KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-CA-2024-03**
	Specialist Prosecutor v. Pjetër Shala
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Kai Ambos Judge Nina Jørgensen
Registrar:	Fidelma Donlon
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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 Articles 33(1)(c) and 46 of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 172, 176 and 183 of the Rules of Procedure and Evidence ("Rules"), is seised of an appeal by Mr Pjetër Shala ("Shala" or "the Accused", who is the appellant) against the Trial Judgment in the case of the *Specialist Prosecutor v. Pjetër Shala*, KSC-BC-2020-04 ("Trial Judgment"), which was pronounced and filed in writing on 16 July 2024 in accordance with Rule 159 of the Rules. The Appeals Panel hereby issues the present Judgment, together with Annex 1 detailing the abbreviations used and materials cited in this Judgment.

I. BACKGROUND

A. PRE-TRIAL PROCEEDINGS

1. On 12 June 2020, the Pre-Trial Judge confirmed the indictment against Shala.[2]

2. The Accused was arrested on 16 March 2021 in the Kingdom of Belgium[3] and, on 15 April 2021, he was transferred to the detention facilities of the Specialist Chambers in The Hague, the Netherlands.[4]

3. The initial appearance of Shala took place before the Pre-Trial Judge on 19 April 2021, during which Shala pleaded not guilty to all crimes charged.[5]

[1] Decision on Assignment.
[2] Confirmation Decision.
[3] Notification of Arrest, paras 1, 5.
[4] Notification of Reception in the Detention Facilities, para. 2.
[5] Decision Setting the Date for the Initial Appearance, para. 22(a); Transcript, 19 April 2021, p. 11.

4. On 1 November 2021, the SPO submitted a corrected confirmed indictment,[6] following challenges to the form of the indictment.[7]

5. On 21 September 2022, the Pre-Trial Judge transmitted the case file to the Trial Panel.[8]

B. TRIAL PROCEEDINGS

6. The Trial in this case opened on 21 February 2023 and closed on 17 April 2024.[9] Between 27 March 2023 and 15 January 2024, the Trial Panel received evidence from 33 witnesses.[10] Throughout the pre-trial and trial phases of the case, eight victims participated in the proceedings.[11] During the trial proceedings, the Trial Panel considered, *inter alia*, oral evidence of *viva voce* witnesses, written statements of witnesses and of the Accused, documentary evidence and expert testimonies and/or reports.[12]

7. The Trial Panel found that between approximately 17 May 1999 and 5 June 1999, in the context of a non-international armed conflict between the KLA and the Serbian forces, at least 18 individuals were deprived of their liberty by the Accused and other KLA members at a former metal works factory in Kukës, Republic of Albania, the Kukës Metal Factory.[13] These individuals included [REDACTED] ("TW4-01"), the Murder Victim, [REDACTED] ("TW4-11"), [REDACTED] ("W04733"), [REDACTED] ("W01448"), [REDACTED] ("TW4-05"), [REDACTED] ("TW4-04"), [REDACTED] ("TW4-02"), [REDACTED], [REDACTED] and a third Roma detainee, [REDACTED], a female detainee, whose first name was "[REDACTED]" and at least

[6] Indictment.
[7] Decision on Defects in the Indictment.
[8] Decision Transmitting the Case File to Trial Panel I.
[9] Trial Judgment, paras 6, 12.
[10] Trial Judgment, paras 6-9.
[11] Trial Judgment, para. 13.
[12] Trial Judgment, para. 77.
[13] Trial Judgment, paras 587, 945.

one more female detainee, [REDACTED], [REDACTED], and [REDACTED] and [REDACTED]. The Trial Panel found that these detainees were deprived of all basic procedural guarantees to which they were entitled while in detention, pursuant to international humanitarian law.[14] The Trial Panel further found that the detainees at the KMF were held in inhumane and degrading conditions of detention and were routinely assaulted, both psychologically and physically for the purpose of obtaining information or a confession from them, and/or to punish, intimidate, coerce and/or discriminate against them on political grounds.[15] Lastly, the Trial Panel found that the Murder Victim died while still in detention at the KMF, on or about 5 June 1999, as a consequence of gunshot wounds inflicted on his leg, combined with the denial of appropriate medical treatment.[16] While the Accused was not found to be the one to have shot the Murder Victim, he was present in the room when the Murder Victim was shot and further participated in his mistreatment, both before and after the shooting.[17]

8. On 16 July 2024, the Trial Panel delivered the Trial Judgment, convicting the Accused of having committed, as part of a JCE I, the war crimes of arbitrary detention (Count 1), torture (Count 3) and murder (Count 4).[18] The Trial Panel considered that the charge of the war crime of cruel treatment was "fully consumed" by the charge of the war crime of torture and consequently found the Accused not guilty of the war crime of cruel treatment (Count 2).[19] The Trial Panel sentenced Shala to a single sentence of 18 years of imprisonment, with credit for time served.[20]

[14] Trial Judgment, paras 591, 946-948.
[15] Trial Judgment, paras 748-749, 752.
[16] Trial Judgment, paras 832, 1090.
[17] Trial Judgment, paras 830, 1107.
[18] Trial Judgment, paras 1037-1039, 1086, 1103-1108, 1124.
[19] Trial Judgment, paras 964, 1124.
[20] The Trial Panel imposed the following individual sentences on the Accused: (i) Count 1 (war crime of arbitrary detention, committed against at least 18 persons) – six years of imprisonment; (ii) Count 3 (war crime of torture, committed against at least 18 persons) – 16 years of imprisonment; and (iii) Count 4 (war crime of murder, committed against one person) – 18 years of imprisonment. Based

9. On 29 November 2024, the Trial Panel issued an order against the Accused, awarding reparations to eight victims participating in the proceedings.[21]

C. APPELLATE PROCEEDINGS

10. On 24 July 2024, the Appeals Panel granted, in part, the Accused's request for an extension of time to file his notice of appeal against the Trial Judgment and ordered him to do so by 2 September 2024.[22]

11. On 2 September 2024, the Accused filed a notice of appeal against the Trial Judgment.[23]

12. On 18 September 2024, the Panel granted in part the SPO's request to reject Shala's notice of appeal and ordered the Accused to file an amended notice of appeal.[24]

13. On 20 September 2024, the Presiding Judge of the Appeals Panel held a pre-appeal conference on behalf of the Panel.[25]

14. On 30 September 2024, the Accused filed his revised notice of appeal and, on 30 October 2024, a corrected version thereof.[26] Raising 14 grounds of appeal,[27] the Accused requests that the Court of Appeals Panel: (i) quash the convictions entered

on these individual sentences, the Trial Panel imposed a single sentence of 18 years of imprisonment, reflecting the totality of the Accused's criminal conduct, and deducted from the sentence the time he had spent in detention since his arrest on 16 March 2021. See Trial Judgment, paras 1121-1123.

[21] Reparation Order.

[22] Defence Motion for Extension of Time to File Notice of Appeal; Decision on Extension of Time to File Notice of Appeal. On 8 August 2024, the Appeals Panel denied an additional request from Shala to further vary the time limit to file his notice of appeal, and confirmed that the Parties had to file their notices of appeal, if any, by 2 September 2024. See Decision on Further Extension of Time to File Notice of Appeal, para. 8. See also Defence Motion for Further Extension of Time to File Notice of Appeal.

[23] Initial Notice of Appeal.

[24] Decision on Order to Shala to Refile the Notice of Appeal, para. 16; SPO Request for Shala to Refile Notice of Appeal.

[25] Order Scheduling Pre-Appeal Conference, para. 7; Transcript, 20 September 2024.

[26] For the purposes of the present Judgment, the corrected version of the revised notice of appeal filed by the Accused on 30 October 2024, is referred to as "Notice of Appeal".

[27] Notice of Appeal, para. 1.

by the Trial Panel on Counts 1, 3 and 4 and/or (ii) remit the case for retrial and/or (iii) impose, if necessary, an appropriate sentence.[28]

15. On 30 October 2024, the Appeals Panel granted in part the Accused's motion for an extension of time and word limit to file its appeal brief, authorising the Accused to file an appeal brief of no more than 32,000 words by 25 November 2024.[29]

16. On 13 November 2024, the Appeals Panel granted in part the requests of the SPO and Victims' Counsel for an extension of time to file their briefs in response, authorising both to file these by 17 January 2025.[30]

17. On 21 November 2024, the Appeals Panel denied the Accused's urgent request for the suspension or extension of the deadline to file his appeal brief.[31]

18. On 25 November 2024, the Accused filed his appeal brief and, on 26 November 2024, filed a corrected version thereof.[32]

19. On 10 January 2025, the Appeals Panel granted in part Shala's request to find that the SPO failed to comply with its disclosure obligations. The Panel further declared moot his request to order the SPO to disclose immediately all statements and testimonies in its possession relating to W04264, and denied his request that the SPO's

[28] Notice of Appeal, para. 35; Appeal Brief, paras 3, 272; Reply Brief, para. 49. See also Appeal Brief, paras 1-2; Reply Brief, para. 1. The Accused further requests the Appeals Panel to hold an appeal hearing. See Appeal Brief, para. 273.
[29] Decision on Variation of Time and Word Limits to File Appeal Brief; Defence Motion for Variation of Time and Word Limits to File Appeal Brief.
[30] Decision on Extension of Time to File Briefs in Response; SPO Request for Extension of Time to File its Response Brief; Victims Request for Extension of Time for Response Brief.
[31] Decision on Suspension or Extension of Time to File Appeal Brief; Defence Urgent Request for Suspension or Extension of Time to File Appeal Brief.
[32] For the purposes of the present Judgment, the appeal brief filed by the Accused on 26 November 2024 is referred to as "Appeal Brief".

violation should be "taken into consideration" by the Panel in the assessment of Shala's arguments on appeal.[33]

20. On 14 January 2025, the Appeals Panel granted the SPO's request for an extension of the word limit for filing its response brief, authorising both the SPO and Victims' Counsel to file response briefs, not exceeding 32,000 words each.[34]

21. On 17 January 2025, the SPO and Victims' Counsel filed their response briefs.[35]

22. On 28 January 2025, the Accused filed a notice of appeal against the Reparation Order.[36]

23. On 4 February 2025, the Accused filed his reply brief and, on 6 March 2025, a corrected version thereof.[37]

24. On 28 March 2025, the Panel denied the Accused's motion to present additional evidence on appeal pursuant to Rule 181 of the Rules and his request to call W04264 to testify on appeal.[38]

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[33] Decision Regarding Disclosure, para. 18; Defence Request Regarding Disclosure. See also SPO Response to Defence Request Regarding Disclosure.

[34] Decision on Extension of Word Limit for Response Briefs, para. 7; SPO Request for Extension of Word Limit for Response Brief.

[35] For the purposes of the present Judgment, the response brief filed by the SPO on 17 January 2025 is referred to as "SPO Response Brief"; the response brief filed by Victims' Counsel on 17 January 2025 is referred to as Victims Response Brief.

[36] Notice of Appeal of the Reparation Order. On 14 March 2025, the Accused filed his appeal brief against the Reparation Order and on 19 March 2025, a corrected version thereof. On 4 April 2025, Victims' Counsel filed his response brief on the Reparation Order. On 23 May 2025, the Accused re-filed his reply brief against the Reparation Order, which was initially filed on 24 April 2025. See Appeal Brief Against the Reparation Order; Victims Response Brief on Reparation Order; Reply Brief on Reparation Order. The judgment on the Accused's appeal against the Reparation Order will be issued separately.

[37] For the purposes of the present Judgment, the reply brief filed by the Accused on 6 March 2025 is referred to as "Reply Brief".

[38] Decision on Defence Rule 181 Motion, paras 67, 71, 76; Defence Rule 181 Motion. See also SPO Response to Defence Rule 181 Motion; Defence Reply to SPO Response to Defence Rule 181 Motion.

25. On 15 and 16 May 2025, the Appeals Panel heard oral submissions from the Parties and Participants regarding the appeal.[39] Further to specific questions sent to the Parties and Participants beforehand, the Appeals Panel also raised additional questions during the Appeal Hearing.[40]

26. In accordance with the Revised Order Scheduling Appeal Judgment dated 27 June 2025, the Panel decided to issue the Appeal Judgment on Monday, 14 July 2025.[41]

II. STANDARD OF REVIEW

27. Article 46 of the Law sets out the standard of review for appeals against trial judgments. Under Article 46 of the Law, the Appeals Panel may affirm, reverse or revise the Trial Judgment, and take any other appropriate action, on the following grounds: (i) "an error on a question of law invalidating the judgement"; (ii) "an error of fact which has occasioned a miscarriage of justice"; or (iii) "an error in sentencing".[42]

28. 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.[43] 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

[39] Order Scheduling Appeal Hearing; Transcript, 15 May 2025; Transcript, 16 May 2025. See also Order for Preparation of Appeal Hearing.
[40] See Order for Preparation of Appeal Hearing; Transcript, 15 May 2025, pp. 110-113; Transcript, 16 May 2025, pp. 139-141, 163, 181. See also Defence References for Appeal Hearing Questions; SPO References for Appeal Hearing Question.
[41] Revised Order Scheduling Appeal Judgment, paras 3, 5. The pronouncement of the Appeal Judgment was initially scheduled for 15 July 2025. See Order Scheduling Appeal Judgment, paras 3, 5.
[42] Article 46(1)(a)-(c), (3) of the Law. See also *Mustafa* Appeal Judgment, para. 17; *Gucati and Haradinaj* Appeal Judgment, para. 21.
[43] *Mustafa* Appeal Judgment, para. 18; *Gucati and Haradinaj* Appeal Judgment, para. 22. See also *Ongwen* Appeal Judgment, para. 76; *Mladić* Appeal Judgement, para. 16; *Nyiramasuhuko et al.* Appeal Judgement, para. 30; *Merhi and Oneissi* Appeal Judgment, para. 29.

is alleged to have omitted, and explain why this omission invalidates the decision.[44] 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.[45] 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.[46] The Appeals Panel will review the Trial Panel's findings of law to determine whether they are correct.[47]

29. Moreover, Article 46(4) of the Law specifies that:

> When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.

30. Where the Appeals Panel itself applies the correct legal standard to the evidence contained in the trial record and determines whether it is satisfied as to the requisite standard of proof of the challenged factual finding,[48] it will only take into account evidence referenced in the Trial Judgment, evidence contained in the trial

[44] *Mustafa* Appeal Judgment, para. 18; *Gucati and Haradinaj* Appeal Judgment, para. 22. See also *Ongwen* Appeal Judgment, para. 88; *Mladić* Appeal Judgement, para. 16; *Merhi and Oneissi* Appeal Judgment, para. 29.
[45] *Mustafa* Appeal Judgment, para. 18; *Gucati and Haradinaj* Appeal Judgment, para. 22. See also *Mladić* Appeal Judgement, para. 16; *Merhi and Oneissi* Appeal Judgment, para. 29.
[46] *Mustafa* Appeal Judgment, para. 18; *Gucati and Haradinaj* Appeal Judgment, para. 22. See also *Karadžić* Appeal Judgement, para. 15; *Merhi and Oneissi* Appeal Judgment, para. 29.
[47] *Mustafa* Appeal Judgment, para. 18; *Gucati and Haradinaj* Appeal Judgment, para. 22. See also *Merhi and Oneissi* Appeal Judgment, para. 29.
[48] *Mustafa* Appeal Judgment, para. 20; *Gucati and Haradinaj* Appeal Judgment, para. 24. See also *Mladić* Appeal Judgement, para. 17; *Nyiramasuhuko et al.* Appeal Judgement, para. 31.

record to which the parties refer, and where applicable, additional evidence admitted on appeal pursuant to Rule 181 of the Rules.[49]

31. In exceptional circumstances, the Appeals Panel may also consider arguments raised by a party in an appeal concerning errors of law that would not lead to the invalidation of the Trial Judgment if they are of general significance to the Specialist Chambers' jurisprudence.[50]

32. The Panel further notes that, when a party alleges on appeal that its right to a fair trial has been infringed, it must demonstrate that this violation caused prejudice amounting to an error of law which, in turn, invalidates the challenged decision.[51]

33. On errors of fact, Article 46(5) of the Law provides that:

> In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.

34. The same standard applies to alleged errors of fact regardless of whether the impugned finding was based on direct or circumstantial evidence.[52] 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.[53] The Appeals

[49] *Mustafa* Appeal Judgment, para. 20; *Gucati and Haradinaj* Appeal Judgment, para. 24. See also *Karadžić* Appeal Judgement, para. 17; *Nyiramasuhuko et al.* Appeal Judgement, para. 31.
[50] *Mustafa* Appeal Judgment, para. 21. See also *Prlić et al.* Appeal Judgement, para. 18; *Haradinaj et al.* Appeal Judgement, para. 9; *Kupreškić et al.* Appeal Judgement, para. 22; *Nahimana et al.* Appeal Judgement, para. 12.
[51] *Mustafa* Appeal Judgment, para. 22. See also *Haradinaj* First Appeal Decision on Detention, para. 44; *Karadžić* Appeal Judgement, para. 26; *Galić* Appeal Judgement, para. 21; *Kordić and Čerkez* Appeal Judgement, para. 119.
[52] *Mustafa* Appeal Judgment, para. 24; *Gucati and Haradinaj* Appeal Judgment, para. 26. See also *Mladić* Appeal Judgement, para. 18; *Karadžić* Appeal Judgement, para. 17; *Merhi and Oneissi* Appeal Judgment, para. 32.
[53] *Mustafa* Appeal Judgment, para. 24; *Gucati and Haradinaj* Appeal Judgment, para. 26. See also *Ongwen* Appeal Judgment, paras 78, 80, 82; *Karadžić* Appeal Judgement, para. 17; *Nyiramasuhuko et al.* Appeal Judgement, para. 32; *Merhi and Oneissi* Appeal Judgment, para. 31.

Panel will only overturn a decision by a trial panel where an error of fact occasioned a miscarriage of justice.[54] 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.[55]

35. The Appeals Panel is not bound by a party's characterisation of an alleged error as a question of law or fact.[56] Where a party mischaracterises an alleged error, the Appeals Panel will apply the correct standard of review.[57] Furthermore, where the Appeals Panel identifies a mixed error of law and fact, the Panel will first examine the applicable law and then determine whether the factual conclusion reached by the trial panel was one which no reasonable trier of fact could have reached.[58]

III. GENERAL CONSIDERATIONS

36. In adjudicating this appeal, the Panel acknowledges that the Trial Panel took into consideration Article 31(5) of the Constitution, Articles 3(2), 14(1)(c) and (2), 16(1)(a), 21, 23(1), 34, 40(5), 43, and 44(1), (2) and (5) of the Law and Rules 23(1), 24(1)-(3), 138, 139, 140, 158, 159(1)-(4) and (6), and 163(1), (3), (4) and (6) of the Rules.[59]

37. In adjudicating this appeal, the Panel recalls that the Law clearly states that Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the ICC and other

[54] *Mustafa* Appeal Judgment, para. 24; *Gucati and Haradinaj* Appeal Judgment, para. 26. See also *Mladić* Appeal Judgement, para. 18; *Nyiramasuhuko et al.* Appeal Judgement, para. 32; *Lubanga* Appeal Judgment, para. 25; *Merhi and Oneissi* Appeal Judgment, para. 31.
[55] *Mustafa* Appeal Judgment, para. 24; *Gucati* First Appeal Decision on Arrest and Detention, para. 64.
[56] *Mustafa* Appeal Judgment, para. 25. See also *Dragomir Milošević* Appeal Judgement, para. 18; *Strugar* Appeal Judgement, paras 252, 269; *Blagojević and Jokić* Appeal Judgement, paras 144-145.
[57] *Mustafa* Appeal Judgment, para. 25. See also *Dragomir Milošević* Appeal Judgement, para. 18; *Strugar* Appeal Judgement, paras 252, 269; *Blagojević and Jokić* Appeal Judgement, paras 144-145.
[58] *Mustafa* Appeal Judgment, para. 26. See also *Strugar* Appeal Judgement, para. 269.
[59] Trial Judgment, para. 14.

criminal courts.[60] These subsidiary sources can guide the Judges' reflection in instances where primary sources do not provide guidance on a specific matter.[61]

A. FORMAL REQUIREMENTS ON APPEAL AND SUMMARY DISMISSAL

38. The Appeals Panel notes that its ability to assess a party's arguments depends on the latter presenting its case clearly, logically and exhaustively.[62] The appealing party is required to provide precise references to relevant paragraphs in the impugned judgment or transcript pages of testimony to which a challenge is being made, and to the jurisprudence cited in support thereof.[63] The Appeals Panel cannot be expected to consider a party's submissions if they are obscure, contradictory, vague, unsubstantiated or suffer from other formal and obvious insufficiencies.[64]

39. An appeal is not a trial *de novo*.[65] A party may not merely repeat arguments that did not succeed at trial, unless it can demonstrate that the Trial Panel's rejection of those arguments constituted an error warranting the Appeals Panel's intervention.[66] Furthermore, a party should not remain silent on a matter which was apparent during the course of the trial, only to raise it for the first time on appeal.[67] The importance of

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[60] Article 3(3) of the Law.
[61] *Mustafa* Appeal Judgment, para. 28; *Gucati and Haradinaj* Appeal Judgment, para. 28; *Gucati* First Appeal Decision on Arrest and Detention, para. 11.
[62] *Mustafa* Appeal Judgment, para. 29; *Gucati and Haradinaj* Appeal Judgment, para. 29.
[63] Practice Direction on Filings, Articles 32(2), 47(1)(b)(2)-(3), 48(1)(b)(1)-(2). See also *Mustafa* Appeal Judgment, para. 29; *Gucati and Haradinaj* Appeal Judgment, para. 29; *Ongwen* Appeal Judgment, para. 88; *Mladić* Appeal Judgement, para. 21; *Nyiramasuhuko et al.* Appeal Judgement, para. 35. The appeal brief shall also contain an annex containing the list of authorities referred to in the appeal brief. See Practice Direction on Filings, Article 48(1)(e).
[64] *Mustafa* Appeal Judgment, para. 29; *Gucati and Haradinaj* Appeal Judgment, para. 29; *Mladić* Appeal Judgement, para. 21; *Nyiramasuhuko et al.* Appeal Judgement, para. 35.
[65] Article 46(2) of the Law; *Mustafa* Appeal Judgment, para. 30; *Gucati and Haradinaj* Appeal Judgment, para. 21; *Šainović et al.* Appeal Judgement, para. 223; *Tadić* Appeal Judgement, para. 55.
[66] *Mustafa* Appeal Judgment, para. 30; *Gucati and Haradinaj* Appeal Judgment, para. 29. See also *Mladić* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 34.
[67] *Mustafa* Appeal Judgment, para. 30. See also *Karadžić* Appeal Judgement, paras 25, 312; *Haradinaj et al.* Appeal Judgement, para. 112; *Tolimir* Appeal Judgement, para. 183; *Šainović et al.* Appeal Judgement, paras 125, 223; *Kayishema and Ruzindana* Appeal Judgment, para. 91; *Niyitegeka* Appeal Judgement, para. 199.

a timely objection rests on the fact that a panel must be afforded an opportunity to remedy the alleged deficiencies. 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.[68] Similarly, pursuant to Rule 138(1) of the Rules, an objection to the admissibility of evidence must be made as soon as its basis becomes apparent.[69]

40. The Appeals Panel may also decline to consider issues raised in an appeal brief or brief in reply which were not contained in the notice of appeal,[70] unless a timely request for an amendment has been made and authorised by the Appeals Panel, in accordance with Rule 176(3) of the Rules. The Appeals Panel may also decline to consider arguments raised for the first time during an appeal hearing.[71] Furthermore, the grounds of appeal and arguments in the appeal brief shall be set out and numbered in the same order as in the appellant's notice of appeal, unless otherwise varied with leave of the Appeals Panel.[72] In principle, failure to do so warrants summary dismissal. However, the Appeals Panel may exceptionally decide to consider such submissions where the Panel deems it necessary out of fairness to the accused and in the interests of justice.[73]

41. The Panel may also decline to consider issues raised in a notice of appeal that are not subsequently developed in an appeal brief.[74] Generally, arguments made in a

[68] *Mustafa* Appeal Judgment, para. 30. See also *Karadžić* Appeal Judgement, paras 25, 312; *Prlić et al.* Appeal Judgement, para. 165; *Kunarac et al.* Appeal Judgement, para. 61; *Niyitegeka* Appeal Judgement, para. 199. See also *Ongwen* Sentencing Appeal Judgment, para. 108.
[69] See also *Mustafa* Appeal Judgment, para. 30.
[70] *Mustafa* Appeal Judgment, para. 31; *Gucati and Haradinaj* Appeal Judgment, para. 30. See also *Ntakirutimana and Ntakirutimana* Appeal Judgement, paras 370, 524; *Vasiljević* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 78.
[71] *Mustafa* Appeal Judgment, para. 31.
[72] Practice Direction on Filings, Article 48(2). See also *Mustafa* Appeal Judgment, para. 31; *Gucati and Haradinaj* Appeal Judgment, para. 30.
[73] *Mustafa* Appeal Judgment, para. 31.
[74] *Mustafa* Appeal Judgment, para. 32. See also *Brima et al.* Appeal Judgment, fn. 69; *Nyiramasuhuko et al.* Appeal Judgement, fn. 441; *Kayishema and Ruzindana* Appeal Judgment, para. 46.

notice of appeal should be developed in the appeal brief, or they are deemed to have been "abandoned".[75] However, the Appeals Panel may nevertheless, as a matter of fairness, decide to consider such arguments.[76]

42. Moreover, arguments which do not have the potential to cause the impugned decision to be reversed or revised may be dismissed by the Panel immediately and need not be considered on the merits.[77] The Appeals Panel 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.[78] In particular, the Appeals Panel notes that the following types of arguments may be summarily dismissed:

(i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings;

(ii) mere assertions that the trial chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the trial chamber;

(iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding;

(iv) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence;

(v) arguments contrary to common sense;

[75] *Mustafa* Appeal Judgment, para. 32. See also *Nyiramasuhuko et al.* Appeal Judgement, fn. 441.
[76] *Mustafa* Appeal Judgment, para. 32. See also *Nyiramasuhuko et al.* Appeal Judgement, fn. 441.
[77] *Mustafa* Appeal Judgment, para. 33; *Gucati and Haradinaj* Appeal Judgment, para. 31. See also *Mladić* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 34; *Merhi and Oneissi* Appeal Judgment, para. 33; *Ongwen* Appeal Judgment, para. 89.
[78] *Mustafa* Appeal Judgment, para. 31; *Gucati and Haradinaj* Appeal Judgment, para. 31. See also *Mladić* Appeal Judgement, para. 21; *Nyiramasuhuko et al.* Appeal Judgement, para. 35; *Merhi and Oneissi* Appeal Judgment, para. 33.

(vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party;

(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];

(viii) allegations based on material not on the trial record;

(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.[79]

B. LIMITED GROUNDS FOR APPELLATE INTERVENTION

1. Trial Panel's Reasoned Opinion

43. The Appeals Panel notes that, in order to fulfil its obligation to provide a reasoned opinion, a trial panel must provide reasoning in support of its findings on the substantive considerations relevant for a decision. However, it is neither required to articulate every step of its reasoning, nor to address all of the arguments raised by the parties or every item of evidence relevant to a particular finding, provided that it indicates with sufficient clarity the basis for its decision.[80] It is presumed that a trial panel evaluated all of the evidence before it, as long as there is no indication that it completely disregarded any particular piece of evidence.[81] Accordingly, if a trial panel did not refer to a specific piece of evidence in its findings, it is to be presumed that it

[79] *Mustafa* Appeal Judgment, para. 33; *Gucati and Haradinaj* Appeal Judgment, para. 32. See also Appeal Decision on Provisional Release, para. 8; *Haradinaj* First Appeal Decision on Detention, para. 29; *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 15; *Thaçi et al.* Appeal Decision on Fourth Victim Participation, paras 8, 17, 24; *Thaçi et al.* Appeal Decision on Fifth Victim Participation, para. 29.
[80] *Mustafa* Appeal Judgment, para. 34; *Gucati and Haradinaj* Appeal Judgment, para. 33; *Veseli* First Appeal Decision on Interim Release, para. 72; *Thaçi et al.* Appeal Decision on Jurisdiction, para. 154.
[81] *Mustafa* Appeal Judgment, para. 34; *Gucati and Haradinaj* Appeal Judgment, para. 33. See also *Halilović* Appeal Judgement, para. 121; *Kvočka et al.* Appeal Judgement, para. 23.

assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings. This presumption may be rebutted when evidence which is clearly relevant to the findings is not addressed by a trial panel's reasoning.[82]

44. Furthermore, an accused's right to a reasoned opinion does not require a detailed analysis of the credibility of witnesses, as long as the trial panel provides reasons for accepting a witness's testimony despite any alleged or material inconsistencies.[83]

2. Trial Panel's Discretion

45. The Appeals Panel recalls that, where the decision that is being challenged is a discretionary decision, a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.[84]

46. The Panel recalls that a decision on whether to admit or exclude evidence pursuant to Rule 138(1) of the Rules is one that lies within a trial panel's discretion in its assessment of the relevance, authenticity and probative value of the submitted evidence.[85] A trial panel may refuse to admit evidence where no reasonable showing of relevance has been made.[86] For the purposes of deciding on the admissibility of

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[82] *Mustafa* Appeal Judgment, para. 34; *Gucati and Haradinaj* Appeal Judgment, para. 33. See also *Halilović* Appeal Judgement, para. 188; *Kvočka et al.* Appeal Judgement, para. 23.
[83] *Mustafa* Appeal Judgment, para. 35. See also *Popović et al.* Appeal Judgement, para. 133; *Kajelijeli* Appeal Judgement, paras 60-61.
[84] *Mustafa* Appeal Judgment, para. 36. See also Appeal Decision on Prior Statements, para. 8; *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 14. With regard to the Trial Panel's discretion in sentencing, see below, para. 876.
[85] *Mustafa* Appeal Judgment, para. 37; *Gucati and Haradinaj* Appeal Judgment, para. 35. See also *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 14.
[86] *Mustafa* Appeal Judgment, para. 37; *Gucati and Haradinaj* Appeal Judgment, para. 35. See also *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 20; *Prlić et al.* Appeal Decision on

evidence, relevance is assessed on the basis of whether the proposed evidence relates to elements of the offence(s) or mode(s) of liability pleaded in the indictment, or to other facts or circumstances material to the parties' case.[87] Moreover, appellate intervention in decisions relating to the admission of evidence is warranted only in very limited circumstances.[88]

47. The Panel also recalls that a trial panel is best placed to assess the credibility of a witness and the reliability of the evidence presented by the parties,[89] and therefore has broad discretion in determining the appropriate weight to be given to witness testimony.[90] There is no general requirement that the testimony of a witness be corroborated if otherwise deemed credible.[91] In fact, corroboration is neither a condition nor a guarantee of reliability of a single piece of evidence.[92] A trial panel has the discretion to decide, in the circumstances of each case, whether corroboration of

Admission of Evidence, para. 17; *Bagosora et al*. Decision on Admission of Binder, para. 7; Rules 137(1) and 138(1) of the Rules.

[87] *Mustafa* Appeal Judgment, para. 37; *Gucati and Haradinaj* Appeal Judgment, para. 35. See also *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 20; *Prlić et al.* Appeal Decision on Admission of Evidence, para. 17; *Ruto et al.* Confirmation Decision, para. 66; *Katanga and Ngudjolo* Bar Table Decision, para. 16.

[88] *Mustafa* Appeal Judgment, para. 37; *Gucati and Haradinaj* Appeal Judgment, para. 35. See also *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 14, referring to *Simba* Appeal Judgement, para. 19; *Bagosora et al.* Appeal Decision on Exclusion of Evidence, para. 11. See also below, Section V.B.2.(b)(ii).

[89] *Mustafa* Appeal Judgment, para. 38; *Gucati and Haradinaj* Appeal Judgment, para. 36. See also *Šainović et al.* Appeal Judgement, paras 437, 464, 1296; *Lukić and Lukić* Appeal Judgement, para. 296; *Đorđević* Appeal Judgement, para. 395; *Limaj et al.* Appeal Judgement, para. 88; *Aleksovski* Appeal Judgement, para. 63; *Kayishema and Ruzindana* Appeal Judgment, para. 187.

[90] *Mustafa* Appeal Judgment, para. 38. See also *Popović et al.* Appeal Judgement, para. 131; *Đorđević* Appeal Judgement, paras 781, 797, 819; *Ndahimana* Appeal Judgement, paras 43, 93; *Lukić and Lukić* Appeal Judgement, paras 86, 235, 363, 375; *Kupreškić et al.* Appeal Judgement, para. 32; *Rutaganda* Appeal Judgement, para. 28.

[91] Rule 139(3) of the Rules; *Mustafa* Appeal Judgment, para. 38; *Gucati and Haradinaj* Appeal Judgment, para. 36. See also *Ntaganda* Appeal Judgment, para. 782; *Dragomir Milošević* Appeal Judgement, para. 215; *Ntawukulilyayo* Appeal Judgement, para. 21.

[92] *Mustafa* Appeal Judgment, para. 38. See also *Dragomir Milošević* Appeal Judgement, para. 248; *Limaj et al*. Appeal Judgement, para. 203.

evidence is necessary, and to rely on uncorroborated, but otherwise credible, witness testimony.[93]

48. The Panel further notes that, where an alleged violation of fair trial rights concerns a discretionary decision, the appellant must show that the Trial Panel committed a discernible error resulting in prejudice to that appellant.[94]

3. Trial Panel's Presumption of Impartiality

49. The Panel recalls that there is a presumption of impartiality which attaches to the Judges of a trial panel, and it is for the appealing party to rebut this presumption on the basis of adequate and reliable evidence.[95]

C. LEGAL CERTAINTY

50. The Panel notes that, in the interests of legal certainty and predictability, an appeals panel is expected to follow previous decisions by the Court of Appeals Chamber and should only depart from them for cogent reasons in the interests of justice.[96] Therefore, a party requesting such departure must demonstrate that it is justified for cogent reasons.[97]

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[93] *Mustafa* Appeal Judgment, para. 38. See also *Karera* Appeal Judgement, para. 45; *Ntawukulilyayo* Appeal Judgement, para. 21; *Dragomir Milošević* Appeal Judgement, para. 215.
[94] *Mustafa* Appeal Judgment, para. 39. See also *Mladić* Appeal Judgement, paras 63, 107; *Nyiramasuhuko et al.* Appeal Judgement, para. 431; *Prlić et al.* Appeal Judgement, para. 119.
[95] *Mustafa* Appeal Judgment, para. 40. See also e.g. *Veseli* Third Appeal Decision on Detention, para. 34; *Akayesu* Appeal Judgment, para. 91; *Furundžija* Appeal Judgement, paras 196-197.
[96] *Mustafa* Appeal Judgment, para. 41; *Gucati and Haradinaj* Appeal Judgment, para. 37. See also *Thaçi et al.* Appeal Decision on Fifth Victim Participation, para. 10; Appeal Decision on Jurisdiction, para. 15; *Mladić* Appeal Judgement, para. 14; *Semanza* Appeal Decision, para. 92; *Aleksovski* Appeal Judgement, paras 107-111; *Šešelj* Appeal Judgement, para. 11 (wherein the IRMCT Appeals Chamber held, *inter alia,* that instances where cogent reasons in the interests of justice would require departure from previous appeals decisions include where decisions were made on the basis of a wrong legal principle or where the judges were ill-informed about the applicable law).
[97] *Mustafa* Appeal Judgment, para. 41. See also *Mladić* Appeal Judgement, para. 14; *Karadžić* Appeal Judgement, para. 13; *Šešelj* Appeal Judgement, para. 11.

IV. ADMISSIBILITY OF VICTIMS' COUNSEL'S SUBMISSIONS

51. In the Decision on Victim Participation in Appellate Proceedings, the Appeals Panel decided that the victims who participated in the trial proceedings may participate in the appellate proceedings, but confined their participation to issues arising from the grounds of appeal.[98] The Panel further determined that Victims' Counsel may file responses and replies to any submissions made before the Panel, including appellate briefs, but must explicitly set out how the submissions are related to the participating victims' personal interests.[99] The Panel specified that "[f]ailure to satisfy the Panel of this relationship may […] lead to the summary dismissal of the submissions".[100]

52. The Appeals Panel notes that, in the Victims Response Brief, Victims' Counsel responds to Grounds 4, 6, 7 and 14 as these submissions "related to the participating victims' personal interests".[101] The Panel further notes that within each ground of appeal, Victims' Counsel describes how the ground impacts victims' rights and personal interests.[102] In particular, Victims' Counsel submits that all grounds relate to the participating victims' rights to: (i) recognition of the harm that they suffered as a result of being direct or indirect victims of the crimes of arbitrary detention, torture and murder; (ii) obtain reparation for their harm; and (iii) contribute to the establishment of the truth.[103] Neither Shala nor the SPO made submissions on the admissibility of the Victims' Counsel's submissions.

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[98] Decision on Victim Participation in Appellate Proceedings, paras 4-5.
[99] Decision on Victim Participation in Appellate Proceedings, para. 10.
[100] Decision on Victim Participation in Appellate Proceedings, para. 10.
[101] Victims Response Brief, para. 16. The Panel notes that Victims' Counsel made submissions on Grounds 4, 6A, 6B, 6D, 6E, 7 and 14, and refrained from making any submissions on all other grounds of appeal raised by the Defence (namely Grounds 1, 2, 3, 5, 6C, 8, 9, 10, 11, 12, 13).
[102] Victims Response Brief, paras 18 (Ground 4), 19-22 (Grounds 6A, 6B, 6D and 6E), 23 (Ground 7), 24 (Ground 14), 25.
[103] Victims Response Brief, para. 17. See also Victims Response Brief, paras 18-24.

53. The Panel recalls that, pursuant to Article 22(6) of the Law and further to its Decision on Victim Participation in Appellate Proceedings, it shall dismiss submissions by Victims' Counsel on issues that do not affect the personal interests of the participating victims,[104] and must ensure that victims' participation is neither prejudicial nor inconsistent with the rights of the Accused.[105]

54. While the Panel considers that, in general terms, the participating victims' interests are affected by the Defence's appeal, the Panel must be satisfied that their personal interests are affected in relation to each individual ground of appeal on which they make submissions.[106]

55. The Panel observes that two of the four grounds of appeal on which Victims's Counsel's responds pertain to the testimony or evidence provided by witnesses, [REDACTED] and their credibility.[107] The Panel notes that participating victims have a particular interest in having evidence provided by [REDACTED] admitted by the Trial Panel and relied upon in the Trial Judgment. With respect to these grounds, the Panel is satisfied that Victims' Counsel's submissions relate to the personal interests of the participating victims, including their right to recognition for any harm suffered and to contribute to the establishment of the truth. The Panel further notes that Ground 4, as far as it relates to the notice of victim particulars in the Indictment, impacts the participating victims' right to contribute to the determination of the truth and to recognition of the harm they suffered as a result of being direct or indirect victims, and, therefore, it has a direct impact on their right to obtain reparation for the harm suffered. Finally, with regard to the Defence's arguments under Ground 14, the

[104] Decision on Victim Participation in Appellate Proceedings, para. 10.
[105] Decision on Victim Participation in Appellate Proceedings, para. 7.
[106] *Mustafa* Appeal Judgment, para. 46. See similarly *Ayyash et al.* Appeal Decision on Modalities of Victim Participation in Appeal, paras 51-52, 62.
[107] See Victims Response Brief, paras 16, 19-23, relating to Grounds 6A, 6B, 6D, 6E and 7.

Panel considers that the participating victims' personal interests could be affected by the Panel's potential finding on sentencing.[108]

56. In light of the above, the Panel is satisfied that Victims' Counsel's submissions on Grounds 4, 6A, 6B, 6D, 6E, 7 and 14 relate to the participating victims' personal interests. Furthermore, the Appeals Panel finds that victim participation on these grounds is neither prejudicial nor inconsistent with the rights of the Accused. Accordingly, the Panel finds that the Victims' Counsel's submissions relating to these Grounds are admissible.

V. DISCUSSION

A. ALLEGED VIOLATIONS OF DEFENCE RIGHTS (GROUND 9)

57. The Trial Panel rejected Shala's challenges concerning his fair trial rights complaints.[109] The Trial Panel notably dismissed Shala's claims: (i) that disclosure violations by the SPO violated his fair trial rights;[110] (ii) that the Defence was pressured to proceed to trial before completion of its investigations;[111] and (iii) that the passage of time between the crimes charged and Shala's prosecution rendered the proceedings unfair.[112]

58. Shala argues that the Trial Panel erred in failing to acknowledge that his rights to present an effective defence were violated and alleges: (i) disclosure violations; (ii) undue restrictions imposed by the Trial Panel on which Defence witnesses to call; (iii) the fact that the trial started before the Defence was trial-ready; and (iv) the impact of the passage of time between the events charged in the Indictment and the trial, on

[108] See *Mustafa* First Supreme Court Decision, paras 29-30. See also *Mustafa* Constitutional Court Judgment on First Referral, paras 76-77.
[109] Trial Judgment, para. 73. See also Trial Judgment, paras 22-73.
[110] Trial Judgment, paras 43-47.
[111] Trial Judgment, paras 56-58.
[112] Trial Judgment, paras 34, 52.

Shala's ability to defend himself.[113] The SPO responds that Shala received a fair trial and that he fails to demonstrate any error invalidating the Trial Judgment.[114]

1. Alleged Disclosure Violations (Ground 9A)

(a) Submissions of the Parties

59. Asserting that the SPO continuously delayed disclosing exculpatory, as well as incriminatory, material,[115] Shala submits that the Trial Panel erred by failing to consider that: (i) Rule 103 of the Rules calls for immediate disclosure of exculpatory evidence; (ii) the delayed disclosures concerned documents in the SPO's possession for years prior to the disclosure; and (iii) the SPO failed to respect applicable disclosure deadlines.[116] He adds that this delayed disclosure has significantly impacted the Defence's ability to investigate and its trial-readiness.[117]

60. Shala further contends that the late disclosure of items relating to W02540 caused him serious prejudice as he would otherwise have called W02540 to testify and his evidence would have assisted in the cross-examination of SPO witnesses, in particular TW4-01, and the examination in chief of Defence witnesses.[118] According to Shala, the Trial Panel erred in disregarding his arguments concerning the importance of W02540's evidence with respect to the credibility assessment of TW4-01.[119]

61. The SPO responds that Shala simply repeats "grossly exaggerated and unsupported" allegations of disclosure violations which were dismissed in the Trial Judgment, while failing to substantiate any claimed prejudice.[120] With respect to the instance of delayed disclosure concerning W02540, the SPO contends that his evidence

[113] Appeal Brief, paras 169-191; Reply Brief, paras 31-35; Notice of Appeal, para. 19.
[114] SPO Response Brief, paras 178-187.
[115] Appeal Brief, para. 170, referring to Defence Final Trial Brief, paras 294-300.
[116] Appeal Brief, para. 171.
[117] Appeal Brief, para. 171. See also Appeal Brief, para. 169.
[118] Appeal Brief, para. 172; Reply Brief, para. 33.
[119] Appeal Brief, para. 173; Reply Brief, para. 33. See also Appeal Brief, paras 204-205.
[120] SPO Response Brief, para. 179.

was cumulative of other evidence on the record, notably that of W03881 and [REDACTED], which were available to Shala for the purposes of challenging TW4-01.[121] In the SPO's view, Shala fails to demonstrate how W02540's evidence could have further informed his cross-examination of TW4-01 or examination in chief of Defence witnesses.[122]

62. Shala replies that the Defence submissions on the SPO's disclosure violations are substantiated by "many examples" and adds that such violations continue to this date.[123] He further contends that while the Pre-Trial Judge had deemed the SPO's delay in disclosing exculpatory material relating to TW4-01 as "significant", the SPO continued the "deliberate violation" of its disclosure obligations.[124]

(b) Assessment of the Court of Appeals Panel

63. At the outset, the Panel observes that in some instances Shala incorporates, by way of a reference in a footnote, arguments he made in his Defence Final Trial Brief.[125] The Panel recalls that such an approach lacks the necessary substantiation since parties are not permitted to incorporate earlier submissions by mere reference without properly substantiating them before the competent Appeals Panel.[126]

64. In any event, the Panel notes that the instances of alleged disclosure violations Shala refers to on appeal were considered and dismissed by the Trial Panel.[127] While Shala claims that "the delayed disclosures" concerned documents the SPO had in its possession for years or impacted the Defence's ability to investigate, the Panel finds that he fails to identify which instances of "delayed disclosures" he is specifically

[121] SPO Response Brief, paras [REDACTED].
[122] SPO Response Brief, para. 181.
[123] Reply Brief, para. 31.
[124] Reply Brief, para. 32, referring to Second Decision on SPO Rule 102(2) Motion.
[125] See e.g. Appeal Brief, fns 385, [REDACTED]; Reply Brief, fn. 39.
[126] *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 65.
[127] See Trial Judgment, paras 42-47.

referring to or to identify any specific prejudice.[128] As such, these submissions are dismissed.[129]

65. While Shala refers in his Reply Brief to the Pre-Trial Judge's finding that there were significant delays in the SPO disclosure of material related to TW4-01, the Panel observes that Shala ignores the fact that the Pre-Trial Judge fully addressed this instance of late disclosure and in fact decided to grant additional time to the Defence and to extend the deadline to transmit the case to the Trial Panel.[130]

66. The Panel further rejects Shala's general claim that the Trial Panel failed to consider that Rule 103 of the Rules calls for immediate disclosure of exculpatory evidence and finds that the Trial Panel was clearly mindful of what disclosure obligations under Rule 103 of the Rules entail.[131]

67. Turning to the only instance of delayed disclosure developed by Shala in his Appeal Brief,[132] the Appeals Panel first recalls that decisions concerning disclosure, as well as remedies for disclosure violations, fall within the discretion of the lower panel.[133]

68. The Panel notes that Shala repeats on appeal arguments he already made before the Trial Panel, namely that the late disclosure by the SPO of evidence relating to

[128] See Appeal Brief, para. 171.
[129] This does not concern Shala's specific submissions regarding W02540, which the Panel has addressed below. See below, paras 436-437.
[130] See Second Decision on SPO Rule 102(2) Motion, paras 30-31, 46 (where the Pre-Trial Judge also granted additional time to the Defence to indicate any objections to the admissibility of evidentiary material and to submit the Defence Pre-Trial Brief). Contra Reply Brief, para. 32.
[131] See Trial Judgment, para. 44, referring to Framework Decision on Disclosure, para. 54, which in turn states that "[t]he requirement [under Rule 103 of the Rules] that the SPO shall disclose exculpatory evidence *immediately, as soon as* it is in its custody, control or actual knowledge, identifies a continuous obligation for the SPO to disclose such material to the Defence, unless justifiable reasons prevent immediate disclosure" (emphasis in original). Contra Appeal Brief, para. 171.
[132] See Appeal Brief, para. 172.
[133] See e.g. *Karadžić* Appeal Judgement, para. 85; *Gucati and Haradinaj* Appeal Decision on Disclosure, para. 36.

potential Defence witness W02540 caused him prejudice.[134] These arguments were fully considered and dismissed on repeated occasions by the Trial Panel.[135] The Trial Panel considered that, while the SPO had failed to comply with its disclosure obligations in relation to that material, it caused no prejudice as W02540's evidence was only of limited relevance to the present case.[136]

69. While Shala contends that the Trial Panel erred in "disregarding" the Defence arguments on the importance of W02540's evidence for the evaluation of the credibility of TW4-01, he does not point to any argument which was "disregarded" by the Trial Panel.[137] The Appeals Panel notes that, to reach this conclusion that the Defence was not prejudiced as a result of the late disclosure, the Trial Panel notably observed that: (i) W02540's evidence was outside the geographical and temporal scope of the charges; (ii) W02540's evidence was cumulative of other evidence on the record concerning [REDACTED]; (iii) the inconsistencies between W02540's evidence and TW4-01 were minor; and (iv) in essence, W02540's evidence largely corroborated TW4-01's account.[138] In the Panel's view, the Trial Panel amply addressed Shala's arguments and its rejection thereof was fully reasoned.[139]

70. In addition, the Panel finds that Shala does not substantiate his claim of prejudice as a result of this late disclosure and his general contention that W02540's

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[134] *Compare* Appeal Brief, para. 172 *with* Defence Motion to Reopen its Case, para. 29; Defence Motion for Reconsideration or Certification of Decision Denying Leave to Reopen Defence Case, para. 30; Defence Final Trial Brief, para. 300. See also below, paras 436-437.
[135] See Decision Denying Leave to Reopen Defence Case, paras 21, 23; Decision on Certification or Reconsideration of Decision Denying Leave to Reopen Defence Case, para. 13; Trial Judgment, para. 45.
[136] Decision Denying Leave to Reopen Defence Case, paras 17-18, 21. See also Decision on Certification or Reconsideration of Decision Denying Leave to Reopen Defence Case, para. 13.
[137] See Appeal Brief, para. 173; Reply Brief, para. 33.
[138] See Decision Denying Leave to Reopen Defence Case, paras 19-21. See also Decision on Certification or Reconsideration of Decision Denying Leave to Reopen Defence Case, paras 13-14. The Trial Panel found that W02540's evidence was notably cumulative of the evidence of W03881, [REDACTED], that this evidence was admitted into evidence and was available to Shala to challenge TW4-01's credibility. See Decision Denying Leave to Reopen Defence Case, para. 19.
[139] See below, para. 436.

evidence would have "informed the Defence cross-examination" of SPO witnesses or the examination in chief of Defence witnesses.[140]

71. In light of the above, the Appeals Panel finds that Shala fails to show any abuse in the Trial Panel's exercise of its discretion or any error warranting the Panel's intervention. Accordingly, the Appeals Panel dismisses Shala's Ground 9A.

2. Alleged Restrictions on Calling Defence Witnesses (Ground 9B)

(a) Submissions of the Parties

72. Shala submits that the Trial Panel erred when imposing undue restrictions on which witnesses the Defence could call and in instructing the Defence during the Defence preparation conference to remove W04454, DW4-04, W02517, W02549, and W04751 from its witness list.[141] Shala recalls that the Trial Panel found that the expected evidence of W02517 and W02549 was "repetitive" of W03881 and that the evidence of W04454, DW4-04 and W04751 concerned events falling outside the scope of the Indictment.[142] He argues that, by contrast, a different standard was applied as the Pre-Trial Judge permitted the SPO to add four witnesses to its witness list after the expiry of the applicable time-limit, despite the fact that their evidence was repetitive and mostly fell outside the scope of the charges.[143]

73. The SPO responds that Shala has waived his right to raise this issue on appeal.[144] The SPO submits that Shala merely disagrees with the Trial Panel's exercise of its broad discretion under Rule 119 of the Rules and fails to identify any precise error or prejudice.[145] The SPO further argues that Shala's comparison between the Oral

[140] Contra Appeal Brief, para. 172; Reply Brief, para. 33.
[141] Appeal Brief, paras 174-175, 180, referring to Oral Order Shortening Defence Witness List. See also Appeal Brief, paras 169, 181.
[142] Appeal Brief, paras 176-179, 182. The Appeals Panel notes that in two instances in paragraph 178 of the Appeal Brief, Shala erroneously refers to W04751 instead of W02517.
[143] Appeal Brief, paras 181-182.
[144] SPO Response Brief, para. 182.
[145] SPO Response Brief, paras 183-184. See also SPO Response Brief, para. 185.

Order Shortening Defence Witness List and the Trial Panel's decision allowing the addition of four witnesses to the SPO witness list is inapposite as the collective evidence of these four witnesses became necessary following [REDACTED] and was relevant and probative.[146]

74. Shala replies that the SPO misrepresented the Defence submissions regarding the relevance of DW4-04 and W04751.[147] He further submits that the Defence did not have to challenge the Trial Panel's discretionary decision in an interlocutory appeal as no leave would have been granted, and contends that the "proper manner" to do so is as part of an appeal against a conviction.[148]

(b) Assessment of the Court of Appeals Panel

75. The Appeals Panel recalls that during the Defence preparation conference, on 25 August 2023, the Trial Panel ordered the Defence to remove Defence witnesses W04454, DW4-04, W02517, W02549 and W04751 from its list of witnesses pursuant to Rule 119(3) of the Rules and ordered the Defence to file an updated list.[149]

76. The Appeals Panel observes that, while Shala now takes issue with the Trial Panel restricting the witnesses the Defence could call, he did not object to the removal of W04454, DW4-04, W02517, W02549 and W04751 from his witness list during the trial proceedings, while he had ample opportunity to do so. Specifically, the Panel notes that: (i) Shala did not seek reconsideration or certification to appeal the Trial Panel's decision;[150] and (ii) he did not challenge any alleged undue restrictions on the witnesses he could call either in his Defence Final Trial Brief or during closing statements. For these reasons, the Appeals Panel considers that Shala has waived his

[146] SPO Response Brief, para. [REDACTED].
[147] Reply Brief, para. 34.
[148] Reply Brief, para. 35.
[149] Oral Order Shortening Defence Witness List, pp. 1-4.
[150] Oral Order Shortening Defence Witness List.

right to raise this issue on appeal.[151] In that regard, the Panel finds that Shala's unsupported claim that he did not have to file an interlocutory appeal to challenge the Trial Panel's decision on the ground that it was a discretionary decision is without merit.[152] The fact that a decision may be discretionary is irrelevant and does not relieve an appellant of the duty to object at trial should he or she wish to address it on appeal.[153] Exceptions to this rule are only made in special circumstances, such as when the matter could not realistically have been raised earlier.[154] The Panel considers that Shala has not demonstrated any special circumstances justifying consideration of his submissions for the first time on appeal. Accordingly, the Appeals Panel dismisses without further consideration Shala's submissions with respect to the removal of W04454, DW4-04, W02517, W02549 and W04751 from his list of witnesses.

77. As to Shala's claim that a different standard was applied with respect to SPO witnesses, the Appeals Panel finds unconvincing Shala's assertion that the SPO was permitted to add four witnesses whose evidence was "repetitive" and "mostly falling outside the scope of the charges".[155] When deciding to authorise the SPO to include these witnesses to its witness list, the Pre-Trial Judge took into account the fact that [REDACTED].[156] The Panel further considers that the ability for a lower panel to determine the number of witnesses to be called under Rule 118(1)(a) and Rule 119(3)(a) of the Rules falls within the broad discretionary powers afforded to it in deciding whether to admit or exclude evidence under Rule 138(1) of the Rules.[157] The Panel also notes that the principle of equality of arms does not mean that an

[151] See above, para. 39.
[152] See Reply Brief, para. 35.
[153] See e.g. *Nyiramasuhuko et al.* Appeal Judgement, fn. 169 (listing examples of application of the waiver principle).
[154] See *Kambanda* Appeal Judgement, para. 41.
[155] See Appeal Brief, paras 181-182.
[156] See Decision on SPO Rule 102(2) Motion, paras 7, 17-18. The Pre-Trial Judge further found that the information provided by these witnesses served to corroborate the information [REDACTED] which was already disclosed to the Defence and therefore did not fundamentally affect the allegations against the Accused. See Decision on SPO Rule 102(2) Motion, para. 19.
[157] See above, para. 46. See also *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 14.

accused is "necessarily entitled to precisely the same amount of time or the same number of witnesses as the [p]rosecution".[158] Shala's argument is therefore dismissed.

78. In light of the above, the Appeals Panel finds that Shala fails to demonstrate any abuse in the Trial Panel's discretion in not allowing him to call W04454, DW4-04, W02517, W02549 and W04751 as Defence witnesses or that this resulted in a violation of the principle of equality of arms in that it deprived Shala of the opportunity to present an adequate defence.[159] Accordingly, the Appeals Panel dismisses Shala's Ground 9B.

3. Alleged Start of the Trial Before the Defence was Ready (Ground 9C)

(a) Submissions of the Parties

79. Shala submits that the Trial Panel violated his right to present an effective defence by pressuring the Defence to proceed to trial before it could complete or at least significantly advance its investigations.[160] He argues that the Defence continuously expressed the difficulties it was facing regarding investigations and the impact on its trial-readiness.[161] According to Shala, the SPO's late disclosures as well as the withdrawal of witnesses obliged the Defence to conduct new investigations, while no additional time was granted and the trial went ahead.[162]

80. The SPO responds that Shala misrepresents the record as the Trial Panel, far from pressuring him to proceed to trial before he was ready, rather varied applicable

[158] See e.g. *Orić* Appeal Decision on Defence Case, para. 7 (where the ICTY Appeals Chamber emphasised that the prosecution has the burden of proving every necessary element of the crimes charged beyond a reasonable doubt while the Defence "often focuses on poking specifically targeted holes in the [p]rosecution's case, an endeavor which may require less time and fewer witnesses", and found that "a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides").
[159] See e.g. *Nyiramasuhuko et al.* Appeal Decision on Witness List, para. 21. See also *Gucati and Haradinaj* Appeal Judgment, para. 50.
[160] Appeal Brief, para. 183. See also Appeal Brief, para. 169.
[161] Appeal Brief, paras 183-184.
[162] Appeal Brief, para. 185.

time limits to ensure that Shala was afforded the opportunity to present an effective defence.[163]

(b) Assessment of the Court of Appeals Panel

81. The Appeals Panel finds that Shala merely repeats the arguments that were addressed by the Trial Panel, without identifying any error in the Trial Panel's assessment that would warrant the Appeals Panel's intervention.[164] Such deficiencies warrant summary dismissal.[165] However, the Panel will exceptionally consider Shala's argument out of fairness to the Accused and in the interests of justice.

82. While mindful of the utmost importance of the right of the accused to have adequate time and facilities for the preparation of his or her defence,[166] the Appeals Panel recalls, as the Trial Panel did,[167] that there is no requirement that the trial can start only once the Defence investigations are completed.[168] Furthermore, the Panel recalls that lower panels enjoy considerable discretion in the conduct of the proceedings before them, including in the scheduling of trials.[169] Therefore, the fact that the Defence investigations were not completed by the time the trial started does not in itself violate the Accused's right to present an effective defence.

83. In addition, the Panel notes that Shala does not address the Trial Panel's finding that it took measures to accommodate the Defence progress in its investigations and preparation throughout the trial, showing awareness of the alleged difficulties the Defence was facing.[170] Furthermore, Shala does not refer to the fact that he indicated

[163] SPO Response Brief, para. 186.
[164] *Compare* Appeal Brief, paras 183-185 *with* Defence Final Trial Brief, paras 322-326. See also Trial Judgment, paras 56-58.
[165] See above, paras 39, 42.
[166] Article 21(4)(c) of the Law. See also e.g. *Krajišnik* Appeal Judgement, para. 80.
[167] See Trial Judgment, para. 56.
[168] See *Thaçi et al.* Appeal Decision on Amendment of Indictment, para. 48. See also *Karadžić* Appeal Decision on Commencement of Trial, para. 24.
[169] See e.g. *Ngirabatware* Appeal Decision on Trial Date, para. 22.
[170] See Trial Judgment, para. 58.

he would be trial ready "in January 2023" while the trial started later, on 21 February 2023,[171] or that following the close of the SPO case he was granted the one-month extension of time he had requested to conduct further investigations and file his lists of witnesses and exhibits.[172] The Panel finds that Shala fails to demonstrate that the amount of pre-trial preparation time in the present case was insufficient to allow him to adequately prepare his defence.[173]

84. As to Shala's claim that the SPO's late disclosure and withdrawal of witnesses obliged the Defence to conduct new investigations and that no additional time was granted before the start of the trial,[174] the Panel observes that while the Defence discussed this issue at length during the trial preparation conference, the Defence did not seek additional time or to postpone the start of the trial.[175]

85. In light of the above, the Appeals Panel finds that Shala fails to demonstrate any error on behalf of the Trial Panel. Accordingly, the Appeals Panel dismisses Shala's Ground 9C.

4. Alleged Prejudice Resulting from Passage of Time (Ground 9D)

(a) Submissions of the Parties

86. Shala submits that the Trial Panel erred by failing to acknowledge the impact of the passage of time between the events charged in the Indictment and the trial on

[171] Decision on Date for Commencement of Trial, para. 6; Defence Trial Preparation Submissions, para. 10. See also Trial Judgment, para. 57.
[172] Decision Extending Deadline for Defence Witness and Exhibit Lists, paras 3, 7-8, 14(a)-(b); Defence Request for Extension of Time for Witness and Exhibit Lists, paras 1, 6, 14. See also Trial Judgment, para. 57.
[173] See e.g. *Ngirabatware* Appeal Decision on Trial Date, paras 27-28; *Karadžić* Appeal Decision on Commencement of Trial, para. 19.
[174] Appeal Brief, para. 185.
[175] See Transcript, 18 October 2022, pp. 311-319, 374-375 (private session). The Panel further notes that the Trial Panel expressly addressed the disclosure issue during the trial preparation conference and recalled that the Defence may request additional time. See Transcript, 19 October 2022, pp. 403-404.

his ability to defend himself.[176] He points to a judgment where the ECtHR held that "the mere passage of time can work to the detriment of the investigation".[177] In Shala's view, the lapse of time between the events alleged in the Indictment – that took place almost 25 years ago – and the decision to prosecute deprived him of an effective opportunity to conduct proper investigations.[178] The Defence asserts that the Trial Panel instead used the passage of time to the detriment of the Accused when assessing inconsistencies in the evidence of SPO witnesses such as TW4-01, TW4-11 and W04733, and that of W04280.[179] Shala asks that the convictions on all counts be vacated.[180]

87. The SPO responds that Shala's "imprecise" claim regarding the impact of the passage of time on investigations fails to meet his burden on appeal.[181] The SPO further contends that the Trial Panel appropriately assessed the impact of the passage of time and possible deterioration of the quality of the evidence in assessing evidence together with other relevant factors.[182] In the SPO's view, Shala merely disagrees with the Trial Panel's assessment of certain evidence but fails to identify any precise error.[183]

(b) Assessment of the Court of Appeals Panel

88. The Appeals Panel first observes that the Trial Panel addressed the Defence's argument regarding the excessive time that had elapsed between the alleged crimes and the prosecution of Shala, including his claim about the Defence's inability to confront certain witnesses who were unavailable or deceased.[184] In the Panel's view, Shala repeats almost verbatim arguments he raised in his Defence Final Trial Brief

[176] Appeal Brief, paras 186, 189. See also Appeal Brief, paras 169, 191.
[177] Appeal Brief, para. 187, referring to *Nicolaou v. Cyprus* Judgment, para. 150.
[178] Appeal Brief, paras 188, 191.
[179] Appeal Brief, paras 189-190.
[180] Appeal Brief, para. 191.
[181] SPO Response Brief, para. 187.
[182] SPO Response Brief, para. 187.
[183] SPO Response Brief, para. 187.
[184] See Trial Judgment, paras 34, 52.

which were unsuccessful before the Trial Panel but fails to show any error in the Trial Panel's rejection of such arguments.[185]

89. The Panel notes that in the *Nicolaou v. Cyprus* Judgment Shala relies upon, the ECtHR held that "the mere passage of time can work to the detriment of the investigation, and even fatally jeopardise its chances of success" and that "the passage of time will inevitably erode the amount and quality of the evidence available".[186] While the facts of that case bear in themselves little relevance to the present case as they do not concern the ability of the accused to prepare his or her defence,[187] the Panel nevertheless considers that the general principles set forth by the ECtHR are relevant and endorses them.[188]

90. However, in the Panel's view, Shala fails to demonstrate how his ability to defend himself and prepare his case was "fatally jeopardised" as a result of the passage of time. In addition, Shala does not point to any specific examples of alleged lost investigative opportunities or witnesses who died, disappeared or became unwilling to testify in his favour. The Panel therefore dismisses Shala's undeveloped argument in that regard.[189]

91. Moreover, the Panel observes that the Trial Panel was cognisant of the issue of the time that had elapsed between the crimes charged and the prosecution of the

[185] *Compare* Defence Final Trial Brief, para. 288 *with* Appeal Brief, paras 187-188. See also Defence Final Trial Brief, para. 313.
[186] *Nicolaou v. Cyprus* Judgment, para. 150.
[187] The case concerned the state's obligation to discharge its procedural obligation to conduct an effective investigation under Article 2 of the ECHR – guaranteeing the right to life, in a specific scenario with established deficiencies in the initial investigations. See *Nicolaou v. Cyprus* Judgment, paras 132-152.
[188] See *Nicolaou v. Cyprus* Judgment, para. 150.
[189] To the extent that Shala argues that he was unable to confront witnesses who were no longer available, the Appeals Panel recalls, as rightly noted by the Trial Panel, that the Specialist Chambers' legal framework provides for alternative avenues to introduce evidence other than through live testimony, in case the witnesses are unavailable which have been found to be in line with internationally recognised fair trial standards and which provide for safeguards to protect the rights of the accused. See Rule 155 of the Rules; Constitutional Court Judgment on the Rules of Procedure and Evidence Referral, para. 206. See also Trial Judgment, para. 52. See below, para. 473.

Accused – which indeed occurs in many international crime cases – and agrees with the Trial Panel that a set of solid safeguards exists before the Specialist Chambers against unlawful or unfair prosecutions and conviction, including (in the words of the Trial Panel): "(i) the exercise of testing the evidence in court through questioning of witnesses, under the supervision of professional Judges; (ii) oral and written litigation on the admissibility and probative value of testimonial and documentary evidence; (iii) the role of Judges in weighing the evidence, within a well-defined legal framework, in light of the *beyond reasonable doubt* threshold under Article 21(3) of the Law and Rule 140(1) of the Rules; and (iv) the remedies provided for under the Law and the Rules for appellate and other reviews."[190]

92. In light of these safeguards, the Panel agrees with the Trial Panel that the passage of time and the possible deterioration of the quality of the evidence are not, by themselves, grounds to render the proceedings unfair, but rather factors that may be evaluated when assessing the reliability, probative value and, ultimately, the weight of the evidence.[191]

93. As to Shala's argument that the Trial Panel used the passage of time "to the detriment" of Shala when assessing inconsistencies in the evidence,[192] the Appeals Panel notes that when the Trial Panel assessed the impact of the passage of time on the evidence of TW4-01, TW4-11, W04733 and W04280, it also assessed: (i) whether the inconsistencies were marginal and/or concerned details or essential aspects of the

[190] See Trial Judgment, para. 34. See also e.g. *Papon v. France* Decision, p. 22 (where the ECtHR noted that while death, age or illness had prevented the hearing of witnesses both for the prosecution and the defence, it found that it did not appear that the applicant was not able to have major witnesses for the defence examined under the same conditions as witnesses for the prosecution and further found that the applicant was able to put forward all the arguments he considered it necessary to raise to defend his interests and present the evidence in his favour).
[191] See Trial Judgment, para. 52.
[192] Appeal Brief, paras 189-190.

witness's testimony;[193] (ii) the existence of other relevant factors;[194] and (iii) the witness's overall demeanour.[195] The Panel finds that Shala merely disagrees with the Trial Panel's findings and fails to identify any specific error in the way the Trial Panel exercised its discretion to assess the evidence of these witnesses.

94. In light of the above, the Appeals Panel finds that Shala fails to demonstrate that the Trial Panel erred in failing to acknowledge the impact of the passage of time on his ability to defend himself. Accordingly, the Appeals Panel dismisses Shala's Ground 9D.

B. ALLEGED ERRORS REGARDING SHALA'S PRIOR STATEMENTS (GROUNDS 1, 2 AND 8B)

95. The Panel's reference to Shala's "Prior Statements" in this Judgment encompasses: the transcripts of the interviews given by Shala to the Office of the Prosecutor of the ICTY in 2005 and 2007 ("2005 ICTY Statement" and "2007 ICTY Statement", respectively) (collectively, "ICTY Statements") and to the Belgian Federal Judicial Police in 2016 and 2019 ("2016 Belgian Statement" and "2019 Belgian Statement", respectively) (collectively, "Belgian Statements"), together with associated material and related procedural documents.[196]

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[193] The Trial Panel noted that the imprecisions were "minimal", the evidence "differ[ed] […] marginally" [REDACTED] (see Trial Judgment, paras 397, 599, [REDACTED]), or, by contrast that the witness's inability to remember concerned "essential aspects" of his evidence (see Trial Judgment, para. 893).

[194] The Trial Panel noted that the witness knew of Shala through his previous work in the police, remembered his nickname and identified his distinctive howl (see Trial Judgment, para. 451), that the witness's inability to recall a co-detainee was also due to the turnover of detainees and that the witness focused on his individual circumstances (see Trial Judgment, para. 485), [REDACTED].

[195] The Trial Panel noted the witnesses' "visible efforts" to recall details accurately, their "desire to stay true", their "genuineness" and "manifest attempt at accuracy", their "outright admission" of their inability to remember (see Trial Judgment, paras 166, 392, 418, 665) or, by contrast, the fact that the witness "made no effort" to recall facts (see Trial Judgment, para. 893).

[196] See Trial Judgment, para. 48. See also Appeal Decision on Prior Statements, para. 2; Appeal Brief, para. 5. Shala underlines that a representative of the SPO also attended the 2019 Belgian Interview. See Appeal Brief, para. 5.

96. The Court of Appeals Panel considers that Grounds 1, 2 and 8B are connected to each other in that they all allege errors committed by the Trial Panel in the admission and assessment of Shala's Prior Statements. Therefore, the Panel will consider these grounds together.

97. At the outset, the Panel notes that the Trial Panel refused to address similar submissions to those underpinning Grounds 1 and 2 in the Trial Judgment, finding that these matters had already been fully addressed during the trial phase.[197] Under Ground 1, Shala challenges the Trial Panel's admission of and reliance on the Prior Statements on the ground that they were allegedly taken in violation of his fair trial rights.[198] Under Ground 2, Shala argues that the Trial Panel erred in refusing to rule on the admissibility of numerous items of non-oral evidence, including the Belgian Statements, in the course of the proceedings rather than at the end, in the Trial Judgment itself. Shala argues that the Trial Panel failed to ensure certainty of the evidentiary record of the proceedings.[199]

98. Under Ground 8B, Shala claims that the language used in the assessment of some of the Prior Statements demonstrates that the Trial Panel shifted the burden of proof to the Defence to disprove the SPO evidence. Shala argues that, in doing do, the Trial Panel placed an unattainable burden of proof on the Defence.[200]

99. The SPO responds that: (i) contrary to Shala's assertions in Ground 1, the Trial Panel was entitled to rely upon his Prior Statements;[201] (ii) Shala's assertions in Ground 2 exceed the scope of the Notice of Appeal and, in any event, Shala was on notice that the Prior Statements were available for the Trial Panel's consideration;[202]

[197] See Trial Judgment, paras 48-50, 63-65.
[198] Appeal Brief, paras 4-15; Reply Brief, paras 2-3; Notice of Appeal, para. 2.
[199] Appeal Brief, paras 16-30; Reply Brief, paras 4-7; Notice of Appeal, para. 3.
[200] Appeal Brief, paras 165-168; Reply Brief, para. 24; Notice of Appeal, para. 16.
[201] SPO Response Brief, paras 4, 10-20.
[202] SPO Response Brief, paras 4, 21-34.

and (iii) contrary to Shala's assertions in Ground 8B, the Trial Panel did not shift the burden of proof in its assessment of the Prior Statements.[203]

1. Alleged Violation of Right to Legal Assistance in Relation to Shala's Prior Statements (Ground 1)

(a) Submissions of the Parties

100. Shala submits that he provided the Prior Statements without receiving legal assistance either prior to or during questioning.[204] Shala recalls that the Court of Appeals Chamber accepted that his right to legal assistance was violated when he was barred from accessing legal advice for the purposes of the 2016 Belgian Statement.[205]

101. Shala submits that despite the above, the Trial Panel admitted the Prior Statements into evidence when the Trial Judgment was issued and, although the Trial Panel "carefully avoided openly relying" on the 2016 Belgian Statement in its findings, it in fact heavily relied on all the impugned statements for its verdict and, in doing so, violated his fair trial rights.[206]

102. Shala submits that the right to a fair trial guarantees a suspect's right to legal assistance and protection against self-incrimination, and that according to the doctrine of the fruit of the poisonous tree, which has been developed by the ECtHR and similarly applied at the ICTY and at the ICTR, evidence obtained unlawfully cannot be admitted as, if it does, it taints the fairness of the entire proceedings.[207] According to Shala, none of the Prior Statements should have been relied upon by the Trial Panel.[208]

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[203] SPO Response Brief, paras 149, 151, 174-177.
[204] Appeal Brief, paras 4-5; Transcript, 15 May 2025, p. 27.
[205] Appeal Brief, para. 6; Transcript, 15 May 2025, pp. 27-28.
[206] Appeal Brief, paras 4-8, 11, 14-15; Reply Brief, para. 2; Transcript, 15 May 2025, pp. 27-30.
[207] Appeal Brief, paras 9-13. See also Reply Brief, para. 3; Transcript, 15 May 2025, pp. 31-32.
[208] Appeal Brief, para. 14.

103. Shala argues that even admitting that only the 2016 Belgian Statement was obtained in breach of his rights, the doctrine of the fruit of the poisonous tree precludes the use of the 2019 Belgian Statement because it was tainted by the prior breach of his rights.[209] Shala specifically claims that if "he had not responded the way he was forced to do in 2016, his 2019 statements would have been different".[210] Shala further argues that he felt compelled not to rely on the interpreter when he gave the Belgian Statements because the interpreter was an associate of the Belgian police.[211]

104. According to Shala, the Trial Panel also erred in law by denying the violation to his rights and refusing to remedy it.[212] Therefore, Shala requests the Panel to vacate all his convictions and remit the case for re-trial with the exclusion of the Prior Statements.[213]

105. The SPO responds that Shala's attempt to re-litigate the admissibility of the Prior Statements warrants summary dismissal.[214] The SPO recalls that the Court of Appeals Chamber already adjudicated this matter and ruled that the 2016 Belgian Statement was "not inadmissible" under Rule 138(2) of the Rules. Therefore, in the SPO's view, the Trial Panel could have relied on it for the purpose of the Trial Judgment but nonetheless chose not to do so.[215]

106. Furthermore, the SPO challenges Shala's argument that the Trial Panel heavily relied on his Prior Statements in reaching its verdict.[216] In that regard, the SPO argues that: (i) the matters that Shala identifies as prejudicial concern the Trial Panel's reliance on his Prior Statements in respect of background facts, which, he explicitly admitted,

[209] Appeal Brief, para. 14. See also Reply Brief, paras 2, 6.
[210] Reply Brief, para. 3.
[211] Appeal Brief, para. 5; Transcript, 15 May 2025, pp. 32-33.
[212] Appeal Brief, para. 15, referring to Trial Judgment, paras 73, 1119. See also Reply Brief, para. 2.
[213] Appeal Brief, para. 15; Reply Brief, para. 2.
[214] SPO Response Brief, paras 4, 10-11.
[215] SPO Response Brief, para. 12.
[216] SPO Response Brief, paras 15-20.

Shala did not contest at trial, and/or which had limited bearing on his criminal responsibility;[217] and (ii) the Trial Panel treated Shala's Prior Statements with appropriate caution and, in respect to criminal responsibility including Shala's presence and actions at the KMF, only relied on them when corroborated.[218] In the SPO's view, Shala's arguments are insufficient to overcome the deference afforded to the Trial Panel in the assessment of evidence.[219]

107. Regarding Shala's submission that the 2019 Belgian Statement was negatively tainted by his 2016 Belgian Statement, the SPO argues that this argument is untenable as Rule 138(2) of the Rules necessitates an individualised assessment of evidence which the Trial Panel deems to have been obtained by means of a violation of the Law, Rules, or international human rights law.[220] Further, the SPO argues that Shala's allusion to the fact that he might have given different answers in his 2019 Belgian Statement is purely speculative especially since his right to counsel was fully respected in relation to this statement.[221]

(b) Assessment of the Court of Appeals Panel

108. In the Trial Judgment, the Trial Panel refused to entertain this matter, recalling instead that the issue relating to the admissibility of the Prior Statements had been extensively litigated before the Trial Panel and the Court of Appeals Chamber.[222]

(i) The ICTY Statements

109. The Panel recalls that in the Appeal Decision on Prior Statements, the Court of Appeals Chamber upheld the Trial Panel's decision to admit both the ICTY Statements

[217] SPO Response Brief, para. 16.
[218] SPO Response Brief, paras 17-19.
[219] SPO Response Brief, para. 20.
[220] SPO Response Brief, para. 13.
[221] SPO Response Brief, para. 14.
[222] Trial Judgment, paras 48-50.

into evidence.[223] The Panel notes that the Defence reiterates in its appeal arguments presented to the Trial Panel.[224] Although the Defence disagrees with the Trial Panel's findings as upheld by the Court of Appeals Chamber, the Panel finds that it fails to demonstrate that this matter warrants appellate review.

110. Turning to Shala's arguments that the Trial Panel's heavy reliance on the Prior Statements for its verdict violated his right to a fair trial,[225] as far as the ICTY Statements are concerned, the Panel fails to see how a panel's reliance on evidence properly admitted at trial could, in itself, be constitutive of the violation Shala alleges.

(ii) The 2016 Belgian Statement

111. Regarding the 2016 Belgian Statement, as underlined by Shala,[226] the Court of Appeals Chamber found that the Trial Panel erred by concluding that overall, Shala was not barred from access to a lawyer during the 2016 Belgian Interview. It found that Shala was not informed of his right to legal assistance and was not afforded the right of access to a lawyer *during* this interview.[227] The Court of Appeals Chamber concluded that this procedural failure constituted a violation of the standards of international human rights law as per Rule 138(2) of the Rules but underlined the limited scope of the violation.[228] The Court of Appeals Chamber further stressed that, in light of the extent of the other procedural guarantees offered to Shala in the context of the 2016 Belgian Interview, there would be "no indicia of unreliability or possible damage to the integrity of the proceedings if the interview is admitted".[229] Accordingly, the Court of Appeals Chamber upheld the Trial Panel's decision to

[223] Appeal Decision on Prior Statements, paras 54, 69.
[224] See e.g. Appeal Brief, paras 5, 14.
[225] See Appeal Brief, paras 4, 7-8. See also Appeal Brief, paras 11, 14-15.
[226] Appeal Brief, para. 6.
[227] Appeal Decision on Prior Statements, paras 75-76.
[228] Appeal Decision on Prior Statements, paras 78-79.
[229] Appeal Decision on Prior Statements, paras 80-81.

consider the 2016 Belgian Statement as "not inadmissible pursuant to Rule 138(2) of the Rules".[230]

112. The Panel further notes that after the Appeal Decision on Prior Statements was issued, Shala applied unsuccessfully for a reconsideration of the Trial Panel's decision regarding the 2016 Belgian Statement.[231] Subsequently, Shala lodged a referral with the Constitutional Court Chamber arguing that the Trial Panel's finding that the 2016 Belgian Statement was not inadmissible as evidence, and the Trial Panel's subsequent refusal to reconsider its finding, violated his fair trial rights.[232] The referral was deemed to be premature and was dismissed.[233] Accordingly, the Panel concurs with the Trial Panel's finding that the issue relating to the admissibility of the 2016 Belgian Statement has been extensively litigated at trial.[234]

113. The Panel also observes that the Trial Panel did not rely, in the Trial Judgment, on the 2016 Belgian Statement for any of its findings. Shala's related argument that although the Trial Panel did not openly rely on the 2016 Belgian Statement, this statement "was duly considered for the purposes of the [Trial] Panel's conclusions",

[230] Appeal Decision on Prior Statements, paras 80-81.
[231] Transcript, 6 June 2023, pp. 1938-1939. See also Request for Reconsideration of the Decision Concerning Shala Prior Statements.
[232] See Constitutional Court Decision on Prior Statements, para. 2.
[233] See Constitutional Court Decision on Prior Statements, paras 29-31. The Panel notes that, in assessing whether Shala's complaints were premature, the Constitutional Court Chamber emphasised that: "the criminal proceedings against the Applicant are pending and that the charges at issue are yet to be wholly examined and determined by the Trial Panel and, as the case may be, by a Court of Appeals and a Supreme Court panel, in accordance with their respective competence". See Constitutional Court Decision on Prior Statements, para. 25. The Constitutional Court Chamber further recalled that: "[…] it falls in the first place to the criminal chambers to assess whether there is any merit to the raised procedural violation and whether this has to be remedied in the course of the ensuing proceedings". See Constitutional Court Decision on Prior Statements, para. 27. The Constitutional Court Chamber therefore found that: "[…] the Applicant, at this stage of the proceedings, cannot claim to be a victim of the alleged violation of his right to fair trial […]". See Constitutional Court Decision on Prior Statements, para. 28.
[234] See Trial Judgment, para. 49.

is unsupported.[235] In this context, the Appeals Panel finds it unnecessary to examine this argument further.[236]

114. Turning to Shala's reliance on the ECHR doctrine of the "fruit of the poisonous tree",[237] the Panel notes that Shala already raised similar arguments in his Defence Final Trial Brief and his closing statements.[238] The jurisprudence relied upon by the Defence pertains to whether incriminating evidence stemming from irregular interrogation at the pre-trial stage can be used to support a conviction at trial.[239] In the Panel's view, the ECtHR doctrine of the "fruit of the poisonous tree" relied upon by Shala does not apply in the present circumstances.

[235] See Appeal Brief, para. 7.
[236] See above, para. 42.
[237] Appeal Brief, paras 9-14.
[238] See Transcript, 17 April 2024, p. 4292; Defence Final Trial Brief, paras 307-310. Using ECtHR language, Shala argued that the 2016 Belgian Statement was a "poisonous tree", and, because it "inevitably shaped the answers given" in the 2019 Belgian Statement, this second interview was the "fruit of the poisonous tree" and that it should have been excluded as well. See Appeal Brief, para. 14.
[239] See Appeal Brief, paras 9-14. The Panel notes that the Defence is notably referring to the *Dvorski v. Croatia* Judgment in which the ECtHR found that, in the context of criminal proceedings, the police did not inform the applicant either of the availability of the lawyer of his choice or of the lawyer's presence at the police station where the applicant, "during police questioning, confessed to the crimes with which he was charged and that this confession was admitted in evidence at his trial; and that the national courts did not properly address this issue and, in particular, failed to take adequate remedial measures to ensure fairness". According to the ECtHR, these factors, taken cumulatively, irretrievably prejudiced the applicant's defence rights and undermined the fairness of the proceedings as a whole. *Dvorski v. Croatia* Judgment, para. 112. As underlined by Shala, Judge Zupančič agreed with the finding of a violation of the applicant's fair trial rights. See *Dvorski v. Croatia* Judgment, Concurring Opinion of Judge Zupančič, paras 5-6, 11-13. The Defence is further relying on the concurring opinions of Judges Kalaydjieva, Pinto de Albuquerque, and Turković to the same judgment where the judges underlined that "the use of evidence collected in breach of this basic privilege [the privilege against self-incrimination] will always render a trial unfair, irrespective of any other circumstances of the case." See *Dvorski v. Croatia* Judgment, Concurring Opinions of Judges Kalaydjieva, Pinto de Albuquerque, and Turković, paras 16-18, 21. See Appeal Brief, paras 9-12. In addition, the Defence is referring to the *Panovits v. Cyprus* Judgment in which the ECtHR found that: "[…] the conviction was based to a decisive extent on the applicant's confession, corroborated largely by his second statement. It considers that the extent to which the second statement made by the applicant was tainted by the breach of his rights of defence due to the circumstances in which the confession had been taken was not addressed by the trial court and remains unclear". See *Panovits v. Cyprus* Judgment, para. 85. See also Appeal Brief, para. 14.

115. First, the Panel acknowledges that, according to the ECtHR, compliance with the requirements of a fair trial must be examined for each respective issue but having regard to the fairness of the proceedings as a whole. At the time of issuing the Appeal Decision on Prior Statements, the Court of Appeals Chamber stressed that its role was however different than the role of the ECtHR as, in the specific circumstances of the Prior Statements, the Panel was required to rule on an alleged violation of international human rights standards at an early stage of the proceedings.[240] The Court of Appeals Chamber found no indicia of unreliability or possible damage to the integrity of the proceedings if the 2016 Belgian Statement was to be admitted.[241] Therefore, as per the wording of the ECtHR, there is no "poisonous tree" in the first place. At the appeal stage, the Appeals Panel has a more complete view of the development of the proceedings in this case and, since the Trial Panel did not rely on the 2016 Belgian Statement for any of its findings, the Panel is satisfied that the issue related to the 2016 Belgian Statement had no impact on the overall fairness of proceedings.[242]

116. In addition, Shala's argument that, without the responses he was "forced" to give in relation to the 2016 Belgian Statement, he might have given different responses in the 2019 Belgian Statement, is speculative.[243] The Panel recalls that, in the context of the 2016 Belgian Interview, Shala was informed of the nature and cause of the

[240] Appeal Decision on Prior Statements, para. 77.
[241] See Appeal Decision on Prior Statements, para. 81.
[242] See *Beuze v. Belgium* Judgment, para. 121; *Salduz v. Turkey* Judgment, para. 50; *Ibrahim and Others v. United Kingdom* Judgment, para. 251. In the *Beuze v. Belgium* Judgment, relying on the *Ibrahim and Others v. United Kingdom* Judgment, the ECtHR held that the principles developed in a prior case, the *Salduz v. Turkey* Judgment, require a two-stage test of analysis, and ruled out that systematic statutory restriction of a general and mandatory nature would in itself constitute an automatic violation of Article 6(3)(c) of the ECHR. See *Beuze v. Belgium* Judgment, paras 141-150. The Court explained that the two-stage test of analysis consists of: (i) looking at whether or not there were compelling reasons to justify the restriction on the right of access to a lawyer; and (ii) examining the overall fairness of proceedings. See *Beuze v. Belgium* Judgment, paras 142-144. See also *Ibrahim and Others v. United Kingdom* Judgment, paras 257-262; *Doyle v. Ireland* Judgment, paras 75-103.
[243] See Appeal Brief, para. 14; Reply Brief, para. 3.

suspicions or allegations against him, of his rights to remain silent and not to be compelled to self-incriminate.[244] The Panel further notes that the two statements were taken three years apart from each other and the 2016 Belgian Statement was not used in a prejudicial manner or even presented for comparison when the 2019 Belgian Statement was recorded. Therefore, there is no "tree and fruit relation". Further, in the Appeal Decision on Prior Statements, the Court of Appeals Chamber rejected Shala's arguments that the circumstances in which the 2019 Belgian Statement was recorded violated his right to legal representation.[245]

(iii) The 2019 Belgian Statement

117. Regarding the 2019 Belgian Statement, the Court of Appeals Chamber previously found that the Defence failed to demonstrate that the Trial Panel erred or abused its discretion in finding that the Accused was sufficiently informed of his right to have access to a lawyer and that he implicitly waived this right.[246]

118. Turning to the Trial Panel's reliance on the 2019 Belgian Statement in the Trial Judgment,[247] the Panel recalls that where an accused has freely and voluntarily made statements, he or she cannot invoke his or her right against self-incrimination retroactively to shield those statements from being introduced into evidence, provided the person was informed of his or her right to remain silent before giving this statement.[248] The Panel finds that a review of the Trial Judgment shows that the Trial Panel assessed the credibility of this statement and treated it with caution.[249] The

[244] The Panel notes that the 2016 Belgian Statement, which the Accused signed, clearly states that the Accused was given information about the fact that he was not deprived from his freedom and could, therefore, come and go at any moment. See 2016 Belgian Statement, "Procès-Verbal" (confidential), p. 3 (074119). See also Trial Panel Decision on Prior Statements, para. 73.
[245] See Appeal Decision on Prior Statements, paras 92, 96.
[246] See Appeal Decision on Prior Statements, paras 92, 96.
[247] Appeal Brief, paras 4, 7-8. See also Appeal Brief, paras 11, 14-15.
[248] See e.g. *Stanišić and Simatović* Decision on Prosecution Submission on Exhibits, p. 5.
[249] See e.g. Trial Judgment, paras 863, 865, 870-872, 899, 910-913.

Trial Panel relied on it when corroborated, notably by the 2005 ICTY Statement,[250] to establish Shala's membership in the KLA in 1998 and later on, in 1999, during the timeframe of the charges and to describe the uniforms, tasks and duties of the KLA Military Police.[251] Regarding Shala's presence at the KMF and at the frontline during the timeframe of the charges, the Trial Panel explained that it would:

> [...] treat Mr Shala's 2019 [Belgian] Statement with caution and attach more weight to his 2005 [ICTY] Statement on the relevant issues. The Panel relies on Mr Shala's 2019 [Belgian] Statement only to the extent that it is corroborated by other evidence.[252]

119. The Trial Panel further relied on the 2019 Belgian Statement in its determination that Shala has shown no remorse and no empathy for the victims.[253] However, to reach this finding, the Trial Panel also relied on other evidence, such as Shala's own words at trial.[254] Accordingly, and mindful of trial panels' broad discretion in assessing the reliability and the appropriate weight to be given to evidence presented at trial,[255] the Panel rejects Shala's argument that the Trial Panel violated his fair trial rights in "heavily" relying on the 2019 Belgian Statement in the Trial Judgment.[256]

120. Finally, Shala argues that he felt compelled not to rely on the interpreter when he gave the Belgian Statements because the interpreter was an associate of the Belgian police.[257] The Panel notes that this argument was raised and rejected at trial,[258] and that Shala did not propose this issue for certification while, on the other hand, he put forward for certification ten other issues arising from the Trial Panel Decision on Prior

[250] The Panel recalls that the Court of Appeals Chamber upheld the Trial Panel's decision to admit the 2005 ICTY Statement into evidence in the Appeal Decision on Prior Statements. See Appeal Decision on Prior Statements, para. 54.
[251] See e.g. Trial Judgment, paras 286-287, 289, 292-293, 338-340.
[252] Trial Judgment, para. 872. See also Trial Judgment, paras 853-863, 898-899.
[253] See Trial Judgment, para. 1117, referring to Transcript, 17 April 2024, p. 4370.
[254] Trial Judgment, para. 1117.
[255] *Thaçi and Selimi* Appeal Decision on SIMs, para. 80. See also *Thaçi and Selimi* Appeal Decision on SIMs, para. 86. See also above, para. 47.
[256] See Transcript, 15 May 2025, pp. 28-29.
[257] See Appeal Brief, para. 5. See also Transcript, 15 May 2025, pp. 32-33.
[258] See Trial Panel Decision on Prior Statements, paras 15, 56, 69, 96-99.

Statements.[259] The Panel considers that Shala waived his right to raise this issue at the appeal stage.[260] In any event, the Panel finds that the Trial Panel's assessment of Shala's related arguments is detailed and well-reasoned.[261] Ultimately, the Panel is not convinced that the sole fact that the interpreter was provided through the Belgian police could have any impact on the fairness of the proceedings.[262]

121. In light of all of the above, the Panel finds that Shala fails to demonstrate an error in the Trial Panel's findings related to his Prior Statements. Accordingly, the Appeals Panel dismisses Shala's Ground 1.

2. Alleged Failure to Ensure Certainty as to the Evidentiary Record (Ground 2)

(a) Submissions of the Parties

122. Shala argues that the Trial Panel erred in law and in fact by failing to ensure that there is certainty regarding the evidentiary record of the proceedings as the trial proceeded.[263] In Shala's view, the wording of Article 40(6)(h) of the Law, read together with Rule 138(1) of the Rules, requires trial panels to issue admissibility decisions during the course of the trial.[264] He submits that the legal frameworks of international criminal courts require a similar approach.[265]

123. Shala further argues that the Specialist Chambers' legal framework is different from the ICC legal framework that provides trial judges with the discretion "to assess

[259] See Request for Leave to Appeal Decision on Prior Statements, para. 4.
[260] See above, para. 39. During the Appeal Hearing, the Defence claimed that "the recordings of Shala's statement could never be provided to the Defence". See Transcript, 15 May 2025, p. 30. The Panel notes that the Defence raised this argument for the first time during the Appeal Hearing and recalls that the Panel may decline to consider such an argument on that basis. See above, para. 40. The Panel finds that this argument is largely undeveloped and was not raised in a timely manner. Accordingly, the Panel declines to address it.
[261] See Trial Panel Decision on Prior Statements, paras 69, 96-99.
[262] See *Ucak v. United Kingdom* Decision, p. 10.
[263] Appeal Brief, para. 16; Reply Brief, para. 6.
[264] Appeal Brief, paras 17-18, 20-21; Reply Brief, para. 4. See Transcript, 15 May 2025, pp. 34-37.
[265] Appeal Brief, para. 24. See also Reply Brief, paras 4-5.

freely all evidence submitted in order to determine its relevance or admissibility in accordance with [A]rticle 69 [of the Rome Statute]", to rule on admissibility or even to proceed and deal directly with relevance.[266] Shala acknowledges that the discretion provided to the ICC judges has resulted in different approaches by different trial chambers.[267] Moreover, Shala points, *inter alia*, to the *Gbagbo* Dissenting Opinion of Judge Henderson according to whom "the settled and uncontroversial practice" (with the exception of the ICC *Bemba et al.* case) is to rule on admissibility of evidence before the closure of the case.[268]

124. According to Shala, the Trial Panel erred by failing to apply correctly the Specialist Chambers' legal framework and to follow the above-mentioned well-established practice in international criminal proceedings by requiring admissibility decisions in the course of the trial.[269] Shala argues that he had "no clarity whatsoever" as to the Trial Panel's intention regarding highly incriminating evidentiary material tendered by the SPO and that, in adopting this approach, the Trial Panel failed to ensure certainty regarding the evidentiary record of the proceedings.[270]

125. Referring to the Framework Decision on Non-Oral Evidence, Shala recalls the Trial Panel's decision to defer consideration of the admissibility of evidence to the judgment stage, except where it is required to render discrete decisions prior to that.[271] Shala submits that, the Trial Panel chose to issue admissibility decisions for 360 items, "including core evidential material tendered by the [SPO] at the time of issuing its Judgment".[272] Shala further submits that during the proceedings, the Trial Panel

[266] Appeal Brief, para. 19.
[267] Appeal Brief, para. 22.
[268] Appeal Brief, paras 22-23. See also *Gbagbo* Dissenting Opinion of Judge Henderson, para. 12.
[269] Appeal Brief, para. 25. See also Transcript, 15 May 2025, pp. 35-37.
[270] Appeal Brief, paras 16, 26; Reply Brief, para. 6.
[271] Appeal Brief, para. 25.
[272] Appeal Brief, para. 25; Reply Brief, para. 4.

refused to rule on whether it would admit into evidence the Belgian Statements or statements he made in support of his asylum applications.[273] Instead, the Trial Panel admitted this material without explanation, "with the delivery of" the Trial Judgment.[274]

126. According to Shala, the fact that he was "only given notice of the evidence against him at the close of the proceedings cannot be reconciled with his right to be informed promptly and in detail of the charges against him".[275] Shala also argues that he was deprived of the possibility to comment on the incriminatory statements he gave without knowing whether this evidence would be admitted or not and therefore his ability to present his defence was prejudiced.[276] Shala further argues that his team was forced to perform investigations with a view to countering all factual allegations contained in the evidence tendered by the SPO without knowing, during the entire proceedings, whether any of it would be admitted or excluded.[277] In Shala's view, the Trial Panel violated his rights under Article 21 of the Law and Article 6(3) of the ECHR.[278]

127. Finally, Shala submits that the Trial Panel erroneously found that the Defence's complaints on that matter had been addressed at trial in the Framework Decision on Non-Oral Evidence, while this is not the case.[279] Shala argues that he had no possibility to challenge the Framework Decision on Non-Oral Evidence at trial in an interlocutory

[273] Appeal Brief, paras 26, 30; Transcript, 15 May 2025, pp. 27-28.
[274] Appeal Brief, para. 26; Transcript, 15 May 2025, pp. 27-28. In relation to the Belgian Statements, Shala provided a slightly contradictory submission in saying that these statements were not admitted into evidence and did not receive an exhibit number. The Panel however underlines that the Belgian Statements were admitted under the following exhibit numbers: P00010 (confidential) (2016 Belgian Statement), P00011 (confidential), P00012 (confidential), P00013 (confidential), P00014 (confidential), P00015 (confidential), P00021 (confidential) (2019 Belgian Statement).
[275] Appeal Brief, para. 28.
[276] Appeal Brief, para. 30.
[277] Appeal Brief, para. 28.
[278] Appeal Brief, para. 29.
[279] Appeal Brief, para. 27; Reply Brief, para. 4.

appeal because of its discretionary nature and that, therefore, this issue is being presented for the first time before the Appeals Panel in the course of challenging his convictions.[280] In Shala's view, the Trial Panel further misleadingly stated that "the Defence abided by that system [on the admission of written evidence]" while in fact, the Defence had no other option since this "was clearly a matter falling within its discretion and could not be challenged in an interlocutory appeal".[281]

128. The SPO responds that according to Shala's Notice of Appeal, the scope of Ground 2 was limited to the alleged uncertainty of the evidentiary record in respect of the Prior Statements. In his Appeal, however, Shala is expanding his challenges to the Framework Decision on Non-Oral Evidence and the timing of admissibility decisions in general. As a result, the SPO requests that the Panel dismiss Ground 2 entirely.[282]

129. Regarding the Framework Decision on Non-Oral Evidence, the SPO argues that Shala waived his right to challenge it by failing to seek reconsideration or certification to appeal,[283] and that, in any event, this decision was issued properly within the discretion of the Trial Panel and in line with the Specialist Chambers' legal framework.[284] In that regard, the SPO submits that Shala's attempt to support his own interpretation by reference to the dissenting opinions of two ICC trial chamber judges is misguided as subsequent jurisprudence has confirmed that ICC trial chambers have the discretion to defer admissibility rulings to the judgment phase.[285] The SPO further

[280] Reply Brief, paras 4, 7. See also Appeal Brief, para. 27. Shala further adds that the Appeal Decision on Prior Statements is still reviewable by the Constitutional Court Chamber as this matter concerns the protection of Shala's rights. See Reply Brief, para. 7.
[281] Appeal Brief, para. 27.
[282] SPO Response Brief, para. 21.
[283] SPO Response Brief, paras 22-23.
[284] SPO Response Brief, paras 24-26.
[285] SPO Response Brief, para. 24.

argues that there is no well-established practice among international courts requiring admissibility rulings to be made during trial.[286]

130. Turning to Shala's Prior Statements, the SPO argues that, throughout the proceedings, the Trial Panel made clear that the Prior Statements were available for consideration in the Trial Judgment.[287] The SPO submits that the ICTY Statements were clearly admitted into evidence by the Trial Panel on 6 December 2022 and this decision was upheld on appeal.[288] As for the Belgian Statements, the SPO argues that they were found to be "not inadmissible" by the Trial Panel in the same decision and that this finding was also upheld on appeal.[289] The finding that the Belgian Statements were "not inadmissible" was repeated by the Trial Panel in the course of a subsequent decision.[290] In the SPO's view, Shala's contention that he had no clarity on the Trial Panel's intention with regard to the Prior Statements, is therefore false.[291]

131. The SPO further argues that Shala chose not to address his Prior Statements during his trial and cannot now claim that his rights were breached as a consequence.[292] In addition, the SPO submits that Shala fails to explain why Counsel could not comment on his Prior Statements without risking Shala's protection against self-incrimination. The SPO stresses that both in relation to his Prior Statements and during his own trial, Shala was properly informed and well aware of his right to remain silent.[293]

[286] SPO Response Brief, para. 25.
[287] SPO Response Brief, paras 27-31.
[288] SPO Response Brief, para. 28.
[289] SPO Response Brief, para. 29.
[290] SPO Response Brief, paras 29-30.
[291] SPO Response Brief, para. 31.
[292] SPO Response Brief, paras 32-34.
[293] SPO Response Brief, para. 33.

(b) Assessment of the Court of Appeals Panel

(i) Scope of the Notice of Appeal and Waiver Issues

132. The Panel addresses first the SPO's submission that the arguments developed in Ground 2 of the Appeal Brief exceed the scope of the Notice of Appeal and that Ground 2 should be summarily dismissed.[294] The Panel recalls that it may decline to consider issues raised in an appeal brief which were not contained in the notice of appeal.[295] The Panel notes that, in the Appeal Brief, the Defence does not develop any arguments in support of its allegation that the Trial Panel erred regarding its admission of the statements Shala made in relation to his asylum applications and other incriminating evidentiary material.[296] Accordingly, the Panel will not consider these arguments.

133. The Panel agrees with the SPO that according to Shala's Notice of Appeal, the scope of Ground 2 is limited to alleged uncertainty of the evidentiary record in respect of the Prior Statements.[297] The Panel notes that in the Notice of Appeal and in the Appeal Brief, Shala refers generally to all his Prior Statements.[298] The Panel however recalls that the ICTY Statements were clearly admitted by the Trial Panel pursuant to Article 37(1) of the Law, on 6 December 2022,[299] and that only the Belgian Statements were declared as "not inadmissible".[300] Any arguments raised by Shala claiming that he was prejudiced by the uncertainty of the trial record in this case cannot validly

[294] SPO Response Brief, para. 21.
[295] See above, para. 40.
[296] Appeal Brief, paras 26, 30. The only reference Shala makes to his asylum applications is to be found in the context of his reply to the SPO Response Brief on Ground 7 and does not relate to the admission of these applications. See Reply Brief, para. 22.
[297] SPO Response Brief, para. 21.
[298] *Compare* Appeal Brief, para. 26 *with* Appeal Brief, para. 30; Notice of Appeal, para. 3.
[299] See Appeal Decision on Prior Statements, para. 14, recalling the specific provision of Article 37(1) of the Law according to which assigned panels shall decide on the admissibility of evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the Specialist Chambers prior to its establishment by authorities or agencies including the ICTY. See also Trial Panel Decision on Prior Statements.
[300] See Trial Panel Decision on Prior Statements, para. 80; Appeal Decision on Prior Statements, para. 14.

encompass the ICTY Statements. Accordingly, the Panel will limit its assessment to arguments related to the admissibility of the Belgian Statements.

134. Turning to the SPO's submissions that Shala failed to address the matter related to the admission of the Belgian Statements during trial,[301] the Panel agrees with this submission.

135. The first opportunity for Shala to challenge the admissibility of the Belgian Statements was in the context of the Trial Panel Decision on Prior Statements. The Panel observes that although Shala put forward ten issues arising from the Trial Panel Decision on Prior Statements, in which the Trial Panel decided that the Belgian Statements were "not inadmissible", he did not propose the issue of specific timing of admissibility regarding the Belgian Statements for certification.[302] The Panel further notes that, in another decision, the Trial Panel stated that the Belgian Statements were "available to the [Trial] Panel for the purposes of its judgment",[303] and that this finding was not challenged by the Defence either. Accordingly, the Panel finds that Shala failed to challenge at trial the finding made in the Trial Panel Decision on Prior Statements that the Belgian Statements were "not inadmissible", despite having had the opportunity to do so.

136. The Panel finds that the Framework Decision on Non-Oral Evidence was another opportunity for Shala to challenge the admissibility of the Belgian Statements as well as the admissibility of non-oral evidence in general. In the Trial Judgment, the Trial Panel found that if the Defence considered the system of admission of non-oral evidence to be detrimental to Shala's fair trial rights, it should and could have sought reconsideration or leave to appeal this decision. The Trial Panel considered that Shala was merely attempting to re-litigate this matter and decided to dismiss Shala's related

[301] SPO Response Brief, paras 22-23.
[302] See Request for Leave to Appeal Decision on Prior Statements, para. 4.
[303] See Decision on Admission of Documentary Evidence, para. 41.

arguments.[304] The Panel agrees that Shala failed to request reconsideration or leave to appeal the Framework Decision on Non-Oral Evidence, despite having had the opportunity to do so. As rightly underlined by the SPO, the discretionary nature of a decision does not preclude appellate review, provided the certification requirements are met.[305]

137. In principle, a party's failure to make formal and timely objections to the admissibility of evidence at trial warrants summary dismissal of the objection raised for the first time on appeal.[306] The Panel is however mindful of Shala's arguments that his fair trial rights were violated and his ability to present his defence prejudiced.[307] The Panel further acknowledges that the impugned evidence was only admitted with the delivery of the Trial Judgment, therefore this appeal is the first opportunity Shala has had to argue that he was prejudiced by the implementation of the Trial Panel's decisions.[308] The Appeals Panel thus decides to address Shala's Ground 2 insofar as it pertains to the admissibility of the Belgian Statements, including the related arguments challenging the Framework Decision on Non-Oral Evidence, out of fairness to the Accused and in the interests of justice.

(ii) Admissibility of Evidence at the Specialist Chambers

138. The Panel notes that according to Article 40(6)(h) of the Law governing the overall powers and functions of the Trial Panel:

> Prior to a trial or during the course of a trial, the Trial Panel may, as necessary […] rule on any other matters, including the admissibility of evidence.

[304] Trial Judgment, paras 63-65.
[305] See above, para. 76. See also SPO Response Brief, para. 22. Contra Reply Brief, para. 4.
[306] See above, para. 39.
[307] Appeal Brief, paras 28-30.
[308] See Reply Brief, para. 7.

139. The Panel finds that the above reference to "may, as necessary" gives a broad discretion to the Trial Panel,[309] on both whether and when it may rule on admissibility of evidence. The Panel recalls however that the Law:

> […] is not and does not purport to be […] a meticulously detailed code providing explicitly for every possible scenario and every solution thereto. It sets out in rather general terms the jurisdictional framework within which the Specialist Chambers have been mandated to operate.[310]

140. Subject to being bound by the plain meaning of the text, provisions of the Law are construed in the context of other provisions of the Law and of the Rules.[311] The Rules, in particular Rule 138(1) of the Rules addressing specifically the question of the admissibility of evidence, provide further clarification:

> Unless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect. In exceptional circumstances, when the Panel is satisfied that an issue was not known at the time when the evidence was submitted, it shall be raised immediately after it has become known.

141. Mindful that it is bound by the plain meaning of the text, the Panel is of the view that Rule 138(1) of the Rules, read in connection with Article 40(6)(h) of the Law, does not impose on a trial panel a duty to rule on admissibility of evidence under a specific timeframe. This finding is consistent with a previous finding of the Court of Appeals Chamber stressing that the Law and the Rules "do not expressly regulate the issue of admissibility of an Accused's statements".[312] In addition, this finding is further

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[309] See e.g. *Krasniqi* Third Appeal Decision on Detention, para. 47 (on the interpretation of the word "may", although in a different context).
[310] See *Thaçi et al.* Appeal Decision on Jurisdiction, para. 137.
[311] See e.g. *Gucati* First Appeal Decision on Arrest and Detention, para. 30.
[312] *Krasniqi and Selimi* Appeal Decision on Admission of Prior Accused Statements, para. 11. See also *Krasniqi and Selimi* Appeal Decision on Admission of Prior Accused Statements, para. 45, fn. 133, where the Court of Appeals Chamber further explains that the ECtHR jurisprudence relates to the use of the evidence rather than its admission ("[r]ules governing admissibility of evidence are primarily a matter for regulation under national law and it is not the role of the ECtHR to determine, as a matter of principle, whether a particular type of evidence may be admissible").

consistent with the general principle according to which decisions related to the admission of evidence are generally treated as discretionary, and that appellate intervention in that respect is warranted only in very limited circumstances.[313]

142. The Panel notes that the Parties discuss at length the practice of the ICC and further refer to the legal framework of other international courts with regard to the modalities and implementation of the different approaches to the admission of evidence.[314] The Panel recalls that the Specialist Chambers are not bound to follow the jurisprudence of other international criminal tribunals.[315] That being said, the Parties seem to agree,[316] and so does the Panel, that the ICC jurisprudence reflects a margin of discretion afforded to judges when dealing with admissibility of evidence, resulting in different approaches within the same Court.[317] As for other courts, such as the ICTY, the ICTR or the IRMCT for example, the Panel finds that, contrary to Shala's submissions, the provisions governing the admissibility of evidence before these

[313] See *Krasniqi and Selimi* Appeal Decision on Admission of Prior Accused Statements, para. 6, and jurisprudence cited therein. See also above, para. 46.
[314] Appeal Brief, paras 19-24; SPO Response Brief, paras 24-25.
[315] See e.g. *Veseli* First Appeal Decision on Interim Release, para. 51; Appeal Decision on Provisional Release, para. 41; *Thaçi et al.* Appeal Decision on Jurisdiction, para. 44.
[316] See Appeal Brief, paras 19, 22-23; SPO Response Brief, para. 24.
[317] Piragoff, D., Clarke, P., in *Ambos* Rome Statute Commentary, Article 69, mn. 45, commenting on Article 69(4) of the Rome Statute governing the procedure on admissibility of evidence before the ICC, the authors stress that: "[o]ne of the key elements of the compromise of the Statute and the Rules was to grant the Court, in the context of a hybrid trial system, the discretion to rule on questions of relevance, admissibility and weight by employing the analytical technics of both the common law and civil law systems, provided that 1) the relevance and admissibility of an item of evidence is considered at some point in the proceedings […], and 2) the Court has a discretion to exclude the admission of an item of evidence in accordance with the Statute and Rules". The authors further comment on the lack of consensus of approach among the decisions of the ICC Appeals Chamber (that was constituted differently when delivering decisions on the similar question of admissibility of evidence) in the *Prosecutor v. Bemba* and *Prosecutor v. Bemba et al.* cases. See Piragoff, D., Clarke, P., in *Ambos* Rome Statute Commentary, Article 69, mns 45-47. The authors observed that: "it appears that the majority of [ICC] Chambers have tended to follow the second analytical method" [*i.e.*, consider relevance, admissibility and weight as part of the evaluation process at the end of the trial], although "there has been a growing trend to rule on the admissibility of *certain types of evidence* at the time of submission […]"(emphasis added). See Piragoff, D., Clarke, P., in *Ambos* Rome Statute Commentary, Article 69, mn. 50.

courts are not analogous to Rule 138(1) of the Rules.[318] In any event, the reference to "admit" in the relevant rules of these courts stating that "[a] Chamber may admit any relevant evidence which it deems to have probative value", cannot be interpreted as imposing on trial panels a specific time when they have to take a decision on admission of evidence.[319]

(iii) Trial Panel's Findings on Admissibility of the Belgian Statements

143. The Panel recalls that the Belgian Statements were declared as "not inadmissible" in the context of the Trial Panel Decision on Prior Statements issued on 6 December 2022,[320] and that the Trial Panel adopted its procedure for the admissibility of non-oral evidence in the context of a subsequent decision, the Framework Decision on Non-Oral Evidence issued on 17 March 2023.[321] In the context of the Framework Decision on Non-Oral Evidence, the Trial Panel stressed that it would:

> [...] refrain, in general, from rendering discrete item-by-item admissibility rulings of evidence upon submission during trial, unless: (i) the evidence is challenged and the Panel finds compelling reasons to rule on the admissibility of a particular evidentiary item; (ii) the Panel exercises its *proprio motu* power to rule on the admissibility of individual evidentiary items with a view to excluding any of them; or (iii) the Panel is compelled to do so by

[318] *Compare* Rule 138(1) of the Rules *with* ICTY (Rule 89(C) of the Rules of Procedure and Evidence), ICTR (Rule 89(C) of the Rules of Procedure and Evidence) and IRMCT (Rule 105(C) of the Rules of Procedure and Evidence) stating that "A Chamber may admit any relevant evidence which it deems to have probative value".

[319] See *Ambos* Treatise ICL III, Chapter V, A.(1)(a) (Free assessment and admissibility), p. 447, where the author stresses that "[g]enerally speaking, the evidence law of international criminal tribunals is governed by the principle of the free assessment of all evidence, leaving 'maximum flexibility' and 'broad discretion' to [Trial Chambers] when deciding on the admissibility and probative value of evidence". The jurisprudence of these courts further supports the observation that the timing of trial chambers' rulings on the admissibility of evidence is a discretionary matter. See e.g. *Kanyarukiga* Appeal Judgement, para. 52 ("the timing of the Trial Chamber's rulings on the admissibility of the Prosecution evidence related to the general conduct of the proceedings and was thus a matter within the discretion of the Trial Chamber"). See also *Hadžihasanović and Kubura* Appeal Judgement, para. 115 (in terms of timing, "there is nothing in the Rules that would, in principle, prohibit a Trial Chamber from admitting evidence after the Defence case as long as it is relevant and the Trial Chamber deems it to have probative value").

[320] See Trial Panel Decision on Prior Statements, paras 80, 110.

[321] See Framework Decision on Non-Oral Evidence, paras 21, 67.

> specific legal provisions, as further discussed below. When deliberating on the judgment, the Panel will consider the standard admissibility criteria in Rule 138(1) of the Rules as part of its assessment of the evidence when determining the guilt or innocence of the Accused and on the basis of a holistic evaluation of all items of evidence that are part of the evidentiary record in the present case […].[322]

144. The Trial Panel further stressed, in the Framework Decision on Non-Oral Evidence that the Parties and Victims' Counsel would have "absolute clarity", at the closing of the evidentiary proceedings, which evidentiary items may be considered by the Trial Panel for the purpose of the Trial Judgment.[323]

145. Regarding the SPO's argument stating that, in light of the above decision, the evidentiary record was certain,[324] the Panel recalls first that, before the Framework Decision on Non-Oral Evidence was issued, the SPO and the Defence were both of the view that the admissibility of non-oral evidence should be decided at the time of its submission and should not be deferred to the judgment on the guilt or innocence of the Accused.[325] Second, the Panel finds that the Trial Panel's reference to the Belgian Statements being "not inadmissible" is not straightforward and the use of quotation marks in the Appeal Decision on Prior Statements and in the submissions of the Parties on appeal,[326] shows a lack of clarity as to the exact position of the Trial Panel regarding the status of these statements. Third, in the Trial Panel Decision on Prior Statements, the Trial Panel gave indications which could validly be interpreted as meaning that the question related to the admission of the Belgian Statements into

[322] Framework Decision on Non-Oral Evidence, para. 21. See also Framework Decision on Non-Oral Evidence, para. 22.
[323] See Framework Decision on Non-Oral Evidence, para. 16.
[324] See SPO Response Brief, paras 27-31.
[325] See Framework Decision on Non-Oral Evidence, para. 4.
[326] Appeal Brief, para. 26; SPO Response Brief, paras 29-30. See Appeal Decision on Prior Statements, paras 81, 109. See also Reply Brief, para. 6.

evidence would be addressed in the Framework Decision on Non-Oral Evidence, which was not the case.[327]

146. In that regard, the Panel finds that while neither the Law nor the Rules do require an immediate ruling by trial panels on issues of admissibility, postponing the admissibility assessment to a later stage in the proceedings may have detrimental effects in terms of fairness to the Parties, in the sense that neither the SPO nor the Defence may know for sure what evidence will ultimately be considered by the Judges.[328] The Trial Panel seemed to be of the same view, as the Framework Decision on Non-Oral Evidence explicitly provides for exceptions and foresees the possibility to render admissibility rulings upon submission of evidence during trial when the evidence is challenged and the Trial Panel finds compelling reasons to rule on the admissibility of a particular evidentiary item.[329]

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[327] See Trial Panel Decision on Prior Statements, paras 80, 110 ("Concerning the question of whether to admit into evidence the [Belgian Statements], the Panel recalls that it will issue in due course a decision on the submission and admissibility of non-oral evidence").

[328] Piragoff, D., Clarke, P., in *Ambos* Rome Statute Commentary, Article 69, mn. 48, referring to *Guariglia*, 'Admission' v. 'Submission' of Evidence at the International Criminal Court, pp. 315, 317-318. Although these remarks were developed in another context, the Panel finds relevant the section of the Rome Statute Commentary addressing the issue of admissibility of evidence and echoes the suggestion according to which it might be preferable for trial panels not to state categorically at an early stage of the trial that they would only employ the admission method (where admission of evidence is decided upon submission) or the submission method (where the admission of evidence is postponed to the end of the trial). The authors rather recommend "a more nuanced and flexible approach […] in order to determine which analytical method to employ in any given situation and be true to its obligations to ensure a fair trial" […] "While a [Trial Chamber] can presumably decide to follow one analytical method, it cannot close its eyes to its obligations to ensure a fair trial, which may require exercising discretion and, at times, employing both analytical methods within the trial process to ensure fairness". See Piragoff, D., Clarke, P., in *Ambos* Rome Statute Commentary, Article 69, mns 47-49.

[329] See Framework Decision on Non-Oral Evidence, para. 21. See also Framework Decision on Non-Oral Evidence, para. 22. The Panel notes that a review of the trial record does not indicate that the Trial Panel ever made use of this possibility to rule on admissibility of evidence upon submission during trial when the evidence is challenged, and the Trial Panel finds compelling reasons to rule on the admissibility of a particular evidentiary item. Rather, the Trial Panel seems to have consistently applied a more rigid approach consisting in postponing its non-oral evidence admissibility assessment until the stage of the Trial Judgment, unless compelled to rule on the admissibility of discrete items at an earlier stage by specific legal provisions. See e.g. Decision on SPO Motion for Admission of Documentary Evidence, para. 36; Decision on Requests for Admission of Items Used with TW4-08, TW4-06, TW4-07, TW4-09, TW4-10, TW4-11, para. 15; Decision on SPO and Defence Motions for Admission of Materials Related

147. Moreover, the Panel considers that making use of this exception was warranted in light of the incriminatory nature of the impugned evidence and because the Parties had expressly requested the Trial Panel to issue a ruling on the admissibility of the Belgian Statements.[330] Accordingly, although the Trial Panel did not abuse its discretion in adopting the procedure set out in the Framework Decision on Non-Oral Evidence, the Panel finds that it erred in failing to issue a ruling on the admissibility of the Belgian Statements either upon submission or in the context of the Framework Decision on Non-Oral Evidence. The Panel will now turn to address the impact of this error, if any.

(iv) Shala's Allegation of Prejudice

148. The Panel will address Shala's argument that he was only given notice of the evidence against him at the close of the proceedings and that this cannot be reconciled with his right to be informed promptly and in detail of the charges against him.[331] The Panel finds this argument to be unsubstantiated and recalls that an indictment does not need to set out the evidence proving the pleaded material facts underpinning the charges.[332] The Panel further notes that this Ground does not pertain to whether Shala was properly informed "of the cause and content of the charges against him" but rather whether he was properly informed that the Belgian Statements would eventually be admitted in the trial record.

to Expert Witnesses, para. 30; Decision on Requests for Admission of Items Used with DW4-06, DW4-02, DW4-05 and W04754, para. 12; Decision on Defence Requests for Admission of Non-Oral Evidence, paras 26, 33; Decision on Defence Requests for Admission of Evidence, para. 21; Decision on Requests for Admission of Items Used with W03887, W04441, W04440, DW4-03, W04280 and W04405, para. 43.

[330] See Trial Panel Decision on Prior Statements, paras 14-15.

[331] Appeal Brief, para. 28.

[332] *Thaçi et al.* Appeal Decision on Defects in the Indictment, para. 20. See also Appeal Decision on Defects in the Indictment, para. 19; *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 38. See also below, para. 212.

149. The Panel finds that Shala fails to demonstrate that he was prejudiced on the basis that he was deprived of the possibility to comment on the alleged incriminatory statements he gave without knowing whether this evidence would be admitted or not.[333] The Trial Panel noted that Shala commented on the merits of numerous other pieces of evidence subjected to the same analytical method.[334] The Panel observes therefore that commenting on some pieces of evidence and not on others, such as the Belgian Statements, appears to be a deliberate approach by Shala. The Panel recalls that Shala freely and voluntarily made these statements and that he was informed about his right to remain silent before giving them.[335] The Panel finds that Shala fails to support his claim that he could not have commented on the Belgian Statements without risking his protection against self-incrimination,[336] especially in the context of the proceedings before the Trial Panel where he was assisted by legal counsel. In that regard, the Panel further recalls that (i) the privilege against self-incrimination does not protect against making an incriminating statement per se but against providing evidence by coercion or oppression, and (ii) it is when the degree of compulsion involved destroys the very essence of the privilege against self-incrimination that Article 6 of the ECHR is violated.[337]

150. Finally, regarding Shala's assertion that he had to conduct investigations to counter the SPO's evidence without knowing whether any of it would be admitted or

[333] Appeal Brief, paras 26, 30; Transcript, 15 May 2025, pp. 35-37.
[334] See Trial Judgment, para. 64, fns 79-80.
[335] See Appeal Decision on Prior Statements, para. 80 (in relation to the 2016 Belgian Statement, the Court of Appeals Chamber found that: "at the time of the 2016 Belgian Interview, all the other procedural guarantees were provided for in the context of this interview. […] In addition, Shala received comprehensive information about his rights as part of the summons and the statements of rights"). See also Appeal Decision on Prior Statements, para. 85 (in relation to the 2019 Belgian Statement, the Court of Appeals Chamber found that: "[f]urther, at the start of the interview, on both 11 and 12 February 2019, Shala was reminded of his right to remain silent and that he could not be forced to incriminate himself. Shala confirmed that he understood").
[336] See Appeal Brief, para. 26.
[337] *Krasniqi and Selimi* Appeal Decision on Admission of Prior Accused Statements, para. 42.

excluded,[338] this argument is equally unsubstantiated. In particular, the Panel finds that Shala does not show that his ability to defend himself against the allegations underpinning his conviction was impaired. His general and unsubstantiated claim that he could not comment on the Belgian Statements and that he "was forced to perform investigations" to counter the SPO case,[339] is insufficient to show that he suffered prejudice or that the fairness of the proceedings was undermined. Accordingly, the Panel finds that Shala fails to demonstrate that he suffered prejudice as a result of the Trial Panel's decision to postpone its determination on the admissibility of the Belgian Statements to the judgment stage.

151. In light of all of the above, the Panel finds that the Trial Panel erred in failing to rule on the admissibility of the Belgian Statements before the delivery of the Trial Judgment. However, Shala fails to show that he suffered any prejudice in that regard. Accordingly, the Appeals Panel dismisses Shala's Ground 2.

3. Alleged Errors in Assessing Shala's Prior Statements (Ground 8B)

(a) Submissions of the Parties

152. Shala argues that the language the Trial Panel used in its assessment of some of the Prior Statements, stating that they did not "discredit" or "cast doubt on" the SPO's evidence, demonstrates that the Trial Panel shifted the burden of proof to the Defence to disprove the findings regarding Shala's presence at the KMF during the timeframe of the charges and his participation in mistreating detainees.[340] Shala requests the Appeals Panel to vacate his convictions on all counts and to remit the case for re-trial.[341]

[338] See Appeal Brief, para. 28.
[339] Appeal Brief, para. 28.
[340] Appeal Brief, paras 165-167. In support of his assertion, Shala relies on the *Zigiranyirazo* Appeal Judgement, para. 19. See also Reply Brief, para. 24; Transcript, 15 May 2025, pp. 30, 50.
[341] Appeal Brief, para. 168.

153. The SPO responds that the Trial Panel did not shift the burden of proof in assessing the Prior Statements, that Shala relies on jurisprudence which bears scarce relevance to the issue at hand and that the examples used by Shala are taken out of context and based on a misleading reading of the Trial Judgment.[342]

(b) Assessment of the Court of Appeals Panel

154. With regard to Shala's contention that the Trial Panel misapplied the burden of proof in finding that some of his Prior Statements did not "discredit" or "cast doubt" on the SPO's evidence regarding Shala's presence at the KMF and role in the commission of the charged crimes,[343] the Appeals Panel first recalls that the SPO bears the burden of establishing facts material to the guilt of an accused beyond reasonable doubt. In the Panel's view, suggesting that the Defence should present evidence proving the contrary would be an impermissible shift of such burden.[344] In this case, the Appeals Panel observes that in paragraph 873 of the Trial Judgment, the Trial Panel found:

> In any case, neither Mr Shala's 2005 [ICTY] Statement nor his 2019 [Belgian] Statement discredit the consistent, coherent and mutually corroborative evidence on record emanating, in particular, from TW4-01, W04733 and W01448, as well as Mr Elezaj, that Mr Shala was at the KMF on several occasions […] taking part in the mistreatment of detainees. To the contrary, Mr Shala's admission in his 2019 [Belgian] Statement […] supports the evidence of the above-mentioned witnesses.

155. In addition, in paragraph 913 of the Trial Judgment, the Trial Panel stated:

> In light of the foregoing, the Panel finds that Mr Shala's 2019 [Belgian] Statement denying or minimising any involvement in the crimes committed at the KMF is not reliable, as Mr Shala deliberately downplayed his role. His statements do not cast doubt on the highly

[342] SPO Response Brief, paras 149, 151, 174-177. The SPO points out that the *Zigiranyirazo* Appeal Judgement as relied upon by Shala pertains to the burden of proof in relation to an alibi defence. See SPO Response Brief, para. 175.
[343] See Appeal Brief, paras 165-166, referring to Trial Judgment, paras 873, 913.
[344] See e.g. *Nyiramasuhuko et al.* Appeal Judgement, para. 1425; *Ntawukulilyayo* Appeal Judgement, para. 103; *Dragomir Milošević* Appeal Judgement, para. 231.

> consistent and mutually corroborative evidence given by witnesses TW4-01, W04733 and W01448 who were detained at the KMF and were mistreated by him. To the contrary, to the extent that Mr Shala's 2019 [Belgian] Statement is consistent with these witnesses' evidence, it strongly corroborates them and reinforces their truthfulness, as explained above.

156. The Appeals Panel agrees that the Trial Panel's choice of language, namely that Shala's statements do not "discredit" the SPO evidence, is not appropriate as this might indicate a misapplication of the burden of proof. However, the Panel finds that the Trial Panel conducted a holistic assessment of the available evidence and found the evidence provided by TW4-01, W04733 and W01448, as well as Mr Asllan Elezaj ("Mr Elezaj"), to be coherent and mutually corroborative.[345] It then considered Shala's 2019 Belgian Statement and concluded that this statement supported the evidence of the above-mentioned witnesses.[346]

157. Elsewhere in the Trial Judgment, the Trial Panel assessed the credibility of each of these witnesses individually and explained in details why it found TW4-01, W04733, and W01448 to generally be credible and reliable.[347] It also explained in detail that it would consider Mr Elezaj's statement with caution, in light of possible incentives to protect his and Shala's interests.[348] The Trial Panel assessed the 2005 ICTY Statement carefully and relied on it partly, when corroborated.[349] The Panel notes that the Trial Panel further articulated in detail the reasons why it decided to consider the 2019 Belgian Statement with more caution.[350] In the two instances recalled above, the Trial Panel explained why it preferred to rely on evidence presented by the SPO that it found consistent and corroborative,[351] rather than on the 2019 Belgian Statement where it found Shala deliberately downplayed his role.[352] In this instance, the Panel

[345] Trial Judgment, para. 873.
[346] Trial Judgment, para. 873.
[347] Trial Judgment, paras 119 (TW4-01), 188 (W04733), 175 (W01448).
[348] Trial Judgment, paras 191-197.
[349] Trial Judgment, paras 854-860.
[350] Trial Judgment, paras 861-873.
[351] Trial Judgment, paras 873, 913.
[352] Trial Judgment, para. 913.

finds no error in the Trial Panel's preference for the account presented by the SPO and partly supported by Shala's 2019 Belgian Statement.

158. The Appeals Panel further observes that the Trial Panel correctly articulated the relevant standard, stating that as guaranteed by Article 31(5) of the Constitution and Article 21(3) of the Law, the accused shall be presumed innocent until proven guilty.[353] Furthermore, the Trial Panel correctly stressed that (i) a panel may find an accused guilty where guilt is proved beyond reasonable doubt, in accordance with Article 21(3) of the Law and Rules 140(1) and 158(3) of the Rules; (ii) a reasonable doubt must be grounded in reason and cannot consist of imaginary or frivolous doubt, but must have a rational link to the evidence, lack of evidence or inconsistencies in the evidence; and (iii) the burden of proof rests solely on the SPO.[354]

159. In light of the above, the Panel finds that although the language used by the Trial Panel, stating that some of Shala's Prior Statements did not "discredit" or "cast a doubt" on the SPO's evidence, was not appropriate, this, as such, does not mean that it misapplied the burden of proof. The Trial Panel's careful assessment of the available evidence, as well as its accurate reference to the appropriate burden of proof elsewhere in the Trial Judgment, shows, in the opinion of the Appeals Panel, that the Trial Panel did not shift the burden of proof to the Defence regarding its findings on Shala's presence at the KMF during the timeframe of the charges and his participation in mistreating detainees.[355]

160. The Panel finds that Shala fails to demonstrate that the language the Trial Panel used in its assessment of some of his Prior Statements, shifted the burden of proof to the Defence. Accordingly, the Panel dismisses Shala's Ground 8B.

[353] Trial Judgment, para. 74.
[354] Trial Judgment, para. 74. See also *Nahimana et al.* Appeal Judgement, para. 414.
[355] See also above, paras 118-119.

C. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S COMPLIANCE WITH THE PRINCIPLE OF LEGALITY (GROUND 3)

161. The Trial Panel dismissed the Defence's arguments that it would be contrary to the principle of legality to convict Shala under JCE and for the war crime of arbitrary detention in a non-international armed conflict.[356]

162. Shala challenges his convictions under a JCE and for the war crime of arbitrary detention in a non-international armed conflict as well as the Trial Panel's findings that JCE as mode of liability and the war crime of arbitrary detention in a non-international armed conflict formed part of Kosovo law and customary international law in 1999 and were accessible and foreseeable to the Accused.[357] The SPO responds that Shala is attempting to re-litigate settled matters and that Ground 3 should be dismissed entirely.[358]

1. Submissions of the Parties

163. Shala submits that the Trial Panel, in entering convictions under a JCE and for the war crime of arbitrary detention in a non-international armed conflict, erred in law by violating the principle of legality enshrined in Article 33 of the Constitution, Articles 6 and 7 of the ECHR and Article 15 of the ICCPR.[359]

164. Shala develops three lines of arguments. First, Shala submits that the direct application of customary international law by the Trial Panel and thus his conviction for crimes under customary international law violate the principle of legality.[360] In Shala's view, neither the SFRY Constitution, which was applicable at the material

[356] Trial Judgment, paras 934-935, 996-997. See also Trial Judgment, para. 22.
[357] Appeal Brief, paras 31-55; Reply Brief, paras 8-10; Notice of Appeal, para. 4.
[358] SPO Response Brief, paras 35-40.
[359] Appeal Brief, paras 31-32. See also Appeal Brief, paras 33-34, 40, 55; Reply Brief, para. 8. In Shala's view, the Trial Panel's error was amplified by the breach of his right to have a sufficient reasoned opinion on this matter. See Appeal Brief, para. 34.
[360] Appeal Brief, paras 35-37.

time, nor the Constitution allowed for the direct application of norms of international law, including customary international law, unless they satisfy the "duality test".[361] Shala argues that a lack of clarity exists arising from the discrepancy within the domestic law, which violated the accessibility, foreseeability and precision requirements of Article 7(1) of the ECHR.[362] Shala further argues that the Trial Panel violated the principle of *lex mitior* in failing to compare the various potentially applicable regimes (the SFRY Constitution, the Constitution and the Law), and to apply the most favourable one.[363]

165. Second, Shala submits that his conviction under JCE is contrary to the principle of legality and violates the *lex mitior* principle since this mode of liability: (i) did not exist under the criminal law in force in Kosovo at the time the crimes were allegedly committed;[364] (ii) was specifically and clearly excluded from Article 16(1)(a) of the Law;[365] (iii) was not established under customary international law in 1999;[366] and (iv) was neither accessible nor foreseeable to him in the sense that the Accused could not have known what acts, including the form of liability, constituted crimes.[367] With respect to the latter, Shala argues, *inter alia,* that, by contrast to the *Thaçi et al*. case in which the Pre-Trial Judge took into consideration the accused's "high ranking positions within the KLA", the Trial Panel failed to take into account that Shala had only minimal education and could not have anticipated that he would be charged and convicted on the basis of a judicially constructed customary international law rule

[361] Appeal Brief, para. 35.
[362] Appeal Brief, para. 36.
[363] Appeal Brief, para. 37.
[364] Appeal Brief, paras 38, 40.
[365] Appeal Brief, paras 40-41. See also Appeal Brief, para. 38.
[366] Appeal Brief, paras 39-40, 42.
[367] Appeal Brief, paras 40, 42-44; Reply Brief, paras 9-10.

based on inaccessible and limited post-WW II cases.[368] Shala submits that the Trial Panel's errors as regards JCE invalidate his convictions under all three counts.[369]

166. Third, Shala submits that arbitrary detention committed in a non-international armed conflict (i) did not exist under the criminal law in force in Kosovo at the material time;[370] (ii) is not listed in the clearly exhaustive enumeration of crimes under Article 14(1)(c) of the Law;[371] (iii) was not established under customary international law in 1999 and cannot be considered to have constituted criminal conduct in 1999, especially when detention is deemed required on security grounds;[372] and (iv) was neither accessible nor foreseeable to the Accused given, *inter alia*, the number of uncertainties surrounding the notion of arbitrariness.[373] Shala also submits that the lack of organisation and capacity of the KLA in 1999 prevented the KLA and its members at the KMF from foreseeing and ensuring the respect of detention rules and procedural safeguards, as required by the Trial Panel.[374]

167. In its Response Brief, the SPO recalls that the Constitutional Court Chamber dismissed Shala's referral on the direct applicability of customary international law before the Specialist Chambers, finding that it revealed no appearance of violation

[368] Appeal Brief, para. 45; Reply Brief, para. 10.
[369] Appeal Brief, para. 45.
[370] Appeal Brief, para. 46.
[371] Appeal Brief, para. 46.
[372] Appeal Brief, para. 47. See also Appeal Brief, paras 31, 48-52, 55. In particular, Shala argues that the Trial Panel erred in law by finding the elements of arbitrary detention in a non-international armed conflict sufficiently certain while there exists a lack of certainty as to the notion of arbitrariness and the basic guarantees, which deprives the law of the requisite quality that is expected from criminal provisions. See Appeal Brief, paras 48-52.
[373] Appeal Brief, paras 31, 49, 55; Reply Brief, para. 39. See also Transcript, 15 May 2025, p. 54. Shala also submits that the Trial Panel should have considered (i) the absence of any domestic or international rule prohibiting arbitrary deprivation in a non-international armed conflict at the material time; and (ii) the fact that the Accused had no official role or power with the KLA at the relevant time. See Appeal Brief, paras 49, 55.
[374] Appeal Brief, paras 52-54.

under the Constitution or the ECHR, and submits that Shala is thus precluded from attempting to re-litigate this issue, which may be considered settled law.[375]

168. The SPO further submits that the Court of Appeals Chamber, in previous decisions including in this case, has confirmed JCE as a legitimate mode of liability included under Article 16(1)(a) of the Law, and the existence of arbitrary detention in a non-international armed conflict as a war crime, which may be charged under Article 14(1)(c) of the Law.[376] The SPO argues that Shala fails to raise any cogent reasons to depart from these decisions and instead repeats arguments that have already been rejected.[377]

169. As regards arbitrary detention, the SPO submits that Shala makes unsubstantiated submissions regarding the organisation of the KLA, which directly contradict the Trial Panel's factual findings.[378]

170. As regards JCE, the SPO contends that Shala's assertion, newly introduced on appeal, that JCE liability was not foreseeable to him on account of his position within the KLA is unfounded.[379] In the SPO's view, Shala mischaracterises the *Thaçi et al.* Appeal Decision on Jurisdiction which refers to the position of the accused as only one of several factors to be considered in assessing the foreseeability of JCE liability.[380] Furthermore, the SPO submits that his claim that he had no access to public information or knowledge on account of his minimal education and lack of an official position within the KLA does not stand as he himself acknowledged, in one of the ICTY Statements, his familiarity with the Geneva Conventions, suggesting that this was one of the reasons he was appointed to a KLA military police unit in 1998.[381]

[375] SPO Response Brief, para. 36.
[376] SPO Response Brief, para. 37.
[377] SPO Response Brief, para. 37.
[378] SPO Response Brief, paras 37, 223 (under Ground 12).
[379] SPO Response Brief, para. 38.
[380] SPO Response Brief, para. 38. See also SPO Response Brief, para. 39.
[381] SPO Response Brief, para. 40, referring to P00002 (confidential), p. 16.

2. Assessment of the Court of Appeals Panel

171. The Panel recalls that Shala has already raised the challenges he now puts forward under this Ground of appeal with respect to the direct applicability of customary international law and the Specialist Chambers' jurisdiction over JCE and arbitrary detention in a non-international armed conflict.[382] In his preliminary motion challenging the jurisdiction of the Specialist Chambers and in his related interlocutory appeal, Shala has already argued that the Pre-Trial Judge's findings on these matters constitute violations of the principle of legality.[383]

172. With respect to the direct applicability of customary international law before the Specialist Chambers, the Appeals Panel notes that Shala's arguments have already been addressed and dismissed by the Pre-Trial Judge,[384] the Court of Appeals Chamber[385] and the Constitutional Court Chamber.[386] The Constitutional Court Chamber found that Shala's referral revealed no appearance of a violation under Article 33(1) of the Constitution and Article 7 of the ECHR when it comes

[382] *Compare* Appeal Brief, paras 31-55 *with* Defence Preliminary Motion on Jurisdiction, paras 3-4, 16-60; Defence Reply to SPO Response to Preliminary Motion on Jurisdiction, paras 17-48; Defence Appeal on Jurisdiction, paras 11-12, 20-24; Defence Reply on Jurisdiction, paras 27-34.
[383] Defence Preliminary Motion on Jurisdiction, paras 3-4, 16-60; Defence Reply to SPO Response to Preliminary Motion on Jurisdiction, paras 17-48; Defence Appeal on Jurisdiction, paras 11-12, 20-24; Defence Reply on Jurisdiction, paras 27-34.
[384] Pre-Trial Judge Decision on Jurisdiction, paras 82-89.
[385] Appeal Decision on Jurisdiction, paras 18-21, 24-31.
[386] Constitutional Court Decision on Shala's Referral on Jurisdiction, paras 61-73. The Appeals Panel notes that, in his referral before the Constitutional Court Chamber, Shala also challenged the Specialist Chambers' jurisdiction over JCE and arbitrary detention in a non-international armed conflict. However, the Constitutional Court Chamber found Shala's referral inadmissible on this issue. More specifically, the Constitutional Court Chamber noted that "the question of whether JCE and arbitrary detention are indeed provided for in [customary international law] and whether they were accessible and foreseeable at the material time, is not for the Chamber to decide at this stage, but for the other panels of the [Specialist Chambers] to determine, in accordance with their respective competence". See Constitutional Court Decision on Shala's Referral on Jurisdiction, paras 50, 67, 70, 72-73, p. 27. See also Shala Constitutional Referral on Jurisdiction.

to the Specialist Chambers' direct applicability of war crimes under customary international law, including related forms of individual criminal responsibility.[387]

173. In light of the foregoing, the Panel is satisfied that the Trial Panel's direct application of customary international law in the present case does not violate the principle of legality, including the principle of *lex mitior*.[388] Accordingly, the Panel dismisses Shala's arguments in this respect.[389]

174. Turning to Shala's arguments with respect to JCE and arbitrary detention in a non-international armed conflict, as correctly recalled by the Trial Panel, the Court of Appeals Chamber has already addressed and dismissed Shala's challenges in the Appeal Decision on Jurisdiction.[390]

175. As regards JCE, the Court of Appeals Chamber has found that: (i) the Law provides for JCE as a form of criminal liability, more particularly a form of commission under Article 16(1)(a) of the Law;[391] (ii) JCE, in both its first and third

[387] Constitutional Court Decision on Shala's Referral on Jurisdiction, para. 73. The Constitutional Court Chamber found that "the direct application by the [Specialist Chambers] of war crimes and crimes against humanity, including modes of liability, under [customary international law] to establish an individual's guilt is compatible with the Constitution […] provided that such application is in accordance with Article 33(1) of the Constitution and Article 7 of the [ECHR], as interpreted by the ECtHR in its case law". See Constitutional Court Decision on Shala's Referral on Jurisdiction, para. 69.
[388] The Panel recalls that the Constitutional Court Chamber rejected Shala's argument elevating the *lex mitior* principle to a constitutional norm (namely, that in case of two potentially applicable constitutional regimes, i.e. the SFRY Constitution and the Constitution, the most favourable regime to the Accused has to be applied). The Constitutional Court found that only one constitutional regime may be applied by the Specialist Chambers, which is the Constitution. See Constitutional Court Decision on Shala's Referral on Jurisdiction, paras 64-66. See also *Thaçi et al.* Appeal Decision on Jurisdiction, para. 26; Appeal Decision on Jurisdiction, paras 20, 30.
[389] The Panel recalls that the decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of Kosovo, and may be considered as settled law. See Article 116(1) of the Constitution and Article 49(1) of the Law. See also *Thaçi et al.* Appeal Decision on Legality Challenge, para. 22.
[390] Trial Judgment, para. 996, referring to Appeal Decision on Jurisdiction, paras 32-40; Trial Judgment, para. 934, referring to Appeal Decision on Jurisdiction, paras 44-46; *Mustafa* Appeal Judgment, para. 430; *Thaçi et al.* Appeal Decision on Jurisdiction, paras 106-111.
[391] Appeal Decision on Jurisdiction, para. 35. The Court of Appeals Chamber reiterated its previous finding from the *Thaçi et al.* Appeal Decision on Jurisdiction. See *Thaçi et al.* Appeal Decision on Jurisdiction, paras 136-140.

forms, is a mode of liability under customary international law, including at the time the crimes were committed;[392] and (iii) JCE liability was accessible and foreseeable to Shala.[393]

176. As regards arbitrary detention, the Court of Appeals Chamber has confirmed that: (i) the Specialist Chambers' jurisdiction is not limited to the acts expressly enumerated under Article 14(1)(c) of the Law;[394] (ii) the non-exhaustive language of the provision does not violate the principle of legal certainty (*lex certa*) considering that, for an act to be included in the Law, and thus be within the jurisdiction of the Specialist Chambers, it must have existed under customary international law during the Specialist Chambers' temporal jurisdiction and must constitute a serious violation of Common Article 3;[395] (iii) arbitrary detention amounts to a serious violation of Common Article 3, and detention becomes arbitrary and constitutes a serious violation of Common Article 3 when the principle of humane treatment is violated, irrespective of whether there is a legal basis to detain a person;[396] (iv) arbitrary detention during a non-international armed conflict was criminalised under customary international law at the material time;[397] (v) it was accessible and foreseeable to the Accused at the relevant time that involvement in acts of arbitrary detention might give rise to individual criminal

[392] Appeal Decision on Jurisdiction, para. 37. See also Appeal Decision on Jurisdiction, para. 38.
[393] Appeal Decision on Jurisdiction, para. 36.
[394] Appeal Decision on Jurisdiction, para. 44. See also *Mustafa* Appeal Judgment, para. 430; *Thaçi et al.* Appeal Decision on Jurisdiction, para. 87.
[395] Appeal Decision on Jurisdiction, paras 44, 46. See also *Mustafa* Appeal Judgment, para. 430; *Thaçi et al.* Appeal Decision on Jurisdiction, para. 89.
[396] Appeal Decision on Jurisdiction, para. 45. See also *Mustafa* Appeal Judgment, para. 430; *Thaçi et al.* Appeal Decision on Jurisdiction, paras 96-97, 102.
[397] Appeal Decision on Jurisdiction, para. 46. See also *Mustafa* Appeal Judgment, para. 430; *Thaçi et al.* Appeal Decision on Jurisdiction, paras 109, 111.

responsibility;[398] and (vi) charges of arbitrary detention in non-international armed conflict in this case do not violate the principle of legality.[399]

177. The Appeals Panel notes that, in the Appeal Brief, Shala mostly repeats arguments previously raised before the Pre-Trial Judge and the Court of Appeals Chamber.[400] However, Shala also submits a few additional arguments on the foreseeability of JCE liability and arbitrary detention.[401] While the Court of Appeals Chamber has already found that JCE and arbitrary detention in a non-international armed conflict were foreseeable to the Accused at the material time,[402] the Appeals Panel will nevertheless address them out of fairness to the Accused and in the interests of justice. First, the Panel finds unconvincing Shala's argument that he could not have foreseen his liability under JCE due to his lack of an official position within the KLA, his lack of access to public information, and his minimal education.[403] While in the *Thaçi et al.* case, the Pre-Trial Judge and the Court of Appeals Chamber

[398] Appeal Decision on Jurisdiction, para. 46. See also *Mustafa* Appeal Judgment, para. 430; *Thaçi et al.* Appeal Decision on Jurisdiction, paras 109, 111. In the Appeal Decision on Jurisdiction, the Court of Appeals Chamber noted that "a plain reading of Article 142 of the 1976 SFRY Criminal Code and of the corresponding provisions of other criminal legislation from countries of the former Yugoslavia shows that these provisions provided at the time for the express criminalisation of illegal arrest as a war crime without distinguishing between non-international and international armed conflicts". See Appeal Decision on Jurisdiction, fn. 147, referring to *Thaçi et al.* Appeal Decision on Jurisdiction, para. 107, referring in turn to 1976 SFRY Criminal Code, Article 142; Slovenia, Penal Code (1994), Article 374(1); Republic of North Macedonia, Criminal Code (1996), Article 404(1); Croatia, Criminal Code (1997), Article 158(1); Federation of Bosnia and Herzegovina, Criminal Code (1998), Article 154(1).

[399] Appeal Decision on Jurisdiction, para. 46.

[400] As regards JCE, *compare* Appeal Brief, paras 38-45; Reply Brief, paras 8-10 *with* Defence Preliminary Motion on Jurisdiction, paras 20-45; Defence Reply to SPO Response to Preliminary Motion on Jurisdiction, paras 30, 32, 34, 40-48; Defence Appeal on Jurisdiction, paras 18, 20-22; Defence Reply on Jurisdiction, paras 27-31. As regards arbitrary detention, *compare* Appeal Brief, paras 46-55; Reply Brief, paras 8-10 *with* Defence Preliminary Motion on Jurisdiction, paras 46-60; Defence Reply to SPO Response to Preliminary Motion on Jurisdiction, paras 32-39; Defence Appeal on Jurisdiction, paras 18, 23; Defence Reply on Jurisdiction, paras 32-34. The Panel also notes that in the Appeal Brief, Shala refers to the arguments he developed in the Defence Preliminary Motion on Jurisdiction and the Defence Final Trial Brief. See Appeal Brief, fns 68-73, 76, 79, 88-91, 93.

[401] Appeal Brief, paras 45, 52-55.

[402] Appeal Decision on Jurisdiction, paras 36, 46. See also *Thaçi et al.* Appeal Decision on Jurisdiction, paras 106-109, 111, 211-224.

[403] See Appeal Brief, para. 45. The Panel notes that Shala makes a similar argument with respect to arbitrary detention, without substantiating it. See Appeal Brief, para. 55.

found that the alleged status of the accused and their access to information, as high-ranking KLA members, was a relevant factor to assess foreseeability, it was only one factor to be considered.[404] In Shala's case, the Court of Appeals Chamber approved the Pre-Trial Judge's assessment of the relevant factors and his conclusion that JCE was accessible and foreseeable to Shala.[405] Therefore, the Panel dismisses Shala's arguments in this respect.

178. Second, the Appeals Panel observes that Shala's arguments that the KLA was not sufficiently organised to implement international humanitarian law and thus that KLA members could not foresee that they could be liable for arbitrary detention[406] are contradicted by adjudicated facts,[407] evidence available on the record, including Shala's prior statements,[408] and the Trial Panel's findings.[409] Accordingly, the Panel dismisses these arguments.

[404] Other factors included: (i) the fact that JCE was part of customary international law at the time of the alleged events; (ii) the fact that the ICTY first applied JCE liability in December 1998 in the *Furundžija* Trial Judgement; (iii) the post-WW II general legal framework; (iv) the ongoing ICTY prosecutions at the time of the relevant events; and (v) the existence of comparable modes of common purpose liability in domestic law at the relevant time. See *Thaçi et al.* Appeal Decision on Jurisdiction, paras 213, 219-220; Appeal Decision on Jurisdiction, para. 36. Moreover, while the Court of Appeals Chamber observed that the foreseeability standard "is even stricter in relation to persons with higher responsibilities", this does not mean that JCE would not be foreseeable to a person with a lower rank. In particular, the Panel recalls that the participants in the conflict are duty-bound to inform themselves regarding what acts and omissions may render them criminally liable. See *Thaçi et al.* Appeal Decision on Jurisdiction, paras 215-216.

[405] See Appeal Decision on Jurisdiction, para. 36. See also Appeal Decision on Jurisdiction, para. 46, with respect to arbitrary detention.

[406] See Appeal Brief, paras 52-54. The Panel notes that Shala's arguments regarding the lack of organisation of the KLA (Appeal Brief, paras 52-54) overlap with Shala's arguments under Ground 12 (Appeal Brief, para. 211).

[407] Decision on Adjudicated Facts; List of Adjudicated Facts, Facts 38-49.

[408] See Trial Judgment, paras 337-340, and references cited therein; P00002 (T000-2742-T000-2742-Alb and Eng Transcript-3-B) (confidential), p. 16; P00012_ET (066864-TR-ET Part 2 Revised 1) (confidential), pp. 102-103, 114-115.

[409] See Trial Judgment, paras 95, 919-921. In particular, the Panel recalls the Trial Panel's findings, unchallenged by the Defence, that the KLA is an organised armed group within the meaning of Article 14(2) of the Law and that a non-international armed conflict existed between the KLA and the Serbian forces at the time of the crimes charged. See Trial Judgment, paras 919-921. See also Defence Certification Request to Appeal Decision on Adjudicated Facts.

179. Having said that, the Panel further notes that Shala fails to explain how the Trial Panel could have erred by only following the Court of Appeals Chamber's decisions.[410]

180. Furthermore, the Panel recalls that an appeals panel is expected to follow previous decisions by the Court of Appeals Chamber and should depart from them only for cogent reasons in the interests of justice.[411] In the present case, Shala does not advance any cogent reason that would lead the Panel to reach a different conclusion regarding the Specialist Chambers' jurisdiction over JCE or over arbitrary detention in a non-international armed conflict.[412] For these reasons, the Appeals Panel dismisses Shala's arguments.

181. In light of the above, the Appeals Panel finds that Shala has failed to demonstrate that the Trial Panel erred in law and violated the principle of legality in finding that JCE and the war crime of arbitrary detention in a non-international armed conflict were criminalised under the applicable law in Kosovo at the time of the charges, and the criminalisation of this mode of liability and this offence were accessible and foreseeable to Shala at the relevant time.[413] Accordingly, the Appeals Panel dismisses Shala's Ground 3.

[410] See Appeal Decision on Jurisdiction, paras 35-40, 44-46; Trial Judgment, paras 934 (referring to Appeal Decision on Jurisdiction, paras 44-46; *Mustafa* Appeal Judgment, para. 430; *Thaçi et al.* Appeal Decision on Jurisdiction, paras 106-111), 997 (referring to *Thaçi et al.* Appeal Decision on Jurisdiction, paras 135-144, 162-172, 186-196; *Mustafa* Trial Judgment, para. 735).
[411] *Mustafa* Appeal Judgment, paras 41, 431; *Gucati and Haradinaj* Appeal Judgment, paras 37, 95; Appeal Decision on Jurisdiction, para. 15.
[412] See above, para. 50.
[413] Trial Judgment, paras 935, 996-997.

D. ALLEGED ERRORS REGARDING THE INDICTMENT (GROUNDS 4 AND 5)

182. The Court of Appeals Panel considers that Ground 4 and Ground 5 substantially overlap in that they both allege errors relating to the Indictment and the charges contained therein; therefore, the Panel will consider these grounds together.

183. The Trial Panel dismissed Shala's challenges concerning alleged insufficient notice in the Indictment regarding, notably, the number and identity of alleged detainees and the identity of some alleged co-perpetrators.[414]

184. Shala submits that the Trial Panel erred in convicting him for the crimes of arbitrary detention and torture of 18 individuals while he was charged with respect to nine individuals, and on the basis of a defective Indictment lacking sufficient particulars as to the alleged JCE members and the victims, as well as containing cumulative charging of cruel treatment and torture.[415] The SPO responds that the Indictment is not defective and that Shala fails to demonstrate any error on the part of the Trial Panel.[416] Victims' Counsel responds that Shala fails to identify any discernible prejudice.[417]

1. Alleged Conviction on the Basis of Victims Not Included in the Indictment (Ground 5)

(a) Submissions of the Parties

185. Recalling that an accused can only be convicted of crimes charged in the indictment, Shala submits that the Trial Panel erred in convicting him of the crimes of arbitrary detention and torture in respect of *18* victims while the Indictment charged him with these crimes in respect of *nine* individuals.[418] In light of the nature of the

[414] Trial Judgment, paras 23-28.
[415] Appeal Brief, paras 56-77; Reply Brief, paras 11-14; Notice of Appeal, paras 5-7.
[416] SPO Response Brief, paras 41-53.
[417] Victims Response Brief, paras 26-29 (with respect to Ground 4).
[418] Appeal Brief, paras 70, 75-76; Reply Brief, para. 14. See also Reply Brief, para. 30; Transcript, 15 May 2025, pp. 37-38.

charges, the scale of the case and the proximity of the Accused to the crimes he was convicted for, Shala argues that each victim of crimes in respect of which he was convicted should have been identified in the Indictment.[419] According to him, the fate of these nine additional victims was factually distinct and fell outside the scope of the charges of arbitrary detention and torture.[420] Shala contends the Trial Panel should have ordered the amendment of the Indictment to include additional victims, or, in the alternative, should have excluded that evidence.[421] He requests that the Appeals Panel quash his convictions relating to the nine additional victims and to reconsider the sentence imposed in that respect.[422]

186. The SPO responds that Shala ignores the plain language of the Indictment which refers to "*at least*" nine victims subjected to arbitrary detention, cruel treatment and torture.[423] The SPO submits that the detention and torture of the additional victims fell squarely within the scope of arbitrary detention and torture as pleaded in the Indictment and was found by the Trial Panel to reflect the "same operational pattern".[424] The SPO further contends that Shala misstates the record concerning his notice of the number of victims, stressing that from the SPO Pre-Trial Brief onwards, the SPO consistently referred to the arbitrary detention and mistreatment of 18 victims and that therefore, this does not amount to the introduction of "new allegations".[425] In the SPO's view, the Trial Panel was entitled to convict Shala with respect to the 18 victims it identified.[426]

[419] Appeal Brief, para. 72. See also Appeal Brief, para. 71; Reply Brief, para. 14.
[420] Appeal Brief, paras 72, 75. See also Appeal Brief, para. 73. At the Appeal Hearing, the Defence further submitted that the additional victims were never interviewed nor summoned by the SPO. See Transcript, 15 May 2025, p. 38.
[421] Appeal Brief, para. 74.
[422] Appeal Brief, para. 77. The Appeals Panel notes that in paragraph 77 of the Appeal Brief, Shala erroneously refers to eight victims instead of nine victims.
[423] SPO Response Brief, paras 50, 52-53.
[424] SPO Response Brief, para. 51.
[425] SPO Response Brief, para. 52.
[426] SPO Response Brief, para. 53.

187. Shala replies that he had no notice that he was charged with committing crimes against 18 persons and that this only became apparent when reading the Trial Judgment.[427] In his view, the fact that the SPO referred to 18 victims in the SPO Pre-Trial Brief did not provide sufficient notice in that respect.[428]

(b) Assessment of the Court of Appeals Panel

188. The Panel recalls that the Indictment alleges that Shala committed the crimes of arbitrary detention, cruel treatment and torture with respect to "at least nine persons".[429] The Trial Panel found that Shala was found guilty under Count 1 and Count 3 of the Indictment for having committed, as part of a JCE, the war crime of arbitrary detention and the war crime of torture respectively against "at least eighteen (18) persons" between approximately 17 May 1999 and 5 June 1999 at the KMF.[430] As Shala's claim concerns an alleged defect in the Indictment, the Appeals Panel will assess: (i) whether the Indictment was defective with respect to the number of alleged victims; and, if so, (ii) whether the defect was curable; and, if so, (iii) whether the defect was cured; and, in the event it is not, (iv) whether the Accused suffered prejudice.

(i) Preliminary Matter

189. Before turning to address whether the Indictment is defective, the Appeals Panel first notes that while Shala had alleged at trial that the SPO had impermissibly changed its case regarding, *inter alia*, the number of detainees,[431] the Trial Panel only very succinctly addressed Shala's arguments and dismissed them.[432] In that regard,

[427] Reply Brief, para. 14. See also Transcript, 15 May 2025, p. 38. At the Appeal Hearing, the Defence also argued that the Defence was never given the opportunity to investigate, contest or present a defence regarding these nine additional alleged victims. See Transcript, 15 May 2025, p. 38.
[428] Reply Brief, para. 14.
[429] Indictment, para. 14 (illegal or arbitrary arrest and detention). See also Indictment, paras 18-24 (cruel treatment), 26 (torture). See also Trial Judgment, paras 18, 557.
[430] Trial Judgment, paras 1037-1038. See also Trial Judgment, para. 587, wherein the Trial Panel lists these 18 individuals.
[431] See Defence Final Trial Brief, para. 275.
[432] See Trial Judgment, paras 23-26.

the Panel notes that the Trial Panel dismissed Shala's arguments on the ground that the alleged inconsistencies he raised between the Indictment and other submissions were "largely unsubstantiated and inaccurate" and on the ground that the Trial Panel "adhered to the charges" as set out in the Indictment and that other documents and submissions from the SPO during trial "must be seen under the light of pursuing its case", as pleaded in the Indictment.[433]

190. In fact, the Panel observes that the Trial Panel never expressly engaged with Shala's claim regarding the evolution in the SPO case concerning the number of victims compared to the number pleaded in the Indictment.[434] While the Panel notes that the Trial Panel was aware that it entered findings with respect to a larger number of persons than initially pleaded in the Indictment,[435] at no point did the Trial Panel examine whether the Indictment was defective in that respect and/or whether it could convict Shala on the basis of 18 victims in light of what was pleaded in the Indictment. The Appeals Panel recalls that a trial panel is not obliged to respond to each and every submission made at trial and has discretion to decide which argument to address.[436] However, the Panel considers that the Trial Panel should have made such a determination and should have provided reasons for deciding to enter convictions against Shala with respect to a larger number of persons than initially pleaded in the Indictment. The Appeals Panel finds that the Trial Panel's failure to do so constitutes an error of law. It will proceed to determine whether this error invalidates the Trial

[433] See Trial Judgment, paras 25-26.
[434] While Shala did not develop in detail his claim of impermissible change in the SPO case with regard to the number of victims, it is clear from the specific references he made to the Indictment, the SPO Pre-Trial Brief and the SPO opening statements that he challenged the fact that the Indictment charged him with respect to at least nine persons while the SPO then changed that number to at least 18 persons. See Indictment, para. 14 ("at least nine persons"); SPO Pre-Trial Brief, paras 1, 30, 42 ("at least eighteen" victims/civilians); Transcript, 21 February 2023, p. 511 ("at least 18 victims"), all referred to in Defence Final Trial Brief, fn. 640.
[435] See Trial Judgment, para. 557 (where the Trial Panel recalls that the SPO alleged that at least nine persons were alleged to have been arbitrarily detained in the Indictment, and indicates that it has received evidence that other persons were also detained at the KMF during the timeframe of the charges). See also Trial Judgment, paras 18, 587.
[436] See above, para. 43.

Panel's decision to convict Shala in relation to at least 18 victims under the counts of arbitrary detention and torture by examining whether Shala was charged on this basis, and, if so, whether he was provided with sufficient information on the material facts underpinning the charges against him. The Panel will first turn to consider whether the Indictment was defective.

(ii) Whether the Indictment Was Defective

191. The Appeals Panel recalls at the outset the well-established principle that an accused can only be convicted of crimes that are charged in an indictment.[437] The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused and enable him or her to prepare a meaningful defence.[438] The Panel further recalls that the indictment is the primary accusatory document and an accused should not be required to consult documents other than the indictment in order to understand and piece together the factual allegations underpinning the charges.[439] Whether a fact is "material" cannot be decided in the abstract but on a case-by-case basis, and depends on the nature of the Prosecution's case.[440] An indictment will be deemed defective when it fails to plead the facts underpinning the charges or it does so in an insufficient or unclear manner, creating ambiguity as regards the pleaded charges, including the modes of liability, and thus impairing the Defence's ability to prepare.[441]

[437] See e.g. *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 36; *Naletilić and Martinović* Appeal Judgement, para. 26; *Kvočka et al.* Appeal Judgement, para. 33; *Rukundo* Appeal Judgement, para. 29.
[438] See e.g. *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 36, and jurisprudence cited therein.
[439] See e.g. Appeal Decision on Defects in the Indictment, para. 15; *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 49.
[440] See e.g. *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 38; *Blaškić* Appeal Judgement, para. 210; *Uwinkindi* Appeal Decision, para. 4.
[441] See e.g. Appeal Decision on Defects in the Indictment, para. 15; *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 38.

192. While the Appeals Panel is mindful of the previous Court of Appeals Chamber's findings in the present case that the Indictment adequately pleaded the identity and number of alleged victims – which was based on the premise that the SPO case was limited to "at least nine persons",[442] the Panel notes that the SPO was in fact in possession of information prior to the start of the trial that indicated that the allegations of arbitrary detention, cruel treatment and torture concerned 18 individuals.[443] The Panel notes the significant increase in the number of alleged victims – which basically doubled. The Panel considers that the SPO was required to provide greater specificity in the Indictment in that regard and should have included these additional victims therein.[444] Bearing in mind that the degree of specificity which has to be provided in an indictment depends on the nature and circumstances of the case,[445] the Panel recalls its finding in the present case that having regard to the limited scope of the case, a higher degree of specificity than in larger-scale cases is required and the pleading requirements with regard to the alleged victims is correspondingly higher.[446] The Appeals Panel therefore concludes that the reference to "at least nine persons" as pleaded in paragraph 14 of the Indictment was insufficiently specific in this context and that the Indictment was defective on this point.

193. Consequently, the Panel finds that the Trial Panel erred in failing to find that the Indictment was defective in relation to these additional persons alleged to have

[442] See Appeal Decision on Defects in the Indictment, para. 29. The Panel notes that the issue now raised by the Defence, with respect to a number of 18 alleged victims, was not before the Appeals Panel at the time.
[443] See below, para. 197. The Panel further notes that some of these additional victims were in fact SPO witnesses: TW4-11, TW4-05, TW4-04, TW4-02. See SPO Pre-Trial Brief, para. 30; Trial Judgment, para. 587.
[444] See Appeal Decision on Defects in the Indictment, paras 26, 29 (where the Appeals Panel recalled that if the SPO was in the position to name victims, it should do so).
[445] See e.g. Appeal Decision on Defects in the Indictment, para. 17; *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 42.
[446] Appeal Decision on Defects in the Indictment, paras 17, 27. See also Appeal Brief, para. 71.

been detained at the KMF.[447] The Appeals Panel will next turn to assess whether this defect was curable.

(iii) Whether the Defect Was Curable

194. The Panel recalls the distinction between counts or charges made in an indictment and the material facts underpinning them, the count or charge being the legal characterisation of the material facts which support that count or charge.[448] The Panel further recalls that a new charge introduces a new basis for conviction not previously reflected in the Indictment that is factually or legally distinct from any already alleged.[449] In addition, the introduction of a factual allegation not previously alleged in the indictment may amount to a new charge, but only where it exposes an accused to an additional basis for conviction.[450] The Panel finally recalls that defects arising from an omission of a "count or a charge" from an indictment can only be remedied through formal amendment under the applicable procedural rules.[451] However, defects concerning vagueness in an indictment, such as the omission of a material fact underpinning a charge, can be cured in certain circumstances and through the provision of timely, clear and consistent information in post-indictment documents such as the pre-trial briefs, witness summaries and witness statements.[452] A vague or ambiguous indictment which is not cured of its defect by the provision of timely, clear, and consistent information might cause prejudice to the accused.[453]

[447] See Trial Judgment, paras 23-28, 557, 587.
[448] *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 36; *Thaçi et al.* Appeal Decision on Amendment of Indictment, para. 24; *Muvunyi* Appeal Decision on Amendment of Indictment, para. 19.
[449] *Thaçi et al.* Appeal Decision on Amendment of Indictment, para. 24.
[450] *Thaçi et al.* Appeal Decision on Amendment of Indictment, para. 24.
[451] See e.g. *Ntabakuze* Appeal Judgement, para. 30; *Đorđević* Appeal Judgement, para. 574.
[452] See e.g. *Đorđević* Appeal Judgement, para. 574. See also e.g. *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 51; *Uwinkindi* Appeal Decision, para. 13; *Kupreškić et al.* Appeal Judgement, para. 114.
[453] See e.g. *Nyiramasuhuko et al*. Appeal Judgement, para. 1105; *Šainović et al.* Appeal Judgement, para. 262.

195. While the reference to "at least 18 victims" is a material fact which should have been pleaded in the Indictment in the present case,[454] the Appeals Panel finds that the addition of nine victims does not amount to a new charge or lead to a radical transformation of the SPO case against Shala.[455] Despite the fact that paragraph 14 of the Indictment only refers to at least nine individuals, the Appeals Panel finds that the term "*at least*" clearly signposts that the Accused could face liability with respect to a higher number of persons. In the Panel's view, the nine additional victims fell within the scope of the charges of arbitrary detention and torture pleaded in the Indictment and were encompassed in paragraph 14 of the Indictment. Indeed, contrary to Shala's contention, they fall under the same factual context as those originally charged, namely, they were detained in the same locations within the KMF, during the same narrow timeframe pleaded in the Indictment, and subjected to the same operational pattern of arrest, detention and mistreatment as the nine initial victims.[456] The Panel is therefore satisfied that their addition does not introduce an additional legal basis for conviction that is factually distinct from any allegation already contained in the Indictment or shift the SPO case so significantly as to undermine the Accused's ability to defend himself.[457]

196. Having concluded that the reference to nine additional victims did not constitute a separate charge, the Appeals Panel will now turn to consider whether the defects in the Indictment were cured.

[454] See above, para. 192.
[455] See *Đorđević* Appeal Judgement, para. 576. Contra Appeal Brief, paras 72, 75.
[456] See Trial Judgment, paras 558-560, 570-575, 578-579, 581-583, 590, 716, 728, 733-734, 747. Contra Appeal Brief, para. 72.
[457] See *Popović et al*. Decision on Indictment Challenges, para. 11; *Halilović* Decision on Amendment of Indictment, para. 30, referred to in Appeal Brief, para. 73. See also, albeit in the context of ICC confirmation process, *Abd-Al-Rahman* Decision on Amendment of Charges, paras 20-25.

(iv) Whether the Defect Was Cured

197. The Panel notes that the SPO Pre-Trial Brief expressly refers to the arbitrary detention and mistreatment of at least 18 victims.[458] Likewise, in its opening statement, the SPO also referred to at least 18 persons.[459] The SPO continued to consistently refer to the alleged arbitrary detention and mistreatment of at least 18 persons in its submissions at trial.[460] The Appeals Panel considers that the information provided in the SPO Pre-Trial Brief and subsequent SPO post-Indictment submissions remedied the lack of specificity of the Indictment with respect to the number of victims and was sufficient to allow Shala to prepare a meaningful defence against these allegations. In the Panel's view, Shala was unambiguously put on notice of the SPO's intention to prove that he was involved in the arbitrary detention, cruel treatment and torture of at least 18 persons from the moment the SPO Pre-Trial Brief was filed.[461]

198. This conclusion is bolstered by a review of the conduct of Shala's defence which reflects his awareness that he was charged with regard to allegations involving at least 18 victims. While Shala does not expressly allude to the number of victims in his Defence Pre-Trial Brief, he directly refers to the SPO case as pleaded in the SPO Pre-Trial Brief which refers in turn to the fact that he allegedly arbitrarily detained, interrogated and mistreated "at least eighteen" victims.[462] In the Panel's view, this shows that Shala was aware that he had to defend himself against a SPO case alleging his criminal responsibility with respect to at least 18 victims. Moreover, the Panel

[458] See SPO Pre-Trial Brief, paras 1, 30, 42.
[459] See Transcript, 21 February 2023, p. 511.
[460] See SPO Final Trial Brief, paras 1, 327, 390; Transcript, 15 April 2024, pp. 4088, 4162, 4167. The Panel is mindful however that notification at the stage of closing submissions cannot constitute proper notice. See *Ntawukulilyayo* Appeal Judgement, para. 202.
[461] Contra Appeal Brief, para. 75; Reply Brief, para. 14.
[462] See Defence Pre-Trial Brief, para. 6, fn. 7, referring to SPO Pre-Trial Brief, paras 1, 18, 30, 42 (the Panel notes that paragraphs 1, 30 and 42 of the SPO Pre-Trial Brief mention "at least eighteen" victims or civilians subject to acts of arbitrary detention, cruel treatment and torture).

observes that Defence Counsel expressly referred to "18 people" alleged to have been detained at the KMF during the Defence's closing statements.[463]

199. The Appeals Panel is satisfied that the defects in the Indictment were cured given that Shala was provided timely, clear and consistent notice that he was charged with respect to 18 victims. In light of this, the Panel finds that Shala was able to prepare a meaningful defence against the allegations of arbitrary detention and torture pleaded in the Indictment. As a result, the Panel does not need to address the issue of any alleged prejudice resulting from an uncured, defective Indictment.[464]

(v) Conclusion

200. Based on the foregoing, the Appeals Panel finds that the Trial Panel erred in law in failing to address whether the Indictment was defective, and in failing to find the Indictment defective regarding the pleading of the number of victims of allegations of arbitrary detention and torture. However, the Panel finds that the Trial Panel's errors do not invalidate its decision to convict Shala on this basis, since the defect was subsequently cured and since he received adequate notice in that respect. Accordingly, the Appeals Panel dismisses Shala's Ground 5.[465]

2. Alleged Lack of Sufficient Particulars (Ground 4A)

(a) Submissions of the Parties and Participants

201. Shala submits that the Trial Panel erred in law in convicting him on the basis of an Indictment which was defective for lack of sufficient particulars as to the members

[463] See Transcript, 17 April 2024, p. 4305.
[464] The Panel recalls that a vague or ambiguous indictment not cured of its defect by the provision of timely, clear and consistent information causes prejudice to the accused. See above, para. 194.
[465] The Appeals Panel recalls that, for different grounds, it has partially set aside Shala's convictions under Counts 1 and 3 to the extent that they rely on the arbitrary detention of [REDACTED] and [REDACTED] and on the torture of TW4-04, [REDACTED] and [REDACTED], [REDACTED], and [REDACTED]. See below, para. 605.

of the alleged JCE and the victims of the alleged crimes.[466] He adds that the indictment is the primary accusatory instrument and that an accused should not have to decipher the alleged basis for his criminal responsibility from scattered factors read together.[467]

202. With respect to the alleged JCE members, Shala submits that the Trial Panel found that Mr Fatmir Limaj ("Fatmir Limaj"), Mr Osman Kryeziu (W04848) ("Mr Kryeziu") and Mr Sokol Dobruna ("Mr Dobruna") were members of the alleged JCE while they were never mentioned in the Indictment and the SPO never alleged they were part of the JCE, not even in the SPO Pre-Trial Brief or the SPO Final Trial Brief.[468] Shala contends that the failure to identify these individuals in the Indictment was in breach of the well-established principle that an indictment must identify members of a JCE and provide their specific identities when known.[469] Shala points out that while a broader description of the charges may be acceptable where the alleged crimes are of a larger scale and the accused is further removed from the scene of the crimes, the scale of the present case does not justify the vagueness of the Indictment, particularly when the missing information was known to the SPO at the time of charging.[470] Shala further impugns the use of open language in identifying JCE members as "certain other KLA soldiers, police, and guards" in the Indictment.[471]

203. As to the identity of the alleged victims, Shala submits that the Indictment mentions "at least nine persons" as victims under the count of arbitrary detention without identifying a single victim, while, under the counts of cruel treatment and torture, several paragraphs of the Indictment do not provide any number or identity

[466] Appeal Brief, para. 56; Reply Brief, para. 11.
[467] Appeal Brief, para. 59.
[468] Appeal Brief, para. 61. See also Reply Brief, para. 12; Transcript, 15 May 2025, pp. 38-39. Shala adds that Mr Kryeziu has been a SPO witness since the beginning of the proceedings. See Appeal Brief, para. 61; Transcript, 15 May 2025, p. 39.
[469] Appeal Brief, para. 61. See also Reply Brief, para. 12.
[470] Appeal Brief, para. 60.
[471] Appeal Brief, para. 60.

for the victims.[472] He contends that, according to well-established jurisprudence, the identity of victims must be pleaded in the indictment and if the prosecution is in a position to name victims, it should do so.[473] Shala stresses that while the massive scale of crimes may make it impracticable to require a high degree of specificity with respect to the identity of the victims, the limited nature and scale of the allegations in the present case and the fact that the identity of these victims was known to the SPO at the time of charging the Accused warranted the inclusion of such information in the Indictment.[474]

204. Shala argues that the defects in the Indictment with respect to the identity of JCE members and victims were not cured.[475] He claims that these defects deprived him of an effective opportunity to conduct investigations in time, challenge the SPO case and prepare and present his defence, thus violating his fair trial rights.[476] He asks that the Appeals Panel acknowledge this violation and remedy the prejudice by quashing his convictions, or, in the alternative, by taking it into consideration as a mitigating factor in sentencing.[477]

205. The SPO responds that Shala ignores previous Appeals Panel's findings and repeats arguments on alleged defects in the Indictment regarding the identity and number of alleged JCE members and victims which were rejected in their entirety.[478] In the SPO's view, both Mr Kryeziu and Fatmir Limaj fall within the category of "certain other KLA soldiers, police and guards" referred to in the Indictment.[479] The SPO argues that the identification of additional JCE members in the Trial Judgment

[472] Appeal Brief, para. 63.
[473] Appeal Brief, para. 62.
[474] Appeal Brief, paras 62, 64. See also Reply Brief, para. 11.
[475] Appeal Brief, para. 68. See also Appeal Brief, para. 67; Reply Brief, para. 12.
[476] Appeal Brief, paras 60-61, 65, 69. See also Appeal Brief, paras 56, 58; Transcript, 15 May 2025, pp. 38-39.
[477] Appeal Brief, para. 69.
[478] SPO Response Brief, para. 41. See also SPO Response Brief, paras 43, 46, 50.
[479] SPO Response Brief, para. 43.

does not render the Indictment retrospectively defective.[480] The SPO also contends that Shala knew that witnesses placed Mr Kryeziu and Fatmir Limaj at the KMF and does not show how the fact they were not named in the Indictment materially affected his ability to prepare his defence.[481] As to the number and identity of victims, the SPO submits that Shala's claim of uncertainty and the alleged impact on his ability to prepare an effective defence is "unsustainable" as Shala fails to acknowledge that the SPO Pre-Trial Brief referred to "at least eighteen victims", included a list of the said individuals and that the SPO consistently reiterated this number of victims throughout trial.[482]

206. Victims' Counsel responds that Shala's submission that the Indictment does not identify a single victim is without merit, and points out that the Indictment provides the names of five of the detainees.[483] In Victims' Counsel's view, Shala repeats prior litigation without establishing any discernible prejudice resulting from the alleged lack of notice of victim particulars.[484] More specifically, he contends that Shala fails to explain how having further particulars would have assisted in his preparations or changed the outcome of the case.[485]

207. Shala replies with respect to JCE members that the SPO's failure to identify Mr Kryeziu, Fatmir Limaj and Mr Dobruna in the Indictment prevented the Defence from being able to locate alleged JCE members and present their evidence at trial. In that regard, he adds that he was deprived of the opportunity to present [REDACTED]'s evidence as [REDACTED].[486]

[480] SPO Response Brief, para. 45.
[481] SPO Response Brief, paras 44-45.
[482] SPO Response Brief, para. 46.
[483] Victims Response Brief, para. 26. Victims' Counsel adds that the names of three direct victims, [REDACTED], [REDACTED] and [REDACTED] are provided in the Indictment. See Victims Response Brief, paras 26, 28.
[484] Victims Response Brief, paras 27-29.
[485] Victims Response Brief, paras 28-29.
[486] Reply Brief, para. 12.

(b) Assessment of the Court of Appeals Panel

208. The Appeals Panel will first address the alleged lack of particulars in the Indictment regarding the identity of JCE members before turning to the identity and number of victims.

(i) JCE Members

209. The Panel recalls that the Indictment alleged that in addition to Shala, other members of the JCE included Mr Sabit Geci ("Sabit Geci"), Mr Xhemshit Krasniqi ("Xhemshit Krasniqi"), KLA soldiers nicknamed "Bedri" and "Van Damme", and certain other KLA soldiers, police, and guards present at the KMF.[487] The Trial Panel found that JCE members included Xhemshit Krasniqi, Sabit Geci, the Accused, Mr Kryeziu, KLA members nicknamed "Bedri" and "Van Damme", Fatmir Limaj, other members of the KLA Military Police and other KLA members.[488]

210. At the outset, the Appeals Panel notes that, contrary to Shala's contention, the Trial Panel did not name Mr Dobruna as a JCE member.[489] Rather, it identified Mr Dobruna as a KLA member involved in the interrogation of detainees at the KMF.[490] As a consequence, the Panel will not address Shala's arguments to the extent they relate to Mr Dobruna. In any event, the Panel recalls that the Trial Panel's findings regarding Mr Dobruna [REDACTED].[491]

211. The Panel observes that the names of Mr Kryeziu and Fatmir Limaj are not mentioned in the Indictment while the Trial Panel identified them as JCE members.[492]

[487] See Indictment, para. 10. See also Indictment, para. 9.
[488] See Trial Judgment, para. 1003.
[489] See Appeal Brief, para. 61. See also Reply Brief, para. 12.
[490] *Compare* Trial Judgment, paras 341, 363 *with* Trial Judgment, para. 1003.
[491] See [REDACTED].
[492] See above, para. 209.

The Panel will examine whether the Indictment was defective in not expressly listing Mr Kryeziu and Fatmir Limaj as JCE members.

212. The Appeals Panel first recalls that, at a minimum, the indictment must identify members of a JCE by category or group, and provide their specific identities when known.[493] Although it is not necessary or always possible to name each of the individuals involved, if some members of the JCE cannot be individually identified, they should be identified by referring to categories or groups of persons.[494] The degree of specificity that has to be provided in an indictment depends on the nature and circumstances of the case.[495] The Panel further recalls that the Indictment does not need to set out the evidence proving the pleaded material facts underpinning the charges.[496]

213. The Panel also recalls the Court of Appeals Chamber's findings in the present case that: (i) while the alleged JCE was of a comparatively small size, the Indictment identified with sufficient specificity the alleged JCE members since five persons were identified by name or nickname and the other unnamed members were identified not only by categories, namely KLA soldiers, police and guards, but also narrowed down to those present at the KMF during the specific timeframe of 17 May to 5 June 1999; (ii) the identification of each and every member specifically by name in the Indictment was not warranted in this case; and (iii) any further detail in that respect constituted

[493] See e.g. Appeal Decision on Defects in the Indictment, para. 16; *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 45; *Thaçi et al.* Appeal Decision on Defects in the Indictment, para. 72; *Uwinkindi* Appeal Decision, para. 11.
[494] See e.g. Appeal Decision on Defects in the Indictment, para. 16; *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 45; *Thaçi et al.* Appeal Decision on Defects in the Indictment, para. 72.
[495] See above, para. 192. See also e.g. Appeal Decision on Defects in the Indictment, para. 17; *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 42; *Thaçi et al.* Appeal Decision on Defects in the Indictment, para. 73.
[496] See e.g. Appeal Decision on Defects in the Indictment, para. 19; *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 38; *Kupreškić et al.* Appeal Judgement, para. 88; *Uwinkindi* Appeal Decision, para. 4.

evidentiary material that could be provided subsequently.[497] The Court of Appeals Chamber further stressed that should the SPO be in a position to identify additional alleged JCE members by name, it should do so.[498]

214. The Panel recalls the finding of the Court of Appeals Chamber that the formulation "certain other KLA soldiers, police, and guards" was not impermissibly vague and therefore rejects Shala's contention that the use of open language rendered the Indictment defective.[499]

215. The Panel finds that the language in the Indictment placed the Defence on unambiguous notice that the charged JCE encompassed additional individuals beyond those expressly named in the Indictment. In the Panel's view, both Mr Kryeziu and Fatmir Limaj fall within the category of "certain other KLA soldiers, police and guards" referred to in the Indictment.[500] The Panel remains satisfied that the Indictment is not defective and provides sufficient particulars with respect to the persons alleged to have belonged to the JCE. The Panel therefore considers that identifying Mr Kryeziu and Fatmir Limaj as members of the JCE does not constitute a material fact but rather an evidentiary matter.[501]

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[497] Appeal Decision on Defects in the Indictment, paras 16-19.
[498] Appeal Decision on Defects in the Indictment, para. 19.
[499] Appeal Decision on Defects in the Indictment, para. 20. Contra Appeal Brief, para. 60.
[500] See Indictment, para. 10.
[501] See also above, para. 213. In this respect, the Panel observes that in the *Stanišić and Župljanin* case, although the indictment explicitly named only 11 individuals alleged to be part of the JCE, the ICTY Trial Chamber, based on the evidence, ultimately concluded that the JCE involved 27 specific participants. Significantly, on appeal, the ICTY Appeals Chamber did not find an error in this approach. See *Stanišić and Župljanin* Trial Judgement, para. 314; *Stanišić and Župljanin* Appeal Judgement, paras 73, 79-82, 87 (discussing alleged errors in the Trial Chamber's findings on JCE membership and concluding that no reversible error was committed). The Panel further notes that in the *Krajišnik* case, the ICTY Trial Chamber ultimately named dozens of individuals as JCE members in addition to those pleaded in the indictment. If the ICTY Appeals Chamber found that the inclusion of JCE members merely by reference to the "JCE rank and file consisted of local politicians, military and police commanders, paramilitary leaders, and others" was "impermissibly vague", it did not criticise the naming of additional JCE members by the Trial Chamber beyond those specifically listed in the indictment. See *Krajišnik* Trial Judgement, paras 1086-1088; *Krajišnik* Appeal Judgement, para. 157.

216. While the SPO had the duty to identify additional alleged JCE members by name in the Indictment if it was in a position to do so,[502] the Panel finds that Shala fails to substantiate his claim that Mr Kryeziu's and Fatmir Limaj's names and the fact that they were alleged members were known to the SPO at the time of charging.[503] In addition, this claim is contradicted by the fact that, as Shala himself acknowledges, the SPO never alleged that Mr Kryeziu and Fatmir Limaj were alleged members of the JCE.[504] Indeed, the Panel notes that the SPO does not refer to them as alleged JCE members either in the SPO Pre-Trial Brief,[505] its opening statements or even the SPO Final Trial Brief.[506] Consequently, the Appeals Panel is not persuaded that the SPO was in a position to name Mr Kryeziu and Fatmir Limaj as alleged JCE members in the Indictment.

217. Against this background, the Panel is satisfied that the Trial Panel made no error in ultimately identifying, on the basis of the evidence presented at trial, Mr Kryeziu and Fatmir Limaj as additional named members of the JCE since this constituted an evidentiary matter that the Trial Panel was entitled to address at trial.

218. Consequently, and in light of its finding that the Indictment is not defective in pleading the identity of the alleged JCE members, the Panel does not need to address Shala's arguments of alleged prejudice resulting from an uncured, defective Indictment.[507]

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[502] Appeal Decision on Defects in the Indictment, para. 19.
[503] See Appeal Brief, para. 60.
[504] See Appeal Brief, para. 61. See also Transcript, 15 May 2025, p. 39.
[505] The Panel notes that the SPO Pre-Trial Brief refers to Mr Kryeziu by his pseudonym W04848, stating that he worked at the KMF "as a sort of 'KLA prosecutor'" and was present during the [REDACTED], but does not refer to him as an alleged JCE member. See SPO Pre-Trial Brief, para. 53.
[506] The Panel notes that the SPO Final Trial Brief mentions Fatmir Limaj as being involved in the interrogation and mistreatment of detainees at the KMF, but not as an alleged JCE member. See SPO Final Trial Brief, paras 74, 124, fn. 464.
[507] See Appeal Brief, paras 67-69.

219. In any event, for the reasons detailed below, the Panel is not persuaded that the fact that Mr Kryeziu and Fatmir Limaj were not identified by name in the Indictment materially affected Shala's ability to prepare a meaningful defence.

220. The Panel observes that both W04733 and W01448 mentioned in their statements that Fatmir Limaj was present at times at the KMF and participated either in their interrogation or mistreatment.[508] While the witness summaries of W04733's and W01448's evidence attached to the SPO Pre-Trial Brief do not mention Fatmir Limaj, the summary for W04733 states that he "[REDACTED]"[509] and the summary for W01448 indicates that he "[REDACTED]".[510] Given the importance of W04733's and W01448's evidence to the SPO case, the Panel considers that the fact that W04733 and W01448 identified Fatmir Limaj at the KMF, and mentioned his involvement in their interrogation and/or mistreatment, was information directly accessible to Shala at trial which he could not ignore.

221. With respect to Shala's contention that he could not have foreseen the necessity to "challenge the evidence [of] W04733 with contradictory evidence of W01448" regarding the presence of Fatmir Limaj during the 20 May 1999 Incident,[511] the Panel

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[508] For W04733, see e.g. P00123 (SPOE00013793-SPOE00013847 RED2) (W04733's [REDACTED] (confidential), p. 35 (SPOE00013827) (disclosure 11, 31 July 2021) (which mentions the presence of Fatmir Limaj at the KMF); P00127_ET (082892-TR-AT-ET Part 4 RED3) (W04733's 2018 SPO Statement) (confidential), p. 22 (disclosure 14, 20 September 2021) (which mentions Fatmir Limaj among the KLA members who beat the witness during the 20 May 1999 Incident). For W01448, see e.g. P00101 (SITF00013852-00013869 RED6) (W01448's 2003 ICTY Statement) (confidential), pp. 9-10 (SITF00013860-SITF00013861) (disclosure 93, 24 November 2022) (where W01448 mentions being interrogated by Fatmir Limaj).

[509] SPO First List of Witnesses, p. 10, para. 5 (emphasis added). The Trial Panel's decision pursuant to Rule 155 of the Rules further mentions that W04733's statements concern, *inter alia*, "his alleged interrogation and mistreatment *by KLA members* while in detention" and "the identities and involvement of *other KLA members* present in Kukës, [REDACTED]". See Decision on SPO Rule 155 Motion, para. 32 (emphasis added).

[510] SPO First List of Witnesses, p. 9, para. 6 (emphasis added). The Trial Panel's decision pursuant to Rule 155 of the Rules further mentions that W01448 statements concern, *inter alia*, "his alleged interrogation and mistreatment *by KLA members* in Kukës" and "the identities, involvement and roles of *different KLA members* present in Kukës, including [REDACTED]". See Decision on SPO Rule 155 Motion, para. 18 (emphasis added).

[511] See Appeal Brief, fn. 111.

notes that both witnesses are deceased and that their evidence was tendered pursuant to Rule 155 of the Rules.[512] It is therefore unclear how Shala could have confronted the witnesses with their evidence. In any event, and regardless of whether Fatmir Limaj was part of the JCE, Shala could not ignore the fact that the evidence adduced by the SPO clearly placed Fatmir Limaj at the KMF during the relevant Indictment period and SPO witnesses W04733 and W01448 provided evidence that he was involved in the interrogation and or mistreatment of detainees, including themselves.[513]

222. As to Mr Kryeziu, the Panel observes that he was already listed as a SPO witness from the SPO First List of Witnesses.[514] His witness summary appended to the SPO Pre-Trial Brief states that he worked at the KMF and that he questioned detainees during his time at the KMF.[515] Shala was therefore unambiguously informed that the SPO alleged that Mr Kryeziu was present at the KMF and involved in the interrogation of detainees. The Panel further notes that Shala listed Mr Naser Kocinaj ("Mr Kocinaj") as Defence witness, and indicated that the witness "[REDACTED]".[516]

223. The Panel also observes that Shala's Counsel questioned several witnesses regarding the presence of Mr Kryeziu and Fatmir Limaj at the KMF, including their role in the questioning or mistreatment of detainees.[517] In the Panel's view, Shala fails to substantiate his claim of prejudice and to show how his line of defence and his

[512] See Decision on SPO Rule 155 Motion, paras 19, 33, 70(b).
[513] See above, para. 220.
[514] SPO First List of Witnesses, p. 2.
[515] [REDACTED]. The Panel further notes that the Trial Panel's decision on Rule 155 of the Rules also refers to Mr Kryeziu's role at the KMF and with the KLA in questioning detainees. See Decision on SPO Rule 155 Motion, para. 45.
[516] Defence Updated Witness List, p. 7, para. 4.
[517] See e.g. Transcript (TW4-07), 29 March 2023, pp. 945-946 (TW4-07 was questioned about Fatmir Limaj); Transcript (TW4-11), 3 May 2023, pp. 1302-1306 (TW4-11 was questioned about Mr Kryeziu); Transcript (TW4-01), 5 June 2023, pp. 1818-1826 (private session) (TW4-01 was questioned about [REDACTED]); Transcript (Bardhyl Mahmuti), 20 September 2023, pp. 2518, 2527-2531 (private session) (Bardhyl Mahmuti was questioned about [REDACTED]); Transcript (Naser Kocinaj), 3 October 2023, p. 2827 (private session) (Naser Kocinaj was questioned about Mr Kryeziu); Transcript (Mark Shala), 23 October 2023, p. 2998 (Mark Shala was questioned about Mr Kryeziu); Transcript (W04280), 28 November 2023, pp. 3779-3780 (W04280 was questioned about [REDACTED]).

cross-examinations or examinations in chief of witnesses would have differed had the names of Mr Kryeziu and Fatmir Limaj been mentioned in the Indictment.

224. Ultimately, the Panel observes that the Trial Panel's findings relating to Mr Kryeziu and Fatmir Limaj are relatively limited[518] and that the Trial Panel's findings regarding their participation in the JCE did not play any decisive role in the Trial Panel's conclusion as to Shala's criminal responsibility and ultimate convictions.[519]

225. Accordingly, the Panel dismisses Shala's arguments related to his alleged lack of notice of the identities of JCE members.

(ii) Victims

226. As recalled above, the Indictment charged Shala with allegations of arbitrary detention, cruel treatment and torture with respect to "at least nine persons", including [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].[520] The Panel further recalled that the Trial Panel found that Shala was guilty under Count 1 and Count 3 of the Indictment for having committed, as part of a JCE, respectively the war crime of arbitrary detention and the war crime of torture against "at least 18 persons" between approximately 17 May 1999 and 5 June 1999 at

[518] See Trial Judgment, paras 202-210, 341, 351-353, 363, 422-423, 433, 435-437, 521, 529-530, 541, 552-553, 555, 745, 856-860, 948, 1003-1004, 1014 (Mr Kryeziu), paras 341, 357, 363, 491, 689, 691, 706, 742, 904, 1003-1004, 1014 (Fatmir Limaj).
[519] See Trial Judgment, paras 945-949, 951-956, 971-984, 988-991, 1003-1036. While the Trial Panel found that Fatmir Limaj was involved in the 20 May 1999 Incident in the Office, the Trial Panel found that other KLA members were present and participated in the mistreatment of detainees during that incident, including Shala himself. See Trial Judgment, para. 904. In addition, the Trial Panel found that Shala engaged "most notably" with Sabit Geci and Xhemshit Krasniqi at the KMF. See Trial Judgment, para. 914. As to Mr Kryeziu, the Trial Panel found that he did not exercise the function of a "judge" or "competent" authority and was not in a position to independently order anyone's release. The Trial Panel concluded 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. See Trial Judgment, para. 948.
[520] Indictment, paras 14-15, 21, 26.

the KMF.[521] The Trial Panel found that the following individuals were deprived of their liberty by KLA members between approximately 17 May 1999 and 5 June 1999 at the KMF: TW4-01, the Murder Victim, TW4-11, W04733, W01448, TW4-05, TW4-04, TW4-02, [REDACTED], [REDACTED] and a third Roma detainee, [REDACTED], [REDACTED] and at least one more female detainee, [REDACTED], [REDACTED], [REDACTED] and [REDACTED].[522]

227. Turning first to Shala's argument that the Indictment does not identify a single victim under the count of arbitrary detention and that several paragraphs of the Indictment under the counts of cruel treatment and torture do not provide any number or identity for the alleged victims,[523] the Appeals Panel finds that the Indictment must be considered as a whole and select paragraphs read in the context of the entire document.[524] The Panel further recalls the finding of the Court of Appeals Chamber that it was clear from a plain reading of the Indictment that the alleged victims of cruel treatment and torture belong to the same group of at least nine persons detained at the KMF who were allegedly victims of arbitrary detention, and that five of the victims alleged victims were identified by name and one as a "female detainee".[525] The Panel therefore rejects this argument.

228. Before turning to address whether the Indictment is defective, the Appeals Panel first notes, as it did with respect to the number of alleged victims,[526] that the Trial Panel did not expressly engage with Shala's claim that the SPO had impermissibly changed its case regarding, *inter alia*, the identity of detainees,[527] and

[521] Trial Judgment, paras 1037-1038.
[522] Trial Judgment, para. 587.
[523] See Appeal Brief, para. 63.
[524] See Appeal Decision on Defects in the Indictment, para. 18. See also *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 56, and jurisprudence cited therein.
[525] See Appeal Decision on Defects in the Indictment, para. 28.
[526] See above, paras 189-190.
[527] See Trial Judgment, para. 23; Defence Final Trial Brief, para. 275.

did not examine whether the Indictment was defective in that respect.[528] The Panel considers that the Trial Panel should have made such a determination and erred in not doing so.

229. As to whether the Indictment was defective with respect to the identity of the alleged victims, the Appeals Panel pays heed to the guiding principles it recalled above[529] as well as to the limited scope of the present case and the corresponding requirement of a higher degree of specificity to be provided in the Indictment.[530] As with the number of alleged victims,[531] the Panel is mindful of its previous conclusion, at the pre-trial stage, that the Indictment adequately pleaded the identity of the alleged victims.[532] However, this finding relates to the nine victims specifically referred to in the Indictment.[533]

230. The Panel recalls that the fact that some victims are not identified by name in the Indictment does not necessarily render it defective. Nevertheless, the Panel notes that since the SPO was in possession of information as to the identities of additional victims, it should have therefore been in a position to provide these names in the Indictment but did not do so.[534] The Appeals Panel further recalls, as found above, that the Indictment was insufficiently specific with respect to the number of victims and that it should have included the additional victims with respect to which Shala was ultimately convicted under the counts of arbitrary detention and torture.[535] For the same reasons, the Appeals Panel likewise considers that the Indictment does not put

[528] See Trial Judgment, paras 23-26.
[529] See above, para. 191.
[530] See above, para. 192.
[531] See above, para. 192.
[532] See Appeal Decision on Defects in the Indictment, para. 29.
[533] See Appeal Decision on Defects in the Indictment, para. 29.
[534] See below, para. 233. See also Appeal Decision on Defects in the Indictment, paras 26, 29.
[535] See above, para. 192.

Shala on adequate notice with respect to the identities of the additional victims and is defective in that respect.

231. Consequently, the Panel finds that the Trial Panel erred in entering findings with respect to these other persons alleged to have been detained at the KMF without first determining whether the Indictment was defective in that regard and in dismissing Shala's related claims of insufficient notice, and in ultimately failing to find that the Indictment was defective.[536]

232. In light of the failure of the SPO to provide particulars as to the identity of the additional victims in the Indictment, and having concluded that this allegation did not constitute a separate charge and that Shala was put on notice that he was charged in relation to these additional victims,[537] the Panel will turn to examine whether this defect was cured by the provision of timely, clear and consistent post-indictment information.

233. The Panel observes that the SPO Pre-Trial Brief provides the full identity of 16 of the 18 victims and identifies the last two as "two women from Gjakova".[538] Furthermore, the Panel notes that seven of the 18 victims were included as witnesses in the SPO First List of Witnesses appended to the SPO Pre-Trial Brief.[539] These

[536] See Trial Judgment, paras 23-28, 557, 587.
[537] See above, paras 194-195.
[538] See SPO Pre-Trial Brief (F00136/A01), para. 30. The Panel notes that in addition to the 18 victims mentioned in the Trial Judgment, the SPO Pre-Trial Brief also mentioned "the son of [REDACTED], a Kosovar musician" as a victim. *Compare* Trial Judgment, para. 587 *with* SPO Pre-Trial Brief, paras 30, 38.
[539] TW4-01, TW4-02, TW4-04, TW4-05, TW4-11, W01448 and W04733. See SPO First List of Witnesses (F00136/A02), p. 1. While the reference to TW4-02 [REDACTED] was redacted in the confidential redacted version of the SPO Pre-Trial Brief initially disclosed to the Defence (see SPO Pre-Trial Brief (F00136/A01), paras 37, 43), the summary of his anticipated testimony appended to the SPO First List of Witnesses (F00136/A02), disclosed at the same time, referred to the fact that the witness was detained at the KMF. In the Panel's view, this was sufficient to put Shala on notice that TW4-02 was among the alleged victims detained at the KMF. See SPO First List of Witnesses, p. 5. The Panel further notes that the Trial Panel took judicial notice of the fact that nine persons, including five of these additional victims not mentioned in the Indictment, were detained at the KMF. See List of Adjudicated Facts, Fact 53.

witnesses were also listed as relevant with respect to the paragraphs of the Indictment relating to the charges of arbitrary detention, cruel treatment and torture.[540]

234. The Appeals Panel considers that the information provided in the SPO Pre-Trial Brief remedied the lack of specificity of the Indictment with respect to the identity of the alleged victims. The Panel is therefore satisfied that Shala received appropriate and sufficient notice to allow him to prepare a meaningful defence against these allegations.[541] As a result, the Panel will not address Shala's arguments of alleged prejudice resulting from an uncured, defective Indictment.[542]

235. In light of the above, the Appeals Panel finds that the Trial Panel erred in failing to address whether the Indictment was defective, and in failing to find that the Indictment was defective regarding the pleading of the identity of the 18 victims of allegations of arbitrary detention and torture. However, the Panel finds that the Trial Panel's errors do not invalidate its decision to convict Shala on this basis as the defect was subsequently cured and as Shala received adequate notice in that respect. The Panel therefore dismisses Shala's arguments related to his alleged lack of notice of victims' particulars.

236. Accordingly, the Appeals Panel dismisses Shala's Ground 4A.

3. Alleged Unlawful Cumulative Charging (Ground 4B)

(a) Submissions of the Parties

237. Shala submits that the Indictment contains impermissible cumulative charging of cruel treatment and torture and thus fails to comply with the *Blockburger* test and

[540] See SPO First List of Witnesses (F00136/A02), pp. 3, 5-10, referring, *inter alia*, to Indictment, paras 14, 16, 18-19, 24, 26.
[541] Contra Appeal Brief, paras 65, 69.
[542] See Appeal Brief, paras 67-69. The Panel recalls that a vague or ambiguous indictment not cured of its defect by the provision of timely, clear and consistent information might cause prejudice to the accused. See above, para. 194.

the principle of reciprocal speciality.[543] According to Shala, it is a well-established principle that cumulative charging is detrimental to the rights of the Defence, and only distinct crimes protecting distinct values may justify cumulative charging.[544] He argues that the Trial Panel erred in permitting the trial to go ahead on the basis of a defective Indictment containing cumulative charging of cruel treatment and torture, and in ultimately upholding the Defence's objections only when issuing the Trial Judgment.[545] Shala contends that this caused him "irreparable" prejudice as the Defence had to unnecessarily answer cumulative charges under Counts 2 and 3 while operating with limited available time for investigations and scarce resources.[546]

238. The SPO responds that neither the Law nor the Rules prohibit cumulative charging and this practice has been repeatedly upheld in the jurisprudence of international tribunals.[547] The SPO submits that Shala's claims of prejudice are general and unsupported since the underlying facts in respect of the charges of torture and cruel treatment are identical and no additional investigatory burden was placed on Shala.[548] The SPO finally contends that the Panel properly applied the cumulative conviction test in its treatment of the charges of cruel treatment and torture.[549]

239. Shala replies that cumulative charging is in any event unnecessary as it could not lead to cumulative convictions.[550]

[543] Appeal Brief, paras 57, 66, referring, *inter alia,* to *Blockburger* Judgment.
[544] Appeal Brief, para. 66, referring to *Bemba* Confirmation Decision, para. 202; *Ayyash et al.* Interlocutory Decision on Applicable Law, paras 298-299.
[545] Appeal Brief, paras 57, 66.
[546] Appeal Brief, paras 58, 66; Reply Brief, para. 13.
[547] SPO Response Brief, para. 47. See also SPO Response Brief, para. 42. The SPO adds that Shala's reliance on the *Bemba* Confirmation Decision is misguided as it fails to acknowledge the specific legal framework at the ICC. See SPO Response Brief, para. 47.
[548] SPO Response Brief, para. 48.
[549] SPO Response Brief, para. 49.
[550] Reply Brief, para. 13.

(b) Assessment of the Court of Appeals Panel

240. At the outset, the Appeals Panel notes that the Indictment charges Shala, *inter alia,* with the counts of cruel treatment (Count 2) and torture (Count 3) cumulatively.[551] The Panel further recalls that the Trial Panel found that the charge of cruel treatment was fully consumed by the charge of torture and decided not to consider further the charge of cruel treatment for the purposes of a conviction.[552]

241. While Shala argues that the Indictment failed to comply with the principle of reciprocal speciality and the "*Blockburger* test", the Panel notes that this jurisprudence concerns cumulative convictions after trial and finds that it is therefore not applicable to the concept of cumulative charging.[553] In that sense, the Panel is not persuaded that the Trial Panel "ultimately upheld the Defence's objections" when issuing the Trial Judgment.[554] In any event, the Panel is satisfied that the Trial Panel correctly applied the test for cumulative convictions *after trial*, in line with the principle of "reciprocal speciality", when finding that the charge of cruel treatment was fully consumed by the charge of torture since both offences protected the same value(s) or social interest(s), the legal elements of cruel treatment were entirely encompassed within the legal elements of torture – the most specific offence, and they were based on the same underlying facts and conduct.[555]

242. Turning to the practice of cumulative charging, namely the possibility of employing different legal qualifications for the same acts in an indictment,[556] the Panel first notes that Shala repeats his arguments that this practice is "impermissible" that he already made before the Pre-Trial Judge. These were dismissed by the Pre-Trial

[551] See Indictment, para. 31.
[552] See Trial Judgment, para. 964.
[553] See Appeal Brief, para. 66; *Delalić et al.* Appeal Judgement, para. 412; *Kupreškić et al.* Trial Judgement, paras 681-685; *Blockburger* Judgment, p. 304.
[554] Contra Appeal Brief, para. 66.
[555] Trial Judgment, paras 961-964. See also *Gucati and Haradinaj* Appeal Judgment, para. 302.
[556] See also Decision on Defects in the Indictment, para. 44.

Judge but Shala fails to identify any error in their dismissal.[557] In addition, the Panel observes that neither the Law nor the Rules contain any provision prohibiting cumulative charging.

243. The Panel further notes that the *ad hoc* tribunals have repeatedly upheld that the practice of cumulative charging by the prosecution is permitted on the ground that prior to the presentation of all of the evidence, it is not possible to determine with certainty which of the charges brought against an accused will be proven and that lower panels are better placed to evaluate the sufficiency of the evidence and which charges should be retained.[558]

244. Shala is correct that the practice of cumulative charging by the prosecution was rejected in the *Bemba* case.[559] However, the Panel notes that the ICC Pre-Trial Chamber explicitly noted the differences in the legal framework of the ICC and that of the *ad hoc* tribunals and relied on the fact that, unlike at the *ad hoc* tribunals, ICC chambers are expressly empowered to re-characterise the facts pleaded by the prosecution to give them the most appropriate legal characterisation.[560] In doing so, the ICC Pre-Trial Chamber implicitly acknowledged the validity of cumulative charging before courts that would not provide for such a re-characterisation.[561] Furthermore, the Panel notes

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[557] Appeal Brief, para. 66; Defence Motion on Defects in the Indictment, paras 14-18, 24, 26; Decision on Defects in the Indictment, paras 38-51. See also Defence Motion for Leave to Appeal Decision on Indictment Defects, paras 7-8; Certification Decision on Indictment Challenges, paras 21-22.

[558] *Delalić et al.* Appeal Judgement, para. 400; *Musema* Appeal Judgement, para. 369; *Kupreškić et al.* Appeal Judgement, paras 385-386; *Kunarac et al.* Appeal Judgement, para. 167; *Naletilić and Martinović* Appeal Judgement, para. 103; *Semanza* Appeal Judgement, paras 308-309; *Galić* Appeal Judgement, para. 161; *Nyiramasuhuko et al.* Appeal Judgement, para. 530; *Karadžić* Appeal Judgement, para. 56. See also *Brima et al.* Appeal Judgment, fn. 327; *Duch* Decision on Appeal Against Closing Order, paras 85-88.

[559] See *Bemba* Confirmation Decision, paras 201-202; Appeal Brief, para. 66.

[560] See *Bemba* Confirmation Decision, paras 201-202. For a detailed analysis, see *Ambos* Treatise ICL III, Chapter IV, B.(7)(b) (Cumulative/alternative charging and recharacterization of facts (Regulation 55)), pp. 438-450.

[561] See *Bemba* Confirmation Decision, para. 203 (where the ICC Pre-Trial Chamber held that "the ICC legal framework differs from that of the *ad hoc* tribunals, since under regulation 55 of the Regulations, the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation. Therefore, before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach

that this decision is no longer reflective of the current practice before the ICC, which has more recently allowed cumulative charging by the prosecution.[562]

245. Therefore, consistent with the position before the *ad hoc* tribunals, and having regard to the fact that judicial re-characterisation of the charges by lower panels at trial is not provided for within the Specialist Chambers' legal framework, the Appeals Panel considers that the practice of cumulative charging is permissible before the Specialist Chambers. Shala's arguments in that respect are dismissed accordingly.

246. In any event, the Appeals Panel notes that while Shala generally claims that he suffered "real prejudice", as he had to answer allegations under both counts,[563] Shala does not identify any actual prejudice or point to any additional investigative lines or preparations which would have been specifically required to answer allegations of cruel treatment, in addition to that of torture. While cumulative charging may in some specific instances have an impact on the fair trial rights of an accused,[564] the Panel does not consider that it is the case here. The Panel notes that, as per the Indictment, the underlying facts to be proven at trial for the charge of cruel treatment are identical to those for the charge of torture.[565] The Panel further recalls that, regarding the elements of the offences, torture requires an additional element, namely that the perpetrator must have inflicted the pain or suffering for a prohibited purpose, such as obtaining

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and present all possible characterisations in order to ensure that at least one will be retained by the Chamber."). See also *Bemba* Confirmation Decision, para. 200. The Appeals Panel further observes that, in the same vein, the STL Appeals Chamber noted that none of the tribunals endorsing cumulative charging "had a comparable regulation" to the ICC. See *Ayyash et al.* Interlocutory Decision on Applicable Law, paras 290-292, referred to in Appeal Brief, fn. 123.

[562] See *Ongwen* Confirmation Decision, paras 30-33 (where the ICC Pre-Trial Chamber held that questions of concurrence of offences were better left to the determination of trial chambers and that the prosecution should be allowed to present cumulative charges at trial); *Yekatom and Ngaïssona* Confirmation Decision, para. 121; *Al Hassan* Appeal Judgment on Admissibility Challenges, para. 123. See also ICC Chambers Practice Manual, para. 68; *Ruto et al.* Confirmation Decision, paras 279-281; *Abd-Al-Rahman* Confirmation Decision, paras 26-27.

[563] See Appeal Brief, para. 66; Reply Brief, para. 13.

[564] See *Ambos* Treatise ICL II, Chapter VI, A.(3)(b), pp. 301-302. See also Decision on Defects in the Indictment, para. 48; Certification Decision on Indictment Challenges, para. 21.

[565] See Indictment, paras 18-24, 26. See also Trial Judgment, para. 963.

information or a confession, or punishing, intimidating, coercing or discriminating against, on any ground, the victim or a third person.[566]

247. In light of this, the Panel is not persuaded by Shala's argument that answering the allegations of cruel treatment in addition to those of torture as charged in the Indictment entailed any additional time for preparation, allocation of additional resources, or placed an additional burden on the Defence in terms of workload in the present case. Therefore, the Panel finds that Shala fails to demonstrate that he suffered a prejudice as a result of the cumulative charging of torture and cruel treatment in the Indictment.

248. In light of the above, the Appeals Panel finds that Shala fails to demonstrate any error in the Trial Panel's approach with respect to cumulative charging. Accordingly, the Appeals Panel dismisses Shala's Ground 4B.

E. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S ASSESSMENT OF KEY SPO WITNESSES (GROUND 6)

249. In the Trial Judgment, the Trial Panel assessed the credibility of SPO witnesses TW4-01, W04733 and W01448, and found them credible.[567]

250. Shala argues that the Trial Panel abused its discretion in assessing and finding credible key SPO witnesses TW4-01, W04733 and W01448, in failing to apply caution when accepting the evidence of SPO witnesses despite strong indications that it was contaminated, and in applying double standards in assessing exculpatory and

[566] See Trial Judgment, paras 962, 969. See also *Mustafa* Appeal Judgment, para. 404. In the Panel's view, cumulative charging should be permissible and is not "unnecessary" in the case where the additional element (here, under the charge of torture) could not be proven – a conviction for the "lesser charge" (here, the charge of cruel treatment) would still be possible as it does not require proof of that additional element. Contra Reply Brief, para. 13.
[567] Trial Judgment, paras 119, 175, 188.

incriminating evidence.[568] The SPO and Victims' Counsel respond that Shala fails to demonstrate any error in the Trial Panel's assessment of SPO witnesses.[569]

251. The Appeals Panel will examine Shala's contentions in turn.[570]

252. At the outset, the Appeals Panel recalls that the Trial Panel is vested with broad discretion to evaluate the credibility and reliability of witness testimony, and that the Panel will not lightly overturn the Trial Panel's factual findings in that respect unless the evidence it relied upon could not have been accepted by any reasonable trier of fact, or the evaluation of the evidence is wholly erroneous.[571] The Panel also recalls that an accused's right to a reasoned opinion does not require a detailed analysis of the credibility of witnesses, as long as the relevant chamber provides reasons for accepting a witness's testimony despite any alleged or material inconsistencies.[572]

253. The Appeals Panel further recalls that Rule 139(4) of the Rules provides that, in determining the weight to be given to the testimony of a witness, a panel shall assess the credibility of the witness and the reliability of his or her testimony. The Appeals Panel notes that credibility relates to the truthfulness of the witness (i.e. whether the witness is speaking the truth),[573] and further notes that the fact that a witness gives evidence honestly is not in itself sufficient to establish the reliability of that evidence.[574] The Panel observes that reliability relates to whether the evidence, if accepted, proves

[568] Appeal Brief, paras 78-114; Reply Brief, paras 15-20; Notice of Appeal, paras 8-12.
[569] SPO Response Brief, paras 54-101; Victims Response Brief, paras 30-74.
[570] Shala's arguments relating to the Trial Panel's reliance on untested evidence have been addressed under Ground 7. See Appeal Brief, paras 89, 99; below, Section V.G.
[571] *Mustafa* Appeal Judgment, paras 24, 228; see above, paras 34, 47.
[572] *Mustafa* Appeal Judgment, paras 34, 228; see above, para. 44.
[573] *Mustafa* Appeal Judgment, para. 229; *Lubanga* Appeal Judgment, para. 239; *Kunarac et al.* Decision on Acquittal, para. 7. See also Trial Judgment, para. 81.
[574] *Mustafa* Appeal Judgment, para. 229; *Brđanin* Trial Judgement, para. 25. See also *Lubanga* Appeal Judgment, para. 239; Trial Judgment, para. 81.

the fact to which it is directed, or whether it can be put in doubt by other evidence or surrounding circumstances.[575]

254. The Appeals Panel observes that the Trial Panel correctly articulated its approach to assessing evidence in this case, in particular, with respect to evaluating the credibility and reliability of witnesses before relying on their evidence.[576] The Appeals Panel also recalls that the Trial Panel identified a non-exhaustive list of factors that it considered in its assessment of the credibility of all witnesses and the reliability of their testimony.[577] The Panel recalls that these factors do not operate as a "check-list" of requirements, and that their relevance must be assessed on a case-by-case basis.[578] Accordingly, the Trial Panel's consideration and application of these factors in determining a witness's credibility will vary according to each witness's testimony.

[575] *Mustafa* Appeal Judgment, para. 229; *Kunarac et al.* Decision on Acquittal, para. 7; *Lubanga* Appeal Judgment, para. 239. See also Trial Judgment, para. 81.
[576] Trial Judgment, paras 78-92.
[577] See Trial Judgment, para. 82, where the Trial Panel refers to: (i) the level of detail provided by the witness, indicating that the witness experienced the events personally; (ii) the coherence and consistency of the witness's account, including the consistency of their testimony with their written statement(s) and the explanations provided by the witness for any inconsistencies, as discussed with them in court; (iii) the coherence and consistency of the witness's testimony with other evidence before the Panel; (iv) the plausibility of the witness's account; (v) attempts or efforts made by the witness to be accurate (for instance, acknowledging difficulties in recalling certain events or details, or differentiating between what the witness experienced personally and what they learnt from others); (vi) the effects of time and trauma on the witness's memory, which may have an impact on their ability to reconstruct the events; (vii) the witness's demeanour when testifying in court, including their readiness and willingness to respond to questions and any changes in attitude when questioned by the opposing Party; (viii) the witness's relationship to either Party or Victims' Counsel, including any ties to, bias towards, or motives to implicate or exculpate, the Accused, any ties to KLA members, the KLA as such or any branch thereof, any involvement in the events under consideration and any other incentive or motive to lie, fabricate, distort or withhold information; (ix) any bias towards the Specialist Chambers and/or the SPO, which may have undermined the witness's willingness and sense of obligation to provide the Panel with evidence to assist it in its determination of the truth; and (x) any indications that the witness may have been intimidated, threatened, pressured or influenced, or that they have colluded with other witnesses.
[578] See *Mustafa* Appeal Judgment, para. 233. See also *Popović et al.* Appeal Judgement, para. 132; *Nchamihigo* Appeal Judgement, para. 47.

1. Alleged Errors Regarding TW4-01 (Ground 6A)

(a) Submissions of the Parties and Participants

255. Shala submits that the Trial Panel abused its discretion and erred in finding TW4-01 credible despite the abundance of evidence undermining his credibility, the contradictions and inconsistencies in his evidence and his history of [REDACTED].[579] He also asserts that the Trial Panel selected which parts of TW4-01's evidence "fitted the narrative they wished to present" and "*ex post facto* adjusted" its credibility assessment of TW4-01.[580]

256. More specifically, Shala takes issue with the Trial Panel's "inconsistent" findings regarding the impact of trauma on TW4-01's evidence, arguing that on the one hand, the Trial Panel found that trauma did not affect TW4-01's memory or testimony, while, on the other hand, it relied on trauma to justify [REDACTED].[581]

257. Shala also points to the Trial Panel's erroneous assessment of a number of inconsistencies and "plain lies" in TW4-01's evidence concerning, *inter alia*: (i) [REDACTED]; (ii) [REDACTED]; (iii) whether TW4-01 could see the entrance gate from where he was detained; and (iv) the circumstances of TW4-01's [REDACTED] and his release.[582] He adds that TW4-01's evidence on [REDACTED] formed the basis for his conviction for murder.[583]

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[579] Appeal Brief, paras 79, 88. See also Appeal Brief, paras 78, 114; Reply Brief, para. 15; Transcript, 15 May 2025, pp. 40-41, 42-43 (private session).
[580] Appeal Brief, para. 80.
[581] Appeal Brief, para. 80. See also Reply Brief, para. 16.
[582] Appeal Brief, paras 81-83, 85. See also Appeal Brief, para. 98; Reply Brief, para. 17; Transcript, 15 May 2025, pp. 41-42 (private session), 48 (private session). Shala also raises other alleged inconsistencies regarding whether TW4-01 [REDACTED] whether he [REDACTED] or whether [REDACTED]. See Appeal Brief, para. 84. At the Appeal Hearing, the Defence further mentioned the circumstances and date of TW4-01's arrival at the KMF demonstrates the unreliability of his account. See Transcript, 15 May 2025, p. 41; Transcript, 16 May 2025, p. 171 (private session).
[583] Appeal Brief, para. 81; Reply Brief, para. 18.

258. Shala finally contends that the Trial Panel erred in not taking into consideration TW4-01's prior convictions and criminal record, as well as [REDACTED].[584] [REDACTED].[585] [REDACTED].[586]

259. Shala contends that no reasonable trier of fact could have: (i) [REDACTED]; (ii) considered that a witness [REDACTED] was truthful, reliable and credible and that his evidence did not have to be treated with caution; (iii) found no support that TW4-01 had a motive to falsely implicate the Accused while [REDACTED]; and (iv) ignored TW4-01's [REDACTED].[587]

260. The SPO and Victims' Counsel both respond that Shala failed to demonstrate that the Trial Panel abused its discretion in finding TW4-01 credible.[588] The SPO adds that the duty for the Trial Panel to provide a reasoned opinion does not require it to address every argument in detail and it is presumed that it evaluated all the evidence presented to it.[589]

261. Regarding the alleged inconsistent assessment of the effect of PTSD on TW4-01's evidence, the SPO and Victims' Counsel argue that Shala conflates issues of trauma with the reliability of TW4-01's testimony, stressing that expert evidence shows that he experienced no memory loss.[590] Both contend that Shala mischaracterises the Trial Judgment, as TW4-01's [REDACTED].[591] In the SPO's and

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[584] Appeal Brief, para. 86. See also Reply Brief, paras 16, 19; Transcript, 15 May 2025, pp. 42 (private session), 52 (redacted).
[585] Appeal Brief, para. 86. See also Reply Brief, para. 19.
[586] Appeal Brief, para. 86. See also Reply Brief, para. 19; Transcript, 15 May 2025, pp. 42-43 (private session).
[587] Appeal Brief, paras 86-87. See also Reply Brief, paras 16, 19; Transcript, 15 May 2025, pp. 41, 42 (private session), 52 (redacted).
[588] SPO Response Brief, paras 57, 73; Victims Response Brief, paras 30-32, 50. See also SPO Response Brief, paras 54-55; Victims Response Brief, para. 49; Transcript, 16 May 2025, pp. 147-148, 149-153 (private session).
[589] SPO Response Brief, paras 57, 66. See also SPO Response Brief, para. 67.
[590] SPO Response Brief, paras 58-59; Victims Response Brief, paras 34-36.
[591] SPO Response Brief, paras 58-59; Victims Response Brief, paras 35-36. See also SPO Response Brief, para. 69; Transcript, 16 May 2025, pp. 149-150 (private session).

Victims' Counsel's view, Shala's claim that the Trial Panel adjusted its credibility assessment of TW4-01 "*ex post facto*" to fit a "narrative" is unsupported.[592]

262. With respect to [REDACTED], the SPO and Victims' Counsel submit that Shala fails to show why it was erroneous for the Trial Panel to accept TW4-01's evidence rather than that of [REDACTED], and that Shala ignores the Trial Panel's finding that it was plausible that [REDACTED].[593] The SPO further submits that contrary to Shala's claim, the Trial Panel held that [REDACTED], while established, was not required for his responsibility for murder to arise.[594]

263. Victims' Counsel argues that the various alleged inconsistencies raised by Shala with respect to whether the gate was visible from Room 1, [REDACTED] do not have any significant bearing on the issue of TW4-01's credibility.[595] The SPO submits that: (i) the Trial Panel is not required to address every submission; (ii) Shala incorrectly claims that the Trial Panel overlooked some evidence and did not consider some of his submissions; (iii) certain issues he raised were "fully ventilated" during TW4-01's testimony and the Trial Panel was entitled to find that such minor discrepancies were not indicators of dishonest testimony; and (iv) Shala merely disagrees with the Trial Judgment.[596]

264. The SPO and Victims' Counsel contend that Shala misrepresents the Trial Panel's findings regarding TW4-01's criminal record when claiming it was excluded

[592] SPO Response Brief, para. 59; Victims Response Brief, para. 49. See also Transcript, 16 May 2025, p. 146.
[593] SPO Response Brief, paras 60-62, 64; Victims Response Brief, para. 37. The SPO adds that [REDACTED]. See SPO Response Brief, para. 61. Victims' Counsel also submits that the Defence's reliance on [REDACTED]. See Victims Response Brief, para. 37; Transcript, 16 May 2025, p. 151 (private session).
[594] SPO Response Brief, para. 63.
[595] Victims Response Brief, para. 45. In addition, with respect to [REDACTED], Victims' Counsel submitted at the Appeal Hearing that [REDACTED]. See Transcript, 16 May 2025, p. 148 (private session).
[596] SPO Response Brief, paras 65-68.

as a matter of principle.[597] The SPO adds that the Trial Panel's conclusion that TW4-01's criminal record did not constitute a reason to doubt the truthfulness of his testimony was reasonable and in line with established jurisprudence.[598] The SPO and Victims' Counsel argue that, contrary to Shala's assertion, the Trial Panel fully addressed the issue of [REDACTED].[599] As to the [REDACTED], both the SPO and Victims' Counsel submit that Shala's claim, that he was prejudiced as a result, is unsupported since the fact that [REDACTED] was never in dispute and was fully considered by the Trial Panel.[600]

265. Finally, the SPO and Victims' Counsel argue that Shala fails to demonstrate any error in the Trial Panel rejecting his claim that TW4-01 had a motive to falsely incriminate him and that [REDACTED] is consistent with Shala being responsible for what happened to him [REDACTED].[601] They both recall key aspects in TW4-01's testimony which the Trial Panel considered in order to find him credible and to discard Shala's claim that TW4-01 was seeking revenge.[602]

266. In his Reply Brief, Shala first stresses that a trial panel's discretion to assess witnesses' credibility and reliability is not unfettered.[603] Shala further replies that the fact that TW4-01 [REDACTED] was a valid reason explaining why his memory could not be trusted, especially when contradicted by the account of two SPO witnesses.[604] He adds that while a panel is not required to answer each and every submission, the Trial Panel failed to answer to important challenges and concerns raised as to TW4-

[597] SPO Response Brief, para. 70; Victims Response Brief, paras 38-40.
[598] SPO Response Brief, para. 70. See also Victims Response Brief, para. 38.
[599] SPO Response Brief, paras 71-72; Victims Response Brief, paras 41-42. See also Transcript, 16 May 2025, pp. 149-150 (private session).
[600] SPO Response Brief, para. 72; Victims Response Brief, para. 43.
[601] SPO Response Brief, para. 69; Victims Response Brief, para. 44. See also Transcript, 16 May 2025, p. 151 (private session).
[602] SPO Response Brief, para. 64; Victims Response Brief, paras 46-48. See also Transcript, 16 May 2025, pp. 151-153 (private session).
[603] Reply Brief, para. 15.
[604] Reply Brief, para. 17.

01's credibility in circumstances where no reasonable trier of fact would have failed to address such issues.[605]

(b) Assessment of the Court of Appeals Panel

267. At the outset, the Panel notes that in some instances Shala incorporates, by way of a reference in a footnote, arguments he made in his Defence Final Trial Brief.[606] The Panel recalls that such an approach lacks the necessary substantiation since parties are not permitted to incorporate earlier submissions by mere reference without properly substantiating them before the competent Appeals Panel.[607] For these reasons, the Panel declines to address such arguments to the extent that Shala has not provided additional substantiation in support.

268. The Panel will now turn to examine the specific examples of alleged inconsistencies raised by Shala where he provided substantiation.

(i) Impact of Trauma

269. Shala argues that it was contradictory for the Trial Panel to find that trauma did not affect TW4-01's memory while at the same time allegedly finding that trauma could "selectively […] justify" inconsistencies and [REDACTED].[608]

270. The Appeals Panel finds that Shala's argument is misleading for the following reasons. The Panel first notes that the Trial Panel endorsed the conclusion of the expert witnesses Ms Karin Duhne-Prinsen ("Ms Duhne-Prinsen") and Dr Chayén Lozano

[605] Reply Brief, para. 19.
[606] See Appeal Brief, fns 144-145, 153, referring to Defence Final Trial Brief, paras 204-205, 225-226. Shala's arguments concern (i) the fact that TW4-01 allegedly changed his evidence regarding Shala's involvement in his transfer to the KMF following the publication of Shala's arrest by the Specialist Chambers in 2021; (ii) the fact that TW4-01 allegedly kept changing his account depending on other available evidence on the record; and (iii) TW4-01's alleged implausible account of the circumstances surrounding his release.
[607] *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 65.
[608] Appeal Brief, para. 80.

Parra ("Dr Lozano Parra") that TW4-01 did not have any signs of memory problems.[609] The Trial Panel took into account, among a number of other factors, the traumatic nature of the events that TW4-01 experienced to reach the conclusion that inconsistencies in TW4-01's evidence did not affect his overall credibility.[610] However, to the extent the Trial Panel found that TW4-01's account was affected by trauma, the Appeals Panel observes that the Trial Panel did not find that it affected the witness's ability to recollect events.[611] Rather, it found that TW4-01's [REDACTED].[612]

271. The Panel sees no contradiction or inconsistent approach in the Trial Panel finding that TW4-01 provided a clear, coherent and focused in-court testimony and did not suffer memory loss while, at the same time, also finding that TW4-01 suffered from PTSD.[613] Therefore, the Panel finds that Shala fails to demonstrate that the Trial Panel selectively relied on trauma with respect to TW4-01 to justify inconsistencies.

(ii) TW4-01's [REDACTED]

272. First, with respect to [REDACTED], the Panel recalls that [REDACTED].[614] As noted by the Trial Panel,[615] [REDACTED]: (i) [REDACTED];[616] and (ii) [REDACTED].[617]

[609] Trial Judgment, para. 106. See also V00003 (V4010023-V4010044) (confidential), p. 14 (V4010036); Transcript (Karin Duhne-Prinsen and Chayén Lozano Parra), 21 August 2023, pp. 2330-2331 (redacted).
[610] The Trial Panel also took into account the fact that TW4-01 provided numerous statements and interviews over the course of years and has been questioned multiple times about the same events; that different authorities pursued different investigative lines and the statements were taken and recorded in different manners; the difficulty in recounting repeatedly painful events, particularly to foreign authorities; and the effects of time on TW4-01's memory. See Trial Judgment, para. 104.
[611] The Trial Panel found that TW4-01 gave a remarkably detailed testimony, with graphic and vivid descriptions of the events he witnessed and provided a clear, coherent account, in a narrative manner, while he admitted outright when he did not know or could not remember certain details of the events. See Trial Judgment, paras 101-102. Contra Appeal Brief, para. 80.
[612] Trial Judgment, para. 111. See also [REDACTED].
[613] See Trial Judgment, paras 106, [REDACTED], 1094.
[614] See [REDACTED]. See also Trial Judgment, paras [REDACTED].
[615] Trial Judgment, para. [REDACTED].
[616] See [REDACTED].
[617] [REDACTED].

The Panel notes that this issue was extensively discussed at trial and in the Trial Judgment.[618]

273. While Shala claims that the Trial Panel dismissed [REDACTED] evidence and preferred the account of TW4-01 "for unconvincing reasons" and "without a credible explanation",[619] Shala ignores the fact that the Trial Panel provided extensive reasoning as to why it decided to favour TW4-01's account. Contrary to what he asserts, the Trial Panel did not offer one "only reason", namely that [REDACTED].[620] Indeed, the Appeals Panel observes that the Trial Panel's conclusion that [REDACTED][621] was based on several additional factors, notably the fact that: (i) [REDACTED];[622] (ii) [REDACTED];[623] (iii) [REDACTED];[624] and (iv) [REDACTED].[625]

274. In the Panel's view, Shala merely (i) repeats arguments which were unsuccessful at trial, without showing that their rejection was erroneous; and (ii) disagrees with the Trial Panel's findings without articulating any error in the Trial Panel's exercise of its discretion vis-à-vis the appropriate credibility and weight to be accorded to the evidence of these witnesses.[626] Therefore, the Panel dismisses Shala's arguments in that regard.

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[618] See Trial Judgment, para. [REDACTED]. See also Trial Judgment, paras [REDACTED]; Defence Final Trial Brief, paras 211-216; SPO Final Trial Brief, paras 171-178; Transcript, 15 April 2024, pp. 4110-4114 (private session); Transcript, 16 April 2024, pp. 4259-4260 (private session).
[619] See Appeal Brief, para. 81; Reply Brief, para. 17. See also Transcript, 15 May 2025, p. 48 (private session).
[620] Contra Reply Brief, para. 17. See Trial Judgment, para. [REDACTED]. See also Trial Judgment, para. [REDACTED].
[621] See Trial Judgment, para. [REDACTED].
[622] Trial Judgment, para. [REDACTED]. See also Trial Judgment, paras [REDACTED].
[623] Trial Judgment, para. [REDACTED]. The Trial Panel [REDACTED]. See Trial Judgment, para. [REDACTED].
[624] Trial Judgment, para. [REDACTED]. See also Trial Judgment, paras [REDACTED].
[625] See Trial Judgment, paras [REDACTED]. See also Trial Judgment, para. [REDACTED].
[626] See above, para. 42.

(iii) [REDACTED]

275. The Panel now turns to address Shala's claim [REDACTED] "formed the basis" for Shala's conviction for murder.[627] The Appeals Panel notes that the Trial Panel, [REDACTED].[628] However, the Panel observes that the Trial Panel: (i) carefully evaluated the credibility of TW4-01 [REDACTED]; (ii) fully considered alleged inconsistencies and the challenges brought by the Defence in that regard; and (iii) provided detailed reasons for ultimately accepting TW4-01's account.[629] In the Panel's view, Shala ignores the extensive reasoning provided by the Trial Panel in this regard. The Panel finds that Shala fails to demonstrate any error in the Trial Panel's assessment of TW4-01's evidence [REDACTED].[630]

(iv) [REDACTED]

276. Regarding Shala's contention that [REDACTED],[631] the Panel notes that Shala merely repeats arguments he raised at trial in that respect.[632] Shala further ignores the fact that the Trial Panel found that [REDACTED] and therefore declined to address the Defence's challenges further.[633] The Panel notes that this is in line with the general approach of the Trial Panel to the assessment of evidence, which the Appeals Panel endorses.[634] In the Panel's view, Shala fails to demonstrate that the Trial Panel erred

[627] See Appeal Brief, para. 81.
[628] Trial Judgment, paras [REDACTED]. See also Trial Judgment, paras [REDACTED]; [REDACTED]; [REDACTED].
[629] See Trial Judgment, paras [REDACTED].
[630] The Appeals Panel further notes that if the Trial Panel relied notably on the fact that Shala participated in the mistreatment of [REDACTED] the Murder Victim on or about 4 June 1999 to conclude that Shala significantly contributed to the JCE and shared the intent to kill, this is only one among several other factual findings the Trial Panel relied upon to reach its conclusion. See Trial Judgment, paras 1025, 1031-1036. See also below, paras 795-796, 847, 851.
[631] See Appeal Brief, para. 81. See also Reply Brief, para. 17; Transcript, 15 May 2025, p. 43 (private session).
[632] See Defence Final Trial Brief, paras [REDACTED].
[633] See Trial Judgment, paras [REDACTED].
[634] See Trial Judgment, para. 79 (where the Trial Panel notably indicates that it is required to make findings only on those facts which are essential for the determination of the guilt or innocence of the accused on each count in the charges).

in the exercise of its discretion in declining to address this alleged inconsistency in TW4-01's evidence.

(v) [REDACTED]

277. As to Shala' claim that the Trial Panel erred by not addressing [REDACTED],[635] the Panel recalls that the Trial Panel is not required to address every submission or piece of evidence.[636] In addition, the Panel observes that: (i) [REDACTED];[637] (ii) [REDACTED];[638] (iii) the Trial Panel found that [REDACTED];[639] and (iv) the Trial Panel stated that [REDACTED].[640] For these reasons, the Panel sees no error in the Trial Panel not engaging with this particular argument.

(vi) Sighting of KMF's Entrance Gate

278. With respect to the Trial Panel's alleged error in disregarding Mr Zijadin Hoxha's ("Mr Hoxha") evidence to prefer TW4-01's evidence that he could see the entrance gate of the KMF from Room 1,[641] the Appeals Panel notes that the Trial Panel fully addressed the fact that Defence witnesses claimed that they had never seen or could not recall the existence of the Detention Building within the KMF,[642] including Mr Hoxha's evidence that he did not recognise the Detention Building and that there were trucks in the courtyard blocking the view.[643] The Trial Panel found that Mr Hoxha's evidence was contradicted by the evidence of TW4-01 who testified that he could see "the entire headquarters" from the window of Room 1, thus confirming that the field of view between the Detention Building and the courtyard was not

[635] See Appeal Brief, para. 81.
[636] See above, para. 43.
[637] See [REDACTED]; Trial Judgment, para. [REDACTED].
[638] See [REDACTED]. See also Trial Judgment, paras [REDACTED].
[639] Trial Judgment, paras [REDACTED]. See also below, [REDACTED].
[640] See Trial Judgment, para. [REDACTED].
[641] See Appeal Brief, para. 82.
[642] See Trial Judgment, paras 313-317. See also Trial Judgment, paras 312, 318.
[643] See Trial Judgment, paras 889-890. See also Trial Judgment, fn. 1824.

blocked.[644] Contrary to Shala's contention, the Trial Panel expressly referred to the evidence Shala claims it failed to analyse.[645] The Panel further observes that the Trial Panel provided detailed reasons as to why it concluded that Mr Hoxha was not truthful regarding his evidence concerning the building at the KMF where detainees were held.[646] In light of this, the Panel finds no error in the way the Trial Panel exercised its discretion to discard Mr Hoxha's evidence and favour TW4-01's account,[647] especially in light of the fact that the latter is corroborated by photographic evidence.[648]

(vii) Circumstances Surrounding TW4-01's Release

279. As to the circumstances surrounding TW4-01's release,[649] the Panel recalls, as noted by the Trial Panel, that TW4-01 indicated [REDACTED] on [REDACTED] June 1999 [REDACTED] ("[REDACTED]"), [REDACTED].[650] [REDACTED].[651]

280. The Appeals Panel notes that the Trial Panel addressed in detail the Defence's arguments regarding discrepancies in TW4-01's evidence regarding the exact date of the release [REDACTED].[652] The Panel recalls that a trial panel has the discretion to evaluate any inconsistencies that may arise within or among witnesses' testimonies

[644] See Trial Judgment, para. 890, referring to Transcript (TW4-01), 30 May 2023, p. 1424.
[645] See Trial Judgment, para. 466, fn. 842, referring, *inter alia,* to P00080 (SPOE00330365-00330365) (confidential). See also Trial Judment, para. 318, fn. 529, referring, *inter alia,* to P00081 (SPOE00330364-00330364) (confidential) and Trial Judgment Annex, p. 2 (SPOE00330362-00330362), which contain nearly identical aerial photographs. Contra Appeal Brief, para. 82, fn. 147.
[646] See Trial Judgment, paras 253, 313-317, 890-891. See also below, paras 424, 426-427.
[647] Trial Judgment, para. 890.
[648] See Trial Judgment, fns 517, 529, 555; V00005 (SPOE40010264-40010559) (confidential), pp. 10, 18-19 (SPOE40010273, SPOE40010281-SPOE40010282); Trial Judgment Annex, pp. 3, 5 (SPOE40010281), 6 (074390, SPOE40010290). See also P00164 (REG00954-REG00954) (confidential); Transcript (TW4-01), 30 May 2023, pp. 1420-1424, 1450 (private session); Transcript (TW4-01), 6 June 2023, p. 1920.
[649] See Appeal Brief, para. 85. See also Transcript, 15 May 2025, p. 41.
[650] [REDACTED]. See also Trial Judgment, para. 397.
[651] [REDACTED]. See also Trial Judgment, para. 398.
[652] See Trial Judgment, paras 396-400. See also Trial Judgment, para. 238, fn. 402.

and to determine whether, in light of the overall evidence, the witnesses were reliable and credible.[653]

281. Regarding the date when the detainees were released, the Trial Panel found that [REDACTED] and that the imprecision in TW4-01's account is minimal, can be attributed to the passage of time and has no impact on TW4-01's credibility.[654] The Appeals Panel sees no error in the Trial Panel's conclusion, especially in light of the fact that the discrepancy in the date is so minor [REDACTED].[655]

282. As to [REDACTED], the Panel observes that the Trial Panel acknowledged that TW4-01's account was contradicted by other evidence but found that there was a logical explanation for this discrepancy as TW4-01's and [REDACTED]'s perspectives "understandably differ[ed]", namely being that of a detainee who was held [REDACTED] at the KMF, severely mistreated and psychologically abused on several occasions, versus that of [REDACTED].[656] The Trial Panel also took into account the fact that TW4-01 [REDACTED].[657] The Trial Panel ultimately concluded that TW4-01's general recollection of the circumstances of his release "remains internally consistent" and corroborated by other evidence, and that his credibility remains unaffected by the minor inconsistencies regarding the exact date of release or his overestimation [REDACTED].[658] In the Panel's view, the Trial Panel provided ample reasoning as to why it reached this conclusion and was well within its discretion to still find TW4-01 credible regarding the circumstances of his release despite these inconsistencies. The Panel finds that Shala fails to demonstrate that no reasonable trier of fact would have concluded that these considerations did not impact TW4-01's credibility.[659]

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[653] See e.g. *Popović et al.* Appeal Judgement, para. 137.
[654] See Trial Judgment, para. 397.
[655] See Trial Judgment, para. 397; [REDACTED]; [REDACTED].
[656] Trial Judgment, paras 398-399.
[657] See Trial Judgment, para. 399. In that regard, the Appeals Panel notes that [REDACTED]. See [REDACTED]. [REDACTED]. [REDACTED].
[658] See Trial Judgment, para. 400.
[659] Contra Appeal Brief, para. 85.

(viii) TW4-01's Prior Criminal Record [REDACTED]

283. The Appeals Panel now turns to address the issue of TW4-01's [REDACTED]. At the outset, the Panel recalls that a trial panel is best placed to assess the credibility of a witness and the reliability of the evidence presented by the parties, and therefore has broad discretion in assessing the appropriate weight to be given to witness testimony.[660] The Panel further recalls that the fact that a witness [REDACTED] does not render that witness per se unreliable.[661]

284. The Appeals Panel rejects Shala's contention that the Trial Panel did "not tak[e] into consideration" TW4-01's prior convictions [REDACTED].[662] Contrary to Shala's contention, the Panel observes that the Trial Panel, far from ignoring this aspect of TW4-01's evidence, in fact expressly and extensively took into consideration the fact that [REDACTED].[663] This issue was also expansively litigated at trial[664] and TW4-01 was thoroughly examined in court on this topic.[665]

285. The Panel further disagrees with Shala that the Trial Panel "denied" the importance of this fact.[666] In order to reach its conclusion that [REDACTED] did not ultimately affect his credibility,[667] the Trial Panel engaged in a detailed and careful assessment of [REDACTED].[668] The Panel notes that the Trial Panel notably took into account the fact that: (i) TW4-01 was forthcoming in admitting outright and without hesitation [REDACTED];[669] (ii) TW4-01 explained that [REDACTED];[670] (iii) other

[660] See above, para. 47.
[661] See e.g. [REDACTED]. See also Trial Judgment, para. 109.
[662] See Appeal Brief, para. 86.
[663] See Trial Judgment, paras 105, 107-114. See also Trial Judgment, para. [REDACTED].
[664] See [REDACTED]; [REDACTED]; Defence Final Trial Brief, paras [REDACTED]; SPO Final Trial Brief, paras [REDACTED]; [REDACTED]; [REDACTED]; Defence Pre-Trial Brief, paras [REDACTED]. See also Decision on Defence Rule 130 Motion, [REDACTED].
[665] See [REDACTED]; [REDACTED].
[666] Contra Appeal Brief, para. 86. See also Transcript, 15 May 2025, p. 42 (private session).
[667] Trial Judgment, para. 114.
[668] See Trial Judgment, paras 108-113.
[669] Trial Judgment, paras 108-109.
[670] Trial Judgment, para. 108.

evidence on the record corroborates TW4-01's account [REDACTED];[671] (iv) TW4-01's explanation [REDACTED];[672] (v) [REDACTED];[673] (vi) TW4-01's [REDACTED];[674] and (vii) TW4-01 [REDACTED].[675]

286. In light of this, the Appeals Panel finds that the Trial Panel fully engaged with the fact that TW4-01 [REDACTED] and provided ample reasoning as to why it found that this did not impact TW4-01's credibility. The Panel finds that Shala fails to show that no reasonable trier of fact could have reached this conclusion.

287. With respect to TW4-01's criminal record, Shala takes issue with the Trial Panel finding that TW4-01's criminal record does not "as such, affect[] his credibility or reliability as a matter of principle".[676] The Panel finds that Shala misrepresents the Trial Judgment when claiming that the Trial Panel "excluded" TW4-01's criminal record as a matter of principle.[677] In the Panel's view, the Trial Panel merely conveyed, in line with established jurisprudence,[678] that the fact that TW4-01 had a criminal record did not automatically render him not credible.[679] The Panel sees no error in that conclusion. The Panel further recalls that it is for the trier of fact to take into account criminal convictions and any other relevant evidence concerning the witness's character along with all the other relevant factors in determining whether the witness

[671] Trial Judgment, para. 110. See also [REDACTED]; [REDACTED].
[672] Trial Judgment, para. 111.
[673] Trial Judgment, para. 112.
[674] Trial Judgment, para. 112.
[675] Trial Judgment, para. 113.
[676] See Trial Judgment, para. 107.
[677] See Appeal Brief, para. 86.
[678] See e.g. *Kamuhanda* Appeal Judgement, para. 142 (holding that there is nothing inherent in a murder conviction that per se precludes a witness's testimony from being deemed credible by the trier of fact); *Popović et al.* Appeal Judgement, para. 132 (where the ICTY Appeals Chamber found that a witness's criminal history is one among many factors relevant when assessing witness credibility, depending on the specific circumstances of each case); *Nzabonimana* Appeal Judgement, paras 45, 93 (recalling that a trial chamber has full discretion to assess witness credibility and that a witness's criminal history may be a factor in assessing credibility).
[679] See Trial Judgment, para. 107.

is credible.[680] As a result, the Appeals Panel finds that it was within the Trial Panel's discretion to find that TW4-01's prior criminal record was not indicative of any untruthfulness on the part of TW4-01.[681]

288. Finally, with respect to Shala's claim that "[a]t the very least" TW4-01's evidence should have been treated with caution,[682] the Appeals Panel recalls the broad discretion afforded to the Trial Panel in assessing the credibility of a witness and that the question before the Appeals Panel is not whether it "agrees with that decision" but "whether the trial chamber has correctly exercised its discretion in reaching that decision".[683] In light of this and of its findings above,[684] the Panel does not consider that it was "manifestly unreasonable" for the Trial Panel to decide not to treat TW4-01's evidence with caution in the specific circumstances of the present case. Furthermore, contrary to Shala's contention, the Panel observes that the Trial Panel did not find that TW4-01 was "an absolutely truthful, reliable, and credible witness".[685] Rather, the Trial Panel found that the fact that [REDACTED] did not affect his credibility or render his evidence unreliable in the present case.[686] Shala's argument is therefore rejected.

(ix)[REDACTED]

289. The Panel turns to Shala's argument regarding [REDACTED]. [REDACTED].[687]

[680] See *Kamuhanda* Appeal Judgement, para. 142.
[681] Trial Judgment, para. 107.
[682] See Appeal Brief, paras 86, 88.
[683] See e.g. *Popović et al.* Appeal Judgement, para. 131.
[684] See above, paras 286-287.
[685] Contra Appeal Brief, para. 86.
[686] See Trial Judgment, para. 114. See also Trial Judgment, para. 119.
[687] See Appeal Brief, para. 86. See also Transcript, 15 May 2025, pp. 42-43 (private session).

290. The Panel recalls that [REDACTED].[688] The Panel notes that the Trial Panel expressly addressed the Defence's argument that [REDACTED] and concluded that [REDACTED].[689] [REDACTED].[690]

291. [REDACTED],[691] [REDACTED]. For these reasons, the Panel does not see any error in the Trial Panel's conclusion that [REDACTED].[692] The Panel therefore rejects Shala's contention in this respect.[693]

(x) Motive to Falsely Implicate the Accused

292. With respect to Shala's argument regarding TW4-01's motives to falsely implicate the Accused,[694] the Panel notes that the Trial Panel addressed at length the Defence's claim that TW4-01 had personal grievances against the Accused, that he deliberately fabricated evidence to incriminate him and that he had an incentive to "worsen" Shala's role and liability.[695] For instance, the Trial Panel [REDACTED].[696] The Trial Panel [REDACTED].[697] While the Trial Panel [REDACTED].[698] While it is undeniable, in the Appeals Panel's view, that TW4-01 still has negative feelings towards the Accused, the Panel finds that this in itself is not sufficient to demonstrate that TW4-01 had a "motive" to falsely implicate him. In the Panel's view, this sentiment is explainable by the cause of TW4-01's grievance, which is precisely the witness's knowledge of the events [REDACTED].

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[688] [REDACTED]. [REDACTED].
[689] [REDACTED].
[690] [REDACTED].
[691] [REDACTED]. See also above, paras [REDACTED].
[692] [REDACTED]. See also [REDACTED].
[693] The Appeals Panel notes that Shala argues in his Notice of Appeal that the Trial Panel erred in [REDACTED] but does not develop this argument in his Appeal Brief. See Notice of Appeal, para. [REDACTED]. The Appeals Panel therefore declines to address this argument. See above, para. 41. In any event, [REDACTED]. [REDACTED].
[694] See Appeal Brief, para. 87.
[695] See Trial Judgment, paras 105, 115, [REDACTED].
[696] See Trial Judgment, para. [REDACTED]. See also [REDACTED].
[697] See Trial Judgment, para. [REDACTED].
[698] See [REDACTED]. See also Appeal Brief, para. 87.

293. In addition, the Appeals Panel takes note of the Trial Panel's findings that TW4-01 remained measured during his testimony regarding Shala's role, did not overstate Shala's involvement and that TW4-01 made it clear when he could not remember whether Shala was present at a particular incident.[699] In the Panel's view, it was within the Trial Panel's discretion to find that [REDACTED] and moreover, to ultimately conclude that there was no support for the assertion that TW4-01 had a motive to falsely implicate Shala.[700] Therefore, the Appeals Panel finds that Shala does not demonstrate any error in the Trial Panel rejecting his claim.

(xi)Miscellaneous Inconsistencies

294. Regarding the other alleged inconsistences raised by Shala,[701] the Panel recalls that, considering that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of a trial panel to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[702] In light of the marginal significance of these inconsistencies,[703] the Panel finds no error in the Trial Panel's overall assessment of TW4-01's credibility.[704]

295. Finally, while Shala argues that the Trial Panel found that "most of the Defence examples" concerning TW4-01's credibility were "immaterial to the charges",[705] Shala's submission is misleading as it takes the Trial Panel's words out of context. This conclusion in fact pertained to selected instances where the Defence alleged that

[699] See Trial Judgment, paras [REDACTED]. See also Trial Judgment, para. 102.
[700] See Trial Judgment, paras 115, 665, [REDACTED].
[701] See Appeal Brief, para. 84, with respect to whether TW4-01 [REDACTED], whether he [REDACTED] or whether [REDACTED].
[702] See e.g. *Popović et al*. Appeal Judgement, para. 137. See also above, paras 43-44. See also e.g. *Haradinaj et al*. Appeal Judgement, para. 129.
[703] The Appeals Panel notes that Shala only mentioned these alleged inconsistencies in a footnote in his Final Trial Brief. See Defence Final Trial Brief, fn. 416.
[704] See Trial Judgment, para. 104.
[705] See Appeal Brief, para. 83.

TW4-01 had provided "implausible and grossly exaggerated evidence".[706] In any event, as demonstrated above, the Panel finds that the Trial Panel addressed extensively and in a detailed manner the numerous challenges brought by the Defence with regard to TW4-01's credibility and that Shala has failed to demonstrate any discernible error in the Trial Panel's exercise of its discretion in doing so.

(xii) Conclusion

296. In light of the above, the Appeals Panel finds that Shala fails to show any abuse in the Trial Panel's exercise of its discretion in the way it assessed TW4-01's credibility or any error justifying the Panel's intervention. Accordingly, the Appeals Panel dismisses Shala's Ground 6A.

2. Alleged Errors Regarding W04733 (Ground 6B)

(a) Submissions of the Parties and Participants

297. Shala submits that the Trial Panel abused its discretion and erred in finding W04733 credible despite the inconsistencies and contradictions in his evidence, and in relying on his wrong identification of the Accused.[707]

298. In particular, he points to: (i) W04733's description of Shala as being "almost black"; (ii) the fact that W04733's evidence given [REDACTED] should have been treated with caution due to the deterioration of his health; (iii) the fact that W04733 failed to refer to Shala being present during his transfer prior to 2010; (iv) the inconsistent evidence provided by W04733 concerning the person that broke his teeth;

[706] See Trial Judgment, paras 105, 117; Defence Final Trial Brief, paras 223-226.
[707] Appeal Brief, para. 89. See also Appeal Brief, paras 78, 93, 96, 114; Reply Brief, paras 15, 20; Transcript, 15 May 2025, pp. 43-44.

and (v) the inconsistent evidence he provided as to whether he saw [REDACTED] being ill-treated.[708]

299. Shala also argues that the Trial Panel erred in relying on the evidence of W04733's Family Members without applying caution and in finding that they corroborated W04733's evidence despite the hearsay nature of the relayed evidence.[709]

300. The SPO and Victims' Counsel respond that Shala failed to demonstrate that the Trial Panel abused its discretion in finding W04733 credible.[710] In particular, with respect to Shala's claim that W04733's [REDACTED] evidence should have been treated with caution, the SPO and Victims' Counsel argue that while the Trial Panel noted W04733's declining health after [REDACTED] as a relevant factor among others to assess his credibility, it was not unreasonable for the Trial Panel to find W04733 credible.[711] In the SPO's view, it did not mean that W04733's evidence was unreliable thereafter and the Trial Panel was not bound to treat his evidence with caution.[712]

301. Regarding W04733's identification of Shala, the SPO and Victims' Counsel submit that Shala misstates the Trial Panel's assessment, and contend that the Trial Panel's findings were reasonable as the Trial Panel: (i) fully considered W04733's description of Shala's physical appearance and Shala's allegations of errors; and (ii) attributed greater weight to W04733's identification of Shala on the basis of his previous work as a police officer where Shala was a person of interest, as well as Shala's nickname and distinctive wolf-like howl.[713]

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[708] Appeal Brief, paras 90-92, 94. See also Transcript, 15 May 2025, pp. 43-44. Shala contends that the Trial Panel applied a more rigorous standard in assessing inconsistencies of other witnesses, such as TW4-02, TW4-04 or TW4-10. See Appeal Brief, paras 93-94.
[709] Appeal Brief, paras 89, 95-96. See also Transcript, 15 May 2025, pp. 44, 45 (redacted).
[710] SPO Response Brief, para. 74; Victims Response Brief, paras 30-32, 61. See also SPO Response Brief, paras 54-55; Transcript, 16 May 2025, p. 153.
[711] SPO Response Brief, para. 77; Victims Response Brief, para. 55.
[712] SPO Response Brief, para. 77.
[713] SPO Response Brief, paras 78-82; Victims Response Brief, paras 54, 56. See also Transcript, 16 May 2025, p. 154.

302. The SPO and Victims' Counsel both claim that the fact that W04733 did not mention Shala being involved in his transfer to the KMF in his 2002 statement was fully addressed by the Trial Panel.[714] They further assert that W04733's inconsistencies as to who was responsible for breaking his teeth and the detainees he saw being mistreated on 20 May 1999 was also considered by the Trial Panel and reasonably assessed.[715]

303. As to Shala's claim that the Trial Panel should have approached the evidence of W04733's Family Members with caution, Victims' Counsel responds that the Trial Panel was fully cognisant of Shala's argument, reasonably rejected it and found that it did not detect any sign of deliberate collusion.[716] The SPO contends in that regard that the Trial Panel did not blindly accept the evidence of W04733's Family Members but closely assessed their credibility and made a careful determination of the weight to afford to their evidence.[717]

(b) Assessment of the Court of Appeals Panel

(i) W04733's Identification Evidence of Shala

304. The Appeals Panel will first address Shala's challenges regarding W04733's identification evidence of the Accused.[718]

305. The Panel recalls that the determination of the weight, if any, to be accorded to a witness's identification of an accused lies within the discretion of the Trial Panel.[719] However, particular caution must be exercised when assessing identification evidence

[714] SPO Response Brief, para. 76; Victims Response Brief, para. 57.
[715] SPO Response Brief, para. 75; Victims Response Brief, para. 60.
[716] Victims Response Brief, paras 52-53. See also Transcript, 16 May 2025, pp. 154-155.
[717] SPO Response Brief, para. 83.
[718] See Appeal Brief, paras 89-90, 92. See also Transcript, 15 May 2025, pp. 43-44. The Appeals Panel has addressed Shala's arguments concerning the alleged application of double standards below, under Ground 6E. See Appeal Brief, paras 93-94; see below, paras 359-380.
[719] See *Mustafa* Appeal Judgment, fn. 210; *Lukić and Lukić* Appeal Judgement, para. 187.

of an accused made by a witness under difficult circumstances.[720] Factors relevant to the Appeals Panel's determination of whether a trial panel's decision to rely upon identification evidence was unreasonable or renders a conviction unsafe include: identifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant; identifications occurring in the dark and as a result of a traumatic event experienced by the witness; inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event; misidentification or denial of the ability to identify followed by later identification of the defendant by a witness; the existence of irreconcilable witness testimonies; and a witness' delayed assertion of memory regarding the defendant coupled with the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others.[721] To this end, a trial panel must provide a reasoned opinion, clearly articulating the factors relied upon in support of the identification, and address any factors negatively impacting on the reliability of the evidence.[722]

306. The Panel notes that the Trial Panel endorsed these principles when assessing identification evidence regarding the Accused.[723] In light of these principles, the Panel agrees with the Defence that the fact that W04733 gave an inaccurate or inconsistent description of the Accused's physical characteristics is a relevant factor to take into account.[724] That being said, the Panel finds that the Trial Panel fully considered this aspect of W04733's evidence and Shala's submissions regarding the witness's flawed identification of the Accused in 2018, before the Trial Panel eventually rejected them

[720] See *Mustafa* Appeal Judgment, fn. 210; *Popović et al*. Appeal Judgement, para. 382; *Haradinaj et al.* Appeal Judgement, para. 155; *Kupreškić et al.* Appeal Judgement, para. 39.
[721] See *Kupreškić et al.* Appeal Judgement, paras 39-40; *Haradinaj et al*. Appeal Judgement, para. 156. See also *Mustafa* Appeal Judgment, fn. 210.
[722] See *Mustafa* Appeal Judgment, fn. 210; *Haradinaj et al.* Appeal Judgement, paras 152-156; *Popović et al*. Appeal Judgement, para. 382; *Kupreškić et al.* Appeal Judgement, para. 39.
[723] See Trial Judgment, paras 85-86.
[724] See Appeal Brief, para. 90, referring to P00124_ET (082892-TR-AT-ET Part 1 RED3) (W04733's 2018 SPO Statement) (confidential), p. 38 (where W04733 indicated that Shala "was of dark complexion, almost black").

and decided to give weight to other factors, while noting that the passage of time may affect a witness's memory.[725]

307. While the Defence now takes issues with the Trial Panel's finding that the accuracy of the description of the physical appearance of Shala "does not matter", the Trial Panel's decision to rely on W04733's identification evidence was based on the fact that: (i) Shala was known to W04733 through his police work before the war, as Shala was a person of interest to the police and W04733 had seen his picture in a police photo album;[726] and (ii) W04733 recalled Shala's nickname and heard his distinctive howl.[727] The Trial Panel also noted that Shala himself admitted that his nickname during the war was "Ujku" (meaning "wolf") and that he made "wolf-like sounds".[728]

308. In these circumstances, the Appeals Panel finds that Shala fails to demonstrate that it was erroneous for the Trial Panel to give more weight to these factors rather than W04733's (in)ability to give an accurate physical description of Shala at the time.[729] The Panel further observes that W04733: (i) was forthcoming in stating that he had not seen Shala in person before being apprehended in Romanat; (ii) himself recognised that there existed a physical difference in the Accused's appearance between his picture in the police photo album and when he saw the Accused at the time of the events in May-June 1999; and (iii) acknowledged that he did not recognise Shala from his sole physical appearance.[730] W04733 indeed clarified that he was able

[725] See Trial Judgment, paras 450-452. See also Trial Judgment, para. 181.
[726] Trial Judgment, para. 451. See also P00119 (SITF00018740-00018767 RED) (W04733's 2010 EULEX Statement) (confidential), p. 2 (SITF00018741); P00121 (SITF00019824-00019876 RED2) (W04733's [REDACTED]) (confidential), p. 13 (SITF00019836); P00124_ET (082892-TR-AT-ET Part 1 RED3) (W04733's 2018 SPO Statement) (confidential), pp. 37-38.
[727] Trial Judgment, para. 451. See also P00119 (SITF00018740-00018767 RED) (W04733's 2010 EULEX Statement) (confidential), p. 2 (SITF00018741); P00126 (082892-TR-AT-ET Part 3 RED2) (W04733's 2018 SPO Statement) (confidential), p. 12.
[728] See Trial Judgment, para. 451, referring to P00015_ET (066888-TR-ET Part 1 Revised) (2019 Belgian Statement) (confidential), pp. 132-133. See also Trial Judgment, para. 285.
[729] See Trial Judgment, para. 451. Contra Appeal Brief, para. 90.
[730] P00121 (SITF00019824-00019876 RED2) (W04733's [REDACTED]) (confidential), pp. 13-14 (SITF00019836-SITF00019837). See also P00126_ET (082892-TR-AT-ET Part 3 RED2) (W04733's 2018

to recognise Shala when he saw him not only from the fact that he had seen his picture but mostly from hearing him "hollering like a wolf".[731] The Panel is therefore satisfied that the Trial Panel's findings on W04733's identification evidence during his transfer to the KMF are reasonable and resulted from a careful analysis of all the evidence on the record. Consequently, the Panel dismisses Shala's arguments.

(ii) Shala's Involvement in W04733's Transfer

309. As to the fact that W04733 did not mention the involvement of Shala in his transfer from Romanat to the KMF prior to 2010,[732] the Panel notes that this was expressly addressed by the Trial Panel.[733] While Shala contends that the Trial Panel "failed to give adequate reasoning" to explain this omission in W04733's earlier statements, the Trial Panel did in fact provide reasons and found that the varying level of detail in W04733's accounts could be explained by the different investigative lines pursued by different authorities as W04733 was not specifically asked to elaborate on individuals involved in his transfer in his earlier statements "where the line of questioning revolved around possible perpetrators at the KMF".[734] In the Panel's view, it was therefore not inconsistent that W04733 provided in 2003 details of the mistreatment he suffered from Shala at the KMF.[735] The Panel further finds that Shala fails to identify the specific finding he challenges and does not allege any error in the

SPO Statement) (confidential), p. 12; P00124_ET (082892-TR-AT-ET Part 1 RED3) (W04733's 2018 SPO Statement) (confidential), p. 37.

[731] P00121 (SITF00019824-00019876 RED2) (W04733's [REDACTED]) (confidential), p. 14 (SITF00019837). See also P00126_ET (082892-TR-AT-ET Part 3 RED2) (W04733's 2018 SPO Statement) (confidential), p. 12. Contra Appeal Brief, para. 92.

[732] See Appeal Brief, para. 92.

[733] See Trial Judgment, paras 450, 453.

[734] Trial Judgment, para. 453. See also Trial Judgment, paras 181, 184, 465, where the Trial Panel notes that W04733 provided numerous statements and interviews over the course of 16 years and indicates that statements given by a witness over several years to various authorities, pursuing different investigative lines, are never the same, and that the individuality of each statement is a sign of reliability and must be appreciated fully in light of other evidence available.

[735] Contra Appeal Brief, para. 92. See also Trial Judgment, para. 698; P00117 (U003-2283-U003-2289 RED2) (W04733's 2003 ICTY Statement) (confidential), p. 4 (U0032286).

Trial Panel's reasoning beyond asserting, without further substantiation, that it is not "adequate".[736] Accordingly, the Panel dismisses Shala's submission.[737]

(iii) Deterioration of W04733's Health

310. The Appeals Panel now turns to Shala's claim that the Trial Panel failed to engage with his argument concerning the deterioration in W04733's health since [REDACTED].[738] The Panel observes that the Trial Panel did not expressly address Shala's argument that this made it "implausible" for W04733 to be able to provide a more detailed account of the events [REDACTED] than in his earlier statements. In that regard, the Panel recalls that the Trial Panel is not required to discuss every submission or piece of evidence.[739] In light of the speculative and unsubstantiated nature of Shala's contention, the Panel sees no error in the Trial Panel not engaging with this particular argument. The Panel further finds that the Trial Panel was clearly mindful of W04733's deteriorating health from [REDACTED] and gave due weight to this factor when assessing W04733's alleged discrepancies or omissions.[740]

311. Nevertheless, and contrary to Shala's assertion, the Panel does not consider that this means that the Trial Panel *had* to treat W04733's evidence after that with caution.[741] In that respect, the Panel finds that Shala, either at trial or on appeal, does not identify which parts of W04733's evidence should have allegedly been approached with caution and fails to point to any specific examples in W04733's [REDACTED] evidence

[736] The Panel notes that Shala does not provide any reference to any findings in the Trial Judgment. See Appeal Brief, para. 92.
[737] See above, para. 42.
[738] See Appeal Brief, para. 91.
[739] See above, para. 43.
[740] See Trial Judgment, para. 181. See also Trial Judgment, fn. 294, where the Trial Panel listed instances where W04733 needed [REDACTED] due to his medical state or indicated that his memory used to be better. See P00121 (SITF00019824-00019876 RED2) (W04733's [REDACTED]) (confidential), pp. 18, 23 (SITF00019841, SITF00019846); P00122 (106978-107020) (W04733's [REDACTED]) (confidential), p. 35 (107012); P00131_ET (082892-TR-AT-ET Part 8 RED2) (W04733's 2018 SPO Statement) (confidential), p. 14; P00133_ET (082892-TR-AT-ET Part 10, RED 2) (W04733's 2018 SPO Statement) (confidential), pp. 31-32.
[741] See Appeal Brief, para. 91.

where the impact on the witness's memory and health would be to such a degree that the account of the witness could no longer be found reliable by a reasonable trier of fact.[742] In the Panel's view, the fact that W04733's health deteriorated from [REDACTED] and that he experienced memory issues due to the passage of time does not imply that his evidence became unreliable as of then. The Panel further notes that W04733 acknowledged in 2018 that his memory was not as good as it used to be but indicated that he was still "mentally fit".[743] For these reasons, the Panel rejects Shala's arguments concerning W04733's deteriorating health and sees no error in the Trial Panel relying on the evidence the witness provided since [REDACTED].[744]

(iv) Breaking of W04733's Teeth

312. Turning to the issue of who was responsible for breaking W04733's teeth, the Panel observes that the Trial Panel fully considered the arguments brought by Shala regarding inconsistencies in W04733's evidence in that regard – which he is now repeating on appeal.[745] The Appeals Panel recalls that a trial panel has the discretion to accept a witness's evidence, notwithstanding inconsistencies between the said evidence and his or her previous statements.[746] In the present instance, the Panel finds that the Trial Panel provided detailed reasons as to why it did not consider that this discrepancy affected W04733's overall credibility. Notably, the Trial Panel was mindful that W04733 provided a different account in 2010, at that time stating that Shala broke his teeth and found that this statement was "isolated".[747] The Appeals

[742] See Appeal Brief, para. 91; Defence Final Trial Brief, paras 242-243. Shala only refers to a single instance during [REDACTED] where [REDACTED] noted the age of the witness, that he was tired and becoming confused, and [REDACTED]. See Defence Final Trial Brief, para. 242. See also P00121 (SITF00019824-00019876 RED2) (W04733's [REDACTED]) (confidential), p. 23 (SITF00019846). The Panel notes that W04733 was able [REDACTED]. See P00122 (106978-107020) (W04733's [REDACTED]) (confidential).
[743] See P00133_ET (082892-TR-AT-ET Part 10, RED 2) (W04733's 2018 SPO Statement) (confidential), pp. 31-32.
[744] See Trial Judgment, para. 188.
[745] *Compare* Appeal Brief, para. 94 *with* Defence Final Trial Brief, para. 235. See Trial Judgment, para. 699.
[746] See e.g. *Popović et al*. Appeal Judgement, para. 136; *Rukundo* Appeal Judgement, para. 86.
[747] Trial Judgment, para. 699.

Panel sees no error in the Trial Panel's finding that, "with the exception of the statement he provided in 2010", W04733 provided consistent and detailed evidence in 2002, [REDACTED], [REDACTED] and 2019 that it was Xhemshit Krasniqi who forced the baton into his mouth.[748] The Panel further notes that W04733 was confronted in his [REDACTED] testimonies with the fact that he had previously involved Shala in 2010 and confirmed the involvement of Xhemshit Krasniqi, blaming interpretation errors.[749] Therefore, the Appeals Panel finds that Shala demonstrates no error or abuse of discretion in the way the Trial Panel assessed this incident and its impact on W04733's overall credibility.

(v) Mistreatment of Other Detainees

313. With respect to the alleged inconsistencies regarding which other detainees W04733 saw being mistreated by KLA members and/or the Accused during the 20 May 1999 Incident,[750] the Panel observes that Shala merely repeats arguments which were rejected by the Trial Panel without demonstrating any error in their rejection that would warrant the Appeals Panel's intervention.[751] As such, Shala's arguments are summarily dismissed.[752]

(vi) W04733's Family Members

314. The Appeals Panel will now address Shala's claim that the Trial Panel erred by finding that W04733's evidence was corroborated by the evidence of his family members, namely, TW4-06, TW4-07, TW4-08 and TW4-09 (collectively, "W04733's Family Members") and in not applying caution when assessing the evidence of

[748] See Trial Judgment, para. 699. The Trial Panel also noted that W01448 provided corroboration as to this incident. See Trial Judgment, para. 699. See also P00105 (SITF00013833-00013847 RED4) (W01448's 2009 EULEX Statement) (confidential), p. 5 (SITF00013837).
[749] See P00122 (106978-107020) (W04733's [REDACTED]) (confidential), p. 5 (106982); P00123 (SPOE00013793-SPOE00013847 RED2) (W04733's [REDACTED]) (confidential), pp. 51-52 (SPOE00013843-SPOE00013844).
[750] See Appeal Brief, para. 94.
[751] See Defence Final Trial Brief, para. 236; Trial Judgment, para. 662.
[752] See above, para. 42.

W04733's Family Members despite the hearsay nature of their evidence and the inconsistencies between their accounts.[753]

315. At the outset, the Panel recalls that hearsay evidence is in principle admissible, although, in assessing its probative value, the surrounding circumstances must be considered.[754] The Panel notes that the Trial Panel was cognisant of these principles.[755]

316. The Panel further notes that the Trial Panel fully considered the Defence's contention that the hearsay evidence of W04733's Family Members should be treated with caution and that their testimonies lacked coherence and consistency.[756] Notably, in assessing the credibility of W04733 regarding his evidence on the mistreatment he suffered during his detention, the Trial Panel found that his evidence was confirmed and reinforced by the evidence provided by W04733's Family Members as well as other witnesses.[757] In this specific context, the Panel is of the view that the Trial Panel was necessarily aware of the second hand nature of the evidence provided by W04733's Family Members. In that regard, the Trial Panel expressly acknowledged that W04733's Family Members were not present and have no first-hand knowledge of a number of incidents W04733 gave evidence about.[758]

317. In addition, the Panel further finds that the Trial Panel's assessment of the evidence provided by W04733's Family Members in relation to other aspects of W04733's evidence shows that the Trial Panel considered their testimonies with the

[753] See Appeal Brief, paras 95-96. See also Appeal Brief, para. 89. The Appeals Panel has addressed Shala's claims of alleged collusion concerning W04733's Family Members under Ground 6D. See Appeal Brief, paras 89, 95-96; see below, paras 343-346.
[754] See e.g. *Lukić and Lukić* Appeal Judgement, para. 303; *Popović et al*. Appeal Judgement, para. 1307; *Aleksovski* Appeal Decision on Admissibility, para. 15. See also *Thaçi and Selimi* Appeal Decision on SIMs, para. 57; *Mustafa* Appeal Judgment, fn. 296.
[755] See Trial Judgment, paras 91, 151.
[756] Trial Judgment, paras 149-151.
[757] Trial Judgment, para. 180.
[758] See Trial Judgment, para. 186.

appropriate caution.[759] In that regard and contrary to Shala's contention,[760] the Trial Panel made a distinction between instances where W04733's Family Members were first hand witnesses,[761] and other instances where they mostly repeated what W04733 told them.[762] For instance, with respect to W04733's transfer, the Panel observes that the Trial Panel found that the evidence provided by W04733's Family Members amounted to hearsay and carefully assessed whether the witnesses distinguished between what they personally witnessed and information given by W04733.[763] On this basis, and having found that their accounts were reliable, the Trial Panel decided to accord "some" weight to their hearsay evidence.[764]

318. As for alleged inconsistencies between the evidence of W04733 and that of W04733's Family Members or among the testimonies of W04733's Family Members,[765] the Panel notes that Shala raised detailed challenges at trial on this topic,[766] and that these challenges were carefully addressed but ultimately rejected by the Trial Panel.[767] The Panel finds that Shala merely repeats on appeal these arguments, albeit in a more general manner, without demonstrating any error in their rejection that would warrant the Appeals Panel's intervention. As such, Shala's arguments are summarily dismissed.[768]

319. In addition to his general arguments, the Panel observes that Shala also raises some specific allegations of inconsistencies between, on the one hand, W04733's evidence, and, on the other hand, that of his relatives TW4-06 and TW4-08 on discrete

[759] See Trial Judgment, paras 444, 449, 452. See also Trial Judgment, paras 617, 624, 703-704.
[760] Appeal Brief, para. 95.
[761] See Trial Judgment, paras 444, 617, 624, 703-704.
[762] See Trial Judgment, para. 449. See also Trial Judgment, para. 452.
[763] See Trial Judgment, para. 449.
[764] Trial Judgment, para. 449.
[765] Appeal Brief, para. 95; Transcript, 15 May 2025, pp. 44, 45 (redacted).
[766] See Trial Judgment, paras 150, 182. See also Trial Judgment, para. 452.
[767] See Trial Judgment, paras 151-154, 186. See also Trial Judgment, para. 452.
[768] See above, para. 42.

issues related to the circumstances surrounding the mistreatment of W04733.[769] While the Panel notes that the Trial Panel did not expressly mention these issues,[770] the Panel recalls that the Trial Panel is not required to address every submission, alleged inconsistency or piece of evidence.[771] In light of the minor character of these alleged inconsistencies, the Panel finds that it was within the Trial Panel's discretion not to consider them.[772] In any event, the Panel is not persuaded that this, as such, could demonstrate that the Trial Panel failed to treat the evidence of these witnesses with caution. Likewise, the Panel finds that it would not impact the Trial Panel's overall finding that some inconsistencies could arise between W04733's testimony and the testimonies of some of W04733's Family Members, given that the latter were not present and had no first-hand knowledge of a number of incidents W04733 gave evidence about.[773] The Appeals Panel therefore dismisses these allegations.

320. As a result, the Panel finds that Shala fails to demonstrate any error in the Trial Panel's assessment of and approach to the evidence of the W04733's Family Members.

(vii) Conclusion

321. In light of the above, the Appeals Panel finds that Shala fails to show any abuse in the Trial Panel's exercise of its discretion in the way it assessed W04733's credibility or any error justifying the Panel's intervention. Accordingly, the Appeals Panel dismisses Shala's Ground 6B.

[769] See Appeal Brief, para. 96. See also Transcript, 15 May 2025, p. 45 (redacted).
[770] See Defence Final Trial Brief, para. 253.
[771] See above, para. 43.
[772] In addition, with respect to Shala's presence in Durrës, the Panel notes that Shala's assertion that he had never been there is in fact directly contradicted by his own statement. See P00015_ET (066888-TR-ET Part 1 Revised) (2019 Belgian Statement) (confidential), pp. 69, 71-72, 76, 79-80, 84, 183. Contra Appeal Brief, para. 96.
[773] See Trial Judgment, para. 186.

3. Alleged Errors Regarding W01448 (Ground 6C)

(a) Submissions of the Parties

322. Shala submits that the Trial Panel abused its discretion and erred by failing to consider W01448's evidence with caution and by finding his evidence credible and corroborative despite his false identification of the Accused.[774] He claims that no reasonable trier of fact could have reached that conclusion as W01448's identification evidence was based on hearsay information provided by [REDACTED] and as W01448 identified an individual other than Shala in a photo board identification procedure.[775] In Shala's view, the unreasonableness of the Trial Panel's finding is amplified by the fact that W01448's evidence was untested.[776]

323. The SPO responds that Shala fails to identify any appealable error in the Trial Panel's assessment of W01448's credibility and repeats previous arguments addressed and rejected by the Trial Panel.[777] The SPO submits that Shala fails to demonstrate that W01448 was unreliable in identifying Shala and explaining his source of information, namely [REDACTED] who knew Shala previously.[778] According to the SPO, the Trial Panel carefully determined the weight to give to W01448's evidence in line with established jurisprudence on hearsay.[779] As to W01448's photo board identification procedure which occurred years after the mistreatment, the SPO contends that it does

[774] Appeal Brief, para. 97. See also Appeal Brief, paras 78, 114; Reply Brief, paras 15, 20; Transcript, 15 May 2025, pp. 45-46.
[775] Appeal Brief, paras 97, 99. See also Transcript, 15 May 2025, pp. 46-47 (private session). At the Appeal Hearing, the Defence also submitted that the Trial Panel erred in discarding W01448's evidence that he was told by the Murder Victim that Lima(n) Geci was the person who shot him. See Transcript, 15 May 2025, p. 47 (private session).
[776] Appeal Brief, para. 99. See also Transcript, 15 May 2025, p. 48 (private session).
[777] SPO Response Brief, paras 84-85, 88. The SPO stresses that Shala alleges that the Trial Panel erred in finding W01448 credible while arguing at the same time that no reasonable trier of fact would have discarded his evidence. See SPO Response Brief, para. 84.
[778] SPO Response Brief, para. 86.
[779] SPO Response Brief, para. 86. See also SPO Response Brief, para. 85.

not call into question the Trial Panel's finding that W01448 was informed of Shala's identity [REDACTED] and its finding that it did not render his evidence unreliable.[780]

(b) Assessment of the Court of Appeals Panel

324. The Panel will examine Shala's contention that the Trial Panel abused its discretion in finding W01448's evidence credible and corroborative and erred in not treating W01448's hearsay identification evidence with caution.[781]

325. The Panel recalls that the Trial Panel found that on or about 20 May 1999, a group of KLA members, including Shala, mistreated W01448, and that W01448's evidence in that regard, considering the detail of his account and the corroborating evidence provided by W04733 and TW4-01, was "very reliable".[782] With respect to the identification of Shala by W01448, the Trial Panel found that W01448, who did not know Shala prior to his detention at the KMF, identified him and clarified that he acquired this information through [REDACTED].[783] The Trial Panel found that, as the identifying details provided by W01448 extended beyond the mere name or nickname attributed to Shala and as [REDACTED], [REDACTED] accurately conveyed Shala's identity to W01448.[784] The Trial Panel further found that the fact that W01448 identified another individual as Shala amongst a series of photos presented to him in 2010, 11 years after the events, did not have any bearing on its latter finding.[785]

326. The Appeals Panel notes that the Trial Panel fully considered the fact that W01448 identified another individual in a photo board procedure and expressly

[780] SPO Response Brief, para. 87. The SPO submits that at most, it shows that in 2010 W01448 was not able to definitively identify the Accused, in a photo board without Shala's photo and that the person he then identified resembled Shala the most. See SPO Response Brief, para. 87, fn. 330.
[781] Appeal Brief, paras 97-99. See also Transcript, 15 May 2025, pp. 45-46, 47 (private session).
[782] Trial Judgment, paras 711, 714. See also Trial Judgment, paras 707-710.
[783] Trial Judgment, para. 713.
[784] Trial Judgment, para. 713.
[785] Trial Judgment, para. 713.

addressed the challenges that Shala raised in that respect.[786] To justify its conclusion that this did not affect its findings, the Trial Panel notably mentioned that: (i) the photo board did not include a picture of the Accused; (ii) W01448 did not know the Accused before the detention; and (iii) the identification took place 11 years after the events.[787] In the Panel's view, Shala disregards the extensive analysis conducted by the Trial Panel before reaching its conclusion and merely repeats previously rejected arguments without showing an error warranting the Appeals Panel's intervention.

327. Furthermore, the Appeals Panel notes that W01448 already reported his mistreatment, and Shala's involvement therein in 2003, many years before the photo board identification procedure took place.[788] In addition, W01448 was far from categorical during the photo board identification procedure and specified that he was "not sure" that the man on the picture he selected, after having hesitated, was Shala.[789] The Panel further observes that the EULEX officers who assembled the photo board themselves thought that they had included a picture of the Accused in the photo line-up – the picture that W01448 in fact selected – and later expressed doubts about the authenticity of the pictures used therein.[790]

328. In light of this, and bearing in mind that the fact that a witness does not personally know an accused prior to the events does not necessarily undermine the reliability of his or her identification evidence,[791] the Panel finds that it was reasonable

[786] See Trial Judgment, paras 712-713. See also Defence Final Trial Brief, paras 101-102, 138.
[787] See Trial Judgment, para. 713.
[788] See P00101 (SITF00013852-00013869 RED6) (W01448's 2003 ICTY Statement) (confidential), p. 6 (SITF00013857).
[789] P00111 (SITF00374536-SITF00374541 RED) (W01448's 2010 EULEX Photo Board Statement) (confidential), p. 1 (SITF00374536). See also P00114 (SITF00374534-00374534) (April 2010 EULEX Report Regarding Photo Board Procedure with W01448) (confidential); P00111 (SITF00374536-SITF00374541 RED) (W01448's 2010 EULEX Photo Board Statement) (confidential), p. 5 (SITF00374540).
[790] See P00114 (SITF00374534-00374534) (April 2010 EULEX Report Regarding Photo Board Procedure with W01448) (confidential). See also P00111 (SITF00374536-SITF00374541 RED) (W01448's 2010 EULEX Photo Board Statement) (confidential), p. 6 (SITF00374541).
[791] See *Nyiramasuhuko et al*. Appeal Judgement, para. 1616.

for the Trial Panel to give more weight to W01448's identification evidence of Shala acquired through information obtained at the time of the events than to the photo board procedure conducted in 2010.

329. As to the hearsay nature of W01448's identification evidence, the Appeals Panel first recalls that it is settled in the jurisprudence of international courts and tribunals that chambers have the discretion to rely on hearsay evidence.[792] Likewise, the Panel recalls that the legal framework of the Specialist Chambers does not bar the use of hearsay evidence.[793] The weight and probative value to afford to hearsay evidence will depend upon on the surrounding circumstances and requires a case-by-case basis assessment.[794]

330. The Panel is further mindful that caution is generally warranted in the consideration of hearsay evidence where such evidence constitutes the primary basis for the identification of an accused.[795] Relevant criteria in assessing the weight or the probative value to be accorded to hearsay evidence are the source of the information, the precise character of the information and corroborative evidence.[796]

331. First, as to the source of the information, the Appeals Panel notes that the Trial Panel, relying on the fact that [REDACTED], found that [REDACTED] accurately

[792] See *Thaçi and Selimi* Appeal Decision on SIMs, para. 57. See also *Aleksovski* Appeal Decision on Admissibility, para. 15; *Karadžić* Appeal Judgement, para. 598; *Popović et al*. Appeal Judgement, para. 1307; *Bemba et al.* Appeal Judgment, para. 874; *Munyakazi* Appeal Judgement, para. 77.
[793] See *Thaçi and Selimi* Appeal Decision on SIMs, para. 57; *Mustafa* Trial Judgment, para. 44; *Gucati and Haradinaj* Trial Judgment, para. 24. See also Trial Judgment, para. 91.
[794] See e.g. *Thaçi and Selimi* Appeal Decision on SIMs, para. 57; *Lukić and Lukić* Appeal Judgement, para. 303; *Popović et al*. Appeal Judgement, para. 1307; *Aleksovski* Appeal Decision on Admissibility, para. 15. See also *Mustafa* Appeal Judgment, fn. 296; Trial Judgment, para. 91. See also above, para. 315.
[795] See *Lukić and Lukić* Appeal Judgement, para. 577.
[796] See *Lukić and Lukić* Appeal Judgement, para. 577; *Karera* Appeal Judgement, para. 39. In that regard, the Panel specifies that corroboration for hearsay evidence is not required per se but is only one factor that can be taken into consideration to determine the weight and probative value to accord to hearsay evidence. See *Thaçi and Selimi* Appeal Decision on SIMs, para. 59; *Karadžić* Appeal Judgement, para. 598. See also *Mustafa* Appeal Judgment, para. 38.

conveyed Shala's identity to W01448.[797] The Appeals Panel also notes that the Trial Panel paid heed to the fact that W01448 made genuine efforts to distinguish between events he personally witnessed and information he was given by [REDACTED], explaining the source of his information and offering details that supported the credibility of his information.[798] In the Panel's view, Shala does not show any error in the Trial Panel's assessment of the reliability of the source of the information.

332. Second, with respect to the precise character of the information, the Panel observes that the Trial Panel took note of the accuracy of the Accused's identifying details that W01448 provided, namely Shala's full name and nickname as well additional personal details such as his religion and where he came from.[799]

333. Third, the Panel notes that the Trial Panel duly considered whether there existed corroborating evidence on Shala's presence in the Office during the 20 May 1999 Incident and his involvement in the mistreatment of detainees during that incident.[800] In this regard, the Panel notes that the Trial Panel found that TW4-01 and W04733 also provided evidence that they saw Shala in the Office on or about 20 May 1999 and that he, along with other KLA members, participated in the interrogation and mistreatment of detainees, including themselves and W01448.[801] The Trial Panel notably found that their evidence was "mutually corroborative".[802]

334. Based on the above, the Panel is satisfied that the Trial Panel properly assessed the specific circumstances surrounding W01448's evidence before determining the weight to attribute to it.[803] The Panel recalls that when an appellant is challenging a

[797] See Trial Judgment, para. 713.
[798] See Trial Judgment, para. [REDACTED].
[799] See Trial Judgment, para. 713. See also Trial Judgment, para. 284.
[800] See Trial Judgment, para. 713.
[801] See Trial Judgment, paras 654-655, 661-663, 688-694, 706.
[802] Trial Judgment, para. 843. See also Trial Judgment, paras 661-663, 694, 697.
[803] With respect to Shala's argument concerning W01448's evidence on Lima(n) Geci's role and involvement in events at the KMF, the Panel first notes that the Defence raised this argument for the first time during the Appeal Hearing and recalls that the Panel may decline to consider such an

lower level panel's reliance on hearsay evidence, he or she must demonstrate that no reasonable trier of fact would have considered that evidence or that the lower panel's evaluation of the evidence is wholly erroneous.[804] Consequently, the Appeals Panel finds that the Trial Panel treated W01448's hearsay evidence with the appropriate caution and that Shala fails to demonstrate any error in the Trial Panel's assessment of that evidence and conclusion that W01448's identification evidence was reliable.[805]

335. In light of the above, the Appeals Panel finds that Shala fails to show any abuse in the Trial Panel's exercise of its discretion in the way it assessed W01448's credibility or any error justifying the Panel's intervention. Accordingly, the Appeals Panel dismisses Shala's Ground 6C.

4. Alleged Contamination of Witnesses (Ground 6D)

(a) Submissions of the Parties and Participants

336. Shala submits that the Trial Panel erred when accepting the evidence of several SPO witnesses without applying proper caution to their evidence.[806] He argues that the Trial Panel erred by finding that W04733's evidence was corroborated by the evidence of W04733's Family Members, namely, TW4-06, TW4-07, TW4-08 and TW4-09, despite the hearsay nature of the relayed evidence and despite the inconsistencies between the accounts of these witnesses.[807] Shala also argues that the Trial Panel erred in accepting the evidence of W04733's Family Members despite strong indications that they jointly rehearsed their forthcoming testimony, and further

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argument on that basis. See above, para. 40. The Panel further notes that the Trial Panel fully addressed this issue in the Trial Judgment. In the Panel's view, Shala fails to demonstrate any error or any application of an alleged "double standard" in the Trial Panel's conclusion that W01448's evidence that Lima(n) Geci shot the Murder Victim in the leg on or about 4 June 1999 was not credible and in its decision to credit [REDACTED] W04733's evidence that the Murder Victim was rather shot by Xhemshit Krasniqi. See Transcript, 15 May 2025, p. 47 (private session); Trial Judgment, paras 797-805.

[804] See *Mustafa* Appeal Judgment, para. 126.

[805] See Trial Judgment, paras 713-714. Contra Appeal Brief, para. 99.

[806] Appeal Brief, paras 100-108. See also Appeal Brief, paras 89, 95-96.

[807] Appeal Brief, paras 89, 95-96. See also Appeal Brief, para. 106; Transcript, 15 May 2025, pp. 44, 45 (redacted).

unreasonably dismissed the possibility of TW4-08 being influenced by his presence at an interview given by W04733.[808]

337. In addition, Shala argues that the Trial Panel erred by failing to apply caution to the evidence of witnesses W04733, W01448, TW4-01, TW4-02, TW4-05, TW4-10 and [REDACTED] despite the strong indications that these witnesses discussed disputed issues in this case and that therefore their evidence was contaminated.[809]

338. Specifically, Shala refers to instances of contact between W04733 and (separately) W01448 and TW4-01;[810] between W01448 and TW4-05, along with their respective children;[811] between W01448 and TW4-09, wherein they discussed "the events in Kukës";[812] between TW4-02 and [REDACTED], whereby the latter spoke about his and the Murder Victim's mistreatment at Kukës;[813] between TW4-02 and [REDACTED], who, "[REDACTED]", and discussed the latter's detention in Kukës;[814] and a meeting between [REDACTED] that occurred after the events, wherein the death of the Murder Victim was discussed.[815] Lastly, he cites the fact that [REDACTED] discussed "disputed issues", including the death of the Murder Victim; and the fact that they are "friends".[816] Shala concludes that, in these instances, the Trial Panel erred by failing to apply caution to the evidence of witnesses who discussed disputed issues in this case.[817]

339. The SPO responds that Shala repeats the exact same arguments on alleged collusion he made before the Trial Panel and fails to demonstrate any error warranting

[808] Appeal Brief, paras 100-101, 108. Shala also submits that W04733 had regular conversations with his family members about his detention. See Appeal Brief, para. 106.
[809] Appeal Brief, paras 100, 103-108.
[810] Appeal Brief, paras 103, 106.
[811] Appeal Brief, para. 103.
[812] Appeal Brief, para. 103.
[813] Appeal Brief, para. 104.
[814] Appeal Brief, para. 104.
[815] Appeal Brief, para. 105.
[816] Appeal Brief, para. 107.
[817] Appeal Brief, para. 108, referring to Trial Judgment, paras 174, 187.

appellate intervention or to support his claim that the evidence of these witnesses was contaminated.[818] In the SPO's view, Shala's arguments that these witnesses discussed disputed issues in this case is unsupported, and the trial record rather shows that over the course of 23 years witnesses infrequently met or discussed events in their lives.[819] The SPO further argues that the Trial Panel explicitly addressed each challenge made by the Defence and correctly found that there was no indication of contamination.[820]

340. Regarding specifically Shala's arguments on W04733's Family Members, the SPO argues that Shala misstates the evidence and that the Trial Panel did not err in finding them credible.[821]

341. Victims' Counsel responds that the Trial Panel was scrupulous in examining the evidence of W04733's Family Members, weighed the Defence arguments fairly and reasonably concluded that there was no sign of collusion.[822] Victims' Counsel further notes that the purpose of the testimony of W04733's Family Members was not to give first-hand evidence, and that the Defence challenges the aspects of their evidence where they were asked to recall what W04733 told them.[823]

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[818] SPO Response Brief, paras 89-90. See also SPO Response Brief, paras 56, 91.
[819] SPO Response Brief, para. 91. The SPO submits that Shala's contention that W04733 identified Shala after a conversation with [REDACTED] does not stand as W04733 did not speak to [REDACTED] prior to giving statements implicating Shala in his mistreatment. See SPO Response Brief, para. 90.
[820] SPO Response Brief, paras 92-93. As to Shala's argument that the mention by W04733's Family Members of a certain individual shows that they rehearsed their testimony, the SPO submits that Shala misstates the evidence. See SPO Response Brief, para. 93. Regarding Shala's claim that the Trial Panel erred in not approaching the evidence of W04733's Family Members with caution, the SPO responds that the Trial Panel did not blindly accept their evidence, but closely assessed their credibility and made a careful determination of the weight to afford to their evidence. See SPO Response Brief, para. 83.
[821] SPO Response Brief, para. 93.
[822] Victims Response Brief, paras 62-63. See also Victims Response Brief, paras 52-53; Transcript, 16 May 2025, p. 156. Victims' Counsel argues that the Trial Panel addressed Shala's claim that the evidence of W04733's Family Members should be approached with caution and was entitled to reject it. See Victims Response Brief, paras 52-53. Victims' Counsel adds that while Shala emphasised alleged discrepancies in the evidence of W04733's Family Members at trial, he now claims that they "jointly rehear[ed] their testimony". See Victims Response Brief, para. 64. See also Transcript, 16 May 2025, pp. 155-156.
[823] Victims Response Brief, para. 64. See also Victims Response Brief, para. 65.

(b) Assessment of the Court of Appeals Panel

342. The Appeals Panel recalls the Trial Panel's discretionary powers to assess the credibility and reliability of witnesses and that the Trial Panel identified a list of factors for the purpose of assessing testimonial evidence, including any indication that the witnesses may have colluded with other witnesses.[824] Turning to the specific challenges raised by Shala, the Appeals Panel will first address his arguments alleging collusion among W04733's Family Members.[825] The Panel will then turn to Shala's allegations that the Trial Panel failed to treat the testimonies of W04733, W01448, TW4-01, TW4-02, [REDACTED], TW4-05, and TW4-10 with caution despite strong indications of collusion.[826]

(i) Alleged Collusion Among W04733's Family Members

343. In support of his allegation of collusion among W04733's Family Members,[827] Shala is notably referring to the Trial Panel's finding that "the witnesses did not align or memorise their accounts prior to their testimonies before the Panel".[828] The Panel observes that the Trial Panel made this finding in the context of its assessment of the general credibility of W04733's Family Members. In the same paragraph of the Trial Judgment, the Trial Panel clearly acknowledged that the evidence of W04733's Family Members was largely congruent as a "result of their shared experiences".[829] However, the Trial Panel, mindful that W04733's Family Members could have coordinated their

[824] See above, para. 254, fn. 577. See also Trial Judgment, para. 82.
[825] Appeal Brief, paras 89, 95-96, 100-101, 108.
[826] Appeal Brief, paras 100, 103-108.
[827] Appeal Brief, paras 100-101, 108. Shala also argues that the Trial Panel applied a different standard with respect to the evidence of Defence witnesses and unreasonably selected which evidence to treat with caution. See Appeal Brief, paras 102, 108. This argument is addressed under Ground 10; see below, paras 407-409. See also Appeal Brief, para. 89, fn. 166, referring to Trial Judgment, para. 180. See also Appeal Brief, para. 106.
[828] Appeal Brief, para. 101, referring to Trial Judgment, para. 147.
[829] Trial Judgment, para. 147.

evidence with each other, carefully assessed their testimonies and concluded that the witnesses recounted truthfully their personal experiences.[830]

344. In support of his allegation of collusion, Shala cites to a purported similarity: namely the fact that W04733's Family Members "strangely referred" to a certain KMF detainee who was "never mentioned" by W04733.[831] As the SPO correctly points out, however, W04733 did in fact refer to this individual in his 2018 SPO Statement.[832] While Shala further claims that the Trial Panel "unreasonably dismissed the possibility of TW4-08 being influenced" by virtue of his presence at an interview of W04733,[833] the Panel finds that this argument is based on a mischaracterisation of the Trial Judgment.

345. Indeed, the Panel notes that the Trial Panel gave express attention to Shala's arguments on this matter, (i) noting that Shala had failed to "point concretely" to any part of TW4-08's testimony that had allegedly been influenced in this regard; (ii) further recalling that TW4-08 had heard details of W04733's mistreatment from the latter in 1999, and had personally witnessed other relevant events; and (iii) noting that TW4-08's testimony was "largely corroborated" by the evidence of the other W04733's Family Members.[834] The Panel considers that, far from merely dismissing the possibility of undue influence, the Trial Panel duly assessed the evidence, provided legal reasoning, and concluded that it was unable to identify "any improper influence […] that would warrant discarding [TW4-08's] testimony".[835] The Appeals Panel finds that Shala fails to show that no reasonable trier of fact could have reached the Trial Panel's conclusion.

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[830] Trial Judgment, paras 147-149, 444.
[831] Appeal Brief, para. 101.
[832] See P00130_ET (082892-TR-AT-ET Part 7) (W04733's 2018 SPO Statement) (confidential), p. 27. See also SPO Response Brief, para. 93, fn. 349.
[833] See Appeal Brief, para. 101.
[834] See Trial Judgment, para. 152.
[835] See Trial Judgment, para. 152.

346. In light of the foregoing, the Panel finds that Shala fails to demonstrate that the Trial Panel erred in the way it treated the evidence of W04733's Family Members and in finding that there was no sign of collusion between them.[836]

(ii) Alleged Collusion Between W04733, W01448, TW4-01, TW4-02, TW4-05, TW4-10, TW4-09 and [REDACTED]

347. The Panel turns to address Shala's argument that the Trial Panel failed to consider the strong indications that W04733, W01448, TW4-01, TW4-05, TW4-10, TW4-09, [REDACTED] as well as TW4-02 were either [REDACTED], or in contact, and exchanged views as to the events in Kukës.[837]

348. The Panel finds that Shala mainly repeats on appeal arguments on alleged collusion he made at trial, which were rejected by the Trial Panel without demonstrating any error in their rejection warranting appellate intervention, and further fails to support his claim that the evidence of these witnesses was contaminated.[838] As such, Shala's arguments warrant summary dismissal.[839]

349. In any event, the Panel recalls that the Trial Panel fully addressed and rejected the Defence's allegations of collusion between W01448 and TW4-01, TW4-05 and TW4-09.[840] The Trial Panel underscored that it found no indication of collusion in the content or nature of the witnesses' evidence.[841] The Trial Panel concluded that the fact that W01448 talked with or met TW4-05 and TW4-09 once was not sufficient, in and of itself, to demonstrate collusion or improper influence.[842] Likewise, the Trial Panel could not detect any collusion between W01448 and TW4-01 when comparing their evidence, in terms of content and language used.[843] The Trial Panel further addressed

[836] Appeal Brief, paras 100-101.
[837] Appeal Brief, paras 103-107.
[838] *Compare* Appeal Brief, paras 103-107 *with* Defence Final Trial Brief, paras 257, 260-261, 263-265.
[839] See above, para. 42.
[840] See Trial Judgment, para. 174.
[841] See Trial Judgment, para. 174.
[842] See Trial Judgment, para. 174.
[843] See Trial Judgment, para. 174.

and rejected the Defence's allegations of collusion between W01448, TW4-01 and W04733 for the following reasons: (i) Shala failed to provide any evidence in support of his assertion that the witnesses had talked about "disputed issues in the case"; (ii) W04733 and TW4-01 openly admitted that they met and W04733 admitted having had contacts with W01448 without trying to conceal such contacts; (iii) while the witnesses were consistent on the main points, they still varied on discrete aspects of the events; and (iv) the Trial Panel detected no indication of collusion in the content or nature of the witnesses' evidence.[844] The Trial Panel therefore concluded that the fact that W04733 talked with or met W01448 and TW4-01 was not sufficient, in and of itself, to demonstrate collusion or improper influence.[845] Against this background, the Appeals Panel is satisfied that the Trial Panel's findings on the absence of collusion are reasonable and resulted from a careful analysis of all the evidence on the record.

350. Notwithstanding the above, the Appeals Panel notes that Shala's allegations of collusion between TW4-02 and [REDACTED] and between TW4-02 and [REDACTED][846] were raised in the Defence Final Trial Brief, and do not seem to have been addressed expressly in the Trial Judgment.[847] The Panel first recalls that the Trial Panel is not required to discuss every submission or piece of evidence and it is presumed that it evaluated all of the evidence before it, as long as there is no indication that it completely disregarded any particular piece of evidence.[848] In the present instance, the Appeals Panel finds that Shala does not demonstrate such a disregard by the Trial Panel.

351. In any event, in the Panel's view, the allegation that some witnesses met and spoke about events relevant to the case and the fact that they would have "likely"

[844] See Trial Judgment, para. 187.
[845] Trial Judgment, para. 187.
[846] Appeal Brief, para. 104.
[847] Defence Final Trial Brief, para. 260.
[848] See above, para. 43.

exchanged information on the events at Kukës is not, in itself, sufficient to demonstrate collusion. The Panel notes that the Trial Panel found that the fact that some witnesses talked or met with other witnesses is not sufficient, in and of itself, to demonstrate collusion or improper influence.[849] The Panel endorses this general approach. The Panel further recalls that collusion is defined as "an agreement, usually secret, between two or more persons for a fraudulent, unlawful, or deceitful purpose".[850] The Panel notes – and this observation is also valid for the other similar allegations Shala raises in the Appeal Brief[851] – that Shala does not even suggest that these witnesses may have exchanged information for a fraudulent, unlawful, or deceitful purpose. Shala further fails to point to any similarities in the evidence provided by the relevant witnesses or the language they used, any repetition of erroneous information or any other circumstances that could support his claim of collusion.[852] Accordingly, Shala's assertion that "[no] reasonable trier of fact would have approached contaminated Prosecution evidence in this manner", is largely unsubstantiated and the Panel dismisses it.[853]

352. In light of the above, the Appeals Panel finds that Shala fails to demonstrate that the Trial Panel erred in the way it approached the evidence of these SPO witnesses. Accordingly, the Appeals Panel dismisses Shala's Ground 6D.

5. Alleged Double Standards (Ground 6E)

(a) Submissions of the Parties and Participants

353. Shala submits that the Trial Panel abused its discretion and erred by using double standards in assessing exculpatory and incriminating evidence, in violation of

[849] See Trial Judgment, paras 174 (with respect to W01448 with TW4-01, TW4-05 and TW4-09), 187 (with respect to W04733 with W01448 and TW4-01).
[850] See e.g. *Nyiramasuhuko et al.* Appeal Judgement, para. 231, fn. 551.
[851] See Appeal Brief, paras 103, 105-107.
[852] See e.g. *Bemba et al.* Trial Judgment, para. 318.
[853] See Appeal Brief, para. 108.

the principle *in dubio pro reo*.[854] He argues that the Trial Panel approached the evidence of TW4-02, TW4-04 and TW4-05 with caution due to inconsistencies when it did not fit with the preferred narrative or was exonerating, while inconsistencies in TW4-01 and W04733's evidence were deemed justified.[855] More specifically, Shala suggests that the Trial Panel applied a different standard among these witnesses with respect to: (i) an alleged shift in the evidence of TW4-04 as compared to W04733's evidence; (ii) TW4-04's, TW4-01's and W04733's inability to recall details; (iii) TW4-02's and TW4-01's inaccurate account regarding the date of their arrest; and (iv) the use of temporal markers by TW4-02 and W01448.[856] Shala also alleges that the Trial Panel erred in applying a more rigorous standard when assessing the evidence of TW4-10 than it did when considering W04733's evidence.[857]

354. The SPO and Victims' Counsel respond that Shala's claim of alleged double standards fails to show any error or abuse of discretion.[858] The SPO also argues that Shala ignores relevant jurisprudence on the holistic nature of credibility assessments and the fact that the Trial Panel is not required to assess credibility factors in exactly the same manner across witnesses as this is a case-by-case consideration.[859] It adds that Shala's reliance on the *in dubio pro reo* principle is misplaced, as it applies to findings required for a conviction, not to individual pieces of evidence.[860] Finally, the SPO contends that Shala misrepresents the Trial Judgment and points to specific examples concerning the evidence of TW4-02.[861]

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[854] Appeal Brief, paras 109-110, 113, referring, *inter alia*, to *Barberà, Messegué and Jabardo v. Spain* Judgment, para. 77; *Tsalkitzis v. Greece* Judgment, para. 60. See also Appeal Brief, para. 114; Transcript, 15 May 2025, pp. 40, 44-45, 47-48 (private session).
[855] Appeal Brief, paras 93, 111-112.
[856] Appeal Brief, paras 111-112. See also Appeal Brief, para. 93, fn. 175; Transcript, 15 May 2025, p. 41.
[857] Appeal Brief, para. 94.
[858] SPO Response Brief, paras 56, 96, 99, 101; Victims Response Brief, paras 66-70, 74. See also Transcript, 16 May 2025, pp. 156-157.
[859] SPO Response Brief, paras 94-97. See also SPO Response Brief, para. 99.
[860] SPO Response Brief, para. 98.
[861] SPO Response Brief, paras 99-101.

355. Victims' Counsel submits that Shala's contention that the Trial Panel applied "more rigorous standards" towards other witnesses is flawed as not all inconsistencies carry the same weight.[862] He further stresses that lower panels have the discretion to reach different conclusions as to the significance of inconsistencies in witness evidence.[863] Victims' Counsel points out that the Trial Panel provided detailed reasons to conclude that it did not find aspects of TW4-04's evidence credible.[864]

(b) Assessment of the Court of Appeals Panel

356. At the outset, the Appeals Panel recalls that the presumption of innocence is enshrined in Article 6(2) of the ECHR, as well as Article 31(5) of the Constitution and Article 21(3) of the Law.[865] This principle entails that the burden of proof lies with the prosecution and cannot be reversed. Together with the standard of proof beyond reasonable doubt, it further entails the principle that any doubt should benefit the accused (*in dubio pro reo*).[866] The Panel observes that the ECtHR jurisprudence referred to by Shala confirms these principles.[867] In the Panel's view, Shala's reliance on the *in dubio pro reo* principle is misplaced,[868] as this principle only applies to reasonable doubt as to any factual element relevant for a conviction. Consequently, it does not apply to the assessment of individual pieces of evidence and findings of fact which are not aimed at a conviction or which are not required to establish the elements of the crime charged.[869] Rule 140(2) of the Rules further confirms that the standard of proof beyond reasonable doubt, of which the principle of *in dubio pro reo* is a corollary, should not

[862] Victims Response Brief, para. 58. See also Victims Response Brief, para. 59; Transcript, 16 May 2025, p. 153.
[863] Victims Response Brief, paras 67-70, 74.
[864] Victims Response Brief, paras 71-73.
[865] See also Trial Judgment, para. 74.
[866] See *Ambos* Treatise ICL III, Chapters I, D.(3)(b), V, A.(2)(b), pp. 69-70, 487-488.
[867] See *Tsalkitzis v. Greece* Judgment, para. 60; *Barberà, Messegué and Jabardo v. Spain* Judgment, para. 77, referred to in Appeal Brief, para. 110.
[868] See Appeal Brief, para. 109.
[869] See *Limaj et al.* Appeal Judgement, para. 21.

be applied to individual pieces of evidence.[870] The Appeals Panel, therefore, considers that this principle is not relevant to the determination by the Panel on Shala's claim of alleged application of double standards in the assessment of select pieces of evidence.

357. The Panel recalls that a trial panel has a broad discretion to consider all relevant factors in determining the weight to attach to the evidence of any given witness.[871] As noted above, the Trial Panel identified a non-exhaustive list of factors that it considered in its assessment of the credibility of witnesses.[872] The relevance of these factors has to be assessed on a case-by-case basis and their application and consideration by the Trial Panel will vary according to each witness's testimony.[873] Trial panels enjoy a broad discretion in considering these factors.[874]

358. The Panel further recalls that a trial panel has a broad discretion in assessing inconsistencies within the evidence.[875] Rule 139(6) of the Rules also provides that inconsistencies do not per se require a panel to reject a piece of evidence as unreliable and that a panel may accept parts of a piece of evidence and reject others.[876]

359. The Panel now turns to the alleged applications of double standards by the Trial Panel in the present case. The Panel notes that Shala generally claims that the Trial Panel approached TW4-02's, TW4-04's and TW4-05's evidence with caution due to inconsistencies, while inconsistencies in TW4-01's and W04733's evidence were

[870] See also Trial Judgment, para. 75.
[871] See above, paras 47, 252. See also e.g. *Lukić and Lukić* Appeal Judgement, para. 112; *Bikindi* Appeal Judgement, para. 116.
[872] See above, para. 254, fn. 577. See also Trial Judgment, para. 82.
[873] See above, para. 254. See also *Mustafa* Appeal Judgment, para. 233.
[874] See *Bikindi* Appeal Judgement, para. 116 (where the ICTR Appeals Chamber held that the fact that a criterion for assessing the credibility of Defence witnesses was not equally applicable to Prosecution witnesses did not invalidate the application of this factor, and that the right to have Defence witnesses examined under the same conditions as Prosecution witnesses does not encompass the factors that a trial chamber may consider relevant in assessing the credibility of those witnesses).
[875] See e.g. *Setako* Appeal Judgement, para. 31; *Kupreškić et al.* Appeal Judgement, para. 31; *Popović et al.* Appeal Judgement, para. 137; *Ntaganda* Appeal Judgment, para. 18. See also Trial Judgment, para. 83.
[876] See also Trial Judgment, para. 84.

deemed justified.[877] However, Shala only provides support for his contention with respect to a few select examples and fails to bring any support or reference for his claim that the Trial Panel erred in the way it approached the evidence of TW4-05.[878] Considering that such an approach lacks the necessary substantiation, the Panel will only address the specific instances where Shala provides appropriate support.[879]

360. Turning first to the Trial Panel's assessment of TW4-04's credibility and its findings that his evidence shifted, the Panel notes that the Trial Panel found that TW4-04 has been "inconsistent over the years", [REDACTED], when he started "downplaying" what had happened to other detainees.[880] The Trial Panel notably observed that: (i) TW4-04 first mentioned personally seeing bruises on [REDACTED] in 2009, while [REDACTED], he denied having seen any such bruises; (ii) TW4-04 first mentioned in 2009 having personally heard people screaming and hearing shots coming from within the Detention Building, while [REDACTED], he denied that people were screaming when he was in the Detention Building and that the shots were coming from inside the Detention Building; and (iii) TW4-04 first mentioned in 2009 that "two gypsy" detainees told him after the war about being tortured at the KMF, while [REDACTED], he denied having spoken with [REDACTED] about their tortures at the KMF.[881]

361. The Trial Panel found that there was a pattern in TW4-04's evidence [REDACTED], where TW4-04 provided a "markedly different account", denying [REDACTED] even when confronted with his prior statements, and "persisting in his denial without providing any justification or explanation for his changed evidence".[882]

[877] See Appeal Brief, para. 111.
[878] See Appeal Brief, para. 111.
[879] See above, para. 42.
[880] Trial Judgment, para. 134.
[881] See Trial Judgment, para. 134.
[882] See Trial Judgment, para. 134.

362. In these circumstances, the Appeals Panel considers that it was not unreasonable for the Trial Panel to conclude that the shift in TW4-04's evidence was deliberate, and showed an effort to avoid providing information which could incriminate KLA members including Xhemshit Krasniqi.[883] The Panel further notes that the Trial Panel also took into consideration the fact that TW4-04, [REDACTED], had a motive to downplay Xhemshit Krasniqi's role at the KMF when ultimately deciding to attach no weight to certain aspects of TW4-04's evidence because of its very limited probative value.[884]

363. While Shala claims that W04733 "naming and adding KLA members in various incidents throughout the years" was "unreasonably considered normal",[885] the Appeals Panel observes that the Trial Panel expressly considered the fact that W04733 only named some KLA members in his more recent statements in 2018,[886] and noted with regard to W04733's initial apprehension that he "implicated a series of third-persons, thus adding an otherwise unnecessary complication to his account".[887] As found above, the Trial Panel took into account the fact that W04733 provided numerous statements to various authorities over the years, and found that the varying level of detail in W04733's accounts could be explained by the different investigative lines pursued by these authorities, as W04733 was not specifically asked to elaborate on individuals involved in his transfer in his earlier statements.[888] The Panel further notes that "it is normal for a witness who testified in several trials about the same event or occurrence to focus on different aspects of that event, depending on the identity of the person at trial and the questions posed to the witness".[889]

[883] See Trial Judgment, paras 134, 136.
[884] Trial Judgment, paras 133, 136. See also Trial Judgment, para. [REDACTED].
[885] See Appeal Brief, para. 111.
[886] See Trial Judgment, para. 184.
[887] See Trial Judgment, para. 442. See also Trial Judgment, para. 179.
[888] See Trial Judgment, paras 181, 184, 453, 465. See also above, para. 309.
[889] See *Galić* Decision on Additional Evidence on Appeal, para. 73. See also Trial Judgment, paras 181, 184.

364. In the Panel's view, this situation – where W04733 mentioned names he had not mentioned before because the line of questioning differed – depicts a wholly distinguishable context than with respect to TW4-04, who started to systematically deny previous aspects of his evidence without providing any explanation.[890] The Panel further considers that "[m]erely stating that two witnesses, who testified about two separate events, were accorded different weight by a trial panel does not meet the standard of appeal".[891] The Panel therefore finds that Shala fails to show that the Trial Panel applied any double standard when assessing the evidence of TW4-04 and W04733.

365. As to Shala's claim that TW4-04's inability to remember details was allegedly considered problematic while TW4-01's and W04733's memory lapses were considered a genuine effort to be accurate,[892] the Appeals Panel notes that the Trial Panel took into account TW4-04's indication that [REDACTED].[893] The Panel finds that this aspect of TW4-04's account does not display any "memory lapse" or "inability to remember details".[894] The Panel further notes that TW4-04's evidence in that regard is rather in stark contrast to mutually corroborative evidence of other witnesses regarding [REDACTED], such as that of [REDACTED].[895] The Panel, therefore, sees no error in the way the Trial Panel relied on this aspect of TW4-04's evidence when assessing TW4-04's credibility and the weight to attach to his evidence.

366. By contrast, the Panel observes that when the Trial Panel considered instances where TW4-01 and W04733 were unable to remember certain aspects of the events due to the passage of time,[896] the Trial Panel also took into account the witnesses'

[890] See above, para. 361.
[891] *Lukić and Lukić* Appeal Judgement, para. 112.
[892] See Appeal Brief, para. 111.
[893] See Trial Judgment, para. 135, referring to [REDACTED].
[894] See [REDACTED]. Contra Appeal Brief, para. 111.
[895] See Trial Judgment, paras [REDACTED]. See also above, para. [REDACTED].
[896] See e.g. Trial Judgment, paras 104, 181, 392, 397, 451, 665, [REDACTED].

attempts to stay true to what they personally experienced and their efforts to provide a truthful and accurate account.[897] The Panel further pays heed to the Trial Panel's consideration of the fact that, in contrast to TW4-04, TW4-01 and W04733: (i) were forthcoming in admitting when they could not remember certain details of the events;[898] (ii) distinguished what they witnessed themselves from what they heard from others;[899] and (iii) insisted on correcting some aspects of their prior statements.[900]

367. For these reasons, the Appeals Panel rejects Shala's claim that the Trial Panel applied a different standard when assessing TW4-01's and W04733's evidence.

368. Turning to the Trial Panel's assessment of TW4-02's and TW4-01's evidence on their respective date of arrest,[901] the Panel first notes that the Trial Panel found that it could not rely on the evidence of either witness to establish the date of their respective apprehension.[902] If it is correct that the Trial Panel found that this did not affect TW4-01's overall credibility or the reliability of his evidence concerning his detention at the KMF,[903] the Trial Panel still found that TW4-01 was "inaccurate" in stating that he arrived on [REDACTED] May 1999 at the KMF and decided to "set aside" his testimony in that regard.[904] Shala's contention that the Trial Panel "allowed such inconsistencies" for TW4-01 is therefore rejected.[905]

369. Furthermore, the Appeals Panel recalls that when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible.[906] In the Panel's view, Shala ignores the fact that

[897] See Trial Judgment, paras 102, 112, 179, 392, 665, [REDACTED]. See also Trial Judgment, paras 82-83.
[898] See e.g. Trial Judgment, paras 102, 106, 179, 381, [REDACTED]. See also Trial Judgment, para. 665.
[899] See e.g. Trial Judgment, paras 102, 118, 179, 184, 442.
[900] See e.g. Trial Judgment, paras 102, 179.
[901] See Appeal Brief, para. 112.
[902] See Trial Judgment, paras 378, 539.
[903] See Trial Judgment, para. 378. See also Trial Judgment, para. 393.
[904] See Trial Judgment, para. 378.
[905] Contra Appeal Brief, para. 112. See also Transcript, 15 May 2025, p. 41.
[906] See e.g. *Nyiramasuhuko et al.* Appeal Judgement, para. 645; *Ndahimana* Appeal Judgement, para. 46.

the Trial Panel provided detailed reasons as to why it decided not to rely on TW4-02's evidence regarding the date of his arrest and duration of his detention.[907] The Panel observes that the Trial Panel took into account: (i) internal inconsistencies within TW4-02's own statements as he provided "three different time frames" regarding the date of his arrest and for how long he was detained at the KMF;[908] (ii) TW4-02's own evidence regarding the presence and mistreatment of other detainees who were held at the KMF prior to TW4-02's alleged arrest;[909] (iii) TW4-01's testimony that [REDACTED];[910] (iv) the fact that TW4-01's evidence is corroborated by that of other witnesses concerning the presence of co-detainees at the relevant time;[911] (v) the fact that TW4-02 intentionally provided a short timeframe for his detention at the KMF "to avoid having to give evidence on certain events";[912] and (vi) the possible existence of motives for TW4-02 to downplay certain aspects of his evidence.[913]

370. Against this background, the Panel also disagrees with Shala's claim that TW4-01 and TW4-02 committed "analogous" mistakes and that the Trial Panel's conclusion not to credit this aspect of TW4-02's evidence was unreasonable or wholly erroneous.[914] The Appeals Panel finds that Shala fails to demonstrate the application of any double standard in the Trial Panel's assessment of TW4-02's and TW4-01's evidence.

371. The Panel will now address Shala's contention that TW4-02 provided a temporal marker which was declined when it allegedly did not fit the preferred narrative, while W01448's provision of temporal markers was accepted by the Trial

[907] See Trial Judgment, paras 393, 533-539.
[908] Trial Judgment, paras 534, 536. See also Trial Judgment, para. 124.
[909] Trial Judgment, para. 535.
[910] Trial Judgment, para. 536.
[911] Trial Judgment, para. 536. The Trial Panel also took into account TW4-04's contradicting evidence placing TW4-02 as a KMF detainee prior to the death of the Murder Victim on or about 5 June 1999. See Trial Judgment, para. 537.
[912] Trial Judgment, para. 538.
[913] Trial Judgment, para. 536. See also Trial Judgment, paras 124-125.
[914] See Appeal Brief, para. 112.

Panel.[915] At the outset, the Appeals Panel notes that when the Trial Panel relied on the temporal markers provided by W01448, it was precisely to disregard TW4-01's evidence on the date of his arrest – a witness whom Shala argues was assessed with too much leniency by the Trial Panel.[916]

372. While it is true that the Trial Panel did not take into consideration the temporal marker provided by TW4-02 – [REDACTED] – when assessing TW4-02's account regarding the date of his arrest, the Panel recalls that the Trial Panel's conclusion that TW4-02's evidence in that respect was not reliable was carefully reasoned and based on the consideration of numerous factors, including corroborative evidence contradicting TW4-02.[917] In these circumstances, the Panel finds that it was within the Trial Panel's broad discretion to rely on temporal markers in one instance but not in another one. In the Panel's view, Shala fails to show any abuse in the way the Trial Panel exercised its discretion or that its finding was wholly erroneous.

373. As to Shala's argument that the Trial Panel applied caution only to the portions of TW4-02's evidence that were exonerating,[918] the Appeals Panel first recalls that a trial panel has discretion to accept some but reject other parts of a witness's testimony.[919] The Panel further recalls its finding above that the Trial Panel provided extensive reasons for not accepting TW4-02's evidence regarding the date of his arrest.[920] Against this background, the Panel finds that it was within the Trial Panel's discretion to reach this conclusion. The Panel observes that Shala does not point to any further instance where the Trial Panel would have allegedly applied undue

[915] See Appeal Brief, para. 112.
[916] See Trial Judgment, para. 378. See also Trial Judgment, para. 475.
[917] See above, para. 369. See also Trial Judgment, paras 533-539.
[918] See Appeal Brief, para. 112.
[919] See e.g. *Haradinaj et al.* Appeal Judgement, para. 201; *Kanyarukiga* Appeal Judgement, para. 187; *Popović et al.* Appeal Judgement, para. 132. See also Rule 139(6) of the Rules; Trial Judgment, para. 84.
[920] See above, para. 369.

caution to TW4-02's evidence only because of its exonerating character. In light of this, the Panel rejects Shala's contention.

374. The Appeals Panel is further not persuaded by Shala's argument that the Trial Panel only one-sidedly discarded evidence when it was exculpatory and blindly accepted evidence just because it would have been incriminating in order to "fit" an alleged "preferred narrative".[921] To the contrary, the Panel observes that in the specific instances where the Trial Panel decided not to rely on TW4-02's and TW4-04's evidence, it provided detailed reasons for its decision and carefully assessed the evidence in light of the list of factors it established, notably whether the evidence was internally inconsistent, whether it was contradicted by other evidence on the record, whether the inconsistencies were impossible to resolve or whether explanations were provided, whether the witnesses' account was deemed implausible and whether the witness had any motive to downplay certain aspects of the evidence.[922] For these reasons, the Panel rejects Shala's allegation of preferred narrative as vague and unsupported.

375. The Appeals Panel now turns to Shala's argument regarding the assessment of TW4-10. The Panel notes that Shala merely contends that the Trial Panel applied a more rigorous standard to assess TW4-10's evidence than the one used to assess inconsistencies in W04733's evidence.[923] The Panel recalls that the Trial Panel found that TW4-10's evidence on the detention, interrogation and mistreatment of detainees at the KMF had very limited value and decided not to attach any weight to it.[924]

376. With respect to the aspects of W04733's evidence challenged by Shala, the Panel recalls its findings that the Trial Panel committed no error in the way it addressed

[921] Contra Appeal Brief, paras 93, 112-113.
[922] See e.g. Trial Judgment, paras 124-126, 132-136, 534-538, 546-547, [REDACTED], 729. See also Trial Judgment, para. 82.
[923] See Appeal Brief, para. 94.
[924] Trial Judgment, para. 161. See also Trial Judgment, paras 159-160, 162.

inconsistencies in W04733's evidence regarding the person who broke his teeth and its summary dismissal of Shala's allegations of error with respect to which detainees W04733 saw being mistreated by KLA members and/or Shala during the 20 May 1999 Incident.[925] The Panel observes that W04733's evidence on these two incidents had been consistent across his statements and over the years, with the exception of one isolated instance in 2010.[926] In addition, if W04733's 2010 account differed, the Panel notes that W04733 still indicated then that he had been mistreated by Xhemshit Krasniqi on the same occasion as when his teeth were broken, and that TW4-01 and the Murder Victim had been mistreated during the 20 May 1999 Incident, in line with W04733's other prior and subsequent statements.[927]

377. The Panel observes, in contrast, that the nature and seriousness of the inconsistencies in TW4-10's testimony is entirely different, as TW4-10 changed his testimony to deny that any mistreatment took place at the KMF when he was stationed there.[928] Furthermore, Shala overlooks the Trial Panel's extensive reasoning as to why it concluded that TW4-10's evidence on the conditions of detention and mistreatment of detainees was not reliable and the different factors it took into account to reach this finding, namely: (i) the fact that TW4-10 was not forthcoming in his answers; (ii) his

[925] See above, paras 312-313.
[926] See Trial Judgment, paras 662, 699. Regarding the teeth-breaking incident, *compare* P00116 (SITF00013181-SITF00013189 RED3) (W04733's 2002 ICTY Statement) (confidential), pp. 6-7 (SITF00013186-SITF00013187); P00128_ET (082892-TR-AT-ET Part 5 RED2) (W04733's 2018 SPO Statement) (confidential), pp. 7-8; P00122 (106978-107020) (W04733's [REDACTED]) (confidential), p. 5 (106982); P00123 (SPOE00013793-SPOE00013847 RED2) (W04733's [REDACTED]) (confidential), p. 26 (SPOE00013818) *with* P00119 (SITF00018740-00018767 RED) (W04733's 2010 EULEX Testimony) (confidential), pp. 4-5 (SITF00018743-SITF00018744). Regarding the persons mistreated during the 20 May 1999 Incident, *compare* P00118 (SPOE00185335-00185363 RED3) (W04733's 2009 [REDACTED] Statement) (confidential), pp. 6-7 (SPOE00185340-SPOE00185341); P00122 (106978-107020) (W04733's [REDACTED]) (confidential), pp. 7-8 (106984-106985); P00123 (SPOE00013793-SPOE00013847 RED2) (W04733's [REDACTED]) (confidential), pp. 28-29 (SPOE00013820-SPOE00013821); P00128_ET (082892-TR-AT-ET Part 5 RED2) (W04733's 2018 SPO Statement) (confidential), pp. 12-13 *with* P00119 (SITF00018740-00018767 RED) (W04733's 2010 EULEX Testimony) (confidential), pp. 5, 7 (SITF00018744, SITF00018746).
[927] See P00119 (SITF00018740-00018767 RED) (W04733's 2010 EULEX Testimony) (confidential), pp. 4-5, 7 (SITF00018743-SITF00018744, SITF00018746).
[928] See Trial Judgment, para. 160. See also Transcript (TW4-10), 1 May 2023, p. 1102.

reluctance to answer questions and his demeanour when confronted with inconsistencies in prior evidence; (iii) the implausible nature of TW4-10's account in light of the evidence on the record; (iv) the fact that TW4-10 downplayed the conditions of detention and mistreatment suffered at the KMF; and (v) the fact that he sought to distance himself from the events.[929]

378. In the Panel's view, the fact that the Trial Panel assessed differently the inconsistencies in TW4-10's and W04733's evidence while both witnesses blamed interpretation errors for inconsistencies in their evidence[930] falls well within the Trial Panel's role as the primary trier of fact to assess inconsistencies and its broad discretion in that regard.[931] The Panel sees no error in the Trial Panel's approach to their evidence and rejects Shala's claim that the Trial Panel applied a more rigorous standard towards TW4-10.[932]

379. For these reasons, the Appeals Panel is satisfied that the Trial Panel provided detailed explanations as to why it reached the finding that the evidence (or some aspects thereof) of each of these witnesses, namely TW4-02, TW4-04, TW4-05 and TW4-10, was not reliable and/or had to be approached with caution.[933] In the Panel's view, Shala fails to identify any error in the Trial Panel's reasoning but merely disagrees with the Trial Panel's conclusion with respect to these witnesses.

380. In light of the above, the Appeals Panel finds that Shala fails to demonstrate that the Trial Panel abused its discretion in reaching different conclusions with respect

[929] See Trial Judgment, paras 159-161.
[930] See Trial Judgment, para. 159. See also Transcript (TW4-10), 1 May 2023, pp. 1085, 1102; Transcript (TW4-10), 2 May 2023, p. 1167; P00122 (106978-107020) (W04733's [REDACTED]) (confidential), p. 5 (106982).
[931] See above, para. 358.
[932] Contra Appeal Brief, para. 94.
[933] See Trial Judgment, paras 124-126 (TW4-02), 131-136 (TW4-04), 141-143 (TW4-05), 159-161 (TW4-10). With respect to TW4-05, see also above, para. 359.

to inconsistencies in the evidence of these witnesses and in the way it assessed their credibility. Accordingly, the Appeals Panel dismisses Shala's Ground 6E.

F. ALLEGED ERRORS REGARDING THE TRIAL PANEL'S ASSESSMENT OF THE EVIDENCE OF DEFENCE WITNESSES (GROUND 10)

381. In the Trial Judgment, the Trial Panel assessed the credibility of Defence witnesses and the reliability of their testimony, taking into consideration a non-exhaustive list of factors.[934] The Trial Panel decided to treat the evidence of W04280, Mr Bedri Dervishaj ("Mr Dervishaj"), Mr Hoxha, Mr Kocinaj and Mr Mark Shala with caution or extreme caution.[935] The Trial Panel further found that the evidence of Mr Safet Gashi ("Mr Gashi"), Ms Safete Hadergjonaj ("Ms Hadergjonaj"), Ms Time Kadrijaj ("Ms Kadrijaj") and Mr Bardhyl Mahmuti ("Mr Mahmuti") was wholly unreliable.[936]

382. Shala argues that the Trial Panel erred by considering irrelevant factors in assessing the evidence of Defence witnesses and affording such factors inappropriate and determinative weight.[937] The SPO responds that Shala makes speculative and unsupported claims about the Trial Panel's impartiality and its deliberative process, and fails to show any error or abuse of discretion in the Trial Panel's findings on witness credibility and reliability, or in its assessment of Defence witnesses.[938]

1. Submissions of the Parties

383. Shala submits generally that the Trial Panel erred by placing determining weight on Defence witnesses' support for the KLA, political opinions and hostility

[934] Trial Judgment, paras 213-283. See also Trial Judgment, paras 81-88. See above, para. 254.
[935] Trial Judgment, paras 225, 234, 254, 268, 283.
[936] Trial Judgment, paras 244, 248, 259, 273.
[937] Appeal Brief, paras 102, 192-205; Reply Brief, paras 36-38; Notice of Appeal, para. 20. See also Appeal Brief, para. 108.
[938] SPO Response Brief, paras 188-200.

towards the Specialist Chambers.[939] He also argues that the Trial Panel did not apply the same strict standard to SPO witnesses and that the Trial Panel's tendency to consider Defence witnesses' evidence with caution was because it "failed to fit the Panel's preferred narrative".[940]

384. Shala alleges an appearance of bias by the Trial Panel, calling into question its impartiality based on the Trial Panel having considered allegedly irrelevant factors when it found that certain Defence witnesses were unreliable.[941] In this vein, Shala contends that the Trial Panel erred by discrediting portions of witnesses' evidence which favoured Shala, while using other portions to support his conviction or establish aggravating circumstances.[942]

385. Shala first argues that the Trial Panel disregarded or treated with caution all of the evidence provided by witnesses who had ties with or sympathised with the KLA, without considering whether it was reliable.[943]

386. With regard to specific Defence witnesses, Shala argues that the Trial Panel erred in deciding to treat the evidence of W04280, Mr Dervishaj, Mr Hoxha and Mr Mark Shala with caution due to their reluctance to provide evidence on Shala and/or the charges.[944]

387. With respect to Mr Kocinaj's evidence, Shala argues that the Trial Panel erred by finding that it should be treated with "extreme caution" on the basis that he was reluctant to give evidence on key points such as detention practices or his knowledge of Mr Mark Shala.[945] Moreover, Shala contends that in treating Mr Dervishaj's and

[939] Appeal Brief, para. 192.
[940] Appeal Brief, paras 196, 203. See also Transcript, 15 May 2025, pp. 51-52; Appeal Brief, paras 102, 108; Reply Brief, paras 36, 38.
[941] Appeal Brief, paras 196, 199, 203.
[942] Appeal Brief, paras 202-203; Reply Brief, para. 38.
[943] Appeal Brief, paras 193, 195-198, 203.
[944] Appeal Brief, para. 194.
[945] Appeal Brief, para. 194.

Mr Kocinaj's evidence with caution because of their ongoing ties to the KLA, the Trial Panel erred by: (i) noting Facebook posts from Mr Dervishaj's and Mr Kocinaj's acquaintances even though the witnesses could not control the actions of others; (ii) concluding that their "reluctance to provide evidence" may be related to their ties to or support for the KLA; and (iii) not applying the same strict standard to SPO witnesses.[946] According to Shala, the Trial Panel also placed undue weight on Mr Dervishaj's and Mr Kocinaj's relationship, finding that they had "familial ties" as a basis for treating their evidence with caution, while not applying the same standard to SPO witnesses.[947]

388. Furthermore, Shala argues that the Trial Panel erred by finding wholly unreliable the evidence of Mr Gashi, Ms Hadergjonaj, Ms Kadrijaj and Mr Mahmuti on the basis that they were protecting Shala's interests, were reluctant to provide meaningful information concerning the charges or had negative views towards the Specialist Chambers and the SPO.[948]

389. Specifically regarding Mr Mahmuti, Shala argues that the Trial Panel erred by disregarding certain aspects of his evidence which were relevant to cast doubt on W04733's credibility.[949] In particular, Shala contends that the Trial Panel failed to acknowledge entries in Mr Mahmuti's passport that demonstrate that he was not at the KMF, while W04733 claimed that Mr Mahmuti was there.[950]

390. Moreover, Shala argues that the Trial Panel also failed to give proper weight to the evidence which demonstrated that Shala was not part of the alleged JCE and that

[946] Appeal Brief, para. 195, referring to W04733, W01448, TW4-01, TW4-10, and TW4-04.
[947] Appeal Brief, paras 102, 195. The Panel notes that Shala argues that the Trial Panel erred in not applying the same standard in its assessment of Mr Dervishaj's and Mr Kocinaj's evidence regarding their familial ties, as it applied to the evidence of W04733's Family Members. The Panel will address this argument under this Ground. See Appeal Brief, para. 102; see also above, paras 343-346.
[948] Appeal Brief, paras 197-198, 200-201; Transcript, 15 May 2025, p. 52.
[949] Appeal Brief, para. 198. See also Reply Brief, para. 37; Transcript, 15 May 2025, p. 52.
[950] Appeal Brief, para. 198. See also Reply Brief, para. 37; Transcript, 15 May 2025, p. 52.

he did not share the requisite intent for the crimes found to be part of the common purpose.[951]

391. Finally, Shala submits that the Trial Panel erred in law and fact by depriving the Defence of the opportunity to call W02540 in order to discredit TW4-01's evidence on several aspects [REDACTED], and then by subsequently making adverse findings on issues to which W02540 could have testified.[952] According to Shala, the Trial Panel's errors under this Ground have resulted in a miscarriage of justice and warrant a re-trial.[953]

392. The SPO responds that Shala's challenges under Ground 10 are "mere disagreements" with the Trial Panel's assessment of the credibility of Defence witnesses, are incapable of invalidating the Trial Judgment or amounting to a miscarriage of justice and should be summarily dismissed.[954] According to the SPO, Shala's arguments are contradicted by the Trial Panel's detailed description of its general approach to evidence and, as acknowledged by Shala, the Trial Panel's express consideration and assessment of the Defence witnesses.[955]

393. In response to Shala's arguments regarding the Trial Panel's assessment of Mr Dervishaj and Mr Kocinaj, the SPO submits that the Trial Panel comprehensively and properly assessed their credibility.[956] With respect to Mr Kocinaj's credibility, the SPO highlights that the Trial Panel decided to treat his evidence with extreme caution based on his demeanour and evasive, implausible, inconsistent and nebulous

[951] Appeal Brief, para. 202.
[952] Appeal Brief, paras 204-205.
[953] Appeal Brief, para. 205. The Panel notes that there is no paragraph number for the relevant sentence before heading XII (Ground 12: Errors Related to the Conviction for Arbitrary Detention) of the Appeal Brief; therefore, the Panel considers the sentence to be part of paragraph 205.
[954] SPO Response Brief, paras 188, 190.
[955] SPO Response Brief, para. 189. See also Transcript, 15 May 2025, p. 79.
[956] SPO Response Brief, paras 191-193.

responses, which the Trial Panel considered was related to his close ties with former KLA members.[957]

394. Regarding Mr Dervishaj, the SPO notes that the Trial Panel relied on his evidence for some findings in the Trial Judgment, but also considered his selective willingness to answer questions directly and some instances of evasiveness which led the Trial Panel to conclude that his reticence was tied to his desire to avoid providing meaningful information to protect his interests and those of Shala.[958]

395. Regarding the Trial Panel's assessment of Mr Gashi, Ms Hadergjonaj, Ms Kadrijaj and Mr Mahmuti, the SPO argues that Shala's arguments are internally contradictory and based on mischaracterisations of their testimony and the Trial Judgment.[959] According to the SPO, Shala ignores the Trial Panel's findings, *inter alia*, on the inconsistent and incoherent responses, exaggeration and evasiveness demonstrated by these witnesses during their testimony.[960]

396. Specifically in response to Shala's submission about the stamps in Mr Mahmuti's passport, the SPO argues that the Trial Panel was not obligated to discuss every piece of evidence and, in any event, this evidence does not demonstrate that he was not at the KMF when W04733 was there, as Mr Mahmuti admitted there were alternative routes to enter Albania other than official border posts.[961]

397. With respect to Shala's challenges to the Trial Panel's assessment of W04280, the SPO submits that the Trial Panel provided detailed explanations regarding its conclusion that he made no genuine attempt to respond to questions put to him and

[957] SPO Response Brief, paras 191-192.
[958] SPO Response Brief, para. 193.
[959] SPO Response Brief, para. 194.
[960] SPO Response Brief, paras 194-195.
[961] SPO Response Brief, para. 195.

that the Trial Panel's finding that he did not suffer a genuine lack of knowledge was supported by the record.[962]

398. Moreover, the SPO argues that Shala fails to demonstrate any appearance of bias by the Trial Panel nor does he explain the "preferred narrative" he alleges the Trial Panel presented and that this argument should be dismissed as unfounded.[963]

399. Finally, the SPO responds that Shala fails to show that the Trial Panel abused its discretion in denying Shala's motion to re-open his case to hear W02540, as it issued a fully reasoned decision, considered Shala's arguments and found that W02540's evidence was unnecessary for the determination of the truth.[964] The SPO further argues that Shala fails to identify how W02540's evidence is capable of impacting the verdict and cannot disturb the uncontested fact of [REDACTED].[965]

400. Shala replies that the Trial Panel's abuse of discretion in applying double standards in assessing the Defence witnesses, compared to SPO evidence, cannot be reduced to a "mere disagreement" with the Trial Panel's findings.[966] Regarding Mr Mahmuti's evidence, and in particular regarding the passport stamps, Shala argues that there is no evidence on the record to support the SPO's speculative assertion about other entries into Albania.[967] Shala reiterates that this evidence demonstrates that Mr Mahmuti was not at the KMF during the Indictment period which contradicts W04733's claim that Mr Mahmuti was allegedly involved in W04733's mistreatment at Kukës and supports a "pattern which shows the unreliability" of W04733's evidence.[968]

[962] SPO Response Brief, para. 196.
[963] SPO Response Brief, paras 197-198.
[964] SPO Response Brief, para. 199.
[965] SPO Response Brief, para. 200.
[966] Reply Brief, para. 36.
[967] Reply Brief, para. 37.
[968] Reply Brief, para. 37.

2. Assessment of the Court of Appeals Panel

401. Recalling the considerations in paragraph 47 above regarding a trial panel's discretion in evaluating evidence, the Panel considers that the Trial Panel correctly articulated its approach to assessing evidence in this case, in particular, with respect to evaluating the credibility and reliability of witnesses, before relying on their evidence.[969]

(a) Evidence of Mr Dervishaj and Mr Kocinaj

402. The Panel will first address Shala's arguments on the Trial Panel's assessment of Mr Dervishaj and Mr Kocinaj, including that the Trial Panel placed undue weight on the relationship between Mr Dervishaj and Mr Kocinaj, and their ties to or support for the KLA.[970] The Panel notes that, with respect to Mr Dervishaj, the Trial Panel carefully assessed his evidence and found that while he gave detailed evidence about his involvement in the KLA, he did not provide any evidence relevant to the charges and was evasive and reluctant to answer questions regarding his ties with former KLA members or any meaningful information about Shala.[971] The Panel further notes that the Trial Panel considered that the content and manner of Mr Dervishaj's account was "strategically directed" to protect his and Shala's interests, and to avoid providing information which could link KLA members with the commission of any crimes, and on this basis it considered his testimony with caution.[972]

403. Regarding Mr Kocinaj, the Appeals Panel notes that the Trial Panel conducted a detailed assessment of his credibility, in which it considered that while he provided detailed information about his time in the KLA, he was evasive and unconvincing when explaining his time at the KMF, including making implausible claims that he

[969] See above, paras 252-254. See also Trial Judgment, paras 78-92.
[970] See Appeal Brief, paras 102, 194-195.
[971] Trial Judgment, paras 230-233.
[972] Trial Judgment, paras 233-234.

did not know Mr Mark Shala, who was his superior according to other evidence, as well as his "systematic incapacity" to indicate any dates or approximate timeframes.[973] The Trial Panel found that Mr Kocinaj showed a "strong reticence and reluctance" to provide any truthful information concerning the KLA base at the KMF.[974] Moreover, the Trial Panel noted that Mr Kocinaj's "implausible, inconsistent, evasive and nebulous responses" during his testimony, while seeking to provide evidence favourable to the KLA and Shala, negatively impacted his general credibility and on this basis, it considered his evidence with extreme caution.[975]

404. The Panel observes that in assessing their credibility, the Trial Panel considered Mr Dervishaj's and Mr Kocinaj's evasiveness and reluctance to provide evidence related to the charges or Shala, while also noting any inconsistencies in their evidence with other evidence it found reliable.[976] The Panel also observes that in alleging errors in the Trial Panel's findings on Mr Dervishaj's and Mr Kocinaj's credibility, Shala ignores the detailed analysis and assessment conducted by the Trial Panel for both witnesses. The Panel therefore finds that Shala has not demonstrated any error or abuse of discretion in the Trial Panel's assessment of these witnesses.

405. Regarding the relationship between Mr Dervishaj and Mr Kocinaj, the Panel observes that the Trial Panel considered that the witnesses had familial and friendly ties to each other and that both witnesses admitted having met and spoken to each other before their testimony.[977] The Trial Panel further noted that both witnesses were confronted by the SPO with two Facebook posts by acquaintances praising the KLA war efforts and expressing support for the witnesses' upcoming testimony.[978] The

[973] Trial Judgment, paras 263-267, 886-887.
[974] Trial Judgment, paras 264-267, 888.
[975] Trial Judgment, paras 267-268.
[976] Trial Judgment, paras 231-233, 264-267, 886-888.
[977] Trial Judgment, paras 232, 266. See also Transcript (Bedri Dervishaj), 2 October 2023, pp. 2791-2793; Transcript (Naser Kocinaj), 3 October 2023, p. 2881.
[978] Trial Judgment, paras 232, 266.

Panel notes that the Trial Panel considered these as factors demonstrating Mr Dervishaj's and Mr Kocinaj's ongoing close ties to (former) KLA members and explaining their reluctance to provide information about Shala and other KLA members involved.[979]

406. Regarding the Trial Panel's consideration of Mr Kocinaj's and Mr Dervishaj's familial ties, as well as of their evasive responses to the SPO questions about their acquaintances' Facebook posts praising the witnesses and the KLA war efforts, the Panel finds that these factors are relevant to the assessment of their credibility.

407. The Panel also notes Shala's argument that in deciding to treat Mr Kocinaj's and Mr Dervishaj's evidence with caution, based in part on the fact that they had familial ties with each other, the Trial Panel erred by not applying the same "lenient standard" as with SPO witnesses, such as W04733 and his family members.[980] The Panel first observes that the Trial Panel did not base its entire credibility assessment of Mr Kocinaj and Mr Dervishaj on the fact that the witnesses had familial ties or that they met before providing testimony; in fact, the Trial Panel only considered this as one factor in an extensive list of factors which it took into account in support of its finding to approach their evidence with caution.[981]

408. Second, the Panel observes that, with respect to the Trial Panel allegedly applying a different standard, as noted earlier, the Trial Panel applied the same standard to SPO and Defence witnesses, as well as witnesses called by Victims' Counsel, and made findings for each witness on any inconsistencies in their evidence, personal circumstances or other factors that may have impacted the witnesses' credibility.[982]

[979] Trial Judgment, paras 232-233, 266-267.
[980] See Appeal Brief, para. 102.
[981] See Trial Judgment, paras 229-234, 261-268.
[982] See above, para. 254.

409. The Panel recalls that it already found above that Shala failed to demonstrate that the Trial Panel erred in the way it treated the evidence of W04733's Family Members and in finding that there was no sign of collusion between them.[983] In light of the Trial Panel's detailed credibility assessments of Mr Kocinaj, Mr Dervishaj and W04733's Family Members,[984] and recalling the broad discretion held by the Trial Panel in evaluating the credibility and reliability of witness testimony, the Panel finds that Shala fails to show that the Trial Panel applied a different standard to Mr Kocinaj and Mr Dervishaj as compared to SPO witnesses, such as W04733's Family Members.

410. The Panel finds that Shala fails to demonstrate an error or abuse of discretion in the Trial Panel's assessment of Mr Kocinaj and Mr Dervishaj and thus dismisses Shala's arguments challenging the Trial Panel's decision to treat Mr Dervishaj's evidence with caution and Mr Kocinaj's evidence with extreme caution.

(b) Evidence of Mr Gashi, Ms Hadergjonaj and Ms Kadrijaj

411. The Panel now turns to Shala's contention that the Trial Panel erroneously disregarded the evidence of Mr Gashi, Ms Hadergjonaj and Ms Kadrijaj, by finding it "wholly unreliable, without considering whether any of it was reliable".[985] The Panel notes that the Trial Panel provided a detailed assessment regarding the evidence of these three witnesses.[986] First, the Panel notes that the Trial Panel observed that Mr Gashi was "contradictory, evasive, equivocal and not forthcoming" and that his testimony was inconsistent, not only with his own prior statement on several aspects and throughout his own testimony, but also with other reliable evidence before the

[983] See above, paras 343-346.
[984] See Trial Judgment, paras 229-234, 261-268. See also above, para. 343.
[985] See Appeal Brief, paras 197-198.
[986] Trial Judgment, paras 241-244, 246-248, 256-259. See also Trial Judgment, para. 185.

Trial Panel.[987] The Trial Panel found that Mr Gashi clearly demonstrated that he attempted to distance himself from any allegations related to the KMF.[988]

412. Regarding Ms Hadergjonaj, the Panel notes that the Trial Panel observed her open defiance and reluctance to provide any meaningful information on the charges or Shala.[989] The Trial Panel further found that her responses were "marked with exaggeration and imbued with conspiracy allegations", and "strategically directed" to protect her own and Shala's interests.[990]

413. Finally, with respect to Ms Kadrijaj, the Panel notes that the Trial Panel considered that she demonstrated a "palpably evasive attitude" when responding to questions, bias against the Specialist Chambers and the SPO and that her account was also "strategically directed" to protect her own and Shala's interests.[991]

414. The Panel considers that all of the above are relevant factors taken into account by the Trial Panel in finding that these witnesses' evidence was wholly unreliable, a finding which is also in line with the Trial Panel's broad discretion in assessing the appropriate weight to be given to witness testimony. The Panel further finds that Shala merely disagrees with the Trial Panel's assessment of these witnesses and that in challenging the Trial Panel's findings, Shala ignores many factors considered by the Trial Panel in its detailed assessments of these witnesses.

415. The Appeals Panel considers that the Trial Panel provided sufficient and appropriate reasoning to find that the evidence of Mr Gashi, Ms Hadergjonaj and Ms Kadrijaj was wholly unreliable and therefore dismisses Shala's challenges regarding the Trial Panel's assessment of these witnesses.

[987] Trial Judgment, paras 242-243.
[988] Trial Judgment, para. 244.
[989] Trial Judgment, para. 247.
[990] Trial Judgment, paras 247-248.
[991] Trial Judgment, paras 257-259.

(c) Evidence of Mr Mahmuti

416. The Panel turns to Shala's challenges regarding the Trial Panel's assessment of Mr Mahmuti's evidence.[992] The Panel notes that the Trial Panel considered that Mr Mahmuti did not provide any relevant evidence to the case and that his testimony was "outright implausible".[993] The Trial Panel noted that he showed a "profound bias" against the Specialist Chambers and the SPO, as well as a strong reticence to provide any meaningful information concerning Shala and the charges.[994] The Trial Panel found that Mr Mahmuti's account was "strategically directed" to protect his own and Shala's interests and considered his evidence to be wholly unreliable.[995]

417. As found above, the Panel considers that it was within the Trial Panel's discretion to consider these factors when assessing Mr Mahmuti's credibility.[996] The Panel also recalls that a witness's expressed bias towards the Specialist Chambers and his or her personal support for and close personal ties with the Accused may be considered by a panel in assessing the credibility of a witness.[997] The Panel considers that the Trial Panel conducted a detailed assessment of Mr Mahmuti's credibility and of his evidence, and therefore finds that Shala does not demonstrate an error in the Trial Panel's assessment.

418. The Panel notes that Shala further argues that the Trial Panel failed to rely on a particular aspect of Mr Mahmuti's evidence, namely entries in his passport, to assess W04733's evidence.[998] In this regard, the Panel notes that Shala submits that while W04733 claimed that Mr Mahmuti was at the KMF during the Indictment period and was involved in W04733's mistreatment at Kukës, the passport entries allegedly

[992] See Appeal Brief, paras 197-198; Reply Brief, para. 37; Transcript, 15 May 2025, pp. 51-52.
[993] Trial Judgment, para. 271.
[994] Trial Judgment, paras 271-272.
[995] Trial Judgment, paras 271-273. See also Trial Judgment, para. 185.
[996] See above, paras 252-254.
[997] *Mustafa* Appeal Judgment, paras 265, 275.
[998] See Appeal Brief, para. 198; Reply Brief, para. 37; Transcript, 15 May 2025, p. 52.

corroborate Mr Mahmuti's evidence that he was not at the KMF at the same time as W04733.[999]

419. The Panel observes that the Trial Panel considered that W04733 provided largely consistent and inherently coherent evidence on, *inter alia*, the identities of KLA members that participated in his mistreatment, and the presence, identities and mistreatment of other detainees at the KMF.[1000] The Trial Panel also noted that its findings were not based solely or to a decisive extent on W04733's evidence and that it evaluated the evidence holistically in light of the entire body of evidence before it.[1001] The Panel notes that the Trial Panel considered the Defence challenges to W04733's evidence, including that Ms Kadrijaj, Ms Hadergjonaj and Mr Mahmuti testified that they were not present at the KMF during the period relevant to the charges,[1002] but ultimately found that these witnesses were not credible and attached no weight to their evidence that they were not present at the KMF.[1003] Moreover, the Appeals Panel recalls that it found above that the Trial Panel did not err in its assessment of W04733's credibility.[1004]

420. With respect to the specific evidence surrounding Mr Mahmuti's passport, the Appeals Panel considers that the Trial Panel assessed all of the evidence before it, including this evidence and Mr Mahmuti's relevant testimony, and ultimately found it to not be credible to challenge W04733's evidence on Mr Mahmuti's presence at the KMF during the Indictment period.[1005] In the Panel's view, this assessment was reasonable and fell within the Trial Panel's discretion in evaluating and weighing all

[999] See Appeal Brief, para. 198; Reply Brief, para. 37; Transcript, 15 May 2025, p. 52.
[1000] Trial Judgment, para. 180.
[1001] Trial Judgment, para. 183.
[1002] Trial Judgment, para. 182. See Defence Final Trial Brief, paras 234, 240.
[1003] Trial Judgment, para. 185.
[1004] See above, para. 321.
[1005] Trial Judgment, para. 185. See Transcript (Bardhyl Mahmuti), 20 September 2023, pp. 2490-2492, 2494-2514; D00033 (DPS00880-DPS00896) (confidential). See also Transcript (Bardhyl Mahmuti), 21 September 2023, pp. 2713-2715.

of the evidence before it. The Panel finds that Shala has not demonstrated that the Trial Panel erred in not relying on Mr Mahmuti's evidence in this regard.

421. Consequently, the Appeals Panel dismisses Shala's argument that the Trial Panel failed to rely on Mr Mahmuti's evidence in its assessment of W04733's credibility.

(d) Evidence of W04280, Mr Hoxha and Mr Mark Shala

422. With respect to W04280, Mr Hoxha and Mr Mark Shala, the Panel notes that Shala did not make specific arguments regarding the Trial Panel's assessment of their credibility and thus Shala's general challenge regarding these witnesses warrants summary dismissal.[1006] In any event, the Panel notes that the Trial Panel carefully evaluated the credibility of these witnesses.[1007]

423. For W04280, the Trial Panel observed that he was evasive, equivocal and "very reluctant" to provide any relevant evidence on Shala or the charges in the case, including any details about the KMF, on which the Trial Panel noted that his testimony "clearly fell short of what the Panel would expect from a witness with his position at the KMF".[1008] The Trial Panel concluded that W04280 showed a strong reticence and open reluctance to provide meaningful information concerning any crimes committed at the KMF during the relevant period and decided to treat his evidence with caution and relied on it to a "very limited extent".[1009]

424. With regard to Mr Hoxha, the Panel notes that the Trial Panel considered that he provided detailed and overall coherent and consistent evidence about events he personally experienced at the KMF.[1010] However, the Trial Panel noted Mr Hoxha's

[1006] See Appeal Brief, paras 193-194, 201-202.
[1007] See Trial Judgment, paras 222-225, 250-254, 277-283, 889-895.
[1008] Trial Judgment, paras 222-223.
[1009] Trial Judgment, paras 223-225, 892-895.
[1010] Trial Judgment, para. 252.

"obvious reticence" in giving evidence on key aspects of the charges and clearly demonstrated that he wished to distance himself from any allegations related to detention practices at the KMF.[1011]

425. Regarding Mr Mark Shala, the Panel notes that the Trial Panel considered that he provided detailed and overall coherent and consistent evidence about his time and role in the KLA and about the operation of the KMF.[1012] The Trial Panel however observed that the witness demonstrated an "obvious reticence" to give evidence on key aspects of the charges and denied knowledge of detention practices at the KMF, which the Trial Panel found particularly not credible in light of his role as a commander at the KMF.[1013]

426. The Trial Panel considered that both Mr Hoxha and Mr Mark Shala "strategically directed" their testimony to protect their own and Shala's interests and to avoid linking KLA members with the commission of crimes, deciding to consider their evidence with caution.[1014]

427. The Appeals Panel considers that in challenging the Trial Panel's findings on the credibility assessment of W04280, Mr Hoxha and Mr Mark Shala, Shala fails to support his arguments with any concrete examples and ignores the detailed analysis conducted by the Trial Panel and factors considered with respect to these witnesses. The Panel finds that the Trial Panel provided sufficient and appropriate reasoning for its decision to approach with caution the evidence of W04280, Mr Hoxha and Mr Mark Shala, and dismisses Shala's arguments in this regard.

[1011] Trial Judgment, paras 253, 889-891.
[1012] Trial Judgment, para. 279.
[1013] Trial Judgment, paras 280, 282.
[1014] Trial Judgment, paras 253-254, 282-283, 891.

(e) Shala's Intent and Participation in the JCE

428. The Panel turns to Shala's argument that the Trial Panel failed to give proper weight to Defence evidence demonstrating that Shala was not part of the alleged JCE and that he did not share the requisite intent for the crimes found to be part of the common purpose.[1015] The Panel considers that Shala's argument in this regard is undeveloped and lacks specific support, thus warranting summary dismissal.[1016]

429. In any event, the Appeals Panel notes that in challenging the Trial Panel's finding, Shala refers to the evidence of W04280, Mr Dervishaj, Ms Hadergjonaj, Mr Hoxha, Mr Kocinaj, Mr Mahmuti and Mr Mark Shala, all of whom were deemed to have little or no credibility by the Trial Panel.[1017] Based on the considerations detailed above regarding the Trial Panel's assessment of these witnesses and the weight it gave to their evidence, the Panel is not convinced that the Trial Panel should have relied on evidence it found to be either wholly or partially unreliable to determine that Shala was not part of the alleged JCE or that he did not share the requisite intent for the crimes forming part of the JCE.[1018] The Appeals Panel finds no error in the Trial Panel's findings in this regard.

(f) Alleged Bias by the Trial Panel

430. The Appeals Panel now turns to Shala's contention that the Trial Panel showed bias by focusing on a preconceived narrative and considering allegedly irrelevant factors in its assessment of Defence witnesses.[1019] The Panel observes that there is a high threshold to rebut the presumption of impartiality and that the burden is on

[1015] See Appeal Brief, para. 202.
[1016] The Panel notes that Shala refers to a large range of paragraphs in the Trial Judgment to support his argument. See Appeal Brief, fn. 433. The Panel further notes that it addresses Shala's challenges to the Trial Panel's findings on Shala's participation in the JCE and on his intent for the crimes considered to be part of the JCE common purpose, as they relate to the crime of murder, below in Ground 13. See below, Section V.I.2.
[1017] See Appeal Brief, para. 202, fn. 433.
[1018] See above, paras 410, 415, 417, 427. See Appeal Brief, para. 202, fn. 433.
[1019] See Appeal Brief, paras 196, 199, 203; Reply Brief, para. 38.

Shala to demonstrate that there is a "reasonable apprehension of bias by reason of prejudgement" that is "firmly established".[1020]

431. The Panel first observes that Shala provides no support for his argument either that the Trial Panel had a preconceived or preferred narrative into which it tried to fit all of the evidence, or that it disregarded Defence evidence which was inconsistent with such a narrative.

432. The Appeals Panel also recalls that the Trial Panel applied the same standard to all witnesses[1021] and thus finds that the Trial Panel's consistent approach to its assessment of all witnesses shows no indication of a specific bias against Defence witnesses.

433. The Panel considers that Shala's submissions regarding the Trial Panel entering findings consistent with a "preferred narrative" are general and unsubstantiated and therefore do not rebut the presumption of impartiality attaching to the Judges of the Trial Panel.[1022] The Panel finds that Shala has not met the requisite high threshold by showing that there was a firmly established reasonable apprehension of bias by the Trial Panel.

434. Moreover, Shala fails to demonstrate that no reasonable trier of fact would have accepted the evidence relied upon by the Trial Panel in its assessment, or how the alleged error in the Trial Panel's assessment would lead to a different outcome. The Panel therefore dismisses Shala's arguments on the Trial Panel's alleged bias in this regard.

[1020] See e.g. *Mladić* Decision on Judge Disqualification, para. 11; *Furundžija* Appeal Judgement, para. 197.
[1021] See above, paras 254, 408.
[1022] See above, para. 49.

(g) Potential Evidence of W02540

435. Finally, the Panel turns to Shala's challenge that the Trial Panel erred in law and fact by refusing to hear the evidence of potential Defence witness W02540 in order to discredit TW4-01's evidence.[1023]

436. The Panel notes that Shala repeats on appeal arguments he previously made before the Trial Panel requesting to re-open his case to hear W02540's evidence.[1024] Namely, Shala argued at trial that there were many "major" discrepancies between W02540's and TW4-01's evidence, specifically on the [REDACTED], which were relevant to the credibility and reliability of TW4-01.[1025] The Panel further notes that the Trial Panel considered these arguments and explicitly dismissed them on several occasions.[1026] The Trial Panel found that the inconsistencies between W02540's evidence and TW4-01's testimony on the issues Shala challenges were minor and that, in large part, W02540's evidence corroborated that of TW4-01.[1027] On this basis, the Trial Panel found that it was not necessary to hear W02540's evidence for the determination of the truth and that reopening the evidentiary proceedings at the final stage of the trial was not warranted, would unnecessarily prolong the proceedings,

[1023] See Appeal Brief, paras 204-205. The Appeals Panel has addressed above Shala's argument that the Trial Panel erred by disregarding the Defence's arguments on the importance of W02540's evidence in its evaluation of the credibility of TW4-01 and that W02540's evidence would have "informed the Defence cross-examination" of SPO witnesses or the examination in chief of Defence witnesses. See above, paras 69-70.
[1024] *Compare* Appeal Brief, paras 204-205 *with* Defence Motion to Reopen its Case, paras 34-35; Defence Motion for Reconsideration or Certification of Decision Denying Leave to Reopen Defence Case, paras 24, 29, 31-32. See also above, para. 68.
[1025] Defence Motion to Reopen its Case, paras 34-35; Defence Motion for Reconsideration or Certification of Decision Denying Leave to Reopen Defence Case, paras 24, 29, 31-32.
[1026] See Decision Denying Leave to Reopen Defence Case, paras 20-21, 23; Decision on Certification or Reconsideration of Decision Denying Leave to Reopen Defence Case, para. 14.
[1027] Decision Denying Leave to Reopen Defence Case, para. 20. See also Decision on Certification or Reconsideration of Decision Denying Leave to Reopen Defence Case, para. 14. Specifically, the Trial Panel noted that: (i) with respect to [REDACTED], TW4-01 testified that [REDACTED], while according to W02540, it [REDACTED] and (ii) regarding the [REDACTED], TW4-01 testified that [REDACTED] and W02540 stated that [REDACTED]. See Decision Denying Leave to Reopen Defence Case, para. 20.

and would affect the Accused's right to be tried without undue delay.[1028] The Appeals Panel considers that the Trial Panel provided sufficient reasoning for its decision not to hear W02540's evidence and finds no error by the Trial Panel in this regard.

437. The Appeals Panel considers that Shala merely repeats arguments that were already addressed by the Trial Panel, without demonstrating that the Trial Panel's rejection of them constitutes an error warranting the Appeals Panel's intervention.[1029] As such, the Panel dismisses Shala's argument that the Trial Panel erred by refusing to hear the evidence of W02540.

(h) Conclusion

438. In light of the above, the Appeals Panel finds that Shala fails to show any abuse in the Trial Panel's exercise of its discretion or any error justifying the Panel's intervention. Accordingly, the Appeals Panel dismisses Shala's Ground 10.

[1028] See Decision Denying Leave to Reopen Defence Case, para. 21, 23; Decision on Certification or Reconsideration of Decision Denying Leave to Reopen Defence Case, para. 14. The Trial Panel further found that any "minor" discrepancies between the evidence of TW4-01 and other witnesses on the same issues did not have "any broader impact on TW4-01's credibility" nor "any bearing on the material question" as to [REDACTED]. See Trial Judgment, paras 396-400.
[1029] See above, para. 42.

G. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S RELIANCE ON UNTESTED EVIDENCE (GROUNDS 7 AND 12 IN PART)

439. The Trial Panel admitted into evidence the written statements of SPO witnesses: (i) W01448, W04733, Mr Elezaj and Mr Kryeziu, pursuant to Rule 155(1) of the Rules;[1030] and (ii) [REDACTED] and TW4-04, pursuant to Rule 153 of the Rules.[1031]

440. The Trial Panel assessed the credibility of all six witnesses and found W01448 and W04733 credible.[1032] The Trial Panel treated with caution the evidence of TW4-02, Mr Elezaj and Mr Kryeziu and relied on it where appropriate, or in the case of Mr Kryeziu, found that it only relied on those aspects which are corroborated by other evidence on record.[1033] Finally, for TW4-04, the Trial Panel found that his evidence had "very limited value" and found certain "discrete" aspects of his statements credible and relied on them where appropriate.[1034]

441. Shala argues generally that the Trial Panel erred and breached his fair trial rights by impermissibly relying solely or decisively on untested evidence to convict him on all counts and that, as a result, the convictions are rendered unsafe and the

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[1030] Trial Judgment, paras 169, 176, 191, 202. See also Decision on SPO Rule 155 Motion, paras 28-29, 41-42, 49-50, 65, 67, 70. The Appeals Panel recalls that under Rule 155 of the Rules, the Trial Panel may admit evidence in the form of written statements, transcripts of statements or any other records, of persons who are unavailable to testify orally before the panel and the material sought for admission is *prima facie* reliable. Rule 155(5) of the Rules further provides that if the evidence goes to the proof of the acts and conduct of the accused as charged in the indictment, this may be a factor against its admission, to be taken into account by the Trial Panel when exercising its discretion, but does not preclude its admission. See Rule 155 of the Rules.

[1031] Trial Judgment, paras 120, 127. See also Decision on SPO Rule 153 Motions, paras 40, 51, 54. The Appeals Panel recalls that under Rule 153 of the Rules, the Trial Panel may admit, in lieu of oral testimony, the written statement of a witness, or a transcript of evidence and associated exhibits provided by a witness in proceedings before the Specialist Chambers, when they go to proof of a matter other than the acts and conduct of the accused as charged in the indictment. See Rule 153 of the Rules. See also *Mustafa* Appeal Judgment, para. 117.

[1032] Trial Judgment, paras 175, 188. See also Sections V.E.2, V.E.3.

[1033] Trial Judgment, paras 126, 197, 210.

[1034] Trial Judgment, para. 136, wherein the Trial Panel found that it attached no weight to TW4-04's evidence with regard to the duration of his detention at the KMF, his own mistreatment, the role of Xhemshit Krasniqi at the KMF, and the mistreatment suffered by, or forced labour imposed on, other co-detainees.

case "must be remitted for re-trial".[1035] The SPO and Victims' Counsel respond that Shala fails to: (i) demonstrate that the Trial Panel's findings based on untested evidence were the sole or decisive basis for any aspect of Shala's convictions or (ii) acknowledge the corroborating evidence relied on by the Trial Panel in entering the contested findings, which warrants the dismissal of Ground 7 in its entirety.[1036]

1. Submissions of the Parties and Participants

(a) Alleged Errors Regarding the Trial Panel's Reliance on the Evidence of W04733

442. Shala submits that the Trial Panel erred in relying solely or to a decisive extent on the evidence of W04733 to enter findings which formed the basis of Shala's convictions for arbitrary detention and torture.[1037] First, Shala argues that the Trial Panel erred by finding, based on W04733's evidence, that he was involved in W04733's transfer from Romanat to the KMF around 20 May 1999.[1038]

443. Shala also contends that the Trial Panel, on the basis of the untested and inconsistent evidence of W04733 (and W01448), found that on 20 May 1999, during the interrogations of W04733 and [REDACTED], Shala accused W04733 of being a spy, and [REDACTED] that other detainees had collaborated with Serbs.[1039]

444. Shala further argues that the Trial Panel erred by relying to a decisive extent on the untested evidence of W04733 and Mr Elezaj to make findings on Shala's presence

[1035] Appeal Brief, paras 115-143, 220-221, 224-225, 244; Reply Brief, paras 21-22; Notice of Appeal, paras 13-15. The Appeals Panel considers that under Grounds 7, 12 in part and 13 in part, Shala alleges errors committed by the Trial Panel in its reliance on the evidence of W04733; therefore, the Panel will consider these relevant arguments together under this Ground.
[1036] SPO Response Brief, paras 102-148; Victims Response Brief, paras 75-84.
[1037] Appeal Brief, paras 117-120, 125, 131-132, 137-143. See also Appeal Brief, paras 115-116; Reply Brief, para. 21.
[1038] Appeal Brief, paras 118-119, 140.
[1039] Appeal Brief, paras 131-132, 138, 140, 142, 225.

at the KMF on or about 28 or 29 May and on 31 May 1999, and on Shala's involvement in questioning detainees.[1040]

445. Shala avers that the Trial Panel erred by relying on factual findings on arbitrary detention based solely and/or decisively on the untested evidence of W04733 (and W01448) to find that Shala possessed the necessary intent for the crime of arbitrary detention, that he was a member of, and significantly contributed to, the JCE, and that the common purpose of the JCE included arbitrary detention.[1041]

446. With respect to torture, Shala argues that the Trial Panel also erred by relying on W04733's decisive and untested evidence to find that during the 20 May 1999 Incident, Shala and Xhemshit Krasniqi ordered [REDACTED] to beat W04733, and that Shala told W04733 that "they were going to kill" him.[1042]

447. Shala further submits that the Trial Panel erred in relying solely on the evidence of W04733 (and W01448) in making findings on the inadequate and degrading conditions in the Command Building Detention Room, which he argues underpinned the Trial Panel's findings on the material elements of torture.[1043] Shala also argues that the Trial Panel found, solely based on W04733's untested evidence, that Mr Dobruna was a KLA member who was involved in establishing and maintaining the detention conditions at the KMF and played a role in the interrogation of detainees there.[1044]

448. Finally, Shala contends that the Trial Panel's findings that Shala had a "certain degree of autonomy and authority, especially in mistreating and interrogating detainees" and that he "actively participated in the transfer, interrogation and mistreatment of detainees without (fear of) consequence" were based on the decisive

[1040] Appeal Brief, paras 220-221.
[1041] Appeal Brief, paras 119, 131, 141-142, 224-225. See also Transcript, 15 May 2025, p. 49.
[1042] Appeal Brief, paras 138, 142, 225, 244.
[1043] Appeal Brief, para. 125.
[1044] Appeal Brief, para. 120.

and untested evidence of W04733, as well as that of W01448.[1045] He argues in turn that these findings on Shala's "autonomy and authority" were impermissibly relied upon by the Trial Panel in entering findings on his significant contributions to the JCE.[1046]

449. The SPO responds that Shala fails to demonstrate any violation of Shala's right to cross-examine witnesses, arguing that the Trial Panel ensured when relying on untested evidence, that it was always corroborated.[1047] The SPO cited ECtHR principles regarding reliance on untested evidence, to argue that "decisive" means "of such significance and importance that it is likely to be determinative of the outcome of the case"; and further, that the Panel could take into consideration Shala's ability to cross-examine live witnesses who were victims of the same crimes by the same perpetrators in determining whether Shala's rights had been violated.[1048]

450. The SPO and Victims' Counsel respond that Shala fails to explain any error in the Trial Panel entering findings based on W04733's evidence, on issues not related to the acts and conduct of the Accused, nor why such findings were decisive for Shala's conviction.[1049] Moreover, the SPO and Victims' Counsel argue that Shala ignores or otherwise fails to engage with evidence which is corroborative of findings reached by the Trial Panel in relying on the evidence of W04733.[1050]

451. The SPO and Victims' Counsel argue that Shala fails to demonstrate that the Trial Panel impermissibly relied on W04733's evidence to find that Shala: (i) accused W04733 of being a spy; (ii) ordered [REDACTED] to hit W04733; (iii) demanded that [REDACTED] as Serb collaborators; (iv) participated in W04733's transfer to the KMF;

[1045] Appeal Brief, paras 137-139. See also Section V.E.3, regarding Shala's challenges to the Trial Panel's reliance on W01448's evidence.
[1046] Appeal Brief, paras 138, 141. See also Transcript, 15 May 2025, p. 49.
[1047] Transcript, 15 May 2025, pp. 88-90. See also SPO Response Brief, paras 102-105, 148.
[1048] Transcript, 15 May 2025, pp. 88-90; Transcript, 16 May 2025, pp. 143-144.
[1049] SPO Response Brief, paras 107, 120, 123-125; Victims Response Brief, paras 76, 79, 82.
[1050] SPO Response Brief, paras 125-132, 141-148; Victims Response Brief, para. 83.

and (v) threatened to kill W04733.[1051] According to the SPO and Victims' Counsel, Shala does not demonstrate that these findings were either individually or collectively indispensable to any aspect of Shala's conviction; rather, they represent only some of the evidence the Trial Panel reasonably relied on and Shala's responsibility would "firmly stand even in their absence".[1052]

452. In particular, in respect of the Trial Panel's finding that Shala accused W04733 of being a spy, the SPO and Victims' Counsel submit that this finding was corroborated, *inter alia*, by the evidence of TW4-01 and W01448 regarding Shala's participation in the mistreatment of W04733, during which accusations were levelled at him by "perpetrators".[1053] The SPO further argues that the Trial Panel's findings on Shala demanding that [REDACTED] and ordering [REDACTED] to beat W04733 are also corroborated.[1054]

453. Victims' Counsel further responds that Shala's arguments regarding the Trial Panel's finding on Shala's involvement in the transfer of W04733 to the KMF are incoherent and unsupported.[1055] Victims' Counsel submits that W04733's evidence on this issue is corroborated by TW4-09, TW4-07 and TW4-06, all of whom testified live and were cross-examined on the content of W04733's written statements.[1056] The SPO moreover argues that there is additional evidence which further corroborates and contextualises W04733's evidence that Shala was involved in the transfer, when assessed holistically.[1057]

454. Regarding Shala's intent for arbitrary detention, the SPO responds that the Trial Panel reached its conclusion based on other factors and evidence beyond Shala's

[1051] SPO Response Brief, para. 106; Victims Response Brief, para. 83.
[1052] SPO Response Brief, para. 107; Victims Response Brief, para. 83.
[1053] SPO Response Brief, para. 126; Victims Response Brief, para. 83.
[1054] SPO Response Brief, paras 127-128.
[1055] Victims Response Brief, paras 78-80.
[1056] Victims Response Brief, paras 80-81. See also SPO Response Brief, paras 129-132.
[1057] SPO Response Brief, para. 131.

participation in W04733's transfer and his interrogation of [REDACTED] during the 20 May 1999 Incident – including Shala's participation in the mistreatment of other detainees, and his presence at the KMF – and thus did not consider these facts indispensable to its *mens rea* finding.[1058]

455. In addition, the SPO avers that Shala fails to show how Mr Dobruna's involvement in the detention conditions and interrogation of detainees at the KMF had a decisive role in any aspect of Shala's conviction, and that this part of Ground 7 should be summarily dismissed.[1059]

456. With regard to the Trial Panel's findings on the existence and scope of the JCE common purpose and Shala's membership in the JCE, the SPO argues that they are established irrespective of W04733's evidence, as the Trial Panel considered other factors in its findings.[1060] The SPO submits that the Trial Panel also based its findings on "extensive and mutually corroborative" evidence demonstrating the JCE common purpose, as well as Shala's membership in the KLA, his presence at the KMF on several occasions and his "free and unconstrained participation" in the mistreatment of detainees along with other JCE members.[1061]

457. Regarding Shala's significant contribution to the JCE, the SPO submits that W04733's evidence alone was not indispensable to the Trial Panel's findings in this regard, which were based on mutually corroborative evidence of multiple witnesses, including [REDACTED], whom Shala extensively cross-examined, and on Shala's own statements.[1062] The SPO cites the underlying evidence of Shala's extensive and

[1058] SPO Response Brief, para. 116.
[1059] SPO Response Brief, paras 123-124, arguing further that to the extent the Trial Panel's finding on Mr Dobruna is relevant to establish that KMF detainees were interrogated, it plays a minimal role as the Trial Panel established that interrogations occurred based on the evidence of numerous detainees and KLA members. See also Victims Response Brief, para. 82.
[1060] SPO Response Brief, paras 108-110.
[1061] SPO Response Brief, paras 109-110.
[1062] SPO Response Brief, para. 111.

criminal participation in the mistreatment of detainees in the 20 May 1999 Incident and the Leg-Shooting Incident, and argues that irrespective of the individual findings that Shala challenges under this Ground, Shala's conduct still amounts to a significant contribution to the JCE.[1063]

458. Finally, with respect to Shala's challenge to the Trial Panel's findings on Shala's position of autonomy at the KMF, the SPO avers that the Trial Panel did not consider his position as a material element of his JCE responsibility.[1064] The SPO argues that to the extent that the Trial Panel considered that Shala enjoyed a degree of *de facto* autonomy and authority, Shala fails to acknowledge that it based its findings on other evidence in addition to W04733's evidence, including of [REDACTED].[1065] The SPO also notes that Shala himself "boasted about enjoying a 'superior' or 'senior officer' status within the KLA".[1066]

459. Shala replies that the SPO correctly concedes that Shala "claimed" in his asylum applications that he held an important function during the war in order to be granted protection, but he was nothing but a simple KLA soldier.[1067]

(b) Alleged Errors Regarding the Trial Panel's Reliance on Evidence of W01448, TW4-02 and TW4-04

460. Shala argues that the Trial Panel erred by making impermissible and crucial findings to convict him of arbitrary detention and torture based solely or decisively on the untested evidence of W01448, TW4-02 and TW4-04.[1068] In this regard, Shala

[1063] SPO Response Brief, paras 112-115.
[1064] SPO Response Brief, paras 120-121.
[1065] SPO Response Brief, paras 120-121.
[1066] SPO Response Brief, para. 122, wherein the SPO submits that Shala boasted about his status when he was at the KMF, but also later on his asylum applications.
[1067] Reply Brief, para. 22.
[1068] Appeal Brief, paras 117, 121-124, 126-128, 130, 133-136, 143. The Panel notes that in footnote 243 of his Appeal Brief, Shala includes extensive references to paragraphs of the Trial Judgment, amounting to over 300 paragraphs. In light of their sheer quantity, the Panel has understood these references to comprise part of Shala's introductory submissions, demonstrating the extent of the Trial Panel's general reliance on untested evidence, rather than challenges to the unspecified findings contained within these

submits that the Trial Panel admitted the evidence of TW4-02 and TW4-04 without cross-examination, despite the availability of both witnesses to testify,[1069] and proceeded to decisively rely on their evidence.[1070]

461. The SPO responds that, contrary to Shala's claims, the Trial Panel did not err by relying on the untested evidence of W01448, TW4-02 and TW4-04, which comprise only "a small fraction" of the factual basis on which Shala's convictions for arbitrary detention and torture rest.[1071]

(i) Alleged Errors in Torture Findings

462. Shala first argues that the Trial Panel impermissibly convicted him of the torture of [REDACTED], TW4-04, [REDACTED] and [REDACTED] based exclusively on the untested evidence of [REDACTED] and/or W01448.[1072]

463. Shala also argues that in making findings on the inadequate and degrading conditions in Room 3, the Trial Panel erred in relying solely or to a decisive extent on the evidence of [REDACTED] and [REDACTED].[1073] Shala further contends that the Trial Panel made findings on the interrogation of the Murder Victim on 20 May 1999, specifically on his questioning and the accusations made against him, based on W01448's untested evidence.[1074] By extension, Shala argues that the Trial Panel impermissibly relied on untested evidence by relying on these findings, in entering further findings on the *mens rea* and *actus reus* for torture, and on the JCE common

300-plus paragraphs. In any event, the Appeals Panel recalls that vague, unsubstantiated or undeveloped assertions are grounds for summary dismissal (see above, paras 38-42). See also Appeal Brief, paras 115-116.

[1069] Appeal Brief, para. 117; Transcript, 15 May 2025, p. 49.

[1070] Transcript, 15 May 2025, p. 49.

[1071] SPO Response Brief, paras [REDACTED]. The SPO further submits that Shala fails to explain how the Trial Panel erred in admitting the evidence of [REDACTED] and TW4-04 pursuant to Rule 153 of the Rules, as they are purely crime-base witnesses whose evidence does not to go Shala's acts and conduct. See SPO Response Brief, para. [REDACTED].

[1072] Appeal Brief, paras 133-136, 143. See also Reply Brief, para. 21.

[1073] Appeal Brief, para. 126.

[1074] Appeal Brief, paras 127-128.

purpose.[1075] Shala also submits that he does not challenge the Trial Panel's finding that detention conditions improved at the KMF following the arrival of new guards there, after 5 June 1999.[1076]

464. Shala also argues that the Trial Panel's finding that detainees were forced to pretend to have sexual intercourse with each other was based solely on W01448's uncorroborated evidence.[1077]

465. The SPO responds that Shala challenges isolated factual findings which he claims are based on untested evidence and formed the basis for the Trial Panel's findings on torture; however, he fails to demonstrate that they were indispensable or decisive in Shala's conviction on torture and should be dismissed accordingly.[1078] The SPO further argues that Shala fails to acknowledge that the Trial Panel's findings on the *actus reus* for torture were based on mutually corroborative evidence of several witnesses, including live witnesses TW4-01 and TW4-11, regarding detention conditions at the KMF, and the physical and psychological abuse to which detainees were subjected.[1079] In response to a question from the Panel, the SPO argued that, despite some marginal improvements in the detainees' conditions, the collective mistreatment and inhumane detention conditions continued after the arrival of new guards at the KMF.[1080]

466. The SPO also argues that "incidents" claimed by Shala to be based on untested evidence, including in respect of the mistreatment of women, [REDACTED], [REDACTED] and TW4-04, are in fact corroborated by evidence establishing, *inter alia*,

[1075] Appeal Brief, paras 128-129.
[1076] Transcript, 15 May 2025, p. 53.
[1077] Appeal Brief, para. 130.
[1078] SPO Response Brief, para. 140. See, however, Transcript, 16 May 2025, pp. 141-142, where the SPO further elaborated that, in accordance with ICTY/IRMCT jurisprudence, a panel could establish a single criminal incident based on untested evidence *if it is accompanied by corroboration* (emphasis added).
[1079] SPO Response Brief, paras 141-143.
[1080] Transcript, 15 May 2025, pp. 80-81; SPO References for Appeal Hearing Question, pp. 1-2.

that "all the detainees held in the Detention [B]uilding were subjected to various forms of mistreatment"; it further argues that the untested evidence was not determinative in respect of these incidents, nor of Shala's overall responsibility.[1081] The SPO cites ICTY and IRMCT jurisprudence to submit that single criminal incidents could be established on the basis of untested evidence if accompanied by "some corroboration", including a pattern of conduct;[1082] it further states that reliance on untested evidence was "entirely legitimate" in respect of these incidents of mistreatment, given that Shala was able to cross-examine live witnesses regarding their corroborative evidence of "similar episodes" that occurred within the same location and timeframe.[1083] The SPO also argues that Shala's ability to do so at trial was a counterbalancing factor that should be taken into account by the Panel vis-à-vis the Trial Panel's reliance on untested evidence.[1084]

467. In response to a question from the Panel, the SPO further submitted that live evidence on the trial record, considered along with untested evidence, supported the allegation that [REDACTED], [REDACTED], TW4-04, and [REDACTED] were detained at the KMF prior to 5 June 1999.[1085]

468. With respect to Shala's *mens rea* for torture, the SPO argues that the Trial Panel's findings regarding Shala's participation and/or presence during the mistreatment of detainees demonstrate that Shala knew that the mistreatment he participated in was being inflicted for the special purpose required by torture, irrespective of his participation in W04733's transfer or of calling W04733 a spy, and this knowledge, coupled with his continued participation in mistreatment established his intent.[1086]

[1081] SPO Response Brief, paras 144-146. See also Transcript, 15 May 2025, p. 89.
[1082] Transcript, 16 May 2025, pp. 141-142. See also Transcript, 15 May 2025, p. 94.
[1083] Transcript, 16 May 2025, p. 143.
[1084] Transcript, 16 May 2025, p. 143.
[1085] Transcript, 15 May 2025, pp. 81-82 (redacted), 83-88 (private session).
[1086] SPO Response Brief, paras 117-119, 147.

469. In reply, Shala reiterates that the Trial Panel erred by entering "a great number of findings" based on untested evidence which "served as the foundation" for its conclusions on Shala's convictions; and argues that this "rule does not change" when a conviction under one count is based on a number of incidents.[1087] He argues that the evidence of Shala's participation in the mistreatment of detainees on 20 May 1999 was "non-credible" and thus "did not suffice for the conviction on torture"; and that as such, "the interrogation allegations", themselves based on untested evidence, were relied upon by the Trial Panel to convict him.[1088] He reiterates in this respect that the Trial Panel relied to a decisive extent on untested evidence in entering findings on the purpose element of torture, notwithstanding the SPO's "interpretation" of findings in respect of Shala's presence and/or participation in mistreatment.[1089] Shala also counter-argues that in fact there was no live evidence supporting the allegation that [REDACTED], [REDACTED], TW4-04 and [REDACTED] were detained at the KMF prior to 5 June 1999, and reiterates that his conviction vis-à-vis crimes for these individuals rested solely on untested evidence.[1090]

470. Shala further argues that the ICTY/IRMCT jurisprudence cited by the SPO required more than merely "some" corroboration, and that the corroboration found to be sufficient in the case law was "solid evidence as to a pattern of conduct"; and moreover, that the case law on the prohibition against convictions based solely or decisively on untested evidence was consistent and unequivocal.[1091] Shala also submits that the ECtHR case law cited by the SPO in respect of "counterbalancing factors" was distinguishable from the case at hand, and further, needs to be assessed in its proper context.[1092]

[1087] Reply Brief, para. 21. See also Transcript, 16 May 2025, pp. 175-176.
[1088] Reply Brief, para. 21.
[1089] Reply Brief, para. 21.
[1090] Transcript, 16 May 2025, pp. 166-168.
[1091] Transcript, 16 May 2025, pp. 175-177.
[1092] Transcript, 16 May 2025, pp. 176-178.

(ii) Alleged Errors in Arbitrary Detention Findings

471. Shala argues that the Trial Panel convicted him for the arbitrary detention of [REDACTED] and another female detainee, [REDACTED],[1093] [REDACTED] and [REDACTED] and [REDACTED] at the KMF based solely or decisively on the untested evidence of W01448, TW4-02 and TW4-04.[1094]

472. The SPO responds that the Trial Panel's findings on the detention of the six individuals – [REDACTED] and another female detainee, [REDACTED], [REDACTED], [REDACTED] and [REDACTED] – challenged by Shala are corroborated by evidence that Shala fails to acknowledge, and that the untested evidence was not determinative in respect of these incidents.[1095] The SPO submits that the Trial Panel correctly found that the witnesses' evidence challenged by Shala was consistent with other evidence, or reinforced by a "similar pattern of conduct", with respect to the treatment of other detainees at the KMF.[1096] Moreover, according to the SPO, these findings are not indispensable to Shala's conviction for arbitrary detention, which is based on the detention of 18 people.[1097]

2. Assessment of the Court of Appeals Panel

(a) Applicable Law

473. The Appeals Panel recalls that, according to Rule 140(4)(a) of the Rules, "a conviction may not be based solely or to a decisive extent on the statement of a witness whom the Defence had no opportunity to examine".[1098] This Rule is a corollary of the fundamental fair trial right of an accused to examine, or have examined, witnesses

[1093] The Panel notes that Shala refers to this individual as [REDACTED] at points in the Appeal Brief, but the correct spelling as confirmed in the Trial Judgment is [REDACTED]. See Trial Judgment, paras 573-577. See also Appeal Brief, para. 122.
[1094] Appeal Brief, paras 121-124. See also Appeal Brief, paras 115-117.
[1095] SPO Response Brief, paras 135-139; Transcript, 15 May 2025, p. 89.
[1096] SPO Response Brief, paras 137-139.
[1097] SPO Response Brief, para. 135. See also Transcript, 15 May 2025, p. 89.
[1098] Rule 140(4) of the Rules. See also Appeal Brief, para. 115.

brought against him or her, as guaranteed under Article 21(4) of the Law, Article 31(4) of the Constitution, and Article 6(3)(d) of the ECHR.[1099]

474. The Panel observes that the ECtHR has expanded on the rationale underpinning the "sole and decisive rule" as applied before that Court,[1100] as follows:

> Experience shows that the reliability of evidence, including evidence which appears cogent and convincing, may look very different when subjected to a searching examination. The dangers inherent in allowing untested hearsay evidence to be adduced are all the greater if that evidence is the sole or decisive evidence against the defendant. […] [T]he defendant must not be placed in the position where he is effectively deprived of a real chance of defending himself by being unable to challenge the case against him.[1101]

475. The Panel takes further guidance from ECtHR case law wherein the terms "sole evidence" and "decisive evidence" within the meaning of this rule have been respectively interpreted as "the only evidence against the accused" and "evidence of such significance or importance as is likely to be determinative of the outcome of the case".[1102]

476. The Appeals Panel is also guided by ECtHR case law establishing that, "[t]he requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive";[1103] and further, that the "lack of a good reason for a prosecution witness's absence is a very important factor […]

[1099] See also *Thaçi and Selimi* Appeal Decision on SIMs, para. 58.
[1100] See *Al-Khawaja and Tahery v. United Kingdom* Judgment, paras 119, 126-128; *Schatschaschwili v. Germany* Judgment, paras 123-124; *Jaupi v. Albania* Judgment, para. 99.
[1101] *Al-Khawaja and Tahery v. United Kingdom* Judgment, para. 142. See also *Al-Khawaja and Tahery v. United Kingdom* Judgment, para. 139.
[1102] *Schatschaschwili v. Germany* Judgment, para. 123. See also Transcript, 15 May 2025, p. 89; Transcript, 16 May 2025, p. 143.
[1103] *Al-Khawaja and Tahery v. United Kingdom* Judgment, para. 120; *Jaupi v. Albania* Judgment, para. 99. See also *Schatschaschwili v. Germany* Judgment, para. 120. Regarding the "three-step" process, see below, fn. 1123.

which may tip the balance" in favour of finding that an accused's right to examine witnesses brought against him or her has been violated.[1104]

477. In the *Karadžić* case, the IRMCT Appeals Chamber set out the principle enshrined in Rule 140(4)(a) of the Rules – itself well-established in international criminal law – as follows:

> [A] conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial. This principle applies "to any fact which is indispensable for a conviction", meaning "the findings that a trier of fact has to reach beyond reasonable doubt". It is considered to "run counter to the principles of fairness [...] to allow a conviction based on evidence of this kind without sufficient corroboration".[1105]

478. Further, noting Rule 140(2) of the Rules,[1106] as well as relevant international jurisprudence,[1107] the Panel thus understands Rule 140(4)(a) of the Rules to likewise apply only to the facts constituting the elements of the crimes or the modes of liability alleged, and to any other facts indispensable for entering a conviction.

479. In the *Karadžić* case, the IRMCT Appeals Chamber held that "evidence demonstrating a consistent pattern of conduct can provide sufficient corroboration in

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[1104] See *Schatschaschwili v. Germany* Judgment, para. 113. See also *Al-Khawaja and Tahery v. United Kingdom* Judgment, paras 119-120.

[1105] *Karadžić* Appeal Judgement, para. 449, and references cited therein. See also *Ntaganda* Appeal Judgment, para. 629, and references cited therein; *Ayyash et al.* Trial Judgment, para. 276; *Al-Khawaja and Tahery v. United Kingdom* Judgment, paras 118-128, 143; *Schatschaschwili v. Germany* Judgment, paras 100-107. The Appeals Panel recalls that pursuant to Article 3(3) of the Law, Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the ICC and other criminal courts; and further, that these subsidiary sources can also guide the Judges' reflection in instances where primary sources do not provide guidance on a specific matter. See Decision on Defence Rule 181 Motion, para. 13.

[1106] Rule 140(2) of the Rules states: "The standard of proof beyond reasonable doubt shall be applied to the facts constituting the elements of the crime and of the mode of liability of the Accused as charged as well as to other facts on which the conviction depends. The beyond reasonable doubt requirement shall not be applied to individual pieces of evidence."

[1107] See e.g. *Halilović* Appeal Judgement, para. 125, and references cited therein; *Ngudjolo* Appeal Judgment, paras 124-125.

support of convictions based on [untested testimonial] evidence".[1108] The Appeals Panel considers that the question of whether untested evidence is sufficiently corroborated is necessarily a fact-specific inquiry and thus must be assessed on a case-by-case basis.[1109] As the ECtHR has held:

> Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supporting evidence: the stronger the other incriminating evidence, the less likely it is that the evidence of the absent witness will be treated as decisive.[1110]

480. Moreover, the Panel observes that as the central question is whether a conviction rests decisively on untested evidence, the extent to which an accused has been afforded the opportunity to examine the evidence relied on in corroboration, including any "corroborative pattern" evidence, will also necessarily fall within the scope of this assessment.[1111] Where one piece of untested evidence is being used to corroborate another piece of untested evidence, a trial panel must exercise caution to ensure that findings which are indispensable for a conviction do not rest solely or decisively on untested evidence.[1112]

481. The Panel notes the SPO's submission, that "when a conviction under one count is rooted in a number of different incidents, a panel can legitimately establish some of them through written evidence";[1113] and further, that the Trial Panel's findings on the

[1108] *Karadžić* Appeal Judgement, para. 457, and references cited therein. See also *Al-Khawaja and Tahery v. United Kingdom* Judgment, para. 131.
[1109] *Haraqija and Morina* Appeal Judgement, para. 62. See e.g. *Haradinaj et al.* Appeal Judgement, para. 101.
[1110] *Jaupi v. Albania* Judgment, para. 99(vi).
[1111] See e.g. *Popović et al.* Appeal Judgement, para. 1226; *Haraqija and Morina* Appeal Judgement, paras 62-65. See also *Lukić and Lukić* Appeal Judgement, paras 568-570; *Karadžić* Appeal Judgement, para. 459 (wherein the IRMCT Appeals Chamber partially dismissed an argument of the appellant on the basis of his failure to demonstrate that certain impugned findings "were not independently supported by adjudicated facts and/or sufficiently corroborated *by non-Rule 92 bis or quater evidence*" (emphasis added)).
[1112] *Popović et al.* Appeal Judgement, para. 1226.
[1113] SPO Response Brief, para. 104, fn. 374.

arbitrary detention of six individuals challenged by Shala were "not indispensable" to his conviction on Count 1 which was "based on the detention of 18 people".[1114] The Panel further notes that during the Appeal Hearing, in response to a question from the Panel as regards whether Rule 140(4)(a) of the Rules "permit[s] a Trial Panel to rely solely and decisively on untested evidence to enter findings on individual charged criminal incidents as long as those incidents are not indispensable for a conviction",[1115] the SPO did not expressly affirm or reject this interpretation of the Rule, instead arguing that "a single incident can be established on the basis of untested evidence when it is accompanied by some corroboration".[1116]

482. In any event, the Panel considers that Rule 140(4)(a) of the Rules does not allow a trial panel to rely solely or decisively on untested evidence to enter findings on individual charged criminal incidents, on the mere basis that those incidents are "not indispensable" for a conviction – i.e. where a conviction is based on multiple underlying criminal incidents. The Panel considers that such an interpretation of this Rule would render its applicability unduly contingent on the *form* of an indictment – i.e. whether charged incidents of a given crime are grouped together and brought under a single count, or brought individually, i.e. under separate counts.[1117] Due to the nature and scale of mass atrocity crimes, charged underlying incidents of such crimes are often grouped together and brought under a single count against an accused in the practice of international criminal proceedings. Yet the formal manner in which such charges are organised in an indictment has little, if any, bearing on the substantive consequences of conviction. In this regard, the Panel notes that the sentences imposed by the Trial Panel on Shala for Counts 1 and 3 reflected his

[1114] SPO Response Brief, para. 135. See also SPO Response Brief, para. 140, where the SPO similarly argued that the Trial Panel's findings on torture were not "indispensable".
[1115] Transcript, 15 May 2025, p. 113.
[1116] Transcript, 16 May 2025, pp. 141-142. *Compare with* Shala's submissions arguing that "solid evidence as to a pattern of conduct" was required by way of corroboration for untested evidence, relying on the jurisprudence of the ICTY and IRMCT. See Transcript, 16 May 2025, pp. 175-176.
[1117] See also *Popović et al.* Trial Judgement, Dissenting Opinion of Judge Kwon, paras 40-46.

responsibility for the arbitrary detention and torture of 18 individuals.[1118] More broadly, upon conviction, an accused will be potentially liable for reparations vis-à-vis any participating victims in respect of each individual criminal incident, whether brought under a single count or under separate counts.

483. The Appeals Panel therefore considers that Rule 140(4)(a) of the Rules applies to individual criminal incidents even where multiple such incidents are brought under a single count and are therefore not individually "indispensable" for a conviction. Indeed, a contrary interpretation of this Rule potentially precludes *in limine* an appeals panel from determining whether a finding as to an accused's criminal responsibility for a criminal incident was impermissibly based on untested evidence, due merely to the manner in which the SPO has elected to organise its indictment. Moreover, the reduction of Rule 140(4)(a) of the Rules to a strict structural assessment of an indictment potentially interferes with a panel's ability to duly consider, on a case-by-case basis, whether evidence of a "consistent pattern of conduct" provides sufficient corroboration for untested evidence; and by extension, whether an accused's right to confront evidence has been impermissibly violated. Conversely, and in any event, the Panel's interpretation of Rule 140(4)(a) of the Rules still allows a panel to take into consideration any pattern of conduct, including in the form of other charged underlying criminal incidents, in determining whether untested evidence is sufficiently corroborated for the purposes of that Rule.

484. The Panel notes that a similarly restrictive interpretation of the principle enshrined in Rule 140(4)(a) of the Rules was effectively rejected in the *Karadžić* case, wherein the IRMCT Appeals Chamber (by Majority) found that the Trial Chamber had impermissibly relied on untested testimonial evidence in reaching findings in

[1118] See Trial Judgment, paras 1087-1089, 1091, 1102, 1121. Cf. *Prlić et al.* Appeal Decision on Admission of Transcripts, para. 59, where the ICTY Appeals Chamber held that the scope of the principle that a conviction may not be based solely or decisively on untested evidence extended to facts "used as an aggravating circumstance in sentencing".

relation to five charged incidents underpinning the accused's convictions for the counts of persecution, murder as a crime against humanity and as a war crime, genocide, and extermination; and consequently reversed these convictions to the extent that they were based upon the findings on the five incidents in question – notably, whilst affirming the accused's convictions on each of these counts.[1119] In other words, the IRMCT Appeals Chamber reversed findings on individual criminal incidents despite them not being indispensable for any of the accused's convictions on those counts.[1120]

485. Lastly, the Panel notes that during the Appeal Hearing the SPO argued, citing ECtHR case law, that the Panel should take into consideration the fact that Shala had the opportunity to cross-examine "witnesses who were victims of the same crimes by the same perpetrators", in its determination as to whether the Trial Panel's reliance on untested evidence violated his fair trial rights.[1121] In this regard, the Panel notes ECtHR case law establishing that, in respect of proceedings where evidence of absent witnesses was relied upon, the ECtHR will examine whether there exist "sufficient

[1119] See *Karadžić* Appeal Judgement, paras 460-475 (regarding scheduled incidents C.27.5, B.20.4, B.13.1, C.22.5 and E.11.1), 775 (regarding the impact of these reversals on the accused's conviction on each count). See also *Karadžić* Appeal Judgement, paras 454-457, wherein the IRMCT Appeals Chamber clarified that the position taken in the *Popović et al.* Appeal Judgement, consistent with that of the *Đorđević* Appeal Judgement, reflected that "evidence demonstrating a consistent pattern of conduct can provide sufficient corroboration in support of convictions based on [untested] evidence admitted pursuant to Rule 92 *bis* or 92 *quater* of the ICTY Rules".

[1120] See also *Đorđević* Appeal Judgement, paras 803-809, where the ICTY Appeals Chamber examined whether the accused's conviction for persecution through the destruction of the Landovica/Landovicë mosque was impermissibly based on untested evidence, specifically, by undertaking a detailed examination of corroborative evidence (including pattern evidence of the conduct of Serbian forces), despite the fact that destruction of the Landovica/Landovicë mosque was one of eight such incidents that the Trial Chamber had relied upon to find that Serbian forces had committed persecutions by destruction of religious property (*Đorđević* Trial Judgement, paras 1854-1856), which itself was one of four types of persecutory acts underlying the accused's conviction for persecution, brought under count 5 of the indictment (*Đorđević* Trial Judgement, para. 2230).

[1121] Transcript, 15 May 2025, pp. 89-90, referring to *Al-Khawaja and Tahery v. United Kingdom* Judgment. See also Transcript, 16 May 2025, p. 143. *Compare with* Transcript, 16 May 2025, pp. 176-178, where in reply, Shala cited the existence of distinguishing circumstances in the *Al-Khawaja and Tahery* Judgment.

counterbalancing factors", including "measures that permit a fair and proper assessment of the reliability of [the untested] evidence".[1122]

486. However, the Panel also notes that at the ECtHR, the examination of "counterbalancing factors" is undertaken subsequent to (or in any event, separately from) a determination that a conviction was based solely or decisively on untested evidence.[1123] Indeed, concomitant with the principle that the "sole and decisive rule" as applied at the ECtHR is but one component of that Court's evaluation of the "overall fairness of the criminal proceedings", itself the ECtHR's "primary concern under Article 6(1) of the [ECHR]",[1124] ECtHR jurisprudence does not in fact strictly prohibit convictions based solely or decisively on untested evidence.[1125] By contrast,

[1122] See e.g. *Al-Khawaja and Tahery v. United Kingdom* Judgment, para. 147; *Schatschaschwili v. Germany* Judgment, paras 107, 125-131 (see in particular, para. 128). Such counterbalancing factors include, for example, the fact that the domestic courts approached the untested evidence with caution, or were aware that the untested statements carried less weight; or whether domestic courts provided detailed reasoning as to why they considered the evidence to be reliable, while having regard to other evidence available; or whether the defence was able to put questions to the witness indirectly (e.g. in writing). *Schatschaschwili v. Germany* Judgment, paras 126, 129.

[1123] The Panel notes that in case law cited by the SPO, the ECtHR examined whether sufficient counterbalancing factors existed *after* finding that untested evidence had been decisive in the conviction of both applicants; and concluded only in respect of one applicant that their right to a fair trial under Article 6(1) of the ECHR had been breached. See *Al-Khawaja and Tahery v. United Kingdom* Judgment, paras 153-165. See also *Schatschaschwili v. Germany* Judgment, paras 141-165; *Jaupi v. Albania* Judgment, paras 99-100, 118-129, 133-147. In this regard, the Panel further notes ECtHR case law establishing a "three-step" process whereby an examination as to whether untested evidence was solely or decisively relied upon in a conviction (i.e. the "sole and decisive rule") is preceded by an examination of whether there was a good reason for the non-attendance of a witness, and followed by an assessment of "counterbalancing factors". See e.g. *Schatschaschwili v. Germany* Judgment, paras 107, 116-118. The Panel also notes that while the ECtHR has deemed it "pertinent" to review the steps in order, it has also noted case law wherein the "sole and decisive" rule was examined first, followed then by an examination of the reason for non-attendance. See *Schatschaschwili v. Germany* Judgment, para. 118. Finally, the Panel also notes ECtHR case law establishing that counterbalancing factors will be examined not only where untested evidence was decisive, but also following a determination that the untested evidence carried "significant weight and that its admission may have handicapped the defence". See e.g. *Jaupi v. Albania* Judgment, para. 100.

[1124] See *Al-Khawaja and Tahery v. United Kingdom* Judgment, paras 146-147; *Schatschaschwili v. Germany* Judgment, paras 101, 106-107; *Keskin v. The Netherlands* Judgment, paras 38, 46-47, 51; *Jaupi v. Albania* Judgment, paras 95, 99.

[1125] See e.g. *Jaupi v. Albania* Judgment, paras 99(viii), 137; *Al-Khawaja and Tahery v. United Kingdom* Judgment, para. 147. See also *Jaupi v. Albania* Judgment, para. 120, wherein the ECtHR distinguished its role from domestic courts, holding that, "it is not for the [ECtHR] to rule on the applicant's guilt or

however, the Panel interprets Rule 140(4)(a) of the Rules as precluding it from upholding a conviction based solely or decisively on untested evidence, irrespective of whether the trial proceedings evaluated as a whole were fair. In this respect, the Panel considers that the weight to be afforded to "sufficient counterbalancing factors", if any, must be determined with this prohibition in mind.

(b) Alleged Errors in the Trial Panel's Findings on Elements of Crimes and Modes of Liability

487. As a preliminary matter, the Panel notes that in his Notice of Appeal, Shala alleged that the Trial Panel "erred in law and fact when admitting the written evidence of Prosecution witnesses [REDACTED] and TW4-04 without cross-examination".[1126] In his Appeal Brief, whereas Shala made reference to the admission of these witnesses' written evidence, he did not expressly challenge the relevant admissibility decisions, merely including (in footnotes) references to relevant interlocutory litigation.[1127] During the Appeal Hearing, Shala briefly reiterated this alleged error, adding that the Trial Panel denied his request to have these witnesses appear in court and be cross-examined.[1128] However, he did not meaningfully develop or substantiate the argument.[1129] In light of this, the Panel summarily dismisses this allegation on the basis that it was "abandoned" and in any event unsubstantiated, and also recalling that a party may not merely repeat arguments that did not succeed at trial.[1130]

488. The Panel also makes the following preliminary observation on what it understands to be the structural approach underpinning Shala's challenges to the Trial Panel's findings on the facts constituting the elements of the crimes and the modes of

innocence. […] The Court's role is only supervisory, to assess whether procedural rights of the defence were respected, and in that connection to review whether the proceedings as a whole were fair".
[1126] Notice of Appeal, para. [REDACTED].
[1127] See Appeal Brief, para. [REDACTED], and references cited therein. See also SPO Response Brief, para. 134.
[1128] See Transcript, 15 May 2025, p. 49.
[1129] See Transcript, 15 May 2025, p. 49.
[1130] See above, paras 38-42.

liability, brought under this Ground. Specifically, the Panel understands these challenges to follow a two-stage approach. First, Shala cites a Trial Panel predicate factual finding which he submits is based solely or decisively on untested evidence; for instance, he argues that the Trial Panel's finding that Shala was involved in the transfer of W04733 was based "solely on the written statements of deceased witness W04733".[1131] Second, Shala argues that the predicate factual finding in question was impermissibly relied upon by the Trial Panel in reaching an essential finding(s), i.e. on the constituent elements of the charged crimes or mode of liability; for instance (continuing with the example of W04733's transfer): findings on Shala's *mens rea* for arbitrary detention; his significant contribution to, and membership of, the JCE; and the common purpose of the JCE.[1132]

489. The Panel's reasoning in the following paragraphs will therefore structurally reflect this two-stage approach. In the same vein, and recalling that Rule 140(4)(a) of the Rules applies only to findings that a trier of fact has to reach beyond reasonable doubt,[1133] the Panel will thus focus on the question of whether the Trial Panel violated Rule 140(4)(a) of the Rules by relying solely and/or decisively on the cited predicate findings (and by extension, on allegedly untested evidence) to enter the impugned essential findings.

490. The Panel has assessed Shala's arguments and examined the evidential and/or factual underpinnings of the cited predicate findings, i.e. (i) Shala's involvement in the transfer of W04733;[1134] (ii) the role of Mr Dobruna in interrogating detainees and

[1131] Appeal Brief, para. 118. The Appeals Panel relies on the term "predicate factual findings" to refer to findings of fact that are not inherently essential to prove the elements of the crimes or modes of liability alleged, or to prove other indispensable facts. See e.g. *Halilović* Appeal Judgement, para. 112.
[1132] Appeal Brief, paras 118-119, 140.
[1133] See above, paras 477-478. The Panel also notes that in his submissions under this Ground, Shala directly quotes the IRMCT Appeals Chamber's findings in the *Karadžić* Appeal Judgement regarding the scope of the principle underpinning Rule 140(4)(a) of the Rules, including its applicability only to those facts indispensable for conviction. See Appeal Brief, para. 116. See also Transcript, 15 May 2025, p. 49.
[1134] See Appeal Brief, paras 118-119.

establishing and maintaining detention conditions;[1135] (iii) "wholly inadequate and degrading" living and sleeping conditions in the Command Building Detention Room,[1136] and (iv) in Room 3;[1137] (v) the fact that the Murder Victim was accused of collaborating with Serbs during his interrogation on or about 20 May 1999;[1138] (vi) the fact that detainees were forced to simulate sexual intercourse with one another;[1139] (vii) the fact that Shala demanded that [REDACTED] that [REDACTED] were Serb collaborators during her interrogation on or about 20 May 1999;[1140] (viii) the fact that Shala accused W04733 of being a spy during the latter's interrogation on or about 20 May 1999;[1141] and (ix) Shala's degree and position of authority and autonomy at the KMF[1142] (collectively, "Cited Predicate Findings").

491. The Panel has likewise examined the underpinnings of the impugned essential findings, i.e. (i) the *mens rea* for arbitrary detention; (ii) the *actus reus* and (iii) the *mens rea* for torture; (iv) Shala's membership of the JCE; (v) his significant contributions to the JCE; and (vi) the common purpose of the JCE ("Impugned Essential Findings").

(i) Underpinnings of Cited Predicate Findings

492. First, the Panel observes that the Trial Panel relied to varying degrees on untested evidence in reaching the Cited Predicate Findings.

[1135] See Appeal Brief, para. 120.
[1136] See Appeal Brief, para. 125.
[1137] See Appeal Brief, para. 126.
[1138] See Appeal Brief, paras 127-129.
[1139] See Appeal Brief, para. 130.
[1140] See Appeal Brief, paras 131, 138.
[1141] See Appeal Brief, para. 132.
[1142] See Appeal Brief, paras 137-138. The Trial Panel expressly found that while an accused's position of authority was an evidentiary consideration for the purposes of determining whether they significantly contributed to a JCE, it was not a legal requirement for JCE liability (see Trial Judgment, para. 1027). The Panel therefore considers this finding to constitute a predicate factual finding for the purposes of its assessment under this Ground.

493. Specifically, in respect of (i) Shala's involvement in the transfer of W04733, the Trial Panel relied on the untested evidence of W04733, in addition to the live hearsay evidence of TW4-09, TW4-07 and TW4-06, which it together deemed "consistent and mutually corroborative", in reaching this predicate finding.[1143] In turn, the Trial Panel relied upon this predicate finding to enter Impugned Essential Findings on the *mens rea* for arbitrary detention, the common purpose of the JCE, and Shala's membership of and significant contributions to the JCE.[1144]

494. In respect of (ii) the role of Mr Dobruna in interrogating detainees and establishing and maintaining detention conditions, the Trial Panel relied on the untested evidence of W04733 (which the Trial Panel noted "[found] support in" the likewise untested evidence of Mr Kryeziu), in reaching this predicate finding.[1145] Noting that Shala fails to link this predicate finding to an essential finding, or to otherwise establish that the Trial Panel violated Rule 140(4)(a) of the Rules per se in reaching this finding,[1146] the Panel will not consider this finding further.[1147]

495. In respect of (iii) the "wholly inadequate and degrading" living and sleeping conditions in the Command Building Detention Room and (iv) in Room 3, the Trial Panel respectively relied on the untested evidence of W04733 and W01448, in addition to the "corroborated" live evidence of TW4-01;[1148] and on the untested evidence of [REDACTED] and [REDACTED],[1149] in reaching these predicate findings. In turn, the Trial Panel relied upon these findings to enter Impugned Essential Findings on the *actus reus* for torture.[1150]

[1143] See Trial Judgment, paras 447-449, 455. Regarding Shala's challenge to the Trial Panel's finding as to the mutually corroborative nature of this evidence, see below, para. 501.
[1144] See Trial Judgment, paras 952, 1004, 1007, 1011, 1025, 1029.
[1145] See Trial Judgment, paras 354-356, 462, 471.
[1146] See above, paras 477-478.
[1147] See above, para. 42.
[1148] See Trial Judgment, paras 596-599, 613.
[1149] See Trial Judgment, paras 606-608, 613.
[1150] See Trial Judgment, para. 971.

496. In respect of (v) the fact that the Murder Victim was accused of collaborating with Serbs during his interrogation on or about 20 May 1999, the Trial Panel relied on the untested evidence of W01448, in addition to the "mutually corroborating" live evidence of TW4-01, in reaching this predicate finding.[1151] In turn, the Trial Panel relied upon this finding to enter Impugned Essential Findings on the *actus reus* for torture, the *mens rea* for torture, and the common purpose of the JCE.[1152]

497. In respect of (vi) the fact that detainees were forced to simulate sexual intercourse with one another, the Trial Panel relied on the untested evidence of W01448 in reaching this predicate finding.[1153] Noting that Shala also fails to link this finding to an essential finding, or to otherwise establish that the Trial Panel violated Rule 140(4)(a) of the Rules per se in reaching this finding,[1154] the Panel will not consider this predicate finding further.[1155]

498. In respect of (vii) the fact that Shala demanded that [REDACTED] that [REDACTED] were Serb collaborators during her interrogation on or about 20 May 1999, the Trial Panel relied on the untested evidence of W04733 and W01448 (as well as on the live evidence of TW4-01) in reaching this predicate finding.[1156] In turn, the Trial Panel relied upon this finding to enter Impugned Essential Findings on the

[1151] See Trial Judgment, paras 659, 661, 688, 740, 750. Regarding Shala's argument that the Trial Panel relied only on W01448's evidence to find (with regard to the Murder Victim specifically) that inhumane detention conditions and abuse were inflicted for the purpose of obtaining information or a confession, see below, para. 501.
[1152] See Trial Judgment, paras 740, 972, 982-983, 1014.
[1153] See Trial Judgment, paras 648, 653, 749. The Panel notes that the Trial Panel deemed the evidence of TW4-01, TW4-11, W04733 and W01448 as regards their psychological abuse as "mutually corroborative" (See Trial Judgment, para. 650).
[1154] See Appeal Brief, para. 130. See above, paras 477-478. Regarding Shala's argument that the Trial Panel's failure to address the fact that W04733 denied that this occurred constituted an error in of itself, see below, para. 501.
[1155] See above, para. 42.
[1156] See Trial Judgment, paras 718-720. Regarding Shala's challenge to the Trial Panel's conclusion that the discrepancy between the "mutually corroborative" accounts of W04733 and W01448 was not "significant enough to cast doubt on the reliability" of their evidence, see below, para. 501.

mens rea for arbitrary detention, the *mens rea* for torture, the membership and common purpose of the JCE, and Shala's significant contributions thereto.[1157]

499. In respect of (viii) the fact that Shala accused W04733 of being a spy during the latter's interrogation on or about 20 May 1999, the Trial Panel relied on the untested evidence of W04733 (which, the Trial Panel held, "finds strong corroboration" in the live evidence of TW4-01 and statements of W01448 regarding W04733's mistreatment on 20 May 1999) in reaching this predicate finding.[1158] In turn, the Trial Panel relied upon this finding to enter Impugned Essential Findings on the *mens rea* for torture and Shala's membership of, and significant contributions to, the JCE.[1159]

500. In respect of (ix) Shala's degree and position of authority and autonomy at the KMF,[1160] Shala argues that this particular predicate finding is itself made up of seven underlying evidential bases.[1161] The Panel notes that three of the seven evidential bases correspond to Cited Predicate Findings (i), (vii) and (viii), addressed above.[1162] Two of

[1157] See Trial Judgment, paras 952-953, 973, 981, 1004, 1007-1008, 1014, 1025. See also Trial Judgment, para. 1029.
[1158] See Trial Judgment, paras 692, 694, 706, 741. Regarding Shala's challenge to the Trial Panel's finding on corroboration, see below, para. 501.
[1159] See Trial Judgment, paras 981, 983, 1004, 1007, 1025. See also Trial Judgment, para. 471.
[1160] The Panel notes that the Trial Panel expressly found that while an accused's position of authority was an evidentiary consideration for the purposes of determining whether her or she significantly contributed to a JCE, it was not a legal requirement for JCE liability (see Trial Judgment, para. 1027). Shala does not challenge this finding.
[1161] Specifically, Shala argues that the Trial Panel relied on: **first**, evidence of Shala's involvement in the transfer of W04733 (corresponding to Cited Predicate Finding (i) above); **second**, evidence of Shala's "involvement in the mistreatment of detainees in the Command Building on 20 May 1999"; **third**, evidence that Shala accused W04733 of being a spy during his interrogation on or about 20 May 1999 (see Cited Predicate Finding (viii) above); **fourth**, evidence that Shala demanded that [REDACTED] confess that [REDACTED] were Serb collaborators during her interrogation on or about 20 May 1999 (see Cited Predicate Finding (vii) above); **fifth**, evidence that Shala and Xhemshit Krasniqi ordered [REDACTED] to hit W04733; **sixth**, evidence that Shala told W04733 that they were going to kill him; and **seventh**, the finding that Shala "participated together with other KLA members in the beating of [REDACTED] the Murder Victim on 4 June 1999" (see Appeal Brief, paras 137-138). The Panel notes that Shala enumerates six evidential bases (instead of seven) due to the fact that he combines the evidence of the **third** and **fourth** evidential bases (see Appeal Brief, para. 138).
[1162] See above, fn. 1161 (specifically, **first**, **third** and **fourth** evidential bases). See also Trial Judgment, paras 903, 905.

the underlying evidential bases relate to Shala's personal involvement in the interrogation and mistreatment of detainees during two incidents at the KMF, namely, the 20 May 1999 Incident, and the Leg-Shooting Incident; and were elicited predominantly from live witness TW4-01, as discussed in detail below.[1163] In respect of the remaining two evidential bases (i.e. evidence that Shala and Xhemshit Krasniqi ordered [REDACTED] to hit W04733, and evidence that Shala told W04733 that they were going to kill him), Shala argues that these were based on the evidence of W04733.[1164] However, the Panel notes that the Trial Panel held that the evidence of W04733 on these two matters respectively "[found] strong corroboration" regarding his mistreatment in the evidence of, *inter alia,* live witness TW4-01 and W01448,[1165] and was "consistent" with, *inter alia,* the evidence of live witness TW4-01 regarding W04733's beating (in particular, in the head area), during the 20 May 1999 Incident.[1166] The Panel also observes that, in reaching predicate finding (ix) (i.e. regarding Shala's degree and position of authority and autonomy at the KMF), the Trial Panel also relied on its findings regarding Shala's position within the KLA at the KMF, themselves based on, *inter alia,* live witness Mr Mark Shala, and on the written statements of Mr Elezaj and Shala himself.[1167] In turn, the Trial Panel relied upon this predicate finding to enter Impugned Essential Findings on Shala's significant contributions to the JCE.[1168]

501. Lastly, the Panel notes that in respect of Cited Predicate Findings (i), (v), (vi), (vii) and (viii), Shala makes subsidiary arguments impugning certain Trial Panel findings, in support of his primary argument that these Cited Predicate Findings are

[1163] See below, para. 504. See above, fn. 1161 (specifically, **second** and **seventh** evidential bases). See also Trial Judgment, paras 904, 907.
[1164] See above, fn. 1161 (specifically, **fifth** and **sixth** evidential bases). See Appeal Brief, para. 138; Trial Judgment, paras 905-906. See also below, Section V.I.
[1165] See Trial Judgment, paras 694, 905, 690. See also Trial Judgment, paras 689-699.
[1166] See Trial Judgment, para. 906, referring to, *inter alia,* Trial Judgment, para. 694.
[1167] See Trial Judgment, paras 898-902, 914.
[1168] See Trial Judgment, para. 1028.

based on untested evidence.[1169] Recalling the applicable requirements on appeal set out above,[1170] the Panel finds that these subsidiary arguments warrant summary dismissal, on the basis that Shala has expressed mere disagreement and failed to explain how the Trial Panel erred in reaching the impugned finding;[1171] failed to provide support for his challenge;[1172] failed to explain the relevance of findings;[1173] and/or failed to develop his argument.[1174]

(ii) Underpinnings of Impugned Essential Findings

502. Turning now to the Impugned Essential Findings (i.e. the Trial Panel's findings on: (i) *mens rea* for arbitrary detention, (ii) *actus reus* and (iii) *mens rea* for torture, (iv) Shala's membership of the JCE, (v) his significant contributions to the JCE, and (vi) the common purpose of the JCE), as set out above, the Panel observes that the Trial Panel did in fact rely on the above Cited Predicate Findings in reaching the Impugned Essential Findings.[1175]

503. However, in reaching the Impugned Essential Findings, the Trial Panel relied on an array of predicate findings (in addition to the Cited Predicate Findings),

[1169] See above, fns 1143, 1151, 1154, 1156, 1158. See also Appeal Brief, paras 118-119, 127-132, 138.
[1170] See above, paras 38-42.
[1171] Specifically, in respect of Cited Predicate Finding (i), where Shala challenges the Trial Panel's finding as to the mutually corroborative nature of this evidence. See Appeal Brief, para. 118.
[1172] Specifically, in respect of Cited Predicate Finding (v), where Shala argues that the Trial Panel relied only on W01448's evidence to find (with regard to the Murder Victim specifically) that inhumane detention conditions and abuse were inflicted for the purpose of obtaining information or a confession. In this regard, the Panel also notes that in the Trial Judgment paragraphs to which he cites, the Trial Panel cross-references to factual findings solely reliant on the live-evidence of TW4-01 (see Appeal Brief, para. 128).
[1173] Specifically, in respect of Cited Predicate Finding (vi), where Shala makes the subsidiary argument that the Trial Panel's failure to address the fact that W04733 denied that this occurred constituted an error in and of itself, noting that Shala fails to explain the relevance of this Cited Predicate Finding. See Appeal Brief, para. 130.
[1174] Specifically, in respect of Cited Predicate Finding (vii), where Shala challenges the Trial Panel's conclusion that the discrepancy between the "mutually corroborative" accounts of W04733 and W01448 was not "significant enough to cast doubt on the reliability" of their evidence (see also Trial Judgment, para. 719); and in respect of Cited Predicate Finding (viii), where Shala challenges the Trial Panel's finding on corroboration (see also Appeal Brief, paras 132, 138).
[1175] See above, paras 493, 495-496, 498-500.

including findings based on the testimony of witnesses whom Shala was able to cross-examine at trial.

504. In particular, the Panel observes that all six of the Impugned Essential Findings are underpinned by the Trial Panel's findings regarding Shala's personal involvement in the interrogation and mistreatment of detainees on two specific occasions – namely, during the 20 May 1999 Incident and the Leg-Shooting Incident,[1176] which were themselves based extensively on the live testimony of [REDACTED].[1177]

505. Moreover, the Panel observes that four of the six Impugned Essential Findings are based on additional predicate findings, themselves underpinned in substantial part by live evidence, as follows:

- The Trial Panel's Impugned Essential Findings on (ii) the *actus reus* for torture and (iii) the *mens rea* for torture were additionally based on predicate findings on inhumane detention conditions, collective mistreatment of detainees in

[1176] Regarding the Trial Panel's findings on the ***mens rea* for arbitrary detention**, see Trial Judgment, paras 952-955. Contra Appeal Brief, paras 118-119, 131. See also Appeal Brief, paras 220-221 (where under Ground 12, Shala reiterates that the Trial Panel's findings on the *mens rea* for arbitrary detention were, *inter alia*, impermissibly reliant on untested evidence). Regarding the ***actus reus* for torture**, see Trial Judgment, paras 972-974. Contra Appeal Brief, paras 125-127, 129, 131. Regarding the ***mens rea* for torture**, see Trial Judgment, paras 978, 980-981, 983. Contra Appeal Brief, paras 127, 129, 131-132. Regarding **Shala's JCE membership**, see Trial Judgment, paras 1004, 1007. Contra Appeal Brief, paras 118-119, 131-132, 140. Regarding **Shala's significant contributions to the JCE**, see Trial Judgment, paras 1025, 1028. Contra Appeal Brief, paras 118-119, 131-132, 137-138, 141-142. The Panel notes that Shala expressly acknowledges the Trial Panel's reliance on its findings in respect of Shala's involvement in the 20 May 1999 Incident and the Leg-Shooting Incident in reaching its findings on Shala's JCE contributions (see Appeal Brief, paras 141-142). See also Transcript, 15 May 2025, p. 49. See also Appeal Brief, paras 224-225 (where under Ground 12, Shala reiterates that the Trial Panel's findings on Shala's JCE contributions were, *inter alia*, impermissibly reliant on untested evidence). Regarding the **common purpose of the JCE**, see Trial Judgment, paras 1014-1015. Contra Appeal Brief, paras 118-119, 127, 129, 131.

[1177] See Trial Judgment, paras [REDACTED] (regarding predicate findings on Shala's involvement in the 20 May 1999 Incident, based on evidence of [REDACTED]), 674, 757, 786-787 (regarding predicate findings on Shala's involvement in the Leg-Shooting Incident, based on evidence of [REDACTED]). See also Trial Judgment, paras 904, [REDACTED]. The Panel notes that the Trial Panel found [REDACTED] to be a credible witness. See Trial Judgment, paras [REDACTED]. See also above, Section [REDACTED].

Room 1, and other instances of mistreatment of detainees;[1178] and in reaching these predicate findings, the Trial Panel relied on, *inter alia,* live witnesses TW4-01, TW4-11, TW4-06, TW4-07, TW4-08, TW4-09, [REDACTED] and Dr Gasior;[1179]

- The Trial Panel's Impugned Essential Finding on (iv) Shala's JCE membership was additionally based on predicate findings on his physical presence and activities at the KMF, his participation in interrogation and mistreatment specifically "in the same manner as" other JCE members, and on his membership of the KLA in 1999;[1180] and in reaching these predicate findings, the Trial Panel relied on, *inter alia,* live witnesses TW4-01, TW4-10, TW4-11, Mr Hoxha, Mr Mark Shala and Mr Dervishaj, in addition to Shala's own statements;[1181] and

- The Trial Panel's Impugned Essential Finding on (vi) the common purpose of the JCE (amounting to the commission of the crimes of arbitrary detention and torture) was based on predicate findings on the organised pattern of apprehension of the detainees, their institutionalised detention, and on their systematic interrogation and mistreatment;[1182] and in reaching these predicate findings, the Trial Panel relied on, *inter alia,* live witnesses TW4-01, TW4-10,

[1178] See Trial Judgment, paras 971-976, 979-980, 982-984.
[1179] Regarding findings on detention conditions, see Trial Judgment, paras 597, 601-602, 604, 612, 614-615, 617-618, 620, 623-626, 629, 633. Regarding findings on collective mistreatment of detainees, see Trial Judgment, paras 641-643, 645-649. Regarding findings on further instances of mistreatment of detainees, their purposes, and their consequences, see Trial Judgment, paras 664-673, 684-687, 702-704, 721, 724, 728, 730, 733, 737, 740-741, 744-747.
[1180] See Trial Judgment, para. 1007.
[1181] Regarding findings on Shala's physical presence and activities at the KMF, see Trial Judgment, paras 840-841, 846, 849, 853-873, 896-897. Regarding findings on Shala's participation in mistreatment of detainees together with and in the same manner as other JCE members, see Trial Judgment, paras 654-661, 674-678, 680, 694, 697, 715, 757, 786-787, 797, 799, 801-803, 805-806. Regarding findings on Shala's membership of the KLA in 1999, see Trial Judgment, paras 292-293 (relying only on Shala's own statements).
[1182] See Trial Judgment, paras 1009-1015.

TW4-11, Mr Kocinaj, Mr Mark Shala, Mr Hoxha, TW4-06, TW4-07, TW4-08 and TW4-09, in addition to Shala's own statements.[1183]

(iii) Conclusion on Alleged Errors in Trial Panel's Findings on Elements of Crimes and Modes of Liability

506. The Appeals Panel thus observes that in reaching the six Impugned Essential Findings, the Trial Panel relied on (in addition to the Cited Predicate Findings) numerous predicate factual findings that were substantially underpinned by the live testimonial evidence of multiple witnesses. The Panel is particularly mindful of the Trial Panel's extensive reliance on predicate factual findings regarding Shala's direct personal participation in the physical and psychological abuse of detainees at the KMF on two occasions, which were underpinned by the live testimony of [REDACTED].[1184] Indeed, the Panel considers that the evidential underpinnings of the Impugned Essential Findings are such that, even if it were the case, *arguendo*, that each of the Cited Predicate Findings was based entirely on untested evidence, Shala would not have established that the Impugned Essential Findings were entered in violation of Rule 140(4)(a) of the Rules.

507. In light of the foregoing, the Panel considers that Shala has failed to demonstrate that the Trial Panel relied solely or decisively on untested evidence in reaching the Impugned Essential Findings.

508. The Panel thus dismisses Ground 7 insofar as it relates to Shala's challenges to the Trial Panel's findings on the Impugned Essential Findings: i.e. the *mens rea* for arbitrary detention, the *actus reus* and the *mens rea* for torture, Shala's membership of

[1183] Regarding findings on the organised pattern of apprehension of the detainees, see Trial Judgment, paras 380-382, 407, 415-419, 441-444, 446, 449, 474, 477, 514, 533, 536, 564. Regarding findings on institutionalised detention, see Trial Judgment, paras 383-388, 408-410, 422-423, 456, 481, 501, 521, 560, 565-567, 574, 579, 582, 588, 626, 637. Regarding findings on the systematic interrogation and mistreatment of detainees, see above, fn. 1179.
[1184] See above, para. 504.

the JCE, his significant contributions to the JCE, and the common purpose of the JCE.[1185]

509. As noted above, Shala also challenges two of the Impugned Essential Findings – namely, (i) on Shala's *mens rea* for arbitrary detention, and (v) on his significant contributions to the JCE – in Ground 12 of his Appeal Brief, as part of his broader challenge to his conviction for arbitrary detention.[1186] Again, the Panel discerns no error in the Trial Panel's reliance on untested evidence in reaching these findings, including findings on Shala's presence at the KMF, given that, in so doing, the Trial Panel also relied on live testimony relating to Shala's direct participation in the mistreatment of detainees at the KMF, which Shala had the opportunity to confront at trial.[1187] The Panel thus dismisses Shala's argument under Ground 12 in part insofar as he argues that the Trial Panel impermissibly relied on untested evidence in finding that Shala had the requisite *mens rea* for arbitrary detention and significantly contributed to the JCE as related to arbitrary detention.[1188]

(c) Alleged Errors in the Trial Panel's Findings on Torture in Respect of Specific Individuals

510. The Panel will now address Shala's challenges to his conviction for torture in respect of TW4-04,[1189] [REDACTED],[1190] [REDACTED][1191] and [REDACTED].[1192]

511. In its holistic assessment of whether Shala's convictions for the torture of these individuals were decisively based on untested evidence, the Appeals Panel broadly adopted the following approach. First, the Panel assessed the evidence regarding

[1185] See Appeal Brief, paras 118-119, 125-127, 129, 131-132, 140-142.
[1186] See Appeal Brief, paras 220-221, 225.
[1187] See above, fns 1176-1177. See also Trial Judgment, paras 951-952, 954-956.
[1188] See below, para. 636.
[1189] See Appeal Brief, para. 134.
[1190] See Appeal Brief, para. 135.
[1191] See Appeal Brief, para. 136.
[1192] See Appeal Brief, para. 133.

these individual detainees' specific mistreatment. Next, recalling that a determination as to whether reliance on untested evidence is decisive will depend on the strength of the supporting evidence,[1193] the Panel assessed the evidence relied on by the Trial Panel to corroborate the evidence of individual detainees' specific mistreatment. Specifically, where the Trial Panel relied on a pattern of collective mistreatment of KMF detainees (as corroboration), this assessment involved an examination of the corroborative strength of this pattern. However, the Panel was mindful that (as discussed in detail below) collective mistreatment of KMF detainees effectively ended on or around 5 June 1999 with the arrival of new guards. Moreover, it considered that the determination that these individuals were detained prior to 5 June 1999 was therefore a *sine qua non* for this pattern to have any corroborative strength in this respect. The Panel thus also took into account whether Shala was able to confront the evidence relied upon to determine that an individual was in fact detained prior to 5 June 1999, in light of the critical importance of this determination. Lastly, the Panel considered the Trial Panel's findings in respect of whether these individuals were subjected to inhumane detention conditions – again, taking into account the impact of the arrival of new guards and the above considerations arising therefrom (*mutatis mutandis*).

(i) TW4-04

512. The Panel notes that the only specific evidence of TW4-04's individual mistreatment relied upon by the Trial Panel was that of untested witness [REDACTED].[1194] [REDACTED] did not provide any details in respect of TW4-04's mistreatment, stating only that "He was tortured a lot".[1195] As noted by the Trial Panel, [REDACTED]'s account on this point comprises (potentially multiple levels of)

[1193] See above, para. 479.
[1194] See Trial Judgment, para. 728, fn. 1485.
[1195] See [REDACTED].

hearsay evidence;[1196] and in his own statement, TW4-04 denied having been personally mistreated.[1197]

513. The Trial Panel deemed [REDACTED]'s evidence on this matter reliable after noting, *inter alia*, that [REDACTED]'s account was "consistent with other reliable evidence before the Panel, attesting to the continuous mistreatment of all the detainees held at the Detention Building".[1198] While no reference was provided for this finding, the Panel observes that elsewhere in the Trial Judgment, the Trial Panel entered findings regarding the "continuous physical and psychological abuse to which the detainees were collectively subjected, notably inside Room 1", based on, *inter alia*, the evidence of live witnesses TW4-01 and TW4-11.[1199] The Trial Panel also entered findings on the inhumane and degrading conditions of detention at the KMF, based on an array of tested and untested evidence.[1200]

514. Recalling that a "pattern of conduct" can provide sufficient corroboration in support of convictions based on untested evidence,[1201] the Panel understands the Trial Panel to have relied upon a "corroborative pattern of evidence" vis-à-vis the evidence of [REDACTED] regarding the specific mistreatment of TW4-04.[1202]

[1196] As noted by the Trial Panel, [REDACTED] did not provide the source of his information regarding the mistreatment of TW4-04. See Trial Judgment, paras 728-729. Moreover, [REDACTED] did not personally see TW4-04 at the KMF. See Trial Judgment, fn. 962.
[1197] See Trial Judgment, para. 729. Regarding the Trial Panel's finding that TW4-04 downplayed the treatment he received, see below, fn. 1227.
[1198] See Trial Judgment, paras 728-729.
[1199] See Trial Judgment, paras 639-653.
[1200] See above, para. 505. The Trial Panel's findings on the detention conditions at the KMF are based on, *inter alia,* the evidence of live witnesses TW4-01, TW4-11, Mr Mark Shala, Mr Hoxha, [REDACTED], TW4-06, TW4-07, TW4-08, TW4-09, TW4-10 and on an Adjudicated Fact. See Trial Judgment, paras 593-638.
[1201] See above, para. 479.
[1202] The Panel notes that during the Appeal Hearing, the SPO argued that evidence of witnesses "who testified" that all the detainees in Room 1 were beaten can provide corroboration for untested evidence regarding "similar episodes [that] happened within the same location or in the room next to Room 1 within the same timeframe". See Transcript, 16 May 2025, p. 143. See also SPO Response Brief, para. 145.

515. However, the Panel recalls that a determination as to whether untested evidence is sufficiently corroborated for the purposes of Rule 140(4)(a) of the Rules is a fact-specific inquiry and must be assessed on a case-by-case basis, and that the central question remains whether a conviction rests decisively on untested evidence.[1203] With this in mind, and regardful of ECtHR jurisprudence establishing that an assessment of whether untested evidence is "decisive" will depend on the strength of the corroborating evidence,[1204] the Appeals Panel must examine the corroborative strength of the pattern of collective mistreatment of KMF detainees, relied on by the Trial Panel.

516. First, the Panel is mindful of the live evidence of TW4-01 (whom the Trial Panel found "credible"[1205]) in respect of disparities in KMF detainees' length of detention and treatment: "Some were kept for a day, two days, three days. Some for a week or two weeks. There were people who were brought in for two or three days and not beaten up because they probably knew somebody higher up the chain, somebody who would have intervened and released them. […] But there were lots who were brought in who were released".[1206]

517. Second, the Panel notes the following findings of the Trial Panel (citing "ample evidence from TW4-01, W01448 and TW4-04"):

> [I]mmediately after the death of the Murder Victim, on or about 5 June 1999, new guards were placed in charge of the Detention Building and that the conditions of the detainees improved. The detainees were provided with blankets and were allowed to wash

[1203] See above, paras 479-480.
[1204] See above, para. 479.
[1205] See Trial Judgment, paras 98-119. See also Section V.E.1.
[1206] Transcript (TW4-01), 6 June 2023, p. 1921. The Panel notes that this extract of TW4-01's evidence was relied on by the Trial Panel, in respect of the fluctuating number of detainees in Room 1. See Trial Judgment, para. 427, fn. 766.

> themselves. The evidence further demonstrates that the detainees were no longer being physically abused and were able to sleep.[1207]

518. The Panel also notes that the SPO has referred to, and relied on, this change in detention conditions at the KMF throughout the trial, including in its charging documents,[1208] in procedural motions,[1209] and in its Final Trial Brief.[1210] It was also relied on during the SPO's examination of witnesses: for instance, where SPO Counsel cross-examined Mr Hoxha, citing "extensive evidence in this case, both orally and in writing" that "things changed radically for the better" after the death of the Murder Victim: "Nobody was beaten. Hygienic conditions improved. People could shower".[1211]

519. At the Appeal Hearing, in response to a question of the Panel, the SPO argued that "despite some marginal improvements in the detainees' conditions, their collective mistreatment and inhumane detention conditions did continue" after the death of the Murder Victim and the arrival of new guards.[1212] Having examined the

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[1207] Trial Judgment, para. 637. The Panel notes that the Trial Panel positively relied upon this improvement in detention conditions to reject Shala's argument that the degrading conditions at the KMF were the "result of necessity", as opposed to an "institutionalised practice" imposed by those in charge of the detainees (see Trial Judgment, paras 636-637). See also Trial Judgment, fn. 1185, para. 1023. The Panel notes that on appeal, Shala did not challenge the Trial Panel's finding in respect of this improvement of detention conditions, and, in fact, argued that this finding was supported by the evidence of TW4-01, TW4-04 and W01448; see Transcript, 15 May 2025, p. 53.

[1208] See e.g. SPO Pre-Trial Brief, paras 1, 63, wherein the SPO submitted that "[t]he beatings of the detainees lasted until 5 June 1999, the day [the Murder Victim] died", and that "a new KLA member was placed in charge of the detainees". See also Indictment, paras 8, 14, wherein 5 June 1999 constitutes the end of the Indictment period of this case.

[1209] See e.g. SPO Rule 153 Application for TW4-04, para. 16, wherein the SPO cited TW4-04's evidence that "conditions got better as there was a change in the management of the prison".

[1210] See SPO Final Trial Brief, para. 197, wherein the SPO submitted that "[w]ith [the new guards'] arrival, the detention conditions at the KMF improved, with the detainees finally being allowed to wash themselves. The beatings, too, stopped. The detainees in Room 1 could finally sleep, even though it was difficult to properly rest in such limited space".

[1211] See e.g. Transcript (Osman Hoxha), 29 November 2023, p. 3846 (private session).

[1212] See Transcript, 15 May 2025, pp. 80-81. The Appeals Panel notes that, in its response to the Panel's question, the SPO submitted that Shala was "neither charged [nor] convicted" for collective mistreatment and inhumane detention conditions that took place after 5 June 1999, which is the end of the Indictment period in these proceedings (see Transcript, 15 May 2025, pp. 80-81). The Appeals Panel clarifies that its question as to whether there existed evidence that collective mistreatment and detention conditions continued beyond 5 June 1999 was posed solely for the purposes of the Panel's

evidence cited by the SPO in support of its position,[1213] the Appeals Panel considers that the cited evidence of mistreatment is better understood as establishing episodic instances of mistreatment specific to certain individuals and/or circumstances (for instance, detainees who witnessed the death of the Murder Victim, or who were transferred from the KMF to the Prizren MUP building on 17 June 1999), rather than evidence that the pattern of collective mistreatment of all detainees at the KMF continued even after the death of the Murder Victim on or about 5 June 1999.[1214] In the same vein, the Appeals Panel considers that the cited evidence does not establish that inhumane and degrading detention conditions (for the purposes of detention conditions as *actus reus* elements of torture) continued after that date.[1215]

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assessment of the corroborative strength and sufficiency of the pattern of mistreatment relied on by the Trial Panel to corroborate untested evidence – and, specifically, for the determination as to whether this pattern of mistreatment applied only to those detained at the KMF prior to the arrival of new guards on 5 June 1999, or whether it applied to all those detained there (in May-June 1999). In this regard, the Panel notes ICTR case law establishing that evidence of events outside the scope of the ICTR's temporal jurisdiction could be relied upon to establish, *inter alia*, a "deliberate pattern of conduct". See *Nahimana et al.* Appeal Judgement, paras 315-316, and references cited therein. See also *Ongwen* Appeal Judgment, para. 304. As developed below, the Appeals Panel considers that this determination is critical to its assessment of whether untested evidence was impermissibly relied upon by the Trial Panel.

[1213] SPO References for Appeal Hearing Question, pp. 1-2.

[1214] In this respect, the Appeals Panel is mindful of the evidence relied on by the Trial Panel on this point, including that of TW4-01, who explained that the new guard "behaved towards us as if we were kept in a normal prison, state prison, where prisoners had rights and were treated correctly"; that of W01448, who stated that on the evening that the Murder Victim died, Xhemshit Krasniqi "came and assured us that nobody would touch us from then on", and "[f]rom that day onwards till [sic] we were shifted to Prizren, the usual beatings stopped"; and that of TW4-04, who stated, "Before I showed up, people were getting mistreated quite badly, but when I got there, there was a change in who was caring for the prisoners and things got a lot better. It was the commander who'd come and see what -- seen what the abuses were, and he changed the situation right away." See Trial Judgment, para. 637, fn. 1217, citing [REDACTED]; P00101 (SITF00013852-00013869 RED6) (W01448) (confidential), pp. 8-9 (SITF00013859-SITF00013860); [REDACTED]. *Compare with* Trial Judgment, paras 640-653, regarding the Trial Panel's findings on collective mistreatment of KMF detainees prior to the death of the Murder Victim.

[1215] In particular, the Appeals Panel notes that (i) W01448's description of the heat as "disastrous" must be understood alongside his evidence that "for the young guys [the heat] was not so bad" (see P00110 (SITF00013736-SITF00013800 RED5) (W01448) (confidential), p. 15 (SITF00013750)); (ii) evidence of the drastic weight loss of TW4-01 and W01448 is not specifically probative of continued scarcity of food *after* the arrival of new guards and the change in conditions; and (iii) the evidence of denial of medical care is limited to TW4-01. See SPO References for Appeal Hearing Question, pp. 1-2.

520. Given that the pattern of collective and/or systematic mistreatment of KMF detainees thus effectively ended with the arrival of new guards on or around 5 June 1999, it follows that the corroborative strength (and therefore sufficiency) of this pattern, vis-à-vis the untested evidence of TW4-04's mistreatment, is conditional upon a determination that TW4-04 was detained at the KMF prior to that date. By extension, the Appeals Panel considers that such a determination is thus of pivotal importance, if not indispensable, to the Trial Panel's finding that TW4-04 was subjected to torture. As such, mindful that the central question remains whether Shala's conviction for the torture of TW4-04 rested decisively on untested evidence, the Panel must also assess the extent to which Shala was afforded the opportunity to confront the evidence relied upon to make such a determination.[1216]

521. The Trial Panel found that TW4-04 was brought to the KMF "sometime around the end of May/beginning of June 1999" and was "released from the KMF sometime around [REDACTED]"; and that he was detained [REDACTED].[1217] The Trial Panel's findings as regards the period of TW4-04's detention appear to be based on TW4-04's own (untested) evidence.[1218] In this regard, the Panel notes the Trial Panel's finding that the only other witness who "[REDACTED]" was [REDACTED], who "[REDACTED]".[1219] However, the Trial Panel also found that "TW4-04's detention at the KMF is confirmed by the statements of Mr Kryeziu".[1220]

522. The evidence of TW4-04, [REDACTED] and Mr Kryeziu is untested: Mr Kryeziu's written statements were admitted pursuant to Rule 155 of the Rules, as

[1216] To this end, the Appeals Panel invited the Parties to answer the following question at the Appeal Hearing: "What live evidence on the trial record supports or rebuts the allegation that [TW4-04, [REDACTED], [REDACTED], and [REDACTED]] were i) detained at the KMF; ii) prior to the death of the Murder Victim, on or about 5 June 1999?". See Order for Preparation of Appeal Hearing, para. 2(i).
[1217] See Trial Judgment, paras 513-518, 526-527.
[1218] See Trial Judgment, paras 513-515, 526-527, and references cited therein.
[1219] See Trial Judgment, para. 521, fn. 962.
[1220] *Compare* Trial Judgment, fn. 962, where the Trial Panel found that, beside [REDACTED], "[REDACTED]" *with* Trial Judgment, para. 521, where the Trial Panel found that "TW4-04's detention at the KMF is confirmed by the statements of Mr Kryeziu".

he is deceased; while those of [REDACTED] and TW4-04 were admitted without cross-examination, pursuant to Rule 153 of the Rules.[1221]

523. During the Appeal Hearing, the SPO argued that live evidence of TW4-01 corroborated TW4-04's untested evidence regarding the period of his detention: specifically, that TW4-01's evidence that after the [REDACTED], the Murder Victim was briefly taken to [REDACTED], was corroborative of TW4-04's evidence that a detainee "whom [he] later learned was the murder victim" was brought to [REDACTED] where he was detained; and that read together, this suggested that TW4-04 was detained prior to the death of the Murder Victim.[1222] While the accounts of TW4-01 and TW4-04 appear consistent on this matter, the Panel is mindful that [REDACTED],[1223] which therefore might impact the corroborative strength of TW4-01's evidence on this matter.[1224] Moreover, recalling that the Panel's present concern is Shala's ability to confront evidence of TW4-04's detention at the KMF during the period when collective mistreatment was ongoing, the Panel notes that TW4-01's live evidence does not specifically refer to TW4-04's presence in [REDACTED], to which the Murder Victim was taken.[1225]

524. In any event, the Panel notes that according to TW4-04, this encounter took place on his first night at the KMF, and it was the very next day that new guards were brought and detention conditions improved.[1226] In this regard, even if the Panel were

[1221] See above, para. 439.
[1222] See Transcript, 15 May 2025, p. 86 (private session).
[1223] See Trial Judgment, para. [REDACTED], fn. [REDACTED], citing [REDACTED].
[1224] The Panel notes that, as TW4-04 was not called to testify regarding this encounter, no clarification regarding what exactly he [REDACTED] was elicited, which could have allowed a more complete assessment of the independence of TW4-04's evidence.
[1225] See Transcript (TW4-01), 31 May 2023, p. 1523 (private session). The Panel also notes that, in fact, TW4-01 refers to a *different* individual, i.e. [REDACTED] at the time. The Panel also notes the Trial Panel's finding that "[REDACTED]." See Trial Judgment, fn. [REDACTED]. See also Transcript, 16 May 2025, p. 167.
[1226] See [REDACTED], cited at Trial Judgment, para. [REDACTED], fn. [REDACTED]. The Appeals Panel is mindful that the Trial Panel relied on TW4-04's account of this encounter as corroboration for the [REDACTED] to the Leg-Shooting Incident, which led to the death of the Murder Victim. This is

to consider that TW4-01's evidence corroborated TW4-04's untested account regarding the timing of his detention, the Panel notes that this would mean that TW4-04's detention at the KMF overlapped with the period of collective mistreatment by one day — a fact which also affects the Panel's assessment of whether the pattern of collective mistreatment can sufficiently corroborate TW4-02's untested evidence of TW4-04's mistreatment.

525. To summarise, therefore, in respect of the corroborative strength of the pattern of mistreatment at the KMF, the Panel notes: (i) the lack of detail in [REDACTED]'s indirect untested account of TW4-04's mistreatment, which TW4-04 denied;[1227] (ii) the fact that the evidence relied on to establish that TW4-04 was detained while collective mistreatment was ongoing at the KMF was also untested;[1228] (iii) that in any event, it was immediately after TW4-04's arrival that collective mistreatment at the KMF ended, with the arrival of new guards;[1229] and (iv) that TW4-04 was initially detained

despite the fact that TW4-04 stated that the individual he encountered died "that night" and that it was the very next day that new guards were brought to the KMF, which would suggest that the encounter (and his first night at the KMF) took place following the Leg-Shooting Incident (see also SPO Pre-Trial Brief, para. 60, wherein TW4-04's account of hearing gunshots on his first night at the KMF is relied on by the SPO in respect of the Leg-Shooting Incident). The Panel is also mindful that TW4-04 was not called to testify about, and thus potentially clarify, the timing of this encounter.

[1227] See above, para. 512. The Panel is cognisant of the Trial Panel's findings that TW4-04 "downplayed" the treatment he received while at the KMF, which was based on [REDACTED]'s (untested) contradictory statement, as well as "numerous accounts of other witnesses who were detained and mistreated at the compound at the same time and provided evidence that all detainees at the KMF were mistreated" (see Trial Judgment, para. 132). The Appeals Panel recalls that it has upheld the Trial Panel's findings on TW4-04's credibility more broadly, including in respect of his downplaying of treatment of other detainees at the KMF (see above, Section V.E.5.). Regarding TW4-04's *own* mistreatment specifically, however, the Panel is nonetheless mindful of TW4-01's evidence regarding disparities in treatment of KMF detainees, including that some detainees "were brought in for two or three days and not beaten up" (see above, para. 516); the fact that TW4-04 was initially detained in Room 3, and thus separately from most other detainees (see below, fn. 1230); and the fact that collective mistreatment of detainees ended immediately after TW4-04's arrival at the KMF (see above, para. 517, fn. 1214).

[1228] See above, paras 521-523.

[1229] See above, para. 517, fn. 1214. The Panel recalls that TW4-04's evidence was expressly relied upon by the Trial Panel in reaching its finding that detention conditions improved immediately after the death of the Murder Victim and the arrival of new guards. See above, para. 517.

in [REDACTED], separately from most other detainees.[1230] In the circumstances, the Panel considers that the pattern of collective mistreatment of detainees at the KMF does not sufficiently corroborate the untested evidence of [REDACTED] for the purposes of Rule 140(4)(a) of the Rules.

526. The Appeals Panel now turns to the Trial Panel's finding that TW4-04 was "kept in inhumane and degrading conditions [at] the KMF at the time relevant to the charges",[1231] which finding was in turn relied upon in the Trial Panel's findings on the material elements of torture.[1232]

527. The Panel considers that the Trial Panel's determination that TW4-04 was detained at the KMF prior to the arrival of new guards and improvement of detention conditions there, is also an indispensable condition for the Trial Panel's finding that TW4-04 was subjected to inhumane and degrading detention conditions at the KMF.[1233] As noted above, the Trial Panel's findings regarding TW4-04's period of detention appear to be based on TW4-04's own untested evidence; and in any event, the only witnesses who referred to TW4-04's detention at the KMF were the non-live witnesses TW4-04, [REDACTED] and Mr Kryeziu.[1234] As such, Shala was not afforded any meaningful opportunity to confront the evidence relied upon to enter the indispensable finding that TW4-04 was detained at the KMF while inhumane and degrading detention conditions were ongoing. Lastly, the Panel is also mindful that,

[1230] See Trial Judgment, paras 516-518, 521. The Panel observes in this regard that the Trial Panel's findings on collective mistreatment predominantly relate to Room 1 detainees. See Trial Judgment, paras 640-653.
[1231] See Trial Judgment, para. 638. The Panel understands the Trial Panel's reference to the "period relevant to the charges" to be a reference to the Indictment period of the SPO case, i.e. between approximately 17 May 1999 and 5 June 1999. See Indictment, paras 8, 14, 18, 28, 31.
[1232] See Trial Judgment, para. 971.
[1233] See also Trial Judgment, para. 378 (in particular, the Trial Panel's use of the term "to the extent that").
[1234] See above, paras 521-523.

as found above, TW4-04's own evidence indicates that the drastic improvement in detention conditions took place the very next day after his arrival.[1235]

528. In sum therefore, the Appeals Panel observes that Shala was not afforded the opportunity to cross-examine [REDACTED], who was the sole witness to provide (unsourced) untested hearsay evidence of TW4-04's specific mistreatment, which TW4-04 himself denied took place. Nor was Shala afforded the opportunity to cross-examine TW4-04, whose own evidence was relied upon to find that he was detained at the KMF prior to 5 June 1999, namely before detention conditions at the KMF materially improved. In this regard, the Panel considers that the Trial Panel's finding that TW4-04 was detained at the KMF *prior* to the improvement in detention conditions is indispensable for Shala's conviction for the torture of TW4-04, given (i) the Trial Panel's reliance on the pattern of collective mistreatment to corroborate [REDACTED]'s untested evidence; and (ii) the Trial Panel's finding that TW4-04 was subjected to inhumane and degrading detention conditions.

529. The Appeals Panel thus considers that the untested evidence of [REDACTED], TW4-04 and Mr Krezyiu was determinative of the Trial Panel's findings that TW4-04 was mistreated and subjected to inhumane conditions of detention. The Appeals Panel emphasises that no live evidence was called or elicited in respect of TW4-04's very detention at the KMF, let alone his mistreatment. The Panel therefore finds that Shala's conviction for the torture of TW4-04 was based to a decisive extent on the evidence of witnesses whom he had no opportunity to examine.

[1235] See above, para. 525. The Appeals Panel also notes the Trial Panel's findings on the legal elements of torture, i.e. that "Conditions imposed during detention such as beatings, sexual violence, *prolonged denial* of sleep, food, hygiene and medical care" (emphasis added). See Trial Judgment, para. 965.

(ii) [REDACTED]

530. The Panel notes that the only evidence of [REDACTED]'s specific mistreatment relied upon by the Trial Panel was a statement of untested witness TW4-02.[1236] The Panel is mindful of the lack of detail in TW4-02's cited evidence in this regard.[1237] It also observes that, while the Trial Panel noted that TW4-02's information in this respect was sourced from [REDACTED], no express consideration was given to its hearsay nature vis-à-vis its reliability.[1238]

531. The Trial Panel deemed TW4-02's evidence of [REDACTED]'s mistreatment reliable "in particular because it is consistent with the pattern of mistreatment of all other detainees held in the Detention Building".[1239] The Appeals Panel understands the Trial Panel to have thus relied on a "corroborative pattern of evidence".[1240] Adopting the same approach as above,[1241] in order to evaluate the corroborative sufficiency of this pattern vis-à-vis [REDACTED]'s mistreatment, the Panel will examine the Trial Panel's findings as regards the period of [REDACTED]'s detention, and the evidential underpinnings thereof.

532. While the Trial Panel noted that it had "not received any evidence regarding the circumstances surrounding the arrest of [[REDACTED]], the duration of [his]

[1236] See Trial Judgment, paras 583, fn. 1095, citing P00146_ET (060664-TR-ET Part 4) (TW4-02) (confidential), p. 10, 728, fn. 1490.
[1237] The extract in respect of [REDACTED]'s specific mistreatment, in its entirety, is as follows: "Q. At Kukes, did [REDACTED] tell you that he had been tortured or mistreated? A. Yes. Yes." See P00146_ET (060664-TR-ET Part 4) (TW4-02) (confidential), p. 10, cited at Trial Judgment, para. 728, fn. 1490.
[1238] See Trial Judgment, para. 728. The Appeals Panel also notes that this information is part of a longer extract of TW4-02's written evidence, containing "additional personal details regarding [[REDACTED]] place of origin, nickname and activities before the conflict", relied upon by the Trial Panel to establish [REDACTED]'s identity; and that in this extract, TW4-02 stated in respect of [REDACTED] (i.e. the source of his hearsay information): "He was a deceiver all his life, a deceiver. He would lie. He was a liar". See P00146_ET (060664-TR-ET Part 4) (TW4-02) (confidential), p. 9, cited (within longer extracts) at Trial Judgment, para. 582, fns [REDACTED], 1093.
[1239] The Panel notes that the Trial Panel made this finding in the context of its factual findings on arbitrary detention. See Trial Judgment, para. 583.
[1240] See above, para. 514. See also SPO Response Brief, para. 145.
[1241] See above, paras 511, 515-520.

detention, or details of [his] release", it found that [REDACTED] was detained in Rooms 1 and 3 of the KMF Detention Building during the period relevant to the charges, on the basis of the evidence of TW4-01, TW4-02 and W01448.[1242]

533. The only *live* evidence relied upon in this regard was that of TW4-01, given the untested nature of the evidence of TW4-02[1243] and W01448.[1244] In TW4-01's cited evidence, he stated that he was detained with [REDACTED]; however, he provided no details in respect of the period of their detention.[1245] Noting that TW4-01 was detained at the KMF between approximately 19 May 1999 and [REDACTED] 1999, the Panel considers that TW4-01's live evidence is inconclusive as to whether [REDACTED] was detained prior to 5 June 1999.[1246] The Panel notes that during the Appeal Hearing, in response to a question of the Panel, the SPO argued that TW4-01's

[1242] See Trial Judgment, paras 582-583. The Appeals Panel also notes that the Trial Panel found elsewhere in the Trial Judgment that [REDACTED]'s detention in Room 3 coincided with that of TW4-04. See Trial Judgment, paras 519, 524-525. See also Transcript, 15 May 2025, p. 82 (redacted).

[1243] The Appeals Panel notes that the cited extract of TW4-02's evidence relied upon by the Trial Panel does not specify the timing or duration of [REDACTED]'s detention. See Trial Judgment, fn. 1093, referring to P00146_ET (060664-TR-ET Part 4) (TW4-02) (confidential), pp. 5, 8-11. However, the Panel notes that elsewhere in the Trial Judgment, the Trial Panel noted TW4-02's evidence regarding his co-detainees at the KMF (including [REDACTED]), wherein he stated "I found them there and I left them there", which the Trial Panel understood to be TW4-02 stating that, *inter alia*, [REDACTED] was "detained prior to his arrival and remained at the KMF after his release". See Trial Judgment, para. 543. The Panel also notes the Trial Panel's finding that TW4-02 was detained at the KMF "[REDACTED]" and released "mid-June 1999". See Trial Judgment, paras 539, 551. However, the Panel reiterates, for the purposes of its Rule 140(4)(a) assessment in respect of the evidence underpinning Shala's conviction for the torture of [REDACTED], that TW4-02's evidence was untested.

[1244] The Appeals Panel notes that the extract of W01448's written statement relied upon by the Trial Panel is ambiguous as to the period of [REDACTED]'s detention. See Trial Judgment, fn. 1094, referring to P00112 (SITF00016221-00016285 RED4) (W01448) (confidential), p. 17 (SITF00016237) ("In the bigger room we were 13 and another from Smolica and they beat us in the room where we stayed and slept. There was another [REDACTED]. [REDACTED]."). See also P00104 (U003-2232-U003-2232-ET) (W01448) (confidential) (wherein 15 detainees in Room 1 are listed; see in particular, "Initially there were 13 of us, later the number increased"). During the Appeal Hearing, the SPO argued that W01448's (untested) evidence indicated that [REDACTED] was detained prior to the Murder Victim's death, citing (i) his sketch of Room 1 in which [REDACTED] and the Murder Victim "are drawn as being present at the same time"; and (ii) his statement, in which he lists [REDACTED] and the Murder Victim as co-detainees in Room 1. See Transcript, 15 May 2025, pp. 82-83 (redacted).

[1245] See Transcript (TW4-01), 30 May 2023, pp. 1433-1434 (private session), cited at Trial Judgment, fn. 1092.

[1246] See Trial Judgment, paras 379-382, 395, 401.

evidence regarding the fact that [REDACTED] detained in Room 1 should be understood as referring to "the beginning of [TW4-01's] detention".[1247] Having examined the cited evidence, the Panel is unpersuaded by the SPO's interpretation.[1248]

534. The Panel therefore finds that, although the detention of [REDACTED] has been established on the basis of live evidence of TW4-01, he did not provide evidence regarding the timing of [REDACTED]'s detention vis-à-vis the change in detention conditions at the KMF.[1249]

535. To summarise in respect of the corroborative pattern of evidence vis-à-vis [REDACTED]'s mistreatment, the Panel notes: (i) the lack of detail in TW4-02's untested hearsay account of [REDACTED]'s mistreatment; and (ii) that the Trial Panel's finding that [REDACTED] was detained at the KMF prior to the change in detention conditions was not based on live evidence. In the circumstances, the Appeals Panel considers that the pattern of collective mistreatment of detainees at the KMF cannot sufficiently corroborate the untested evidence of TW4-02 in respect of the mistreatment of [REDACTED], for the purposes of Rule 140(4)(a) of the Rules.

536. The Panel next turns to the Trial Panel's findings that "to the extent that" he was held at the KMF "at the time relevant to the charges", [REDACTED] was subjected to inhumane and degrading conditions of detention.[1250] The Panel reiterates in this

[1247] See Transcript, 15 May 2025, pp. 83-84 (private session).
[1248] The Panel observes that when TW4-01 was specifically asked who was in Room 1 when TW4-01 was first brought there, he was unable to recall anyone except the Roma musicians; and it was only after SPO Counsel mentioned the fact that "at some point" more detainees were brought into the room, and subsequently asked for the names of other co-detainees, that TW4-01 provided the name of [REDACTED]. Furthermore, the fact that [REDACTED] also provided the name of TW4-02 whom, according to the Trial Panel, was brought to the KMF "sometime around [REDACTED]" (see Trial Judgment, para. 539), also rebuts the SPO's suggestion that TW4-01 was referring to "the beginning of [TW4-01's] detention" when he named [REDACTED] and [REDACTED] as his co-detainees. See Transcript (TW4-01), 30 May 2023, pp. 1431, 1433-1434 (private session).
[1249] See above, para. 533, where the Panel finds that W01448 and TW4-02 provided untested evidence related to the timing of [REDACTED]'s detention.
[1250] See Trial Judgment, para. 638.

regard the untested evidential underpinnings of the Trial Panel's finding that [REDACTED] was detained prior to the change in detention conditions at the KMF.[1251] It also recalls the Trial Panel's finding that it received no live evidence regarding the duration of [REDACTED]'s detention.[1252]

537. In light of the above, the Appeals Panel considers that Shala's conviction for the torture of [REDACTED] was based to a decisive extent on the evidence of witnesses whom he had no opportunity to examine.

(iii) [REDACTED]

538. The Panel notes that Shala challenges the Trial Panel's findings as to the mistreatment of [REDACTED] under Ground 8A of his Appeal Brief.[1253] However, the Panel observes that in the Trial Judgment, the Trial Panel addressed, and entered findings in respect of, [REDACTED] and [REDACTED] collectively.[1254] The Panel further notes that under Ground 7, Shala challenges the Trial Panel's findings in respect of the arbitrary detention of both [REDACTED] and [REDACTED].[1255] The Panel will therefore address *proprio motu* the Trial Panel's findings in respect of the torture of [REDACTED] under Ground 7, instead of Ground 8A.[1256]

539. Unlike [REDACTED] himself, the Panel notes that the Trial Panel received no evidence whatsoever regarding the specific mistreatment of [REDACTED].[1257] However, the Trial Panel noted that [REDACTED] was held in Room 1 of the KMF Detention Building, and relied on the evidence of collective mistreatment of detainees

[1251] See above, paras 533-534.
[1252] See above, para. 532; Trial Judgment, paras 582-583. In this regard, the Panel is mindful of the Trial Panel's findings on the legal elements of torture, i.e. that "Conditions imposed during detention such as beatings, sexual violence, *prolonged denial* of sleep, food, hygiene and medical care" (emphasis added). See Trial Judgment, para. 966.
[1253] Appeal Brief, para. 158.
[1254] See e.g. Trial Judgment, paras 582-583.
[1255] See below, paras 568-575.
[1256] See also below, paras 714-715.
[1257] See Trial Judgment, para. 730.

held in that room, to find that "the only reasonable conclusion based on the evidence" was that he too was mistreated while detained at the KMF.[1258]

540. Moreover, the Trial Panel found that "to the extent that" he was held at the KMF "at the time relevant to the charges", [REDACTED] was subjected to inhumane and degrading conditions of detention.[1259]

541. The Panel will therefore examine the evidential underpinnings of the Trial Panel's finding that [REDACTED] was detained at the KMF during the period when inhumane and degrading detention conditions and collective mistreatment of detainees was ongoing, given that this finding is indispensable to Shala's conviction for the mistreatment of [REDACTED].

542. The Trial Panel's conclusion that [REDACTED] was held in Room 1 of the KMF at the time relevant to the charges was based on the same evidence as that relied on in respect of [REDACTED] himself.[1260] The Panel reiterates that the cited evidence of TW4-01 – i.e. the only live evidence – is inconclusive as to the timing of [REDACTED] detention.[1261]

543. As such, the Panel considers that Shala's conviction for the torture of [REDACTED] was based to a decisive extent on the evidence of witnesses whom he had no opportunity to examine.

[1258] See Trial Judgment, para. 730.
[1259] See Trial Judgment, para. 638.
[1260] See Trial Judgment, para. 582.
[1261] See above, para. 533.

(iv) [REDACTED]

544. The Panel notes that the only evidence of [REDACTED]'s specific mistreatment relied upon by the Trial Panel was that of untested witnesses W01448 and [REDACTED], which the Trial Panel deemed corroborative.[1262]

545. In the extracts relied upon by the Trial Panel, W01448 stated that [REDACTED] was "beaten outside the room", and that when [REDACTED] returned, W01448 saw him putting broken false teeth in his pocket.[1263] [REDACTED] stated that throughout the period of his own detention, [REDACTED] "did not suffer", but that [REDACTED] told him that prior to [REDACTED]'s arrival, he was tortured, though [REDACTED] did not see any injuries or signs of mistreatment on his face.[1264]

546. The Appeals Panel recalls that where untested evidence is being relied upon to corroborate other untested evidence, a trial panel must exercise caution to ensure that findings indispensable for a conviction do not rest solely or decisively on untested evidence.[1265] In this respect, the Panel is mindful that, contrary to the Trial Panel's findings on the specific mistreatment of TW4-04 and [REDACTED] addressed above,[1266] the Trial Panel did not expressly rely on evidence of a pattern of collective

[1262] See Trial Judgment, paras 727-728, 731. The Appeals Panel notes that at paragraph 647 of the Trial Judgment, the Trial Panel found that "TW4-01 graphically recalled [REDACTED]: 'when he was brought back later in the evening to the room, I removed his shirt and actually a part of his skin came off with the shirt'". The Panel understands this finding to comprise a typographical error, as TW4-01's evidence on this incident related to [REDACTED] (i.e. "the one from Suhareke") and not to [REDACTED], as is clear from the transcript extract cited by the Trial Panel (see Transcript (TW4-01), 31 May 2023, p. 1538; Trial Judgment, fn. 1243) and other references in the Trial Judgment collectively indicating that the Trial Panel is referring to [REDACTED], and not to [REDACTED] as being the "person from Suhareka/Suharekë" (see Trial Judgment, para. 389; see also Trial Judgment, paras 543-544, 573). The Panel also notes the Trial Panel's findings in respect of TW4-04's account of [REDACTED]'s mistreatment. See Trial Judgment, para. 134.
[1263] See Trial Judgment, para. 728, fn. 1488, referring to P00101 (SITF00013852-00013869 RED6) (W01448) (confidential), p. 7 (SITF00013858); P00110 (SITF00013736-SITF00013800 RED5) (W01448) (confidential), pp. 25-26 (SITF00013760-SITF00013761).
[1264] See Trial Judgment, para. 728, fn. [REDACTED], referring to [REDACTED].
[1265] See above, para. 480.
[1266] See above, paras 514, 531.

mistreatment of KMF detainees to corroborate the untested evidence of W01448 and [REDACTED] regarding [REDACTED]'s mistreatment.[1267]

547. The Panel further notes the Trial Panel's finding that, "to the extent that" [REDACTED] was detained at the KMF "at the time relevant to the charges," he was subjected to "inhumane and degrading conditions of detention".[1268]

548. Regarding [REDACTED]'s period and location of detention, the Trial Panel found that W01448, [REDACTED] and TW4-04 "provide mutually corroborative accounts regarding [his detention] during the period relevant to the charges", and found that he was "detained in Room 3 while at the KMF".[1269]

549. During the Appeal Hearing, in response to a question from the Panel as to whether there was any live evidence on the trial record of [REDACTED]'s detention at the KMF, the SPO cited the testimony of TW4-11 in respect of a "[REDACTED]" with whom he had been detained in Room 1.[1270] The Panel notes, however, that the Trial Panel understood TW4-11's reference to the "[REDACTED]" to be a reference not to [REDACTED], but to W04733, whom TW4-11 identified in a photograph as such; and that the Trial Panel positively relied on TW4-11's visual identification of W04733 as the "person he believed to be the '[REDACTED]'" to conclude that TW4-11 and W04733 were co-detainees at the KMF.[1271] The Panel is also mindful that the

[1267] Contra Transcript, 15 May 2025, pp. 88-89; SPO Response Brief, para. 105. See *Karadžić* Appeal Judgement, paras 462, 464, 467, 470, 473, where the IRMCT Appeals Chamber found that the Trial Chamber had not explicitly relied on evidence of a "pattern of conduct" to corroborate untested evidence underpinning the accused's convictions in respect of five underlying criminal incidents. The Appeals Chamber subsequently reversed the Trial Chamber's findings (see above, para. 484, fn. 1119). See also Victims Response Brief, para. 81.
[1268] See Trial Judgment, para. 638.
[1269] See Trial Judgment, paras [REDACTED]. The Appeals Panel observes that while the Trial Panel noted that W01448, [REDACTED] and TW4-04 identified [REDACTED] as being present in both Room 1 and Room 3 at the KMF, ultimately, the Trial Panel appears to have found that he was detained in Room 3, finding that it "relies on TW4-04's evidence in this regard".
[1270] Transcript, 15 May 2025, pp. 86-88 (private session).
[1271] See Trial Judgment, paras 426-429. See also Transcript, 16 May 2025, pp. 167-168.

SPO did not seek to clarify TW4-11's evidence as to the identity of the "[REDACTED]" following his identification of W04733 as such during cross-examination. The Panel therefore does not accept the SPO's suggestion that the Trial Panel relied on the live evidence of TW4-11 to establish that [REDACTED] was detained in Room 1 of the KMF.[1272]

550. The Appeals Panel thus notes that the Trial Panel relied on the untested evidence of W01448, [REDACTED] and TW4-04 in respect of [REDACTED]'s specific mistreatment and the timing and location of his detention.[1273] Whereas W01448 was unavailable to testify due to him being deceased, as noted above, neither [REDACTED] nor TW4-04 were made available by the SPO for cross-examination.[1274]

551. Consequently, the Panel finds that Shala was not afforded the opportunity to cross-examine the witnesses on whose untested evidence the Trial Panel relied to find

[1272] Contra Transcript, 15 May 2025, p. 86 (private session). In light of the above, the Panel considers that the Trial Panel's reference to "TW4-11's […] evidence regarding the detention of [[REDACTED]] at the KMF" to be a typographical error, in particular, given that the extract cited by the Trial Panel is the same extract cited by the Trial Panel in support of its conclusion that TW4-11's reference to the "[REDACTED]" with whom he was detained was in fact W04733. See Trial Judgment, paras 426, 524, both citing Transcript (TW4-11), 2 May 2023, p. 1216 (private session). The Panel also notes that in contrast, the Trial Panel did not list [REDACTED] among TW4-11's co-detainees at the KMF (see Trial Judgment, paras 426, 428-429).

[1273] During the Appeal Hearing, in response to the Panel's question seeking live evidence of the timing of [REDACTED]'s detention, the SPO only cited the untested evidence of W01448 (specifically W01448's sketch; see above, fn. 1244 and TW4-04's untested hearsay evidence that [REDACTED] told him he had been beaten in Room 1, which the SPO argued indicated he was detained prior to the change in detention conditions. See Transcript, 15 May 2025, pp. 87-88 (private session). Setting aside the fact that this evidence was untested, the Panel also notes that in subsequent written evidence, TW4-04 stated under oath that he "[didn't] believe [[REDACTED]] was mistreated". See P00162 (SPOE00014669-00014751 RED) (TW4-04) (confidential) p. 25 (SPOE00014693). See also Trial Judgment, para. 132, regarding the Trial Panel's findings that TW4-04 "downplayed" the mistreatment of other detainees.

[1274] See above, para. 439. The Panel notes that, in support of Shala's objection to the SPO Rule 153 Application for [REDACTED], Shala specifically argued that [REDACTED] was "allegedly detained in a [REDACTED] than [live witnesses] TW4-01 and TW4-11 and has provided information regarding the alleged detainees in his [REDACTED]". In addition, Shala cited the exact extract of [REDACTED]'s written statement that the Trial Panel subsequently relied upon to find that [REDACTED] was "detained at the KMF during the period relevant to the charges". See Defence Response to SPO Rule 153 Application for [REDACTED], para. 30, fn. 46; Trial Judgment, para. [REDACTED], fn. [REDACTED]. The extract in question is [REDACTED].

that [REDACTED] was mistreated, or to find that he was detained at the KMF prior to the "radical" improvement in detention conditions there.[1275] While mindful that [REDACTED] and W01448 provide corroborative (albeit hearsay or circumstantial) evidence of his mistreatment, the Panel must afford due weight to the fact that the SPO did not lead any live evidence regarding [REDACTED]'s very detention at the KMF, let alone regarding [REDACTED]'s mistreatment, that could have been confronted by Shala at trial.[1276] In such circumstances, the Appeals Panel considers that Shala's conviction for the torture of [REDACTED] was based to a decisive extent on the evidence of witnesses whom he had no opportunity to cross-examine.

(v) [REDACTED]

552. The Panel notes that the sole witness who gave direct evidence of [REDACTED]'s specific mistreatment was W01448.[1277] As noted by the Trial Panel, W01448's written statement contained an eyewitness account of the physical abuse endured by [REDACTED] and "another female detainee he identified as [REDACTED]" in the Office, on or around 20 May 1999.[1278]

553. The Panel also notes that the Trial Panel found that W01448's evidence was corroborated by TW4-01's account of the mistreatment of [REDACTED], on that same occasion.[1279] However, TW4-01's account of this incident did not contain any reference to the presence or mistreatment of a second female detainee.[1280] The Panel considers

[1275] Regarding the fact that Trial Panel did not expressly rely on evidence of a pattern of collective mistreatment of KMF detainees to corroborate the untested evidence of [REDACTED]'s mistreatment (see above, para. 546): the Panel notes that in any event, the fact that the indispensable finding as to [REDACTED]'s detention prior to the change in detention conditions was based on untested evidence would mean that any such pattern does not sufficiently corroborate the untested evidence of [REDACTED]'s mistreatment, keeping in mind its hearsay and circumstantial nature, and the Trial Panel's finding that he was detained in Room 3. Contra Response Brief, para. 145. See also *Karadžić* Appeal Judgement, Partially Dissenting Opinion of Judge Joensen, para. 145.
[1276] See below, para. 600.
[1277] See Trial Judgment, paras 716-717, 720.
[1278] See Trial Judgment, paras 716-717. See also Transcript, 15 May 2025, pp. 84-86 (private session).
[1279] See Trial Judgment, para. 717.
[1280] See Transcript (TW4-01), 30 May 2023, pp. 1450-1477 (private session).

that, the essential core of the inquiry being the presence and mistreatment of [REDACTED] specifically, the fact that TW4-01 did not mention a second female detainee being present or mistreated during this incident must mean that W01448's account is not corroborated by TW4-01 on [REDACTED]'s specific mistreatment.[1281] Indeed, the fact that TW4-01 did not mention this could reasonably be understood as a potential inconsistency in their accounts, in particular, given that W04733 (who was also personally mistreated during this incident in the Office) also did not mention the presence of a second female detainee there that evening, in his written evidence relied upon by the Trial Panel regarding the 20 May 1999 Incident.[1282]

554. The Panel is also mindful that, like in the case of [REDACTED], and contrary to the Trial Panel's findings on the specific mistreatment of TW4-04 and [REDACTED] addressed above,[1283] the Trial Panel did not expressly rely on evidence of a pattern of collective mistreatment of KMF detainees to corroborate the untested evidence of W01448.[1284]

555. Next, the Panel notes the Trial Panel's finding that "to the extent that" [REDACTED] was detained at the KMF "at the time relevant to the charges" she was subjected to "inhumane and degrading conditions of detention".[1285] The Panel notes that, whereas the Trial Panel noted that it had "not received any evidence regarding [REDACTED]'s exact location and conditions of her detention", it nonetheless concluded, "in light of the abundance of mutually corroborative evidence establishing that the detainees at the KMF were held in insufficient and inadequate living and

[1281] See also *Karadžić* Appeal Judgement, paras 465-466; *Gbagbo* Appeal Judgment, paras 356-358.
[1282] See Trial Judgment, para. 718, citing P00118 (SPOE00185335-00185363 RED3) (W04773) (confidential) p. 7 (SPOE00185341); P00122 (106978-107020) (W04773) (confidential) p. 10 (106987); P00123 (SPOE00013793-SPOE00013847 RED2) (W04773) (confidential) p. 27 (SPOE00013819). The Panel notes the Trial Panel's finding that both W04733 and TW4-01 were taken out of the Office at one point during this incident; see Trial Judgment, paras 693, 716.
[1283] See above, para. 546.
[1284] See SPO Response Brief, para. 145.
[1285] See Trial Judgment, para. 638.

sleeping conditions" that "the only reasonable conclusion is that [REDACTED] was held under similar conditions, especially considering that, like the rest of the detainees, [REDACTED] was severely mistreated, interrogated and had accusations levied against her during her detention at the KMF".[1286]

556. The Panel will therefore examine the evidential underpinnings of the Trial Panel's indispensable finding that [REDACTED] was detained at the KMF prior to the change in detention conditions there. In this regard, the Panel notes that the Trial Panel found that while it could not "enter detailed findings" in respect of [REDACTED]'s location or period of detention, it concluded that [REDACTED] was "detained in the Detention Building or elsewhere at the KMF throughout the time period relevant to the charges".[1287] The Panel understands the Trial Panel to have relied solely on the evidence of W01448 in this regard, given that the latter is the only witness cited by the Trial Panel to mention a detainee by the name of [REDACTED].[1288]

557. During the Appeal Hearing, in response to a question from the Panel as to whether there was any live evidence on the trial record of [REDACTED]'s detention at the KMF, the SPO referenced TW4-01's evidence regarding two "sisters from Đakovica/Gjakovë" whom he stated were detained and mistreated at the KMF; and argued that it was "fully within the [Trial] Panel's discretion to find that one of [the two sisters]" was in fact [REDACTED].[1289] However, in the Trial Judgment, the Trial Panel expressly found that it was unable to "conclusively establish" whether [REDACTED] was one of the two "sisters from Đakovica/Gjakovë".[1290] In the circumstances, contrary to the SPO's argument, the Panel does not consider TW4-01's

[1286] See Trial Judgment, para. 610.
[1287] See Trial Judgment, para. 572.
[1288] See Trial Judgment, paras 564-572.
[1289] See Transcript, 15 May 2025, pp. 84-85 (private session).
[1290] See Trial Judgment, paras 570-571.

testimony regarding the mistreatment of the "sisters from Đakovica/Gjakovë" to comprise live evidence of [REDACTED]'s detention at the KMF.[1291]

558. In sum, therefore, the Panel observes that the only evidence on the trial record of [REDACTED]'s detention at the KMF, let alone evidence of her specific mistreatment, was the untested evidence of W01448.[1292] While the Panel is mindful that the SPO was not able to call W01448 due to him being deceased, the Panel must nonetheless afford due weight to the fact that the SPO did not lead live evidence regarding [REDACTED]'s very detention at the KMF, or live evidence regarding her mistreatment, that could have been confronted by Shala at trial.[1293]

559. In light of the foregoing, the Panel finds that Shala's conviction for the torture of [REDACTED] was decisively reliant on evidence that Shala was afforded no opportunity to cross-examine.

(vi) Conclusion

560. To conclude on Shala's challenges to the Trial Panel's findings on the torture of TW4-04, [REDACTED] and [REDACTED], [REDACTED], and [REDACTED], the Appeals Panel finds that the Trial Panel erred in relying decisively on untested evidence in entering these findings.

[1291] The Panel also notes that in its Final Trial Brief, the SPO specifically submitted that "The woman referred to by W01448 as [REDACTED], who was beaten in the Office Room during the 20 May 1999 Incident, *may* be one of these two [sisters]" (emphasis added). See SPO Final Trial Brief, para. 103. See also Transcript, 16 May 2025, p. 167.
[1292] See also Transcript, 16 May 2025, p. 167.
[1293] Regarding the fact that the Trial Panel did not expressly rely on evidence of a pattern of collective mistreatment of KMF detainees to corroborate the untested evidence of [REDACTED]'s mistreatment (see above, para. 554): the Panel notes that the fact that the indispensable finding as to [REDACTED]'s detention prior to the change in detention conditions was based on untested evidence would mean that any pattern of mistreatment of KMF detainees (or mistreatment of women generally – see SPO Response Brief, para. 145) would not sufficiently corroborate the untested evidence of [REDACTED]'s mistreatment, keeping in mind that neither TW4-01 nor W07433 mentioned the presence of a second female detainee during the 20 May 1999 Incident. See above, para. 553, fn. 1282.

(d) Alleged Errors in the Trial Panel's Findings on Arbitrary Detention of Specific Individuals

561. The Panel now turns to the remainder of Shala's arguments under this Ground: namely the challenges to his conviction for arbitrary detention in respect of [REDACTED],[1294] [REDACTED] and [REDACTED],[1295] [REDACTED] and another female detainee,[1296] and [REDACTED].[1297]

(i) [REDACTED]

562. With regard to [REDACTED], the Panel understands Shala to be specifically challenging the Trial Panel's findings that [REDACTED] was not properly informed of the reasons for his arrest, and that he was not brought before a judge or competent authority.[1298] The Panel will therefore examine the evidential underpinnings of these findings, which constitute material elements of the crime of arbitrary detention.[1299]

563. First, the Panel observes (and Shala concedes) that the Trial Panel's conclusion that [REDACTED] was not properly informed of the reasons for his arrest or detention was based on (i) TW4-01's live evidence that [REDACTED] was held at the KMF and interrogated on allegations of "keeping company with Serbs"; (ii) TW4-02's written statement that [REDACTED] was held at the KMF for having "collaborated with the Serbs"; and (iii) the fact that [REDACTED]'s detention followed "the same pattern as others who were detained at the KMF on allegations of being spies or collaborators".[1300]

[1294] See Appeal Brief, para. 122.
[1295] See Appeal Brief, para. 124.
[1296] See Appeal Brief, para. 121.
[1297] See Appeal Brief, para. 123.
[1298] See Appeal Brief, para. 122; Trial Judgment, para. 576.
[1299] See below, Section V.H.1.(a).**Error! Reference source not found.**.
[1300] See Trial Judgment, para. 576; Appeal Brief, para. 122.

564. While the Trial Panel did not provide an express reference in respect of this "pattern", the Panel notes the Trial Panel's findings, set out elsewhere in its factual findings on arbitrary detention, in respect of the existence of a pattern whereby detainees were not informed of the reasons for their deprivation of liberty; and observes that this pattern was based in substantial part on the live evidence of TW4-01 and TW4-11 regarding their own arrests and detention, as well as the arrests and detention of the Murder Victim.[1301] The Panel thus understands the Trial Panel to be referring to, and to have relied on the said pattern, in reaching its finding that [REDACTED] was not properly informed of the reasons for his arrest or detention.

565. Second, the Trial Panel's conclusion that [REDACTED] was not brought before a judge or competent authority was based on (i) TW4-01's live evidence of [REDACTED]'s mistreatment; (ii) "the absence of procedural guarantees afforded to any other detainees"; and (iii) the circumstances of his release.[1302]

566. Again, while the Trial Panel did not provide an express reference in respect of finding (ii) above, the Panel notes the Trial Panel's findings on what it deemed "corroborating evidence establishing a pattern of detainees held at the KMF being deprived of their procedural guarantees", citing the evidence of live witnesses TW4-01 and TW4-11 (as well as the written evidence of W04733 and W01448), regarding the fact that they "were not brought before a judge or any other competent authority and

[1301] Specifically, the Trial Panel found that the fact that TW4-01, TW4-11 and the Murder Victim were not informed of the reasons of the deprivation of their liberty "len[t] support to the existence of a pattern in this regard" (see Trial Judgment, para. 470). The Trial Panel's findings that TW4-01, TW4-11 and the Murder Victim were not properly informed of the reasons for their arrests and detention were based, *inter alia*, on the live evidence of TW4-01 and TW4-11 (see Trial Judgment, paras 403, 412, 433-434). The Panel also notes that the Trial Panel's conclusion that W04733 was likewise not informed of the reason for his arrest and detention was based on (in addition to his own written statements) the corroborative live evidence of TW4-08, as well as the above pattern (see Trial Judgment, para. 470). It also notes that the Trial Panel's conclusions that W01448, TW4-05, TW4-04 and TW4-02 were not informed of the reason for their arrests and detention were predominantly based on their own respective written statements (see Trial Judgment, paras 491-492, 509-510, 528, 552-554).
[1302] See Trial Judgment, para. 576.

did not have an opportunity to challenge the lawfulness of their detention".[1303] Regarding the Trial Panel's reliance on finding (iii) above, namely the circumstances of [REDACTED]'s release, the Panel understands the Trial Panel to have relied on the written evidence of W01448.[1304]

567. The Panel thus observes that both impugned findings in respect of [REDACTED] – that he was not properly informed of the reasons for his arrest, and that he was not brought before a judge or competent authority – are substantially underpinned by both direct evidence and pattern evidence of witnesses whom Shala was afforded the opportunity to cross-examine – namely, TW4-01 and TW4-11. The Panel is also mindful of TW4-01's live evidence specifically regarding [REDACTED]'s detention at the KMF.[1305] The Panel therefore considers that Shala has not established that the Trial Panel relied decisively on untested evidence in convicting him of the arbitrary detention of [REDACTED] and thus dismisses Shala's challenge in this regard.

(ii) [REDACTED] and [REDACTED]

568. With regard to [REDACTED] and [REDACTED], Shala challenges the Trial Panel's finding that these individuals were "not awarded with basic procedural safeguards", which the Panel understands to be a reference to the Trial Panel's findings that they were "not informed of the reasons of their arrest and detention,

[1303] See Trial Judgment, para. 413. See also Trial Judgment, fn. 730, where the Trial Panel refers to further factual findings on arbitrary detention set out elsewhere in the Trial Judgment. Regarding the Trial Panel's findings as to the lack of procedural guarantees afforded to TW4-01, TW4-11, W04733 and W01448, see respectively Trial Judgment, paras 404-406, 435-438, 471-472, 493. See also below, Section V.H.1.(a)**Error! Reference source not found.**.

[1304] See Trial Judgment, paras 575-576.

[1305] The Panel notes the Trial Panel's finding that "[b]ased on the evidence as a whole, the Panel is satisfied that [REDACTED] was detained at the KMF within the Confirmed Indictment period." See Trial Judgment, para. 575. The Panel also notes that TW4-01's live evidence regarding [REDACTED]'s mistreatment at the KMF is consistent with his detention prior to the change in detention conditions at the KMF (i.e. prior to the end of physical mistreatment of detainees). See Transcript (TW4-01), 31 May 2023, pp. 1538-1539. See above, fn. 1262.

were not brought before a judge or other competent authority, and were not provided with an opportunity to challenge the lawfulness of their detention".[1306]

569. In reaching these findings, the Trial Panel relied on (i) the written evidence of TW4-02 regarding [REDACTED]'s mistreatment, which it deemed "reliable, in particular because it is consistent with the pattern of mistreatment of all other detainees held in the Detention Building"; and (ii) the "operational pattern followed for the arrest and detention of all detainees at the KMF".[1307]

570. The Appeals Panel recalls its findings regarding the Trial Panel's conclusions vis-à-vis the torture of [REDACTED] – in particular, regarding the fact that Shala was not afforded the opportunity to test the hearsay evidence of TW4-02 regarding [REDACTED]'s specific mistreatment, nor the evidence underpinning the Trial Panel's conclusion that [REDACTED] was detained at the KMF prior to the change in detention conditions there.[1308] The Panel is therefore mindful of the untested evidence underpinning factor (i) relied on by the Trial Panel.

571. However, the Panel understands the above-cited "operational pattern" (namely, factor (ii) relied on by the Trial Panel in respect of [REDACTED] and [REDACTED]) to be a reference to both the "pattern whereby detainees were not informed of the reasons for their deprivation of liberty" and the "corroborating evidence establishing a pattern of detainees held at the KMF being deprived of their procedural guarantees".[1309] The Panel recalls that the Trial Panel also relied on both patterns in respect of [REDACTED], which were based, *inter alia*, on the live evidence of TW4-01 and TW4-11.[1310]

[1306] See Appeal Brief, para. 124; Trial Judgment, para. 583.
[1307] See Trial Judgment, para. 583.
[1308] See above, paras 530-537. See also Trial Judgment, para. 583.
[1309] See above, paras 564, 566.
[1310] See above, paras 562-567. The Panel also notes the Trial Panel's summary conclusions on this "operational pattern" pursuant to which individuals were arrested and detained at the KMF, whereby

572. The Panel further notes the Trial Panel's reliance on the live evidence of TW4-01, who testified that [REDACTED] and [REDACTED] were his co-detainees in Room 1 of the Detention Building of the KMF.[1311] In this regard therefore, Shala was afforded the opportunity to confront live evidence regarding the fact of their detention at the KMF.

573. In light of the above, and in particular noting the evidential underpinnings of the "operational pattern" relied on by the Trial Panel, the Appeals Panel considers that the Trial Panel's conclusions in respect of [REDACTED] and [REDACTED] being deprived of their procedural guarantees were not solely or decisively reliant on untested evidence. In this regard, the Appeals Panel is mindful of the fact that the Trial Panel concluded that [REDACTED] was deprived of his procedural guarantees, despite the fact that, unlike in the case of [REDACTED], it had no evidence of his specific mistreatment. In other words, in the view of the Trial Panel, the "operational pattern" alone was a sufficient basis to reach this conclusion. The Appeals Panel considers this to be an indication of the relative weight given to the "operational pattern" in respect of the Trial Panel's conclusions on [REDACTED] and [REDACTED], and moreover, discerns no error in its reasoning in this respect.

574. Furthermore, the Appeals Panel recalls that the detention of [REDACTED] and [REDACTED] has been established on the basis of the live evidence of TW4-01.[1312] The Panel acknowledges, however, that evidence regarding the timing of their detention is untested.[1313] Recalling that the central question is whether a conviction rests decisively on untested evidence, and in line with its holistic assessment of the extent of the Trial Panel's reliance on untested evidence, the Appeals Panel considers that,

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individuals were, *inter alia*, apprehended and interrogated on vague allegations of sympathising or otherwise being associated with Serbia/"Serbs"/Serbian authorities or being "traitors" or "collaborators", and mistreated and detained. See Trial Judgment, para. 590.

[1311] See Trial Judgment, para. 582. Contra Transcript, 16 May 2025, pp. 166-167.

[1312] See above, para. 572.

[1313] See above, paras 533-534, fn. 1249.

here, Rule 140(4)(a) of the Rules does not require reliance on tested evidence to determine whether [REDACTED]'s and [REDACTED]'s detention occurred prior to 5 June 1999. Indeed, the Panel considers that the term "facts indispensable for conviction", as applied in the context of Rule 140(4)(a) of the Rules,[1314] must be understood as facts "integral *to the crime*", including the "facts constituting the elements of the crimes", i.e. the *actus reus* and *mens rea*.[1315] Accordingly, the Panel is satisfied that [REDACTED] and [REDACTED] were detained within the Indictment period.

575. The Panel therefore considers that Shala has not established that the Trial Panel relied decisively on untested evidence in convicting him of the arbitrary detention of [REDACTED] and [REDACTED] and thus dismisses Shala's challenge in this regard.

(iii) [REDACTED] and an unnamed female detainee

576. Shala challenges the Trial Panel's findings that [REDACTED] and an unnamed female detainee were deprived of their liberty and of all basic procedural guarantees.[1316]

577. First, as noted above, the Panel understands the Trial Panel's conclusion that [REDACTED] was detained at the KMF to have been based on the written evidence of W01448, in particular in light of the Trial Panel's finding that it was unable to "conclusively establish" whether [REDACTED] was one of the two "sisters from Đakovica/Gjakovë" who, according to TW4-01, were detained and mistreated at the KMF.[1317]

[1314] See above, paras 477-478. See also *Halilović* Appeal Judgement, para. 125.
[1315] See e.g. *Kupreškić et al.* Appeal Judgement, para. 226 (emphasis added). See also *Halilović* Appeal Judgement, paras 125 (fn. 339), 129-130.
[1316] See Appeal Brief, para. 121.
[1317] See above, paras 552-553, 557. See also Trial Judgment, para. 571.

578. Regarding the unnamed female detainee's detention, the Panel understands the Trial Panel to have relied on the live evidence of TW4-01 in its finding; in other words, that the Trial Panel considered that she was in fact one of the two sisters in respect of whom he testified.[1318]

579. Second, the Appeals Panel notes that, in its findings on arbitrary detention specific to these individuals, the Trial Panel omitted to enter findings as to whether these two individuals were deprived of procedural guarantees.[1319]

580. However, the Panel notes that in the Trial Panel's conclusions on its factual findings on arbitrary detention, it summarised the "operational pattern" of the arrest and detention of individuals detained at the KMF, and proceeded to conclude that "a number of detainees, including […] [REDACTED] and at least one more female detainee […], were deprived of all basic procedural guarantees to which they were entitled while in detention, pursuant to international humanitarian law."[1320] The Appeals Panel thus understands the Trial Panel to have relied on this "operational pattern", the evidential underpinnings of which are addressed above,[1321] in concluding that these two individual were deprived of basic procedural guarantees.

581. Noting the live evidence of TW4-01 regarding the presence of the unnamed female detainee at the KMF,[1322] as well as the live evidential underpinnings of the "operational pattern" relied on by the Trial Panel, the Appeals Panel considers that the Trial Panel did not rely solely or decisively on untested evidence in convicting

[1318] See Trial Judgment, paras 570-572.
[1319] See Trial Judgment, paras 570-572.
[1320] See Trial Judgment, paras 590-591.
[1321] See above, paras 562-567.
[1322] The Panel notes the Trial Panel's finding that "based on the evidence before it", the unnamed female detainee was detained at the KMF throughout the time period relevant to the charges. See Trial Judgment, paras 570, 572. The Panel moreover notes that TW4-01's live evidence regarding her mistreatment is consistent with her detention prior to the change in detention conditions at the KMF (i.e. prior to the end of physical mistreatment of detainees). See Transcript (TW4-01), 31 May 2023, pp. 1565-1566.

Shala of the arbitrary detention of the unnamed female detainee. The Panel therefore dismisses Shala's challenge in this regard.

582. In respect of [REDACTED], however, given that W01448 is the sole witness to have mentioned a detainee at the KMF by the name of [REDACTED], and recalling the Panel's above finding that W01448's untested evidence as to [REDACTED]'s detention was not corroborated by the account of TW4-01,[1323] the Panel notes that the very fact of [REDACTED]'s deprivation of liberty was based on evidence that Shala was afforded no opportunity to confront.[1324] The Panel therefore considers that Shala's conviction for arbitrary detention in respect of [REDACTED] was decisively reliant on untested evidence.

(iv) [REDACTED]

583. Shala challenges the Trial Panel's finding that [REDACTED] was not properly informed of the reasons for his arrest or detention, not brought before a judge or other competent authority, and not provided with an opportunity to challenge the lawfulness of his detention.[1325]

584. In reaching this conclusion, the Trial Panel relied on the above-noted "operational pattern" of arrests and detention of individuals at the KMF, and the fact that [REDACTED] was liberated from the MUP building in Prizren during a KFOR operation on 18 June 1999, noting in addition that W01448 [REDACTED] released "in the context of the same operation".[1326]

[1323] See above, paras 553, 556-558.
[1324] See below, para. 600.
[1325] See Appeal Brief, para. 123; Trial Judgment, para. 581.
[1326] See Trial Judgment, paras 580-581.

585. The Appeals Panel recalls that the evidential basis of the "operational pattern" relied on by the Trial Panel consists in large part of the live evidence of TW4-01 and TW4-11.[1327]

586. The Appeals Panel notes that the Trial Panel's finding regarding [REDACTED]'s liberation is based on the evidence of [REDACTED] and W01448.[1328] The Panel observes that the extracts of [REDACTED]'s evidence cited by the Trial Panel do not contain information about [REDACTED]'s liberation.[1329] W01448 provided untested evidence regarding [REDACTED]'s transfer (along with himself and, notably, [REDACTED]) to Prizren.[1330]

587. In respect of the Trial Panel's finding that W01448 [REDACTED] released "in the context of the same operation", the Panel also observes that in [REDACTED]'s account of his transfer to Prizren with W01448, on the eve of their liberation by KFOR, no express reference is made to [REDACTED].[1331] In other words, no live corroborative evidence was elicited from [REDACTED] regarding [REDACTED]'s presence among the transferees (noting that according to W01448, the three detainees were transferred together, in the same vehicle).[1332] In this respect, the Panel notes that, as is clear from the above, the Trial Panel did not expressly cite [REDACTED]'s account in concluding that [REDACTED] was liberated from the MUP building in Prizren during a KFOR operation on 18 June 1999.[1333] Nor did the Trial Panel find that the account of

[1327] See above, paras 562-567.
[1328] See Trial Judgment, para. 580, fn. 1089.
[1329] See [REDACTED]; [REDACTED].
[1330] See P00101 (SITF00013852-00013869 RED6) (W01448) (confidential), p. 10 (SITF00013861); P00110 (SITF00013736-SITF00013800 RED5) (W01448) (confidential), p. 21 (SITF00013756), cited at Trial Judgment, para. 580, fn. 1089.
[1331] The Panel notes that [REDACTED]. [REDACTED]. [REDACTED]; [REDACTED]. See also Trial Judgment, paras [REDACTED], 580.
[1332] See Trial Judgment, para. 580, fn. 1089, referring to P00101 (SITF00013852-00013869 RED6) (W01448) (confidential), p. 10 (SITF00013861); P00110 (SITF00013736-SITF00013800 RED5) (W01448) (confidential), p. 21 (SITF00013756). See also SPO Final Trial Brief, paras [REDACTED], 84. See below, para. 600.
[1333] See Trial Judgment, para. 580.

[REDACTED] corroborated, or was even consistent with, the account of W01448 regarding [REDACTED]'s presence during the 17 June 1999 transfer.[1334]

588. In this regard, the Panel recalls, as noted above, that the Trial Panel's findings that [REDACTED] was detained at the KMF were based on the written statements of W01448, [REDACTED] and TW4-04, and that whereas W01448 was unavailable to testify due to him being deceased, neither [REDACTED] nor TW4-04 were made available by the SPO for cross-examination.[1335]

589. In light of the foregoing, the Panel finds that Shala was not afforded the opportunity to confront the evidence brought against him regarding [REDACTED]'s very detention at the KMF, let alone on his deprivation of basic procedural rights. The Panel thus finds that Shala's conviction in respect of the arbitrary detention of [REDACTED] was based decisively on untested evidence.

(v) Conclusion

590. In sum, the Panel finds that the Trial Panel erred in relying decisively on untested evidence in convicting Shala for the arbitrary detention of [REDACTED] and [REDACTED]. The Panel dismisses Shala's challenges to his conviction for the arbitrary detention of [REDACTED], [REDACTED] and [REDACTED], and the unnamed female detainee.

(e) Further Considerations and Overall Conclusions

591. First, the Panel recalls that, according to ECtHR principles, the "lack of a good reason for a prosecution witness's absence is a very important factor […] which may tip the balance" in favour of finding that an accused's right to examine witnesses brought against him or her has been violated.[1336]

[1334] See Trial Judgment, para. 581.
[1335] See above, paras 544, 550.
[1336] See above, para. 476.

592. As set out above, the Panel considers that the untested evidence of [REDACTED] and TW4-04 was decisive for Shala's convictions for the torture and/or arbitrary detention of TW4-04, [REDACTED] and [REDACTED], and [REDACTED]. The SPO tendered the statements of [REDACTED] and TW4-04, both of whom had been initially scheduled as live witnesses, without cross-examination via Rule 153 of the Rules.[1337] The SPO's reasons for these applications were that, further to the SPO's review of the evidentiary record, and "with a view to streamlining the presentation of its case and expediting the proceedings", the SPO "no longer deem[ed] it necessary" to call these witnesses live, as their evidence was cumulative and/or corroborative of that of witnesses who testified or would testify live in the trial, whom the Defence had or would have the opportunity to cross-examine.[1338] These statements were admitted by the Trial Panel over repeated objections of Shala, who specifically contested their characterisation as "cumulative and/or corroborative" and argued, *inter alia*, that their admission would prejudice his right to examine evidence brought against him.[1339]

593. While the Panel considers that streamlining and expediting proceedings is an important objective, the Panel must nonetheless take into account the fact that the reasons for the non-attendance of decisive witnesses [REDACTED] and TW4-04 are imputable to the SPO and the Trial Panel.[1340]

594. In this regard, the Panel recalls that Article 162(2) of the Constitution expressly obliges the SPO and Specialist Chambers to "uphold the protections enshrined within Chapter II of the Constitution", which include an accused's right to examine

[1337] See SPO Rule 153 Application for TW4-04; SPO Rule 153 Application for [REDACTED].
[1338] See SPO Rule 153 Application for [REDACTED], paras 5, 9; SPO Rule 153 Application for TW4-04, paras 5, 9.
[1339] See Decision on SPO Rule 153 Motions, para. 54; Defence Response to SPO Rule 153 Application for [REDACTED], paras 16-20, 25-28, 36-37; Defence Response to SPO Rule 153 Application for TW4-04, paras 22-25, 31-33, 46. See also Defence Request for Certification to Appeal Decision on SPO Rule 153 Motions, paras 26-31; Decision on Defence Request for Certification to Appeal Decision on SPO Rule 153 Motions, paras 24-26.
[1340] See also *Schatschaschwili v. Germany* Judgment, para. 120, and references cited therein.

witnesses, and "in particular" to "act in compliance with the international human rights standards guaranteed by Article 22 [of the Constitution]", including those guaranteed by the ECHR.[1341] The Panel is therefore mindful of ECtHR case law establishing that Contracting States are required under the ECHR "to take positive steps to enable the accused to examine witnesses or have examined witnesses against him [or her]"; and further, that "[s]uch measures form part of the diligence which the Contracting States have to exercise in order to ensure that the rights guaranteed by Article 6 [of the ECHR] are enjoyed in an effective manner".[1342]

595. Secondly, the Panel recalls that during the Appeal Hearing, the SPO argued that in accordance with ECtHR case law, the Panel should take into consideration the "counterbalancing factor" that Shala was able to cross-examine TW4-01 and TW4-11 "on the same conditions [and] mistreatments that the witnesses introduced in writing testified about".[1343] As noted above, the Panel considers that the weight that can be given to such "counterbalancing factors", if any, must be determined in accordance with the fact that at the ECtHR, the assessment of such factors is conducted subsequent to and/or separately from the determination as to whether a conviction was based solely or decisively on untested evidence.[1344] The Panel recalls that, by contrast, Rule 140(4)(a) of the Rules does not allow it to uphold a conviction based

[1341] Article 162(2) of the Constitution states, "The Specialist Chambers and Specialist Prosecutor's Office shall uphold the protections enshrined within Chapter II of the Constitution, and in particular shall act in compliance with the international human rights standards guaranteed by Article 22 and subject to Article 55." Article 31(4) of the Constitution, contained within Chapter II, states in relevant part, "Everyone charged with a criminal offense has the right to examine witnesses." Article 22(2) of the Constitution states: "Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions: […] European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols."
[1342] See e.g. *Schatschaschwili v. Germany* Judgment, para. 120, and references cited therein.
[1343] See Transcript, 15 May 2025, pp. 89-90; Transcript, 16 May 2025, p. 143.
[1344] See above, para. 486.

solely or decisively on untested evidence on the basis that the trial proceedings evaluated as a whole were not unfair.[1345]

596. However, even if *arguendo* the Panel were to consider the weight of the "counterbalancing factor" argued by the SPO, the Panel is not persuaded by the SPO's position for the following reasons.

597. The Panel notes that in respect of the assessment of "counterbalancing factors", the ECtHR has held that "[t]he question in each case is whether there are sufficient counterbalancing factors in place, *including measures that permit a fair and proper assessment of the reliability of* [sole or decisive untested] *evidence to take place*".[1346]

598. Mindful of the constitutional duties imposed on the SPO and the Trial Panel noted above, the Panel finds that in the circumstances of this case, Shala's ability to cross-examine TW4-01 and TW4-11 regarding their experiences of detention and mistreatment, in lieu of confronting [REDACTED] and TW4-04 regarding their specific allegations of individuals' detention and mistreatment, does not sufficiently allow the "*fair* and proper assessment" of the reliability of these untested allegations from [REDACTED] and TW4-04.[1347] In this regard, the Panel reiterates the fact that the non-attendance of [REDACTED] and TW4-04 is imputable to the SPO and the Trial Panel. Again, while the Panel stresses that the promotion of expeditiousness of proceedings, including via reliance on Rule 153 of the Rules, is an important objective, any such efforts to this end must duly take into consideration an accused's

[1345] See above, para. 486. The Panel reiterates that in the *Al-Khawaja and Tahery v. United Kingdom* case cited by the SPO, the ECtHR examined whether sufficient counterbalancing factors existed (including an applicant's ability to cross-examine witnesses regarding a similar crime committed by the applicant) *after* finding that untested evidence had been decisive in his conviction; and concluded in respect of one applicant that his right to a fair trial under Article 6(1) of the ECHR had not been breached. See *Al-Khawaja and Tahery v. United Kingdom* Judgment, paras 153-158.
[1346] See e.g. *Al-Khawaja and Tahery v. United Kingdom* Judgment, para. 147 (emphasis added); *Jaupi v. Albania* Judgment, para. 99(viii).
[1347] See above, para. 597.

fundamental fair trial rights, and in particular, the protections enshrined in Rule 140(4)(a) of the Rules.

599. Further, the Panel considers that the SPO's argument is undermined by the fact that [REDACTED] and TW4-04 had both been scheduled to testify live, until the SPO instead moved for the admission of their written statements pursuant to Rule 153 of the Rules, approximately two and three months respectively after the deadline for filing Rule 153 applications set by the Trial Panel, and after the conclusion of TW4-11's live testimony.[1348] The SPO Rule 153 Application for TW4-04 was filed after the conclusion of TW4-01's testimony;[1349] and moreover, the Trial Panel expressly deferred its decision on the SPO Rule 153 Application for [REDACTED] until after the conclusion of TW4-01's testimony.[1350] As such, insofar as Shala's ability to cross-examine TW4-01 and TW4-11 can be understood as a measure that allows the "fair and proper assessment" of the reliability of [REDACTED] and TW4-04's untested allegations, it must be considered in light of the belated filing of these Rule 153 applications, and the impact that this may have had on the conduct of Shala's defence – in particular, his cross-examination strategy vis-à-vis TW4-01 and TW4-11.[1351]

[1348] The SPO filed its Rule 153 Applications for [REDACTED] and TW4-04 on 17 May 2023 and 14 June 2023, respectively. See SPO Rule 153 Application for [REDACTED], para. 5; SPO Rule 153 Application for TW4-04, para. 5. The deadline for filing SPO Rule 153 applications had been set as 20 March 2023. See Decision on SPO Rule 153 Motions, paras 1, 25-29. TW4-11 testified on 2 and 3 May 2023. See also Appeal Brief, para. [REDACTED].

[1349] See above, fn. 1348. TW4-01 testified from 30 May 2023 to 6 June 2023.

[1350] Transcript, 31 May 2023, pp. 1485-1486.

[1351] The Panel also notes that on 24 May 2023, the SPO indicated in a filing that it intended to "re-assess the most appropriate mode for [TW4-04's] testimony, including possible submission pursuant to Rule 153, but considers it more appropriate to make this assessment after the testimony of TW4-01". See SPO Updated Witness Order, para. 4. The SPO's submission in this regard does not affect the Panel's views regarding the impact of the belated Rule 153 applications on Shala's defence preparations, noting the indeterminacy of the SPO's position as stated. The Panel also notes that in its subsequent decision on the SPO Rule 153 applications, the Trial Panel held that "[t]he Panel is persuaded that, in this particular case, the SPO was in a position to make its (final) determination only after hearing the live testimonies of the aforementioned witnesses." See Decision on SPO Rule 153 Motions, para. 26. The Panel also reiterates that, as noted by the Trial Panel, "[REDACTED]". See Trial Judgment, fn. 962.

600. Lastly, whereas the SPO asked the Panel to take into consideration the fact that Shala was able to cross-examine TW4-01 and TW4-11, the Panel is mindful of the lack of live evidence elicited from these SPO witnesses by the SPO, which could have corroborated or clarified decisive allegations from untested SPO witnesses regarding the detention and/or mistreatment of TW4-04, [REDACTED] and [REDACTED], [REDACTED] and [REDACTED]; and therefore assisted the "fair and proper assessment" of their reliability. In particular, the Panel emphasises the lack of live evidence on the trial record regarding the detention and mistreatment of [REDACTED] and [REDACTED].[1352]

601. Based on all of the above, the Panel finds that the Trial Panel's findings in respect of, the arbitrary detention of [REDACTED] and [REDACTED], and the torture of TW4-04, [REDACTED] and [REDACTED], [REDACTED] and [REDACTED], were entered in violation of Rule 140(4)(a) of the Rules and Shala's fundamental fair trial right to examine witnesses brought against him. These violations have invalidated the Trial Judgment to the extent that Shala's convictions on Counts 1 and 3 are based upon these findings.[1353]

602. The Panel notes that, by way of remedy under this Ground, Shala argues that the violations of his right to examine witnesses "render all convictions unsafe and the case must be remitted for re-trial".[1354]

603. The Appeals Panel observes that an order for retrial is "an exceptional measure to which resort must necessarily be limited".[1355] The Panel also considers that the choice of remedy for any errors found to have been committed by the Trial Panel lies within its discretion, which must be exercised "on proper judicial grounds on a case-

[1352] See above, paras 549, 551, 558, 587.
[1353] See Trial Judgment, paras 1037-1038.
[1354] See Appeal Brief, para. 143.
[1355] See e.g. *Prlić et al.* Appeal Judgement, para. 3131. See also e.g. *Muvunyi* Appeal Judgement, para. 148; *Stanišić and Simatović* Appeal Judgement of 9 December 2015, para. 127.

by-case basis, balancing factors including fairness to the accused, the interests of justice, the nature of the offences, and the circumstances of the case."[1356]

604. In the present case, the Panel notes that the above errors represent a limited proportion of those originally alleged by Shala under this Ground, and that Shala's convictions for the war crimes of arbitrary detention, torture, and murder have been upheld by the Appeals Panel, these errors notwithstanding.[1357]

605. Consequently, the Appeals Panel finds that remittal of this matter for re-trial would be excessive in the circumstances of this case, and that the interests of justice will be best served if it instead partially sets aside Shala's convictions for arbitrary detention and torture to the extent that they rely upon the Trial Panel's findings in respect of the arbitrary detention of [REDACTED] and [REDACTED] and the torture of TW4-04, [REDACTED] and [REDACTED], [REDACTED] and [REDACTED].[1358] The impact, if any, of these errors on Shala's sentence will be addressed below.[1359]

606. In light of the above, with respect to Shala's remaining challenges under Ground 7 and Ground 12 in part, the Appeals Panel finds that Shala fails to show any abuse in the Trial Panel's exercise of its discretion or any error justifying the Panel's intervention. Accordingly, the Appeals Panel grants Shala's Ground 7 in part and dismisses the remainder of Shala's Ground 7 and Ground 12 in part.

[1356] See e.g. *Prlić et al.* Appeal Judgement, para. 3122.
[1357] See below, Disposition. See also *Prlić et al.* Appeal Judgement, para. 3130.
[1358] See above, para. 601.
[1359] See below, Section V.J.4.

H. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S FINDINGS ON THE WAR CRIME OF ARBITRARY DETENTION (GROUNDS 8A, 11 AND 12)

607. After concluding that the *actus reus* and *mens rea* elements were satisfied,[1360] the Trial Panel found Shala guilty of the war crime of arbitrary detention in a non-international armed conflict.[1361]

608. Shala challenges the Trial Panel's findings on the elements of the war crime of arbitrary detention in a non-international armed conflict, punishable under Article 14(1)(c) of the Law and underpinning his conviction under Count 1 of the Indictment pursuant to JCE liability.[1362] In particular, he disputes the Trial Panel's findings on the *actus reus*, the *mens rea*, and on Shala's responsibility for arbitrary detention pursuant to JCE I.[1363] Shala contends that if the Appeals Panel, on the basis of the identified errors, is not inclined to acquit Shala for arbitrary detention, a new trial should take place applying the correct law for arbitrary detention in a non-international armed conflict.[1364] The SPO responds that the Trial Panel correctly identified the elements of arbitrary detention in a non-international armed conflict, and that Shala has failed to demonstrate any error in the Trial Panel's findings on the

[1360] Trial Judgment, paras 945-956.
[1361] Trial Judgment, para. 1124. See also Trial Judgment, para. 1037.
[1362] Appeal Brief, paras 144-160, 162-164, 206-236; Reply Brief, paras 23-30, 39-42; Notice of Appeal, paras 16-18, 21-25. The Appeals Panel notes that under Ground 11 of the Notice of Appeal, Shala alleged "Errors in Inferring the Purpose of the Alleged JCE" (see Notice of Appeal, para. 21), while in the Appeal Brief, Shala merged Ground 11 with Ground 8 in the section titled "Grounds 8 and 11: Placing an Unattainable Burden of Proof on the Defence". For the purposes of the present Judgment, the Panel considers that Ground 11 is now subsumed under Ground 8A. The Panel will consider Shala's challenges under Ground 8A to the Trial Panel's findings on the JCE common purpose with respect to arbitrary detention in this section. See below, Section V.H.3.(a). The Panel further notes that some of Shala's arguments concerning the murder-related common purpose of the JCE are included under Ground 8A and will be considered below in the section on Ground 13. See below, Section V.I.1. Finally, the Panel notes that the remainder of Shala's arguments under Ground 8B have been addressed above. See above, Section V.B.3.
[1363] Appeal Brief, paras 144-160, 162-164, 206-236; Reply Brief, paras 23-30, 39-42.
[1364] Transcript, 16 May 2025, pp. 180-181.

actus reus, the *mens rea*, or on Shala's responsibility for arbitrary detention pursuant to JCE I.[1365]

1. Alleged Errors Regarding the Trial Panel's Findings on the *Actus Reus* of the War Crime of Arbitrary Detention

609. The Trial Panel found that at least 18 individuals were deprived of their liberty by KLA members between approximately 17 May 1999 and 5 June 1999 at the KMF.[1366] It further found that those detainees were deprived of all basic procedural guarantees that shall be afforded to any person deprived of their liberty pursuant to international humanitarian law.[1367] In particular, the Trial Panel found that: (i) the detainees were not properly informed of the reasons for their deprivation of liberty nor were they held pursuant to criminal charges or security concerns that made their detention absolutely necessary;[1368] (ii) they were not brought promptly before a judge or other competent authority;[1369] and (iii) were not provided with an opportunity to challenge the lawfulness of their detention.[1370] In particular, the Trial Panel found that no one at the KMF exercised the function of a "judge" or "competent" authority for the purposes of meeting the latter procedural guarantee.[1371]

(a) Alleged Errors of Law Regarding the Elements of the *Actus Reus* of the War Crime of Arbitrary Detention

(i) Submissions of the Parties

610. Shala advances three arguments alleging that the Trial Panel erred in law with respect to the basic procedural safeguards that the Trial Panel found to be part of the

[1365] SPO Response Brief, paras 149-173, 201-236.
[1366] Trial Judgment, paras 587, 945, 1037.
[1367] Trial Judgment, paras 591, 946.
[1368] Trial Judgment, paras 590-591, 947.
[1369] Trial Judgment, paras 591, 948.
[1370] Trial Judgment, paras 591, 948.
[1371] Trial Judgment, para. 948.

actus reus of the war crime of arbitrary detention in a non-international armed conflict.[1372]

611. First, Shala submits that the Trial Panel erred in law when requiring proof, as an objective element of the war crime of arbitrary detention in a non-international armed conflict, of a failure to bring detainees promptly before a judge or other competent authority and a failure to afford them an opportunity to challenge the lawfulness of their detention.[1373] To this end, Shala argues that the Trial Panel erred in respect of the sources of law on which it relied in "setting out" these obligations.[1374] Additionally, he contends that the Trial Panel erred by "simply refer[ring]" to institutional guidelines, including the "ICRC Study" and to a single ECtHR case, *Lawless v. Ireland*.[1375] In the latter respect, in response to questions raised by the Panel, Shala added that, in his view, this case is not on point as it concerns state obligations during a terrorism context.[1376]

612. In addition, Shala contends that the Trial Panel erred in relying on Article 75 of Additional Protocol I.[1377] He argues that this provision only applies to international armed conflicts, and yet, the Trial Panel relied on it in holding that the obligation to provide the detained person with an opportunity to challenge the lawfulness of their detention requires, at a minimum, review of detention by an authority independent from the one that ordered the detention.[1378] Finally, in response to questions raised by the Panel, Shala contended that the Trial Panel's reliance on Article 6 of Additional Protocol II is inapposite in that, even though this provision applies to non-international armed conflicts, the context is the guarantees that apply to penal

[1372] Appeal Brief, paras 206-212; Reply Brief, para. 40.
[1373] Appeal Brief, para. 208. See also Appeal Brief, para. 207; Reply Brief, para. 40.
[1374] Appeal Brief, para. 208.
[1375] Appeal Brief, para. 208.
[1376] Transcript, 15 May 2025, p. 56.
[1377] Appeal Brief, para. 208.
[1378] Appeal Brief, para. 208; Reply Brief, para. 40; Transcript, 15 May 2025, p. 56.

prosecutions rather than the guarantees that apply to persons suspected to pose a security risk.[1379]

613. Second, Shala submits that the Trial Panel erred in law in applying an overly high standard as to the nature of what constitutes a "competent authority",[1380] when it held that this obligation "requires, at a minimum, that an independent authority from the one ordering the detention reviews the detention".[1381] To this end, he contends that what amounts to a competent authority in a non-international armed conflict should, as a matter of law, be context specific, depending on the resources available to the armed group.[1382] On this basis, he further contends that the Trial Panel ignored the limited capacity of the KLA to ensure effective respect for humanitarian norms.[1383]

614. Third, Shala submits that the Trial Panel erred in law in relying upon the *Delalić et al*. Appeal Judgement when it held, in relation to its assessment of the compliance with the basic procedural safeguards, that it is irrelevant whether "the perpetrator is personally responsible for the failure to have the detainee's procedural rights respected".[1384] Shala contends that the referred to finding in the *Delalić et al*. case pertains to the international armed conflict crime of unlawful confinement rather than to non-international armed conflict.[1385]

615. The SPO responds concerning Shala's first argument, that the Trial Panel correctly identified the elements of arbitrary detention in a non-international armed conflict through a comprehensive analysis of customary international humanitarian

[1379] Transcript, 15 May 2025, p. 56.
[1380] Appeal Brief, paras 209-211. See also Appeal Brief, para. 207.
[1381] Appeal Brief, para. 208.
[1382] Appeal Brief, para. 210.
[1383] Appeal Brief, paras 209-211.
[1384] Appeal Brief, paras 207, 212.
[1385] Appeal Brief, paras 207, 212; Reply Brief, para. 40.

law sources, in light of the facts of the case.[1386] The SPO adds that these elements were not "simply" based on institutional guidelines.[1387] Rather, these elements were based on: (i) the well-established requirement of humane treatment;[1388] (ii) customary international law principles identified in the ICRC Customary IHL Database, which have been routinely relied upon to assist judicial bodies in the establishment of a rule of customary international law;[1389] (iii) Article 6 of Additional Protocol II (applicable in non-international armed conflicts) as well as Article 75(4) of Additional Protocol I;[1390] and (iv) an ECtHR case which lends support to the obligation to promptly bring an arrested person before a judge or other competent authority.[1391] In response to questions raised by the Panel, the SPO added that the ICRC Customary IHL Study on which the Trial Panel relied concerns both international and non-international armed conflicts and that a Specialist Chambers' appeals panel has relied on this study to support conclusions on the customary nature of the war crime of arbitrary detention in a non-international armed conflict.[1392] The SPO further added that the Trial Panel's conclusions are also consistent with the ICTY Appeals Chamber's holding rejecting any interpretation of Common Article 3 of the Geneva Conventions which would deprive detainees of any basic protection.[1393]

616. Concerning Shala's second argument on the requirement of a "competent authority", the SPO responds that Shala has failed to show that the Trial Panel set an overly high standard.[1394] In the SPO's view, the Trial Panel merely required basic procedural safeguards consistent with Article 6 of Additional Protocol II, which

[1386] SPO Response Brief, para. 216. See also Transcript, 15 May 2025, pp. 90-91.
[1387] SPO Response Brief, para. 219. See also Transcript, 15 May 2025, pp. 90-91.
[1388] SPO Response Brief, para. 219.
[1389] SPO Response Brief, para. 219.
[1390] SPO Response Brief, para. 220.
[1391] SPO Response Brief, para. 220.
[1392] Transcript, 15 May 2025, pp. 91-92.
[1393] Transcript, 15 May 2025, p. 92.
[1394] SPO Response Brief, paras 221-223.

includes having an impartial authority review the lawfulness of detention.[1395] The SPO further responds that Shala's suggestion that the assessment of this requirement must be "context specific" ignores the baseline requirements listed in the same source he cites.[1396] Finally, the SPO argues that Shala's assertion that the KLA operated through largely informal command structures is not supported by the record, contradicts adjudicated facts, and conflicts with both Shala's prior statements and the Trial Panel's findings.[1397]

617. Concerning Shala's third argument, the SPO responds that the Trial Panel correctly applied the *Delalić et al*. jurisprudence and that Shala fails to demonstrate that the international nature of the armed conflict in the *Delalić et al*. case renders this jurisprudence inapposite.[1398]

(ii) Assessment of the Court of Appeals Panel

618. The Panel recalls that, in two appeal decisions on motions challenging the Specialist Chambers' jurisdiction, the Court of Appeals Chamber confirmed that, during the time period of the Indictment, a customary international humanitarian law rule existed criminalising arbitrary detention as a war crime in non-international armed conflict.[1399] In so doing, the Court of Appeals Chamber upheld the Pre-Trial Judge's conclusion that arbitrary detention is implicitly prohibited in a

[1395] SPO Response Brief, para. 221.
[1396] SPO Response Brief, para. 222.
[1397] SPO Response Brief, para. 223.
[1398] SPO Response Brief, paras 224-225. The Appeals Panel observes that the SPO Response Brief partly discusses the *mens rea* of unlawful confinement as a war crime in an international armed conflict in relation to the *mens rea* for arbitrary detention as a war crime in a non-international armed conflict. However, the Appeals Panel notes that Shala's argument did not pertain to the *mens rea* for arbitrary detention. Moreover, the statement in the *Delalić et al*. Appeal Judgement, the Trial Panel's application of which is contested by Shala, was made in the context of the mode of liability of commission and not in the context of the *mens rea*. *Compare* Response Brief, para. 225 *with Delalić et al*. Appeal Judgement, paras 378-379. On this basis, the Appeals Panel will neither address the SPO's submissions concerning the *mens rea* for arbitrary detention nor Shala's submissions in reply. See Reply Brief, para. 41.
[1399] *Thaçi et al.* Appeal Decision on Jurisdiction, paras 109, 111; Appeal Decision on Jurisdiction, para. 46. See above, para. 176. See also *Mustafa* Appeal Judgment, para. 430.

non-international armed conflict as a matter of customary international humanitarian law.[1400] The origin of this prohibition is the requirement of humane treatment contained in Common Article 3 of the Geneva Conventions.[1401]

619. The Appeals Panel observes that the Trial Panel set out the following definition of the *actus reus* of the war crime of arbitrary detention:

> [T]he war crime of arbitrary detention, within the meaning of Article 14(1)(c) of the Law, is committed through an act or omission resulting in depriving a person who is not taking an active part in hostilities of his or her liberty without legal basis or without complying with basic procedural safeguards.[1402]

620. As to the "basic procedural safeguards" – the second and alternative limb of the *actus reus* – the Trial Panel clarified that the obligations of the detaining power owing to the person detained encompass the obligation to: (i) inform of the reasons for the deprivation of liberty; (ii) bring the person deprived of liberty promptly before a judge or other competent authority; and (iii) provide an opportunity to challenge the lawfulness of their detention.[1403]

621. The Trial Panel further clarified the contours of these three basic procedural safeguards.[1404] With respect to the obligation to be informed, the Trial Panel clarified that since the purpose is to allow the concerned person to challenge the lawfulness of his or her detention – and irrespective of whether the grounds for detention pertain to a criminal offence or a security matter – the person must be promptly informed and in a sufficient level of detail of the grounds for detention.[1405] With respect to the

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[1400] *Thaçi et al.* Appeal Decision on Jurisdiction, para. 109. See also Appeal Decision on Jurisdiction, paras 44-47.
[1401] *Thaçi et al.* Pre-Trial Judge Decision on Motions Challenging Jurisdiction, paras 152-156.
[1402] Trial Judgment, para. 936.
[1403] Trial Judgment, para. 938.
[1404] The Trial Panel considered that the rationale for providing basic procedural safeguards lies in the fact that the person deprived of his or her liberty is *hors de combat*, and, accordingly, does not pose any threat to the detaining power. See Trial Judgment, para. 939.
[1405] Trial Judgment, para. 941.

obligation to bring the person before a judge or other competent authority, the Trial Panel clarified, *inter alia*, that what is required, at a minimum, is the review of the lawfulness of the detention by an independent authority from the one ordering the detention, whether it continues to be necessary and whether the detainee is to be released.[1406] With respect to the obligation to provide an opportunity to challenge the lawfulness of detention, the Trial Panel clarified that avoidance of arbitrary detention is fostered by ensuring that an initial review and continued oversight of detention is exercised throughout the course of a person's detention.[1407]

622. The Appeals Panel now turns to Shala's first argument. The Appeals Panel notes that while Shala indicates that his argument pertains to when the Trial Panel "[set] out" the basic safeguards, he does not point to the location in the Trial Judgment where the Trial Panel initially set out the three basic safeguards.[1408] Moreover, he does not substantiate a challenge to the elements of the *actus reus*, as such (*the existence of the actus reus elements*).[1409] The Appeals Panel observes that Shala further failed to substantiate a challenge to the *actus reus* elements during the Appeal Hearing.[1410] The Appeals Panel recalls in this regard that when a party alleges an error of law, it must present arguments in support of its claim and explain how the error invalidates the decision.[1411] Accordingly, to the extent that Shala intended to challenge the elements

[1406] Trial Judgment, para. 942.
[1407] Trial Judgment, para. 943.
[1408] Appeal Brief, para. 208, referring to Trial Judgment, paras 942-943.
[1409] See Appeal Brief, para. 208, fns 444-445, referring to Trial Judgment, paras 942-943. Whereas, the Trial Panel set out the three basic procedural safeguards at paragraph 938 of the Trial Judgment.
[1410] The Panel notes that Shala alleged during the Appeal Hearing that the Trial Panel "constructed new requirements as elements of arbitrary detention" (Transcript, 15 May 2025, p. 54). However, in support, he merely put forward the proposition that the Trial Panel erred in transposing procedural guarantees from the law of international armed conflict or international human rights law (Transcript, 15 May 2025, p. 54). In the latter respect, he contended that armed groups are not directly bound by international human rights treaties and are not in a position to derogate from related obligations (Transcript, 15 May 2025, pp. 54-55).
[1411] See above, para. 28.

of the *actus reus* of the war crime of arbitrary detention, as such, the Appeals Panel dismisses this argument.

623. The Appeals Panel now turns to Shala's argument that the Trial Panel erred in "simply refer[ring] to institutional guidelines, including the ICRC Study, and one ECtHR decision [*Lawless v. Ireland*]" when it delineated the contours of the basic procedural safeguard to bring the detained person before a judge or other competent authority and to provide the detained person with an opportunity to challenge the lawfulness of the detention (*the interpretation of some of the actus reus elements*).[1412] The Appeals Panel observes that the footnotes accompanying the Trial Panel's delineation of the contours of these basic safeguards refer to one or more of the following sources challenged by Shala: (i) Rule 99 of the ICRC Customary IHL Study (on the customary international law prohibition on arbitrary detention in international and non-international armed conflict); (ii) the ECtHR's judgment in *Lawless v. Ireland* (concerning an alleged violation of Article 5, right to liberty and security, of the ECHR); (iii) the UN General Assembly Guidelines on Detention Protections; and (iv) the UN Human Rights Committee's General Comment numbers 8 (on Article 9, right to liberty and security of person, of the ICCPR) and 29 (on Article 4, derogations during states of emergency, of the ICCPR).[1413]

624. As a preliminary matter, the Appeals Panel recalls that the principle of legality does not prevent a court from interpreting and clarifying the elements of a crime.[1414] However, as to references to the jurisprudence of the ECtHR and General Comments by the UN Human Rights Committee – the treaty body responsible for interpreting the ICCPR (wherein, Article 9 prohibits arbitrary detention) – the Appeals Panel cautions that international human rights law and practice may be relevant to some but

[1412] See Appeal Brief, para. 208; Transcript, 15 May 2025, pp. 55-56.
[1413] Trial Judgment, fns 1917-1920.
[1414] See *Thaçi et al.* Appeal Decision on Jurisdiction, para. 214; *Aleksovski* Appeal Judgement, paras 126-127.

not all aspects of a prohibition under customary international humanitarian law, the violation of which entails individual criminal liability. In this instance, the Appeals Panel considers that the interests of international human rights law and international humanitarian law broadly converge (e.g. common goals and protected interests) in that, as explained by the ICRC, they aim "to prevent arbitrary detention by specifying the grounds for detention based on needs, in particular security needs, and by providing for certain conditions and procedures to prevent disappearance and to supervise the continued need for detention".[1415] This is not to say that every element of international human rights law provisions on arbitrary detention necessarily overlaps with the counterpart customary international humanitarian law prohibition on arbitrary detention. However, the Appeals Panel notes in this regard that Shala does not point to any structural differences between international human rights and humanitarian law which would preclude reliance on the referred to sources for the purposes of delineating the contours of the second and third basic procedural safeguards.[1416]

625. With the above in mind, the Appeals Panel observes that the international human rights law references in the respective portion of the Trial Judgment emphasise: (i) the independence of the person before whom the detained person should be brought (whether Judge or other competent authority); and (ii) that the purpose of the "promptness" requirement for bringing the detained person before a judge or other competent authority is to allow the person an opportunity to effectively challenge the lawfulness of his or her detention.[1417] The Appeals Panel can find no error in the Trial Panel's reliance on these particular sources, including the reference

[1415] ICRC Customary IHL Study, Rule 99, "Summary", p. 344.
[1416] On the relevance of assessing structural differences or specificities that may distinguish international human rights and international humanitarian law when defining a crime derived from an international humanitarian law prohibition, see generally, *Kunarac et al.* Trial Judgement, paras 470-497; *Krnojelac* Trial Judgment, para. 181.
[1417] Trial Judgment, paras 942-943 and fns 1917-1918, referring to *Lawless v. Ireland* Judgment, para. 14; General Comment No. 29; General Comment No. 8.

to the ECtHR's Judgment, *Lawless v. Ireland*, to add depth to its enumeration of the basic procedural safeguards applicable to the war crime of arbitrary detention in a non-international armed conflict.

626. Similarly, the Appeals Panel finds no error in the Trial Panel's references to the UN General Assembly Guidelines on Detention Protections, adopted by UN General Assembly Resolution 43/173.[1418] These references support the Trial Panel's broad conclusions on the purposes of detention reviews and the safeguarding function of the prohibition on arbitrary detention against other prohibited conduct.[1419]

627. As it concerns the Trial Panel's references to the ICRC Customary IHL Study (Rule 99),[1420] the Court of Appeals Chamber has previously addressed and dismissed arguments challenging reliance on this study for the purpose of setting out the basic procedural safeguards under customary international law applicable to the war crime of arbitrary detention in a non-international armed conflict at the time of the events charged in the Indictment.[1421] It considered that while the ICRC Customary IHL Study is not declaratory of customary international law, it refers to various international humanitarian law sources of a customary international law nature.[1422] By logical extension, the Appeals Panel can find no error in the Trial Panel's reliance on the ICRC Customary IHL Study for the more limited purposes of delineating the contours of the basic procedural safeguards applicable to the non-international armed conflict war crime of arbitrary detention.

628. The Appeals Panel now turns to Shala's argument that the Trial Panel erred in referring to Article 75(4) of Additional Protocol I and Article 6(2) of

[1418] See Trial Judgment, fns 1917, 1919-1920. The Appeals Panel notes that UN General Assembly resolutions *may* be considered evidence of *opinio juris* for the purpose of identifying the existence of a rule of customary international law. See *Nuclear Weapons* Advisory Opinion, paras 70-73.
[1419] See Trial Judgment, paras 942-943, fns 1919-1920.
[1420] See Trial Judgment, paras 942-943, fns 1917-1918, 1920.
[1421] See *Thaçi et al.* Appeal Decision on Jurisdiction, para. 99.
[1422] *Thaçi et al.* Appeal Decision on Jurisdiction, para. 99.

Additional Protocol II in that the former only applies to international armed conflict, and the latter, while applying to non-international armed conflict, concerns "penal prosecutions" rather than persons suspected of posing a security risk to the detaining authority.[1423] The Appeals Panel observes that the Trial Panel referred to these provisions when it held that the obligation to be brought promptly before a judge or other competent authority requires, at a minimum, an independent authority.[1424]

629. Concerning Shala's Additional Protocol I argument, what appears to be implied is that the Trial Panel improperly imported content from the treaty-based international humanitarian law provisions prohibiting arbitrary detention in an international armed conflict, into the customary international humanitarian law prohibition on arbitrary detention applicable to a non-international armed conflict. However, the Appeals Panel notes that the Trial Panel first and foremost relied on Rule 99 of the ICRC Customary IHL Study. This rule captures the customary international humanitarian law prohibition on arbitrary detention – applicable in both types of armed conflict – distilling it from, *inter alia*, the treaty-based provisions encompassing the prohibition on arbitrary detention contained in Additional Protocol I, applying to international armed conflicts, and Additional Protocol II, applying to non-international armed conflicts. The Trial Panel further referred (in "see also" capacity) to the relevant provisions, respectively, of Additional Protocols I (Article 75(4)) and II (Article 6(2)) which implicitly prohibit arbitrary detention.[1425] The Appeals Panel observes that there are differences between the two treaty-based regimes.[1426] However, significantly, the requirement of "independence" to which the Trial Panel referred, comes directly from Additional Protocol II.[1427] Accordingly, the

[1423] See Appeal Brief, para. 208; Transcript, 15 May 2025, p. 56.
[1424] Trial Judgment, para. 942.
[1425] Trial Judgment, fn. 1917.
[1426] See Additional Protocol I, Article 75(4), which concerns "fundamental guarantees" under the heading "treatment of persons in the power of a party to the conflict"; Additional Protocol II, Article 6, which concerns "penal prosecutions", under the heading "humane treatment".
[1427] See Additional Protocol II, Article 6(2).

Appeals Panel considers that Shala fails to demonstrate that the Trial Panel improperly imported content unique to international armed conflicts when it held that the obligation, in a non-international armed conflict, to be brought promptly before a judge or other competent authority requires, at a minimum, an independent authority.

630. Concerning Shala's Additional Protocol II argument, bearing in mind the protective function of the prohibition on arbitrary detention, Shala has not demonstrated that, as a matter of customary international law, persons suspected of penal offences under Article 6(2) of Additional Protocol II benefit from what the Trial Panel considered a "minimum [requirement]" of independent detention review while persons suspected of posing a security risk are subject to a standard below this minimum. Accordingly, the Appeals Panel considers that Shala fails to demonstrate that the Trial Panel erred in relying on Article 6(2) of Additional Protocol II.

631. In view of the above, the Appeals Panel dismisses Shala's overall argument that the Trial Panel erred in respect of the sources of law on which it relied when delineating the contours of two of the basic procedural safeguards.

632. The Appeals Panel now turns to Shala's second argument that the Trial Panel further erred with respect to the second procedural safeguard (detention review by a judge or other competent authority) by applying the "overly high standard" of independent review and by not making its assessment of this standard context specific to the KLA, as Shala argues should be the case in non-international armed conflicts.[1428] The Appeals Panel is not persuaded that the requirement of independent review is an "overly high standard". In an armed conflict context, the protective function of the prohibition on arbitrary detention would be nullified if the authority reviewing detention is not independent from the authority who ordered it.[1429] Accordingly, the Appeals Panel dismisses this argument.

[1428] See Appeal Brief, paras 207-211.
[1429] See, *mutatis mutandis*, 1987 ICRC Commentary Additional Protocols, paras 3084, 4601.

633. As to Shala's related argument that, as a matter of law, the Trial Panel's assessment of "competent authority" should have been context-specific, the Appeals Panel notes that the only authority Shala provides for this proposition is a reference to the 2020 ICRC Commentary GCIII which in turn refers to the ICRC Procedural Principles on Internment in Armed Conflict.[1430] Shala implies that the ICRC indicated that independent review of detention is only required in certain circumstances.[1431] However, while these principles allow for a certain amount of variation in the type of authority that may carry out detention reviews,[1432] the overarching principle enumerated requires independent initial and periodic reviews of detention.[1433] Accordingly, the Appeals Panel dismisses this argument. Further, in view of this conclusion, the Appeals Panel considers moot Shala's related argument that the Trial Panel erred in failing to take into account the specific circumstances of the KLA when it required the "competent authority" to be independent.[1434]

634. The Appeals Panel now turns to Shala's third argument that the Trial Panel erred in law in relying on the *Delalić et al*. Appeal Judgement when it held, in relation to its assessment of the compliance with the basic procedural safeguards, that it is irrelevant whether "the perpetrator is personally responsible for the failure to have the detainee's procedural rights respected".[1435] The Appeals Panel considers that the mere fact that the referred to finding was made in the context of an analysis of the corollary to the war crime of arbitrary detention in a non-international armed conflict, namely unlawful confinement as a grave breach of the Geneva Conventions – a war crime in an international armed conflict – does not demonstrate an error. The Appeals Panel notes in this regard that even where the wording of war crimes derived from

[1430] Appeal Brief, para. 210, referring to 2020 ICRC Commentary GCIII, common Article 3, para. 760, referring to ICRC Procedural Principles on Internment in Armed Conflict.
[1431] Appeal Brief, para. 210.
[1432] ICRC Procedural Principles on Internment in Armed Conflict, pp. 386-387.
[1433] ICRC Procedural Principles on Internment in Armed Conflict, pp. 386-388.
[1434] See Appeal Brief, paras 209-211.
[1435] See Appeal Brief, paras 207, 212.

Common Article 3 of the Geneva Conventions and which apply to non-international armed conflicts differ from the corollary grave breaches of the Geneva Conventions which apply to international armed conflict, practice demonstrates that the elements tend to be the same irrespective of the nature of the armed conflict.[1436] With respect to the Trial Panel's clarification that, in determining whether an accused satisfied the *actus reus* element of arbitrary detention, it is irrelevant whether "the perpetrator is personally responsible for the failure to have the detainee's procedural rights respected", Shala has not articulated why this principle does not transcend the nature of the armed conflict, applying equally to war crimes in both types of armed conflict. Therefore, the Appeals Panel dismisses this argument.

635. In light of all of the above, the Panel finds that Shala fails to demonstrate that the Trial Panel erred in law with respect to the basic procedural safeguards that the Trial Panel found to be part of the *actus reus* of the war crime of arbitrary detention in a non-international armed conflict. Accordingly, the Appeals Panel dismisses Ground 12 in part.

(b) Alleged Errors Regarding the Trial Panel's Assessment of the Actus Reus of the War Crime of Arbitrary Detention

636. At the outset, the Appeals Panel recalls that it found above, under Ground 7, that Shala was not afforded the opportunity to confront the evidence brought against him with respect to [REDACTED]'s and [REDACTED]'s detention at the KMF, let alone of their deprivation of basic procedural rights, therefore finding that Shala's convictions in respect of the arbitrary detention of [REDACTED] and [REDACTED] were based decisively on untested evidence.[1437] Accordingly, the Panel overturned the Trial Panel's findings underpinning the conviction of Shala for the crime of arbitrary

[1436] ICRC Customary IHL Study, Rule 156.
[1437] See above, paras 582, 589.

detention against [REDACTED] and [REDACTED].[1438] Therefore, in the present section, the Panel will not consider Shala's arguments under Grounds 8A and 12 with respect to those two detainees,[1439] and will only make findings in respect of the arbitrary detention of the remaining 16 detainees.

(i) Alleged Errors in the Trial Panel's Finding that Detainees were not Brought Before a Judge or Other Competent Authority

a. Submissions of the Parties

637. Shala submits that the Trial Panel erred in fact in finding that no one at the KMF, neither Mr Kryeziu, Mr Dobruna, nor any other KLA member, acted as a competent authority,[1440] and that no reasonable trier of fact would have come to the Trial Panel's conclusion that the detainees were "not brought promptly before a judge or other competent authority".[1441] First, Shala submits that the Trial Panel found credible Mr Kryeziu's statement that he interviewed two civilians at the KMF and conducted investigations into KLA members, and concluded that Mr Kryeziu was a KLA member who exercised "the function of interrogating detainees".[1442] In Shala's view, this shows that Mr Kryeziu exercised the functions of a competent authority at the KMF.[1443]

638. Second, Shala highlights that four out of the seven detainees who provided evidence (TW4-11, TW4-04, TW4-02 and TW4-05),[1444] stated that they had been questioned by and/or provided a statement to a person who acted as a judge or prosecutor, and three of them (TW4-11, TW4-04 and TW4-02) identified this person as

[1438] See above, paras 601, 605.
[1439] See in particular Appeal Brief, paras 156, 159.
[1440] Appeal Brief, paras 229-236. See also Appeal Brief, paras 149, 153; Reply Brief, paras 27-28.
[1441] Appeal Brief, paras 229, 236.
[1442] Appeal Brief, paras 230, 236.
[1443] Appeal Brief, para. 236.
[1444] See Appeal Brief, paras 149, 152-153, 231-234.

Mr Kryeziu, and that the Trial Panel found those witnesses credible on those facts.[1445] Shala also emphasises that TW4-11, TW4-04 and TW4-02 were released after their questioning by Mr Kryeziu.[1446] In regard to TW4-02 more specifically, Shala argues that based on TW4-02's account that he was questioned on a number of occasions during his detention by Mr Kryeziu, whom TW4-02 knew personally, the Trial Panel erroneously inferred that Mr Kryeziu did not exercise the function of a judge or other competent authority, but rather that of a friend or acquaintance.[1447] Shala further argues that regardless of the familiarity between Mr Kryeziu and TW4-02, it cannot be excluded that Mr Kryeziu exercised the function of a judge or other competent authority, or facilitated a favourable decision made by a competent authority.[1448]

639. Shala also submits that the Trial Panel did not properly examine W04733's evidence regarding his release,[1449] and argues that the Trial Panel erred by inferring from W04733's release by [REDACTED] that he was not provided with an opportunity to challenge the lawfulness of his detention.[1450] In Shala's view, the fact that W04733 was released as a [REDACTED] does not preclude the possibility that he had been lawfully detained before being released.[1451] Moreover, Shala argues that the Trial Panel erred by inferring that based on the fact that Mr Dobruna interviewed W04733 together with Xhemshit Krasniqi, who was directly involved in W04733's mistreatment, there was no independent oversight over the lawfulness of W04733's detention.[1452]

[1445] Appeal Brief, paras 149, 153, 231-234, 236. Shala also emphasises that these three detainees were released after their questioning by Mr Kryeziu. See Appeal Brief, paras 149, 153, 231-233. See also Reply Brief, para. 27.
[1446] Appeal Brief, paras 149, 153, 231-233. See also Reply Brief, para. 27.
[1447] Appeal Brief, para. 153.
[1448] Appeal Brief, para. 153. See also Reply Brief, para. 28.
[1449] Appeal Brief, para. 235.
[1450] Appeal Brief, paras 150, 235.
[1451] Appeal Brief, para. 150. See also Transcript, 15 May 2025, pp. 50-51.
[1452] Appeal Brief, para. 150.

640. Regarding TW4-05, Shala emphasises that the Trial Panel found credible TW4-05's statement that, upon his arrival at the KMF, he was questioned by [REDACTED] and "someone who posed as a lawyer or a judge" and was subsequently questioned three times by [REDACTED].[1453]

641. The SPO responds that the Trial Panel reasonably found that Mr Kryeziu did not exercise the functions of an independent authority having oversight over the lawfulness of detention.[1454] According to the SPO, Shala overlooks evidence, in particular the testimony of the detainees interviewed by Mr Kryeziu which were expressly considered by the Trial Panel, that Mr Kryeziu was neither impartial nor competent to order the release of detainees.[1455] The SPO argues that Mr Kryeziu's appointment by Xhemshit Krasniqi and Sabit Geci, two JCE members who were in charge of arrests and detention at the KMF and heavily involved in the mistreatment of detainees, negated any kind of independent oversight over the lawfulness of the detentions.[1456] The SPO further argues that Shala ignores or fails to acknowledge factors the Trial Panel considered when entering findings on W04733, namely the modalities of his arrest together with his release by [REDACTED], and that he was never informed of the reasons for his detention nor was his detention reviewed by an independent authority.[1457]

642. In reply, Shala argues that the SPO misleadingly claims that the Defence ignored the Trial Panel's findings on Mr Kryeziu, despite extensive Defence

[1453] Appeal Brief, para. 234. See also Trial Judgment, paras 497-498.
[1454] SPO Response Brief, para. 233.
[1455] SPO Response Brief, paras 161, 167, 233, 235.
[1456] SPO Response Brief, paras 167, 234-235.
[1457] SPO Response Brief, para. 162. The SPO also points out that Shala mischaracterises the Trial Panel's finding that Mr Dobruna did not exercise independent oversight over the lawfulness of W04733's detention, as this was related to Xhemshit Krasniqi's presence during W04733's interrogation. See SPO Response Brief, para. 163.

submissions suggesting that Mr Kryeziu was exercising the functions of a judge or competent authority.[1458]

b. Assessment of the Court of Appeals Panel

643. As regards Shala's challenges to the Trial Panel's finding that no one at the KMF acted as a competent authority and its conclusion that the detainees were "not brought promptly before a judge or other competent authority",[1459] the Panel recalls that the Trial Panel found that neither Mr Kryeziu, nor Mr Dobruna nor any other KLA member exercised the function of a "judge" or "competent" authority for the purposes of meeting this procedural guarantee.[1460] In the Trial Panel's view, none of them exercised the function of an independent authority having oversight over the lawfulness of the persons' detention as they actively participated in interrogations and were not in a position to independently order anyone's release.[1461] The Trial Panel further considered that throughout their detention, a number of detainees were seriously mistreated by KLA members, including by Shala, some were subjected to forced confessions, and one of them was killed.[1462]

644. The Panel recalls that the second procedural safeguard (detention review by a judge or other competent authority) requires, at a minimum, that the review of the lawfulness of the detention be conducted by an independent authority from the one ordering the detention, to determine whether the detention continues to be necessary and whether the detainee is to be released.[1463] Therefore, by logical implication, the

[1458] Reply Brief, paras 27-28. Shala also replies that the SPO "blatantly ignored" the Defence submissions that TW4-11 testified that his release took place after his questioning by Mr Kryeziu. See Reply Brief, para. 27.
[1459] See Appeal Brief, paras 229-236; Trial Judgment, para. 948.
[1460] Trial Judgment, paras 437, 472, 948.
[1461] Trial Judgment, para. 948.
[1462] Trial Judgment, para. 948.
[1463] Trial Judgment, para. 942.

authority must be empowered to order release when detention is determined to be unlawful or unwarranted.

645. Having said that, the Appeals Panel will determine whether the Trial Panel's conclusion that the detainees held at the KMF were not brought promptly before a "judge" or "competent authority" was one which no reasonable trier of fact could have reached.[1464]

i. On the Lack of Competent Authority of Mr Kryeziu

646. First, the Panel will determine whether the Trial Panel erred in finding that Mr Kryeziu did not exercise the functions of a competent authority.[1465] The Panel will then address Shala's remaining arguments.[1466]

647. The Panel observes that out of the seven detainees who provided evidence, five of them[1467] indicated that they were questioned and/or gave a statement to an individual who claimed to act in an official capacity – namely, as a judge or prosecutor[1468] – and three of them, TW4-11, TW4-04 and TW4-02, identified this person as Mr Kryeziu.[1469] However, and as correctly found by the Trial Panel, the fact that, according to witnesses, Mr Kryeziu was presenting himself as "judge" or "prosecutor" does not suffice to make him a "competent authority".[1470] The Panel notes in this regard that while Shala contends that Mr Kryeziu exercised the functions of a

[1464] See Trial Judgment, para. 948.
[1465] See Appeal Brief, paras 153, 229-233, 236. See also Appeal Brief, para. 149.
[1466] See Appeal Brief, paras 150, 234-235.
[1467] Shala inaccurately mentions only four of them. See Appeal Brief, paras 231-234, 236.
[1468] Trial Judgment, paras 207, 433, 435-436, 462, 497-499, 509, 529-530, 552-555. The Panel notes that TW4-02 indicated in his written statement that Mr Kryeziu was an "investigator". See P00144 (060664-TR-ET Part 2) (TW4-02) (confidential), p. 11.
[1469] Trial Judgment, paras 207, 352, 433, 435-436, 529-530, 552-555.
[1470] Trial Judgment, para. 948. See also Trial Judgment, paras 207, 351-353, 433, 437, 529; Transcript (TW4-11), 3 May 2023, p. 1261; P00153 (SITF00013262-00013315 RED) (TW4-04) (confidential), p. 13 (SITF00013274); P00154 (SITF00015825-SITF00015925 RED) (TW4-04) (confidential), p. 30 (SITF00015854); P00162 (SPOE00014669-00014751 RED) (TW4-04) (confidential), p. 23 (SPOE00014691); P00159_ET (064716-TR-ET Part 5 RED4) (TW4-04) (confidential), pp. 2-3, 9-10; P00134 (SITF00014088-00014120 RED) (Mr Kryeziu) (confidential), p. 13 (SITF00014100).

competent authority, he does not advance any specific arguments that would demonstrate that Mr Kryeziu had the required level of independence, or that he was in position to independently oversee the lawfulness of the persons' detention and order anyone's release.[1471]

648. Further, the Panel considers that Shala ignores the evidence, duly considered by the Trial Panel, demonstrating that Mr Kryeziu did not exercise independent oversight over the lawfulness of the detention of the persons held at the KMF.[1472] In particular, the Trial Panel gave special consideration to evidence concerning Mr Kryeziu's functions during the period of the charges, and concluded that Mr Kryeziu was a KLA member working with the KLA Military Police who, throughout the time relevant to the charges, was based at the KMF and had the "function of interrogating detainees",[1473] a conclusion that is not challenged by Shala. To reach this conclusion, the Trial Panel notably took into account Mr Kryeziu's statement,[1474] in which he explained that, after having served as a prosecutor in Prishtina/Priština prior to 1990,[1475] he was approached by Xhemshit Krasniqi to join the KLA in April 1999,[1476] and was ultimately appointed at the KMF by Xhemshit

[1471] Shala merely refers to the statements of certain witnesses who indicated that they had been questioned by a "judge or prosecutor", which the Trial Panel found credible. See Appeal Brief, paras 231-233.
[1472] Trial Judgment, paras 351-353, 435-437, 529-530, 552-553, 555. See also Trial Judgment, para. 948.
[1473] Trial Judgment, paras 351-353. The Appeals Panel notes that Mr Kryeziu himself stated that he interviewed two civilians and conducted investigations into KLA members, account that the Trial Panel found credible. See Trial Judgment, paras 205, 351-352; P00134 (SITF00014088-00014120 RED) (Mr Kryeziu) (confidential), pp. 9, 13-14 (SITF00014096, SITF00014100-SITF00014101); P00135 (SITF00016908-00016964 RED) (Mr Kryeziu) (confidential), pp. 9-10 (SITF00016916-SITF00016917).
[1474] See Trial Judgment, paras 351-352, referring, *inter alia,* to Mr Kryeziu's written statement (P00134 (SITF00014088-00014120 RED) (Mr Kryeziu) (confidential)). The Trial Panel found that Mr Kryeziu's (partial) admission on his role at the KMF was corroborated by the evidence provided by TW4-11, TW4-04 and TW4-02. See Trial Judgment, para. 352.
[1475] Trial Judgment, paras 203, 351, referring to P00135 (SITF00016908-00016964 RED) (Mr Kryeziu) (confidential), p. 3 (SITF00016910); P00134 (SITF00014088-00014120 RED) (Mr Kryeziu) (confidential), p. 13 (SITF00014100).
[1476] Trial Judgment, para. 351. See P00134 (SITF00014088-00014120 RED) (Mr Kryeziu) (confidential), pp. 6, 10-11 (SITF00014093, SITF00014097-SITF00014098) (confirming that he is referring to Xhemshit Krasniqi); P00135 (SITF00016908-00016964 RED) (Mr Kryeziu) (confidential), p. 5 (SITF00016912). As to the period when Mr Kryeziu joined the KLA, see P00134 (SITF00014088-00014120 RED) (Mr Kryeziu)

Krasniqi and Sabit Geci,[1477] two JCE members who participated actively in the mistreatment of detainees.[1478] The Trial Panel further considered Mr Kryeziu's evidence that his responsibility was to conduct investigations and interrogations, including of persons accused of collaborating with Serbian authorities, and he himself questioned detainees — among them TW4-11, TW4-04, and TW4-02, whose evidence is corroborative.[1479]

649. With respect to the Trial Panel's finding that Mr Kryeziu had "the function of interrogating detainees", the Panel understands Shala to argue that such a function contributes to the demonstration of Mr Kryeziu exercising the functions of a competent authority.[1480] In the absence of any substantiation of this claim, the Appeals Panel considers that Shala merely disagrees with the Trial Panel's finding that as a KLA member working with the KLA Military Police, who was actively involved in trying to elicit information from detainees, Mr Kryeziu lacked independence.[1481] Moreover, and contrary to what Shala seems to argue,[1482] the Appeals Panel further observes that the Trial Panel conducted a careful and detailed assessment of the testimonies of TW4-02, TW4-11 and TW4-04,[1483] which confirmed that Mr Kryeziu did not have the power to exercise independent oversight over the lawfulness of the

(confidential), pp. 4, 6 (SITF00014091, SITF00014093); P00135 (SITF00016908-00016964 RED) (Mr Kryeziu) (confidential), p. 5 (SITF00016912), stating that he joined after the KLA members went to Burrel for training. See also Trial Judgment, para. 352, referring to P00012_ET (066864-TR-ET Part 2 Revised 1) (2019 Belgian Statement) (confidential), pp. 114-115, where Shala stated that the KLA Military Police recruited former policemen and judges within its ranks as it became more structured. See also Trial Judgment, para. 860, finding that this happened mid-April 1999 (at the earliest).

[1477] Trial Judgment, paras 203, 351, referring to P00134 (SITF00014088-00014120 RED) (Mr Kryeziu) (confidential), pp. 10-11 (SITF00014097-00014098); P00135 (SITF00016908-00016964 RED) (Mr Kryeziu) (confidential), pp. 5, 13 (SITF00016912, SITF00016920).

[1478] Trial Judgment, paras 1003, 1004, 1007.

[1479] Trial Judgment, paras 203, 351-352, 948. See also Trial Judgment, paras 433-437, 529-530, 552-553, 555.

[1480] See Appeal Brief, para. 236.

[1481] Trial Judgment, paras 351, 353, 436-437, 530, 555, 948.

[1482] See Appeal Brief, paras 149, 153, 231-233, 236. See also Reply Brief, paras 27-28.

[1483] See Trial Judgment, paras 120-136, 163-168, 415-440, 513-556.

detention, that he was actively involved in trying to elicit information from the detainees, and was not in a position to independently order anyone's release.[1484]

650. As regards TW4-11, the Panel observes that the Trial Panel considered, *inter alia*, that: (i) TW4-11 testified that he was brought, one month after his arrest, to Mr Kryeziu who did not give him any explanation about his detention but questioned him and told him that "he was sorry that he had no arguments against [him]"; and (ii) the witness did not confirm or deny whether he was released as a result of his interview with Mr Kryeziu.[1485]

651. As regards TW4-04, the Panel observes that the Trial Panel considered that: (i) the witness indicated that he was brought, prior to his release, before Mr Kryeziu who asked him to provide a written statement containing information about his past and his arrest;[1486] and (ii) TW4-04 indicated that, even though he was released a few days later,[1487] this procedure was not genuine because Mr Kryeziu was "just making something official that had been already decided by somebody else".[1488]

652. As regards TW4-02, the Panel observes that the Trial Panel considered that: (i) TW4-02 indicated that he was questioned on a number of occasions by

[1484] See Trial Judgment, paras 435-437, 530, 555, 948.
[1485] Trial Judgment, paras 421, 433, 435, 437. See also Transcript (TW4-11), 3 May 2023, pp. 1261-1262, 1265-1266, 1305-1306. The Panel notes that the Trial Panel "accepted an absence of precision as regards the witness's exact date of arrest [and date of release] given the witness's advanced age and passage of time". See Trial Judgment, para. 431.
[1486] Trial Judgment, para. 529, referring to P00153 (SITF00013262-00013315 RED) (TW4-04) (confidential), p. 13 (SITF00013274); P00154 (SITF00015825-00015925 RED) (TW4-04) (confidential), p. 30 (SITF00015854); P00162 (SPOE00014669-00014751 RED) (TW4-04) (confidential), p. 23 (SPOE00014691); P00159_ET (064716-TR-ET Part 5 RED4) (TW4-04) (confidential), pp. 2-3, 9-10; P00134 (SITF00014088-00014120 RED) (Mr Kryeziu) (confidential), p. 13 (SITF00014100).
[1487] Trial Judgment, para. 529.
[1488] Trial Judgment, para. 529, referring to P00159_ET (064716-TR-ET Part 5 RED4) (TW4-04) (confidential), pp. 9-10. The Appeals Panel notes that the Trial Panel paid heed to the fact that, in TW4-04's words, Mr Kryeziu was not the ultimate decision-maker. See Trial Judgment, para. 530.

Mr Kryeziu;[1489] (ii) TW4-02 knew Mr Kryeziu personally from the past;[1490] and (iii) during one interrogation session, Mr Kryeziu tried to help TW4-02 by advising him to stay quiet and, in any event, not to confess to anything, and also informed him that he was to be released but that he had been subjected to a verification procedure "completely in vain".[1491]

653. The Trial Panel further considered crucial the fact that during the time relevant to the charges, namely at the time Mr Kryeziu was based at the KMF,[1492] a number of detainees were seriously mistreated by KLA members, including by Shala, that some were subjected to forced confessions, and that one of them was killed.[1493]

654. The Panel observes that the evidence on the record amply supports the Trial Panel's conclusion that neither TW4-11, nor TW4-04 nor TW4-02 were brought before a judge or other competent authority. In contrast, the Panel notes that Shala neither points to evidence on the record supporting another reasonable inference nor explains how it could be inferred, from their evidence, that Mr Kryeziu exercised vis-à-vis TW4-11, TW4-04, and TW4-02 the function of a judge or other competent authority, or facilitated a favourable decision made by a competent authority.

655. In light of the aforementioned, the Panel finds that Shala has failed to show that no reasonable trier of fact could have reached the Trial Panel's findings that Mr Kryeziu did not exercise the function of a judge or competent authority[1494] and that

[1489] Trial Judgment, paras 541, 552, referring to P00144_ET (060664-TR-ET Part 2) (TW4-02) (confidential), pp. 11-12; P00145_ET (060664-TR-ET Part 3) (TW4-02) (confidential), p. 26; P00146_ET (060664-TR-ET Part 4) (TW4-02) (confidential), pp. 18-19; P00142_ET (108850-TR-ET Part 1 RED) (TW4-02) (confidential), pp. 10-11.
[1490] Trial Judgment, para. 552, referring notably to P00144_ET (060664-TR-ET Part 2) (TW4-02) (confidential), pp. 11-12; P00142_ET (108850-TR-ET Part 1 RED) (TW4-02) (confidential), p. 10.
[1491] Trial Judgment, paras 552, 555, referring to P00144_ET (060664-TR-ET Part 2) (TW4-02) (confidential), p. 11; P00147_ET (060664-TR-ET Part 5 RED4) (TW4-02) (confidential), p. 17; P00142_ET (108850-TR-ET Part 1) (TW4-02) (confidential), p. 10.
[1492] See above, para. 648.
[1493] Trial Judgment, para. 948, and references cited therein.
[1494] Trial Judgment, paras 437, 530, 555, 948.

neither TW4-11, nor TW4-04 nor TW4-02 were brought promptly before a judge or other competent authority.[1495]

ii. On the Lack of Competent Authority of Mr Dobruna

656. The Panel will now turn to Shala's arguments concerning W04733 and the role of Mr Dobruna.[1496] The Panel notes that the Trial Panel found that the only reasonable conclusion, based on the evidence as a whole, was that W04733 was not brought before a judge or other competent authority, nor was he provided with an opportunity to challenge the lawfulness of his detention.[1497]

657. The Panel will first address Shala's specific allegation that even assuming that W04733 was mistreated during an interview with Mr Dobruna and Xhemshit Krasniqi, this, in itself, does not show a lack of independent oversight over the lawfulness of his detention.[1498] The Panel considers that Shala's assumption that "W04733 [was] mistreated during an interview",[1499] only partially reflects the Trial Panel's assessment. The Trial Panel more precisely considered the fact that W04733 was interrogated by Mr Dobruna on several occasions, together with Xhemshit Krasniqi who was directly involved in W04733's mistreatment and forced confessions, which the Trial Panel found indicated that Mr Dobruna "did not exercise any kind of independent oversight" over the lawfulness of W04733's detention (or anyone else's).[1500]

658. The Panel recalls the Trial Panel's finding that Xhemshit Krasniqi was a senior member of the KLA Military Police and held a position of authority at the KMF, as the

[1495] Trial Judgment, paras 438-440, 530-531, 555-556, 948.
[1496] See Appeal Brief, paras 150, 235.
[1497] Trial Judgment, paras 472, 473.
[1498] See Appeal Brief, para. 150. The Panel considers that the use of violence against detained individuals is a factor to consider in assessing the lawfulness of their detention. See e.g. *Mladić* Trial Judgment, para. 3216.
[1499] See Appeal Brief, para. 150.
[1500] Trial Judgment, paras 471-472. See also Trial Judgment, paras 462, 689-695, 699.

person (directly) in charge of the detainees and the detention facilities there.[1501] As for Mr Dobruna, the fact that W04733 described him as a "judge" or a "prosecutor",[1502] does not suffice to make him a judge or competent authority.[1503] In these circumstances, considering Xhemshit Krasniqi's position of authority at the KMF and his direct involvement in W04733's mistreatment, the Panel finds that it was reasonable for the Trial Panel to consider that the simple fact that Mr Dobruna interrogated W04733 together with Xhemshit Krasniqi indicated that Mr Dobruna did not exercise any kind of independent oversight over the lawfulness of W04733's detention.[1504]

659. The Panel further stresses that the Trial Panel did not rely on this factor only, but rather conducted a holistic assessment of the evidence to conclude that W04733 was not brought before a judge or other competent authority nor provided with an opportunity to challenge the lawfulness of his detention.[1505] In addition to the above, the Trial Panel observed that W04733's release was the result of an external intervention, and not a decision by a judge or other competent authority.[1506]

660. This specific finding is also challenged by Shala, which the Panel will now address. First, Shala claims that the Trial Panel did not properly examine W04733's evidence and erred in not establishing with certainty which [REDACTED] were responsible for W04733's release.[1507] The Panel notes W04733's statement that he was released on 1 June 1999 [REDACTED],[1508] and that the Trial Panel accepted this evidence as plausible and truthful.[1509] Moreover, the Panel notes that Shala raised this

[1501] Trial Judgment, para. 349.
[1502] Trial Judgment, paras 354, 462.
[1503] See Trial Judgment, para. 948. See also above, para. 647.
[1504] Trial Judgment, para. 472.
[1505] Trial Judgment, paras 471-472.
[1506] Trial Judgment, paras 469, 472.
[1507] See Appeal Brief, para. 235.
[1508] P00129_ET (082892-TR-AT-ET Part 6) (W04733) (confidential), pp. 12-15; 26; P00130_ET (082892-TR-AT-ET Part 7) (W04733) (confidential), pp. 1-2, 9-10.
[1509] Trial Judgment, paras 462-463.

argument at trial and that the Trial Panel answered it,[1510] stating that it was not necessary to establish which [REDACTED] secured his release as "[w]hat matters is that W04733 was released […] not as a result of a judicial decision, but following an external intervention".[1511] Shala clearly disagrees with this conclusion, without demonstrating why it was necessary for the Trial Panel to establish which [REDACTED] released W04733.

661. Shala also argues that the release of W04733 by an external entity did not preclude the possibility that he had been lawfully detained prior to his release.[1512] While this may be true in theory, the Panel observes first that the Trial Panel did not reach this conclusion. To the contrary, it found that W04733 and other detainees were deprived of all basic procedural guarantees to which they were entitled while in detention, pursuant to international humanitarian law.[1513] In addition, the Panel considers that while the circumstances of W04733's release may not have been a decisive factor in the context of assessing whether he had an opportunity to challenge the lawfulness of his detention, it is nonetheless a relevant one, and the Trial Panel considered it as such.[1514] Further, Shala does not explain how, based on the evidence, the Trial Panel could have reasonably inferred that W04733 had been released as a result of a judicial decision.

662. Therefore, the Appeals Panel finds that a reasonable trier of fact could have concluded on the basis of the totality of the evidence that the only reasonable inference was that W04733 was not brought before a judge or other competent authority, nor was he provided with an opportunity to challenge the lawfulness of his detention.[1515] The Panel thus dismisses Shala's contention.

[1510] Trial Judgment, para. 468. See also Trial Judgment, para. 464; Defence Final Trial Brief, paras 55-56.
[1511] Trial Judgment, para. 468.
[1512] See Appeal Brief, para. 150. See also Transcript, 15 May 2025, pp. 50-51; Appeal Brief, para. 235.
[1513] Trial Judgment, para. 591.
[1514] Trial Judgment, para. 472.
[1515] See Trial Judgment, paras 471-473, 948.

iii. On the Lack of Competent Authority of Other KLA Members

663. The Panel will now address Shala's remaining arguments as regards TW4-05's evidence concerning his questioning at the KMF. The Panel observes that Shala merely repeats TW4-05's statement, which the Trial Panel found credible, that upon his arrival at the KMF, he was questioned by [REDACTED] and "someone who posed as a lawyer or a judge".[1516] Shala does not identify any error in the Trial Panel's assessment that would warrant the Appeals Panel's intervention.[1517] The Panel considers that such deficiencies warrant summary dismissal.[1518] In any event, the Panel considers that the simple fact that TW4-05 was interrogated by, or in the presence of, [REDACTED], a JCE member who participated actively in the mistreatment of detainees, confirms that the person who "posed as a lawyer or a judge" cannot be qualified as competent authority.[1519] Therefore, the Panel finds that Shala has failed to show that no reasonable trier of fact could have reached the Trial Panel's conclusion that TW4-05 was not brought promptly before a judge or other competent authority.[1520]

664. In light of the above, the Panel is satisfied that the Trial Panel's factual finding that the detainees were not brought promptly before a judge or other competent authority is supported by duly weighed evidence and ample reasoning.[1521] The Panel therefore finds that Shala has failed to demonstrate that the Trial Panel erred in finding that neither Mr Kryeziu nor Mr Dobruna nor any other KLA member exercised the function of a judge or competent authority for the purposes of meeting the second procedural safeguard (detention review by a judge or other competent authority).[1522]

[1516] Appeal Brief, para. 234; Trial Judgment, paras 497-498, 509.
[1517] Appeal Brief, para. 234.
[1518] See above, para. 42.
[1519] See Trial Judgment, paras 497, 509, 1004, 1007.
[1520] See Trial Judgment, paras 511-512, 948.
[1521] Trial Judgment, paras 351-356, 437, 471-472, 511, 530, 555.
[1522] Trial Judgment, paras 437, 472, 530, 555, 948.

Accordingly, the Appeals Panel dismisses Shala's Ground 8A and Ground 12 in part, with respect to the Trial Panel's findings on the lack of competent authority.[1523]

(ii) Alleged Errors Concerning the Trial Panel's Inferences in Entering Findings on the Deprivation of Basic Procedural Safeguards

a. Submissions of the Parties

665. Shala submits that the Trial Panel erred when it drew unwarranted inferences and failed to give sufficient weight to other reasonable inferences based on the evidence.[1524] He further submits that "[i]f no reasonable [trial panel] could have ignored an inference which favours the accused, the [Appeals Panel] must vacate the [Trial] Panel's factual inference and reverse any conviction dependent on it."[1525]

666. Shala challenges specific findings by the Trial Panel on arbitrary detention, namely that TW4-01, the Murder Victim, TW4-11, W01448 and TW4-05, were deprived of procedural guarantees and the opportunity to challenge the lawfulness of their detention.[1526] In this regard, Shala argues that the Trial Panel failed to provide sufficient reasons supporting its conclusions based on unreasonable inferences.[1527]

667. In particular, with respect to TW4-01, Shala takes issue with the Trial Panel's finding that because detainees were liberated [REDACTED], the only reasonable conclusion was that TW4-01 was not brought before a judge or other competent authority nor was he provided the opportunity to challenge the lawfulness of his

[1523] The remainder of Shala's challenges under Grounds 8A and 12 have been addressed below. See below, Sections V.H.1.(b).(ii)-(iii), V.H.2., and V.H.3.
[1524] Appeal Brief, paras 144-145; Reply Brief, paras 24-25; Transcript, 15 May 2025, pp. 50-51.
[1525] Appeal Brief, paras 146, 164.
[1526] Appeal Brief, paras 147-153; Reply Brief, para. 24. The Panel recalls that it has already addressed above Shala's arguments with respect to TW4-02 and W04733. See above, paras 652-662.
[1527] Appeal Brief, paras 147-153; Reply Brief, paras 24-25.

detention.[1528] Rather, according to Shala, another reasonable inference was that TW4-01's detention could have been lawful given his record and [REDACTED].[1529]

668. As regards the Murder Victim, Shala argues that the Trial Panel erred when making an inference that he was not properly informed of the reasons for his arrest or detention based on the evidence that [REDACTED].[1530] Rather, according to Shala, another reasonable inference was that the Murder Victim was duly informed of legitimate reasons for detention, particularly given his "prior criminal history".[1531]

669. With respect to the circumstances surrounding the detention of TW4-11, Shala contends that the Trial Panel erroneously inferred from the circumstances of his release that TW4-11 was not provided an opportunity to challenge the lawfulness of his detention.[1532] However, Shala notes that TW4-11 was interviewed by Mr Kryeziu and that another reasonable inference was that he was released after the interview based on a decision made by Mr Kryeziu – exercising the function of a judge or other competent authority or facilitating a favourable decision made by a competent authority.[1533]

670. For W01448, Shala argues that another possible inference than the Trial Panel's finding that he was not provided with an opportunity to challenge the lawfulness of his detention is that W01448 was treated differently from other detainees because he was suspected of undermining KLA efforts and would have to face trial.[1534]

671. Regarding TW4-05, Shala challenges the Trial Panel's finding that TW4-05 was not provided with an opportunity to challenge the lawfulness of his detention, as he

[1528] Appeal Brief, para. 147; Reply Brief, para. 26.
[1529] Appeal Brief, para. 147. See also Appeal Brief, paras 150-152.
[1530] Appeal Brief, para. 148.
[1531] Appeal Brief, para. 148.
[1532] Appeal Brief, para. 149. See also Appeal Brief, paras 150-152.
[1533] Appeal Brief, para. 149. See also Reply Brief, para. 27.
[1534] Appeal Brief, para. 151.

was released as a result of an external intervention, and according to Shala, being released by an external entity does not preclude the possibility that TW4-05 had been lawfully detained before being released.[1535] Shala also argues that, in its finding on TW4-05, the Trial Panel erred by relying on the fact that TW4-01, the Murder Victim, TW4-11, W04733 and W01448 did not have an opportunity to challenge the lawfulness of their detention, as those findings were also based on adverse inferences that were not the only reasonable conclusions.[1536]

672. Moreover, Shala argues that the Trial Panel erred by inferring that [REDACTED], [REDACTED] and a third Roma musician were not afforded any basic guarantees, based on its inference that: (i) all detainees were detained under similar conditions; and (ii) TW4-01, the Murder Victim, TW4-11, W04733, W01448, TW4-05, TW4-04 and TW4-02 were deprived of their liberty without any basic guarantees.[1537] In Shala's view, it cannot be excluded that these three individuals were treated differently based on the lack of information in evidence regarding their arrest and detention.[1538]

673. With respect to the finding that [REDACTED] was not properly informed of the reasons for his arrest or detention, Shala argues that the Trial Panel erred by failing to consider alternative reasonable conclusions, including that he was treated differently because his son was a KLA member.[1539]

674. Finally, Shala avers that the Trial Panel erred by making the inference that [REDACTED] and [REDACTED] and [REDACTED] were not informed of the reasons for their arrest or detention or unable to challenge the lawfulness of their detention

[1535] Appeal Brief, para. 152. Regarding TW4-05, Shala further argues that it cannot be precluded that his detention was legitimate as he was interviewed about his links with "Serbs" by someone who presented himself as a lawyer or judge. See Appeal Brief, para. 152.
[1536] Appeal Brief, para. 152.
[1537] Appeal Brief, para. 154.
[1538] Appeal Brief, para. 154.
[1539] Appeal Brief, para. 155.

based on its conclusion that all detainees were arrested and detained in similar conditions.[1540] Shala also challenges the Trial Panel's finding that, although it acknowledged it had not received specific evidence on the mistreatment of [REDACTED], based on the evidence that all detainees held in Room 1 were subjected to mistreatment and since [REDACTED] was held there, the only reasonable inference was that he was also mistreated.[1541] Similarly, Shala challenges that although the Trial Panel had not received specific evidence pertaining to the interrogation of [REDACTED], [REDACTED] and [REDACTED], it found based on the evidence of TW4-11, W04733, W01448 and TW4-05 that all detainees were interrogated and on this basis, the only reasonable conclusion on the evidence was that [REDACTED], [REDACTED] and [REDACTED] were also interrogated.[1542]

675. The SPO responds that Shala's arguments under Ground 8A should be summarily dismissed as he mischaracterises the Trial Judgment and proposes "entirely speculative, alternative explanations" of the evidence, based on an erroneous interpretation of the principles of proof beyond reasonable doubt and *in dubio pro reo*.[1543] According to the SPO, the Trial Panel properly applied both principles in its findings that TW4-01, the Murder Victim, TW4-11, W04733, W01448, TW4-05 and TW4-02 were deprived of procedural guarantees and the opportunity to challenge the lawfulness of their detention.[1544] In particular, the SPO argues that Shala ignores or fails to acknowledge factors the Trial Panel considered when making these findings, including: (i) for TW4-01, the severe mistreatment he suffered and interrogations he was subjected to, which were not carried out by an independent authority;[1545] (ii) for

[1540] Appeal Brief, paras 156-157.
[1541] Appeal Brief, para. 158. See also Reply Brief, para. 29.
[1542] Appeal Brief, para. 159.
[1543] SPO Response Brief, paras 149-150, 152-155, 177.
[1544] SPO Response Brief, paras 156-167.
[1545] SPO Response Brief, para. 156. Regarding the Trial Panel's findings on TW4-01, the SPO argues that Shala further conflates the requirement to comply with basic procedural safeguards and the possible existence of security grounds that could have justified his initial arrest, which, even if they had been present, would not have rendered his detention lawful. See SPO Response Brief, para. 157.

the Murder Victim, his severe mistreatment and killing while in detention;[1546] (iii) TW4-11's "clear and unequivocal" testimony that he was never informed of the reasons for his detention and his mistreatment during detention;[1547] and (iv) regarding W01448 and TW4-05, their mistreatment while detained and their [REDACTED].[1548]

676. In the SPO's view, Shala also merely disagrees with, or fails to acknowledge, the Trial Panel's relevant findings on the unlawful detention and interrogation of [REDACTED], [REDACTED] and a third Roma musician, [REDACTED], [REDACTED] as well as [REDACTED] and [REDACTED].[1549] In particular, the SPO submits that Shala ignores the fact that the Trial Panel did not only base its findings on the treatment of their co-detainees, but considered the deplorable conditions of detention, beatings, interrogations, forced labour and other forms of mistreatment.[1550] Moreover, specifically with respect to the interrogation of [REDACTED], [REDACTED] and [REDACTED], the SPO argues that while Shala acknowledges the evidence relied on by the Trial Panel, he proposes an alternative conclusion which the evidence "explicitly contradicts" and does not rely on any additional evidence in support of his position.[1551] In addition, in this regard, the SPO contends that Shala fails to establish that a reversal of the Trial Panel's finding would have any impact on Shala's conviction under any count, as to the extent that interrogations were

[1546] SPO Response Brief, para. 158. The SPO further submits that Shala's suggestion that because the Murder Victim had previously been detained [REDACTED], it was reasonable to conclude that he may have been informed of the reasons for his detention at the KMF, is contrary to common sense. See SPO Response Brief, para. 159.
[1547] SPO Response Brief, paras 160-161.
[1548] SPO Response Brief, paras 164, 166. The SPO notes that with respect to TW4-05, Shala's argument that it cannot be excluded that there were legitimate reasons for his initial detention, even if proven, would not render his detention lawful. See SPO Response Brief, para. 165. The SPO also argues that Shala ignored other factors considered by the Trial Panel in concluding that TW4-05 was unlawfully detained, including [REDACTED], the nature of the allegations brought against him and the fear he experienced during his detention. See SPO Response Brief, para. 166.
[1549] SPO Response Brief, paras 168-172. With regard to the mistreatment of [REDACTED], the SPO argues that Shala disagrees with the Trial Panel's findings despite consistent evidence from multiple witnesses that all those detained in Room 1 were mistreated. See SPO Response Brief, para. 171.
[1550] SPO Response Brief, paras 169-170.
[1551] SPO Response Brief, para. 172.

considered by the Trial Panel to establish the *actus reus* and *mens rea* for torture, this is only one of the factors underpinning these determinations.[1552]

677. In reply, Shala submits that the SPO entirely misrepresents the essence of his arguments under this Ground and clarifies that he argues there was an unreasonable and unmerited exclusion by the Trial Panel of "alternative *reasonable* hypotheses and *reasonable* doubts in order to reach its incriminatory findings".[1553]

678. Regarding specific arguments on individual detainees, Shala replies that with respect to TW4-01, the SPO failed to justify the Trial Panel's rejection of the reasonable explanation that TW4-01 was detained and interrogated on the basis of legitimate suspicions that he was [REDACTED].[1554] In addition, Shala reiterates that the Trial Panel's findings on the unlawful detention and mistreatment of [REDACTED] were not the only reasonable conclusions from the evidence, as the Trial Panel itself acknowledged that it had not received any evidence about his arrest, duration of detention, specifics about his interrogation or mistreatment or details about his release.[1555]

b. Assessment of the Court of Appeals Panel

679. As a preliminary matter, the Appeals Panel notes that in the Notice of Appeal, Shala alleges an error of law in the Trial Panel's reliance on adjudicated facts.[1556] However, Shala does not develop this argument in the Appeal Brief and therefore the Panel considers it to be "abandoned", and will not address this argument.[1557]

680. The Appeals Panel recalls, as considered above, that the Trial Panel correctly stressed that a panel may find an accused guilty where guilt is proved beyond

[1552] SPO Response Brief, para. 173.
[1553] Reply Brief, paras 23, 25 (emphasis in original).
[1554] Reply Brief, para. 26.
[1555] Reply Brief, para. 29.
[1556] Notice of Appeal, paras 17-18.
[1557] See above, para. 41.

reasonable doubt, in accordance with Article 21(3) of the Law and Rules 140(1) and 158(3) of the Rules.[1558]

681. The Appeals Panel also recalls that the Trial Panel considered that, pursuant to Rule 140(2) and (3) of the Rules: (i) the beyond reasonable doubt standard shall apply to facts constituting the elements of the crimes and modes of liability charged and to other facts on which the conviction depends, not to individual pieces of evidence; and (ii) with respect to circumstantial evidence, the standard of proof is satisfied only if the inference to be drawn from such evidence is the only reasonable one.[1559] The Appeals Panel notes that the Trial Panel also considered that according to Rule 139(2) of the Rules, a panel must evaluate the totality of the evidence holistically and weigh such evidence in its assessment as to whether the SPO has met the beyond reasonable doubt standard.[1560]

682. The Appeals Panel further recalls the considerations above regarding the *in dubio pro reo* principle and that this principle does not apply to individual pieces of evidence and findings of fact on which the trial judgment does not rely.[1561]

683. The Panel first turns to Shala's arguments that the Trial Panel failed to provide sufficient reasons, or drew unwarranted and unreasonable inferences, when finding that TW4-01, the Murder Victim, TW4-11, W01448 and TW4-05 were unlawfully detained, and specifically that they were deprived of basic procedural guarantees.[1562]

i. TW4-01

684. Beginning with Shala's challenges to the Trial Panel's findings on TW4-01, the Panel notes that the Trial Panel found that the only reasonable conclusion, based on

[1558] See above, para. 158.
[1559] See Trial Judgment, paras 75-76. See also above, para. 356.
[1560] See Trial Judgment, paras 52, 75.
[1561] See above, para. 356.
[1562] See Appeal Brief, paras 147-153. The Panel recalls that it has already addressed above Shala's arguments under Ground 8A with respect to TW4-02 and W04733. See above, paras 652-662.

the evidence as a whole, is that TW4-01 was not brought before a judge or other competent authority, nor was he provided with an opportunity to challenge the lawfulness of his detention.[1563]

685. Contrary to Shala's contention,[1564] the Panel observes that the Trial Panel's conclusion in this regard was not based solely on the fact that TW4-01 was liberated [REDACTED], but also on the basis of a number of other findings, namely the fact that TW4-01: (i) when in detention, was subjected to severe mistreatment; (ii) did not have access to his family or to the outside world; (iii) was subjected to several interrogation sessions – none of which was carried out by a judge or competent authority – where he was also mistreated; and (iv) was subjected to forced confessions.[1565] The Panel further notes that Shala points to no evidence on the record supporting a different reasonable inference from the one reached by the Trial Panel.

686. Shala argues that TW4-01's release [REDACTED] could not preclude the possibility that his detention had been lawful on security grounds particularly given his record [REDACTED].[1566] The Panel considers, as correctly found by the Trial Panel, that when assessing the compliance with basic procedural safeguards, it is irrelevant whether the initial deprivation of liberty was justified.[1567] Therefore, even assuming the possible existence of alleged "security grounds" that might have justified TW4-01's initial arrest, this would have been incapable of rendering TW4-01's detention lawful in light of the subsequent absence of any basic procedural safeguards afforded to TW4-01.[1568] In addition, the Panel recalls that while TW4-01 testified that he was told at the moment of his arrest that there was an order to arrest him, it was

[1563] Trial Judgment, para. 405. See also Trial Judgment, paras 406, 591.
[1564] See Appeal Brief, para. 147. See also Appeal Brief, paras 150-152.
[1565] See Trial Judgment, paras 403-405, 591, 946-948. See also Trial Judgment, paras 656, [REDACTED].
[1566] See Appeal Brief, para. 147.
[1567] See Trial Judgment, para. 940, referring to *Delalić et al.* Appeal Judgement, para. 322; *Kordić and Čerkez* Appeal Judgement, para. 73. See also below, paras 724, 734.
[1568] See Trial Judgment, paras 405-406.

never shown to him, despite his requests, and he was not otherwise provided with any reason for his arrest.[1569] The fact that TW4-01 understood that he was detained because he was accused of collaborating with the Serbs does not change the fact that the witness was denied basic procedural guarantees.[1570]

687. As a result, the Appeals Panel is satisfied that a reasonable trier of fact could have determined, on the basis of the totality of the evidence, that the only reasonable inference was that TW4-01 was not informed of the reasons for his deprivation of liberty, nor brought before a judge or other competent authority, or provided with an opportunity to challenge the lawfulness of his detention. Shala's argument is therefore rejected.

ii. The Murder Victim

688. The Panel notes that the Trial Panel found that the Murder Victim was not properly informed of the reasons for his arrest or detention on the basis that there was no evidence on the record that the Murder Victim received such information, and that [REDACTED].[1571] The Trial Panel further found that "[i]n light of the corroborating evidence establishing a pattern of detainees held at the KMF being deprived of their procedural guarantees", the only reasonable conclusion was that the Murder Victim was not brought before any judicial or other competent authority and was not afforded any opportunity to challenge the lawfulness of his detention.[1572]

689. Shala advances the argument that the Trial Panel erred in making these inferences as there was another reasonable possibility, namely that the Murder Victim was duly informed of the legitimate reasons for detention, "particularly given his prior criminal history".[1573] The Panel fails to see how the fact that the Murder Victim

[1569] See Trial Judgment, para. 403.
[1570] See Trial Judgment, para. 403. See also Trial Judgment, paras 404, 590-591, 946-948.
[1571] Trial Judgment, para. 412. See also Trial Judgment, paras 414, 591.
[1572] Trial Judgment, para. 413. See also Trial Judgment, paras 414, 591.
[1573] See Appeal Brief, para. 148.

[REDACTED] could possibly constitute a legitimate reason to justify his detention at the KMF.[1574] In the Panel's view, Shala's argument is unsupported, speculative and contrary to common sense and should be rejected on this basis.[1575] In light of the fact that [REDACTED], and given the absence of any evidence showing that the Murder Victim was informed of the reasons for his deprivation of liberty, the Appeals Panel is satisfied that the Trial Panel's conclusion was the only reasonable inference based on the totality of the evidence.[1576]

690. While Shala claims that "in the absence of specific evidence suggesting the contrary", another reasonable conclusion was that the Murder Victim was lawfully detained and that procedural guarantees were respected, the Panel notes that Shala does not point to any evidence supporting his alternative inference that the Murder Victim was afforded procedural guarantees while detained at the KMF.[1577]

691. The Panel further notes that the Trial Panel's conclusion that the Murder Victim was deprived of basic procedural guarantees was based on a number of additional factors beyond the "pattern" of KMF detainees who were deprived of their procedural guarantees, including the fact that the Murder Victim was severely mistreated and died while in detention, that he did not have access to his family or the outside world, and that he was denied medical care against the advice of a doctor.[1578]

692. The Appeals Panel therefore finds that a reasonable trier of fact could have concluded, on the basis of the totality of the circumstantial evidence, that the only reasonable inference was that the Murder Victim was deprived of his procedural guarantees, and dismisses Shala's contention.

[1574] See D00009 (058578-058582 RED2) ([REDACTED]) (confidential), para. 14.
[1575] See above, paras 38, 42.
[1576] See Trial Judgment, para. 412.
[1577] See Appeal Brief, para. 148. See also Appeal Brief, paras 150-152.
[1578] See Trial Judgment, paras 412-414, 629, 831-832. See also Trial Judgment, paras 590-591.

iii. TW4-11

693. Turning to Shala's challenges regarding the Trial Panel's findings in relation to TW4-11, the Panel notes that the Trial Panel inferred from the circumstances of his release that TW4-11 was not provided with an opportunity to challenge the lawfulness of his detention and was "at the mercy of his captors".[1579]

694. The Panel notes that Shala argues that another reasonable inference was that TW4-11 was released based on a decision by Mr Kryeziu or other competent authority following his interview with Mr Kryeziu.[1580]

695. The Panel first recalls that it has found above that Shala has failed to demonstrate that the Trial Panel erred in finding that neither Mr Kryeziu nor any other KLA member exercised the function of a judge or competent authority.[1581] Furthermore, the Panel observes that the Trial Panel found TW4-11 to be credible and accepted his testimony that he was detained at the KMF for approximately a month until NATO forces entered Kosovo, and "the doors opened and [he] just left".[1582]

696. In this context, the Panel considers that the Trial Panel properly inferred that TW4-11 was not provided with an opportunity to challenge the lawfulness of his detention. By contrast, Shala does not explain how, based on the evidence, the Trial Panel could have reasonably inferred that TW4-11 was released as a result of a decision made by a competent authority. In fact, nothing in the evidence shows that

[1579] Trial Judgment, para. 439. See also Trial Judgment, para. 438.
[1580] See Appeal Brief, para. 149. See also Reply Brief, para. 27.
[1581] See above, para. 664.
[1582] Trial Judgment, para. 430. The Appeals Panel notes that the Trial Panel "accepted an absence of precision" as regards the witness's exact dates of arrest and release given the witness's advanced age and passage of time. See Trial Judgment, para. 431. The Appeals Panel also recalls that the Trial Panel noted that (i) TW4-11 testified that towards the end of his detention, he was brought before Mr Kryeziu, who questioned him, including about his occupation and his whereabouts during the conflict, and told him that "he was sorry that he had no arguments against [him]"; and (ii) TW4-11 neither confirmed nor denied whether his release came about as a result of his interview with Mr Kryeziu. See Trial Judgment, paras 435, 437. See also above, para. 650.

an initial review of detention was conducted nor that continued oversight was exercised during the course of TW4-11's detention.[1583] For these reasons, the Panel finds that Shala fails to demonstrate that the Trial Panel erred in inferring from the circumstances of his release that TW4-11 was not provided with an opportunity to challenge the lawfulness of his detention.

iv. W01448

697. With regard to the Trial Panel's findings on W01448, the Panel notes that the Trial Panel found that the only reasonable conclusion, based on the evidence as a whole, is that W01448 was not brought before a judge or other competent authority, nor was he provided with an opportunity to challenge the lawfulness of his detention.[1584] In reaching this finding, the Panel notes that the Trial Panel considered that: (i) W01448 was told that he would be released after an interview or a trial, and that he was not released after his interview and no such trial took place; (ii) W01448 was severely mistreated while detained at the KMF; and further (iii) he was kept in similar conditions of detention as other co-detainees, who were equally not brought before a judge or did not have an opportunity to challenge the lawfulness of their detention.[1585]

698. Shala contends that it cannot be excluded that W01448 was "differently treated" as "he was told that he was suspected of undermining the KLA efforts and that he would have to face trial".[1586] However, the Panel finds that Shala's alternative suggestion is speculative, unsupported, as well as contradicted by evidence on the record which confirms that W01448 was not offered any particular or favourable

[1583] See Trial Judgment, para. 943, setting out the definition of the obligation to provide a detained person with an opportunity to challenge the lawfulness of their detention (third basic procedural safeguard).
[1584] Trial Judgment, paras 493-494. See also Trial Judgment, para. 492, wherein the Trial Panel found that W01448 was not properly informed of the reason for his arrest and detention.
[1585] Trial Judgment, para. 493.
[1586] See Appeal Brief, para. 151.

treatment, but rather was severely mistreated like other co-detainees and that he was only liberated by KFOR, and not after facing trial or following the decision of a judge or other competent authority.[1587] In the Panel's view, the fact that W01448 testified that he was told he would be released after an interview or a trial and that he was accused of not having financially contributed to the KLA does not demonstrate that W01448 benefited from an alleged different treatment at the KMF, nor that he was afforded basic procedural guarantees, especially since W01448 indicated that a release or trial did not materialise and that he was brutally beaten on numerous occasions.[1588]

699. Furthermore, the Panel sees no error in the Trial Panel's consideration of corroborating evidence from co-detainees kept in similar conditions of detention, in addition to W01448's own account, to reach its finding that the only reasonable inference was that W01448 was not brought promptly before a judge or other competent authority, and was not provided with an opportunity to challenge the lawfulness of his detention.[1589] The Appeals Panel finds that Shala fails to demonstrate that there was another reasonable inference available based on the totality of the evidence, and therefore dismisses this argument.

v. TW4-05

700. Turning to Shala's challenges to the Trial Panel's findings on TW4-05's unlawful detention,[1590] the Panel notes that the Trial Panel concluded that "based on the evidence as a whole", the only reasonable conclusion was that TW4-05 was not provided with an opportunity to challenge the lawfulness of his detention.[1591] The Panel observes that the Trial Panel took into account, in particular, that: (i) TW4-05 suffered mistreatment similar to that of other detainees at the KMF and was subjected

[1587] Trial Judgment, paras 489-494 and evidence cited therein. See also Trial Judgment, paras 707-711, 714.
[1588] See Trial Judgment, paras 491, 493.
[1589] See Trial Judgment, para. 493.
[1590] Appeal Brief, para. 152.
[1591] Trial Judgment, para. 511.

to forced labour;[1592] (ii) TW4-05 and other detainees were liberated not as a result of a decision by a judge or other competent authority, but [REDACTED];[1593] and (iii) other detainees, such as TW4-01, the Murder Victim, TW4-11, W04733 and W01448, were equally not brought before a judge or any other competent authority and did not have an opportunity to challenge the lawfulness of their detention.[1594] In addition, the Trial Panel also considered that throughout his detention, TW4-05 was interrogated by [REDACTED] who participated actively in the mistreatment of detainees, and another KLA member on several occasions and was questioned about and accused of having friendly relationships with Serbs, [REDACTED].[1595] The Panel observes that the above-mentioned findings and evidence fully support the Trial Panel's conclusion that TW4-05 was not provided with an opportunity to challenge the lawfulness of his detention.[1596]

701. While Shala takes issue with the fact that the Trial Panel's finding that TW4-01, the Murder Victim, TW4-11, W04733 and W01448 did not have an opportunity to challenge the lawfulness of their detention was itself also based on adverse inferences,[1597] the Panel recalls that it has found above that the conclusions made by the Trial Panel with respect to these witnesses were the only reasonable inferences.[1598]

702. Furthermore, while Shala argues that TW4-05's release [REDACTED] could not preclude that his detention had been lawful on security grounds, particularly given

[1592] Trial Judgment, paras 502, 511, 734, 748-749.
[1593] Trial Judgment, para. 511. See also Trial Judgment, para. 506. The Panel notes that the Trial Panel took into account the fact that TW4-05's account is mutually corroborative [REDACTED]. See Trial Judgment, para. 506.
[1594] Trial Judgment, para. 511. See also Trial Judgment, paras 404-406, 413-414, 435-440, 471-473, 493-494.
[1595] Trial Judgment, paras 502, 509. See also Trial Judgment, para. 743. The Panel recalls its above finding that the simple fact that TW4-05 was interrogated by or in the presence of [REDACTED] who participated actively in the mistreatment of detainees, confirms that the person who "posed as a lawyer or a judge" cannot be qualified as competent authority. See above, para. 663.
[1596] Trial Judgment, paras 511-512.
[1597] See Appeal Brief, para. 152.
[1598] See above, paras 662, 687, 692, 696, 699.

that he was interviewed as to his links with "Serbs" by someone who presented himself as a lawyer or judge,[1599] the Panel recalls that when assessing the compliance with basic procedural safeguards, it is irrelevant whether the initial deprivation of liberty was justified.[1600] Therefore, even assuming the possible existence of alleged "security grounds" that might have justified TW4-05's initial arrest, this would have been incapable of rendering TW4-05's detention lawful in light of the subsequent blatant absence of any basic procedural safeguards afforded to TW4-05.[1601]

703. As a result, the Appeals Panel is satisfied that a reasonable trier of fact could have determined, on the basis of the totality of the evidence, that the only reasonable inference was that TW4-05 was not afforded the opportunity to challenge the lawfulness of his detention. Shala's argument is therefore rejected.

vi. Other Detainees

704. The Panel will now address Shala's challenges to the Trial Panel's findings on the unlawful detention of [REDACTED], [REDACTED], a third Roma musician, [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

705. First, regarding Shala's argument that the Trial Panel erred by inferring that [REDACTED], [REDACTED] and a third Roma musician were not afforded any basic guarantees,[1602] the Panel notes that, contrary to what Shala claims, the Trial Panel did not only base this finding on an inference that all detainees were detained under similar conditions. In fact, the Panel observes that the Trial Panel received extensive and mutually corroborative evidence on these three individuals' detention conditions at the KMF, directly provided by their co-detainees TW4-01, TW4-11, TW4-10, W04733, W01448, TW4-05 and TW4-04.[1603] In particular, the Trial Panel considered

[1599] See Appeal Brief, para. 152.
[1600] See above, para. 686. See also below, paras 724, 734.
[1601] See Trial Judgment, paras 509-511.
[1602] See Appeal Brief, para. 154.
[1603] Trial Judgment, para. 558, and references cited therein.

evidence on: (i) the severe mistreatment suffered by [REDACTED], [REDACTED] and the third Roma musician;[1604] (ii) the manual labour they had to perform in the Warehouse and the courtyard;[1605] and (iii) KLA members' interrogations of the three individuals.[1606] As additional support for its finding on these three individuals, the Trial Panel also considered its findings that TW4-01, TW4-11, the Murder Victim, W04733, W01448, TW4-05, TW4-04 and TW4-02 were deprived of their liberty without any basic procedural guarantees.[1607]

706. While Shala claims that given "how little information" the Trial Panel provided on the reasons for the arrest and detention, it cannot be excluded that these three individuals were treated differently,[1608] the Panel notes that Shala does not point to any evidence supporting his alternative inference that [REDACTED], [REDACTED] and the third Roma musician were afforded procedural guarantees while detained at the KMF. Consequently, and in light of the compelling evidence on the record on the conditions of detention of [REDACTED], [REDACTED] and the third Roma musician, the Appeals Panel is satisfied that a reasonable trier of fact could have determined, on the basis of the totality of the evidence, that the only reasonable inference was that they were not afforded procedural guarantees. Shala's argument is therefore rejected.

707. With regard to the detention of [REDACTED], the Panel notes that the Trial Panel found that the only reasonable conclusion based on the evidence was that [REDACTED] was not properly informed of the reasons for his arrest or detention, nor brought before a judge or competent authority, or afforded the opportunity to challenge the lawfulness of his detention, and that overall he was deprived of the basic guarantees provided for under international humanitarian law.[1609] Shala challenges

[1604] Trial Judgment, paras 562, 724-726. See also Trial Judgment, paras 748-749, 751.
[1605] Trial Judgment, paras 560-562, 732-738.
[1606] Trial Judgment, paras 560-562. See also Trial Judgment, para. 746.
[1607] See Trial Judgment, para. 562. See above, paras 655, 662, 687, 692, 696, 699, 703.
[1608] See Appeal Brief, para. 154.
[1609] Trial Judgment, paras 576-577.

this finding, arguing that the Trial Panel erred in failing to consider alternative reasonable possibilities, for instance, that [REDACTED] was treated differently because his son was a KLA member.[1610]

708. In the Panel's view, Shala's alternative suggestion that [REDACTED] was "treated differently",[1611] is unsupported, as well as contradicted by evidence on the record which shows that [REDACTED] was not offered any particular or favourable treatment, but rather was severely mistreated like other co-detainees.[1612] As to Shala's suggested alternative inference, the Trial Panel expressly noted TW4-01's testimony that [REDACTED] was held on allegations of "keeping company with Serbs", while "his own son was a member of the KLA".[1613] The Panel considers that the fact that [REDACTED] was accused of collaborating with the Serbs, while his son was a member of the KLA, does not impact the finding that [REDACTED] was not properly informed of the reasons for his detention.[1614]

709. The Appeals Panel therefore finds that a reasonable trier of fact could have concluded, on the basis of the totality of the circumstantial evidence, that the only reasonable inference was that [REDACTED] was deprived of his procedural guarantees, and dismisses Shala's challenges accordingly.

710. Regarding the detention of [REDACTED], the Panel recalls that it found above that Shala was not afforded the opportunity to confront the evidence brought against him in respect of the very fact of [REDACTED]'s detention at the KMF, let alone of his deprivation of basic procedural rights, therefore finding that Shala's conviction in respect of the arbitrary detention of [REDACTED] was based decisively on untested

[1610] See Appeal Brief, para. 155.
[1611] See Appeal Brief, para. 155.
[1612] Trial Judgment, para. 576. See also Trial Judgment, paras 727-728, 731, 749.
[1613] Trial Judgment, para. 576.
[1614] See Trial Judgment, paras 576-577.

evidence.[1615] Accordingly, the Panel overturned the Trial Panel's findings underpinning the conviction of Shala for the crime of arbitrary detention against [REDACTED].[1616] In light of this, Shala's argument that the Trial Panel failed to consider other reasonable inferences showing that [REDACTED]'s detention was lawful,[1617] is moot. Therefore, the Panel will not address this argument further.

711. With regard to [REDACTED] and [REDACTED], the Panel observes that the Trial Panel found that [REDACTED] and [REDACTED] were detained at the KMF during the period relevant to the charges.[1618] The Trial Panel further noted that it had not received any evidence regarding their arrest, the duration of their detention or the circumstances of their release.[1619] However, based on the evidence of another witness who attested to [REDACTED] being mistreated during his detention and evidence of the "operational pattern" followed for the arrest and detention of all detainees at the KMF, the Trial Panel found that [REDACTED] and [REDACTED]: (i) were not informed of the reasons of their arrest and detention; (ii) were not brought before a judge or other competent authority; and (iii) were not provided with an opportunity to challenge the lawfulness of their detention.[1620] While Shala argues that there was "simply no evidence demonstrating to the requisite standard the Panel's inference" for these individuals,[1621] the Panel notes that Shala does not point to any evidence supporting any alternative inference.

712. Moreover, the Panel notes that the Trial Panel based its findings on the unlawful detention of these individuals on the "operational pattern followed for the

[1615] See above, para. 589.
[1616] See above, para. 601.
[1617] See Appeal Brief, para. 156.
[1618] See Trial Judgment, para. 582. See also above, paras 572, 574.
[1619] See Trial Judgment, para. 583.
[1620] See Trial Judgment, para. 583. See also above, para. 569. The Panel recalls that the Trial Panel also relied on the live evidence of TW4-01, who testified that [REDACTED] and [REDACTED] were his co-detainees in Room 1 of the Detention Building of the KMF. See above, para. 572.
[1621] See Appeal Brief, para. 157.

arrest and detention of all detainees at the KMF".[1622] While the Trial Panel did not provide an express reference in respect of this "pattern", the Panel notes the Trial Panel's findings in respect of the existence of a pattern whereby detainees were not informed of the reasons for their deprivation of liberty and of detainees held at the KMF being deprived of their procedural guarantees.[1623]

713. In light of this evidence of a consistent pattern of a lack of procedural guarantees at the KMF, and considering the fact that [REDACTED] and [REDACTED] were confirmed to have been detained there, the Appeals Panel is satisfied that a reasonable trier of fact could have determined, on the basis of the totality of the circumstantial evidence, that the only reasonable inference was that they were deprived of their procedural guarantees. Shala's argument is therefore rejected.

714. The Panel turns to Shala's argument that, in the absence of any evidence to the contrary, there are other reasonable inferences that [REDACTED], [REDACTED] and [REDACTED] were not interrogated and that [REDACTED] was not mistreated.[1624]

715. The Panel recalls that it found above that Shala's convictions for the torture of [REDACTED], [REDACTED] and [REDACTED] were based to a decisive extent on the evidence of untested witnesses.[1625] Accordingly, the Panel overturned the Trial Panel's findings underpinning the convictions of Shala for the crime of torture against [REDACTED], [REDACTED] and [REDACTED].[1626] In light of this, Shala's arguments that the Trial Panel failed to consider other reasonable inferences showing that [REDACTED], [REDACTED] and [REDACTED] were not interrogated and that

[1622] Trial Judgment, para. 583. See also above, paras 571, 573.
[1623] See e.g. Trial Judgment, paras 403-406, 412-414, 433-440, 470-4732, 491-494, 509-512, 528-531, 552-556. See also above, paras 564-566.
[1624] See Appeal Brief, paras 158-159.
[1625] See above, para. 560.
[1626] See above, para. 601.

[REDACTED]was not mistreated,[1627] are moot. Therefore the Panel will not address these arguments further.

716. For the above reasons, the Appeals Panel is satisfied that the Trial Panel's conclusions challenged by Shala on the arbitrary detention findings for TW4-01, the Murder Victim, TW4-11, TW4-02, W04733, W01448, TW4-05, [REDACTED], [REDACTED], a third Roma musician, [REDACTED], [REDACTED] and [REDACTED] were the only reasonable inferences based on the totality of the evidence and finds that Shala fails to demonstrate any error in this regard. The Appeals Panel further finds that Shala's arguments that the Trial Panel failed to consider other reasonable inferences showing that: (i) [REDACTED] was not arbitrarily detained; (ii) [REDACTED], [REDACTED] and [REDACTED] were not interrogated; and (iii) [REDACTED] was not mistreated are moot as a result of the Appeals Panel's findings in Ground 7.[1628]

717. In light of the above, the Appeals Panel finds that Shala fails to demonstrate that the Trial Panel abused its discretion in making inferences in the challenged findings on arbitrary detention, except with regard to [REDACTED], [REDACTED] and [REDACTED].[1629] Accordingly, the Appeals Panel dismisses Shala's Ground 8A in part.[1630]

(iii) Alleged Errors in the Trial Panel's Finding that There was no Basis to Detain Based on Security Concerns

a. Submissions of the Parties

718. Shala submits that the Trial Panel erred in its findings on the *actus reus* of the war crime of arbitrary detention when it found that none of the detainees were held

[1627] See Appeal Brief, paras 158-159.
[1628] See above, paras 710, 715. See also above, para. 601.
[1629] See above, para. 716.
[1630] The remainder of Shala's challenges under Ground 8A have been addressed below. See below, Section V.H.3.(a).

"pursuant to any criminal charges and no security concerns made [their detention] absolutely necessary".[1631] Shala argues that this conclusion was not the only reasonable inference, and was not explained, as is evidenced, in his view, by the inherent paradox in the Trial Panel coming to this conclusion while also finding that the detainees "were arrested and detained on vague allegations of being 'collaborators', 'spies', or 'traitors' or of not being sufficiently supportive of the KLA effort," be it financially, militarily or politically.[1632] Finally, Shala adds that the Trial Panel neither received nor analysed any evidence going to whether the security concerns about the detainees were genuine.[1633]

719. The SPO responds that the Trial Panel received and considered evidence on whether the detainees were held based on security concerns, rendering their detention absolutely necessary.[1634] The SPO further responds that Shala fails to acknowledge that the Trial Panel found that the detainees were held based on vague allegations and that such allegations fall short of meeting the standard of proof.[1635] Finally, the SPO submits that, even if a legitimate basis for detention existed, the subsequent denial of procedural safeguards would have rendered the detention illegal.[1636]

720. Shala replies that the Trial Panel erred in considering that the detention was arbitrary from its inception.[1637] Shala contends in this regard that the Trial Panel's conclusion that the suspicions against the detainees were "vague", which was not explained, was a qualitative assessment (as to how concrete, specific, realistic and therefore valid the suspicions were), made 20 years after the fact and which differs

[1631] Appeal Brief, paras 213-214; Transcript, 15 May 2025, pp. 57, 61; Transcript, 16 May 2025, pp. 178-181.
[1632] Appeal Brief, paras 215-216; Reply Brief, para. 42; Transcript, 15 May 2025, p. 57.
[1633] Appeal Brief, para. 216.
[1634] SPO Response Brief, para. 227.
[1635] SPO Response Brief, para. 227; Transcript, 15 May 2025, p. 101.
[1636] SPO Response Brief, para. 227.
[1637] Reply Brief, para. 42.

from that of the KLA officers at Kukës who were operating in the middle of a war.[1638] Shala additionally replies that the SPO did not focus its investigation or presentation of evidence on what grounds of detention may or may not have existed and therefore the Trial Panel's analysis is based on scattered and incomplete evidence.[1639]

721. In response to questions raised by the Panel, Shala added that, as a matter of law, the Trial Panel applied the wrong test in requiring the existence of security concerns which made detention "absolutely necessary"[1640] and that the correct test should have been whether there was a suspicion in respect of each detainee which could have been considered reasonable at the time.[1641] As to the facts, Shala added that: (i) the Trial Panel cursorily dismissed the evidence that suspicions of security concerns existed and could have been considered reasonable;[1642] (ii) spies do not need to be visibly and openly members of the other side, are not only found close to the front and may well be present in refugee camps;[1643] (iii) the evidence relied upon indicates that detainees had been interrogated by KLA officers – notably Osman Kryeziu and Sokol Dobruna – as to concrete suspicions concerning their relationship with enemy forces;[1644] (iv) the evidence of detainees themselves or their family members, the latter of whom may not be aware that their family member was a spy, needed to be approached with caution;[1645] (v) the facts of the present case are to be distinguished from those in, for example, the ICTY's "*Čelebići* case";[1646] and (vi) the evidence of [REDACTED], additionally supports the existence of security concerns.[1647] Shala

[1638] Reply Brief, para. 42; Transcript, 15 May 2025, p. 57.
[1639] Reply Brief, para. 42.
[1640] Transcript, 15 May 2025, p. 57.
[1641] Transcript, 15 May 2025, p. 57.
[1642] Transcript, 15 May 2025, p. 57.
[1643] Transcript, 16 May 2025, p. 178.
[1644] Transcript, 15 May 2025, p. 58.
[1645] Transcript, 16 May 2025, pp. 178-179.
[1646] Transcript, 16 May 2025, p. 180.
[1647] Transcript, 15 May 2025, p. 60 (private session).

further highlighted the evidence which, in his view, demonstrates that the trial record did not permit the impugned finding.[1648]

722. In response to questions by the Panel and Shala's related submissions during the Appeal Hearing, the SPO argued, as to the law on arbitrary detention, that the standard applied by the Trial Panel matches that of the *Mustafa* Trial Judgment as well as that in the jurisprudence of other international courts.[1649] The SPO added that the jurisprudence shows that the evidence of detained persons can be used for the purposes of concluding that no security concerns justified detention.[1650]

723. As to the Trial Panel's assessment of the evidence, the SPO gave examples of specific evidence which, in its view, when considered against the totality of evidence, was sufficient to allow the Trial Panel to reach the impugned finding.[1651] In so doing, the SPO advanced the following further evidentiary arguments: (i) the information provided by detainees in this case related to the possible reasons for their detention reveals that they were not detained because they could seriously put the KLA's security at risk;[1652] (ii) all detainees denied the allegations against them;[1653] (iii) detainees provided direct evidence including on the circumstances that immediately preceded their detention and on what explanation, if any, was given for depriving them of their liberty;[1654] (iv) the evidence of certain detainees' family members supports the finding that the detentions were not based on security concerns;[1655] (v) the Trial Panel conducted extensive credibility assessments of all witnesses;[1656] (vi) it is illogical that some persons would be allowed out of Room 1 and

[1648] Transcript, 15 May 2025, pp. 58-60 (private session); Transcript, 16 May 2025, pp. 178-181; Defence References for Appeal Hearing Questions.
[1649] Transcript, 15 May 2025, pp. 93-94.
[1650] Transcript, 15 May 2025, pp. 94-95; Transcript, 16 May 2025, pp. 125-127.
[1651] Transcript, 15 May 2025, p. 101. See also Transcript, 15 May 2025, pp. 96-101.
[1652] Transcript, 15 May 2025, pp. 96-99.
[1653] Transcript, 15 May 2025, p. 99.
[1654] Transcript, 16 May 2025, pp. 125-126.
[1655] Transcript, 16 May 2025, p. 127. See also Transcript, 16 May 2025, p. 128 (private session).
[1656] Transcript, 16 May 2025, p. 126.

into other areas of the KMF compound to perform forced labour if they were regarded as security threats;[1657] (vii) the Trial Panel could not rely on the evidence of KLA members – the other persons present at the KMF – because they denied all knowledge of basic facts of the facility;[1658] and (viii) the evidence is unequivocal that those detained were not detained on criminal charges.[1659]

b. Assessment of the Court of Appeals Panel

724. The Appeals Panel notes that the Trial Panel considered that the prohibited consequence that forms the *actus reus* of the war crime of arbitrary detention in a non-international armed conflict is disjunctive, requiring the deprivation of liberty of the victim either (i) without legal basis or (ii) without complying with the basic procedural guarantees.[1660] Shala challenges the Trial Panel's finding as to the former. More specifically, the Appeals Panel understands Shala to allege that the Trial Panel erred in failing to provide a reasoned opinion when it concluded that detainees "were not held at the KMF pursuant to any criminal charges and no security concerns made it absolutely necessary for any of them to be detained"[1661] and in holding that this conclusion was the only reasonable inference.[1662]

725. As a preliminary matter, the Appeals Panel notes that, during the Appeal Hearing, Shala argued that the Trial Panel applied the wrong test in requiring the

[1657] Transcript, 15 May 2025, p. 99.
[1658] Transcript, 16 May 2025, pp. 129-130.
[1659] Transcript, 15 May 2025, pp. 99-101.
[1660] Trial Judgment, para. 936. See also *Thaçi et al.* Appeal Decision on Jurisdiction, para. 109; Appeal Decision on Jurisdiction, paras 44-47.
[1661] Trial Judgment, para. 947. The Appeals Panel understands Shala to argue for the first time in his Reply Brief that, as a matter of law, the Trial Panel needed to establish "at which point in time […] the legal and non-arbitrary detention became arbitrary" (Reply Brief, para. 42. See also Transcript, 16 May 2025, p. 180). The Appeals Panel recalls that the core of the moving party's arguments must be provided in the initial motion and not raised for the first time in reply, so that the opposing party is not deprived of an opportunity to respond. See *Gucati* and *Haradinaj* Appeal Decision on Haradinaj Request for SPO Disclosure of Rule 102(3) or Rule 103 Material, para. 32. See also above, para. 40. Accordingly, the Appeals Panel dismisses this argument.
[1662] Appeal Brief, paras 215-216; Reply Brief, para. 42.

existence of security concerns which made detention "absolutely necessary"[1663] and that the correct test should have been whether there was a suspicion in respect of each detainee which could have been considered reasonable at the time.[1664] The Appeals Panel considers that Shala failed to substantiate both an error in the standard applied by the Trial Panel and the basis for his proposed alternative standard. The Appeals Panel therefore dismisses this argument.[1665]

726. The Appeals Panel now turns to Shala's argument that the Trial Panel failed to provide a reasoned opinion when it concluded that detainees "were not held at the KMF pursuant to any criminal charges and no security concerns made it absolutely necessary for any of them to be detained".[1666]

727. The Appeals Panel observes that the Trial Panel clarified that an initial deprivation of liberty on security grounds is without legal basis if there are no "reasonable grounds to believe that security concerns make it absolutely necessary".[1667] The Appeals Panel further observes that the ICTY trial and appeals chambers, in assessing corollary war crimes in an international armed conflict, have provided helpful interpretive guidance on when detention is rendered absolutely necessary *at the time of detention*. Notably, they have considered that a measure of discretion should be afforded to a detaining power in assessing what is detrimental to their own security.[1668] As to what, within those discretionary bounds, would make the detention "absolutely necessary" at the time of detention, there must be "serious and

[1663] Transcript, 15 May 2025, p. 57.
[1664] Transcript, 15 May 2025, p. 57.
[1665] See above, para. 42. The Appeals Panel further notes that Shala raised this argument for the first time at the Appeal Hearing and that parties should not raise new arguments during an appeal hearing that are not contained in their written briefs unless specifically authorised by the Appeals Panel. See *Gotovina and Markač* Appeal Judgement, para. 18; *Haradinaj et al.* Appeal Judgement, para. 18. See above, para. 40.
[1666] Trial Judgment, para. 947.
[1667] Trial Judgment, para. 937.
[1668] *Delalić et al*. Appeal Judgement, para. 323; *Prlić et al.* Trial Judgement (Vol. I), para. 134. See also 1958 ICRC Commentary GCIV, Article 42, p. 257.

legitimate reasons 'to think that the person concerned, by his activities, knowledge or qualifications, represents a *real* threat to [the detaining power's] present or future security'".[1669] However, the ICTY Appeals Chamber clarified that a detaining power is "entitled to some reasonable time to determine which of the detainees is a danger to […] security".[1670] It drew a distinction in this regard between the initial basis of detention and the subsequent inquiry into whether "an objective foundation" exists concretising the initial suspicion.[1671] Shala's argument relates to the former (the initial suspicion) not the latter (the objective foundation which may concretise initial suspicion).

728. As to the Trial Panel's application of this test, the Trial Panel summarised the facts which gave rise to its conclusion that no security concerns made the detainees' detention absolutely necessary, finding that detainees were, *inter alia*:

(i) arrested and detained following an "operational pattern" in which they were picked up after being expelled from Kosovo;

(ii) transferred to the KMF or arrested inside the KMF; and

(iii) apprehended and interrogated on "vague allegations of sympathizing or otherwise being associated with Serbia, 'Serbs', or Serbian authorities, or being 'traitors' or 'collaborators' or not being sufficiently supportive of the KLA effort – be it financially, militarily or politically".[1672]

729. The Trial Panel appears to have considered nine out of the 18 detainees to have been explicitly accused of being spies, traitors or collaborators with the enemy.[1673]

[1669] *Prlić et al.* Trial Judgement (Vol. I), para. 134 (emphasis in original); 1958 ICRC Commentary GCIV, Article 42, p. 258; *Delalić et al*. Trial Judgement, para. 576.
[1670] *Delalić et al*. Appeal Judgement, para. 328.
[1671] *Delalić et al*. Appeal Judgement, para. 328.
[1672] Trial Judgment, para. 947, referring to Trial Judgment, para. 590. See also Trial Judgment, para. 1011.
[1673] See Trial Judgment, para. 1011 (concerning the Murder Victim, TW4-01, [REDACTED], TW4-11, W04733, W01448, TW4-05, TW4-02 and TW4-04).

730. In analysing the Trial Panel's application of the "absolutely necessary" test to the facts of the case, the Appeals Panel is mindful that, at issue, is an element of the *actus reus* of the war crime of arbitrary detention. There is therefore no question that any conclusion to this end by the Trial Panel should be reasoned. With this in mind, the Appeals Panel considers that the Trial Panel's reasoning does not indicate that it probed whether the detention of the 18 detainees was absolutely necessary. That is, the Trial Panel's reasoning does not indicate that it assessed whether the 18 individuals, by their activities, knowledge or qualifications, represented a real threat to the KLA's present or future security. The Appeals Panel notes in this regard that there is no separate paragraph in the Trial Judgment where the Trial Panel summarises its conclusion on whether security concerns made it absolutely necessary for the 18 individuals to be detained. Rather, the Trial Panel entered this finding, apparently in support of its conclusion that none of the detainees were properly informed of the reasons for the deprivation of their liberty.[1674]

731. The Appeals Panel considers that, in the circumstances of this case, the need to conduct a separate analysis of the absolute necessity of the detention of each of the 18 detainees is borne out by two factors. First, as previously recounted, the Trial Panel concluded that they were arrested and detained following an "operational pattern" after having been expelled from Kosovo, and in a number of cases, the evidence suggests that detainees were investigated prior to their arrest.[1675] The Appeals Panel understands these Trial Panel findings to suggest that the 18 detainees were singled out by the KLA rather than being caught up in a collective arrest campaign clearly based on, for example, perceived ethnicity, such as was the case in the ICTY's *Delalić et al*. Trial Judgement.[1676] Second, as previously recounted, the Trial Panel

[1674] Trial Judgment, para. 947.
[1675] Trial Judgment, para. 590.
[1676] See *Delalić et al*. Trial Judgement, para. 1134.

appears to have considered that nine out of the 18 detainees were explicitly accused of being "spies", "traitors" or "collaborators".[1677]

732. Further, the Appeals Panel notes the SPO's submission that the detainees "all denied" the truth of the allegations against them.[1678] If this is indeed the case, and the Trial Panel took this into account in arriving at the impugned conclusion, it is not apparent from the Trial Panel's reasoning.

733. In view of the above factors, the Appeals Panel finds that the Trial Panel failed to issue a reasoned opinion in respect of its finding that detainees "were not held at the KMF pursuant to any criminal charges and no security concerns made it absolutely necessary".[1679] This finding is therefore overturned. In light of this, the Appeals Panel considers moot Shala's argument that the Trial Panel erred in respect of the same finding on the basis that it was not the only reasonable inference.[1680] Accordingly, the Appeals Panel grants, in part, Ground 12 of Shala's appeal.

734. The Appeals Panel now turns to the impact of its finding overturning the Trial Panel's finding that detainees "were not held at the KMF pursuant to any criminal charges and no security concerns made it absolutely necessary for any of them to be detained".[1681] The Appeals Panel recalls in this regard the disjunctive nature of the *actus reus* of the war crime of arbitrary detention.[1682] The *actus reus* may be satisfied either by a finding that detainees were held without legal basis or without complying with basic procedural guarantees. In that (i) the Trial Panel found that none of the detainees were provided with the basic procedural guarantees, [1683] and (ii) the Appeals

[1677] See Trial Judgment, para. 1011 (concerning the Murder Victim, TW4-01, [REDACTED], TW4-11, W04733, W01448, TW4-05, TW4-02 and TW4-04).
[1678] Transcript, 15 May 2025, p. 99.
[1679] Trial Judgment, para. 947.
[1680] See Appeal Brief, paras 215-216; Reply Brief, para. 42; Transcript, 15 May 2025, p. 57.
[1681] Trial Judgment, para. 947.
[1682] See above, para. 724.
[1683] Trial Judgment, paras 946-949.

Panel has upheld all other Trial Panel findings challenged by Shala in respect of the *actus reus* of the war crime of arbitrary detention,[1684] this error, in and of itself, has no impact on Shala's conviction for arbitrary detention. However, an additional consequence of overturning the finding that detainees "were not held at the KMF pursuant to criminal charges and no security concerns made it absolutely necessary for any of them to be detained"[1685] is that the Trial Panel's related *mens rea* finding that "the perpetrators, including Mr Shala, had no reasonable grounds to believe that security concerns made the detention of these individuals absolutely necessary"[1686] must also be overturned. Accordingly, the Appeals Panel, *proprio motu*, overturns this element of the Trial Panel's *mens rea* finding. The Appeals Panel will address the impact of this finding, if any, below.[1687]

2. Alleged Errors Regarding the Trial Panel's Findings on the *Mens Rea* of the War Crime of Arbitrary Detention

735. The Trial Panel found that the *mens rea* of the war crime of arbitrary detention was satisfied,[1688] considering that during the Indictment period, the perpetrators, including Shala, acted intentionally in relation to their conduct with respect to arbitrary detention.[1689] To this end, the Trial Panel found that Shala knew that arbitrary detention was being committed and intended it through his participation, as demonstrated by, *inter alia*, his: (i) participation in the transfer of detainees;[1690] and (ii) presence at the KMF on multiple occasions, during which time he personally mistreated and interrogated detainees and witnessed the shooting of the Murder

[1684] The Appeals Panel recalls that it has overturned the Trial Panel's findings underpinning the conviction of Shala for the crime of arbitrary detention against [REDACTED] and [REDACTED]. See above, para. 605.
[1685] Trial Judgment, para. 947.
[1686] Trial Judgment, para. 953.
[1687] See below, para. 745.
[1688] Trial Judgment, paras 951, 956.
[1689] Trial Judgment, paras 951, 956.
[1690] Trial Judgment, paras 952, 955.

Victim.[1691] The Trial Panel further found that the perpetrators, including Shala, were aware that: (i) the detainees were not held at the KMF on specific charges and security concerns did not make their detention absolutely necessary;[1692] and (ii) no procedural guarantees had been afforded to the detainees for the duration of their respective detentions.[1693]

(a) Submissions of the Parties

736. Shala submits that the Trial Panel erred in finding that he had the requisite *mens rea* for the crime of arbitrary detention on three bases.[1694] First, Shala submits, referring to the *Delalić et al*. Appeal Judgement, that in order to establish that an accused committed arbitrary detention, "something more must be proved than mere knowing 'participation' in a general system or operation".[1695] Second, Shala submits, relying on the *Limaj et al.* Appeal Judgement, that his knowledge of the crime of arbitrary detention cannot be inferred by his mere presence at the KMF alone.[1696] Relatedly, Shala submits that the Trial Panel erred in relying entirely or to a decisive extent on untested evidence from deceased witnesses to situate him at the scene.[1697] In particular, Shala contends that his alleged presence at the KMF, in two instances, on or about 28 or 29 May 1999 and on or about 31 May 1999, was founded either entirely or to a decisive extent on the untested evidence of deceased witnesses, respectively W04733 and Mr Elezaj.[1698] Third, Shala submits that the Trial Panel did not explain how he could be expected to know that detentions were not justified by security

[1691] Trial Judgment, paras 951-952, 955. See also Trial Judgment, paras 953-954.
[1692] Trial Judgment, paras 953, 955.
[1693] Trial Judgment, paras 954-955.
[1694] Appeal Brief, paras 219-221, 223.
[1695] Appeal Brief, para. 219, quoting *Delalić et al*. Appeal Judgement, para. 342.
[1696] Appeal Brief, paras 218, 220.
[1697] Appeal Brief, para. 220.
[1698] Appeal Brief, para. 220.

concerns, despite also finding that the evidence showed that he did not have an official position or particular rank in the KLA.[1699]

737. The SPO responds that the Trial Panel properly assessed Shala's *mens rea*.[1700] Responding to Shala's first argument, the SPO argues that Shala's reliance on the *Delalić et al*. Appeal Judgement is inapposite as the finding Shala quoted relates to a form of responsibility other than JCE.[1701] Responding to Shala's second argument, the SPO contends that the *Limaj et al*. Appeal Judgement is also irrelevant given that, in contrast to the present case, Fatmir Limaj was found not to have been present at the location of the crimes.[1702] The SPO also avers that the Trial Panel did not establish Shala's *mens rea* based solely on his "mere presence" at the KMF but also on his direct participation in the crimes and his own admissions.[1703]

(b) Assessment of the Court of Appeals Panel

738. As a preliminary matter, the Appeals Panel recalls that it has found, *proprio motu*, that the Trial Panel erred in finding, as an element of the *mens rea* of the war crime of arbitrary detention, that the perpetrators, including Shala, had no reasonable grounds to believe that security concerns made the detention of these individuals absolutely necessary.[1704] Accordingly, the Appeals Panel considers moot Shala's third argument that the Trial Panel did not explain how he could be expected to know that detentions were not justified by security concerns despite also finding that the evidence showed that he did not have an official position or particular rank in the KLA.[1705]

[1699] Appeal Brief, paras 218, 221.
[1700] SPO Response Brief, paras 228-230.
[1701] SPO Response Brief, paras 228-229.
[1702] SPO Response Brief, para. 229.
[1703] SPO Response Brief, para. 229.
[1704] See above, para. 734.
[1705] Appeal Brief, para. 221. See also Appeal Brief, para. 218.

739. Turning to Shala's remaining arguments, the Appeals Panel notes the following definition for the *mens rea* of the war crime of arbitrary detention in a non-international armed conflict set out by the Trial Panel:

> The perpetrator must have acted intentionally in relation to his or her conduct. Intent to commit a crime may be inferred from the accused's knowledge that crimes are being committed and by his or her participation in the perpetration of such crimes. In addition, the perpetrator must have no reasonable grounds to believe that security concerns of the parties to the conflict make the detention absolutely necessary, or the perpetrator must know that the detainees have not been afforded the requisite procedural guarantees, or be reckless as to whether those guarantees have been afforded or not.[1706]

740. In support of his first argument that the Trial Panel erred in setting out the above standard, Shala points to the ICTY Appeals Chamber's holding in the *Delalić et al*. Appeal Judgement that "to establish that an individual has *committed* the offence […], something more must be proved than mere knowing 'participation' in a general system or operation pursuant to which civilians are confined".[1707] The ICTY Appeals Chamber went on to clarify that it would be inadequate to find *primary criminal responsibility* for those, in a junior capacity, who maintain such system, adding that "[s]uch responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense".[1708] In reading the entirety of the ICTY Appeals Chamber's view on this matter, it is clear that it was evaluating different forms of commission, and their respective degrees of proximity to the crime. When it referred to "committing" and "primary criminal responsibility," the ICTY Appeals Chamber meant direct perpetration.[1709] It distinguished between this, most direct or proximate form of commission, and less direct forms of commission, such as JCE.[1710] Thus, in the Appeals Panel's view, the *Delalić et al*. conclusion on which Shala relies to

[1706] Trial Judgment, para. 944.
[1707] Appeal Brief, para. 219, referring to *Delalić et al.* Appeal Judgement, para. 342.
[1708] *Delalić et al.* Appeal Judgement, para. 342.
[1709] See *Delalić et al.* Appeal Judgement, paras 343, 345.
[1710] See *Delalić et al.* Appeal Judgement, para. 343.

argue that, when it comes to the *mens rea* for arbitrary detention, "something more must be proved than mere knowing 'participation' in a general system", concerned direct perpetration. However, Shala was not convicted as a direct perpetrator for the war crime of arbitrary detention. He was convicted pursuant to JCE I, a less direct form of liability. Moreover, the Appeals Panel recalls that the *mens rea* for JCE I liability *does require* more than "mere knowing participation". The *mens rea* for JCE I requires that an accused shares the intent to commit the crimes that form part of the common criminal purpose of the JCE and the intent to participate in a common plan aimed at their commission.[1711] Accordingly, the Appeals Panel dismisses this argument.

741. Turning to Shala's second argument, that knowledge of the crime of arbitrary detention cannot be inferred by his mere presence at the KMF alone,[1712] the Appeals Panel understands Shala to contest the Trial Panel's finding that "Mr Shala in particular knew that arbitrary detention and other crimes were being committed and intended them by his participation in the perpetration of such crimes".[1713] As regards knowledge and intent, the Appeals Panel notes that the Trial Panel clarified that intent to commit a crime may be inferred from the accused's knowledge that crimes are being committed and by his or her participation in the perpetration of such crimes.[1714] As to the Trial Panel's application of this law to the facts in this case, the Panel notes that the Trial Panel did not come to the impugned conclusion solely on the basis of Shala's "mere presence at the KMF alone",[1715] but rather on the basis of his personal participation in and his attendance during the perpetration of the crime of arbitrary detention and other crimes.[1716] In particular, the Trial Panel took into account the fact

[1711] *Stanišić and Simatović* Appeal Judgement of 31 May 2023, para. 522; *Popović et al.* Appeal Judgement, para. 1369; *Brđanin* Appeal Judgement, para. 365.
[1712] See Appeal Brief, para. 220.
[1713] Trial Judgment, para. 952. See also Appeal Brief, para. 218.
[1714] Trial Judgment, para. 944.
[1715] Contra Appeal Brief, para. 220.
[1716] Trial Judgment, paras 951-955; Trial Judgment, Section VI.I.2. The Trial Panel held that, during the period relevant to the charges, the perpetrators, including Shala, were present at the KMF, apprehended the detainees, mistreated them on a regular and recurring basis in a variety of manners,

that: (i) on or about 20 May 1999, Shala participated in the transfer under guard of W04733 from Romanat to the KMF;[1717] (ii) on or about 20 May 1999, Shala personally mistreated TW4-01, the Murder Victim, W04733 and W01448, and questioned [REDACTED], demanding that she make a confession;[1718] and (iii) on or about 4 June 1999, he personally mistreated [REDACTED] the Murder Victim during the Leg-Shooting Incident, which led to the death of the Murder Victim.[1719] The Panel further notes that the evidence of Shala's presence at the KMF on other occasions, and notably on about 28 or 29 May 1999 and on or about 31 May 1999, constitutes additional evidence on which the Trial Panel relied to come to the impugned conclusion.[1720]

742. The Appeals Panel considers inapposite Shala's reliance on the *Limaj et al.* Appeal Judgement in further support of the above argument that the Trial Panel could not infer his knowledge by his mere presence at the KMF alone.[1721] Shala points to[1722] the ICTY Appeals Chamber's conclusion that "the Trial Chamber reasonably refused to find that the alleged occasional presence of Fatmir Limaj in the immediate proximity of the Llapushnik/Lapušnik prison camp […], proved his knowledge of the existence of the prison camp or his participation in it".[1723] The Appeals Panel notes, however, that the *Limaj et al.* Trial Chamber could not conclude that Fatmir Limaj personally participated in the operation of the Llapushnik/Lapušnik prison camp

interrogated them, kept them locked up at the KMF in several rooms used for detention purposes, and made decisions regarding the fate or release of detainees at will. See Trial Judgment, para. 951. See also below, para. 784, where the Appeals Panel finds no error in the Trial Panel's assessment of Shala's personal contribution to the JCE regarding the war crime of arbitrary detention.

[1717] Trial Judgment, para. 952. See also Trial Judgment, paras 455, 903.

[1718] Trial Judgment, paras 952, 954. See also Trial Judgment, paras 904-905, 908, and references cited therein, 953.

[1719] Trial Judgment, paras 952, 954. See also Trial Judgment, paras 907, and references cited therein, 953.

[1720] See Trial Judgment, paras 951 (referring notably to Trial Judgment, Section VI.D), 952. See also Trial Judgment, paras 840-852, 897 (where the Trial Panel found that Shala was physically present at the KMF on several occasions, including, at a minimum (i) between the approximate dates of [REDACTED] and [REDACTED] May 1999; (ii) on or about 20 May 1999; (iii) on or about 28 or 29 May 1999; (iv) on or about 31 May 1999; and (v) on or about 4 June 1999).

[1721] See Appeal Brief, para. 220, referring to *Limaj et al.* Appeal Judgement, para. 218.

[1722] Appeal Brief, para. 220, fn. 478.

[1723] *Limaj et al.* Appeal Judgement, para. 218.

where crimes had been committed.[1724] By contrast, in the case at hand there is, as previously recounted, evidence – accepted by the Trial Panel – demonstrating Shala's repeated presence at the KMF during the relevant period of the charges.[1725]

743. The Panel turns to Shala's related argument that the Trial Panel erred in establishing that Shala was present at the KMF on or about 28 or 29 May 1999 and on or about 31 May 1999, as this finding was based on untested evidence of deceased witnesses W04733 and Mr Elezaj.[1726] The Panel recalls that it has already found, in respect of Shala's presence at the KMF, that the Trial Panel also relied on live testimony relating to Shala's direct participation in the mistreatment of detainees at the KMF, which Shala had the opportunity to confront at trial.[1727] Accordingly, the Appeals Panel dismisses Shala's argument that the Trial Panel inferred Shala's knowledge of the crime of arbitrary detention by his mere presence at the KMF alone.

744. In view of the above, the Panel finds that Shala fails to establish that the Trial Panel erred with respect to the *mens rea* of the war crime of arbitrary detention in a non-international armed conflict. Accordingly, the Appeals Panel dismisses Ground 12, in part. However, as a result of its finding that the Trial Panel erred in concluding that no criminal charges and no security concerns made the detainees' detention absolutely necessary, thereby overturning this finding,[1728] the Appeals Panel, *proprio motu*, further overturned the Trial Panel's finding that the perpetrators,

[1724] *Limaj et al.* Trial Judgement, paras 564-565. See also *Limaj et al*. Appeal Judgement, para. 218.
[1725] Trial Judgment, para. 897. See also Trial Judgment, paras 839-852. The Appeals Panel notes that the Trial Panel found that Shala admitted himself, in his 2019 Belgian Statement, that he entered and exited the KMF very often and was able to do so without restrictions. See Trial Judgment, paras 861-864, 873, 897. In this regard, the Panel recalls that it rejected Shala's argument under Ground 1 with respect to the Trial Panel's reliance on Shala's Prior Statement, and, in particular, the 2019 Belgian Statement. See above, paras 117-121.
[1726] Appeal Brief, para. 220.
[1727] See above, para. 509.
[1728] See above, para. 734.

including Shala, had no reasonable grounds to believe that security concerns made the detention of these individuals absolutely necessary.[1729]

745. Concerning the impact of this finding, the Appeals Panel recalls the disjunctive nature of the *mens rea* of the war crime of arbitrary detention. In addition to the demonstration that the perpetrator acted intentionally, the *mens rea* may be satisfied either by a trial panel finding, *inter alia*, that the perpetrator must have no reasonable grounds to believe that security concerns of the parties to the conflict make the detention absolutely necessary or the perpetrator must know that the detainees have not been afforded the requisite procedural guarantees.[1730] In that, in addition to finding that the perpetrators, including Shala, acted intentionally in relation to their conduct, (i) the Trial Panel found that the perpetrators, including Shala, knew that the detainees had not been afforded the requisite procedural guarantees,[1731] and (ii) the Appeals Panel has upheld all other Trial Panel findings challenged by Shala in respect of the *mens rea* of the war crime of arbitrary detention, this overturned finding has no impact on Shala's conviction for arbitrary detention.

3. Alleged Errors Regarding the Trial Panel's Conviction of Shala for the War Crime of Arbitrary Detention Pursuant to JCE I

746. The Trial Panel found that there was a common purpose shared by the JCE members to "arbitrarily detain […] detainees at the KMF who were perceived to collaborate with, be associated with, or sympathize with the Serbian authorities or who were considered not sufficiently supportive of the KLA effort".[1732] The Trial Panel found that the common purpose could be inferred from the fact that the JCE members "acted in unison and with intent to put into effect the JCE".[1733]

[1729] See above, para. 734.
[1730] Trial Judgment, para. 944.
[1731] Trial Judgment, para. 954.
[1732] Trial Judgment, paras 1010, 1024.
[1733] Trial Judgment, paras 1009, 1021.

747. The Trial Panel inferred the common purpose from the following: (i) detainees were apprehended after being singled out for being perceived to collaborate with, be associated with, or sympathise with the Serbian authorities or for not being sufficiently supportive of the KLA effort; (ii) their apprehension followed the same pattern and an organised *modus operandi*; (iii) their arbitrary detention at the KMF was institutionalised; and (iv) their interrogation and mistreatment at the KMF was systematic and carried out by several JCE members acting together.[1734] The Trial Panel concluded that the detainees' "arbitrary detention and mistreatment at the KMF were not random, haphazard and isolated events, but instead followed the same pattern".[1735]

748. The Trial Panel further found that Shala made a significant contribution to the crime of arbitrary detention by, *inter alia*, "upholding the detention regime established by the JCE Members" as he "physically committ[ed] and participat[ed] in the arbitrary detention, interrogation and severe and brutal mistreatment of detainees".[1736]

749. Shala alleges a number of legal and factual errors concerning the Trial Panel's findings on the JCE common purpose, the Accused's contribution to and his shared intent in respect of the JCE to commit the war crime of arbitrary detention.[1737] The SPO responds that Shala's submissions should be dismissed.[1738]

(a) Alleged Errors Concerning the Trial Panel's Inferences in Entering Findings on the JCE Common Purpose to Arbitrarily Detain

(i) Submissions of the Parties

750. Shala alleges that the Trial Panel erred in law and fact and breached the principle of *in dubio pro reo* by making "unwarranted inferences" in entering findings

[1734] Trial Judgment, paras 1011-1015, 1022.
[1735] Trial Judgment, para. 1010.
[1736] Trial Judgment, paras 1025, 1028.
[1737] Appeal Brief, paras 160, 162-164, 213, 224-228. See also Reply Brief, paras 23-25, 30.
[1738] SPO Response Brief, paras 149-151, 201-215, 224-226, 231-232.

on the JCE common purpose with respect to arbitrary detention, while there were alternative reasonable inferences from the available evidence.[1739] In particular, Shala asserts that the Trial Panel erred by inferring the common purpose of the JCE from the pattern and *modus operandi* followed regarding the apprehension of detainees, the institutionalisation of detention and the systemic mistreatment of detainees, as this inference was itself based on a number of inferences which were not the only reasonable inferences on the evidence.[1740]

751. Shala argues that the Trial Panel's finding that the JCE members were all linked to each other because their activities revolved around the KMF and that the arbitrary detention and mistreatment at the KMF followed the same pattern were not the only reasonable inferences based on the evidence.[1741] Although the Trial Panel found that it was entirely improbable that all JCE members acted individually, Shala submits that another reasonable inference was that there was no collective decision-making process about arrests and detention, and that individuals were detained "because of personal grievances with particular KLA members with authority at the KMF".[1742]

752. The SPO responds that, when arguing that the Trial Panel's findings on pattern and *modus operandi* were not the only reasonable inferences available, Shala mischaracterises the Trial Judgment and wrongly interprets the *in dubio pro reo* principle.[1743]

[1739] Appeal Brief, paras 160, 162-164; Reply Brief, paras 23-25, 30.
[1740] Appeal Brief, para. 160. See also Transcript, 15 May 2025, p. 50. The Appeals Panel notes that Shala's arguments that the Trial Panel erred with respect to finding that murder was part of the common purpose are addressed separately below. See below, Section V.I.1.
[1741] Appeal Brief, paras 162-164; Reply Brief, para. 30.
[1742] Appeal Brief, para. [REDACTED]. Shala specifically argues in this respect that the Trial Panel erred by not considering [REDACTED]'s statement, supported by additional evidence, that he had been detained because [REDACTED]. See Appeal Brief, para. [REDACTED].
[1743] SPO Response Brief, para. 202.

753. The SPO argues that the Trial Panel properly inferred the common purpose of the JCE as the only reasonable inference available based on the evidence.[1744] While Shala avers that there were other reasonable inferences, the SPO submits that he only identifies one such alleged alternative inference – that persons were detained because of personal grievances with particular KLA members with authority at the KMF – which the Trial Panel dismissed at trial following a detailed consideration of the evidence.[1745] The SPO contends that, in suggesting this alternative inference, Shala: (i) ignores relevant jurisprudence distinguishing motive from intent;[1746] (ii) conflates the legal requirements for finding the existence of a common plan shared by a plurality of persons;[1747] and (iii) disregards the Trial Panel's factual findings and the totality of the evidence considered by the Trial Panel, including on the organised and coordinated manner in which the JCE members acted together to implement the JCE in the arrest, detention and mistreatment of detainees at the KMF.[1748]

754. More specifically, the SPO submits that, in support of its finding on the common purpose of the JCE, the Trial Panel considered a "plethora" of evidence demonstrating that detainees were singled out, apprehended and interrogated based on sympathising or otherwise being associated with Serbia, "Serbs", or Serbian authorities, being "traitors" or "collaborators", or not sufficiently supportive of the KLA effort.[1749]

755. Shala replies that the Trial Panel's inference concerning a "so-called common plan" by the KLA to detain individuals in Kukës for two weeks in May and June 1999 is not the only reasonable inference from the evidence, particularly given the chaos in

[1744] SPO Response Brief, paras 201, 210-213.
[1745] SPO Response Brief, paras 201-202, 211. See also SPO Response Brief, para. 214.
[1746] SPO Response Brief, paras 203-204, wherein the SPO argues that Shala's argument that [REDACTED] believed that [REDACTED] had a grudge against him ignores relevant jurisprudence that such evidence may go to [REDACTED]'s motive but not his intent.
[1747] SPO Response Brief, paras 204, 215.
[1748] SPO Response Brief, paras 205-209.
[1749] SPO Response Brief, paras 211-213.

that period and the "arbitrary and uncoordinated acts" of individual KLA members who had personal grievances against particular detainees.[1750] Shala further replies that the evidence relied on by the SPO to show that all detainees were apprehended and interrogated on allegations of sympathising with Serbs, or otherwise being associated with Serbia, in fact demonstrates the "lack of arbitrariness" in the selection, arrest and detention of such individuals.[1751]

(ii) Assessment of the Court of Appeals Panel

756. The Panel recalls that the Trial Panel found that there was a common purpose shared by the JCE members to "arbitrarily detain, interrogate, torture and murder detainees at the KMF who were perceived to collaborate with, be associated with, or sympathize with the Serbian authorities or who were considered not sufficiently supportive of the KLA effort".[1752]

757. The Panel observes that in the Trial Judgment, the Trial Panel addressed and provided a detailed explanation responding to this argument by Shala that its findings that the apprehension of detainees and arbitrary detention and mistreatment at the KMF followed the same pattern and *modus operandi* were not the only reasonable inferences available based on the evidence.[1753] The Panel considers that Shala repeats on appeal the same argument he made at trial.[1754] As Shala has not provided any basis to support a conclusion that the Trial Panel's rejection of this argument constituted an

[1750] Reply Brief, para. 30.
[1751] Reply Brief, para. 30.
[1752] See above, para. 746.
[1753] See Trial Judgment, para. 1022, finding that Shala's proposed alternative inference is contradicted by the fact that (i) detainees were apprehended after they were singled out for being perceived as, *inter alia*, collaborators of the Serbian authorities; (ii) their apprehension followed the same pattern and a *modus operandi*; (iii) their detention at the KMF was institutionalised; and (iv) their interrogation and mistreatment was systematic and carried out by several JCE members acting together. See Appeal Brief, paras 160, 163; Reply Brief, para. 30.
[1754] *Compare* Appeal Brief, para. 163 *with* Defence Final Trial Brief, para. 80. See Trial Judgment, para. 1022.

error warranting the intervention of the Appeals Panel, this argument warrants summary dismissal.[1755]

758. However, the Panel will exceptionally consider Shala's argument out of fairness to the Accused and in the interests of justice.

759. The Panel recalls that the Trial Panel inferred the JCE common purpose from the following: (i) detainees were apprehended after being singled out for being perceived to collaborate with, be associated with, or sympathise with the Serbian authorities or for not being sufficiently supportive of the KLA effort; (ii) their apprehension followed the same pattern and an organised *modus operandi*; (iii) their arbitrary detention at the KMF was institutionalised; and (iv) their interrogation and mistreatment at the KMF was systematic and carried out by several JCE members acting together.[1756]

760. The Panel notes that Shala does not specifically challenge the Trial Panel's findings, in inferring the JCE common purpose, regarding sub-findings (iii) and (iv), i.e. the institutionalisation of arbitrary detention at the KMF, and the fact that the detainees' interrogation and mistreatment at the KMF was systematic and carried out by several JCE members acting together. The Panel will address Shala's arguments related to the first two sub-findings.

a. Apprehension of Detainees Based on Association with Serbian Authorities

761. First, the Panel notes the Trial Panel's detailed and comprehensive findings that individuals were singled out, apprehended, interrogated and mistreated based on sympathising, or otherwise being associated, with Serbian authorities.[1757] In this regard, the Trial Panel found that detainees, including TW4-01, the Murder Victim,

[1755] See above, para. 39.
[1756] See above, para. 747.
[1757] See Trial Judgment, paras 403-404, 412, 448, 470-471, 491, 496-497, 509, 513, 532, 569, 576, 590, 656, 659, 692, 1011, 1014.

TW4-11, W04733, W01448, TW4-05, TW4-02, TW4-04, [REDACTED] and [REDACTED], were singled out prior to their arrest for being perceived to collaborate with or sympathise with the Serbian authorities and then were arrested after the KLA verified them as "collaborators" or supporters of the Serbian authorities.[1758]

762. The Panel further notes that the Trial Panel also found that detainees, notably W04733, TW4-01 and the Murder Victim, were systematically interrogated by JCE members about their relationship with the Serbian authorities or their knowledge of "collaborators", or were accused themselves of being "collaborators", "spies", or "traitors" while being mistreated.[1759]

763. The Panel observes that the Trial Panel further considered that KLA members and fighters returning from the front harassed and threatened detainees with violence through the window of Room 1, and that KLA members entered Room 1 and accused the detainees of being spies and traitors.[1760] The Panel notes, in this regard, the Trial Panel's recollection of TW4-01's testimony, who stated that: "When people walked by the window, they would insult our mothers and say 'Spies' and everything that they would think of".[1761] In light of this, the Panel finds that the Trial Panel did not err in finding that the JCE members had a common purpose to arbitrarily detain, interrogate and torture detainees at the KMF who were accused of sympathising, or otherwise being associated, with Serbian authorities.[1762]

764. The Panel notes Shala's further argument that the evidence the SPO relies on to show that all detainees were apprehended or interrogated on allegations of sympathising or being associated with Serbia, in fact, "goes to show the lack of

[1758] See Trial Judgment, paras 403, 412, 470, 491, 496, 509, 513, 532, 569, 576, 590, 659, 692, 1011.
[1759] See Trial Judgment, paras 404, 448, 471, 491, 497, 509, 569, 590, 655-656, 659, 692, 750, 1014.
[1760] Trial Judgment, paras 648, 721, 1013.
[1761] Trial Judgment, para. 648, referring to Transcript (TW4-01), 30 May 2023, p. 1466. See also Trial Judgment, para. 748.
[1762] See Trial Judgment, paras 1010, 1024.

arbitrariness" in the selection, arrest and detention of these individuals.[1763] The Panel is not persuaded by Shala's argument in this regard and reiterates that it finds convincing the Trial Panel's findings, as recalled above,[1764] on the systematic and consistent pattern of conduct by JCE members to single out, arrest, interrogate and mistreat detainees based on sympathising or otherwise being associated with Serbian authorities. The Panel therefore considers that Shala's proposed alternative inference in terms of a lack of arbitrariness is not supported by the evidence and that the Trial Panel's inference was the only reasonable one based on the evidence before it.

765. Consequently, the Appeals Panel finds that Shala fails to demonstrate any error in the Trial Panel inferring the JCE common purpose based on its finding that detainees were apprehended after being singled out for being perceived to collaborate with, be associated with, or sympathise with the Serbian authorities, or for not being sufficiently supportive of the KLA effort.

b. Apprehension of Detainees Followed the Same Pattern and Organised *Modus Operandi*

766. The Panel observes the Trial Panel's comprehensive and detailed findings on the pattern and organised *modus operandi* of the apprehension of detainees brought to the KMF.[1765] The Panel also notes the Trial Panel's finding that the search, arrest and transfer of detainees required a "significant degree of organisation and considerable logistics and manpower".[1766]

767. The Panel will now address Shala's argument that the Trial Panel's inference on the common purpose was not the only reasonable inference, particularly given the

[1763] See Reply Brief, para. 30. Contra SPO Response Brief, paras 212-213.
[1764] See above, paras 761-762.
[1765] See Trial Judgment, paras 380-382, 407, 415-419, 441-444, 446-449, 474-475, 477, 513-514, 533, 536-537, 564, 590, 834, 1011.
[1766] Trial Judgment, para. 834. See also Trial Judgment, para. 1011.

chaos in May and June 1999 and the "arbitrary and uncoordinated acts" of certain KLA members who detained individuals at the KMF.[1767]

768. The Appeals Panel considers that based on, *inter alia*, the abovementioned findings by the Trial Panel, Shala's proposed alternative inference that individuals were arrested and detained as a result of the uncoordinated acts of KLA members at the KMF is not a reasonable one. The Panel finds that the Trial Panel's inference on the JCE common purpose was the only reasonable one based on the evidence.[1768] Accordingly, the Panel dismisses this argument.

769. The Panel turns to Shala's specific challenge that in finding that "it [was] entirely improbable that all JCE Members acted individually", the Trial Panel did not consider [REDACTED] statement that he was detained because [REDACTED].[1769] The Panel first observes that the Trial Panel considered Shala's argument that the JCE Members did not act in unison, but individually, to settle personal grievances, in entering its findings.[1770] The Panel similarly considers that Shala repeats an argument that was unsuccessful at trial without demonstrating that it constitutes an error justifying the Appeals Panel's intervention, which warrants summary dismissal.[1771]

770. In any event, the Panel recalls that, as underlined by the ICTY Appeals Chamber, "motive is generally not an element of criminal liability".[1772] Further, the Panel finds merit in the SPO's submission that motive must be distinguished from

[1767] See Reply Brief, para. 30. See also Appeal Brief, para. 163.
[1768] See e.g. *Đorđević* Appeal Judgement, paras 728-729; *Strugar* Appeal Judgement, para. 109.
[1769] See Appeal Brief, para. [REDACTED], referring to Trial Judgment, para. 1022; Defence Final Trial Brief, para. [REDACTED].
[1770] See Trial Judgment, paras 1020, fn. 2090 (referring, *inter alia*, to Shala's relevant argument in Defence Final Trial Brief, para. 80), 1022.
[1771] See above, paras 39, 42.
[1772] *Limaj et al.* Appeal Judgement, para. 109. See *Ambos* Treatise ICL I, Chapter VII, A.(1), pp. 365-366, where the author states that "[t]he principle of culpability requires that the perpetrator acts with a certain state of mind, normally with intent; possible motive(s), that is, the reason(s) why the agent performed the act is (are) irrelevant in this respect. This – here so-called – *irrelevance thesis* has been correctly recognized by the international case law" (emphasis in original).

intent.[1773] As a consequence, personal motive does not preclude a perpetrator from having criminal intent.[1774] Accordingly, the Panel considers that any personal motives [REDACTED] may have had against [REDACTED] do not undermine the Trial Panel's finding that [REDACTED] was a JCE member and that he, together with the other JCE members, shared the common purpose to arbitrarily detain detainees at the KMF who were perceived to collaborate with, be associated with, or sympathise with the Serbian authorities, or who were considered not sufficiently supportive of the KLA effort.[1775] In addition, the Panel considers that Shala fails to acknowledge the Trial Panel's findings that other KLA members, who did not have the same alleged grudge against [REDACTED], participated in his brutal mistreatment, as well as of the mistreatment of other detainees, over an extended period of time.[1776] As such, the Panel dismisses Shala's argument in this regard.

771. The Appeals Panel therefore finds that Shala fails to demonstrate any error in the Trial Panel inferring the JCE common purpose based on its finding that the apprehension of detainees followed the same pattern and an organised *modus operandi*.

772. For these reasons, in the Panel's view, Shala fails to demonstrate that, based on the evidence before the Trial Panel, no reasonable trier of fact could have inferred that there was a common purpose shared by the JCE members to "arbitrarily detain […] detainees at the KMF who were perceived to collaborate with, be associated with, or sympathize with the Serbian authorities or who were considered not sufficiently supportive of the KLA effort".[1777] In light of the above, the Appeals Panel finds that Shala fails to demonstrate that the Trial Panel abused its discretion in making inferences in the challenged findings on the JCE common purpose with respect to

[1773] SPO Response Brief, paras 203-204.
[1774] SPO Response Brief, paras 203-204.
[1775] See Trial Judgment, paras 1003, 1010-1014, 1022, 1024.
[1776] See e.g. Trial Judgment, paras 640-650, 654-678, 1015.
[1777] See Trial Judgment, paras 1011-1014, 1022, 1024. See also Trial Judgment, para. 1010.

arbitrary detention. Accordingly, the Appeals Panel dismisses the remainder of Shala's Ground 8A and Ground 11.[1778]

(b) Alleged Errors Concerning the Trial Panel's Finding that Shala Significantly Contributed to the JCE to Arbitrarily Detain

(i) Submissions of the Parties

773. First, Shala argues that the Trial Panel erred in relying either exclusively or to a decisive extent on the untested evidence of W04733 when it concluded that he made a significant contribution to the JCE[1779] by "'upholding the detention regime established by the JCE members'" and "'physically committing and participating in the arbitrary detention'".[1780]

774. Second, Shala argues that the Trial Panel "erred in law when it found that 'it is irrelevant whether Mr Shala had any position of responsibility, authority or control, or whether he was under a duty to act in any specific manner towards the detainees'".[1781] Shala submits to this end – referring to the *Delalić et al*. Appeal Judgement – that established case law provides that "responsibility is 'more properly allocated to those who are responsible for the detention in a more direct or complete sense'".[1782] Shala contends in this regard that the Trial Panel considered that Xhemshit Krasniqi – who was under the authority of Sabit Geci – "was in charge of detainees and 'played a prominent role in [their] apprehension, transfer, interrogation and mistreatment'".[1783] He further contends that, by contrast, the Trial Panel found that Shala did not possess the power to arrest, detain or release individuals and that the

[1778] See above, fn. 1362.
[1779] Appeal Brief, para. 225, referring to Ground 7 of the Appeal Brief.
[1780] Appeal Brief, paras 224-225, referring to Trial Judgment, paras 1025, 1028.
[1781] Appeal Brief, para. 226, referring to Trial Judgment, para. 1027.
[1782] Appeal Brief, para. 226, referring notably to *Delalić et al*. Appeal Judgement, para. 342.
[1783] Appeal Brief, para. 228, referring to Trial Judgment, para. 1004.

Trial Panel's conclusion that he could autonomously move around and autonomously mistreat and interrogate detainees does not imply such power.[1784]

775. Concerning Shala's first argument, the SPO responds that his submission that the Trial Panel erred in relying on untested evidence of W04733 repeats those raised under Ground 7.[1785] Concerning Shala's second argument, the SPO responds that a position of authority, including over other JCE members, is not required to find an accused responsible for arbitrary detention through a JCE.[1786] The SPO contends that JCE requires that an accused significantly contributed in some way to the common plan, and that Shala's contribution went far beyond the minimum legal threshold.[1787]

(ii) Assessment of the Court of Appeals Panel

776. The Appeals Panel notes the objective elements of JCE I set out by the Trial Panel: (i) a plurality of persons who act pursuant to a common purpose; (ii) a common purpose which amounts to or involves the commission of a crime provided for in the Law; and (iii) participation of the perpetrator in furthering the common design or purpose.[1788]

777. The Panel further observes that the Trial Panel set out the following definition and standard for the perpetrator's contribution (or participation):

> The perpetrator must have participated in the furthering of the common purpose at the core of the JCE by assisting in, or contributing to, the execution of the common plan or purpose, but need not have performed any part of the *actus reus* of the crime charged. The perpetrator's contribution to the JCE need not be, as a matter of law, necessary or substantial, but it should be at least a

[1784] Appeal Brief, para. 227, referring to Trial Judgment, paras 902, 914. See also Trial Judgment, para. 228.
[1785] SPO Response Brief, para. 231.
[1786] SPO Response Brief, para. 232.
[1787] SPO Response Brief, para. 232. See also SPO Response Brief, para. 2.
[1788] Trial Judgment, para. 998.

> significant contribution to the crimes for which he or she is found responsible. The contribution does not need to be criminal *per se*.[1789]

778. The Panel notes that Shala does not challenge this definition.

779. The Panel further observes that, in the assessment of Shala's contribution to the JCE, the Trial Panel found that:

> Throughout the time frame of the charges, Mr Shala made a significant contribution to the crimes charged by: (i) participating in the transfer of W04733, under guard, from a detention location in Romanat to the KMF; (ii) continuing and enforcing the arbitrary detention of TW4-01, the Murder Victim, W04733 and W01448 by physically mistreating them on or about 20 May 1999 and 4 June 1999, thereby upholding the detention regime established by the JCE Members at the KMF; (iii) personally mistreating TW4-01, the Murder Victim, W04733 and W01448, on or about 20 May 1999; (iv) accusing W04733 of being a "spy", on or about 20 May 1999; (v) ordering [REDACTED] to beat W04733, on or about 20 May 1999; (vi) questioning and demanding that [REDACTED] make a confession identifying [REDACTED] as Serb collaborators, on or about 20 May 1999; and (vii) personally and brutally mistreating [REDACTED] the Murder Victim, on or about 4 June 1999. In the Panel's view, Mr Shala's contributions were significant in furthering the common plan to detain, interrogate, mistreat and murder detainees.[1790]

780. The Trial Panel then added that Shala enjoyed a certain degree of autonomy and authority at the KMF, especially when mistreating detainees, and concluded that his contribution "went far beyond" what is required to meet the element of substantial contribution to the JCE.[1791]

781. Regarding Shala's first argument that the Trial Panel erred in making findings (i), (iv), (v), and (vi),[1792] as it relied either exclusively or to a decisive extent on

[1789] Trial Judgment, para. 1001 (footnotes omitted).
[1790] Trial Judgment, para. 1025 (footnotes omitted).
[1791] Trial Judgment, para. 1028.
[1792] See above, para. 779, citing Trial Judgment, para. 1025.

the untested evidence of W04733,[1793] the Appeals Panel observes that Shala repeats an argument that has already been addressed and dismissed by the Panel above under Ground 7.[1794] Accordingly, the Appeals Panel dismisses Shala's duplicate argument under Ground 12.

782. The Panel now turns to Shala's argument that the Trial Panel "erred in finding that 'it is irrelevant whether Mr Shala had any position of responsibility, authority or control, or whether he was under a duty to act in any specific manner towards the detainees'".[1795] The Panel first notes that the Defence already raised at trial the argument that Shala did not have any power over the detainees' arrest, detention, conditions of detention or release, and that as a consequence, he could not be found responsible for the war crime of arbitrary detention, including through JCE I.[1796] The Trial Panel addressed and dismissed this argument in the Trial Judgment,[1797] finding that "[a]n accused's position of authority or control, or the existence of a legal duty to act, may be factors to be taken into account to establish that the accused significantly contributed to a JCE, but they are not legal requirements", and that "[w]hat amounts to a significant contribution is a question of fact to be determined on a case-by-case basis".[1798] The Trial Panel then added that "it is irrelevant whether Mr Shala had any

[1793] Appeal Brief, para. 225. The Appeals Panel notes that Shala does not challenge, under Ground 12, the findings (ii), (iii), and (vii) of paragraph 1025 of the Trial Judgment.
[1794] See above, paras 493, 498-500, 509. The Panel recalls that it found no error in the Trial Panel's reliance on untested evidence when concluding that Shala made a significant contribution to the JCE as related to arbitrary detention; the Panel considered that, in so doing, the Trial Panel also relied on live testimony relating to Shala's direct participation in the mistreatment of detainees at the KMF, which Shala had the opportunity to confront at trial.
[1795] Appeal Brief, para. 226, referring to Trial Judgment, para. 1027.
[1796] See Trial Judgment, para. 1026, referring to Defence Final Trial Brief, paras 73, 76, 86, 122, 128-129; Transcript, 16 April 2024, pp. 4275-4277. The Panel notes that, at trial, Shala relied on the same authority, the *Delalić et al*. Appeal Judgement, para. 342. See Defence Final Trial Brief, para. 74; Transcript, 16 April 2024, pp. 4276-4277.
[1797] Trial Judgment, para. 1027.
[1798] Trial Judgment, para. 1027.

position of responsibility, authority or control, or whether he was under a duty to act in any specific manner towards the detainees at the KMF".[1799]

783. In any event, and as found above, Shala's reliance on the *Delalić et al.* Appeal Judgement is inapposite given that the ICTY Appeals Chamber's finding to which Shala refers – "[s]uch responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense" – was made in the context of direct perpetration, distinguishing between this most direct or proximate form of commission, and less direct forms of commission such as JCE I.[1800] The Panel recalls that Shala was convicted of the war crime of arbitrary detention pursuant to JCE I liability, in relation to which, as correctly found by the Trial Panel, there is no requirement of a certain level of authority, control or a legal duty to act.[1801]

784. Therefore, the Panel finds that Shala has failed to demonstrate an error of law in the Trial Panel's findings on his contribution to the JCE for the war crime of arbitrary detention. Accordingly, the Appeals Panel dismisses Shala's Ground 12 in part.[1802]

(c) Alleged Errors Concerning the Trial Panel's Finding that Shala Shared the Intent of the JCE Members to Commit Arbitrary Detention

785. The Trial Panel concluded that Shala shared the intent of the other JCE members to commit the war crime of arbitrary detention.[1803] It came to this conclusion on the basis of, *inter alia*, its findings on Shala's: (i) personal and repeated participation in the mistreatment of detainees; (ii) knowledge that detainees were held at the KMF;

[1799] Trial Judgment, para. 1027.
[1800] See above, para. 740. See also *Delalić et al.* Appeal Judgement, paras 342-343, 345.
[1801] See above, para. 782.
[1802] The remainder of Shala's challenges under Ground 12 have been addressed below. See below, Section V.H.3.(c).
[1803] Trial Judgment, paras 1029, 1036.

and (iii) knowledge that no basic guarantees were afforded to them for the duration of their respective detention.[1804]

(i) Submissions of the Parties

786. Shala argues that the Trial Panel's erred in finding that he shared the intent to commit arbitrary detention with other alleged JCE members.[1805] He submits in this regard that the ICTY Appeals Chamber held that "JCE 'is not an open-ended concept that permits convictions based on guilt by association'".[1806]

787. The SPO responds that the jurisprudence on which Shala relies is taken out of context, and highlights that Shala was not convicted based on guilt by association, but for his contribution to the JCE with the required *mens rea*.[1807]

(ii) Assessment of the Court of Appeals Panel

788. The Appeals Panel stresses that the *mens rea* element for JCE I requires that an accused shares the intent to commit the crimes that form part of the common criminal purpose of the JCE and the intent to participate in a common plan aimed at their commission.[1808]

789. Concerning Shala's argument that the Trial Panel erred in finding that he shared the intent to commit arbitrary detention with other alleged JCE members on the basis that JCE does not permit convictions based on guilt by association, the Appeals Panel notes, as a preliminary matter, that he raised this argument at trial.[1809] Both at trial and on appeal, Shala refers to this end to the *Brđanin* Appeal Judgement, in which the ICTY Appeals Chamber held that "JCE is not an open-ended concept that

[1804] Trial Judgment, paras 951-955, 1029, 1036.
[1805] Appeal Brief, para. 222.
[1806] Appeal Brief, para. 222, referring to *Brđanin* Appeal Judgement, para. 428.
[1807] SPO Response Brief, para. 230.
[1808] See above, para. 740 and below, para. 846. See also Trial Judgment, para. 1002.
[1809] Defence Final Trial Brief, para. 87.

permits convictions based on guilt by association".[1810] The Appeals Panel considers that Shala has not explained how the Trial Panel's findings on his intent would amount to "guilt by association".[1811] In any event, the link between Shala and the crime of arbitrary detention does not follow from his membership of the JCE but from his significant contribution to the JCE and the intent he shared with other JCE members to commit the crime of arbitrary detention and to participate in a common plan aimed at its commission.[1812] Furthermore, and as recalled by the ICTY Appeals Chamber in the same *Brđanin* Appeal Judgement, "a Chamber can only find that the accused has the requisite intent if this is the only reasonable inference on the evidence".[1813] However, Shala points to no evidence on the record supporting a different reasonable inference from the one found by the Trial Panel. Therefore, the Panel rejects Shala's argument in this respect.

790. In light of the above, the Panel finds that Shala fails to establish that the Trial Panel abused its discretion in making inferences in the challenged findings on the JCE common purpose and erred in finding that Shala made a significant contribution to the common purpose and shared the intent to commit the crime of arbitrary detention with the other members of the JCE. Accordingly, the Appeals Panel dismisses the remainder of Shala's Ground 12.

4. Conclusion

791. The Appeals Panel recalls that it has found that, taking the evidence as a whole, Shala failed to demonstrate any error in the Trial Panel's assessment of his conviction

[1810] *Brđanin* Appeal Judgement, para. 428. See also Defence Final Trial Brief, para. 87; Appeal Brief, para. 222.
[1811] Appeal Brief, para. 222.
[1812] Trial Judgment, paras 951-952, 954-955, 1010-1014, 1021-1022, 1024-1025, 1027-1029, 1035-1036. The Appeals Panel recalls that it has, *proprio motu*, overturned one finding in the Trial Panel's assessment of Shala's *mens rea* for arbitrary detention. This does not undermine the Trial Panel's conclusion that Shala satisfied the *mens rea* for arbitrary detention (Trial Judgment, para. 956). See above, paras 734, 744-745.
[1813] See *Brđanin* Appeal Judgement, para. 429.

for the arbitrary detention of TW4-01, the Murder Victim, TW4-11, W04733, W01448, TW4-05, TW4-02, TW4-04, [REDACTED], [REDACTED] and a third Roma detainee/musician, [REDACTED], at least one more female detainee, [REDACTED], [REDACTED] and [REDACTED].[1814] Accordingly, the Appeals Panel dismissed Ground 8A, Ground 11 and Ground 12, in part.[1815]

792. The Appeals Panel further recalls that it has granted, in part, Ground 12, finding that the Trial Panel erred in concluding that detainees "were not held at the KMF pursuant to any criminal charges and no security concerns made it absolutely necessary for any of them to be detained",[1816] thereby overturning this finding, and *proprio motu*, overturning the Trial Panel's related *mens rea* finding that the perpetrators, including Shala, "had no reasonable grounds to believe that security concerns made the detention of these individuals absolutely necessary".[1817] As recalled above, these errors have no impact on Shala's conviction.[1818] The Appeals Panel has dismissed Ground 12 of Shala's appeal in all other respects. Accordingly, the Appeals Panel upholds Shala's conviction for the war crime of arbitrary detention in respect of the above referenced individuals.

I. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S FINDINGS ON THE WAR CRIME OF MURDER (GROUND 13)

793. The Appeals Panel recalls that the Trial Panel found that the JCE members shared a common purpose to arbitrarily detain, interrogate, torture and murder detainees at the KMF who were perceived to collaborate with, be associated with, or

[1814] See above, Sections V.H.1.(b).(i)-(ii). The Appeals Panel recalls that it has overturned the Trial Panel's findings underpinning the conviction of Shala for the crime of arbitrary detention against [REDACTED] and [REDACTED]. See above, paras 605, 636.
[1815] See above, para. 772.
[1816] See above, para. 733. See also Trial Judgment, para. 947.
[1817] See above, para. 734. See also Trial Judgment, para. 953.
[1818] See above, paras 734-735.

sympathise with the Serbian authorities or who were considered not sufficiently supportive of the KLA effort.[1819]

794. The Trial Panel found that murder was part of the common purpose based on: (i) the intentional manner in which (some of the) detainees were mistreated; (ii) statements made by JCE members, including Shala, that clearly show the intent to kill detainees; and (iii) the purposeful denial of medical treatment to the Murder Victim.[1820]

795. The Trial Panel further found that Shala made a significant contribution to the JCE, as relevant to the crime of murder, by: (i) personally mistreating TW4-01, the Murder Victim, W04733 and W01448, on or about 20 May 1999; (ii) ordering [REDACTED] to beat W04733, on or about 20 May 1999; and (iii) personally and brutally mistreating [REDACTED] the Murder Victim, on or about 4 June 1999.[1821]

796. The Trial Panel considered that, based on the circumstances of this case, Shala's individual criminal responsibility was best reflected by the mode of liability of JCE I.[1822] Furthermore, the Trial Panel inferred that Shala shared the intent to carry out the crime of murder, as part of the JCE, from a number of factors that will be discussed below.[1823]

797. Shala first challenges the Trial Panel's conclusion that murder was part of the common purpose of the JCE in that it drew unwarranted inferences and failed to give sufficient weight to relevant considerations.[1824] The SPO responds that Shala fails to

[1819] Trial Judgment, paras 1010, 1024.
[1820] Trial Judgment, para. 1016. See also Trial Judgment, paras 1017-1019.
[1821] Trial Judgment, para. 1025. See also Trial Judgment, para. 1028.
[1822] Trial Judgment, para. 994.
[1823] Trial Judgment, paras 1031, 1036. See also Trial Judgment, paras 1032-1035. See below, paras 846-863.
[1824] Appeal Brief, paras 145, 160-161, 240-247; Reply Brief, para. 43; Notice of Appeal, para. 21. The Appeals Panel notes that under Ground 13 of the Notice of Appeal, Shala did not allege an error in the Trial Panel's finding that murder was part of the JCE common purpose. The Panel notes, however, that Shala alleged such error generally under Ground 11 of the Notice of Appeal (see Notice of Appeal,

demonstrate that the Trial Panel committed an error in finding that murder was part of the common purpose of the JCE.[1825] In addition, in relation to alleged errors regarding the Trial Panel's finding that Shala shared the intent to commit the crime of murder, Shala alleges that the Trial Panel erred in law and fact in finding that he had the requisite *mens rea* for killing and was criminally liable for the murder of the Murder Victim.[1826] Shala further submits that the Trial Panel failed to identify which form of intent he possessed and provide its definition.[1827] He submits that, on the basis of the enumerated errors, the Appeals Panel should quash his conviction for murder.[1828] The SPO responds that the Trial Panel committed no error in finding that Shala's conduct made him responsible for the killing of the Murder Victim,[1829] and that he possessed the requisite criminal intent for murder.[1830]

1. Alleged Errors Regarding the Trial Panel's Findings on the Murder-Related Common Purpose of the JCE

(a) Submissions of the Parties

798. Shala contends that the Trial Panel erred by inferring that murder was part of the common purpose of the JCE based on its findings regarding: (i) the manner in which some of the detainees were mistreated; (ii) statements made by JCE members, including Shala, that clearly show the intent to kill detainees; and (iii) the purposeful denial of medical treatment to the Murder Victim.[1831] Shala further argues that the Trial

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para. 21) and therefore will consider Shala's arguments on this alleged error. The Panel further notes that some of Shala's arguments concerning the murder-related common purpose of the JCE under Ground 13 overlap with his arguments under the section titled "Grounds 8 and 11: Placing an Unattainable Burden of Proof on the Defence" of the Appeal Brief. The Panel will consider these arguments together under Ground 13 in the present section.

[1825] SPO Response Brief, paras 237-238, 240-248.

[1826] Appeal Brief, para. 251; Notice of Appeal, paras 26-27, 29; Transcript, 15 May 2025, pp. 61-65. See also Appeal Brief, paras 237-239, 244, 246, 249-250.

[1827] Appeal Brief, paras 248, 251; Reply Brief, para. 44; Notice of Appeal, para. 27.

[1828] Appeal Brief, para. 252.

[1829] SPO Response Brief, paras 249-250.

[1830] SPO Response Brief, paras 251-255.

[1831] Appeal Brief, paras 160, 241. See also Appeal Brief, paras 161, 240, 242-247; Reply Brief, para. 43.

Panel erroneously based its findings on the common purpose on a number of inferences that were not the only reasonable inferences from the evidence.[1832]

799. First, concerning the Trial Panel's findings on the manner in which detainees were mistreated, Shala specifically asserts that, in relation to the 20 May 1999 Incident: (i) guns were "brandished" but not fired, and nobody died as a result of the beating during this incident;[1833] and (ii) the Trial Panel unreasonably excluded the possibility that the persons involved in the mistreatment during this incident only intended to mistreat, rather than to kill, the immediate victims or any other detainee.[1834] In relation to the [REDACTED], Shala argues that: (i) guns were never fired in the presence of or against detainees until that incident;[1835] and (ii) the incident was "[REDACTED]" that anyone not present could not have foreseen the criminal conduct that ensued.[1836] In relation to the Leg-Shooting Incident, Shala submits that there was no intent to kill before or during the shooting as the Murder Victim was shot in the leg and returned to his room alive.[1837]

800. Second, regarding the Trial Panel's finding that statements made by JCE members, including Shala, clearly demonstrated the intent to kill, Shala asserts that: (i) W04733's evidence that Shala told him that, "We're going to kill you. We're going to execute you", is untested and uncorroborated; (ii) even accepting that Shala made this "flawed" statement, at most, this could indicate intent to kill W04733 rather than other detainees, including the Murder Victim; and (iii) no other evidence was presented based on which the Trial Panel could reasonably have inferred Shala's desire to kill the Murder Victim.[1838]

[1832] Appeal Brief, para. 160. See also Appeal Brief, para. 164.
[1833] Appeal Brief, paras 161, 243.
[1834] Appeal Brief, para. 161.
[1835] Appeal Brief, para. 243.
[1836] Appeal Brief, paras 243 (referring to [REDACTED], para. 237), 247. See also Reply Brief, para. 43.
[1837] Appeal Brief, para. 243. See also Appeal Brief, para. 242; Transcript, 15 May 2025, p. 64.
[1838] Appeal Brief, paras 241, 244-245.

801. Shala further contends that while the Trial Panel relied on [REDACTED] did not implicate Shala in this incident.[1839] Shala adds that it cannot be excluded that any threats to kill that may have been made were only intended to intimidate and that there was never any intention to act upon these threats.[1840]

802. Third, Shala argues that, in regards to the Trial Panel's finding that the intent to kill was also manifested by the purposeful denial of medical treatment to the Murder Victim, Shala asserts that the Trial Panel's reliance on [REDACTED] is erroneous in that [REDACTED] did not remember who denied the Murder Victim's transfer to the hospital.[1841] Shala further argues that the evidence suggests that KLA members regretted the death of the Murder Victim and immediately took measures to improve the conditions at the KMF so that this would not be repeated.[1842] Finally, Shala asserts that he had nothing to do with such an order to deny medical care, there is no evidence that he was aware of such an order and that the intent of the person who gave such order could not be "imputed to a group of others".[1843]

803. The SPO responds that Shala fails to demonstrate any error by the Trial Panel in concluding that murder was a part of the JCE common purpose.[1844] According to the SPO, the Trial Panel carried out a "meticulous analysis" of the acts and omissions of the JCE members before concluding that the common plan included murder.[1845] The

[1839] Appeal Brief, para. 245.
[1840] Appeal Brief, para. 245.
[1841] Appeal Brief, para. 246, wherein Shala argues that [REDACTED] indicated instead that it was "the people in charge", "Xhemshit and the likes" and "the staff, the headquarters". See also Appeal Brief, para. 241.
[1842] Appeal Brief, para. 246; Transcript, 15 May 2025, pp. 64-65.
[1843] Appeal Brief, para. 246. See also Transcript, 15 May 2025, pp. 64-65.
[1844] SPO Response Brief, paras 237, 241, 248. See also Transcript, 16 May 2025, p. 135.
[1845] SPO Response Brief, para. 241.

SPO also argues that Shala fails to demonstrate that no reasonable trier of fact could have made this finding.[1846]

804. With regard to the 20 May 1999 Incident, the SPO argues that the Trial Panel not only considered that the perpetrators brandished their guns, but also that the perpetrators continued beating the victims even after they had lost consciousness.[1847] The SPO submits that in claiming that the perpetrators only intended to mistreat the detainees during the 20 May 1999 Incident, Shala ignores "clear indicators" as found by the Trial Panel, and his alternative inference has no link or support in the evidence.[1848] According to the SPO, the continued mistreatment of detainees during [REDACTED] the Leg-Shooting Incident further confirms the Trial Panel's finding that murder became a part of the common purpose as of 20 May 1999.[1849] The SPO further submits that Shala's reliance on the assessment of the [REDACTED] is misplaced as it was not binding on the Trial Panel and, in any event, has no bearing on the scope of the common plan which the Trial Panel found included murder before this incident.[1850]

805. Regarding Shala's arguments that there was no intent to kill before or during the Leg-Shooting Incident, the SPO contends that Shala's submission "grossly misrepresents" this incident and is contrary to common sense.[1851] Based on the evidence of continued mistreatment of such a gravely wounded person after the Leg-Shooting Incident, the SPO argues that the Trial Panel's finding that all of the perpetrators had direct intent was the only reasonable conclusion to draw.[1852] The SPO

[1846] SPO Response Brief, paras 240-241, wherein the SPO argues that Shala mischaracterises the factual basis considered by the Trial Panel and that his "choice not to acknowledge important facts that unequivocally support" the Trial Panel's conclusions warrants summary dismissal of his arguments.
[1847] SPO Response Brief, para. 242.
[1848] SPO Response Brief, para. 242.
[1849] SPO Response Brief, para. 243. See also SPO Response Brief, para. 247.
[1850] SPO Response Brief, para. 247. See also SPO Response Brief, paras 242-243.
[1851] SPO Response Brief, para. 243.
[1852] SPO Response Brief, para. 244. See also Transcript, 15 May 2025, pp. 106-107; Transcript, 16 May 2025, p. 136.

avers that this evidence of intent is further supported by the statements of JCE members, including Shala's death threats to W04733, considered together with threats made to [REDACTED] by other JCE members.[1853]

806. In response to Shala's argument that he played no direct role in the denial of medical care to the Murder Victim, the SPO submits that it has no impact on the Trial Panel's findings that Shala significantly contributed to the JCE.[1854] The SPO also submits that Shala's argument that the perpetrators regretted the Murder Victim's death and took measures immediately after is a repetition of Shala's previous arguments already rejected by the Trial Panel.[1855] The SPO further underlines that the Trial Panel did not consider the denial of medical care in support of its finding that Shala had the required *mens rea* for murder.[1856]

(b) Assessment of the Court of Appeals Panel

807. The Appeals Panel first notes the Trial Panel's consideration that pursuant to Rule 140(3) of the Rules, the standard of proof is satisfied with respect to circumstantial evidence, only if the inference to be drawn from such evidence is the only reasonable one.[1857] The Appeals Panel further recalls that to establish proof beyond reasonable doubt, it is not required for a panel to discuss every possible hypothesis or inference it may have considered, as long as it is satisfied that the inference it retained was the only reasonable one.[1858] Moreover, the Panel also recalls that it will not lightly overturn the Trial Panel's factual findings unless the evidence

[1853] SPO Response Brief, para. [REDACTED]. See also Transcript, 15 May 2025, pp. 105-106, 108; Transcript, 16 May 2025, p. 136.
[1854] SPO Response Brief, para. 246.
[1855] SPO Response Brief, para. 246. Although the SPO further asserts that "despite some marginal improvements in the detainees' conditions," the collective mistreatment and inhumane detention conditions continued after 5 June 1999. See Transcript, 15 May 2025, p. 81. See also above, para. 465; SPO References for Appeal Hearing Question, pp. 1-2.
[1856] SPO Response Brief, para. 246.
[1857] See Trial Judgment, paras 75-76. See also above, paras 356, 681.
[1858] See above, paras 356, 681. See e.g. *Mrkšić and Šljivančanin* Appeal Judgement, para. 220; *Mladić* Appeal Judgement, para. 272; *Prlić et al.* Appeal Judgement, para. 967.

the Trial Panel relied upon could not have been accepted by any reasonable trier of fact, or the evaluation of the evidence is wholly erroneous.[1859]

808. The Appeals Panel further notes that, as rightly recalled by the Trial Panel, within the meaning of Article 14(1)(c)(i) of the Law, the *actus reus* of the war crime of murder is committed through an act or omission resulting in the death of a person. The act or omission may include, for instance, causing serious bodily harm or omitting and/or denying medical care to a detainee.[1860] Regarding the *mens rea*, the perpetrator must have intentionally killed the person, or wilfully caused serious bodily harm, or wilfully denied or omitted to provide medical care to a detainee, which the perpetrator should reasonably have known might lead to death.[1861]

809. The Appeals Panel notes, as recalled above, the objective elements of JCE I set out by the Trial Panel: (i) a plurality of persons who act pursuant to a common purpose; (ii) a common purpose which amounts to or involves the commission of a crime provided for in the Law; and (iii) participation of the perpetrator in furthering the common design or purpose.[1862]

810. The Panel further notes the Trial Panel's findings that it is not necessary for the common plan to have been previously arranged or formulated, rather that it may materialise extemporaneously, and the existence of a common plan or purpose may be inferred from: (i) the fact that a plurality of persons acts in unison to put into effect a JCE, or (ii) the persons' intent.[1863]

[1859] *Mustafa* Appeal Judgment, para. 228; see also above, para. 34.
[1860] See Trial Judgment, para. 985. See also *Mustafa* Appeal Judgment, para. 341.
[1861] Trial Judgment, para. 987. See also *Mustafa* Appeal Judgment, paras 388, 392.
[1862] See above, para. 776; Trial Judgment, para. 998.
[1863] See Trial Judgment, para. 1000. See also *Tadić* Appeal Judgement, para. 227(ii); *Vasiljević* Appeal Judgement, paras 100, 109; *Brđanin* Appeal Judgement, para. 418.

811. For crimes committed as part of a JCE, it is required to establish that the accused made a significant contribution to the common purpose.[1864] The Panel observes that under JCE I, each perpetrator must willingly participate in a common plan having the same aim which is shared with all of the other participants.[1865] For the common purpose to include murder, it is necessary to show that the death of the victim is the result of implementing the joint criminal plan.[1866] The Panel observes that it is not necessary to prove the participation of the accused in the commission of a specific crime, for example murder, but such participation may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[1867]

812. The Panel recalls the Court of Appeals Chamber's finding that the alleged JCE in the present case is of a "comparatively small size and that the events underlying the charges are restricted to one location and a relatively short timeframe".[1868] As a consequence, overall, the present case has a limited scope, covering a narrow time period and location.[1869] The Panel further recalls that Kosovo courts have also applied JCE liability to cases of a similar scope as the present case.[1870]

[1864] See e.g. *Krajišnik* Appeal Judgement, para. 215; *Brđanin* Appeal Judgement, para. 430. See also Trial Judgment, para. 1001.
[1865] See e.g. *Brđanin* Appeal Judgement, para. 430; *Vasiljević* Appeal Judgement, para. 119.
[1866] See e.g. *Kvočka et al*. Appeal Judgement, para. 262.
[1867] *Tadić* Appeal Judgement, para. 227(iii); *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 466; *Stanišić and Župljanin* Appeal Judgement, para. 110. See also *Kvočka et al*. Appeal Judgement, para. 263.
[1868] Appeal Decision on Defects in the Indictment, para. 17.
[1869] See Appeal Decision on Defects in the Indictment, paras 18, 27, 29. The Appeals Panel observes that JCE liability has been applied to relatively small-scale cases, such as the present case with one detention facility and one killing (see e.g. *Brđanin* Appeal Judgement, paras 420-425; *Tadić* Appeal Judgement, para. 232; *Vasiljević* Trial Judgment, paras 206, 208; *Banović* Sentencing Judgement, paras 6, 28; *Kvočka et al*. Trial Judgement, paras 319-320), as well as to larger-scale cases which involve mass killings across multiple municipalities or large camps.
[1870] Kosovo Supreme Court Judgment of 26 January 2011, paras 114-117; Kosovo Basic Court of Prishtinë/Priština Judgment of 7 June 2013, pp. 1-2; Kosovo Court of Appeals Judgment of 11 August 2015, pp. 1-2, 14, 18-19; Kosovo Supreme Court Judgment of 13 May 2016, paras 69-74; Kosovo Court of Appeals Judgment of 30 January 2014, paras 34-41; Kosovo Supreme Court Judgment of 7 August 2014, paras xlii-xliv; Kosovo Supreme Court Judgment of 10 April 2009, pp. 14-16, 46-47, 63-64, 82-83. See also Kosovo Court of Appeals Judgment of 11 September 2013, para. 74;

813. The Panel emphasises that the scope of the JCE common purpose as found by the Trial Panel in this case is indeed narrow, and in particular is marked by a considerably limited period of less than three weeks between the initial detention of detainees at the KMF, on approximately 17 May 1999, and the ultimate death of the Murder Victim, on or about 5 June 1999.[1871] The case is also only concerned with certain KLA members and members of the KLA Military Police at the KMF who shared a common purpose in relation to these events.[1872]

814. Based on the findings of the Trial Panel, the Panel observes that the present case with one detention facility and one killing, is distinguishable from the "so-called 'concentration camp' cases", as observed by the *Tadić* Appeals Chamber.[1873] The Panel further observes that the Trial Panel's finding that the common purpose in this instance included murder does not amount to a finding that the KMF was a detention camp specifically established for the purpose of killing detainees.

815. Turning to Shala's specific arguments under this Ground, the Appeals Panel observes that the Trial Panel's conclusion that the common purpose of the JCE included murder is, as Shala indicated, based on three sub-findings.[1874] The Appeals Panel notes that Shala alleges errors with regard to certain underlying findings to these three sub-findings, and recalls that in order for his arguments to be successful, Shala must demonstrate that no reasonable trier of fact could have reached the Trial

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Kosovo Court of Appeals Judgment of 22 June 2017, para. 1.7 (pp. 11-12); Kosovo Basic Court of Mitrovicë/Mitrovica Judgment of 12 September 2013, p. 37; Kosovo Court of Appeals Judgment of 29 October 2014, pp. 1-3, 22; *Thaçi et al.* Appeal Decision on Jurisdiction, para. 193.

[1871] See Trial Judgment, paras 587, 748. See also Trial Judgment, paras 367, 1037-1039. The Appeals Panel further notes that regarding the operational period of the KMF, the Trial Panel found that the KLA maintained a base at the KMF in Kukës between the end of March and July 1999. See Trial Judgment, para. 299.

[1872] See Trial Judgment, paras 1003-1005.

[1873] *Tadić* Appeal Judgement, paras 202-203, wherein the ICTY Appeals Chamber referred to the post-WW II case, the *Dachau Concentration Camp* case, as an example and further found that "[t]his [second distinct category] of [joint criminal enterprise] cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category".

[1874] See Trial Judgment, para. 1016.

Panel's conclusion that the common purpose of the JCE included murder as the only reasonable inference.[1875]

(i) Intentional Mistreatment of Detainees

816. Concerning the Trial Panel's first sub-finding that (some of) the detainees were intentionally mistreated, Shala argues that the 20 May 1999 Incident, [REDACTED] the Leg-Shooting Incident do not support the Trial Panel's conclusion that murder was part of the JCE common purpose.[1876] The Appeals Panel observes in this regard that the Trial Panel found that TW4-01, the Murder Victim and W04733 were in various respects, victims of this mistreatment.[1877]

817. Concerning the mistreatment during the 20 May 1999 Incident, the Trial Panel found that it included group assaults – notably assaults directed at the head— using a rubber baton, baseball bat, rubber bar, knife and a gun (as a blunt object).[1878] The Trial Panel further found, *inter alia*, that the victims were bleeding as a result of the mistreatment and that beatings by JCE members continued even after the victims lost consciousness.[1879] Concerning [REDACTED] the Leg-Shooting Incident, the Trial Panel found that Xhemshit Krasniqi [REDACTED] shot [REDACTED] the Murder Victim, and that [REDACTED].[1880] Based on the above, the Trial Panel found that murder was a part of the common purpose already on or about 20 May 1999.[1881]

818. The Appeals Panel first turns to Shala's argument that guns were "brandished" during the 20 May 1999 Incident, but not used against detainees until, allegedly, [REDACTED] June 1999, and that no one died on 20 May 1999.[1882] As recalled above,

[1875] See above, para. 807.
[1876] See Appeal Brief, paras 160, 243.
[1877] Trial Judgment, para. 1017.
[1878] Trial Judgment, para. 1017. See also Trial Judgment, para. 1032.
[1879] Trial Judgment, para. 1017. See also Trial Judgment, paras [REDACTED], 691, 1032.
[1880] Trial Judgment, para. 1017. See also Trial Judgment, paras [REDACTED], 830, 907.
[1881] Trial Judgment, para. 1017.
[1882] See Appeal Brief, paras 161, 243.

the Trial Panel found that the perpetrators used various tools, such as a rubber baton, bat, knife and a gun as a blunt object to beat the detainees during the 20 May 1999 Incident, and that the mistreatment continued even after the victims lost consciousness.[1883] The Panel notes that even if guns were not used to shoot at the detainees on 20 May 1999, they were used to beat detainees. The Panel further considers that, in light of the Trial Panel's findings, the fact that guns were not fired on 20 May 1999, or that no one died then, does not undermine the Trial Panel's conclusion that murder was part of the JCE. The Panel finds that Shala's argument in this regard is not persuasive.

819. As to Shala's related argument that the Trial Panel unreasonably excluded the possibility that during the 20 May 1999 Incident, the perpetrators only intended to mistreat, rather than to kill, the immediate victims as well as any other detainees,[1884] the Appeals Panel recalls again the Trial Panel's findings on the severe mistreatment of the detainees, including that [REDACTED] lost consciousness as a result.[1885] The Panel further notes the evidence considered by the Trial Panel that the perpetrators continued to beat the victims even after they lost consciousness, [REDACTED].[1886] Based on these findings, the Appeals Panel considers that Shala's proposed alternative inference concerning the mistreatment during the 20 May 1999 Incident is not supported by the evidence.[1887]

820. As to Shala's argument that the [REDACTED] concluded that the [REDACTED] that any person not present could not have foreseen the criminal conduct that ensued,[1888] the Appeals Panel notes that the finding Shala refers to is not evidence in this case, but rather is a finding made by a different court which was not binding on

[1883] Trial Judgment, paras 655, [REDACTED], 659-660, [REDACTED], 690-694, 1017, 1032.
[1884] Appeal Brief, para. 161.
[1885] Trial Judgment, paras [REDACTED], 1017, 1032.
[1886] Trial Judgment, paras [REDACTED], 1017, 1032.
[1887] See e.g. *Đorđević* Appeal Judgement, paras 728-729; *Strugar* Appeal Judgement, para. 109.
[1888] See Appeal Brief, para. 243.

the Trial Panel.[1889] The Panel observes that the Trial Panel did not have access to the evidentiary record before the other court and therefore considers that the Trial Panel did not err by not relying on that court's findings, and by drawing its own inferences from the evidence of brutal and systematic mistreatment adduced in the present case. In any event, the Panel notes that the Trial Panel found that the scope of the common purpose included murder as of on or about 20 May 1999 "[g]iven the manner in which TW4-01, the Murder Victim and W04733 were mistreated",[1890] i.e. before this incident. The Panel therefore dismisses Shala's argument in this regard.

821. The Panel turns to Shala's argument that since the Murder Victim was shot in the leg and returned to his room alive, the perpetrators did not possess intent to kill before or during the Leg-Shooting Incident.[1891] In this regard, the Panel considers the Trial Panel's findings that: (i) the JCE members continued to mistreat the Murder Victim, who was seriously wounded after he was shot; (ii) the shooting caused extensive bleeding which required medical assistance; and (iii) instead of seeking such medical care, the perpetrators continued to beat the Murder Victim, [REDACTED], until the following morning.[1892] On this basis, the Panel considers Shala's argument to be unpersuasive and dismisses it.

822. In light of the above, the Appeals Panel rejects Shala's arguments that the manner in which detainees were mistreated during the 20 May 1999 Incident, [REDACTED] the Leg-Shooting Incident does not support a conclusion that murder was part of the JCE common purpose.

[1889] See [REDACTED], para. 237. The Appeals Panel also notes that the finding made by this court is slightly different than as submitted by Shala, as the court found specifically that [REDACTED]. See [REDACTED], para. 237 (emphasis added).
[1890] Trial Judgment, para. 1017.
[1891] See Appeal Brief, para. 243.
[1892] Trial Judgment, paras 674, 676-677, 757-760, 775-776, 988.

(ii) Statements Made by JCE Members that Show the Intent to Kill Detainees

823. The Appeals Panel now turns to Shala's challenge to the Trial Panel's second sub-finding that the statements made by JCE members, including Shala, clearly show the intent to kill detainees.[1893] The Appeals Panel observes that the Trial Panel based this finding on the following: (i) Shala's statement to W04733: "We're going to kill you. We're going to execute you";[1894] and (ii) [REDACTED].[1895]

824. First, the Panel will address Shala's argument on the statement to W04733, that it could, at most, indicate an intent to kill W04733 rather than other detainees, including the Murder Victim, and that there was no evidence that Shala desired to kill the Murder Victim.[1896] The Appeals Panel considers, as discussed further below, that it was not necessary for the Trial Panel to establish that Shala had the intent to kill a specific person, i.e. the Murder Victim, but rather that Shala shared the intent of the other JCE members to "murder detainees at the KMF who were perceived to collaborate with, be associated with, or sympathize with the Serbian authorities or who were considered not sufficiently supportive of the KLA effort".[1897] The Panel therefore dismisses Shala's argument in this regard.

825. Second, the Panel turns to Shala's argument on [REDACTED], namely that this statement did not implicate Shala in the [REDACTED] and that it cannot be excluded that the threats were only intended to intimidate the detainees.[1898] The Panel notes that indeed, [REDACTED].[1899] However, the Panel observes that an accused's presence at the time the crime is committed by the direct perpetrator is not required for

[1893] See Appeal Brief, paras 244-245.
[1894] Trial Judgment, paras 906, 1018. See also Trial Judgment, para. 1033.
[1895] Trial Judgment, paras 668, 1018. See also Trial Judgment, para. 990.
[1896] See Appeal Brief, para. 244. The Panel will address below Shala's further argument that the Trial Panel erroneously relied on W04733's statement as it is untested and uncorroborated evidence. See below, paras 848-852.
[1897] Trial Judgment, para. 1010. See also below, para. 854.
[1898] See Appeal Brief, para. 245.
[1899] See Trial Judgment, para. 668.

responsibility to arise under JCE.[1900] In any event, the Panel recalls that Shala was present during the Leg-Shooting Incident when another JCE member shot the Murder Victim, and witnessed the consequences of the shooting, which ultimately led to the death of the Murder Victim.[1901]

826. As for Shala's related argument that it cannot be excluded that any alleged threats to kill were only intended to intimidate and that there was never any intention to act upon these threats,[1902] the Panel understands that Shala, through this argument, implies that the intent to kill was not the only reasonable inference to be drawn from these threats. The Panel recalls that the Trial Panel was mindful of the standard of proof under Rule 140(3) of the Rules, according to which an inference to be drawn from circumstantial evidence needs to be "the only reasonable one".[1903] The Trial Panel analysed at length the evidence presented in this case to support its finding that the JCE members – including Shala – had the intent to commit the crime of murder as a war crime.[1904]

827. In that regard, the Panel considers particularly persuasive the following evidence relied on by the Trial Panel to find that the JCE members had the intent to kill: (i) [REDACTED];[1905] (ii) the KLA member who denied the Murder Victim's transfer to the hospital after the Leg-Shooting Incident said: "We did not maltreat him to this point to send him to the hospital then"; and (iii) [REDACTED].[1906] The Panel also notes that the Trial Panel found that Shala participated in the mistreatment of [REDACTED] the Murder Victim during the Leg-Shooting Incident, was present when other JCE members shot [REDACTED] the Murder Victim, and witnessed the

[1900] See *Krnojelac* Appeal Judgement, para. 81. See also Trial Judgment, para. 1035. See below, para. 854.
[1901] Trial Judgment, para. 1034. See also Trial Judgment, para. 830. See below, para. 852.
[1902] See Appeal Brief, para. 245.
[1903] See above, para. 807.
[1904] Trial Judgment, paras 990-991, 1018-1024, 1031-1036.
[1905] Trial Judgment, para. 990. See also Trial Judgment, para. 758.
[1906] Trial Judgment, paras 760-[REDACTED], 990, 1019.

consequences of the shooting.[1907] As such, the Panel is of the view that the Trial Panel did not err in concluding that the JCE members – including Shala – demonstrated the intent to kill.

828. Therefore, the Appeals Panel rejects Shala's argument that the Trial Panel erred in relying on statements made by JCE members allegedly showing an intent to kill detainees to support its conclusion that murder was part of the JCE common purpose.

(iii) Purposeful Denial of Medical Treatment to the Murder Victim

829. The Appeals Panel now turns to Shala's final argument that the Trial Panel erred in reaching its third sub-finding in the context of its conclusion that the common purpose of the JCE included murder, namely that intent to kill was also manifested by the purposeful denial of medical treatment to the Murder Victim.[1908] This sub-finding is based on [REDACTED].[1909] First, as to Shala's argument that [REDACTED] did not remember who denied the Murder Victim's transfer to a hospital for treatment, indicating only "the people in charge", "Xhemshit and the likes" and "the staff, the headquarters",[1910] the Appeals Panel notes that the Trial Panel acknowledged that [REDACTED] "did not remember exactly who denied the Murder Victim's transfer to the hospital".[1911] Further, the Trial Panel recalled that [REDACTED] clarified, when asked whom he considered to be in charge, "that it was Xhemshit Krasniqi who was in charge of the detainees, but whenever Sabit Geci was there, he (*i.e.* Sabit Geci) was in charge".[1912]

830. However, the Appeals Panel considers that Shala fails to demonstrate that it was required for [REDACTED] to specify exactly who was responsible for denying

[1907] Trial Judgment, para. 1034. See also Trial Judgment, paras 688, 796.
[1908] See Appeal Brief, para. 246.
[1909] Trial Judgment, para. 760. See also Trial Judgment, para. 1019.
[1910] See Appeal Brief, para. 246.
[1911] See Trial Judgment, para. 760.
[1912] Trial Judgment, para. 760.

the Murder Victim medical care in order for the Trial Panel to rely on his testimony. In this regard, the Appeals Panel recalls its previous holding that an indictment must at least identify members of a JCE by category or group, and provide their specific identities when known.[1913] There is similarly no requirement for a trial panel to specifically identify each of the persons involved in a JCE in order to hold someone responsible as a participant in that JCE.[1914] The Appeals Panel notes in this regard the Trial Panel's conclusion, consistent with the Indictment, that the JCE members included, *inter alia*, Xhemshit Krasniqi, Sabit Geci, Shala as well as other KLA members.[1915] The Appeals Panel therefore dismisses Shala's argument.

831. Second, as to Shala's argument that the Trial Panel erred by concluding that intent to kill was also manifested by the purposeful denial of medical treatment to the Murder Victim because the evidence suggests that KLA members "regretted" the death of the Murder Victim and immediately took measures to improve the conditions at the KMF,[1916] the Panel notes that Shala raised this argument at trial and the Trial Panel specifically addressed and dismissed it in the Trial Judgment.[1917] In the Panel's view, Shala repeats an argument that was unsuccessful at trial, without showing that the Trial Panel's rejection of this argument constituted an error warranting the intervention of the Appeals Panel.[1918] Such deficiency warrants summary dismissal.[1919]

832. In any event, the Panel recalls the evidence considered by the Trial Panel in this regard, that following the Leg-Shooting Incident, the Murder Victim clearly required medical assistance, and yet instead of seeking such medical care, the perpetrators

[1913] Appeal Decision on Defects in the Indictment, para. 16. See also above, para. 212.
[1914] See e.g. *Karemera and Ngirumpatse* Appeal Judgement, para. 150; *Gotovina and Markač* Appeal Judgement, para. 89.
[1915] Trial Judgment, para. 1003.
[1916] See Appeal Brief, para. 246; Transcript, 15 May 2025, pp. 64-65.
[1917] See Trial Judgment, para. 1023.
[1918] *Compare* Appeal Brief, para. 246 *with* Defence Final Trial Brief, paras 180-181, 184; Transcript, 17 April 2024, pp. 4287-4290. See also Trial Judgment, para. 1020.
[1919] See above, paras 39, 42.

continued to beat the Murder Victim and he later died in detention at the KMF.[1920] Moreover, the Panel recalls that [REDACTED].[1921] The Panel considers that this statement is particularly persuasive to demonstrate that JCE members did not show regret following the death of the Murder Victim. Based on this evidence, and the Trial Panel's findings as a whole, the Panel finds that Shala fails to demonstrate that the Trial Panel erred by not considering that the change in conditions following the death of the Murder Victim showed that the JCE members regretted what happened. The Appeals Panel dismisses Shala's argument in this regard.

833. As to Shala's argument that he had nothing to do with the order to deny medical care and was not in a position to affect either the decision or its execution, the Appeals Panel recalls that, as a matter of law, Shala does not need to have been personally implicated in every fact on which the Trial Panel relied to infer the existence and nature of the common purpose.[1922] Thus, the Panel finds that Shala fails to demonstrate an error in this regard.

834. As to Shala's argument that the Trial Panel erred by imputing the intent of others to murder "to a group" as he was not involved in any decision to deny medical care to the Murder Victim,[1923] Shala appears to confuse a finding on the existence and nature of the common purpose of the JCE with a finding on his contribution to the common purpose of the JCE – these being separate objective elements of JCE liability.[1924] The Appeals Panel observes that the Trial Panel assessed these elements separately,[1925] and in relation to the latter, the Trial Panel did not base its conclusion that Shala contributed to the JCE on having had knowledge of, involvement in, or

[1920] Trial Judgment, paras 674, 676-677, 756-769, 774-778, 988. See also Trial Judgment, paras 1019, 1023.
[1921] Trial Judgment, paras [REDACTED], 990, 1019.
[1922] See above, para. 811.
[1923] See Appeal Brief, para. 246.
[1924] See Trial Judgment, paras 998-1001. See also above, paras 809-811.
[1925] Trial Judgment, paras 1009-1024 (regarding the common purpose of the JCE), 1025-1028 (regarding Shala's contribution to the JCE). See also Trial Judgment, paras 1031-1036 (regarding Shala's intent to commit murder).

responsibility for the denial of medical treatment to the Murder Victim.[1926] Accordingly, the Appeals Panel dismisses this argument.

835. Finally, having found that the Trial Panel did not base Shala's liability for murder on him having had knowledge of, involvement in, or responsibility for the denial of medical treatment to the Murder Victim, the Appeals Panel dismisses as moot Shala's argument that no evidence demonstrates that he was aware of an order to deny medical care to the Murder Victim.[1927]

836. Therefore, the Appeals Panel rejects Shala's argument that the denial of medical treatment to the Murder Victim does not support the Trial Panel's conclusion that murder was part of the JCE common purpose.

(iv) Conclusion

837. For the above reasons, the Appeals Panel considers that the Trial Panel did not err in finding that murder was part of the JCE common purpose based on the three sub-findings, taken cumulatively: (i) the intentional manner in which (some of the) detainees were mistreated during the 20 May 1999 Incident, [REDACTED] the Leg-Shooting Incident; (ii) statements made by JCE members showing the intent to kill detainees; and (iii) the purposeful denial of medical treatment to the Murder Victim.[1928] Therefore, the Panel finds that Shala fails to demonstrate that no reasonable trier of fact could have reached the Trial Panel's conclusion that murder was part of the JCE common purpose as the only reasonable inference.

838. In light of all of the above, the Appeals Panel finds that Shala fails to demonstrate that the Trial Panel erred in finding that the common purpose of the JCE

[1926] See Trial Judgment, paras 1025-1028.
[1927] See Appeal Brief, para. 246. See also *Mustafa* Appeal Judgment, para. 351.
[1928] See Trial Judgment, para. 1016.

included murder. Accordingly, the Appeals Panel dismisses Shala's Ground 13 in part.

2. Alleged Errors Regarding the Trial Panel's Finding that Shala Shared the Intent to Commit the Crime of Murder

(a) Submissions of the Parties

839. Shala recalls that the Trial Panel found him liable for the murder of the Murder Victim despite the fact that he did not perpetrate this crime.[1929] Shala further recalls that the Trial Panel relied on his alleged participation in a JCE to support its finding that he was criminally liable for the crime of murder.[1930] Referring to jurisprudence from the ICTY, Shala argues that "the significance and scope of the material participation of an individual in a [JCE] may be relevant in determining whether that individual had the requisite *mens rea*".[1931] He further argues that actions that the Trial Panel considered caused the death of the Murder Victim cannot be attributed to him but only to the two other KLA members.[1932]

840. Additionally, Shala submits that the Trial Panel erred in fact in that "[n]o evidence was presented based on which the [Trial] Panel could have reasonably inferred [Shala's] desire to kill [the Murder Victim]".[1933] Shala argues that there is no evidence that he intended or ever accepted the risk that detainees would be shot and may die as a result.[1934] In addition, he argues that the Trial Panel erred in relying on the untested and uncorroborated evidence of W04733 that Shala allegedly told him:

[1929] Appeal Brief, paras 237-239. See also Transcript, 16 May 2025, pp. 165-166.
[1930] Appeal Brief, para. 240.
[1931] Appeal Brief, para. 250, citing *Kvočka et al*. Appeal Judgement, para. 188. At the Appeal Hearing, Shala added that there must be an "alignment" between the *actus reus* and the *mens rea* of the crime, and they must both occur at the same time. See Transcript, 16 May 2025, pp. 172-173.
[1932] Appeal Brief, para. 250. See also Transcript, 15 May 2025, pp. 63-64, 65 (redacted); Transcript, 16 May 2025, pp. 165-166.
[1933] Appeal Brief, para. 244. See also Transcript, 15 May 2025, pp. 61-64, 65 (redacted); Transcript, 16 May 2025, pp. 172-175.
[1934] Appeal Brief, para. 249. See also Transcript, 15 May 2025, pp. 61-64, 65 (redacted).

"We're going to kill you. We're going to execute you".[1935] In Shala's view, this statement, taken at its highest, could only indicate intent to kill W04733, not intent to kill the Murder Victim.[1936]

841. Shala further submits that the Trial Panel erred in law by failing to identify which form of intent he possessed and provide its definition.[1937] Shala adds that: (i) the Trial Panel simply stated that it inferred his "intent to kill"; (ii) the Appeals Panel indicated in the *Mustafa* Appeal Judgment that it expected a clear indication of the type of intent and its definition to appear in a trial judgment; and (iii) the need for a precise finding on and definition of the relevant intent is emphasised in the jurisprudence.[1938]

842. The SPO responds that the Trial Panel committed no error in finding that Shala shared the requisite intent and that, contrary to Shala's contention, the Trial Panel specified that Shala had direct intent.[1939] The SPO further responds that even if the Trial Panel had not indicated the type of intent it was relying on, this would not have amounted to a reversible legal error.[1940]

843. The SPO submits that the Trial Panel did not convict Shala of murder for acts committed by others but, as required by the jurisprudence on JCE, it convicted him

[1935] Appeal Brief, para. 244, referring to Trial Judgment, paras 906, 1018. See also Transcript, 16 May 2025, pp. 173-174.
[1936] Appeal Brief, para. 244. See also Transcript, 15 May 2025, p. 62; Transcript, 16 May 2025, pp. 181-182.
[1937] Appeal Brief, paras 248, 251; Reply Brief, para. 44. See also Appeal Brief, para. 252.
[1938] Appeal Brief, para. 248; Reply Brief, para. 44. See also Transcript, 15 May 2025, pp. 61-63; Transcript, 16 May 2025, pp. 172-173.
[1939] SPO Response Brief, para. 237. See also Transcript, 15 May 2025, pp. 105, 108. The SPO argues that the direct intent of all the perpetrators is the only reasonable conclusion that the Trial Panel could draw from the continued mistreatment of the Murder Victim despite the gravity of his wounds. See SPO Response Brief, para. 244. See also Transcript, 15 May 2025, pp. 106-108; Transcript, 16 May 2025, pp. 122-124, 136.
[1940] SPO Response Brief, para. 237. During the Appeal Hearing, the SPO indicated that *mens rea* for murder includes both direct and indirect intent. See Transcript, 15 May 2025, pp. 102-104, 108; Transcript, 16 May 2025, pp. 135-141.

for his own conduct and his own significant contribution to the common plan with the required *mens rea*.[1941] The SPO adds that while physical presence at the time of the commission of a crime is also not a requirement under JCE, Shala was present when the Murder Victim was shot and actively engaged in his mistreatment before and after he was shot. Accordingly, in the SPO's view, Shala did not only contribute to the common plan but also to the murder itself.[1942]

844. The SPO further submits that the Trial Panel correctly found that Shala possessed the *mens rea* for murder.[1943] In support of its assertion, the SPO argues that the Trial Panel established Shala's intent for murder based on his participation in the 20 May 1999 Incident, his statement to W04733 that he would be executed, and his further participation in the Leg-Shooting Incident.[1944]

845. Finally, the SPO argues that the Trial Panel was under no obligation to find that Shala "desired" to kill the Murder Victim as Shala should have reasonably known that his mistreatment of the Murder Victim might lead to his death.[1945]

(b) Assessment of the Court of Appeals Panel

846. The Appeals Panel recalls that the *mens rea* element for JCE I requires that an accused shares the intent to commit the crimes that form part of the common criminal purpose of the JCE and the intent to participate in a common plan aimed at their

[1941] SPO Response Brief, para. 238. See also Transcript, 15 May 2025, pp. 105-106; Transcript, 16 May 2025, pp. 122, 136.
[1942] SPO Response Brief, para. 250. See also Transcript, 15 May 2025, pp. 105-108; Transcript, 16 May 2025, pp. 122, 136.
[1943] SPO Response Brief, paras 251-255. See also Transcript, 15 May 2025, pp. 102-108; Transcript, 16 May 2025, pp. 122, 136.
[1944] SPO Response Brief, para. 252. See also SPO Response Brief, paras 253-255; Transcript, 15 May 2025, pp. 105-108; Transcript, 16 May 2025, pp. 122, 136.
[1945] SPO Response Brief, para. 255, referring, *inter alia*, to *Mustafa* Appeal Judgment, para. 388; *Kvočka et al*. Appeal Judgement, para. 259. See also Transcript, 15 May 2025, pp. 102-104, 108; Transcript, 16 May 2025, pp. 138-141.

commission.[1946] Crucially, in the case of JCE I, it is required to establish that the accused shares the intent to commit the crime with the other members of the JCE.[1947] Explicit manifestations of criminal intent are often rare, the requisite intent may therefore be inferred from a combination of relevant facts and circumstances, such as, *inter alia*, the accused's words and/or actions, as well as the general context in which they occurred.[1948]

847. In the present case, the Panel recalls that the Trial Panel inferred Shala's direct intent to commit the crime of murder from the Accused's words, his statement to W04733's ("We're going to kill you. We're going to execute you").[1949] Regarding the Accused's actions, the Trial Panel inferred Shala's criminal intent from his active and personal involvement in the severe and brutal mistreatment of detainees during the 20 May 1999 Incident up until the Leg-Shooting Incident and its aftermath as further assessed below.[1950]

848. Regarding Shala's assertion that no evidence was presented based on which the Trial Panel could have reasonably inferred his desire to kill the Murder Victim,[1951] the Appeals Panel first turns to Shala's specific arguments related to the Trial Panel's reliance on the evidence of W04733.[1952] The Panel confirms that the Trial Panel relied on this part of W04733's statement ("We're going to kill you. We're going to execute you") to deduce that Shala had a direct intent to commit murder.[1953] In support of its conclusion that the evidence provided by W04733 was credible,[1954] the Trial Panel

[1946] See e.g. *Stanišić and Simatović* Appeal Judgement of 31 May 2023, para. 522; *Popović et al.* Appeal Judgement, para. 1369; *Brđanin* Appeal Judgement, para. 365. See also above, paras 740, 788.
[1947] See Trial Judgment, paras 1002, 1035; *Mustafa* Trial Judgment, para. 741. See also e.g. *Đorđević* Appeal Judgement, para. 468; *Krajišnik* Appeal Judgement, para. 707.
[1948] See *Mladić* Appeal Judgement, para. 306. See also *Jelisić* Appeal Judgement, para. 47.
[1949] Trial Judgment, para. 1033. See also Trial Judgment, paras 906, 1018.
[1950] Trial Judgment, paras 690, 904-905, 907-909, 1017, 1025, 1032, 1034. See below, paras 851-852.
[1951] See Appeal Brief, para. 244; Transcript, 15 May 2025, pp. 61-64, 65 (redacted).
[1952] See Appeal Brief, para. 244.
[1953] Trial Judgment, para. 1033. See also Trial Judgment, para. 1018.
[1954] Trial Judgment, para. 188.

conducted a detailed assessment of W04733's statements.[1955] In the Trial Judgment, the Trial Panel further specifically addressed the part of W04733's 2018 SPO Statement in which he alleged that Shala uttered those words.[1956] The Trial Panel found W04733's statement in this regard to be credible and reliable.[1957] Notably, the Trial Panel found this statement consistent with: (i) the fact that W04733 was threatened by KLA members that he would be killed during his transfer to the KMF as well; and (ii) the manner in which he was beaten on or about 20 May 1999 in the Office, in particular on his head.[1958]

849. The Trial Panel further addressed and rejected the Defence's submission that the fact that W04733 only mentioned this in the statement he gave in 2018 to the SPO cast doubt on his credibility. Rather, the Trial Panel considered that it reflected the fact that in 2018, the questioning focused more on Shala and his role than it did before.[1959]

850. The Panel recalls that although there is no general requirement that the testimony of a witness be corroborated if deemed otherwise credible,[1960] a conviction may not be based solely or to a decisive extent on the statement of a witness whom the Defence had no opportunity to examine.[1961] The Panel acknowledges that W04733's evidence is untested. As for corroboration, a review of the Trial Judgment does not

[1955] The Trial Panel observed that W04733's account was very detailed, that he was forthcoming in his statements and made clear attempts to be accurate, and that the evidence he provided was largely consistent and inherently coherent. Furthermore, the Trial Panel was convinced that W04733 spoke from personal experience. See Trial Judgment, paras 179-180. See also above, paras 321, 366.
[1956] The Trial Panel further addressed the fact that W04733 only mentioned certain names or information, including Shala's presence at the KMF, in his 2018 statement. In that regard, the Trial Panel noted that statements given by a witness over several years to various authorities, pursuing different investigative lines, are never the same. See Trial Judgment, paras 184, 465. See also Trial Judgment, para. 906. See above, para. 363.
[1957] Trial Judgment, para. 906.
[1958] Trial Judgment, para. 906.
[1959] Trial Judgment, para. 906. See also above, para. 363.
[1960] See above, para. 47. See also e.g. *Mustafa* Appeal Judgment, para. 38; *Prlić et al.* Appeal Judgement, para. 215.
[1961] Rule 140(4)(a) of the Rules.

show that Shala's threat to W04733 was heard by anyone else or that W04733 was directly corroborated in other ways.

851. However, the Panel observes that Trial Panel did not only rely on W04733's evidence to reach its findings. It also took into consideration other circumstantial evidence to infer Shala's intent to commit the crime of murder. In that regard, the Trial Panel recalled its previous finding that on or about 20 May 1999, Shala actively participated in beating TW4-01, the Murder Victim, W04733 and W01448 and, most notably, that he hit W04733 on the head with a rubber baton.[1962] The Trial Panel found that Shala also witnessed the extreme violence inflicted, in particular, on TW4-01, the Murder Victim and W04733 by other JCE members and its effects, which, *inter alia*, included: bleeding (including from the head), and injuries so severe that the victims could no longer walk or maintain consciousness.[1963] Moreover, the Panel notes the Trial Panel's finding that Shala was the first to hit TW4-01 with a rubber bar, demonstrating that he had the authority to take initiative, especially when mistreating detainees.[1964] The Trial Panel concluded that the degree of violence used and the fact that Shala witnessed it, and yet continued to participate in the mistreatment of the detainees even after they started bleeding or lost consciousness, clearly showed that he already possessed the intent to kill on or about 20 May 1999.[1965]

[1962] Trial Judgment, para. 1032. The Panel notes that this finding was itself based on, *inter alia,* the live evidence of TW4-01 (see Trial Judgment, paras 654-661, 694, 697, 710). In this respect, the Panel is particularly mindful of the Trial Panel's reliance on TW4-01's live evidence regarding the fact that he witnessed W04733's head "wrapped with dressings and totally covered in blood", and that "a wooden bar that was wrapped in rubber" was being used to hit W04733 (see Transcript (TW4-01), 30 May 2023, pp. 1452-1454 (private session); Transcript (TW4-01), 31 May 2023, p. 1491 (private session), referred to at Trial Judgment, para. 694, fns 1400-1401). The Panel notes that the Trial Panel found TW4-01 to be a credible witness; see Trial Judgment, paras 98-119. See also above, para. 296.
[1963] Trial Judgment, para. 1032. The Panel notes that in reaching this finding, the Trial Panel cross-referenced to its findings on, *inter alia,* Shala's involvement in the 20 May 1999 Incident, including in beatings of TW4-01, the Murder Victim and W04733; and that these findings were based on, *inter alia,* the live evidence of TW4-01 (see Trial Judgment, paras 654-661, 694, 697, 710).
[1964] Trial Judgment, paras 655, 904.
[1965] Trial Judgment, para. 1032.

852. In addition, the Trial Panel found that on or about 4 June 1999, Shala participated in the mistreatment of [REDACTED] the Murder Victim. The Trial Panel further found that Shala was present when other JCE members shot [REDACTED] the Murder Victim, and witnessed the consequences of the shooting, including the fact that the Murder Victim was bleeding profusely.[1966] The Panel recalls the Trial Panel's finding that [REDACTED].[1967] According to the Trial Panel, the fact that Shala continued to participate in the mistreatment of the Murder Victim [REDACTED], even after [REDACTED] shot, demonstrated that he shared the intent to kill.[1968] This finding is consistent with ICTY jurisprudence stating that an accused's knowledge of the common plan or the crimes it involves, combined with his or her continuous participation in the JCE are also relevant factors from which the requisite *mens rea* can be inferred.[1969] In light of the above, the Panel is satisfied that the Trial Panel properly assessed Shala's individual intent based on W04733's evidence as well as the other circumstances it took into consideration.[1970]

853. The Appeals Panel turns next to Shala's further argument that, rather than demonstrating Shala's intent to kill the Murder Victim, W04733's evidence that Shala told him, "We're going to kill you. We're going to execute you", taken at its highest, only indicates Shala's intent to kill W04733.[1971]

[1966] Trial Judgment, para. 1034. The Panel notes that in reaching this finding, the Trial Panel cross-referenced to, *inter alia,* its findings on Shala's presence during the Leg-Shooting Incident, which were based on the [REDACTED] evidence of [REDACTED] (see Trial Judgment, paras 787, 796; see also Trial Judgment, paras 674, 676-677). See also Trial Judgment, paras 758-759, 762, 775-776, 830.
[1967] Trial Judgment, para. 758.
[1968] Trial Judgment, para. 1034. The Panel notes that in reaching this finding, the Trial Panel cross-referenced to its findings on the continuing mistreatment of the Murder Victim after his shooting, by KLA members, including Shala, which were based on the [REDACTED] evidence of [REDACTED] (see Trial Judgment, paras 677, 787). See also Trial Judgment, para. 830.
[1969] *Stanišić and Simatović* Appeal Judgement of 31 May 2023, para. 522; *Mladić* Appeal Judgement, para. 252; *Karadžić* Appeal Judgement, para. 672. See also Transcript, 15 May 2025, pp. 105-106.
[1970] Contra Transcript, 15 May 2025, pp. 61-64, 65 (redacted).
[1971] See Appeal Brief, para. 244.

854. The Appeals Panel recalls that for crimes committed as part of a JCE, it is not necessary to establish the participation of the accused in the commission of a specific crime. It is sufficient to establish "the responsibility of the accused in furthering the common criminal purpose" that included the crime of murder of detainees at the KMF.[1972] Accordingly, the Panel considers that in order to establish Shala's liability with respect to a JCE common purpose that included the crime of murder, the Trial Panel did not need to establish that Shala had the intent to commit murder in respect of a specific person – in this instance, the Murder Victim.[1973] The Trial Panel needed to establish that Shala shared the intent of the other JCE members to "murder detainees at the KMF who were perceived to collaborate with, be associated with, or sympathize with the Serbian authorities or who were considered not sufficiently supportive of the KLA effort".[1974] Accordingly, the Appeals Panel dismisses Shala's related argument.

855. The Appeals Panel now turns to Shala's argument that the Trial Panel erred in law by failing to identify which form of intent he possessed and provide its definition.[1975] Contrary to Shala's submissions, based on the combination of acts and omissions and other circumstances described above, the Trial Panel explicitly found

[1972] See *Kvočka et al*. Appeal Judgement, para. 263. See also above, para. 811.
[1973] The Panel further notes that paragraph 8 of the Indictment does not refer to specific and/or named victims and rather alleges that "the common purpose involved the crimes of arbitrary detention, cruel treatment, torture, and murder".
[1974] See Trial Judgment, para. 1010. The Panel acknowledges that according to Shala, the Trial Panel had to establish that Shala had the intent to commit murder in respect of the Murder Victim. See Transcript, 15 May 2025, pp. 61-62, referring to *Karadžić* Trial Judgement, paras 447-448, and jurisprudence cited therein; Transcript, 16 May 2025, pp. 181-182. The Panel however observes that the jurisprudence quoted by Shala, in support of his submissions on the required *mens rea* for the crime of murder, refers to the definition of the general elements constitutive of the crime of murder as a war crime rather than to the definition of applicable modes of liability. The Panel recalls that, as stated above, the *mens rea* element for the first category of JCE liability requires that an accused shares the intent to commit the crimes that form part of the common criminal purpose of the JCE and the intent to participate in a common plan aimed at their commission. See above, para. 846. See also *Stanišić and Simatović* Appeal Judgement of 31 May 2023, para. 522; *Popović et al.* Appeal Judgement, para. 1369; *Brđanin* Appeal Judgement, para. 365. See also Transcript, 16 May 2025, pp. 137-138.
[1975] See Appeal Brief, paras 248, 251; Reply Brief, para. 44.

that Shala possessed direct intent to murder.[1976] Moreover, although the Trial Panel did not explicitly provide a definition of this intent in the body of the Trial Judgment, it nonetheless referred in a footnote to the definition of direct intent previously clarified in the *Mustafa* Appeal Judgment.[1977]

856. The Appeals Panel considers that the Trial Panel could have been clearer in providing a precise definition of the type of intent it considered that Shala possessed in the body of the Trial Judgment rather than in a footnote. The Panel recalls that it previously stressed the importance of clear and precise findings on the *mens rea* for murder and especially on the type of intent retained by the Trial Panel as well as its definition.[1978] However, the failure to fully comply with this guidance from the Panel does not invalidate the Trial Panel's finding that Shala possessed direct intent to murder.

857. The Panel further notes Shala's submission that the Trial Panel found him liable for the murder of the Murder Victim despite the fact that he did not perpetrate this crime.[1979] The Panel recalls that the Trial Panel found that the Murder Victim died on or about 5 June 1999, while still in detention at the KMF, from the consequences of the Leg-Shooting Incident in Room 2 on or about 4 June 1999 during which [REDACTED] the Murder Victim [REDACTED] mistreated and shot by Xhemshit Krasniqi, combined with the subsequent denial of appropriate medical treatment by another KLA member.[1980]

[1976] Trial Judgment, para. 1033.
[1977] See Trial Judgment, para. 990, fn. 2014, referring to *Mustafa* Appeal Judgment, para. 390.
[1978] See *Mustafa* Appeal Judgment, para. 389.
[1979] See Appeal Brief, paras 237-239. The Appeals Panel notes that the argument in paragraph 28 of the Notice of Appeal concerning the expert evidence of Col Zbyněk Dolejši was not included in the Appeal Brief. Likewise, the argument in paragraph 26 of the Notice of Appeal regarding Shala's position within the chain of command at the KMF is not further developed in the Appeal Brief. The Appeals Panel therefore considers that Shala decided to forgo these arguments and dismisses them. See above, para. 41. See also SPO Response Brief, para. 239.
[1980] Trial Judgment, paras 988-989. See also Trial Judgment, paras 778, 832. The Trial Panel established the gunshot wounds were inflicted by Xhemshit Krasniqi. See Trial Judgment, paras 805, 830, 988.

858. Regarding Shala's contention that he did not perpetrate this crime,[1981] as well as his other assertion that he did not play "an integral part" in the murder,[1982] and that the "acts and intent of others cannot be imputed on a group",[1983] the Panel recalls that Shala was not convicted for committing the *actus reus* of the crime himself and that the law on JCE does not require an accused to have performed the *actus reus* of the crime, or any part thereof.[1984] Rather, the Trial Panel found that Shala committed the crime of murder against the Murder Victim, as a contributor, within the framework of a JCE I.[1985] As the *Tadić* Appeals Chamber explained, "[a]lthough only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question".[1986]

859. The Panel stresses that the significance of an accused's contribution to the common criminal purpose is relevant to assessing his or her *mens rea* in connection with his or her alleged JCE liability.[1987] In the Panel's view, the significance and scope of Shala's participation in the JCE was properly assessed by the Trial Panel.

860. The Trial Panel concluded that by, *inter alia*, physically committing and participating in the arbitrary detention, interrogation and severe and brutal mistreatment of detainees,[1988] Shala significantly contributed to the common plan to

[1981] Appeal Brief, paras 237-239.
[1982] See Appeal Brief, para. 239.
[1983] Appeal Brief, para. 239.
[1984] *Kvočka et al.* Appeal Judgement, para. 112, in which the ICTY Appeals Chamber stated that: "[A] co-perpetrator in a joint criminal enterprise need not physically commit any part of the *actus reus* of the crime involved". See also Trial Judgment, para. 1001; *Mustafa* Trial Judgment, para. 740; *Stanišić and Župljanin* Appeal Judgement, para. 110; *Brđanin* Appeal Judgement, para. 427.
[1985] See Trial Judgment, paras 994, 1039.
[1986] *Tadić* Appeal Judgement, para. 191.
[1987] *Stanišić and Simatović* Appeal Judgement of 31 May 2023, para. 522; *Prlić et al.* Appeal Judgement, para. 2780; *Kvočka et al.* Appeal Judgement, para. 97.
[1988] Trial Judgment, para. 1028.

arbitrarily detain, interrogate, torture and murder detainees at the KMF who were perceived to collaborate with, be associated with, or sympathise with the Serbian authorities or who were considered not sufficiently supportive of the KLA effort.[1989]

861. Furthermore, and as underlined by the SPO,[1990] in addition to Shala's contribution to the common plan, the Trial Panel also found that he was present when Xhemshit Krasniqi shot the Murder Victim, and was actively engaged in his mistreatment before and after his shooting during the Leg-Shooting Incident.[1991] Accordingly, Shala's argument regarding his lack of direct involvement in the perpetration of the crime,[1992] does not undermine the Trial Panel's findings on the significance of his contribution to the common plan.

862. Therefore, the Appeals Panel finds that Shala fails to demonstrate that the Trial Panel erred in finding that Shala possessed direct intent to kill.[1993] In light of this finding, the Panel does not need to address Shala's alternative argument that there is no evidence that he ever accepted the risk that detainees would be shot and may die as a result.[1994]

863. In light of the above, the Appeals Panel finds that Shala fails to demonstrate that the Trial Panel erred in finding that he shared the intent to commit the crime of murder. Therefore, the Appeals Panel dismisses the remainder of Shala's Ground 13.

864. Accordingly, the Appeals Panel dismisses Shala's Ground 13.

[1989] Trial Judgment, paras 1010, 1025.
[1990] See SPO Response Brief, paras 249-250.
[1991] See Trial Judgment, paras 674-677, 787, 796, 830, 907, 1025, 1034, 1107. See also above, para. [REDACTED].
[1992] See Appeal Brief, paras 237-239.
[1993] Contra Appeal Brief, para. 248.
[1994] See Appeal Brief, para. 249.

J. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S FINDINGS ON SENTENCING (GROUND 14)

865. In the Trial Judgment, the Trial Panel set out the purposes of sentencing and the applicable provisions of the Specialist Chambers' legal framework.[1995] The Trial Panel found that it was required to "take into account" the punishments under the law applicable in Kosovo at the time the crimes were committed, as well as any subsequent more lenient punishments, but ultimately found that it was "not bound by such considerations", nor by the sentencing practices of other courts, be they international or domestic.[1996] The Trial Panel also determined that the 1976 SFRY Criminal Code was the relevant applicable law in Kosovo at the time of the commission of the crimes, and that subsequent relevant laws or codes provided equal or more severe sentencing ranges, notably with higher maximum sentences.[1997]

866. The Trial Panel further identified the factors it would consider and how it would balance them in determining the applicable overall single sentence.[1998] In determining the Accused's sentence, the Trial Panel specifically considered: (i) the gravity and consequences of the crimes, including the aggravating factors of the commission of crimes with particular cruelty and against particularly vulnerable or defenceless victims; (ii) Shala's personal contribution to the crimes; and (iii) Shala's individual circumstances.[1999] It rejected the alleged violations of Shala's right to a fair trial as a mitigating circumstance.[2000]

867. Based on the above-mentioned factors, the Trial Panel imposed the following individual sentences on the Accused:

[1995] Trial Judgment, paras 1060-1070.
[1996] Trial Judgment, paras 1068, 1070.
[1997] Trial Judgment, para. 1069.
[1998] Trial Judgment, paras 1071-1085.
[1999] Trial Judgment, paras 1086-1118.
[2000] Trial Judgment, para. 1119.

(i) Count 1 (war crime of arbitrary detention, committed against at least 18 persons) – six years of imprisonment;

(ii) Count 3 (war crime of torture, committed against at least 18 persons) – 16 years of imprisonment; and

(iii) Count 4 (war crime of murder, committed against one person) – 18 years of imprisonment.[2001]

868. Finally, based on these individual sentences, the Trial Panel imposed a single sentence of 18 years of imprisonment, reflecting the totality of the Accused's criminal conduct, and deducted from the sentence the time he had spent in detention since his arrest on 16 March 2021.[2002]

869. Shala submits that the Trial Panel made discernible errors in establishing the sentences,[2003] and erred in applying the sentencing regime.[2004] In Shala's view, the sentence of 18 years of imprisonment is manifestly unreasonable and excessive.[2005] Shala argues that the Panel should vacate the sentence imposed on him by the Trial Panel and, if it upholds any convictions, impose a new sentence taking all the applicable mitigating circumstances into account.[2006] The SPO and Victims' Counsel respond that Shala's sentence appropriately reflects the magnitude of his crimes and that he failed to demonstrate that the Trial Panel committed any errors.[2007]

1. General Principles of Sentencing

870. The Panel recalls that pursuant to Article 44(1) of the Law, the Specialist Chambers may impose a maximum term of life-long imprisonment. Under

[2001] Trial Judgment, para. 1121.
[2002] Trial Judgment, paras 1122-1123, 1125.
[2003] Appeal Brief, paras 254-265; Reply Brief, paras 46-48; Notice of Appeal, paras 31-34.
[2004] Appeal Brief, paras 266-271; Reply Brief, para. 45.
[2005] Appeal Brief, para. 253; Notice of Appeal, para. 30.
[2006] Appeal Brief, paras 271-272.
[2007] SPO Response Brief, paras 256-268; Victims Response Brief, paras 85-126.

Article 44(2)(a) to (c) of the Law, when imposing a sentence for an international crime under the Law, the Specialist Chambers shall take into account:

> (a) the sentencing range for the crime provided under Kosovo Law at the time of commission,
>
> (b) any subsequent more lenient sentencing range for the crime provided in Kosovo Law, and
>
> (c) Article 7(2) of the European Convention for Human Rights and Fundamental Freedoms and Article 15(2) of International Covenant for Civil and Political Rights as incorporated and protected by Articles 22(2), 22(3) and 33(1) of the Constitution of the Republic of Kosovo, and the extent to which the punishment of any act or omission which was criminal according to general principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2 (a) and (b).

871. Moreover, according to Article 44(5) of the Law, the Specialist Chambers shall take into account aggravating and mitigating factors, including the gravity of the crime and its consequences, and the convicted person's individual circumstances.[2008] Rule 163(1) of the Rules also provides that the Trial Panel shall balance the aggravating and mitigating factors mentioned in Article 44(5) of the Law.[2009]

872. Pursuant to Rule 163(4) of the Rules, the Specialist Chambers:

> shall determine a sentence in respect of each charge in the indictment under which the Accused has been convicted and shall impose a single sentence reflecting the totality of the criminal conduct of the Accused […]. The single sentence shall not be less than the highest individual sentence determined in respect of each charge.

873. The single sentence must therefore be at least equal to the highest individual sentence imposed in the case and, since Rule 163(4) of the Rules does not specify any

[2008] *Mustafa* Appeal Judgment, para. 449. See also *Gucati and Haradinaj* Appeal Judgment, para. 409.
[2009] *Mustafa* Appeal Judgment, para. 449. See also *Gucati and Haradinaj* Appeal Judgment, para. 409.

upper limit for the single sentence, the maximum single sentence may be as high as life imprisonment, pursuant to Article 44(1) of the Law.[2010]

874. Furthermore, the Appeals Panel recalls the following basic principles applicable to sentencing. First, according to international criminal jurisprudence, deterrence and retribution are the primary objectives of sentencing, and rehabilitation is relevant but should not play a predominant role.[2011] The gravity of the offence is the primary consideration in imposing a sentence, and a sentence proportionate to the gravity of the criminal conduct will necessarily provide sufficient retribution and deterrence.[2012] Further, Article 38(1) of the 2019 KCC focuses rather on rehabilitation and deterrence, and not explicitly on retribution.[2013]

875. Second, a sentence should be adequate to dissuade a convicted person from re-offending (individual deterrence), while also aiming to dissuade other potential perpetrators from committing the same or similar crimes (general deterrence).[2014] In addition, retribution should be understood as the imposition of an appropriate punishment which reflects the culpability of the convicted person, but it should not express revenge or vengeance, while rehabilitation is focused on the reintegration of the convicted person into society.[2015]

[2010] *Mustafa* Appeal Judgment, para. 450.
[2011] *Mustafa* Appeal Judgment, para. 451. See also *Gucati and Haradinaj* Appeal Judgment, para. 410 and the jurisprudence cited in fn. 904.
[2012] *Mustafa* Appeal Judgment, para. 451. See also *Gucati and Haradinaj* Appeal Judgment, para. 410 and the jurisprudence cited in fns 905-906.
[2013] *Mustafa* Appeal Judgment, para. 451. See also *Gucati and Haradinaj* Appeal Judgment, paras 410, 437.
[2014] *Mustafa* Appeal Judgment, para. 452. See also *Gucati and Haradinaj* Appeal Judgment, para. 411 and the jurisprudence cited in fn. 908.
[2015] *Mustafa* Appeal Judgment, para. 452. See also *Gucati and Haradinaj* Appeal Judgment, para. 411 and the jurisprudence cited in fns 909-910.

876. Third, appeals against sentencing are appeals *stricto sensu*, meaning that they are corrective in nature.[2016] A trial panel has broad discretion in determining an appropriate sentence, including tailoring it to reflect the gravity of the crimes, the extent of the accused's involvement in the offences and his or her individual circumstances.[2017] The Appeals Panel will therefore not substitute its own sentence for that of a trial panel, unless the appellant shows that the trial panel committed a discernible error in exercising its discretion or failed to follow the applicable law.[2018] Consequently, the Appeals Panel will only interfere with a trial panel's exercise of discretion where the sentence it imposed is: (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of its discretion. In this regard, the Appeals Panel will consider whether a trial panel, in reaching its decision on sentencing, gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations.[2019]

877. Finally, the Panel acknowledges that the sentencing section of the Trial Judgment refers extensively to the *Mustafa* Appeal Judgment and endorses some findings made by the Panel that were subsequently the subject of protection of legality litigation before the Supreme Court Chamber and the Constitutional Court Chamber. Therefore, the guidance provided in the *Mustafa* case by these latter panels is relevant in the context of this case to determine whether the Trial Panel erred in relation to the

[2016] *Mustafa* Appeal Judgment, para. 453. See also *Gucati and Haradinaj* Appeal Judgment, para. 413; *Mladić* Appeal Judgement, para. 539; *Krajišnik* Appeal Judgement, para. 734; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Karadžić* Appeal Judgement, para. 749.
[2017] *Mustafa* Appeal Judgment, para. 453. See also *Gucati and Haradinaj* Appeal Judgment, para. 413; *Nyiramasuhuko et al*. Appeal Judgement, para. 3349; *Lubanga* Sentencing Appeal Judgment, paras 34, 40; *Dragomir Milošević* Appeal Judgement, para. 297; *Limaj et al.* Appeal Judgement, para. 127.
[2018] *Mustafa* Appeal Judgment, para. 453. See also *Gucati and Haradinaj* Appeal Judgment, para. 414; *Karadžić* Appeal Judgement, para. 749; *Prlić et al.* Appeal Judgement, para. 3204; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349.
[2019] *Mustafa* Appeal Judgment, para. 453. See also *Gucati and Haradinaj* Appeal Judgment, para. 414; *Mladić* Appeal Judgement, para. 539; *Ngirabatware* Appeal Judgement, para. 255; *Krajišnik* Appeal Judgement, para. 735; *Lubanga* Sentencing Appeal Judgment, para. 44.

applicable sentencing range, and will be discussed by the Panel first. The Panel will then turn to address the remaining challenges raised by Shala.

2. Alleged Errors Regarding the Applicable Sentencing Range

(a) Submissions of the Parties and Participants

878. Shala submits that the Trial Panel erred in finding that it was not bound to consider the punishments provided by Kosovo laws at the time the crimes were committed, and any subsequent more lenient punishment, as required by Article 44(2) of the Law, and that a similar finding in the *Mustafa* case was overturned by the Supreme Court Chamber.[2020] In particular, Shala argues that the Trial Panel failed to: (i) identify the relevant Kosovo law in accordance with Article 44(2)(b) of the Law and the principle of *lex mitior*; (ii) identify the more lenient sentencing range, which in his view, is five to 15 years of imprisonment, as provided by the 1976 SFRY Criminal Code; and (iii) provide adequate reasons for arriving at the sentence.[2021] In addition, at the Appeal Hearing, Shala alleged a breach of the principle of legality enshrined in Article 7 of the ECHR, due to an alleged failure to impose a sentence that was provided by the law at the time of the commission of the crimes, and an alleged lack of accessibility, clarity and foreseeability of the law on sentencing as demonstrated by the evolving jurisprudence on the matter before the Specialist Chambers.[2022]

879. The SPO and Victims' Counsel submit that the Trial Panel was correct in its interpretation that Article 44(2) of the Law requires the Trial Panel to "take into account" the relevant sentencing ranges under Kosovo law, but that it is not bound by them.[2023] The SPO and Victims' Counsel notably rely on the *Mustafa* First Supreme

[2020] Appeal Brief, paras 256-258, referring to *Mustafa* First Supreme Court Decision, para. 87. See also Reply Brief, para. 45; Transcript, 15 May 2025, p. 69.
[2021] Appeal Brief, paras 259-260, 262. See also Reply Brief, para. 45; Transcript, 15 May 2025, p. 66.
[2022] Transcript, 15 May 2025, pp. 66-67; Transcript, 16 May 2025, p. 181.
[2023] SPO Response Brief, para. 257; Victims Response Brief, paras 96-99, 103-104. See also Transcript, 16 May 2025, pp. 118-119, 122, 158.

Court Decision issued on 29 July 2024 and on the *Mustafa* Constitutional Court Judgment on First Referral in support of their argument.[2024] The SPO and Victims' Counsel further contend that the Trial Panel is only bound by Article 44(1) of the Law which authorises the imposition of a life sentence, and that it may therefore impose a greater or a lesser sentence of imprisonment than would have been applicable in Kosovo.[2025]

880. The SPO and Victims' Counsel also submit that, contrary to Shala's contentions, the Trial Panel did not err as it clearly identified the relevant laws, and the most lenient sentencing range, and took them into account.[2026] In addition, the SPO and Victims' Counsel argue that the *lex mitior* principle only applies to laws which are binding on the Specialist Chambers, and is therefore inapplicable to Article 44(2) of the Law.[2027] In the SPO's view, even if the *lex mitior* principle had applied to Article 44(2) of the Law, the Trial Panel could not have reached a different determination on the sentence, since: (i) UNMIK Regulation 1999/24 cannot be understood as having replaced the death penalty – included in the 1976 SFRY Criminal Code – with a five to 15 years sentencing range; and (ii) all other Kosovo laws provide for maximum sentences of 40 years to life imprisonment.[2028] Victims' Counsel further argues that, contrary to Shala's assertion, the Trial Panel provided adequate reasons for arriving at the sentence.[2029]

881. In response to Shala's oral submissions, the SPO and Victims' Counsel submit that applying the Law does not breach the principle of legality.[2030] Victims' Counsel moreover contends that the most lenient sentencing range must be identified prior to

[2024] Victims Response Brief, paras 97-98; SPO Response Brief, para. 257, fn. 920; Transcript, 16 May 2025, pp. 117-118, 157-158.
[2025] SPO Response Brief, para. 257; Transcript, 16 May 2025, pp. 122, 158.
[2026] SPO Response Brief, paras 258, 260; Victims Response Brief, paras 101-102. See also Transcript, 16 May 2025, p. 117.
[2027] SPO Response Brief, para. 259; Transcript, 16 May 2025, pp. 117, 119, 158.
[2028] SPO Response Brief, para. 261. See also Transcript, 16 May 2025, p. 119.
[2029] Victims Response Brief, para. 110.
[2030] Transcript, 16 May 2025, pp. 118-119, 160-162.

a decision on sentencing and, therefore, at the appellate stage, it must be identified independently from the sentence initially imposed at the trial stage.[2031] In Victims' Counsel's view, if the Appeals Panel considers that the 1976 SFRY Criminal Code is not applicable, the 2003 KCC should apply.[2032]

882. Finally, at the Appeal Hearing, Shala argued that the *Mustafa* Constitutional Court Judgment on First Referral does not impact his submissions on sentencing, while the SPO and Victims' Counsel submitted that the *Mustafa* Constitutional Court Judgment on First Referral does not impact the Trial Panel's findings on this matter.[2033]

(b) Assessment of the Court of Appeals Panel

883. At the outset, the Panel notes that the SPO and Victims' Counsel disagree with Shala on whether, pursuant to Article 44(2) of the Law, panels of the Specialist Chambers are bound to consider and/or to apply the sentencing ranges provided by Kosovo laws at the time the crimes were committed, and any subsequent more lenient punishment.[2034]

884. The Panel recalls that the Supreme Court Chamber and the Constitutional Court Chamber provided their interpretation on this matter in the context of the *Mustafa* case.[2035] Specifically, the Supreme Court Chamber affirmed the Appeals Panel's interpretation of Article 44(2) of the Law that the elements listed under this

[2031] Victims Response Brief, para. 107. See also Victims Response Brief, paras 105-106.
[2032] Victims Response Brief, para. 108. See also Victims Response Brief, para. 109.
[2033] See Transcript, 15 May 2025, p. 66; Transcript, 16 May 2025, pp. 117, 157.
[2034] *Compare* Appeal Brief, paras 256-258; Reply Brief, para. 45; Transcript, 15 May 2025, pp. 66, 69 *with* SPO Response Brief, para. 257; Victims Response Brief, paras 96-99; Transcript, 16 May 2025, pp. 118-119, 122, 158.
[2035] The Panel recalls that on 16 December 2022, Trial Panel I delivered its judgment in the *Mustafa* case, and sentenced Mr Salih Mustafa ("Mustafa") to a single sentence of 26 years of imprisonment, with credit for time served. See *Mustafa* Trial Judgment, paras 829-831. On 14 December 2023, the Court of Appeals Panel issued the *Mustafa* Appeal Judgment, wherein it lowered Mustafa's single sentence to 22 years of imprisonment, with credit for time served. See *Mustafa* Appeal Judgment, paras 480, 484. On 14 March 2024, Mustafa filed a first request for protection of legality. See *Mustafa* First Request for Protection of Legality, paras 23-49, 67-87, 117.

provision, namely the domestic sentencing ranges, are "factors" that the lower panel "shall take into account", and not ranges that the lower panels are bound to apply.[2036] The Constitutional Court Chamber confirmed this interpretation in the *Mustafa* Constitutional Court Judgment on First Referral, stating that "whereas the criminal chambers are bound to take these ranges into account when determining the punishment to be imposed on a person found guilty of a crime under international law, they are not bound to apply them".[2037]

885. Turning to the Trial Judgment, the Panel notes that the Trial Panel clearly stated that "[p]ursuant to Article 44(2) of the Law, in determining the sentence, the Panel is also *required* to 'take into account' the punishments provided for crimes under the applicable law in Kosovo at the time of the commission of the crimes […] and […] any subsequent more lenient punishment".[2038] It then determined which was the relevant applicable law on sentencing in Kosovo at the time of the commission of the crimes and noted the sentencing regime provided by subsequent laws.[2039] Accordingly, the Panel finds that the Trial Panel did not err in finding that it was required to take into account the Kosovo laws sentencing ranges but was not bound by them.[2040] Shala's argument in this regard is therefore dismissed.

[2036] *Mustafa* First Supreme Court Decision, paras 62, 106; *Mustafa* Appeal Judgment, para. 466. However, the Supreme Court Chamber found, *inter alia*, that the Appeals Panel erred as it failed to identify which of the relevant sentencing ranges under Kosovo law is the most lenient one in accordance with the *lex mitior* principle, and to take this range into account when determining the sentence of imprisonment. See *Mustafa* First Supreme Court Decision, paras 86-92.

[2037] *Mustafa* Constitutional Court Judgment on First Referral, para. 115. The Constitutional Court Chamber additionally stated that "it is clear from a plain reading of Article 44(2) of the Law that neither the contemporaneous sentencing range nor any other subsequent more lenient range for the crime provided under Kosovo laws is binding on the criminal chambers". See *Mustafa* Constitutional Court Judgment on First Referral, para. 115. See also *Mustafa* Constitutional Court Judgment on First Referral, paras 116-120.

[2038] See Trial Judgment, para. 1068 (emphasis added).

[2039] See Trial Judgment, para. 1069.

[2040] Trial Judgment, para. 1068.

886. The Panel will now turn to Shala's second argument on whether the Trial Panel identified the relevant Kosovo law in accordance with Article 44(2)(b) of the Law and the principle of *lex mitior* and on whether it adequately identified the most lenient sentencing range.[2041]

887. The Appeals Panel first recalls, in chronological order, the litigation before the Specialist Chambers in the *Mustafa* case in relation to the relevant domestic sentencing range to be taken into account pursuant to Article 44(2) of the Law. In this regard, the Panel notes that, like Mr Salih Mustafa ("Mustafa"), Shala was convicted for war crimes under customary international law as set forth in Article 14(1)(c) of the Law.[2042] Therefore, the reasoning of the higher panels to determine the applicable sentencing range in Kosovo law is equally relevant to this case.

888. In the *Mustafa* First Supreme Court Decision, the Supreme Court Chamber found that the Appeals Panel failed to identify "a definitive sentencing range […] before determining the sentence" and concluded that the more lenient sentencing range to be taken into account in that case in accordance with Article 44(2)(b) of the Law and Article 146(1) in conjunction with Article 42(1) of the 2019 KCC, was five to 25 years of imprisonment.[2043]

889. The Panel further recalls that on 10 September 2024, the Appeals Panel issued a decision on the new determination of Mustafa's sentence in which it applied the guidance provided by the Supreme Court Chamber and decided, *inter alia*, that, a single sentence of 15 years of imprisonment, with credit for the time served, reflected

[2041] Appeal Brief, paras 259-260. See also Reply Brief, para. 45; Transcript, 15 May 2025, p. 66.
[2042] See Trial Judgment, para. 1124; *Mustafa* Appeal Judgment, para. 484; *Mustafa* Trial Judgment, para. 831.
[2043] *Mustafa* First Supreme Court Decision, paras 92, 102. See also *Mustafa* First Supreme Court Decision, para. 108. On 27 September 2024, Mustafa consequently filed a referral before the Constitutional Court Chamber. See *Mustafa* First Constitutional Court Referral, paras 1-3, 129. The judgment on this referral, issued by the Constitutional Court Chamber on 17 April 2025, is addressed below. See below, para. 891.

the totality of Mustafa's criminal conduct in his case.[2044] On 9 and 10 December 2024, Mustafa and the SPO, respectively, filed requests for protection of legality before the Supreme Court Chamber against the *Mustafa* Appeal Decision on Determination of New Sentence.[2045]

890. On 25 February 2025, the Supreme Court Chamber issued the *Mustafa* Second Supreme Court Decision in which it dismissed the requests for protection of legality in their entirety.[2046] Notably, the Supreme Court Chamber found that Mustafa merely disagreed with the findings of the Supreme Court Chamber regarding the sentencing range identified and the application of the *lex mitior* principle, in an attempt to re-litigate the same issue that had already been decided upon.[2047] Therefore, the Supreme Court Chamber dismissed Mustafa's arguments.[2048] The Supreme Court Chamber further summarily dismissed the SPO's allegation of a violation of Article 44(1), 44(2) (b) and (c) of the Law as it found that the SPO was equally merely disagreeing with the law as settled by the Supreme Court Chamber, and was attempting to re-litigate a matter that had already been settled.[2049]

891. On 17 April 2025, the Constitutional Court Chamber adjudicated the *Mustafa* First Constitutional Court Referral, filed on 27 September 2024, in which Mustafa complained about a violation of his fundamental rights, notably due to an alleged violation of the *lex mitior* principle in the *Mustafa* First Supreme Court Decision.[2050]

[2044] *Mustafa* Appeal Decision on Determination of New Sentence, para. 26.
[2045] *Mustafa* Second Request for Protection of Legality; *Mustafa* SPO Request for Protection of Legality.
[2046] *Mustafa* Second Supreme Court Decision, para. 64. The Panel notes that on 24 April 2025, Mustafa filed the *Mustafa* Second Constitutional Court Referral in which he challenged the *Mustafa* Second Supreme Court Decision. On 9 July 2025, the Constitutional Court Chamber dismissed as inadmissible the *Mustafa* Second Constitutional Court Referral on the ground that the referral did not reveal any appearance of a violation of Mustafa's constitutional rights. See *Mustafa* Constitutional Court Decision on Second Referral, para. 54.
[2047] *Mustafa* Second Supreme Court Decision, para. 38.
[2048] *Mustafa* Second Supreme Court Decision, para. 38.
[2049] *Mustafa* Second Supreme Court Decision, para. 48.
[2050] *Mustafa* First Constitutional Court Referral, paras 1-3, 129.

In the *Mustafa* Constitutional Court Judgment on First Referral, the Constitutional Court Chamber found that there had been no violation of Article 33 of the Constitution and Article 7 of the ECHR.[2051] The Constitutional Court Chamber further concurred with the findings of the Court of Appeals Panel when it held that the *lex mitior* principle is "'only applicable if a law that binds the [Specialist Chambers] is subsequently changed to a more favourable law by which the [Specialist Chambers] are also bound'".[2052] In addition, the Panel notes that the Constitutional Court Chamber found that:

> [It] is not persuaded by the Supreme Court panel's findings excluding the 1976 SFRY Criminal Code and its amendments from the analysis to be conducted under Article 44(2)(a) and (b) of the Law on the basis of the distinction between Articles 14 and 15 of the Law[.][2053] […] Having found, however, that neither the 1976 SFRY Criminal Code nor any subsequent Kosovo laws apply as a matter of binding law to the legal regime of the [Specialist Chambers], and that the rights and freedoms guaranteed in Chapter II of the Constitution apply in relation to the autonomous legal framework of the [Specialist Chambers] rather than other non-binding Kosovo laws, the Chamber concludes that the Applicant cannot successfully claim a violation of the principles of non-retroactivity and *lex mitior*, as guaranteed by Article 33(2) and (4) of the Constitution and Article 7 of the [ECHR].[2054]

892. Turning to the circumstances of the case, the Appeals Panel recalls that the Trial Panel noted that: (i) the 1976 SFRY Criminal Code was the relevant applicable law in Kosovo at the time of the commission of crimes relevant to the case; (ii) UNMIK Regulation 1999/24 subsequently abolished the death penalty without specifying an

[2051] *Mustafa* Constitutional Court Judgment on First Referral, para. 122.
[2052] *Mustafa* Constitutional Court Judgment on First Referral, para. 119.
[2053] See *Mustafa* Constitutional Court Judgment on First Referral, fn. 299: "The [Constitutional Court] Chamber also notes in this regard that, in determining a convicted person's sentence, the trial chambers at the ICTY consistently had recourse to the statutory provisions governing sentencing in the former Yugoslavia, as well as the sentencing practice of its courts. See, for example, ICTY, [*Đorđević* Trial Judgement], para. 2226; [*Milutinović et al.* Trial Judgement (Vol. III)], paras 1154-1155; [*Tadić* Sentencing Judgment], para. 8. See also [*Đorđević* Appeal Judgement], paras 955-956; [*Šainović et al.* Appeal Judgement], para. 1830; [*Tadić* Sentencing Appeal Judgement], paras 21, 23, 73-74".
[2054] *Mustafa* Constitutional Court Judgment on First Referral, para. 121.

alternative range, resulting in an applicable sentencing range of five to 15 years of imprisonment under Articles 38 and 142 of the 1976 SFRY Criminal Code; and (iii) subsequent relevant Kosovo laws or codes provide equal or more severe sentencing ranges, and in particular attract higher maximum sentences.[2055] Accordingly, although the Trial Panel's conclusion could have been more explicit,[2056] the Panel is satisfied that through the reasoning recalled above, the Trial Panel discussed the sentencing regime in Kosovo laws, notably as provided by the 1976 SFRY Criminal Code and subsequent regulations and codes, and that it identified a definitive sentencing range – of five to 15 years of imprisonment under Articles 38 and 142 of the 1976 SFRY Criminal Code – before determining the sentence. The Appeals Panel notes that the Trial Panel, having considered that it was not bound by this sentencing range and after having weighed and balanced all relevant factors, went beyond the maximum of 15 years of imprisonment set out in the 1976 SFRY Criminal Code to impose a sentence of 18 years of imprisonment.[2057]

893. The Trial Panel's finding is consistent with the Constitutional Court Chamber's conclusion that the sentencing range provided by the 1976 SFRY Criminal Code should not be set aside in the assessment to be undertaken pursuant to Article 44(2)(a) of the Law, as it was the applicable law at the time of the commission of the crimes under consideration.[2058]

894. The Appeals Panel recalls its own analysis as well as that of the Supreme Court Chamber, enumerating the various sentencing ranges under Kosovo laws for crimes

[2055] Trial Judgment, para. 1069. See also Trial Judgment, fn. 2190, which describes the relevant sentencing ranges included in the 2003 KCC, 2012 KCC and 2019 KCC.
[2056] The Panel recalls that, in the *Mustafa* First Supreme Court Decision, the Supreme Court Chamber underlined, in the context of the *Mustafa* case, the importance of identifying a definitive sentencing range before determining the sentence. See *Mustafa* First Supreme Court Decision, paras 86-92. See also *Mustafa* First Supreme Court Decision, para. 108.
[2057] Trial Judgment, paras 1068, 1121-1122, 1124.
[2058] See *Mustafa* Constitutional Court Judgment on First Referral, para. 121, fn. 299. Contra *Mustafa* First Supreme Court Decision, paras 93-97.

such as those for which Shala was found guilty under Article 14(1)(c) of the Law.[2059] For the purpose of Article 44(2)(a) of the Law, the Panel notes that Article 142 of the 1976 SFRY Criminal Code sets out, when read together with Article 38 of the 1976 SFRY Criminal Code, a sentencing range of five to 15 years of imprisonment, or the death penalty, or a term of 20 years for criminal acts eligible for the death penalty.[2060] In relation to the subsequent domestic sentencing ranges to be assessed pursuant to Article 44(2)(b) of the Law,[2061] the Panel recalls that the 1976 SFRY Criminal Code was amended by UNMIK Regulation 1999/24, adopted on 12 December 1999, which abolished the death penalty without specifying an alternative;[2062] this resulted in an applicable sentencing range of five to 15 years of imprisonment.[2063] In addition, UNMIK Regulation 2000/59 enacted on 27 October 2000 amended UNMIK Regulation 1999/24, and provided that the death penalty shall be replaced by a maximum sentence of 40 years of imprisonment.[2064] Furthermore, the Panel recalls the following provisions: (i) Article 120 of the 2003 KCC (setting out, when read together with Articles 37(2) and 38(1) of the 2003 KCC, a sentencing range of five to 40 years of imprisonment); (ii) Article 152 of the 2012 KCC (setting out, when read together with Article 45(1) of the 2012 KCC, a sentencing range of five to 25 years, or life-long imprisonment); and (iii) Article 146 of the 2019 KCC (setting out, when read together with Article 42(1)-(2) of the 2019 KCC, a sentencing range of five to 25 years, or life-long imprisonment, the latter of which can be replaced by up to 35 years of imprisonment).[2065]

[2059] See *Mustafa* Appeal Judgment, paras 473-474; *Mustafa* First Supreme Court Decision, para. 100.
[2060] See also Trial Judgment, para. 1069.
[2061] See *Mustafa* Constitutional Court Judgment on First Referral, para. 122.
[2062] UNMIK Regulation 1999/24, Section 1(1.5).
[2063] See *Mustafa* Appeal Judgment, para. 473, fn. 1282, referring to Kosovo Constitutional Court Judgment of 31 March 2022, paras 48, 50; Kosovo Supreme Court Judgement of 20 March 2023, p. 8.
[2064] UNMIK Regulation 2000/59, Section 1.6.
[2065] *Mustafa* First Supreme Court Decision, para. 100. See also *Mustafa* Appeal Judgment, fn. 1284.

895. In light of the above, the Panel confirms that, contrary to the SPO's and Victims' Counsel's assertions,[2066] the more lenient sentencing range to be taken into account for the purpose of sentencing in this case is five to 15 years of imprisonment in accordance with the 1976 SFRY Criminal Code, as amended by UNMIK Regulation 1999/24, and as interpreted by the Kosovo Constitutional Court.[2067] In any event, the Panel also recalls that such sentencing range shall only be taken into account in the determination of the sentence, but that it does not limit the discretionary power of the panels to impose a higher sentence. The only binding limit upon the Panel is the one stated in Article 44(1) of the Law, which prescribes that the highest sentence that may be imposed by the Specialist Chambers is imprisonment up to a maximum term of life-long imprisonment.

896. The Panel finally turns to the challenge raised by Shala during the Appeal Hearing that the Trial Panel breached the principle of legality guaranteed by Article 7 of the ECHR, due to: (i) the alleged failure to impose a sentence that was provided by the law at the time of commission of the crimes;[2068] and (ii) an alleged lack of accessibility, clarity and foreseeability of the law on sentencing as demonstrated by the evolving jurisprudence before the Specialist Chambers on this matter.[2069]

897. First, in relation to the argument that the sentence imposed on Shala emanated from a sentencing regime introduced retrospectively by the Law in breach of the principle of legality,[2070] the Panel notes that Shala did not raise this argument in his Notice of Appeal nor in his Appeal Brief, but only during the Appeal Hearing. In that regard, the Panel recalls that it may decline to consider such an argument on that basis and finds that this argument was not raised in a timely manner.[2071] In any event, the

[2066] See SPO Response Brief, para. 261; Victims Response Brief, para. 108.
[2067] See above, fn. 2063.
[2068] See Transcript, 15 May 2025, pp. 66-67; Transcript, 16 May 2025, p. 181.
[2069] See Transcript, 15 May 2025, pp. 66-67; Transcript, 16 May 2025, p. 181.
[2070] See Transcript, 15 May 2025, p. 67.
[2071] See above, para. 40.

Panel considers that the applicable sentences under the Law for crimes prosecuted before the Specialist Chambers do not violate the *nulla poena sine lege* principle, because an accused must have been aware of the fact that the crimes for which he or she was indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties since at least the tribunals established after WW II.[2072] Accordingly, this argument is dismissed.

898. Second, with regard to the interpretation of Article 44(2) of the Law and the evolving jurisprudence of the Specialist Chambers on the relevant domestic law on sentencing,[2073] the Appeals Panel recalls the consistent jurisprudence of the Specialist Chambers that the panels shall take such domestic sentencing ranges into account but are ultimately not bound by them.[2074] In addition, the Panel recalled above that there was no more lenient posterior domestic sentencing law than the one provided in the 1976 SFRY Criminal Code as amended by UNMIK Regulation 1999/24 and that, therefore, it shall take into account a sentencing range of five to 15 years of imprisonment.[2075]

899. Considering that the 1976 SFRY Criminal Code was the applicable law at the time of the commission of the crimes in Kosovo, Shala cannot successfully claim the lack of accessibility or foreseeability of this law. In addition, the Appeals Panel is of the view that any alleged uncertainty on the relevant domestic sentencing range that shall be taken into account did not have any impact on Shala's case since: (i) the Trial Panel and the Appeals Panel in the present case both rely on the same domestic law

[2072] See e.g. *Mladić* Appeal Judgement, para. 564; *Blaškić* Appeal Judgement, para. 681; *Delalić et al.* Appeal Judgement, para. 817.
[2073] See above, paras 888-891.
[2074] See Trial Judgment, para. 1068; *Mustafa* Trial Judgment, para. 780; *Mustafa* Appeal Judgment, paras 449, 466, 469; *Mustafa* First Supreme Court Decision, paras 62, 87-88; *Mustafa* Constitutional Court Judgment on First Referral, paras 115-117. The Constitutional Court Chamber also emphasised that "the only law that *must* be applied to the sentencing of the Applicant is the Law". See *Mustafa* Constitutional Court Judgment on First Referral, para. 119 (emphasis in original).
[2075] See above, para. 895.

on sentencing;[2076] and (ii) the Trial Judgment against the Accused was delivered prior to the *Mustafa* First Supreme Court Decision, and this Appeal Judgment is delivered after the *Mustafa* Constitutional Court Judgment on First Referral. Neither the Trial Judgment nor this Appeal Judgment were thus affected by the period of uncertainty between these two decisions. The Appeals Panel is therefore of the view that Shala fails to demonstrate that there was a breach of the principle of legality and dismisses this argument accordingly.

3. Alleged Errors Regarding the Sentencing Factors Taken Into Consideration by the Trial Panel

(a) Submissions of the Parties and Participants

900. Shala considers that the sentence of 18 years of imprisonment is manifestly unreasonable and excessive.[2077] He first argues that the Trial Panel failed to give sufficient weight to the sentencing purpose of rehabilitation.[2078] He submits that, according to the ECtHR, rehabilitation "has become a 'mandatory factor' that member states need to take into account when designing their penal policies".[2079]

901. Shala further submits that the Trial Panel failed "to ensure equality" and abused its discretion in imposing a sentence that is unreasonably disproportionate when compared to similar cases.[2080] Shala refers in particular to the *Sabit Geci et al.* and *Xhemshit Krasniqi* cases, which concern individuals who, as noted by the Trial Panel, had commanding roles at the KMF and greater responsibility than Shala for the indicted crimes, and ultimately had lower sentences imposed on them than the Accused.[2081] Shala additionally refers to the *Mustafa* case, which he argues is similar to

[2076] See Trial Judgment, para. 1069; see above, para. 895.
[2077] Appeal Brief, para. 253.
[2078] Appeal Brief, para. 254.
[2079] Appeal Brief, para. 255. See also Notice of Appeal, para. 30, wherein Shala argues that the Trial Panel failed altogether to consider in sentencing the purposes of rehabilitation and reintegration to society.
[2080] Appeal Brief, paras 261, 263. See also Reply Brief, paras 46-48; Transcript, 15 May 2025, pp. 69-73.
[2081] Appeal Brief, paras 262, 264-265. See also Reply Brief, paras 46-47; Transcript, 15 May 2025, pp. 70-71.

his case in terms of the applicable law on sentencing, but differs as Mustafa was in a position of authority.[2082] According to Shala, the Trial Panel also erred in failing to provide a reasoned opinion as to why it chose to significantly depart from those sentences.[2083]

902. In addition, Shala argues that the Trial Panel failed to ensure proportionality in the sentencing regime it applied, as it erred in law when imposing a sentence for the crimes of arbitrary detention and torture committed against 18 victims, instead of nine as charged in the Indictment.[2084]

903. Shala finally argues that the Trial Panel failed to give sufficient weight to mitigating factors, namely: (i) the violation of Shala's rights not to incriminate himself and to legal assistance – a violation which was acknowledged by the Court of Appeals Chamber;[2085] (ii) the fact that Shala had no leadership role or position within the KLA's hierarchy at the KMF;[2086] (iii) the passage of time since the alleged crimes;[2087] (iv) the health of his former spouse and exceptional family circumstances;[2088] (v) Shala's compliance with court orders and absence of obstruction to the procedures conducted

[2082] Transcript, 15 May 2025, pp. 72-73.
[2083] Appeal Brief, para. 262. See also Appeal Brief, paras 263-265; Transcript, 15 May 2025, p. 72. In this respect, Shala argues that the Trial Panel in this case made a similar error as in the *Mustafa* case by venturing outside its discretionary bounds and imposing a disproportionate sentence, in comparison to a line of sentences imposed in similar circumstances for similar offences. See Appeal Brief, para. 263.
[2084] Appeal Brief, para. 266. See also Transcript, 15 May 2025, p. 38.
[2085] Appeal Brief, para. 267. See also Appeal Brief, paras 4-15; Transcript, 15 May 2025, p. 34.
[2086] Appeal Brief, para. 268. See also Appeal Brief, paras 262, 265; Transcript, 15 May 2025, pp. 72-73.
[2087] Appeal Brief, paras 268, 270. See also Transcript, 15 May 2025, p. 75. The Panel notes the Defence's contention that an "assessment of whether a reasonable time has been exceeded or not because if it is, exceeding a reasonable time limit in a judicial process has legal consequences" during the Appeal Hearing. See Transcript, 15 May 2025, p. 75. The Panel notes that Shala did not raise this argument in his Notice of Appeal nor in his Appeal Brief. In that regard, the Panel recalls that it may decline to consider such an argument on that basis. See above, para. 40. The Panel finds that this argument was not raised in a timely manner. In addition, this argument is vague and unsubstantiated. The Panel declines to address it.
[2088] Appeal Brief, para. 268.

against him by the SPO;[2089] and (vi) Shala's sense of duty.[2090] As a result, Shala requests that the Appeals Panel vacate the sentence of 18 years of imprisonment and, if it upholds any convictions, impose a reduced sentence taking all the applicable mitigating circumstances into account.[2091]

904. The SPO and Victims' Counsel both respond that the sentence should not be reduced, as the Defence fails to show that the Trial Panel erred in exercising its discretion.[2092] With respect to Shala's argument that the Trial Panel failed to give relevant weight to the sentencing purpose of rehabilitation, the SPO and Victims' Counsel both contend that such consideration should not be given undue weight, and that jurisprudence of the Specialist Chambers and other courts and tribunals uphold retribution and deterrence as the main purposes of sentencing.[2093] Victims' Counsel adds that the ECtHR jurisprudence cited in support of Shala's arguments relates to issues distinct from those of the Appeal.[2094]

905. The SPO and Victims' Counsel submit that Shala's claim that the Trial Panel erred by failing to properly weigh sentences of other cases, overlooks the case- specific

[2089] Appeal Brief, para. 268.
[2090] Appeal Brief, para. 269. At the Appeal Hearing, Shala also argued that the Trial Panel failed to give sufficient weight to his "suffering of the segregation and violent oppression organised by the Serbian State" as an Albanianspeaker. See Transcript, 15 May 2025, pp. 74-75. The Panel notes that Shala did not raise this argument in his Notice of Appeal nor in his Appeal Brief. In that regard, the Panel recalls that it may decline to consider such an argument on that basis. See above, para. 40. The Panel finds that this argument was not raised in a timely manner. In any event, similar submissions were fully addressed by the Trial Panel in the Trial Judgment. The Panel observes that the Trial Panel found that Shala's difficult early life in Kosovo and his imprisonment in Serbia does not constitute, in and of itself, a justification of any sort for the commission of crimes, and, while it acknowledged such difficult experiences, it attached little weight to these events for the purpose of mitigating Shala's sentence. See Trial Judgment, para. 1110. For these reasons, the Panel declines to address Shala's argument any further.
[2091] Appeal Brief, paras 271-272.
[2092] SPO Response Brief, para. 256; Victims Response Brief, paras 93-94. See also Transcript, 16 May 2025, pp. 121-122. The SPO also stressed that the sentence imposed by the Trial Panel adequately reflects the gravity of the crimes and the aggravating circumstances. See Transcript, 16 May 2025, pp. 117, 120-121, 123-124.
[2093] SPO Response Brief, para. 265; Victims Response Brief, para. 88.
[2094] Victims Response Brief, para. 91.

nature of sentencing and the limited relevance of comparison with other sentences, and provides no legal basis upon which the Trial Panel's findings should be challenged.[2095] Moreover, the SPO and Victims' Counsel argue that the *Sabit Geci et al.* and the *Xhemshit Krasniqi* cases concern different convictions, and that by failing to identify similar cases, Shala does not provide an appropriate basis upon which to demonstrate that his sentence is unreasonably disproportionate.[2096] In relation to the *Mustafa* case, the SPO and Victims' Counsel further submitted that the Appeals Panel should not find the 15 years of imprisonment imposed on Mustafa to be binding, persuasive, nor a useful source of comparison because: (i) in principle, comparison in sentencing is incompatible with the need to tailor a sentence; (ii) it would perpetuate an error stemming from the *Mustafa* First Supreme Court Decision; and (iii) unlike Mustafa who was not sentenced for physically perpetrating the murder in his case, Shala was sentenced as a direct and deliberate participant in the extremely violent beating of the Murder Victim.[2097]

906. The SPO and Victims' Counsel also respond that Shala's argument that the Trial Panel erred by imposing a sentence for crimes against 18 victims, in contrast to nine as allegedly charged in the Indictment, ignores the clear wording of the Indictment.[2098] Moreover, the SPO and Victims' Counsel challenge as unfounded Shala's assertions that the Trial Panel abused its discretion by failing to reduce his sentence based on fair trial violations, and submit that the Trial Panel found no such violations.[2099] The SPO and Victims' Counsel further submit that Shala's arguments related to the Trial Panel's assessment of mitigating circumstances should be dismissed, including his claims

[2095] SPO Response Brief, para. 266; Victims Response Brief, paras 120-123.
[2096] SPO Response Brief, para. 267; Victims Response Brief, paras 114-119. See also Transcript, 16 May 2025, pp. 120, 162-163.
[2097] Transcript, 16 May 2025, pp. 120-124, 159-160, 162-163.
[2098] SPO Response Brief, para. 262; Victims Response Brief, para. 124.
[2099] SPO Response Brief, para. 263; Victims Response Brief, para. 125.

related to his lack of a formal commanding role, as well as his assertion that he changed or that he is duty-driven, as they are unexplained and irrelevant.[2100]

(b) Assessment of the Court of Appeals Panel

907. At the outset, the Panel dismisses Shala's argument that the Trial Panel erred in law when imposing a sentence for the crimes of arbitrary detention and torture committed against 18 victims, instead of nine as charged in the Indictment.[2101] These submissions rest entirely on Shala's arguments under Ground 5 alleging errors relating to the Indictment, arguments that the Panel has already dismissed above.[2102] In addition, the Panel dismisses Shala's argument that the Trial Panel erred in law when declining to consider as a mitigating factor the infringement of Shala's rights not to incriminate himself and to legal assistance.[2103] These submissions rest on Shala's arguments under Ground 1 challenging the Trial Panel's admission of and reliance on the Prior Statements on the ground that they were allegedly taken in violation of his fair trial rights. The Panel has addressed and dismissed all these arguments above.[2104] The Panel will address below Shala's arguments that the Trial Panel failed to: (i) consider the purpose of rehabilitation;[2105] (ii) give sufficient weight to mitigating factors;[2106] and (iii) ensure equality in imposing a sentence that is unreasonably disproportionate when compared to similar cases.[2107]

(i) The Trial Panel's Alleged Failure to Consider the Purpose of Rehabilitation

908. The Appeals Panel will turn to address Shala's arguments related to the Trial Panel's consideration of the purpose of rehabilitation and reintegration into

[2100] SPO Response Brief, para. 264; Victims Response Brief, para. 126. See also Transcript, 16 May 2025, p. 121.
[2101] See Appeal Brief, para. 266.
[2102] See above, para. 200.
[2103] See Appeal Brief, para. 267. See also Appeal Brief, paras 4-15.
[2104] See above, para. 121.
[2105] See Appeal Brief, paras 254-255.
[2106] See Appeal Brief, paras 267-270.
[2107] See Appeal Brief, paras 261-265.

society.[2108] The Appeals Panel considers that the Trial Panel correctly recalled the primary objectives of sentencing before the Specialist Chambers, as also set out above.[2109]

909. In the Panel's view, Shala misrepresents the Trial Judgment when he asserts that the Trial Panel disregarded the purpose of rehabilitation in sentencing in this instance.[2110] Relying on ECtHR jurisprudence, the Trial Panel expressly recognised that "rehabilitation has gained in prominence in both national jurisdictions and some regional human rights instruments".[2111] However, the Trial Panel found that given the gravity of the crimes falling under the jurisdiction of the Specialist Chambers, considerations of rehabilitation could not be given undue weight.[2112] The Trial Panel also considered the Specialist Chambers' overall objective to end impunity as well as the acknowledgement of the harm and suffering caused to victims of the crimes and to society.[2113]

910. The Panel notes that while Shala disagrees with the Trial Panel's findings, he provides no arguments in support of his contention beyond general references to the ECtHR case law. In any event, the Appeals Panel notes and agrees with the ECtHR's observation that the balance between the justifications for detention, which include punishment, deterrence, public protection and rehabilitation, "is not necessarily static and might shift in the course of the execution of the sentence".[2114] In other words, what could be the primary justifications for imprisonment when the sentence is pronounced – for example, punishment and retribution – could evolve as the rehabilitative aim of the sentence gains more importance towards the end of a long imprisonment

[2108] See Appeal Brief, paras 254-255.
[2109] Trial Judgment, para. 1060. See above, paras 870-876.
[2110] See Appeal Brief, para. 255.
[2111] See Trial Judgment, para. 1061, and references quoted therein.
[2112] Trial Judgment, para. 1061.
[2113] Trial Judgment, paras 1062-1063.
[2114] *Murray v. The Netherlands* Judgment, para. 100; *Harakchiev and Tolumov v. Bulgaria* Judgment, para. 245.

sentence.[2115] The Panel also observes that the ECtHR case law does not require Member States to prioritise the rehabilitative aim of the sentence over other legitimate grounds in every situation, but convicted persons must have a fair chance of rehabilitation and know what they can do to be considered for release and under what conditions.[2116] In this regard, the Panel is of the view that the framework of the Law satisfies the requirements of the ECtHR since, notably, rehabilitation is one of the criteria to be considered in the review process undertaken by the President on whether a sentence should be commuted, modified or altered, when the sentenced person has served two thirds of it.[2117]

911. Overall, the Panel finds that the Trial Panel properly balanced the rehabilitation requirement with the need to impose a sentence proportionate to the gravity of Shala's criminal conduct and that Shala fails to demonstrate that the Trial Panel committed any error. Accordingly, the Panel rejects Shala's argument in this respect.

(ii) The Trial Panel's Alleged Failure to Give Sufficient Weight to Mitigating Factors

912. Regarding Shala's argument that the Trial Panel failed to give sufficient weight to the fact that he had no leadership role or position within the KLA's hierarchy at the KMF,[2118] the Panel observes that the Trial Panel examined this factor when assessing his personal contribution to the crimes,[2119] rather than as a mitigating factor as it is

[2115] See *Murray v. The Netherlands* Judgment, paras 70, 100; *Khoroshenko v. Russia* Judgment, para. 121; *Vinter and Others v. United Kingdom* Judgment, para. 115; *Harakchiev and Tolumov v. Bulgaria* Judgment, para. 245.
[2116] See *Murray v. The Netherlands* Judgment, para. 103; *Vinter and Others v. United Kingdom* Judgment, para. 122.
[2117] See Article 51 of the Law; Rule 196 of the Rules; Articles 3(1) and 10 of the Practice Direction on Commutation of Sentences. See e.g. *Januzi* Decision on Commutation, Modification or Alteration of Sentence, paras 20, 53, 55, 59; *Gucati* Decision on Commutation, Modification or Alteration of Sentence, paras 27, 65, 67, 71.
[2118] See Appeal Brief, para. 268. See also Appeal Brief, paras 262, 265.
[2119] Trial Judgment, paras 1079, 1103-1108.

now argued by the Accused.[2120] The Appeals Panel observes that the Trial Panel, while noting his lack of a formal commanding role, also considered that Shala had a degree of autonomy and authority within the KLA at the KMF,[2121] and played an active role within the group of KLA members who arbitrarily detained, tortured and murdered the detained persons.[2122] The Trial Panel found that the degree of Shala's personal participation and intent with regard to the crimes under consideration was "high", and underlined that it "took into account the fact that [Shala] did not have any formal commanding role".[2123]

913. In this regard, the Appeals Panel notes that, in determining Shala's personal contribution to the crimes for the purpose of sentencing, the Trial Panel did not make any distinction in relation to his participation in the commission of the various crimes, namely arbitrary detention, torture, and murder.[2124] By contrast, in its conclusion on the factual finding related to Shala's role in the commission of the crimes charged, the Trial Panel found that Shala "had a certain degree of autonomy and authority, *especially in mistreating and interrogating detainees*".[2125] The Panel understands from this finding that Shala's degree of autonomy and authority was not necessarily the same in the context of the murder incident. While the Panel is mindful of Shala's active role notably in the severe mistreatment of the Murder Victim before and after he was shot, as well as his presence in the room when the Murder Victim was shot,[2126] it also takes into consideration the fact that, in correlation with his lack of an official position, Shala did not have *de jure* nor *de facto* authority over Xhemshit Krasniqi, Sabit Geci or any

[2120] See Appeal Brief, para. 268.
[2121] Trial Judgment, paras 1104, 1108.
[2122] Trial Judgment, paras 1104-1107.
[2123] Trial Judgment, para. 1108. See also Trial Judgment, paras 1103-1107.
[2124] See Trial Judgment, paras 1103-1108.
[2125] Trial Judgment, para. 914 (emphasis added). See also Trial Judgment, paras 903-913. The Panel notes the Trial Panel's finding that Shala was the first to hit TW4-01 with a rubber bar, demonstrating that he had the authority to take initiative, especially when mistreating detainees. See Trial Judgment, paras 655, 904; Transcript (TW4-01), 30 May 2023, pp. 1457-1458 (private session).
[2126] See Trial Judgment, para. 1108.

other KLA member involved in the death of the Murder Victim.[2127] In light of these circumstances, the Panel finds that the Trial Panel erred in failing to give sufficient weight to the fact that Shala did not have a commanding role at the KMF in relation to his personal contribution to the crime of murder. The Appeals Panel addresses further below the impact of this error, if any, on Shala's sentence.

914. Turning to the mitigating factors, and notably to Shala's references to the health of his former spouse and to his "exceptional family circumstances",[2128] the Panel notes that the only explanation he provides in support of this submission is that he is the sole guardian of their children.[2129] The Panel notes that Shala is not the father of minor children legally placed under the responsibility of their parents. Rather, as Shala mentioned in his Defence Final Trial Brief, his two children are in their twenties.[2130] Shala does not provide any further information as to why this factor should have been considered as a mitigating factor.

915. In any event, the Panel notes that the Trial Panel considered Shala's family circumstances, and his partner's medical treatment, when determining the sentence,[2131] and in particular, recognised that Shala's detention "has undoubtedly affected the lives of his family members".[2132] However, the Trial Panel determined that the present circumstances did not meet the high standard of "exceptional family circumstances" and could not be given any weight as mitigating circumstances.[2133] Overall, the Panel finds that Shala fails to show that the Trial Panel erred in the weight attributed to Shala's family circumstances for the purpose of sentencing.

[2127] See Trial Judgment, paras 988-991.
[2128] See Appeal Brief, para. 268.
[2129] See Appeal Brief, para. 268.
[2130] Trial Judgment, para. 1111.
[2131] Trial Judgment, para. 1111.
[2132] Trial Judgment, para. 1112.
[2133] Trial Judgment, para. 1112.

916. Turning to Shala's argument that the Trial Panel failed to give sufficient weight to his compliance with court orders and the absence of obstruction on his part of the procedures against him,[2134] the Panel agrees with the Trial Panel that compliance with the law and court-imposed orders is expected of any person, and therefore does not, on its own, constitute a mitigating circumstance, unless exceptional.[2135] In the present case, the Trial Panel observed that Shala had not always shown respect towards the court and even received a warning from the Presiding Judge of the Trial Panel.[2136] The Trial Panel concluded that Shala's overall good behaviour in detention or cooperation with the Specialist Chambers were not exceptional so as to justify a reduction of his sentence.[2137] The Panel therefore finds that Shala merely disagrees with the Trial Panel's assessment of this individual circumstance and fails to show that the Trial Panel erred by not attaching any weight to it in mitigation.

917. As to Shala's claim that the Trial Panel failed to give sufficient weight to the passage of time since the occurrence of the crimes in 1999,[2138] the Appeals Panel notes Shala's assertion that he is "not the same person he was 25 years ago".[2139] While Shala's assertion is vague and unsupported in his briefs, he referred in his oral submissions to the construction of a new honourable life in Belgium and the distance taken from any group or criminal activity.[2140] In light of some of the Trial Panel's findings,[2141] the Panel is not convinced by this argument. In addition, the jurisprudence of the ICTY addressed the question as to whether the passage of time between the commission of war crimes and the commencement of trial could be considered as a mitigating factor. The ICTY stated that "[t]he importance of international prosecution of the perpetrators

[2134] See Appeal Brief, para. 268.
[2135] Trial Judgment, para. 1115; *Mustafa* Trial Judgment, para. 824.
[2136] Trial Judgment, para. 1115.
[2137] Trial Judgment, para. 1115.
[2138] See Appeal Brief, paras 268, 270. See also Transcript, 15 May 2025, p. 75.
[2139] See Appeal Brief, para. 270.
[2140] See Transcript, 15 May 2025, p. 75.
[2141] See Trial Judgment, para. 1116, wherein the Trial Panel noted Shala's conviction for a violent stabbing offence in a public place in 2018, in Belgium.

of such serious crimes diminishes only slightly over the years, if at all."[2142] In light of the seriousness of Shala's crimes, the Panel finds that Shala's mere assertion that he changed, could not, in itself, constitute a mitigating factor.[2143]

918. Finally, turning to Shala's submission that the Trial Panel failed to sufficiently weigh "other personal circumstances", including his sense of duty, which is devoid of personal motive,[2144] the Panel considers that the meaning and purpose of this allegation is unclear and subject to interpretation. In any event, the Panel finds that this assertion is unsupported and that Shala fails to demonstrate why such personal circumstances should have been considered as a mitigating circumstance under Rule 163(1)(a) of the Rules.

919. In light of the above, the Appeals Panel partially grants Shala's appeal in relation to the weight attached to his lack of a commanding position. However, it finds that Shala fails to demonstrate that the Trial Panel erred in not giving sufficient weight to other mitigating factors, and rejects Shala's arguments in this respect.

(iii) The Trial Panel's Alleged Failure to Ensure Equality

920. The Panel notes that, in support of his argument that the Trial Panel failed "to ensure equality" and to provide a reasoned opinion,[2145] Shala is specifically referring to the *Sabit Geci et al.* and *Xhemshit Krasniqi* cases.[2146] These cases involved two of the JCE members listed in the Indictment against Shala, who have already been convicted in Kosovo for some of the crimes charged in this case.[2147]

[2142] *Mrđa* Sentencing Judgement, para. 103.
[2143] The Panel is further mindful of the Trial Panel's observation that throughout the proceedings, Shala has shown no remorse and no empathy for the victims. See Trial Judgment, para. 1117.
[2144] See Appeal Brief, para. 269.
[2145] See Appeal Brief, paras 261-265. See also Reply Brief, paras 46-48.
[2146] See Appeal Brief, paras 262, 264-265. See also Reply Brief, paras 46-47.
[2147] See Trial Judgment, paras 1044, 1052, 1070. See also Appeal Brief, para. 262; SPO Response Brief, para. 267; Victims Response Brief, paras 114-119.

921. When addressing the relevance of domestic and international sentencing practice for the purpose of establishing the applicable sentencing regime in this case, the Trial Panel referred to the cases considered by the Appeals Panel in the *Mustafa* Appeal Judgment, including the *Sabit Geci et al.* case.[2148] The Trial Panel further referred to the *Xhemshit Krasniqi* case.[2149] Shala complains that the Trial Panel failed to provide a reasoned opinion as to why it chose to significantly depart from the sentences imposed in those cases.[2150] The Trial Panel, however, underlined that the sentencing practices of other courts are not binding on the Specialist Chambers,[2151] and therefore provided a reasoned opinion in this regard. The Panel considers that Shala fails to substantiate his claim and dismisses this argument. The Panel now turns to its analysis of the various cases.

922. Shala underlines that, in the *Mustafa* case, the Appeals Panel found that the Trial Panel ventured outside of its discretionary bounds by imposing sentences on Mustafa which were out of reasonable proportion in comparison with sentences imposed in similar circumstances for similar offences.[2152]

923. The Panel recalls the Specialist Chambers' duty to ensure equality before the law.[2153] However, as mentioned by the Constitutional Court Chamber, the duty to ensure equality before the law and prohibition of discrimination concerns the treatment of individuals within the same jurisdiction.[2154] Moreover, the Panel recalls that, in light of the specific jurisdiction of the Specialist Chambers, any difference in treatment between accused before the Specialist Chambers and other Kosovo courts

[2148] Trial Judgment, para. 1070. See also *Mustafa* Appeal Judgment, para. 478.
[2149] Trial Judgment, para. 1070.
[2150] Appeal Brief, para. 262.
[2151] Trial Judgment, para. 1070.
[2152] Appeal Brief, para. 263, referring to *Mustafa* Appeal Judgment, para. 479.
[2153] Articles 3 and 24 of the Constitution; *Krasniqi and Veseli* Constitutional Court Decision on Jurisdiction, para. 23.
[2154] *Krasniqi and Veseli* Constitutional Court Decision on Jurisdiction, para. 23.

is objectively and reasonably justified and therefore, does not constitute discrimination.[2155]

924. Having said that, the Appeals Panel has recognised that consistency in sentencing – for similar cases in particular – is important, but must allow for the exercise of discretion to account for, *inter alia*, the individual facts of each case.[2156] The Appeals Panel further recalls that a previous decision on sentence may provide guidance if it relates to the same offence and was committed in substantially similar circumstances.[2157] However, the guidance is limited and the transposition of sentences from one case to another is impossible, given the overriding obligation to individualise the sentence to appropriately reflect the particular facts of the case and the individual circumstances of the convicted person.[2158]

a. *Sabit Geci et al.* and *Xhemshit Krasniqi* cases

925. The Panel acknowledges that Shala refers specifically to the *Sabit Geci et al.* and *Xhemshit Krasniqi* cases.[2159] Although Sabit Geci and Xhemshit Krasniqi may have been given lower sentences than Shala, despite having commanding roles at the KMF,[2160] unlike Shala, they were both acquitted of the war crime of murder.[2161] The Panel recalls

[2155] *Thaçi et al.* Appeal Decision on Jurisdiction, para. 46; *Thaçi et al.* Appeal Decision on Legality Challenge, para. 38. The Panel further recalls that pursuant to Article 162(1) of the Constitution, the Specialist Chambers and the SPO function in accordance with their own established legal framework within the justice system of Kosovo. See *Mustafa* Constitutional Court Judgment on First Referral, para. 118.
[2156] *Gucati and Haradinaj* Appeal Judgment, para. 435.
[2157] *Mustafa* Appeal Decision on Determination of New Sentence, para. 21, fn. 55.
[2158] See *Mustafa* Appeal Judgment, para. 478. See also *Mustafa* Appeal Decision on Determination of New Sentence, para. 21, fn. 55.
[2159] See Appeal Brief, paras 262, 264-265. See also Reply Brief, paras 46-47.
[2160] See Appeal Brief, para. 265.
[2161] Sabit Geci was sentenced to 15 years of imprisonment for three counts of war crimes that took place at Kukës as a co-perpetrator, a count of war crime in Cahan and a count of unauthorised possession of weapon – the last two counts relating to completely different facts and situation than Shala. He was acquitted on the charge of murder. See Kosovo District Court of Mitrovicë/Mitrovica Judgment of 29 July 2011; Kosovo Court of Appeals Judgment of 11 September 2013. Xhemshit Krasniqi was sentenced to eight years of imprisonment for arresting and illegally detaining witnesses and other unknown civilians, inhumane conditions, torture, and violation of bodily integrity or health, as a co-

that the war crime of murder is the one that carries the heaviest sentence (18 years of imprisonment) in the present case.[2162] The Panel also observes that when determining the sentences against Sabit Geci and Xhemshit Krasniqi, Kosovo courts applied a sentencing range of five to 15 years of imprisonment pursuant to the 1976 SFRY Criminal Code, as amended by UNMIK Regulation 1999/24.[2163] In this context, the Panel notes that Sabit Geci was in fact given the most severe applicable sentence, and Xhemshit Krasniqi a mid-range sentence. In addition, the Panel underlines that, as stressed by the Constitutional Court Chamber, the only law that *must* be applied to the sentencing of an accused is the Law of the Specialist Chambers and, in that regard, Article 44(1) of the Law specifies that the Specialist Chambers may impose a maximum term of life-long imprisonment.[2164]

b. *Limaj et al.* and *Mucić et al.* cases

926. The Panel is mindful of Shala's general assertion that, in the *Mustafa* case, the Trial Panel ventured outside of its discretionary bounds by imposing sentences on Mustafa which were out of reasonable proportion in comparison with sentences imposed in similar circumstances for similar offences – arguing that the Trial Panel made the same error in this case.[2165] In that regard, the Panel finds that some of its reasoning developed in the context of the *Mustafa* Appeal Decision on Determination of New Sentence is equally applicable to this case, including the observation that the

perpetrator. He was acquitted on the charge of murder. See Kosovo Basic Court of Mitrovicë/Mitrovica Judgment of 8 August 2016. On appeal, the Kosovo Court of Appeals confirmed Xhemshit Krasniqi's acquittal on the murder charge but overturned some of the findings made by the Basic Court. Ultimately, he was sentenced to seven years of imprisonment for two counts of outrages upon personal dignity, one count of violence to life and persons and one count of unauthorised ownership, control and possession or use of weapons. See Kosovo Court of Appeals Judgment of 22 June 2017.

[2162] Trial Judgment, paras 1121-1122.

[2163] Kosovo Court of Appeals Judgment of 22 June 2017, para. 1.1.2.11; Kosovo Basic Court of Mitrovicë/Mitrovica Judgment of 8 August 2016, para. 9; Kosovo District Court of Mitrovicë/Mitrovica Judgment of 29 July 2011, para. 14, referring to Kosovo Supreme Court Decision of 21 July 2005, p. 5. See also Kosovo Supreme Court Decision of 21 July 2005, p. 9; Kosovo Court of Appeals Judgment of 11 September 2013, para. 86.

[2164] *Mustafa* Constitutional Court Judgment on First Referral, paras 119-120.

[2165] See Appeal Brief, para. 263, referring to *Mustafa* Appeal Judgment, para. 479.

Limaj et al. and *Mucić et al.* cases at the ICTY are also relevant cases to consider for the purpose of sentencing.[2166] These cases concern, *inter alia*, individuals who were convicted of war crimes, including murder (or wilful killing) and torture committed in a detention centre context. The Panel recalls that the accused in those cases, Haradin Bala ("Bala"), Esad Landžo and Hazim Delić, were sentenced to 13, 15 and 18 years of imprisonment, respectively.[2167]

927. The Appeals Panel acknowledges that these two cases are not perfectly analogous to the present case. This is due to the number of variables relevant to sentencing and, in any event, the Panel recalls that its primary responsibility is to tailor the sentence to fit the specific circumstances of Shala's case.[2168] Nonetheless, with the above caveat, the Panel considers that the case of the accused Bala from the *Limaj et al.* case, in particular, shares sufficient similarities with the present case to be of guidance in evaluating the proportionality of the sentence imposed on Shala by the Trial Panel. The Panel notes that, like Shala, Bala was not in a position of command, his conduct contributed to creating and reinforcing a culture of violence in a camp, he participated in the physical mistreatment of detainees[2169] and he was convicted for the war crime of murder;[2170] yet, the number of victims differs in the two cases.[2171]

[2166] *Mustafa* Appeal Decision on Determination of New Sentence, para. 22.
[2167] *Mustafa* Appeal Decision on Determination of New Sentence, para. 22.
[2168] See e.g. *Mustafa* Appeal Decision on Determination of New Sentence, para. 21.
[2169] *Limaj et al.* Trial Judgement, para. 726.
[2170] *Limaj et al.* Trial Judgement, paras 727, 741.
[2171] Whereas Shala was found guilty by the Trial Panel of committing the war crime of arbitrary detention against at least 18 persons, the war crime of torture against at least 18 persons and the war crime of murder against one person, Bala was convicted of the war crime of cruel treatment against three persons, the war crime of torture against one person and the war crime of murder against nine persons. See Trial Judgment, paras 1037-1039; *Limaj et al.* Trial Judgement, paras 670, 741; *Limaj et al.* Appeal Judgement, Disposition.

c. *Mustafa* case

928. The Panel considers that the *Mustafa* case is also instructive for the purpose of sentencing, in particular as Mustafa was tried before the Specialist Chambers.[2172] As underlined by the ICTY Appeals Chamber, while similar cases do not provide a "legally binding tariff of sentences", they can be of assistance in sentencing if they involve the commission of the same offences in substantially similar circumstances.[2173] In addition, a disparity between an impugned sentence and another sentence rendered in a like case can constitute an error if the former is out of reasonable proportion with the latter.[2174]

929. The *Mustafa* case exhibits notable similarities to the present case in that it concerns, *inter alia*, (i) an individual who was convicted as a JCE member, (ii) for having committed war crimes of arbitrary detention, torture and murder, (iii) which the Trial Panel found to be crimes of high gravity, (iv) in a detention centre context, and (v) against a comparable number of victims for the above referred crimes.[2175] The Panel however acknowledges that the two cases are different, notably in relation to Shala's personal contribution to the crimes.[2176] It recalls its finding above that Shala had no commanding role within the KLA and that this factor should have been granted more weight by the Trial Panel.

930. The Panel notes that the Trial Panel appears to have relied extensively on the *Mustafa* case in support of some of its findings, notably on the applicable legal framework for sentencing.[2177] However, the Trial Panel did not refer to the *Mustafa*

[2172] See above, para. 923.
[2173] See e.g. *Strugar* Appeal Judgement, para. 348.
[2174] *Strugar* Appeal Judgement, para. 349.
[2175] Trial Judgment, paras 1037-1039, 1102; *Mustafa* Trial Judgment, paras 758-760, 812; *Mustafa* Appeal Judgment, paras 3, 484.
[2176] The Panel recalls that the Trial Panel found that Shala's personal contribution to the crimes was "high", whereas Mustafa's personal contribution was found to be "very high". *Compare* Trial Judgment, para. 1108 *with Mustafa* Trial Judgment, para. 819.
[2177] See Trial Judgment, paras 1060-1085.

case in support of its analysis of the different factors leading to the determination of Shala's sentence.[2178]

931. The Panel recalls that, ultimately, Mustafa was found guilty, as a JCE member, of committing the war crime of arbitrary detention against at least six persons and sentenced to eight years of imprisonment,[2179] the war crime of torture against at least six persons and sentenced to 13 years of imprisonment[2180] and the war crime of murder against one person and sentenced to 15 years of imprisonment.[2181] Such sentence was found appropriate by the Appeals Panel in light of a domestic sentencing range of five to 25 years of imprisonment,[2182] whereas the Appeals Panel, in the present case and following the *Mustafa* Constitutional Court Judgment on First Referral, shall now take into account a more lenient sentencing range of five to 15 years of imprisonment.[2183]

932. In comparison, Shala was found guilty by the Trial Panel, as a JCE member, of committing the war crime of arbitrary detention against at least 18 persons and sentenced to six years of imprisonment,[2184] the war crime of torture against at least 18 persons and sentenced to 16 years of imprisonment[2185] and the war crime of murder against one person and sentenced to 18 years of imprisonment.[2186] As noted previously, the Trial Panel took into account but went beyond the domestic sentencing range of five to 15 years of imprisonment.[2187]

[2178] See Trial Judgment, paras 1086-1119. But see Trial Judgment, fns 2217-2218, 2225, 2263.
[2179] *Mustafa* Trial Judgment, paras 759, 831; *Mustafa* Appeal Judgment, para. 484; *Mustafa* Appeal Decision on Determination of New Sentence, paras 24-25.
[2180] *Mustafa* Trial Judgment, paras 758-759, 831; *Mustafa* Appeal Judgment, para. 484; *Mustafa* Appeal Decision on Determination of New Sentence, paras 24-25.
[2181] *Mustafa* Trial Judgment, paras 760, 831; *Mustafa* Appeal Judgment, para. 484; *Mustafa* Appeal Decision on Determination of New Sentence, paras 24-25.
[2182] *Mustafa* Appeal Decision on Determination of New Sentence, paras 18, 20, 24.
[2183] See above, para. 895.
[2184] Trial Judgment, paras 1087, 1121.
[2185] Trial Judgment, paras 1088-1089, 1121.
[2186] Trial Judgment, paras 1090, 1121.
[2187] Trial Judgment, paras 1069, 1121. See also above, para. 895. The Panel further notes that the Trial Chamber in the *Karadžić* case considered that: "where a [t]rial [c]hamber is to depart from the

933. As a result of this analysis, while fully cognisant of the Trial Panel's broad discretion in sentencing, and taking into account all relevant factors and individual circumstances in this case,[2188] the Panel finds that there is a disparity between Shala's sentences and the other sentences it analysed. The Panel finds in particular that the final sentence of 15 years imposed on Mustafa, who was in a commanding position and whose personal contribution to the crimes was found by the Trial Panel to be "very high", shows that the Trial Panel has ventured outside of its discretionary bounds by imposing sentences on Shala which are out of reasonable proportion to comparable cases. In light of the above, the Appeals Panel grants Shala's Ground 14, in part.

4. Impact of the Appeals Panel's Findings on Sentencing

934. The Panel recalls that it found that: (i) the findings of the Trial Panel in relation to two victims of arbitrary detention as a war crime, and to five victims of torture as a war crime – which amounts to almost one third of the number of victims for this count – should be reversed;[2189] (ii) the Trial Panel did not give sufficient weight to the lack of a commanding role of Shala in relation to the crime of murder;[2190] and (iii) the Trial Panel abused its discretion in imposing on Shala sentences that were disproportionate.[2191] The Appeals Panel considers that these findings must be reflected in the sentences imposed on Shala.[2192]

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sentencing practices in the former Yugoslavia, it must give reasons for such departure and must go beyond merely reciting the relevant code provisions." See *Karadžić* Trial Judgement, para. 6038.

[2188] See Article 44(5) of the Law; Rule 163(1) of the Rules.

[2189] See above, paras 601, 605.

[2190] See above, paras 913, 919.

[2191] See above, para. 933.

[2192] The Appeals Panel will assess the impact of the reversal of the Trial Panel's findings, if any, in due course, when it adjudicates Shala's appeal against the Reparation Order. See Appeal Brief Against the Reparation Order. The Appeals Panel notes though that none of the participating victims are affected by its findings granting Shala's grounds of appeal; therefore its findings on Shala's sentence do not necessarily affect the Trial Panel's findings in the Reparation Order against Shala. See above, paras 601, 605.

935. In light of the above, and taking into account all relevant factors, the Appeals Panel therefore finds it appropriate to reduce, in part, the individual sentences imposed on Shala by the Trial Panel to the following sentences: (i) six years of imprisonment for Count 1 (war crime of arbitrary detention committed against at least 16 persons); (ii) 13 years of imprisonment for Count 3 (war crime of torture, committed against at least 13 persons); and (iii) 13 years of imprisonment for Count 4 (war crime of murder, committed against one person). Accordingly, the Appeals Panel must also now determine, pursuant to Rule 163(4) of the Rules, "a single sentence reflecting the totality of the criminal conduct of the Accused" which "shall not be less than the highest individual sentence determined in respect of each charge". In this regard, the Appeals Panel considers that a single sentence of 13 years of imprisonment, with credit for the time served since his arrest on 16 March 2021, reflects the totality of Shala's criminal conduct in this case.

936. Finally, the Appeals Panel emphasises that this reduction in Shala's sentences in no way suggests that the crimes for which he has been convicted and sentenced are not grave.

937. The Appeals Panel further recalls, as a general matter, that the present case relates solely to the individual criminal responsibility of the Accused and his involvement in the crimes charged, and that the Specialist Chambers only have jurisdiction over individuals, not groups or organisations. The Appeals Panel emphasises that neither the KLA nor the people of Kosovo as a whole were the subject of these proceedings, and they have not been found responsible for or convicted of these crimes.

VI. DISPOSITION

938. For these reasons, having considered all of the arguments made by the Parties and the Participants, the Court of Appeals Panel, pursuant to Article 46 of the Law and Rules 182 and 183 of the Rules:

GRANTS Shala's Grounds 7 in part, 12 in part, and 14 in part;

REVERSES, in part, Shala's convictions under Counts 1 and 3 to the extent that they rely on the arbitrary detention of two individuals and on the torture of five individuals;

DISMISSES Shala's appeal in all other aspects;

AFFIRMS the remainder of Shala's conviction for the War Crime of Arbitrary Detention pursuant to Articles 14(1)(c) and 16(1)(a) of the Law under Count 1 of the Indictment, the War Crime of Torture pursuant to Articles 14(1)(c)(i) and 16(1)(a) of the Law under Count 3 of the Indictment, and the War Crime of Murder pursuant to Articles 14(1)(c)(i) and 16(1)(a) of the Law under Count 4 of the Indictment;

AFFIRMS the sentence of six years of imprisonment imposed with respect to Count 1;

SETS ASIDE the sentence of 16 years of imprisonment imposed with respect to Count 3 and **IMPOSES** a sentence of 13 years of imprisonment;

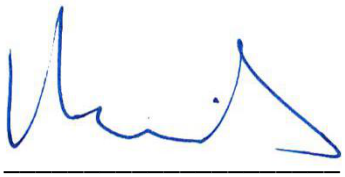
SETS ASIDE the sentence of 18 years of imprisonment imposed with respect to Count 4 and **IMPOSES** a sentence of 13 years of imprisonment;

SETS ASIDE the single sentence of 18 years of imprisonment imposed on Shala and **IMPOSES** a single sentence of 13 years of imprisonment on Shala, with credit for the time served;

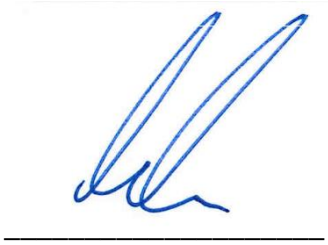
RULES that this Judgment shall be enforced immediately pursuant to Rule 185(1) of the Rules;

ORDERS that, in accordance with Article 50(1) of the Law and Rule 166(3) of the Rules, Shala shall remain in the custody of the Specialist Chambers pending the finalisation of the arrangements for his transfer to the State where his sentence will be served; and

REMAINS SEISED of Shala's appeal against the Reparation Order.



Judge Michèle Picard,
Presiding Judge



Judge Kai Ambos

Judge Nina Jørgensen

Dated this Monday, 14 July 2025

At The Hague, the Netherlands