

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: 14 March 2025

Filing Party: Specialist Counsel for Pjetër Shala

Original language: English

Classification: Public

**Public Redacted Version of Corrected Version of Defence Appeal Brief against
the Reparation Order**

with public Annex 1

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Table of Contents

I. INTRODUCTION.....	2
II. GROUND 1: THE TRIAL PANEL ERRED IN DEFINING AND APPLYING THE LAW OF CAUSATION	3
III. GROUND 2: THE PANEL ERRED IN LAW BY PRESUMING SPECIFIC HARM AND MAKING ARBITRARY AWARDS	6
IV. GROUND 3: THE TRIAL PANEL ERRED IN ORDERING COMPENSATION IN RESPECT OF UNDEMONSTRATED LOSSES.....	10
V. GROUND 4: THE TRIAL PANEL ERRED BY IMPOSING AN AWARD WHICH IS DISPROPORTIONATE TO ITS FINDINGS AS TO MR SHALA’S ROLE	16
VI. GROUND 5: BREACH OF DUE PROCESS BY DECIDING CIVIL LIABILITY ON THE BASIS OF NON-DEFINITIVE FINDINGS.....	19
VII. RELIEF SOUGHT	21

I. INTRODUCTION

1. Pursuant to the Decision by the Panel of the Court of Appeals Chamber (“Appeals Panel”) dated 12 February 2025, Article 44 of the of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”), Rule 179 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), and Article 48 of the Practice Direction on Files and Filings before the Kosovo Specialist Chambers (“Practice Direction”), the Defence for Mr Pjetër Shala (“Defence”) hereby submits its Appeal Brief against the Reparations Order against Pjetër Shala issued by Trial Panel I on 29 November 2024 (“Impugned Decision”).¹
2. On 16 July 2024, the Trial Panel issued the Trial Judgment, convicting Mr Shala of the war crimes of arbitrary detention, torture, and murder. The Trial Panel sentenced Mr Shala to 18 years of imprisonment.²
3. On 29 November 2024, the Trial Panel issued the Reparation Order in which it found Mr Shala liable for a monetary award of €208,000 in total for the eight victims participating in the proceedings against him.³
4. On 28 January 2025, the Defence filed its Notice of Appeal against the Reparation Order.⁴
5. With the present appeal, the Defence requests the Appeals Panel to annul the reparation award issued by the Trial Panel and remit the assessment of Mr Shala’s potential civil liability to a different Panel to issue a fair and

¹ KSC-CA-2024-03, F00046, Decision on Defence Request for Extension of Time to File its Appeal Brief Against the Reparation Order, 12 February 2025; KSC-BC-2020-04, F00866, Reparation Order against Pjetër Shala, 29 November 2024 (confidential)(“Impugned Decision”).

² KSC-BC-2020-04, F00847, Trial Judgment and Sentence, 16 July 2024 (confidential)(“Trial Judgment”), paras. 1121-1125.

³ Impugned Decision.

⁴ KSC-CA-2024-03, F00042, Defence Notice of Appeal of the Reparation Order, 28 January 2025.

proportionate award, if such an award is required following the judgment on the merits of Mr Shala's appeal against conviction. The Defence presents the following five grounds of appeal.

II. GROUND 1: THE TRIAL PANEL ERRED IN DEFINING AND APPLYING THE LAW OF CAUSATION

6. The Trial Panel erred by holding Mr Shala liable to repair harm which was not caused by his acts or omissions.⁵ At paragraphs 60, 62 and 99 of the Reparation Order, the Trial Panel noted its position that Mr Shala is deemed liable for the harm caused to victims *by the crimes* in respect of which Mr Shala was convicted. In its analysis of the requisite causation, the Trial Panel acknowledged the need for applying a test of causation but erroneously identifies the required causal link, or the "but/for relationship" as it puts it, between the crime and the harm, as opposed to Mr Shala's culpable conduct and the harm caused to the individual victims participating in the proceedings against him.⁶ Contrary to the Trial Panel's analysis, the typical application of the *condition sine qua non* test would require assessing whether the damage would have occurred if the tortfeasor had not acted in the way he did.⁷
7. In doing so, the Trial Panel erred in law by considering that the requisite link should be between the specific harm and the crime. In its analysis of the applicable law the Trial Panel endorsed, albeit with a significant qualification,⁸ the Pre-Trial Judge's analysis as to when the harm suffered by a victim can be considered to have been caused by a crime, namely "where, [...] the acts or omissions of the perpetrator(s) would *most likely* bring about that harm, as

⁵ Impugned Decision, paras. 203-206.

⁶ Impugned Decision, para. 62.

⁷ See for instance Cees van Dam, *European Tort Law* (2nd ed.) (Oxford 2013), p. 310.

⁸ Impugned Decision, fn 95 ("The Panel does not subscribe to the Pre-Trial Judge's conclusion that the crime must have significantly contributed to the harm").

viewed by an objective observer” (emphasis added).⁹ The general reference to “perpetrator(s)” may or may not specifically include the convicted person depending on the form of liability engaged; complex forms of liability are not limited to physical perpetration. As can be seen by the manner in which the test was applied, the link or foreseeability assessment, did not consider specifically the culpable conduct of Mr Shala or the extent to which such culpable conduct may have contributed to any harm suffered by the victims. The Trial Panel made the additional error of specifying that, in its view, the “crime’s” contribution “to the harm” need not even be significant for causation to be considered established.¹⁰ The Trial Panel failed entirely to identify the basis in law of its test of causation although it conceded that the applicable legal framework does not contain specific directions in this respect.¹¹ In any event, for the purposes of attribution of civil liability not every factor contributing to the realization of a crime can be considered as the crime’s “cause”.

8. The Trial Panel’s analysis fails to require a specific causal link between the culpable conduct of the convicted person (as opposed to other perpetrators) and the specific harm caused. It employs such a wide definition of “cause” that results in imposing civil liability for factors that are too remote to Mr Shala’s conduct.
9. It is recalled that Mr Shala was convicted through the mode of liability of a joint criminal enterprise, therefore he stands convicted due to the acts and omissions - the conduct- of others who were considered by the Trial Panel as members of the alleged joint criminal enterprise.¹² The Defence has challenged the use of joint criminal enterprise liability at trial and on appeal. For the purposes of

⁹ KSC-BC-2020-04, F00064, Framework Decision on Victims’ Applications, 1 September 2021, para. 45.

¹⁰ Impugned Decision, fn 93 (“The Panel does not subscribe to the Pre-Trial Judge’s conclusion that the crime must have significantly contributed to the harm”).

¹¹ Impugned Decision, paras. 60-65.

¹² Trial Judgment, paras. 1037-1039.

attribution of civil liability, the Trial Panel ought to connect through a sequence of events (and, therefore, factual findings) the injury suffered by the injured party and, specifically, Mr Shala's acts or omissions as well as the degree to which they may be considered to have caused any specific harm. The precise extent of his specific contribution to any harm caused should have been analysed. As Lord Atkin noted it is "impossible to divorce any theory of contributory negligence from the concept of causation".¹³ This assessment is absent from the Reparation award and the Trial Panel's failure to establish a link with Mr Shala's conduct for each perceived harm requiring in its view reparation constitutes an error of law that merits appellate intervention.¹⁴

10. The Trial Panel notes in this respect that, in its view, "it does not matter whether [Mr Shala] personally carried out individual acts resulting in [the] said harm, nor is it necessary, or for that matter possible, to link each specific harm suffered to each specific instance of mistreatment."¹⁵ However, this is indeed what is required in law before civil liability can be attributed and to the extent that this is not possible no civil liability should have been imposed. The Trial Panel erred by considering generally that it suffices "that there is sufficient proof that the harm suffered by the Victims in this case arises from the crimes of which Mr Shala has been convicted."¹⁶
11. The Trial Panel's failure to acknowledge the importance of a link between specifically the acts and omissions of the convicted and the harm suffered by the victims constitutes an error of law.
12. Specifically for murder, and the Defence strongly contests the view that Mr Shala can be considered criminally liable for the death of the "Murder Victim",

¹³ *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, 165.

¹⁴ Impugned Decision, paras. 100-144.

¹⁵ Impugned Decision, para. 99.

¹⁶ Impugned Decision, para. 99.

the Trial Panel entirely failed to consider the effect of the *novus actus interveniens* brought about by the refusal to allow the Murder Victim's transfer to hospital to receive necessary medical treatment, an act that was entirely unforeseeable for Mr Shala, particularly given how extraordinary the circumstances leading to the death of the Murder Victim had been.¹⁷

13. The Trial Panel erred in its interpretation of the law on the attribution of civil liability and its errors have led it to draw causal notions that give absurd, arbitrary and unjust results that merit appellate intervention.
14. The Defence, therefore, requests the Appeals Panel to annul the reparation award issued by the Trial Panel and remit the assessment of Mr Shala's potential civil liability to a different Panel to issue an appropriate, fair and proportionate award in the event that such an award is required following the judgment on appeal against conviction.

III. GROUND 2: THE PANEL ERRED IN LAW BY PRESUMING SPECIFIC HARM AND MAKING ARBITRARY AWARDS

15. The Trial Panel erred by basing its awards on presumptions of harm it considered that the victims had suffered, without moreover assessing whether such presumed harm could reasonably be imputed to Mr Shala.¹⁸
16. The ICC Appeals Chamber in *Katanga* emphasised that "the reasonableness of a factual presumption drawn by a trial chamber in reparation proceedings will

¹⁷ [REDACTED].

¹⁸ Impugned Decision, paras. 54, 58-59, 65, 67, 70, ("certain harms may be presumed, once a victim has demonstrated [...] to be a victim"), 90 ("[t]he Panel will also, where it sees fit, proceed on presumptions"), 113, 118-119, 139, 140-141, 143, 200-201.

depend upon the circumstances of the case”.¹⁹ The Trial Panel’s presumptions however were presumptions that no reasonable trier of fact would have made.

17. The Trial Panel erred in presuming with regard to both V01/04 and W04733 that, had they not been detained at the KMF, they “would have more likely than not been able to pursue ‘an average career path’ and gain employment with regular income”.²⁰ The Trial Panel also erred by failing to consider and link such perceived harm to any culpable conduct by Mr Shala.²¹
18. The Trial Panel erred in adopting the presumption that “had the arbitrary detention and torture of V01/04 [REDACTED] (with the associated stigma of being labelled as a ‘traitor’, ‘spy’, or ‘Serb collaborator’) [REDACTED], not occurred, and considering V01/04’s age at the time of the relevant events, V01/04 would have more likely than not being able to pursue ‘an average career path’ and gain employment with regular income”.²² Similarly, the Trial Panel erred by presuming that “had the arbitrary detention and torture not occurred with the associated stigma of being labelled as a ‘traitor’, ‘spy’, or ‘Serb collaborator’, and considering his age at the time of events ([REDACTED]), W04733 would have more likely than not been able to pursue ‘an average career path’ and continue to gain employment with regular income”.²³ Relying on these presumptions, the Trial Panel found that, on the balance of probabilities, the crimes of which Mr Shala was convicted had caused V01/04 and W04733’s

¹⁹ ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07 A3 A4 A5, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute”, 8 March 2018, para. 76.

²⁰ Impugned Decision, paras. 118-119, 140-141.

²¹ See above GROUND 1. See also KSC-BC-2020-04, F00819, Defence Response to Victims’ Counsel’s Request for Reparations to Address the Physical, Mental, and Material Harm Suffered by Victims Participating in the Proceedings, 25 March 2024 (confidential), para. 43.

²² Impugned Decision, para. 119.

²³ Impugned Decision, para. 141.

loss of opportunities and earnings as well as inability to regain their financial independence and provide for their family.²⁴

19. The Trial Panel erred by considering Mr Shala liable for specific harm perceived as misfortune or loss of opportunity with regard to all victims resulting from the social stigma suffered because the primary victims (V01/04 and W04733) were considered by the KLA as traitors; for instance, because of collaboration with enemy forces.²⁵ The Trial Panel made no finding as to whether there were sufficient grounds to believe that the primary victims were in fact enemy collaborators, and the Trial Panel also failed to consider (at least for the purposes of its reparation order given the importance of this element for its reasoning) whether the specific victims could reasonably be considered as collaborators (at least by assessing the evidence on record suggesting that it is more likely than not that the particular detainees were in fact collaborators).²⁶ The Trial Panel proceeded in this respect on a presumption that the accusations or suspicions of collaboration were ill-founded which was an error of fact and/or an arbitrary exercise of discretion.
20. While it is not doubted that being accused or considered a collaborator can create social stigma, as the ECtHR considered in the case of *Sidabras and Džiautas v. Lithuania* one cannot “complain of a loss of reputation which is the foreseeable consequence of one’s own actions”.²⁷ In the face of well-founded suspicions and/or accusations that the victims had indeed collaborated with enemy forces, they cannot in law complain of the impact of their actions on

²⁴ Impugned Decision, paras. 119, 141, fn. 328.

²⁵ Impugned Decision, paras. 139, 143.

²⁶ V01/04: SITF00015437-00015510 RED2, p. 19 ([REDACTED]); 104837-104855-TR Revised RED2, p. 1 ([REDACTED]); 5007244-5007250 RED, p. 1; W04733: 082892-TR-AT-ET Part 1 RED3, pp. 19-22, ([REDACTED]); SITF00390625-00390626, p. 1. ([REDACTED]).

²⁷ ECtHR, *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, Judgment, 27 July 2004, para. 49. See also ECtHR, *Axel Springer AG v. Germany*, Grand Chamber, no. 39954/08, 7 February 2012, para. 83; ECtHR, *Gillberg v. Sweden*, Grand Chamber, no. 41723/06, 3 April 2012, para. 67; ECtHR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, [GC] no. 17224/11, 27 June 2017, para. 76.

their reputation and manner in which they are perceived or received in Kosovan society in the aftermath of the war and, subsequently, in the Kosovan society *en route* to recovery. Measures to protect democratic institutions in democracies recovering from totalitarian regimes or other historical calamities, like World War II, can be found throughout Council of Europe member states; they reflect the social repercussions of “enemy collaboration”. While they need to remain proportionate, a consideration which is reflected in the relevant Strasbourg jurisprudence, the relevant question for our purposes, namely the need to assess the fairness of the reparation award issued against Mr Shala, is not whether the measures by third parties, individuals, public or private entities against direct or indirect victims were proportionate but rather whether he, Mr Shala, can be deemed personally liable for measures or acts targeting or affecting the participating victims *by others*. For instance, the award made to repair harm allegedly suffered by W04733’s children resulting from decisions, real and (mostly) hypothetical, of potential employers and the finding that Mr Shala bears personal liability for such hypothetical harm is arbitrary as it is not grounded on any causal link between the harm (which remains alleged in the absence of concrete substantiation) and Mr Shala’s conduct.²⁸ Appellate intervention is required.

21. The Trial Panel’s conclusion to consider Mr Shala liable for any perceived (and undemonstrated) consequence of such social stigma generally, or general loss of opportunity because for instance, the victims’ personal decisions to interrupt formal education was entirely unreasonable.²⁹
22. For the following reasons the Defence, requests the Appeals Panel to annul the award issued by the Trial Panel and remit the assessment of Mr Shala’s

²⁸ Impugned Decision, para. 143.

²⁹ Impugned Decision, paras. 139, 143, 200, 201.

potential civil liability to a different Panel to consider and correctly apply the law following the judgment on appeal against his conviction.

IV. GROUND 3: THE TRIAL PANEL ERRED IN ORDERING COMPENSATION IN RESPECT OF UNDEMONSTRATED LOSSES

23. The Trial Panel erred in law and fact by issuing compensation awards without requiring demonstration of actual damage suffered.³⁰ The Trial Panel erred in fact by entering findings as to material harm resulting from: (i) “loss of earnings and a damage to his life plan” in relation to V01/04;³¹ (ii) W04733’s “loss of opportunities”,³² as well as “costs with regard to the medical care provided to W04733 to address the physical injuries he suffered at the KMF, as well as his declining health over the years”;³³ and (iii) “damage to their life plan” in relation to V02/04, V03/04, V04/04, V05/04, V06/04, V07/04, and V08/04, in respect of which no sufficient evidence was adduced by the victims.³⁴
24. It is striking that the above awards were made in the absence of any substantiation.
25. The Trial Panel erred in awarding the amount of 60,000 euros in favour of V01/04.³⁵ There was no concrete claim demonstrating specific loss of earnings or damage to V01/04’s life plan. In addition, given V01/04’s long criminal

³⁰ Impugned Decision, paras. 67-68, 89, 90, 119-122, 141-144, 179, 195, 196, 197, 200-201, 203, 239(f) (to V01/04: €10,000 for physical harm; €30,000 for mental harm, and €60,000 for material harm; to V03/04: €10,000 for mental harm; to V02-04, V04/04, V05/04, V06/04, V07/04, V08/04: €8,000 for mental harm each; to V02/04-V08/04 collectively: €50,000 for material harm). *See also* KSC-BC-2020-04, F00716/A01, Defence Submission of an Expert Report for the Purposes of the Reparations Proceedings, 13 November 2023, (confidential), pp. DPS01631, DPS01637, DPS01640, DPS01643; KSC-BC-2020-04, F00736/A01, Defence Submission of Expert’s Answers to Written Questions from Victims’ Counsel, 6 December 2023 (confidential), pp. 2, 6-7.

³¹ Impugned Decision, para. 120.

³² Impugned Decision, para. 141.

³³ Impugned Decision, para. 142.

³⁴ Impugned Decision, para. 143.

³⁵ Impugned Decision, paras. 197, 203, 239(f).

record,³⁶ the Trial Panel erred to assume as it did that it would have been likely that V01/04 would have been able to pursue “an average career path”.³⁷ The Trial Panel failed altogether to factor in its assessment other circumstances affecting V01/04’s inability to secure regular income. For instance, his lack of formal education and the economic crisis in Kosovo after the war as well as the effects of the COVID-19 pandemic.³⁸ It is moreover entirely unclear what the Trial Panel had in mind by referring to “an average career path” in general or what was expected or projected with regard to V01/04’s specific and realistic possibilities. The Trial Panel erred by failing to draw the required causal link between Mr Shala’s conduct and the material harm suffered by V01/04 in terms of loss of earnings following his release from the KMF.³⁹

26. In reaching its findings on material harm suffered by V02/04, V03/04, V04/04, V05/04, V06/04, V07/04, and V08/04, the Trial Panel erred by proceeding on the presumption that W04733, viewed as the “main breadwinner” of the family, “would have more likely than not been able to pursue ‘an average career path’ and continue to gain employment with regular income.”⁴⁰ This finding was made without any evidence presented in support as to any concrete loss of opportunity or earnings. In fact, the Trial Panel failed altogether to take into consideration that W04733 was already retired from his work as a police officer by [REDACTED], prior therefore to his detention at the KMF, and would have

³⁶ KSC-BC-2020-04, F00821, Defence Final Trial Brief, 25 March 2024 (confidential), para. 191 and references therein.

³⁷ Impugned Decision, para. 119.

³⁸ KSC-BC-2020-04, F00716/A01, Annex 1 to Defence Submission of an Expert Report for the Purposes of the Reparations Proceedings, 13 November 2023, (confidential), pp. DPS01624, DPS01626.

³⁹ KSC-BC-2020-04, F00716/A01, Annex 1 to Defence Submission of an Expert Report for the Purposes of the Reparations Proceedings, 13 November 2023, (confidential), pp. DPS01631, DPS01637, DPS01640, DPS01643; KSC-BC-2020-04, F00736/A01, Annex 1 to Defence Submission of Expert’s Answers to Written Questions from Victims’ Counsel, 6 December 2023 (confidential), pp. 2, 6-7.

⁴⁰ Impugned Decision, para. 141.

been [REDACTED] old at the time of his detention at the KMF.⁴¹ The Trial Panel was convinced that “the crimes of which Mr Shala was convicted contributed to W04733’s loss of opportunities and inability to regain his financial independence and provide for his family” without considering or providing adequate reasoning as to how any specific culpable acts by Mr Shala affected W04733’s loss of opportunities.⁴² In addition, the Trial Panel failed altogether to consider W04733’s advanced age at the relevant time.

27. The Trial Panel erred in the manner it effectively assumed “the costs of medical treatments or other harm of financial or patrimonial nature”, the latter being entirely unclear as to what it refers to, and considered that there was no “requirement to furnish data” to demonstrate such harm.⁴³ The Trial Panel’s approach contradicts clear case law under Article 41 of the ECHR that requires injury to be specifically demonstrated and substantiated to be recovered as just satisfaction. The Trial Panel erred by holding that the ECHR “jurisprudence and practice” on reparation awards “remains of limited relevance”.⁴⁴ The Trial Panel considered *inter alia* the fact that [REDACTED] and W04733 refrained from seeking medical treatment for [REDACTED] physical injuries, primarily out of fear or due to stigma; and the fact that at least one victim ([REDACTED]) suffered mental harm which has reportedly remained untreated until today, as factors justifying the absence of a requirement to furnish data for harm suffered.⁴⁵ However, the Trial Panel’s purported justification for its lax evidential requirements⁴⁶ suggests that W04733 had in fact refrained from seeking treatment for his physical injuries.⁴⁷ In any event, the Trial Panel erred

⁴¹ 082892-TR-AT-ET Part 1 RED3, pp. 7, 17, 21, 32.

⁴² Impugned Decision, para. 141.

⁴³ Impugned Decision, para. 179.

⁴⁴ Impugned Decision, para. 183.

⁴⁵ Impugned Decision, para. 179.

⁴⁶ Impugned Decision, para 179.

⁴⁷ Impugned Decision, paras. 142, 179.

by failing to require proof as to any amount due for medical costs and nonetheless proceeded to “assume” such costs and finding “a figure of €30,000 for medical costs [a]s adequate and reasonable.”⁴⁸ The Trial Panel did not even take into consideration any figures showing the average costs for the provision of relevant medical services at the time in Kosovo generally or in W04733’s area in particular. It also erred by failing to specify to what extent any ill-treatment suffered could have affected any medical conditions suffered either prior to or after detention. For instance, with regard to the alleged costs for surgery related to W04733’s poor eyesight the Panel failed to consider the fact that W04733 was suffering from [REDACTED] prior to his detention at the KMF, and that his [REDACTED] requiring medical intervention may have been have been the result of the underlying [REDACTED].⁴⁹

28. Regarding medical costs borne by the family, the Trial Panel noted that W04733’s family “incurred certain costs with regard to the medical care provided to W04733 to address the physical injuries he suffered at the KMF, as well as his declining health over the years”.⁵⁰ However, it acknowledged that “not all aspects of W04733’s declining health over the years are a direct result of the crimes committed against him at the KMF” but that “can only have had an exacerbating effect on his overall health, [REDACTED]”.⁵¹ The Trial Panel did not specify which injuries were deemed to have been caused by incidents that occurred at the KMF or how the injuries impacted W04733’s ability to work.
29. The Trial Panel reached its conclusion that “a figure of €30,000 for medical costs is adequate and reasonable” based on W04733’s statement regarding [REDACTED] and V03/04’s testimony that the overall costs for W04733’s

⁴⁸ Impugned Decision, para. 200.

⁴⁹ 082892-TR-AT-ET Part 8 RED2, p. 4.

⁵⁰ Impugned Decision, para. 142.

⁵¹ Impugned Decision, para. 200.

medical treatments were as high as €150,000.⁵² However, no medical documents or invoices were provided in support of these claims. In addition, as acknowledged by the Trial Panel, the Lerz Report estimates did not include any medical costs or expenses incurred in relation to the treatment W04733 would have received throughout the years as a result of the crimes committed against him at the Kukës Metal Factory.⁵³ There was no sufficient or credible evidence in support of the victims' claims for reparation for material harm stemming from the loss of income and the costs of medical treatment for W04733.

30. In addition, the Trial Panel erred by considering Mr Shala personally liable for "choices and decisions" W04733's family members made which "limited their future prospects."⁵⁴ The Trial Panel exceeded the permissible limits of its discretion when considering Mr Shala liable for "the discontinued education of [REDACTED] daughters of W04733 ([REDACTED]) and [REDACTED]" as well as for the decisions of [REDACTED] to "refrain" from pursuing "their chosen career paths".⁵⁵ All these decisions represent autonomous choices made by the individuals concerned and Mr Shala cannot reasonably be considered responsible for such choices. In addition, no evidence was provided in support of any concrete and specific loss of opportunity or earnings.
31. The cursory consideration regarding [REDACTED] discontinued education or [REDACTED] changing career paths without further analysis or evidence could not be reasonably considered sufficient to demonstrate the losses implied

⁵² Impugned Decision, para. 200, fn. 348.

⁵³ Impugned Decision, para. 199; KSC-BC-2020-04, F00558/A04, ANNEX four to Victims' Counsel's Submissions pursuant to the Order of 4 May 2023 setting further procedural steps for the presentation of evidence by Victims' Counsel, 30 June 2023 (confidential).

⁵⁴ Impugned Decision, para. 143.

⁵⁵ Impugned Decision, para. 143.

in the Trial Panel's awards.⁵⁶ The Trial Panel only relied on the victims' subjective claims of fear and victimisation because of the perceived social "stigma".⁵⁷ Notably, the figures included in the Lerz Report do not include any identified loss of earnings incurred by W04733's family, for example, due to the fact that W04733's daughters interrupted their education or [REDACTED].⁵⁸ In the absence of evidence demonstrating the victims' claims the Trial Panel's findings were arbitrary.

32. The Trial Panel erred by considering Mr Shala personally liable for the "stigma" caused by the fact that W04733 was considered a collaborator and his family "was seen as a family of spies".⁵⁹ Mr Shala cannot reasonably be considered responsible for the acts and omissions of third parties in that respect. The Trial Panel's error is aggravated by the lack of serious consideration as to whether the suspicions that W04733 was an enemy collaborator were well-founded. It is the Defence position that there was ample evidence on the trial record suggesting that it was not unreasonable at the time to consider W04733 as having links with enemy forces.⁶⁰
33. For these reasons, the Defence requests that the Appeals Panel reverse the Impugned Decision in respect of the Trial Panel's award of €60,000 with respect to material harm suffered by V01/04 and €50,000 with respect to material harm suffered collectively by V02/04-V08/04 and remit the matter for a fresh determination.⁶¹

⁵⁶ Impugned Decision, paras 143, 200.

⁵⁷ Impugned Decision, para. 143.

⁵⁸ Impugned Decision, para. 200; KSC-BC-2020-04, F00558/A04, ANNEX four to Victims' Counsel's Submissions pursuant to the Order of 4 May 2023 setting further procedural steps for the presentation of evidence by Victims' Counsel, 30 June 2023 (confidential).

⁵⁹ Impugned Decision, para. 143.

⁶⁰ 082892-TR-AT-ET Part 1 RED3, pp. 19-22, ([REDACTED]); SITF00390625-00390626, p. 1. ([REDACTED]).

⁶¹ Impugned Decision, paras 204, 239(f).

V. GROUND 4: THE TRIAL PANEL ERRED BY IMPOSING AN AWARD WHICH IS DISPROPORTIONATE TO ITS FINDINGS AS TO MR SHALA'S ROLE

34. The Trial Panel erred in fact and in law in awarding the amount of €208,000 against Mr Shala which is disproportionate to, and does not fairly reflect, the Trial Panel's findings as to his role in the crimes.⁶²

35. A convicted person's liability for reparations should reflect the mode of individual criminal liability employed to convict him and his causal contribution to the crime.⁶³ The Trial Panel erred in law by failing to consider in its assessment how each and specific actual harm is linked to any culpable action of Mr Shala. The Trial Panel in fact considered "that it does not matter whether [Mr Shala] personally carried out individual acts resulting in [the] said harm, nor is it necessary, or for that matter possible, to link each specific harm suffered to each specific instance of mistreatment."⁶⁴

36. The Trial Panel found that Mr Shala was a "simple soldier" who "did not have an official position or particular rank in the KLA."⁶⁵ He did not order anyone's apprehension or detention or ill-treatment, he had no control over or responsibility regarding the poor detention conditions at the KLA. The Trial

⁶² Impugned Decision, paras. 205, 212, 239(e).

⁶³ See, e.g., ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, para. 118. See also ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 8 March 2018, para. 175; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, para. 302.

⁶⁴ Impugned Decision, para. 99. See also Impugned Decision, para. 176 ("Mr Shala is liable to repair the harm caused to all direct and indirect victims of the crimes of which he was convicted, regardless of whether others may have also contributed to the harm.")

⁶⁵ Trial Judgment, paras. 898-900.

Panel conceded that others had a superior position in the overall hierarchy that committed the alleged crimes at the Kukës Metal Factory.⁶⁶ The perceived liability reflected in the Trial Panel’s award does not reflect the role, responsibility and alleged participation of Mr Shala in the perpetration of the crimes. The Trial Panel erred by failing to sufficiently take into consideration the reduced role Mr Shala played in the commission of the alleged crimes.

37. The ICC Appeals Chamber has held that “[t]he convicted person’s liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.”⁶⁷
38. In relation to the physical harm suffered by V01/04, the Trial Panel found that “[REDACTED]” and “[o]n another occasion, [REDACTED].”⁶⁸ Mr Shala was not present during [REDACTED],⁶⁹ [REDACTED].⁷⁰ The Trial Panel found that V04/01 suffered mental harm from “being threatened with death while in detention”; as well as from [REDACTED].⁷¹ However, according to the Trial Panel’s findings [REDACTED].⁷² Mr Shala was not involved in any of the above

⁶⁶ Trial Judgment, paras. 342, 345-346, 349.

⁶⁷ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Annex A to Judgment on the appeals against the “Decision establishing the principles and procedure to be applied to reparations” of 7 August 2012 order for reparations (amended), 3 March 2015, para. 21. See also KSC-BC-2020-04, F00819, Defence Response to Victims’ Counsel’s Request for Reparations to Address the Physical, Mental, and Material Harm Suffered by Victims Participating in the Proceedings, 25 March 2024 (confidential), para. 16.

⁶⁸ Impugned Decision, para. 103.

⁶⁹ KSC-BC-2020-04, F00819, Defence Response to Victims’ Counsel’s Request for Reparations to Address the Physical, Mental, and Material Harm Suffered by Victims Participating in the Proceedings, 25 March 2024 (confidential), para. 22. See also Trial Judgment, para. 668.

⁷⁰ KSC-BC-2020-04, F00819, Defence Response to Victims’ Counsel’s Request for Reparations to Address the Physical, Mental, and Material Harm Suffered by Victims Participating in the Proceedings, 25 March 2024 (confidential), para. 22. See also Trial Judgment, para. 675.

⁷¹ Impugned Decision, paras 108-110, 114.

⁷² KSC-BC-2020-04, F00819, Defence Response to Victims’ Counsel’s Request for Reparations to Address the Physical, Mental, and Material Harm Suffered by Victims Participating in the Proceedings, 25 March 2024 (confidential), paras 32, 35. See also Trial Judgment, paras 668, 1097.

acts committed against V04/01 [REDACTED], nor the further trauma suffered by V04/01 in relation [REDACTED].⁷³

39. In respect of the physical harm suffered by W04733, the Trial Panel found that W04733 was “hit in the head, causing him to bleed and resulting in his head being bandaged” and “one of the KLA members repeatedly cut the dressing off with a knife.”⁷⁴ It was not Mr Shala but Xhemshit Krasniqi who hit W04733 on the head with a gun, and [REDACTED] who used a knife to cut W04733.⁷⁵
40. The harm suffered by V04/01 and W04733 based on the acts mentioned above should have no bearing on Mr Shala’s personal liability. The Trial Panel’s findings on Mr Shala’s liability for reparation is disproportionate to his role and level of involvement. The Trial Panel ought to carefully consider the precise acts and omissions of Mr Shala and determine the level of his contribution to any harm suffered by the said victims. Its failure to do so renders its awards disproportionate.
41. The ICC Appeals Chamber in *Katanga* and *Lubanga* held that “when determining the amount a convicted person is liable to pay for reparations [...]. Criteria such as the gravity of the crimes [...] are not relevant to this question. The goal of reparations is not to punish the person”.⁷⁶ However, the Trial Panel erred in law by taking into account an irrelevant factor, the gravity of the crimes,

⁷³ KSC-BC-2020-04, F00819, Defence Response to Victims’ Counsel’s Request for Reparations to Address the Physical, Mental, and Material Harm Suffered by Victims Participating in the Proceedings, 25 March 2024 (confidential), paras 33, 39. *See also* Trial Judgment, para. 667.

⁷⁴ Impugned Decision, para. 126.

⁷⁵ KSC-BC-2020-04, F00819, Defence Response to Victims’ Counsel’s Request for Reparations to Address the Physical, Mental, and Material Harm Suffered by Victims Participating in the Proceedings, 25 March 2024 (confidential), para. 52. *See also* Trial Judgment, para. 1017.

⁷⁶ ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute”, 8 March 2018, para. 184; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, 18 July 2019, para. 314.

in assessing the amount to be awarded to W04733's family for the mental harm they suffered.⁷⁷ The Trial Panel sought to impose a further punishment on Mr Shala through its reparation award.

42. In addition, the Trial Panel erred by failing to take into consideration Mr Shala's indigence.⁷⁸ Imposing such an excessive award to an indigent defendant cannot be considered proportionate.

43. The Trial Panel's errors have resulted in issuing an unreasonably high and disproportionate reparation award against Mr Shala. Although Mr Shala is indigent, the fact remains that the excessive award issued against him will haunt him and, implicitly, his family for the rest of their lives. It will also be unfairly perceived as reflecting his culpability in the crimes committed at the Kukës Metal Factory.

44. Based on the above, the disproportionate reparation award made by the Trial Panel should be set aside and the matter should be remitted for fresh assessment following the conclusion of the appeal proceedings challenging Mr Shala's conviction.

VI. GROUND 5: BREACH OF DUE PROCESS BY DECIDING CIVIL LIABILITY ON THE BASIS OF NON-DEFINITIVE FINDINGS

45. In its Reparation Order, the Trial Panel stressed that it is "bound by the factual and legal findings made in the Trial Judgment" and that it has thus relied on "relevant findings made therein" for the purposes of its order.⁷⁹ Specifically,

⁷⁷ Impugned Decision, paras. 198 ("[...] while the requested amount in relation to V03/04 in particular slightly exceeds the amounts suggested by the Kosovo Guidelines, the gravity of the crimes committed against W04733 and the extent of harm suffered by the family justify the proposed amounts."), 204, 206, 239(f).

⁷⁸ Impugned Decision, paras. 84, 176.

⁷⁹ Impugned Decision, para. 86.

the Trial Panel noted in the Reparation Order that it relied on relevant findings pertaining to “credibility or reliability” as developed in the Trial Judgment.⁸⁰

46. The fact remains however that, should the relevant factual and other findings on which Mr Shala’s conviction are based be reversed on appeal, the entire reparation proceedings will need to be re-examined; this evidently goes against the interests of justice and judicial economy. Similarly, if any of the convictions entered in the Trial Judgment are reversed on appeal, even if they are partially reversed on appeal, the reparation order will have to follow suit; the monetary awards would have to be re-assessed and any implementation efforts would need to immediately cease.
47. As stated by the Trial Panel in the Order, the reparation proceedings should not “prejudice or be inconsistent with the rights of the accused or convicted person to fair and expeditious proceedings”.⁸¹ Appeal proceedings against a reparation order before the relevant first-instance findings become final hinders the right of the convicted person to have a proper assessment of his civil liability.
48. It is only logical that reparation proceedings follow the proceedings challenging the factual findings on which a conviction is based. A discernible trend can be identified whereby appeal proceedings against a reparation order (if any) are initiated after conviction, and thereby the findings that a reparation order are based on, become final. In most cases heard by the ICC, for instance in *Katanga*, *Al Mahdi*, and *Ongwen* the relevant reparation orders were issued after the judgments on convictions became final on appeal.⁸²

⁸⁰ Impugned Decision, para. 86.

⁸¹ Impugned Decision, para. 46.

⁸² ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017; ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-

49. The Defence maintains that any harm allegedly suffered by V01/04 and W04733 at the Kukës Metal Factory was not due to any culpable act or omission by Mr Shala.⁸³ The Reparation Award is based on factual findings concerning Mr Shala's conduct and alleged ill-treatment of both V01/04 and V04733 that are heavily contested on appeal.⁸⁴ It is only logical that whether these awards can be considered fair and reasonable can only be determined once the underlying factual findings concerning Mr Shala's conduct become definitive.
50. Any conclusion as to Mr Shala's potential civil liability in this respect needs to await until such findings become final. In this respect, the Defence position is that the Trial Panel erred in finding Mr Shala personally liable for "long-standing" physical and mental harm suffered by V01/04 and W04733.⁸⁵
51. For these reasons, the Defence requests the Appeals Panel to suspend hearing the appeal against the Reparation Order until the main appeal against Mr Shala's convictions is examined and all relevant factual findings have become final.

VII. RELIEF SOUGHT

52. In light of the above errors of law, fact, as well as the resulting prejudice to Mr Shala's fair trial rights, the Defence respectfully requests the Appeals Panel to annul the reparation award issued by the Trial Panel and remit the assessment of Mr Shala's potential civil liability to a different Panel to issue an appropriate,

01/12-01/15, Reparations Order, 17 August 2017; ICC, *The Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Reparations Order, 28 February 2024.

⁸³ Impugned Decision, paras. 197, 200; KSC-BC-2020-04, F00819, Defence Response to Victims' Counsel's Request for Reparations to Address the Physical, Mental, and Material Harm Suffered by Victims Participating in the Proceedings, 25 March 2024 (confidential), para. 43.

⁸⁴ KSC-CA-2024-03, F00029, Defence Appeal Brief, 25 November 2024 (confidential).

⁸⁵ Impugned Decision, para. 195, 196.

fair and proportionate award, if such an award is required, following the judgment on appeal against Mr Shala's conviction.

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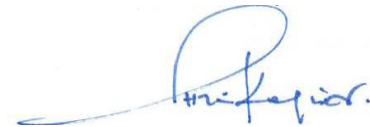
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Friday, 14 March 2025

The Hague, the Netherlands

Explanatory Note:

In footnote 10, the reference to “fn 95” has been corrected to “fn 93”.

In paragraph 23, “V04/04” has been added.

In paragraph 39, the reference to “[REDACTED]” has been replaced with “Xhemshit Krasniqi” and “[REDACTED]” has been replaced with “[REDACTED]”.

In footnote 75, “para. 22” has been corrected to “para. 52”.