

1 Tuesday, 16 April 2024
2 [Open session]
3 [Closing Statements]
4 [The accused appeared via videolink]
5 --- Upon commencing at 9.30 a.m.

6 PRESIDING JUDGE VELDT-FOGLIA: Good morning. Welcome.
7 Court Officer, can you please call the case.

8 THE COURT OFFICER: Good morning, Your Honours. This is case
9 KSC-BC-2020-04, The Specialist Prosecutor versus Pjeter Shala.

10 PRESIDING JUDGE VELDT-FOGLIA: Thank you, Madam Court Officer.
11 I see that there has been a slight change of composition, so I
12 will give you the floor to introduce who is present today.

13 Mr. Prosecutor, you have the floor.

14 MR. DE MINICIS: Yes, good morning, Your Honours. Good morning,
15 everyone else. Today we have for the SPO, the Specialist Prosecutor,
16 Kimberly West; Line Pedersen, Case Manager. And then we have
17 Cian Heraghty and Alexandra Ptak. They are the new entries in the
18 compositions. And Gaia Pergolo, Eva Wyler, and Filippo De Minicis.

19 PRESIDING JUDGE VELDT-FOGLIA: Thank you very much.
20 Victims' Counsel, you have the floor.

21 MR. LAWS: Thank you. Good morning, Your Honour. I am
22 Simon Laws, counsel for the victims in this case, together with my
23 co-counsel, Maria Radziejowska.

24 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

25 Defence counsel, I also see a slight change in composition in

1 your side.

2 MR. GILISSEN: Yes, indeed, Your Honour. Good morning. Good
3 morning to you. We are here with Mr. Shala as usual by videolink
4 from the detention centre. I am here with my co-counsel,
5 Mr. Hedi Aouini and Ms. Leto Cariolou; and with Dzeneta Petravica,
6 our Case Manager; Ms. Kailin Chen, associate legal officer;
7 Juliette Healy and Judit Kolbe, assistant legal officer. And this
8 morning we are with Livia Veliu, legal intern and our translator
9 sometimes with Mr. Shala. Thank you very much.

10 PRESIDING JUDGE VELDT-FOGLIA: Thank you very much.

11 Mr. Shala, welcome. Can you hear me?

12 THE ACCUSED: [via videolink][Interpretation] Good morning,
13 everyone. Yes, I do hear you very well indeed.

14 PRESIDING JUDGE VELDT-FOGLIA: Mr. Shala, can you repeat what
15 you said?

16 THE ACCUSED: [via videolink][Interpretation] Good morning. I do
17 hear you very well.

18 PRESIDING JUDGE VELDT-FOGLIA: Thank you, Mr. Shala.
19 Good.

20 Today, we continue with the closing statements. Yesterday we
21 had the closing statements of the Specialist Prosecutor's Office. We
22 now turn to Victims' Counsel for its closing statement on the guilt
23 or innocence of the accused and on sentencing.

24 Victims' Counsel, you indicated yesterday that in addition to
25 the time you were allocated, and that was for this part of your

1 closing statements one hour, you might need some more time. Can you
2 giving us an estimation with regard to that?

3 MR. LAWS: Your Honour, yes. My current estimate is that we
4 will be about 15 minutes over the hour, so maybe a little more but
5 not very substantially more.

6 PRESIDING JUDGE VELDT-FOGLIA: Very well. Then you have the
7 floor.

8 MR. LAWS: Your Honour, thank you.

9 When I made my opening statement on behalf of the victims in
10 this case some 14 months ago, I began by saying this:

11 "The evidence in this case shows that in the indictment period,
12 the Kukes metal factory was a place that temporarily existed beyond
13 the rule of law."

14 And what I meant by that was that it was a place of criminality
15 and cruelty, a place where there was no opportunity for a detainee to
16 raise a complaint, where there seemed to be no prospect of any
17 intervention from a judicial or other authority. The KLA were in
18 charge, and it was members of the KLA who were committing these
19 crimes.

20 The evidence that has been called in the trial has, we submit,
21 justified that description of the metal factory of being a place that
22 temporarily existed beyond the rule of law. This accused and others
23 were working from a location that was close to an ordinary
24 functioning society and yet it was entirely removed from it at the
25 same time.

1 It was just down the road from the centre of Kukes town, and yet
2 at the same time, the cells in which the KLA's prisoners were held
3 might as well have been in the remotest tundra or deepest jungle on
4 the planet. They were beyond the reach of the rule of law.

5 And what we know about situations of that kind are that they
6 often lead to abuse, to torture, and to killing. One of the evils
7 about crimes committed in conflicts is that places of impunity
8 flourish, and that is exactly what happened at Kukes.

9 Some people, including witnesses called for the Defence, want to
10 pretend that there were no crimes committed there. But sadly, that
11 is a lie. Crimes were committed there against people who never had
12 the chance of a trial like this, never had an opportunity to see the
13 evidence against them, still less to challenge it, but instead were
14 held in a place of detention in an arbitrary manner.

15 Once there, the prisoners were at the mercy of their captors.

16 We need to have very much in mind the highly combustible mix of
17 anti-Serb sentiment and absolute power over prisoners who were
18 themselves being accused of collaborating with the Serbs. It was a
19 position of special vulnerability for the detainees.

20 Release only came *[REDACTED] Pursuant to In-Court Redaction Order
21 F832RED.*

21 *[REDACTED] Pursuant to In-Court Redaction Order F832RED.* For others, it
22 was the final collapse of

22 the Serbian regime at the end of the NATO bombing campaign. But one
23 of them would never leave the Kukes metal factory alive. Instead, he
24 would die a cruel and unnecessary death.

25 For the survivors, and in some cases for their relatives, the

1 scars have never healed. It shouldn't come as a surprise that what
2 happened has had lasting effects.

3 The environment in Kukes was an extreme one, unimaginable to
4 most of us. A place where a group of men can decide to lock people
5 away in a cell and beat them, humiliate them, burn them, cut them,
6 and torment them in the other ways that the evidence has revealed.
7 In short, to do whatever they wanted to them.

8 And we know that those who have provided testimony were not the
9 only ones. We heard about others in the course of this trial,
10 including women, and one woman in particular, and the Roma musicians
11 and others who were seriously mistreated. Their absence from this
12 trial may tell its own story, becoming involved in a case against
13 members of the KLA is not something to be undertaken lightly. It
14 takes real courage. You risk a lot. You risk social ostracism at
15 the very least, and at worst you risk your personal safety.

16 So no one can be blamed for wanting to keep out of the judicial
17 process. But it is obvious that if everyone did that, the Kukes
18 metal factory would have remained beyond the rule of law.

19 However, enough victims did speak out. Enough have had the
20 strength and bravery to say what happened to them.

21 Because the metal factory's existence beyond the rule of law was
22 only temporary. One of the things that this case has demonstrated is
23 that if the victims are prepared to persevere, justice can be done
24 many years later. The victims in this case have persevered and they
25 have played a prominent part in the trial.

1 In their individual ways, they have all been harmed by what
2 happened at Kukes, and their desire is above all else to see that
3 justice is done. In this case, that means the conviction of the
4 accused who, as they know very well, is one of those responsible for
5 their harm, and it is for that reason that I will be addressing the
6 issue of the guilt of the accused in just a moment.

7 Some of the detainees have died before this Court was able to
8 provide an opportunity for a trial of Pjeter Shala. Their voices
9 have nonetheless been heard in the shape of the testimony that they
10 left behind. Happily, others are still alive and have come here to
11 share their experience.

12 In the case of Witness 01, we submit that what you saw is
13 someone who burns with the injustice of what happened at Kukes.
14 Someone whose daily life in the present is dominated by those events
15 in the past. Whose body has its own memory of what was done to him,
16 of what he saw, and of what was done to others, so that he sweats
17 when he's reminded of his ordeal, is quick to anger, cannot find a
18 path back to his old self, and even wishes that he had been killed.
19 And he comes to this Court and is accused of lying. It is suggested
20 he's making up the role of Pjeter Shala in these crimes, and we'll
21 come back to that shortly.

22 4733, who is dead, devoted much energy in the remainder of his
23 life to seeking justice, and Pjeter Shala was one of those he wanted
24 to see brought to justice. His family have bravely continued that
25 struggle in this Court. The Defence case is that, for reasons that

1 aren't clear, he too was making a false allegation against the
2 accused.

3 On their behalf, the first point -- part of what I want to say
4 addresses the issue of who is telling the truth here and who is
5 lying. The second part of our submissions this morning in relation
6 to sentencing will be conducted by my co-counsel, Ms. Radziejowska.
7 And, finally, later in the week, we will deal with reparations.

8 The important point in relation to reparations is a short one.
9 The Defence's legal analysis of the approach to reparations in cases
10 involving more than one perpetrator is simply wrong. It's based on
11 an incorrect reading of the law, and our submissions will focus on
12 addressing what we say is their error.

13 But for today, I want to turn to the first important issue: Was
14 Pjeter Shala a perpetrator at the Kukes metal factory?

15 At the heart of the Defence case is an all-out assault on the
16 credibility of Witness 01 and of 4733. On their behalf, we reject
17 those attacks. And I will focus this morning on a number of matters
18 that we suggest demonstrate the truth and where it lies in this case.

19 I want to deal briefly with the evidence called by the Defence
20 just in two aspects, two matters that are of special importance to
21 Witness 01 and to his credibility. And to do that, I'm going to need
22 to move into private session. I can say that in dealing with
23 Witness 01, that is going to be essential. Very, very shortly after
24 I begin to deal with 4733, we'll be able to move back into open
25 session, to public session, I should say.

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17 [Open session]

18 THE COURT OFFICER: Your Honours, we are now in public session.

19 PRESIDING JUDGE VELDT-FOGLIA: Very well. Thank you.

20 Victims' Counsel, you have the floor.

21 MR. LAWS: Thank you, Your Honour.

22 So we're moving to consider 4733, a witness with no obvious link
23 to Witness 01, and we're going to need to ask the same question: Is
24 he lying too? It seems he must be, on the Defence case. It can't be
25 a mistake, a mistaken identification of some kind. 4733 can't have

1 gone through the experience that we know he did at Kukes and emerged
2 believing that another person altogether was the person who he knew
3 by the name of Pjeter Shala. That can't be true.

4 The accused has admitted that they were at the metal factory at
5 the same time. They were in the same room together at one point,
6 even on the accused's version of events. There's no doubt about it.
7 The accused knew who he was. And the idea that 4733 has someone else
8 in mind as a perpetrator and has wrongly given that person Shala's
9 name, well, we suggest it's just not a reasonable proposition.

10 [REDACTED] Pursuant to In-Court Redaction Order F832RED.

11 [REDACTED] Pursuant to In-Court Redaction Order F832RED.

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11 [REDACTED] Pursuant to In-Court Redaction Order F832RED.

12 Why should 4733 have said those things about this accused? We
13 submit because he is reporting accurately the identity of a person
14 who did exactly what he described. This man, whom he recognised on
15 the transport from Rromanat to the metal factory and who other
16 people, he said, in the van were calling "Ujku," and whom he
17 described as howling like a wolf on that van, and whom he saw lining
18 up prisoners to beat them while letting out his howl.

19 And he followed this up with a report to the investigative
20 authorities as early as 2002, and the reference to that is
21 SITF00013181 to SITF00013189 RED2 at 0031378.

22 4733 has not made a mistake, and we submit that it is apparent
23 that he has not lied.

24 When interviewed in 2019, the accused said that he had seen 4733
25 in Kukes. He said that he had seen him serving coffee. And so we

1 know that he was there at the same time as him and, therefore, had
2 the opportunity to assault him. And much more importantly, he has
3 said that he had in the past wished to kill or seriously harm 4733
4 and that he had wished to do that just a year before their paths
5 crossed in Kukes.

6 May we have slide 12, please. And this can be broadcast to the
7 public.

8 "If I had caught him one year earlier, he wouldn't have been
9 able to testify about anything anymore. Unfortunately, I never found
10 him."

11 The accused said that his motive for having wanted to harm 4733
12 was to do with 4733's supposed misconduct in his former employment as
13 to which there is no evidence at all. And that's at page 74121 of
14 the same exhibit given as a reference on the screen.

15 Well, as motives go, we suggest that that's a fairly clear
16 expression of one. So he had the motive to assault 4733. He was
17 unquestionably there at the same time as 4733, as we've seen, so he
18 had the opportunity. And given his own story of the slap, it would
19 appear even he believes he has the propensity to commit violence
20 against detainees.

21 And so that is the person that you are asked to believe against
22 whom 4733 made false allegations. That would mean, would it not,
23 that 4733 just happened to invent an allegation of brutality against
24 someone who not only wanted to behave in a brutal manner towards him,
25 but had had the opportunity to do so.

1 We say it defies any reasonable person's view of how the real
2 world operates.

3 And, finally, on the topic of whether the accused was a
4 perpetrator at Kukes, we do need to look at the evidence of a further
5 detainee, 01448. And the SPO dealt with this yesterday, and I am not
6 going to repeat it, but he is describing a man also called Wolf, also
7 called Pjeter Shala, who also beat detainees in the company of
8 Xhemshit Krasniqi. And that can be found at SITF00013852 to 00013869
9 RED5 at SITF00013857.

10 So here is someone unconnected to either of the VPPs describing
11 his own beating at the hands of Pjeter Shala, and what we want to say
12 about that is this. For the accused to have been incorrectly named
13 as an offender by one witness would be a remarkable misfortune. For
14 it to have happened with a second witness is a misfortune of an
15 astonishing kind. By the time we get to three witnesses
16 incriminating Mr. Shala in violent beatings, and bearing in mind his
17 admitted presence, we say that there is no reasonable explanation
18 other than the fact that the accused was indeed a perpetrator at the
19 metal factory.

20 And on that topic, I want to give Witness 01 another chance to
21 be heard by quoting his own words at this trial when Defence counsel
22 put his client's case to him. What was being put to him was that he
23 had decided to involve Pjeter Shala's name in what had happened at
24 Kukes, and this is in the transcript on 2 June 2023 at page 1692.

25 Defence case: You've decided to involve Shala.

1 Answer:

2 "How could I involve him when he's involved already? Because he
3 beat us. He knows that. He's here. This has nothing to do with
4 involving or implicating. It's about facts that were done. He did
5 those things."

6 We say that there are moments in some trials when the truth is
7 plain for all to see, and this is one such moment, and we don't seek
8 to improve on it.

9 The accused, unlike those in detention at Kukes, has been
10 afforded a fair trial. It has explored in granular detail the events
11 at the metal factory, and it has, with the help of the victims, shown
12 beyond any reasonable doubt that the accused was a part of the
13 lawless world of the metal factory. But it has meant that his
14 participation in the crimes there is no longer beyond the reach of
15 the law.

16 Your Honour, that's what I want to say on this topic. And --

17 PRESIDING JUDGE VELDT-FOGLIA: Victims' Counsel, sorry to
18 interrupt you. I would like to go for a moment into private session.

19 MR. LAWS: Certainly.

20 PRESIDING JUDGE VELDT-FOGLIA: And then we take it from there.

21 Madam Court Officer, can you bring us into private session,
22 please.

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1 [Open session]

2 THE COURT OFFICER: Your Honours, we are now in public session.

3 PRESIDING JUDGE VELDT-FOGLIA: Victims' Counsel, you have the
4 floor again.

5 MR. LAWS: Your Honour, thank you.

6 Your Honour, that concludes what I wanted to say on the first
7 part of our submissions, and I'm going to hand over now to my
8 co-counsel, Ms. Radziejowska.

9 We think it's somewhere between 15 and 20 minutes, this part of
10 what we're going to say. Our preference would be to do it now, but
11 we're entirely in the hands of the Panel, if you think it's better to
12 take the break.

13 PRESIDING JUDGE VELDT-FOGLIA: Victims' Counsel, if it's 20
14 minutes, I don't see a problem.

15 MR. LAWS: Thank you.

16 MS. RADZIEJOWSKA: [Microphone not activated].

17 PRESIDING JUDGE VELDT-FOGLIA: It's not -- very well.

18 MS. RADZIEJOWSKA: My apologies.

19 Your Honours, our submissions on sentencing are not intended to
20 repeat our impact statement on this topic. Our purpose is to address
21 some of the points raised by the Defence on sentencing in their final
22 trial brief.

23 First, I will address some of the submissions of the Defence in
24 relation to individual circumstances of the accused and the
25 mitigating circumstances. Then, I will make short remarks on the

1 gravity of the crimes charged against Mr. Shala.

2 We have grouped individual circumstances of the accused raised
3 by the Defence under the following categories: One, age of the
4 accused; two, circumstances in which the accused grew up and the
5 context in Kosovo; three, family circumstances; four, health issues.

6 Defence mentions the age of the accused at the time of the
7 events, 36 years old, and today, 61. This is at paragraphs 356 and
8 362 of the final trial brief of the Defence.

9 However, the Defence does not explain how the age of the accused
10 could be relevant for the purpose of determining his sentence. 36 is
11 clearly the age in which one is able to recognise the meaning of
12 their acts. Provided that no grounds for excluding criminal
13 responsibility exist, one should be held responsible for the crimes
14 committed at that age. In case of conviction, that age is irrelevant
15 for sentencing.

16 Similarly, the Defence does not explain whether, and if so how,
17 the age of the accused now, 61, should be considered for the purpose
18 of sentencing.

19 As noted in the appeals judgment in the Mustafa case, "relevant
20 international jurisprudence has consistently rejected the assertion
21 that a sentence which may exceed a convicted person's life expectancy
22 constitutes an error in sentencing."

23 The Defence emphasises the individual circumstances of the
24 accused that concern his upbringing, life in Kosovo, and the
25 injustice that he has endured in his life; for example, growing up in

1 insecurity and precariousness in Kosovo, being detained in a Serbian
2 prison as a political prisoner, losing all siblings and a nephew in a
3 massacre during the war in Kosovo.

4 We need to ask ourselves a question: How are these
5 circumstances relevant for determining the sentence to be imposed on
6 the accused? Are they at all relevant for that purpose? Have the
7 circumstances that the Defence raises affected the mental capacity of
8 the accused? Does being a victim of crimes justify committing
9 crimes?

10 Your Honours, in the Ntaganda case before the ICC, the Defence
11 argued that "an offender's past trauma is highly relevant to the
12 sentencing process and could serve to diminish an offender's
13 culpability." The appeals chamber in that case found that "the
14 potential impact of a convicted person's previous traumatic
15 circumstances on his or her sentence is necessarily a fact specific
16 assessment." The appeals chamber noted that no evidence was adduced
17 to show that the accused in that case suffered brain damage or any
18 other form of mental illness as a result of traumatic experiences he
19 may have encountered.

20 Your Honours, in order for the circumstances noted by the
21 Defence to be relevant, the Defence would need to show that they have
22 affected the accused to the extent that diminished his culpability at
23 the time of the events. No defence was raised or evidence led to
24 that effect.

25 The Defence describes in its final trial brief the family

1 circumstances of the accused. It is unclear how and why Mr. Shala's
2 family circumstances should be considered in determination of his
3 sentence. There is no indication of that in the sources referenced
4 by the Defence. According to consistent jurisprudence, only
5 exceptional family circumstances can be considered in mitigation.

6 In the Bemba case, the ICC trial chamber in the decision on
7 sentence found that "family circumstances alleged by the Defence,"
8 such as having a wife and children, "are common to many convicted
9 persons and are not exceptional. They therefore do not constitute a
10 mitigating circumstance ..."

11 The Defence submits that poor health has been accepted by
12 international tribunals as a mitigating factor. However, relevant
13 jurisprudence is more specific and speaks of exceptional or rare
14 cases. This has been confirmed by the ICC appeals chamber in the
15 Ongwen case. The appeals chamber confirmed that the management of
16 the convicted person's health is primarily a matter for the
17 enforcement of the imposed sentence, not a factor bearing upon the
18 determination of its length.

19 The appeals chamber confirmed also that poor health can be
20 considered as a mitigating circumstance only in extreme and
21 exceptional cases such as a very serious health condition or terminal
22 disease.

23 Your Honours, with your leave, I would request to go to private
24 session to discuss the details of the health issues raised by the
25 Defence.

1 PRESIDING JUDGE VELDT-FOGLIA: Very well.

2 Madam Court Officer, can you bring us into private session,
3 please.

4 [Private session]

5 [Private session text removed]

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23 [Open session]

24 THE COURT OFFICER: Your Honours, we are back in public session.

25 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

1 Please proceed, Victims' Counsel.

2 MS. RADZIEJOWSKA: Thank you.

3 We submit that the health issues of the accused raised by the
4 Defence are not of an extreme or exceptional character. That is why
5 they cannot have any bearing on the determination of the length of
6 the sentence to be imposed on the accused.

7 Specifically with regard to his psychological health, the rules
8 do list circumstances such as diminished or lack of mental capacity
9 among mitigating circumstances, but there is no evidence suggesting
10 that the accused suffered from such a condition at the time of the
11 events concerned.

12 I will now move on to discuss some of the mitigating
13 circumstances raised by the Defence.

14 The Defence lists a number of those in its final trial brief.
15 It argues that good behaviour of the accused and his cooperation with
16 the Belgian authorities, the SPO, and the Specialist Chambers
17 mitigate in his favour. In the case of Mr. Shala, one cannot speak
18 of a free-standing and free-willing cooperation. Responding to a
19 court order or summons, complying with the law - these circumstances
20 cannot be equated with voluntary cooperation.

21 Good behaviour and compliance with the law, with court orders,
22 are the expected norm.

23 As Your Honours have found in the Mustafa case, "compliance with
24 the law or court-imposed orders are expected of any person, and
25 therefore [do] not, on its own, constitute a mitigating circumstance,

1 unless exceptional."

2 The Defence lists a number of fair trial complaints in the final
3 trial brief. In relation to sentencing, the Defence submits that the
4 alleged fair trial violations should be considered as a significant
5 mitigating factor. We submit that the Defence confuses a potential
6 reduction of a sentence as a remedy for fair trial violations with
7 mitigating circumstances. More importantly, we submit that the fair
8 trial complaints raised by the Defence are unsubstantiated.

9 I wish to address only some of those complaints in the context
10 of sentencing.

11 The Defence alleges that the joint criminal enterprise mode of
12 liability is not expressly stated in the law, and it would be unfair
13 for the Panel to apply it.

14 With regard to the alleged violation of the principle of
15 equality of arms, the Defence concludes that these manifold
16 violations have prejudiced the proceedings as a whole and irreparably
17 affected the fairness of the trial. That is at paragraph 326 of the
18 Defence final trial brief.

19 Your Honours, such violations, if they were proven, and we
20 submit that they are not, such violations cannot be remedied by a
21 reduction of a sentence. It is because they could not lead to a
22 valid conviction in the first place. These are matters that relate
23 to the issue of conviction, not sentencing.

24 The Defence also alleges that the right to a public trial was
25 violated. This is because of the use of extensive redactions and

1 protective measures. But these measures were applied by the
2 Prosecution and the Panel in accordance with the law and the rules,
3 and they're applied to protect safety and security of witnesses as
4 required and justified by the circumstances of this case.

5 As to the allegations concerning the breach of the accused's
6 right to effective legal assistance, the Appeals Chamber has found
7 that only one interview of the accused -- that only in the case of
8 one interview of the accused that was conducted by the Belgian
9 authorities, the breach was limited, and insufficient to provide a
10 basis for the exclusion of that interview from the evidence.

11 Your Honours, it cannot be a breach for which a reduction of a
12 sentence is justified.

13 When it comes to the alleged disclosure obligations violations,
14 we submit that the specific violations in question have no impact on
15 the outcome of these proceedings.

16 Your Honours, these alleged violations of fair trial rights, if
17 proven - and, again, we submit that they are not - they do not
18 provide a reason for reduction of the sentence. It is worth noting
19 that the ICTR jurisprudence relied on by the Defence to justify that
20 request concerned very specific and straightforward violations of
21 fundamental procedural guarantees in the early stages of the
22 proceedings; that is, the right to be informed promptly about the
23 charges upon arrest, and delayed initial appearance hearing.

24 None of the alleged violations raised by the Defence falls in
25 that category.

1 The Defence submits that Your Honours should also consider in
2 mitigation the time lapse between the alleged events and the present
3 proceedings, but the Defence does not provide any reference or
4 explanation to support this submission. Moreover, the lapse of time
5 between the events and the proceedings is already argued by the
6 Defence as one of the elements that contributed to violation of the
7 equality of arms.

8 Sentence for a crime that was committed years earlier, if
9 imposed in result of a fair trial, cannot be reduced just because of
10 the lapse of time.

11 The time lapse was not considered as a mitigating factor in the
12 Khmer Rouge trials that took place over 30 years after the crimes.

13 This proposition is inconsistent with the principles
14 underpinning all war crimes trials. No statute of limitation applies
15 to prosecuting these crimes.

16 Finally, Your Honours, we are concerned by the submission of the
17 Defence which aim as diminishing the gravity of the crimes charged
18 against the accused.

19 Should Your Honours find that the accused is guilty, it is the
20 gravity of the crimes charged against him that is the primary
21 consideration in imposing a sentence.

22 The Defence does not explain why and how the limited temporal
23 and geographical scope or scale of the crimes charged against the
24 accused diminish their gravity.

25 Arbitrary detention of the victims in this case lay the ground

1 for cruel treatment and torture; and in the case of one detainee,
2 murder. Prohibition of torture is a peremptory norm of international
3 law. Murder is one of the most serious crimes. In this case, these
4 crimes were committed against defenceless detainees, with sustained,
5 ruthless cruelty, at times for the amusement of the perpetrators,
6 including the accused. These crimes have changed victims' lives
7 forever.

8 The fact that these crimes were committed in a period of 20 days
9 at one location against 18 victims does not and cannot diminish their
10 gravity. Eight of the 18 victims participated in these proceedings.
11 For them, there is no punishment that will take them back to their
12 lives as they were before Kukes.

13 Your Honours, we do not propose a particular punishment, a
14 number of years of imprisonment to be imposed in the case of the
15 accused conviction. This is because we are mindful of the fact that
16 the VPPs, the victims participating in these proceedings, were not
17 the only victims in this case. That said, for all the reasons set
18 out in our impact statement, the sentence will necessarily be a very
19 substantial one.

20 Thank you. This concludes our submissions.

21 PRESIDING JUDGE VELDT-FOGLIA: Thank you, Victims' Counsel.

22 We have now completed the closing statement by Victims' Counsel.
23 It's five minutes past 11.00, so it's time to adjourn for a small
24 break. I propose that we continue at quarter to 12.00. I see
25 Defence counsel nodding. Yes. Very well. Then we go for a small

1 break.

2 The hearing is adjourned.

3 --- Recess taken at 11.06 a.m.

4 --- On resuming at 11.48 a.m.

5 PRESIDING JUDGE VELDT-FOGLIA: Welcome back.

6 Let me see. On your side, Mr. Prosecutor, do we have a change
7 in composition?

8 MR. DE MINICIS: No, Your Honour. The same composition.

9 PRESIDING JUDGE VELDT-FOGLIA: Okay. Well, I see, of course,
10 not at your side.

11 And then this side, Defence counsel?

12 MR. GILISSEN: [Microphone not activated].

13 Mr. Basile Mulera join us. Thank you very much.

14 PRESIDING JUDGE VELDT-FOGLIA: Very well. And I see Mr. Shala.

15 Mr. Shala, have you heard us well?

16 THE ACCUSED: [via videolink][Interpretation] Yes, I can hear you
17 well.

18 PRESIDING JUDGE VELDT-FOGLIA: Very well.

19 Then now we will proceed with the closing statements of the
20 Defence.

21 Defence counsel, we noted that you asked for three hours and
22 15 minutes for your closing statements. The same remarks apply to
23 you as for the other party and Victims' Counsel. If there are any
24 changes time-wise, please inform the Panel.

25 I will give you now the floor.

1 We will continue till 1.00 in principle. And if you think that
2 taking into account the different parts of your submissions it's
3 better to stop a little bit earlier, then we do that, or we do it a
4 little bit after. Just inform me and then we can discuss it.

5 Please, you have the floor.

6 MR. GILISSEN: Thank you very much.

7 Thank you very much. Your Honours, Madam Prosecutor, my dear
8 colleagues.

9 Did you see the weather today? Did you see the weather? It's
10 raining. The wind is terrible. It's a windy day. We can say that.
11 Why to say that? Because I would like to come back to the reality.
12 I would like to come back to the reality and to make some repeal. We
13 are talking about investigations. We are talking about the way this
14 procedure is rendered possible and how is it possible that a case
15 come before your Panel.

16 It was a very long road, a difficult one, full of difficulties
17 and ambushes. And I have to say, why to act like there is no
18 problem, absolutely no problem in this procedure? Of course, we
19 have, all of us, to speak about that, speaking out in a legal or
20 judicial proceeding, it's always having responsibility. And I recall
21 that taking the floor in specific cases as that of Mr. Pjeter Shala
22 is even a greater responsibility.

23 I think, indeed, the case before you is very far to be the so
24 easy case, easy case announced, if you remember, at the beginning of
25 the trial, by the Prosecutor himself. And I have to say that on the

1 contrary, this case could be one of these formidable case in which
2 the real risks of miscarriage of justice exists. And when I heard
3 yesterday and today how things happen, I can say, yes, we could have
4 a real problem of miscarriage of justice, because miscarriage of
5 justice never happens by its own, at random. Miscarriage of justice
6 always has history.

7 All the things that exist on the planet Earth has history, and
8 the things we know are the result of this history. And it is the
9 case for this procedure.

10 All practitioners of criminal law know that such mistakes result
11 from unfortunate choices of investigators, bad management of
12 investigations, from blindness or inability to take into account
13 certain part of information seriously or to accomplish work as it
14 should have been.

15 In my country, we used to say that judges are not responsible
16 for the content of the case before them, but they are responsible for
17 what they do with them. And I have to say, after reviewing the
18 files, how much of this case seemed to contain problems,
19 difficulties, and particularities that are well known to be usually
20 one of the basis of miscarriage of justice. On this subject, I would
21 like to be as specific as exploded.

22 We are going to present to you the argument and analysis, both
23 factual and legal, that form the basis of Pjeter Shala's Defence. We
24 are also going to respond to some of the SPO and Victims' Counsel
25 arguments put forward in their final brief or presented to you during

1 the hearing.

2 And I have to say, I have to say at this stage: Please, pain
3 and suffering is never a proof, an evidence. No -- no -- nothing to
4 do with a proof of a participation.

5 And of course -- and, of course, I have to say that what's
6 happened in Kukes metal factory was -- we know that because two
7 decisions, two judicial decisions has been issued about that.
8 Terrible events. That's sure. But it's not the point at all. It's
9 not the point at all. The core, the heart of this trial is to know
10 if Mr. Shala participated to this, if he took part of these events.

11 The same when I hear to present the Defence as the one who
12 didn't contest, say anything yesterday, they used the words we were
13 silent about the prior statement made by Mr. Pjeter Shala. As you
14 know perfectly well, it's wrong. The reality is absolute not -- that
15 we challenge these statements, you know it perfectly well, till the
16 beginning. And there are reasons to this, of course.

17 We challenge it. And I don't understand how is it possible to
18 talk about concessions of Mr. Shala in this prior statement? Please
19 be serious. It's wrong. No concession, of course. No admission at
20 all. And I would like to say that what Mr. Shala explained concerned
21 another scene of the fact at another moment.

22 You know, explanation by Mr. Shala, you took it or you leave it.
23 We don't have the choice. If you consider that concession, you took
24 it or you leave it. And Mr. Shala never, never, I have to focus on
25 that, never have made -- never made, have made, or do, or issue some

1 concession. Please. On the contrary, till the beginning, till the
2 first day, more than 20 years ago, every time he was asked about
3 something he explained. He was not afraid to go to see the
4 investigators. He was not afraid to go to The Hague and to appear
5 before the Judges without a lawyer, because when you have nothing to
6 reproach to yourself, you are not afraid. You are not afraid. You
7 don't hide yourself behind a defence lawyer or to be here, "No, no, I
8 cannot go." No. Every time Mr. Shala faced it.

9 And to explain he run away from Kosovo to avoid this
10 responsibility is to ignore the case. That's a typical ignorant
11 situation. We know perfectly well why he came back to Belgium.
12 Because Mr. Shala was there, because he lived in Belgium, as you
13 know. All of us know that. Why to present it like that? That's
14 really very particular. And I have to say I was a little bit
15 disappointed to hear how much the Defence argument were caricatured
16 and misrepresented.

17 Please, it's not an argument to make a draw, a caricature of our
18 argument. Please, it's not an argument. What do you think? Now we
19 are talking about our argument, the real one. Not the face you tried
20 to provide to them. And really, when I hear about confession and
21 admission, I have to say is mischaracterise the reality and the words
22 using and the explanation of Mr. Shala.

23 No need of that in judicial proceedings. That's what I consider
24 and I focus on this.

25 So, you know, I would like to present the Defence argument for

1 the Defence. But before doing that, I would like to share with you a
2 few thoughts about the whole procedure because they are at the very
3 heart of the defence in this case, these thoughts. And I think that
4 the Panel, very respectfully, should take all this into account or
5 these reflections into account in its deliberation.

6 In particular, I'm sure that these observations should inform
7 your work as you analyse the quality of the evidence administered in
8 this case.

9 Of course, it's very simple. When you take a part, when you
10 take a piece of some pieces of the information included in the files,
11 things are very simple. Do I have to say I was very convict, I was
12 very full of confidence with the scenario issued to -- yesterday by
13 the Prosecution team, or the scenario issued by the Victims' Counsel
14 today. Of course, I was convinced. I was convinced if I didn't know
15 the case, if I didn't know the file.

16 If you choose like cherry-picking some elements on the right,
17 some elements on the left, of course you build a mystery. May I say
18 a story. What I say, a scenario. Please, why to avoid a lot of
19 information, why to avoid a lot of problem we have and we have to
20 face altogether.

21 The facts before you, Your Honours, date back to 1999, and if
22 I'm not mistaken, it means at not less than 25 years ago. 25 years
23 is a very long time. And I hear this morning: No way, it's not a
24 problem. You don't have to take into account these particularities
25 of the case. 25 years, it's a long time. And I mean by that, that

1 in 25 years everything has changed.

2 I want to say things, times, and of course people have changed.
3 Many people find themselves in situations that are completely
4 different from what they were in the past, before 1999 and
5 particularly 1999 war.

6 The vast majority of the population in Kosovo, of Kosovo,
7 considers that the situation is much better than it was in 1999, but
8 for some, for some things are different. They have lost their
9 incomes, they have lost their status, and for some, they have lost
10 their privileges. For some of them, Kosovo declaration of
11 independence was a disaster, a real catastrophe, because it placed
12 them firmly in the losing camp.

13 This is therefore not surprising that for some the investigation
14 were an unexpected opportunity of settling of score or even
15 reprisals, as we heard and was explained, please, by so many
16 witnesses of the Prosecutor in the statements and in the testimony
17 presented before you in this case.

18 We'll be coming back to this special feature of certain
19 testimony in more detail in a moment, and Mr. Aouini have a lot to
20 explain about that.

21 Because, first of all, one thing is certain, and it needs to be
22 stressed: The effect of time and its flow have therefore been real
23 and significant in this case. All of us know that. We witness the
24 consequences of this. And, indeed, as you know, the passing of time
25 takes its toll.

1 Some of the people who were in Kukes metal factory in 1999 are
2 ill today, and their illness renders them unfit to be a witness or
3 even to make a statement, therefore impacting the quality of the
4 evidence that can be provided by the parties.

5 Let me give you a single example. We tried a lot of times to
6 reach Mr. Ruzhdi Saramati. Why Mr. Ruzhdi Saramati? Because this
7 person was obviously an important person in Kukes and more
8 particularly in Kukes metal factory in 1999. It is certain he
9 possessed information directly related to life, to organisation in
10 the Kukes metal factory at the time of the indictment.

11 Well, for months, now for years it seemed, there has been no
12 point in trying to meet him. He is no longer fully with us. He's
13 unable to remember anything, to answer to any question or to accept
14 or refuse any proposal to meet. And yet that's simply the reality.
15 The importance of meeting and calling such a man to the stand, it's
16 obvious. What a loss for the search for the truth.

17 The same is true of all those who died since then and, for some,
18 without ever having made any prior statement. This is the case of
19 several persons who Mr. Pjeter Shala referred us to. Impossible to
20 work properly for a defence and to try to find the truth, to share
21 information about the truth with you, Your Honours. Impossible.
22 These people died. They were fighters. And no possibility to have
23 contact with them. Here is another piece of lost information.

24 And whatever these people may have said, it is certain that, as
25 we have done with others, we could have met some of them and obtained

1 some useful information for the search of the truth. But once again,
2 here is a part of information and truth that has disappeared. You
3 don't have it. We don't have it. You don't have it. You just have
4 a slice, may I say, of the reality. I don't know if the image it's a
5 good one: A slice of the sausage. Do you have the real taste of the
6 sausage if you have only a little slice? Do you have a real view of
7 the reality or real knowledge of the reality with a slice of the
8 reality?

9 And in these both situations, it was worth bearing in mind that
10 Mr. Pjeter Shala is a complete stranger to the causes this major loss
11 of information, this disappearance of evidence.

12 So I should add that the passage of time has had more than one
13 perverse effect on proof.

14 An exceptionally larger number of very interesting archive and
15 documents are no longer available, and they were very interesting, of
16 course, in such a case.

17 Mr. Pjeter Shala's Defence was unable to consult such documents
18 because, unlike the Office of the Specialist Prosecutor, we did not
19 benefit from the information provided by the Serbian authorities,
20 Serbian authorities who have this archive and documents. And it
21 seemed that the Serbian authorities are very proud and happy, that's
22 what they say in the Serbian parliament, of the use they made with
23 the information or the part of information, the information they
24 choose to provide to the Prosecutor. Documents which are not
25 contradictory.

1 The Defence has no access to this. Your Honours, you don't have
2 access too. One more time a part of the reality, accessible this
3 time, it's not for you. It's not for your knowledge. We don't have
4 to share that. We don't know why. We don't know how. But what we
5 know, that something happened, and we are not aware about that, and I
6 cannot understand that this information provided to one party is not,
7 please, contradictory.

8 And then there are all those persons we have searched in vain.
9 It's a fact some people have simply disappeared. They left no trace.
10 Perhaps they have gone abroad or started a new life. Nobody knows.
11 But once again, here is some of the information that is missing from
12 our common knowledge and understanding of what reality was like in
13 the Kukes metal factory in the first half of 1999.

14 As you can see, this is an important part of the reality that is
15 forever inaccessible to us all, and all this due solely to the effect
16 of the passage of time. But it doesn't stop here.

17 The loss of evidence appeared to be also due to some
18 investigative choices. Some investigative, I say, bad choices.

19 In fact, it turned out that dozens of people whose name appear
20 in the statement or information in the Prosecutor files have never
21 been heard or invited to give a statement. The investigators didn't
22 take contact with them.

23 However, it appears that these names of these persons were given
24 to the investigation by people who were present at Kukes 1999 -- in
25 Kukes in 1999, at the Kukes metal factory in 1999. So these last

1 persons in their statement provided these numerous names of people
2 precisely to identify them in order to enable them to be heard, to
3 corroborate their statement or not, to confirm or to complete the
4 information they gave in the statement. And nothing happened.

5 Nothing happened. There is no trace of attempt to contact all
6 those people with the names who were provided by some who provide
7 some statement to the investigators.

8 I provide you two examples. First, Shani Berisha who was named
9 by two Prosecution witness, and I say Prosecution witness, TW4-02 and
10 04, as having influence in the Kukes metal factory and on the
11 detention for Witness 04.

12 A second example. A person nicknamed Loqka who was mentioned by
13 the Witness W04733 in relation in his arrest and detention in Kukes
14 metal factory.

15 You have to take into account that this person has been named in
16 the indictment, that's why I choose this example, and in the
17 Prosecution pre-trial brief. So it's undeniable that these two
18 persons are relevant for the case and for the search of the truth.
19 So I can say I cannot understand nobody finds time to go to meet and
20 to ask some questions to these people.

21 The direct consequences of this was the loss of opportunity to
22 obtain confirmation, corroboration or not, of certain statements.
23 But I have to say that when I see the statement, the prior statement
24 of the people who provided the name of other people to the
25 investigators, corroboration and confirmation presented as favourable

1 to Mr. Pjeter Shala's explanation was welcome, because these people
2 provide some information about Mr. Pjeter Shala. And, of course,
3 yesterday, today, nobody talk about these person who provide some
4 very interesting information about Mr. Shala. The reality don't
5 exist. The reality doesn't exist with the Prosecutor team. Only a
6 part of the reality exists. But what could be trouble, what could be
7 a problem, not a word, not even a word of explanation, the total
8 silence.

9 So, please, we are talking about the case, not your files. The
10 case, the real one we have to deal with.

11 In any case, a great deal of information has once again been
12 lost. All this obviously begs a question: How is it that after more
13 than 20 years of investigation, no investigators found the time to
14 interview these persons when there was still time?

15 And in the aftermath, I would like to add this question: How is
16 it possible that in such case, after more than 20 years of
17 investigation, the Prosecutor is just able to provide barely 17
18 witnesses, almost - almost - a third of whom have nothing to do with
19 the case, with the period covered by the indictment? How is it
20 possible to see that?

21 17 witnesses whereas thousands of people, thousands of people
22 like Mr. Shala passed through Kukes metal factory in 1999. They were
23 witnesses. They were on the spot at the moment. What's consider --
24 consider in this indictment as a criminal moment. No trace of all
25 those people. No trace. Not a word about a thousand people who,

1 like Mr. Shala - like Mr. Shala - have not become aware of everything
2 that was happening in this place.

3 And no trace of these people in the explanation of my dear
4 colleague from the Prosecution team or from the representative of
5 victims. I told you, the reality doesn't exist. These are the key
6 things of what I hear yesterday and today morning.

7 More than this. It has to be, and it should even be stressed,
8 that the file disclosed by the Specialist Prosecutor to the Defence
9 reveals that nothing happened in the investigation in the Shala file
10 for several years. For several years. Your Honour will pay
11 attention to the fact that it appears that for several years, the
12 numerous statements the Witness TW4-01 - I will call him 01, it's
13 better for the thing - claimed to have given were not taken
14 seriously. Not taken seriously. It took a real press campaign in
15 Serbia. We know it. It's in the file. A real press campaign in
16 Serbia to change this situation, to change the things. Indeed, those
17 so-called many statements provided by this witness have not even been
18 found. Have not even been found despite the numerous searches that
19 were made to find them. What a mess.

20 The authorities in charge of the investigation lost, it seems,
21 that's what claims this witness, these so many statements he made.
22 Be serious. The witness pretend he provided numerous statement. He
23 talk about, if I'm not committing a mistake, more than 100
24 statements. But, of course, it was an image, I suppose. But it's
25 not one, two, or three according to him. According to him.

1 It's as these so-called numerous statements never exist at all.
2 And this is, of course, a real problem for the Defence and, of
3 course, for the quality of the procedure and for Your Honours
4 themselves.

5 This is a real problem. Why? Because the Defence should have
6 access to these statements, if only to check that they did not
7 contradict those made later. Particularly about a witness who,
8 that's a fact, changed so much. In these conditions, it cannot be
9 argued that those so-called first statements could be considered as
10 confirmation of statements made later by this witness. Indeed, this
11 witness, as Mr. Aouini will tell you in more details, has already
12 varied so much that an audit was organised in the investigation team
13 to try to find this questionable statement, and nobody found them.

14 Indeed, we received a document, reference SPOE00168130-00168138
15 RED, to justify why these statements could never have been found.
16 Strange document, this one. No signature on it, and there is nothing
17 else to identify the author of this document. But it means such
18 important statements were not introduced in the database. Not
19 introduced in the database of the investigative body. What a mess
20 for an international investigation.

21 Here is clearly, and one more time, an abnormal loss of
22 information which, in any case, directly harms the Defence, of
23 course. Abnormally harm your knowledge of the case, of course. And
24 here is an abnormal attempt to justify an unbelievable assertion of
25 the existence of numerous statements lost by the authorities in

1 charge of investigations.

2 So, at the end, either these statements exist and the Defence
3 had to have access to them, or they never existed and things are
4 problematic for the credibility of this witness.

5 Who is to blame for such a situation? The seriousness of the
6 investigation or the credibility of the witness himself? In all
7 cases this is done to the detriment of the interests and rights of
8 Mr. Pjeter Shala but also the quality and the fairness of the trial
9 itself.

10 One thing must be stressed about this. According to this
11 Witness 01, the facts of this case are incomplete, and the Defence
12 has no access to all the documents collected during the investigation
13 concerning Mr. Pjeter Shala's case. I don't hesitate to add that
14 such a situation is very heavy in its consequences in a case in which
15 this witness, he don't hesitate to assert that a prosecutor who was
16 in charge in the past of the investigation in this case had
17 manipulate his statement and the investigation.

18 You have to remember, and I'm sure you remember, that under oath
19 this witness didn't hesitate, and I don't want to quote the name of
20 this poor prosecutor, that he manipulate the investigation and
21 statement. Unbelievable. But this is the reality. Not a word about
22 that, of course. Not a word about -- and this is the procedure we
23 have to deal with.

24 A last reflection on this. If the Witness 01 was not taken
25 seriously during several years, it can be as much because of the

1 content of the statement that he would have made while the fact that
2 credibility problems encountered in other proceedings. Because we
3 know perfectly well, by the files, of course, this witness provides
4 other statements in other parts of the proceedings, and we know
5 what's happened with these proceedings, yellow house and so on. Just
6 nothing. Just nothing.

7 And this witness, like others, I want to say, W04733 and W01448,
8 were not considered credible and really able to testify enough before
9 the ICTY when it was time, and Mr. Shala appeared there. And they
10 were not considered as credible enough in their attempt to charge the
11 accused at this moment. And I would like to know by what magic would
12 these three witnesses considered not credible in early 2000s suddenly
13 became credible in their statement in 2024? I didn't hear a word
14 about that.

15 I hear that we have a formidable, magnificent, and nice piece of
16 evidence when this Witness 01 or the two others say something. Okay,
17 please, they say something, and then where is the corroboration of
18 that? This is a case. This is a judicial trial. You are not in a
19 café or in the street. We don't have to be confident with the
20 statement of the one or the others.

21 How can we analyse such a situation, such a loss of information,
22 and the definitive and, I say, irreparable nature of this loss? Does
23 this prevent the trial? It hasn't so far. We saw it. But can a
24 trial held under such conditions provide the sufficient guarantee of
25 compliance with the requirement of procedural fairness? When so much

1 evidence, proof, documents, direct witnesses, and other persons
2 involved that were available in good time have been neglected by the
3 investigation, have become unavailable, and have disappeared due to
4 the simple passage of time but also due to unfortunate choices, real
5 abstention and culpable inaction during so many years of
6 investigation. Can we ignore the enormous problem this posed and
7 pretend they don't exist or have no devastating effect to the
8 detriment of the proceedings?

9 For more than 25 years, several fact-finding missions, employing
10 dozens of investigators, have worked and had imposing budget at their
11 disposal, and all this to end up to this: A few selected witnesses
12 to the exclusion of dozens of others who were neglected or skillfully
13 avoided.

14 I provide you an example. W4392. W4392. This is a central
15 witness in this case. All of us know this. This is a central
16 witness because this witness was present during, sure, according the
17 Prosecution team, during the first scene of beating. She was there.
18 This witness was there. Fully in. And could be avoid when I talk
19 about the sex of the witness, My Honour, I'm sorry.

20 So this witness, W4392, was there. This is the only neutral
21 witness in all this case. She is not part, she is not between the
22 victims. This is the only witness is a direct witness, a nice
23 witness, a [indiscernible] witness, and the Prosecution team decided
24 not to call this witness. What are you afraid of? What do you want
25 to hide?

1 This protected witness who refused to meet us. We tried a lot,
2 of course. There is absolutely no reason to be like this.
3 Yesterday, Ms. Wyler talk about this witness. She talked about
4 further detained, subjected to the most brutal violence. It's very
5 interesting to hear this witness. This is the only one you have at
6 your disposal to provide a direct information. Selected witness to
7 avoid the difficulty, I say to avoid the reality. But the search of
8 the truth is a duty for the Prosecution team, of course. This is the
9 rule. And you know perfectly well because we presented our position
10 about that.

11 We are not fear in the Defence of the reality. Every time we
12 have the possibility to obtain a statement, we try to provide a
13 witness. And it was difficult. It was very difficult. Why?
14 Because, as it is said by the Prosecution team, and they are
15 absolutely right, there is a risk for the witness.

16 In this particular proceeding, the only one who provides
17 threaten is the Witness 01. Nobody else. No threaten from
18 Mr. Shala, friend of Mr. Shala, or I don't know who. Only this one
19 issue before you, under oath, during a hearing, threaten against
20 Mr. Shala, his wife, and his children.

21 So I have to remember, all of us, we lost two days before he
22 came to The Hague, a witness. We lost him because he was afraid. He
23 refused to come. This guy signed a document to say: Okay, I'm
24 coming. Okay, I accept to appear. He accept to meet us, to discuss
25 with us, and at the last moment he was too afraid to come. He was so

1 afraid he hide. He hide. And during some weeks, you have to
2 remember that the service of the Court tried to identify him, to find
3 the place where he was. He was hiding because he was fear.

4 So I have to say that by the time a Defence team has been
5 designed, it was more than 25 years after the alleged fact of -- the
6 alleged fact the accused was charged with. A time that the damage
7 has long since been done. In fact, I should point out that the
8 Defence was careful to highlight this situation as early as the
9 preliminary phase, and I quote a reference, 4 March 2022, Status
10 Conference, page 226.

11 Can we seriously maintain that such a situation would have no
12 effect on the fairness of the procedure?

13 So we need to be careful before answering such a question. I
14 don't want to make like in the silent movie where there's those
15 people who throw a cream pie on the other. You know the Defence
16 counsel. So many times they cry about breach, grave breach of the
17 Defence right, and so on. No, no, we have to be careful before
18 answer to such a question.

19 First, I think that the problems that are arised are not due to
20 the complexity of the facts. We have all seen or been involved in
21 many cases where the facts were far more numerous and difficult and
22 where the investigation were carried out correctly in just a few
23 years. In just a few years.

24 Nor can the complexity of the political, material or security
25 issue explain such a delay of treatment. And I am sorry to say that,

1 but before the Judges we have to say all the failures and the
2 scandals that in the past characterised investigative and sometimes
3 the judicial mission in Kosovo cannot be ignored or kept in silence
4 in their very consequences. I am afraid the situation you have to
5 deal with is for part issue of this terrible situation.

6 So there are real problems to be solved, and these have to be
7 analysed in terms of compliance with what legal expert and the law
8 call reasonable time, of course.

9 As you know, this type of procedural situation requires a
10 response in the form of compensation, if any, or insofar as such a
11 compensation is possible. Sometimes the answer may go so far as to
12 state that as no compensation can fully offset the damage, the case
13 must be declared inadmissible.

14 As I said at the beginning of my speech, I believe that the
15 damage I have described is definitively irreversible and there is no
16 way to fully repair it.

17 You will appreciate this. You will appreciate, of course,
18 because if you are the judge of Pjeter Shala, you are first and
19 foremost the judge of the conditions in which these proceedings come
20 before you and the quality but also the defects, the vices of this
21 procedure.

22 So I put the question to you directly and without detour: What
23 are the chances of organising a real useful and effective defence in
24 a context like this? Of course, we are able to appear before you
25 with some marvelous robe, with some marvelous luxury of means, and we

1 are very welcome, and I thanks -- really, I thank the institution and
2 the Registry for the condition in which we are able to work. But on
3 the ground, in the reality, when the people are so fear that, if they
4 are alive, they refuse to meet you, because they know if you work
5 with the Defence, you are deprived of your liberty for some hours.
6 Investigators, police took your phones if you have some phones. But
7 if you have phones, they took it too. They took your note.

8 How is it possible to work properly 25 years after the fact in
9 such conditions? That's a real question. And I'm sure you will have
10 your own feeling. But when you are a defence set up more than 25
11 years after the fact, this is a reality that a defender has to face.
12 And I consider that I am not a crazy one to ask you the question,
13 because that's the question we have to answer every day or almost
14 every day till we are in this case.

15 And I don't pretend it's impossible for us to work. We work a
16 lot. You can trust me. But to work properly, with efficiency,
17 that's, I think so, a real question.

18 It is certain that whatever the means used by Defence counsel in
19 such an environment, the quality of Defence itself is reduced. And I
20 consider I'm a very gentle guy to say "reduced." Justice, the real
21 justice, lies in taking this into account. In fact, even if you were
22 to consider that the situation does not prevent a trial from taking
23 place, you would take into account what has just been explained in
24 order to proceed to compensation.

25 I respectfully submit to you that the very first of this remedy

1 should then consist in adopting an exceptional degree of prudence in
2 the way you read and analyse the evidence that is being administered
3 before you against the accused in this case.

4 In the circumstances described above, the Prosecutor chose to
5 rely on a particularly small - small - number of witnesses and to
6 disregard - to disregard - the statement and testimony given by
7 several persons who were direct witness to the events. We maintain
8 that it's therefore necessary to be particularly demanding as to the
9 existence of contradiction, changes of version, and incongruous and
10 irrelevant random or implausible explanations. I am sure you will.

11 I would like the Defence to be extremely concrete in this
12 respect, and I would like, therefore, to ask you to give the floor to
13 Mr. Aouini to do so.

14 Thank you very much for hearing me.

15 PRESIDING JUDGE VELDT-FOGLIA: Thank you, Defence counsel.

16 We will now give the floor to Mr. Aouini.

17 Please.

18 MR. AOUINI: Thank you, Mr. Gilissen.

19 Good morning, Your Honours, honourable Panel. To start with,
20 Your Honours, maybe on a timing discussion, I see that we have around
21 15 minutes. I propose to go with an introduction for about 12 to
22 15 minutes, and then in private session address a number of
23 witnesses. They take different times.

24 I have two proposals, Your Honours. Either that you allow me a
25 little bit more time past 1.00 so I can address at least one witness

1 in private session after the introduction, to make the link between
2 submissions we make in the introduction and some concrete examples
3 that would need to be dealt with in private. Otherwise, to break
4 early, and then we go in one go with all the public and private
5 submissions.

6 We're in your hands.

7 PRESIDING JUDGE VELDT-FOGLIA: Defence counsel, if I understood
8 your last proposal well, that would mean that we adjourn the hearing
9 now and then take a one-and-a-half-hour break, and then you do your
10 introduction and proceed with also the private session you indicated
11 to us.

12 MR. AOUINI: Exactly, Your Honours. That is one of the options.
13 The other option being that we start now but that we are allowed 25
14 minutes rather than 15 minutes and break at that natural time, which
15 is between addressing one witness and another.

16 PRESIDING JUDGE VELDT-FOGLIA: Yes, but I want to take into
17 account also the time for the interpreters.

18 But what I can do is I ask if that is possible, because then we
19 would continue, let us say, till quarter past 1.00. Okay. I will
20 liaise for that.

21 [Trial Panel and Court Officer confers]

22 PRESIDING JUDGE VELDT-FOGLIA: Defence counsel, you may continue
23 till quarter past 1.00. So you have the floor, and then we will
24 adjourn at a quarter past 1.00.

25 MR. AOUINI: Thank you, Your Honours. Thanks for the

1 interpreters.

2 And good morning to everyone in and around the courtroom.

3 Madam President, honourable Panel, I will address you today on
4 the topic of the witnesses of the case, and more specifically, I
5 propose to go over the main points of credibility that Your Honours
6 need to resolve in order to deliver a just and correct verdict on the
7 charges submitted by the SPO against Mr. Shala in this case.

8 Your Honours, as we embarked on this mandate as Defence lawyers
9 for Mr. Shala, and upon analysis of the case file and throughout, up
10 until today, we were hit. We were hit by the feeling, the unusual
11 and discomfoting feeling that the voice of the victims should be
12 listened to with caution, that we need to be careful to separate what
13 we can trust from what we cannot trust.

14 Indeed, Your Honours, and I had the privilege to represent
15 victims alongside Mr. Gilissen in the early days of the International
16 Criminal Court. We submit to you that this case presents a painful
17 and discomfoting observation, one wishes not to draw, that some
18 victims did not speak the truth, that some victims have made
19 mistakes.

20 But let us be clear, Your Honours. We acknowledge, like
21 Mr. Gilissen said, we acknowledge that we heard accounts of pain,
22 suffering, and grief. We acknowledge that unfortunate, very
23 unfortunate events appear to have happened in Kukes 1999. But it is
24 apparent, Your Honours, that there is a serious risk to derail the
25 course of justice and alter the establishment of the truth through

1 mistake and deliberate misuse of the sacred role of testimony under
2 oath.

3 But the course of justice that Your Honours are entrusted with,
4 in the case of Pjeter Shala, has and needs to deliver a response to
5 this. We need to remind the SPO, Victims' Counsel, the Court, and
6 the public that this case is the case of Pjeter Shala and no one
7 else. And we need to repeat, Your Honours, what we submitted at the
8 outset, that the case of Kukes is not the case of Pjeter Shala.

9 And we submit, Your Honours, that the response that needs to be
10 delivered today in order to protect the rule of law, the right
11 message of justice that will provide Kosovo and the people of Kosovo
12 with trust in the state of law, that retribution is there for any
13 wrong-doing, but also that no one should fear abuse or injustice when
14 they haven't done wrong.

15 We submit, Your Honours, that it is your duty towards the people
16 of Kosovo and towards this man who stands in front of you, having
17 responded and stood trial of the accusations leveled against him.
18 Your duty is to show that no one, absolutely no one, can take the
19 course of justice into a hostage. That testimony under oath is the
20 most serious and sacred right but also duty of a citizen towards his
21 nation, its society, and the history and legacy of that society, and
22 can never be a business or an opportunistic endeavour.

23 The case of Kukes presented to Your Honours does not call for
24 the avoidance of impunity for the real perpetrators of crime. The
25 case of Kukes presented to you calls for the avoidance of injustice

1 that would result from punishing the innocent for acts of others. It
2 is vital that Your Honours make the statement, through your verdict
3 and your judgment, that the court of law is no space for gossip, for
4 approximation, for imagination, and speculation. It is not a place
5 to settle accounts or to hit at the next man at sight. That a court
6 of justice is hostage -- only hostage, voluntarily as it should be,
7 of truth and evidence of reliable and trustworthy nature.

8 Your Honours, we have set out in our brief at length our
9 position regarding the credibility of witnesses, and I shall not
10 repeat those submissions. But with your permission, I wish to touch
11 on the main and salient points to take away from the key witnesses in
12 this case, key witnesses' and victims' accounts, and to respond to a
13 number of submissions made by the Victims' Counsel and SPO yesterday
14 and today.

15 At the outset, Your Honours, the Defence for Mr. Shala, and
16 Mr. Shala himself, wish to make it clear that we deliberately and
17 consciously focused our observation, both written and oral, not
18 essentially on the challenging of the veracity and accuracy of the
19 alleged fact of detention and mistreatment that may have happened in
20 Kukes 1999, but essentially on Pjeter Shala and the lack of any
21 meaningful presence or participation he had during the indictment
22 period and for the offences that are alleged to have happened there.

23 The reason for this, Your Honours, is simple and
24 straightforward. Mr. Shala was not present and did not witness or
25 participate in any of those charged offences. So out of respect for

1 the truth and any harm suffered by innocent people, it was the
2 Defence position that this matter is not the main and central field
3 of legal and factual battle of the Defence in this case because the
4 position of the Defence is, and we said it throughout, bad things,
5 possibly horrible things, may have happened in Kukes at the relevant
6 time, but the nature and extent of it is not clear.

7 What is clear, Your Honours, from the evidence is that what
8 happened in Kukes is not what Prosecution Witness 01 told you
9 happened, and it is certainly not what Prosecution Witness 4733 told
10 you happened. The position of the Defence is that whatever happened
11 in Kukes at that time, Pjeter Shala had no role or participation in
12 it. And in these circumstances, Mr. Shala does not and cannot have a
13 say on what exactly happened to any of the alleged victims during the
14 indictment period in 1999 at the Kukes metal factory.

15 And as observed by Mr. Gilissen during the opening statements of
16 this case, and again today, at the beginning of the closing, the
17 Defence pursued the search for the truth as we firmly believe that
18 discovery of the truth is what shows Your Honours that Mr. Shala is
19 completely stranger and innocent from the accusations leveled against
20 him in this trial.

21 Your Honours, it is no secret to anyone who studies this case
22 and the evidence presented in this trial that the big question marks
23 revolve around the account of three witnesses. As Your Honours
24 perceived through the reading of our brief, and as we will expose
25 today, the case, in fact, boils down to the credibility of one

1 witness in this case. And I believe everyone in this courtroom, at
2 least, knows who it is.

3 Three victims in this case named Pjeter Shala or Ujku as one of
4 the participants in their suffering: Prosecution Witness 01,
5 Witness 4733, and Witness 1448. And we will take them in turn with
6 more detail.

7 But it is important to note that every single victim other than
8 those three never mentions Pjeter Shala or Ujku. When asked in
9 interviews or during investigations or during testimony in court,
10 they all deny ever knowing Pjeter Shala the person or the name
11 Pjeter Shala or Ujku. Those victims know exactly and name with
12 precision who detained them and for what reason. They remarkably,
13 all of them, name the same person as their tormentor and the person
14 responsible for their pain.

15 Two witnesses, Prosecution Witnesses 2 and 4, mention an
16 additional person or persons as an actor responsible for their arrest
17 and detention. But all of those victims, Your Honours, respond to
18 one theme when it comes to the reason behind their arrest and
19 detention: A personal grudge, a personal revenge, a settlement of an
20 old score.

21 And to be able to expand, Your Honours, on the account of
22 protected witnesses, I believe that we should move into private
23 session at this moment before returning later to public session to
24 conclude.

25 PRESIDING JUDGE VELDT-FOGLIA: Very well, Defence counsel.

1 Madam Court Officer, can you bring us into private session,
2 please.

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7 [Open session]

8 THE COURT OFFICER: Your Honours, we are back in public session.

9 PRESIDING JUDGE VELDT-FOGLIA: Thank you very much,
10 Madam Court Officer.

11 I propose that we now take our lunch break and that we continue
12 at half past 2.00. Yeah? Is that agreeable for everybody? Very
13 well.

14 Then the hearing is adjourned.

15 --- Luncheon recess taken at 1.08 p.m.

16 --- On resuming at 2.30 p.m.

17 PRESIDING JUDGE VELDT-FOGLIA: Welcome for this afternoon's
18 session, which will be for one and a half hour till 4.00.

19 Yes, Defence counsel, you have the floor again. Or maybe one
20 thing I should do, and that is to see if everybody is present. But I
21 see there the same composition, there the same composition, and I see
22 one person new on the left-hand side.

23 MR. AOUINI: Thank you, Your Honours. And good afternoon to
24 everyone. We are joined for this session by Ms. Tzortzia Peno, who
25 is a legal intern joining for the first time. Thank you,

1 Your Honour.

2 PRESIDING JUDGE VELDT-FOGLIA: Very well. Noted. Then you have
3 the floor.

4 MR. AOUINI: Thank you, Your Honour. And to be able to proceed
5 with earlier submissions, we need to go straightaway back to the
6 private session, Your Honours.

7 PRESIDING JUDGE VELDT-FOGLIA: Do you have an indication how
8 long we will be, less or more, in private?

9 MR. AOUINI: Your Honours, my best estimate is we will be around
10 35 minutes, maybe 40, maybe 30, in the private session before coming
11 back to public session to conclude.

12 PRESIDING JUDGE VELDT-FOGLIA: Very well. It's for people in
13 the public gallery and watching the streaming. Very well.

14 Madam Court Officer, can you bring us into private session,
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3 [Open session]

4 THE COURT OFFICER: Your Honours, we are now in public session.

5 PRESIDING JUDGE VELDT-FOGLIA: Thank you, Madam Court Officer.

6 Defence counsel, you may proceed.

7 MR. AOUINI: Thank you, Your Honours.

8 Your Honours, as you heard from the Defence today, and
9 throughout the final brief, on behalf of Mr. Shala, the theme that
10 transpires from the assessment and analysis of the Prosecution
11 witnesses' account is the theme of approximation, error, or, shall I
12 say, mistake. And to sum up our address, Your Honours, on this
13 topic, allow me to conclude with these few words.

14 Any detention, mistreatment, or crime was for one sake, personal
15 revenge, for which Mr. Shala did not partake. He had no authority,
16 no position, no rank. A document giving him command was proven fake.
17 Allegations were based on gossip, hearsay, shared like cake. One
18 said he's black, that he threw bodies in lake. One identified Wolf
19 on a picture that was fake. The picture was not of Shala, the
20 Prosecution would still take. There was threat, there was perjury,
21 some chose to undertake. The SPO's response? Give them a break. If
22 and when tested evidence proved to shake, contradictions and untruths
23 began to flake. All there was is one encounter after the war's
24 break. Shala was told of treason, which he could not take. Gave
25 slaps on one occasion and no further ache. Then false accusations

1 began, added up, until his arrest's wake. The truth is clear to
2 those awake, and the decision is Your Honours to make. The life of a
3 man is today at stake, and there is no room for further mistake.

4 Thank you, Your Honours.

5 PRESIDING JUDGE VELDT-FOGLIA: Thank you, Defence counsel.

6 Mr. Gilissen, you have the floor.

7 MR. GILISSEN: Thank you very much, Your Honour.

8 I thank Mr. Aouini for being so clear. And I have to say now we
9 are in the core of the Defence of Mr. Shala. Difficult, of course,
10 to continue to mischaracterise it or to say nobody is able to
11 understand. It seems now very clear.

12 Before asking you to provide the possibility to Ms. Cariolou to
13 deal with the aspect of the procedure and the legal points we have to
14 develop, I would like to focus on just some things.

15 You are able to understand that Shala's case is not the Geci
16 case or the Krasniqi case. The tribunal of Mitrovice, the court, the
17 Mitrovice court, were able to understand that everybody, every people
18 who were invited to provide some statement or some testimony were
19 able to say Mr. Krasniqi was on the spot. He was dealing, he was
20 responsible of the detainees in Kukes metal factory. Mr. Geci was on
21 the spot. He was there. A lot of people, a lot of people explain
22 it. And more than this. These people agree they were in charge with
23 the detainees and the interrogation, the interview they made with the
24 detainees.

25 It's absolutely not the case with Mr. Shala, and this is a huge

1 difference, of course. You don't have the same kind of quality
2 evidence in your hand because nobody has such a quality evidence.
3 And this is, in my opinion, very, very important to underline it, to
4 make the difference, of course.

5 Yesterday, we heard the last scenario of the Defence team. It's
6 not the first one. I will have the possibility to explain it when I
7 have to conclude after Ms. Cariolou explains to you some elements.
8 But it was amazing to hear the last scenario for the murder. Have a
9 guess. Do you know who is the shooter? It's no more what Witness 01
10 says, Van Dam. He told us Van Dam in some statements. No more
11 Bedri. No, no. No more Liman Geci. It was the same for
12 Witness 1448. No, no. The shooter is Mr. Krasniqi, the man who has
13 been acquitted is the shooter. This is the last version we have now.

14 That's more than amazing. We have to face, of course, a tiny
15 problem. Is it serious to say today, "No, we change it one more
16 time." One more time.

17 So what to say? Perhaps two reflections. After the acquittal
18 of Mr. Krasniqi and Mr. Geci for the murder, is it fair to consider
19 that the one, the responsive of this murder is Mr. Shala? Is it
20 fair? Is it serious? When you know the reason why these two people,
21 Krasniqi and Geci, were acquitted. Because lie? Because
22 contradictions? Because changement of versions? Because some
23 pretend Mr. Geci was there and we know he was not? A judicial
24 decision has been issued about this fact. He was not there.

25 And now, and, of course, today, nobody says something about

1 that, about the presence of Mr. Geci. Because according to
2 Witness 01, he was there. And the document issued from the hospital
3 is a fake one, is false. It continues. What's happening at this
4 moment? Nobody knows, of course. In such conditions, nobody knows.
5 And that's why the wise judges in Mitrovica tribunal and Mitrovica
6 court issued a decision of acquittal, to say in such conditions it's
7 impossible to condemn someone.

8 Of course, it's not a question of will. It's not a question of
9 taste. It's not a question to cry on the pain suffered by the
10 Witness 01. I'm sure he suffered. It's not the point. But to
11 convince -- to issue a sentence against someone in such condition,
12 that's really not -- I can't say. That's really not justice.

13 So I told about the Witness 4392 in the first part of my speech
14 this morning. I ask you to focus on that. And I fully understand.
15 I have to say I fully understand the Prosecutor not to call this
16 witness, because she's saying nothing about Mr. Shala. But this is
17 the point, please. This witness said nothing when this witness
18 described the persons who were in this beating scene and so on.

19 So thank you very much for hearing me. I think, with your
20 authorisation, or more than this, I ask you to give the floor to
21 Ms. Cariolou. Thank you very much.

22 PRESIDING JUDGE VELDT-FOGLIA: Thank you, Defence counsel.

23 Before I do that, I will, of course, give you the floor, but
24 there is a -- maybe a correction to make to the transcript. Page 96,
25 line 8, I saw a reference made to "the last scenario of the Defence

1 team." I understand that that is the last scenario of the SPO team.
2 Just for the record. Very well.

3 Ms. Cariolou, you have the floor, please.

4 MS. CARILOU: Thank you, Your Honours. Before I begin, just a
5 housekeeping matter.

6 I believe that we have 30 more minutes to go for today. I am
7 estimating that I would need more time to cover the first subject I
8 would like to cover today. I will find an appropriate moment and
9 interrupt so as to respect the interpreters and stop in 20, 25
10 minutes, and then continue tomorrow morning if that's fine.

11 PRESIDING JUDGE VELDT-FOGLIA: Thank you for thinking ahead on
12 this matter. When you see that the appropriate moment is there, then
13 we adjourn and continue tomorrow.

14 MS. CARILOU: Thank you, Your Honours.

15 I will address a few matters on the law as well as a few matters
16 related to the fairness of these proceedings.

17 First, I will focus on Count 1, the charge for the offence of
18 arbitrary detention in a non-international conflict.

19 We heard yesterday the Prosecution presenting the legal basis as
20 well as the evidence they rely upon to prove their case in this
21 regard. The only basis they refer to twice was Common Article 3 of
22 the Geneva Conventions. Now, this is entirely understandable. This
23 is because Common Article 3 is the only relevant provision that
24 regulated the conduct between parties in the -- to the
25 non-international armed conflict that we are dealing with here.

1 Crimes must be recognised, as we know, as crimes by the law in
2 force at the time of the events in question. This is a
3 well-established principle of the law. It requires that when
4 adjudicating events taking place in 1999, the law as it stood in 1999
5 is the law that must be applied. The Geneva Conventions and their
6 Protocols were ratified by the Socialist Federal Republic of
7 Yugoslavia in 1979. Therefore, they were in force during the armed
8 conflict in Kosovo.

9 Now, the problem is that Common Article 3 of the Geneva
10 Conventions does not contain the criminal offence of arbitrary
11 detention. When setting out the legal basis of this charge, the
12 Prosecution did not refer to the Constitution of the Socialist
13 Federal Republic of Yugoslavia of 1974. The Prosecution did not
14 refer to the 1977 Criminal Code, nor did it refer to any other
15 domestic statute or ratified treaty. This is not due to
16 inadvertence. It is because the crime of arbitrary detention in a
17 non-international armed conflict was not to be found in any of these.

18 Arbitrary detention in an non-international armed conflict did
19 not constitute a criminal offence in Kosovo at the material time.

20 Should we look elsewhere for the legal basis of the
21 Prosecution's charge? Was there another norm of international law
22 that could form such basis? Well, the 1974 Constitution prohibits us
23 from doing so. Article 181 of the Constitution provides that
24 criminal offences and sanctions must be determined by statute.

25 With regard to the application of international law, the

1 constitution required that only ratified international treaties could
2 be directly applied by the courts, and that's in Article 210 of the
3 constitution.

4 And this is, indeed, how the constitution was interpreted and
5 applied in a series of judgments by the Supreme Court of Kosovo. The
6 Supreme Court of Kosovo unequivocally held in the case of Kolasinac
7 that in the legal framework of Kosovo "criminal offences and
8 punishments must be provided for in specific domestic legislation."
9 Thus, criminal offences deriving from customary international law
10 without domestic incorporation cannot be considered criminal offences
11 prescribed in Kosovo in 1999.

12 In any event, Your Honours, in 1999, which is the only relevant
13 time we are concerned with here, customary international law did not
14 prescribe as an offence arbitrary detention in a non-international
15 armed conflict. At that time, international humanitarian law
16 applying to this type of conflict did not impose specific obligations
17 on non-state armed groups concerning detention that went beyond the
18 requirement to ensure humane treatment of detainees.

19 In 1999, the mere fact of deprivation of someone's liberty on
20 security grounds in a non-international armed conflict was not, in
21 itself, a criminal offence under customary international law.

22 Can it be retrospectively considered an offence in way that
23 would make Mr. Shala's prosecution for it lawful and consistent with
24 the Kosovo Constitution? Again, the answer is simple: No, it
25 cannot. Subsequent provisions and legal frameworks can only be

1 applied to the extent that they are more favourable to the accused.

2 Now, the indictment is also based on Article 14(1)(c) of the Law
3 of the Kosovo Specialist Chambers. Article 14(1)(c) refers to Common
4 Article 3 of the Geneva Conventions and sets out an exhaustive list
5 of criminal conduct, and it does not list arbitrary detention.

6 Extending the list of crimes without an explicit legal basis is
7 a clear violation of a principle of legality which, as we know, is
8 guaranteed by Article 33 of the Constitution and Article 7 of the
9 European Convention on Human Rights.

10 Prosecuting Mr. Shala for this crime is a clear breach of the
11 principle of legality.

12 Now, what we would urge the Panel to consider is that even
13 assuming that arbitrary detention could be considered a crime for the
14 purposes of the Kosovo Specialist Chambers, which it is not, there is
15 no general agreement as to what can be considered arbitrary. What
16 amounts to arbitrary in the context of a non-international armed
17 conflict is context-specific. It depends on the general
18 circumstances and the resources available to the armed group in
19 question.

20 The Prosecution's evidence shows that the KLA emerged as an
21 armed resistance group over time without the organisation, without
22 the structures, without the facilities, or the resources of a
23 conventional army of a state or an established local administration.

24 In many locations, the KLA emerged as groups of individuals able
25 to defend their families gathered together, spontaneously, in

1 response to the attacks and in response to the ethnic cleansing by
2 the Serbian military forces and paramilitaries.

3 During the indictment period, although some formal structures
4 were established within the KLA, it is clear that the KLA still
5 operated as a people's army, a voluntary army in makeshift facilities
6 with scarce resources.

7 The conditions in which the KLA operated in 1999 entailed no
8 organisation akin to that of a local administration, which would have
9 enabled it to ensure and apply the safeguards we normally expect to
10 see to protect against arbitrary detention. In light of the largely
11 informal structures of command and control and the limitations of the
12 KLA's capacity, it cannot be inferred that the KLA was capable of
13 having in place competent authorities, as the Prosecution suggested
14 yesterday, and ensuring respect for detailed rules on detention, for
15 periodic review of the lawfulness of detention, and the other
16 procedural guarantees we would normally expect.

17 It is simply not reasonable to have expected or assume that the
18 KLA had such capacities in 1999 when operating extraterritorially,
19 outside Kosovo, in Albania in the middle of a raging war.

20 The ICRC Commentary of 2020 states, and I quote, that:

21 "At the time of writing ... the question of which standards and
22 safeguards are required in non-international armed conflict to
23 prevent arbitrariness is still subject to debate and needs further
24 clarification ..."

25 This is the ICRC Commentary on Common Article 3 of the Geneva

1 Conventions as it stood in 2020. How can such standards and
2 safeguards be presumed to have been clear in 1999? Even the ICRC
3 study on which the decision confirming the Prosecution's indictment
4 was based acknowledges that detention of civilians will not be
5 arbitrary if it is based on security imperatives.

6 Your Honours, there is an inherent inconsistency in the way in
7 which the Prosecution has pleaded its case on this point. On the one
8 hand, they maintain that detention of the victims identified in the
9 indictment was arbitrary. On the other, they presented extensive
10 evidence showing that each victim was suspected of being a Serb spy,
11 a traitor, or an enemy collaborator. We refer the Panel in this
12 respect to the Prosecution's final brief, paragraph 24.

13 Yesterday, the Prosecution stated this about two of the named
14 victims, and I quote:

15 "... they were labelled as having committed the highest form of
16 treason. They were Serb combatants, essentially. They had fought
17 with the Serbs. They had killed Albanians."

18 This is at page 73, I believe, of the provisional transcript.

19 The Prosecution also stated yesterday that another victim, who I
20 will not name because we're in open session, worked, and I quote,
21 "for the Serb police." And this is on page 4131 of the transcript.

22 Witness 04 stated that when detained he was questioned and he
23 was asked to provide a written statement to a judge. A few days
24 later, he said that he was released by this judge.

25 Witness 1448 stated that upon his arrest, he was questioned on

1 suspicion of undermining the efforts of the KLA and that he would
2 face trial for it.

3 Witness 05 stated that upon arrival at the metal factory, he was
4 accused of assisting the Serbs by expelling people from his village,
5 and that he was questioned in the presence of someone who posed as a
6 lawyer or a judge.

7 Witness 10 testified that people were questioned at the metal
8 factory and that they were referred to as "suspects."

9 Witness 11 testified that he was questioned at the Kukes metal
10 factory by a judge or prosecutor.

11 Many witnesses identified this so-called judge or prosecutor by
12 name. When a statement was taken from him, he confirmed that he was
13 a former prosecutor and that he had participated in the questioning
14 of individuals suspected of being collaborators. This was a summary
15 of the Prosecution's evidence on this point.

16 Your Honours, the Prosecution cannot have its cake and eat it at
17 the same time. Which one is it? Was the detention arbitrary or was
18 it based on grounds of suspicion of collaboration with the enemy
19 forces?

20 In addition, was it or was it not reasonable for the KLA
21 commanders or soldiers or whoever was in charge at the Kukes metal
22 factory to suspect that these persons posed a security threat? We
23 cannot answer this question, and, in our respectful submission, the
24 Panel can also not answer this question. This is simply because we
25 have not heard any evidence on this matter. The Prosecution has

1 simply failed to demonstrate that any detention was not based on
2 reasonable suspicion and that therefore it was arbitrary.

3 This is a question that must be separated from any treatment
4 these persons may or may not have received while allegedly detained.
5 This is a separate matter.

6 Importantly, and in any event, the evidence relied upon by the
7 Prosecution shows that Mr. Shala had no effective power to arrest,
8 had no effective power to detain, and had no effective power to
9 release anyone. The Prosecution, in fact, accepts his lack of a
10 position of authority over anyone, anyone generally or any other KLA
11 soldier in particular.

12 Being influential, as they put it yesterday, does not imply a
13 power to arrest, to detain, or release. To suggest otherwise, it is
14 simply absurd.

15 Now, without prejudice to what we have said, our position is
16 that in any event the Prosecution has entirely failed to meet its
17 burden and demonstrate the elements of this crime as these have been
18 set out by this Panel in the Mustafa case.

19 First, the Prosecution has failed to present any evidence
20 suggesting that the accused had arrested or was in any way involved
21 in the arrest or release of any person. They did not show that he
22 had any role in the decision-making as to who should be arrested or
23 for how long and who or when should be released.

24 Second, the Prosecution provided no evidence suggesting that the
25 accused knew or had reason to know that anybody deprived of their

1 liberty was deprived of their liberty arbitrarily, without being
2 formally charged or without a determination that there were
3 reasonable grounds to believe that security concerns made his or her
4 detention necessary, or, indeed, that he was reckless about it.

5 The evidence presented by the Prosecution does not show that
6 Mr. Shala knew that there was any regime in which persons were
7 deprived of their liberty at the Kukes metal factory without good
8 reason, arbitrarily.

9 No evidence was presented showing that Mr. Shala could exercise
10 any authority, power, or control over others who were arrested -- who
11 arrested, detained, or released any detainee.

12 The Prosecution's allegation that the accused enforced and
13 continued the arbitrary detention of detainees through the act of
14 cruel treatment does not satisfy the elements that need to be met.
15 As the ICTY appeals chamber stated in the Celebici appeal judgment,
16 and I'm reading from paragraph 342 of that judgment:

17 To establish that the accused committed the offence of unlawful
18 confinement of civilians, because there we're talking about an
19 international armed conflict, unlike what we have here, "something
20 more must be proved than mere knowing 'participation' in a general
21 system or operation pursuant to which civilians are confined."

22 Such responsibility is more properly allocated, the ICTY appeals
23 chamber stated, to those responsible for the detention in a more
24 direct, in a more complete manner, such as those who actually place
25 an accused in detention without reasonable grounds to believe that he

1 constitutes a security risk; or those who, having some powers over
2 the place of detention, accepts a civilian into detention without
3 knowing that such grounds exist; or who, having power or the
4 authority to release fail to do so despite knowledge that no
5 reasonable grounds for detention exist, or that such grounds have
6 ceased to exist.

7 None of these elements, Your Honours, are shown here, even on
8 the version presented by the Prosecution.

9 This Panel concluded in the Mustafa case that Mustafa had
10 committed the crime of arbitrary detention due to his position as the
11 overall and the only BIA commander of particular importance, as well
12 as the fact that by virtue of that position, Mr. Mustafa had the
13 responsibility to ensure that the detainees were afforded basic
14 guarantees.

15 Mr. Mustafa's position, therefore, is entirely distinguishable
16 from the position of Mr. Shala. As we've said, no evidence was
17 presented that Shala held a position of responsibility or authority
18 over anyone's arrest, detention, or release. In fact,
19 Witness Mark Shala testified that the accused was nothing more than a
20 simple soldier.

21 In addition, the Prosecution failed to provide any evidence
22 showing that a group of persons, which included the accused, had
23 agreed to adopt a common criminal plan to arbitrarily detain
24 civilians. To the contrary, the evidence relied upon by the
25 Prosecution showed that there was no unison, but, actually, certain

1 KLA members, other than the accused, acted individually to settle
2 personal scores, personal grievances with the alleged detainees.

3 The Prosecution presented the evidence of several persons
4 detained at the Kukes metal factory who stated that their detention
5 was motivated by personal revenge taken against them by specifically
6 Xhemshit Krasniqi, Sabit Geci, and Shani Berisha. As Mr. Aouini has
7 already explained, and we set out in paragraph 70 of our final brief,
8 the evidence presented in this case portrays a clear line of personal
9 revenge taken against persons detained at the Kukes metal factory,
10 instead of actions pursuing any common purpose.

11 In fact, the so-called judge or former prosecutor himself stated
12 that it was the routine that a person who brought an individual in
13 would further work on the case and be responsible for that person,
14 emphasising the lack of unity, the lack of coordination between the
15 persons in charge there.

16 Witness 04 also stated that KLA members were responsible for
17 persons from their own region, in his words, "the people that they
18 knew," which is why Witness 04 believed that Xhemshit Krasniqi was
19 responsible for him.

20 No witness named the accused as involved in his or her arrest or
21 being, in this sense, responsible for them. Moreover, several
22 witnesses provided evidence as to who had authority or who was in
23 charge of the detainees and the detention building at Kukes. No
24 witness named the accused as one of the persons who had authority
25 over the detainees or was in any way in charge.

1 Witness 01 testified that Xhemshit Krasniqi and Sabit Geci were
2 the "main ones," as he put it, while Krasniqi was responsible for the
3 prison and in charge of the detention room. While when Sabit Geci
4 was present, in his words, "nobody could do anything or say anything
5 because he was in charge."

6 Witness 1448 stated that Kadri Veseli, Sabit Geci,
7 Xhemshit Krasniqi, and Bedri Halili were in charge of the detention
8 facilities and the headquarters, while Driton Krasniqi was in charge
9 of the detention room.

10 Witness 1448 also confirmed before the Mitrovica District Court
11 that Xhemshit Krasniqi was in charge of this camp.

12 Similarly, Witness 05 stated that Sabit Geci and
13 Xhemshit Krasniqi had authority over the detainees and that they were
14 in charge.

15 Witness 4733 stated that Commander Hoxha, whom he identified as
16 Ruzhdi Saramati, was "the head, was the supervisor of the prison"
17 where he was detained.

18 No evidence was presented of any association, let alone a close
19 association of the accused, with these persons.

20 For all these reasons and the reasons that are in our final
21 brief, it is our position that the Prosecution has not proved beyond
22 a reasonable doubt that the accused can be held criminally liable
23 under any of the pleaded modes of liability for the crime of
24 arbitrary detention.

25 I will now briefly deal with the charges under Counts 2 and 3.

1 It is essentially boiled down to the evidence of the three witnesses
2 that has already been discussed at length by Mr. Aouini as well as in
3 our final brief.

4 For the reasons he mentioned and are extensively developed in
5 paragraphs 93 to 146 of our final brief, we submit that the
6 Prosecution has failed to show that Mr. Shala committed the crime of
7 cruel treatment or torture in the instances and in the manner pleaded
8 in the indictment.

9 Your Honours, I'm hesitating. I believe I would rather
10 interrupt here and continue tomorrow so as not to break or interrupt
11 the next theme that I would like to explore with you, if that's fine.

12 PRESIDING JUDGE VELDT-FOGLIA: Very well. We only have ten
13 minutes left, and it has been a long day.

14 So for tomorrow, Defence counsel, only a rough estimation would
15 do. But how much time do you think that you would like to continue?

16 MR. GILISSEN: So, Your Honour, it seems that 40 minutes for
17 Ms. Cariolou, and 15, maximum 20 minutes for me to conclude, to draw
18 some conclusions. And then we have to enter some words about
19 sentencing. And you know the diary you issue perfectly well and
20 better than me, so ...

21 PRESIDING JUDGE VELDT-FOGLIA: Okay. Good.

22 MR. GILISSEN: Thank you.

23 PRESIDING JUDGE VELDT-FOGLIA: That suffices. Thank you very
24 much, Defence counsel.

25 Then tomorrow we will continue with the closing statements of

1 the Defence, and then we will follow the agenda as we have set it out
2 in our decision for this week, so I will not repeat that.

3 Before I adjourn, I would like to know if the Specialist
4 Prosecutor's Office has something to raise with the Panel.

5 MR. DE MINICIS: Not at this time. Thank you.

6 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

7 Victims' Counsel, you have the floor.

8 MR. LAWS: No, thank you, Your Honour.

9 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

10 Defence counsel, is there something you would like to raise?

11 MR. GILISSEN: No. Thank you very much.

12 PRESIDING JUDGE VELDT-FOGLIA: Okay. Then I wish you a good
13 evening.

14 And the hearing is adjourned.

15 --- Whereupon the hearing adjourned at 3.52 p.m.

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