PUBLIC
Date original: 04/02/2025 17:05:00
Date public redacted version: 11/02/2025 15:37:00

In:	**KSC-CA-2024-03**
	The Specialist Prosecutor v. Pjetër Shala
Before:	**A Panel of the Court of Appeals Chamber**
	Judge Michèle Picard
	Judge Kai Ambos
	Judge Nina Jørgensen
Registrar:	Fidelma Donlon
Date:	4 February 2025
Filing Party:	Counsel for Pjetër Shala
Original language:	English
Classification:	Public

Public Redacted Version of Defence Reply Brief

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Table of Contents

I. INTRODUCTION

1. The Prosecution fails to persuade that Mr Shala's convictions and the process which led to them are fair. It repeatedly calls for summary dismissal of the Defence submissions and fair trial complaints purporting to present them as "mere" disagreements with the outcome. In doing so, it fails to respond to the essence of Mr Shala's arguments as to why appellate intervention is warranted. In addition to the submissions developed in this brief, the Defence refers the Panel to the submissions filed as part of its Appeal Brief,[1] which are fully endorsed and provide a self-standing reply to the Prosecution's Response.

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

2. The Prosecution's response to Mr Shala's first ground of appeal ignores the essence of Mr Shala's submissions. The Trial Panel's decision to admit Shala's incriminatory statements on record and use them in the manner in which these were used constituted a violation of Mr Shala's right to a fair trial, which resulted in real prejudice: Mr Shala's convictions under three counts of war crimes. Mr Shala does not seek reconsideration of the Panel's admissibility decisions. The prejudice suffered by those decisions could have been remedied by the Panel, had the Panel chosen not to rely on the incriminatory statements obtained in breach of Mr Shala's rights. However, the Panel failed to do so as evidenced in its trial judgment.[2] On appeal, Mr Shala seeks an acknowledgment of the violation of his fair trial rights that he has suffered and the only remedy that can be considered effective at this point: a re-trial.

3. The Prosecution fails to understand Mr Shala's argument and binding ECtHR case law on point. There does not need to be a specific "basis under the KSC legal

[1] KSC-CA-2020-03, F00029COR, Corrected Version of Defence Appeal Brief, 25 November 2024 (confidential)("Appeal Brief").
[2] Appeal Brief, paras. 4-8.

framework"[3] for the Panel to exclude or decline to rely on evidence obtained in breach of fair trial rights. The KSC judicial panels remain bound by the provisions of the European Convention on Human Rights, as interpreted by the ECtHR, as well as the Kosovo Constitution. That suffices. Mr Shala's answers during the 2019 interview depended on, and were presented based on his earlier 2016 statements. Is it really "speculative" to argue that had he not responded in the way he was forced to do in 2016, his 2019 statements would have been different?[4] What difference could the presence of a lawyer in 2019 make, realistically speaking? Any lawyer assisting Mr Shala in 2019 (and ever since for that matter) could not change the statements Mr Shala gave in 2016 when he ignored his rights (due to the authorities' failure to properly inform him) and could not appreciate what he was stating. Mr Shala's 2019 statements were tainted by the 2016 violation of his rights and should have been excluded from the trial record and not further used or relied upon.

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

4. The second ground of Mr Shala's appeal addresses how the Panel erred by failing to apply correctly the KSC legal framework on admission of evidence and departing from well-established practice in international criminal proceedings which requires decisions on the admissibility of evidence to be made in the course of a trial. The Panel chose to issue admissibility decisions for 360 items, including core evidential material tendered by the Prosecution at the time of issuing its Judgment. Shala could not challenge the Framework Decision in an interlocutory appeal as he would never obtain certification to appeal a purely discretionary decision – as the

[3] KSC-CA-2024-03, F00040, Prosecution Response Brief, 17 January 2025 (confidential)("Response"), para. 13.
[4] Response, para. 14.

Prosecution concedes- related to the conduct of the trial proceedings. The proper means to challenge the framework decision's application is as part of his main appeal.

5. The isolated examples relied upon by the Prosecution to undermine the reality that in international criminal proceedings admissibility decisions are meant to be issued while the proceedings are on-going do not change the fact that in the vast majority of international criminal proceedings admissibility decisions are taken while the proceedings are on-going. This is for good reason. The Defence refers the Panel to its submissions made in the Appeal Brief on this matter.[5]

6. The evidentiary record was uncertain as it was entirely unclear what the Panel's novel formulation of "not inadmissible" meant in practice or how the Panel intended to use or exclude or rely upon the statements that breached Mr Shala's fair trial rights in the course of its deliberations. The Panel's reliance on Mr Shala's statements for the purposes of its trial judgment came therefore as a surprise, particularly given the Appeals Panel finding of a violation of Mr Shala's rights in the context of the 2016 interview. The Defence expected the Panel to comply with the Appeals Panel decision and proceed in its deliberations and Trial Judgment without relying on statements obtained in breach of Mr Shala's fair trial rights or statements tainted by the 2016 violation of his rights.

7. The Prosecution's submissions regarding the supposed "presumptive finality" of the admissibility question entirely misrepresents the judicial review process before the Kosovo Specialist Chambers; the complaint as to the violation of Mr Shala's fair trial rights presented by Grounds 1 and 2 of his Appeal Brief concerns the use of incriminatory statements obtained in breach of Mr Shala's rights for the purposes of his convictions. This issue is currently being presented for the first time before the Appeals Panel in the course of challenging Mr Shala's convictions. The Appeals Panel's decision remains reviewable by the Constitutional Court as this concerns the

[5] Appeal Brief, paras. 16-30.

protection of Mr Shala's rights guaranteed by the Kosovo Constitution and (should the Government of Kosovo join the Council of Europe as full member) the matter will in principle be reviewable by the ECtHR itself. The Prosecution's arguments concerning "presumptive finality" therefore are fundamentally flawed.

IV. GROUND 3: BREACH OF THE PRINCIPLE OF LEGALITY

8. The Prosecution misrepresents the essence of Mr Shala's arguments. The convictions – which were just entered- and are based on JCE liability constitute a violation of the principle of legality. The same applies to the conviction of the crime of arbitrary detention in a non-international armed conflict. Mr Shala is challenging his convictions because they were entered in violation of the principle of legality as argued in his Appeal Brief and these challenges are presented for the first time as part of his appeal against the trial judgment.

9. The Prosecution's suggestion at paragraph 38 of its Response that the Defence submission that JCE liability was not foreseeable to Shala is an argument introduced for the first time on appeal is absurd; this was a point which was consistently presented throughout the proceedings. The Defence emphasised specifically the lack of foreseeability given how JCE liability in international criminal law was established with the delivery of the Tadic Appeal Judgement by the ICTY on 15 July 1999; significantly, therefore, after the Indictment period had come to an end.[6]

10. Shala's purported familiarity with the Geneva Conventions[7] cannot be taken in any realistic sense to mean that he understood the nature and possibility that the doctrine of JCE liability would be applicable in Kosovo at the time or how norms of

[6] KSC-BC-2020-04, F00821, Defence Final Trial Brief, 25 March 2024 (confidential)("Defence Final Trial Brief"), para. 274; KSC-BC-2020-04, F00265, Defence Pre-Trial Brief, 5 September 2022 (confidential), paras. 81, 88; KSC-BC-2020-04, F00084, Defence Reply to the Prosecution Response to the Preliminary Motion of Pjetër Shala Challenging the Jurisdiction of the KSC, 24 September 2021 (confidential), para. 22.
[7] See Response, para. 40.

customary international law – not reflected in the Geneva Conventions or ratified in the domestic legal order- could be used, retrospectively, as basis to introduce war crimes in the Kosovar legal order for which he could be deemed liable.

V. GROUND 4: DEFECTIVE INDICTMENT

11. The Panel erred in law when convicting Mr Shala on Counts 1, 3, and 4, on the basis of a defective Indictment which failed to provide sufficient particulars as to the members of the alleged JCE and the victims of the alleged criminal activities, depriving thus Mr Shala of an effective opportunity to answer to the Prosecution's allegations.[8] Had the identity of victims been clearly indicated in this Indictment (as it should have been), the further error of convicting Mr Shala of crimes committed in respect of eighteen victims, instead of nine victims as charged, could have been prevented. Enhanced clarity in the presentation of the Prosecution's case would have assisted not only the Defence but also the Panel, which would have been able to proceed and hear the evidence with certainty as to what crimes (and against whom) the Prosecution was trying to demonstrate.

12. The Prosecution knew its case at the time of presenting its Indictment. It was obliged to specify JCE members and other important information concerning its case that was known to it at that time. It failed to do so. It failed to identify Kryeziu, Limaj, Dobruna and others as JCE members. The Defence was entitled to have this information to use it for the purposes of its investigations and presentation of Mr Shala's defence case. The Prosecution's failure to disclose this information right at the beginning of the case prevented the Defence from being able to locate alleged JCE members and present their evidence at trial. For instance, the Prosecution deprived

[8] KSC-BC-2020-04, F00847, Trial Judgment and Sentence, 16 July 2024 (confidential)("Trial Judgment"), paras. 945, 977, 1005; 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 (confidential).

the Defence of the opportunity to present [REDACTED] (exculpatory) evidence [REDACTED].

13. The Prosecution fails to respond to the essence of Mr Shala's main argument: the Prosecution's cumulative charging, which was in any event unnecessary as it could not in law lead to cumulative convictions (although that was the Prosecution's unlawful aim), has created prejudice for the Defence that had to undergo trial and spend its scarce resources both in terms of time and means to respond to charges which should not have been presented. It is this prejudice that led to the fair trial violation that Mr Shala presents on appeal.

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

14. Shala is not complaining (in this ground) about the Panel's assessment of the evidence concerning the additional victims; it complains about the fact that a conviction was entered in respect of double the number of victims set out in the Indictment. He was charged of committing the Indictment crimes against nine victims whose identity was supposedly presented in the Prosecution's pre-trial brief. The use of the phrase "at least" does not assist the Prosecution on this point. They chose to charge him with committing crimes against nine persons; their identity should have been pled in the Indictment given the scale and nature of the case. The fact that it was not, cannot be relied upon to retrospectively justify a conviction for committing crimes against persons not included in the primary accusatory instrument. The commission of crimes against nine specific individuals was the focus of Mr Shala's investigations and response to the Prosecution's case. However, to his surprise, he found himself convicted of crimes against an additional nine victims. He had no notice that this would or could be the case. He was convicted of crimes against certain specific individuals, nine specific individuals, with which he was not charged. The Prosecution's submissions in its pre-trial brief providing information about 18 victims

do not change the fact that in its primary accusatory document the Prosecution charged Mr Shala with committing crimes against nine victims nor do they give sufficient notice that, in fact, Mr Shala was being prosecuted for committing crimes against 18 persons, which only became apparent to him when reading the Trial Panel's judgment!

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

15. Contrary to the Prosecution's claims,[9] a trial panel's discretion to assess witnesses' credibility and reliability is not unfettered. It is governed by rules pertaining to reasonableness to avoid arbitrary findings.

16. The Defence never argued that TW4-01's [REDACTED] was due to his [REDACTED]![10] To the contrary, the Defence noted his [REDACTED], his vindictiveness, and generally his propensity to act in bad faith. The Prosecution's explanation about [REDACTED] is nothing but a misconceived attempt to divert the Panel's attention away from TW4-01's very clear and explicit justification for his actions, namely that he [REDACTED].[11]

17. The Panel's acceptance of TW4-01's evidence despite evidence to the contrary by two Prosecution witnesses is unconvincing because the joint and consistent account given by the two other witnesses carries more force but was dismissed without a credible explanation for such dismissal. The only reason offered was the explanation that TW4-01's evidence was to be preferred because "[REDACTED]" by the relevant events, related as they were to [REDACTED]; however, one could argue that the fact

[9] Response, para. 55 ("a trial panel retains full discretionary power" which is then undermined by its acknowledgment that "a margin of deference is afforded to a trial panel's assessment of witnesses" which demonstrates that the discretion in fact is limited to a "margin" beyond which appellate intervention may be merited.)
[10] Response, para. 60.
[11] Response, para. 59; T. 6 June 2023 pp. 1882, 1883.

that he was [REDACTED] was a valid or additional reason explaining why his memory could not be trusted on that point, particularly when contradicted by the account of not only one but two others! In addition, TW4-01's evidence was also undermined by the fact that he had also placed [REDACTED] at the relevant time and place whereas medical records, which [REDACTED] conveniently claims were forged, show that [REDACTED].[12]

18. To the extent that the Prosecution suggests that [REDACTED]'s evidence was not decisive for the purposes of the [REDACTED],[13] its suggestion is directly contradicted by the reasoning of the Trial Panel.[14]

19. The Prosecution entirely fails to justify the Panel's abuse of discretion in assessing and relying to the extent and manner that it did on the evidence of the Prosecution witnesses discussed in its Response. While the Panel was not required to provide an answer to each and every submission presented by the Defence, the Panel failed to answer to important challenges and concerns raised as to TW4-01's credibility in circumstances where no reasonable trier of fact would have failed to address such issues. For instance, no reasonable trier of fact would have concluded that TW4-01's criminal record "did not constitute a reason to doubt the truthfulness of his testimony".[15] In addition, no reasonable trier of fact would have found that the Defence has failed to show his propensity to lie and generally his lack of credibility given how the [REDACTED].[16] The Panel's factual findings based on TW4-01's evidence are unsafe and should be reviewed on appeal.

20. Similarly, the Prosecution fails to show that the Panel's assessment of W04733 and W01448's credibility was reasonable. The Prosecution's claim that the Panel's

[12] Defence Final Trial Brief, para. 221.
[13] Response, para. 63.
[14] Appeal Brief, para. 81.
[15] Response, para. 70.
[16] Trial Judgment, para. 107; Appeal Brief, para. 86.

errors in this respect have had no impact on the Judgment is false; the Panel heavily relied on the evidence of these two witnesses for its findings.[17] This error was aggravated by the fact that their evidence was also untested as discussed below.

VIII. GROUND 7: UNFAIR RELIANCE ON UNTESTED EVIDENCE

21. The Prosecution's submission that "[n]one 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" is a bold misrepresentation.[18] As the Prosecution concedes, the determining question remains whether the untested evidence was decisive for a finding on the accused's responsibility.[19] As shown in the Appeal Brief, a great number of findings which served as the foundation for the Panel's conclusions on Mr Shala's responsibility and, therefore, convictions, were based to a decisive extent on untested evidence.[20] This rule does not change when (as it is almost inevitably the case in international criminal proceedings) a conviction under one count is rooted in a number of incidents. Findings that are decisive for a conviction cannot be based to a decisive extent on untested evidence. Any finding to the contrary, would be inconsistent with common sense and the aim of the principle on which Shala's complaint in this ground relies. The latter intends to ensure that convictions are safe and based on evidence properly confronted in court in full respect of the rights of the accused. The manner in which the Trial Panel proceeded in this case and based all of Mr Shala's convictions to a decisive extent on untested evidence was an error of law and fact and violation of Mr Shala's rights that needs to be remedied. The Appeal Brief explains in detail how the findings that were based on untested evidence formed the foundation for Shala's convictions. For instance, non-credible evidence referred to by the Prosecution to argue that Mr Shala was beating

[17] Trial Judgment, para. 107.
[18] Response, para. 103.
[19] Response, para. 104.
[20] Appeal Brief, paras. 137-143.

TW4-01 , W04733 and W01488 did not suffice for the conviction on torture, which also required the interrogation allegations which in turn relied on for demonstration on untested evidence.[21] The Prosecution's attempts to justify the Panel's findings by interpreting other elements on the trial record that, in its view, "demonstrate that SHALA knew that the mistreatment he was participating in was being inflicted for the special purpose required by torture"[22] do not change the fact that the findings the Panel relied upon to convict him of torture were based, as shown in its judgment, to a decisive extent on untested evidence.

22. The Prosecution correctly concedes that Shala "claimed" he held some important function during the war in his asylum applications,[23] influenced by his need to be granted protection as a refugee in Belgium to ensure his family's survival. As the Prosecution also concedes the reality and truth of the matter remains that he was nothing but a simple KLA soldier during the war.

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

23. The Prosecution entirely misrepresents the essence of the Defence submissions in these grounds.[24] The Defence is not arguing that Mr Shala was convicted despite the fact that there were doubts as to whether he had indeed acted in the way described in the Panel's factual findings whereas other hypotheses could be made as to what may have actually taken place. The Defence is complaining of an inappropriate shift of the burden of proof and breach of the principle of in *dubio pro reo* given the

[21] Response, para. 112.
[22] Response, para. 119.
[23] Response, para. 122.
[24] Response, para. 154 "[t]he test for establishing proof beyond reasonable doubt does not require the exclusion of every hypothesis or possibility of innocence, but only ever fair or rational hypotheses that may be derived from the evidence." Yet, the Defence never argued that the Panel erred by failing to consider other unreasonable hypotheses or possibilities.

unreasonable and unmerited exclusion by the Panel of alternative *reasonable* hypotheses and *reasonable* doubts in order to reach its incriminatory findings.

24. Contrary to the Prosecution's assertions, the Defence did not misinterpret the principle of *in dubio pro reo*. The Panel erred by shifting the burden of proof in relation to Mr Shala's presence at the KMF and his alleged participation in the mistreatment of detainees.[25] The Panel's finding that detainees were unlawfully held and mistreated at the KMF was not the only reasonable conclusion available to be drawn on the evidence on record.[26]

25. The Prosecution erroneously claimed that the Defence proposed "entirely speculative explanations of the evidence",[27] whereas the Defence has provided reasonable inferences based on the evidence to demonstrate that the Panel has erred in drawing unwarranted inferences which were not the only reasonable inferences available, as required by Rule 140(3) of the Rules.[28] The Prosecution also erroneously suggested that the Defence has argued that every "hypothesis or possibility of innocence" needed to be excluded, whereas the Defence focused on how the Panel's inferences were unwarranted based on the evidence and that reasonable alternatives existed and ought to have been considered.[29]

26. As to TW4-01, the Panel erroneously dismissed without providing adequate reasoning the reasonable and, in fact, much more likely explanation that TW4-01 had been detained and interrogated on the basis of legitimate suspicions that he was [REDACTED].[30] The Prosecution entirely fails to justify the Panel's rejection of this very reasonable explanation. The mistreatment of a detainee could constitute unlawful ill-treatment or torture but that would not of itself fulfil the elements of the

[25] Response, paras. 149-151, 154.
[26] See Appeal Brief, paras. 140-160.
[27] Response, para. 154.
[28] Appeal Brief, para. 142 and all references therein, 143-159.
[29] Response, para. 154; Appeal Brief, paras. 143-159.
[30] [REDACTED].

crime of arbitrary detention. The same applies to murder; the murder of a detainee does not of itself render his or her detention arbitrary.[31]

27. In its submissions relating to TW4-11, the Prosecution misleadingly claimed that the Defence "ignore[ed] the Panel's specific findings about KRYEZIU" and its finding that "KRYEZIU did not […] exercise independent oversight over the lawfulness of the detention of any detainee at the KMF, including TW4-11".[32] The Defence presented extensive submissions on evidence suggesting that Kryeziu was exercising the functions of a judge or competent authority purporting to review the lawfulness of detention of detainees at the KMF and the Panel's errors in this respect,[33] including in relation to TW4-11.[34] The Prosecution also blatantly ignored the Defence submission that TW4-11 testified that his release took place after his questioning by Kryeziu.[35]

28. Similarly, with respect to TW4-02, the Prosecution misleadingly claimed that the Defence ignored the Panel's findings regarding Kryeziu, despite the clear Defence submissions that evidence existed on the record suggesting that Kryeziu exercised the function or a judge or other competent authority.[36]

29. In relation to [REDACTED], the Prosecution argued that the Defence merely disagrees with the Panel's conclusions on his unlawful detention and mistreatment or "acknowledges the evidence relied on by the Panel, but nevertheless proposes an alternative conclusion which this evidence explicitly contradicts, without relying on any additional evidence in support of his position" with respect to his interrogation.[37] The Defence substantiates why, in its view, the Panel's conclusions were flawed and

[31] Response, paras. 158, 159.
[32] Response, para. 161.
[33] Appeal Brief, paras. 227-232.
[34] Appeal Brief, para. 227.
[35] Appeal Brief, para. 228, fn. 510.
[36] Appeal Brief, paras. 227-232.
[37] Response, paras. 170-172.

not the only reasonable conclusions from the evidence; the Panel itself had acknowledged that it had not received any evidence regarding the circumstances surrounding his arrest, the duration of his detention, any details about his release, nor any specific evidence pertaining to his interrogation and mistreatment, including that no detainees [REDACTED] spoke about witnessing his mistreatment.

30. The Panel erred by inferring that the alleged members of the JCE had acted pursuant to a common plan as this was not the only available conclusion from the evidence. Contrary to what the Prosecution suggests, the Defence points out to personal grievances and reasons leading to the arrest and detention of certain detainees that had nothing to do with a common plan regarding detention. Findings as to the existence of a common plan can be inferred, the Defence is not arguing that there had to be concrete proof of a meeting, deliberative process, or express agreement to demonstrate such common act. The case law requires however that inferences can be drawn where they are the only reasonable conclusion from the evidence; the inference concerning a so-called common plan to detain the particular or generally various individuals by the KLA at Kukës for two weeks in May and June 1999 is simply not the only reasonable inference from the evidence, particularly given the chaos that ruled over those days and the arbitrary and uncoordinated acts of individual KLA members at the time that, as a matter of fact, had personal grievances against particular detainees. The evidence the Prosecution relies on to show that all detainees were apprehended and interrogated on allegations of sympathizing or otherwise being associated with Serbia in fact goes to show the lack of arbitrariness in the selection, arrest and detention of such individuals.[38] The Appeals Panel must correct the inconsistency in the Trial Judgment in their findings concerning an alleged common purpose to detain persons suspected of enemy collaboration and the finding

[38] Response, para. 212-213

that the detention of the nine (and not eighteen) detainees at Kukës was arbitrary and not justified by reasonable suspicions of enemy collaboration.

X. GROUND 9: VIOLATION OF DEFENCE RIGHTS

31. Contrary to the Prosecution's assertions, the Defence submissions regarding the Prosecution's continuous disclosure violations are substantiated by many examples. [39] They have caused continuous prejudice to the preparation and presentation of the Defence case including its investigations and trial-readiness. As the Appeals Panel has come to acknowledge, the Prosecution's disclosure violations continue to this date.[40]

32. In July 2022, the Pre-Trial Judge has found the Prosecution's delay in disclosure of the exculpatory material of the criminal records of the Prosecution's central witness TW4-01—despite repeated requests from the Defence as a matter of urgency—to be "significant" and ordered the Prosecution to "put in place control mechanisms within the Office that will ensure that evidence is processed and disclosed in a timely manner".[41] Nonetheless, the Prosecution has continued the deliberate violation of its disclosure obligations unimpeded.

33. The Defence has previously made extensive submissions on the prejudice it has suffered from the Prosecution's late disclosure of W02540's evidence, which could have further informed the Defence cross-examination of TW4-01 or direct examination of Defence witnesses, including on the circumstances [REDACTED]. [42] As presented in the Appeal Brief, the Defence argues that the Panel erred in law by finding that this

[39] Appeal Brief, paras. 165-169; Defence Final Trial Brief, paras. 294-301.
[40] KSC-CA-2024-03, F00034, Decision on Defence's Request Regarding Disclosure, 10 January 2025 (confidential), paras. 12-13, 18.
[41] Defence Final Trial Brief, para. 296, *referring to* F00234, Decision on Specialist Prosecutor's Rule 102(2) and Related Requests, 20 July 2022 (confidential), para. 30.
[42] Appeal Brief, para. 168, *referring to* Defence Final Trial Brief, para. 300 and KSC-BC-2020-04, F00803, Defence Motion Requesting Leave to Reopen its Case to Present Exculpatory Evidence Recently Disclosed in Breach of the Prosecution's Disclosure Obligations, 29 February 2024 (confidential).

late disclosure caused no prejudice to the Defence, disregarding the Defence arguments regarding the importance of this evidence for the evaluation of the credibility of TW4-01.[43]

34. The Prosecution misrepresented the Defence submissions regarding the relevance of proposed Defence witnesses DW4-04 and W04751.[44] The Prosecution asserted:

> 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. However, the Panel concluded, having considered evidence from other Brigade 128 members, that SHALA was not a member of the brigade. The witnesses were therefore, indeed unnecessary and repetitive, and SHALA fails to demonstrate how their exclusion could have had any impact on the Judgment.

The Defence did indeed submit that DW4-04 and W04751 were expected to provide evidence regarding Brigade 128.[45] However, what is important is that DW4-04 was expected to "testify about his time and role at the KMF, including […] that he never saw Mr Shala in Kukës", and W04751 about "the different KLA members he met and saw in and around Kukës and their positions and duties", which would not include Mr Shala.[46] Their anticipated evidence went to show that Mr Shala was not present at Kukës at crucial times during the Indictment Period, and was thus central to the Defence case. The Panel erred by restricting the Defence and not allowing these witnesses to be called which breached Mr Shala's right to present an effective defence.

35. Contrary to the Prosecution's unfounded submission,[47] the Defence did not have to challenge the Panel's discretionary decisions as to how to conduct the trial in an interlocutory appeal, as no leave to lodge an interlocutory appeal would be granted.

[43] Appeal Brief, para. 169. *See* Response, para. 180.
[44] Response, para. 184.
[45] Appeal Brief, paras. 173, 175.
[46] Appeal Brief, paras. 173, 175.
[47] Response, para. 182.

The proper manner in which such discretionary decisions are to be challenged are as part of an appeal against conviction.

XI. GROUND 10: ABUSE OF DISCRETION CONCERNING DEFENCE WITNESSES

36. The Panel abused its discretion and applied double standards in its evaluation of Prosecution evidence. This cannot be reduced to a "mere disagreement" with the Panel's reasoning that supposedly merits summarily dismissal.

37. The Prosecution's argument regarding Bardhyl Mahmuti's passport stamps is purely speculative. The Prosecution asserted that "contrary to SHALA's submission, MAHMUTI's passport stamps did not 'demonstrate' that he was not at the KMF when W04733 was there, as MAHMUTI admitted that there were other routes available to enter Albania without using official border posts."[48] There is simply no evidence from any witness to suggest this speculative scenario that the Prosecution presented. As the Defence submitted, Mahmuti's passport is important evidence corroborating his evidence and demonstrating that he was not at the KMF during the Indictment period which shows the unartfulness of W04733's claim that Mahmuti supposedly was involved in W04733's mistreatment at Kukës.[49] This evidence was essential and should have been addressed in the Panel's analysis of W04733's credibility, particularly in light of W04733's pattern which shows the unreliability of his evidence, namely to refer to numerous persons he saw on television and identify them as actors in his account of events, including Mahmuti and other Defence witnesses such as Time Kadrijaj and Safete Hadergjonaj.[50]

38. The abuse of discretion in the Panel's assessment of potentially exculpatory evidence, which stands in stark contrast to its lenient treatment of incriminatory

[48] Response, para. 195.
[49] Appeal Brief, para. 194.
[50] Appeal Brief, para. 194; Defence Final Trial Brief, paras. 234, 240-241.

evidence supporting its preferred narrative of events, undermines the appearance that the Panel has acted in an objective and non-biased manner.

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

39. The CIL principles referred to by the Prosecution (and relied upon by the Panel) developed much later than the period we are concerned with in this case and were certainly not known, were not sufficiently clear, and could not have been foreseen by Shala in 1999.[51]

40. Contrary to the Prosecution's arguments,[52] the Panel erred in law in the manner in which it set out the elements of arbitrary detention and subsequently considered them to have been met. The Panel erred by considering as element of the offence the requirement to assess compliance with basic procedural safeguards; in doing so the Panel relied on jurisprudence pertaining to the offence of unlawful confinement of civilians in the context of an *international* armed conflict, as well as previous KSC decisions—one of which is its own—referring to the same few cases.[53] Thus, the Panel relied on inapposite jurisprudence for the purposes of considering and setting out the applicable law in this context.[54]

41. The Prosecution states that "SHALA fails to demonstrate that the international nature of the armed conflict in *Delalić et al.* renders this jurisprudence inapposite. […] SHALA fails to explain why, *mutatis mutandis*, the same considerations should not

[51] Response, para. 219.
[52] Response, paras. 216, 219-226.
[53] Appeal Brief, para. 208; Trial Judgment, para. 940 and all references therein. The Prosecution misrepresented the Defence submissions in alleging that "[t]he 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."[53] The Prosecution blatantly ignored that the paragraph it referred to in the Appeal Brief concerns the Panel's error in law in establishing the requirement in assessing the compliance with basic procedural safeguards. Response, para. 220, *referring to* Appeal Brief, para. 208.
[54] Response, para. 220, fn. 793. *See* Trial Judgment, para. 942, fn. 1917.

apply when assessing an accused's *mens rea* in the context of a NIAC."[55] There is however a significant difference in assessing the applicable *mens rea* in an international or non-international armed conflict for this particular offence; an international armed conflict is pursued by organised enemy armies which is not the case in non-international armed conflicts, which are generally pursued by less organised structures and entities. The Prosecution's suggestion that the Panel's reliance on the requirements concerning the *mens rea* of a different crime does not matter because the requirements concern "the same *mens rea*" is absurd:[56] the Appeals Panel should consider and apply the correct *mens rea* which concerns the specific offence at stake namely the offence of arbitrary detention in a non-international armed conflict. The nature of the conflict, particularly as to the applicable *mens rea* requirements and what is reasonable to expect as to the provision of procedural guarantees regarding detention of traitors by non-state actors and paramilitaries is of the essence.

42. The Panel failed to explain why it found the allegations and suspicions requiring detention of the detainees "vague". However, even assuming (and the Defence strongly contests that this is the case) that such allegations and suspicions were "vague", "vague" is an adjective which provides a qualitative assessment of the merits of such suspicions: it describes how concrete, specific, realistic and therefore valid they were. Evidently, the Panel (and the Prosecution) acknowledged that there were, in fact, reasons, grounds, suspicions and concerns suggesting that these detainees were collaborators; the Panel's qualitative assessment however seems to differ from that of the KLA officers at Kukës in 1999 who considered that those grounds, concerns and suspicions justified detention. Is it reasonable to give more weight to the Panel's assessment of such grounds, which was conducted as it was twenty years after the fact from the safety of its Ivory Tower in the Hague than the judgment call of the KLA members at Kukës operating in the middle of the war on the

[55] Response, para. 225.
[56] Response, para. 225.

basis of information showing realistic concerns that these individuals were assisting the enemy? In addition, the Prosecution hardly focused its investigations or presentation of evidence on what grounds for detention may or may not have existed. The evidence we have on record stems from its efforts to show that the detainees' interrogations constituted torture. The Panel's analysis therefore is based on whatever scattered and incomplete evidence the Prosecution happened to present on the issue of enemy collaboration. In addition, if a legitimate basis for initial detention existed (as the Prosecution's alternative submission seems to accept),[57] what evidence did the Prosecution present to show that the "subsequent" denial of basic safeguards rendered such detention arbitrary? At which point in time did the legal and non-arbitrary detention become arbitrary? We do not know the answer to this question posed indirectly by the Prosecution[58] because this was not the Prosecution's case at trial and it does not correspond to the Panel's findings on this point. The Panel considered the detention arbitrary from its inception. In doing so, it erred. Its error should be rectified on appeal.

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

43. The Panel erred by ignoring the "highly unusual character" of the events on [REDACTED] June 1999 and finding that murder was part of the common plan, despite the ensuing circumstances. The Prosecution fails to show that the finding that a JCE existed having as common plan to kill detainees was reasonable in those circumstances.

44. In addition, the Panel erred in law when it failed to identify which form of intent Mr Shala possessed and provide its definition. It simply stated that it inferred his "intent to kill".[59] As stated by the Appeals Panel in *Mustafa*, "given the combination

[57] Response, para. 227 ("Regardless, even if a legitimate basis for the initial detention existed, the subsequent denial of basic procedural safeguards would have rendered the detention illegal.")
[58] Response, para. 227.
[59] Trial Judgment paras. 1031-1032, 1034.

of acts and omissions and range of circumstances from which the intent was inferred", a clear indication of the type of intent and its definition would be expected to appear in a trial judgment.[60] The need for a precise finding and definition of the intent to kill is emphasized by jurisprudence.[61] The Prosecution's submissions fail to respond to this point.

XIV. GROUND 14: ERRORS IN SENTENCING

45. The Prosecution misrepresents the Defence submissions as to the requirement to apply *lex mitior*. Contrary to its misconceived suggestion, *lex mitior* must be applied not because of any "interpretation of Article 44(2)" but because there are different possible regimes that are relevant in sentencing by the KSC and these should have been identified before the most lenient one for the accused is applied.

46. The Prosecution also entirely fails to justify the disproportionate character of the sentence imposed by the Panel when compared to the sentence imposed in similar cases concerning the same facts. As noted in the Appeal Brief, Sabit Geci was sentenced to 15 years' imprisonment for inhumane treatment, violation of bodily integrity, and torture in Kukës but also in Cahan.[62] Xhemshit Krasniqi was initially sentenced to 8 years' imprisonment for illegal detention, torture, violation of bodily integrity or health of witnesses and unknown civilians, which was reduced to 7 years on appeal.[63]

47. Considering the position of Sabit Geci and Xhemshit Krasniqi in the KLA command structure, as recognized by the Panel, as well as their greater involvement

[60] KSC-BC-2023-02, F00038/RED, Public Redacted Version of Appeal Judgment, 14 December 2023, para. 389.
[61] See for example the discussion on negligence and gross negligence at ICTY, *Prosecutor v. Naser Orić,* Case No. IT-03-68, Judgment, 30 June 2006, para. 348.
[62] SPOE00248405-00248500, p. 10 (*Geci et al.* Judgment).
[63] SPOE00248071-00248128, p. 8 (*Xhemshit Krasniqi* Judgment).

and control over the indicted crimes, the sentence for Mr Shala is disproportionate to his alleged involvement.

48. The Panel failed to ensure equality in sentencing, and this is an error that requires appellate intervention.

XV. CONCLUSION

49. As a result of the Panel's errors, the Appeals Panel should annul the Trial Judgment, vacate the 18-year sentence of imprisonment, and remit the case for re-trial. In the event that the Panel upholds any convictions, it must impose a new sentence taking all the applicable mitigating circumstances into account.

Word count: 6529

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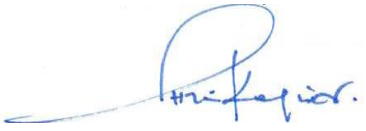

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Tuesday, 4 February 2025

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