocated.⁵²⁰

143. The Panel made multiple findings that the detainees were physically and psychologically abused on a daily basis by several members of the KLA,⁵²¹ including SHALA.⁵²² The sources of these findings include TW4-01 and TW4-11, whom SHALA

⁵¹³ Appeal, paras 125-128, 130-136.

⁵¹⁴ Appeal, para. 129.

⁵¹⁵ Appeal, paras 129, 131-132. The role of these findings in this regard is discussed above under Section III(G)(1)(a)(1)-(4).

⁵¹⁶ See Section II.

⁵¹⁷ Judgment, paras 613, 622, 627, 632.

⁵¹⁸ Appeal, paras 125-126.

⁵¹⁹ Judgment, para. 588. See also paras 389, 425, 459, 483, 485, 504.

⁵²⁰ Judgment, paras 385, 458-459, 482, 1012.

⁵²¹ Judgment, paras 639-653, 688, 706, 714, 720, 723, 726, 731.

⁵²² Judgment, paras 688, 706, 714, 725, 731, 735, 748-753.

extensively cross-examined, and whose evidence is corroborative of the accounts of other witnesses, including W04733 and W01448.⁵²³

144. Furthermore, most of the incidents claimed by SHALA to be based on untested evidence are in fact corroborated. The small size of the Command Building Detention Room is not based solely on the evidence of W01448 and W04733,⁵²⁴ but is corroborated by TW4-01,⁵²⁵ and by a photograph of that room, showing the extremely limited space available to the detainees.⁵²⁶

145. The mistreatment of women other than [REDACTED] is corroborated by TW4-01.⁵²⁷ The mistreatment of [REDACTED] and [REDACTED], who were both detained in Room 1 of the Detention Building,⁵²⁸ and that of TW4-04, is corroborated by the evidence of TW4-01, TW4-11, W01448, and W04733, which establishes that all the detainees held in the Detention Building were subjected to various forms of mistreatment.⁵²⁹

146. The beating and interrogation of the Murder Victim on 20 May 1999, described in detail by W01448,⁵³⁰ is corroborated by [REDACTED],⁵³¹ who could hear the Murder Victim's screams [REDACTED], the noise of the blows he received,⁵³² and the insults that his tormentors uttered against him.⁵³³

⁵²³ Judgment, paras 640-650.

⁵²⁴ *Contra Appeal*, para.125.

⁵²⁵ Judgment, para.329, *citing* 30 May 2023, p.1471; 6 June 2023, p.1915.

⁵²⁶ 065616-065657, p.065636. This photograph shows a room under a slanted roof, and was taken on the second floor of the Command Building (*see* 065613-065615-ET, p.065614, stating that the booklet contains pictures of the interior of both floors of the two-storey building on the South Eastern side of the square, and 065616-065657, p.065635, indicating the beginning in the booklet of the photographs taken on the 2nd floor of that building, 'KAT - II' in the Albanian language). *See also* Judgment, para.329, describing the Command Building Detention Room as having a 'low ceiling'; 6 June 2023, p.1915, [REDACTED].

⁵²⁷ *See* 31 May 2023, pp.1561,1565-1566. *Contra Appeal*, para.133.

⁵²⁸ Judgment, paras 579,582.

⁵²⁹ Judgment, paras 641,729-731,1015.

⁵³⁰ Judgment, paras 659-661.

⁵³¹ *Contra Appeal*, paras 127-128.

⁵³² Judgment, paras 658,661.

⁵³³ [REDACTED].

147. SHALA equally fails to acknowledge the wide evidentiary basis on which the findings on the *mens rea* for torture are based, in relation to which the factual findings singled out by SHALA⁵³⁴ only amount to a minimal part.⁵³⁵

148. SHALA thus fails to demonstrate that the Panel committed any error, either of law or fact, in its reliance on evidence introduced under Rules 153 and 155. It has failed to do so on two different levels: first, he fails to show that any of the findings based on such evidence were the sole basis, or even a decisive one, for any aspect of SHALA's conviction; and, second, it fails to acknowledge the corroborating evidence relied on by the Panel when assessing witness statements tendered in writing. On this basis, Ground 7 should be dismissed.

H. Ground 8: The Panel properly assessed the evidence of arbitrary detention and SHALA's Prior Statements⁵³⁶

149. Ground 8⁵³⁷ should be dismissed in its entirety, as it mischaracterises the Judgment, wrongly interprets *in dubio pro reo*, and fails to establish that the Panel shifted the burden of proof in relation to SHALA's presence at the KMF and his participation in the mistreatment of detainees.⁵³⁸

150. The unlawful detention of those held at the KMF is the only reasonable inference that the Panel could draw from the evidence.⁵³⁹ SHALA's claims to the contrary are based on a partial, misleading summary of the Panel's findings, which *per se* warrants

⁵³⁴ Appeal, para.129.

⁵³⁵ Judgment, paras 978-984.

⁵³⁶ SHALA impermissibly addresses together two grounds, 8 and 11, which were separate in the Notice, see *Mustafa AJ*, para.31. Only submissions pertaining to Ground 8 (Appeal, paras 144,146-159,165-169) are addressed here.

⁵³⁷ Notice, para.17 alleges an error of law in the Panel's reliance on adjudicated facts upon which the Appeal is silent. SHALA has thus abandoned this particular sub-ground, which need not be addressed further, see *Mustafa AJ*, para.32.

⁵³⁸ *Contra Appeal*, paras 144,167.

⁵³⁹ *Contra Appeal*, paras 147-159. A minor part of SHALA's submissions concern the Panel's findings on the mistreatment and interrogation of certain detainees, see Appeal, paras 158-159.

summary dismissal.⁵⁴⁰ Such claims are also based on an incorrect interpretation of proof beyond reasonable doubt and its corollary *in dubio pro reo*.⁵⁴¹

151. In arguing an impermissible shift of the burden of proof,⁵⁴² SHALA relies on excerpts of the Judgment taken entirely out of context which, in fact, reflect the Panel's holistic assessment of his Prior Statements in light of the entirety of the evidentiary record.⁵⁴³

1. The Panel's determination that detainees were unlawfully held and mistreated at the KMF was the only reasonable conclusion available

152. SHALA's claims that the Panel applied the incorrect standard of proof and violated *in dubio pro reo* are vitiated by two fatal shortcomings.⁵⁴⁴

153. First, SHALA ignores specific factual findings underpinning the Panel's determinations, thus misrepresenting the Panel's reasoning. By ignoring relevant factual findings, which *per se* warrants summary dismissal,⁵⁴⁵ SHALA inevitably fails to explain why the Panel's determination should not stand on the basis of those findings.⁵⁴⁶

154. Second, SHALA proposes entirely speculative, alternative explanations of the evidence, as refuted below, based on an erroneous interpretation of proof beyond reasonable doubt and *in dubio pro reo*. The test for establishing proof beyond reasonable doubt does not require the exclusion of every hypothesis or possibility of innocence, but only every fair or rational hypotheses that may be derived from the evidence.⁵⁴⁷

⁵⁴⁰ *Mustafa* AJ, para.33(i),(iv).

⁵⁴¹ *Limaj* AJ, para.21; *Halilović* AJ, n.282.

⁵⁴² *Contra* Appeal, paras 165-168.

⁵⁴³ *Mustafa* AJ, para.206; *Mrkšić* AJ, para.217.

⁵⁴⁴ Appeal, paras 146-159, 167.

⁵⁴⁵ *Mustafa* AJ, para.33(i).

⁵⁴⁶ *Mustafa* AJ, para.33(iv).

⁵⁴⁷ *Mrkšić* AJ, para.220.

155. Reasonable doubt must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.⁵⁴⁸ The principle of *in dubio pro reo* must be interpreted in light of this interpretation of reasonable doubt.⁵⁴⁹ As detailed below, the Panel not only explicitly recalled,⁵⁵⁰ but also properly applied these principles.

a) TW4-01

156. In concluding that TW4-01 was not brought before a judge or competent authority and was not allowed to challenge the lawfulness of his detention, the Panel did not only rely on [REDACTED].⁵⁵¹ It also considered the severe mistreatment he suffered during his detention,⁵⁵² and the several interrogations he was subjected to, which were not carried out by an independent authority,⁵⁵³ but by the same people responsible for arrests and detentions at the KMF.⁵⁵⁴ Further, the Panel considered that the interrogators tried to extort confessions from TW4-01 under extreme duress.⁵⁵⁵ SHALA's failure to even acknowledge these factors warrants the summary dismissal of his submissions in relation to TW4-01.⁵⁵⁶

157. SHALA further conflates the requirement to comply with basic procedural safeguards with the possible existence of security grounds that could have justified TW4-01's initial arrest,⁵⁵⁷ which were not only absent,⁵⁵⁸ but would not have rendered

⁵⁴⁸ *Rutaganda* AJ, para.488.

⁵⁴⁹ *Limaj* AJ, para.21; *Halilović* AJ, paras 108-109, n.282.

⁵⁵⁰ Judgment, paras 52,74,75.

⁵⁵¹ *Contra* Appeal, para.147.

⁵⁵² Judgment, para.948.

⁵⁵³ The Panel correctly considered this requirement in its assessment of the evidence in relation to the crime of arbitrary detention, *see* Judgment, para.942.

⁵⁵⁴ *See* Judgment, paras 345,349,1004 where the Panel found that Xhemshit KRASNIQI and Sabit GECI were in charge of the detainees at the KMF and played a prominent part, *inter alia*, in their apprehension, transfer, interrogation and mistreatment.

⁵⁵⁵ Judgment, para.404.

⁵⁵⁶ *See* Section II; *Gucati & Haradinaj* AJ, para.32(i); *Mustafa* AJ, para.33(i).

⁵⁵⁷ Appeal, para.147.

⁵⁵⁸ Judgment, para.947.

TW4-01's detention lawful in the subsequent absence of basic procedural safeguards.⁵⁵⁹

b) The Murder Victim

158. The Panel's conclusion that the Murder Victim was deprived of basic procedural guarantees is based on a holistic and comprehensive assessment of several factors,⁵⁶⁰ including his severe mistreatment and murder whilst in detention.⁵⁶¹ SHALA does not acknowledge the majority of these factors,⁵⁶² thus failing to demonstrate that the Panel was unreasonable in its determination.

159. SHALA's suggestion that the Murder Victim's past detention in [REDACTED]⁵⁶³ made it reasonable to conclude that he may have been informed of the reasons for his detention at the KMF is contrary to common sense.⁵⁶⁴ This is a clear example of SHALA's erroneous interpretation of *in dubio pro reo*, as only ambiguities that stem from a reasonable interpretation of the evidence, and not any theoretically possible alternative explanation, must be resolved in the defendant's advantage.⁵⁶⁵

c) TW4-11

160. SHALA's claim that the Panel failed to provide sufficient reasons in relation to TW4-11 is particularly egregious considering that SHALA ignores most of the Panel's findings.⁵⁶⁶ SHALA fails to acknowledge the Panel's consideration of TW4-11's 'clear and unequivocal' testimony that he was never informed of the reasons for his

⁵⁵⁹ Judgment, para.940.

⁵⁶⁰ Judgment, paras 412-414.

⁵⁶¹ Judgment, paras 413,945,988-991.

⁵⁶² Appeal, para.148.

⁵⁶³ 31 May 2023, p.1588.

⁵⁶⁴ *Mustafa* AJ, para.33(v).

⁵⁶⁵ *Limaj* AJ, para.21; *Halilović* AJ, paras 108-110, n.282.

⁵⁶⁶ Appeal, para.149.

detention,⁵⁶⁷ a circumstance which, logically, would have made it impossible for TW4-11 to challenge it.

161. SHALA also ignores the Panel's specific findings about KRYEZIU, the self-proclaimed 'judge or prosecutor'⁵⁶⁸ whom TW4-11 only saw for the first time [REDACTED].⁵⁶⁹ KRYEZIU did not – according to the Panel's reasoned findings – exercise independent oversight over the lawfulness of the detention of any detainee at the KMF, including TW4-11.⁵⁷⁰ SHALA also ignores the Panel's consideration of TW4-11's mistreatment during his detention.⁵⁷¹

d) W04733

162. In determining that W04733's detention was unlawful, the Panel considered W04733's evidence that – aside from general accusations of collaboration, mostly levied against W04733 while he was being severely beaten⁵⁷² – he was never properly informed of the reasons for his detention,⁵⁷³ nor was his detention reviewed by an independent authority.⁵⁷⁴ It also considered the modalities of W04733's arrest,⁵⁷⁵ together with his release by [REDACTED],⁵⁷⁶ and the fact that other detainees held at the same time were likewise denied basic procedural safeguards.⁵⁷⁷ SHALA ignores

⁵⁶⁷ Judgment, paras 433-434.

⁵⁶⁸ [REDACTED].

⁵⁶⁹ Judgment, para.435.

⁵⁷⁰ Judgment, para.437. *See also* Section III(L)(7) below on the lack of independence of KRYEZIU. *Contra* Appeal, para.149.

⁵⁷¹ While not specifically considered in the section of the Judgment dedicated to lack of procedural guarantees for TW4-11 (Judgment, paras 433-440), the Panel considered mistreatments as one of the factors relevant to establish arbitrary detention in relation to all detainees, *see* Judgment, para.948.

⁵⁷² Judgment, para.471.

⁵⁷³ Judgment, para.470.

⁵⁷⁴ Judgment, para.472.

⁵⁷⁵ Judgment, paras 441-445. During his transport to the KMF, W04733 was dressed in a black KLA uniform to disguise him as a KLA member in case they were stopped by Albanian authorities, further confirming the unlawfulness of his arrest, *see* 082892-TR-AT-ET Part 3 RED2, pp.2-3; 30 May 2023, pp.1453-1454.

⁵⁷⁶ Judgment, para.472.

⁵⁷⁷ Judgment, para.472. SHALA argues that that the Panel's conclusions concerning other detainees were based on 'adverse inferences that were not the only reasonable conclusions.' *See* Appeal, paras 150-152.

most of these factors and their holistic assessment by the Panel. Instead, SHALA takes W04733's release by [REDACTED] in isolation, arguing that it 'does not preclude the possibility that he had been lawfully detained prior to his release'.⁵⁷⁸ This alternative, speculative scenario has no rational link to the evidence.⁵⁷⁹

163. SHALA also mischaracterises the Panel's conclusion that DOBRUNA did not exercise independent oversight over the lawfulness of W04733's detention. This finding is not related to the mistreatment suffered by W04733 during his interrogation,⁵⁸⁰ but to the presence of Xhemshit KRASNIQI, who was in charge of KMF detentions, during the questioning.⁵⁸¹

e) W01448

164. The Panel found that W01448 was detained on the basis of vague and differing accusations,⁵⁸² severely mistreated throughout his detention,⁵⁸³ and only released following KFOR intervention on 18 June 1999.⁵⁸⁴ It also noted that W01448 was treated and detained in similar conditions as other co-detainees.⁵⁸⁵ Therefore, SHALA's suggestion that 'it cannot be excluded that W01448 was treated differently' from the other detainees⁵⁸⁶ is not only speculative, but contradicted by the evidence.

f) TW4-05

165. SHALA does not argue that TW4-05 was afforded basic procedural guarantees, but only that it cannot be excluded that there were legitimate reasons for his initial

As shown in this Response, this submission is incorrect and based on a patently wrong interpretation of the beyond reasonable doubt standard.

⁵⁷⁸ Appeal, para.150.

⁵⁷⁹ See e.g. *Rutaganda AJ*, para.488.

⁵⁸⁰ *Contra* Appeal, para.150.

⁵⁸¹ Judgment, paras 349,472.

⁵⁸² Judgment, para.491.

⁵⁸³ Judgment, para.493.

⁵⁸⁴ Judgment, para.490.

⁵⁸⁵ Judgment, para.493.

⁵⁸⁶ Appeal, para.151.

detention.⁵⁸⁷ This entirely suppositive assertion, even if proven, would not render TW4-05's detention lawful.⁵⁸⁸

166. The Panel holistically considered several factors in concluding that TW4-05 was unlawfully detained,⁵⁸⁹ which SHALA largely ignores.⁵⁹⁰ They include [REDACTED],⁵⁹¹ his mistreatment,⁵⁹² the nature of the allegations brought against him,⁵⁹³ the fear he experienced during his detention,⁵⁹⁴ [REDACTED].⁵⁹⁵

g) TW4-02

167. With respect to TW4-02, SHALA takes issue with the Panel's findings on KRYEZIU's role,⁵⁹⁶ arguing that it cannot be excluded that he 'exercised the function of a judge or other competent authority.'⁵⁹⁷ This submission ignores findings made elsewhere that KRYEZIU, who was recruited by Xhemshit KRASNIQI and worked with KLA military police in the interrogation of detainees,⁵⁹⁸ did not exercise such a function at the KMF.⁵⁹⁹

h) Other detainees

168. SHALA also disagrees with the Panel's conclusions regarding other KMF detainees, which are based on several circumstances pointing unequivocally to the unlawfulness of their detention.⁶⁰⁰ These determinations are supported by clear

⁵⁸⁷ Appeal,para.152.

⁵⁸⁸ Judgment,para.940.

⁵⁸⁹ Judgment,paras 503-512.

⁵⁹⁰ Appeal,para.152.

⁵⁹¹ Judgment,paras 502,509.

⁵⁹² Judgment,para.511.

⁵⁹³ Judgment,para.510.

⁵⁹⁴ Judgment,paras 509-510.

⁵⁹⁵ Judgment,para.508.

⁵⁹⁶ Appeal,para.153.

⁵⁹⁷ Appeal,para.153.

⁵⁹⁸ Judgment,paras 351-353.

⁵⁹⁹ Judgment,paras 436,555.

⁶⁰⁰ *Delalić AJ*,para.458.

reasoning showing the consistency and intrinsic coherence of the evidence on which they rest.⁶⁰¹

169. The Panel concluded that [REDACTED], [REDACTED], and [REDACTED] were unlawfully detained not only based on the treatment of their co-detainees, as claimed by SHALA,⁶⁰² but also on the deplorable conditions of detention, beatings, interrogations, forced labour, and other forms of mistreatment to which they were subjected,⁶⁰³ which SHALA does not acknowledge.

170. Similarly, SHALA merely disagrees with the Panel's conclusions on [REDACTED], [REDACTED], and [REDACTED],⁶⁰⁴ whose unlawful detention the Panel established based on their detention conditions,⁶⁰⁵ their mistreatment,⁶⁰⁶ the circumstances of their release,⁶⁰⁷ and a holistic assessment of the totality of the evidence on the treatment of those detained at the KMF at the same time.⁶⁰⁸

171. SHALA further disagrees with the Panel's conclusions on the mistreatment of [REDACTED],⁶⁰⁹ in spite of the consistent evidence of TW4-01, TW4-11, W04733, and W01448 that all those detained in Room 1 were mistreated.⁶¹⁰ SHALA also fails to acknowledge the related finding that all those detained at the KMF were subjected to inhumane and degrading conditions of detention.⁶¹¹

172. With respect to the interrogation of [REDACTED], [REDACTED], and [REDACTED],⁶¹² SHALA acknowledges the evidence relied on by the Panel, but

⁶⁰¹ See *Gucati & Haradinaj* TJ, para.42.

⁶⁰² Appeal, para.154.

⁶⁰³ Judgment, para.562.

⁶⁰⁴ Appeal, paras 155-157.

⁶⁰⁵ Judgment, paras 576,581-582. See also para.638, where the Panel found that the detainees at the KMF were subjected to 'inhumane and degrading' detention conditions.

⁶⁰⁶ Judgment, para.576.

⁶⁰⁷ Judgment, para.581.

⁶⁰⁸ Judgment, paras 577,581.

⁶⁰⁹ Appeal, para.158.

⁶¹⁰ Judgment, para.130.

⁶¹¹ Judgment, para.638.

⁶¹² Appeal, para.159.

nevertheless proposes an alternative conclusion which this evidence explicitly contradicts, without relying on any additional evidence in support of his position.

173. Finally, with respect to the interrogation of these detainees,⁶¹³ SHALA has failed to establish that the reversal of this finding would have any impact on his conviction under any count.⁶¹⁴ To the extent that interrogations were considered by the Panel to establish the *actus reus* and *mens rea* for torture,⁶¹⁵ this is only one of the factors underpinning these determinations. The Panel also considered, *inter alia*, the psychological mistreatment of detainees, the inhumane conditions of detention, the fact that the detainees were forced to witness and hear the mistreatment of other detainees, and that they were compelled to live in constant fear.⁶¹⁶

2. The Panel did not shift the burden of proof in assessing SHALA's Prior Statements

174. At no point did the Panel shift the burden of proof to SHALA.⁶¹⁷ SHALA bases this contention on two verbs used by the Panel in the assessment of his evidence taken entirely out of context.⁶¹⁸

175. In support, SHALA relies on jurisprudence on the burden of proof in relation to an alibi defence, which bears scarce relevance to the issue at hand.⁶¹⁹ In *Zigiranyirazo*, the Appeals Chamber recalled that the use of certain language in a judgment may indicate a misapplication of the burden of proof.⁶²⁰ However, whether this shift

⁶¹³ Appeal, para.159.

⁶¹⁴ *Mustafa* AJ, para.33(iv),(vi).

⁶¹⁵ Judgment, para.973.

⁶¹⁶ Judgment, paras 974-977,983-984.

⁶¹⁷ *Contra* Appeal, para.167.

⁶¹⁸ Appeal, paras 165-167.

⁶¹⁹ Appeal, para.167, *citing Zigiranyirazo* AJ, para.19. SHALA did not use an alibi defence and admitted his presence at the KMF during parts of the Indictment Period.

⁶²⁰ *Zigiranyirazo* AJ, para.19.

actually took place must be assessed based on the totality of the evidence considered in relation to a specific finding.⁶²¹ No such shift took place in this case.

176. The Panel first analysed the evidence of TW4-01, TW4-10, W04733, W01448, and Asllan ELEZAJ, who stated that SHALA was present at the KMF during the Indictment Period and participated in the mistreatment of detainees.⁶²² It then considered SHALA's statements, finding that they supported the 'coherent and mutually corroborative' evidence of these witnesses.⁶²³ Therefore, far from reversing the burden of proof, the Panel correctly assessed each piece of evidence holistically, as required by Rule 139(2) and relevant jurisprudence.⁶²⁴ In this regard, it was entirely appropriate for the Panel to consider SHALA's statements as corroborative of other witnesses' evidence.⁶²⁵

177. SHALA's submissions under Ground 8 are based on a partial and misleading reading of the Judgment, and contain entirely speculative explanations completely divorced from the evidence in this case. SHALA has also failed to show that the Panel shifted the burden of proof to him for any aspect of the SPO's case. Accordingly, Ground 8 should be dismissed.

I. Ground 9: SHALA received a fair trial

178. SHALA alleges four distinct fair trial violations. However, SHALA fails to demonstrate how any of these alleged violations caused him prejudice amounting to an error of law invalidating the Judgment.⁶²⁶ Ground 9 should therefore be dismissed.

⁶²¹ *Zigiranyirazo* AJ, paras 19-20.

⁶²² Judgment, paras 839-852. Asllan ELEZAJ and TW4-10's evidence only concerns SHALA's presence at the KMF.

⁶²³ Judgment, paras 873, 913.

⁶²⁴ *Mustafa* AJ, para.206; *Mrkšić* AJ, para.217.

⁶²⁵ *Mustafa* AJ, paras 190, 276.

⁶²⁶ See Section II; *Mustafa* AJ, para.22.

1. SHALA has suffered no disclosure-related prejudice

179. SHALA's repeated allegations of continuous disclosure violations⁶²⁷ are grossly exaggerated and unsupported. They were rightly dismissed in the Judgment, where the Panel found that SHALA misrepresented or ignored the legal framework governing disclosure.⁶²⁸ SHALA simply repeats these allegations, citing only his own prior submissions,⁶²⁹ fails to substantiate any claimed prejudice, and addresses just one instance of late disclosure which resulted in no prejudice.⁶³⁰

180. The only instance of delayed disclosure which SHALA seeks to develop relates to W02540's evidence, which the Panel found was 'not necessary for the determination of the truth', and that its late disclosure caused no prejudice.⁶³¹ W02540 was a KFOR soldier who participated in the liberation of detainees from the Prizren MUP Building on 18 June 1999. Therefore, his evidence, falling outside the geographical and temporal scope of the charges, is of 'limited relevance' to the present case.⁶³²

181. W02540's evidence was 'cumulative of other evidence on the record', including that of fellow KFOR soldier W03881⁶³³ and the KFOR report detailing the operation,⁶³⁴ which were available to SHALA to challenge [REDACTED].⁶³⁵ SHALA does not articulate how W02540's evidence could have further informed his cross-examination of [REDACTED] or direct examination of Defence witnesses. On appeal, SHALA

⁶²⁷ Defence Leave to Reopen Case Motion, paras 19-21; Defence Request for Leave to Appeal Decision Denying Leave to Reopen Case, para.20; Defence FTB, paras 294-301; Defence Request for Extension of Time, paras 12-13.

⁶²⁸ Judgment, para.44.

⁶²⁹ Appeal, n.385,387. See Section II.

⁶³⁰ Appeal, paras 169-173.

⁶³¹ Decision Denying Leave to Reopen Case, para.21.

⁶³² Decision Denying Leave to Reopen Case, para.21. See Section III(J)(7)-(8) regarding W02540's evidence as it relates to Ground 10.

⁶³³ 071136-TR-ET Part 1 RED; 071136-TR-ET Part 2 RED; 071136-TR-ET Part 3; 071136-TR-ET Part 4 RED; 071136-TR-ET Part 5 RED; 071107-071127-ET RED; 071142-071313-ET Revised 1 RED.

⁶³⁴ SITF00189121-00189140 RED2.

⁶³⁵ Decision Denying Leave to Reopen Case, para.19.

merely repeats arguments ‘already made, considered and dismissed by the Panel’,⁶³⁶ and fails to demonstrate how the rejection thereof constitutes an error warranting appellate intervention.⁶³⁷ These arguments should be dismissed accordingly.⁶³⁸

2. The Panel appropriately exercised its discretion under Rule 119

182. SHALA did not seek reconsideration or certification to appeal the Panel’s decision ordering the removal of five witnesses from the Defence Witness List.⁶³⁹ Nor was this alleged violation mentioned in SHALA’s final trial brief, despite inclusion of a dedicated section alleging a slew of other fair trial violations.⁶⁴⁰ SHALA has thus waived his right to raise this issue on appeal.⁶⁴¹

183. SHALA’s claim amounts to mere disagreement with the Panel’s exercise of its broad discretion over the conduct of proceedings, including the presentation of evidence.⁶⁴² SHALA makes no attempt to demonstrate that the Defence Witnesses Decision was so unfair or unreasonable so as to constitute an abuse of discretion,⁶⁴³ and does not even reference Rule 119(3)(a), which expressly empowers the Panel to make such determinations.

⁶³⁶ Decision Denying Leave to Appeal Reopening Decision, paras 13-14.

⁶³⁷ See Section II; *Gucati & Haradinaj* AJ, para.32(vii); *Mustafa* AJ, para.33(vii).

⁶³⁸ The Appeals Panel ascertained two disclosure violations during the appeal proceedings. For the first one, SHALA failed to show prejudice (Suspension Decision, para.10). For the second one, relating to Sokol DOBRUNA, the Appeals Panel held that, to the extent that SHALA might have demonstrated any prejudice, he has already availed himself of a potential remedy through Rule 181 (Disclosure Violations Decision, para.15). As argued below in response to Ground 7, Sokol DOBRUNA’s role at the KMF has no bearing on the Panel’s findings on SHALA’s responsibility, and his relevance for W04733’s credibility is marginal at best.

⁶³⁹ 25 August 2023, pp.2428-2431.

⁶⁴⁰ DefenceFTB, Section D.

⁶⁴¹ *Mustafa* AJ, para.30. SHALA does not explain why he failed to raise the issue at an earlier stage, nor, in the circumstances, could there be any explanation justifying such a failure.

⁶⁴² *Gucati & Haradinaj* AJ, para.93; *Karadžić* Defence Case Duration Appeal Decision, para.7; *Nshogoza* Witness List Reconsideration Decision, para.8.

⁶⁴³ See Section II.

184. The Panel made an objective determination based on the asserted relevance of the proposed Defence witnesses.⁶⁴⁴ SHALA was afforded multiple opportunities, both in writing⁶⁴⁵ and during the Defence Preparation Conference,⁶⁴⁶ to outline the relevance of these witnesses. Having failed to persuasively do so, SHALA now expresses mere disagreement with the Panel's findings without identifying any precise error therein, let alone prejudice.⁶⁴⁷ SHALA's submissions regarding DW4-04 and W04751 exemplify this approach. These witnesses were expected to provide evidence regarding Brigade 128 as part of a Defence strategy to show SHALA was not a member of the brigade.⁶⁴⁸ However, the Panel concluded, having considered evidence from other Brigade 128 members, that SHALA was not a member of the brigade.⁶⁴⁹ The witnesses were therefore, indeed unnecessary and repetitive, and SHALA fails to demonstrate how their exclusion could have had any impact on the Judgment. Nor does SHALA demonstrate how any of the other excluded witnesses could have had an impact.

185. The Defence Witnesses Decision also did not breach the equality of arms principle,⁶⁵⁰ which does not necessarily entitle an accused to the same amount of time or the same number of witnesses as the prosecution.⁶⁵¹ In this regard, SHALA's comparison between the Defence Witnesses Decision and the Panel's decision allowing the addition of four witnesses (TW4-06, TW4-07, TW4-08, and TW4-09) to the SPO's witness list is inapposite.⁶⁵² The evidence of these four witnesses, W04733's family members, became necessary for the establishment of the truth following

⁶⁴⁴ See *Prlić* Defence Case Length Appeal Decision, para.25.

⁶⁴⁵ Defence Witness Summaries; 24 August 2023, p.2365.

⁶⁴⁶ See e.g. 24 August 2023, pp.2352-2354, 2357-2364, 2382-2383, 2394.

⁶⁴⁷ Appeal, paras 176-179.

⁶⁴⁸ Appeal, paras 178, 179; 24 August 2023, pp.2358-2360, 2382-2383, 2394.

⁶⁴⁹ Judgment, paras 898-900.

⁶⁵⁰ *Contra* Appeal, paras 174, 181-182.

⁶⁵¹ *Orić* Interlocutory Decision, para.7. See also *Karadžić* Defence Case Duration Appeal Decision, para.16.

⁶⁵² Appeal, paras 181-182; SPO Witnesses Decision.

W04733's untimely death.⁶⁵³ The collective evidence of these witnesses was relevant and probative of W04733's arrest, detention, and release.⁶⁵⁴ Conversely, SHALA was unable to establish the relevance of his five removed witnesses. Their evidence was either duplicative of other evidence SHALA intended to present, or only tangentially related to operations at the KMF outside the Indictment period.⁶⁵⁵ SHALA thus fails to demonstrate how the Panel erred in exercising its discretion to assess the relevance of his proposed evidence,⁶⁵⁶ or prejudiced his ability to present an effective defence. These arguments should be dismissed accordingly.

3. SHALA's arguments relating to trial readiness are without merit

186. SHALA misrepresents the record in asserting that the Panel pressured him to proceed to trial before he was ready. SHALA cites to various submissions made on this topic during the pre-trial stage,⁶⁵⁷ but neglects to mention that on 10 October 2022, he submitted that he expected 'to be trial ready in January 2023'.⁶⁵⁸ The trial did not commence until 21 February 2023,⁶⁵⁹ and, following the conclusion of the SPO's case, SHALA was granted an additional month to conduct further investigations and file his witness list.⁶⁶⁰ SHALA did not begin presenting his case until 20 September 2023.⁶⁶¹ Far from pressuring SHALA to proceed to trial, the Panel varied applicable time limits to ensure he was afforded the opportunity to present an effective defence. SHALA's submissions to the contrary are baseless.⁶⁶²

⁶⁵³ SPO Witnesses Decision, paras 16-20.

⁶⁵⁴ Judgment, paras 144-154, 443-444, 449. *Contra* Appeal, paras 181-182.

⁶⁵⁵ 25 August 2023, pp. 2428-2431.

⁶⁵⁶ *See e.g. Karadžić* Defence Case Duration Appeal Decision, para. 20.

⁶⁵⁷ Appeal, n. 406-408.

⁶⁵⁸ Defence Trial Preparation Submissions, para. 10.

⁶⁵⁹ 21 February 2023, p. 497.

⁶⁶⁰ Defence Case Time Extension Decision, paras 8-9. *See also* Judgment, para. 57.

⁶⁶¹ 20 September 2023, p. 2450.

⁶⁶² Appeal, paras 183-185.

4. The Panel appropriately considered the effect of the passage of time in assessing the evidence

187. ‘The passage of time and the possible deterioration of the quality of the evidence are not, by themselves, grounds to render the proceedings unfair, but rather factors that may be evaluated when assessing the reliability, probative value and, ultimately, the weight of the evidence.’⁶⁶³ The Panel appropriately assessed the impact of this factor in assessing evidence, together with other relevant factors, including the overall demeanour of a witness and whether discrepancies arose with respect to details⁶⁶⁴ or ‘essential aspects’⁶⁶⁵ of testimony. SHALA merely disagrees with the Panel’s assessment of certain evidence, but fails to identify a precise error in the Panel’s reasoning.⁶⁶⁶ Regarding the impact of the passage of time on investigations, SHALA simply asserts that documents have been lost or witnesses are no longer available.⁶⁶⁷ No further explanation or examples are provided. SHALA’s imprecise claims fail to meet his burden on appeal and should be dismissed accordingly.⁶⁶⁸

J. Ground 10: The Panel properly assessed Defence witnesses

188. In attempting to re-frame his mere disagreement with the Panel’s findings as an appealable error or abuse of discretion,⁶⁶⁹ SHALA makes speculative and unsupported claims about the deliberative process and the impartiality of the Panel. SHALA fails

⁶⁶³ Judgment, para.52.

⁶⁶⁴ See e.g. Judgment, paras 52,83,392,397,418,427,431,451,485,599,665,784.

⁶⁶⁵ See e.g. Judgment, para.893.

⁶⁶⁶ Appeal, paras 189-190.

⁶⁶⁷ Appeal, para.188.

⁶⁶⁸ *Krajišnik* AJ, para.26.

⁶⁶⁹ Ground 10 refers to an abuse of discretion in the title and to errors of law and fact, see Appeal, para.204, but SHALA fails to identify an impugned finding that no reasonable trier of fact could have reached or any legal error committed by the Panel.

to show any error or abuse of discretion and does not develop any argument that the applicable standard has been met.⁶⁷⁰ Ground 10 should be summarily dismissed.

1. The Panel considered the evidence of Defence witnesses

189. SHALA's claims that the Panel disregarded Defence witness evidence and failed to give adequate reasons for its conclusions⁶⁷¹ are contradicted by: (i) the Panel's detailed description of its general approach to evidence, including testimonial evidence,⁶⁷² and (ii) the Panel's express consideration and assessment of SHALA's witnesses,⁶⁷³ a fact acknowledged by SHALA.⁶⁷⁴

2. The Panel reached reasonable conclusions on witness credibility and reliability

190. When SHALA's complaint is assessed without the false lens of a failure to provide 'proper' reasons,⁶⁷⁵ his remaining arguments amount to no more than mere disagreement with the Panel's findings. While claiming that the Panel gave undue consideration to certain factors, such as a witness's hostility to the KSC, political opinions, and support for the KLA,⁶⁷⁶ SHALA ignores that these were among many factors, considered by the Panel. In addition, the Appeals Panel has held that a witness's expressed bias to the KSC and personal support for and close personal ties with an accused may be properly considered in determining credibility.⁶⁷⁷ None of SHALA's disagreements with the Panel's assessment of witness evidence are capable of invalidating the Judgment or amounting to a miscarriage of justice. The Panel

⁶⁷⁰ See Section II. While SHALA claims the 'Panel's errors have resulted in a miscarriage of justice and warrant a retrial' (Appeal, para.205), this assertion remains undeveloped.

⁶⁷¹ Appeal, paras 194-198, 200-203.

⁶⁷² Judgment, paras 74-97.

⁶⁷³ Judgment, paras 213-283. DW4-01 is not included for the reasons explained at Judgment, n.368.

⁶⁷⁴ Appeal, para.193.

⁶⁷⁵ Appeal, para.203.

⁶⁷⁶ Appeal, paras 192, 196, 203.

⁶⁷⁷ *Mustafa AJ*, paras 265, 275.

provided appropriate and extensive reasoning for approaching certain witness testimony with caution or finding evidence wholly unreliable.⁶⁷⁸

3. The Panel properly assessed the credibility of DERVISHAJ and KOCINAJ

191. SHALA claims that the Panel erred by placing undue weight on DERVISHAJ and KOCINAJ's relationship and their reluctance to provide meaningful evidence due to ties to or support for the KLA.⁶⁷⁹ However, this claim ignores that the Panel's decision to treat KOCINAJ's evidence with extreme caution⁶⁸⁰ reflects the Panel's analysis of his: (i) demeanour; (ii) the (im)plausibility of his statements about what he saw at his workplace over the course of months and his own conduct; (iii) inconsistencies in his account compared to other evidence before the Panel; and (iv) his 'systemic incapacity' to orient his account in time.⁶⁸¹ The Panel assessed the severity of KOCINAJ's evasiveness and far-fetched answers, noting that his manner of testifying led the Panel to remind him of his obligations several times.⁶⁸² Concerning responses to questions on the KMF and the KLA soldiers present, the Panel found that he provided 'implausible, inconsistent, evasive and nebulous responses.'⁶⁸³

192. Contrary to SHALA's suggestion,⁶⁸⁴ the Panel stated that KOCINAJ cannot be made responsible for the acts of others, but found, having assessed the aspects of his testimony listed above, and his close ties to former KLA members, that his unwillingness to answer certain questions truthfully was related to his close ties to former KLA members, thereby negatively impacting his credibility.⁶⁸⁵ While SHALA may not agree with the Panel's assessment of KOCINAJ, the factors considered,

⁶⁷⁸ See *Mustafa AJ*, para.266.

⁶⁷⁹ Appeal, para.195.

⁶⁸⁰ Judgment, para.268.

⁶⁸¹ Judgment, paras 264-267,887.

⁶⁸² Judgment, paras 264,266.

⁶⁸³ Judgment, para.267.

⁶⁸⁴ Appeal, para.195

⁶⁸⁵ Judgment, para.267.

assessed in a detailed and comprehensive manner, were relevant factors the Panel was entitled to place weight upon.⁶⁸⁶

193. As with KOCINAJ, the Panel undertook a comprehensive analysis of DERVISHAJ's evidence, underscoring his knowledge of certain topics and lack of knowledge on others, and his selective willingness to answer questions directly – noting that in some instances his manner was evasive.⁶⁸⁷ His evidence was relied on in relation to: (i) the KLA's facilities in Kukës;⁶⁸⁸ (ii) the whereabouts of KLA members, some of whom temporarily left Kukës for Burrel;⁶⁸⁹ and (iii) SHALA's absence at the frontline.⁶⁹⁰ By expressly noting it in the Judgment, the Panel made clear that DERVISHAJ's credibility and reliability were questioned due to: (i) the change in his demeanour after SPO questions related to social media posts of his friend, a fellow KLA member; and (ii) the fact that it was only on the third time, and following judicial intervention, that he answered a question related to his ties with former KLA members.⁶⁹¹ Contrary to SHALA's claim,⁶⁹² the Panel explained the factors that led them to conclude that his reticence was tied to his desire to avoid providing meaningful information, including to protect his interests and those of SHALA, and that this was clear from the content and manner of his responses.⁶⁹³

4. The Panel properly assessed the credibility of GASHI, HADERGJONAJ, KADRIJAJ, and MAHMUTI

194. SHALA's claims in respect of GASHI, HADERGJONAJ, KADRIJAJ, and MAHMUTI are internally contradictory and based on mischaracterisations of their

⁶⁸⁶ *Contra Appeal*, para.192.

⁶⁸⁷ Judgment, paras 229-232.

⁶⁸⁸ *Contra Appeal*, para.193; Judgment, paras 300,331.

⁶⁸⁹ *Contra Appeal*, para.193; Judgment, paras 856,858,860.

⁶⁹⁰ *Contra Appeal*, para.193; Judgment, paras 881-882.

⁶⁹¹ Judgment, para.232.

⁶⁹² *Contra Appeal*, paras 200-201,203.

⁶⁹³ Judgment, para.233.

testimony and the Judgment. While claiming that the Panel assessed their evidence ‘without considering whether any of it was reliable’, SHALA acknowledges, in the preceding paragraph of the Appeal, that the Panel made findings on the reliability of each witness.⁶⁹⁴ Contrary to SHALA’s assertion, the Panel explained in detail its assessment of Safet GASHI’s credibility, including *inter alia* his inconsistent and incoherent answers.⁶⁹⁵

195. The Panel noted, among other factors ignored by SHALA: (i) exaggeration and answers ‘imbued with conspiracy allegations’ provided by HADERGJONAJ;⁶⁹⁶ (ii) the ‘striking inconsistencies’ between KADRIJAJ’s testimony and other reliable evidence of her presence at the KMF, which she denied;⁶⁹⁷ and (iii) MAHMUTI’s manner of avoiding questions and the fact that his evidence was ‘outright implausible’ in light of other reliable evidence.⁶⁹⁸ SHALA wrongly suggests that the Panel was obligated to assess a particular point in MAHMUTI’s evidence, ignoring that the Panel is not required to discuss every submission, or refer to every piece of evidence.⁶⁹⁹ Furthermore, contrary to SHALA’s submission, MAHMUTI’s passport stamps did not ‘demonstrate’ that he was not at the KMF when W04733 was there,⁷⁰⁰ as MAHMUTI admitted that there were other routes available to enter Albania without using official border posts.⁷⁰¹ These aspects of the Panel’s analysis, which SHALA omits to acknowledge or address, reveal that the Panel made reasoned and reasonable findings on the credibility of all witnesses.⁷⁰²

⁶⁹⁴ Appeal, paras 197-198.

⁶⁹⁵ *Contra* Appeal, paras 197-198; Judgment, paras 242-243.

⁶⁹⁶ Judgment, para.247.

⁶⁹⁷ Judgment, para.257.

⁶⁹⁸ Judgment, para.271.

⁶⁹⁹ Judgment, para.79; *Kvočka* AJ, para.23; *Krajišnik* AJ, para.139.

⁷⁰⁰ Appeal, para.198.

⁷⁰¹ 21 September 2023, pp.2714-2715.

⁷⁰² SHALA fails to develop arguments about alleged errors or abuses in respect of every Defence witness individually. As such, not every witness, noted in a footnote or in the text with a mere recitation of the findings, has been assessed in this ground. SHALA’s inclusion of numerous paragraphs in lengthy footnotes is insufficient to discharge his burden on appeal, *see Galić* AJ, para.297; *Krajišnik* AJ, para.26.

5. The Panel properly assessed witnesses' answers

196. SHALA's claim that the Panel wrongly assessed witnesses' answers, allegedly failing to consider the possibility of genuine lack of knowledge, is insufficiently reasoned and contradicted by the Judgment paragraphs cited.⁷⁰³ For example, the Panel's assessment of W04280 provides detailed explanations supporting the conclusion that he made no genuine attempt to respond to questions put to him,⁷⁰⁴ noting, *inter alia*: (i) his failure to recognise or recall sketches and photographs of his workplace, a matter which the Panel expected him to know given his position; (ii) his unwillingness to answer questions from any party, including the Defence, about numerous topics, even when his memory was refreshed by his prior statements and when told about other available evidence describing him personally; and (iii) his repetitive assertions about his health and the passage of time, which, assessed by the Panel against his behaviour in court, led the Panel to reasonably conclude that such comments were but a pretext to avoid answering questions.⁷⁰⁵ Based on the foregoing, the Panel's conclusion that W04280 did not suffer a genuine lack of knowledge is wholly supported by the record.

6. SHALA fails to demonstrate any appearance of bias

197. SHALA resorts to baseless claims in attempting to discredit the Panel's assessments of witness credibility. He claims, without evidence and ignoring the extensive credibility assessments contained in the Judgment, that the Panel assessed evidence against an alleged 'preferred narrative'.⁷⁰⁶ Nowhere does SHALA explain this 'preferred narrative' or offer any proof as to its existence, except to suggest, without support, that the narrative is one that 'the Panel wished to present.'⁷⁰⁷ Such

⁷⁰³ Appeal, paras 200-201.

⁷⁰⁴ *Contra* Appeal, para.201.

⁷⁰⁵ Judgment, paras 222-224, 893-894.

⁷⁰⁶ Appeal, paras 196, 199, 203.

⁷⁰⁷ Appeal, para.203.

vague and unsubstantiated submissions ignore the 'high threshold' of proof required to prove judicial misconduct and bias.⁷⁰⁸ The Panel's cautious and comprehensive approach to evaluating the evidence of all witnesses contradicts his claim that the Panel 'automatically' judged Defence witnesses as lacking credibility.⁷⁰⁹

198. As SHALA's claim of bias is unfounded and does not meet the standard for showing an appearance of bias, this argument should be dismissed. The Judgment reveals that the Panel's assessments are the result of the lack of credibility and reliability of certain witness evidence, not the result of any hypothetical 'preferred narrative.'

7. The Panel did not abuse its discretion in denying SHALA's motion to re-open its case

199. SHALA fails to articulate how the Panel erred in law or made an incorrect finding of fact in issuing its decision not to permit the re-opening of the case.⁷¹⁰ To the extent that SHALA is arguing an abuse of discretion,⁷¹¹ he fails to show how the decision is so unfair or unreasonable so as to constitute such an abuse.⁷¹² SHALA merely disagrees with the decision and reiterates the same arguments previously rejected by the Panel.⁷¹³ The Panel issued a fully reasoned decision, took note of SHALA's arguments,⁷¹⁴ and made plain that W02540's evidence was 'not necessary for the determination of the truth', given it concerned events outside the temporal and geographical scope of the charges and was therefore of 'limited relevance.'⁷¹⁵ The

⁷⁰⁸ *Mladić* Judge Disqualification Decision, para.11; *Šešelj* Judge Disqualification Decision, para.11.

⁷⁰⁹ *Contra* Appeal, para.193.

⁷¹⁰ *Contra* Appeal, para.204; Decision Denying Leave to Reopen Case, para.21.

⁷¹¹ Appeal, para.205.

⁷¹² *Mustafa* AJ, para.36.

⁷¹³ Decision Denying Leave to Reopen Case, paras 19-21.

⁷¹⁴ Decision Denying Leave to Reopen Case, paras 5-7,13.

⁷¹⁵ Decision Denying Leave to Reopen Case, para.21.

decision on admission of individual items of evidence is strictly within the Panel's discretion and SHALA fails to show any abuse thereof.⁷¹⁶

8. SHALA fails to show any error or impact in the verdict resulting from the Panel's denial of his motion to re-open his case

200. While SHALA claims that the Panel made adverse findings on issues to which W02540 could have testified and that his evidence directly contradicts that of [REDACTED],⁷¹⁷ SHALA identifies no finding capable of impacting the verdict. In particular, he argues that W02540's evidence contradicted [REDACTED] on the date of [REDACTED] and the number [REDACTED] – both matters that were raised before the Panel and dismissed.⁷¹⁸ The Panel found discrepancies on these exact issues 'marginal' and 'minor', noting that they did not have any 'broader impact' on [REDACTED], nor any bearing on the 'material question' as to when and under which circumstances [REDACTED].⁷¹⁹ Therefore, W02540's evidence is incapable of impacting the verdict and cannot disturb the uncontested fact of [REDACTED].⁷²⁰

K. Ground 11: JCE members committed the crimes in accordance with the common plan

201. The Panel correctly inferred the JCE common plan,⁷²¹ which was the only reasonable inference available from the unified acts and statements of JCE members,⁷²² their *modus operandi* in the apprehension of detainees,⁷²³ the institutionalisation of

⁷¹⁶ *Gucati & Haradinaj* AJ, para.35; *Mustafa* AJ, para.37.

⁷¹⁷ Appeal, para.204.

⁷¹⁸ Defence Leave to Reopen Case Motion, paras 25-26; Decision Denying Leave to Reopen Case, para.20.

⁷¹⁹ [REDACTED].

⁷²⁰ [REDACTED]. [REDACTED].

⁷²¹ *Contra* Appeal, paras 145,160-164. SHALA's submissions that the Panel erred in finding that murder was part of the common plan are found in Ground 13, and the SPO has responded to para.161 there. See Section III(M).

⁷²² Judgment, para.1021.

⁷²³ Judgment, para.1011.

detention at the KMF,⁷²⁴ the systematic interrogation and mistreatment of detainees,⁷²⁵ and the murder of one of them.⁷²⁶

202. SHALA's contention that the Panel's findings on pattern and *modus operandi* were not the only reasonable inferences available⁷²⁷ is based on mischaracterisations of the Judgment and an erroneous interpretation of *in dubio pro reo*,⁷²⁸ which must be grounded in reason and have a rational link to the evidence in the case.⁷²⁹ SHALA avers that there were 'other reasonable inferences' and purports to identify one—that persons were detained because of personal grievances with particular KLA members with authority at the KMF.⁷³⁰ The Panel provided a detailed explanation as to the implausibility of this exact claim, raised during trial, and dismissed it as without merit following consideration of the evidence.⁷³¹ On appeal, SHALA repeats this claim and does not show how the same arguments he made at trial about TW4-01⁷³² demonstrate that the Panel misapplied the standard of proof resulting in an erroneous finding. SHALA fails to meet the standard of review and merely attempts to introduce his own interpretation of the evidence without showing any error in the Panel's assessment.

1. SHALA ignores relevant jurisprudence

203. SHALA's argument that [REDACTED] believed that [REDACTED] bore a grudge against him⁷³³ ignores relevant jurisprudence. This evidence may go to

⁷²⁴ Judgment, paras 1012-1013, 1022.

⁷²⁵ Judgment, paras 1014-1015.

⁷²⁶ Judgment, paras 1016-1019.

⁷²⁷ Appeal, para. 160.

⁷²⁸ SHALA recalls his submissions in Ground 8, which should be dismissed for the reasons explained above in Section III(H).

⁷²⁹ Judgment, para. 74 and references therein.

⁷³⁰ Appeal, para. 163. SHALA also claims that the Panel failed to give weight to relevant considerations but does not identify any such consideration, *see* Appeal, para. 145.

⁷³¹ Judgment, para. 1022.

⁷³² Appeal, para. 163, *citing* DefenceFTB, para. 80.

⁷³³ [REDACTED].

[REDACTED]'s motive, but motive must be distinguished from intent.⁷³⁴ Personal motive does not preclude a perpetrator from having criminal intent, and motive is irrelevant insofar as liability is shown where an intent is clear.⁷³⁵ SHALA fails to acknowledge this or explain why other KLA members, who did not have any grudge against [REDACTED], would have participated in the brutal mistreatment of [REDACTED] over the course of weeks.

204. Similarly, any evidence of motive on the part of a particular KLA member does not negate the existence of the JCE. SHALA's argument that there is another purported reasonable inference that there was 'no collective decision-making process about arrests and detention' misstates the requirements for the finding of a common plan shared by a plurality of persons.⁷³⁶ SHALA conflates the legal requirements for the existence of a common plan with one possible type of evidence to show the common plan and plurality of persons. Due to the nature of criminal enterprises, it is not always the case that documentary or witness evidence explicitly proves a particular meeting, deliberative process, or express agreement on the common plan.⁷³⁷ As such, panels may infer the common plan by the fact that a plurality of persons act in unison to put into effect a JCE.⁷³⁸ There is no requirement for a formal decision or process to arrest, detainee and mistreat.⁷³⁹ It is unnecessary that JCE members have previously arranged or formulated the common plan, design, or purpose.⁷⁴⁰

⁷³⁴ *Popović* AJ, para.1027.

⁷³⁵ *Limaž* AJ, para.109; *Jelišić* AJ, para.71; *Tadić* AJ, para.269. See also *Dorđević* AJ, para.887.

⁷³⁶ Appeal, para.163.

⁷³⁷ See e.g. *Šainović* AJ, para.658.

⁷³⁸ Judgment, paras 1000,1021.

⁷³⁹ Judgment, paras 1000,1021. *Contra* Appeal, para.163.

⁷⁴⁰ Judgment, paras 1000,1021.

2. SHALA's arguments disregard factual findings and the totality of the evidence considered by the Panel

205. SHALA's alternative narrative of the Indictment crimes being the result of perpetrators acting individually to settle personal grievances ignores the multitude of factual findings that refute this scenario and displays a disregard for the evidence. The evidence and findings of the Panel show that the JCE members were not identified from a series of unrelated or spontaneous mistreatment incidents. The arrest, detention and mistreatment of detainees reveals a developed practice, involving the participation of numerous persons working together to operate a detention regime in numerous locations at the KMF,⁷⁴¹ including, prominently, in a single-purpose and permanent structure (the Detention Building),⁷⁴² which was known to others as the place where detainees were held.⁷⁴³ The degrading detention conditions during the time relevant to the charges, which included the lack of necessities, rampant physical abuse and effective sleep deprivation, were found to be an 'institutionalised practice imposed by the KLA members in charge of the detainees.'⁷⁴⁴ As shown by the Judgment, the action taken by the JCE members, including in various aspects of the detention experience of the detainees, was by design, not happenstance.

a) The Panel's findings show that JCE members were acting together in implementing the JCE as shown by the arrests of detainees

206. The search, arrest, and transfer operations to bring detainees to the KMF required a significant degree of organisation, considerable logistics, and manpower.⁷⁴⁵ The circumstances of certain arrests suggest advance investigations – detainees were

⁷⁴¹ Judgment, para. 588.

⁷⁴² Judgment, paras 833-835, 1012.

⁷⁴³ Judgment, paras 362, 604, 648, 1013.

⁷⁴⁴ Judgment, para. 637.

⁷⁴⁵ Judgment, para. 834.

singled out, some after ‘verifications’ and others following repeated arrest attempts.⁷⁴⁶ Some victims were told that they had been specifically sought.⁷⁴⁷ Several detainees experienced detention in an intermediate location for a short period before being transferred to the KMF.⁷⁴⁸ KLA military police played a prominent role in such operations which were repeated again and again.⁷⁴⁹

b) The Panel’s findings show that JCE members were acting together in implementing the JCE as shown by the detention and mistreatment of detainees at the KMF

207. Once at the KMF, detainees were under the control of KLA members whose actions furthered the detention regime. KLA members managed: (i) the turnover of detainees, who were interrogated and mistreated; (ii) the constant surveillance of all detainees in various locations, including when they used the toilets; and (iii) the movement of detainees between detention and interrogation locations.⁷⁵⁰ Such an operation could not have been achieved without significant resources and manpower as up to forty people were detained, with thirteen detainees in just one room at a given time.⁷⁵¹ Those responsible for guarding detainees allowed anyone at the KMF to access detainees for the purposes of mistreatment.⁷⁵²

208. Detainees were beaten by KLA members, sometimes numbering ten or more at once.⁷⁵³ Detainees were subjected to collective beatings on a daily basis.⁷⁵⁴ Senior members of the KLA participated in these beatings⁷⁵⁵ and collaborated closely with

⁷⁴⁶ Judgment, paras 359,416,441,474,496,590,1011.

⁷⁴⁷ Judgment, paras 416,441,1011.

⁷⁴⁸ Judgment, paras 446,477,513.

⁷⁴⁹ Judgment, paras 363,1011.

⁷⁵⁰ Judgment, paras 589,626,835,1012.

⁷⁵¹ Judgment, paras 427,589,n.766,1012.

⁷⁵² Judgment, paras 362-363.

⁷⁵³ Judgment, paras 360,835.

⁷⁵⁴ Judgment, paras 653,1015.

⁷⁵⁵ Judgment, paras 342,345-346,349,642,835.

other KLA members, including SHALA.⁷⁵⁶ The manner of physical mistreatment revealed coordination among JCE members,⁷⁵⁷ including by successively mistreating detainees.⁷⁵⁸ The Panel found that senior KLA members, including Sabit GECI and Xhemshit KRASNIQI, readily accepted and condoned physical mistreatment and interrogations of detainees committed by other JCE members, including in their presence.⁷⁵⁹

209. The Panel's findings reflect a record replete with evidence showing that there was a JCE, proving false SHALA's claim otherwise.⁷⁶⁰

3. SHALA's claim that the Panel wrongly inferred the common plan is unclear and baseless

210. Contrary to SHALA's claim,⁷⁶¹ in inferring the common plan, the Panel did not err in relying on: (i) the *modus operandi* and pattern in apprehending detainees; (ii) the institutionalisation of detention; and (iii) the systemic mistreatment of detainees.⁷⁶² His statement that the Panel could not infer the common plan from these factors, as well as the singling out of detainees, is unsupported by law or fact. Viewing the evidence in totality, the Panel found that the assessment, apprehension and detention of detainees followed an operational pattern.⁷⁶³ The Panel explicitly refuted any claim that the evidence revealed a series of opportunistic, chance, or coincidental occurrences—the Panel held that these crimes, were not 'random, haphazard and isolated events, but instead followed the same pattern.'⁷⁶⁴ Merely suggesting that there

⁷⁵⁶ Judgment, paras 908-909.

⁷⁵⁷ Judgment, paras 692,1014.

⁷⁵⁸ Judgment, paras 654-659,1015.

⁷⁵⁹ Judgment, paras 908-909.

⁷⁶⁰ Appeal, para.163.

⁷⁶¹ Appeal, paras 160,162-164.

⁷⁶² Judgment, para.1022.

⁷⁶³ Judgment, para.590.

⁷⁶⁴ Judgment, para.1010.

was no common plan as a purported other reasonable inference ignores the facts in evidence and the Panel's findings on pattern.

211. In arguing against the Panel's finding, SHALA makes no argument that the detention, interrogation, torture, and murder at the KMF did not occur. His statement that persons were 'detained because of personal grievances' does not foreclose the finding that JCE members intended the crimes.⁷⁶⁵ SHALA's submissions are vague, but to the extent he seeks to challenge the finding that the totality of the evidence reveals that crimes were committed against detainees who were perceived to collaborate with, be associated with, or sympathise with the Serbian authorities or who were considered not sufficiently supportive of the KLA effort,⁷⁶⁶ a plethora of evidence establishes this aspect of the common plan.

a) The Panel properly inferred the common plan from the evidence

212. Detainees were singled out, apprehended and interrogated on vague allegations of sympathising or otherwise being associated with Serbia, 'Serbs' or Serbian authorities, being 'traitors' or 'collaborators', or not being sufficiently supportive of the KLA effort.⁷⁶⁷ Examples of detainees being mistreated following such accusations include that: (i) TW4-01 [REDACTED], according to SHALA's statement, accused of [REDACTED];⁷⁶⁸ (ii) TW4-01 was accused of [REDACTED], being a spy and collaborating with the Serb police;⁷⁶⁹ (iii) W04733 was accused of committing murders and rape, of being a 'Serb commander' and a traitor, being a Serb spy and working with Serbs;⁷⁷⁰ (iv) W04733 was asked to sing a Serbian song;⁷⁷¹ (v) a female detainee

⁷⁶⁵ See Section III(K)(1).

⁷⁶⁶ Judgment, paras 1010, 1024.

⁷⁶⁷ Judgment, paras 590, 1011.

⁷⁶⁸ 066888-TR-ET Part 1 Revised, p.157.

⁷⁶⁹ Judgment, para.404.

⁷⁷⁰ Judgment, paras 447, 692.

⁷⁷¹ Judgment, para.692.

was accused of working in a café and singing to Arkan;⁷⁷² and (vi) a female detainee was accused of having relationships with Serbs and told to write a confession implicating other detainees as Serb collaborators.⁷⁷³ The Panel found that some of the accusations were commonly made, such as accusations of being a ‘Serb commander’ and having killed and raped many people, lending support to the truthfulness of various accounts.⁷⁷⁴

213. Further, the Panel found that from the other side of the window of Room 1, KLA members called the detainees ‘spies’ and hurled insults,⁷⁷⁵ indicating that the purpose of the Detention Building was well-known. An abundance of credible evidence that allegations like these were made against victims, frequently in a repetitive fashion and accompanied by mistreatment, in the context of an institutionalised arrest and detention regime, provide a solid evidentiary basis for the Panel’s finding on this aspect of the JCE.

b) The Panel’s inference is supported by established legal principles

214. SHALA’s alternative narrative is incompatible with jurisprudence and the evidence in this case. As shown above, the factors relied upon by the Panel⁷⁷⁶ are supported by an abundance of findings that refute his purported alternate inference.

215. SHALA fails to explain how the Panel erred in law.⁷⁷⁷ A chamber may infer that a common plan or purpose existed by examining the totality of the circumstances surrounding the commission of a crime or underlying offence.⁷⁷⁸ The common plan, design or purpose can be inferred from the facts, including events on the ground.⁷⁷⁹

⁷⁷² SITF00016221-00016285 RED4,p.SITF00016235, referring to Serb paramilitary leader Željko Ražnjatović, ‘Arkan.’

⁷⁷³ Judgment,paras 569,718-720,905.

⁷⁷⁴ Judgment,para.448.

⁷⁷⁵ Judgment,paras 648,1013.

⁷⁷⁶ Judgment,paras 1010-1024.

⁷⁷⁷ *Contra* Appeal,para.145.

⁷⁷⁸ *Vasiljević* AJ,para.100; *Ntakirutimana* AJ,para.466.

⁷⁷⁹ *Šainović* AJ,para.611.

The way in which the crime or underlying offence is committed may support an inference that it must have been pursuant to a common plan.⁷⁸⁰ SHALA does not demonstrate any error in the Panel's findings regarding the common purpose.

L. Ground 12: The Panel committed no error in convicting SHALA of arbitrary detention

216. The Panel identified the elements of arbitrary detention in NIAC through a comprehensive analysis of customary IHL sources,⁷⁸¹ assessed in light of the facts of the case.⁷⁸² The Panel's finding that there was no independent review of detention for those held at the KMF was the only reasonable conclusion available on the evidence.⁷⁸³

217. The evidence considered by the Panel establishes that those detained at the KMF were not held pursuant to any criminal charges or cogent security concern.⁷⁸⁴ Regardless, their detention was unlawful due to the absence of the most basic procedural guarantees.

218. Finally, SHALA has failed to demonstrate any error in the Panel's findings on his *mens rea*⁷⁸⁵ and conduct giving rise to his responsibility for arbitrary detention.⁷⁸⁶

1. The Panel made no error of law in identifying the elements of arbitrary detention

219. The elements of arbitrary detention identified by the Panel are not 'simply' based on institutional guidelines,⁷⁸⁷ but on the well-established requirement of humane

⁷⁸⁰ *Vasiljević* AJ, paras 100,109; *Ntakirutimana* AJ, para.466.

⁷⁸¹ *Contra* Appeal, paras 207-208.

⁷⁸² *Contra* Appeal, paras 209-210.

⁷⁸³ *Contra* Appeal, paras 229-236.

⁷⁸⁴ *Contra* Appeal, para.215.

⁷⁸⁵ Appeal, paras 212,217-223.

⁷⁸⁶ Appeal, paras 224-228.

⁷⁸⁷ *Contra* Appeal, para.208.

treatment,⁷⁸⁸ and CIL principles identified in the ICRC's Customary IHL Database.⁷⁸⁹ These principles may assist a judicial body in determining the existence of a particular customary rule.⁷⁹⁰ ICRC commentaries have routinely been relied upon for this purpose.⁷⁹¹

220. The Panel also relied upon Article 6 of Additional Protocol II, applicable to NIAC, and not only Article 75(4) of Protocol I, as argued by SHALA.⁷⁹² The ECtHR judgment cited by the Panel lends further support to the obligation to promptly bring any arrested person before a judge or other competent authority.⁷⁹³ SHALA fails to show any error in the Panel's reliance on this jurisprudence, together with other sources.

2. SHALA fails to demonstrate the application of an overly high standard in relation to the competent authority requirement

221. The Panel did not apply an 'overly high standard' to the review of detention of KMF detainees.⁷⁹⁴ Rather, it required compliance with 'basic procedural safeguards',⁷⁹⁵ including the impartiality of the reviewing authority,⁷⁹⁶ as required by Article 6 of Additional Protocol II.⁷⁹⁷

222. In arguing that, according to the ICRC, what amounts to a competent authority in NIAC should be 'context specific', SHALA fails to acknowledge a set of basic

⁷⁸⁸ *Mustafa AJ*, para.430.

⁷⁸⁹ Judgment, n.1917.

⁷⁹⁰ *Thaçi Jurisdiction Challenges Appeal Decision*, para.99. *See also* Draft Conclusion on Identification of CIL, p.132, para.9.

⁷⁹¹ *See e.g. Tadić AJ*, n.113; *Halilović AJ*, n.167; *Karadžić AJ*, n.1306-1308; *Duch TJ*, para.441.

⁷⁹² Appeal, para.208.

⁷⁹³ *Lawless v. Ireland*, para.14.

⁷⁹⁴ *Contra Appeal*, para.209.

⁷⁹⁵ Judgment, para.936.

⁷⁹⁶ Judgment, para.942.

⁷⁹⁷ *See also* 2020 ICRC Commentary, para.761. This is also reflected in international human rights law, which identifies the requirement to bring an arrested person before a competent legal authority as a safeguard against detentions based solely on an 'executive decision' (*Lawless v. Ireland*, para.14).

requirements identified in the same source, which include a review by an independent authority to be carried out ‘with the least possible delay’.⁷⁹⁸

223. Regardless, SHALA’s submissions that the Panel failed to consider ‘the specific circumstances of the KLA’ should be rejected.⁷⁹⁹ SHALA’s description of such circumstances, including his claim that the KLA had largely informal command structures, is unsupported by any evidence,⁸⁰⁰ and contradicted by adjudicated facts,⁸⁰¹ SHALA’s own statements,⁸⁰² and the Panel’s findings.⁸⁰³

3. SHALA’s personal responsibility with respect to the detainee’s procedural rights was irrelevant

224. The Panel correctly held that, for the purpose of establishing SHALA’s responsibility for arbitrary detention, it is irrelevant whether he was personally responsible for the failure to respect detainees’ procedural rights.⁸⁰⁴

225. SHALA fails to demonstrate that the international nature of the armed conflict in *Delalić et al.* renders this jurisprudence inapposite.⁸⁰⁵ The *Delalić et al.* Appeals Chamber found such personal responsibility to be irrelevant in relation to the *mens rea* of the accused Mucić,⁸⁰⁶ which is the same *mens rea* identified and applied by the Panel in relation to arbitrary detention in NIAC.⁸⁰⁷ SHALA fails to explain why, *mutatis mutandis*, the same considerations should not apply when assessing an accused’s *mens rea* in the context of a NIAC.

⁷⁹⁸ 2020 ICRC Commentary, para.761.

⁷⁹⁹ Appeal, para.211.

⁸⁰⁰ Appeal, para.211, n.448-452, in which SHALA exclusively cites his own submissions.

⁸⁰¹ Adjudicated Facts Decision, Facts 38-49.

⁸⁰² Judgment, paras 337-340.

⁸⁰³ Judgment, paras 209, 339, 834-835, 919. Several high-ranking KLA officers were routinely present at the KMF, from where they conducted their work, *see* 23 October 2023, pp.2928, 2991-2992.

⁸⁰⁴ Judgment, para.940, *citing Delalić AJ*, para.379.

⁸⁰⁵ Appeal, para.212.

⁸⁰⁶ *Delalić AJ*, paras 370-387.

⁸⁰⁷ Judgment, para.944.

226. The point made in *Delalić et al.*, and correctly relied upon by the Panel, is that there are other means by which responsibility for arbitrary detention may be incurred beyond being directly responsible for the failure to respect a detainee's procedural rights.⁸⁰⁸ SHALA was convicted of arbitrary detention as a participant in a JCE, which does not require that he committed the *actus reus* of arbitrary detention, or any part thereof, provided he contributed to the JCE,⁸⁰⁹ which he did.⁸¹⁰

4. The Panel reasonably concluded that there were no reasons justifying detention

227. Contrary to SHALA's assertion,⁸¹¹ the Panel did receive and consider evidence on whether the detainees were held based on security concerns rendering their detention absolutely necessary.⁸¹² SHALA neglects to acknowledge that the Panel found that they were all held based on vague allegations.⁸¹³ Vague and unsubstantiated allegations against detainees are not legitimate bases for detention, and fall well short of demonstrating that the deprivation of liberty was absolutely necessary.⁸¹⁴ Regardless, even if a legitimate basis for the initial detention existed, the subsequent denial of basic procedural safeguards would have rendered the detention illegal.⁸¹⁵

⁸⁰⁸ *Delalić* AJ, para.379.

⁸⁰⁹ *Tadić* AJ, para.227(iii); *Karadžić* TJ, para.564.

⁸¹⁰ Judgment, paras 1025-1028.

⁸¹¹ Appeal, para.216.

⁸¹² Judgment, para.590. *See also* *Delalić* TJ, paras 1133-1134; *Duch* TJ, paras 235-238,469.

⁸¹³ Judgment, paras 590,947; Appeal, paras 215-216.

⁸¹⁴ *Delalić* TJ, para.1134; *Geci* TJ, para.216.

⁸¹⁵ *Thaçi* Jurisdiction Challenges Appeal Decision, para.97.

5. The Panel properly assessed SHALA's *mens rea*

228. The finding in *Delalić et al.* does not demonstrate any error by the Panel.⁸¹⁶ It relates to a responsibility assessment under forms of commission other than JCE.⁸¹⁷ As specifically held in the paragraph following that relied on by SHALA, 'lesser degrees of directness of participation obviously remain relevant to liability as an accomplice or a participant in a [JCE].'⁸¹⁸

229. SHALA's reliance on *Limaj et al.* is equally inapposite.⁸¹⁹ The judges in that case could not conclude that LIMAJ had been present inside the Llapushnik/Lapušnik prison camp,⁸²⁰ and declined to establish his responsibility based solely on his occasional presence in the camp's proximity.⁸²¹ Here, the Panel did not establish SHALA's *mens rea* based solely on his 'mere presence at the KMF',⁸²² but on his attendance during and personal participation in the crimes.⁸²³ SHALA's presence at the KMF on other occasions,⁸²⁴ which he also admitted,⁸²⁵ is additional evidence that the Panel could rely on to establish his knowledge of arbitrary detention.⁸²⁶

230. The Panel provided reasons why SHALA's participation in the crimes, coupled with his own admissions, established his *mens rea* with respect to lack of reasons for detention and basic procedural guarantees.⁸²⁷ Finally, SHALA's out of context reliance on *Brđanin*⁸²⁸ fails to acknowledge that, as required by that jurisprudence,⁸²⁹ SHALA

⁸¹⁶ *Contra Appeal*, paras 218-219.

⁸¹⁷ *Delalić AJ*, para.342.

⁸¹⁸ *Delalić AJ*, para.343.

⁸¹⁹ *Appeal*, para.220.

⁸²⁰ *Limaj TJ*, paras 564-565.

⁸²¹ *Limaj AJ*, para.218.

⁸²² *Contra Appeal*, para.220.

⁸²³ *Judgment*, paras 951-953.

⁸²⁴ *Judgment*, paras 840-852.

⁸²⁵ *Judgment*, para.897.

⁸²⁶ *Judgment*, para.952; *Limaj AJ*, para.218.

⁸²⁷ *Judgment*, paras 952-956. *Contra Appeal*, para.221.

⁸²⁸ *Appeal*, n.482.

⁸²⁹ *Brđanin AJ*, para.431.

was not convicted based on guilt by association, but for his contribution to the JCE with the required *mens rea*.⁸³⁰

6. The Panel properly assessed SHALA's contribution to the JCE

231. SHALA's submissions on the factual basis for his contribution to the JCE are a repetition of submissions made under Ground 7.⁸³¹

232. A position of authority,⁸³² including over other JCE members,⁸³³ is not required to find an accused responsible for arbitrary detention through JCE.⁸³⁴ What is required is that an accused significantly contributed in some way to the common plan,⁸³⁵ which SHALA did, with his contribution going far beyond the minimum legal threshold.⁸³⁶

7. The Panel reasonably concluded that KRYEZIU was not a competent authority

233. The Panel correctly found that KRYEZIU did not exercise the functions of an independent authority having oversight over the lawfulness of detention.⁸³⁷ In claiming that he did,⁸³⁸ SHALA fails to acknowledge evidence, specifically considered by the Panel, showing that KRYEZIU lacked any independence and impartiality,⁸³⁹ and that he had no power to order the release of detainees.⁸⁴⁰

234. First, KRYEZIU was appointed by Sabit GECI and Xhemshit KRASNIQI,⁸⁴¹ two JCE members in charge of the arrests and detentions at the KMF,⁸⁴² and heavily

⁸³⁰ Judgment, paras 1028, 1036.

⁸³¹ *Compare* Appeal, paras 224-225 and 141-142. See Section III(G)(1)(a)(3).

⁸³² *Stanišić & Župljanin* AJ, para. 110.

⁸³³ *Delalić* AJ, para. 338.

⁸³⁴ *Contra* Appeal, paras 226-228.

⁸³⁵ *Mladić* AJ, para. 414.

⁸³⁶ Judgment, para. 1028.

⁸³⁷ Judgment, para. 948.

⁸³⁸ Appeal, para. 236.

⁸³⁹ Judgment, para. 948.

⁸⁴⁰ Judgment, paras 530, 555.

⁸⁴¹ Judgment, para. 203.

⁸⁴² Judgment, paras 345, 349.

involved in the mistreatments of detainees.⁸⁴³ His lack of independent authority in reviewing the legitimacy of detentions at the KMF is also demonstrated by the testimony of those he interviewed.⁸⁴⁴

235. When KRYEZIU interrogated TW4-11, [REDACTED],⁸⁴⁵ he did not give him any explanation for his detention,⁸⁴⁶ nor could TW4-11 confirm or deny whether KRYEZIU had any role in his release.⁸⁴⁷ TW4-04 characterised KRYEZIU's interrogation as a farce designed to legitimise something that had been decided by someone else.⁸⁴⁸ TW4-02 was advised by KRYEZIU to "shut up" because TW4-02 had no idea of what was actually happening at the KMF.⁸⁴⁹

236. The Panel was thus correct in finding that the KMF detainees were denied basic procedural guarantees, and SHALA has failed to demonstrate any error in this regard.

M. Ground 13: The Panel committed no error in convicting SHALA of murder

237. Ground 13 should be dismissed as the Panel committed no error in finding that the JCE common plan included murder,⁸⁵⁰ and that SHALA shared the requisite intent.⁸⁵¹ Contrary to SHALA's contention,⁸⁵² the Panel specified that SHALA had direct intent.⁸⁵³ However, even if it had not indicated the type of intent, this would not have amounted to a reversible legal error.⁸⁵⁴

⁸⁴³ Judgment, paras 1004, 1017.

⁸⁴⁴ See e.g. Judgment, paras 437, 530-531, 555. *Contra* Appeal, paras 231-236.

⁸⁴⁵ Judgment, para. 435.

⁸⁴⁶ Judgment, para. 433.

⁸⁴⁷ Judgment, para. 437.

⁸⁴⁸ Judgment, para. 529.

⁸⁴⁹ Judgment, para. 552.

⁸⁵⁰ *Contra* Appeal, paras 161, 240-247. In the Notice, SHALA alleged an error regarding the scope of the common plan under Ground 11, and not under Ground 13. However, SHALA's contention that murder was not part of the plan is predominantly developed under Ground 13, with only one paragraph of Ground 11 (para. 161) covering this issue. The SPO therefore responds to submissions on murder being outside the common plan here.

⁸⁵¹ Appeal, paras 244, 249.

⁸⁵² Appeal, para. 248.

⁸⁵³ Judgment, para. 1033. See also para. 990.

⁸⁵⁴ *Mustafa* AJ, para. 389.

238. The Panel did not convict SHALA of murder for acts committed by others.⁸⁵⁵ As required by the law on JCE,⁸⁵⁶ it convicted him for his own significant contribution to the common plan⁸⁵⁷ with the required *mens rea*.⁸⁵⁸

239. Two other errors alleged in the Notice, namely the Panel's failure to consider SHALA's position within the chain of command at the KMF,⁸⁵⁹ and the Panel's assessment of DNA evidence,⁸⁶⁰ were not further developed in the Appeal, and should be either deemed to have been abandoned,⁸⁶¹ or summarily dismissed.

1. SHALA has demonstrated no error in the Panel's determinations that the JCE common plan included murder

240. SHALA mischaracterises the factual basis considered by the Panel in concluding that murder was part of the common plan. After acknowledging the general categories of evidence considered by the Panel,⁸⁶² SHALA neglects to address highly relevant determinations within each of these categories, which support the Panel's conclusions.

241. It is settled jurisprudence that the common plan need not have been previously arranged or formulated, and that it may materialise extemporaneously and be inferred

⁸⁵⁵ *Contra* Appeal, para.239.

⁸⁵⁶ *Brđanin* AJ, para.431.

⁸⁵⁷ Judgment, paras 1025-1028.

⁸⁵⁸ Judgment, paras 1031-1036.

⁸⁵⁹ Notice, para.26. This argument is a mere repetition of submissions already made at trial, and correctly dismissed by the Panel, *see* Judgment, paras 1026-1027. While a position of authority or a duty to act may be relevant in assessing an accused's contribution to a JCE, such as in cases of contribution by omission, *see Galić* AJ, para.175; *Karadžić* TJ, para.566, it is not a constitutive element of JCE, *Stanišić & Župljanin* AJ, para.110, nor has SHALA established its relevance in this case. Absent any further explanation in the Appeal on why the Panel's determinations on this issue were legally incorrect, this part of Ground 13 should be summarily dismissed.

⁸⁶⁰ Notice, para.28. First, SHALA has failed to explain how the error of law alleged in paragraph 28 of the Notice invalidates any aspect of the Judgment, a shortcoming warranting *per se* summary dismissal, *see Mustafa* AJ, para.18. Second, while the Panel was not obliged to provide reasons for its dismissal of SHALA's objections on DOLEJSI's reliability, provided it sufficiently explained its reliance on his evidence, *see Mustafa* AJ, para.34, it did specifically note these objections, and dismissed them with detailed reasons, *see* Judgment, paras 809,821-825.

⁸⁶¹ *Mustafa* AJ, para.32.

⁸⁶² Appeal, para.241; Judgment, para.1016.

from the fact that a plurality of persons act in unison to put the JCE into effect.⁸⁶³ The Panel carried out a meticulous analysis of the acts and omissions of the JCE members before concluding that the common plan included murder.⁸⁶⁴ SHALA has failed to demonstrate that no reasonable trier of fact could have made this finding. This failure inevitably stems from SHALA's choice not to acknowledge important facts that unequivocally support the Panel's conclusions,⁸⁶⁵ a shortcoming warranting summary dismissal.⁸⁶⁶

242. The Panel did not only consider that the perpetrators on 20 May 1999 brandished their guns,⁸⁶⁷ but that they used them to hit the victims on their heads, opening deep wounds which covered the victims in blood, and used knives and other sharp objects to wound their victims.⁸⁶⁸ It also considered that the perpetrators continued beating the victims even after they had lost consciousness,⁸⁶⁹ thus – correctly – giving weight to the perpetrators' continued violence against the victims in spite of their knowledge of their health conditions.⁸⁷⁰ In claiming that it would have been equally reasonable to conclude that the perpetrators only intended to mistreat the victims on this specific occasion,⁸⁷¹ SHALA ignores these clear indicators, putting forward an alternative scenario with no link with or support in the evidence considered by the Panel.⁸⁷² The fact that nobody ultimately died that night does not negate that the perpetrators already possessed the *mens rea* for murder on 20 May 1999.⁸⁷³

⁸⁶³ *Kvočka* AJ, para.96; *Tadić* AJ, para.227.

⁸⁶⁴ Judgment, paras 1016-1024.

⁸⁶⁵ Appeal, paras 242-243.

⁸⁶⁶ *Mustafa* AJ, paras 33(i),(iv); *Gucati & Haradinaj* AJ, para.32(i),(iv).

⁸⁶⁷ *Contra* Appeal, para.243.

⁸⁶⁸ Judgment, paras 1017,1032. *See also* paras 691-694,702 (regarding wounds inflicted on W04733), 655-659,686 (regarding the wounds inflicted on [REDACTED] and the Murder Victim).

⁸⁶⁹ Judgment, para.1017. *Contra* Appeal, para.242.

⁸⁷⁰ *Mustafa* AJ, para.393.

⁸⁷¹ Appeal, para.161.

⁸⁷² *Rutaganda* AJ, para.488.

⁸⁷³ Judgment, paras 1017,1032. *Contra* Appeal, para.243. The *mens rea* for murder does not only include direct intent, but also indirect intent, *see* *Mustafa* AJ, para.388; *Stakić* TJ, paras 587,616; *Karadžić* TJ, para.448; *Martić* TJ, para.60.

243. The mistreatment of detainees on 3 and 4 June 1999 further confirms the Panel's determinations regarding the scope of the common plan as of 20 May 1999.⁸⁷⁴ SHALA's submission that there was no intent to kill during or before the 4 June 1999 incident because 'the Murder Victim was shot in the leg and returned to the room alive',⁸⁷⁵ grossly misrepresents this incident, and is contrary to common sense.

244. Dr GASIOR testified that one of the shots fired at the Murder Victim on 4 June 1999 destroyed a major artery, causing extensive bleeding which only prompt surgical intervention could have stopped.⁸⁷⁶ Rather than immediately calling for help, the perpetrators, including SHALA,⁸⁷⁷ continued to beat [REDACTED] the Murder Victim until the following morning.⁸⁷⁸ The direct intent of all the perpetrators is the only reasonable conclusion that the Panel could draw from the continued mistreatment of such a gravely wounded person.⁸⁷⁹ At the very least, the perpetrators should have known that their wilful infliction of bodily harm upon the Murder Victim at that stage not only might, but would most likely lead to his death.⁸⁸⁰

245. This compelling evidence of intent is further bolstered by statements of JCE members unequivocally supporting the same conclusion.⁸⁸¹ They include SHALA's death threats to W04733, considered by the Panel not in isolation,⁸⁸² but together with threats made to TW4-01 by other JCE members.⁸⁸³ Further, W04733's evidence that SHALA threatened to kill him is consistent with and corroborated by SHALA's

⁸⁷⁴ It is well established that the crimes forming part of a JCE common plan may expand over time, *see Krajišnik AJ*, para.163; *Brđanin AJ*, para.410. Thus, even if the Appeals Panel were to find that murder became part of the plan at a later stage, this finding would not affect SHALA's conviction for murder.

⁸⁷⁵ Appeal, para.243.

⁸⁷⁶ Judgment, paras 775-776, 988.

⁸⁷⁷ Judgment, para.674.

⁸⁷⁸ Judgment, para.677.

⁸⁷⁹ Judgment, paras 1017, 1032. The degree of a perpetrator's participation in a JCE is a factor which may be considered in determining whether he acted with the requisite *mens rea*, *see Kvočka AJ*, para.188.

⁸⁸⁰ *Mustafa AJ*, para.388.

⁸⁸¹ Judgment, para.1018.

⁸⁸² The Panel's correct application of the law in its reliance on statements admitted pursuant to Rule 155 is discussed in detail in Section III(G).

⁸⁸³ Judgment, paras 1018-1019.

actions during the 20 May 1999 incident, which the Panel found *per se* sufficient to establish the existence of murderous intent.⁸⁸⁴

246. SHALA's claim not to have played a role in the denial of medical treatment does not undermine the Panel's determinations regarding his responsibility for murder.⁸⁸⁵

It also has no impact on the findings on SHALA's significant contribution to the JCE with the required *mens rea*, in relation to which the denial of medical care was not considered by the Panel.⁸⁸⁶ SHALA's contention that the perpetrators 'regretted' the Murder Victim's death and immediately took measures to ensure it would not happen again is a mere repetition of previous arguments⁸⁸⁷ already rejected by the Panel.⁸⁸⁸

247. Finally, SHALA's reliance on the characterisation of the [REDACTED] is misplaced.⁸⁸⁹ This assessment⁸⁹⁰ by a different panel of judges, in relation to a different accused, and with a different evidentiary record before them was not binding on the Panel. In any event, it has no bearing on the Panel's determinations on the scope of the common plan,⁸⁹¹ which the Panel found included murder already before this incident,⁸⁹² and was not considered by the Panel to establish SHALA's intent.⁸⁹³

248. SHALA has thus failed to demonstrate any error in the Panel's determinations on the scope of the JCE common plan.

⁸⁸⁴ Judgment, paras 1018, 1032.

⁸⁸⁵ *Contra* Appeal, para. 246.

⁸⁸⁶ *See* Judgment, paras 1025, 1031-1036.

⁸⁸⁷ Defence FTB, para. 181.

⁸⁸⁸ Appeal, para. 246; Judgment, para. 1023.

⁸⁸⁹ Appeal, paras 243, 247. [REDACTED].

⁸⁹⁰ [REDACTED].

⁸⁹¹ *Contra* Appeal, para. 247.

⁸⁹² Judgment, para. 1017.

⁸⁹³ Judgment, paras 1031-1036.

2. The Panel correctly found that SHALA's conduct made him responsible for murder⁸⁹⁴

249. In finding that SHALA's conduct rendered him responsible for murder, the Panel correctly applied the law governing JCE, which does not require an accused to have performed the *actus reus* of the crime, or any part thereof, but to have acted in a way that contributed to the common plan.⁸⁹⁵

250. Physical presence at the time of the commission of a crime is also not a requirement under JCE.⁸⁹⁶ Nevertheless, SHALA was present when Xhemshit KRASNIQI shot the Murder Victim, and was actively engaged in his mistreatment before and after he was shot.⁸⁹⁷ SHALA's contribution, therefore, is not just to the common plan – which would have sufficed – but to the murder itself, as he inflicted violence on the victim while facilitating the conduct of the other perpetrators,⁸⁹⁸ like a 'cog in the wheel of events' leading up to the Murder Victim's death.⁸⁹⁹

3. The Panel correctly found that SHALA possessed the *mens rea* for murder

251. In the Notice, SHALA characterised the alleged error concerning his *mens rea* as one of 'law and fact'.⁹⁰⁰ In the Appeal, however, SHALA fails to identify the nature of the alleged legal error. The SPO understands SHALA's submissions as a challenge to the Panel's factual determinations.⁹⁰¹ SHALA has failed to demonstrate that no reasonable trier of fact should have reached these determinations, or that the Panel's evaluation of the evidence was erroneous.

⁸⁹⁴ *Contra Appeal*, para.239.

⁸⁹⁵ *Judgment*, para.1001; *Mladić AJ*, para.414; *Krajišnik AJ*, paras 215,695; *Tadić AJ*, para.192.

⁸⁹⁶ *Judgment*, para.1035; *Krnojelac AJ*, para.81; *Simba AJ*, para.296.

⁸⁹⁷ *Judgment*, paras 674-677,907,1025.

⁸⁹⁸ *Tadić AJ*, para.196.

⁸⁹⁹ *Tadić AJ*, para.199, citing *Ponzano Case*.

⁹⁰⁰ *Notice*, para.27.

⁹⁰¹ *Appeal*, paras 242-248.

252. The Panel established SHALA's intent for murder based on his participation in the 20 May 1999 incident,⁹⁰² his statement to W04733 that he would be executed,⁹⁰³ and his further participation in the 4 June 1999 mistreatment of [REDACTED] the Murder Victim.⁹⁰⁴

253. SHALA's statement to W04733 is one of the factors considered by the Panel, but not a decisive one, and is supported by SHALA's conduct on both 20 May and 4 June 1999.⁹⁰⁵

254. The circumstances of the 20 May 1999 incident considered by the Panel to conclude that the common plan included murder are equally probative of SHALA's *mens rea*. The Panel noted, *inter alia*, that SHALA hit W04733 on the head with a baton, that he witnessed the state of the victims that night, and that he nevertheless continued to engage in their mistreatment.⁹⁰⁶ The Panel was equally correct in considering SHALA's physical presence and participation in the 4 June 1999 mistreatment when assessing his *mens rea*,⁹⁰⁷ especially because – as noted by the Panel – SHALA 'witnessed the consequences of the shooting', including that the victim was 'bleeding profusely', and continued to participate in his mistreatment.⁹⁰⁸ SHALA's knowledge, on 20 May and 4 June 1999, of the health condition of the victims, together with his conduct, prove that he had the required intent for murder.⁹⁰⁹

255. Finally, a showing that SHALA 'desired' to kill the Murder Victim was not necessary for his murder conviction,⁹¹⁰ as under the circumstances described above,

⁹⁰² Judgment, para.1032.

⁹⁰³ Judgment, para.1033.

⁹⁰⁴ Judgment, para.1034.

⁹⁰⁵ See *Al-Khawaja and Taery v. UK*, para.131, interpreting the 'decisive' requirement as evidence of such importance that is likely to be determinative of the outcome of the case.

⁹⁰⁶ Judgment, para.1032.

⁹⁰⁷ *Simba AJ*, para.296.

⁹⁰⁸ Judgment, para.1034.

⁹⁰⁹ The *Mustafa* Appeals Panel considered Mustafa's knowledge of the state of health of the murder victim in that case to be relevant to establish his intent, see *Mustafa AJ*, para.393.

⁹¹⁰ *Contra Appeal*, para.244.

SHALA should have reasonably known that his mistreatment of the Murder Victim might lead to his death.⁹¹¹ SHALA fails to demonstrate any error in the Panel's finding of guilt in respect of the murder charge.

N. Ground 14: SHALA's sentence reflects the magnitude of his crimes and no reduction is warranted

256. Appeals against sentence, as appeals from a trial judgment, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.⁹¹² SHALA's sentence reflects the Panel's discharge of its obligation to individualise the penalty to fit the circumstances of the accused and the gravity of the crimes.⁹¹³ No discernible error was committed in the Panel's exercise of its discretion. SHALA's sentence reflects the gravity of the crimes,⁹¹⁴ his role in them,⁹¹⁵ the severe consequences borne by his victims,⁹¹⁶ the presence of multiple aggravating factors and lack of mitigating factors,⁹¹⁷ and the importance of deterrence.⁹¹⁸

1. The Panel is not bound by sentencing ranges under Article 44(2)

257. As a preliminary matter, and contrary to SHALA's submissions,⁹¹⁹ the only binding sentencing range applicable for ICL crimes at the KSC is that set out in Article 44(1). Article 44(2)(a)-(b) provides that, when determining a sentence, a panel 'shall take into account', but is not bound by, sentencing ranges for the crimes under other

⁹¹¹ *Mustafa* AJ, para.388; *Kvočka* AJ, para.259. See also *Stakić* TJ, paras 587,616; *Karadžić* TJ, para.448; *Martić* TJ, para.60, which held that if a perpetrator knows that the death of the victim is a likely outcome of his or her conduct, and reconciled himself or herself to and made peace with that outcome, the *mens rea* for murder is satisfied.

⁹¹² *Popović* AJ, para.1961; *Šainović* AJ, para.1798; *Mustafa* AJ, para.453.

⁹¹³ *Popović* AJ, para.1961; *Đorđević* AJ, para.931; *Lukić & Lukić* AJ, para.640.

⁹¹⁴ Judgment, paras 1086-1092,1102.

⁹¹⁵ Judgment, paras 1103-1108.

⁹¹⁶ Judgment, paras 1093-1095.

⁹¹⁷ Judgment, paras 1096-1101,1109-1119.

⁹¹⁸ Judgment, paras 1060,1062-1065.

⁹¹⁹ Appeal, paras 256,260.

Kosovo laws.⁹²⁰ The Article 44(2) considerations are part of a broader range of factors⁹²¹ - including consideration of Article 44(2)(c) and the particular circumstances of the case - that a panel must holistically evaluate and weigh.⁹²² A panel is entitled to impose, within the limits of Article 44(1), either a greater or lesser sentence than would have been imposed under any other punitive regime in Kosovo.⁹²³

2. The Panel properly interpreted Article 44(2)

258. Consistent with the plain language of Article 44(2), the Panel correctly took into account the punishments provided for (comparable) crimes in Kosovo at the relevant time, and any subsequent more lenient punishment.⁹²⁴

259. No reasonable interpretation of Article 44(2) required the Panel to apply *lex mitior* in identifying the single most lenient law or single sentencing range.⁹²⁵ The *lex mitior* principle applies only to binding laws,⁹²⁶ and is therefore inherently inapplicable to Article 44(2). Moreover, it is inconsistent with the legislative intent of Article 44, which is for a trial panel to have discretion to take into account all relevant factors.

260. However, in any event, contrary to SHALA's submissions, the Panel did expressly identify what it considered to be the sentencing range from relevant laws, and which it considered to be the most lenient.⁹²⁷ As such, no error arises, and it is clear that each of these ranges - and, in particular, the one the panel considered the most lenient - were properly taken into account.

⁹²⁰ *Mustafa* SCC Decision, para.106; *Mustafa* New Determination, paras 9,18,n.43; *Mustafa* AJ, para.466.

⁹²¹ See Art.44(5) (similarly using the phrase 'shall take into account').

⁹²² *Mustafa* SCC Decision, para.106.

⁹²³ See *Krstić* AJ, para.262.

⁹²⁴ Judgment, paras 1068-1069.

⁹²⁵ Cf. *Mustafa* SCC Decision, paras 87-88. See SPO CCC Submissions on *Mustafa* Referral, paras 32-43.

⁹²⁶ Constitution, Art.33(4) (referring to 'subsequent applicable law'). See also *Nikolić* AJ, para.81; *Scoppola v. Italy*, paras 41,105-109 (referring to, *inter alia*, the *Nikolić* AJ when finding that a consensus has emerged in Europe and internationally concerning the application of subsequent *lex mitior* before a final decision in a case).

⁹²⁷ Judgment, para.1069,n.2190.

261. In the event *lex mitior* were to be applied to Article 44(2), it is required that each punitive regime be assessed globally in its entirety in identifying relevant ranges, rather than in a piecemeal or selective manner.⁹²⁸ The SFRY Code and its UNMIK amendments do not provide a sentencing range for the international crimes, including modes of liability,⁹²⁹ underlying SHALA's conviction⁹³⁰ that would form any part of a *lex mitior* assessment in this case,⁹³¹ although they may be taken into account, as a discretionary consideration (providing limited guidance), under Article 44(2)(a). Compared with other Kosovo laws, Article 142 of the SFRY Code provided for the same minimum (five years) and higher maximum (death) penalties for the crimes in this case.⁹³² Considering legislative intent, context,⁹³³ and the application of Article 44(2)(c), UNMIK Regulation No. 1999/24 cannot be read as having replaced the death penalty – for the most serious of crimes, including war crimes – with a 5-15 year sentencing range.⁹³⁴ All other Kosovo laws provide for maximum sentences of 40 years

⁹²⁸ *Maktouf and Damjanović v. Bosnia and Herzegovina*, Concurring Opinion of Judges Albuquerque and Vučinić, para.8; *Ruban v. Ukraine*, paras 20,23,46.

⁹²⁹ When previously addressing 'offences' under customary international law in the context of ECHR Article 7, the Chamber considered war crimes and crimes against humanity, 'including related modes of liability.' Shala Constitutional Court Referral Decision, para.63; JCE and Jurisdiction Constitutional Court Decision (Case 6), paras 70-72,78.

⁹³⁰ Article 44(2)(a)-(b) concern sentencing ranges for 'the crime', which read together with the chapeau means the relevant 'international crime'.

⁹³¹ JCE and Jurisdiction Constitutional Court Decision (Case 6), para.79. In analysing cases from Bosnia and Herzegovina implicating Article 142 of the SFRY Code, the ECtHR distinguished between imposing penalties for crimes under customary international law which were subsequently criminalised under domestic law (where *lex mitior* was found not to apply) and imposing penalties for crimes falling under Article 142 of the SFRY Code and a later domestic law (where *lex mitior* was found to apply). The present case falls under the first scenario, as Article 142 of the SFRY Code does not directly criminalise customary international law, as is done in KSC Articles 12-14 and 16(1). Compare *Šimšić v. Bosnia and Herzegovina*, paras 23,25, with *Maktouf and Damjanović v. Bosnia and Herzegovina*, paras 55,67-76. Notably, the scope of offences cannot be extended to include offences that were not criminal under the original law. See *Haradinaj* Judgment, para.136. In turn, retroactively extending the reach of Article 142 and other relevant provisions to include customary international law would not be permissible.

⁹³² See *Mustafa* SCC Decision, para.97, n.150.

⁹³³ Including the enactment of UNMIK Regulation 2000/59 less than one year later clarifying a 40-year maximum to be applicable.

⁹³⁴ See *Ruban v. Ukraine*, paras 45-46.

in the case of the PCCK, and life imprisonment in the case of the 2012 KCC and 2019 KCC.⁹³⁵ These codes also provide minimum sentences of five years for serious violations of Common Article 3,⁹³⁶ with a clear legislative intent for torture and murder as international crimes,⁹³⁷ and aggravated murder,⁹³⁸ to be punished by no less than 10 years.⁹³⁹ Notably, none of the potential ranges to be taken into account pursuant to Article 44(2) are more lenient than the binding range provided for in Article 44(1), given that there is no prescribed minimum sentence for war crimes in the Law. As such, there can be no concern that the Trial Panel may have reached a different determination on the sentence had it explicitly identified various other sentencing ranges (more stringent than the Law) to be taken into account for the purposes of Article 44(2).

3. The Panel properly weighed the relevant factors

262. SHALA shows no abuse of discretion in the Panel's determination.⁹⁴⁰ SHALA's claim that he was sentenced for uncharged conduct ignores the plain language of the Indictment.⁹⁴¹ No legal error was committed.

263. SHALA's claim that the Panel abused its discretion by failing to reduce his sentence based on fair trial violations is without basis, as the Panel found no such violations.⁹⁴² His assertions are unsupported as he fails to show prejudice,⁹⁴³ how any remedy for any supposed prejudice should automatically be a sentencing discount or

⁹³⁵ 2012 KCC, Arts 43,44,152(1); 2019 KCC, Arts 40,41,146(1); PCCK, Arts 120(1),37(2).

⁹³⁶ See 2019 KCC, Art.146(1); 2012 KCC, Art.152(1); PCCK, Art.120.

⁹³⁷ 2019 KCC, Art.146(2)(1); 2012 KCC, Art.152(2)(1); and PCCK, Art.120(2)(1).

⁹³⁸ The minimum sentence for aggravated murder is not discretionary, where the relevant conditions are met (as they would have been in this case). See 2019 KCC, Art.173; 2012 KCC, Art.179; PCCK, Art.147.

⁹³⁹ 2019 KCC, Art.146(2)(1); 2012 KCC, Art.152(2)(1); PCCK, Art.120(2)(1). In the case of the PCCK, the crimes would have been eligible for long-term imprisonment, with a minimum of 21 years (PCCK, Arts 37(2),118).

⁹⁴⁰ Appeal, paras 266-271.

⁹⁴¹ See Section III(E)(1).

⁹⁴² Appeal, para.267; Judgment, para.1119.

⁹⁴³ See Section III(A)(1)-(2).

how any sentencing discount would be proportionate⁹⁴⁴ to any prejudice he suffered. The cases cited do not support his claim.⁹⁴⁵

264. The Panel considered SHALA's lack of a formal commanding role⁹⁴⁶ and explained why his proposed mitigating factors fail in these circumstances.⁹⁴⁷ SHALA's claim to be duty-driven is unexplained and irrelevant, as is his assertion that he changed.⁹⁴⁸ SHALA identifies no jurisprudence suggesting the Panel failed to discharge its legal obligation to determine a fair and appropriate sentence on this basis.

265. While the Panel considered submissions on rehabilitation and reintegration, it found that in the circumstances, those factors musn't carry undue weight.⁹⁴⁹ This reflects established jurisprudence which reveals that retribution and deterrence are the main purposes of sentencing, and rehabilitation should not be given undue weight.⁹⁵⁰ The gravity of the crimes is the primary consideration in imposing a sentence⁹⁵¹ and:

[T]he goals of sentencing should not be accorded undue prominence in the overall assessment of the sentences to be imposed. Although they play an important role and must be considered, the Trial Chamber's duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime.⁹⁵²

⁹⁴⁴ *Karadžić* AJ,para.757,n.2058 and references therein; *Rwamakuba* Remedy AD,para.27; *Nyiramasuhuko* AJ,para.396.

⁹⁴⁵ Appeal,para.267,n.574 (In *Ndindiliyimana* AJ,para.23, the relief requested was inappropriate even where prejudice was demonstrated from disclosure violations; *Menelaou v. Cyprus*, no paragraph specified, and *Barayagwiza* Separate Opinion,para.39 concern excessive delays violating right to trial within a reasonable time).

⁹⁴⁶ Judgment,paras 1104,1108. *Contra* Appeal,para.268.

⁹⁴⁷ Judgment,paras 1111-1112,1115-1116. *Contra* Appeal,para.268.

⁹⁴⁸ In 2020, SHALA was convicted of stabbing someone five times with a knife at a bar in 2018, requiring surgery for the victim (118356-118384-ET,p.118368).

⁹⁴⁹ Judgment,para.1061.

⁹⁵⁰ *Contra* Appeal,paras 254-255; *Mustafa* AJ,para.451; *Popović* AJ,para.1966; *Stakić* AJ,para.402.

⁹⁵¹ *Mustafa* AJ,para.451.

⁹⁵² *Popović* AJ,para.1966 and references therein.

266. SHALA's claim that the Panel erred by not 'attaching weight' to sentences in other cases or explaining why it departed from sentences in other cases⁹⁵³ lacks legal basis and demonstrates a fundamental misunderstanding of the Panel's obligation. Comparisons to sentences in other cases, in particular those under appeal, are of limited authority⁹⁵⁴ and not necessarily a proper avenue to challenge the sentence.⁹⁵⁵ The existence of numerous variables in any case and tendency of appellants to focus on similarities and not differences while comparing sentences does not make the cases or sentences analogous.⁹⁵⁶ The plethora of case-specific factors in sentencing cannot be easily quantified and make the transposition of sentences from one case to another impossible.⁹⁵⁷

267. SHALA wrongly presumes that the Panel was obligated to sentence him in light of the sentences of Sabit GECI and Xhemshit KRASNIQI.⁹⁵⁸ No such obligation exists, for obvious reasons, including the different evidentiary record, differing convictions, and the non-binding nature of those trials *vis-à-vis* the KSC. Even if the Panel were obligated to compare its sentence to those in EULEX trials, which it is not, SHALA's claims fail as, critically, he fails to acknowledge that GECI and KRASNIQI were not convicted of murder.

268. SHALA's suggestion that the sentence is unreasonably disproportionate to other cases⁹⁵⁹ is unsubstantiated, as he fails to identify any similar cases. The appellant challenging the sentence must demonstrate how the trial panel ventured outside the bounds of its discretionary framework in imposing the sentence,⁹⁶⁰ and SHALA fails

⁹⁵³ Appeal, para.262.

⁹⁵⁴ *Kordić & Čerkez* AJ, para.1064; *Muhimana* AJ, para.232.

⁹⁵⁵ *Naletilić & Martinović* AJ, para.615.

⁹⁵⁶ *Kvočka* AJ, para.696.

⁹⁵⁷ *Mustafa* AJ, para.478, n.1295 (and references therein); *Mustafa* New Determination, n.55.

⁹⁵⁸ Appeal, paras 261-265.

⁹⁵⁹ Appeal, paras 261,263.

⁹⁶⁰ *Karadžić* AJ, para.749.

to do so. SHALA neither addresses the bounds nor how the Panel exceeded them. Ground 14 should be dismissed.

IV. CLASSIFICATION AND DISCLOSURE DECLARATION

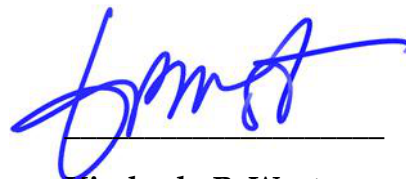
269. The SPO Response Brief is submitted confidentially in accordance with Rule 82(4).

270. In accordance with Rule 179(5), the SPO has disclosed all material in its custody or control falling under its disclosure obligations.

V. CONCLUSION

271. As shown in this Response, none of the grounds submitted by SHALA demonstrate errors of law or fact by the Panel warranting a reversal of any aspect of his conviction. The Appeal should be dismissed in its entirety.

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Kimberly P. West

Specialist Prosecutor

Friday, 17 January 2025

At The Hague, the Netherlands.