PUBLIC
Date original: 04/04/2025 16:31:00
Date public redacted version: 15/04/2025 09:43:00

In:	**KSC-CA-2024-03**
	The Specialist Prosecutor v. Pjetër Shala
Before:	**Court of Appeals Panel**
	Judge Michèle Picard
	Judge Kai Ambos
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Victims' Counsel
Date:	4 April 2025
Language:	English
Classification:	Public

Public Redacted Version of Victims' Counsel's Response to the Defence Appeal of the Reparation Order with public Annex 1

Specialist Prosecutor's Office
Kimberly P. West

Counsel for the Accused
Jean-Louis Gilissen

Counsel for Victims
Simon Laws

Contents

I. INTRODUCTION

1. Pursuant to Articles 22(3) and (8), and 46(9) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Rules 114(4) and 179(2) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), the Decision on Victims' Participation on Appeal,[1] and the direction of the Appeals Panel,[2] Victims' Counsel hereby submits this Response to Pjetër Shala's Appeal Brief against the Reparation Order[3] on behalf of the eight victims participating in the proceedings ("VPPs").
2. Victims' Counsel addresses all of the grounds of appeal relied on by the Defence and invites the Panel to dismiss each of them and uphold the Reparation Order.

II. CLASSIFICATION

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

III. PROCEDURAL HISTORY

4. Eight VPPs have been admitted to participate in the proceedings.[4]
5. The Judgment of 16 July 2024 found Mr Shala guilty and sentenced him to 18 years of imprisonment, with credit for time served.[5]
6. On 24 July 2024, the Appeals Panel issued its Decision on Victims' Participation on Appeal.[6]

---

[1] KSC-CA-2024-03/F00005, Decision on Modalities of Victims' Participation in Appellate Proceedings, 24 July 2024 ("Decision on Victims' Participation on Appeal").
[2] Email from CMU forwarding a message from the Appeals Panel to the Parties and Participants, Potential appeal(s) of the Reparation Order against Pjeter Shala, 29 November 2024 at 12:12.
[3] KSC-CA-2024-03/F00049, Defence Appeal Brief against the Reparation Order with public Annex 1, 14 March 2025 ("Reparations Appeal Brief").
[4] KSC-BC-2020-04/F00123, First Decision on Victims' Participation, 15 December 2021, para. 50(a); KSC-BC-2020-04/F00249, Second Decision on Victims' Participation, 11 August 2022, para. 43(b); KSC-BC-2020-04/F00279, Third Decision on Victims' Participation, 19 September 2022, para. 43(a).
[5] KSC-BC-2020-04/F00847, Trial Judgment and Sentence with one confidential annex, 16 July 2024, paras 1124-1125 ("Judgment" or "Trial Judgment").
[6] Decision on Victims' Participation on Appeal.

7. On 29 November 2024, the Trial Panel issued its Reparation Order against Pjetër Shala.[7]
8. On 28 January 2025, having been granted an extension of time,[8] the Defence filed its Notice of Appeal of the Reparation Order.[9]
9. The Defence filed its Reparations Appeal Brief on 14 March 2025 (notified on 17 March 2025), having been granted an extension of time.[10] A corrected version was notified on 19 March 2025.[11]
10. On 26 March, Victims' Counsel requested a three-day extension to 4 April to file this Response,[12] which was granted by the Appeals Panel the following day.[13]

IV. SUBMISSIONS

A. Applicable law

11. The Rules and the Law make no specific provision for the standard of review in relation to reparation proceedings.
12. Article 46 of the Law provides that the Appeals Panel may affirm, reverse, or revise a Trial Judgment if there has been "an error on a question of law invalidating the judgement", or "an error of fact which has occasioned a miscarriage of justice".[14]

---

[7] KSC-BC-2020-04/F00866, Reparation Order against Pjetër Shala, 29 November 2024 ("Reparation Order").
[8] KSC-CA-2024-03/F00038, Decision on Defence Request for Extension of Time to File its Notice of Appeal Against the Reparation Order, 14 January 2025.
[9] KSC-CA-2024-03/F00042, Defence Notice of Appeal of the Reparation Order, 28 January 2025.
[10] Reparations Appeal Brief; 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.
[11] KSC-CA-2024-03/F00049/COR, Corrected Version of Defence Appeal Brief against the Reparation Order with public Annex 1, 14 March 2025.
[12] KSC-CA-2024-03/F00050, Victims' Counsel's Request for an extension of time to respond to the Defence Appeal Brief against the Reparation Order, 26 March 2025.
[13] KSC-CA-2024-03/F00051, Decision on Victims' Counsel's Request for an Extension of Time to Respond to the Defence Appeal Brief Against the Reparation Order, 27 March 2025.
[14] Article 46(1)(a)-(c), (3) of the Law; *Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj*, KSC-CA-2022-01/F00114, Appeal Judgment, 2 February 2023, para. 21 ("*Gucati and Haradinaj* Appeal Judgment"); *Specialist Prosecutor v. Salih Mustafa*, KSC-CA-2023-02, Appeal Judgment, 14 December 2023, para. 17 ("*Mustafa* Appeal Judgment").

13. Victims' Counsel submits that the same standard of review should apply to appeals against reparation orders as that applicable to appeals under Article 46, provided that the specificities of the reparation proceedings are duly considered (for example, different standard of proof or the use of presumptions). This is consistent with the practice at the ICC.[15]

14. On errors of law, in the *Mustafa* case the Appeals Panel elaborated that:

> The party alleging an error of law must identify it, present arguments in support of its claim and explain how the error invalidates the decision. In addition, when a party alleges an error of law on the basis of a lack of a reasoned opinion, it must identify the specific issues, factual findings or arguments which the Trial Panel is alleged to have omitted, and explain why this omission invalidates the decision. The Appeals Panel considers that an alleged error of law which has no prospect of changing the outcome of the decision may be rejected on that basis. However, even if a party's arguments are insufficient to support the contention of an error, the Panel may find an error of law based on other reasons. The Appeals Panel will review the Trial Panel's findings of law to determine whether they are correct.[16]

15. The ICC Appeals Chamber has consistently stated in relation to errors of law raised on an appeal against a reparation order that it:

> … will only intervene if the error materially affected the Impugned Decision.
>
> [An Impugned Decision] is "materially affected by an error of law" if the Trial Chamber "would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error".[17]

---

[15] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3466-Red, 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, paras 27-33 ("*Lubanga* Judgment on Reparation Appeals"); *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, 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", 9 March 2018, paras 39-41, 43-45 ("*Katanga* Appeal Judgment on Reparations"); *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2908-Red, Judgment on the appeals against the decision of Trial Chamber II of 14 July 2023 entitled "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659", 1 November 2024, paras 14-15, 17-22 ("2024 *Ntaganda* Appeal Judgment").

[16] *Mustafa* Appeal Judgment, para. 18.

[17] ICC, see for example, *Katanga* Appeal Judgment on Reparations, para. 39; *Lubanga* Judgment on Reparation Appeals, para. 28; 2024 *Ntaganda* Appeal Judgment, para. 14.

16. In the *Mustafa* case and in line with Article 46(5) of the Law, the Appeals Panel set out the standard of review applicable to appellate proceedings in respect of factual findings before the Kosovo Specialist Chambers:

> …The Appeals Panel will not lightly overturn a trial panel's factual findings, as it is primarily the latter's task to hear, assess and weigh the evidence presented at trial. The Appeals Panel will only overturn a decision by a trial panel where an error of fact occasioned a miscarriage of justice. In this regard, the Panel notes that mere disagreement with the conclusions that the Trial Panel drew from available facts or the weight it accorded to particular factors is not enough to establish a clear error.[18]

17. A similar standard of review is applied by the ICC Appeals Chamber,[19] keeping in mind that the standard of proof at the reparation stage is "balance of probabilities" and not "beyond reasonable doubt".[20]
18. In relation to errors concerning factual presumptions applied in reparations proceedings, the ICC Appeals Chamber has found that:

> On appeal, bearing in mind the standard of review, a party challenging a factual presumption must demonstrate that no reasonable trier of fact could have formulated the presumption in question in light of the particular set of circumstances in that case.[21]

19. The Appeals Panel in the *Mustafa* case held that it has "inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and may dismiss arguments which are evidently unfounded without providing detailed reasoning."[22] For example, arguments that should be summarily dismissed on appeal, include:

[18] *Mustafa* Appeal Judgment, para. 24.
[19] ICC, 2024 *Ntaganda* Appeal Judgment, para. 15; *Lubanga* Judgment on Reparation Appeals, para. 30; *Katanga* Appeal Judgment on Reparations, para. 41.
[20] ICC, 2024 *Ntaganda* Appeal Judgment, para. 16; *Lubanga* Judgment on Reparation Appeals, para. 33; *Katanga* Appeal Judgment on Reparations, para. 42.
[21] ICC, *Katanga* Appeal Judgment on Reparations, para. 77.
[22] *Mustafa* Appeal Judgment, para. 33.

> vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals [Panel];
>
> […]
>
> ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate an error; and
>
> x) mere assertions that the trial [panel] failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.[23]

20. Drawing on a wide range of precedent, the Appeals Panel in the *Mustafa* case found that arguments not raised in trial proceedings should be summarily dismissed on appeal:

> …The Appeals Panel considers that, absent special circumstances, if a party fails to raise an issue in a timely manner during trial, when it reasonably could have done so, it has effectively waived its right to raise it on appeal.[24]

21. Similarly, the ICC Appeals Chamber has held:

> The Appeals Chamber recalls that if it were to address the substance of arguments that could have reasonably been raised before the first-instance chamber, but were raised for the first time only on appeal, this "would exceed the scope of its review", as there would be no finding from the trial chamber to review.[25]

---

[23] *Mustafa* Appeal Judgment, para. 33.
[24] *Mustafa* Appeal Judgment, para. 30, citing the following authorities: *Karadžić* Appeal Judgement, paras 25, 312; *Prlić et al*. Appeal Judgement, para. 165; *Boškoski and Tarčulovski* Appeal Judgement, para. 185; *Tolimir* Appeal Judgement, para. 170; *Šainović et al*. Appeal Judgement, para. 223; *Kunarac et al*. Appeal Judgement, para. 61; *Niyitegeka* Appeal Judgement, para. 199. See also, ICC, *The Prosecutor v. Dominic Ongwen*, Appeals Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence", ICC-02/04-01/15-2023, 15 December 2022, para. 108 ("*Ongwen* Sentencing Appeal Judgment").
[25] ICC, *Ongwen* Sentencing Appeal Judgment, para. 108. See also, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 17 December 2009, para. 109; *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-251, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 17 June 2015, para. 45.

B. Victims' standing in appeal proceedings against reparation order

22. Victims' Counsel notes that in its Decision on Victims' Participation on Appeal, issued in relation to the appeal proceedings against the Trial Judgment and before the Reparation Order against Mr Shala was delivered, the Appeals Panel held that:

> …Counsel for Victims may continue, […] to make oral and written submissions on any point of law or fact, and to file responses and replies, as the case may be, to any submissions made before the Panel, including appellate briefs. However, the Panel stresses that Counsel for Victims must explicitly set out how the submissions are related to the participating victims' personal interests.[26]

23. The right of VPPs to reparations is explicitly provided for in Article 22(3) and (8) of the Law. VPPs are *de facto* the triggering parties of the reparation proceedings. VPPs, pursuant to Article 46(9) of the Law, are also entitled to appeal a reparation order. As recognized by the Trial Panel and not contested, "reparations at the SC ought to be victim-centred."[27]
24. It is also noteworthy that victims participating in reparation proceedings before the ICC are considered to be parties to those proceedings. This has been derived from the fact that pursuant to Article 82(4) of the Rome Statute, victims (through their legal representatives) may appeal a reparation order.[28]
25. It is therefore submitted that VPPs interests in submitting this response and in their continued participation in these appeal proceedings are self-explanatory and apparent.

---

[26] Decision on Victims' Participation on Appeal, para. 10 (see also para. 3 of the same decision).
[27] Reparation Order, para. 35; *Specialist Prosecutor v. Salih Mustafa*, KSC-BC-2020-05/F00517/RED/COR, Corrected version of Public redacted version of Reparation Order against Salih Mustafa With 4 Annexes strictly confidential and ex parte, 14 April 2023, para. 68 ("*Mustafa* Reparation Order").
[28] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2953, Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, para. 67; *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1820, Order for submission on reparations, 6 May 2021, para. 5, fn 4.

C. Response

1. *The Trial Panel correctly identified and applied the test of causation between the crime and the harm suffered (Response to Ground 1)*

26. Under the first ground, the Defence argues that the Trial Panel erred in law by holding the Accused liable to repair harm which it says was not caused by his acts or omissions.[29] Specifically, the Defence alleges that: (i) the Trial Panel erroneously identified the required causal link as the "but/for relationship" between the crime and the harm and that the Trial Panel failed to identify the basis in law of its test of causation; (ii) that the correct causal link should be between Mr Shala's culpable conduct and the harm caused to the VPPs; and finally, (iii) that the Trial Panel erroneously applied the causal link because it did not consider the culpable conduct of Mr Shala or the extent to which such conduct may have contributed to any harm suffered by the victims.[30] The Defence has failed to demonstrate any error of law, let alone one requiring appellate intervention.

(a) No assessment of Mr Shala's contribution to the crimes is necessary

27. The Defence wrongly suggests that for the purpose of reparations a causal link must exist between the culpable conduct of Mr Shala and the "specific harm" caused to VPPs. This proposition conflates the issue of the convicted person's liability for reparations with the issue of the causal link that must exist between the crimes for which an accused was convicted and the harm they are said to have caused.

[29] Reparations Appeal Brief, paras 6, 10-11, 13.
[30] *Ibid*., paras 7-9, 12, 13.

28. The factual causal link understood as the "but/for relationship" between the crime and the harm is not an invention of the Trial Panel.[31] It has been relied on and applied in reparation proceedings before the ICC.[32]

29. The Defence's arguments under this ground repeat its earlier submissions[33] that were fully addressed by the Trial Panel in the Reparation Order. The Trial Panel explained their approach, and rejected the alleged error raised by the Defence in clear terms, requiring no further explanation:

> […] as to the Defence's argument that the crimes which resulted in the Victims' suffering were not carried out by the acts of Mr Shala, the Panel finds that the Defence fundamentally misinterprets the requirement for causal link. The causal nexus needs to be established between the crimes of which Mr Shala has been found guilty and the alleged harm suffered by the Victims. Mr Shala's obligation to repair the harm arises from his individual criminal responsibility as a member of a joint criminal enterprise having committed the aforementioned crimes, as established in the Trial Judgment. In this regard, the Panel notes that Mr Shala did in fact actively participate in some of the beatings, and therefore also directly participated in the harm suffered by the Victims. Nevertheless, the Panel underlines that it does not matter whether he personally carried out individual acts resulting in said harm, nor is it necessary, or for that matter possible, to link each specific harm suffered to each specific instance of mistreatment. This is especially the case when victims have been systematically mistreated in a variety of ways during several weeks, including by being subjected to inhumane and degrading conditions of detention. As will be laid out in detail below, the Panel is satisfied 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. The Panel therefore dismisses the Defence's argument in this regard.[34]

30. The Defence merely disagrees with this interpretation and application of the Law and notably fails to engage with the Trial Panel's reasoning. Instead, it

---

[31] Reparation Order, paras 61-62 and fn 90-91.
[32] *Mustafa* Reparation Order, para. 95; ICC, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-2074, Reparations Order, 28 February 2024 ("*Ongwen* Reparations Order"), para. 419; *The Prosecutor v. Thomas Dyilo Lubanga*, ICC-01/04-01/06-3129-AnxA, Order for Reparations (amended), 3 March 2015, para. 59 ("*Lubanga* Reparations Order").
[33] 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, paras 29, 42, 58, 61 ("Defence Response to Reparations Request").
[34] Reparation Order, para. 99. See also Reparation Order, paras 80-84 wherein the Panel dealt with the question of a convicted person's liability for reparations.

simply repeats its arguments without even acknowledging, still less addressing, the jurisprudence that demonstrates their falsity.

31. Despite the Defence's disagreement with the Trial Panel's interpretation and application of the Law, it is consistent with the jurisprudence and practice of the KSC and the ICC.[35] In support of its submissions, and in the face of clear authority, the Defence cites one case: an eighty-five-year-old domestic authority relating to an irrelevant aspect of the civil law of negligence.[36]
32. The Defence submissions proceed on the basis of a misstatement of the case law. Contrary to their argument, there is no need for a "causal link" between Mr Shala's actions and the "specific harm" caused to the direct victims. "Specific harm", in this context, seems to be used to denote individual injuries. This is an unwarranted and unnecessary refinement of the assessment of harm for the purpose of deciding reparations in international criminal trials.
33. The supposed "error" that the Defence purports to identify amounts to the Trial Panel having found Mr Shala liable to repair the harm caused by others. This is no error at all, but rather a direct and inescapable consequence of the fact that he was convicted on the basis of his participation in a joint criminal enterprise.
34. The law in relation to the liability of those convicted as part of a joint criminal enterprise is settled and clear: all participants are jointly and severally liable for the harm caused to the victims.
35. In the *Ntaganda* case, the specific point relied on by the Defence was addressed:

> 218. Accordingly, the Chamber finds Mr Ntaganda liable to repair the full extent of the harm caused to the direct and indirect victims of all crimes for which he was

[35] ICC, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2659, Reparations Order, 8 March 2021, paras 217-219 ("*Ntaganda* Reparations Order"); *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2782, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 12 September 2022, paras 267-268 ("2022 *Ntaganda* Judgment on Appeal of Reparation Order"). See also, Reparation Order, para. 99.
[36] See para. 40 below.

> convicted, regardless of the different modes of liability relied on in the conviction and regardless of whether others may have also contributed to the harm.
>
> 219. As to the shared liability of Mr Ntaganda and his co-perpetrators in the crimes for which he was convicted, including Mr Thomas Lubanga, the Chamber notes that they are all jointly liable *in solidum* to repair the full extent of the harm caused to the victims. Responsibility *in solidum*, as noted by the Appointed Experts, entails the corresponding right for any of the co-perpetrators who may have repaired, in full or in part, the harms caused to the direct and indirect victims, to seek to recover from the co-perpetrators their proportionate share.[37]

36. This decision was upheld by the ICC Appeals Chamber in clear terms:

> 267. The Appeals Chamber recalls that:
>
> > A 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.
>
> 268. The Appeals Chamber further held that the above finding "does not mean, however, that the amount of reparations for which a convicted person is held liable must reflect his or her relative responsibility for the harm in question *vis-à-vis* others who may also have contributed to that harm". The Appeals Chamber clarified that,
>
> > in principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person's liability to repair that harm. While a reparations order must not exceed the overall cost to repair the harm caused, it is not, *per se*, inappropriate to hold the person liable for the full amount necessary to repair the harm.[38]

37. Notwithstanding this jurisprudence, the Defence wrongly suggests that for the purpose of reparations the causal link must exist between the culpable conduct of Mr Shala and the "specific harm" caused to VPPs, and that the Panel were at fault in failing to carry out an analysis of the link between the two. In order to

[37] ICC, *Ntaganda* Reparations Order, paras 218-219. See also, *Katanga* Appeal Judgment on Reparations, paras 175 and 178.
[38] ICC, 2022 *Ntaganda* Judgment on Appeal of Reparation Order, paras 267-268. See also, *Katanga* Appeal Judgment on Reparations, paras 175 and 178.

support this proposition, the Defence simply asserts what *they* suggest the Trial Panel "*ought*" to have done:

> For the purposes of 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.[39]

38. Victims' Counsel notes that as well as there being no authority for such a rule, there could be no justification for one: the essence of joint offending is that each accused, by his conduct, assumes responsibility for the acts of others. It is impossible to see why, at the reparations stage, liability should cease to be joint but should instead be assessed on the basis of individual culpable acts. By the reparations stage in a joint criminal enterprise case, there has been a finding that an accused took part in a criminal offence, sharing the objective and intention of his co-perpetrators. The harm thereby caused is a product of a joint endeavour to cause injury for which all perpetrators share responsibility. Why the proper approach at the reparations stage should be to ignore the joint nature of the offence and instead to parse and assess each individual's conduct and seek to attribute a "specific harm" to it, is not explained.
39. The practical consequences of such a rule would be to render reparations proceedings impracticable in many scenarios. A group of offenders wearing masks, whose joint conduct was shown to have caused harm for which reparations would otherwise be ordered, could defeat any such claim by their victims on the basis that it was not possible to link their individual conduct to any "specific harm" suffered. Such a rule, so clearly capable of producing absurd and undesirable outcomes, seems unlikely to have any role to play in

[39] Reparations Appeal Brief, para. 9.

the development of the law in this area, and, absent any authority to support it, can be presumed not to exist.

40. Rather, the sole authority offered by the Defence in support of the radically different approach to causation that it proposes in opposition to the jurisprudence of the ICC and the KSC, is the case of *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152. This case is no authority for any of the propositions being advanced by the Defence. The case concerned a civil action arising from an accident in a coal mine in which a man had been killed. The plaintiff alleged that the death was due to the dangerous conditions of the man's work and that the employers were therefore liable. Part of the employer's case was that the deceased's own conduct had contributed to his death, thereby reducing or extinguishing their liability. The quotation from Lord Atkin[40] recognises that the "contributory negligence" of the deceased worker was inextricably linked to the question of what caused the accident (and thereby who was responsible for it).

41. As Lord Atkin went on to explain:

> And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis be asking who caused the injury…[41]

42. Victims' Counsel notes that the doctrine of contributory negligence has no discernible relevance to this case, and that the quotation relied on by the Defence has no bearing at all on the liability of an accused to make reparations in a criminal case before the KSC. It does not undermine in any way the well-established legal framework which the Trial Panel correctly identified and applied.[42]

---

[40] A judge of what was at this time the highest court in the United Kingdom, the Judicial Committee of the House of Lords.
[41] *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, p. 165.
[42] See paras 35 and 36 above.

43. Having been invited to clarify its position during closing submissions in relation to the issue of the liability of JCE members for reparations, the Shala Defence made a clear concession as to the applicable law:

> Your Honours, thank you. Just perhaps a clarification is required. When we stated the evident fact that Mr. Shala cannot be held liable nor ordered to repair harm caused by others, we meant others who cannot be considered jointly liable. And I believe that this clarifies our position. Thank you.[43]

44. Victims' Counsel respectfully submits that that concession was correctly made. Mr Shala has been found by the Trial Panel to have been part of a JCE and is therefore jointly liable with its other members, irrespective of whether or not the Defence agree with that factual finding.

(b) No assessment of Mr Shala's specific contribution to harm is necessary

45. In relation to the causal link the Defence also argues that the Trial Panel adopted an erroneous understanding of legal causation when it specified that the harm must be the direct result of the crime and that the crime does not have to be the only cause of the harm suffered, but it must have contributed thereto.[44] The Defence takes issue with the Trial Panel's allegedly erroneous departure from the Pre-Trial Judge's conclusion that the crime must have significantly contributed to the harm.[45] However, the Defence provides no other reference to support this proposition.

46. The Trial Panel's understanding of the legal causation is grounded in the jurisprudence cited by it in the *Mustafa* Reparation Order. Interestingly, the Panel relies on the same decision as that relied on by the Pre-Trial Judge, specifically, the Fourth Decision on Victims' Participation in the *Bemba* case. A

[43] T. 17 April 2024, 4365:7-12. See the development of this argument in T. 17 April 2024, 4348:4-4350:15, 4362:9-4363:1.
[44] Reparation Order, para. 64, fn 93.
[45] Reparations Appeal Brief, para. 7.

careful reading of paragraph 77 of that decision makes it clear that the Trial Panel's position is the correct one:

> In case two or more distinct incidents referred to by a victim applicant are alleged to be the cause of the harm purportedly suffered, the Single Judge is of the view that the required causality cannot be ruled out because other events, besides those under judicial examination, may have contributed to the harm purportedly sustained. The Single Judge finds that the incidents forming the factual basis of the alleged crime(s) must not have played a substantial part or be the predominant cause as long as they have, at least in part, as viewed *ex post* by an objective observer, contributed to the harm allegedly suffered.[46]

47. Therefore, the Defence is wrong to suggest that the Trial Panel erred by specifying that the crime's contribution to the harm need not even be significant for causation to be considered established.[47] Accordingly, the Trial Panel did not have to 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".[48] Contrary to the Defence's submission, the Trial Panel's interpretation of legal causation is correct. Whether other contributing factors could or could not be considered as the crime's cause was irrelevant for the purpose of deciding on Mr Shala's liability for the harm caused by the crimes of which he was convicted.[49] Victims' Counsel notes that the Defence has failed to explain the practical implications of their interpretation of the Reparation Order having regard to the factual findings of the Trial Panel.

(c) *Novus actus interveniens* is irrelevant

48. Victims' Counsel makes two submissions with regard to the Defence's proposition that "the Trial Panel entirely failed to consider the effect of the *novus*

[46] ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-320, Fourth Decision on Victims' Participation, 15 December 2008, para. 77.
[47] Reparations Appeal Brief, para. 7.
[48] *Ibid*.
[49] *Ibid*.

actus interveniens brought about by the refusal to allow the Murder Victim's transfer to hospital".[50]

49. First, this submission was not made at any stage of the reparation litigation before the Trial Panel. For the reasons set out at paragraphs 20 and 21 above, it should be summarily dismissed.

50. Second, if the Defence submission is to be considered on its merits, it should be rejected. *Novus actus interveniens* may operate to negate an accused's criminal liability if it can be shown that a supervening event was the true cause of death, but this was not the finding of the Trial Panel.[51] Following Mr Shala's conviction for murder, *novus actus interveniens* is of no relevance to determine his liability for reparations in this case.

2. *The Trial Panel did not err by presuming certain harm and did not make arbitrary awards (Response to Ground 2)*

51. Under the second ground the Defence alleges that the Trial Panel erred in law by basing its awards on presumptions of harm suffered by the VPPs.[52] The Defence also repeats on three occasions the complaint made in Ground 1, *i.e.* that the harm was not properly linked to the conduct of Mr Shala.[53]

52. The use of presumptions in reparation proceedings in itself is not an error. The Defence alleges that "[t]he Trial Panel's presumptions […] were presumptions that no reasonable trier of fact would have made", but it fails to substantiate that allegation.[54] In footnote 18 the Defence purports to point to examples of the erroneous use of presumptions by the Panel. However, these examples concern

[50] Reparations Appeal Brief, para. 12.
[51] To the contrary, the Trial Panel regarded the decision to deprive the Murder Victim of medical attention as evidence of an intention to kill, see Trial Judgment, para. 990.
[52] Reparations Appeal Brief, paras 15, 17, 18, 19.
[53] *Ibid*., paras 15, 17, 20.
[54] *Ibid*., para. 16.

either general considerations on the use of presumptions,[55] presumptions adopted correctly and consistently with established jurisprudence,[56] or instances which do not concern presumptions at all.[57] Furthermore, the Defence failed to indicate why any of the alleged instances of the use of presumptions by the Trial Panel is wrong and unreasonable.

53. The Defence highlight the following occasions on which, it argues, presumptions have been incorrectly applied: V01/04 and W04733's harm in the form of not being able to pursue an average career path, and their harm in the form of social stigma and loss of opportunities. Here, the Defence seems to confuse presumptions of harm with the assessment of evidence conducted against the test of the balance of probabilities.

---

[55] Reparation Order, para. 70 (the Trial Panel states that "certain harms may be presumed, once a victim has demonstrated, on the balance of probabilities, to be a victim of the crimes of which the convicted person was convicted, and that it may rely upon circumstantial evidence when a victim lacks direct proof. However, when resorting to presumptions, the Panel must respect the rights of the victims as well as of the convicted person"); Reparation Order, para. 90 (the Trial Panel notes that it "will also, where it sees fit, proceed on presumptions, once a victim proved, on a balance of probabilities, to be a victim of the crimes of which Mr Shala was convicted, or rely on circumstantial evidence.").

[56] Reparation Order, para. 54 (presumption that those in "close personal relationship" with the direct victim have suffered personal harm that resulted from the crimes against the direct victim); para. 65 (the mental harm of an indirect victim as a result of the death or grave injury of a direct victim shall be presumed, provided that the close relationship between them is sufficiently established). Victims' Counsel notes that these are presumptions that have been universally applied in similar contexts. Further, the Defence did not challenge: KSC-BC-2020-04/F00064, Framework Decision on Victims' Applications, 1 September 2021, para. 40; First Decision on Victims' Participation, para. 28 and references therein.

[57] Reparation Order, paras 58-59 (the Trial Panel discusses types of harm suffered by victims of specific crimes, not presumptions of harm); para. 67 (discusses the burden and standard of proof, not presumptions of fact or harm); para. 113 (discusses V01/04's mental harm and his evidence, and notes that "the accusations of being a 'collaborator' or a 'spy' also cast a long-lasting social stigma on V01/04 and his family": no mention of presumptions); paras 118-119 (the Panel discusses the harm suffered by V01/04 in the form of loss of opportunities: no mention of presumptions); para. 139 (discusses harm suffered by the family members of W04733, including his children not being able to pursue their chosen life paths: no mention of presumptions); paras 140-141, 143 (discusses material harm suffered by W04733 and that of his family members: no mention of presumptions); paras 200-201 (discusses specific amounts of material harm, including in relation to the medical costs incurred by W04733 due to his mistreatment at the KMF and the form of reparation awarded: no mention of presumptions).

(a) It was reasonable to conclude that V01/04 and W04733 would have been able to pursue an "average career path and gain employment with regular income"[58] but for the crimes committed against them at the KMF

54. The first matter to be clear about is that the conclusions reached by the Trial Panel in these instances were not dependent on presumptions. These were judgments formed by the Trial Panel after listening to the evidence, not as a result of presuming anything. A presumption permits a conclusion in the absence of evidence: this is not an apt description of the Trial Panel's approach here. Rather, the Trial Panel heard and weighed evidence and drew conclusions as to the likely way in which the future would unfold.

55. With regard to V01/04, the conclusion complained of is based upon the Trial Panel's finding that he was not able to work as a consequence of what happened to him at the KMF. This finding had support from [Redacted].[59] The evidence showed that V01/04 [Redacted],[60] and the Trial Panel accepted that he was no longer working as a result of fear connected to the crimes at the KMF.[61] It followed that he would have continued to be economically active had it not been for the intervening criminality which changed his life plan and which Mr Shala has been found to have been a part of. As the Trial Panel put it:

> The Panel is therefore persuaded that the crimes of which Mr Shala was convicted contributed to V01/04's loss of opportunities and inability to regain his financial independence [Redacted].[62]

56. With regard to W04733, a similar factual finding as to his inability to work as a result of the physical and mental harm resulting from his detention was made

[58] Reparations Appeal Brief, para. 17.
[59] Reparation Order, para. 115.
[60] See Trial Judgment, paras 99, 523.
[61] Trial Judgment, para. 685.
[62] Reparation Order, para. 119.

by the Trial Panel.[63] This led in turn to the same finding as that in relation to V01/04:

> The Panel is also persuaded 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. As a result, the family was deprived of their main breadwinner.[64]

57. Both V01/04 and W04733 had been shown to be people who had pursued careers,[65] but who were unable to work as a result of the crimes at the KMF.
58. With regard to the Defence's complaint that the finding that V01/04 and W04733 would have followed "average career paths" and gained "employment with regular income" had it not been for the crimes at the KMF, Victims' Counsel submits that this was a perfectly fair and reasonable approach to take. Based upon their previous working history, it would have been unfair to characterise their prospects as anything less than average. Again, this is not a presumption, but a matter of judgment and a conclusion on the facts.
59. In order to overturn a factual finding, the Defence must meet the standard of review set out above.[66] They do not attempt to do so. The Defence simply mischaracterise the Trial Panel's findings as presumptions and go on to assert that they were unreasonable[67] without proper explanation.
60. Specifically, with regard to V01/04, it should be noted that the amount actually requested by Victims' Counsel was but a fraction of the amount that would have been necessary to repair his harm. The calculation of Dr Lerz[68] was that his loss

[63] *Ibid*., para. 140.
[64] *Ibid*., para. 141.
[65] As a [Redacted] and police officer respectively, see Trial Judgment, paras 99 and 146.
[66] See paras 16 to 18 above.
[67] Reparations Appeal Brief, para. 16.
[68] An expert in the calculation of capitalized loss whose report was submitted by Victims' Counsel, 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 ("Lerz Report").

of earnings amounted to between [Redacted].[69] The Defence expert proposed a figure of [Redacted].[70] Victims' Counsel sought,[71] and the Trial Panel ordered, reparations for material harm in the sum of €60,000.[72]

61. It follows that, even if there was some force in the Defence argument that the Trial Panel should not have concluded that V01/04 would have followed an average career path, in order to undermine the figure actually awarded, the Defence would need to suggest that V01/04 would have earned an exceptionally small amount indeed each year for the period of his loss.[73] No basis is put forward for that proposition and it is therefore unclear how the Defence suggests the calculation of V01/04's material harm should have been approached.

62. With regard to the criticism of the Trial Panel for applying presumptions in relation to the harm suffered by the victims without assessing whether this harm could be imputed to Mr Shala, Victims' Counsel adopts his submissions in respect of Ground 1. The criticism is misplaced. The Trial Panel did not have to consider Mr Shala's liability any further: at the point of the Reparation Order, he had been convicted of a number of crimes and became liable to repair the harm caused by them, as provided by Article 22(8) of the Law.

(b) Paragraphs 19-21 raise arguments that were not advanced before the Trial Panel and should therefore be summarily dismissed

63. In relation to the harm in the form of social stigma and loss of opportunities, the Defence argues that "[i]n 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 their reputation and manner in which

[69] Reparation Order, para. 197.
[70] *Ibid*.
[71] *Ibid*.
[72] Reparation Order, para. 203.
[73] See para. 76 below.

they are perceived or received in Kosovan society in the aftermath of the war and, subsequently, in the Kosovan society *en route* to recovery."[74] The Defence thereby suggests that the direct victims were collaborators and therefore, according to Mr Shala, are themselves to blame for harm arising from societal attitudes in Kosovo.

64. It has never been submitted that, as a result of the direct victims being collaborators, the Reparation Order should have been structured so as to avoid awarding compensation for "self-inflicted harm".

65. The Trial Panel was never asked to determine whether the two direct victims were, as Mr Shala now asserts, collaborators. This is despite the fact that in the course of the trial, the Defence had ample opportunity both in writing[75] and orally[76] to raise this allegation against the direct victims.

66. It is a matter which would have been strongly contested both by the VPPs and on their behalf. However, in light of the jurisprudence cited at paragraphs 20 and 21 above, it is now too late: a fact-sensitive decision of this kind is wholly unsuited to appellate proceedings. This argument should therefore be summarily dismissed.

67. If, notwithstanding this procedural bar, the Defence arguments are to be considered, then they should be dismissed on their merits. A close analysis of the Reparation Order and of the relevant evidence shows that the social stigma and related loss of opportunities raised by the VPPs, stemmed from the fact that the direct victims were detained and mistreated at the KMF.

68. Specifically, V01/04 testified about being labelled a spy by the perpetrators at the KMF and explained the long-lasting effect that this had on him and his family.[77] The family members of W04733 testified about living in fear as a result

[74] Reparations Appeal Brief, para. 20.
[75] Defence Response to Reparations Request.
[76] See Transcripts for 16 and 17 April 2024.
[77] Reparation Order, paras 111-113.

of the crimes committed against W04733 at the KMF.[78] According to their evidence, they were perceived as a family of spies by some people, or considered as such, because of their father's detention at the KMF not because of W04733's alleged collaboration with the enemy.

69. The Defence argues that one cannot "complain of a loss of reputation which is the foreseeable consequence of one's own actions"[79] citing an excerpt from the jurisprudence of the European Court of Human Rights ("ECtHR") in relation to violations of the right to private life. According to this jurisprudence "Article 8 [of the Convention for the Protection of Human Rights and Fundamental Freedoms] cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence."[80] The jurisprudence cited by the Defence is irrelevant for the argument in question as it concerned allegations of violation of Article 8 brought by applicants in factual situations radically different to that of the VPPs in this case.[81] Unlike the factual background of the cases cited by the Defence, here, there has been no finding of fact that the stigma suffered by the victims is a consequence of their own actions. Further, no meaningful comparison can be made between an alleged violation of Article 8 and the assessment of harm before the Kosovo Specialist Chambers.

70. Finally, this argument, which is an egregious example of victim-blaming wholly unsubstantiated by the facts, mischaracterises the nature of the hostility towards victims by some sections of the community in Kosovo. The stigma attached to

[78] *Ibid*., paras 143-144.
[79] Reparations Appeal Brief, para. 20.
[80] ECtHR, *Case of Sidabras and Džiautas v. Lithuania*, Application nos. 55480/00 and 59330/00, Judgment, 27 July 2004, para. 49 ("*Sidabras and Džiautas v. Lithuania*").
[81] Two Lithuanian nationals who were former KGB agents (*Sidabras and Džiautas v. Lithuania)*; an actor convicted for unlawful possession of drugs (*Case of Axel Springer AG v. Germany,* [GC], Application no. 39954/08, Judgment, 7 February 2012); a professor convicted for misuse of office (*Case of Gillberg v. Sweden*, [GC], Application no. 41723/06, Judgment, 3 April 2012); case concerning freedom of expression (*Case of Medžlis Islamske Zadnice Brčko and Others v. Bosnia and Herzegovina*, [GC], Application no. 17224/11, Judgment, 27 June 2017).

those who were victims of the KLA, irrespective of the truth of the underlying allegation.

3. *The Trial Panel correctly determined the harm suffered by the VPPs (Response to Ground 3)*

71. Under this ground, the Defence submits that the Trial Panel "erred in law and fact by issuing compensation awards without requiring demonstration of actual damage suffered".[82] The Defence also submits that the Trial Panel erred in fact by finding specific material harm suffered by V01/04, W04733, and by V02/04, V03/04, V04/04, V05/04, V07/04 and V08/04.[83]

(a) "loss of earnings and a damage to [a] life plan" in relation to V01/04

72. The Defence complains that the award of €60,000 for the material harm to V01/04 was made without any "concrete claim demonstrating specific loss of earnings or damage to V01/04's life plan."[84]
73. This argument appears to re-state part of Ground 2 in different terms. Consequently, the answer to it will overlap with the response to that Ground.
74. The evidence that V01/04 had suffered a loss of income was extremely clear. He testified that he was unable to work because of his fear, which stemmed from the crimes committed against him [Redacted] at the KMF.[85] [Redacted].[86] The Trial Panel accepted both aspects of this evidence, as they were entitled to do. It follows that there was a proper evidential foundation for the decision to award reparations to him for his loss of earnings and the change to his life plan. In

[82] Reparations Appeal Brief, para. 23.
[83] *Ibid*., para. 23. At paragraphs 25, 26, and 30, the Defence also repeats the causation argument advanced in Ground 1. Victims' Counsel adopts his earlier submissions in response.
[84] *Ibid*., para. 23.
[85] Reparation Order, para. 115.
[86] *Ibid*.

determining the appropriate amount, the Trial Panel relied, amongst other evidence, on an expert report from Victims' Counsel and one from the Defence.[87]

75. Ultimately, Victims' Counsel sought, and the Trial Panel awarded, an amount that was a little over one third of the figure for loss of income for V01/04 arrived at by the Defence's own expert.

76. To look at the award from a different perspective: the period of V01/04's working life that remained after 1999 was estimated at [Redacted] years.[88] That means that the award of €60,000 for material harm to V01/04 equates to just €[Redacted] per year. In order for the Defence complaint to be upheld, the Trial Panel would have had to order reparations in an amount even lower than that. To do that would cross the line between an award of reparations that was adequate to count as "symbolic"[89] and an award that was simply inappropriately, even insultingly, low.

77. The Defence further submits that V01/04's criminal record provides a basis for undermining the Trial Panel's finding that he would have pursued "an average career path". This argument is undeveloped with no attempt to link any specific offence of which V01/04 has been convicted to the way in which that would have impeded his employment prospects to such a degree that he would have earned less than €[Redacted] per year. Concluding on a balance of probabilities that V01/04 would have pursued a similar professional life after the war (had it not been for the crimes at the KMF) is not unreasonable. It is not the case that having a criminal record is an obstacle to gainful employment.

78. The Defence makes further suggestions about the potential impact of the Covid-19 pandemic, and the economic difficulties of Kosovo, on the ability of V01/04 to make a living. However, the Defence Expert made specific mention of the

[87] See Reparation Order, paras 191-193.
[88] Lerz Report, p. 6, heading 3.1.1.
[89] Reparation Order, para. 165.

Covid-19 pandemic and its consequences in [Redacted] report,[90] as well as providing an analysis of the Kosovan economy[91] and *still* arrived at a figure for V01/04's loss of earnings that is almost three times the amount awarded by the Trial Panel. Dr Lerz explained that the Covid-19 pandemic was already factored into his calculations.[92] In any event, neither of these very minor adjustments have any significance for the sum requested by Victims' Counsel and awarded by the Trial Panel.

79. The questions that the Defence have to address are these: on what basis is it suggested that V01/04, previously a self-sufficient member of the workforce, would have earnt less than €[Redacted] per year, and what figure do they propose as an alternative, given that on the Trial Panel's findings, some amount of reparation was due to him.

(b) Material harm in relation to W04733's family members

80. Turning to the position of W04733 and his family, the Defence again repeats the complaint raised in Ground 2 that the Trial Panel erred in determining that W04733 would have managed to pursue "an average career path".[93] This submission includes the startling and ageist proposition that at the "advanced age" of [Redacted], it was an error to regard W04733 as having a significant working future. It is also misleading to state, without qualification, that W04733

[90] KSC-BC-2020-04/F00716, Defence Submission of an Expert Report for the Purpose of the Reparations Proceedings with Confidential Annex 1, 13 November 2023; KSC-BC-2020-04/F00716/A01, ANNEX 1 to Defence Submission of an Expert Report for the Purposes of the Reparations Proceedings, Profit loss calculation report and opinion regarding Victim V01/04 and Victims V2/04 to V2/08; DPS01621-DPS01723, Expert report of [Redacted] 'Profit loss calculation report and opinion regarding Victim V01/04 and Victims V2/04 to V2/08', 13 November 2023, p. 5 ("Defence Expert Report").
[91] Defence Expert Report, p. 11, notably not regarding post-war economic difficulties as deserving specific mention in the context of [Redacted] calculations.
[92] KSC-BC-2020-04/F00696/A01, ANNEX 1 to Victims' Counsel's Submission of Expert's Answers to Written Questions from the Defence with Confidential Annex 1, 27 October 2023, p. 5 (response to question 7).
[93] Reparations Appeal Brief, para. 26.

"was already retired"[94] from his job as a police officer: the evidence was that he had been dismissed by the Serbian authorities as part of their purge of Albanians from the police force.[95]

81. In other words, W04733 was not a person who had voluntarily retired. The evidence was that he went from being capable of discharging the functions of a police officer to being physically and psychologically "broken"[96] as a result of his detention at the KMF:[97]

> The evidence received by the Panel reveals that W04733 suffered long-lasting physical and psychological consequences due to the injuries he sustained during his detention at the KMF.[98]

82. The consequences included W04733 being unable to work:

> The Panel is also persuaded 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. As a result, the family was deprived of their main breadwinner.[99]

83. As a result, W04733's family members were entitled to reparations and the modest sum of €20,000 was awarded to reflect the fact that W04733, after his release from the KMF, was unable to gain paid employment before reaching retirement age in 2011. The sum calculated by Dr Lerz ([Redacted]) was not addressed by the Defence Expert[100] and the Trial Panel was entitled to regard it as providing guidance to them.

---

[94] *Ibid*., para. 26.
[95] W04733 himself put it in this way: "[Redacted]." P00116, [Redacted], SITF00013181-SITF00013189 RED at SITF00013182. See also, Trial Judgment, para. 177: "The witness was a Kosovo Albanian [Redacted], who worked as a police officer from 1968 until his dismissal in 1997 [Redacted]." His dismissal by the Ministry of the Interior was based on his Albanian ethnicity. See T. 27 March 2023, 631:25-632:11.
[96] Trial Judgment, para. 703.
[97] The evidence in relation to W04733's incapacity as a result of his detention is summarized in the Trial Judgment at paras 700-703.
[98] Trial Judgment, para. 700.
[99] Reparation Order, para. 141.
[100] Reparation Order, para. 199.

84. The Defence argue that "there was no sufficient or credible evidence in support of the victims' claims for reparation"[101] with regard to the award of €30,000 in respect of medical expenses. Victims' Counsel notes that the Trial Panel correctly stated the law on the topic of medical records and invoices:

> The Panel will consider any difficulties victims may have faced in gathering and producing information, such as medical, financial, and employment records, including due to the passage of time since the crimes were committed.[102]
>
> […]
>
> The Panel stresses in this regard that it is not a requirement to furnish data as to the costs of medical treatments or other harm of financial or patrimonial nature […].[103]

85. The Trial Panel's approach in this regard was consistent with that developed at the ICC:

> The Appeals Chamber recalls that, in reparations proceedings, a standard "less exacting" than that for trial applies. This is, in part, due to the difficulties victims may face in obtaining evidence in support of their claims.[104]

86. Furthermore, the suggestion that the Trial Panel ought to have considered "figures showing the average costs for the provision of relevant medical services at the time in Kosovo"[105] should be disregarded. To obtain evidence of that kind would be a burdensome and disproportionate measure of the kind discouraged by the ICC Appeals Chamber:

> However, in the exercise of their discretion, it is clear that proceedings intended to compensate victims for the harm they suffered, often years ago, must be as expeditious and cost effective as possible and thus avoid unnecessarily protracted, complex and expensive litigation.[106]

---

[101] Reparations Appeal Brief, para. 29.
[102] Reparation Order, para. 89.
[103] *Ibid*., para. 179.
[104] ICC, *Katanga* Appeal Judgment on Reparations, para. 75.
[105] Reparations Appeal Brief, para. 27.
[106] ICC, *Katanga* Appeal Judgment on Reparations, para. 64.

87. In this context, the Defence also argues that "[t]he Trial Panel's approach contradicts well-established case law under Article 41 of the ECHR that requires injury to be specifically demonstrated and substantiated to be recovered as just satisfaction"; and that "[t]he Panel erred in holding that the ECHR 'jurisprudence and practice' on reparation awards 'remains of limited relevance'."[107]

88. However, the Defence provides no reference to support this proposition. Notably, the Practice Direction of the ECtHR states in relation to pecuniary damage:

> The applicant should submit relevant evidence to prove, as far as possible, not only the existence but also the amount or value of the damage. Normally, the Court's award will reflect the full calculated amount of the damage, unless it finds reasons in equity to award less (see point 4 above). If the actual damage cannot be precisely calculated, or if there are significant discrepancies between the parties' calculations thereto, the Court will make an as accurate as possible estimate, based on the facts at its disposal.[108]

89. It follows that, not only was the Trial Panel right to find that the ECtHR's jurisprudence and practice is of limited relevance, the practice of the ECtHR does not contradict that of the KSC.

90. The Trial Panel's approach must be seen in the light of the fact that it accepted the evidence that W04733 had long-lasting physical consequences from his mistreatment at the KMF and that the family had incurred substantial costs in funding that care.[109] That finding itself must be seen in the light of the earlier finding that the family of W04733 showed an "eagerness to stay truthful,

[107] Reparations Appeal Brief, para. 27.
[108] ECtHR, Practice Direction: Just satisfaction claims (Article 41 of the Convention), amended 9 June 2022, para. 9 (available at www.echr.coe.int/documents/d/echr/pd_satisfaction_claims_eng, last accessed 4 April 2025).
[109] Reparation Order, para. 200.

coupled with a manifest attempt at accuracy",[110] and were credible.[111] This was not an unreasonable conclusion for the Trial Panel to reach.

91. With regard to the impact on the family of W04733, who suffered significant alterations to their life plans in terms of educational attainment and careers, the Defence submits that these were "autonomous choices made by the individuals concerned".[112] That is simply not what the evidence showed. Rather, it was the clear evidence of the family of W04733 that they lived in fear for their safety precisely because their father/husband had been the victim of crimes at the KMF. The Trial Panel accepted that evidence and went on to further accept that it was *as a consequence* of their fear and safety concerns, that they made "choices and decisions which limited their future prospects".[113] The Defence submissions amount to nothing more than a disagreement with the Trial Panel's findings and entirely fail to meet the standard for review set out at paragraphs 16 to 18 above.

92. As to the amounts awarded by the Trial Panel to the family members as a result of these harms, the Defence further submits that there were no figures before them, and that as a result the sums were "arbitrary".[114] This is an unrealistic submission. An expert such as Dr Lerz can provide projections based on some prior data, but it is not part of the role of an expert in capitalised loss simply to speculate about what a person may have achieved in their life had it taken a different turn. Nor is it the case that the sums awarded under this heading should be seen, as the Defence suggests, as straightforward compensation for lost earnings. A modest sum by way of reparations is a way of acknowledging, for example, that as a consequence of the crime, one's family has been ostracised, and their life plan altered. No precise value can be placed on a harm

[110] Trial Judgment, para. 148.
[111] *Ibid*., para. 154.
[112] Reparations Appeal Brief, para. 30.
[113] Reparation Order, para. 143.
[114] Reparations Appeal Brief, para. 31.

of that kind, but that is not a reason for a Trial Panel not to attempt to recognise it, as required by the Law.[115]

93. The final argument by the Defence is that the Trial Panel erred in fact and law in holding Mr Shala liable for the "stigma" that was attached to the family of W04733.[116]

94. It is said that Mr Shala cannot be held liable for the attitudes of others. It is clear that the Trial Panel were doing no such thing. Rather, W04733's family members were seen as "spies" *because* of his detention and mistreatment at the KMF, and this had repercussions for their lives.[117] The Defence submissions appear to lose sight of the fact that what happened at the KMF to W04733 was criminal from start to finish: he was arbitrarily detained and tortured there, and Mr Shala's involvement has been proved to the criminal standard. That criminality must therefore be seen as the genesis of the family's difficulties: without it, they would not have been shunned and stigmatised in the way that, on the evidence accepted by the Trial Panel, they were.

95. Secondly in relation to stigmatisation, the Defence repeats the allegation that W04733 was, or may have been, a collaborator.[118] For the reasons given in Section IV-C-2-(b) above, this proposition cannot be advanced at this stage of the proceedings.

4. *The amount awarded was adequate and the question of proportionality to the role played by Mr Shala is irrelevant (Response to Ground 4)*

96. The Defence alleges under Ground 4 that the Panel: "erred in fact and in law in awarding €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",[119] erred in

[115] Article 22(3).
[116] Reparations Appeal Brief, para. 31.
[117] Reparation Order, para. 143.
[118] Reparations Appeal Brief, para. 32.
[119] Reparations Appeal Brief, para. 34.

law by taking into account the gravity of the crimes, in assessing the amount to be awarded to W04733's family for the mental harm they suffered,[120] and erred by failing to consider the Accused's indigence.[121]

(a) The argument raised in paragraphs 35-37 substantially overlaps with that in Ground 1 and should be dismissed for the same reason

97. Reparation orders are not required to reflect the differing roles of those involved in a joint criminal enterprise. Each of the offenders is jointly and severally liable for the damage that their crime has caused (see Section IV-C-1-(a) above and the references to the *Ntaganda* case in particular).

98. The Defence in paragraph 37 relies on the *Lubanga* Appeals Judgment to argue again that the Reparation Order did not reflect the role, responsibility and alleged participation of Mr Shala in the perpetration of the crimes.[122] This *Lubanga* Judgment has been developed by the ICC Appeals Chamber in the above cited *Katanga* and *Ntaganda* cases.[123] This later jurisprudence does not support the Defence's submission:

> Importantly, as noted above under Mr Katanga's first ground of appeal, the purpose of reparations is to repair the harm that was inflicted on the victims. This corresponds to the general principle of public international law that reparations should, where possible, attempt to restore the *status quo ante*. For these reasons, the Appeals Chamber finds that, in principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person's liability to repair that harm. While a reparations order must not exceed the overall cost to repair the harm caused, it is not, *per se*, inappropriate to hold the person liable for the full amount necessary to repair the harm.[124]

[120] Reparations Appeal Brief, para. 41.
[121] *Ibid*., paras 42-43.
[122] *Ibid*., paras 36-37.
[123] See paras 35 and 36 above; ICC, *Katanga* Appeal Judgment on Reparations, paras 178-180, 182.
[124] ICC, *Katanga* Appeal Judgment on Reparations, para. 178.

(b) The gravity of the crimes (paragraph 41) provide relevant context to understand the extent of harm

99. Victims' Counsel notes that the Appeals Chamber in *Katanga* drew a distinction between factors relevant to sentencing, and those relevant to reparations. "Gravity" was considered to be in the first category in the context in which it had been used in that case. That does not mean that gravity could never be relevant to an assessment made for the purposes of reparations. The Appeals Chamber decided that the primary consideration for the purpose of determining reparations "is the extent of the harm and the cost it takes to repair that harm."[125] It also found that:

> [A]s long as a convicted person is held liable for the costs that it takes to repair the harm caused, there is no punitive element. That this amount may be high is simply a result of the extent of the harm caused by the crimes for which the person was convicted.[126]

100. In this context, it should be noted that the Appeals Chamber did not demur at the inclusion of the term "gravity" in the phrase "the gravity of the crimes in question" as being a relevant factor in the assessment of reparations,[127] and found that "Mr Lubanga has not demonstrated an error in the reasoning of the Trial Chamber."[128]

101. Importantly, unlike the position at the ICC, the KSC's legal lists reparations amongst applicable punishments under Article 44 of the Law (which is titled "Punishments"):

> The Panel wishes further to emphasise that, in its view, the objective of reparations at the SC is not solely to punish the convicted person as foreseen in Article 44(6) of

[125] *Ibid*., para. 184.
[126] *Ibid*., para. 185.
[127] ICC, *Lubanga* Judgment on Reparation Appeals, para. 309.
[128] *Ibid*.

> the Law; rather it serves to acknowledge and to repair, to the extent possible, the harm caused to the victims.[129]

102. At the ICC, reparations are not listed under Article 77 ("Applicable penalties") and the legal basis of the jurisprudence relied on by the Defence on this issue is substantially different to that of the KSC. Accordingly, the jurisprudence of the ICC is not instructive on this point. It follows that the Defence has not demonstrated an error of law.

103. All other things being equal, grave crimes are likely to produce serious harm. It is not therefore irrelevant to have regard to the gravity of the crimes in considering the appropriate level of reparations. The assessment does not take place in a vacuum. Where, as here, the crimes were grave, it is entirely appropriate to have regard to that fact as providing the context for a finding that a victim has been seriously harmed.

104. The Defence seems to suggest that the Trial Panel should have disregarded this important part of the background, but gives no reason why a Panel should conduct an assessment in that way.

105. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles and Guidelines"), include specific reference to the issue of gravity in the context of reparations:

> Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. *Reparation should be proportional to the gravity of the violations and the harm suffered*. […] In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.[130]

[129] Reparation Order, para. 33.
[130] Basic Principles and Guidelines, A/RES/60/147, 16 December 2005, para. 15 (*emphasis added*).

> In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of humanitarian law should, *as appropriate and proportional to the gravity of the violation and the circumstances of each case*, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[131]

106. Specifically, regarding compensation, the Basic Principles and Guidelines provide that:

> Compensation should be provided for any economically assessable damage, *as appropriate and proportional to the gravity of the violations and the circumstances of each case*, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
>
> (a) Physical or mental harm;
>
> (b) *Lost opportunities*, including employment, education and social benefits;
>
> (c) Material damages and loss of earnings, *including loss of earning potential*;
>
> (d) Moral damage;
>
> (e) Costs required for legal or expert assistance, *medicine and medical services*, and psychological and social services.[132]

107. If, arguendo, the Trial Panel erred in including "gravity" as a factor to be considered in their decision, there is still no basis for concluding that any of the amounts awarded might have been lower if they had not done so. Nor is there any foundation for the submission that the Trial Panel's reference to gravity indicates that they were seeking to impose a further punishment on Mr Shala.[133] Rather, they sought to repair the harm suffered by the VPPS.[134]

[131] Basic Principles and Guidelines, para. 18 (*emphasis added*).
[132] *Ibid*., para. 20 (*emphasis added*).
[133] Reparations Appeal Brief, para. 41.
[134] ICC, *Katanga* Appeal Judgment on Reparations, para. 185.

(c) Mr Shala's indigence (paragraphs 42-44) is irrelevant to the amount of the Reparation Order

108. On the topic of indigence, the Trial Panel observed that:

> 84. Likewise, the convicted person's indigence is irrelevant to this determination. Indeed, the indigence of the convicted person at the time of the issuance of the reparation order is neither an obstacle to the imposition of liability for reparations, nor does it give the convicted person any right to benefit from reduced liability. In fact, the reparation order can be enforced against the convicted person when the monitoring of the financial situation reveals that the person has the means to comply with the order. Whilst the convicted person's financial circumstances may affect the way in which reparations are implemented and executed, enforcement constitutes a separate matter that goes beyond the setting of the convicted person's liability for reparations.[135]

109. Similarly, the ICC jurisprudence is clear that indigence is not relevant to the assessment of the amounts payable under a Reparation Order.[136]

110. As a matter of principle, it is right to disregard the accused's indigence at the time of the making of the order. An accused's financial position may change for the better in the future in unpredictable ways. It would be invidious for him to be able to enjoy new wealth free of his obligation to his victims, simply because he had at one time been indigent. At the same time, there is no prejudice to an accused who plainly cannot be compelled to pay money that he does not have, nor be sanctioned in any way for his indigence.

111. Because the aim of reparations is to acknowledge and repair harm, they can only be calculated with regard to the damage sustained by the victims. The means of the accused are irrelevant: a reparation order could not be increased to reflect the wealth of an accused any more than it could be reduced to reflect his indigence. In this respect a reparation order is to be contrasted with a fine which does, typically, reflect an offender's ability to pay. The basis for that

[135] Reparation Order, para. 84.
[136] ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-236, Reparations Order, 17 August 2017, paras 113-114.

approach, that a wealthy individual would be punished to a lesser extent than an indigent one by the imposition of a fine at the same level, has no relevance to the assessment of reparations. Harm does not increase or decrease according to an individual's ability to pay.

112. Victims' Counsel further notes that the Registry has established a fund for victims into which contributions can be made in order to meet the Reparation Order against Mr Shala.[137] Thus Mr Shala's indigence, if given weight in the assessment of the appropriate monetary reparations, would have the unfortunate consequence of reducing the funds available to the VPPs from charitable donations made by third parties.

113. The submission that the Order will "haunt" Mr Shala and his family,[138] is an unpersuasive basis on which to request appellate intervention.

5. *Due process (Ground 5)*

114. The argument raised by the Defence under Ground 5 does not concern an error of law or fact in the Reparation Order. Rather, it is a request concerning an appellate scheduling matter. The subject matter of these appeals dictates the sequence in which they are to be heard.

V. RELIEF

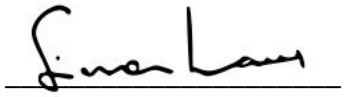
115. For the foregoing reasons, Victims' Counsel respectfully requests that the Appeals Panel:

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

(ii) Affirm the Reparation Order.

[137] KSC-BD-49, Registry Practice Direction, Receipt and Disbursement of Non-Earmarked Voluntary Donations for Contribution to Reparations, 28 November 2024.
[138] Reparations Appeal Brief, para. 43.

Word count: 12000



Simon Laws KC
Counsel for Victims

Maria Radziejowska
Co-Counsel for Victims

4 April 2025
At The Hague, the Netherlands.