PUBLIC
Date original: 17/01/2025 21:33:00
Date public redacted version: 07/02/2025 12:14:00

In:	**KSC-CA-2024-03**
	The Specialist Prosecutor v. Pjetër Shala
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Kai Ambos
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Victims' Counsel
Date:	17 January 2025
Language:	English
Classification:	Public

Public Redacted Version of Victims' Counsel's Response to the Defence Appeal Brief with confidential Annex 1

Specialist Prosecutor's Office
Kimberly P. West

Counsel for the Accused
Jean-Louis Gilissen

Counsel for Victims
Simon Laws

Contents

I. INTRODUCTION

1. Pursuant to the decision of the Appeals Panel,[1] Article 22(3) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Rules 114(4) and 179(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), and the Decision on Modalities of Victims' Participation in Appellate Proceedings,[2] Victims' Counsel hereby submits this Response to Pjetër Shala's Appeal Brief[3] on behalf of the eight victims participating in the proceedings ("VPPs") in this case.
2. Victims' Counsel addresses the Trial Panel in respect of four of the grounds of appeal relied on by the Defence, namely 4, 6, 7 and 14, and invites the Panel to dismiss each of them.

II. CLASSIFICATION

3. This Response Brief is filed as confidential pursuant to Rule 82(4) as it responds to a confidential filing and as it contains information that could identify VPPs.

III. PROCEDURAL HISTORY

4. Eight VPPs have been admitted to participate in the proceedings.[4]
5. The Trial Panel issued its verdict in Case 04 on 16 July 2024,[5] finding Mr Shala guilty of Counts 1, 3 and 4 and sentencing him to 18 years of imprisonment, with credit for time served.[6]

---

[1] *Specialist Prosecutor v. Pjetër Shala*, KSC-CA-2024-03/F00025, Decision on Specialist Prosecutor's and Victims' Counsel's Requests for Extension of Time to File Briefs in Response, 13 November 2024, para. 11 ("Decision on Extension of Time").
[2] KSC-CA-2024-03/F00005, Decision on Modalities of Victims' Participation in Appellate Proceedings, 24 July 2024 ("Decision on Victims' Procedural Rights on Appeal").
[3] KSC-CA-2024-03/F00029, Corrected Version of Defence Appeal Brief with confidential Annexes 1 and 2, 25 November 2024 ("Appeal Brief").
[4] KSC-BC-2020-04/F00123, First Decision on Victims' Participation, 15 December 2021, para. 50(a); KSC-BC-2020-04/F00249, Second Decision on Victims' Participation, 11 August 2022, para. 43(b); KSC-BC-2020-04/F00279, Third Decision on Victims' Participation, 19 September 2022, para. 43(a).
[5] KSC-BC-2020-04/F00847, Trial Judgment and Sentence with one confidential annex, 16 July 2024 ("Judgment" or "Trial Judgment").
[6] Judgment, paras 1124-1125.

6. On 24 July 2024, the Appeals Panel issued its Decision on Modalities of Victims' Participation in Appellate Proceedings.[7]
7. On 30 September 2024, the Defence filed its revised notice of appeal[8] and filed its Appeal Brief on 25 November 2024.[9]
8. In response to requests for extensions of time to respond, the Appeals Panel authorised the SPO and Victims' Counsel to file their responses by 17 January 2025.[10]

IV. SUBMISSIONS

A. Applicable law on appeal proceedings

9. Article 46 of the Law provides that the Appeals Panel may affirm, reverse, or revise a Trial Judgment if there has been "an error on a question of law invalidating the judgement", "an error of fact which has occasioned a miscarriage of justice", or "an error in sentencing."[11]
10. On errors of law, in the *Mustafa* case the Appeals Panel elaborated that,

> The party alleging an error of law must identify it, present arguments in support of its claim and explain how the error invalidates the decision. In addition, when a party alleges an error of law on the basis of a lack of a reasoned opinion, it must identify the specific issues, factual findings or arguments which the Trial Panel is alleged to have omitted, and explain why this omission invalidates the decision. The Appeals Panel considers that an alleged error of law which has no prospect of changing the outcome of the decision may be rejected on that basis. However, even if a party's arguments are insufficient to support the contention of an error, the

[7] Decision on Victims' Procedural Rights on Appeal.
[8] KSC-CA-2024-03/F00017/COR, Corrected Version of Revised Defence Notice of Appeal, 30 September 2024 ("Corrected and Revised Notice of Appeal").
[9] Appeal Brief.
[10] Decision on Extension of Time.
[11] Article 46(1)(a)-(c), (3) of the Law; *Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj*, KSC-CA-2022-01/F00114, Appeal Judgment, 2 February 2023, para. 21 ("*Gucati and Haradinaj* Appeal Judgment"); *Specialist Prosecutor v. Salih Mustafa*, KSC-CA-2023-02, Appeal Judgment, 14 December 2023, para. 17 ("*Mustafa* Appeal Judgment").

> Panel may find an error of law based on other reasons. The Appeals Panel will review the Trial Panel's findings of law to determine whether they are correct.[12]

11. On errors relating to fair trial rights, the Appeals Panel explained,

> The Panel further notes that, when a party alleges on appeal that its right to a fair trial has been infringed, it must demonstrate that this violation caused prejudice amounting to an error of law which, in turn, invalidates the challenged decision.[13]

12. In relation to alleged errors of fact, Article 46(5) of the Law states:

> In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.[14]

13. In the *Mustafa* case, the Appeals Panel set out the standard of review applicable to appellate proceedings in respect of factual findings before the Kosovo Specialist Chambers:

> The Appeals Panel will not lightly overturn a trial panel's factual findings, as it is primarily the latter's task to hear, assess and weigh the evidence presented at trial. The Appeals Panel will only overturn a decision by a trial panel where an error of fact occasioned a miscarriage of justice. In this regard, the Panel notes that mere disagreement with the conclusions that the Trial Panel drew from available facts or the weight it accorded to particular factors is not enough to establish a clear error.[15]

14. In relation to errors concerning the sentence, the Appeals Panel has held that it:

> will not substitute its own sentence for that imposed by the Trial Panel, unless the appealing Party demonstrates that the Trial Panel committed a discernible error in exercising its discretion or failed to follow the applicable law. Consequently, the Appeals Panel will only interfere with the Trial Panel's exercise of discretion where the sentence it imposed is: (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of its discretion. In this regard, the Appeals Panel will also consider whether the Trial Panel, in reaching its decision on

[12] *Mustafa* Appeal Judgment, para. 18.
[13] *Mustafa* Appeal Judgment, para. 22.
[14] See also, *Mustafa* Appeal Judgment, para. 23.
[15] *Mustafa* Appeal Judgment, para. 24.

> sentencing, gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations.[16]

B. Victims' rights and interests

15. In its Decision on Modalities of Victims' Participation in Appellate Proceedings, the Appeals Panel held that:

> Moreover, Counsel for Victims may continue, within the limits set forth in Article 22(6) of the Law and Rule 114(4) of the Rules, without seeking prior leave from the Panel, to make oral and written submissions on any point of law or fact, and to file responses and replies, as the case may be, to any submissions made before the Panel, including appellate briefs. However, the Panel stresses that Counsel for Victims must explicitly set out how the submissions are related to the participating victims' personal interests.[17]

16. In this Response Brief, Victims' Counsel responds to Grounds 4, 6, 7 and 14 of the Appeal Brief and sets out below how these submissions are related to the participating victims' personal interests.

17. All of the VPPs in this case have the right to recognition of the harm that they suffered as a result of being direct or indirect victims of the crimes of arbitrary detention, torture and murder, which directly impact upon their right to obtain reparation for their harm. They also have the right to contribute to the establishment of the truth.[18]

18. Each victim participating in this case is personally affected by the arguments made by the Defence in Ground 4 insofar as they relate to notice of victim particulars in the Indictment. The accounts of TW4-01 and W04733, [REDACTED], have contributed to the determination of the truth of the full circumstances of what happened to all of the detainees at the KMF. The Defence's flawed arguments undermine the victims' right to contribute to the determination of the truth.

---

[16] *Gucati and Haradinaj* Appeal Judgment, para. 414.
[17] Decision on Victims' Procedural Rights on Appeal, para. 10.
[18] *Mustafa* Appeal Judgment, para. 47.

19. Ground 6 includes submissions in relation to the Trial Panel's assessment of the credibility of witnesses, including TW4-01 and W04733. [REDACTED]. [REDACTED]. The Defence submits that the Trial Panel was "wholly erroneous" in its assessment of the credibility of TW4-01 and W04733, and challenges the evidence of W04733's four family members.
20. In addition, the Defence submissions allege that the testimonies of [REDACTED], which related to devastating events of central importance in their lives, were not credible or not reliable. For the Appeal to succeed on that basis would significantly impact the psychological dignity and well-being of the victims.
21. Finally, with regard to TW4-01, part of this Response relies on the testimony and a report from a psychologist and psychiatrist whose evidence was commissioned and adduced at trial by Victims' Counsel. Having submitted to a forensic mental health examination, and the Trial Panel having accepted its findings,[19] it is submitted that [REDACTED].
22. It follows that submissions as to Ground 6 in relation to [REDACTED].
23. Regarding Ground 7, the harm of V002, V003, V004, V005, V006, V007, and V008 arises from the crimes suffered by W04733, who died before trial. What he experienced is well documented and was testified to by not only [REDACTED], but also other witnesses in this case, particularly by those who were also detained at the KMF. The Trial Panel carefully considered W04733's statements, in the context of all of the other evidence before it. These VPPs have a personal interest in their family member's prior statements being considered by the Trial Panel for the establishment of their harm and that of W04733, and to the establishment of the truth, and not being excluded on an improper basis, as argued by the Defence in Ground 7.
24. Regarding Ground 14 as to the alleged errors concerning the sentence, VPPs have been participating in the sentencing process in this case pursuant to Rules 159(6),

[19] Judgment, paras 211-212.

162, and 164. Given the rules governing the determination of the sentence, in particular the requirement to consider the gravity of the crimes and its consequences which have been particularly grave for the VPPs, all of the VPPs participating in this case have a clear interest in the appeals proceedings concerning the sentence imposed on the Accused. Victims' interests in the sentencing are also explicit in the light of the primary objectives of the sentence, i.e. retribution, deterrence, but also "affirmative prevention". Finally, Victims' Counsel submits that an adequate sentence imposed in itself also has a reparative aspect for the VPPs.[20]

25. For these reasons, Victims' Counsel submits that the following submissions on these four grounds relate to the participating victims' personal interests.

C. Grounds concerning procedural violations

1. *Defective indictment (Ground 4)*

26. The Defence complains at para. 63 of the Appeal Brief that para. 14 of the Indictment does not include reference to the names of the "at least nine" victims. This argument is without merit. Paragraph 14 of the Indictment includes reference to paragraphs 18-24, providing the names of five of the detainees, including the names relevant to the VPPs in this case.[21]

27. Rather than providing any new arguments, or arguments demonstrating how the alleged lack of notice of victim particulars occasioned any prejudice, the Defence simply rehashes prior litigation[22] without tying it to a discernible prejudice.

[20] KSC-BC-2020-04/F00866, Public redacted version of the Reparation Order against Pjetër Shala, 29 November 2024, para. 153 ("Reparation Order").
[21] KSC-BC-2020-04/F00098/A01, Annex 1 to Submission of Corrected Indictment, 1 November 2021, paras 21, 22, 23, 28 [REDACTED].
[22] See KSC-BC-2020-04/IA004/F00008, Decision on Pjetër Shala's Appeal against Decision on Motion Challenging the Form of the Indictment, 22 February 2022, para. 22 *et seq* ("Decision on Motion Challenging Indictment").

28. The Defence has failed to explain how having any further particulars would have assisted in its preparations, and how having such information would have changed the outcome of the case. The Defence had notice of the identities of three direct victims [REDACTED] relevant to the VPPs from the Indictment,[23] and Mr Shala was convicted of crimes perpetrated against each of the three direct victims (Counts 1, 3, and 4).
29. The Defence has failed to discharge its burden on appeal. As noted above, when a fair trial right is alleged to have been infringed, the party "must demonstrate that this violation caused prejudice amounting to an error of law, which in turn, invalidates the challenged decision."[24] The Defence has failed to identify any specific findings from the Trial Judgment in respect of which further victim particulars would have made any difference to its preparation and how that caused prejudice.[25]

D. Grounds concerning factual findings

1. *Abuse of discretion (Ground 6)*

30. In Ground 6 it is submitted by the Defence that the Trial Panel abused their discretion in the assessment of key Prosecution witnesses.
31. Victims' Counsel submits that the Trial Panel did not abuse their discretion, but was entitled, and correct, to find that TW4-01 and W04733 were credible witnesses in relation to the key issues in the case.

[23] KSC-BC-2020-04/F00098/A01, Annex 1 to Submission of Corrected Indictment, 1 November 2021, paras 21, 22, 23, 28.
[24] *Mustafa* Appeal Judgment, para. 22.
[25] The Appeal Brief refers to Trial Judgment paragraphs 945, 977, 1005 in footnote 102 to paragraph 56, with paragraphs 945 and 977 being of interest to the VPPs. These two paragraphs summarise findings by the Trial Panel in relation to multiple victims. The Defence fails to identify which specific finding or findings it is challenging.

32. Mr Shala repeats arguments on appeal that did not succeed at trial without demonstrating that the Trial Panel's rejection of them constituted an error warranting the intervention of the Appeals Panel.

(a) Ground 6A: TW4-01

33. The Defence raises a number of complaints about the Trial Panel's finding that TW4-01 was a credible witness. In summary these are:

(i) An alleged inconsistency in the Trial Panel's findings regarding the effects of trauma on TW4-01's memory.[26]

34. This argument misrepresents the evidence. There was highly credible, undisputed evidence in the case demonstrating that TW4-01 suffered from severe post-traumatic stress disorder (PTSD). However, the Defence argument conflates the issues of the reliability of TW4-01's memory with the effects of trauma.

35. Specifically, it is argued that "[REDACTED]."[27]

36. This mischaracterises the Trial Panel's approach. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED][28] [REDACTED][29] [REDACTED]. [REDACTED]. [REDACTED][30] ([REDACTED][31]) [REDACTED]. [REDACTED] "[REDACTED]".[32] Furthermore, TW4-01 was not found by the experts, nor by the Trial Panel, to be suffering from memory problems.[33] The Trial Panel also gave careful consideration to the fact that there were discrepancies between TW4-01's testimony and his prior

[26] Appeal Brief, para. 80.
[27] Appeal Brief, para. 80.
[28] Summarised at Judgment paras 211-212.
[29] Judgment, para. 111.
[30] [REDACTED].
[31] Appeal Brief, para. 86 and *passim*.
[32] Appeal Brief, para. 80.
[33] Judgment, para. 106.

statements, but concluded that these were the result of factors that did not ultimately affect his overall credibility.[34]

(ii) An alleged error in accepting the testimony of TW4-01 in relation to [REDACTED].[35]

37. The Trial Panel was fully entitled to accept the evidence that [REDACTED], "[REDACTED]"[36] and was therefore likely to remember it. It was not unreasonable to further conclude that TW4-11 and W01488 were confusing [REDACTED].[37] The reliance by the Defence on [REDACTED][38] [REDACTED].[39]

(iii) An alleged error by the Trial Panel in "not taking into consideration" TW4-01's prior convictions and [REDACTED].[40]

38. This submission cannot be reconciled with the terms of the Judgment. It is clear that the Trial Panel did consider the fact that TW4-01 had prior convictions.[41] However, they concluded that his criminal record did not affect "his credibility or reliability as a matter of principle", and that it was not "indicative of untruthfulness".[42]

39. In pursuit of this submission, it is argued by the Defence that:

> In any event, no reasonable trier of fact would have considered that a witness [REDACTED] was an absolutely truthful, reliable, and credible witness and that his evidence did not even have to be treated with caution.[43]

[34] Judgment, para. 104.
[35] Appeal Brief, para. 81.
[36] Judgment, para. 781.
[37] Judgment, para. 781.
[38] Appeal Brief, para. 81.
[39] See KSC-BC-2020-04/F00818, Prosecution Final Trial Brief with confidential Annexes 1 and 3 and public Annex 2, 25 March 2024, para. 161.
[40] Appeal Brief, para. 86 and fn. 161.
[41] Judgment, para. 105.
[42] Judgment, para. 107.
[43] Appeal Brief, para. 86.

40. The citation is to paragraph 107 of the Judgment which includes no reference to the witness being "absolutely, truthful, and credible". Rather, it simply rejects the Defence's argument that TW4-01's criminal record *ipso facto* made him unreliable.[44]

41. Moreover, it is a misrepresentation to suggest that the Trial Panel formed the wholly positive view of TW4-01's credibility that the Defence attributes to it. The very paragraph following that cited by the Defence demonstrates that the Trial Panel was fully cognisant of the fact that TW4-01 had [REDACTED]:

> Turning to [REDACTED].[45]

42. The topic had additionally been addressed earlier in the Judgment:

> [T]he Panel observes that [REDACTED]. This fact has been uncontested in this trial, has been extensively explored in both direct and cross-examination, and the Panel has duly considered it in its credibility assessment of the witness.[46]

43. A second element to this argument is the assertion by the Defence that it was [REDACTED]. [REDACTED] "[REDACTED]".[47] [REDACTED].[48] [REDACTED].[49] The Trial Panel was therefore correct to regard the SPO's decision to terminate the proceedings [REDACTED] as "immaterial".[50]

(iv) An alleged error in relation to the issue of TW4-01's motive to falsely implicate the Accused.[51]

44. It is submitted that the Trial Panel was in error in not finding that TW4-01 had a motive to lie about the Accused. It is said that, in particular, [REDACTED], was

[44] Victims' Counsel notes that the Trial Panel also disregarded Mr Shala's own conviction for a violent offence in the course of their deliberations, referring to it only in the decision on sentence (at Judgment, para. 1116).
[45] Judgment, para. 108.
[46] Judgment, para. 40, and see further paras 108-114.
[47] Appeal Brief, para. 86.
[48] Judgment, paras 40, 108-114.
[49] Judgment, para. 40.
[50] Judgment, para. 40.
[51] Appeal Brief, para. 87.

relevant to the issue of whether such a motive existed or not. Victims' Counsel disagrees. [REDACTED] was certainly evidence that TW4-01 harboured a bitter enmity towards the Accused. As such, it was entirely consistent with TW4-01 holding him jointly responsible for the terrible events at the KMF [REDACTED]. It was no evidence at all of some extraneous motive on behalf of TW4-01 to provide false testimony against Mr Shala.

(v) Miscellaneous alleged errors

45. The Defence draw attention to a number of alleged inconsistencies (including whether the gate at the KMF was visible from Room 1,[52] [REDACTED],[53] [REDACTED],[54] and the circumstances surrounding his release from the KMF[55]). None of these matters, individually or collectively, had any significant bearing on the issue of TW4-01's credibility, and the Trial Panel's approach to them could not sensibly be suggested to have caused a miscarriage of justice for the purposes of Article 46.

(vi) Further Submissions on the issue of TW4-01's credibility.

46. The assessment of TW4-01's credibility came down to the stark and simple question: was he telling the truth when he said that the Accused was a party to the criminal conduct at the KMF [REDACTED], or was he simply inventing the Accused's involvement, as alleged by the Defence?
47. In advancing the submission that the Trial Panel's acceptance of TW4-01 as credible was made either in error or bad faith, the Defence omit any mention of the seven significant matters that the Trial Panel identified in support of their conclusion.[56]

[52] Appeal Brief, para. 82.
[53] Appeal Brief, para. 84.
[54] Appeal Brief, para. 84.
[55] Appeal Brief, para. 85.
[56] Judgment, paras 788-796.

48. Read together, they provide ample justification for the final view that the Trial Panel took of TW4-01's credibility and their acceptance that he was telling the truth in the key aspects of his testimony. He had previously implicated Mr Shala as being present in the events at the KMF. There were occasions when he had not mentioned him, but those statements were in the context of investigations into other KLA members. The measured nature of his testimony, in which he did not seek to over-emphasise the role of Mr Shala, was "in stark contrast" to the Defence suggestion that this was a man seeking to incriminate him. The fact that TW4-01 was, on more than one occasion, open about his inability to recall whether Mr Shala was present at other incriminating events, reinforced the Trial Panel in their assessment that he was being truthful in relation to the principal event. There was no support for the proposition that TW4-01 was seeking revenge on Mr Shala for slapping him when he arrived at the KMF: to the contrary, [REDACTED] could not have assisted TW4-01 in any such plan. The expert evidence as to the effect of trauma on memory was supportive of, and did not undermine, TW4-01's credibility.

49. Against that formidable factual background, there is no basis at all for the submission that the "Panel selected which parts of TW4-01's evidence fitted the narrative[57] they wished to present and *ex post facto* adjusted its credibility assessment of this witness."[58] A submission of this kind, suggesting a calculated endeavour on the part of the Judges to tailor their assessment of TW4-01's credibility to fit pre-conceived factual findings, would need a firm foundation before it could begin to displace the presumption of judicial impartiality. To do so requires "adequate and reliable evidence".[59] In this case, there is no such evidence

[57] This is not the only reference to a "narrative" on behalf of the Trial Panel (see also paras 80, 93, 112, 196, 203 of the Appeal Brief) which appears to be used to imply an *a priori* assessment of the facts by the Judges. No reasonable reading of the Judgment would admit of this possibility.
[58] Appeal Brief, para. 80.
[59] See *Mustafa* Appeal Judgment, para. 40: "The Panel recalls that there is a presumption of impartiality which attaches to the judges of a trial panel, and it is for the appealing party to rebut this presumption on the basis of adequate and reliable evidence."

and that absence cannot be filled by the subjective assertion of the Defence that the Trial Panel should not have accepted TW4-01 as a credible witness, or could not have accepted him as such without acting in bad faith.

50. For all these reasons, the Defence has failed to show that the reasoning of the Trial Panel was "wholly erroneous" within Article 45(6) with regard to the credibility of TW4-01, and their arguments to this effect should be dismissed.

(b) Ground 6(B): W04733

51. In relation to W04733, the Defence attempts to mount similar arguments to those advanced in respect of TW4-01, set out in summary below.

(i) The alleged inconsistencies and contradictions in the untested evidence of W04733 were such as to mean that no reasonable trier of fact could have relied on it to a decisive extent. There was a further error in the Trial Panel finding W04733's evidence to have been corroborated by his family members, without applying caution to their evidence.[60]

52. With regard to the suggestion that the Trial Panel should have approached the evidence of W04733's family members with caution, it is clear that the Trial Panel was fully cognisant of the Defence argument in this regard:

> To begin with, the Panel takes seriously the Defence's submission that TW4-06, TW4-07, TW4-08 and TW4-09 may have discussed the issues at stake over the years, thus aligning their testimonies. The Panel observes that the evidence of the Family Members is largely congruent, which the Panel understands is the result of their shared experiences.[61]

53. Having given the submission the consideration that it deserved, the Trial Panel rejected it on an identifiable and justifiable basis, in which the Defence has failed to identify an error:

[60] Appeal Brief, para. 89.
[61] Judgment, para. 147.

> Yet, the Panel has not detected any sign of deliberate collusion. They described the events from different vantage points, providing varying details. This shows that the witnesses did not align or memorise their accounts prior to their testimonies before the Panel.[62]

(i) In support of the submission that W04733's evidence was beset by contradictions and inconsistencies, the Defence focus on his description of W04733 having a dark complexion.[63]

54. In focusing on this one characteristic, which was explicitly taken into account by the Trial Panel,[64] the Defence fails to address other elements of the Trial Panel's findings in relation to W04733's identification.[65] In particular, Mr Shala's distinctive nom de guerre ("Ujku"/"wolf") and wolf-like howl, which he accepted using,[66] were highly identifying traits. It was not credibly suggested that there was another KLA member using the same nickname and call with whom W04733 might have confused the Accused.

(ii) An alleged failure by the Trial Panel to engage with the Defence argument that W04733's statements after 2011 should be treated with caution.[67]

55. A Trial Panel is not required to address every argument put forward by the Defence,[68] especially, where, as here, the basis for the argument is a subjective and

---

[62] Judgment, para. 147.
[63] Appeal Brief, para. 90. Note that in the final sentence of the paragraph the Defence finesse this description, wrongly asserting that W04733's description of Mr Shala's complexion can be taken as applying to the "person", rather than a description of his complexion, which the Trial Panel noted can vary over time. Victims' Counsel notes that a person's skin tone may also vary by the season, and these events took place in the spring/summer of 1999.
[64] Judgment, para. 450.
[65] Judgment, para. 451.
[66] See Judgment, paras 285 and 912 for context.
[67] Appeal Brief, para. 91.
[68] ICTY, *Prosecutor v. Miroslav Kvočka* et al., Case No. IT-98-30/1- A, Judgement, 28 February 2005, para. 23 ("*Kvočka et al.* Appeal Judgement"); ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, para. 382 ("*Kordić and Čerkez* Appeal Judgement"); ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 39 ("*Kupreškić et al.* Appeal Judgement"); ICTY, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 498 ("*Čelebići* Appeal Judgement").

unsubstantiated one: it is simply asserted by the Defence that the deterioration in W04733's health "makes it implausible"[69] that he would be able to provide a more detailed account after 2011 than previously. However, the Trial Panel certainly did have in mind W04733's declining health after [REDACTED], along with several other important issues bearing on his credibility.[70] Having given them due weight, the Trial Panel found that they were outweighed by the many factors indicating that W04733 was credible and that his evidence could be relied upon.[71]

(iii) An alleged "failure to explain" on the part of the Trial Panel their acceptance of W04733's recognition of Mr Shala from a photograph, and the provision of inadequate reasoning in respect of the fact that W04733 did not mention Mr Shala being involved in his transfer to the KMF in 2002.[72]

56. As to the Trial Panel's "failure to explain" the fact that they accepted W04733's recognition of Mr Shala from a photograph in police files, two points need to be made. First, Mr Shala was a person in whom the local police had taken an interest before the war: the purpose of police officers looking at photographs of those in this category is, self-evidently, that it will allow them to recognise the individual should they encounter him. It is not therefore for the Trial Panel to explain why they accepted that W04733, who had previously been a police officer, recognised Mr Shala from a photograph. Second, and more importantly, the initial identification by W04733 was supported by Mr Shala's "distinctive howl".[73]
57. The fact that W04733 did not mention Mr Shala being involved in his transfer to the KMF in a statement made in 2002 was fully addressed by the Trial Panel.[74] Their

[69] Appeal Brief, para. 91.
[70] Judgment, para. 181.
[71] Judgment, paras 179-188, see also para. 695.
[72] Appeal Brief, para. 92.
[73] Judgment, para. 451.
[74] Judgment, paras 698-699.

conclusion, namely that the differing level of detail between W04733's 2002 and 2003 statements reflected the way that the statements were taken, rather than being an indication of his reliability, was a reasoned and reasonable exercise of their judgement.

(iv) An alleged application of "more rigorous" standards to certain evidence by the Trial Panel (TW4-02 and TW4-04 are again cited), while disregarding inconsistencies in the evidence of W04733.[75]

58. The Defence adopts here the same flawed approach to the issue of testimonial inconsistencies as it did in its submissions with regard to TW4-01, and the same overall submission is made in response: not all inconsistencies carry the same weight. The role of the Trial Panel is to form a judgement about the significance of an inconsistency, viewing it in the context of the holistic approach to the evidence required by Rule 139 (2) and (6),[76] which the Defence does not address. It follows that to argue that the Trial Panel fell into error because they regarded some inconsistencies as having greater relevance than others is unproductive, absent a proper basis for impugning the quality of the Trial Panel's analysis and discrimination. No such basis is offered by the Defence: instead, as with TW4-01, the Defence relies on its vague and unsubstantiated assertion that the Panel has shaped its approach in accordance with its "preferred narrative".[77]

59. Again, the comparison proposed by the Defence (the Trial Panel's approach to TW4-02 and TW4-04 vis-à- vis their approach to W04733 are set out fully below and are not repeated here) has no persuasive force in the absence of a proper and identified basis for alleging an error or bias on the part of the Trial Panel. Victims'

[75] Appeal Brief, para. 93.
[76] See Judgment, paras 52, 75, 80, 83 (fn. 117), 84, 183 for the Trial Panel's application of these Rules to their deliberations.
[77] Appeal Brief, para. 93.

Counsel's submissions in respect of the Trial Panel's approach to TW4-02 and TW4-04 are not repeated here.[78]

60. Particular emphasis is placed by the Defence on the issue of who was responsible for breaking W04733's teeth at the KMF.[79] Both W04733 and TW4-06 had, at different times, laid blame for this on Xhemshit Krasniqi and Mr Shala. Against the background of the multiple abuses suffered by W04733, the many occasions on which he recounted them, and the passage of time, it would be surprising, and no doubt argued to be suspicious, if he and his family members had produced just one uniform account. Similarly, matters such as discrepancies in the memories of victims about who had seen whom being mistreated,[80] were understandably relied on by the Defence. However, it was for the Trial Panel, in accordance with Rule 139, to assess the weight to be attached to them.

61. For all these reasons, the Defence has failed to show that the reasoning of the Trial Panel was "wholly erroneous" within Article 45(6) with regard to the credibility of TW4-01, and their arguments to this effect should be dismissed.

(c) Ground 6D: "Contamination"[81]

62. Under this heading, the Defence submits that, as a result of discussing what had happened at the KMF, the witnesses' evidence was "contaminated", which in the context appears to be used as a shorthand for their testimony having become unreliable as a result of collusion.

63. In fact, as the evidence showed, and as the Trial Panel rightly accepted, W04733 returned from his experiences at the KMF a broken man.[82] It is hard to imagine anything more natural than for him to have recounted his experiences to those closest to him, namely his wife and children. In what he had to say to them of his

[78] See below paras 66-74.
[79] Appeal Brief, paras 94, 96.
[80] Appeal Brief, para. 94.
[81] Appeal Brief, para. 100.
[82] Judgment, para. 703.

ordeal, Mr Shala played a prominent part. For that sequence of events to lead directly to the conclusion that W04733's family members were incapable of giving honest accounts of what he had said to them, would be an obvious injustice. The Trial Panel was scrupulous in their examination of the testimony of W04733's family members,[83] weighed the Defence points fairly, and reasonably concluded that the witnesses had "recounted truthfully their personal experiences".[84]

64. It is to be noted that at trial, the Defence placed particular emphasis on the inconsistencies in the testimony of W04733's family members.[85] Emphasis is now also given to the "similarities" in their testimony, which are said to suggest that they had been engaged in "jointly rehearsing their forthcoming testimony".[86] It would seem to follow that if the witnesses stories align, there must have been collusion, and if they do not, they are unreliable. This apparently impossible bind devised by the Defence for the victims illustrates the weakness of the argument being advanced. Without evidence, or at least compelling circumstances from which inferences may be drawn, the argument cannot proceed beyond the general, and unhelpful, proposition that witnesses who have discussed the facts of a case may have influenced one another. In this case, it is important to recall that the purpose of the testimony of W04733's family members was not primarily to give evidence of first-hand experience. They were not eye-witnesses who might have influenced one another's recollections by discussing key details: the parts of their testimony which are complained of by the Defence amounted to them being asked to recall what their father/husband had said to them.

65. Finally on this topic, it is notable that at no stage has the Defence suggested any reason for W04733 to want to falsely implicate Mr Shala in the crimes at the KMF

[83] Judgment, paras 148-154.
[84] Judgment, para. 149.
[85] See Judgment, paras 149-150.
[86] Appeal Brief, para. 101.

when recounting his ordeal to his family, nor ever suggested what he might have gained from lying to them about the identity of one of his captors.

(d) Ground 6E: "Double Standards"[87]

66. The Defence asserts that the Trial Panel adopted different standards in assessing the evidence of the witnesses, favouring those who implicated the Accused and devaluing those who exculpated him:

> For instance, the Panel approached TW4-02, TW4-04, and TW4-05's evidence with caution due to inconsistencies in their respective evidence while at the same time inconsistencies in the accounts of TW4-01 and W04733 were deemed justified. For TW4-04, for instance, the Panel found that the "deliberate shift in the witness's evidence" was an "effort to avoid providing any information which could link KLA members, including Xhemshit Krasniqi, with the commission of any crimes at the KMF". In contrast, W04733 naming and adding KLA members in various incidents throughout the years was unreasonably considered normal. Further, while TW4-04's inability to remember details was considered problematic, TW4-01 and W04733's lapses of memory were considered a genuine effort to be accurate.[88]

67. What is being described here is the exercise of the Trial Panel's judgment in order to reach conclusions. It cannot follow, as the Defence appears to suggest, that inconsistencies must be treated in a particular way. Assessing their relevance and significance is a core judicial function and one that requires proper discrimination in order to assign the proper weight to each piece of the evidence while also considering the case as a whole.

68. Given the centrality of judicial judgment to this task, it is not meaningful to argue, as the Defence do, that the judges approached inconsistencies or difficulties in relation to different witnesses in different ways. That would be to suggest that the judges should have adopted a formulaic approach to their assessment of the evidence, affording similar weight to ostensibly "similar" evidential inconsistencies in the testimony of different witnesses. That is entirely contrary to

[87] Appeal Brief, paras 109-114.
[88] Appeal Brief, para. 111.

the assessment of evidence by judges required by Rule 139 in general and Rule 139(6):

> Inconsistencies in a piece of evidence do not per se require a Panel to reject it as unreliable. A Panel may accept parts of a piece of evidence and reject others.

69. It is therefore unpersuasive to rely on the fact that the Trial Panel reached different conclusions as to the significance of inconsistencies in the testimony of TW4-02, TW4-04, and TW4-05 on the one hand, and TW4-01 and W04733 on the other, as evidence of error. This simply reflects the obvious fact that some inconsistencies will undermine a witness's credibility to a greater extent than others as acknowledged by Rule 139(6).
70. What is absent from the Defence's argument on this issue, is a concrete illustration of *why* the Trial Panel was wrong to ascribe different weight to the different inconsistencies. An analysis demonstrates that, in the context of the Trial Panel's finding in this case, such an argument would be untenable.
71. To take one example: it is argued that W04733 was inconsistent in his accounts of those who were present at the KMF, and that the Trial Panel nonetheless found him credible. At the same time, it is argued, TW4-04's inconsistencies were found to undermine his credibility. The Defence submits that the difference in the Trial Panel's conclusions demonstrates an error on its part, overlooking the key question, which is whether there was a proper basis for the Trial Panel's different approach to the witnesses' testimony, not simply whether it differed.
72. In the case of TW4-04, the Trial Panel provided detailed and compelling reasons for its conclusion that aspects of his testimony were not credible.[89] He had completely changed his account in crucial aspects.[90] In some cases, his changed account was contradicted by credible evidence from other sources. Other parts

[89] Judgment, paras 132-136.
[90] Judgment, para. 134.

were "implausible", "evasive" or "absurd".[91] He offered no explanation at all for the changes in his testimony, but after the war [REDACTED],[92] [REDACTED]. Against that troubling background, the Trial Panel concluded that TW4-04's change of testimony was motivated by a desire to avoid incriminating Krasniqi and other KLA members.[93] This is, in Victims' Counsel's submission, an unimpeachable and fully justified conclusion.

73. By contrast, the inconsistencies relied upon with regard to W04733 were fairly placed in context by the Trial Panel's reasoned assessment that W04733 had provided accounts that were rich in detail,[94] that he had "made clear attempts to provide an accurate account",[95] that he admitted when he could not remember details,[96] that his account was "largely consistent and inherently coherent",[97] and that there was support for it from no fewer than nine other witnesses including a forensic expert.[98]

74. In summary, there was a well-founded and properly explained basis for the Trial Panel to have reached different conclusions in respect of the inconsistencies in the evidence of these two witnesses. The Defence argument fails to acknowledge the obvious point that the assessment of an individual's credibility is a highly fact-sensitive task, fails to engage with the clear reasoning of the Trial Panel, and should be dismissed.

2. *Untested evidence (Ground 7)*

75. In Ground 7, the Defence argues that the Trial Panel's reliance on the written evidence of witnesses who did not testify live to a "decisive extent" violated his

[91] Judgment, para. 135.
[92] Judgment, para. 133.
[93] Judgment, para. 134.
[94] Judgment, para. 179.
[95] Judgment, para. 179.
[96] Judgment, para. 179.
[97] Judgment, para. 180.
[98] Judgment, para. 180.

fair trial rights, relying on Rule 140(4)(a) of the Rules and paragraph 87 of the Trial Judgment.

76. At the outset, Victims' Counsel notes that W04733 is deceased and that his written evidence was admitted pursuant to Rule 155.[99] In that decision, the Trial Panel carefully examined any prejudice that the admission of W04733's evidence might have on the fair trial rights of the Defence,[100] and provided detailed reasoning in the Trial Judgment when it relied on his evidence.[101] The Defence has not developed coherent arguments concerning the admission and permissible uses of W04733's statements regarding the acts and conduct of the Accused in its Final Trial Brief or its Appeal Brief.[102] Rather, throughout Ground 7, the Defence conflates and confuses concepts relating to evidence of unavailable witnesses regarding untested evidence, the acts and conduct of the accused, the decisiveness of evidence, and corroboration. On this basis, the Defence's arguments should be summarily dismissed.

77. Should the Appeals Panel consider this Ground, Victims' Counsel makes the following submissions.

---

[99] KSC-BC-2020-04/F00562, Decision on the Specialist Prosecutor's motion for admission of evidence pursuant to Rule 155 of the Rules, 4 July 2023, para. 42 ("Rule 155 Decision").

[100] Rule 155 Decision, paras 37-40. At paragraph 13 of its Rule 155 Decision, the Trial Panel explained that "Rule 155(5) of the Rules does not preclude the admission written statements that go to proof of the acts and conduct of the accused, but merely provides for a factor – to be taken into account by the Panel, among others – when exercising its discretion. The Panel also recalls that the expression 'acts and conduct of the Accused' refers to the personal actions and omissions of the accused. In other words, it relates exclusively to those actions and omissions of the accused which are described in the charges brought against him, or which are otherwise relied upon to establish his criminal responsibility for the crimes charged. The expression does not encompass the actions and omissions of others which are attributable to the accused under the modes of liability charged by the SPO." This approach is consistent with other international jurisprudence. See also ECCC, Case File No. 002/19-09-2007/SC, F76, Appeal Judgment, 23 December 2022, paras 462-474, esp. paras 462-463, 466 ("Case 002/02 Appeal Judgment").

[101] For example, Judgment, paras 52, 179-188, 441-473, 689-705.

[102] In its Final Trial Brief, the Defence simply asserted that "[t]he evidence of W04733 presented either in his untested statements or through information he and others gave to his family members which was conveyed to the Panel over 20 years after the relevant events cannot be accepted and must be treated with the utmost caution." KSC-BC-2020-04/F00821, Defence Final Trial Brief with Annex 1, 25 March 2024, para. 100, see also para. 346 ("Defence Final Trial Brief"). In the Appeal Brief, for example at paragraph 118, the Defence merely makes conclusory assertions without engaging with the reasoning of the Trial Panel or the applicable rules.

78. The Defence takes particular issue with the Trial Panel's finding about Mr Shala's involvement in the transfer of W04733 to the KMF.[103] The Defence argues that "this crucial finding for the purposes of the conviction for arbitrary detention was solely based on the untested and uncorroborated evidence of W04733."[104] The Defence acknowledges that the Trial Panel "considered that certain aspects of W04733's transfer were corroborated by his family members" in the same sentence.

79. However, the Defence does not develop any legal reasoning for its assertion that W04733's evidence was used in a decisive manner, or why this finding was "crucial" with regard to the conviction for arbitrary detention. The Judgment shows that, in reaching its verdict, the Trial Panel relied upon a wealth of other evidence implicating Mr Shala in the crime of arbitrary detention,[105] and the Defence's arguments on this issue should be summarily dismissed.[106]

80. Victims' Counsel notes that the Defence did not coherently challenge this piece of evidence of W04733 on the basis that it was "uncorroborated" in its final submissions, or that it could not be relied upon because it was the "sole evidence" regarding Mr Shala's participation in his arrest.[107] The Trial Panel correctly considered W04733's prior statements, together with the live evidence of TW4-09, TW4-07, and TW4-06.[108] The Defence has failed to demonstrate why it considers the Trial Panel's extensive reasoning to be insufficient.

---

[103] Appeal Brief, para. 118.
[104] Appeal Brief, para. 118.
[105] See Judgment, paras. 951-956.
[106] See, for example, ECCC, Case 002/02 Appeal Judgment, paras 34-36. The Defence refers to paragraph 449 of the *Karadžić* Appeal Judgment and its supporting references, and paragraphs 629-630 of the *Ntaganda* Appeal Judgment at para. 116 of the Appeal Brief. The Defence fails to engage with the reasoning of these judgments and the evidence considered there as to what constitutes "sufficient corroboration." See MICT, *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-15-A, Judgement, 20 March 2019, para. 457 *et seq.* ("*Karadžić* Appeal Judgment") and ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2666-Red 30-03-2021, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, paras 631-639 ("*Ntaganda* Appeal Judgment").
[107] Defence Final Trial Brief, paras 15, 91, 97, 100, 239, 346; Judgment, para. 450 *et seq*.
[108] Judgment, paras 448-449.

81. This is not a situation, such as those described in the *Karadžić* Appeal Judgment, where untested evidence was not explicitly considered to be corroborated by adjudicated facts or pattern of conduct evidence by the Trial Chamber.[109] The corroboration of W04733's evidence is far stronger: the evidence of TW4-09, TW4-07, and TW4-06 is valuable for both what they directly saw and heard, but also for the fact that W04733 made statements to them describing key elements of his transfer and subsequent abuse that have been consistent over time. These witnesses testified live and were cross-examined on the content of W04733's written statements and what he had said to them, providing context to the written evidence and in-court debate. The Trial Panel carefully explained its reasoning, and the Defence has referred to no relevant authority undermining the Trial Panel's approach.
82. Similarly, the Defence has failed to explain why it was not open to the Trial Panel to make other findings using W04733's evidence on matters not constituting "acts and conduct of the accused"[110] as envisioned by Rule 140,[111] nor has it explained why such findings were decisive for Mr Shala's conviction.
83. The Defence also takes issue with the Trial Panel's findings at paragraphs 706 and 741 as being based solely on W04733's evidence.[112] The Defence ignores or otherwise fails to engage with the evidence supporting these findings. Regarding the Trial Panel's related discussion at paragraph 692, the Defence fails to refer to paragraphs 694 and 697 where the Trial Panel details the evidence from other witnesses who corroborate W04733's account.[113] The Defence's submission concerning W04733's evidence about [REDACTED], is also without merit, as the

[109] Appeal Brief, para. 116; *Karadžić* Appeal Judgment, para. 457 *et seq*. See also, *Ntaganda* Appeal Judgment, paras 631-639 for the application of the legal principles cited by the Defence in which the Appeals Chamber considered the availability of a range of evidence on a particular crime as precluding decisiveness.
[110] Appeal Brief, para. 120; Judgment, paras 354-356, 363.
[111] Rule 155 Decision, para. 13.
[112] Appeal Brief, para. 132.
[113] Appeal Brief, para. 138; Judgment, paras 692, 694, 697.

finding could not reasonably be said to have played a decisive role in the Trial Panel's decision.[114] The same observations apply to the remaining evidence raised by the Defence in paragraph 138 of the Appeal Brief.

84. The Defence has failed to meet its burden, and Ground 7 must be dismissed.

E. Alleged errors in sentencing

85. The Defence alleges that the Trial Panel made a number of errors in relation to sentencing. These errors are grouped under two categories: (1) errors pertaining to establishing the sentencing regime; and (2) errors concerning the application of the sentencing regime.

1. *Alleged errors in establishing the sentencing regime*

(a) Alleged error in failing to give relevant weight to the purposes of rehabilitation and reintegration to society

86. The Defence submits that, in determining the sentence, the Trial Panel failed to give relevant/due weight to the purposes of rehabilitation and reintegration to society.[115]

87. The Defence fails to develop an argument on this issue beyond asserting that the Trial Panel "erred by disregarding the rehabilitation component and not striking a proper balance between punishment and rehabilitation."[116]

88. There is no error in the Trial Panel's finding that "while rehabilitation has gained prominence in both national jurisdictions and some regional human rights instruments, considerations of rehabilitation cannot be given undue weight, given the gravity of the crimes".[117] In fact, this finding reflects established jurisprudence

[114] Appeal Brief, para. 138; Judgment, 718-719, 720.
[115] Appeal Brief, paras 254-255.
[116] Appeal Brief, para. 255.
[117] Appeal Brief, para. 254; Judgment, para. 1061.

of the KSC, and other courts and tribunals.[118] As noted by the Appeals Panel in the *Mustafa* case:

> The gravity of the offence is the primary consideration in imposing a sentence, and a sentence proportionate to the gravity of the criminal conduct will necessarily provide sufficient retribution and deterrence. The Panel further recalls that Article 38(1) of the KCC focuses rather on rehabilitation and deterrence, and not explicitly on retribution.[119]

89. The Appeals Panel further explained that the sentence should serve as an individual and general deterrence.[120] "[R]etribution should be understood as the imposition of an appropriate punishment which reflects the culpability of the convicted person, […] while rehabilitation focuses on reintegration of the convicted person into society."[121]
90. The Defence quotes ECtHR's general consideration that "the emphasis on rehabilitation and reintegration has become a 'mandatory factor' that member states need to take into account when designing their penal policies".[122] This passage does not contradict the Trial Panel's findings on the "considerations of rehabilitation". Nor does it provide any basis for impugning the Trial Panel's approach.
91. In all of the cases cited by the Defence, the European Court of Human Rights ("ECtHR") addresses the principles of rehabilitation and reintegration, but it does so in the context of enforcement of sentences of imprisonment, which is not an issue in the Appeal.[123]

---

[118] *Mustafa* Appeal Judgment, para. 451; *Gucati and Hardinaj* Appeal Judgment, para. 410, and the jurisprudence cited in fn. 904.
[119] *Mustafa* Appeal Judgment, para. 451.
[120] *Mustafa* Appeal Judgment, para. 452.
[121] *Mustafa* Appeal Judgment, para. 452.
[122] Appeal Brief, para. 255.
[123] ECtHR, *Case of Khoroshenko v. Russia* [GC], Application no. 41418/04, Judgment, 30 June 20215, paras 85, 148 (visiting rights for prisoners and the need for rehabilitation and reintegration of life-sentence prisoners); *Case of Vinter and others v. The United Kingdom* [GC], Applications nos. 66069/09, 130/10 and 3896/10, Judgment, 9 July 2013, paras 109-112, 122, and *Case of Harakchiev and Tolumov v. Bulgaria,* Applications nos. 15018/11 and 61199/12, Judgment, 8 October 2014, para. 245, and *Case of Murray v. The*

92. None of these cases provide any substantiation of the alleged disregard of the Trial Panel for the rehabilitation component of the punishment imposed on Mr Shala or the alleged failure to properly balance punishment and rehabilitation, nor do they provide any basis for the proposition that the sentence imposed was excessive because insufficient weight was given to the principles of rehabilitation and reintegration.

93. The Trial Panel was correct to identify as relevant factors: "(i) primarily, the gravity of the crime and its consequences; (ii) the convicted persons' personal contribution to the crimes; (iii) the individual circumstances of the convicted person; and (iv) the existence of mitigating and aggravating circumstances related to those factors, if any."[124]

94. The Defence gives no indication as to the weight the Trial Panel should have given to this factor, and what the outcome for the final sentences would have been in the circumstances of the case of Mr Shala and his conviction. Therefore, the Defence has failed to substantiate that the Trial Panel gave weight to "extraneous or irrelevant" considerations or failed "to give weight or sufficient weight to relevant considerations".

(b) Alleged errors in relation to the applicable sentencing range

95. The Defence alleges that the Trial Panel erred in law "when it found it was *not bound to consider* the punishments provided for crimes under the Kosovo law at the

Netherlands [GC], Application no 10511/10, Judgment, 26 April 2016, paras. 101-102 (all concerning compatibility of irreducible life sentences with Article 3 of the Convention); *Case of Schemkamper v. France*, Application No. 75833/01, Judgment, 18 October 2005, para. 31 (request for temporary release and the notion "that temporary release measures may contribute to a prisoner's social rehabilitation, even where he or she has been convicted of violent crimes"); *Case of Mastromatteo v Italy* [GC], Application no 37703/97, Judgment, 24 October 2002, para. 72, and *Case of Maiorano and others v. Italy*, Application no 28634/06, Judgment, 15 December 2009, para. 108 (alleged violation of the right to life in the context of murders committed by prisoners who were granted temporary release and "the merit of measures – such as temporary release – permitting the social reintegration of prisoners even where they have been convicted of violent crimes.").

[124] Judgment, para. 1072.

time of the crimes and any subsequent more lenient punishment, as required by Article 44(2) of the KSC Law".[125]

96. However, this allegation misrepresents the Trial Panel's finding. The Trial Panel acknowledged that it was "also required to 'take into account' the punishments provided for crimes under the applicable law in Kosovo at the time of the commission of the crimes under consideration, and, in particular, any subsequent more lenient punishment."[126] The Defence seems to take issue with the fact that the Trial Panel noted that it was "not bound by such considerations".[127] However, the plain reading of the Judgment in this part cannot be understood as meaning that the Trial Panel considered itself not bound to consider the relevant Kosovo legislation as provided for in Article 44(2)(a) and (b).

97. To support this alleged error, the Defence refers to the Supreme Court Panel's decision in the *Mustafa* case which concluded that "the Specialist Chambers are bound to consider which of the relevant sentencing ranges under Kosovo law contains the most lenient sentencing range in accordance with the *lex mitior* principle. The sentencing panel shall thereafter take this range into account".[128]

98. However, nothing in this decision suggests that the Trial Panel is bound by this range, as the Defence seems to infer.[129] To the contrary, a comprehensive reading of the *Mustafa* Protection of Legality Decision leads to a different conclusion than the one purported by the Defence. The Supreme Court Panel confirmed the factors listed under Article 44(2) of the Law should be ascribed their ordinary meaning; specifically, in relation to Article 44(2)(a) and (b), that the Trial Panel is not bound to apply domestic law on sentencing ranges, but rather to take them into account.[130]

---

[125] Appeal Brief, para. 256 (emphasis added).
[126] Judgment, para. 1068.
[127] Judgment, para. 1068.
[128] Appeal Brief, para. 258; *Specialist Prosecutor v. Salih Mustafa*, KSC-SC-2024-02/F00018, Decision on Salih Mustafa's Request for Protection of Legality, 29 July 2024, para. 87 (emphasis omitted) ("*Mustafa* Protection of Legality Decision").
[129] Appeal Brief, paras 258-260.
[130] *Mustafa* Protection of Legality Decision, paras 62 and 106; *Mustafa* Appeal Judgment, para. 466.

99. It is worth noting here that the phrase "take into account" and its variations means "to consider or remember something when judging a situation" (according to the Cambridge Dictionary[131]) or "to give attention or consideration to (something)" (according to Merriam-Webster Dictionary[132]). The verb "consider" means "to think about, or to ponder or study and to examine carefully" (the Law Dictionary[133]), "to spend time thinking about a possibility or making a decision, to give attention to a particular subject or fact when judging something else" (Cambridge Dictionary[134]), "to think about carefully" and as a synonym for "study, contemplate, weigh", "to think about in order to arrive at a judgment or decision" (Merriam-Webster Dictionary[135]). None of these meanings suggest that the Trial Panel is bound to apply the sentencing range provided for crimes under the applicable law in Kosovo.

100. Under the alleged error concerning the applicable sentencing range, the Defence argues also that the Trial Panel erred by failing to "(i) identify the relevant Kosovo law in accordance with Article 44(2)(b) of the KSC Law and the principle of *lex mitior*; and (ii) identify the more lenient sentencing range; and (iii) provide adequate reasons for arriving at the sentence."[136]

(c) Alleged failure to (i) identify the relevant Kosovo law in accordance with Article 44(2)(b) of the KSC Law and the principles of *lex mitior*; and (ii) identify the more lenient sentencing range

101. Contrary to the Defence submission, the Trial Panel listed all the subsequent relevant laws or codes adopted in Kosovo and concluded that this legislation

[131] Cambridge Dictionary – "take something into account" (last accessed 16 January 2025).
[132] Merriam-Webster Dictionary – "take account of" or "take into account" (last accessed 16 January 2025).
[133] The Law Dictionary – "consider" (last accessed 16 January 2025).
[134] Cambridge Dictionary – "consider" (last accessed 16 January 2025).
[135] Merriam-Webster Dictionary – "consider" (last accessed 16 January 2025).
[136] Appeal Brief, para. 259.

"provide[s] equal or more severe sentencing ranges, and in particular attract higher maximum sentences."[137]

102. Therefore, it cannot be concluded that the Trial Panel erred by failing to identify (i) "the relevant Kosovo law in accordance with Article 44(2)(b) of the KSC Law and the principles of *lex mitior*"; and "(ii) […] the more lenient sentencing range".

103. The Defence appears to agree with the Trial Panel that the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY Criminal Code") was the applicable law in Kosovo at the time of the alleged crimes, and that Article 38 and 142 of this legislation established a sentencing range of 5-15 years of imprisonment for "war crimes against the civilian population". However, there is no basis for the proposition that the Trial Panel was bound to apply that sentencing range rather than to take it into account. As a result, there is also no basis for the submission that: "Mr Shala was sentenced to 18 years' for analogous crimes. The Panel erred by not considering the applicable sentencing range and applying the most lenient one."[138]

104. The Defence fails to explain why and how the Trial Panel erred. As noted above, it was not bound to apply the most lenient sentencing regime, it was only bound to take it into consideration and it did so.[139] Therefore, it cannot be concluded that the sentence imposed by the Trial Panel on Mr Shala is based on an incorrect interpretation of the governing law, or on a patently incorrect conclusion of fact.

105. Irrespective of the arguments raised by the Defence, Victims' Counsel notes that the Supreme Court Panel found in the *Mustafa* case that "the 1976 SFRY Criminal Code and any amendments thereto are not applicable when considering the sentencing ranges to be taken into account" for war crimes under customary international law under Article 14(1)(c), in accordance with Article 44(2)(a) and (b)

[137] Judgment, para. 1069 and fn. 2190; *Mustafa* Protection of Legality Decision, para. 100.
[138] Appeal Brief, para. 260.
[139] Judgment, paras 1069-1070.

of the Law.[140] The Supreme Court Panel determined that the most lenient sentencing range as provided in "the relevant Kosovo Criminal Codes"[141] which corresponds most closely to war crimes under customary international law as set forth in Article 14(1)(c) of the Law is to be found in the 2019 Kosovo Criminal Code – five to 25 years.[142] The relevant provision of the 2019 Kosovo Criminal Code, Article 146, envisages punishment by imprisonment of not less than five years or by life-long imprisonment.

106. However, the Supreme Court Panel found that due to the fact that that Mr Mustafa had been sentenced to 22 years and not to life imprisonment, the possibility to impose life imprisonment that exists under the 2019 KCC and 2012 KCC should not be considered when determining the most lenient sentencing range pursuant to Article 44(2)(b).[143]

107. In relation to this finding, Victims' Counsel submits that *lex mitior* needs to be identified before a decision on the punishment is made. Therefore, verification of *lex mitior* at the Appellate stage cannot take into account the punishment already imposed at first instance.

108. What needs to be considered is the subsequent sentencing ranges provided for in the Kosovo Law for the crime in question, not the punishment already applied by the Trial Panel in the first instance judgment. Therefore, Victims' Counsel respectfully submits that, should the Appeals Panel disagree with the Trial Panel

[140] *Mustafa* Protection of Legality Decision, para. 97, see also paras 93-96; *Specialist Prosecutor v. Salih Mustafa*, KSC-CA-2023-02/F00045, Decision on New Determination of Salih Mustafa's Sentence, 10 September 2024, para. 12 ("*Mustafa* Decision on New Determination of Sentence").
[141] *Mustafa* Protection of Legality Decision, para. 100: "The Panel considered the following relevant Kosovo Criminal Codes: (i) Article 120(1) of the 2003 Kosovo Provisional Criminal Code (setting out, when read together with Articles 37(2) of the same Code, a sentencing range of five to 40 years of imprisonment, but no life-long imprisonment); (ii) Article 152(1) of the 2012 Kosovo Criminal Code (setting out, when read together with Article 45(1) of the same Code, a sentencing range of five to 25 years or life-long imprisonment; and (iii) Article 146(1) of the 2019 Kosovo Criminal Code (setting out, when read together with Article 42(1)- (2) of the same Code, a sentencing range of five to 25 years or life-long imprisonment, the latter of which can also be replaced by up to 35 years of imprisonment)."
[142] *Mustafa* Protection of Legality Decision, para. 101.
[143] *Mustafa* Protection of Legality Decision, paras 101-102.

as to the applicability of the 1976 SFRY Criminal Code, the most lenient sentencing range to be taken into account as envisaged by Article 44(2)(b) is the one provided for in the 2003 Kosovo Provisional Criminal Code: five to 20 or 21 to 40 years of imprisonment.

109. Independently of the above, Victims' Counsel notes the wording of Article 33(4) of the Constitution of the Republic of Kosovo which provides that "Punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent *applicable law* are more favourable to the perpetrator." It is submitted that applicable law is the law that is binding upon a court at one of two relevant points in time: the time of the commission of the criminal act in question, or the time of sentencing. In other words, sentencing ranges in subsequent laws which are not applicable either at the time of the offence, or the time of sentence, are not relevant: by definition, they are not applicable.

> The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied. It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.[144]

(d) Alleged failure to provide adequate reasons for arriving at the sentence

110. The Defence alleges that the Trial Panel failed to provide adequate reasons for arriving at its sentence.[145] This is manifestly incorrect: the Trial Panel devoted forty-one paragraphs of the Judgment to a comprehensive analysis of the factors that

[144] ICTY, *Prosecutor v. Nikolić*, No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para. 81 (emphasis omitted) ("*Nikolić* Judgement on Sentencing Appeal").
[145] Appeal Brief, para. 259.

they took into account in arriving at their sentence.[146] This argument should be summarily dismissed.

(e) Alleged failure to ensure "equality"

111. The Defence submits that Mr Shala's sentence is unreasonably disproportionate.[147] According to the Defence, the Trial Panel "erred in law by failing to ensure equality in sentencing, by failing to attach appropriate weight to sentences in comparable and related cases, as well as failing to provide a reasoned opinion as to why it chose to significantly depart from those sentences".[148]

112. Furthermore, the Defence asserts that the Trial Panel committed the same error as in the *Mustafa* case, i.e. that it "ventur[ed] outside its discretionary bounds and impos[ed] a disproportionate sentence."[149]

113. However, the Trial Panel's approach to this issue, specifically that it is not bound by sentencing practices of other courts,[150] is consistent with the standard established in the jurisprudence of other tribunals.[151]

114. To support its argument, the Defence relies on the sentences imposed in cases concerning the same events at the KMF on Sabit Geci and Xhemshit Krasniqi, who had commanding roles at the KMF.[152] Sabit Geci was sentenced to an aggregated sentence of 15 years of imprisonment. Xhemshit Krasniqi, following an amendment on appeal, to an aggregated sentence of seven years of imprisonment. However, prior to attaching any weight to the punishments imposed on these two individuals by the Kosovo courts, it is important to look at and analyse: the specific

[146] Judgment, paras 1071-1122.
[147] Appeal Brief, para. 261.
[148] Appeal Brief, paras 261-262.
[149] Appeal Brief, para. 263.
[150] Judgment, para. 1070: "It is highlighted that sentencing practices of other courts, be it international or domestic, are not binding on the Panel, as the Panel must reach its determination taking into account a variety of case-specific factors, in particular the convicted person's conduct, his or her individual circumstances, and the existence of mitigating and/or aggravating circumstances, if any."
[151] See for example below, paras 120-121.
[152] Appeal Brief, paras 262, 264-265.

charges and counts for which Sabit Geci and Xhemshit Krasniqi were convicted, the adopted legal qualifications of the acts, and individual sentences imposed for each of the counts. In the absence an analysis of this kind, the Defence's purported comparisons are invalid and offer no proper basis for criticism of the Trial Panel's approach.[153]

115. Xhemshit Krasniqi was convicted for: outrages upon personal dignity (at trial for inhuman conditions) in relation to eight identified and other unidentified persons, to five years of imprisonment (count 3); violence to life and persons (at trial conviction for torture) against five individuals (count 4), to six years of imprisonment; for outrages upon personal dignity, in particular cruel, humiliating and degrading treatment of eight individuals (at trial conviction for violation of bodily integrity or health) (count 5), to six years of imprisonment.[154] In the final judgment, he was not convicted of arbitrary detention or murder.

116. Sabit Geci, on the other hand, was convicted for the following crimes committed at the KMF: inhumane treatment (count 1) to eight years of imprisonment; torture (count 2) to 12 years of imprisonment and; violation of bodily integrity on an undefined number of civilian prisoners (count 3) to nine years of imprisonment. His aggregated sentence included also an eight-year prison sentence for violation of bodily integrity of one civilian in Cahan (count 5).[155] He was not convicted of murder.

117. Mr Shala was convicted by the Trial Panel on three counts: for the war crime of arbitrary detention (count 1) to six years of imprisonment; for the war crime of

[153] Appeal Brief, paras 262, 264-265.
[154] Basic Court of Mitrovicë/Mitrovica, *Case against Xhemshit Krasniqi*, Case P. No. 184/15, Judgment, 8 August 2016, pp. 2-8; Court of Appeals of Kosovo, *Prosecutor v. Xh. K.*, Case No. 648/16, Judgment, 22 June 2017, pp. 5-7. ("*Xhemshit Krasniqi* Trial Judgment" and "*Xhemshit Krasniqi* Appeal Judgment", respectively). The number of years in the text reflects the sentence on appeal.
[155] District Court of Mitrovicë/Mitrovica, *Prosecutor v. Sabit Geci et al.*, P. Nr. 45/2010, Verdict, 29 July 2011, pp. 3-4, 10; Court of Appeals of Kosovo, *Prosecutor v. Sabit Geci et al.*, PAKR 966/2012, Judgment, 11 September 2013, pp. 3-4. ("*Geci et al.* Trial Judgment" and "*Geci et al.* Appeal Judgment", respectively).

torture (count 3), encompassing cruel treatment, to 16 years of imprisonment; and for the war crime of murder (count 4) to 18 years of imprisonment.

118. As noted by the Trial Panel, the charge of cruel treatment in the case against Pjetër Shala was fully consumed by the charge of torture.[156] The Trial Panel explained in this context that "[i]n assessing the seriousness or severity of the harm or suffering inflicted on the detainees, the Panel has considered all acts or omissions of Mr Shala and other KLA members at the KMF during the time frame of the charges taken as a whole, including the conditions of detention, the psychological assaults suffered by the detainees and the physical assaults to which they were subjected".[157] Therefore, the sentence of 16 years of imprisonment for torture imposed on Mr Shala also encompasses acts such as those qualified in the *Geci* and *Krasniqi* cases as inhumane treatment, outrages upon personal dignity and violation of bodily integrity.

119. An analysis of the actual acts for which Sabit Geci and Xhemshit Krasniqi were convicted in relation to the KMF, as well as the individual sentences for each of these crimes, shows that there can be no comparison between these two convictions and the case of Mr Shala and the sentence imposed on him by the Trial Panel. Although their case concerned the same events, they were not convicted for the same acts. Furthermore, considering the individual sentences imposed on Sabit Geci and Xhemshit Krasniqi for each of the counts, no argument can be made that the individual sentences imposed on Mr Shala are "unreasonably disproportionate", or "capricious or excessive".[158]

120. Finally, Victims' Counsel submits that over-reliance on the sentences imposed in cases adjudicated before other tribunals is a sensitive and potentially misleading exercise. The ICTY Appeals Chamber in the *Kvočka et al.* case cited by the Defence[159]

[156] Judgment, para. 964.
[157] Judgment, para. 963.
[158] Appeal Brief, para. 261.
[159] Appeal Brief, para. 261, fn. 565.

explained that comparison with other sentences is often of limited relevance and should be treated as one of many factors to be taken into consideration:

> Sentences of like individuals in like cases should be comparable and, in this regard, the Appeals Chamber 'does not discount the assistance that may be drawn from previous decisions rendered'. Indeed, the Appeals Chamber has observed that a sentence may be considered 'capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences'. […] Often, too many variables exist to be able to transpose the sentence in one case *mutatis mutandis* to another. […] Thus, while comparison with other sentences may be of assistance, such assistance is often limited. For these reasons, previous sentences imposed by the Tribunal and the ICTR are but one factor to be taken into account when determining the sentence.[160]

In another case cited by the Defence, the ICTY Appeals Chamber found:

> The guidance that may be provided by previous sentences rendered by the International Tribunal and the ICTR is not only "very limited" but is also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence. The reason for this is twofold. First, whereas such comparison with previous cases may only be undertaken where the offences are the same and were committed in substantially similar circumstances, when differences are more significant than similarities or mitigating and aggravating factors differ, different sentencing might be justified. Second, Trial Chambers have an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime, with due regard to the entirety of the case, as the triers of fact.[161]

121. The Appeals Chamber of the International Criminal Court found when addressing an argument of sentence being disproportionate to those imposed by another tribunal:

> This makes it difficult, at the least, to infer from the sentence that was imposed in one case the appropriate sentence in another case. Further, the Appeals Chamber considers that the value of other sentencing practices is even lower when the reference is to the sentencing practices of another tribunal, as opposed to that of a Trial Chamber of the Court. This is because, even though there are similarities in

[160] ICTY, *Kvočka et al*. Appeal Judgment, para. 681.
[161] ICTY, *Nikolić* Judgement on Sentencing Appeal, para. 19.

> the sentencing provisions of the Court and those of other international criminal courts and tribunals, the Court has to apply, in the first place, its own Statute and legal instruments.[162]

122. Every jurisdiction develops its own sentencing policy, which takes into account the broader context of the prosecutorial and punitive policies that are tailored to a given factual setting/conflict. This is the same not only for international jurisdictions but also national jurisdictions. Punishment for a comparable type of crime may legitimately differ depending on the jurisdiction.[163]

---

[162] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3122, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", 1 December 2014, para. 77 ("*Lubanga* Sentencing Appeal Judgment").

[163] Germany, Criminal Code, 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 22 November 2021 (Federal Law Gazette I, p. 4906), Article 212: (1) Whoever kills a person without being a murderer under the conditions of section 211 incurs a penalty of imprisonment for a term of **at least five years**. (2) In especially serious cases, the penalty is **imprisonment for life**. Article 211: Aggravated murder: (1) Whoever commits murder under the conditions of this provision incurs a penalty of **imprisonment for life.** (2) A murderer under this provision is someone who kills a person out of a list to kill, to obtain sexual gratification, out of greed or otherwise base motives, perfidiously or cruelly or by means constituting a public danger or to facilitate or cover up another offence. Kosovo, Criminal Code, Code No. 06/L-074 (2019), Article 172: Whoever deprives another person of his or her life shall be punished by imprisonment of **not less than five (5) years**, and Article 177: 1. A punishment of imprisonment of **not less than ten (10) years or of life long imprisonment** shall be imposed on any person who: 1.8. deprives another person of his or her life because of unscrupulous revenge or other base motives, including in retaliation for testifying or otherwise providing any information to police or in a criminal proceeding. France, Penal Code, last version 01 January 2025 (unofficial translation), Article 221-1: The act of deliberately causing death to another person constitutes murder. It is punishable by **thirty years of criminal imprisonment**; Poland, Criminal Code, 1997, (Journal of Laws 1997 No. 88 item 553, as amended)(unofficial translation), Article 148. Homicide: § 1. Anyone who kills a human shall be liable to imprisonment for a minimum term of **8 years, 25 years' imprisonment or life imprisonment**. § 2. Anyone who kills a human: 1) with particular cruelty, 2) in relation to taking a hostage, rape or robbery, 3) for motives deserving particular condemnation, 4) with the use of explosives, shall be liable to imprisonment for a minimum term of **12 years, 25 years' imprisonment or life imprisonment**. England and Wales, Sentencing Act 2020, Schedule 21, in force at 1.12.2020 by S.I. 2020/1236, reg. 2., paras 3(1) and 3(2)(b). Following conviction for a murder committed with a firearm, an offender, whether a principal or secondary party, would be sentenced to a mandatory, indeterminate, life sentence with a "minimum term"(the period that must be served before an application can be made for parole) fixed in accordance with the Sentencing Act 2020, Schedule 21, paras 3(1) and 3(2)(b) which provides a starting point of 30 years, to be adjusted in the light of aggravating and mitigating circumstances. Norway, Criminal Code, adopted on 20 May 2005, entered into force on 1 October 2015, Article 275: A penalty of imprisonment for a term of between eight and 21 years shall be applied to any person who kills another person.

123. In light of the above, the Defence is wrong to allege that the Trial Panel erred "by failing to ensure equality in sentencing, by failing to attach appropriate weight to sentences in comparable and related cases".[164] Furthermore, the Trial Panel has clearly explained its position towards the relevance of domestic and international sentencing practices, explaining, in line with the above cited jurisprudence, that it must determine a sentence taking into account a variety of case-specific factors.[165]

2. *Alleged errors in the application of the sentencing regime*

124. The Defence argues that the Trial Panel "erred in law when imposing a sentence for arbitrary detention and torture of eighteen victims and not nine as charged in the Indictment."[166] This issue is a consequence of the error alleged in Ground 4 of the Defence Appeal, to which Victims' Counsel responded in paragraphs 26-29 above and argues that it should be dismissed.

125. It is further alleged that the Trial Panel erred in law by declining to consider the mitigating factors raised by the Defence.[167] The Trial Panel has, however, addressed in detail the mitigating individual circumstances of the Accused raised by the Defence at trial.[168] The Defence failed to engage with any of the Trial Panel's reasoning in this regard.

126. The Defence notes also that "Mr Shala's actions demonstrate that he is someone driven solely by a sense of duty, devoid of any ulterior personal motive".[169] It does not explain how this sense of duty influenced his actions at the KMF and why it should have been taken into account as a mitigating circumstance. It is therefore unclear what the relevance of this Defence submission is for the purpose of determining Mr Shala's sentence for the acts of which he was found guilty. What

[164] Appeal Brief, para. 262.
[165] Judgment, para. 1070.
[166] Appeal Brief, para. 266.
[167] Appeal Brief, paras 267-270.
[168] Judgment, paras 1109-1119.
[169] Appeal Brief, para. 269.

is relevant, however, is that at no point in the course of these proceedings has Mr Shala expressed any remorse towards the victims and their families.

V. RELIEF

127. For the foregoing reasons, Victims' Counsel respectfully requests that the Appeals Panel:

(i) Reject the Defence's grounds of appeal addressed in this Response;

(ii) Affirm Pjetër Shala's sentence of 18 years imprisonment.

Word count: 13669

Simon Laws KC
Counsel for Victims

Maria Radziejowska
Co-Counsel for Victims

17 January 2025

At The Hague, the Netherlands.