



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

In: KSC-CA-2024-03
Before: Court of Appeals Panel
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen
Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor's Office
Date: 6 February 2025
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Public redacted version of

**'Prosecution Response to Defence Motion to Present Additional Evidence
Pursuant to Rule 181 with Confidential Annexes 1 and 2'**

Specialist Prosecutor's Office

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I. INTRODUCTION

1. SHALA's Rule 181 Motion¹ does not meet the requirements of the Rule² and should be denied. SHALA declines to clearly specify the significance of each of W04264's eight statements,³ fails to identify any specific content in four of them,⁴ and ignores that the statement he references in most instances—W04264's SPO interview⁵—was available to him at trial. His arguments for the significance of the Proposed Evidence⁶ are contradictory and do not reveal how admission could or would have impacted the verdict on any proffered interpretation.

2. For the sake of transparency and completeness of the record, the SPO hereby provides, in Annex 1, the public transcript of testimony of W04264 in KSC-BC-2020-06, which occurred on 14 January 2025.⁷ Annex 2 contains the preparation note

¹ Defence Motion to Present Additional Evidence Pursuant to Rule 181, KSC-CA-2024-03/F00033, 6 January 2025, Confidential ('Motion').

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein are to the Rules, unless otherwise specified.

³ See Motion, KSC-CA-2024-03/F00033, para.11. While SHALA seeks admission of preparation notes (123558-123568; 123569-123574) and an associated exhibit (SITF00010509-SITF00010563), all of W04264's materials, including his SPO interview, are referred to herein as 'statements', except where otherwise specified.

⁴ No mention is made of the specific contents of four statements: (i) 054704-054734 RED / 054704-054734-AT RED (ii) SPOE00067205-SPOE00067208-ET RED / SPOE0067205-0067208 RED; (iii) 123558-123568; (iv) 123569-123574. They are only listed with a description containing particulars related to authenticity with no submissions about relevance to the case or how any part meets the requirements for additional evidence on appeal.

⁵ 054739-TR-ET Parts 1-9 RED / 054739-TR-AT Part 1-9 Revised RED ('SPO Interview').

⁶ The Proposed Evidence includes the four statements found in the Motion that are described in any detail by SHALA: 054739-TR-ET Parts 1-9 RED / 054739-TR-AT Parts 1-9 Revised RED; 054664-054703 RED / 054664-054703-AT RED; SITF00010487-SITF00010508 RED; SITF00010509-SITF00010563. As SHALA has failed to identify any part of the four statements at Motion, KSC-CA-2024-03/F00033, para.11(b)-(c), (e)-(f), which could arguably justify admission, no response is possible and his request should be summarily dismissed.

⁷ In December 2024, SHALA requested W04264's KSC-BC-2020-06 testimony. As W04264 had not yet testified, it was not provided when the SPO provided all other statements of W04264 to SHALA on 9 December 2024 (Disclosure Package 2) and 12 December 2024 (Disclosure Package 3) and SHALA was informed that W04264 had not yet testified by *inter partes* email, dated 17 December 2024.

recording the contents of W04264's preparation session before his testimony.⁸ During the course of W04264's testimony, which was largely conducted in public session,⁹ it was agreed that his evidence would be admitted in those proceedings pursuant to Rule 155(1) on the basis that the witness had difficulty remembering certain matters.¹⁰

II. APPLICABLE LAW

3. The admission of additional evidence during appeal proceedings is 'exceptional'.¹¹ In addition to satisfying the general conditions for admissibility under Rule 138, the Appeals Panel must 'be satisfied that the proposed evidence: (i) was not available at the time of trial and could not have been discovered with the exercise of due diligence; and (ii) could have been a decisive factor in reaching a decision at trial.'¹²

4. Whether the proposed evidence was available at trial 'is not a question of whether the documents in question were available in a literal sense', but rather whether the information contained therein could have been obtained at an earlier date

⁸ 124605-124608.

⁹ The private session testimony concerned procedural matters and not the substance of W04264's evidence. If SHALA considers it necessary to receive the full transcript, including the procedural matters covered in private session, the SPO will file an access motion in KSC-BC-2020-06 requesting the same for disclosure to SHALA. As the private session testimony does not contain the substance of his testimony, no delays or extensions are appropriate on this basis.

¹⁰ KSC-BC-2020-06, Transcript (Trial Hearing), 14 January 2025, Public, p.23726. The Panel and parties agreed that W04264's evidence would be admitted pursuant to the language in Rule 155(1) allowing for admission in writing where a person is, by virtue of 'other compelling reasons' unable to testify orally. No further preparation notes were admitted into evidence during this testimony.

¹¹ *Specialist Prosecutor v. Gucati & Haradinaj*, KSC-CA-2022-01/F00094, Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing, 28 November 2022, Confidential ('*Gucati & Haradinaj* Decision'), para.18.

¹² *Gucati & Haradinaj* Decision, KSC-CA-2022-01/F00094, para.18.

through the exercise of due diligence.¹³ An applicant who fails to demonstrate that any attempt has been made to obtain the evidence at trial in any form, does not fulfil their duty to act with due diligence.¹⁴

5. Where the proposed evidence was not available at trial, in order to satisfy the ‘decisive factor’ requirement under Rule 181, ‘the evidence must be such that it *could* have had an impact on the verdict, which means that in the case of a request by a defendant, it could have shown that a conviction was unsafe.’¹⁵ Unlike before other institutions, no provision is provided in the Rules to allow for admission on appeal of evidence that was available at trial, including through the exercise of due diligence.¹⁶ The jurisprudence of other courts, which allow, by the language of their respective rules, for admission of materials which were available during trial in exceptional circumstances, establishes that if the proposed evidence was indeed available at trial, it may only be admitted if the applicant can establish that the exclusion of the evidence ‘*would* amount to a miscarriage of justice’, in that, had the evidence been admitted, it ‘*would* have affected the verdict.’¹⁷

¹³ IRMCT, *Ngirabatware v. Prosecutor*, MICT-12-29-A, Decision on Ngirabatware’s Motions for Relief for Rule 73 Violations and Admission of Additional Evidence on Appeal, 21 November 2014 (‘*Ngirabatware Decision*’), para.32.

¹⁴ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Public Redacted Version of 2 May 2014 Decision on Vujadin Popović’s Third and Fifth Motions for Admission of Additional Evidence on Appeal pursuant to Rule 115, 23 May 2014 (‘*Popović May 2014 Decision*’), para.25. See also ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Decision on Vujadin Popović’s Motion for Admission of Additional Evidence on Appeal pursuant to Rule 115, 20 October 2011 (‘*Popović October 2011 Decision*’), para.7; *Ngirabatware Decision*, para.24.

¹⁵ *Gucati & Haradinaj Decision*, KSC-CA-2022-01/F00094, para.18. See also *Popović October 2011 Decision*, para.9; *Popović May 2014 Decision*, para.9; *Ngirabatware Decision*, para.26.

¹⁶ Compare Rule 181 and IRMCT, Rules of Procedure and Evidence, 26 February 2024, Rule 142(C).

¹⁷ IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Decision on a Motion to Admit Additional Evidence on Appeal, 2 March 2018 (‘*Karadžić Decision*’), para.7. See also *Popović October 2011 Decision*, para.10; *Popović May 2014 Decision*, para.10; *Ngirabatware Decision*, para.27.

6. In both scenarios, the applicant bears the burden of ‘specifying with sufficient clarity the impact the additional evidence could or would have had’ upon the verdict.¹⁸ As such, the applicant must show that the evidence is relevant to a material issue, i.e. that ‘it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence.’¹⁹ In all cases, the significance and potential impact of the proposed evidence is assessed not in isolation, but in the context of all the evidence presented at trial.²⁰

III. SUBMISSIONS

7. None of SHALA’s arguments, taken individually or in the aggregate, meet the requirements of Rule 181.²¹ The Motion ignores that a request for the admission of evidence on appeal is one that, by definition, seeks to disprove a fact or finding critical to the finding of guilt. Admission of proposed additional evidence, related to a fact on which no aspect of the conviction relies, is excluded by the Rule. As developed below, SHALA’s submissions about W04733’s sighting of W04264 are not capable of calling into question any finding related to SHALA’s responsibility for the crimes of which he was convicted.

8. SHALA’s alternate argument regarding W04264’s purported evidence about general KLA detention practices are imprecise and conflict with his own arguments about W04733. SHALA makes no attempt to achieve consistency in his position. SHALA’s position on the probative value of the Proposed Evidence is therefore

¹⁸ *Popović* October 2011 Decision, para.11; *Popović* May 2014 Decision, para.11; *Ngirabatware* Decision, para.28; *Karadžić* Decision, para.8.

¹⁹ *Popović* October 2011 Decision, para.8; *Popović* May 2014 Decision, para.8; *Ngirabatware* Decision, para.25.

²⁰ *Popović* October 2011 Decision, para.12; *Popović* May 2014 Decision, para.12; *Ngirabatware* Decision, para.29.

²¹ SHALA’s requests are addressed thematically and, as needed, by reference to statements within the Proposed Evidence.

ambiguous and vague. SHALA, like all defendants, is entitled to pursue multiple lines of defence in accordance with his chosen strategy. However, before evidence is admitted on appeal to prevent a miscarriage of justice, the probative value of the evidence must be clear. SHALA's Motion lacks the requisite clarity.

A. SHALA MAKES UNDEVELOPED CLAIMS ABOUT W04264'S EVIDENCE AND OFFERS IRRECONCILABLE INTERPRETATIONS OF THE PROBATIVE VALUE OF THE PROPOSED EVIDENCE

9. SHALA argues that the Proposed Evidence reveals that W04264 was based in Divjakë after 5 April 1999 and was not therefore physically present at the KMF, as alleged by W04733.²² SHALA seeks admission on this basis to undermine the credibility of W04733. However, in the next paragraph of the Motion, SHALA argues that the Proposed Evidence is relevant because it reveals that with the establishment of directorates, the KLA started to operate consistently with the laws of war.²³ While vague, SHALA appears to suggest that this evidence of W04264 conflicts with the Panel's findings about the absence of procedural safeguards afforded to detainees at the KMF.²⁴

10. Further, although the Motion notes the Panel's findings about the absence of a judge or competent authority,²⁵ it is entirely unclear whether SHALA seeks admission of the Proposed Evidence to suggest that W04264 or any other KLA member exercised the function of a 'judge' or 'competent' authority for the purposes of applying procedural safeguards to detention at the KMF. If SHALA's argument is that W04264 served in this role, this directly contradicts his argument that W04733 fabricated his evidence about W04264's role and presence. If his argument is that other, unnamed

²² Motion, KSC-CA-2024-03/F00033, para.16.

²³ Motion, KSC-CA-2024-03/F00033, para.18.

²⁴ Motion, KSC-CA-2024-03/F00033, para.18.

²⁵ Motion, KSC-CA-2024-03/F00033, para.18.

KLA members served this role, based on W04264's account, this argument is without citation to W04264's evidence and impermissibly vague. None of SHALA's undeveloped suggestions about W04264 or other unnamed KLA members are capable of replacing the Panel's detailed analysis of the detention regime as reflected in the Judgment.²⁶

11. In sum, SHALA does not explain how his argument that W04264 has evidence showing the implementation of procedural guarantees concerns detained persons at the KMF,²⁷ nor, how that would be reconcilable with his claim that W04264's evidence shows that W04264 was not at Kukës or involved in interviewing any suspected collaborators (and therefore contradicts W04733's evidence about W04264 at the KMF). Such unclear and inconsistent submissions, which require the SPO to guess as to the ultimate argument in the face of competing possibilities, should be dismissed and W04264's materials should not be admitted.

B. W04264'S EVIDENCE DOES NOT IMPACT THE PANEL'S FINDINGS ON ARBITRARY
DETENTION AT THE KUKËS METAL FACTORY ('KMF')

12. Nothing in the Proposed Evidence is capable of refuting or even challenging the Panel's extensive findings on the lack of procedural guarantees afforded to detainees at the KMF.²⁸ Specifically, W04264's evidence regarding the KLA legal department

²⁶ Trial Judgment and Sentence, KSC-BC-2020-04/F00847, 16 July 2024, Confidential ('Judgment'), paras 402-406, 412-414, 433-438, 470-473, 491-494, 509-512, 528-531, 552-556, 562-563, 569, 576, 581, 591, 946-949.

²⁷ See Motion, KSC-CA-2024-03/F00033, para.18. The citations to W04264's evidence in this paragraph concern: the establishment of the 'Directorates', including the Judicial Sector, in Divjakë in mid-December 1998; W04264's judicial independence as 'Chief of the Military Court', including his decision to visit the prison in Kleçkë on his own initiative; W04264's exclusive jurisdiction, in general terms, over cases involving accusations of collaboration against civilians; and, that collaboration was punishable by death according to the Criminal Code, but that no cases of collaboration were brought to W04264's attention.

²⁸ Judgment, KSC-BC-2020-04/F00847, paras 402-406, 412-414, 433-438, 470-473, 491-494, 509-512, 528-531, 552-556, 562-563, 569, 576, 581, 591, 946-949.

and establishment of the military court is limited to the operation of those entities in Kleçkë/Divjakë.²⁹ It is therefore incapable of displacing the Panel's findings, which were based on the mutually corroborative evidence of multiple witnesses,³⁰ that KMF detainees were: (i) not informed of the reasons for their arrest and detention; (ii) not brought before a judge or other competent authority; and (iii) not afforded an opportunity to challenge the lawfulness of their detention.³¹ In the face of such a plethora of credible evidence from multiple reliable sources, even if admitted, the Proposed Evidence could not have been a decisive factor in reaching a decision at trial regarding the lack of procedural guarantees afforded to detainees at the KMF.³²

13. Moreover, despite stating that the Proposed Evidence shows that 'KLA members did in fact make efforts to ensure adequate adherence to the laws of war and respect procedural rights of detainees',³³ SHALA does not explain who these KLA members or detainees are, or how the Proposed Evidence is applicable to the detention practices at the KMF, in which SHALA directly participated. Such vague assertions of relevance fall far short of the requirements for admission on appeal.

²⁹ See e.g. SPOE00067205-SPOE00067208-ET RED, p.3 where W04264 confirmed that the KLA Juridical Structure did not have branches/units in other operational zones; 054739-TR-ET Part 2 RED, pp.18, 22 in which W04264 did not recall the existence of other KLA prisons besides those in Kleçkë, Kravasari, and Lladroc; 054739-TR-ET Part 5 RED, p.5 where W04264 confirmed that he only issued the 'Manual on Procedure Implementation Towards the Detainees' to Kleçkë prison, and perhaps to the Pashtrik Zone. Contrary to SHALA's statement, W04264 is not a named member of the JCE (see Judgment, KSC-BC-2020-04/F00847, paras 1003-1005; *Contra* Motion, KSC-CA-2024-03/F00033, para.3).

³⁰ See e.g. Judgment, KSC-BC-2020-04/F00847, paras 402-406 (TW4-01), 412-414 (W01448, TW4-01), 433-438 (TW4-11), 470-473 (W04733, TW4-08), 491-494 (W01448), 509-512 (TW4-05), 528-531 (TW4-04), 552-556 (TW4-02).

³¹ Judgment, KSC-BC-2020-04/F00847, paras 402-406, 412-414, 433-438, 470-473, 491-494, 509-512, 528-531, 552-556, 562-563, 569, 576, 581, 591, 946-949.

³² *Gucati & Haradinaj* Decision, KSC-CA-2022-01/F00094, para.18.

³³ Motion, KSC-CA-2024-03/F00033, para.18.

C. W04264'S EVIDENCE DOES NOT UNDERMINE W04733'S CREDIBILITY OR HAVE THE POTENTIAL TO IMPACT THE VERDICT

14. SHALA submits that the Proposed Evidence is 'relevant' to the Defence case in relation to W04733's credibility and SHALA's presence at the KMF. Mere relevance, however, does not satisfy the stringent criteria of Rule 181.

15. With respect to W04733's credibility, SHALA identifies one finding purportedly affected by the Proposed Evidence,³⁴ without explaining how, even if reversed, it could affect the Panel's credibility assessment of this witness. In this regard, SHALA's contention that W04733's evidence 'shows a clear pattern of fabrications and is unreliable,' is not based on any evidence or on any specific finding of the Panel.³⁵ On the contrary, the Panel found W04733 to be a credible witness who gave an account consistent with and corroborated by the evidence of numerous other witnesses and forensic evidence.³⁶

16. The Proposed Evidence is equally incapable of affecting any determination on SHALA's guilt based on SHALA's presence at the KMF.³⁷ W04733 seeing SHALA through a window, as he was being interrogated by [REDACTED] W04264,³⁸ is just one of multiple instances of SHALA's presence at the KMF,³⁹ and not one to which the Panel attached any particular weight to establish his culpability.⁴⁰

³⁴ Motion, KSC-CA-2024-03/F00033, para.15.

³⁵ Motion, KSC-CA-2024-03/F00033, para.17, where SHALA cites his own final trial brief submissions.

³⁶ Judgment, KSC-BC-2020-04/F00847, paras 180, 188.

³⁷ *Contra* Motion, KSC-CA-2024-03/F00033, para.17. The Panel considered SHALA's frequent presence at the KMF, in addition to his participation in the mistreatment of detainees, as one of the factors establishing his *mens rea* for arbitrary detention. See Judgment, KSC-BC-2020-04/F00847, para.846.

³⁸ Motion, KSC-CA-2024-03/F00033, para.17; Judgment, KSC-BC-2020-04/F00847, para.846.

³⁹ Judgment, KSC-BC-2020-04/F00847, paras 839-852.

⁴⁰ See Judgment, KSC-BC-2020-04/F00847, para.952, where the Panel considered SHALA's presence at the KMF in May and June 1999 as one of the factors establishing his *mens rea* for arbitrary detention, giving particular weight to his presence on or about 20 May and 4 June 1999, when he personally participated in the mistreatment of detainees.

17. Further, in addition to W04733's evidence,⁴¹ SHALA's presence at the KMF is established based on the evidence of TW4-01,⁴² TW4-10,⁴³ W01448,⁴⁴ Asllan ELEZAJ,⁴⁵ and SHALA himself,⁴⁶ who admitted that he went to the KMF very often in order to meet people and get supplies.⁴⁷ SHALA even admitted seeing W04733 within the Command Building of the KMF during one of his visits, specifically recalling what W04733 was wearing and doing.⁴⁸

18. Finally, SHALA fails to explain how the very limited portions of the Proposed Evidence purportedly relevant to W04733's credibility could affect any aspect of his conviction, which is based on his participation in a JCE. The existence of the JCE common plan, as found in the Judgment, is based on the arrest, unlawful detention, interrogation, and mistreatment of at least 18 individuals,⁴⁹ and the murder of one of them.⁵⁰ The Panel found that the interrogation and mistreatment of detainees were systematic,⁵¹ with W04264's interrogation of W04733 playing a minimal role in this determination.⁵² The Panel's findings on Xhemshit KRASNIQI's role in the crimes, and membership in the JCE, are based on his extensive participation in arrests, detentions, mistreatments, and murder,⁵³ and would remain undisturbed by the Proposed Evidence.

⁴¹ Judgment, KSC-BC-2020-04/F00847, paras 842-845.

⁴² Judgment, KSC-BC-2020-04/F00847, paras 840, 843-844.

⁴³ Judgment, KSC-BC-2020-04/F00847, para.841.

⁴⁴ Judgment, KSC-BC-2020-04/F00847, para.843.

⁴⁵ Judgment, KSC-BC-2020-04/F00847, paras 848-851.

⁴⁶ Judgment, KSC-BC-2020-04/F00847, paras 853-873.

⁴⁷ Judgment, KSC-BC-2020-04/F00847, para.862.

⁴⁸ 066888-TR-ET Part 1 Revised, pp.180-181, 185, 188-189.

⁴⁹ Judgment, KSC-BC-2020-04/F00847, para.1010.

⁵⁰ Judgment, KSC-BC-2020-04/F00847, para.1016.

⁵¹ Judgment, KSC-BC-2020-04/F00847, paras 1014-1015.

⁵² Judgment, KSC-BC-2020-04/F00847, paras 739-747.

⁵³ See e.g. Judgment, KSC-BC-2020-04/F00847, paras 346-349, 1004, 1014, 1017-1018.

19. The Panel's findings on SHALA's (more than)⁵⁴ significant contribution to the JCE are based on his conduct on 20 May and 4 June 1999.⁵⁵ His conduct on 20 May 1999 is based on the mutually corroborating and 'highly credible' evidence of TW4-01, W01448, and W04733;⁵⁶ and his conduct on 4 June 1999 on the evidence of [REDACTED] and corroborative forensic evidence.⁵⁷ SHALA himself partially admitted his participation in the mistreatment of [REDACTED].⁵⁸ Thus, contrary to SHALA's submission, the Proposed Evidence is not relevant to assessing his 'participation in alleged crimes at the KMF,'⁵⁹ and it is not capable of changing the relevant findings in the Judgment. Finally, none of the findings on SHALA's *mens rea*⁶⁰ are based on, or linked to, W04264's interrogation of W04733, and are thus incapable of being affected by the Proposed Evidence.

20. Thus, even taking the Proposed Evidence at its highest, and applying the least stringent standard to admissibility on appeal, SHALA does not show that it could have impacted the verdict. SHALA's failure to argue that any finding about W04264 played a decisive role in the conviction reflects the fact that any doubt about the presence of W04264 would be, if entertained, incapable of undermining the extensive analysis of W04733's credibility reflected in the Judgment,⁶¹ and the Panel's ultimate determinations on SHALA's responsibility for the crimes he committed at the KMF.

⁵⁴ Judgment, KSC-BC-2020-04/F00847, para.1028.

⁵⁵ Judgment, KSC-BC-2020-04/F00847, para.1025.

⁵⁶ Judgment, KSC-BC-2020-04/F00847, para.843.

⁵⁷ Judgment, KSC-BC-2020-04/F00847, para.783. SHALA's presence at the KMF in the days immediately preceding the murder is also proved by the evidence of Asllan ELEZAJ, *see* Judgment, KSC-BC-2020-04/F00847, paras 848-851, 873.

⁵⁸ Judgment, KSC-BC-2020-04/F00847, para.862.

⁵⁹ *Contra* Motion, KSC-CA-2024-03/F00033, para.17.

⁶⁰ For SHALA's *mens rea* for arbitrary detention, *see* Judgment, KSC-BC-2020-04/F00847, paras 951-956, 1029; for torture, *see* paras 978-984, 1029; for murder, *see* paras 1031-1036.

⁶¹ Judgment, KSC-BC-2020-04/F00847, paras 176-188.

D. THE PROPOSED EVIDENCE WAS AVAILABLE AT TRIAL

21. SHALA ignores his burden as the applicant on appeal. He is obliged to show that the evidence was not available to him during the trial and could not have been discovered by the exercise of due diligence.⁶² SHALA's failure to provide any information showing that he made efforts to secure the substance of the Proposed Evidence during the trial, combined with his myriad, contradictory submissions on the purported relevance of this material, reveal that his claims to have been unable to present this evidence at trial are false. His submissions fail to persuade, even at a superficial level, that he has met his burden, or made any attempt at all to do so.

22. First, if SHALA believed that any potential witness had evidence showing the existence of a functioning system to review the lawfulness of detention demonstrating respect for the procedural rights of detained persons at the KMF,⁶³ SHALA would certainly have selected the materials available to him from the Rule 102(3) list which were described as concerning 'the legal system' and the 'KLA structure (Legal Department)'.⁶⁴ This includes W04264's SPO Interview, listed in every Rule 102(3) filing since the very first filing on 3 September 2021,⁶⁵ which specified in the description that it contained evidence about the 'Legal Department' or 'legal system' of the KLA.⁶⁶ Having failed to request these items, which were available to him on the

⁶² Rule 181.

⁶³ During trial, SHALA argued that in the prevailing circumstances, no better conditions or procedures were available to even KLA members at the KMF, thereby suggesting that it was not possible to provide any better treatment to detained persons. *See e.g.* Judgment, KSC-BC-2020-04/F00847, paras 611-613, 620, 631, 636.

⁶⁴ *Contra* Motion, KSC-CA-2024-03/F00033, para.18.

⁶⁵ ANNEX 1 to Prosecution Rule 102(3) notice, KSC-BC-2020-04/F00069/A01, 3 September 2021, Confidential, items 141-142. Although the description of the items referred to W04264 by his code, rather than by name, they also specifically referenced the 'Legal Department' or 'legal system' of the KLA.

⁶⁶ All nine parts (in both English and Albanian) of the SPO Interview were contained on every Rule 102(3) filing provided to the Defence. W04264's items bore varying descriptions, however, in every Rule

Rule 102(3) list, SHALA cannot now claim that they were not available to him at the time of trial.⁶⁷

23. Second, the requirement of due diligence means that to succeed in showing that the evidence was unavailable at trial, the applicant must show that he made efforts to obtain the information. Simple assertions that the evidence was not disclosed or that the applicant was unaware of its existence are insufficient to discharge this duty.⁶⁸ Contrary to the requirements of Rule 181, SHALA does not explain any efforts he made to obtain the evidence of or contact W04264, suggesting he made no such efforts. SHALA describes W04733 as a 'core Prosecution witness', yet does not explain why during the trial he did not try to obtain the evidence of W04264, who is named in W04733's statements,⁶⁹ which have been available to SHALA since 2021.⁷⁰

24. In these statements, W04733 described W04264 by full name and position, describing him as an 'investigative judge'⁷¹ or 'so-called Prosecutor'⁷² who he met on multiple occasions, who used an office at the KMF.⁷³ W04733 provided general information about W04264's background and how he knew who W04264 was at the

102(3) filing, his SPO Interview was described as such, with the date, and labelled, across multiple parts with language such as 'specifying KLA structure (Legal Department)', 'testimony on the legal system and his role in the KLA'.

⁶⁷ Four other prior statements of W04264 (054664-054703 RED / 054664-054703-AT RED; 054704-054734 RED / 054704-054734-AT RED; SITF00010487-SITF00010508 RED; SPOE00067205-SPOE00067208-ET RED / SPOE00067205-00067208 RED) were not on the Rule 102(3) list. However, none of them contain any information on the legal department or legal system beyond what is found in the SPO Interview.

⁶⁸ ICTR, *Setako v. Prosecutor*, ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend his Notice of Appeal and Motion to Admit Evidence, 23 March 2011, para.46; *Popović* May 2014 Decision, para.25.

⁶⁹ See 082892-TR-AT-ET Part 5 RED2, p.34; 082892-TR-AT-ET Part 6; 082892-TR-AT-ET Part 7, pp.2, 6, 8; 082892-TR-AT-ET Part 8 RED, p.16; SPOE00013793-SPOE00013847 RED2, pp.SPOE00013823-SPOE00013828.

⁷⁰ SPOE00013793-00013847 RED was first disclosed on 31 July 2021 (Disclosure Package 11). 082892-TR-AT-ET / 082892-TR-AT Parts 1-10 were first disclosed on 20 September 2021 (Disclosure Package 14).

⁷¹ 082892-TR-AT-ET Part 6, p.2.

⁷² SPOE00013793-SPOE00013847 RED2, p. SPOE00013823.

⁷³ SPOE00013793-00013900 RED, p.SPOE00013828; 082892-TR-AT-ET Part 6, p.7.

time he was held at the KMF.⁷⁴ These details, plus having the full name of W04264, provided SHALA with ample information to make efforts to locate W04264. To date, W04264 is a public person in Kosovo, who regularly makes court appearances as he continues to practice law and handle trials.⁷⁵ There is no reason why SHALA would have been unable to use his resources, or those of the SPO, to locate him.⁷⁶

25. SHALA asked no questions about W04264 during the trial, despite knowing that [REDACTED] and [REDACTED] mentioning his name during testimony.⁷⁷ W04264 [REDACTED] testified [REDACTED] in the case of Sabit GECI, a member of the JCE at the KMF.⁷⁸ [REDACTED].⁷⁹ SHALA was in receipt of this evidence and tendered pages from the same record of the hearing.⁸⁰ Alleged significance was placed on [REDACTED].⁸¹ Nonetheless, SHALA did not attempt to secure W04264's evidence on this or any other matter.

26. SHALA's failure to question [REDACTED] on W04264's presence at the KMF, and his failure to carefully review the materials provided to him from the GECI trial and Xhemshit KRASNIQI trial,⁸² as well as from Rule 102(3) filings,⁸³ show a lack of

⁷⁴ 082892-TR-AT-ET Part 6, pp.2-4.

⁷⁵ See Annex 1, p.23699.

⁷⁶ The SPO has regularly received requests from the Defence for contact details of persons who were at the KMF during the Indictment period. The SPO has facilitated Defence requests, after obtaining the consent of the individual or their counsel. No request for assistance in contacting W04264 was received during the trial. SHALA was granted multiple extensions of time for the preparation of his defence. See e.g. Decision on the Defence Request for an extension of time for the submission of its lists of witnesses and exhibits (F00583), KSC-BC-2020-04-F00591, 14 July 2023, Public; Judgment, KSC-BC-2020-04/F00847, para.57.

⁷⁷ [REDACTED].

⁷⁸ SITF00015437-00015510 RED2.

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ [REDACTED].

⁸² [REDACTED].

⁸³ The identification of potentially material information by the SPO and its listing pursuant to Rule 102(3) is part of the 'Disclosure by the Specialist Prosecutor' framework specified by the Rules and

diligence. SHALA has chosen not to follow up on a person named by W04733 in his SPO Interview, who was also named by [REDACTED] during testimony, and to not seek further information following disclosure of W04733's and W04264's statements in the two related cases. SHALA cannot now claim that he was unable to obtain information on W04264 during the trial for the purposes of Rule 181.

E. THE REMAINING ITEMS DO NOT UNDERMINE THE VERDICT

27. The remaining prior statements comprising the Proposed Evidence⁸⁴ have no bearing on the responsibility of SHALA, or even on the events at the KMF. SHALA makes no submissions suggesting otherwise and fails to detail the relevance of the associated exhibits to these proceedings.⁸⁵ The materials fail to meet the admissibility criteria of Rule 138, as well as Rule 181.

F. W04264'S TESTIMONY IS UNNECESSARY

28. SHALA has made no showing that W04264's evidence is necessary to avoid a miscarriage of justice. Its exclusion at this stage of the proceedings is appropriate as it fails to meet the requirements of Rules 138 and 181. As no aspect of W04264's evidence would or could have impacted the verdict, there is no reason to seek to call him as a witness.⁸⁶

constitutes a clear means of the SPO providing notice to the Defence of particular pieces of evidence and making them available to the Defence.

⁸⁴ 054664-054793 RED; SITF00010487-SITF00010508 RED; SITF00010509-SITF00010563.

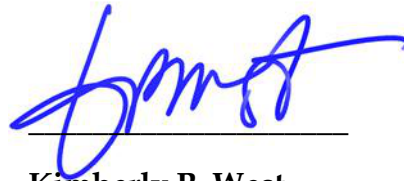
⁸⁵ SITF00010509-SITF00010563 are the associated exhibits to W04264's record of witness hearing (SITF00010487-SITF00010508RED) showing photo lineups of various persons, including persons he saw at Kleckë, a hand-drawn sketch of a house used as a prison at Kleckë, and instructions regarding the Kleckë prison (054664-054703RED, p.9).

⁸⁶ Notwithstanding this, the SPO has provided the contact details of the counsel of W04264 to the Defence following confirmation from W04264's counsel that he was willing to speak to the SHALA Defence, in line with the practice adopted on an *inter partes* basis, throughout the trial. As noted above in paragraph 2, W04264's evidence was admitted pursuant to Rule 155(1) in KSC-BC-06-2020 on the basis that the witness had difficulty remembering certain matters.

IV. CONCLUSION

29. SHALA's motion to introduce additional evidence and call W04264 as a witness should be dismissed as SHALA fails to meet the requirements of Rules 138 and 181.

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Specialist Prosecutor

Thursday, 6 February 2025

At The Hague, the Netherlands.