



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-CA-2024-03**

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Fidelma Donlon

Date: 28 March 2025

Original language: English

Classification: **Public**

**Public Redacted Version of Decision on Defence Motion to Present Additional
Evidence on Appeal**

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 172 of the Rules of Procedure and Evidence (“Rules”), is seised of a motion filed on 6 January 2025 by Mr Pjetër Shala (respectively, “Motion” and “Shala” or “Accused” or “Defence”).² The Specialist Prosecutor’s Office (“SPO”) responded on 6 February 2025 (“Response”).³ Shala replied on 21 February 2025 (“Reply”).⁴

I. BACKGROUND

1. On 16 July 2024, the Trial Panel delivered its judgment (“Trial Judgment”), convicting the Accused of having committed, as part of a joint criminal enterprise (“JCE”), the war crimes of arbitrary detention (Count 1), torture (Count 3) and murder (Count 4) and finding him not guilty of the war crime of cruel treatment (Count 2), and sentenced him to a single sentence of 18 years of imprisonment, with credit for the time served.⁵ The Trial Panel found, *inter alia*, that Shala participated in and significantly contributed to a JCE, the purpose of which was to “arbitrarily detain, interrogate, torture and murder detainees at the KMF [Kukës Metal Factory] who were perceived to collaborate with, be associated with, or sympathize with the Serbian

¹ F00011, Decision Assigning a Court of Appeals Panel, 3 September 2024 (confidential, reclassified as public on 4 September 2024).

² F00033/RED, Public Redacted Version of Defence Motion to Present Additional Evidence Pursuant to Rule 181, 16 January 2025 (confidential version filed on 6 January 2025) (“Motion”).

³ F00044/RED, Public redacted version of ‘Prosecution Response to Defence Motion to Present Additional Evidence Pursuant to Rule 181 with Confidential Annexes 1 and 2’, 13 February 2025 (confidential version filed on 6 February 2025) (“Response”).

⁴ F00048/RED, Public Redacted Version of Defence Reply to ‘Prosecution Response to Defence Motion to Present Additional Evidence Pursuant to Rule 181’, 19 March 2025 (confidential version filed on 21 February 2025) (“Reply”).

⁵ KSC-BC-2020-04, F00847/RED, Public redacted version of Trial Judgment and Sentence, 24 September 2024 (confidential version filed on 16 July 2024) (“Trial Judgment”), paras 1037-1039, 1086, 1103-1108, 1121-1125.

authorities or who were considered not sufficiently supportive of the KLA [Kosovo Liberation Army] effort”.⁶

2. On 2 September 2024, the Accused filed a notice of appeal against the Trial Judgment, appealing his convictions and his sentence⁷ and the briefing of his appeal concluded with the filing of his reply brief on 4 February 2025.⁸ The appeal is currently pending before the Appeals Panel.

3. On 9 December 2024, the SPO disclosed under Rule 103 of the Rules “Package 2” containing (i) the transcript of an SPO interview with W04264 on [REDACTED] and corresponding translations; and (ii) two SPO witness preparation notes dated 14 November 2024 prior to the upcoming testimony of W04264 in case KSC-BC-2020-06.

4. On 13 December 2024, the SPO disclosed under Rule 102(3) of the Rules “Package 3” containing (i) W04264’s interview with the Kosovo Special Prosecution Office (“SPRK”) in [REDACTED]; (ii) W04264’s testimony before the [REDACTED]; and (iii) W04264’s interview with the [REDACTED].⁹

⁶ Trial Judgment, paras 1010-1011, 1024.

⁷ F00010/RED3, Public Redacted Version of Defence Notice of Appeal, 11 October 2024 (confidential version filed on 2 September 2024). On 30 September 2024, the Accused refiled his revised notice of appeal and, on 30 October 2024, a corrected version thereof. See F00017/COR/RED, Public Redacted Version of Corrected Version of Revised Defence Notice of Appeal, 31 October 2024 (corrected confidential version filed on 30 October 2024, uncorrected confidential version filed on 30 September 2024) (“Notice of Appeal”). On 26 November 2024, the Accused filed a corrected version of his appeal brief. See F00029/COR/RED2, Public Redacted Version of Corrected Version of Defence Appeal Brief, 13 January 2025 (confidential corrected version filed on 26 November 2024, uncorrected version filed on 25 November 2024) (“Appeal Brief”). The SPO and Victims’ Counsel filed their briefs in response on 17 January 2025. See F00040/RED, Public redacted version of ‘Prosecution Response Brief with two public annexes’, 30 January 2025 (confidential version filed on 17 January 2025); F00041/RED, Public Redacted Version of Victims’ Counsel’s Response to the Defence Appeal Brief, 7 February 2025 (confidential version filed on 17 January 2025).

⁸ See F00043/COR/RED, Public Redacted Version of Corrected Version of Defence Reply Brief, 26 March 2025 (corrected confidential version filed on 6 March 2025, uncorrected confidential version filed on 4 February 2025) (“Reply Brief”).

⁹ See CRSPD12, Email from SPO to the Appeals Panel Parties and Participants regarding Disclosure Package 3, 13 December 2024 (confidential).

5. On 10 January 2025, the Appeals Panel granted in part Shala's request for an order to disclose W04264's material and a finding of a disclosure violation.¹⁰ The Panel notably found that the SPO failed to timely disclose to the Defence a [REDACTED] SPO interview of W04264 and noted that to the extent that the Defence might have demonstrated any prejudice resulting from this late disclosure, it availed itself of a potential remedy through filing a motion pursuant to Rule 181 of the Rules to have the evidence admitted on appeal.¹¹

6. On 6 February 2025, the SPO disclosed, "for the sake of transparency and completeness", the public transcript of the testimony of W04264 in case KSC-BC-2020-06 dated 14 January 2025 and the preparation note of W04264 before his testimony.¹²

7. In the Motion, Shala seeks leave to call W04264 ([REDACTED]) as a Defence witness to testify before the Appeals Panel and have the transcripts and notes related to the witness's testimony in other cases and interviews admitted as additional evidence on appeal pursuant to Rule 181 of the Rules (collectively, "Proposed Evidence").¹³ More specifically, Shala seeks to admit:

- a. Transcript of SPO interview of W04264 dated [REDACTED] ("[REDACTED] SPO Interview");¹⁴

¹⁰ F00034/RED, Public Redacted Version of Decision on Defence's Request Regarding Disclosure, 10 January 2025 (confidential version filed on 10 January 2025) ("Decision Regarding Disclosure").

¹¹ Decision Regarding Disclosure, paras 12, 15.

¹² Response, para. 2. See F00044/A01, Annex 1 to Prosecution Response to Defence Motion to Present Additional Evidence Pursuant to Rule 181, 6 February 2025 (confidential); F00044/A02, Annex 2 to Prosecution Response to Defence Motion to Present Additional Evidence Pursuant to Rule 181, 6 February 2025 (confidential).

¹³ Motion, paras 1, 11-13, 26. See also Reply, para. 10.

¹⁴ 054739-TR-ET Parts 1-9 RED (confidential); 054739-TR-AT Parts 1-9 Revised RED (confidential) ("[REDACTED] SPO Interview").

- b. Preparation notes 1 and 2 of W04264 dated 14 November 2024 prior to his testimony in case KSC-BC-2020-06 (“2024 Preparation Notes”);¹⁵
- c. Record of witness hearing of W04264 in the [REDACTED] (“[REDACTED] Testimony”);¹⁶
- d. Record of witness interview of W04264 with the [REDACTED] (“[REDACTED] Interview”);¹⁷
- e. KLA Manual on procedure implementation towards the detainees dated 2 March 1999 (“Manual on Detainees”);¹⁸ and
- f. Record of witness interview of W04264 with the Kosovo Special Prosecution Office dated [REDACTED] (“[REDACTED] SPRK Interview”).¹⁹

II. APPLICABLE LAW

8. Rule 181 of the Rules governs the admission of additional evidence on appeal. Rule 181(1) of the Rules provides that:

A Party or, within the limits of Article 46(9) of the Law, Victims’ Counsel, may apply by motion to present additional evidence before the Court of Appeals Panel, identifying with precision the specific factual finding of the Trial Panel to which the additional evidence is directed. Such motions shall be filed within thirty (30) days of the Brief in Reply, unless a delay is justified on showing of good cause.

9. According to Rule 181(1) of the Rules, a motion for the admission of additional evidence shall identify with precision the specific factual finding of the Trial Panel to which the additional evidence is directed. Rule 181(1) of the Rules also provides that

¹⁵ 123558-123568 (confidential); 123569-123574 (confidential) (“2024 Preparation Notes”).

¹⁶ 054664-054703 RED (confidential); 054664-054703-AT RED (confidential); 054704-054734 RED (confidential); 054704-054734-AT RED (confidential) (“[REDACTED] Testimony”).

¹⁷ SPOE00067205-SPOE00067208-ET RED (confidential); SPOE00067205-00067208 RED (confidential) (“[REDACTED] Interview”).

¹⁸ SITF00010509-SITF00010563 (confidential) (“Manual on Detainees”).

¹⁹ SITF00010487-SITF00010508 RED (confidential) (“[REDACTED] SPRK Interview”).

such motions should be filed within 30 days of the brief in reply, unless a delay is justified on a showing of good cause.

10. For additional evidence to be admissible under Rule 181 of the Rules, the applicant must first demonstrate that the additional evidence was not available at trial in any form, or discoverable through the exercise of due diligence.²⁰ The applicant's duty to act with due diligence includes making appropriate use of all mechanisms of protection and compulsion available under the Specialist Chambers' legal framework to bring evidence on behalf of an accused before the Trial Panel.²¹ The applicant is therefore expected to apprise the Trial Panel of all the difficulties he or she encounters in obtaining the evidence in question.²² The applicant must also show that the additional evidence is both relevant to a material issue at trial and is credible.²³

11. Once it has been determined that the additional evidence meets these conditions, the Appeals Panel will assess, in accordance with Rule 181(3) of the Rules, "whether it *could* have been a decisive factor in reaching a decision at trial".²⁴ To satisfy

²⁰ See Rule 181(3); KSC-CA-2022-01, F00094/RED, Public Redacted Version of Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing, 31 January 2023 (confidential version filed on 28 November 2022) ("*Gucati and Haradinaj* Decision on Defence Requests to Interview Witnesses"), para. 18. See also e.g. ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Ntzezirayayo's Motion to Present Additional Evidence, 27 March 2015 ("*Nyiramasuhuko et al.* Decision on Additional Evidence"), para. 4; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Decision on Radivoje Miletić's First and Second Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 15 April 2013 ("*Popović et al.* 2013 Decision on Additional Evidence"), para. 6; 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 on Additional Evidence"), para. 24. See, similarly, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2617-Red, Public redacted version of Decision on request for the admission of additional evidence on appeal of 22 October 2020, 13 November 2020 ("*Ntaganda* Decision on Additional Evidence"), para. 15.

²¹ See e.g. *Nyiramasuhuko et al.* Decision on Additional Evidence, para. 5; *Popović et al.* 2013 Decision on Additional Evidence, para. 6; *Ngirabatware* Decision on Additional Evidence, para. 24.

²² See e.g. *Nyiramasuhuko et al.* Decision on Additional Evidence, para. 5; *Popović et al.* 2013 Decision on Additional Evidence, para. 6; *Ngirabatware* Decision on Additional Evidence, para. 24.

²³ See e.g. *Nyiramasuhuko et al.* Decision on Additional Evidence, para. 4; *Popović et al.* 2013 Decision on Additional Evidence, para. 7; *Ngirabatware* Decision on Additional Evidence, para. 25.

²⁴ Rule 181(3) of the Rules (emphasis added). See *Gucati and Haradinaj* Decision on Defence Requests to Interview Witnesses, para. 18. See also e.g. *Nyiramasuhuko et al.* Decision on Additional Evidence,

the requirement of “decisive factor” under Rule 181 of the Rules, the evidence must be such that it could have had an impact on the verdict, in other words, it could show that the verdict was unsafe.²⁵ A decision will be considered unsafe if the Appeals Panel ascertains that there is a realistic possibility that the lower panel’s verdict might have been different if the new evidence had been admitted.²⁶

12. The Appeals Panel observes that neither Rule 181 of the Rules, nor any other provision of the Rules and the Law, foresees the possibility for evidence which was available at trial to be admitted on appeal.²⁷ The Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) are also silent on this point.²⁸ The Panel notes, however, that the jurisprudence of the *ad hoc* tribunals has established, on the basis of the inherent power of the Judges, the possibility to admit on appeal such evidence even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice.²⁹ Rule 142(C) of the Rules of Procedure and

para. 5; *Popović et al.* 2013 Decision on Additional Evidence, para. 8; *Ngirabatware* Decision on Additional Evidence, para. 26.

²⁵ See *Popović et al.* 2013 Decision on Additional Evidence, para. 8; *Ngirabatware* Decision on Additional Evidence, para. 26. See also *Gucati and Haradinaj* Decision on Defence Requests to Interview Witnesses, para. 18.

²⁶ See e.g. *Popović et al.* 2013 Decision on Additional Evidence, para. 8; *Ngirabatware* Decision on Additional Evidence, para. 26.

²⁷ Rule 181(3) of the Rules states:

Where the Court of Appeals Panel finds that the additional evidence was not available at the time of trial and could not have been discovered with the exercise of due diligence, it shall determine whether it could have been a decisive factor in reaching a decision at trial and render a decision. [...]

²⁸ *Contra* Response, para. 5 (where the SPO contends that “[u]nlike before other institutions, no provision is provided in the Rules to allow for admission on appeal of evidence that was available at trial”).

²⁹ See ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 November 2000, p. 3; ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001, para. 27; ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 26 February 2001, para. 18. See also ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, paras 35, 72; ICTR, *Semanza v. Prosecutor*, ICTR-97-23-A, Decision, 31 May 2000, paras 41, 44; ICTR, *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of

Evidence of the International Residual Mechanism for Criminal Tribunals (“IRMCT”) has since codified this well-established practice.³⁰

13. The Appeals Panel recalls that the Law provides that Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court and other criminal courts.³¹ The Panel further recalls that these subsidiary sources can also guide the Judges’ reflection in instances where primary sources do not provide guidance on a specific matter.³² In light of this and of the fact that Rule 181(3) of the Rules reflects almost verbatim the language of the corresponding applicable provisions of the ICTR and ICTY Rules of Procedure and Evidence,³³ the Panel considers that it has the inherent right to consider admitting evidence that was available at trial and to set the standard for the admissibility on appeal of such evidence relying on the approach adopted by the *ad hoc* tribunals.

14. Accordingly, where the evidence is relevant and credible, but was available at trial, it may still be admissible on appeal if the applicant demonstrates that the exclusion of the additional evidence *would* lead to a miscarriage of justice in that, if it

Procedure and Evidence, 28 October 2004, para. 11; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 6; Eckelmans, F., “Article 83: Proceedings on appeal” in Ambos, K. (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Fourth Edition), C. H. Beck, Hart, Nomos 2022, mns 70, 81.

³⁰ Rule 142(C) of the IRMCT Rules of Procedure and Evidence states:

[...] Where the Appeals Chamber finds that the evidence was available at trial, it may still allow it to be admitted provided that the moving Party can establish that the exclusion of it would amount to a miscarriage of justice.

³¹ Article 3(3) of the Law.

³² See e.g. KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020, para. 11 (with respect to the standard to be applied to interlocutory appeals).

³³ See Rule 115(B) of the ICTY Rules of Procedure and Evidence and Rule 115(B) of the ICTR Rules of Procedure and Evidence, which both state:

If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. [...]

had been admitted at trial, it *would* have had an impact on the verdict.³⁴ In this context, the term “would” has to be understood as referring to a situation which would inevitably or with near certainty occur in the hypothetical scenario where the evidence was admitted at trial.³⁵

15. As previously recalled,³⁶ in both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the trial panel to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the trial panel’s verdict. An applicant who fails to do so runs the risk that the tendered material will be rejected without detailed consideration.³⁷

16. Finally, the significance and potential impact of the tendered material shall not be assessed in isolation, but in the context of the evidence presented at trial.³⁸

³⁴ See e.g. IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Decision on a Motion to Admit Additional Evidence on Appeal, 2 March 2018, para. 7 (emphasis in the original); *Nyiramasuhuko et al.* Decision on Additional Evidence, para. 6; *Popović et al.* 2013 Decision on Additional Evidence, para. 9; *Ngirabatware* Decision on Additional Evidence, para. 27.

³⁵ This is reflected in the way the term “would” has been translated in French in that context. The ICTR Appeals Chamber considered that the French translation of “the moving party will be required to establish that the exclusion of the additional evidence *would amount* to a miscarriage of justice, in as much as had it been available at trial, it *would have had* an impact on the verdict” should be read as follows: “la partie requérante sera tenue d’établir que l’exclusion de ces moyens de preuve supplémentaires *entraînerait* un déni de justice, dans la mesure où s’ils avaient été disponibles au procès, ils *auraient* influé sur le jugement”. See ICTR, *Ntagerura v. Prosecutor*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, fn. 18 (emphasis in the original). In the same vein, the French version of Rule 142(C) of the IRMCT Rules of Procedure and Evidence states:

[...] Si la Chambre d’appel conclut à la disponibilité de ces moyens de preuve au procès, elle peut néanmoins les admettre à condition que la partie requérante établisse que leur exclusion *entraînerait* une erreur judiciaire. (emphasis added)

³⁶ See above, para. 9.

³⁷ See e.g. *Nyiramasuhuko et al.* Decision on Additional Evidence, para. 7; *Popović et al.* 2013 Decision on Additional Evidence, para. 10; *Ngirabatware* Decision on Additional Evidence, para. 28.

³⁸ See e.g. *Nyiramasuhuko et al.* Decision on Additional Evidence, para. 8; *Popović et al.* 2013 Decision on Additional Evidence, para. 11; *Ngirabatware* Decision on Additional Evidence, para. 29.

III. DISCUSSION

A. SUBMISSIONS OF THE PARTIES

17. Shala submits that the Motion is filed within 30 days of the anticipated reply brief.³⁹ Shala further contends that the Proposed Evidence, due to its late disclosure by the SPO, was not available at trial and could not have been discovered by the Defence through the exercise of due diligence.⁴⁰

18. Shala argues that the Proposed Evidence is relevant: (i) in relation to the alleged JCE;⁴¹ (ii) to assess and undermine the credibility of SPO witness W04733;⁴² and (iii) to the findings on and conviction of arbitrary detention.⁴³ He adds that the Proposed Evidence is relevant to Grounds 6, 9 and 12 of his Appeal Brief.⁴⁴

19. More specifically, Shala points out that, on the basis of W04733's testimony, the Trial Panel found that W04264 was a KLA member who participated in the interrogation of detainees at the KMF, including W04733.⁴⁵ According to Shala, while W04733 is the only witness implicating W04264, the Proposed Evidence "substantially" undermines his evidence as it shows that W04264 was based in Divjakë/Divljaka during the relevant period and never mentioned the KMF in his statements.⁴⁶ Shala adds that the Proposed Evidence further directly contradicts

³⁹ Motion, para. 14.

⁴⁰ Motion, para. 14. See also Reply, para. 2.

⁴¹ Motion, para. 15.

⁴² Motion, para. 15.

⁴³ Motion, para. 18.

⁴⁴ Motion, para. 24. In Ground 6 of his appeal, Shala challenges the Trial Panel's assessment of the credibility of SPO witnesses, including W04733. See Notice of Appeal, paras 8-12; Appeal Brief, paras 78-114; Reply Brief, paras 15-20. In Ground 9 of his appeal, Shala argues that his fair trial rights were violated and notably refers to alleged disclosure violations. See Appeal Brief, paras 169-191; Reply Brief, paras 31-35; Notice of Appeal, para. 19. In Ground 12 of his appeal, Shala challenges his conviction under the count of arbitrary detention. See Notice of Appeal, paras 22-25; Appeal Brief, paras 206-236; Reply Brief, paras 39-42.

⁴⁵ Motion, para. 15, referring to Trial Judgment, paras [REDACTED].

⁴⁶ Motion, para. 16, referring to [REDACTED] Testimony, [REDACTED], pp. 7, 35 (054670, 054698).

W04733's evidence as it shows that W04264 never interviewed a suspect together with a commander or a member of the Headquarters.⁴⁷

20. Shala further refers to the Trial Panel's findings that KMF detainees were not brought promptly before a judge or other competent authority and were not provided with an opportunity to challenge the lawfulness of their detention, and that neither W04264 nor [REDACTED].⁴⁸ According to Shala, the Proposed Evidence demonstrates that KLA members did in fact make efforts to ensure adequate adherence to the laws of war and respect procedural rights of detainees and that W04264, as the [REDACTED], operated with judicial independence and would have had exclusive jurisdiction over cases of alleged collaboration with Serbs but never adjudicated such a case.⁴⁹

21. Finally, Shala submits that the Proposed Evidence meets the threshold for *prima facie* reliability and is sufficiently authentic and that its probative value is not outweighed by any prejudicial effect.⁵⁰

22. The SPO responds that the Motion should be denied as it does not meet the requirements under Rule 181 of the Rules.⁵¹ In the SPO's view, Shala makes "unclear" and "contradictory" claims as to the probative value of the Proposed Evidence as he contends that it shows that W04264 was not physically present at the KMF as alleged by W04733 while also appearing to argue that W04264 can provide evidence showing the implementation of procedural guarantees afforded to detainees at the KMF.⁵²

⁴⁷ Motion, para. 17, referring to [REDACTED] SPO Interview, Part 5, p. 25.

⁴⁸ Motion, para. 18, referring to Trial Judgment, para. [REDACTED].

⁴⁹ Motion, paras 16, 18, referring to [REDACTED] SPO Interview, Part 9, p. 11; [REDACTED] SPO Interview, Part 2, pp. 6, 10; [REDACTED] SPO Interview, Part 5, p. 9. Shala adds that W04264 also provided evidence that he issued the "Manual on Procedure Implementation Towards the Detainees which [REDACTED]". See Motion, para. 18, referring to [REDACTED] Testimony, [REDACTED], p. 9 (054672); Manual on Detainees, p. 2 (SITF00010510).

⁵⁰ Motion, paras 19-24. See also Motion, para. 13.

⁵¹ Response, paras 1, 7, 29.

⁵² Response, paras 9-11. See also Response, para. 8.

23. The SPO argues that the Proposed Evidence does not impact the Trial Panel's findings on arbitrary detention at the KMF.⁵³ The SPO submits that W04264's evidence regarding the KLA legal department and establishment of the military court is limited to Kleçkë/Klečka or Divjakë/Divljaka and is incapable of displacing the Trial Panel's findings that the KMF detainees were not afforded procedural guarantees.⁵⁴

24. The SPO also contends that W04264's evidence does not undermine W04733's credibility.⁵⁵ More specifically, the SPO asserts that the Proposed Evidence is incapable of affecting any determination on Shala's guilt based on Shala's presence at the KMF, as this has been established based on the evidence of numerous witnesses in addition to W04733's evidence.⁵⁶ In the SPO's view, Shala fails to explain how the Proposed Evidence could affect his conviction based on his participation in a JCE.⁵⁷ The SPO adds that W04264's interrogation of W04733 "play[ed] a minimal role" in the determination that the interrogation and mistreatment of KMF detainees were systematic and that the Proposed Evidence is not relevant to assessing Shala's participation in alleged crimes at the KMF.⁵⁸

25. The SPO further contends that the Proposed Evidence was available at trial and that Shala fails to provide any information showing that he made efforts to secure the substance of the Proposed Evidence during the trial.⁵⁹ The SPO points out that the [REDACTED] SPO Interview was listed in every Rule 102(3) notice and labeled as concerning the "legal system" and "KLA structure (Legal Department)".⁶⁰ The SPO also points out that W04264 was named in W04733's statements, which were available

⁵³ Response, paras 12-13. See also Response, paras 7, 27.

⁵⁴ Response, para. 12. See also Response, para. 13.

⁵⁵ Response, paras 14-20.

⁵⁶ Response, paras 16-17.

⁵⁷ Response, para. 18.

⁵⁸ Response, paras 18-20

⁵⁹ Response, paras 21, 23, 26. See also Response, paras 1, 22, 24-25.

⁶⁰ Response, para. 22.

to Shala since 2021.⁶¹ The SPO further stresses that Shala failed to question [REDACTED] about W04264's presence at the KMF at trial despite the fact that [REDACTED] and that W04264 testified [REDACTED] before the district court of Mitrovicë/Mitrovica in the case against Sabit Geci, a JCE member at the KMF.⁶²

26. The SPO finally argues that Shala fails to show that calling W04264 as a witness is necessary to avoid a miscarriage of justice.⁶³

27. Shala replies that because of the "entirely inadequate" description of the [REDACTED] SPO Interview in the SPO Rule 102(3) notices, the relevance and potential importance of W04264's evidence to the Defence case could not have been discovered through the exercise of due diligence.⁶⁴ He also points out that he made several attempts to be provided with "better particulars" due to the insufficient information conveyed in Rule 102(3) notices.⁶⁵ Shala invites the Appeals Panel to acknowledge the repeated violations of the SPO's disclosure obligations with regard to its Rule 102(3) notice which he claims substantially hindered the ability of the Defence to investigate its case.⁶⁶

28. Shala further contends that W04264 was not specifically referred to in the Indictment, the SPO Pre-Trial Brief or the SPO Final Trial Brief and that the potential

⁶¹ Response, paras 23-24.

⁶² Response, paras 25-26. The SPO adds that [REDACTED]. See Response, fn. 82.

⁶³ Response, para. 28. The SPO adds that it provided to the Defence the contact details of the counsel of W04264 and mentions that the witness had difficulty remembering certain matters when testifying in case KSC-BC-2020-06. See Response, fn. 86. See also Response, para. 2.

⁶⁴ Reply, paras 2, 4-5. Shala submits that the [REDACTED] SPO Interview is described in the most recent Rule 102(3) notice as "[t]ranscript of SPO interview with W04264, Part [1-9] revised, dated [REDACTED], relating to the witness' testimony on the legal system and his role in the KLA between 1998 and 1999 in Dukagjini" and that the description provided by the SPO is "misleading" as the KMF is located in the Pashtrik Operational Zone. See Reply, paras 4-5.

⁶⁵ Reply, para. 4.

⁶⁶ Reply, paras 5-6. See also Reply, para. 8.

significance of W04264's evidence was "substantially increased" in the Trial Judgment as the Trial Panel considered [REDACTED].⁶⁷

29. Shala recalls his "multifold challenge" to W04733's evidence, arguing that W04733's allegations concerning W04264 were only "one point amongst many others" relied upon to show that W04733 is not reliable. Shala contends that W04733 falsely implicated many persons allegedly present at the KMF and refers to three persons he called as Defence witnesses who denied being present at the KMF.⁶⁸

B. ASSESSMENT OF THE COURT OF APPEALS PANEL

1. Timeliness of the Motion

30. The Appeals Panel notes that the 30-day time-limit prescribed under Rule 181 of the Rules in this case expired on 7 March 2025 and consequently finds that the Motion is timely.

2. Relevance and Credibility of the Proposed Evidence

31. The Appeals Chamber recalls that the evaluation of relevance at the stage of admissibility of additional evidence on appeal has been described as a consideration of "whether the proposed evidence sought to be admitted relates to a material issue".⁶⁹ The Panel considers that the Proposed Evidence is sufficiently relevant to an issue material at trial to the extent that it relates to the assessment of W04733's credibility and the Trial Panel's findings on arbitrary detention.⁷⁰ This determination does not prejudice in any way the assessment of the impact of the Proposed Evidence.⁷¹

⁶⁷ Reply, para. 3. See also Motion, para. 3.

⁶⁸ Reply, para. 7.

⁶⁹ See e.g. *Popović et al.* 2013 Decision on Additional Evidence, para. 34; 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. 32.

⁷⁰ See Trial Judgment, paras 188, 341, 354-356, 363, 462, 471-473, 741, 845, 948.

⁷¹ See below, paras 44-67.

32. The Appeals Panel further recalls that evidence is credible if it appears to be reasonably capable of belief.⁷² The SPO does not dispute the credibility of the Proposed Evidence. The Panel considers that the Proposed Evidence bears sufficient indicia of credibility to be considered admissible as additional evidence on appeal.⁷³

3. Availability at Trial and Due Diligence

33. The Appeals Panel recalls that the party seeking the admission of additional evidence on appeal bears the burden of demonstrating how it exercised due diligence.⁷⁴

34. The Panel observes that Shala claims in the Motion that the Proposed Evidence, due to its late disclosure by the SPO, was not available at trial and could not have been discovered by the Defence through the exercise of due diligence.⁷⁵ The Panel notes that it is only in his Reply that Shala puts forward arguments regarding the availability of the Proposed Evidence.⁷⁶

35. It is not disputed that the Proposed Evidence was in the possession of the SPO and was disclosed to Shala after trial. The Panel recalls that it found that its late disclosure was the result of the SPO's violation of its disclosure obligations.⁷⁷ However, whether the evidence was in possession of the SPO and whether the SPO

⁷² See e.g. *Popović et al.* 2013 Decision on Additional Evidence, para. 7; *Ngirabatware* Decision on Additional Evidence, para. 25.

⁷³ While the [REDACTED] SPO Interview is not signed by the witness, the Panel notes that it was prepared and disclosed by the SPO and is satisfied that it bears sufficient indicia of reliability. See Motion, para. 19. The Panel also notes that part of the English translation of the Manual on Detainees is missing. See Manual on Detainees, p. 2 (SITF00010510).

⁷⁴ See e.g. ICTR, *Karemera and Ngirumpatse v. Prosecutor*, ICTR-98-44-A, Decision on Karemera's and Ngirumpatse's Motions Under Rules 68 and 115 of the Rules, 6 February 2014 ("*Karemera and Ngirumpatse* Decision on Additional Evidence"), para. 39.

⁷⁵ See Motion, para. 14.

⁷⁶ See Reply, paras 2-5.

⁷⁷ See Decision Regarding Disclosure, paras 12, 18. See also above, paras 3-5.

failed to discharge its disclosure obligations in that regard has no bearing on the determination of whether the evidence was available at trial.⁷⁸

36. While the Panel agrees with Shala that W04264 was not referred to in the Indictment or the SPO Pre-Trial Brief, the Panel does not find that this, in itself, renders the Proposed Evidence unavailable at trial or not discoverable through the exercise of due diligence.⁷⁹

37. The Panel recalls that W04733, who was listed as a SPO witness on the SPO's initial witness list,⁸⁰ testified, [REDACTED]⁸¹ and during his interview with the SPO in 2018, that W04264 was present at the KMF and questioned him.⁸² [REDACTED] while the transcripts of W04733's 2018 SPO Interview were disclosed on 20 September 2021 (disclosure 14) under Rule 102(1)(a) of the Rules. The SPO refers directly and at length to W04733's 2018 SPO Interview as supporting evidence in its Rule 86(3)(b) Outline as well as in the SPO Pre-Trial Brief.⁸³ Given the importance of W04733's evidence to the SPO case and the fact that his statements were disclosed at the very early stage of the case to Shala, the Panel considers that the fact that W04733 placed W04264 at the KMF was potentially relevant information which was directly accessible to Shala at trial. In the Panel's view, the fact that Shala did not follow up on

⁷⁸ See e.g. *Karemera and Ngirumpatse* Decision on Additional Evidence, para. 31 (where the ICTR Appeals Chamber found that the evidence was available at trial while the Prosecution was found in violation of its disclosure obligations for not disclosing it to the Defence); *Ngirabatware* Decision on Additional Evidence, paras 20, 23, 34-35 (where the IRMCT Appeals Chamber (majority) found that the Prosecution failed to timely disclose exculpatory evidence to the accused but concluded that the accused failed to demonstrate that the evidence was neither available at trial nor discoverable through the exercise of due diligence).

⁷⁹ See Reply, para. 3. The Panel notes that Shala does not cite any authority in support of his argument.

⁸⁰ See KSC-BC-2020-04, F00136/A02, List of Witnesses, 31 January 2022 (confidential, lesser confidential redacted version filed on 8 February 2022 (F00139/A02)), p. 2.

⁸¹ [REDACTED].

⁸² See 082892-TR-AT-ET ("W04733's 2018 SPO Interview"), Part 6, pp. 2, 4-7.

⁸³ See KSC-BC-2020-04, F00037/A02, Annex 2 to Submission of corrected Rule 86(3)(b) Outline, 19 May 2021 (confidential); KSC-BC-2020-04, F00135/A01/RED, Public redacted version of 'Prosecution Pre-Trial Brief', dated 28 January 2022, KSC-BC-2020-04/F00135/A01, 14 April 2023 (strictly confidential and *ex parte* version filed on 28 January 2022, reclassified as confidential on 8 February 2023) ("SPO Pre-Trial Brief").

this name or seek further information in these circumstances shows that he failed to exercise due diligence.

38. The Panel moreover notes that Shala, in his Defence Final Trial Brief, refers to the fact that W04733 testified to having been questioned by W04264 at the KMF.⁸⁴ Shala even compiles a list of persons that W04733 mentioned as being KLA members present at the KMF, refers to W04264 as among those to “have only been mentioned by W04733”, and specifies that “[a]mong these, there are three defence witnesses, who denied being present at Kukes during the Indictment period”.⁸⁵ From his own admission, Shala contends that he called these persons, namely Mr Bardhyl Mahmuti, Ms Time Kadrijaj and Ms Safete Hadergjonaj, precisely for the purpose of challenging W04733’s evidence who placed them at the KMF.⁸⁶ Shala fails to explain why he did not also attempt to call W04264 as a witness for the purposes of rebutting W04733’s evidence alongside these other Defence witnesses.

39. Finally, with respect to the [REDACTED] SPO Interview Shala seeks to tender now, the Panel notes that this interview was listed in the SPO’s first Rule 102(3) notice in September 2021 and each subsequent version thereafter.⁸⁷ The Panel notes that the description of the items referred to W04264 by his pseudonym, not by his name, and finds that this description could have benefited from more elaboration, especially in light of the language of Rule 102(3) of the Rules which prescribes that the SPO has to provide a “detailed notice” of the material in its possession.⁸⁸ Nevertheless, the Panel

⁸⁴ See KSC-BC-2020-04, F00821/RED3, Public Redacted Version of Defence Final Trial Brief, 19 December 2024 (confidential version filed on 26 March 2024) (“Defence Final Trial Brief”), paras [REDACTED].

⁸⁵ See Defence Final Trial Brief, para. 240. See also Trial Judgment, para. 180.

⁸⁶ See Reply, para. 7.

⁸⁷ See KSC-BC-2020-04, F00069/A01, Annex 1 to Prosecution Rule 102(3) notice, 3 September 2021 (confidential) (“First SPO Rule 102(3) Notice”), items 141-142. See also the SPO’s subsequent Rule 102(3) notices, for example, KSC-BC-2020-04, F00319/A01, Annex 1 to Prosecution amended Rule 102(3) notice dated 19 October 2022, 19 October 2022 (confidential), items 227-244.

⁸⁸ See KSC-BC-2020-07, IA005/F00008/RED, Public Redacted Version of Decision on the Appeals Against Disclosure Decision, 29 July 2021 (confidential version filed on 29 July 2021), paras 33, 38;

observes that the description specifically referenced the “Legal Department” or “legal system” of the KLA.⁸⁹ In the Appeals Panel’s view, this was sufficient to inform the Defence from that moment onwards of the purported relevance of this item as to the fact that the KLA allegedly operated in compliance with international humanitarian law (*jus in bello*).⁹⁰ Despite this, Shala never requested this material. While he claims that he made “several attempts” to be provided with better particulars in the SPO Rule 102(3) notices,⁹¹ he fails to show that he ever sought additional information on these particular items from the SPO,⁹² or that he apprised the Trial Panel of the difficulties he encountered in seeking to obtain such information.⁹³

KSC-CA-2022-01, F00075/RED, Public Redacted Version of Decision on the Specialist Prosecutor’s Office’s Request Regarding Item 206, 31 January 2023 (confidential version filed on 21 October 2022), paras 17, 24; KSC-CA-2022-01, F00044/RED, Public Redacted Version of Decision on Prosecution Notifications, 31 January 2023 (confidential version filed on 15 September 2022), para. 21.

⁸⁹ While Shala argues that the First SPO Rule 102(3) Notice only describes the [REDACTED] SPO Interview as the “[t]ranscript of SPO interview of W04264, dated [REDACTED]”, he fails to mention that the description of the Albanian transcript of the same interview provides further details, namely “specifying KLA structure (Legal Department) and undertakings in Divijak, Lipljan municipality”. See Reply, para. 2; First SPO Rule 102(3) Notice, item 141.

⁹⁰ Contra Reply, paras 2, 4-5.

⁹¹ See Reply, para. 4.

⁹² The Panel notes the SPO’s willingness to meet the Defence’s requests for further particulars in Rule 102(3) notices. See e.g. Transcript, 15 November 2021, pp. 108-110 (which states that the SPO provided further information to the Defence regarding the items listed in accordance with the Defence request to this effect and where Defence states that “the SPO provided us with the necessary descriptions that we requested from them on 22 October”); Transcript, 14 January 2022, pp. 144, 159, 166 (where the SPO indicates that the updated Rule 102(3) list contains “updated and improved and more precise descriptions” of the items and, to the extent that the Defence would find some of the descriptions still unsatisfactory, “we encourage them to point them out to us and we will be happy to provide additional descriptions when the item in question so requires”); KSC-BC-2020-04, F00153, Submissions Pursuant to the Pre-Trial Judge’s Order Dated 9 February 2022 Concerning the Sixth Status Conference, 22 February 2022, para. 11 (where Shala states that “[t]he Defence welcomes the SPO’s readiness to consider *inter partes* specific requests for improved particulars on a case-by-case basis and notes its intention to seek additional information on particular items from the SPO”); Transcript, 4 March 2022, pp. 206-207, 210-211 (where the SPO indicates that it will provide revised descriptions to the Defence and where the Defence commends the SPO’s “reasonableness and courtesy” in acceding to its request to review descriptions of items not selected).

⁹³ See above, para. 10.

40. In light of the above, the Panel finds that Shala fails to demonstrate that the [REDACTED] SPO Interview was not available at trial nor discoverable through the exercise of due diligence.

41. As to the other items of the Proposed Evidence, namely the [REDACTED] Testimony, the [REDACTED] SPRK Interview, the [REDACTED] Interview and the Manual on Detainees, Shala makes no submission to indicate either why they were unavailable, or to detail the efforts he made, if any, to discover these materials at trial. Consequently, in the Panel's view, Shala has not demonstrated the exercise of due diligence to discover this evidence at trial. In any event, if they were not available at trial *as such*, the Panel recalls that a party seeking to adduce additional evidence on appeal under Rule 181 of the Rules must establish that the evidence was not available *in any form whatsoever*.⁹⁴ To the extent that the information contained in these documents is largely similar to and overlaps with the information already contained in the [REDACTED] SPO Interview, which was available at trial, the Panel finds that the [REDACTED] Testimony, the [REDACTED] SPRK Interview, the [REDACTED] Interview and the Manual on Detainees were likewise available at trial.

42. For the same reasons, while the 2024 Preparation Notes were unavailable at trial as they were issued on 14 November 2024, after the Trial Judgment was rendered, the Panel considers that the information contained therein was available at trial.

43. Accordingly, the Panel finds, for the purposes of Rule 181 of the Rules, that the Proposed Evidence was available at trial or discoverable through the exercise of due diligence. Consequently, the Proposed Evidence can only be admitted as additional evidence on appeal if the Appeals Panel is satisfied that its exclusion *would* lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict.⁹⁵

⁹⁴ See e.g. *Karemera and Ngirumpatse* Decision on Additional Evidence, para. 31.

⁹⁵ See above, para. 14.

4. Impact on the Verdict

44. As a preliminary remark, the Panel observes that Shala does not even attempt to bring forward any argument in the Motion as to the alleged relevance and impact on the Trial Panel's findings of the 2024 Preparation Notes and the [REDACTED] Interview.⁹⁶ In light of Shala's failure to identify any specific content in these documents and explain how they would have impacted the verdict had the Trial Panel considered them, the Appeals Panel dismisses without any further consideration Shala's request to admit as additional evidence on appeal the 2024 Preparation Notes and the [REDACTED] Interview.

45. With respect to the remainder of the Proposed Evidence, the Appeals Panel also observes that Shala often fails to: (i) detail their impact item by item; (ii) precisely identify the relevant excerpts he relies upon, which are only referred to in a sporadic, piecemeal manner; and (iii) identify the specific Trial Panel's findings of fact to which the Proposed Evidence pertains.⁹⁷ Despite these shortcomings, the Panel will nevertheless assess the impact of the Proposed Evidence. However, as Shala's submissions are not presented item by item, and in light of the fact that the items, to a large extent, contain similar information, the Panel will address the impact of the Proposed Evidence thematically.

46. At the outset, the Appeals Panel observes that Shala's submissions on the purported impact of the Proposed Evidence appear contradictory as he argues on the one hand that the Proposed Evidence shows that W04264 was not physically present at the KMF but, on the other hand, he also seems to argue that it shows that W04264 exercised the functions of an independent judge and that procedural guarantees were afforded to detainees at the KMF.⁹⁸

⁹⁶ Shala only provides submissions as to their authenticity. See Motion, paras 20, 23.

⁹⁷ See Motion, paras 15-17.

⁹⁸ See Motion, paras 15-18. See also Response, paras 8-11.

(a) JCE

47. Turning first to the impact of the Proposed Evidence on the Trial Panel's findings on the JCE, the Panel notes that Shala merely alleges that it "relat[es] to the alleged JCE" but fails to identify any findings of the Trial Panel to which the Proposed Evidence would pertain in that regard nor present any argument as to its purported impact on the verdict.⁹⁹ The Panel therefore dismisses Shala's argument without further consideration. In any event, the Panel recalls that, contrary to Shala's contention, the Trial Panel did not name W04264 as a JCE member.¹⁰⁰ Rather, the Trial Panel found that W04264 was a [REDACTED].¹⁰¹ As such, the Panel finds that the Proposed Evidence is incapable of impacting the Trial Panel's findings regarding Shala's participation in and significant contribution to the JCE.¹⁰²

(b) W04733's credibility

48. The Panel turns next to whether the Proposed Evidence undermines W04733's credibility.¹⁰³ The Panel recalls the Trial Panel's finding that [REDACTED].¹⁰⁴ The Trial Panel found that around three or four days before his release, W04733 [REDACTED].¹⁰⁵ The Trial Panel further found that W04733 saw Shala leaving the KMF premises through the gate and returning a few minutes later by car with Hashim Thaçi and Azem Sylja.¹⁰⁶ The Trial Panel found that [REDACTED].¹⁰⁷ The Trial Panel concluded that W04733 was not brought before a judge or other competent authority

⁹⁹ See Motion, para. 15.

¹⁰⁰ See Trial Judgment, para. 1003. Contra Motion, para. 3.

¹⁰¹ See Trial Judgment, paras [REDACTED]. See also Trial Judgment, para. [REDACTED].

¹⁰² See Trial Judgment, paras 1007-1008, 1024-1025, 1028.

¹⁰³ See Motion, paras 15-17.

¹⁰⁴ See Trial Judgment, paras [REDACTED]. See also Trial Judgment, para. [REDACTED].

¹⁰⁵ Trial Judgment, para. [REDACTED], referring, *inter alia*, to W04733's [REDACTED] Testimony, pp. 31, 33-35 (SPOE00013823, SPOE00013825-SPOE00013827); W04733's 2018 SPO Interview, Part 6, pp. 2, 4-7. See also Trial Judgment, para. [REDACTED].

¹⁰⁶ Trial Judgment, paras 462, 845.

¹⁰⁷ Trial Judgment, para. [REDACTED].

and that he was not provided with an opportunity to challenge the lawfulness of his detention.¹⁰⁸

49. Shala first claims that the Proposed Evidence shows that from 5 April 1999 onwards W04264 was based in Divjakë/Divljaka and that this undermines W04733's evidence.¹⁰⁹ However, the Panel observes that the Proposed Evidence as to W04264's whereabouts from 5 April 1999 is in fact inconsistent and rather indicates that W04264 did not stay in Divjakë/Divljaka during that entire period.¹¹⁰ The Panel does not find that this aspect of the Proposed Evidence would have any impact on the verdict.

50. Second, according to Shala, the Proposed Evidence contradicts W04733's evidence that he was accused of being a "Serb commander" as W04264 said that he "never adjudicated any cases of collaboration".¹¹¹ The Panel notes that W04264 indicated in the [REDACTED] SPO Interview that cases of alleged collaboration would fall under his exclusive jurisdiction and that he did not remember adjudicating such cases.¹¹² However, W04264 also indicated that he assumed that there were collaborators but that these cases "did not come to [him]".¹¹³ Furthermore, Shala omits to mention that, in the [REDACTED] SPRK Interview as well as in the [REDACTED] Testimony, W04264 referred to a case he dealt with involving two brothers accused of

¹⁰⁸ Trial Judgment, paras 471-473.

¹⁰⁹ See Motion, para. 16.

¹¹⁰ In [REDACTED], W04264 said that he was in Jabllanica from 5 April 1999 until the end of the conflict. See [REDACTED] SPRK Interview, p. 2 (SITF00010488). He then rectified during his [REDACTED] testimony that this was a mistake, that he was based in Divjakë/Divljaka although he did not stay there all the time until the war ended, and that he traveled between zones and was away from Divjakë/Divljaka at times. See [REDACTED] Testimony, [REDACTED], pp. 6-7, 35 (054669-054670, 054698).

¹¹¹ See Motion, para. 16, referring to Trial Judgment, para. 470.

¹¹² [REDACTED] SPO Interview, Part 5, pp. 8-9; [REDACTED] SPO Interview, Part 9, p. 11.

¹¹³ [REDACTED] SPO Interview, Part 9, pp. 11-12.

having collaborated with the Serbs, and that he heard that Fatmir Limaj released them since, as the head of Military Police, he “was the only one who had such power”.¹¹⁴

51. The Panel also recalls that, irrespective of its ultimate findings on Ground 6 of Shala’s appeal, for the purposes of the current assessment under Rule 181 of the Rules, W04733’s account that he was accused of being a “Serb commander”¹¹⁵ is consistent with the evidence of other witnesses who testified to having been subjected to similar accusations.¹¹⁶ In that regard, the Trial Panel found that KMF detainees were apprehended and interrogated on vague allegations of sympathizing or otherwise being associated with Serbia, “Serbs”, or Serbian authorities, or being “traitors”, “spies” or “collaborators”, or not being sufficiently supportive of the KLA effort.¹¹⁷ In light of this, and of the fact that the significance and potential impact of the tendered material must be assessed in the context of the evidence presented at trial,¹¹⁸ the Panel finds that the Proposed Evidence does not appear to contradict W04733’s evidence or the Trial Panel’s findings in that respect.

52. The Panel further considers that the fact that W04264 provided “forthcoming” evidence on two Serb prisoners in Klečë/Klečka prison could not have any impact on any of the Trial Panel’s findings regarding the KMF.¹¹⁹

53. Nevertheless, it is correct that the Proposed Evidence does not mention Kukes and the KMF – while W04264 mentions visiting the Klečë/Klečka prison and other

¹¹⁴ [REDACTED] Testimony, [REDACTED], pp. 14-15 (054677-054678); [REDACTED] SPRK Interview, p. 4 (SITF00010490).

¹¹⁵ See Trial Judgment, paras 448, 470-471. See also Trial Judgment, para. 741.

¹¹⁶ See Trial Judgment, paras 403-404 (TW4-01), 412 (Murder Victim), 497, 509 (TW4-05), [REDACTED]. See also Trial Judgment, paras 740, 742-746.

¹¹⁷ See Trial Judgment, paras 590, 750, 947, 1014. See also Trial Judgment, paras 752, 982.

¹¹⁸ See above, para. 16.

¹¹⁹ See [REDACTED] SPRK Interview, p. 5 (SITF00010491); [REDACTED] Testimony, [REDACTED], pp. 17-18 (054680-054681). Contra Motion, para. 16.

places within the Pashtrik operational zone.¹²⁰ W04264 also indicates that he did not travel to Albania.¹²¹

54. Bearing in mind that W04264 was never specifically asked about the KMF as the line of questioning – pursued by different investigative authorities – focused on Kleçkë/Klečka,¹²² the Panel finds that W04264's account could nevertheless be interpreted as contradicting the evidence of W04733 as the latter indicates that W04264 was at the KMF and [REDACTED].¹²³

55. However, even assuming that the Proposed Evidence, taken at its highest, would show that W04264 was not physically present at the KMF – as Shala argues – the Panel finds that this would not disturb the Trial Panel's findings that W04733 was not brought before a judge or any other competent authority controlling the lawfulness of his detention and that he was not afforded the required procedural guarantees during his detention.¹²⁴

56. Even assuming a finding that W04733 was not credible on this aspect of his evidence leading to a reversal of the finding that W04733 saw W04264 at the KMF, Shala does not explain how the availability of the Proposed Evidence before the Trial Panel could undermine the Trial Panel's credibility assessment of W04733. This assessment was based on an extensive analysis and the Trial Panel's conclusion that

¹²⁰ [REDACTED] SPRK Interview, p. 3 (SITF00010489).

¹²¹ [REDACTED] SPO Interview, Part 2, p. 12.

¹²² In addition, the Panel considers that the Proposed Evidence carries limited weight with respect to whether W04264 knew of or went to the KMF as W04264 declared that he only knew of three detention sites operating during the war (Kleçkë/Klečka, Kravesari and Lladroc) but then admitted that "there could have been" others. See [REDACTED] SPO Interview, Part 2, pp. 18, 22; [REDACTED] SPO Interview, Part 3, pp. 8-9; [REDACTED] SPO Interview, Part 9, p. 24. See also [REDACTED] SPRK Interview, p. 3 (SITF00010489). W04264 then also referred to a location at the border of Albania which did not have the status of a regular prison. See [REDACTED] SPO Interview, Part 3, pp. 10-11. W04264 also stated that he "moved to all operating zones of the KLA". See [REDACTED] Testimony, [REDACTED], p. 6 (054669).

¹²³ W04264 states that he never interviewed any suspect together with a KLA commander or a member of the KLA headquarters. See [REDACTED] SPO Interview, Part 5, p. 25.

¹²⁴ See Trial Judgment, paras 472-473.

W04733 gave largely consistent and inherently coherent evidence which was corroborated by numerous witnesses and forensic evidence.¹²⁵ In addition, the Panel rejects as unsubstantiated Shala's contention, referring to submissions he made in his Defence Final Trial Brief, that W04733's evidence "shows a clear pattern of fabrications".¹²⁶ Shala does not point to any part in the Proposed Evidence that would support such an alleged pattern of fabrications.

57. Likewise, in the Panel's view, whether or not W04733 saw W04264 at the KMF would be incapable of calling into question any finding related to the crimes for which Shala was convicted. Indeed, the Panel finds that neither the presence of W04264 at the KMF, nor any of the Trial Panel's findings on W04264,¹²⁷ seems to have played any significant role in the Trial Panel's conclusion as to Shala's criminal responsibility and his convictions for arbitrary detention and torture, which are based on his participation in a JCE.¹²⁸

58. Even assuming that the Proposed Evidence contradicts W04733's evidence that he saw Shala at the KMF on or about 28 or 29 May 1999,¹²⁹ the Appeals Panel finds that if the Proposed Evidence had been admitted at trial, it would have been incapable of affecting the Trial Panel's findings regarding Shala's presence at the KMF and his alleged participation in crimes. First, this is only one among numerous instances of evidence placing Shala at the KMF, who was found to be present "on multiple occasions in May and June 1999".¹³⁰ Second, the Panel notes that the Trial Panel did not attach any particular weight to Shala's presence at the KMF on the specific dates of 28 or 29 May 1999. Rather, the Trial Panel especially relied on the fact that Shala

¹²⁵ See Trial Judgment, paras 180, 188. See also Trial Judgment, paras 176-179, 181-187.

¹²⁶ See Motion, para. 17.

¹²⁷ See Trial Judgment, paras [REDACTED].

¹²⁸ See Trial Judgment, paras 945-956, 971-984, 1003-1004, 1008, 1010-1015, 1024-1025, 1028-1029, 1037-1038.

¹²⁹ See Motion, para. 17. See also Trial Judgment, paras 462, 845-847.

¹³⁰ See Trial Judgment, paras 839-852, 952.

was present at the KMF at critical times, on or about 20 May and on 4 June 1999, when he was personally involved in the mistreatment of detainees, as one of the factors to establish his *mens rea* for arbitrary detention.¹³¹ Third, the Panel observes that the Trial Panel established Shala's presence at the KMF not only on the basis of W04733's evidence, but also on the basis of the evidence of other witnesses,¹³² as well as Shala himself who admitted returning to the KMF very often.¹³³ Recalling that the significance and potential impact of the tendered material must be assessed in the context of the evidence presented at trial,¹³⁴ the Panel finds that Shala fails to substantiate how the Proposed Evidence, in light of the other evidence considered by the Trial Panel, would have had an impact on the verdict.

59. Finally, with regard to Shala's reference in his Reply to his other "multifold" submissions challenging W04733's evidence and credibility, the Panel finds that they have no bearing on the impact of the Proposed Evidence.¹³⁵

60. In light of the above, the Appeals Panel therefore finds that the Proposed Evidence would not have impacted the Trial Panel's findings on W04733's credibility had it been before the Trial Panel.

(c) Arbitrary detention

61. The Appeals Panel will now turn to address Shala's contention that the Proposed Evidence impacts the Trial Panel's findings on arbitrary detention and the absence of procedural safeguards afforded to detainees at the KMF.¹³⁶

¹³¹ See Trial Judgment, para. 952. See also Trial Judgment, paras 844, 852, 903-905, 907.

¹³² See Trial Judgment, paras 842-845 (W04733), 840, 843-844, [REDACTED], 841 (TW4-10), 843 (W01448), 848-851 (Mr Elezaj). See also Trial Judgment, para. 465.

¹³³ See Trial Judgment, para. 862, referring to 066888-TR-ET Part 1 Revised, pp. 124-125, 131.

¹³⁴ See above, para. 16.

¹³⁵ See Reply, para. 7.

¹³⁶ See Motion, para. 18.

62. The Panel recalls that the Trial Panel found that a number of detainees at the KMF were deprived of all basic procedural guarantees to which they were entitled while in detention, pursuant to international humanitarian law as they were (i) not properly informed of the reasons for their deprivation of liberty; (ii) not brought promptly before a judge or other competent authority; and (iii) not provided with an opportunity to challenge the lawfulness of their detention.¹³⁷ In particular, the Trial Panel found that (i) the KMF detainees were not brought promptly before a judge or other competent authority; (ii) the KMF detainees were not provided with an opportunity to challenge the lawfulness of their detention; (iii) neither Mr Osman Kryeziu, nor W04264 or any other KLA member [REDACTED]; and (iv) none of them exercised the functions of an independent authority having oversight over the lawfulness of the persons' detention and as they rather actively participated in interrogations and were not in a position to independently order anyone's release.¹³⁸

63. The Panel first notes that even if W04264 indicated that with the establishment of the Directorates, the KLA "started to operate based on the laws of the war",¹³⁹ he however specifies that there was a possibility that not all commanders were informed about the guidelines on the laws of war he issued,¹⁴⁰ and adds that the system in place was not effective and that the awareness of the duty to abide by the norms was "at the low level".¹⁴¹

64. In addition, the Panel notes that the Manual on Detainees provides a set of rules affording minimal guarantees to persons in detention,¹⁴² and that the [REDACTED] SPRK Interview, the [REDACTED] Testimony and the [REDACTED] SPO Interview

¹³⁷ Trial Judgment, para. 591. See also Trial Judgment, paras 945-949.

¹³⁸ Trial Judgment, para. [REDACTED].

¹³⁹ [REDACTED] SPO Interview, Part 2, p. 6.

¹⁴⁰ [REDACTED] SPO Interview, Part 5, pp. 9, 19.

¹⁴¹ [REDACTED] SPO Interview, Part 5, p. 21.

¹⁴² Manual on Detainees, p. 2 (SITF00010510).

all confirm that W04264 issued this document.¹⁴³ However, the Panel also observes that W04264 specified that the Manual on Detainees was issued mainly with respect to Klečkë/Klečka prison¹⁴⁴ and that he did not send regulations to other prisons.¹⁴⁵ Therefore, the Panel fails to see how this evidence could impact the Trial Panel's findings in the Trial Judgment in the absence of any indication that this document was ever applicable or applied at the KMF.

65. Likewise, the Panel observes that if the Proposed Evidence shows that W04264 was giving administrative guidelines as to the legal norms to follow and how the guards in detention facilities should behave, it also shows that he did not have control over detention facilities and that he did not have the authority to release prisoners, only to give recommendations.¹⁴⁶ He specifies that "there was only so much [he] could do" and "the prisoners were under the physical control of the KLA military Police".¹⁴⁷ W04264 also makes clear that he was not notified about every prisoner brought into detention and that he could only act if there was a criminal allegation against the detainee,¹⁴⁸ and specified that disciplinary cases did not come to him.¹⁴⁹ W04264 further mentioned several instances of detainees who were not under his jurisdiction but were handled by the KLA military.¹⁵⁰

¹⁴³ [REDACTED] SPO Interview, Part 3, p. 2; [REDACTED] SPO Interview, Part 5, p. 4; [REDACTED] Testimony, [REDACTED], p. 9 (054672); [REDACTED] SPRK Interview, pp. 2-3 (SITF00010488-SITF00010489).

¹⁴⁴ [REDACTED] SPO Interview, Part 5, p. 5; [REDACTED] SPO Interview, Part 3, p. 7.

¹⁴⁵ [REDACTED] SPO Interview, Part 3, pp. 11-12.

¹⁴⁶ [REDACTED] SPO Interview, Part 2, pp. 10, 21, 23-24, 26; [REDACTED] SPO Interview, Part 3, pp. 6-7, 11; [REDACTED] SPO Interview, Part 4, pp. 5-6, 11; [REDACTED] SPO Interview, Part 6, pp. 12, 19, 21; [REDACTED] SPO Interview, Part 8, p. 10; [REDACTED] Testimony, [REDACTED], p. 9 (054672). See also [REDACTED] Testimony, [REDACTED], p. 4 (054667); [REDACTED] SPRK Interview, p. 2 (SITF00010488).

¹⁴⁷ [REDACTED] SPRK Interview, p. 3 (SITF00010489).

¹⁴⁸ [REDACTED] SPO Interview, Part 2, pp. 15-16, 23; [REDACTED] SPO Interview, Part 6, p. 21.

¹⁴⁹ [REDACTED] SPO Interview, Part 9, pp. 17, 20.

¹⁵⁰ [REDACTED] SPRK Interview, pp. 3-4, 6 (SITF00010489-SITF00010490, SITF00010492); [REDACTED] Testimony, [REDACTED], pp. 14-15 (054677-054678).

66. Consequently, the Appeals Panel finds that the Proposed Evidence, to the extent it would be reconcilable with Shala's claim that W04264 was not at the KMF,¹⁵¹ would be incapable of impacting the Trial Panel's findings on the lack of procedural guarantees afforded to the detainees at the KMF, and the Trial Panel's overall conclusion on arbitrary detention.¹⁵² To the contrary, the Panel considers that the Proposed Evidence, to the extent it shows that W04264 could not exercise his functions independently and that he was not in a position to independently order anyone's release, rather appears to be in line with the Trial Panel's findings.

67. Accordingly, the Appeals Panel finds that Shala fails to demonstrate that the remaining items of the Proposed Evidence, namely the [REDACTED] SPO Interview, the [REDACTED] Testimony, the [REDACTED] SPRK Interview and the Manual on Detainees, would have impacted the Trial Panel's verdict and that not admitting it as additional evidence would lead to a miscarriage of justice. In light of the foregoing, the Panel finds that Shala's request to admit the Proposed Evidence should be dismissed.

5. Request to Call W04264 as a Witness

68. The Appeals Panel recalls that the admission of material under Rule 181 of the Rules requires that the party be in possession of the material sought to be admitted and that it provides it to the Appeals Panel.¹⁵³ Rule 181 of the Rules does not permit a party to merely request a particular person to be summoned as a witness to give

¹⁵¹ See above, para. 46.

¹⁵² See Trial Judgment, paras 591, 945-949. See also Trial Judgment, paras 402-406, 412-414, 433-438, 470-473, 491-494, 509-512, 528-531, 552-556, 562-563, 569, 576-577, 581, 583.

¹⁵³ See e.g. ICTR, *Bagosora et al. v. Prosecutor*, ICTR-98-41-A, Decision on Théoneste Bagosora's Motion for Admission of Additional Evidence, 7 February 2011 ("*Bagosora et al.* Decision on Additional Evidence"), para. 8; ICTR, *Nizeyimana v. Prosecutor*, ICTR-00-55C-A, Decision on Appellant's Confidential Motion for Fresh Evidence and Corollary Relief, 23 April 2014 ("*Nizeyimana* Decision on Additional Evidence"), para. 10.

evidence at the appellate stage.¹⁵⁴ A party seeking to call a witness at the appellate stage needs to provide a statement or other documentation of the potential witness's proposed evidence.¹⁵⁵

69. In the present case, Shala has not provided the Appeals Panel with any statement regarding the content of W04264's anticipated testimony in the present case which would prompt the Appeals Panel to call the witness to testify in person. Shala provides no explanation for not doing so. In fact, Shala indicates that, at the time of the Motion, he had not been in contact with W04264.¹⁵⁶

70. In addition, in light of the determination above that the Proposed Evidence would not impact the verdict,¹⁵⁷ the Appeals Panel considers that Shala's request to call W04264 as witness on appeal is moot.

71. In these circumstances, the Appeals Panel denies Shala's request that W04264 be called to testify on appeal in this case.

6. Request for a Finding of Disclosure Violation

72. The Appeals Panel notes that Shala requests that the Panel "acknowledge" the SPO's alleged failure to provide adequate notice under Rule 102(3) of the Rules as "another violation" of the SPO's disclosure obligations with regard to its Rule 102(3) notice.¹⁵⁸

¹⁵⁴ See e.g. *Bagosora et al.* Decision on Additional Evidence, para. 8; *Nizeyimana* Decision on Additional Evidence, para. 10.

¹⁵⁵ See e.g. *Nizeyimana* Decision on Additional Evidence, para. 10; *Bagosora et al.* Decision on Additional Evidence, para. 8.

¹⁵⁶ See Motion, paras 6-7. The Appeals Panel takes note of the SPO's indication that W04264 experienced memory problems when recently testifying. See Response, para. 2, fn. 86. Shala also mentions in his brief in reply that "[REDACTED]". See Reply Brief, para. 12.

¹⁵⁷ See above, paras 58, 64-65.

¹⁵⁸ See Reply, paras 5, 8.

73. The Panel observes that this argument is being brought for the first time in the Reply and goes beyond the issues raised in the Response. The Panel recalls that a reply should be limited to the arguments contained in the response and that the core of the moving party's arguments must be provided in the initial motion.¹⁵⁹ As such, it should be rejected.¹⁶⁰

74. The Panel recalls that it has already found that the SPO failed to timely disclose the [REDACTED] SPO Interview to the Defence.¹⁶¹ However, in light of the very limited probative value of the Proposed Evidence and in light of the Panel's determination that the Proposed Evidence would not have an impact on the verdict had it been admitted at trial,¹⁶² the Panel is satisfied that Shala has suffered no prejudice as a result of this late disclosure and that no remedy is warranted in the present circumstances.¹⁶³

C. CONCLUSION

75. The Appeals Panel emphasizes that its findings in the present Decision pertain strictly to the admissibility of the Proposed Evidence and are in no way indicative of the Appeals Panel's consideration of the merits of Shala's appeal.

¹⁵⁹ See e.g. KSC-BC-2020-06, IA010/F00008/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Review of Detention, 27 October 2021, para. 12; ICTR, *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 8; ICTY, *Nikolić v. Prosecutor*, IT-02-06/1-A, Decision on Prosecution's Motion to Strike, 20 January 2005, para. 32.

¹⁶⁰ The Panel notes that Shala submits that the SPO's "repeated violations" of its disclosure obligations with respect to Rule 102(3) notices hindered his ability to present his case. See Reply, para. 6. However, and while he had the opportunity to do so, Shala did not make this challenge in his appeal against the Trial Judgment. See Notice of Appeal, para. 19; Appeal Brief, paras 170-173; Reply Brief, paras 31-33. See also Defence Final Trial Brief, para. 298. The Panel finds that a request filed under Rule 181 of the Rules does not constitute the proper vehicle to advance new allegations of errors that occurred at trial.

¹⁶¹ See Decision Regarding Disclosure, paras 12, 18.

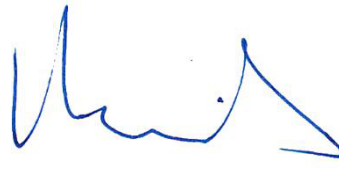
¹⁶² See above, paras 60, 66-67.

¹⁶³ See Decision Regarding Disclosure, para. 15.

IV. DISPOSITION

76. For these reasons, the Court of Appeals Panel:

DENIES the Motion.



**Judge Michèle Picard,
Presiding Judge**

Dated this Friday, 28 March 2025.

At The Hague, the Netherlands