

1 Wednesday, 14 September 2022  
2 [Closing Statements]  
3 [Open session]  
4 [The accused attended via videolink]  
5 --- Upon commencing at 9.30 a.m.

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

8 THE COURT OFFICER: Good morning, Your Honours. This is  
9 KSC-BC-2020-05, The Specialist Prosecutor versus Salih Mustafa.

10 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

11 First, I will call the appearances.

12 Let me see. Could you tell us who is present for the Specialist  
13 Prosecutor's Office, Mr. Prosecutor.

14 MR. MICHALCZUK: Yes. Good morning, Your Honours. Good  
15 morning, everyone in and outside of this courtroom. Today the  
16 Prosecution is represented by Mr. Jack Smith, Specialist Prosecutor;  
17 Prosecutors Silvia D'Ascoli and Filippo de Minicis; we also have with  
18 us the case manager, Julie Mann; and I am Cezary Michalczuk, the  
19 SPO Prosecutor.

20 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

21 Victims' Counsel, you have the floor.

22 MS. PUES: Good morning, Your Honours. Good morning, everybody.  
23 Like yesterday, the victims participating in this trial are today  
24 represented by Jack Provan as Junior Legal Associate, by Brechtje  
25 Vossenbergh as my co-counsel, and by myself, Anni Pues, as counsel.

1           PRESIDING JUDGE VELDT-FOGLIA: Thank you, Victims' Counsel.  
2           Defence counsel, you have the floor.

3           MR. VON BONE: Thank you very much, Your Honour. The Defence is  
4 represented by myself, Julius von Bone; Mr. Betim Shala as my  
5 co-counsel; Mr. Fatmir Pelaj, investigator and interpreter. And  
6 joining us via remote is Mr. Mustafa. Thank you very much.

7           PRESIDING JUDGE VELDT-FOGLIA: Thank you.

8           And for the record, you're appearing before Trial Panel I.

9           Today we continue hearing the closing statements in this case.

10          Before we go to that, the Panel will address a preliminary  
11 matter.

12          The Panel notes that yesterday at 11 minutes past 4.00,  
13 Victims' Counsel notified the Panel and the Defence that it did not  
14 file written submissions on reparations within the deadline of the  
15 7 September of this year, as set out in the paragraph 20 of the  
16 Panel's decision 468 dated 31 August 2022. This was due to a  
17 misunderstanding on the part of the Victims' Counsel.

18          The Panel notes that it requested the Victims' Counsel to send  
19 an e-mail -- we sent her an e-mail through CMU shortly after to file  
20 submissions by 2000 yesterday evening.

21          The Panel would like to receive submissions on the submissions  
22 of the Victims' Counsel from the Defence counsel.

23          Defence counsel, for the Panel, we have a strong preference to  
24 receive all submissions, all relevant submissions orally before the  
25 closing of the case, so my request to you would be if you are in a

1 position to reflect on those submissions when the reparations will be  
2 discussed, if you have any submissions to make on that point, of  
3 course, you have the floor.

4 MR. VON BONE: Your Honour, we will do the entire oral  
5 arguments, including we address the issues that the Victims' Counsel  
6 has put forward in her filing. So as far as we are concerned, we can  
7 close the entire case, as far as the Defence is concerned, today.

8 PRESIDING JUDGE VELDT-FOGLIA: [Microphone not activated].

9 Thank you for being in the position to orally present your  
10 submissions with regard to the submissions made by the  
11 Victims' Counsel, and we have planned to do that tomorrow. Yes, very  
12 well.

13 Now, then we can begin with the closing statements by the  
14 Victims' Counsel on the guilt or innocence of the accused and on  
15 sentencing, if any, for which you were allocated, Victims' Counsel,  
16 one hour.

17 You have the floor.

18 MS. PUES: Thank you, Your Honours.

19 With that, once again, good morning, everybody.

20 In my statement today, Your Honours, I will not seek to  
21 duplicate arguments made by the Specialist Prosecutor. Instead,  
22 highlighting some key aspects of importance to the victims  
23 participating in this case.

24 This trial is the first war crimes case before the Kosovo  
25 Specialist Chambers. For the victims participating here, it is

1     hugely important to finally see this trial drawing to a close and  
2     gaining more clarity. Clarity on the scope of responsibility of the  
3     accused, his guilt or innocence, and the sentence that the Panel may  
4     decide on, as well as the reparations they're entitled to.

5             What I will do today is I will firstly address the crimes and  
6     the accused's legal responsibility or, as criminal lawyers would say,  
7     the modes of liability. Secondly, we will take some time to discuss  
8     the charge of murder in more detail to complement the presentation we  
9     heard yesterday. We then turn, briefly, to discussing the  
10    credibility and reliability of some of the evidence before the Panel.  
11    And, lastly, it's thoughts on sentencing.

12            The crimes for which the accused is held responsible.

13            Victims in this case were subjected to arbitrary detention, to  
14    cruel treatment, torture, and also murder. The Specialist Prosecutor  
15    yesterday morning put victims very much at the heart of his statement  
16    and carved out in detail the experiences that they've had, and we've  
17    heard even some of the statements made in court. All this was very  
18    much appreciated.

19            Now, one of those charges is the charge of arbitrary detention.  
20    We've heard several first-hand accounts of victims being arbitrarily  
21    detained. The arrests were unjust. They lacked any due process  
22    guarantees. No law justified their arrest. No warrants existed. No  
23    judge reviewed their detention. Families weren't notified. And  
24    instead, in at least one case, we heard family members were actively  
25    told lies about the whereabouts of their loved ones.

1           An arbitrary detention is a human rights violation. To be free  
2 from such acts is one of the core rights included in the Universal  
3 Declaration of Human Rights. Article 9 explicitly states no one  
4 shall be subjected to arbitrary arrest, detention or exile.

5           And why is arbitrary detention such a devious crime, as it was  
6 experienced by victims in this case?

7           It renders victims extremely vulnerable to other human rights  
8 violations, and they are deprived of any means to defend themselves.  
9 And this is precisely what happened here. After the initial  
10 arbitrary detention, they were exposed to cruel treatment, to  
11 torture, and to murder. This is why I place this emphasis on this  
12 aspect of arbitrary detention to begin with. It was a deeply  
13 dehumanising experience that left the victims powerless and  
14 vulnerable. It also left the family members searching, helpless,  
15 anxious, and equally vulnerable.

16           We've heard accounts of the crime from both sides: The  
17 witnesses directly exposed to it, but also those desperately  
18 searching for a family member. Although it is difficult to untangle  
19 the impact of this crime from those that follow, it's important to  
20 emphasise that we don't underestimate what arbitrary detention alone  
21 has done to the victims.

22           And while I will discuss the credibility of witnesses and the  
23 reliability of evidence at a later point in my statement this  
24 morning, there is no shred of a doubt that people were detained and  
25 were detained without any justifiable reason or law supporting their

1 detention.

2 The accused is also responsible for cruel treatment of the  
3 victims who testified before this Court, and those are the victims  
4 held at the compound in Zllash. The Prosecution has already  
5 described in detail the conditions imposed on the victims and the  
6 harrowing abuse they endured. The cruel treatment they were exposed  
7 to was a serious attack on their human dignity and it triggered  
8 immense suffering. And what is important to highlight from the  
9 perspective of victims is again this additional dehumanising aspect,  
10 making them feel like or even worse than animals, wishing, some of  
11 them, for actually death to come, to wait for their death.

12 These conditions were combined with active acts of torture  
13 inflicting severe physical and mental pain and suffering. The  
14 perpetrators, the accused, seem to seek to punish those, and I cannot  
15 emphasise this enough, wrongly suspected of collaborating with the  
16 enemy or being accused as thieves, wrongly accused of this.  
17 Torturous acts, beatings that seemed to seek to intimidate those with  
18 different political views. We have heard more of that from the  
19 Specialist Prosecutor yesterday. Or targeted for other unknown  
20 reasons. Burning, beating, electrocuting, mock executions, all those  
21 acts left the victims scarred forever physically and psychologically.

22 The prohibition of torture is absolute, and it's one of the  
23 oldest regulations among the rules of war, and nothing - nothing -  
24 ever justifies inflicting any form of torture. I have said this in  
25 my opening statement, and I will say it again here, as this is a core

1 message that this trial needs to convey.

2 The victims in this case all shared the feeling of how important  
3 it was to defend the people of Kosovo against Serbian persecution,  
4 but the message needs to be clear that torture is never justified. A  
5 just aim does never justify unjust means.

6 The Defence continuously asserted that what the victims had said  
7 was simply not true. This defence is not good enough. The victims  
8 not only offered their own testimony as evidence for the torture they  
9 suffered, they also offered the scars on their bodies and minds as  
10 further evidence. Independent experts, as suggested by  
11 Victims' Counsel and ordered by Your Honours, the Trial Panel,  
12 examined some of the direct victims, and these experts confirmed in  
13 their reports that the victims' bodies showed multiple scars, very  
14 significant and distinct impairments that are fully consistent with  
15 the torture described. It is very powerful evidence.

16 It also documents the psychological impact that crimes have had  
17 on victims. They continue to suffer from post-traumatic stress and  
18 re-live that horrific time in nightmares and flashbacks.

19 The experts who delivered these reports are working to  
20 internationally recognised standards and scientifically agreed  
21 approaches. They have adhered to the Istanbul Protocol, an  
22 internationally agreed manual on the effective investigation and  
23 documentation of torture and other cruel, inhuman and degrading  
24 treatment when they were conducting their examinations and issuing  
25 their reports in this case.

1           It is striking, to say the least, that the Defence did not raise  
2 any objections to the choice of experts, their methods, nor the  
3 viability of their reports. It did not oppose the admission of these  
4 reports into evidence. These reports, in our view, leave no doubt  
5 that the experiences of cruel treatment and torture described by the  
6 direct victims were not made up but concerned very real and very  
7 traumatising events, and the accused is one of those responsible for  
8 these crimes, as I will now discuss.

9           With that, let me turn to the modes of liability.

10          We've heard evidence from different witnesses that pin the  
11 accused, Commander Cali, the man with the red hat, directly to the  
12 crimes, to situations of arbitrary arrest and directly to torture.  
13 This evidence clearly indicates the direct involvement of the accused  
14 in the crimes and allows prosecution as a direct perpetrator. The  
15 Prosecution has discussed this amply and provided evidence on this.

16          He was the one starting the mistreatment of one of the  
17 witnesses, said "finish him off" to his fellow fighters under his  
18 command. He conducted a mock execution. He was present at the  
19 scene. And when he was moving around the region, he was able to  
20 communicate with his unit. He had access to satellite phones and to  
21 a vehicle.

22          We agree with the Prosecution that the accused and other members  
23 of BIA can be regarded as a joint criminal enterprise in its basic  
24 form, commonly referred to as JCE I. The common plan included the  
25 crimes of arbitrary detention, cruel treatment, and torture. They

1 acted together, and the accused participated in this enterprise.  
2 Indeed, he even led it.

3 Even if the main purpose of BIA may have been to free Kosovo  
4 from Serbian persecution and fight for its independence, BIA's  
5 actions, sadly, make clear that, as a small part of that bigger plan,  
6 they detained those they identified as unwanted, as spies, as  
7 thieves, or simply as having an opinion they didn't like. And this  
8 form of joint criminal enterprise is, undoubtedly, part of customary  
9 law. Where the debate rages if another form of joint criminal  
10 enterprise, JCE III, would also be part of customary law, this, in  
11 our view, is not of relevance at this point in the case against the  
12 accused.

13 We also heard ample testimony that the detention, the cruel  
14 treatment, and the torture was done by members of Skifterat.  
15 Skifterat, as the Defence case actually itself demonstrated, was  
16 another name for BIA, a special guerilla unit, and the accused was  
17 the commander. Not a single Defence witness left any doubt in this.  
18 The accused was a respected commander with authority. There's  
19 nothing, nothing that would suggest that the BIA unit was not under  
20 his control or doing things he didn't want them to do.

21 On the contrary, the Defence case was a demonstration of the  
22 esprit de corps that existed in the unit.

23 This is why the accused, Commander Cali, is also responsible  
24 under command responsibility reflected in Article 16(1)(c) of the  
25 Law, which is a distinct mode of liability. And while the SPO has

1 discussed this, I would like to offer two complementary legal  
2 observations here.

3 One is that command responsibility was clearly part of customary  
4 law at this time in question in 1999. The Rome Statute of the  
5 International Criminal Court from 1998 reflects this, as does the  
6 European Court of Human Rights' recent judgement in Milanovic versus  
7 Croatia from January of this year.

8 And, this is my second point, this mode of liability applies, in  
9 our view, cumulatively to liability under joint criminal enterprise.  
10 In Article 16 of the Law, there's nothing in the wording that would  
11 suggest that the modes of liability mentioned therein are mutually  
12 exclusive. We then also look at other instruments such as the Rome  
13 Statute of the International Criminal Court. Article 28 of the Rome  
14 Statute begins with the preface: "In addition to other grounds of  
15 criminal responsibility ..."

16 But beyond the wording, what is important here is that the  
17 purpose for command responsibility is to highlight the special role a  
18 commander has in enforcing the rules of war and to ensure that any  
19 armed conflict is conducted as humanely as war can ever possibly be.  
20 It is a duty to prevent any breaches of international humanitarian  
21 law. And where a unit gets out of control, it is the commander's  
22 duty to punish those responsible to ensure compliance, and this  
23 purpose is very different to that of other modes of liability.

24 Salih Mustafa, he was the commander of the BIA unit. The trial  
25 leaves no doubt on that whatsoever. And when he wasn't personally

1 involved in the crimes in question, his subordinates were. He knew  
2 and he had reason to know what was going on in Zllash. He was  
3 present and he was, as I said before, directly involved. He took no  
4 measures to stop them. His failure to do the right thing as a  
5 commander, to prevent and punish acts of torture and other crimes,  
6 contrasts with his direct involvement and, therefore, is cumulative.

7 As a commander, Mr. Mustafa, you had the duty to protect  
8 victims. Instead, you and your men conducted arbitrary detentions  
9 and committed the crimes you are charged for. Under your watch, at  
10 least one was murdered. Although the Defence has gone to some length  
11 to set out how you moved around and were not always present in  
12 Zllash, this does not relieve you of your responsibility.

13 And I'm saying this here so directly because victims haven't had  
14 the chance to encounter the accused, who wasn't present in the  
15 courtroom.

16 With that, let me turn to the charge of murder and focus for  
17 some time on this specific charge. It deserves some special  
18 attention because the surviving direct victims in this case were all  
19 clearly shaken by the fate of their fellow prisoner who was murdered.  
20 It has left many people traumatised, vulnerable, and continues to  
21 impact their lives to this day.

22 We have heard in detail, and it has been described yesterday as  
23 well, how one victim who was singled out amongst those arbitrarily  
24 detained and tortured. Indeed, the surviving victims who testified  
25 described how the murder victim had been repeatedly tortured,

1 tortured more than anybody else. He wasn't able to walk or stand any  
2 longer. He had, as one victim had said, and we heard yesterday, been  
3 massacred. He was more dead than alive. He was later found buried  
4 in a shallow grave in close proximity to the detention compound, and  
5 the body had been decomposing, indicating that the death must have  
6 occurred some time before he was found.

7 Let us confront the fact, as the Prosecution has done yesterday  
8 to some extent, that we weren't able to fully establish the exact  
9 moment of the victim's death. It will continue to leave open  
10 questions for those who want to fully understand what happened, but I  
11 agree with the Prosecution that this lack of knowledge about those  
12 final moments does not mean that we cannot hold the accused  
13 responsible for murder.

14 Based on the evidence we've heard throughout this trial, only  
15 three explanations for the victim's death are remotely possible, and  
16 the most plausible scenario has extensively been discussed by the  
17 Prosecution. I will, therefore, reduce my presentation with regard  
18 to this most plausible scenario to only sketch this before  
19 confronting the legal consequences of other scenarios.

20 This most plausible scenario is that BIA members committed  
21 murder by actively taking the victim's life before leaving the  
22 compound in Zllash. While we can only speculate as to why the BIA  
23 members would have done this, it is possible that they feared  
24 identification or that the victim would have been an unwanted burden  
25 in the ongoing evacuation. After all, he was incapable of walking

1 due to the torture he had suffered, and the evidence suggests that  
2 his legs had possibly been broken.

3 Whatever their reasoning, the scenario in which the victim was  
4 actively killed by BIA seems most plausible considering the  
5 photographs seemingly displaying a gunshot wound to the torso. All  
6 this would at least trigger the accused's responsibility as a  
7 commander.

8 But let me focus on these other two scenarios. The second one.  
9 It is a theory possible that, when BIA vacated the Zllash compound,  
10 the victim was left behind in the face of the advancing enemy forces  
11 and then died as a result of wounds inflicted by BIA previously.

12 Although I agree that this scenario is far less plausible, it  
13 would still render the accused responsible for the victim's death.  
14 Now, I want to take a moment to spell out why.

15 As a reminder, the elements of the crime of murder as a war  
16 crime have been established in the jurisprudence. The ICTY Appeals  
17 Chamber, for example, in the Djordjevic appeals judgement from  
18 27 January 2014 at paragraph 548 spelled out that the following  
19 elements are required: The death of a victim taking no active part  
20 in hostilities - the case here, clearly; also, it requires that the  
21 death was the result of an act or omission on the part of the  
22 perpetrator or one or more persons for whom the accused is criminally  
23 responsible. These acts here, being the numerous acts of severe  
24 torture that left the victim more dead than alive. As we have heard,  
25 it was a massacre.

1           And, lastly, that the perpetrator intended to kill the victim or  
2 wilfully harm or inflict serious injury with reasonable knowledge  
3 that the attack was likely to result in death. This *mens rea* element  
4 is fulfilled here as well. Torture of this severity that this trial  
5 has shown with respect to the murder victim is most likely to result  
6 in death. In many ways, it is the even more cruel scenario to leave  
7 someone so gravely injured to die a painful and possibly even a slow  
8 and long death.

9           And the last, although in my view least plausible, scenario  
10 would be that the victim was left behind in his gravely injured state  
11 that rendered him unable to walk or run to seek shelter, and that, in  
12 theory, he could have been hit by enemy fire. And I emphasise again  
13 in theory. This is the last straw that finally killed him. And even  
14 then, this would not relieve the accused of liability.

15           Because the victim was a detainee of the accused's unit, they  
16 had a duty of care towards him. Leaving this person defenceless  
17 against an enemy known to persecute Kosovo Albanians also equates to  
18 murder. In this case, it would have only utilised the Serbian fire  
19 to finish the job. Although, and I repeat it again, this last  
20 scenario appears least likely and barely possible in the face of the  
21 evidence we have heard, it is important to consider it as the Defence  
22 seemingly suggested that this could have been the cause of death.

23           Nevertheless, even in this constellation, the legal elements for  
24 murder are still fulfilled. Specifically, the intent to kill. And I  
25 focus on this here.

1           And allow me to draw again an ICTY jurisprudence here, which is  
2           informative in this regard. For example, the ICTY Trial Chamber in  
3           Oric, 30 June 2006, in paragraph 348, held with regard to the war  
4           crime of murder that the intent to kill of course is required to  
5           fulfil the *mens rea*, and this includes proof of a mental state  
6           wherein the perpetrator foresees as more likely than not that the  
7           death of a victim could occur as a consequence of his act or omission  
8           and he nevertheless accepts that risk.

9           In Martić, similarly, 2007, 12 June, the ICTY stated, at  
10          paragraph 60, the *mens rea* of murder is the intent to kill, including  
11          indirect intent. The knowledge that the death of the victim was a  
12          probable consequence of the act or omission. And, again, leaving a  
13          gravely tortured and half-dead man without shelter in the path of  
14          hostile forces, hostile advancing enemy forces, clearly contained the  
15          probable consequence of the victim dying. It was more likely than  
16          not that this would occur.

17          We heard, not least from Defence witnesses, that the accused was  
18          actively involved in the evacuation of the wounded from Zllash. If  
19          the accused gave active orders on what should happen with the victim,  
20          he's directly responsible, and we know that. If he did not engage  
21          further with what would happen with this gravely injured prisoner and  
22          left this to his men, this doesn't relieve or lift his  
23          responsibility.

24          The accused at least had reason to know that the crime of murder  
25          would be committed. The "had reason to know" element that an accused

1 -- requires that an accused must have been in possession of some  
2 general information which would put him on notice with regard to  
3 command responsibility of possible unlawful acts.

4 And, again, allow me to draw on the ICTY Appeals Chamber here in  
5 the Celebici judgement, for example, in 2001, in paragraphs 237 and  
6 following. An interpretation that has been followed by the ICTR,  
7 example, in the Nahimana appeals judgement. And there it was  
8 clarified that this information does not need to provide specific  
9 details of the criminal act itself.

10 The liability of the accused for the murder, therefore, rests on  
11 his possession of general information which would give him reason to  
12 know, at the minimum, of the likelihood of the crime. This means  
13 that the accused would still be liable even if he did not have  
14 specific details of the murder itself. He knew of and he was  
15 involved in the illegal detention and torture. He was leading the  
16 efforts of getting the wounded out of Zllash.

17 Defence Witness Hadri, already we heard her cited yesterday,  
18 felt compelled to state during the trial, when describing the  
19 evacuation from Zllash, and I quote here:

20 "I publicly thank Cali and the other soldiers that, because of  
21 them, I am alive today. I thank them for the organisation they  
22 provided to save our lives as medical staff, of civilians, of the  
23 injured."

24 The deceased was not so lucky. The victim beaten so severely  
25 that he could not walk or stand up any longer wasn't saved. Either

1 actively killed or left behind. The accused had all the information  
2 necessary to know that this would be happening, and this is why the  
3 accused is responsible for murder as well as arbitrary detention,  
4 cruel treatment, and torture, and has to be punished accordingly.

5 Let me now turn to discussing, very briefly, the credibility and  
6 reliability of some of the witnesses and the evidence before the  
7 Panel, because I can echo there much of what the Prosecution has  
8 already presented and to avoid any duplication I will keep this as  
9 brief as I can.

10 Some additional observations are critical when we want to  
11 evaluate the credibility of witnesses here and the reliability of  
12 their statements. The Panel will need to take extra care in  
13 considering the effects that the long-lasting trauma induced through  
14 the crimes in this case have had on witnesses. It will also need to  
15 pay specific attention to, for example, the effects of power dynamics  
16 that continue to subtly, or sometimes not so subtly, influence  
17 witness behaviour and also, lastly, communication and cultural  
18 barriers.

19 We've seen that different witnesses presented themselves very  
20 differently throughout this trial. We saw very, very distant  
21 behaviour. We saw those efforts to stay in control. We also  
22 observed moments of anger, of avoidance, of distress. In short, we  
23 had a whole range of different behaviours that were displayed by  
24 those who reported of the crimes they had suffered, and this range of  
25 behaviours is to be expected in survivors of traumatising events.

1           A survey of recent research in the field has shown that a strong  
2 body of evidence indicates that survivors who experience symptoms of  
3 post-traumatic stress disorder may, for example, suppress emotion to  
4 avoid becoming overwhelmed or induce a state of disassociation. And  
5 this is particularly prevalent when, as is, of course, required in  
6 testimony giving, a traumatic memory is reactivated.

7           The effect of trauma on memory, on the way in which the brain  
8 encodes information, can actually differ hugely between different  
9 victims who have experienced similar things. For some, this can make  
10 it very difficult to recall or recount details in a linear or in a  
11 very sort of complete way, telling one coherent narrative in one go.  
12 Whereas others may achieve a very detailed account, one which is  
13 nearly surprisingly detailed.

14           And, in short, these specificities of effects of trauma on  
15 memory will have to be taken into account by the Panel when assessing  
16 the testimony of the witnesses before it.

17           With that, I will now discuss some elements of the testimonies  
18 provided by the individual witnesses and will do so to the biggest  
19 part in open session and, therefore, keep it short and at times do  
20 not go into as much detail as I would otherwise. But I think for the  
21 benefit of the public, this is, nevertheless, useful and will not  
22 take away from the argument. There will only be a very brief session  
23 which we will have to conduct in private.

24           Having said this, let me turn to the testimony of Witness 01679  
25 who delivered an important and a very detailed account of his ordeal

1 in Zllash. Although struggling with post-traumatic stress, it was  
2 impressive to see his efforts to stay calm and to stay in control.  
3 He clearly tried not to be overwhelmed by emotion. And in my view,  
4 there can be no doubt whatsoever that this witness is credible.

5 He was able to provide a testimony of substance with many  
6 details that were subsequently independently corroborated. As the  
7 SPO has already demonstrated, a poignant fact was that the witness  
8 was able to identify one of his torturers with the nickname Bimi  
9 before it was mentioned in court.

10 Witness 01679 also delivered a very detailed and a consistent  
11 account. He provided clear explanations as to why his SPO witness  
12 statements were not as consistent with previous statements in the  
13 UNMIK proceedings. And, let's face it, those proceedings were  
14 riddled with flaws. As a mission, UNMIK at that time didn't have the  
15 professional capacities to ensure adequate witness support, to ensure  
16 trained and professional interpreters. All those ingredients  
17 necessary to ensure the integrity of proceedings and to ensure  
18 conditions that allow for an authentic account of events to be taken.

19 The witness's account of torture he suffered is also  
20 corroborated, and I've mentioned the report before, by the medical  
21 and psychiatric examination in which two experts jointly concluded  
22 that his scars, his injuries, and his mental state are strongly  
23 consistent with his account. Adhering, as I've mentioned before, to  
24 the standards of the Istanbul Protocol on the investigation of  
25 torture, this result is as strong as it can get.

1           We can never fully determine, or with full certainty determine,  
2           the cause of an injury after many, many years. But a strongly  
3           consistent picture was seen by the experts, which is a result that is  
4           important to consider, and it's important to emphasise that the  
5           witness didn't have to undergo this, for him, very stressful  
6           examination.

7           We didn't have to suggest this form of evidence. Yet, his wish  
8           to contribute, and it evidences how strongly he feels about bringing  
9           truth to light. It bolsters his credibility and the reliability of  
10          his account.

11          Witness 04669 was another direct victim who testified before  
12          this Court and equally credible and reliable in his account of events  
13          leading up to and during his illegal detention in Zllash. He  
14          testified in a very calm and in a very collected manner, supported,  
15          although restrained by body language, making great efforts to keep  
16          negative emotions at bay that could have been triggered through the  
17          recollection of events. He also underwent examination by the  
18          experts, voluntarily exposing him equally to a stressful and to an  
19          invasive experience, and this examination also confirmed that the  
20          witness's body featured scars consistent with his account of the  
21          beatings he received.

22          His testimony also contained details that were later  
23          corroborated by other witnesses. He didn't just confirm the  
24          description that the previous witness, Witness 1679 had given of the  
25          training at the school in Zllash. Nearly ironically, Defence

1 witnesses were among those who provided corroborating details. For  
2 example, the KLA trainer who was a black belt in karate,  
3 Musli Halimi, who confirmed this, or the incident with the Serbian  
4 helicopter falsely using humanitarian insignia, the Red Cross, to  
5 guise an attack, an incident later confirmed by Sejdi Veseli.

6 This context, of course, is important also it was a motivation  
7 for the witness and many, many other people in Kosovo to fight with  
8 the KLA, to participate in the armed conflict that was ongoing at the  
9 time. This was actually one of the devious signs of the crimes  
10 committed against the victim. He believed himself to be among fellow  
11 Kosovars who fought for the same cause.

12 We now turn to discussing the testimony of Witness 03593.  
13 Again, I have no doubt that he was arbitrarily detained, that he  
14 suffered torture and cruel treatment.

15 The core description of his ordeal was coherent and consistent  
16 across his different statements. He even attempted to show scars  
17 that were physically visible. He reported many of the indicators of  
18 trauma: Nightmares, sleep disturbances. And, yes, as we've heard  
19 yesterday as well, and the Panel will remember this, the witness  
20 avoided saying the name of the accused when he was providing  
21 testimony here in court.

22 His refusal, albeit seemingly irrational, considering previous  
23 statements and his testimony overall, can be explained based on  
24 actually two considerations. The one is one the SPO has discussed  
25 yesterday which was the immense pressure the witness was under. The

1 other one I would like to highlight is that we may also have observed  
2 a -- here, that a traumatised witness employed, actually, an  
3 avoidance strategy to disassociate from the person he identified as  
4 the key tormentor.

5 It doesn't seem to make much sense to us, but within the  
6 emotional mindset such a victim is in, this is one other explanation  
7 to consider. The witness had been subjected to very long and  
8 thorough cross-examination to the extent that he nearly felt  
9 mistreated and violated, having to re-live his experiences and  
10 confront his trauma for various consecutive days.

11 Although the Defence has taken the mantra-like position that all  
12 of these witnesses are simply not telling the truth, there is nothing  
13 that would explain why they should lie and put their life at risk.  
14 All those direct victims have been able to provide insights into  
15 their experiences in Zllash and leave no doubt that torture happened  
16 and that it was the BIA unit under the command of the accused, under  
17 the command of Commander Cali, responsible for the crimes committed.  
18 All three men are unconnected to one another, and we've heard this  
19 yesterday. The only common element is their experience in Zllash.  
20 All of them had a lot to lose by testifying in this case.

21 Now, let me turn to Witness 03594. His testimony in court  
22 seemed less credible than that of the other three victims detained in  
23 Zllash and provides only limited probative value. It was, in part,  
24 significantly inconsistent to a previous statement. Even more so, he  
25 presented details in court which would have been significant from his

1 point of view as a position as a witness. Yet, he only came up with  
2 them when we were hearing him here.

3 The Defence repeatedly referred to a 100 Deutschmark moment, and  
4 I would think that all of us very vividly remember this. Or let me  
5 recall how the witness described that on the march from Zllash after  
6 his release, he had stopped to shave. Rather striking given that  
7 they were fleeing from advancing enemy forces. It was peculiar when  
8 he described, in a rather unsolicited manner, that other victims  
9 didn't have any broken arms, broken limbs or broken teeth.

10 This witness, in our view, clearly was on a mission to mitigate  
11 any acts that could be linked to the KLA or to the accused. His  
12 motivation may rest in personal motives expressed during his  
13 testimony. That may be enough pressure to try and limit any damage  
14 done by him, "damage" in inverted commas, in previously testifying to  
15 the SPO.

16 And despite these efforts of minimising any wrong-doing by the  
17 accused or any of the unit, the witness did corroborate some elements  
18 of other victims' accounts. His illegal detention as well as that of  
19 others, the description of the location of the compound in Zllash  
20 which overlapped significantly with that of others, the wooden beams  
21 on the ceiling, the elevation of the area, the room above the stable,  
22 old wooden planks. He confirmed the presence of certain witnesses in  
23 Zllash, confirmed that he did see some marks on their body, confirmed  
24 their release on 18 or 19 April 1999 in the context of the beginning  
25 Serbian offensive, as well as the walk from Zllash to Prishtine. And

1 he confirmed that the conditions in Zllash were inhuman and, in his  
2 words, worse than the treatment of animals.

3 In their no case to answer motion, the Defence seemingly  
4 attached a lot of weight to the testimony of this witness. Yet, it  
5 has failed to engage with the fact that even this witness confirmed  
6 the charges of arbitrary detention and of cruel treatment.

7 Could I now please ask the Panel to move into private session so  
8 that I can discuss some details which may be identifying in order to  
9 ensure continued protection of the witnesses in this case, please.

10 PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer, could you  
11 bring us into private session, please.

12 [Private session]

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20 [Open session]

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

22 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

23 Victims' Counsel, you may proceed.

24 MS. PUES: Thank you, Your Honours.

25 So all these laterally discussed witnesses didn't try to pin any

1 responsibility on the accused where they were lacking such knowledge.  
2 They did not try to exculpate the accused either. Instead, their  
3 testimonies were characterised by the great pain they are under.  
4 Some were visibly under incredible stress, in parts shaking, getting  
5 very emotional, yet making all efforts to keep focusing on their  
6 testimony and deliver it to the best of their abilities.

7 With that, Your Honours, let me now briefly add some  
8 observations on actually how the Defence case has confirmed and  
9 corroborated some of the victims' testimony.

10 They confirm details that the victims could really only have  
11 known if they had, indeed, trained with the KLA and been in the  
12 Zllash compound. I've already named a couple of incidents, such as  
13 the black belt in karate.

14 In fact, these Defence witnesses in some ways support the  
15 experiences of victims and help to confirm credibility and the value  
16 of their testimony for establishing the truth. Musli Halimi, already  
17 mentioned as the witness who confirmed that he was a trainer with a  
18 black belt in karate, also confirmed the account of Witness 04669  
19 that the recruits didn't practice shooting with live weapons but with  
20 air guns. Halimi had explained the rationale for this, that this was  
21 done in order to preserve ammunition.

22 Again, it's one of these small details that seems nearly  
23 irrelevant for the charges as such but important to show that it's an  
24 authentic experience he has recounted.

25 Witness 01679 described the room he had been taken to upon

1 arrival in Zllash. Entering a building, he said, there was a  
2 corridor with a room to the left and a door to the right. He was  
3 taken to the room on the left, which contained chairs, a desk, a  
4 wardrobe, boxes with things, and had wooden planks.

5 Witness 03593 had also remembered the wood and all the different  
6 sorts of stuff in this room.

7 And these details, now, are corroborated, for example, by  
8 Witness Hadri who refers to this building as the headquarters. She  
9 described a corridor with a room on both sides. In the room to the  
10 left, there was a desk and a man sitting behind it with a portable  
11 computer and a satellite phone. We note that several Defence  
12 witnesses actually confirmed that the KLA had satellite phones and  
13 that, in fact, the accused had access to one.

14 But in any case, the key point here is the office-like set up of  
15 this room described by Hadri that corresponds with the testimony of  
16 direct witnesses.

17 And victims also described how they'd been brought upstairs and  
18 downstairs for the interrogation and torture and, amongst other  
19 methods, by electrocution using a box that would be wired to the  
20 legs. Though, the Defence has attempted to show that there was no  
21 electricity at the compound, and the Prosecution also alluded to it  
22 so I will keep it brief, two Defence witnesses confirmed explicitly  
23 that electricity was available.

24 Hadri not only confirms this but remembers watching television  
25 while on the Zllash compound. Witness Canolli-Kaciu in turn

1 testified that batteries were used at the compound to provide energy  
2 and light. A small detail which also corroborates the testimony of  
3 Witness 03593 who recalled that battery-operated torch lights were  
4 used at the detention locations.

5 These brief examples suffice to show the corroborative effect  
6 that the Defence case has had for the testimony of the witnesses.  
7 The Defence witnesses, who nearly all turned out to be members of the  
8 BIA guerilla unit themselves, strengthened what the victims said  
9 rather than undermined their testimony. In our view, the Defence  
10 case is not persuasive.

11 Victims hope that the prosecution of the accused will not be the  
12 only one holding those to account who contributed to their suffering.  
13 With that, let me offer, in closing, very brief remarks on  
14 sentencing.

15 Murder and torture are among the most serious crimes. What  
16 victims want to see is that the accused receives a just sentence that  
17 reflects the extent of his responsibility can only echo the very  
18 detailed observations that have been made by the  
19 Specialist Prosecutor.

20 One thing for us stands out and that is that the accused had a  
21 specific responsibility as a commander to ensure compliance with the  
22 rules of war. Instead, he was an active part of the commission of  
23 war crimes for which he is on trial here, and this needs to be  
24 reflected in the sentencing.

25 And the crimes destroyed not just the life of the murder victim.

1 They have a continuous impact on the surviving victims. The crimes  
2 destroyed private lives, and it impacted and continues to impact  
3 victims' health. The extent of the damage done is huge. It's been  
4 set out in detail in this case, and we have heard about the brutality  
5 and the extent of suffering. It goes without saying that all these  
6 are aggravating factors that the Trial Panel should take into account  
7 in its sentencing.

8 However, victims will not request a specific length of sentence  
9 for the accused. What they want to see is their suffering  
10 acknowledged and the accused punished justly.

11 With that, let me draw to a close, and I thank you all for your  
12 attention.

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

14 It's now 25 minutes to 11.00.

15 Defence counsel, I propose that we adjourn the hearing now and  
16 then you will have more time for taking into account, if need be, the  
17 submissions made by Victims' Counsel. And my proposal would be to  
18 start, as usual, with the next session at 11.30. Is that agreeable  
19 for you?

20 MR. VON BONE: Sure, Your Honour. It's okay. We're ready, but  
21 it's okay.

22 PRESIDING JUDGE VELDT-FOGLIA: Okay. Very well.

23 Good. We will continue at 11.30.

24 The hearing is adjourned.

25 --- Recess taken at 10.38 a.m.

1 --- On resuming at 11.37 a.m.

2 PRESIDING JUDGE VELDT-FOGLIA: Welcome. We will now proceed  
3 with the closing statement by the Defence counsel.

4 And before I give you the floor, Defence counsel, I want to  
5 remind you that whatever you will display in the courtroom for the  
6 public can only be used by the Panel if it has been properly  
7 presented before the deadline for the closing of the evidentiary  
8 proceedings in accordance with Rule 134 of the Rules of Procedure and  
9 Evidence.

10 And after having said that, you have the floor.

11 MR. VON BONE: Thank you very much, Your Honour.

12 In the indictment of Salih Mustafa, the SPO treated the  
13 so-called contextual elements of the allegations against Mr. Mustafa.  
14 It alleges in paragraph 5 that the BIA consisted of approximately 500  
15 to 600 soldiers which operated predominantly in the urban areas. It  
16 claims that the BIA unit operated from a compound in Zllash, and it  
17 claims that the BIA used the compound as a safe house as well as a  
18 detention and interrogation site.

19 The Defence, first, would like to take a look at the terminology  
20 used in this part of the indictment, the approximately 500 or 600  
21 soldiers. What is it, actually? People who worked with the KLA  
22 might think they are soldiers. But in case of BIA, it's nothing  
23 further from the truth.

24 There is no documentation regarding any of the people who  
25 actually belonged to the BIA. There was no enrollment and neither

1 was there any kind of training. There were no ranks, no uniforms, no  
2 command structure. People were committed to liberate their country  
3 from one of the most oppressive regimes in recent history. The  
4 Serbian domination of the people of Kosovo initiated that many people  
5 were supporting in one way or another way the fight for liberation  
6 and self-determination.

7 We have heard in court many people who say that they belong to  
8 the KLA, sometimes to the BIA. None of these people that stated that  
9 they would belong to BIA had received any form of training, did not  
10 have any rank. They didn't have any special insignia or were  
11 enlisted as a BIA member.

12 In the case that we heard people from Barileve or elsewhere,  
13 these were people that were committed to the liberation of Kosovo,  
14 and they voluntarily worked for whatever work they can do in order  
15 that Kosovo would eventually succeed to liberate itself. Therefore,  
16 the terminology "soldier" for the people who thought themselves as  
17 part of BIA is not correct. They were citizens who helped the war  
18 effort as such but had no military role whatsoever.

19 As for the KLA, we can indeed say that, even as the men were  
20 volunteers, this looked much more like a military organisation.  
21 Brigades were set up and the areas of operations were determined in  
22 which these brigades operated. The brigades operated in several  
23 areas and among those areas was the Gollak area and, indeed, was also  
24 the Zllash area.

25 The BIA operated only in urban areas. Citizens would use their

1 house or let their houses be used by people in order to see movement  
2 of troops, cars, military vehicles from the Serbian armed forces.  
3 They would pass on the information and that would be useful for what  
4 was going on in a particular area. It is this kind of gathering of  
5 information in order to know what enemy forces were doing or if they  
6 would have any operations going on.

7 People of BIA were not disciplined. They did not have any  
8 actions regarding the Serbian forces. They had no relation to  
9 brigades whatsoever. The brigade had no control over people of the  
10 BIA, and BIA had no control over people from a brigade. It is as  
11 simple as that.

12 It is a total misconception that the BIA operated in Zllash.  
13 They did not. Maybe people from BIA might have been present there,  
14 but they did not have in any manner control over anything in Zllash.  
15 The BIA did not operate in any particular area in Zllash. They had  
16 nothing to do there. There was nothing that was of any particular  
17 need to have their presence. In short, the BIA had no operations  
18 whatsoever in Zllash.

19 The specific area that has been described in the entire case is  
20 the compound, which means a small group of structures. These  
21 structures were located on a hilltop and has been discussed with many  
22 of the witnesses that have come to testify here in The Hague. That  
23 location was a location owned by the family Krasniqi. That family  
24 gave the KLA the opportunity to use it.

25 Indeed, people from BIA would use this location. The use was to

1 take a rest after their activities in Prishtine. They had no  
2 specific activities in Zllash or in the Gollak area. Mr. Mustafa  
3 called this location a safe house, a place where people could stay  
4 for a while and move on to any other activity that might be  
5 necessary.

6 The entire notion of this compound being used as a base for BIA  
7 is just completely wrong. BIA people had no authority there. The  
8 entire compound was used as a safe location for refugees, that is,  
9 internal displaced people from other areas who could stay there  
10 safely. Many witnesses have spoken about this, and we have mentioned  
11 those in our final trial brief.

12 None of the people who were staying in Zllash said that it was  
13 the BIA who operated this compound or would have said that it was  
14 only BIA who would have the monopoly over this set of structures. We  
15 will get to it at a later stage, but the allegations that the BIA  
16 would use a certain building for the purposes of interrogating and a  
17 detention site is simply false.

18 I return to the allegations that are in the indictment.

19 People of the BIA were not in any manner soldiers. They had no  
20 combat or even non-combat training as soldiers. Non-combat in the  
21 sense of tactical or logistics. And they did not have any missions  
22 related to combat. People from the brigade would have such function,  
23 and there was a clear command structure. People from BIA would not  
24 fall under the command of any brigade. It is an entirely separate  
25 unit, and they certainly helped the war effort as a whole.

1           One wonders why, in fact, people from BIA would detain people,  
2           or why would they even interrogate people? Why would they collect  
3           any information from simple citizens at all? It's an important  
4           question to answer, and there must be some purpose to do such things  
5           to people. What possible information could the people who say that  
6           they have been detained provide to the BIA?

7           There have been no instances recorded where the units of the KLA  
8           brigade operated in concert with each other to achieve some kind of  
9           specific goal. So to simply allege that the BIA people would take  
10          such action is really very farfetched. The BIA had no joint  
11          operations or activities with the police or guards of any kind. So  
12          why on earth would BIA members, KLA soldiers or police or military  
13          police work together in a joint manner with a common purpose to  
14          interrogate and mistreat people, and why would they do that suddenly  
15          in the period of the indictment from the 1st until 19th April 1999?

16          The Defence wants to make it very simply clear: Salih Mustafa,  
17          nor any other BIA people, had neither alone or in a joint manner with  
18          other KLA soldiers, police, military police, or any common purpose to  
19          arbitrarily detain, mistreat, or treat cruelly, torture or murder  
20          anybody at all. Salih Mustafa had no intent for the commission of  
21          these alleged crimes, and neither did anybody else have such intent.

22          In fact, they simply never committed any of these alleged  
23          crimes.

24          There was no such thing as a joint criminal enterprise in which  
25          Salih Mustafa or members of the BIA played any role in the commission

1 of the alleged crimes as stated in the indictment. Mr. Mustafa did  
2 not participate in any joint criminal enterprise, whatever the  
3 composition of such enterprise might have looked like or might have  
4 existed. Mr. Mustafa vehemently denies all the charges.

5 Mr. Mustafa had no knowledge whatsoever of the crimes alleged in  
6 the indictment. In the period of the 1st until 19th April,  
7 Mr. Mustafa has been maybe a couple of times in Zllash at the  
8 compound. He never detained, interrogated, mistreated, or tortured  
9 anybody there at that place. He also did not order anybody to do so.  
10 He also did not oversee any of these alleged actions what would have  
11 been taken by others. There is no evidence that he even knew that  
12 such things happened, and he never witnessed any such things.

13 Mr. Mustafa never killed anybody and never ordered anybody to be  
14 killed, nor did he subject anybody to torture or ordered that to be  
15 done. Mr. Mustafa has never been aware of such things.

16 There is no evidence that there is any relation or connection  
17 between Mr. Mustafa and KLA soldiers with nicknames such as Tabuti,  
18 Ilmi Vela, Bimi, Dardan, or Afrim in committing these crimes, if  
19 these crimes were at all committed by any of these individuals. Bimi  
20 denied it himself. Others were never found or interviewed. And  
21 there is no evidence that these people were, at the time of the  
22 indictment, in the compound. They have never been even identified.

23 Neither Mr. Mustafa, nor people from the BIA, had any authority  
24 over the compound, the structures, the people that were present  
25 there, or things that took place there. There is no evidence

1     whatsoever that Mr. Mustafa had any means available to him that he  
2     would use to order people to undertake the alleged crimes in his  
3     absence.

4             The word BIA came in this context many times back in the  
5     Confirmed Indictment. If we take a look at the Witness 1679, what  
6     did he say about BIA? A question was asked of him *[REDACTED] Pursuant  
7     to In-Court Redaction Order F476RED.*

7     *[REDACTED] Pursuant to In-Court Redaction Order F476RED.*

8     *[REDACTED] Pursuant to In-Court Redaction Order F476RED.*

9             "Have you ever heard of BIA?"

10            And his answer was:

11            "After the war, I would see these initials written on the wall  
12     of the houses," and so on.

13            Your Honours, the Defence would like to speak about the general  
14     location of what the SPO calls the Zllash detention compound.

15            W3593 says about the location that it was in Zllash at an  
16     unknown place for him, 7 or 8 kilometres away from where he was  
17     taken. Up to that moment that he was brought to the first barn, he  
18     had a bag over his head. At the time, he had a bag over his head  
19     until where he got into the first barn where he was placed, and that  
20     place was not more than 5 metres in size. He spent there about one  
21     hour, and then he was placed into a second barn. That second barn  
22     was covered with something.

23            When he was transferred to the second barn, once again, a bag  
24     was put over his head. The second barn was 5 or 6 metres away from  
25     the first barn. The next day, he was taken to another barn together

1 with the alleged victim of the murder in this case, and this one was  
2 15 to 20 metres away. Once again, a bag was put over his head. It's  
3 written in the transcript, 20 September, page 402, 403, 406, 407, and  
4 416.

5 Upon his release, he stated that there were a lot of people in  
6 the yard in civilian clothes and uniform. I quote:

7 "I do not know whether there were one, two, or three buildings.  
8 They were not far away from where I was, so they were about, I don't  
9 know, 50, 60 metres away. Starting from the building where I was  
10 kept, it was a path. It was not a good path. It was mainly meadow.

11 "We couldn't sleep at all because the upper part was just with  
12 wood, covered with wood. And while the people were being beaten  
13 upstairs, we just couldn't sleep because we were scared."

14 20 September, transcript page 476.

15 *[REDACTED] Pursuant to In-Court Redaction Order F476RED.*

16 *[REDACTED] Pursuant to In-Court Redaction Order F476RED.*

17 *[REDACTED] Pursuant to In-Court Redaction Order F476RED.*

18 22 September, page 608 and 609. Just to clarify this issue,  
19 whether he was there earlier, the witness stated to the SPO in an  
20 interview *[REDACTED] Pursuant to In-Court Redaction Order F476RED.*,  
and that is, I quote from his SPO statement, ERN

21 100957-TR-ET, Part 1, page 12, line 12, 13, the witness answered a  
22 question for the SPO:

23 "What about Zllash, the village in general? Had you been there  
24 other times?"

25 His answer:

1 "Yes, perhaps I was there ten years earlier. Perhaps I was  
2 there, because the village is quite small."

3 The conclusion, Your Honour, on the identification of the  
4 general location where Witness 03593 was kept is the following.

5 Indications that he had a bag over his head, so under those  
6 circumstances the witness cannot identify the general location where  
7 he was kept.

8 Second, the distances that he indicates cannot objectively  
9 relate to any other of the structures at the Zllash compound. The  
10 entire compound is less than a quarter of a football field. The  
11 compound is maximum 41 metres in size.

12 And the fourth point. He indicates that he does not know  
13 whether there were one, two, or three buildings. From the aerial  
14 pictures, it is clear that there were at least nine structures in and  
15 around the compound. The yard from one side to the opposite side  
16 would not measure more than 35 metres. The witness is not sure  
17 whether he was there before, so he's not in a place to recognise from  
18 earlier times. Therefore, objectively, his identification of the  
19 general location of Zllash or the Zllash detention compound cannot be  
20 accurate.

21 The Defence is of the opinion that the witness is not reliable  
22 to this aspect.

23 W1679, the witness said:

24 "We continued the road and walked all the way. We arrived at a  
25 place that I do not know how to describe it to you. It was the first

1 time that I was seeing that place. We arrived at that place. They  
2 told me, 'Lower your head.' I did not know what was happening.

3 "When we got closer to some buildings, there was a sack, a black  
4 sack, if I'm not mistaken, they put it on my head, and they took me  
5 into one of the buildings."

6 The witness stated this on 4 October, page 867 of the  
7 transcript.

8 I continue:

9 "They took me to the same building but downstairs. There was a  
10 barn there." Page 882 of the same transcript.

11 "From what I remember" -- the same page.

12 "From what I remember, it was a building made of stone. There  
13 was a wooden door. There was some hay, dampness."

14 Upon his release from the place of detention, the witness did  
15 not state anything as to the general location where he had been kept.  
16 The transcript spoke about his release -- the witness spoke about his  
17 release on 5 October on page 867 of the transcript, 5 October 2021,  
18 that is. The conclusion regarding the identification of the general  
19 location where 1679 was kept is the following:

20 One, the witness, by his own account does not know how to  
21 describe the general location of the place where he was kept.

22 Two, the witness stated that he had a bag over his head. Under  
23 those circumstances, he cannot identify the general location.

24 Three, the indications that the building was made of stone with  
25 a wooden door are not specific or particular for any house in the

1 area of Gollak.

2 And, four, even upon his release, when he had no sack over his  
3 head, the witness did not state anything about the general location  
4 where he had been kept.

5 And I add to this that the witness drew a sketch himself. It's  
6 ERN 060694. That sketch indicates only three buildings and none of  
7 them are connected to each other.

8 The general conclusion is that, in the opinion of the Defence,  
9 the witness is not reliable on this aspect.

10 Then Witness 3594. The witness is a witness that was able to  
11 give a general description of the location where he was kept. He  
12 described it upon a question of the Defence. The question was:

13 "In addition to this old house that you are speaking about, have  
14 you noticed any other buildings?"

15 The witness answered:

16 "No. No."

17 And he continued:

18 "When I got there, I didn't see anything else. Because I went  
19 straight. I did not look on my left but I only looked on my right,  
20 and there I distinguished that old house when I entered."

21 It was in his statement 13 October 2021, page 1174 and 1175 of  
22 the transcript.

23 And he continued to describe what he saw:

24 "When I went out, I saw that there was a large yard and that  
25 there was another building that there was kind of attached to the

1 yard. I saw this space and I saw that there were two houses within  
2 the compound. I do not know who the owner was of those houses, but  
3 there were two houses opposite to each other. I saw two houses."

4 In particular, the witness stated:

5 "If you went out of the barn, you could see nothing because  
6 there was this haystack opposite the barn. But if you go a bit  
7 further up, it was an elevated area there where I was taken to have a  
8 conversation ... when I went to that elevated area, I saw it was a  
9 flat area and that is when I saw that there was another house."

10 And upon a question of the Presiding Judge in that moment,  
11 13 October 2021:

12 "Is it one or two houses?"

13 And the witness responded:

14 "With the house where we were, there were, in total, two  
15 houses."

16 The witness stated this on 13 October, page 1176 of the  
17 transcript. 1176 and 1177.

18 And lastly --

19 PRESIDING JUDGE VELDT-FOGLIA: Defence counsel, sorry to  
20 interrupt you, but I would like to go just for a moment into private  
21 session --

22 MR. VON BONE: Sure.

23 PRESIDING JUDGE VELDT-FOGLIA: -- for a specific issue I want to  
24 touch upon.

25 Madam Court Officer, can we go into private, please.

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12 [Open session]

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

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

15 Defence counsel, you have the floor again.

16 MR. VON BONE: Thank you very much, Your Honour.

17 I pick it up with Witness 03594, where upon a question of the  
18 Defence he was asked:

19 "Was there any house or structure attached or nearly attached to  
20 the barn or to the house in which the barn was located?"

21 And the witness stressed:

22 "I did not see any. I don't know."

23 13 October 2021, page 1178 of the transcript. And I'll say 1178  
24 of the transcript.

25 The conclusion, Your Honour, regarding the identification of the

1 general location where 3594 was kept is the following.

2 The witness said that there were in total two houses.

3 Two, he said that there was a haystack opposite the barn.

4 Three, he said that he did not see any house or structure  
5 attached or nearly attached to the barn.

6 Four, the witness could normally see this as he had no sack over  
7 his head and he was able to observe.

8 And, lastly, his observations make it clear that the place where  
9 he was cannot be the Zllash compound. The Zllash compound at the  
10 time consisted of at least nine structures on a rather short distance  
11 from each other.

12 Our general conclusion is that this witness was able to make  
13 observations, but his observations make it clear that he apparently  
14 speaks about a different location than the Zllash compound. The  
15 Defence is of the opinion that this witness is reliable in this  
16 respect.

17 Witness 4669, Your Honour. W4669 spoke about the general  
18 location of the place where he was kept. Upon a question of the  
19 Presiding Judge regarding what the witness saw around once he went  
20 outside the barn where he was kept, the witness responded:

21 "Nothing. Just a field, a green field, and the toilet."

22 This is how the witness said he remembered it. And upon a  
23 question of the Presiding Judge:

24 "Did you see any buildings?"

25 The witness replied:

1 "No. Only the one that I exited to go to the toilet. And there  
2 were buildings near that one, around it. And we were not allowed to  
3 look on our right or on our left," just had to go straight and then  
4 back.

5 And the Judge continued:

6 "And the buildings near the one you were exiting, how many  
7 buildings were there?"

8 "About two or three very close to each other, almost attached to  
9 [each other]. And there were others a bit further, according to the  
10 configuration of the terrain."

11 And, again, Presiding Judge asked once again about the location  
12 upon his release, and in this case, the distance between the school  
13 and the place where the witness was detained. And I quote:

14 "What I understood that you said there that between the place  
15 you were held, the barn, and the place that you had training, and  
16 from my understanding that was the school, you said it was no further  
17 than 200 metres?"

18 He answered:

19 "Approximately that was the distance. I can't tell you exactly,  
20 but it was that, the distance. Because about the training and the  
21 exercises, we hold those training outside in the mountains. I don't  
22 know whether you are talking about the training inside or indoors or  
23 outside. Because, like I said, we had theoretical parts at the  
24 school, whereas outside, outdoors, we had physical training.

25 "However, in general, [the] building is in that distance.

1 Because I can't really exactly tell you what the perimeter of the  
2 place was, but approximately that is correct."

3 And he stated that on 11 November 2021, page 1575 and 1576 of  
4 the transcript.

5 Our conclusion, Your Honour, about this witness is the  
6 following.

7 The witness did not identify any buildings. He did not even  
8 identify the building in which he was kept himself. He was brought  
9 there by Witness 4600 who also brought the alleged victim of the  
10 murder of this case. He does not give a description about other  
11 structures that he saw and that were attached or nearly attached to  
12 the one he was kept in, but he only spoke about maximum three  
13 buildings close to each other.

14 Last point on this. The building where he was kept was not  
15 further than 200 metres from the school where he was trained.

16 So our general conclusion, Your Honour: This witness had no  
17 sack over his head or was not impaired in his vision. The fact that  
18 he indicates that the building was only 200 metres away from the  
19 school amounts to the conclusion that this was not the Zllash  
20 compound. The Zllash compound is at least a 20-minute or more walk  
21 from the school. The witness speaks about a different location than  
22 the Zllash compound. The Zllash compound has nine other structures,  
23 so the witness is speaking about a different location.

24 Defence witnesses, at least five - Hadri, Canolli, Krasniqi,  
25 Ajeti, and Humolli - were all able to describe the general location

1 of the Zllash compound which consistently corresponds with the aerial  
2 photos in the case file.

3 Another topic is the fence. Witness 3593 said nothing about the  
4 location in general, so he did not say anything about a fence that  
5 would have been around the compound.

6 1679 said nothing on the topic.

7 3594 then. He said he did not remember. He said he did not  
8 think so. He did not look. I quote him:

9 "If there was one, then maybe behind the house. In the opposite  
10 side of the house. That is, behind the house. In front [of it], I  
11 did not notice any."

12 13 October 2021, page 1181 of the transcript.

13 Lastly, Your Honour, 4669, on the question of the  
14 Presiding Judge:

15 "Was there in that place where you were detained, was there a  
16 fence around that place?"

17 The witness replied:

18 "A fence?" with a question mark. "Maybe there was a bit  
19 further, but not close to where we were. There was a small part of a  
20 fence. A fence is usually made of sticks, wooden sticks, to my  
21 understanding."

22 "Was there a fence or not?"

23 "Not the one that you think," the witness replied. "There was  
24 just one small part, but very far from where I was, about 30,  
25 40 metres further away. This is how I remember it."

1 11 November statement, page 1546 of the transcript.

2 Our general conclusion about this witness. None of the  
3 witnesses said that there was a fence around the Zllash compound.  
4 Only one witness gives an indication about the fence but says, "Not  
5 the one that you think." From the testimonies of the SPO witnesses,  
6 no conclusion regarding a fence around the Zllash compound can be  
7 drawn.

8 On the other hand, the Defence witnesses consistently stated it  
9 was an open area without a fence.

10 Witness 4600, then. Witness 4600 who allegedly delivered the  
11 alleged victim of the murder in this case at the compound stated that  
12 he did not recall a fence. The witness stated that on 19 January  
13 2022, page 2049 of the transcript.

14 The SPO noted that the witness deviated from a previous  
15 statement of [REDACTED] Pursuant to In-Court Redaction Order  
F476RED..

16 Your Honour, I would like to go in private session.

17 PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer, could you  
18 bring us into private session, please.

19 [Private session]

20 [Private session text removed]

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8 [Open session]

9 THE COURT OFFICER: Your Honours, we're in public session.

10 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

11 And, Defence counsel, I think that you can re-read the part of  
12 the statement just to make this session as public as possible.

13 MR. VON BONE: I will, Your Honour. I will.

14 And I start again:

15 "But do you remember saying that, indeed, there was a fence on  
16 one side at the perimeter of that compound?"

17 And he replied:

18 "Every house has a fence or part of its yard surrounded. I'm  
19 not very accurate how many -- what part was fenced. But the house  
20 was not -- the family was not living there, so I did not pay much  
21 attention to surrounding it or to a building or a fence. It might be  
22 that there was a part of a fence still on. The war was -- burned it  
23 down. For me it's not important. Maybe for you it is. But for me,  
24 it doesn't make any difference."

25 19 January 2022, page 2050 of the transcript, Your Honour.

1           Our general conclusion about this witness on this aspect is that  
2           the witness is not conclusive about the fence around the yard and,  
3           therefore, no conclusion to that extent can be drawn from this  
4           witness.

5           But the Defence witnesses, then, at least five Defence witnesses  
6           - Hadri, Canolli, Krasniqi, Ajeti, and Humolli - were able to  
7           describe the general location of the Zllash compound. They describe  
8           it as an open area. None of them spoke about the fence, gate or  
9           entrance around the compound or any kind of gate giving access to the  
10          compound.

11          I get to the aspect of the yard of the compound, Your Honour.  
12          And in this particular aspect, I would like to ask the Court Officer  
13          to bring up, first, the DSM00436. It is a picture that we know well.  
14          Your Honour, we've seen it many times. And this is what the aerial  
15          picture looks like.

16          Maybe we can enlarge it a little bit so that we can see. Thank  
17          you very much.

18          And then I would like to bring up REG00013.

19          Thank you very much, Madam Court Officer.

20          And here we see the same aerial photo - we've seen this one also  
21          before - with all the structures that are there on that area visible.  
22          I recall that these pictures were made in 2006. I mean, not the  
23          aerial photos but what is in the case file on the Zllash compound, so  
24          to speak.

25          The next one that I would like to bring up, Your Honour, is a

1 photo with DSM00412. And maybe we can put this one next to the  
2 previous one - Madam Court Officer, I'm sorry, but that would be very  
3 helpful - so that we can see the two next to each other.

4 And what we basically want to see it -- they fit more or less  
5 next to each other. The Defence made a 3D re-creation of this area  
6 and that would a little bit be like this, and we see a little bit  
7 better the structures as they would have most probably looked like.

8 Your Honour, then I would like to ask the Court Officer to bring  
9 up the next two slides, which is DSM00412.

10 Is that correct? Excuse me, I make a mistake,  
11 Madam Court Officer. It's DSM00035. 00035. And next to that ...

12 Yes, thank you very much, Court Officer. And next to that,  
13 DSM00424.

14 And with these pictures, I would like to discuss the yard. This  
15 is based on our own measures that we made at the time on the  
16 location, we have done this and made even a kind of a scale map. And  
17 as we can see, the distances, obviously they are approximate, but we  
18 are -- well, we are sure that we made accurate measurements,  
19 Your Honour.

20 The yard, then. What does Witness 3593 say? Witness 3593 said  
21 nothing about the location in general, but he was questioned about  
22 the yard upon his release. And the SPO asked:

23 "You told us yesterday that when you were released you saw many  
24 people outside; is that correct?"

25 And he replied:

1 "I told you yesterday that when I went out the yard -- out to  
2 the yard, I saw there many people, and we all just wanted to run away  
3 as soon as we could. That is why I did not look around. I was not  
4 interested to look around. I was just concerned about my own life."

5 21 September, page 516 of the transcript.

6 Earlier on, we have already quoted the witness as saying that he  
7 saw at least 60 people in the yard, both in civilian and military  
8 clothes. He did not in any manner further describe the yard itself.  
9 That is what he said on 22 September, page 608 and 609 of the  
10 transcript.

11 The conclusion about this witness regarding the yard,  
12 Your Honour, is that the witness did not look around and basically  
13 was not interested to look around and, therefore, he was not able to  
14 describe the yard.

15 And our general conclusion is that while not being impaired in  
16 his vision anymore, the witness could not provide anything about the  
17 yard. As there are at least nine buildings around the yard of which  
18 one was standing in the middle of the yard, the witness must have  
19 been able to see at such short distance these buildings. Therefore,  
20 the Defence is of the opinion that the witness was kept in another  
21 location.

22 Witness 1679 said nothing relevant to this topic.

23 3594 then. 3594 described that he had the possibility to go  
24 into the yard without a mask but did not really describe the yard  
25 itself. He had been given the opportunity to use a toilet outside

1 the barn where he was kept. He stated that on 12 October 2021, on  
2 page 1074 of the transcript.

3 Once again regarding the yard, the witness earlier quoted said:

4 "I saw this space and saw that there were two houses with that  
5 compound. I do not know who the owner of the house was, but there  
6 were two houses opposite each other. I saw two houses."

7 And to be clear, the witness described it as he went up to the  
8 room where he had a conversation and a coffee.

9 Upon a question of the Presiding Judge:

10 "One or two houses?"

11 And he responded:

12 "With the house where we were, there were, in total, two  
13 houses."

14 13 October, page 1176 and page 1177 of the transcript.

15 Any further description was not given by the witness, but at  
16 least he was the one that could say something because he was without  
17 any mask.

18 Then Witness 4669, Your Honour. Upon a question from the  
19 Presiding Judge regarding what the witness saw around when he went  
20 outside the barn where he was kept, the witness responded:

21 "Nothing. Just a field, a green field, and the toilet."

22 This is how the witness remembered it. The witness stated on a  
23 question posed again:

24 "Did you see any buildings?"

25 The witness replied:

1 "No. Only the one I exited to go to the toilet. And there were  
2 buildings near that one, around it. And we were not allowed to look  
3 on our right or on our left ... [we just had] to go straight ... and  
4 [then] back."

5 The Judge continued:

6 "And the building near the one that you were exiting, how many  
7 buildings were there?"

8 "About two or three very close to each other, almost attached to  
9 each other. And there were others a bit further, according to the  
10 configuration of the terrain."

11 It's 11 November, page 1575 and page 1576 of the transcript.

12 He said, Your Honour, that he left without looking back when he  
13 was released. He did not remember whether there was a gate to the  
14 yard to go inside. There was only a door to the building of the  
15 barn. And the witness stated this on 11 November, page 1549 of the  
16 transcript.

17 The conclusion for both Witnesses 3594 and 4669 is the  
18 following.

19 One, both witnesses described maximum two or three houses that  
20 they saw in or around the yard.

21 Two, as we said earlier, 03594 spoke about the haystack in front  
22 of the barn.

23 And, three, 03594 spoke about an old house in the opposite side.  
24 He did not give any further description of the yard.

25 Our general conclusion is the following. With nine buildings

1 around the yard, of which was one was in the middle of the yard, as  
2 we have seen in the previous photo, and on such short distance the  
3 witness should have been able to identify these. Based on their  
4 description, these witnesses are speaking about a different location.

5 Then Defence witness, at least five Defence witnesses,  
6 Your Honour - Hadri, Canolli, Krasniqi, Ajeti, Humolli - were all  
7 able to describe the general location of the Zllash compound. They  
8 describe it as an open area. None of them spoke about any fence,  
9 gate or entrance around the compound, any kind of gate giving access  
10 to the compound. All of them spoke either about crossing the yard,  
11 staying in the yard. In particular, Witness Fatmir Humolli who spoke  
12 for hours with his family in that very same yard. The Witness  
13 Humolli explicitly said that he spoke with his family in the yard.  
14 That is, in the yard between the buildings on the picture. I quote,  
15 that is the picture ERN DSM00119 up to 00133, attachment number 2.  
16 And he said it was in the yard that he met his family because it was  
17 not possible to meet elsewhere. He would do that even for hours.

18 And having said that, Your Honour, the witness stated that on  
19 the Monday, 4 October, 2021, page 915 of the transcript.

20 Excuse me, Your Honour. My mistake. Transcript of 2 February,  
21 page 2405 and 2425, and the transcript of 1 February, page 2366.

22 Your Honour, then I would like to go to the number of  
23 structures. And maybe we can go back to the previous photo that we  
24 showed, which is REG000013.

25 Exactly, Your Honour. The number of structures.

1           3593 spoke about three places. The first place, Your Honour,  
2 where he was kept was -- where he was put inside, which was a barn  
3 shed for animals, no more than 5 metres big. Page 403 of his  
4 testimony, 20 September 2021.

5           The second place was when he was dragged outside to another  
6 place 5, 6 metres away from the place where he was initially brought.  
7 In the second barn is where the beatings started. The second barn  
8 was covered with something, he said. The second barn was covered  
9 with something. Page 408, 20 September 2021.

10           The third place was the place where he was taken 15, 20 metres  
11 further away. He was taken there with the alleged murder victim or  
12 the alleged victim of the murder. As discussed earlier, he had on  
13 this occasion a sack over his head. That's page 416 of 20 September  
14 2021. And it is in this last barn where he was kept for the rest of  
15 the period of his detention.

16           He made a sketch of the place where he was kept, and we can see  
17 in the document with ERN 061012 up to 06015 that sketch. We will get  
18 later to the topic of the description of the barn itself, but it is  
19 important to know that, at this point, the witness tried to sketch  
20 how the place of detention looked like. Upon his release, he did not  
21 indicate anything further as we have discussed earlier.

22           Witness 1679. He mentioned only one building, which was the  
23 building where he was kept. He did not describe any other building.  
24 He clarified that as he was interrogated he would go to an upper  
25 floor. W1679 was taken initially to the location while he was having

1 a sack over his head. As he was interrogated and taken upstairs, he  
2 would again have a sack over his head.

3 This was not through internal steps but through external steps,  
4 Your Honour.

5 And the sketch that he made indicated only three houses in  
6 total, Your Honour.

7 I would like to go briefly, Your Honour, in private session.

8 PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer, could you  
9 bring us into private session, please.

10 [Private session]

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7 [Open session]

8 THE COURT OFFICER: For the record, Your Honours, we're now in  
9 open session.

10 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

11 You have the floor, Defence counsel.

12 MR. VON BONE: I pick up where I left, Your Honour.

13 He said lastly in the transcript:

14 "This is not through internal steps but through external steps."

15 And the witness said that on Monday, 4 October 2021, 915 of the  
16 transcript. In other words, the witness did not say anything on  
17 other buildings but stated only that about -- about the building in  
18 which he was kept during the 18 days of his detention.

19 Your Honour, I would like to just at this point ask whether we  
20 can -- we have this picture still. And then I would like to ask the  
21 Court Officer to show the next photograph, which is SPOE00128410.

22 Now, with this picture, if we can leave it for a moment, I would  
23 just like to mention the building which -- yes, yes, that is  
24 excellent. Thank you very much. If we can move the other picture a  
25 little bit more to the left, that will be very helpful. The

1 underlying photo. Yes, thank you very much.

2 We see building number 7, and we see structure number 8, or  
3 better to say 9. The Defence believes that with the photo on the  
4 right-hand side we can see that structure indicated with number 7  
5 standing over there. That is the position of the Defence, that that  
6 structure over there indicates number 7 on the photograph which is on  
7 the left side.

8 PRESIDING JUDGE VELDT-FOGLIA: Defence counsel, for my  
9 understanding, in order for me to get it right.

10 The structure that you are indicating with number 7 --

11 MR. VON BONE: Yes.

12 PRESIDING JUDGE VELDT-FOGLIA: -- on the picture with -- so  
13 00013.

14 MR. VON BONE: Yes.

15 PRESIDING JUDGE VELDT-FOGLIA: You say that on the other picture  
16 with the number ending in 128420RED, with the roof that is damaged,  
17 that that is structure number 7?

18 MR. VON BONE: That's right, Your Honour.

19 PRESIDING JUDGE VELDT-FOGLIA: Okay.

20 MR. VON BONE: And in order to clarify that, on the right photo  
21 we can look past that structure, that demolished structure and the  
22 tree. There, we look at something that looks like the part which is  
23 on the left side indicating number 9 around there.

24 And if we, Your Honour, would take out the right picture,  
25 Court Officer, and take the next photograph. And that is, to be

1 clear, SPOE00128410. That is the ERN number. That is not the --  
2 this is -- we need photo A2 in this case, Madam Court Officer. And  
3 that is indeed not 410. That is -- I have it here. That is --  
4 sorry, that is the ERN number 00128389. And --

5 PRESIDING JUDGE VELDT-FOGLIA: Wait.

6 MR. VON BONE: -- this, to be clear, it is photo A2.

7 We believe, Your Honour, we think, and it's our position, that  
8 on the left -- looking at the left photograph, the position where the  
9 photo on the right is taken is most probably from number 9, position  
10 9 of the photo on the left. So position 9 would be the position,  
11 more or less, from where the photo which is depicted on the right  
12 side, photo A2, would be taken. And that is what we wanted to  
13 clarify here.

14 PRESIDING JUDGE VELDT-FOGLIA: Okay. And for my understanding  
15 again, would then the number of the building on the right picture --

16 MR. VON BONE: Yes.

17 PRESIDING JUDGE VELDT-FOGLIA: -- which number would that get on  
18 the picture on the left?

19 MR. VON BONE: Yes. The demolished building, that is the  
20 building that is clearly demolished on the left side --

21 PRESIDING JUDGE VELDT-FOGLIA: Yes.

22 MR. VON BONE: -- is number 7.

23 PRESIDING JUDGE VELDT-FOGLIA: Yes. And then the building on  
24 the right-hand side of the same picture?

25 MR. VON BONE: Is most probably building number 6. That is the

1 position.

2 PRESIDING JUDGE VELDT-FOGLIA: Okay, good. For the record.

3 Thank you.

4 MR. VON BONE: Thank you very much, Your Honour. And thank you  
5 very much, Madam Court Officer.

6 I would like to continue with the Witness 3594 regarding -- once  
7 again, we're discussing all the number of structures and so on.

8 PRESIDING JUDGE VELDT-FOGLIA: Defence counsel, sorry. And with  
9 pointing out --

10 MR. VON BONE: Yes.

11 PRESIDING JUDGE VELDT-FOGLIA: -- what you just pointed out,  
12 what is the point you want to make for us to take into account?

13 MR. VON BONE: I get to that in a little bit later stage,  
14 Your Honour. [Overlapping speakers] ...

15 PRESIDING JUDGE VELDT-FOGLIA: Okay. Okay. Because you are  
16 leaving me curious. I would like to see the whole picture.

17 MR. VON BONE: Yes. Well, I can say already. If Witness 4600,  
18 as he stated, has delivered anybody, and, as we know, 4600 stated  
19 that he would have handed over the alleged victim of the murder at  
20 the particular point near the Zllash location. He pointed that out  
21 at some point, and he spoke about a particular point. And what we  
22 are trying to say with this, that taken from that point, or more or  
23 less that point that that witness indicated, it would be  
24 impossible -- it would be really impossible to see the houses on the  
25 right side of the compound.

1 And if we go to the -- if we take the last photo again, the  
2 structure. And that is the one with all the numbers.

3 PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer, do you need  
4 a number?

5 MR. VON BONE: It's REG -- the same. This one. And if we maybe  
6 enlarge it a bit. Yes, that is -- a little bit to enlarge it. Then  
7 we can see the number 9 well. Well, anyway.

8 Seeing from position 9, it would be impossible -- thank you very  
9 much, Madam Court Officer.

10 Seeing from position 9, we believe that the structure number 7  
11 clearly blocks the view to any of the right-hand side building. In  
12 particular, the numbers 2, 3, 4, and 5. That part is not visible.  
13 Simply not visible. And the height of that building, and it is a  
14 slope there, we can see once again on picture A20.

15 Madam Court Officer, if you would please produce once again  
16 00128410. Thank you very much.

17 There we can clearly see how that it is a slope terrain which is  
18 going down, which indicates that if you are standing there at that  
19 position number 9, that demolished building, as it is to be seen,  
20 simply blocks any view at all towards the right part of the Zllash  
21 location.

22 PRESIDING JUDGE VELDT-FOGLIA: Can you repeat this explanation?

23 MR. VON BONE: Yes, Your Honour. I will.

24 If we look to the demolished building and the tree, and we look  
25 precisely in between, we believe that we see there the other position

1 that we just indicated. That was position 9 on the previous photo.

2 Taken from that position -- but this picture is clear, because  
3 we can see a little bit the height of this demolished building, what  
4 the height is, plus we can clearly see that the terrain is sloped, is  
5 going down. That is what we want to point out with that.

6 So in any case, a person standing on position 9, more or less,  
7 his view would be blocked due to the fact that there is a building  
8 standing there, and that is building number 7.

9 PRESIDING JUDGE VELDT-FOGLIA: Thank you for your clarification.

10 MR. VON BONE: If there is something unclear, then I really can  
11 clarify it at the moment that is the best, if there is any other  
12 question regarding it.

13 JUDGE BITTI: Yes, thank you, Defence counsel. But then if I  
14 understood you correctly, if you are on position 9, which by the way,  
15 looks like a fence --

16 MR. VON BONE: Yes, that looks like a fence, a remnant of a  
17 fence.

18 JUDGE BITTI: Then if you're on position 9, then the only  
19 buildings that you would see would be 10, 11, and 12. Or is there  
20 something I don't understand?

21 MR. VON BONE: 10, 11, and 12?

22 PRESIDING JUDGE VELDT-FOGLIA: Can you please -- wait, wait.  
23 Shall we bring back the other picture --

24 MR. VON BONE: Sure.

25 PRESIDING JUDGE VELDT-FOGLIA: -- and put it next to it, and

1 then we can confirm it.

2 Please, you can re-ask the question.

3 JUDGE BITTI: Yes. So if I understood you correctly, somebody  
4 entering through 9, that's what you're saying, if I understood  
5 correctly --

6 MR. VON BONE: Yes.

7 JUDGE BITTI: -- would see the buildings on the left - 10, 11,  
8 and 12. But would not see, because of building 7, maybe also because  
9 of the tree, but would not see 2, 3, 4, 5, 6. Do I understand that  
10 correctly?

11 MR. VON BONE: You understand that correctly. And to be clear,  
12 4600 explained that he saw Salih Mustafa on the veranda, and that is  
13 the only place on the right side where there would be a veranda. So  
14 that is the moment that he apparently saw him at those structures.

15 JUDGE BITTI: Okay. So your position is that actually 4600  
16 could not see Mr. Mustafa because, according to what you're telling  
17 us, Mr. Mustafa at that time would have been on the right and not on  
18 the left?

19 MR. VON BONE: That is exactly what the Witness 4600 stated.

20 JUDGE BITTI: Okay. Thank you.

21 MR. VON BONE: Thank you very much.

22 With that explanation given, Your Honour, I continue with the --  
23 let me see, 3594.

24 I just want to say that, again, this witness speaks only about  
25 two houses. Upon a question of the Presiding Judge:

1 "Was it one or two houses?"

2 The witness responded:

3 "With the house where we were kept, there was, in total, two  
4 houses."

5 And then coming to Witness 4669 on this issue. Asked about any  
6 surrounding building from where he was kept, the witness stated as  
7 follows:

8 "No. Only the one that I exited to go to the toilet. There  
9 were buildings near that one, around it. And we were not allowed to  
10 look on our right or on our left ... to where we had to go and come  
11 back.

12 "About two or three very close to each other, almost attached to  
13 one another. And there were others a bit further, according to the  
14 configuration of the terrain."

15 The witness stated this 11 November 2021, on page 1542 and 1543.

16 The general conclusion regarding the number of buildings of the  
17 SPO witnesses 03593, Witness 1679, and Witness 3594, and Witness 4669  
18 is that all four were not able to identify and describe buildings at  
19 or around the place where they were kept. If they would have been  
20 detained on the Zllash compound with nine structures, some of them  
21 big structures, and one even in the middle of the yard, they could  
22 not have missed those buildings.

23 Therefore, it is in the opinion of the Defence that they were  
24 kept in a different location.

25 Then, Your Honour, the building where the people were kept, the

1 barn.

2 3593, Your Honour, according to him, he stayed in the following  
3 places that he was taken into detention. Initially, he was put a  
4 sack over his head and then was put in a barn where the sack was  
5 removed. That is place 1; page 403.

6 Then he was taken outside to another place, place 2, where the  
7 perpetrators started to beat him. That is page 406, 407, and page  
8 408. And then lastly, the next day, subsequently he was taken back  
9 to place 1, where the other person had remained. That is page 406,  
10 407, and 408.

11 The next day he was moved to another place, and that is place 3,  
12 where he was eventually kept for 18 days. In this place, he was  
13 moved together with the alleged victim of the murder, and he found in  
14 that last place two or three other people. He summed it up as five  
15 people in total. That is page 418 and 419.

16 Now, I will not say how he described place 1. He described it  
17 around 5 metres. This is all the testimony, to be clear, on  
18 20 September 2021, the pages numbers that I noted.

19 Place 2 was also about 5 to 6 metres away from where he was  
20 staying. And he says "there was wood, all sorts of different stuff  
21 there, and it was there that they started to beat me up." He  
22 continued to describe this place and he said -- place 2, he answered  
23 to the question of the SPO, that:

24 "It was covered with something that I could not exactly tell. I  
25 cannot exactly tell you because I was not looking."

1           It was a dark place. As he was unable to see who actually beat  
2 him. The people used torchlight every now and then. And that is  
3 20 September, page 410.

4           He continued on this topic:

5           "And it was some sort of place. There were no walls but there  
6 was just a cover. And I do not know anything else because it was  
7 dark and I didn't see a thing. I didn't see a thing at all."

8           21 September, page 562 of the transcript.

9           Again, question of the SPO:

10          "Did the place have any lighting or windows?"

11          "No, nothing at all."

12          The witness stated that 20 September, page 417.

13          Your Honour, this witness then described place 2, around whether  
14 there was illumination or a window. Upon a question of the Defence,  
15 he replied, speaking about the barn where he was kept all the time,  
16 whether there was any window, and he replied:

17          "No, it was not closed, it had a peak. It was open. It was  
18 some sort of place. There were no walls, but there was just a cover,  
19 and I do not know anything else because it was dark and I did not see  
20 a thing. I didn't see anything at all. I do not know whether they  
21 had any electricity or not, but it was dark. I couldn't see the  
22 roof. It was dark. They did not allow me to see. I didn't see the  
23 roof at all."

24          21 September, page 562 of the transcript of this witness.

25          Then he described the third place, and the witness explained:

1 "Yes, we could not -- we could not sleep because the upper part  
2 was covered with wood."

3 The SPO asked:

4 "Are you saying that the ceiling of this place where you were  
5 staying was made of wood?"

6 He answered:

7 "They were simple wooden planks. Up there, up there they used  
8 to keep food for the animals, but they were using it as a room."

9 The witness stated that 20 September, page 476 of the  
10 transcript.

11 A sketch, Your Honour. He made a sketch. Apart from the  
12 witness, that he made a sketch, which can be seen at SPOE061012, the  
13 witness explained that in court when he was confronted with the  
14 drawing himself.

15 On 21 September 2021, page 518 of the transcript, he was later  
16 on even confronted with a photograph of the outside of what the  
17 Defence calls the oda building. The oda building, I'll come back on  
18 it, what we call the oda building, but that is basically the building  
19 with the upper part and the lower part that we have seen. I will  
20 explain that later, which building we indicate is the oda building.

21 I can do it now already --

22 PRESIDING JUDGE VELDT-FOGLIA: [Microphone not activated].

23 It's almost time for lunch break.

24 MR. VON BONE: Yes, yes, I am finishing up.

25 PRESIDING JUDGE VELDT-FOGLIA: So if you could look for a

1 natural moment to --

2 MR. VON BONE: Yes.

3 PRESIDING JUDGE VELDT-FOGLIA: -- interrupt your submissions.

4 MR. VON BONE: Yes, Your Honours, it's exactly what I'm doing.  
5 Maybe we can bring up the photo once again. The photo with all the  
6 numbers on it. And then we will conclude this witness.

7 Thank you very much, Madam Court Officer.

8 Building number 12 is what we call the oda building. The  
9 building number 12 on this picture.

10 Your Honour, the conclusion. The witness identified through a  
11 photo, and that photo is SPOE00128392, of a building that he marked  
12 with number 2. I will give the ERN number. It's easy to review  
13 that. ERN 100967 with an Official Note attached on 3 June. That is  
14 the other identifying method that was being used for this witness.

15 Now, I come to the conclusion for this witness, and then I think  
16 that would be a natural moment to stop for the lunch break,  
17 Your Honour.

18 If you allow me. This witness, Your Honour, described only the  
19 inside of a structure, but he does not describe the outside of the  
20 building as he was unable to see this since he was put a sack over  
21 his head.

22 Number two, as we said earlier, Witness 03593 spoke each time  
23 about the inside of a place, never the outside.

24 Three, nevertheless, he was confronted with a photo of the oda.

25 Four, 3593, therefore, can never identify the outside of the

1 building based on a photograph.

2 Based on the sketch, is my next point, based on the sketch he  
3 made and comparing that with what he identified through photo number  
4 2. Photo number 2 is SPOE00128392. Based on the sketch he made and  
5 comparing that with that identified building, number 2, it confirms  
6 the position of the Defence that he was in no position to give any  
7 description of the building on the outside because his head was  
8 covered all the time with a sack, even when he was transferred.

9 And as I said, he only described insides of the building.

10 The general conclusion, and then I will conclude it,  
11 Your Honour. This witness did not make a reliable identification of  
12 the building in which he was kept. The witness was unable to  
13 identify an outside of a building, as he has never been able to see  
14 where he went when he was transferred to the place where he was  
15 beaten.

16 The sketch and the photo that was shown to him cannot be  
17 reliable and have no probative value whatsoever. Showing him a  
18 single picture, especially when the place was never described from  
19 the outside by the witness, showing a witness in such circumstances a  
20 single photo is suggestive and leading. In such case, the witness  
21 should have been shown multiple photos of similar buildings from  
22 which he could have made a choice.

23 Therefore, his testimony to this aspect and the evidence relied  
24 upon by the SPO is not reliable.

25 Thank you very much, Your Honour. I would like to conclude for

1 this moment, and then after the break continue. Thank you very much.

2 PRESIDING JUDGE VELDT-FOGLIA: [Microphone not activated].

3 THE INTERPRETER: Microphone, please.

4 --- Luncheon recess taken at 1.05 p.m.

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

6 PRESIDING JUDGE VELDT-FOGLIA: Welcome back.

7 I call the appearances, but I see the same composition for the  
8 SPO; same composition for the Victims' Counsel, and I see nodding on  
9 my right-hand side; and the same composition at the left-hand side  
10 for the Defence team. And Mr. Mustafa is also present.

11 Very well. Good.

12 Defence counsel, you may proceed.

13 MR. VON BONE: Thank you very much, Your Honour.

14 We will continue with the discussion of the witnesses. And we  
15 would like to ask the Court Officer to bring up ERN REG00001 to  
16 REG00-013.

17 Now, Your Honour, we continue where we left over and we would  
18 like to discuss the Witness 4600 on this occasion.

19 [Microphone not activated].

20 PRESIDING JUDGE VELDT-FOGLIA: Microphone please, Defence  
21 counsel.

22 MR. VON BONE: I need to sort out one thing. Sorry.

23 PRESIDING JUDGE VELDT-FOGLIA: Please proceed.

24 MR. VON BONE: Thank you, Your Honour.

25 Your Honours, I would discuss Witness 4600. And with this

1 picture in mind, I would like to quote what the witness said,  
2 Witness 4600, on 23 September 2021. And I quote from the transcript,  
3 that is page 732.

4 "Yes, we were at the gate," says the witness.

5 And the question is:

6 "And I think you may have told us, but if you could repeat,  
7 what's the distance, by and large, between the place where you were  
8 and where Commander Cali was?"

9 "As I said before, I don't know exactly, but about 20 to 30  
10 metres. I'm not sure. So, yes, 20 to 30 metres."

11 "Now," is the question, "Now, was that sort of a -- was it a  
12 balcony? Did you tell us it was a balcony where Commander Cali was  
13 standing or some sort of a -- or some sort of a balcony?"

14 And the answer is:

15 "Yes, some sort of balcony. He came out of one room. As I  
16 said, this balcony connected three or four rooms. I do not know how  
17 many. He came out of this room here. There was a door there and he  
18 came out of that room, that door, and greeted us."

19 And the question:

20 "Was there a bit of an elevation from the ground to this balcony  
21 where he was standing, or was it at the same level where you were?"

22 "No, it wasn't, because there was an uphill area, not too high.  
23 The balcony was not much higher than the ground level and that's  
24 where Cali was."

25 Your Honour, if I may ask the Court Officer to bring on the

1 screen DSM00412. Now, this is the 3D representation that the Defence  
2 made.

3 If you could zoom out slightly, Ms. Court Officer. Thank you  
4 very much. And enlarge it a little bit more.

5 Anyway, it says that was based on the blowup picture of the  
6 following aerial -- of one of the aerial photos that we know and that  
7 is written under it. That is SPOE00213478.

8 So that would be the configuration of that as it appears to look  
9 like that.

10 If we go to DSM00388 once again. Once again, actually -- we  
11 have more or less the same representation and with the indicative  
12 measurements that the Defence made at the time of the location of the  
13 Zllash compound as we know.

14 Now, here, as we can see, the structure which was demolished,  
15 which we spoke earlier about, is not in this representation.  
16 However, if we go to DSM -- I would like to point out here to the  
17 family house, to the right. I will make some comments about that.

18 And if we go to DSM00436. That's right. And if we could  
19 enlarge that to a great extent. Yes, thank you very much. And we go  
20 to the right.

21 We view the part on the right side. There, obviously, we see on  
22 the right side the building on the very right. It's a large building  
23 on the right side under, with the demolished building that we saw on  
24 the earlier photo. And on the top right, on the top right we see a  
25 house, or a room at least, without any roof on it, and it is that

1 particular house that I would like to point to the Panel's attention.

2 If the Court Officer would please show DSM00392. This is what  
3 the Defence made. It is a view uphill from the map that we made, and  
4 it is pointing in the direction to that house as we have  
5 reconstructed it on the basis of the testimony of Selatin Krasniqi.  
6 As we know, Selatin Krasniqi was the one who was living there and  
7 whose family created that house. On the basis of his statement, we  
8 actually interviewed him on that and created a map in the beginning  
9 with him.

10 And regarding that, maybe if the Court Officer can put up --

11 PRESIDING JUDGE VELDT-FOGLIA: Please, Defence counsel.

12 MR. VON BONE: Yes.

13 PRESIDING JUDGE VELDT-FOGLIA: The number of this building, for  
14 the record, that would be, according to the photograph that you have  
15 been showing us with all the numbers indicated by Mr. Krasniqi?

16 MR. VON BONE: According to that photograph with all the  
17 numbers?

18 PRESIDING JUDGE VELDT-FOGLIA: Yes, we have the photograph with  
19 all the numbers.

20 MR. VON BONE: Yes.

21 PRESIDING JUDGE VELDT-FOGLIA: And I would like to make a  
22 link --

23 MR. VON BONE: Yes.

24 PRESIDING JUDGE VELDT-FOGLIA: -- between this photograph and --

25 MR. VON BONE: Yes, that would be the building which on that

1 photograph with the numbers is 2, 3, 4, and 5.

2 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

3 MR. VON BONE: 2, 3, 4, and 5.

4 And as we discussed this building with Selatin Krasniqi, he gave  
5 an indication of how that configuration of that house was. And that  
6 was more or less to be seen at DSM00406.

7 Yes?

8 PRESIDING JUDGE VELDT-FOGLIA: Defence counsel, I would have a  
9 preference, if it's possible, taking into account how big this  
10 picture is, but to have also the picture -- the aerial picture --

11 MR. VON BONE: Yes. Okay.

12 PRESIDING JUDGE VELDT-FOGLIA: -- of the different -- I think it  
13 would help us in understanding better what you are showing.

14 MR. VON BONE: Yes, and that is with the numbers?

15 PRESIDING JUDGE VELDT-FOGLIA: Yes.

16 MR. VON BONE: Yes, okay. Thank you.

17 Court Officer, thank you very much.

18 So that building of consisted of, in total, four rooms, with the  
19 dimensions given on that photo as we see it on the right side  
20 roughly, and that was given also -- that was based on the testimony  
21 of -- what's his name? Selatin Krasniqi.

22 As we can see, these rooms, they come all out on a balcony, and  
23 that is obviously the single building which has a balcony or a  
24 veranda or whatever we call it on the compound.

25 If we take a look at the last photograph, and that would be

1 photo A1, photo A1. That is SPOE00128388. And if the Court Officer  
2 would be so kind to put that one on the screen.

3 And if we could zoom in on those buildings, and then in  
4 particular the building to the right a little bit. Yes. This would  
5 be fine.

6 Then it is the Defence position that there is nowhere to be  
7 found a balcony on this building whatsoever. And, therefore,  
8 Your Honour, we believe that Witness 4600, with whatever he's stated,  
9 could not have been talking about this building because there was no  
10 some sort building -- as I repeat his testimony, and that is the  
11 testimony of 23 September, page 732 of the transcript:

12 "Yes, some sort of balcony. He came out of one room. As I  
13 said, this balcony connected three or four rooms. I don't know how  
14 many. He came out of this room there. There was a door there and he  
15 came out of the room, and then he greeted us."

16 And then it continued:

17 "Was there a bit of an elevation from the ground to this balcony  
18 where he was standing, or was it at the same level as you were?"

19 "No, it wasn't, because there was an uphill area. Not too high.  
20 It was not much higher than the ground level, and that's where Cali  
21 was."

22 So, Your Honour, it is the Defence's position that Witness 4600,  
23 his testimony regarding seeing Cali from the position that he  
24 indicated, and I should say he indicated that not only one time but  
25 he indicated it, in fact, two times, as in his earlier testimony, he

1 has drawn a map of the situation. And that map indicated to us he  
2 was viewing to the right side of him if we take him at the position  
3 of the gate.

4 And that, Your Honour, he stated in his testimony when he spoke  
5 with the Specialist Prosecutor at the time, Mr. Carney, and I am not  
6 sure whether I have that document now right here, but I think I have.  
7 Yes, I do, Your Honour. He drew a sketch of the situation, and he  
8 did that, Your Honour, when he was interviewed on *[REDACTED] Pursuant  
to In-Court Redaction Order F476RED.*

9 *[REDACTED] Pursuant to In-Court Redaction Order F476RED.* And there  
on that sketch that he made *[REDACTED] Pursuant to In-Court Redaction  
Order F476RED.*

10 *[REDACTED] Pursuant to In-Court Redaction Order F476RED.* he clearly  
indicated two markings, marking 1 and  
11 marking 2. And marking 1 would be the position from the gate as we  
12 have discussed earlier, that is position 9 on the map with all the  
13 numbers on it. Maybe we can take that back for a moment.

14 That is not the one. Yes, the one on the left.

15 And he then also spoke what he marked with a number 2. And  
16 number 2 is a building that is to his right. I will give the number  
17 of the document. Document 072908 until 072914RED1. That is where he  
18 has marked it. And the exact number of that particular sketch that  
19 he made is, to be exact, ERN 072909.

20 And with that, Your Honour --

21 PRESIDING JUDGE VELDT-FOGLIA: Are you intending to show that on  
22 the screen?

23 MR. VON BONE: No, Your Honour.

24 PRESIDING JUDGE VELDT-FOGLIA: But I think I would like to have  
25 it on the screen just to understand better.

1 MR. VON BONE: I don't think we have it on the exhibit numbers  
2 that we have given. I just referred to the --

3 PRESIDING JUDGE VELDT-FOGLIA: To be honest, for me it's not  
4 clear now.

5 MR. VON BONE: Okay.

6 PRESIDING JUDGE VELDT-FOGLIA: You're describing it, but --

7 MR. VON BONE: Yes, yes. Well, I can maybe do something about  
8 that. Let me first explain what the witness says about it.

9 PRESIDING JUDGE VELDT-FOGLIA: Okay.

10 MR. VON BONE: He says in his statement -- that is the  
11 transcript of 23 September 2021. He says -- on the questions of my  
12 learned colleague, he says, the question is:

13 "Now, do you remember sketching this during your SPO interview  
14 that took place on 21 January 2020?"

15 "Yes, I remember it."

16 "Now, in the bottom, slightly left side of the sketch, there is  
17 an arrow. Can you see that?"

18 "Yes."

19 "Can you tell it what it depicts, that part of your drawing?"

20 "There are two arrows. The arrow from the road to the gate and  
21 then the other going inside into the yard."

22 Question:

23 "Yes, I believe that's a number 1, but it doesn't look like an  
24 arrow."

25 "But could you tell us --"

1 And then the answer of the witness is:

2 "No, no, that's an arrow."

3 "That's okay," says the prosecutor. "Can you tell us what that  
4 drawing represents? What part of -- what is it that you drew there?"

5 "I tried," and that is indeed that document, "I tried to depict  
6 here that when you come from the left side on this road and you stop  
7 in front of the gate, that's what the first arrow depicts. And then  
8 the second arrow depicts going inside, and that's why I put that  
9 arrow there."

10 "Thank you. I apologise," says counsel.

11 The question is:

12 "Thank you. I apologise for mischaracterising your sketch.  
13 Now, you see what appears to be a number 2 to a rectangle, a  
14 rectangular drawing on the right-hand side. It's on the centre,  
15 actually, of the sketch. Do you see that?"

16 And the answer of the witness is:

17 "Yes."

18 And the question is:

19 "Can you tell the Panel what that represents there?"

20 "Well, this was a building, a single-storey building, an old  
21 one. Up to these lines, and then you can see in the sketch there was  
22 some sort of a porch there. And there were rooms, one, two, three,  
23 four -- I don't know how many there were. And all the rooms had  
24 doors that came out to this porch."

25 "Does this drawing depict the place where Commander Cali greeted

1     you?"

2             "Yes."

3             "And where is in the place in the sketch where Commander Cali  
4     greeted you from?"

5             "From this part there."

6             "Thank you very much. Can you -- and can you -- you were  
7     standing. Can you also mark with the same pen the place where you  
8     were standing when the exchange happened.

9             "Yes, we were here at the gate."

10            Well, and then I -- I will continue. The question is again:

11            "And I think you may have told us, but if you could repeat,  
12     what's the distance, by and large, between the place where you were  
13     and where Commander Cali was?"

14            Answer:

15            "I said this before. I don't know exactly. But to 20 to 30  
16     metres. I'm not sure. Yes, 20 to 30 metres."

17            Question:

18            "Now, was that sort of -- was it a balcony? Did you tell us it  
19     was a balcony where Commander Cali was standing or some sort of a  
20     balcony?"

21            Answer:

22            "Yes, some sort of a balcony. He came out of one room. As I  
23     said, this balcony connected three or four rooms. I do not know how  
24     many. He came out of this room. There was a door there. And then  
25     he came out of that room, that door, and he greeted us."

1           And I stop at this point with this witness because I have  
2 already read the rest.

3           Your Honour, in sum, to be clear about the Witness 4600, and as  
4 it is the position of the Defence that from the place where he would  
5 have been standing, he would not have been able to see Mr. Mustafa,  
6 if Mr. Mustafa was there at all, I should say.

7           In any event, there was clearly blocking and a demolished  
8 structure from his position from where he would not be able to see  
9 him.

10           I continue with the next witness, Your Honour. That's  
11 Witness 1679. He's another witness that I will discuss regarding the  
12 fact whether he is able to identify any buildings, any structures on  
13 the location.

14           According to W1679, he spoke about the barn where he was kept.  
15 And he stated about that --

16           PRESIDING JUDGE VELDT-FOGLIA: Defence counsel?

17           MR. VON BONE: Yes.

18           PRESIDING JUDGE VELDT-FOGLIA: Sorry to interrupt you. I think  
19 we can take down the picture now.

20           MR. VON BONE: Yes, Your Honour. Yes. We can take them all  
21 down because we don't need them anymore.

22           According to W1679, he spoke about the barn where he was kept.  
23 He stated:

24           "From what I remember, it was a building made of stone. There  
25 was a wooden door. There was some hay, dampness."

1 And then the -- that is 4 October, page 882 of the transcript.

2 Then the cowshed he described as follows:

3 "... there were no animals. But you could tell that it was a  
4 cowshed. You could see that, because I have seen in the past in such  
5 locations, places where cows are kept. So could you tell it was a  
6 cowshed."

7 Upon a question whether it was locked:

8 "Yes. It was a wooden door that we would use to come in and go  
9 out. And there were these wooden posts, beams."

10 The witness stated that again, 4 October, page 919 of the  
11 transcript.

12 The Witness 1679 was asked about the cowshed or the barn where  
13 he was kept, and he gave the following answer. The question was:

14 "Could you describe that place for us, that cowshed or barn,  
15 whatever you want to call it, in dimensions?"

16 The witness answers:

17 "It was not a big place. I don't really know how big exactly.  
18 It was normal ground. There was hay on the floor. It was damp,  
19 stone walls and beams. I don't really know how big it was. Perhaps  
20 it was as big as a normal room."

21 About whether he was able to touch the ceiling, the witness  
22 stated:

23 "I do not remember. I don't know. At the time I was smaller,  
24 and I think perhaps I wouldn't be able to touch the ceiling then."

25 And about the dimensions inside the barn, the witness says:

1 "I don't know, sir. I wouldn't be able to tell you."

2 And, lastly, about whether there was a window, the witness said:

3 "I don't remember. As far as I remember, there was no window.  
4 There was just a door, a wooden door, and there were some spaces  
5 where you could see the light between the wooden slats. But I didn't  
6 pay much attention to these things."

7 That is 5 October, page 982 of the transcript.

8 Lastly, Your Honour, the identification through photos. The  
9 witness identified through two photos, SPOE00128388 and SPO128392, of  
10 buildings he marked with number 2. And that is in ERN 100803 and  
11 100805, with a special note attached on *[REDACTED] Pursuant to In-  
Court Redaction Order F476RED..*

12 Now, Your Honour, we have a conclusion about the Witness 1679.  
13 The witness described only one time the outside of the building.  
14 Because his head, that's point two, because his head was covered all  
15 the time with a sack, even when transferred, he was unable to see  
16 this since he was put a sack over his head upon his arrival.

17 Three, as we said earlier, W1679 spoke nearly most of the time  
18 about the inside of a place, never the outside. The description of  
19 the outside that he gave was extremely limited.

20 Four, nevertheless, he was confronted with two photographs of  
21 what we call the oda of the compound.

22 Five, from the statement of the witness, the witness gives not  
23 any distinctive description of the external part or look of the place  
24 where he was kept. In addition, the witness failed to give any  
25 description of the yard. The description of the interior of that

1 basement where he was kept does not provide anything specific that  
2 can point to the internal of the basement of the oda building or  
3 another building at the scene of the compound. It is not a  
4 distinctive description of a basement but could be any basement in  
5 the area.

6 Six, W1679, therefore, can never identify the outside of the  
7 building based on a photograph.

8 Seven, it was the first time that he was there, and he has never  
9 been there since.

10 Eight, the sketch he made - that's ERN 060694, dated 5 June -  
11 and comparing that with what we know about the compound, it is  
12 impossible to make something out of this. It is clear that it does  
13 not in any manner anything to that can be seen -- it does not reflect  
14 in any manner anything that can be seen on the compound.

15 Lastly, Your Honour, on this, point nine. Therefore, the  
16 identification through two photographs, the photographs 00128388 and  
17 128392, of the oda building, it confirms the position of the Defence  
18 that he was in no position to give a good identification of the  
19 building where he was kept.

20 Your Honour, this witness did not make a reliable identification  
21 of the building in which he was kept. The witness was unable to  
22 identify an outside of a building as he has never been able to see  
23 where he went when he was transferred to the place where he was  
24 beaten. The sketch and the photos that were shown to him cannot be  
25 reliable and have no probative value whatsoever.

1           Showing him a single picture, especially the outside of the  
2           place, especially when the outside of the place was never described  
3           in a distinctive manner, showing a witness in such circumstances a  
4           photo of a single building is suggestive and leading. In such case,  
5           the witness should have been shown multiple photos of similar  
6           buildings from which he could have made a choice. Therefore, his  
7           testimony in this aspect of the evidence cannot be relied upon by the  
8           SPO. It is therefore not reliable.

9           Then, Your Honour, we go to the Witness 03594. He described the  
10          building where he was kept as a two-storey house.

11          "Below that house, in the lower part, there was an old door.  
12          They opened the door and I entered the room.

13          "It wasn't a very big space, I would say. Not very small but  
14          neither very big. It was an area where animals are kept."

15          There was a small window in the lower part. There is one door  
16          and a window.

17          The witness stated that on 12 October, page 1039 of the  
18          transcript.

19          "There was no bed there. There was no discussion of a bed  
20          there.

21          "... they brought us some hay because they had some hay outside  
22          of the building, and what we did is that we laid that down and we had  
23          some blankets as well."

24          That is 12 October, page 1073.

25          Then whether there was daylight in the barn.

1 "Could you see any daylight in the barn?"

2 "Yes, because there was a window. There were two parts and  
3 there was enough light, daylight, coming into the room. It wasn't a  
4 window with glass. It was covered with timber, with wood, but it was  
5 an open space where you can look through, or it was closed because of  
6 the timber.

7 That was a question, excuse me:

8 "But was it an open space where you can look through, or was it  
9 closed because of the timber?"

10 The answer was:

11 "There was enough openings for daylight to come in. Those were  
12 old wooden planks. You can imagine that it was a window for a place  
13 where animals were kept."

14 "And was it possible to look through the window from the barn  
15 and you could watch outside from the barn through the window?"

16 And he said: "No."

17 This is all 13 October, page 1185, 1186 of the transcript.

18 The conclusion regarding this witness, Your Honour.

19 The witness describes the building in general terms, even though  
20 he was not impaired in his observation by a sack over his head. As  
21 we said earlier, spoke nearly most of the time about the inside of a  
22 place but gave no particulars about the outside. The description of  
23 the outside that he gave was limited, not very descriptive in the  
24 sense that it can be compared to any of the photos.

25 He described a single house from which on the opposite side

1 would be one old house.

2 The conclusion for this witness, Your Honour, is that he did not  
3 make a reliable identification of the building in which he was kept.

4 Then, Your Honour, Witness 4669.

5 The witness stated, concerning the barn:

6 "The barn was a sort of room, big in size, something like a  
7 stable. There was something like a trough, a feed trough for animals  
8 in there. It was made of wood. The walls made of wood and earth.  
9 The wall had cracks, so we could see outside. The walls were built  
10 of wood, hay, and mud, and I remember it was always dark. There was  
11 a window but it was closed so the light could not come in."

12 Transcript of 10 November 2021, page 1430 of the transcript.

13 And about the conditions of the barn, Your Honour, the witness  
14 stated whether it was possible to look through the window from the  
15 barn as follows:

16 "No," not, according to the witness, through a window, but he  
17 was able to look through the cracks of the wood of the wall. The  
18 moment in time that the witness was kept inside, there persons in the  
19 surrounding area because the witness could see their movement through  
20 the cracks of the barn. He could see the silhouettes of those  
21 persons. He could see tens of people dealing with different  
22 activities. The witness stated that on 11 November, page 1532 of the  
23 transcript.

24 Asked about how the barn looked and the condition of the barn,  
25 the witness replied that it resembled a stable and that there was

1 some hay here and there. He smelt and saw animal excrements. That  
2 is 11 November, page 1545.

3 Lastly, the witness stated about whether the door of the barn  
4 was closed.

5 "It was a wooden gate, or door, that was made of wood and  
6 planks, like wooden planks, and it was locked from outside, like our  
7 traditional doors. They would lock it either with a lock or  
8 something. I did not see that. It was sort of greyish-black  
9 colour."

10 11 November, page 1745 of the transcript.

11 Your Honours, in the submissions regarding the Panel's question,  
12 the SPO filed a document. That's F00471. In that document, page 3,  
13 the photograph, SPOE128388, with a blue circle is shown on the top of  
14 that page. However, the witness stated during the testimony that,  
15 and I quote:

16 "Mr. Witness, there is a blue -- dark blue circle around two  
17 buildings. Is that place encircled by yourself?"

18 He answered:

19 "The drawing, I do not remember that I have done that, so  
20 probably someone else has done that. He asked first on whether this  
21 was the place, and probably they have encircled that place."

22 The transcript, page 1471, transcript 10 November 2021.

23 The witness was shown in his interview with the SPO at the time,  
24 that is [REDACTED] Pursuant to In-Court Redaction Order F476RED., and  
that is SPOE082023-TR-ET, Part 2,  
25 page 29 and 30, the entire photo album. The document bears the

1 number ERN SPOE00128386 until 128420.

2 At the time that he was shown the album in this interview, he  
3 indicated the photo 00128407. So that is, in fact, a different  
4 photo. Therefore, he was commenting on a different photo, SPO128407,  
5 because there is no indication by the interview which photo he  
6 exactly encircled.

7 The conclusion about this witness, Your Honour, is that the  
8 witness described only the barn. And based on his description, it  
9 might have been recently used for animals.

10 Two, the witness described the building in general terms, even  
11 though he was not impaired in his observation by a sack over his  
12 head.

13 Three, the description of the outside that he gave was limited,  
14 not very descriptive, in the sense that it can be compared to any of  
15 the photos.

16 And, fourth, he stated that he did not believe he encircled  
17 anything on a photo.

18 Our general conclusion is that the witness did not make a  
19 reliable identification of the building in which he was kept.

20 Your Honour, I will then move on to --

21 PRESIDING JUDGE VELDT-FOGLIA: Defence counsel?

22 MR. VON BONE: Yes?

23 PRESIDING JUDGE VELDT-FOGLIA: We went into private session  
24 earlier this morning, and I would just like to remind you, without  
25 going into private session again, of what we discussed then with

1 regards to what can be said or not. Yes?

2 MR. VON BONE: Yes, Your Honour. Okay.

3 I would like to cover the people, what we would call the  
4 interrogators and what was said about that. And then I would like to  
5 first go to Witness 03593.

6 The witness stated that he was interrogated by the accused.  
7 This was approximately six or seven days before the 18th. Two  
8 soldiers had sent him to the room upstairs. There was this room  
9 upstairs, and the accused started asking questions to him. And so he  
10 asked questions like: Who is the thief? The witness stated that on  
11 20 September 2021, page 419 of the transcript.

12 And I would like to ask, Your Honour, to go into private  
13 session.

14 PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer --

15 MR. VON BONE: For a brief moment.

16 PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer, could you  
17 bring us into private session, please.

18 [Private session]

19 [Private session text removed]

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11 [Open session]

12 THE COURT OFFICER: Your Honours, we're in public session.

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

14 Defence counsel, please proceed.

15 MR. VON BONE: Thank you very much.

16 This witness, Your Honour, it is only in 2021 that he starts to  
17 use the name of the accused. He does not even want to pronounce the  
18 name of the accused, but he never mentioned anywhere else, ever, the  
19 name of the accused.

20 The conclusion regarding this witness. Based on his testimony,  
21 it cannot be proven that a red hat that is the accused that  
22 interrogated him.

23 Then Witness 1679. The witness claims that he was interrogated  
24 by Commander Cali. That was upon his arrival at the time that he was  
25 taken from the school building to his later place of detention.

1 4 October, page 867 of the transcript.

2 The conclusion from the testimony of the witness. It cannot be  
3 proven that on the day of the arrest of the witness the commander was  
4 the one who interrogated him or who introduced himself as  
5 Commander Cali.

6 Then Witness 3594. This witness did not mention the accused at  
7 all as one of the interrogators.

8 And Witness 4669, he was only interrogated one time, on the  
9 third day of his arrival at the place where he was kept. The  
10 interrogation lasted 20 minutes to half an hour, including the  
11 beating that took place on him. At one point two females came. They  
12 just stood there near the others. His beating took place after the  
13 co-detainees had been interrogated or beaten.

14 And who interrogated this witness? While being interrogated, he  
15 never noticed anybody being in command. There were two persons that  
16 would question him about 17 years of age. There were two other  
17 people that were standing close to these young men, so they were kind  
18 of readiness if need be to intervene. So there were four persons  
19 standing around him. He did not know the people who interrogated  
20 him.

21 The general conclusion regarding this witness, Your Honour, is  
22 simple, that he did not mention the accused at all as one of the  
23 interrogators.

24 Your Honour, may we go -- I have a reference number of the  
25 person that we discussed in private session. This is maybe the

1 moment to give that number. Should I do that in open session or --

2 PRESIDING JUDGE VELDT-FOGLIA: The ERN number is not a problem.

3 MR. VON BONE: Okay. So the ERN number is SPOE00127751 until  
4 SPOE00127752.

5 PRESIDING JUDGE VELDT-FOGLIA: Thank you.

6 MR. VON BONE: Your Honour, the number of people held in  
7 detention.

8 I will start with Witness 3593. According to W3593, he  
9 mentioned several individuals that arrived in the place where he was  
10 held. It developed over the time that he was there. In place, he  
11 met only the alleged murder victim. He was kept there -- that is the  
12 first place where he arrived, excuse me. He was kept there for one  
13 or one and a half hour. And then he goes back -- he goes to place 2  
14 and he met nobody, because he was beaten up there. He goes back to  
15 place 1 where, once again, he met the person who is allegedly  
16 murdered in this case. And then he goes to place 3, again together  
17 with the alleged person that is murdered in this case, and initially  
18 upon arrival there, he saw there two or three people that were  
19 already there. That is the testimony of the witness on 20 September,  
20 page 416 of the transcript.

21 "So they open the door, and I do not know, because we had the  
22 sacks over our heads. So they pushed that inside. They removed the  
23 sack. And it is then that we saw two or three other people. So this  
24 is how we got there."

25 The witness described that on page 419 of the same date, 20

1 September, 1991.

2 And then he continues:

3 "They were bringing there people every night. We have been up  
4 to 17 people in that room."

5 He did not recognise anybody from the people who were brought to  
6 that room. The witness stated this on Monday, 20 September, page 419  
7 of the transcript.

8 Upon his release, the -- that the witness also testified about  
9 the amount of people that were there at the time of the release. And  
10 I quote him:

11 "It was us, so the persons that werethere. I was the person  
12 before the last. Almost 17 people, I think. So we left the place  
13 and I left just one person behind, so at the end there were only  
14 three of us. So I stopped and I left two other persons when I left.  
15 When I left the building, I left two people behind myself."

16 Well, Your Honour, even though the witness is not completely  
17 clear about how many people he was with, the answer indicates that at  
18 least there were 17 people at the time of his release, 20 September  
19 page 484.

20 The conclusion is that this is the only witness that speaks  
21 about at some point 17 people. It is not possible, if we look  
22 objectively at the place where they were allegedly held, to fit so  
23 many people in that place. And I speak about the basement of what  
24 the Defence calls the oda.

25 Witness 1679, Your Honour, said the following: When he was

1 taken there, he found there the alleged murder victim, 3594, 3593,  
2 though he indicated that the surname of this person was different  
3 than the actual name of 3593. And he mentioned another person,  
4 Your Honour, that has never been identified.

5 May we go one brief moment in private session.

6 PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer, could you  
7 bring us into private session, please.

8 [Private session]

9 [Private session text removed].

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[Open session]

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

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

22 Defence counsel, you have the floor.

23 MR. VON BONE: Thank you very much, Your Honour.

24 3594, then:

25 "With how many people approximately were you in the -- were at

1 the maximum in the stable?"

2 The answer to this question is:

3 "Are you asking how many people could stay there in the stable?

4 Is that correct? Is that the question?"

5 "No. No, sorry. My question is with how many people in total  
6 were you included -- you included, in that stable."

7 The answer that the witness said is:

8 "So once we were five persons, and then it was six of us there."

9 The witness stated that on 12 October 2021, page 1186 of the  
10 transcript.

11 Also, W4669 discussed the amount of people. And he said:

12 "When I got inside that room, I saw two other people."

13 The witness stated this on 10 November, page 1415 of the  
14 transcript.

15 And he says about those people: He did not know the people that  
16 were inside. He never got the names of them. After the war, he got  
17 a telephone number of one of them. This person had two sons that had  
18 joined the KLA.

19 He states that on 10 November, page 1417.

20 Then about the other two people in the barn. He says he  
21 remembered that the other two people were brought there three or four  
22 days before the witness. That is the transcript 10 November, page  
23 1424, line 19 of the transcript.

24 At a certain moment, the alleged victim of the murder was  
25 brought there where the witness was staying. The witness knew this

1 person. He knew this person.

2 Your Honour, I would like to go into private session for a brief  
3 moment.

4 PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer, could you  
5 bring us into private session, please.

6 [Private session]

7 [Private session text removed]

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19 [Open session]

20 THE COURT OFFICER: Your Honours, we are in open session.

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

22 Defence counsel, you have the floor.

23 MR. VON BONE: Thank you very much.

24 Our general conclusion regarding the witnesses that we have just  
25 discussed, 1679, 3593, 3594, and 4699. The witness mentions people

1 that other people do not mention. In particular, W1679 mentions  
2 3593, 3594, the alleged victim of the murder, 04669, and a person  
3 called Burmak.

4 Then if we take a look at 3593, he mentioned the alleged victim  
5 of the murder, 3594, and Burmak.

6 If we take a look at 3594, he mentions 3593, Burmak, the alleged  
7 victim of the murder, and mentioned three people by name.

8 And, lastly, 4669 mentions only the alleged victim of the murder  
9 in this case, and that is one person by name.

10 So they were in the same time in the same place. However,  
11 nobody mentions the same people by name or by indication.

12 We do not believe, Your Honour, that based on this there is  
13 probative value in the accounts of all these witnesses. We give only  
14 one example, but we can -- we have more.

15 W1679 puts W4669 with him in the barn. While at the same time,  
16 W4669 never mentions W1679. And we could go on like this.

17 Your Honour, I would like to conclude, for this moment, this  
18 part, and I would like to move to the topic of arbitrary detention.

19 Arbitrary detention of seven people. According to the pre-trial  
20 brief of the SPO, paragraphs 52 and 59 of filing F00088, Annex 01,  
21 page 19 to 21, document F00088, Annex 01, there were seven people  
22 detained. The Defence will discuss the ones that have testified.  
23 The other people who have not testified have been either missing,  
24 dead or the person has not been able to be tracked down. That leaves  
25 us with four detained people.

1 The detention of W1679, according to the SPO.

2 According to the SPO's pre-trial brief, paragraph 53, W1679 was  
3 arrested on 1 April by armed members of the KLA BIA unit. In the  
4 final trial brief of the SPO, paragraph 33, it reads that W1679 was  
5 arrested on the fifth day of his training. At least four armed  
6 soldiers dressed in black and took him with them. Dressed in black  
7 uniforms and took him with them.

8 Now, for many reasons, we do not believe what the SPO claims on  
9 the date and even what the witness said about the training that he  
10 received is possible. Important is the following, Your Honour.  
11 Important is to note that W1679 claimed he was trained by Adem Shehu.  
12 He testified that on 4 October 2021 on page 864 of the transcript.

13 We know for a fact, Your Honour, that Adem Shehu, commander of  
14 Brigade 153, according to his own statement, did not arrive earlier  
15 than 28 March 1999 at the Brigade 153. The SPO interviewed  
16 Adem Shehu on 27 January 2021. ERN 090258-TR-ET, Part 2, page 6,  
17 line 9 to 16, and page 10, line 19 and 20.

18 The Defence also interviewed Shehu. Adem Shehu never said that  
19 he had trained any recruits in Zllash. He had trained people in  
20 Tirana. That's 27 January. That is ERN 090258-TR-ET, Part 2,  
21 page 5, line 13 to 15.

22 According to Musli Halimi, during the time that he was there a  
23 commander of the training centre until the 7th or 10th of April,  
24 Adem Shehu was not an instructor of the recruits. He stated this in  
25 his testimony on 20 April 2022.

1           Second point. If W1679 was arrested, so he said, and according  
2 to the SPO, on the fifth day of his training, and given the fact that  
3 Adem Shehu arrived on March 28th, W1679 must have been taken or  
4 arrested on 2 April, at least. It is unlikely that Adem Shehu would  
5 have started to train people at the Zllash training centre on the day  
6 of his arrival.

7           Let us not forget, Your Honour, that Adem Shehu walked from  
8 Albania to Kosovo and he arrived on foot in Zllash. He stated this  
9 on Wednesday, 27 January. And that is ERN 090258-TR-ET, Part 2,  
10 page 6, line 9 to 16, and page 10, line 19 to 20.

11           Now, Mr. Shehu is a fit man, but I do exclude that after 18 days  
12 of walking, he would start training recruits on the same day of his  
13 arrival in Zllash. Indeed, the bare minimum theoretical case that  
14 W1679 would have been trained by Shehu would have been on 28 March.  
15 And calculating from that day, the minimum is 1 April. This is just  
16 to say that even if 1679 indeed got his training from Shehu on the  
17 day that he was arrested, that his story does not simply add up.  
18 That is due to the following point.

19           Point three. Another conflict with this assertion is the  
20 following. In this context, it is interesting that W1679's testimony  
21 in court, he stated that when he arrived in the place of his  
22 detention, he found there the alleged victim of the murder; W03594;  
23 then W03593, however, he gives a different surname; and a person  
24 called -- and I would like to go into private session.

25           PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer, could you

1 bring us into private session, please.

2 [Private session]

3 [Private session text removed]

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25 [Open session]

1 THE COURT OFFICER: Your Honours, we are in open session.

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

3 Defence counsel, you have the floor.

4 MR. VON BONE: Thank you.

5 Point 4. According to W3954, he, that is 3954, was arrested on  
6 4 April 1999.

7 W1679 stated that when he entered the barn for the first time,  
8 he saw four people, including 3594 being one of these people. So it  
9 turns out that 1679 was then arrested after 3594 had already arrived  
10 in detention. Otherwise, 1679 could have never seen him upon his  
11 arrival in the barn.

12 And 3594 is sure about the date of his arrest, which was after a  
13 date that he referred to.

14 Your Honour, may we go in private session.

15 PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer, could you  
16 bring us into private session, please.

17 [Private session]

18 [Private session text removed]

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6 [Open session]

7 THE COURT OFFICER: Your Honours, we're in public session.

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

9 Defence counsel, you have the floor.

10 MR. VON BONE: Now, the Defence finds it important to note that  
11 the only person who was able to make a reference to a particular  
12 event of a date was 3594. Neither any of the other witnesses of the  
13 SPO regarding their detention was anybody able to give a point of  
14 reference to which they were referred to.

15 And we should say that in -- this is in stark contrast with the  
16 witnesses of the Defence. Still, if W1679 maintains that he was kept  
17 for 18 days, then he would have been released on 23 April. That is  
18 after the Serbian offensive.

19 Five. Now if it was on 1 April that 1679 was arrested, then  
20 this story still doesn't make any sense. 1679 was arrested in the  
21 late morning, according to himself, around 11.00 a.m. However, the  
22 alleged victim of the murder was arrested by W4600 not until -- did  
23 not arrive until late in the afternoon. So even if -- in that case,  
24 it is not possible that 1679 found the victim of the alleged murder  
25 in that place of detention.

1 Point 6. 1679 stated that after some days, a person with the  
2 name of 4669 arrived. However, 4669 found only two people upon his  
3 arrival in the cowshed. One was from Mitrovica, [REDACTED] Pursuant  
to In-Court Redaction Order F476RED.

4 [REDACTED] Pursuant to In-Court Redaction Order F476RED.

5 [REDACTED] Pursuant to In-Court Redaction Order F476RED. 4669 is  
born -- Your Honour, may

6 we go into private session.

7 PRESIDING JUDGE VELDT-FOGLIA: Madam Court Officer, could you  
8 please bring us into private session.

9 [Private session]

10 [Private session text removed]

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19 [Open session]

20 THE COURT OFFICER: Your Honours, we're in open session.

21 PRESIDING JUDGE VELDT-FOGLIA: Thank you, Madam Court Officer.  
22 Defence counsel, you have the floor.

23 MR. VON BONE: Point 7. Now, we have mentioned that the trainer  
24 of the new recruits said about the start and the finish of the  
25 recruits, Musli Halimi said that there was a fixed schedule where at

1 the beginning of a month a training would start, or about the 15th of  
2 the month. Each generation would start on either of these moments in  
3 time. There was no such thing that people could just come and stop  
4 at the school and they would join the KLA as a soldier. There was a  
5 fixed procedure for that. The new recruits came from the lists that  
6 were furnished by the brigade command.

7 Point 8. In addition, when speaking about the release, W3593  
8 told about his release, he said that only 3594 and the person that I  
9 mentioned earlier, Your Honour, in the private session went to the  
10 family of the alleged murder victim. He, 3593, never mentioned 1679  
11 going there with them.

12 Point 9. The corroborating evidence of the list of prisoners  
13 does not add up as well. The SPO refers to this list of prisoners,  
14 paragraph 171 up to 174 of the SPO's final trial brief.

15 The list of prisoners that the SPO used as corroboration for  
16 this assertion that 1679 was abducted in early April does not fit.  
17 The list of prisoners on which a person with the name of 1679 is  
18 listed says that he was imprisoned on 3 April.

19 If the calculation of 1679 would be right in saying that he had  
20 been held for 18 days and 17 nights, that makes that he was released  
21 20 April. That is about the time that Dr. Teuta Hadri and Ibadete  
22 Canolli-Kaciu would already be there treating -- treating and  
23 operating patients in the building where W1679 claims he was kept.  
24 This is the statement of 1679, 4 October.

25 Then the detention of 3593, according to the SPO. 3593,

1 according to SPO in the pre-trial brief, paragraph 54, was arrested  
2 about 1 April. In the final trial brief, paragraph 45, he was  
3 arrested at the beginning of April.

4 An overall observation about this witness is that we have never  
5 been able to connect his story to any kind of point of reference. He  
6 did not connect it to the NATO bombings, not to anything that took  
7 place in or around his house. He could not remember and, therefore,  
8 he could simply have no point of reference. He just says it was the  
9 4th. We do not know what this date is referred to. It is just a  
10 blank number. He does not even give a month simply because he  
11 doesn't know. Statement of him on 20 September, 394 is the page  
12 number of that date.

13 The fact that a witness just names a number and is unable to  
14 connect this number to any moment - a birthday, a bombing, or a  
15 personal event or even an event that might have taken place in his  
16 village - is a general indication that whatever the witness says  
17 about it cannot be relied upon. Calling just a date without  
18 connecting it to any point of reference has no probative value in a  
19 criminal case. But it might explain why the SPO deviated from its  
20 initial point of the view that he was arrested on 1 April as stated  
21 in the pre-trial brief to the beginning of April in the final trial  
22 brief.

23 The corroborating evidence of the list of prisoners does not add  
24 to the assertion of the SPO that it was on 1 April. The SPO refers  
25 to this list of prisoners in paragraph 171 and 174 of the SPO final

1 trial brief.

2 The list of prisoners, Your Honour. The list of prisoners that  
3 the SPO used as corroborating evidence for his assertion that 3593  
4 was abducted in early April, that list, if it is the same person that  
5 would be envisaged, indicates, however, that the name that is listed  
6 was on 2 April. Further, the witness was extremely occupied that the  
7 accused was one of the -- was the one that had beaten him. He said  
8 he knew that for a fact. Statement of him on 20 September, page 413.

9 I quote:

10 "The person that was there was the accused."

11 "How do you know that?" This is the question of the Prosecutor.

12 But at the moment he was questioned what the basis was saying  
13 that, he says:

14 "I know that for a fact."

15 The witness was unable to answer this. He just kept on saying  
16 that. The Defence made an issue out of it, especially when the  
17 person just mentions somebody -- someone -- somebody here, while he  
18 had never seen that person or even knew him before. Statement on  
19 22 September, page 595.

20 The Defence is of the opinion that simply saying "I know that  
21 for a fact" has no probative value whatsoever. Another example of  
22 this witness is to assess his credibility on general topics and on  
23 specific topics as well.

24 According to him, he was arrested and put into a barn. That was  
25 on the 4th. That's it. Nothing more.

1 Well, if the document called list of prisoners is correct, then  
2 it is not the 4th. According to that document, it's the 2nd. So  
3 maybe the witness is right. Then the conclusion is that the list of  
4 prisoners document is not correct and has no probative value and does  
5 not corroborate anything in that perspective.

6 He described in total three places where he was kept for some  
7 time. But upon the first moment that he was put into a place, he  
8 gave an indication regarding the time of the day.

9 Second, the witness stated that it was on the 4th that he was  
10 detained. And if we take the word of the witness as an unforgettable  
11 life-changing experience, then the following point is for how long  
12 was he kept there. He stated that he slept in water for 18 days.  
13 20 September, page 418. That would mean that the witness was  
14 released on 22 April, even though he said that the offensive had  
15 started on the 18th. The witness stated that on 20 September,  
16 page 419. This is the same. He just gives a date, but he cannot  
17 connect this date, or better to say, to any other event. If his date  
18 of release would have been the 18th and assuming that he was detained  
19 on the 4th, then it means the witness was again not accurate. He  
20 would have stayed there only 14 days in the place where he was kept.

21 Then the detention of 3594, according to the SPO. 3594,  
22 Your Honour, according to the pre-trial brief, paragraph 55, was  
23 arrested on 5 April. And in the final trial brief, paragraph 61, he  
24 was not arrested but he went out of free will with two people that  
25 came to look for him, and this was on or about 4 April. He was

1 detained the same day.

2 The witness is, for a couple of reasons, a witness who's  
3 testimony is reliable. This is due to the following factors: He was  
4 not masked at any point, so he could, in fact, give descriptions. He  
5 was not put a bag over his head. He was he taken out of the barn to  
6 have what he called a conversation. He could recognise people and  
7 describe people who interrogated him and those standing by. He could  
8 describe places, the meaning of the rooms, where he was interrogated,  
9 and the place where he was kept. Lastly, he was able to leave the  
10 barn to be brought to the toilet, and he could give a description of  
11 what he actually saw and what the location looked like.

12 Your Honour, even though the SPO alleged that he was arrested on  
13 5 April, the witness stated it was the 4th. It is for that reason  
14 that, probably, the SPO changed its initial view of that day of the  
15 arrest of this person.

16 The SPO witness stated that the accused, Salih Mustafa, was not  
17 present during the time of his interrogation or conversation. On the  
18 questioning of the Defence whether anyone who was present at the time  
19 of the conversation spoke about Salih Mustafa, the witness replied:

20 "Mr. Lawyer, I know Cali personally. Had anyone mentioned his  
21 name, I would say yes."

22 And he knew Salih Mustafa from before. He knew him in person.  
23 He never heard or saw Salih Mustafa as he was in Zllash. I quote the  
24 witness:

25 "Had I seen him there, I would not have defended him even if he

1 were my brother. But I did not see him there, and I would have seen  
2 him upstairs when I went upstairs, but I did not see him there."

3 Page 1210, 1210, on 13 October.

4 So this witness is very clear and could at least give  
5 information simply because there was no sack over his head. We do  
6 believe, at least, this witness was able to determine things and  
7 testified about it.

8 W4469 then, Your Honour. According to the SPO in the pre-trial  
9 brief, paragraph 56, he was arrested in April 1999. According to the  
10 final trial brief, he was stopped in March or April, but the witness  
11 was never conclusive about this.

12 4669 actually stated that he reported around this sometime  
13 around February 1999, according to his statement. That is transcript  
14 of 10 November 2021, page 1391. He stated actually that, and I  
15 quote:

16 "It was four or five days later, or a week, when he went there  
17 to Zllash to report there."

18 After he finished the training in Zllash, he left back home. We  
19 estimate that this witness, if he had trained in Zllash, must have  
20 been in the beginning of March. We know that the training ended 15  
21 March as Musli Halimi, the trainer in the school, stated. He went on  
22 to say he went back one, two, three, or even four more times, as he  
23 had to present himself in Zllash. It must have been on the last  
24 time, the fourth time, that he was stopped and eventually he was  
25 taken by 04600 to Zllash.

1 And it has not become clear, Your Honour, when he was eventually  
2 detained time period-wise. The witness says March or April --

3 THE INTERPRETER: Your Honour, could can you ask the counsel to  
4 slow down, please.

5 PRESIDING JUDGE VELDT-FOGLIA: Yes.

6 Defence counsel.

7 MR. VON BONE: I go too fast.

8 PRESIDING JUDGE VELDT-FOGLIA: You have heard what I was told --

9 MR. VON BONE: Yes.

10 PRESIDING JUDGE VELDT-FOGLIA: -- and could you slow down. And  
11 I take the opportunity to have a look at the clock.

12 MR. VON BONE: Yes.

13 PRESIDING JUDGE VELDT-FOGLIA: And we are approaching 4.00. So  
14 please, try to be ready for 4.00 and then we take a half-hour break  
15 and then we continue for another hour, or less.

16 MR. VON BONE: Yes. The next topic is really a different topic,  
17 so I'd like to finish this topic and then take a break.

18 PRESIDING JUDGE VELDT-FOGLIA: That's good. I could agree with  
19 that, but I would like to finish at 4.00 because --

20 MR. VON BONE: Okay.

21 PRESIDING JUDGE VELDT-FOGLIA: To have a break for 4.00.  
22 Because the interpreters have been working the whole day.

23 MR. VON BONE: Yes.

24 PRESIDING JUDGE VELDT-FOGLIA: So I really want to stick to our  
25 agreements --

1 MR. VON BONE: Understood, Your Honour.

2 PRESIDING JUDGE VELDT-FOGLIA: -- on the moments of break.

3 MR. VON BONE: Understood. Okay.

4 On page 1452, Witness 4465 stated:

5 "Later on, I returned there again but that was a different sort  
6 of return. I was armed then and I was with many others. We would  
7 distribute supplies for the army. This is when I went there for the  
8 last time, after the NATO bombing had started."

9 4669 stated that he had been beaten by some people. The people  
10 that beat him were younger than himself. They were about 17 or 18  
11 years of age. At the time, 4669 was [REDACTED] Pursuant to In-Court  
Redaction Order F476RED. He did not see  
12 whether there was anybody in charge, and he did not notice anything  
13 like that. Salih Mustafa was, at the time, [REDACTED] Pursuant to In-  
Court Redaction Order F476RED.

14 [REDACTED] Pursuant to In-Court Redaction Order F476RED.

15 I'd like to have that redacted, Your Honour.

16 04669 did not know Mustafa at the time, so he did also not know  
17 the nickname.

18 Your Honour, I would like to speak about the law.

19 PRESIDING JUDGE VELDT-FOGLIA: Defence counsel.

20 MR. VON BONE: Yes?

21 PRESIDING JUDGE VELDT-FOGLIA: But shall we speak about that  
22 argument after the break?

23 MR. VON BONE: That's fine. That's fine.

24 PRESIDING JUDGE VELDT-FOGLIA: Okay. Very well. Thank you.

25 We will have a break until 4.30.

1 The hearing is adjourned.

2 --- Recess taken at 3.58 p.m.

3 --- On resuming at 4.30 p.m.

4 PRESIDING JUDGE VELDT-FOGLIA: Welcome back. We will proceed  
5 with the last hour of today's hearing.

6 Defence counsel, you have the floor.

7 MR. VON BONE: Thank you very much, Your Honour.

8 PRESIDING JUDGE VELDT-FOGLIA: And I gave a glimpse, but I have  
9 to say it for the record. We are in the same composition as before  
10 the break.

11 MR. VON BONE: Honourable members of the Court, we would like to  
12 make submissions about the law regarding arbitrary detention.

13 In paragraph 23 until 30 of the decision of the confirmation of  
14 the indictment, the Pre-Trial Judge, and that's filing  
15 F0008/CONF/RED, notes that the crime of arbitrary detention is not  
16 list in the Law of the Specialist Chambers.

17 Article 6 of the Law provides that the Specialist Chambers shall  
18 have jurisdiction over the crimes set out in Article 12 to 15 of the  
19 Law. The war crimes of cruel treatment, torture, murder, as pleaded  
20 by the Specialist Prosecutor, are listed in 14(1)(c)(i) of the Law  
21 and, therefore, will fall within the subject matter jurisdiction of  
22 the Specialist Chambers.

23 The Presiding Judge states in paragraph 23 of the decision of  
24 the confirmation of the indictment that the SPO submitted in its  
25 further revised indictment that Mr. Mustafa is also criminally

1 responsible for the war crime of arbitrary detention, Count 1, in  
2 violation of Article 14(1) (c) of the Law.

3 The Pre-Trial Judge notes that:

4 "While this provision does not explicitly list arbitrary  
5 detention as a war crime in non-international armed conflict, it does  
6 not limit the crimes falling under the Specialist Chambers  
7 jurisdiction to those expressly enumerated therein."

8 I continue.

9 "Nonetheless, in order to exercise jurisdiction over a war crime  
10 that is not listed in Article 14(1) (c) (i)-(iv) of the Law, such crime  
11 must: (i) constitute a serious violation of Common Article 3; and  
12 (ii) be prohibited by customary international law at the time of its  
13 commission, in conformity with Articles 3(2) (d) and 12 of the Law."

14 The Pre-Trial Judge states in paragraph 24 that Common Article 3  
15 provides that "persons taking no active part in hostilities,  
16 including [...] those placed *hors de combat* by sickness, wounds,  
17 detention, or any other cause, shall in all circumstances be treated  
18 humanely [...]"

19 This protection, also stipulated in Article 14(1) of the  
20 protocol additional to the Geneva Convention of 12 August 1949 and  
21 related to the protection of victims of non-international armed  
22 conflict, Protocol II of 8 June 1977, must be enforced by all parties  
23 to the armed conflict and must be afforded to all detained persons,  
24 irrespective of the reason for their deprivation of liberty.

25 The Pre-Trial Judge goes on and notes that:

1           "The requirement of humane treatment constitutes a fundamental  
2 obligation of humanitarian law ... and reflects customary  
3 international law. It is broader than the prohibitions expressly  
4 listed in Common Article 3, which serve as examples of conduct that  
5 is indisputably in violation of the provision."

6           The Pre-Trial Judge states in paragraph 25 that:

7           "Deprivation of liberty without a legal basis or in violation of  
8 basic safeguards is not compatible with and violates the requirements  
9 of humane treatments of all persons placed *hors de combat*, including  
10 by detention, as enshrined in Common Article 3."

11          The Pre-Trial Judge goes on and notes that -- in paragraph 26  
12 that:

13          "Customary international law prohibits arbitrary deprivation of  
14 liberty. Extensive state practice, in the form of, *inter alia*,  
15 military manuals, criminal legislation, documents of international  
16 organisations and conferences, and international judicial and  
17 quasi-judicial bodies, establishes the applicability of this  
18 prohibition in both international and non-international armed  
19 conflicts. This has also been confirmed by the ICRC in Rule 99 of  
20 its 2005 Customary International Humanitarian Law Study.

21          "In light of the foregoing, the Pre-Trial Judge finds that  
22 arbitrary detention constitutes a serious violation of Common Article  
23 3 and was prohibited by customary international law at the time of  
24 commission of the crimes alleged in the Further Revised Indictment.  
25 The status of the law, at the national and international level, was

1 sufficiently clear and foreseeable to anticipate that depriving  
2 someone of his liberty in an arbitrary manner might give rise to  
3 individual criminal responsibility.

4 "Accordingly, the Pre-Trial Judge concludes," in paragraph 28,  
5 "that the Specialist Chambers may exercise jurisdiction over this war  
6 crime under Article 14(1) (c) in combination with Article 12 of the  
7 Law."

8 The Pre-Trial Judge, Your Honour, defined the arbitrary  
9 detention as follows in the confirmation of the indictment in  
10 paragraph 49:

11 "The crime of arbitrary detention as a war crime, within the  
12 meaning of Article 14(1) (c) of the Law, is committed through an act  
13 or omission resulting in depriving a person not taking active part in  
14 hostilities of his or her liberty without a legal basis or without  
15 complying with basic procedural safeguards."

16 On arbitrary detention, the position of the Defence is the  
17 following.

18 The crime of arbitrary detention is not listed in any of the  
19 articles in the Law of the Specialist Chambers. The Common Article 3  
20 of the Geneva Conventions is about the treatment of protected  
21 persons. In the Geneva Convention I, II, III, and IV, the wording  
22 stipulates "shall be treated humanely." The wording "be treated" is  
23 not by chance.

24 The treatment that is forbidden is listed in a number of acts  
25 that are listed in Article 14 of the Law on the Specialist Chambers.

1 It is an error of interpretation of the law when the Pre-Trial Judge  
2 put arbitrary detention in the box of Common Article 3 of the Geneva  
3 Conventions.

4 The Law of the Specialist Chambers defines as a war crime in  
5 Article 14 of the Law, and I quote:

6 "For the purpose of this law, under customary international law,  
7 'war crimes' means ..."

8 And then the long list stipulates the acts.

9 The fact is, Your Honour, that none of the acts in Article 14  
10 under (c) lists the act of arbitrary detention. The act of unlawful  
11 confinement is listed only under Article 14(a)(vii). Arbitrary  
12 detention is not listed under Article 14(c) at all. Article 14(c)  
13 speaks about taking hostages. However, the detention of the people  
14 in itself does not amount to hostages in the sense of the wording  
15 that is meant in the common interpretation of that word in  
16 international law.

17 Detention does not in itself constitute violence to life.  
18 Neither does it constitute murder, mutilations, cruel treatment, or  
19 torture. Detention does not constitute in itself an outrage upon  
20 personal dignity, in particular, humiliating and degrading treatment.  
21 This wording is being used in Article 14(c) under (ii) of the Law of  
22 the Specialist Chambers.

23 Again here we clearly see again treatment of people. And this  
24 is in line with the acts that are listed in Common Article 3 of the  
25 four Geneva Conventions.

1           The protected persons under the Fourth Geneva Convention. That  
2           is the following topic.

3           The four Geneva Conventions protect several types of people. In  
4           each of the conventions, these people are defined: The wounded and  
5           sick of Convention I are defined, as well as the protected persons in  
6           II and III. The Fourth Geneva Convention is about the civilian  
7           population. Article 14 of the Fourth Geneva Convention reads:  
8           Persons protected by the conventions are those who, at a given moment  
9           and in any manner whatsoever, find themselves, in case of an armed  
10          conflict or occupation, in the hands of a party to the conflict or  
11          occupying power of which they are not nationals.

12          The commentary of the Fourth Geneva Convention reads as follows,  
13          and I quote:

14          "The very title of the Convention shows in a general way whom it  
15          is meant to cover. But it is advisable to be able to determine  
16          exactly what classes of persons are protected. This is the purpose  
17          of this Article.

18          "This Article is, in a sense, the key to the Convention; for it  
19          defines the people to whom it refers."

20          The commentary to this Article 14 of the Convention continues  
21          then to define the people that are protected by Common Article 3 of  
22          the Convention. And it reads, and I quote, as for the territory of  
23          the belligerent states, "protection is accorded under Article 4 to  
24          all persons of foreign nationality and to persons without any  
25          nationality."

1           And then the commentary reads the following, as with the  
2 definitions of this article: "The definition has been put in a  
3 negative form; as it is intended to cover anyone who is 'not' a  
4 national of the Party to the conflict or the Occupying Power in whose  
5 hands he is. The Convention thus remains faithful to a recognised  
6 principle of international law: it does not interfere in a State's  
7 relations with its own nationals."

8           The Defence, therefore, disagrees with the observation of the  
9 Pre-Trial Judge in paragraph 25 of the Confirmed Indictment that, and  
10 I quote:

11           "Deprivation of liberty without a legal basis or in violation of  
12 basic safeguards is not compatible with and violates the requirement  
13 of humane treatment of all persons placed *hors de combat*, including  
14 by detention, as enshrined in Article 3."

15           Once again, Common Article 3 does not in any manner enshrine,  
16 and certainly not in the manner as formulated under Article 14(1) of  
17 the indictment, the detention of people. It is about the treatment  
18 of those who are in the hands of the belligerent parties to the  
19 conflict.

20           For this reason, the Defence concludes that the basis for the  
21 indictment, namely, Article 14(1)(c) does not list and does not even  
22 define the crime of arbitrary detention.

23           Moreover, as the Convention clearly envisages not to interfere  
24 with the principle of international law, not to interfere in a  
25 state's relations to its own national, the Defence is of the opinion

1 that the act of arbitrary detention cannot be qualified under the  
2 chapeau of Common Article 3 of the Geneva Convention as envisaged by  
3 the SPO in the indictment.

4 In the case of the people that were allegedly detained in this  
5 case, they were nationals of the Federal Republic of Yugoslavia, or  
6 the Autonomous Socialist Province of Kosovo. Therefore, the law  
7 would apply for this kind of act. In any event, it is not the law of  
8 the Specialist Chambers that can be applied for these people.  
9 Article 14(c) is not applicable or simply cannot be applied. It is  
10 not enshrined in Common Article 3.

11 Then an observation regarding the armed conflict.

12 Kosovo declared its independence in 2008. Kosovo was, in 1999,  
13 during the period of the indictment, part of the Socialist Federal  
14 Republic of Yugoslavia. Until 1990, Kosovo was known as the  
15 Socialist Autonomous Province of Kosovo. After 1990, it was a simple  
16 province of the Socialist Federal Republic of Yugoslavia as the  
17 autonomous status was dissolved by the Serbian parliament.

18 From June 1999, it was under United Nations interim  
19 administration. Legally speaking, even with a different  
20 administration, this did not change its status. Eventually, Kosovo  
21 was able to become an independent sovereign state at the cost of many  
22 lives and for which struggle many people gave their life.

23 The geographical and status of Kosovo is important to note in  
24 the context of the characterisation of this conflict. Initially, the  
25 armed conflict in Kosovo could be characterised as an armed conflict

1 not of an international character. However, on 23 March 1999,  
2 Mr. Javier Solano, the Secretary-General of NATO, stated in a press  
3 conference, and I quote: "I have just directed SACUER, General Clark  
4 to initiate operations in the Federal Republic of Yugoslavia." In  
5 Belgrade, the state of emergency was declared at the same time. The  
6 NATO air strikes under the name Operation Allied Force was set out in  
7 five phases and ended in June 1999. NATO is, of course, consisting  
8 of a group of countries and it was all these countries that agreed  
9 for the Operation Allied Action. As such, all NATO countries became  
10 part of the conflict in the sense that they became one of the  
11 belligerent parties to the conflict.

12 It is irrelevant if Yugoslavia targeted the individual  
13 countries, but they certainly fought against the forces that were  
14 applied by the NATO countries. And in a number of cases they were  
15 effective in targeting NATO forces.

16 Whatever the motives of the NATO were is not relevant to the  
17 case of Salih Mustafa. What is relevant is that from March 24th  
18 onwards, another belligerent party, namely, the joint NATO countries,  
19 joined in the conflict. Whether NATO countries were bombed by Serbia  
20 is irrelevant. Serbia, nevertheless, declared war against NATO  
21 countries. This is laid down in the OSCE document of March 25, 1999,  
22 ERN SPOE0006124-43.

23 The Defence submits, Your Honour, that from 24 March onward, at  
24 least the characterisation of the armed conflict can be and must be  
25 qualified as an armed conflict of an international character. This

1 is in line with the jurisprudence of the ICTY, in particular,  
2 paragraph 1580 and 1581 of the Djordjevic case of the ICTY. That is  
3 case I-05-87/I-T.

4 As for NATO who carried out the attacks, the Geneva Conventions  
5 would also apply. The fact that NATO became part to the armed  
6 conflict can be concluded as the criteria for being a party apply for  
7 the NATO. The two determinative elements of an armed conflict are  
8 intensity of the conflict and the level of organisation of the  
9 parties.

10 As for these two determinative elements, the Defence submits  
11 that NATO certainly fulfilled these elements. It can be concluded  
12 from the following acts:

13 The series of the NATO attacks and an increase in armed clashes,  
14 in particular also with NATO forces. The spread of clashes over the  
15 territory over a period of time, as NATO bombed both in Kosovo and in  
16 Serbia and other areas of the Federal Republic of Yugoslavia. In  
17 addition, there was a number of increase in the number of government  
18 forces, and there was mobilisation and the distribution of weapons  
19 among both parties to the conflict. Lastly, the conflict has  
20 attracted the attention of the United Nations Security Council.

21 With respect to the organisation of the parties to the conflict,  
22 the Defence believes that for NATO it must be taken into account that  
23 factors such as the existence of a headquarters, the designated zones  
24 of operation, and the ability to procure, transport, and distribute  
25 arms.

1           From 24 March until June 1999, there was an enormous intensity  
2           from the side of NATO as regards to the targets they had in mind in  
3           both Kosovo and the Federal Republic of Yugoslavia. The intensity  
4           was such that on or about 9 June the hostilities ceased.

5           This all means that when looking at the period of the  
6           indictment, which is April 1999, this falls within the period of time  
7           of the NATO air strikes. These air strikes originated from outside  
8           Kosovo and the Federal Republic of Yugoslavia. The NATO had no UN  
9           mandate, and the air strikes were not part of any kind of  
10          peacekeeping operation. The NATO's air strikes have been always  
11          heavily debated as there was no legal mandate for it.

12          As the characterisation of the conflict makes a difference, the  
13          Defence submits that Article 14(1)(c) of the Law would not apply as  
14          it is only tailored to an armed conflict not of an international  
15          character.

16          I move on to cruel treatment. The Defence now wishes to discuss  
17          the issue of cruel treatment, Count 2, as well as the alleged torture  
18          of the seven individuals, that is Count 3. The crime of cruel  
19          treatment is found in Article 14(1)(c)(i) of the Law of the  
20          Specialist Chambers.

21          The war crime of cruel treatment is not in any manner defined  
22          under the Law of the Specialist Chambers. It is only mentioned next  
23          to mutilation and torture.

24          Next topic is the armed conflict. In order not to become  
25          repetitive, Your Honour, the Defence reiterates its position on the

1 characterisation of the armed conflict as well as the things we have  
2 just said about the protected persons under Common Article 3 of the  
3 Geneva Convention.

4 The protected persons under Common Article 3. Also, the Defence  
5 position on whether the individuals that were held would fall under  
6 the protected persons in this regard is the same, as I just stated  
7 earlier. To that effect, we pointed out that the individuals are not  
8 falling under the protection of the persons that are envisaged under  
9 Article 14 of the Geneva Conventions.

10 The general position of the Defence regarding this crime, that  
11 is Count 2.

12 It is the position of the Defence that Mr. Mustafa did not  
13 commit this crime. It is as simple as that. He was not even aware  
14 of the fact that these people were, in fact, detained or for whatever  
15 reason they might have been detained. He does not know where they  
16 were detained. He has not ordered nor instigated these crimes.  
17 Mr. Mustafa did not commit any cruel treatment through the modes of  
18 liability as indicated by the SPO.

19 There is no evidence that proves any omission by him that cruel  
20 treatment would have been committed against any of the individuals,  
21 so no commission by omission.

22 He does not even know three of the four individuals that we will  
23 discuss. The fourth individual, 03594, is someone who he knew.  
24 However, the Witness 3594 stated that he has never seen Salih Mustafa  
25 on the scene. And had 3594 seen Salih Mustafa, he would have said

1 so. That was very clear in his testimony. His own words:

2 "Even if we were my brother, I would not have defended him."

3 The elements of the crime.

4 As for cruel treatment as a war crime, it is necessary that the  
5 perpetrator inflicted severe physical or mental pain or suffering  
6 upon one or more persons. In addition, the treatment must take place  
7 in the context of and was associated with an armed conflict not of an  
8 international character.

9 As regards to mens rea, the perpetrator must have acted with  
10 direct intent to commit cruel treatment or with indirect intent.  
11 That is, in the knowledge that cruel treatment was a probable  
12 consequence of his act or omissions.

13 The conditions in Zllash.

14 Zllash is a remote hamlet on a hilltop, as we have seen. No  
15 sewage. No regular water supply but a well. No tap water.  
16 Electricity was not available based on the witnesses that were  
17 present at the compound. No street illumination. These were  
18 witnesses of the Defence who stated that. No paved road. No  
19 flushing system of the toilet. No toilets at all in the house. Just  
20 a field toilet that were there. There were no showers available. No  
21 possibility to laundry or a washing machine for the clothes.

22 When describing the houses, Fatmir Sopi stated:

23 "BIA location was like any other location in the area."

24 He's described that the houses in the compound looked like any  
25 other house in the area of Gollak, according to Mr. Sopi. I quote

1 him:

2 "It was a normal village house with a yard and a building for  
3 living there. The same as our houses, because the KLA did not have  
4 barracks."

5 Sopi stated this, his perspective, on page 2048 on 18 January  
6 2022.

7 The houses at the location were built by the people themselves.  
8 It is not a developed urban area. No construction company developed  
9 the houses as they develop in urban areas. These houses are mainly  
10 the work of men who built this by themselves with their family. In  
11 other words, there were no facilities available for hygiene as we  
12 know it in 2022 or not even how people in the city of Prishtine would  
13 live at the time of the events.

14 There is no distinction for the people who were seeking refuge  
15 or anybody who would live there. The conditions are as they are in  
16 such location.

17 The SPO's position on the cruel treatment.

18 The SPO discusses the cruel treatment in its final trial brief  
19 in paragraph 295 until paragraph 302.

20 The cruel treatment, in the eyes of the SPO, consists of two  
21 factors in paragraph 295 of its final trial brief: By establishing  
22 and maintaining inhumane conditions and by inflicting beatings and  
23 other forms of maltreatment, including serious mental and physical  
24 harm. The accused and certain other KLA members subjected at least  
25 seven people to the cruel treatment as specified above.

1 About establishing of the inhumane conditions.

2 As for the establishing and maintaining inhumane conditions, the  
3 Defence position is that these conditions were not established by  
4 either the accused or by any other of the KLA soldiers that are  
5 envisaged by the SPO. The Defence notes that there was a huge amount  
6 of people who were internally displaced. These people were also at  
7 the Zllash location where the allegation is that people were held,  
8 but these people would even sleep outside. And there was no toilet  
9 or facility where they could wash themselves or their clothes. All  
10 these people just coped with the situation as it was. A large group  
11 just camped outside.

12 As far as the evidence is concerned, nothing indicates that the  
13 conditions as they were organised or arranged were set up by the KLA,  
14 the BIA, or anybody in particular. We have no testimony about  
15 setting up anything in particular in that regard.

16 The four individuals that testified about their treatment.

17 Of the seven individuals that were allegedly detained at the  
18 Zllash detention compound, three of them at some point have spoken  
19 about their cruel treatment. There is no information about Burmak  
20 who, to date, is a still missing person. There is no information  
21 about the alleged murder victim. The person with the name of  
22 *[REDACTED] Pursuant to In-Court Redaction Order F476RED.*

23 *[REDACTED] Pursuant to In-Court Redaction Order F476RED.* never  
24 testified in court, and there is no first-hand  
25 information from him.

None of the individuals were interrogated together, or at least  
with some of the other detainees present. So the evidence that is to

1 be produced is either that what the individuals testified themselves  
2 or what they have seen directly after an individual was returning to  
3 the place where the other detained people were staying.

4 That leaves us with four individuals who testified in court.

5 3594 stated the following regarding his treatment:

6 "So you stated," that was the question, "that you had been  
7 beaten once but the others they had beaten at least once more. Do  
8 you recall that?"

9 And he answered:

10 "No, I do not remember, so probably I have been misunderstood.  
11 So they have not been once more or one time less. So that was  
12 hitting in the hands. It was not, you know, something major. It was  
13 like hitting a pupil while in the elementary school. So I was not  
14 beaten in my limbs, in my hands, or other parts of my body. Like I  
15 said, that person was very young, and I treated that person like my  
16 kids. I had no anger whatsoever. I just was sorry about him. I was  
17 not sorry about myself. And like I said, that was something that  
18 only happened once. And that happened to everyone else. There was  
19 no difference towards myself or others. There was just one person.

20 "So about the stick, I do not know whether it was a rubber stick  
21 or a wooden stick, but it was very light, and I didn't feel any  
22 suffering or pain at all, although my hand is damaged."

23 That is transcript page 1070 on 12 October.

24 The witness withdrew as a victim during the court session.

25 The Defence position on this individual, 03594, is that he has

1 not been cruelly treated. The conditions under which he was held do,  
2 in itself, not amount to cruel treatment. It does not in any manner  
3 inflict severe pain or suffering on the person. The apparent act,  
4 hitting someone on the fingers, does not amount to severe pain or  
5 suffering. If it is anything at all, it would be a local offence  
6 that is to be treated by a local court.

7 W4669 states the following regarding his treatment.

8 He never stated that he was beaten by a person called Cali.  
9 Cali was never mentioned by the witness, so there is no indication  
10 that the accused Salih Mustafa actually committed any beating to him.  
11 In fact, the witness did not at all name any person with a name or a  
12 nickname who maltreated him. He just knows the age of the people who  
13 maltreated him. And according to the witness, these two persons who  
14 beat him up were about 17 or 18 years of age. That is the transcript  
15 of 10 November, page 1446.

16 Even though there were two older persons standing by, they were  
17 not involved in the beating, and the witness did not know or mention  
18 the names.

19 As far as the beatings is concerned, he said the following:

20 "They told me to bend down. Do you want me to show how exactly  
21 they told me to behave? So I was standing, and they asked me to  
22 bend. And this is how I stood. Like I said, I wasn't wearing any  
23 clothes in the upper part of my body, and I was hit in the shoulder.  
24 So from this part up here until here. So I was hit by a rubber stick  
25 and that was kind of a stick that was -- a baton that was used by the

1 militia, by the Serbian military forces. It was not a metal rod but  
2 that's, like I said, a police rubber stick."

3 "Do you remember how?"

4 "It was a baton."

5 10 November, page 1444.

6 "Let me get back to my question," was the question. "Do you  
7 remember how many times you were hit with that -- as you said, rubber  
8 baton?"

9 Answer:

10 "Only that night."

11 "My question," it continued, "My question did not relate on how  
12 many times you were beaten while in Zllash. My question relates to  
13 how many times you were hit in your back with the baton. If you  
14 remember ..."

15 "About ... 12 times. Even more than that," the witness stated.

16 10 November, 1445.

17 The motives, Your Honour, for the beating or cruel treatment.

18 3594. We have no objective information about the motive why  
19 people were beaten. 35594 stated that upon a leading question of the

20 SPO:

21 "Thank you, Mr. Witness. Do you think [REDACTED] Pursuant to In-  
Court Redaction Order F476RED.

22 [REDACTED] Pursuant to In-Court Redaction Order F476RED.

23 [REDACTED] Pursuant to In-Court Redaction Order F476RED.

24 [REDACTED] Pursuant to In-Court Redaction Order F476RED. had anything  
to do with your arrest?"

25 The answer was:

1 "I think, I have some suspicion that probably that is one of the  
2 reasons why I was imprisoned."

3 Then the question was:

4 "Why would [REDACTED] Pursuant to In-Court Redaction Order  
F476RED. be a possible reason for  
5 your arrest? If you could explain us and the Panel. What led you to  
6 believe that?"

7 And the answer was:

8 "The reason for that is that [REDACTED] Pursuant to In-Court  
Redaction Order F476RED.

9 [REDACTED] Pursuant to In-Court Redaction Order F476RED.

10 [REDACTED] Pursuant to In-Court Redaction Order F476RED.

11 [REDACTED] Pursuant to In-Court Redaction Order F476RED.

12 So that was not one of the reasons that was told to me while I was  
13 detained in Zllash, but this may as well be one of the reasons why I  
14 was sent there."

15 Transcript 13 October, page 1169.

16 We can simply conclude that whatever the motive was to either  
17 detain or beat the witness, it is just based on a thought by the  
18 witness. There is no confirmation from any objective source what  
19 would be the motive to do this to him. To fill in the blanks in a  
20 statement of a witness is just speculation. The conclusion is that  
21 there cannot be established a reason for his arrest, but why he was  
22 slapped on his fingers -- and why he was slapped on his fingers  
23 cannot be established. And that happened while he was detained  
24 downstairs.

25 So this beating, I place that in brackets, is not related to

1 cruel treatment as such. The Defence already said that the witness  
2 was not treated --

3 PRESIDING JUDGE VELDT-FOGLIA: Defence counsel, please --

4 MR. VON BONE: Slow down.

5 PRESIDING JUDGE VELDT-FOGLIA: -- stop because we lost the  
6 connection with --

7 MR. VON BONE: Okay.

8 PRESIDING JUDGE VELDT-FOGLIA: -- your client.

9 [Technical difficulties]

10 PRESIDING JUDGE VELDT-FOGLIA: Mr. Mustafa, can you hear us?

11 THE ACCUSED: [via videolink] [Interpretation] Yes, I can. I can  
12 hear and I can see you. There was an interruption earlier, however.  
13 [In English] Yes, yes, it's okay [indiscernible]. Yes, it's  
14 finished.

15 PRESIDING JUDGE VELDT-FOGLIA: [Microphone not activated] I will  
16 ask your Defence counsel to recap some of the things he said.

17 Defence counsel, you have the floor.

18 MR. VON BONE: Thank you very much.

19 We can simply conclude that whatever the motive was to either  
20 detain or beat the witness, it is just based on a thought by the  
21 witness. There is no confirmation from any objective source what  
22 would be the motive to do this to him. But to fill in the blanks in  
23 a statement of a witness is just speculation. The conclusion is that  
24 there cannot be established a reason for his arrest. But why he was  
25 slapped on his fingers cannot be established as well. And that

1 happened while he was detained downstairs.

2 So this beating, and I place that in brackets, is not related to  
3 the cruel treatment as such. The Defence already said that this  
4 witness was not treated cruelly, let alone that it could have been  
5 done by Salih Mustafa.

6 Witness 4669.

7 We have no objective information about the motive of why people  
8 were beaten. 4669 stated that:

9 "I do not know about other people. Probably there was other  
10 people. However, later on, once I analysed the things, I think that  
11 they did not plan for me to be beaten up. I think this was related  
12 to our political bias, to our political convictions, to military  
13 convictions as well. That is something that has happened to other  
14 people as well. I think that is the reason to that. It is not that  
15 we were spies, because that had nothing to do with us being spies."

16 We can simply conclude, Your Honours, that whatever the motive  
17 was to either detain or beat this witness, it is just based on later  
18 analysis by the witness. There is no confirmation from any objective  
19 source what would be the motive to do this to him. To fill in the  
20 blanks in a statement of a witness is speculation.

21 The conclusion is that there cannot be established a reason for  
22 his arrest, detention, or the beatings that he suffered. So the  
23 Court cannot make a finding on this.

24 Then we have two witnesses left who allegedly were cruelly  
25 treated.

1 3593, the frequency of the beatings.

2 3593 was, according to himself, beaten two times. Once when he  
3 arrived and once another time. The first beating occurred upon his  
4 arrival at the place where he was kept.

5 The amount of perpetrators, his answer was:

6 "It was three or four people. So, like I said, the sack was  
7 placed over my head, and they took me outside ... like I said, and  
8 they started to beat me up. I didn't exactly know who those people  
9 were."

10 20 September, page 407.

11 Another answer:

12 "Well, I don't know who hit me there. I can't know. And so  
13 there were four, five persons, they beat me up in all ways possible,  
14 however they wished. And, like I said, I fainted for a couple of  
15 times, and I don't know anything else."

16 20 September, page 415.

17 About the possibility to observe perpetrators.

18 "Well, I don't know how they beat me. I can tell you that I  
19 fainted a couple of times. Two, three times I fainted. I was hit  
20 with wood. I was kicked. I was hit in different ways. I was hit.  
21 I don't know what with. So my finger was broken. My teeth was  
22 broken there. So I am injured in the head, so I had a surgery in the  
23 head. So that's all I can say."

24 20 September, page 409.

25 About his injuries.

1 "As I told you, when I was taken the first day, he punched me in  
2 the face. Some of my teeth were broken but not all of them. But  
3 when I was beaten, then they were hitting me, kicking me, and with  
4 every sort of instruments, and that's when my teeth were broken. And  
5 I can't remember everything because I fainted on and off."

6 Words spoken by the perpetrators.

7 "They didn't say anything. They were just calling me names.  
8 They were speaking in all different sort of things. So they were  
9 beating at me, they were swearing at me. So, like I said, they once  
10 hit me in the head. So they kicked me, they hit me with a piece of  
11 stick. I mean, that's all I can say. I don't really exactly know."

12 Page 409, 20 September.

13 "I'm speaking about the first occasion. I wasn't able to hear  
14 because I was being hit simultaneously by five, six persons. I  
15 wasn't even aware what was happening to me."

16 20 September, 429.

17 And about the duration, Your Honour, he said:

18 "I have no idea how long they have been beating me up for,  
19 because I didn't have a watch. There was no electricity. I don't  
20 know. So probably I was there two, three, four hours. I can't even  
21 tell. I don't know."

22 "But," the Prosecutor asked, "my question does not deal with the  
23 time of your beating. My question deals with the moment, the event.  
24 How did that beating end? Because at some point it ended, I  
25 understand. And how did it end? This is my question."

1 And the answer is:

2 "It's obvious. So they beat me up for a long period, so I  
3 fainted a couple of times, they'd throw water upon me and then they'd  
4 drag me and send me to the other room. And I didn't know anything  
5 back then, in that point in time. So I'd just lie down in the water  
6 in the barn probably up until the next day. I don't know what time  
7 it was back then ... but ... I was standing ... up until the next  
8 day."

9 About the use of weapons, Your Honour. This person says:

10 "During the beatings that you have just described, did any of  
11 the perpetrators use a weapon at any point?"

12 The answer was: "Yes."

13 "Could you tell us more about the use of this weapon?"

14 "When I was lying, one of them so -- got a revolver and he put  
15 that in this place. So he put the revolver over here, and I heard --  
16 I heard the sound. So I had the impression, like, I was being  
17 killed. So for one moment -- so he made that noise with a revolver,  
18 but the fact was that it didn't shoot. So then -- that's so -- and  
19 then that person said, 'You know what? Let him be, because this man  
20 is lucky.'"

21 About the motives for the cruel treatment, the witness said --  
22 sorry, the question was asked:

23 "Were they making any accusations in relation to you?"

24 Answer:

25 "Yes -- no, no, they didn't say anything to me, but they were

1 just accusing me of being a collaborator with the Serbs."

2 And about the second beating, the question was asked:

3 "You said that you were asked a question or questions that  
4 related to the fact that you might know some thieves. Do you  
5 remember any other question asked by that person to you?"

6 Answer:

7 "He didn't say anything else. He just asked me on whether I  
8 knew some thieves, 'So you either tell us or otherwise we would kill  
9 you. If you tell us, we will send you home.' That's what he told  
10 me."

11 20 September, page 438.

12 Question:

13 "Were they making any accusation in relation to you?"

14 "Yes -- no, no, they didn't say anything to me, but they were  
15 just accusing me of being a collaborator with the Serbs."

16 Then we come to Witness 1679.

17 The tools used at the beating.

18 "Well, they would kick us, beat us with wooden sticks, iron  
19 rods. They would burn us with candle. They would keep the candle on  
20 our back and burn you. With electricity, they had a box and they  
21 would wire your legs with wires. So there were all sorts of torture.

22 "The way I was beaten up there, when they would bring you  
23 upstairs, they had handles of hatchets. And they also had some  
24 batons that resembled police ones. They were iron. And they would  
25 use -- they would use them to hit me."

1 "You mentioned candles as well. Can you explain what they would  
2 do?"

3 "They would sit you on a chair, light the candle, put it near  
4 your back, and then the drops would fall on your skin and burn you."

5 And the witness continued over the hot iron. And he said:

6 "A hot iron. Do you mean an iron where we iron clothes with,  
7 such an iron?"

8 "Yes, an ironing iron. She was doing something in the room. I  
9 didn't see her. She was behind me."

10 And the location. Was it upstairs or downstairs?

11 "These were upstairs."

12 "And because you mentioned both the cowsheds and the upstairs  
13 part, what would they do downstairs in the cowshed? What type of  
14 mistreatment?"

15 "Well, whoever opened the door would kick you or slap you. They  
16 wouldn't leave you without doing something to you."

17 Statement of 4 October, page 884.

18 Other treatments, it happened downstairs.

19 "This happened downstairs while I was in the basement. I asked  
20 for water. I asked them to bring us water. And then two soldiers  
21 came. They beat me. I was lying on the ground and, in the end, they  
22 urinated upon me and said: 'Here's water for you.'"

23 The frequency of the beatings.

24 A question was asked about the frequency:

25 "It happened almost every day. Perhaps there was the odd day

1 that I was not beaten that much, so the intensity was less on those  
2 days. But I was beaten almost every day."

3 Your Honour, the witness stated in the testimony all about this.  
4 I would like to move on to the torture.

5 PRESIDING JUDGE VELDT-FOGLIA: Defence counsel --

6 MR. VON BONE: Yes.

7 PRESIDING JUDGE VELDT-FOGLIA: -- it is almost time to conclude  
8 today's session, so I propose that we continue tomorrow with your  
9 closing statements.

10 Could you give us an indication how much time you think you  
11 would need tomorrow?

12 MR. VON BONE: I'm almost finishing. Maybe one hour maximum.

13 PRESIDING JUDGE VELDT-FOGLIA: Because if -- the calculation I  
14 did is that you would have still 40 minutes --

15 MR. VON BONE: Right.

16 PRESIDING JUDGE VELDT-FOGLIA: -- in general. But, of course,  
17 you will be granted the time you need. So that would be in the first  
18 session you could finalise --

19 MR. VON BONE: Yes, for sure, Your Honour. That's for sure.

20 PRESIDING JUDGE VELDT-FOGLIA: Because in that way, we will  
21 organise it in such a way that the SPO and Victims' Counsel will be  
22 granted some time in order to, if necessary, to prepare or to add to  
23 comments you -- or prepare comments on things you have said also  
24 tomorrow.

25 MR. VON BONE: Yes. Okay.

1 PRESIDING JUDGE VELDT-FOGLIA: Okay.

2 MR. VON BONE: Your Honour, then --

3 PRESIDING JUDGE VELDT-FOGLIA: Sorry? I didn't hear.

4 MR. VON BONE: Oh, sorry. Yes, no, I think then that would wrap  
5 it up for today. [Overlapping speakers] ...

6 PRESIDING JUDGE VELDT-FOGLIA: Okay.

7 So can we agree on the fact that you will be finishing tomorrow  
8 in the first session?

9 MR. VON BONE: I'm 100 per cent sure, Your Honour.

10 PRESIDING JUDGE VELDT-FOGLIA: Yes, good.

11 Then the schedule for tomorrow. We will finalise the closing  
12 statements by the Defence. Then we have foreseen in our agenda the  
13 responses of the SPO and the Victims' Counsel to the points made by  
14 the Defence and the points made on the innocence and guilt of the  
15 accused and the sentencing, if any. Then we will have the comments  
16 of the Defence to the responses of the SPO and the Victims' Counsel.  
17 We will see if there will be questions by the Panel. And at the end  
18 of the day, and maybe going into Friday, it just depend how much time  
19 everything will take, we will discuss the reparations, if any, of  
20 course.

21 Good. Then this is it for today. I thank the parties and the  
22 participants for their attendance today. I thank the interpreters,  
23 who have had a really long day. Thank you for that. Our  
24 stenographer also. And the people from the audio-visual booth, and  
25 our security.

1           The hearing is adjourned until tomorrow.

2                           --- Whereupon the hearing adjourned at 5.29 p.m.

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