Thursday, 26 October 2023

[Open session]

[Appeal Hearing]

[The appellant entered the courtroom]

--- Upon commencing at 1.30 p.m.

PRESIDING JUDGE PICARD: So good afternoon and welcome, everyone.

Mr. Court Officer, could you please call the case.

THE COURT OFFICER: Good afternoon, Your Honours. This is the case number KSC-CA-2023-02, The Specialist Prosecutor versus Salih Mustafa. Thank you, Your Honours.

PRESIDING JUDGE PICARD: Thank you, Mr. Court Officer.

I note that Mr. Mustafa is present in the courtroom.

Mr. Mustafa, can you follow the proceedings in a language you understand?

THE APPELLANT: [Interpretation] Yes.

PRESIDING JUDGE PICARD: Thank you. I will kindly ask the parties and the Victims' Counsel to introduce themselves, starting with counsel for Mr. Mustafa.

MR. VON BONE: Thank you very much, Your Honour. Defence is represented by myself, Julius von Bone, counsel. And my assistants are Mr. Fatmir Pelaj and Mr. Avdi Mehmeti. Thank you very much.

PRESIDING JUDGE PICARD: Thank you.

Now, the Specialist Prosecutor's Office.

MR. MICHALCZUK: Your Honours, good afternoon. Good afternoon,

everybody in and outside of this courtroom. The SPO is represented today by the Specialist Prosecutor Kimberly West, by the Senior Prosecutor Clare Lawson, by the Associate Prosecutor Nico Baarlink, by the legal officer team leader Nathan Quick, by our Case Manager Julie Mann. Today in the courtroom today is also Jaden Harding, the SPO intern, sitting over there. And I'm Cezary Michalczuk, SPO Prosecutor. Thank you.

PRESIDING JUDGE PICARD: Thank you.

Now, I turn to the Victims' Counsel.

MS. PUES: Thank you, Your Honours, and good afternoon. Good afternoon, everybody, equally inside and outside this court. The participating victims are today represented by my co-counsel, Brechtje Vossenberg, as well as myself, Anni Pues, as counsel. Thank you.

PRESIDING JUDGE PICARD: Thank you.

For the record, I am Michele Picard, Presiding Judge in this case, and my colleague Judges are, on my right, Kai Ambos, and on my left, Nina Jorgensen.

This hearing concerns the appeal against the Trial Panel's findings regarding the responsibility of Mr. Mustafa, the commander of the BIA guerilla unit, a unit of the Kosovo Liberation Army, or the KLA, in a series of events between approximately 1 April and 19 April 1999 at the Zllash detention compound, or ZDC.

In its judgment of 16 December 2022, the Trial Panel found that at least six persons were deprived of their liberty by BIA members

under the accused's control and authority; that detainees held at the ZDC were held in inhumane and degrading conditions and routinely assaulted, both physically and psychologically, for the purpose of obtaining information or a confession, punishing, intimidating, coercing and/or discriminating against them on political grounds; and, finally, that one person died as a result of acts and omissions attributable to the accused and his BIA subordinates.

The Trial Panel found the accused guilty of four counts of the indictment for committing war crimes, namely:

- having directly committed the war crime of torture, under Count 3; and

- having committed, as part of a joint criminal enterprise, or JCE I, the war crimes of arbitrary detention, under Count 1; torture, under Count 3; and murder, under Count 4.

The Trial Panel found the accused not guilty of the war crime of cruel treatment, under Count 2, considering that it was "fully consumed" by the charge of the war crime of torture.

The Trial Panel then sentenced Mr. Mustafa to individual sentences of 10 years of imprisonment for the war crime of arbitrary detention, 22 years of imprisonment for the war crime of torture, and 25 years of imprisonment for the war crime of murder. The Trial Panel then imposed an overall single sentence of 26 years of imprisonment, with credit for the time served.

Mr. Mustafa raises 51 grounds of appeal against the trial judgment. He submits that the Trial Panel committed a number of

errors of law and fact and errors in sentencing. Mr. Mustafa requests that the Appeals Panel overturn his conviction and acquit him of all counts or return the case to the Trial Panel. In the alternative, Mr. Mustafa requests the Appeals Panel to reduce his sentence.

The SPO and Victims' Counsel oppose the appeal and request the Appeals Panel to dismiss it, in whole or in part.

In accordance with the Scheduling Order issued on 17 August 2023, the Appeals Panel will hear today and tomorrow oral submissions further to the appeal filed by Mr. Mustafa, the responses from the SPO and Victims' Counsel, and Mr. Mustafa's reply.

In that regard, the Panel notes the following with regard to submissions from Victims' Counsel. The Panel recalls that, in its Decision on Modalities of Victim Participation in Appellate Proceedings, issued on 15 February 2023, the Appeals Panel decided that the victims who had participated in the pre-trial and trial proceedings could participate in the appellate proceedings as long as their participation was limited to issues arising from the grounds of appeal.

Also in accordance with the Law, the Appeals Panel determined that Victims' Counsel may make oral and written submissions before the Panel as long as counsel explicitly set out how the submissions were related to the participating victims' personal interests.

During this hearing, the Panel will allow, in general, oral submissions from Victims' Counsel. The Panel, however, notes that it

will ultimately only consider on their merits submissions from Victims' Counsel which are in line with the guidelines set out in its Decision on Modalities of Victim Participation in Appellate Proceedings.

I will now summarise the manner in which we will proceed in this hearing.

I would like to remind the parties and participants that the appeals process is not a trial *de novo* and to refrain from repeating their case as presented at trial. The arguments must be limited to alleged errors of law which invalidate the trial judgment, alleged errors of fact which occasion a miscarriage of justice, or alleged errors in sentencing.

Throughout the hearing, counsel may present their arguments in any order they consider suitable. The parties and participants shall present their submissions in a precise, clear, and concise manner, and should also provide precise references for materials supporting their oral argument.

The Panel also recalls that, in its Order for the Preparation of the Appeals Hearing, issued on 12 October 2023, it has invited the parties and participants, as relevant, to address a number of specific questions regarding Mr. Mustafa's conviction for the war crime of murder and the sentence imposed by the Trial Panel in this case. The Judges may, of course, also ask additional questions either during or at the end of counsel's submissions or even at the end of the hearing. The Appeals Panel further emphasises that it is

familiar with the briefs and would therefore urge counsel not to repeat verbatim or to summarise extensively their written arguments unless absolutely necessary.

I would also like to remind everyone that a few rules must be observed at all times in order to make for an effective courtroom process with an accurate record.

Please bear in mind the necessity of accurate transcription and interpretation, which often requires a bit of additional time during and after you have finished speaking. Please do not forget to use your microphone. This hearing is transcribed in realtime and will be reflected in a transcript available to the parties and participants and to the public. Therefore, I urge everyone to speak slowly and clearly and to observe a few seconds of pause between speakers.

I also remind counsel to give prior notice should any submission require the disclosure of confidential, strictly confidential, and/or *ex parte* information so we can go into private or closed session. I would also like to remind counsel to be particularly careful not to reveal any information that could identify a protected victim.

In accordance with the Scheduling Order issued on 17 August 2023 setting out the agenda for today, this hearing will proceed as follows: Today, we shall hear submissions from Mr. Mustafa's counsel for one hour and 30 minutes. Following a break of 30 minutes, the SPO will respond to Mr. Mustafa for one hour and 30 minutes.

Tomorrow morning, starting at 9.30, Victims' Counsel will respond to Mr. Mustafa for one hour. Mr. Mustafa's counsel will then

have 20 minutes to reply. After that, Mr. Mustafa will have the opportunity to make a brief personal remark to the Panel.

I would now like to invite counsel for Mr. Mustafa to begin. You have until ten past 3.00, one hour and 30 minutes, please.

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

Honourable members of the Court, the 16th of December, 2022, Trial Panel I rendered its judgment in the case of Salih Mustafa. Mr. Mustafa was charged on four counts: Arbitrary detention, cruel treatment, torture, and murder.

He was acquitted for the cruel treatment. For the arbitrary detention, Mr. Mustafa was found guilty and sentenced to a term of ten years. Lastly, for Count 3, the torture, the Trial Panel sentenced him to 22 years of imprisonment. And, lastly, on Count 4, the murder, he got sentenced 25 years. After having determined the sentences, the Trial Panel imposed a single sentence of 26 years.

On behalf of Mr. Mustafa, the Defence filed a Notice of Appeal on 2 February against both the judgment and the sentencing of Mr. Mustafa. The Defence seeks a reversal of the convictions on Count 1, 3, 4, and an acquittal on each count, or an order returning the case to a Trial Panel, and we will propose to refer a matter for constitutional compatibility. Finally, if any or all convictions are affirmed, a reduction of the sentencing.

The Defence filed an appeal brief and a corrected version of it on 2 May 2023. It formulated the grounds of appeal. Basically, they come down to nine grounds of appeal with 51 subgrounds of appeal.

Six of those were the same or nearly the same, and the Defence appeal brief referred in those grounds to other subgrounds.

The Defence remains firm on the position taken in the corrected version of the Defence appeal brief. It is a strong conviction of Mr. Mustafa and the Defence that the judgment is wrong and the imposed sentence is wrong. Even if the appellant would have been found guilty, still the imposed sentence is disproportionate and too harsh.

Within the limited timeframe of the Appellate Chamber, the Defence will single out a number of grounds of appeal that we would like to bring to the attention of the Appeals Chamber.

The first is 1J, the standard to assess witnesses and their testimony.

The TP erred by failing to apply fair and impartial standards or did not apply themselves in imposed standards in an equal manner when weighing the evidence of witnesses for the Prosecution and the Defence, and of evidence which favoured the Defence when provided by witnesses called by the Prosecution.

The Trial Panel used self-imposed factors. It did so in paragraph 35 of the judgment. Those factors were the standard for assessing the credibility and reliability of the witnesses. In paragraph 50 and further of the judgment, the Court described a climate of fear and intimidation of witnesses in general.

Regarding the ground 1J, the Defence has explained in the appeal brief that the Trial Panel relied only and to a very large extent on

two subjective criteria that can be found under VIII and IX of the self-imposed criteria by the Trial Panel. The criteria are enumerated in paragraph 35 of the judgment.

In particular, the Trial Panel is reluctant, if not unwilling, to take for a fact the testimony of witnesses who deny the existence of a detention place at the Zllash compound. In all cases when witnesses testified to that effect, the Trial Panel suddenly became extremely cautious with such evidence and also the persons testifying to that effect.

When people testified about the non-existence of a detention place or that they testified that the people were never mistreated at the Zllash compound, then the course of this would lead -- then of course this would lead to the fact that the charges could not be proven beyond a reasonable doubt. Such testimony was each time considered with extreme caution or such testimony would be opposed to testimony of three incriminating witnesses.

In the judgment, as for the Defence witnesses, the Defence submits that apparently only two of the criteria were applied to the witnesses who testified about the non-existence of people being detained at the Zllash compound. There were eight witnesses that provided evidence that there was no detention place and/or mistreatment of people at the Zllash compound. This clearly helps to establish that the charges cannot be proved.

So, for example, when Fatmir Sopi, an SPO witness and KLA commander familiar with the compound, testified that there were no

people detained or mistreated in Zllash, the TP suddenly resorts to the fact that other SPO witnesses testified to the contrary. We read that in paragraph 119 to 122 of the judgment.

It has always been the position of the Defence that victims might have well been detained but were certainly not detained at that location, and not even by BIA as this unit had no authority to do so.

The approach of the Trial Panel was systematically that once a witness would testify that on that location there were no people detained or mistreated, the TP would scrutinise that person or suggest motive for him speaking in that manner, or the TP simply regarded their accounts as not credible.

Another example of such a person was Mr. Veseli, another SPO witness and a KLA commander familiar with the compound. He testified that there were no people detained or mistreated in Zllash. The TP, in paragraph 128, nearly copy-pasted its considerations regarding the implausibility of his account regarding the topics of non-existence of a detention centre or that people would have been allegedly mistreated there and then at the compound.

The Trial Panel considered in paragraph 129 that Mr. Veseli strategically directed his testimony to protect the accused, the KLA, and its reputation. This makes no sense to the Defence as there is no indication how Mr. Veseli strategically directed his testimony. Mr. Veseli was simply answering the questions posed by the parties and the Panel. The fact that Mr. Veseli has, to this day, respect for the KLA and its cause or co-fighters is a factor that counts for

nearly all people in Kosovo, as it was the KLA who fought for the independence of Kosovo. In fact, it would be highly unlikely if Mr. Veseli would not support the cause of the KLA. But all this does not change in any manner his observations in the place or the knowledge about that place.

Another example was Mr. Fatmir Humolli. Another example of an SPO witness testifying about the fact that would disprove the charges. Regardless of what the opinion of Mr. Humolli might have been about the Kosovo Specialist Chambers, his family, wife, and children were on the compound and therefore he would be present there on some occasions. His testimony was also set aside as not credible simply because he said that BIA had no mandate to arrest and detain anybody.

In fact, Mr. Humolli corroborated the accounts of Mr. Sopi and Mr. Veseli, but in the words of the Trial Panel, in paragraph 133, and I quote, his account is "overwhelmingly contradicted by clear and mutually corroborating evidence pointing at persons being detained ..."

Just because he testified about BIA's mandate does not mean that there is a contradiction in his testimony. His evidence, as a member of the commanding staff of the Llap operational zone, is just opposing the different accounts of victim witnesses or crime-based witnesses. This does not in any manner affect his credibility on that issue.

It is clear in the judgment that at the moment that oral

evidence by witnesses is produced which disproved the charges, the TP scrutinised the witnesses as to their personal opinions when they provided such evidence. These people were all familiar with the location. The Defence submits that such standard was not applied to witnesses who provided evidence which would prove the charges. In such case, their accounts would be regarded credible as their accounts and the manner in which it was given would be evaluated.

The Defence submits that in its approach to the testimony, the Trial Panel failed to equally and fairly apply the standard to evidence, in particular, when evidence was given that would simply disprove the charges or evidence that would oppose the testimony of what I call the victim-based or crime-based witnesses.

In the same manner, the Trial Panel failed to equally and fairly apply the standard of evidence disproving the facts regarding the location or whether there were any people that were detained and mistreated on that location there and then. When a tribunal does not assess evidence in an equal manner, then this is to the detriment of the accused.

In this case, applying such a random approach cannot result in a valid judgment. Therefore, the unequal, unfair, biased, and random-based approach to evidence disproving the charges cannot stand and therefore invalidates the judgment.

The Trial Panel did, in fact, not evaluate the testimony of witnesses in its entirety. It did not review evidence in a wholistic manner. When evidence was produced that disproved the charges, then

it would only juxtapose such evidence to evidence that had been produced proving the charges. The imbalance, Your Honours, is striking as the number of witnesses disproving the charges and facts is eight as compared to the witnesses proving the charges were only four. Therefore, it is wrong by the Trial Panel to say that evidence disproving the charges is overwhelming contradicted. In paragraph 119, 129, and 133 this can be read.

Even one of the four crime-based witnesses contradicted the accounts of two other witnesses that they were held in the same barn. His testimony about his detention, his mistreatment, and his interrogation was found "wholly implausible" in paragraph 564 of the judgment. Here, in the same manner, the Trial Panel considered his testimony not credible as there was evidence to the contrary from two other witnesses.

Moreover, there is an important nuance to make. Of these four witnesses giving evidence that would prove the charges, one described clearly a very different location. That was Witness 4669. Another one, 3594, spoke about only two buildings on the entire premises where he was kept.

As to these two witnesses, and I mean 4669 and 3594, as they diverted greatly in their accounts with regard to the description of the location, it is the view of the Defence that their accounts were not properly assessed regarding the location of detention.

The Trial Panel did not assess the evidence in the light of the entire body of evidence. Rule 139(2) of the RPE dictates that it

should do so. However, the Trial Panel assessed only parts of one's evidence with selective parts of victim witness evidence. Therefore, the Trial Panel did not assess the evidence properly as it assessed it only partially. The TP erred in the correct application of Article 139(2) of the Rules of Procedure and Evidence.

I will move to another topic that we wish to argue, which is the location of the victims, where they were allegedly held and mistreated, and even allegedly tortured. It is Ground 2D and Ground 2E and/or Ground 2H in particular. It is about the specific location where the alleged crimes took place as identified by the SPO.

Ground 2D is about the specific location where the alleged crimes took place. The Pre-Trial Judge confirmed the indictment on 5 October 2020. The Defence has given, in its appeal brief, an example that the trial brief confirmed the charges based on the facts that the people were detained and beaten in a single building with a room where they were kept situated downstairs and in another room situated upstairs.

The SPO then, in the pre-trial brief, also singled out one single building. The Defence discussed these issues in paragraph 99 and 100 of the corrected version of the corrected appeal brief.

The trial started on 15 September with the opening statement of the SPO. In that statement, once again, the SPO indicated the very same building in which the alleged crimes would have taken place. The Defence wishes now to show footage shown at the time to the

Trial Panel and the Defence and all participants. It is the footage of 15 September.

And that, I would like to ask the Court Officer to run the part from minute 1:01:05 until 1:05:43.

[Video-clip played]

"Mr. Michalczuk: Now, allow me, Your Honours, to turn back to the buildings within the Zllash detention compound where the crimes charged in the indictment allegedly took place.

"It was a two-storey building. As you had seen from the aerial photographs of the compound, the building was part of a small handful of buildings isolated from other structures. Today, this compound is no longer standing and only one small building remains there.

"Let me show you a few additional images of that compound taken by the United Nations Mission in Kosovo in April 2006. I hope it will assist Your Honours to better understand the composition and layout of that place.

"I will start again with the 2006 aerial photograph that I already displayed a few minutes ago.

"And could I kindly ask Madam Court Officer to show us the next slide, slide 14.

"The encircled building is the one where, as the Prosecution alleges, crimes charged in this indictment took place.

"Could we now move on to slide 15, please.

"This slide, Your Honours, depicts three buildings of the Zllash detention compound where, in the Prosecution's submissions, in April

1999, a number of Kosovar Albanian detainees were unlawfully held and mistreated. The blue arrow indicates the rooms in the upper floor used by the BIA members as well as the accused when they stayed in Zllash. The yellow arrow points to the lower part of the building where the victims were detained.

"Could we please display the next slide, slide 16.

"This slide presents the same buildings from a slightly different angle. The building presented on the right-hand side of this photograph is the one which is of our interest in this case. The blue arrow is pointing at that building. We saw it also at the previous slide, and we'll see it again in a moment.

"Could I kindly ask Madam Court Officer to show us the next slide, slide 17. Thank you very much.

"This slide depicts the main building where the alleged mistreatment of some of the victims took place. They were kept in a basement or shed in the lower part of the building, left from the door with a staircase, indicated by yellow arrow. And they were taken by external stairs to a location upstairs where they were interrogated and beaten, and this place is marked with the blue arrow. The accused himself also provided a detailed description of that building.

"Your Honours will see the same building depicted also in photos presented by the Defence, one of them being the photo on the next slide, slide 18.

"And if I could kindly ask to show this one.

"This is the slide I'm talking about. On that slide, the building is on the left-hand side of the photo. The blue and yellow arrows indicate, respectively, the place occupied by BIA where interrogations and mistreatment of victims took place, and the place where the victims were held, which is the yellow arrow.

"The adjacent small building, a wooden shed with triangular roof covered with red tiles, the one next to the building we're talking about, is the only building that remains on that site today."

MR. VON BONE: Okay. Thank you very much, Court Officer. We can remove it.

I quote from the footage of the SPO, Your Honour:

"The encircled building" -- it's three quotes that I make.

"The encircled building," at slide 14 that was, "is the one where, as the Prosecution alleges, crimes charged in this indictment took place."

And, second quote:

"The building," at slide 16, "presented on the right-hand side of this photograph is the one which is of our interest in this case. The blue arrow is pointing at this building."

And, lastly:

"This slide," at slide 17, "[is] the main building where the alleged mistreatment of some of the victims took place."

The indictment, Your Honour, was based on this single building that the SPO showed. The building was also referred to as the *oda*. Witnesses were examined and shown a picture each time with this

single building at the centre of where the alleged crimes would have taken place. The Defence, in its investigations, also focused on the very same building and, later on, witnesses were examined about the same single building.

In any criminal case, place and act are crucial elements to be determined in order to find someone guilty on criminal charges. In the ICC booklet "Elements of Crimes," it speaks about the perpetrator that confines one or more persons to a certain location when the ICC discusses the war crime of unlawful confinement. That is Article 8(2)(a)(vii) of the ICC Statute. Not exactly the same crime, though, but nevertheless very indicative.

The Defence submits neither the SPO nor the Trial Panel can divert from that certain location when that location has been consistently and so specifically being indicated by the SPO. Neither can the SPO change its position on such location. It should have amended the indictment.

This is, nevertheless, exactly what happened when nearly at the end of the trial the Trial Panel even asked for clarification from the SPO about it. As the Defence has indicated and cited in its appeal brief in paragraph 103 through 108, this is exactly what the SPO did. The Defence submits that changing the location of the arbitrary detention and where the torture allegedly took place, that this change has put the Defence in a position of great disadvantage.

Indeed, the Defence submitted that it has been deceived on the certain location at which crimes allegedly took place. Had the

Defence known from the beginning that the crimes took place, as later submitted by the SPO, not in one single building but in multiple buildings, then it would have examined Prosecution witnesses differently. In addition, it would have interviewed its own witnesses on the other relevant buildings as well. Lastly, the Defence would have investigated and searched for other evidence or witnesses who could have said something more specific about the usage of other buildings next to the building that was envisaged by the SPO.

But there was no reason, Your Honours, for the Defence to do so. The location, as it has been consistently indicated, was the certain location. The description of the certain location was also made clear by the SPO to the Pre-Trial Judge. Each spoke consistently about upstairs and downstairs, clearly focusing on one and the same building which was located on the compound-style location with multiple buildings.

The Trial Panel, in its judgment, and that is paragraph 372, stated that this matter was immaterial to the determination of the charges. Now, if that would be the case, then why at all would the Panel have requested the SPO, during the court hearings as well as later in a specific question just before the oral arguments, in which building the alleged crimes would have taken place. Such question from the Panel to the SPO makes no sense to the Defence. In fact, the Defence submits that the Trial Panel erred here as it is crucial to the case to determine where the crimes took place in line with

what the SPO had alleged from the beginning.

The charges are based on the facts. The SPO derives charges in the indictment from facts as they are presented to them. These facts are therefore crucial to the case. Therefore, this matter is certainly not immaterial to the charges. The very foundation of the charges are the facts. And in this case, the Trial Panel was bound by the facts upon which the charges were built. The SPO cannot change the facts in order to adjust them in a matter that suits their case. And the Trial Panel cannot *proprio motu* interpret the facts. It must hold the SPO to its word. And the Defence and the accused must be able to rely on the words of the SPO when it presents its case.

The Trial Panel is wrong when it stated that the matter is immaterial to the determination of the charges. The facts serve the very foundation of the charges.

The Trial Panel was also wrong, as it did in paragraph 373 of that paragraph of the judgment, that the Defence had the opportunity to examine the SPO witnesses on this issue. We could not, and there was no reason as it was clearly determined by the SPO which specific building was envisaged. The entire issue arrived nearly at the end of the trial. To do it all over again would consume an enormous amount of time, precious time in which the accused is constantly held in detention.

As it is the duty of the Panel to determine the truth, the Defence further observes that the Trial Panel itself never focused on

any other building than the one singled out by the SPO.

The Defence reaffirms its position that this is a very substantive diversion of the alleged crime location, and it is unfair, and it amounts to a miscarriage of justice, a miscarriage of justice as it is fundamental in a criminal case to determine the facts, that is, where the crimes as charged took place.

It is also a fundamental right of the accused to know where the crimes as charged took, allegedly, place. I use the word "where" not in the meaning of in Zllash, not in the meaning of at the compound, but in the meaning of the specific building that the SPO clearly indicated in its opening statement and in its subsequent photographs to show to the witnesses. The Defence and the TP must be able to rely on such specific information.

The Defence notes, by the way, that none of the witnesses ever indicated that specific building, and only one merely stated that it resembled a building where he was allegedly kept. All witnesses, as their view was impaired by being put a sack over their head, could not have reasonably identified the building.

The Panel, and I quote paragraph 372, stated that:

"The Panel must be satisfied ... that the crimes ... took place in one or more of the buildings identified above, in the BIA base, between ... 1 April and 19 April ..."

A key factor here is that the building was identified, and we just showed you the footage of it. As described earlier, in the beginning and even consistently during the trial, that building, that

single building was identified.

The Panel cannot divert from the indictment. The indictment is proposed by the SPO and confirmed by the Pre-Trial Judge. Therefore, it leaves no room for any further interpretation by the Panel. And the Panel is wrong because, by conducting the trial in this manner, it lays out the standard for itself, notwithstanding that by doing that, the TP completely ignored the justified interest of the Defence. That renders the trial proceedings unfair in the sense of Article 6 of the European Convention on Human Rights.

Those justified interests are, among others, that the Defence must be able with certainty to rely on the specifics of the case as laid down in the case by the SPO and in the Confirmed Indictment; the examination of all relevant witnesses to all the charges by the Defence regarding any other building might have been on the compound, and considering the time that was allocated to the Defence, which was 50 per cent of the SPO time; the stage in which the proceedings were at the time, and in particular, the Panel asked the question just before the final oral arguments; and, lastly, the investigations that the Defence undertook regarding the location and its selection of witnesses who could testify about the building on the compound.

The fact that the SPO, in its opening statement, identified only one single building must have been a result of their own investigation and must have been based on statements that were given to the SPO by the SPO witnesses. It is a miscarriage of justice if an accused is found guilty on a factual basis when that factual basis

suddenly changes nearly at the end of the trial. The factual basis was established at the beginning of the trial very clearly. That gives certainty for the accused and his Defence in the sense that the Defence can conduct its work from that factual basis.

Such certainty is found in the Confirmed Indictment and in the layout of the factual circumstances by the SPO regarding the alleged facts.

Now, if one changes the factual basis or starts to adjust the factual basis, then the Defence can certainly not anticipate on that. And for sure it cannot anticipate on it when it is done nearly at the end of the trial phase of the case.

The Defence must be able to rely with certainty that the factual exposé given by the SPO and that the factual basis as presented in the Confirmed Indictment will be and will remain the factual basis for the charges. One cannot and may not change that factual basis or amend it in order to make it serve its own case. One must serve justice and not its own case. However, it is exactly what the SPO did.

The error in the Trial Panel's consideration that it is immaterial to the determination of the charges is wrong, and the result is a miscarriage of justice. The Trial Panel should have been critical to these factual changes. Instead, it argued it is immaterial to the charges. For the Trial Panel counts as much as for the Defence that they must rely on the factual basis presented by the SPO. It must do so as it forms the starting point from which the

assessment of the questions where, on what location, the facts and the charges took place. Because ultimately, the location, that is the where question, is essential. It is as essential as the what question: What happened there? And the when question: When did that happen? These elements of a charge are critical to establish in order to find an accused guilty of a particular charge.

This altogether essentially is the miscarriage of justice resulting from the wrongly factual basis of the case. The Trial Panel may not fill in the blanks of an indictment or amend or interpret them in order to make them fit the charges. It must always ensure that the accused, in case of doubt, will get the benefit of such doubt. The Trial Panel based its conclusion for guilt on the wrong factual basis and should have adhered to the facts as they were presented.

Therefore, the Trial Panel did not and could not reach a correct conclusion.

Ground 2E and 2H are very related to the matter that I have just discussed. The Defence developed in Ground 2E the witnesses who were not in a position to identify the buildings in which they were held due to the circumstances at the time of their arrest and when they were moved.

The SPO had four witnesses who said that they had been detained. One of these four, 3594, testified that he never saw the accused at the place where he was detained or where he was interrogated. However, in paragraph 364 of the trial judgment, the Trial Panel

concluded that they could have identified the buildings in which they were allegedly detained. This was based on showing the witnesses the same photograph that they had seen earlier, and they just confirmed that in a closed session.

That conclusion about identification is wrong as no reasonable tribunal could have come to that conclusion. The Trial Panel could not have reasonably come to this conclusion. The reason is that three witnesses testified about the circumstances under which they were arrested and transported when they were being interrogated -- or when they would need to be interrogated and that was basically that they constantly had a sack over their head.

The Trial Panel's findings that these three were able to identify the location of their detention cannot be reconciled with the fact as testified by these three witnesses. Paragraph 675 of the judgment, the Trial Panel noted:

"This atmosphere of constant fear was further fuelled by the fact that the detainees were not informed of the reason of their deprivation of liberty, they had bags put on their heads when they were taken to or from the barn(s), were told not to look around, were held in darkness, were not allowed to speak to each other, and were not allowed to sleep."

The Defence submits that these two considerations oppose each other to the extent that they can simply not be reconciled. No conclusion as to positive identification can be inferred when testimony regarding this is so conflicting. The one circumstances

necessarily excludes the other.

The Trial Panel did not set any standard upon which a credible identification of the location of detention could have been made by any of the witnesses. So in the very short of time of their release, it is not credible or reliable to vest credence to their testimony regarding this issue.

We have elaborated three witnesses in our appeal brief, and these three are 1679, 3593, and 4669, and we have done that in the paragraphs 115 and 150, so 1-1-5 up to 1-5-0, of our appeal brief. Their identification of the location was considered their circumstances, as stated in the appeal brief, completely implausible. Excuse me, I repeat that again. Their identification of the location was, considering their circumstances, as stated in the appeal brief, completely implausible as they were put a sack over their head each time that they would go outside. So it is rather a non-identification. According to one of them, the building on the photograph that was shown only resembled it.

The Defence asserts that these facts of the case were erroneously established as no proper identification was made or, at the very least, no reasonable standard was set by the Trial Panel upon which a positive identification should have been made. It just, 22 years later after the facts, stated that the witnesses identified the building and did not take into account what the witnesses said about their detention and transportation to it, clearly conflicted such identification. An improper identification is the result, and,

therefore, it came to a wrong conclusion.

Lastly, and even more importantly, the --

PRESIDING JUDGE PICARD: Excuse me, counsel. We have a question.

JUDGE AMBOS: Could I ask a question. I just want to return to the buildings, and the paragraph 372 of the trial judgment where the Panel refers to several buildings.

And in the indictment, paras 5, 18, 21, 31 to 32, and 35, the SPO states, I quote, "the BIA unit operated from a compound consisting of a number of buildings."

And that:

"The BIA unit used the compound as a safe house, and as a detention and interrogation site."

Isn't a compound a number of buildings?

MR. VON BONE: Your Honour, of course a compound is a number of buildings, and we see it on the opening statement of the SPO as well. The issue is not whether a compound is composed of a number of buildings. The issue is what location -- what specific locations were these people held and mistreated or tortured or even left alone or whatever. That was the single issue. It has been the object of the examination of the witnesses by the SPO, by the Defence, and by the Trial Panel, and that is why I wanted to show the footage how clearly that was indicated. So --

JUDGE AMBOS: Yeah. My question is where exactly is the deviation if the indictment speaks of a compound and the

Trial Chamber says, I quote -- and that was the quote referring to it being immaterial:

"... the crimes charged took place in one or more of the buildings identified above," including the precise building.

MR. VON BONE: Yes, identified --

JUDGE AMBOS: So where is your -- what is the legal argument that that is erroneous or unlawful what the Trial Panel did as referred to the indictment, which I just quoted? Of course, we saw the footage. There's a certain discrepancy between the indictment and the footage, but the indictment clearly speaks not of one precise building but several buildings. And the Trial Panel takes up this one or more of the buildings and is -- do you have a problem with this conclusion of the Trial Panel in 372?

MR. VON BONE: I have a problem with the following issue, and that is, Your Honour, that the compound is composed of several buildings. No problem. Everybody knows. Where on that compound was envisaged where these people were, in fact, held and mistreated. That is the focus of the investigations of the SPO. It is also in the Confirmed Indictment clearly indicated where they were, in fact, held and detained.

And then we cannot say by the end of the trial, no, they were held in multiple buildings, and that it is -- the building was identified, was clearly identified. So, therefore, the Defence asserts that when it is that building, we can hold the -- the Prosecutor but also the Confirmed Indictment exactly speaks about the

issue about where the people were held and how they were held downstairs and interrogated upstairs, and then at the end of the trial we would say it would be immaterial to the charges. We believe, certainly, that it's not immaterial to the charges because these charges, they are -- the foundation of the charges are the facts, and the facts of it are this is the building of the single interest of the SPO. It showed in the footage.

And, once again, this came just before the oral arguments once again that the question was asked by the Trial Panel, and then the SPO responded and singled out a number of buildings. So that is what -- I hope I've clarified the position of the Defence regarding this issue, Your Honour.

Lastly, Your Honour, important is also whether the three witnesses actually implicated the accused.

1679, he never knew the accused. But 22 years after the events, he identified a building or he identifies a person. One can hardly rely on the identification of the accused given the fact that he never knew the accused before. During his entire detention and his molestation, he never identified the person, the perpetrator, and he never identified the location.

3593 had come to believe that it was the accused. And we asked it over and over. He had come to believe that - I'll quote the paragraph in a second - that it was the accused who was the person who interrogated him. It's written in paragraph 69 of the judgment.

That "come to believe," whatever that may indicate, can hardly

be a proper identification of the accused. He explained, in the words of the TP, that he had come to believe that the person was the accused based on his headgear, his role, authority over the perpetrators, and his nickname.

Notably, he explained that he had learned that the commander in Zllash was the accused, and he had learned that from other persons. It's paragraph 70 of the judgment.

So even if this man was unable to identify the location properly, of the judgment, which is in footnote 739 written, as the Defence has elaborated in paragraph 121 and further of the appeal brief, he never identified the accused either.

In the grounds of the appeal number 2, we have enumerated the facts that we submit are erroneously established or that no reasonable court could have come to the finding that the Trial Panel did. As a consequence, when the facts of the case are erroneously established, the Trial Panel therefore made wrong conclusions and erroneously found the defendant guilty on Counts 1 and 3, that is, the arbitrary detention and torture.

The very foundation of the charges are the facts. When those facts are erroneously established, that constitutes a miscarriage of justice. When and where there is a wrong assessment of facts, a wrong conclusion from that forms the basis on the finding of the guilt of the accused. A finding of guilt that has been built on such grounds cannot stand. That is the miscarriage of justice. A finding of guilt cannot be based on someone who came to believe that it was

this particular person who mistreated him or detained or tortured him.

I'll move to the next topic, Your Honours. It's Ground 2G and 2I.

Ground 2G is about the fact that the Trial Panel lacked to give proper weight to Defence witnesses who were able to observe the location. It is laid down in paragraph 158 to 178 that we have discussed that in the appeal brief.

2I is about the fact that the Trial Panel consistently considers, signals, states and/or presumes that witnesses would have some inclination to provide generally favourable evidence to the accused and unfavourable to the SPO.

The issue here -- the two issues here are related to each other. Someone who will testify is under oath, and each of the witnesses has taken such oath here in court. We have previously already focused on the standard of assessment of witnesses. The standard was not fully or not properly applied when the witnesses were evaluated on their credibility.

But in total, there were eight Defence witnesses who were in the compound at the relevant time: Mehmeti, Sopi, Veseli, Ajeti, Krasniqi, Hadri, and Ibadete Kaciu-Canolli. All of them denied that there was a place on the compound where the people were held or detained and mistreated.

And to be clear, it is less than a quarter of a football field, this entire compound, and so, I mean, we do not speak about a very

large football field, so to speak, but only a quarter of it.

None of these eight Defence witnesses had any impaired view, so they clearly spoke about the non-existence of any detention place there and then. Their testimony was systematically rejected.

When someone testifies, Your Honour, he might have photos on his Facebook account, or he can have respect for someone. Such issues are to be separated from what they actually experienced, saw, noted, noticed at the time of the period of the indictment. The word "witness" is for a reason, that you see, hear, know, experience something. That is what it is. You witness it.

Their personal interests do not necessarily make any difference on what these witnesses experienced or witnessed. Still, the TP, in an arbitrary manner, systematically assessed the testimony either not credible or not reliable or, on some occasions, both. The TP weighed the irrelevant factors into its assessment of these witnesses.

The Defence considers it wrong to assess testimony as unreliable or not credible simply by juxtaposing it to evidence given by other witnesses. So, for example, we have some who say he was detained, and others say on that location where he was was no detention place. TP, on multiple occasions, and written in paragraph 376 of the judgment, the evidence that refutes the allegations made by crime-based witnesses is unpersuasive weighed against the evidence received from victim witnesses.

It might very well be the case, Your Honour, that the TP -- or, sorry, that witnesses who testified about the non-existence of any

people detained at the compound is the truth. It could, therefore, very well be the case that the detained people were at some other location. It certainly does not mean that the testimony is unreliable simply because it contradicts the other evidence given.

The Defence asserts that the TP did not actually consider in a careful manner the actual observations of these witnesses about it. It rather focused on some sort of link between the witnesses and the accused.

PRESIDING JUDGE PICARD: May I interrupt you?

MR. VON BONE: Yes.

PRESIDING JUDGE PICARD: We asked in our order for -- in view of this hearing, we asked several questions.

MR. VON BONE: Sure.

PRESIDING JUDGE PICARD: Are you going to answer the questions before? Because it's almost one hour now that you have the floor.

MR. VON BONE: Yes.

PRESIDING JUDGE PICARD: So may we ask you to answer the question?

MR. VON BONE: Of the Court?

PRESIDING JUDGE PICARD: Of the Court, yes.

MR. VON BONE: Okay. You want me to do it now? Because I think the order of it --

PRESIDING JUDGE PICARD: If you --

MR. VON BONE: -- would make sense to do it in a little bit later stage.

PRESIDING JUDGE PICARD: If you have time. You have a little bit more --

MR. VON BONE: No, half an hour --

PRESIDING JUDGE PICARD: -- than a half hour left.

MR. VON BONE: Yeah, 35 -- yes. Yes. So if you excuse me, I will treat the questions at a later stage.

The Defence asserts that the Trial Panel did not actually consider in a careful manner the actual observations that these witnesses testified about. It rather focused on some sort of link between the witnesses and the accused, and used that as if the account of the witnesses would be not credible and reliable. The Defence gave ample examples of it in the appeal brief, and we believe that it is inappropriate to create a relation between, on the one side, simple observations of a witness and, on the other side, his position in the period of the conflict.

If we do not believe what KLA soldiers or volunteers in the conflict have to say simply because at some point they had some contact with the accused, then there is no point of having them testify. Fatmir Sopi was a brigade commander, and if he says that he was there, that there was no detention at the compound, why would he not be credible?

If another witness makes a post on a Facebook account about the fact that he was proud to be a young soldier and found that he had a good commander, then there is no reason to use that to the detriment of the accused. Mr. Ajeti, which is the one, even said that he

brought himself, with his own hands, some injured people into that *oda* building, and denied that it was the building where people would have been detained or mistreated. And he was on the location nearly all the time of the period of the indictment.

Connecting irrelevant factors as to what the witnesses actually saw on the ground during the period of the indictment is the single issue that the Trial Panel should have evaluated regarding the witnesses.

Lastly, Fatmir Humolli. His family stayed there and sought there refuge, so he visited there. But Mr. Humolli has a particular position regarding the Kosovo Specialist Chambers. His vision is a personal issue. He may freely express that as he has the right of freedom of expression. His wife even became, after the war, a patient of Dr. Teuta Hadri, who also testified that she was there on the compound helping operating patients.

So what has the personal opinion of Mr. Humolli about the KSC to do with the observations of the compound when he was there and when he would visit and meet his family there in the yard?

The Trial Panel weighed his personal opinion, a matter completely unrelated to the facts of the case, to the detriment of the accused. The Trial Panel did not properly weigh the testimony about what he saw. In this manner, the Trial Panel disposed a great number of witnesses who were simply testifying about matters that disproved the charges.

In the view of the Defence, that amounts to a miscarriage of

justice. Witnesses must be evaluated on what they saw, what they noticed, what they observed during the time that they were there. To apply any other standard is simply wrong as it is about those elements that we examine witnesses, in particular eyewitnesses on the ground.

In sum, the Trial Panel did not give proper consideration to the testimony of the witnesses who were in a good position to either identify the buildings of the location or to testify that the accused was elsewhere, in any event, not on the location where the alleged crimes took place.

When the witnesses are not evaluated on the merits of their observations, the facts cannot be established correctly. The Trial Panel did not give proper weight to the merits of what the Defence testified about. The facts formed the very foundation of the charges. It results, in this case, in an improper manner of establishing the factual circumstances of the case, and that amounts to a miscarriage of justice.

Your Honour, I will move on to another topic, and with that topic, I will come to one of the questions of the Court.

It's about the murder. The Trial Panel considered in paragraph 624 that the only reasonable conclusion based on the evidence as a whole is that the murder victim died as a result of a combination between the severe mistreatment inflicted by BIA members who detained him, causing serious bodily harm; the denial of medical aid by BIA members; and gunshot wounds.

Paragraph 639 concluded that, irrespective of the gunshot wounds, the death of the victim is attributed to the accused. However, regarding the attribution of the victims, I'll come to speak later.

I first start with the basics regarding the death.

It is a fact in the case that while a body was available, there was no exhumation that took place in order to execute an autopsy on the corpse. This could have been done at the time in 1999 or at any other time.

It is an undeniable fact in the case that no post-mortem examination was conducted by the SPO.

The Trial Panel, in the absence of a request by the SPO, must in all circumstances determine the truth of the case. It can that through various means. Even the Kosovo Criminal Code refers to such duty, pursuant to Article 7 of the Kosovo Criminal Code, that relates to -- that the facts of the case must be completely established and which are important in order to render a lawful decision, which is Article 7(1) of the Kosovo Criminal Code.

Under Rule 137 of the RPE, the Trial Panel must call evidence that is considered necessary for the determination of the truth. In order to determine the truth, the Trial Panel could, and we believe should, have used this rule in conjunction with Rule 40 of the RPE, as well as Article 19 of the KSC Law, and in conjunction with Article 7 of the Kosovo Criminal Code of Procedure of 2012, which I just cited.

Rule 40 of the rules specifies what is required to establish once a post-mortem examination of an exhumed body; namely, identity, cause and time of death, and the nature of any injuries. The findings from the examination of the exhumed body can provide answers to such questions or remain undetermined. These elements, better to say findings, in the above rule are stipulated for a reason.

Findings on the body of the deceased require the minimum specifics that can establish the nature of the death. Otherwise, and without any eyewitness testimony available, these specifics become mere speculation.

When the truth of a case involving the death of a person cannot be -- unequivocally be determined, only eyewitness testimony regarding these specifics could bring further light in the case. In this case, such eyewitness testimony is not available.

These specific issues are also relevant to the attribution to the death of one or more perpetrators. Without the time of death, some or more perpetrators can be excluded.

The time of death. There is no evidence that the victim died within the timeframe of the indictment. His corpse was found on or around 6 July. The last time he was seen by any of his co-detainees was on 19 April. No evidence is available of any of the witnesses who had contact with this person after 19 April.

It is therefore speculative to conclude that the death of the victim would have been within the timeframe of the indictment. There is no evidence to support such claim. Hence, it makes it impossible

to find the accused guilty of the murder charge as laid down in the indictment.

Even the Trial Panel, Your Honour, who tried to determine whether he would have died in a certain temporal gap, neither -- excuse me. Even the Trial Panel could not, who tried to determine whether he would have died in a certain temporal gap. Neither could the Trial Panel determine whether the victim died after the noted temporal time gap.

In paragraph 634 of the judgment, and I quote, that the Trial Panel says:

"Relatedly, the Panel is not in a position to determine when the Murder Victim died, at least with some approximation, during the above-mentioned temporal gap or after."

Therefore, the Trial Panel cannot hold that the murder victim was killed even before 30 April. They did not address the issue at all in the judgment. And insofar as they did, they were not in a position the determine when the murder victim died. So there is no conclusive evidence when he died. It is simply speculative to say that he died between the 19th and 30th April, and that is critical for the charge in the indictment.

The Trial Panel resorted to what constituted a substantive cause of death. I will speak about this specific issue later, but it did not reason why the substantive cause of death would be within the timeframe of the 19th to 30th April. The *actus reus* cannot be separated from the timeframe within which it took place in order to

find the accused guilty of the war crime of murder as formulated in the indictment. It left open the possibility that the victim died after April 1999, especially considering the fact that he was found in July.

Even if the victim would have died after the cessation of hostilities, it would not even amount to a war crime. The time of death is important. As to the charges, a death occurring outside the timeframe of the charges cannot result in the guilt of the death.

The same with the place of death. It is equally unknown what the place of his death was. Even though the body of the victim was found in the Zllash area, we simply do not know where he died. The place of death is equally important in relation to the charges as laid down in the indictment.

The Trial Panel fell short of the location of the place of death. And there is no evidence that this victim was actually killed at the compound. *[REDACTED]*. Nonetheless, the Confirmed Indictment states that he was killed at the Zllash detention compound.

The Trial Panel failed to address this issue. While the victim might have been mistreated on one place, he might have well been killed in another location, and, for that matter, by anybody else.

Regarding the time and place of death, the Defence asserts that the victim's time and place of death were not established. And, therefore, such error invalidates the judgment. The evidence allows for other reasonable conclusions to be drawn.

The Defence submits that if neither the time of death or the date and the place of death at the compound or not is established, the charges as laid down in the Confirmed Indictment cannot be proven beyond a reasonable doubt. So where there is no conclusive evidence where he died, it is simply speculative to say that he died at the Zllash detention compound. Hence, the charge cannot be proven, and that is critical for the charge in the indictment.

In sum, the Trial Panel could not establish these two matters, time and place, regarding the victim's death, and the Trial Panel cannot find the accused guilty of the charge in the indictment. Hence, it invalidates the judgment.

In order to determine the truth in a case, in particular when the case is about murder, it is necessary to establish at the minimum what caused the death and when was the death caused.

And then I come to speak to the cause of death. Because none of the co-detainees can determine whether the injuries that this person suffered could have resulted in his death, none of the co-detainees is qualified to make any determination of that kind. As earlier stated, there was no autopsy report.

What we do know is that the victim was alive when the other persons who were detained were released. Nobody ever after saw this person again, so anything regarding his state, whether he had medical aid or did not have so, is simply speculation. The denial of medical aid is an assumption for which there is no factual ground.

The Trial Panel made inferences regarding his state, his

condition, that, in the view of the Defence, result to the conclusion that he died or succumbed to those injuries. The people who found the dead corpse stated that the victim had holes in his body, probably bullet holes. It is undisputed that none of the witnesses ever spoke about the victim at the time of his detention as having bullet holes in his body. Therefore, these gunshot holes must have been inflicted after the detainees were released.

The Trial Panel, in paragraph 637 of the judgment, says:

"There exists, in fact, a reasonable doubt as to whether the bullet holes identified on the Murder Victim's body can be attributed to the BIA members or to the Serbian troops."

Then there is the medical aid issue. There is a difference between not receiving medical aid and denying a person medical aid. Simply not receiving medical aid can be due to all kinds of circumstances. Denial of medical aid seems a more rational matter but also depends on the circumstances. Related to both issues is whether medical aid is available at all. It all depends on many factors, factors that cannot simply be determined with hindsight. In any event, they were not determined.

It is unknown with whom the person was when the other detainees had left the premises to go to Prishtine. Whether the victim remained unattended or not is an unknown fact. It is equally unknown with whom the victim was or remained. *[REDACTED] Pursuant to In-Court Redaction Order F00031RED.*

[REDACTED] Pursuant to In-Court Redaction Order F00031RED., who was said to remain at the detention location as well, has never been found and there is no knowledge of this person. But

nobody knows whether there were any other people at the location. We do not know whether these people were KLA soldiers from the brigade, BIA members, or any other unit, or still civilians who were at the scene. No evidence regarding this matter has been produced. It is simply unknown, so any assumption is pure speculation.

It is equally unclear whether or not the victim received medical aid. The TP cannot infer availability or unavailability of medical aid on the basis of any factual ground. We simply do not know. And neither can the TP infer that he was denied medical aid. It simply remains unknown. Let alone that it can infer that it is the BIA members who would deny the person medical aid.

There is simply no proof, not at least in the judgment given, on the fact who would have denied medical aid to this person and whether such person would be a subordinate of Salih Mustafa, or whether Salih Mustafa was aware of this person being there in his condition.

And whether the person was evacuated or not is another issue that remains unsolved. Neither is it clear whether the person could be evacuated at all or whether he even died in any evacuation. We simply do not know.

While the rules provide the possibility to establish critical facts that the TP failed to apply the rule that would have solved the critical matters, it was not done. It invalidates the judgment of the charge of murder because in this case we have no eyewitness testimony on the matter on the cause of death, the time of death, and the place of death. The Trial Panel has only testimony of witnesses

who were confronted with injuries of the victim at the time when he was still alive, and the Trial Panel has only eyewitness testimony of people who found the dead body.

These two sets of testimonies bring no light to the issue as these two sets of witnesses were speaking about events 11 weeks in time apart. The eyewitness testimony when the victim was still alive never indicated any gunshot.

I'll move on to whether the person was released or not released, the non-release of the victim, which is attributed to the accused. Neither the victims themselves, nor the alleged persons who released them, ever gave evidence to this effect, and there is no documentary evidence. The only document that exists is a list of prisoners, but for none of the victims in this case any date of release was listed.

There is no factual basis for the inference of the TP that the accused made a decision not to release the victim. Nevertheless, the TP concluded that this was a decision of the accused not to release this person. It is baseless. The way the TP reasoned it was the following, and that is in paragraph 636:

"As a confirmation that the decision not to release the Murder Victim could only have been made by the Accused, as the BIA commander, the Panel underlines that the release of other detainees was executed by the Accused's BIA subordinates, including his deputy, Mr. Mehmetaj ..."

The fact that the detainees were released by Mr. -- Bimi, Mr. Mehmetaj, is in no manner a confirmation that any such decision

could have been made by Mustafa.

Apart from the fact that Mr. Mehmetaj, the person who released the people, himself denies the entire issue, he was not even a subordinate at the time that he allegedly released the detainee.

The Trial Panel itself stated earlier in the judgment about his role in the BIA, and I quote, paragraph 338:

"His," that is Mr. Mustafa.

"His position as commander is confirmed by the fact that until February 1999, Mr. Mehmetaj (aka Bimi) was the Accused's deputy and first assistant; whereas from February 1999 to 21 April 1999, it was Isa Kastrati, followed by Bahri Gashi," who was the deputy.

In other words, at the time that the people were released, Ibrahim Mehmetaj was not involved at all in BIA anymore and in no manner a subordinate of the accused.

The denial of medical aid or the decision not to release the victim cannot be attributed to either BIA members or the accused. The two factors, nonetheless, form a key factor in the TP's finding that the accused is guilty of the murder charged. The Defence submits that it is baseless. As these findings of the TP have no solid foundation, the finding itself cannot stand and is untenable.

When the facts of the case do not rest on solid ground, the conclusion that is drawn from it can also not stand as it is the firm conviction of the Defence that regarding the matter -- regarding this matter they were wrongly established and the inferences that were drawn is no reasonable tribunal could have done so.

The substantial cause. The questions of the Appeals Chamber.

On question 1(a), the short answer to the question (a) is: No. In the view of the Defence, the Trial Panel failed to apply the correct substantial cause test. It left out elements which, according to the Defence, are critical. The first element is time. The second element is the exclusion of any other cause of death.

As for the time element, the Defence submits the following. If the injuries of the victims were a *conditio sine qua non* for the death, then it needs to be established that his death did occur in a short timeframe from these injuries. At the same time, any other factor that could cause his death must be excluded as to the cause of his death. It must be established that there is a direct relation between the sustained injuries and his death. In other words, the sustained injuries must be a direct cause of his death.

As for the exclusion of any other cause of his death, the Defence submits the following. All other possible causes of death are to be eliminated. However, the Trial Panel took note that the victim sustained gunshot wounds but did not eliminate these as the cause of death, as written in paragraphs 624 and 627. The gunshot wounds that were found on the corpse on the victim were new injuries, in the sense that none of the witnesses in the case spoke about any gunshot wounds that the victim sustained during the time of his detention.

In the substantial cause test that the Trial Panel used, it entirely left out the timeframe within which the person died. They

assumed, without any proper ground, that the victim died between 19 and 30 April even though the grave was found on the 3rd or the 6th July, next to another body, *[REDACTED] Pursuant to In-Court Redaction Order F00031RED.*

[REDACTED] Pursuant to In-Court Redaction Order F00031RED..

The Defence has stressed the issue of time and place of death of the victim earlier.

The Trial Panel did not excuse the cause of death by gunshot wound. It rather stated that the other injuries and the denial of medical care were already enough for his death. The Trial Panel failed to eliminate other possible causes of death.

Question 1(b). The short answer to 1(b) is: Yes. When the causation is broken due to any subsequent new event that can equally and by its very nature cause the death, the Defence submits that in that case it impacts the causation standard.

The Trial Panel took for a possibility, based on statements of witnesses, that there were a number of intervening events. However, they could not establish it, but they certainly did not exclude it. The Trial Panel left open the possibility for these intervening events, although not stating it explicitly, rather, doing it implicitly. Among these intervening events are the shelling of Serbian forces ultimately neared or entered the premises potentially having access to the victim or that the victim might have been moved from the premises. That's paragraph 634.

The TP even left open the issue when the victim died, not even with at least approximation it was able to determine that. It's

paragraph 634.

The Defence, in terms of the impact of new intervening effects on the standard of causality to kill, considers that new events, as confirmed by the TP in 634 and 637 of the judgment, very possibly interrupted the causality between the actions or non-actions of the accused and the death of the victim.

The Defence considers that the death occurred due to the intervention of some new factual cause, i.e., the intervention of Serbian forces at the Zllash complex, that the death occurred from an independent action and regardless of the injury caused. So it can be considered that there was a break of the causal link between the action of the accused and the consequences that occurred so that a new causal link was created between the action and the death.

The impact is simple. These possible intervening events are events that occurred independently from the accused or the BIA or even the KLA. The impact is that when it cannot be excluded that these events occurred, it leads to the consequence that must always be most favourable for the accused, *in dubio pro reo*.

I might run out a little bit of time, but I'm nearly getting to the end, Your Honour.

The question 2. The short answer to the question is: No. Where there is no causation, there is no murder. Where there is no murder, there is no responsibility for murder, not in any form, at least by the accused. Neither personal nor in the context of a JCE or as a superior.

Article 20 of the criminal code of Kosovo states:

"A person is not criminally responsible when there is no causal connection between his action or inaction and the consequence."

However, since there is no material evidence that would prove that the victim's death was as a result of bodily injuries caused as a result by the use of a weapon, then the causal link between the action and non-action of the accused and the killing of the victim could not be proven either.

It is in the Tadic case, ICTY, I cite IT-94-1-T of 7 May 1997, in paragraph 240, the Trial Chamber considered the following. However, there must be evidence to link injuries received to a resulting death. This, the Prosecution has failed to do. Although the Defence has not raised this particular inadequacy of proof, it is incumbent upon the Trial Panel to do so. When there is more than one conclusion reasonably open on the evidence, it is not for this Trial Chamber to draw conclusions -- it is not for this Trial Chamber to draw conclusions at least the most favourable to the accused, which is what the Trial Chamber would be required to do in finding that any of the four prisoners died as a result of the injuries or, indeed, that they are in fact dead.

I come to ground 9(c), (d), (e), and (f), and then I will end my conclusions.

And that is regarding the misapplication, the non-application of the *lex mitior*. And that is the misapplication of Article 44(2) of the Law, which amounts to a constitutional violation of the rights of

the accused.

Mirroring the basic principles of the Constitution of Kosovo in Article 3(2) of the Law of the KSC prescribes that the Specialist Chambers shall adjudicate and function in accordance with the Constitution of the Republic of Kosovo. This provision has two parts: First, the "shall adjudicate" part; and, second, the "function in accordance with" part.

As for the first, it is obvious that the wording "shall" cannot be interpreted in any manner that leaves room on behalf of the KSC to adjudicate as it pleases since the issue at stake is a constitutional guarantee of the accused, reflecting a norm of customary international law, being the *lex mitior*, from which no derogation can ensue until and unless there is any other norm of the same legal value in place of it.

As for this "shall function in accordance" part of the provision, the situation is more clear. In Kosovo, as in other societies, the written constitution, court, and public institutions function and derive their legitimacy from the highest legal act, for example, the constitution of a country as the highest law of the land. The above approach that is foreseen in the national constitution of certain basic procedural guarantees, often reflecting international human rights standard of a *ius cogens* nature, is not specific to Kosovo. It is found in all constitutions of newly established democracies of the former communist societies of Europe. In Kosovo, this is to be found in Article 33 of the constitution that

sanctions the principle of legality and proportionality in criminal cases. Of particular relevance for the case at hand is the wording in paragraph 2 and 4 of Article 33. Article 2 reads:

"No punishment for criminal acts shall exceed the penalty provided by law at the time the criminal act was committed."

And paragraph 4 reads:

"Punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent applicable law are more favourable to the perpetrator."

These are two key provisions that enshrines *lex mitior* in the Kosovo constitution. As such, they reflect an international norm of the highest legal value of a procedural nature.

A similar wording is found as well in Article 7 of the European Convention on Human Rights, which is a source of law of the highest value in Kosovo as far as human rights and fundamental freedoms guaranteed by it is concerned. It reads, *inter alia*:

"Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

Article 44 of the KSC Law equally speaks about the sentencing range that "shall be taken into account," which is under, (a), the sentencing regime for crimes provided under the Kosovo law at the time of the commission.

All this constitutional and legal framework is ignored by the Trial Panel, as it can be seen from paragraph 780 in the trial

judgment, which concluded that it is not bound by the wording "shall take into account" of Article 44(2). If this were to be the case, as the Trial Panel says, then it would effectively mean that the said provision in this article conflicts with Article 33(2) and (4) of the Constitution of Kosovo, which is, as noted, the highest legal act, and obliges the Trial Panel. At the same time, as noted, it represents a *ius cogens* norm of customary international law from which no derogation can be assumed.

The Defence wishes to reiterate that provisions Article 33(2) and (4) are constitutional guarantees for the accused and, by consequence, are of critical importance for him. He derives protections under these constitutional guarantees.

The Defence submits that the Trial Panel, by not binding itself upon the provision of this article, the punishment infringed the constitutional right of the accused. It is not in accordance with Article 3 of the KSC Law and contrary to Article 33 of the constitution with the direct legal consequence invalidating the sentencing.

The procedure before the Specialist Chamber of the Constitutional Chamber, human rights guarantees provided by the Constitution of Kosovo and its jurisdiction are fully applicable. In line with Article 113.8 of the Constitution, it is relevant. It regulates the so-called "incidental control of constitutionality" and stipulates as follows:

"The courts have a right to refer questions of constitutional

compatibility of a law to the Constitutional Court when it is raised in a judicial proceedings and the referring court is uncertain of the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue."

Article 49(4) of the KSC Law has exactly the same wording. And in line with the above --

PRESIDING JUDGE PICARD: Please, can you finish now?

MR. VON BONE: Yes, I will.

PRESIDING JUDGE PICARD: We are well over the time.

MR. VON BONE: Yes, I will finish. I'm about ready to finish, Your Honour.

In line with the above, in case the Appeals Panel holds the same view as to the principle of *lex mitior*, we wish to propose to the Appeals Chamber to trigger proceedings of incidental constitutional control of constitutionality as per Article 113(8) of the constitution and 49(4) of the KSC Law as above.

The Defence submits that the TP's interpretation and application, or better to say non-application, of this provision of the law is unconstitutional as it infringes the provision of the constitution on legality of punishments which represents international standards as well.

I conclude, Your Honour.

The Defence submits that in case the Appeals Chamber does not make a finding on the misapplication of the Trial Panel regarding

Article 44(2) of the KSC Law, then it must and can apply the constitutional possibility to refer to it to the Constitutional Court.

And with that, Your Honour, I would like to conclude the submissions, and I thank you very much.

PRESIDING JUDGE PICARD: Thank you, counsel.

As set forth in the Scheduling Order, we'll now adjourn for a 30-minute break, so that means that we will reconvene at 10 to 4.00.

--- Recess taken at 3.22 p.m.

--- On resuming at 3.51 p.m.

PRESIDING JUDGE PICARD: [Microphone not activated].

Did you hear me? No, perhaps not.

So I invite the SPO to present its response, and you have one hour and 30 minutes. That brings us to -- I don't know, but ...

MR. MICHALCZUK: Of course, Your Honours. Thank you very much. We'll try to stick to the schedule.

Your Honours, the SPO's presentation today will be divided into three parts. We will begin by shortly highlighting a few selected elements of the case, focusing on Mr. Mustafa's responsibility for the crimes charged, and I will cover briefly this point. Then my colleague Mr. Baarlink will proceed with a focused discussion on the murder charge, where he will also address the issues indicated in Your Honours' order for the preparation of the hearing of 12 October, including causation, the impact of intervening events, modes of liability, and the *mens rea* standard for murder. And then Ms. Lawson

will conclude with a few remarks pertaining to sentencing.

And throughout our presentation, we will also address some of the submissions made by Mustafa's Defence today.

Your Honours, in the present case, Salih Mustafa was found guilty of arbitrary detention, torture, and murder as war crimes and was sentenced to 26 years of imprisonment. He was afforded a fair trial, was provided a full opportunity to test and challenge the evidence presented against him, and was allowed to introduce all proposed evidence supporting his case.

The Trial Panel thoroughly adjudicated the charges against Mr. Mustafa, assessing his defences and fair trial claims, issuing reasoned decisions, and granting relief where appropriate. The judgment is detailed, reasoned, and based on credible, reliable evidence. It should be upheld.

Your Honours, as the Trial Panel correctly established, the crimes charged occurred in April 1999 in Zllash, a small remote village located in the mountainous region of Gollak, east of Prishtine, the capital of Kosovo.

Zllash on this slide that Your Honours have right now before yourselves is to the right-hand side. It's about 20 kilometres by road from Prishtine, and it's on the right-hand side from Prishtine. So this is Zllash, Your Honours, in relation to Prishtine.

More specifically, the crimes were perpetrated within a cluster of conjoined buildings in a place referred to as the Zllash detention compound, ZDC. The ZDC was an isolated small location, far away from

inhabited places, and it can be seen on this slide.

The next slide depicts the buildings within the ZDC where the crimes were perpetrated. And here I would like to very briefly respond to today's submission of Mustafa's Defence in relation to the SPO allegedly changing their case throughout the trial.

As Judge Ambos asked and tried to clarify it with Mr. von Bone, indeed, the Prosecution, from the very beginning in the indictment, indicated that the crimes were perpetrated in the compound. In the indictment, which is the primary accusatory instrument, never indicated any particular building or buildings. We simply stated that the location where the crimes were perpetrated was the whole compound, and we maintained this until the end of the trial.

In April 1999, the ZDC was run by members of the Kosovo Liberation Army, in particular by a group called BIA, which was commanded by Mr. Mustafa, also known as Commander Cali or Cali. As found by the Trial Panel, BIA controlled the compound using this location as one of its bases.

Mr. Mustafa, the BIA commander, was in charge and in control of the compound.

The Trial Panel established and exhaustively explained in the judgment that at least six victims were detained in the Zllash detention compound in inhumane, deplorable conditions for prolonged periods of time, were made to sleep on the floor in an animal barn, were given insufficient food and water, and were kept in extremely unsanitary conditions. No medical care was offered to mend the

wounds inflicted by Mr. Mustafa and his subordinates during interrogations. The victims and other detainees in Zllash were also prohibited to interact with each other.

Your Honours, the SPO presented at trial an important evidentiary piece that strongly corroborates the fact of detention of victims. I'm speaking about the list of prisoners evidencing the names of Victims 03593, 03594, 01679, the murder victim, and also several others, as well specific particulars, including the names of their fathers, dates, places of birth, their places of residence, and the dates of their respective arrests.

Your Honours, I'm going to very briefly show you the prisoners list, how it looks. At the same time, I would kindly ask Madam Court Officer not to display this slide in particular.

Your Honours, this is the list, originally in Albanian. It was not contested during the trial. Its authenticity, provenance were not really challenged by the Defence. And as you can see, this list corroborates the testimonies of victims who survived their time in Zllash. For example, the presence of as many as 19 detainees, supporting the account of Witness 3593; or the presence of one named individual, which is fifth on the list, supporting the account of 1679; or, which is not on this slide, the questions posed at the interrogation of Witness 3593; or the connection between Mr. Mustafa and the detainees by the presence on the list the annotation "For Cali."

It is not, Your Honours, on this slide, however, after this

list, in the bundle of documents that we submitted at trial, the second page contained the questions posed during the interrogation to one of the witnesses, and another page contained an annotation "For Cali." And as we know, Salih Mustafa was known by this nickname, Cali.

The victims detained at the Zllash detention compound were beaten and tortured almost every day, both in the barn where they were detained and in the interrogation room in the upper part of one of the buildings. Detainees were taken upstairs individually, one at a time, were often interrogated there, and were brutally beaten, mistreated or tortured. The detainees were also psychologically abused, including by soldiers entering the stable and displaying to them the severely injured body of one detainee in particular, the victim who was later murdered.

Mr. Mustafa himself participated in that mistreatment. Two of the victims, 1679 and 3593, named him as directly participating in their interrogation and beatings and overseeing their mistreatment. 1679 clearly identified Mr. Mustafa and confirmed that, while in Zllash in April 1999, he was interrogated by Mr. Mustafa who first accused him of being a spy, cursed him, then slapped him and beat him before leaving him to the hands of his BIA soldiers who beat that person until he lost consciousness.

The other victim, 3593, was also personally interrogated and mistreated by Mr. Mustafa who, on one occasion, beat the victim with a baseball bat and, on another, performed a mock execution, and

oversaw other KLA members beating this victim.

Both victims also credibly indicated the presence and involvement of Mr. Mustafa's subordinates from the BIA unit who established and maintained the conditions of detention and who physically and psychologically assaulted the detainees at the Zllash detention compound.

Powerful corroboration to the stories of these victims that further contributes to Mr. Mustafa's responsibility for his acts is offered by the medical forensic reports concerning the victims. These reports confirm their physical injuries and psychological symptoms, including post-traumatic stress disorder.

Let me now, Your Honours, very briefly turn to the Trial Panel's specific findings regarding criminal responsibility of Mr. Mustafa for the charged crimes.

The Trial Panel established the existence of both material and mental elements regarding the crime of arbitrary detention.

Your Honours, focusing only on *mens rea* of Mr. Mustafa, the Trial Panel found that it was specifically based on a number of factors: First, Mr. Mustafa's commanding position over BIA and the ZDC; two, his confirmed presence at the ZDC at times crucial for the charges, including when he received the murder victim in April 1999, in the mistreatment of Victims 1679 and 3593; the third finding is that Mr. Mustafa's exclusive power was there to decide on the release or retention of detainees in the ZDC; four, Mr. Mustafa's admitted awareness of detainees at the ZDC was another factor; the next one

was undeniable awareness of BIA members of the presence and detention of the victims, including Mr. Mustafa's deputy in BIA and also his close associate.

Mr. Mustafa's knowledge of the victims' detention and his intention to keep them detained is, as the Trial Panel found, particularly demonstrated by the fact that he saw at least one detainee being brought to the Zllash detention compound, that he personally mistreated two others at the ZDC, and after beating 3593, he ordered his BIA subordinates to bring him back to the detention barn.

As for torture, Your Honours, the Trial Panel also correctly established the existence of the statutory elements of *actus reus* and painstakingly enumerated its finding concerning Mr. Mustafa's *mens rea*. And I'm going to focus only on *mens rea*, Your Honours.

The Trial Panel found that the factors militating for the existence of *mens rea* included Mr. Mustafa's personal participation in the physical and psychological mistreatment of 1679 and 3593 and in their interrogation, including by conducting mock execution of 3593 and beating him with a baseball bat. Also relevant was repeated participation of Mr. Mustafa's subordinates in BIA in, as the Trial Panel formulated that, institutionalised mistreatment and interrogations.

Mens rea of the accused was also based on the denial of sufficient food, water, medical care, and access to sanitary facilities to all detainees by the BIA members under Mr. Mustafa's

command. It was also based on the awareness of the condition of the detainees and of the detention facility.

On the basis of these findings, the Trial Panel concluded that the infliction of severe pain and suffering on the detainees by Mr. Mustafa and his BIA subordinates was intentional and was done for the purpose of obtaining information or a confession, punishing, intimidating, coercing, and/or discriminating against them on political grounds.

Regarding the murder charge, very briefly. The Trial Panel correctly found that the murder victim was killed in April 1999 as a result of a combination between the severe mistreatment inflicted by BIA members who detained him, causing serious bodily harm; the denial of medical aid by BIA members; and gunshot wounds caused by bullets attributable to either the BIA members or to the Serbian forces.

The Trial Panel found these first two causes to constitute substantial causes of the murder victim's death and to be attributable to the accused in the context of his decision to neither release nor evacuate the murder victim and irrespective of whether the murder victim was hit by one or more Serbian bullets.

On intent, regarding murder, Your Honours, the Trial Panel found that the responsibility of Mr. Mustafa was based on his acceptance that victims under his custody may be killed, demonstrated by his own words and using potentially deadly weapons against them; intentional infliction of a severe mistreatment within a prolonged period of time by Mustafa's subordinates; singling the murder victim out for such

exceptionally harsh treatment; using potentially lethal objects in the cause of such mistreatment; denial of medical aid that was otherwise available; Mr. Mustafa's decision not to release or evacuate the murder victim in light of an impending Serbian offensive; abandoning him in a near-death condition in a locked shed, thereby denying him a last opportunity to be saved; the motive to dispose of the murder victim in order to prevent him from reporting the perpetrators or otherwise retaliate against them; and, finally, Mr. Mustafa's subsequent expressions of intent to frustrate any proceedings concerning that murder.

Your Honours, before I'll give the floor to my colleague Mr. Baarlink, I would like to very briefly respond to the oral submissions of today of Mr. Mustafa's Defence regarding the issue of the alleged bias of the Trial Panel in the evaluation of Prosecution witnesses and the Defence witnesses.

Your Honours, we extensively replied to Mr. Mustafa's allegations in this regard in our response, and you can find our detailed submissions in paragraph 71 to 83. We don't have much time, Your Honours, so I'm not going to repeat those submissions. They can be found therein.

Just one issue before we move on, Your Honours. In our response to the appeal of Mr. Mustafa, we dealt with form of deficiencies in his submissions, and I'm not going to repeat them here. We believe that most of appeal submissions fielded by Mr. Mustafa should be rejected *in limine* without considering them on the merits. We

maintain those submissions, but, as I said, we'll not repeat them today.

Your Honours, thank you very much. I would like to give the floor to my colleague Mr. Baarlink, who will address the issue of murder. Thank you.

MR. BAARLINK: Good afternoon, Your Honours. I will now respond to the submissions made this afternoon in relation to Mr. Mustafa's grounds of appeal against conviction for murder. That's Count 4. Which are -- the grounds are Grounds 3, 4, and 5. And I will also endeavour to respond to the questions that Your Honours posed, as well as any additional questions that you might have.

As we go through the issues in this appeal, we would do well not to lose sight of the plight of the man who was denied the opportunity to tell his story in this Court. That unhappy story began *[REDACTED]* *[REDACTED]* April 1999. The murder victim was *[REDACTED]* *[REDACTED]* *[REDACTED]* *[REDACTED]* *[REDACTED]* *[REDACTED]*.

At the Zllash detention compound, the murder victim was handed over to BIA members under Salih Mustafa's command, and *[REDACTED]* *[REDACTED]* *[REDACTED]*.

The murder victim's name, date, and place of birth were entered

into the list of prisoners. He was taken into a barn where he was held in deplorable conditions described as unfit for humans. He slept on damp, muddy ground covered with hay and water. The air smelled of livestock excrement. Days would go by without food being provided.

The murder victim was accused of being a thief and of collaborating with the Serbs. Every time the murder victim was brought back into the barn, his tormentor ordered the other detainees to shout out, "Death to the traitors, death to the thieves, death to the thugs, and glory to the Kosovo Liberation Army." And it was in this inhospitable environment that BIA members under Salih Mustafa's command singled out the murder victim for an extreme level of mistreatment.

The murder victim was the only detainee whose hands were tied, and he was unable to feed himself. He was beaten until he could no longer stand. He was burned with an iron, and he was stabbed with a knife. His entire body was black from the bruises, and his face was swollen to the point that he could only slightly open his eyes.

By the time Witness 3593 arrived in the barn, he saw the murder victim unable to stand and hardly able to speak. The murder victim told him, "They will kill you." Even to this day Witness 4669 has flashbacks and nightmares to the murder victim's mistreatment.

Witness 1679 told the Trial Panel:

"Every one of us was beaten, but he was massacred."

Witness 1679 said he could smell the murder victim's flesh.

And, importantly, the murder victim was denied the badly needed medical care that could have saved his life.

On 19 April 1999, *[REDACTED]* after he was first taken into Salih Mustafa's custody, the murder victim was in a near-to-death state. At that point, he was no longer able to stand or walk. All the other prisoners were released at this time. Only the murder victim and one other detainee, who were the most mistreated detainees, remained in detention.

A few days later, Witness 4600 learned from *[REDACTED]* *[REDACTED]* that the murder victim was dead. The murder victim's body was found later that year, in July 1999, in a shallow grave *[REDACTED]* *Pursuant to In-Court Redaction Order F00031RED.*

[REDACTED] Pursuant to In-Court Redaction Order F00031RED. The body was already decomposing and showed signs of serious injuries on the arms and legs as well as bullet wounds on the torso.

These are the facts, Your Honours, and I would urge you not to lose sight of them as we go through the legal issues, the legal principles in this appeal, and as you consider those legal principles.

Turning now to those legal issues.

And before I address the substantive issues raised in these grounds, and in particular the questions posed by Your Honours, I want to emphasise that Mr. Mustafa has failed to substantiate these grounds to even the minimum standard to escape summary dismissal. We've made detailed submissions, written submissions on the form of deficiencies in Mr. Mustafa's appeal in our brief, and these points

are especially pertinent when it comes to the grounds relating to murder.

Mr. Mustafa's submissions on these grounds, both in his brief and as well as this afternoon, fail to meaningfully develop the grounds as they were articulated in the Notice of Appeal, and the Notice of Appeal raises issues that are raised for the first time on appeal.

Now, the formal requirements of appellate proceedings have developed for a reason, as we've explained in our brief, and they require the appellant to clearly identify errors of law and explain how the errors invalidate the judgment. When alleging errors of fact, the appellant must show that the Trial Panel's evaluation of the evidence is wholly erroneous or that the evidence could not have been accepted by a reasonable trier of fact.

Only an error occasioning a miscarriage of justice justifies appellate intervention. None of Mr. Mustafa's grounds comply with these requirements or raise to these standards. In essence, Your Honours, Mr. Mustafa is presenting you with a block of timber and asking you to carve a figurine out of it. That's not a good model for conducting appellate proceedings.

Mr. Mustafa has failed to substantiate Grounds 3 to 5 to even the minimum standard, and, therefore, these grounds must be summarily dismissed.

Turning now to the substance.

Again, we have addressed Mr. Mustafa's submissions on Grounds 3

to 5 in our brief, and I don't intend to repeat what's written there, so I'll primarily respond to Your Honours' questions as well as the matters raised this afternoon.

But the overarching point that I urge Your Honours to be mindful of when considering abstract principles like those relating to the element of causation is that one can easily get lost in the thicket of logical fallacies. Indeed, the main problem with Mr. Mustafa's submissions on these grounds is that many of them are based on false premises, and chief among those false premises is this: That Mr. Mustafa did not cause death because another cause also contributed; namely, the possibility that Serb forces fired the bullets.

Now, to put this into context. The Trial Panel found that the most probable conclusion from the evidence is that BIA members fired bullets at the murder victim before leaving the Zllash detention compound. That was the most probable conclusion from the evidence. And on this most probable version of events, no issue about causation arises.

Now, in a criminal trial, the court has to establish the accused's guilt beyond reasonable doubt. And where the case is a circumstantial one, as was the case here, the standard of proof beyond reasonable doubt means that the court must ensure that the inference drawn by the court is the only one available on the evidence.

And that's why the Trial Panel had to consider whether there was

a reasonable possibility that the bullet wounds were inflicted by Serb forces during the mid-April offensive. That's a classic *in dubio pro reo* scenario. Because there remained a reasonable doubt about the attribution of the bullets, the Trial Panel considered Mr. Mustafa's criminal responsibility on the assumption that the Serbian forces fired the bullets.

And the Trial Panel correctly found that, even on this version of events, the version of events most favourable to Mr. Mustafa, even on that version of events, Mr. Mustafa and his BIA subordinates substantially contributed to the murder victim's death. And that was on the basis of, number one, the severe mistreatment, the lethal mistreatment inflicted against the murder victim by Mr. Mustafa's BIA subordinates; number two, the denial of medical aid to the victim; number three, the refusal to either release the murder victim together with the other prisoners or to evacuate him with the wounded in light of the impending Serbian offensive.

Now, the argument that this other cause, that is, the possibility of the murder victim being shot by Serb forces, the argument that this other cause absolves Mr. Mustafa of criminal responsibility is false because it is based on the false premise that the accused's contribution must be the sole cause. And that's not what the -- I beg your pardon.

One of the difficulties here is that ordinary language does not mirror the requirements of the law here. Common usage of the word "cause" may imply that the accused's actions must be the sole or the

overwhelming cause of a given result, but that's not how the causation is defined in the law.

The Trial Panel correctly set out the applicable legal standard for causation under customary international law, and that's this: That the perpetrator's conduct does not have to be the sole cause of death of the victim but it must, at a minimum, have contributed substantially thereto. That's the correct test under customary international law. And nothing that Mr. von Bone has said this afternoon credibly challenges that test under customary international law.

And the citation to the trial judgment there is paragraph 687.

Now, Your Honours have asked whether this is indeed the correct standard for causation taking into account *conditio sine qua non* and "but for" causation. And the first point we make here is that on the Trial Panel's findings, "but for" causation is indisputably established.

Now, we need only imagine a world where the actions of Mr. Mustafa and his BIA subordinates are subtracted from the causal chain. Had they not detained the murder victim at the Zllash detention compound, he would not have ended up in a shallow grave *[REDACTED] Pursuant to In-Court Redaction Order F00031RED.*, his corpse pierced with bullet wounds.

Had they not mistreated him with murderous intent and left him in a near-to-death state, unable to move, he would have been able to walk away like the other prisoners.

Had Salih Mustafa given the order to evacuate him or to provide him with medical care, he would not have been found dead, with signs of obvious mistreatment as well as gunshot wounds.

Indeed, the Trial Panel explicitly found that the murder victim would not have died but for the extreme mistreatment by the accused or by the appellant and his BIA subordinates. And the Trial Panel found that he would have survived had they provided medical aid to him. And the trial judgment reference there is paragraph 626.

Those findings, Your Honours, are more than reasonable on the evidence before the Trial Panel.

Now, one might say in response: But this was a time of war. He might have died like many other civilians who were killed during the Serb offensive. And this is exactly the kind of logical dead-end that I alluded to earlier.

When considering "but for" causation, one can always imagine some infinite universe where everything is possible, and that's why the alternative world that we imagine -- when we consider "but for" causation, the alternative world that we imagine must be identical to the one as found minus the acts of the accused and his subordinates. In other words, the exercise is one of subtraction and not addition.

Now, to put this into perspective or, in comparison, the -- the Trial Panel found that there was a rational link to the evidence indicating that Serbian forces fired at the Zllash detention compound. They did not speculate. They found a rational link to the evidence. And for these reasons, regardless of whether the

applicable standard of causation under customary international law includes *conditio sine qua non*, "but for" causation, we say this would make no difference to the Trial Panel's overall finding that causation as an element of murder is met in this case.

Turning now to the broader question of whether substantial cause is the correct test. This question was settled in the jurisprudence of the ICTY more than 20 years ago. The ICTY Trial Chamber in the Celebici case examined various domestic legal systems to arrive at the substantial cause test. Many of them applied a less stringent standard for causation than substantial.

And the Celebici standard has been subsequently applied by trial chambers of the ICTY. In Kordic and Cerkez, that's at the trial judgment at paragraph 229; in Oric, paragraph 347; in Kupreskic at paragraph 560; in Karadzic in Volume I, paragraph 446; in Popovic, paragraph 778; Djordjevic, paragraph 1708; in Lukic and Lukic, paragraph 899; in the Haradinaj retrial judgment at paragraph 427; in Tolimir at paragraph 715; in Brdjanin at paragraph 382; and in Milutinovic at paragraph 137. These are all trial judgments.

The Special Court for Sierra Leone in the Brima *et al* case followed this standard, at paragraph 689, as did the ECCC in the Duch case, Case 001, at paragraph 331. The standard is also reflected in the commentary -- the International Committee of the Red Cross Commentary on the Geneva Conventions, which has been used, including by -- in Appeals Panel in the Thaci *et al* trial as a source of interpretation for customary international law. And the reference

there is Case 06 IA009/F00030, at paragraph 96, an only slightly differently constituted Panel than today.

The same Panel held that the jurisprudence of the *ad hoc* tribunals was the most appropriate method of discerning the existence of customary international law since they tried similar crimes approximately during the same time period. And those comments were in the context of discussion of Joint Criminal Enterprise III.

The substantial cause test is also consistent with the factual findings in at least two cases before of the *ad hoc* tribunals. Two cases where an accused was convicted as a direct perpetrator of murder on the basis of a substantial contribution. That is, not under a mode of liability but as a direct perpetrator. And that's for having made a substantial contribution even where the contribution of others had a more direct effect on death.

The first case is the ICTY Appeals Chamber in Limaj which confirmed Haradin Bala's conviction for murdering nine prisoners as a direct perpetrator even though it could not be established that he shot all nine prisoners himself.

Likewise, a trial chamber of the ICTY convicted Milan Lukic for the murder of five persons even though the evidence only established that he directly shot one of the victims.

Now, the trial chamber found in the Lukic and Lukic trial chamber, at paragraph 908, that:

"... Milan Lukic's role and actions in the events leading up to the killings, at Sase and, particularly, at the river's edge before

and during the killings, were such that were it not for his presence and directions, including regarding the manner in which the men were killed, the killings would not have been committed."

The Lukic trial chamber had relied on findings of the ICTR appeals chamber in Seromba and Gacumbitsi, comments that were made in the context of genocide. And the Lukic and Lukic trial chamber said at -- again at paragraph 908 of the trial judgment:

"... a person who did not physically commit a crime - in the present case, personally shooting each victim - can nonetheless be liable for committing the crime of murder if there is evidence that the perpetrator's acts were as much an integral part of the murder as the killings which the crime enabled."

And the appeals chamber in Lukic, noting the precedent in the Limaj case, confirmed Lukic's conviction for directly committing murder and not as a co-perpetrator under joint criminal enterprise or under mode of liability, but as a direct perpetrator. And that's directly consistent with an application of the substantial cause test as was set out by the trial chamber in this case.

Now, in addition to these precedents, there is a wealth of jurisprudence considering substantial cause or substantial contribution in the context of aiding and abetting. We've set out this jurisprudence in paragraphs 151 to 160 of our brief. I don't intend to repeat those submissions, but they're there for Your Honours' perusal.

These cases might assist Your Honours in getting a tangible idea

of what a substantial contribution means in cases of similar factual backgrounds. And I can commend Your Honours' attention particularly to the case of Mrksic and Sljivancanin, where the accused withdrew their JNA guards and that left non-Serb prisoners exposed to advancing Serb paramilitary forces. So they withdrew their own guards they had, and there were Serb paramilitary forces which were therefore able to attack the prisoners. And in that case, it was found that the accused, by that act, substantially contributed to the deaths of these prisoners who were then killed by the paramilitary forces.

Also the case of Popovic is instructive. There, the accused failed in his legal duty to protect prisoners, and that failure substantially contributed to their subsequent murder.

The case of Krnojelac is another case concerning a commander's responsibility for deaths that occurred in a detention compound under his command.

And that, again, is murder convictions that occurred or were being charged under aiding and abetting.

Now, these cases provide some guidance as to the application of substantial cause, substantial contribution, and they illustrate the reasonableness of the Trial Panel's findings.

Now, Your Honours have also referred to national jurisprudence on this issue, and we say that the substantial cause test is, indeed, consistent with and in most cases higher, a higher standard than the causation standards applied in the national jurisdictions, as can be

seen from the analysis of the ICTY trial chamber in the seminal Celebici case. A number of jurisdictions may even apply a "but for" causation without an additional requirement, attribution requirement.

But other jurisdictions applied the "but for" standard, the *conditio sine qua non* standard, only as a first step to establish what's called or referred to as factual causation. And these jurisdictions then add an additional normative requirement to establish what's referred to as legal causation or proximate causation. And the purpose of this additional requirement is to place some normative restriction on the "but for" standard which may otherwise be over-inclusive or over-deterministic.

It's thought that a grandmother should not be considered to have caused the deaths of her grandson's victim even though her procreation was an essential condition or necessary condition to the murder. And in this way, the legal standard attributions focuses on acts which are morally deserving of criminal sanction.

Now, in customary international law, that normative requirement takes a form of substantial cause.

Now, again, with reference to national jurisprudence, in our submission, the substantive cause test by comparison to national jurisdictions is a very onerous requirement. In the USA, legal causation is satisfied where the resulting death was a natural and reasonably foreseeable consequence of the accused's conduct. And there it suffices to show that the death was a possible consequence which might reasonably have been contemplated.

In other common law countries, there are competing tests applying different standards. One of the leading cases in Canada is the case of the Canadian Supreme Court in *R v. Smithers*. That's [1978] 1 S.C.R. 506. And the Court held, at 518 to 522, that "the causal connection must be more than *de minimis*." That same standard was applied in the United Kingdom in *R v. Cato* [1976], 1 WLR 110, at 117. As well as in Ireland in the Supreme Court in the case of *Dunne v. the Director of Public Prosecutions* [2016], 06/2015, paragraph 67, and there was it was expressed as more than minimal.

Interestingly, the standard was also endorsed by a separate and concurring opinion of Judge Eboe-Osuji in the Bemba appeal. That's 14 June 2018 at paragraph 166.

Another line of authority in the UK applies a significant contribution standard. Two of the leading cases are *R v. Pagett*, that's [1983], 76 Cr App R 279, at -- the relevant reference there is 288. That's the Court of Appeal of England and Wales. As well as *R v. Warburton* [2006], EWCA Crim 627, and the relevant reference there is paragraph 23.

Other courts in common law jurisdictions apply a substantial operating cause, and the leading case there is *R v. Smith*. It's [1959], 2 Q.B. 35, and that's the judgment of the Courts Martial Appeal Court. And that court explicitly rejected a submission by the appellant that his contribution must be the sole cause of death. And it also rejected the proposition that the contribution must be the direct cause of death. And that's significant. So following Smith,

in the common law jurisdictions, the accused's act must be a substantial cause of death, not necessarily the sole or the principal cause, and it need not be the direct cause. So the submissions that Mr. von Bone made this afternoon are inconsistent at least with those authorities in the common law jurisdictions even though they apply a fairly high test for causation, as high as the customary international law test.

And that's also the view of the Crown Prosecution Service of England and Wales in its Prosecution guidance.

Now, the *R v. Smith* has been followed in a number of jurisdictions. In New Zealand, in Fiji, in Hong Kong, in Nauru, in Sri Lanka, and by some courts in Australia. I can provide the relevant references either now or later in writing if Your Honours are interested, but it might take some time to go through, read them out.

So the Court of Appeal in -- South Australian Court of Appeal in *R v. Hallett* followed that line of authority, that is, the substantial operative cause. And the facts in Hallett are somewhat analogous to the present case. In that case, the accused had knocked the deceased unconscious and left him lying on a beach, and the deceased later died from drowning whilst unconscious in the rising tide. The court rejected the argument that the action of the sea on the deceased broke the chain of causation. So, in other words, the accused had knocked the deceased unconscious and left him lying there, and at the time of death, which was directly caused by the

drowning, he was still unconscious. So the accused's actions were still substantial and operative at the time of death even though the medical cause of death was a different one.

Of course, the key difference to the present case is that the murder victim would have died regardless of an intervening event. And I'll have more to say about intervening events later.

There's another line of authority in common law jurisdictions which is the reasonable foreseeability standard, and that was followed in *R v. Roberts*, at least that's one of the leading cases, that's EWCA Crim 4. That line of authority was also followed by the Australian High Court in *Royall v. R* [1991] HCE 27. So that's the common law.

And what this establishes is that the substantial cause test under customary international law at least sits at the very high end of the attribution test -- the normative contribution tests that are being applied in common law countries.

Now, our reading of the German decisions is that they predominantly apply in addition to *conditio sine qua non*, also a theory of normative attribution referred to as *objektive Zurechnung*. And there, the death is only attributed to the accused if he or she created a legally objectionable or relevant danger, *Gefahr*, of death, and that danger or risk in fact materialised.

According to the ICTY appeals chamber in the Celebici case, Belgium and Norway require so-called adequate causation. That's at paragraph 424, footnote 435 of the Celebici trial judgment.

Again, this comparison is just to illustrate that the substantial cause test under customary international law sits at the very high end of the range of different attribution tests that are being applied across the world.

And even if Your Honours were to substitute this test with any of the causation standards that I mentioned, it would make no difference to the Trial Panel's finding that Mr. Mustafa and his BIA subordinates legally caused the death of the murder victim and that death is attributable to them.

In fact, Mr. Mustafa and his BIA subordinates did everything necessary to kill the murder victim. After inflicting the mortal injuries that alone would have killed him, they left the murder victim at the brink of death and incapacitated in the direct path of an additional deadly peril.

Now, the version of events most favourable to Mr. Mustafa is that the murder victim survived long enough to be shot at by Serbian forces. And even on this version of events, the injuries inflicted by Mr. Mustafa and his BIA subordinates, in combination with Mr. Mustafa's refusal to release the murder victim or to evacuate him or provide him with medical care, even on this most favourable version of events, Mr. Mustafa and his BIA subordinates substantially contributed to that death. And that's because they, by the combination of these factors, robbed him of his last chance to survive.

And although the applicable causation standard under customary

international law is substantial cause, these facts would indeed satisfy any of the tests, any of the normative attribution tests. For example, the murder victim's death was a possible consequence which might reasonably have been contemplated. The contribution of Mr. Mustafa and his BIA subordinates was more than *de minimis*. It was substantial. It was operative. Any reasonable person in Mr. Mustafa's position could not have failed to foresee that the murder victim would die in these circumstances.

Mr. Mustafa and his subordinates were the architects of the murder victim's predicament. They created the danger, the danger of death, and that death materialised. They caused his death factually, legally, and morally. The only question they may have left unresolved is how the murder victim may die or would die, but that question is wholly immaterial to Mr. Mustafa's criminal responsibility for the death.

Turning now to the issue of new and intervening events on the causation standard for murder, and Your Honours have asked for reference to domestic and national or international cases. And at the outset, it's important to distinguish between the principle of *novus actus interveniens* which was raised in Mr. Mustafa's Notice of Appeal but not subsequently and at least not supported in submissions this afternoon. But that common law concept of *novus actus interveniens,* we must distinguishing between that distinct concept and how the causation standard under customary international law deals with intervening events.

Broadly speaking, the *novus actus interveniens* principle is an exception to the normative attribution tests in common law jurisdictions. And one aspect, probably the key aspect of this principle, is that the voluntary criminal act of another usually breaks the chain of causation. And I want to highlight that this really has very narrow application.

We're only -- in cases where the accused's contribution is foreseeable and remains substantial and operative at the time of death, it's only conscious voluntary acts, in most cases criminal acts, of a third person that can relieve the first actor from criminal responsibility. For all other intervening events, the ordinary principles of causation apply.

An example there is the case of Pagett, *R v. Pagett* that I mentioned earlier. In that case, the accused had used the deceased as a human shield, and the deceased was shot by a police officer. So even though the accused's actions were only an indirect cause of death, and that was even a voluntary act of another person, but because the police officer was acting in pursuit of a legal duty, that was not considered to not satisfy the principle of *novus actus interveniens* or that principle didn't engage in those circumstances.

And even in common law systems, that principle is not universally applied. There are comments in *R v. Maybin* of the Canadian Supreme Court at [2012], 2 S.C.R. 30, at paragraph 60, as well as in *R v. Smithers*, which I mentioned earlier at page 521. And also in *R v. Warburton*, at [2006] EWCA Crim 627, and the reference

there is paragraph 21.

I'm slightly conscious of the time, so I'm moving a little bit quicker through it than I might otherwise.

Now, this is an appeal, and the burden to establish that the *novus actus interveniens* principle is party of customary international law is on the appellant, and Mr. Mustafa has failed to present any authority capable of demonstrating this. Mr. Mustafa has not pointed to any authority from the *ad hoc* tribunals, as might have been encouraged by subsection 3 of Article 3 of the Law.

Indeed, he has not even supported his ground of appeal with any citation to common law cases.

So even if we accept for the sake of argument that the principle of *novus actus interveniens* applies universally in Anglo-American jurisdictions, that alone is wholly insufficient to say that is customary international law. Now, there's a clear standard for incorporating domestic criminal law rules into customary international law, and the threshold is that the rule must be common to the major legal systems of the world, as it was made clear in the Celebici trial judgment at paragraphs 414 and 431.

And the ICTY appeals chamber in Sainovic made similar comments. The appeals judgment in paragraph 1643.

And I believe Your Honour Judge Ambos made a similar comment in your treatise on international criminal law, volume 1, page 77.

And the point has been made many times that to isolate a concept, a domestic concept from its legal order, the legal order

within which it has organically developed, and import it directly into international criminal law, that's a fraud and legally erroneous undertaking.

Domestic jurisdictions apply their own concept of criminality that are based on their own values and their own principles, and those are not always universally shared, and that's why the standard for incorporating domestic rules into customary international law is a high one.

And in our submission, Mr. Mustafa has wholly failed to establish that this principle is part of customary international law.

And, again, I want to emphasise the dangers inherent in an attempt to distil the rules governing a legal system that is foreign to one's own, especially when the cases contain different charges to what is at issue here.

Nevertheless, given the question that Your Honours have asked, we provided a few examples, and this is our understanding of the jurisprudence in those countries, but the caveat applies.

Now, for example, in Spain, a new action may exceptionally break the chain of causation. So we have "but for" causation and then exceptionally a new event might break the chain of causation. Likewise, in Italy, chain of causation is only broken by completely independent causes which create a chain of causation separate and autonomous from that established by the accused, or those characterised by absolute anomaly and exceptionality, falling outside the realm of normal, reasonable probability and, thus, unforeseeable.

In Germany, generally, an intervening event will only break the chain of causation when it is outside of all life experience. And I refer Your Honours to the decision of the Bundesgerichtshof, the German federal court, on 3 July 1959, 4 StR 196/59 at paragraph 7:

"However, one cannot always speak of a foreseeable outcome only if it is the course of events that finally led to it was foreseeable, as occurred in the individual case. Rather, it is sufficient that the final outcome was foreseeable. If, on the other hand, the course of events is so far beyond the experience of life that the perpetrator could not have foreseen it, even with the care required by the circumstances of the case and which could be expected of him according to his personal abilities and knowledge, he is not criminally liable."

Now, these are examples of how courts have grappled with intervening causes and intervening events. And the following two cases that I mentioned suggest that these principles, at least in Germany, do not change in the case of acts by, you know, voluntary, even criminal, acts by a third person. So the same principles apply.

The first is a decision again of the German federal court, Bundesgerichtshof, 30 August 2000, 2 StR 204/00. The facts can be briefly summarised:

The accused had stabbed the deceased multiple times, including in the face, and left her for dead with the knife stuck in the deceased's face. The accused then ran home and told her boyfriend what she had done, and both of them returned to the scene with the

intention to remove the evidence. While the accused waited outside, the boyfriend went inside. And while he was inside, noticed that the deceased, at that point, was still alive. He removed the knife and hit the deceased on the head with a water bottle, shattering her frontal bone.

And the court stated at page 4:

"Deviations from the assumed cause of causation are legally insignificant, however, if they remain within the bounds of what is foreseeable according to general life experience and do not justify a different assessment of the offence ... This is the case here. The death of the victim is not the result of a chain of unfortunate circumstances which, beyond all probability, would exclude the accused's responsibility for the outcome.":

"The act of the perpetrator" -- this is at page 6.

"The act of the perpetrator remains causal even if a third party acting later intentionally contributes to bringing about the same result, provided that he/she only builds on the actions of the perpetrator ..."

A second case is again a case of the German federal court. That case concerned a public brawl between a large number of young men. The accused identified as "K" pulled a powerful punch against the left temple of the deceased, followed by another punch to the abdomen. The deceased at that point was impaired by these punches, and he was leaning against a shop window. He was visibly dazed. The accused "K" that inflicted these punches withdrew, and another man,

"R", approached the deceased, punching him in the head with three heavy punches. The deceased lost consciousness and choked on inhaled blood from nasal bone fracture.

The court held that the elements of causation and attribution were satisfied because the accused "K" weakened the victim and thereby rendered him unable to defend himself against a mortal blow of another man. In that case, the accused should have foreseen that the victim's reduced capacity to defend himself, which itself was the result of the accused's punches, could lead to the third person continuing the fight and inflicting the punches.

So the key concept applied there was the foreseeability of the death, and that is foreseeability according to normal life experience and the ordinary course of events.

If Your Honours could bear with me one moment.

[Specialist Prosecutors confer]

MR. BAARLINK: Now with respect to Kosovo, the case against Agron Zeqiri concerning charges of unlawful detention which resulted in death. It's not a murder charge, we accept that. Under Article 63 of the Criminal Law of the Republic of Serbia, and Article 63(5), the first one is unlawful detention, and the second one is detention resulting in death.

In addressing these charges, the Supreme Court of Kosovo held that there must be a causal relation between the act of unlawful detention and the lethal consequences for the victim. Noting the probability of such situations during armed conflict or civil unrest,

the court went on to add, this is the Supreme Court judgment 19 October 2006 in the case of Agron Zeqiri, at page 6:

"The responsibility for detention resulting in death can be attributed based on conditions in which the release takes place, [meaning], the victim, instead of being returned to safety, is being released into an environment which poses a threat to his/her life, e.g. amidst armed violence, on enemy territory, in extreme weather conditions, far from human settlements with no means of survival."

The Supreme Court further clarified that where the victim of a legal detention is found murdered, the responsibility for their death can be attributed to those responsible for the detention if the detention or the conditions of release rendered an opportunity for a third party to commit the murder, provided there is a requisite causal link and the applicable *mens rea* on the part of those responsible for the detention are established.

Ultimately in that case, in the Zeqiri case, the Kosovo Supreme Court confirmed the accused's acquittal, finding that causation and intent had not been established, in particular, as the charges and evidence presented only describe the arrest and the discovery of the victim's body.

It noted at page 7 that "at no point during the first instance proceedings did the prosecution attempt to articulate the factual elements which would have demonstrated a causal link between the victim's detention and his murder." Coincidentally, the accused Mustafa was a witness in the Zeqiri case, which also concerned

alleged crimes by BIA members. However, the factual similarities end there.

Unlike in Zeqiri, the crimes charged in the present case have been proven beyond reasonable doubt, including the murder, which, at a minimum, and as painstakingly reasoned in the judgment, resulted from the circumstances of the victim's lethal mistreatment, detention, and release.

PRESIDING JUDGE PICARD: Just to tell you that you have until 5.20.

MR. BAARLINK: Thank you.

[Specialist Prosecutors confer]

MR. BAARLINK: Thank you for that indication.

So the point of going through all of these cases is to once again highlight that this *novus actus interveniens* principle raised by Mr. Mustafa is not customary international law, and Mr. Mustafa bears the burden of establishing that, has made no genuine effort to establish that, and, indeed, the principle is confined to common law jurisdictions. Even there, it's unclear if it's universally applied. And the ordinary principles of causation apply in these cases even when there is an intervening event.

So Your Honours need go no further than the substantial cause test as established in a wealth of jurisprudence under customary international law. And these principles only leave one conclusion, which is that Mr. Mustafa and his BIA subordinates substantially contributed to the murder victim's death.

Now, I note Your Honours have asked no questions about liability for omissions. I do note that we make submissions on that point in our brief. In the interest of time, I don't intend to address that issue here. But I do urge Your Honours to have another look at those submissions as well.

A few points in response to -- specific points in response to Mr. von Bone's arguments this afternoon in relation to the murder.

Point number one, the submissions about time of death. Of course, time of death is not an element of the crime of murder and neither is place of death an element of the crime of murder. The only reason it's relevant is because of the indictment period. And the Trial Panel found, quite reasonably, that the death occurred within the indictment period. And that was based on the fact that the murder victim, at the time that he was last seen, was already in a near-to-death state. He was already at that point close to death. And that's at page 621 of the judgment. When the body was exhumed, it was already decomposing. That's at page 614 of the judgment. And, crucially, Witness 4600, just a few days after the Serb offensive, that is, well before the end of April, was told by *[REDACTED]* *[REDACTED]* that the murder victim was dead -- was dead at that point.

We say that the Trial Panel's finding on that is reasonable, and certainly the standard of review has not been met in challenging that finding.

In relation to the availability of medical treatment. The trial

judgment at paragraph 621, footnote 1346, established that medical treatment was generally available at the Zllash detention compound, contrary to submissions made by Mr. von Bone.

In relation to the substantial cause test, Mr. von Bone does not seem to challenge the correctness of the legal standard but rather its application by the Trial Panel. And that's, of course, a question of fact. And so the relevant standard of review for errors of fact apply there. No reasonable Trial Panel could have came to the conclusion. And in our submission, that's the standard you should be looking at, and in our submission it's not met.

In relation to intervening events, Mr. von Bone said a number of times that the Trial Panel failed to consider alternative scenarios, alternative hypotheses, when the Trial Panel did, in fact, consider the only other reasonable possibility, which is that the bullets may have been fired by Serbian forces. And, therefore, the Trial Panel reasoned that even on that scenario, the accused, Mr. Mustafa, remains liable.

And just briefly, there was a reference to the Tadic trial judgment at paragraph 240. Now, that's a factual finding of one trial chamber. Of course, each case turns on its own facts. The cases can be distinguished. There are a number of factors including that in that case none of the prisoners were ever seen again. There's no finding that any of the prisoners would have died regardless of any other intervening event. And just a general point that the factual findings of one trial panel, of course, does not

bind your determination of factual issues in a different case on entirely different facts, and certainly does not establish that the Trial Panel's conclusions were unreasonable or that no reasonable tribunal could have come to those conclusions.

And just briefly addressing the other modes of liability. Mr. Mustafa is also charged in the alternative with aiding and abetting liability. And in our submission, he would also be liable under aiding and abetting. The elements of aiding and abetting are well-established, including by the Sainovic appeal judgment. The *actus reus* of aiding and abetting consists of practical assistance, encouragement, moral support, which has a substantial effect on the perpetration of a crime.

The *mens rea* requirement of aiding and abetting is knowledge that the accused's acts or omissions assisted in the commission of this specific crime by the principal, and awareness of the essential elements of crime that was ultimately committed, including the intent of the perpetrator. It is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed; rather, it suffices to show that he or she was aware that one of a number of crimes would probably be committed, and one of those crimes is in fact committed. And, moreover, there is no legal requirement that the aider and abettor know every detail of the crime that was eventually committed.

That's the Sainovic appeal judgment. The paragraph reference is there, 1626, 1772, and 1773.

PRESIDING JUDGE PICARD: Just to interrupt. You only have a few minutes now to end.

MR. BAARLINK: Yes, thank you.

PRESIDING JUDGE PICARD: But we have some questions, so I don't know if someone will take the floor to speak about the sentence, but it will be very short. So perhaps we could ask some questions first, and then quickly you go through the last part of your whole submission about the sentence.

MR. BAARLINK: By all means.

JUDGE AMBOS: So, Mr. Baarlink, thank you very much for this very substantive presentation.

I have -- I actually have many questions, but we have not enough time to deal with them all. But let me just start with the first question.

I heard that you said we have to apply *in dubio pro reo* as to para 637 and 638 of the trial judgment, and the Chamber assumes, at the most favourable version of the events, that the victim was killed by Serb forces, no? That's what you said. And you quoted 638, where it is said:

"However, even if the gunshots were attributable exclusively to the Serbian forces ..."

So that would be the most favourable version in line with *in dubio pro reo*.

MR. BAARLINK: Yes.

JUDGE AMBOS: Would you agree?

MR. BAARLINK: Yes.

JUDGE AMBOS: So let's discuss this version, then, to get to the grain of the issue, the gist of the issue here.

Would you say that if a third actor, a third party kills the victim, this is a *novus actus*, or, in other words, Italian, Spanish, German, where you say it's not part of this jurisdiction, but, yes, just we don't use Latin, I can tell you. It's just an intervening act by an independent, free, autonomous agent. Isn't that the situation of this scenario, this legal scenario?

MR. BAARLINK: Well, the reason -- it is, Your Honour. The reason I highlighted the very specifics of the common law concept of *novus actus interveniens* is the consequence that flows from it. And in common law jurisdictions, it might very well be that the conscious voluntary act of a third person intervening might break the chain of causation. But what we have demonstrated is that that's not the case in customary international law. There's no authority for that in customary international law.

JUDGE AMBOS: I come to this -- I just want to clarify with you that we're on the same page here.

MR. BAARLINK: Yes.

JUDGE AMBOS: Then I come to the question of customary international law, which you use a lot, and which, of course, you use in line with case law and practice since 1993. In the good old days, customary international law was defined by state practice, you know? States bring out -- put up some statement. They say: We are against

state immunity, you know? We think you have to target only civilians. Hamas, Gaza, Israel. That was customary international law. What states say.

Now, you implied, and in line with our law in a way, to case law by ICTY and so on, and then you quote the jurisdiction. In your very eloquent submission, written submission, you quote the common law jurisdiction, you quote German law. In the end, isn't it that you, in line with Article 3 of our law, take into account other sources, including general principles? What you're really doing is you say, there is a principle called *actus* -- *novus actus*, but it's not custom, but it could be general principles.

I would deny that it's just a question of common law jurisdictions. We have no time to go into details, but I could give you a lot of case law where under another name this principle is applied in civil law jurisdictions.

So if it's a principle which is an important principle in terms of justifying criminal responsibility for a certain result, can the argument of customary international law take it out of the equation, of the debate, or isn't it part of an *actus reus* of killing? If you say there is a certain act, a certain result, between the act and result there must be causation.

So do we need to invoke customary international law to talk about a principle of epistemology. It's an epistemological question, how you attribute. And you yourself make the argument in your submission now.

So I wonder what is your view now in the end? Should we think about it, or should we just say no, it's not customary, therefore it's not relevant?

MR. BAARLINK: Well, you're applying, of course, customary international law. I mean, the charge is murder as a war crime under customary international law. And you have to follow the ordinary interpretation principles to establish what are the applicable rules under customary international law.

And you have recourse, you know, primarily pursuant to Article 3, primarily to the jurisprudence of the *ad hoc* tribunals. There is cases. It's not just the expression of the standard, but it's also the cases that I referred to today, and also in our written submissions, where perpetrators have been convicted for having -- for murder as direct perpetrators in those situations where another person, by their conscious and voluntary act, might have pulled the trigger.

So primarily, I urge Your Honours to go through the normal principles of interpretation. Now, one of those leaves open under the International Court of Justice statute, one of them is general principles of law. But in order to be a general principle of law, it must be common to all the major legal systems of the world. And in my submission, that's not been established in this appeal.

JUDGE AMBOS: Okay. In your brief, on para 164 and 166, you yourself talk of factual causation may lead to overdetermination. You said it today. And, therefore, we have in basically all

jurisdictions elements of what we -- what you call in common law countries legal causation, in civil law you talk of normative elements of restricting causation, so in the end you speak of a fair attribution.

You yourself speak of a fair attribution in your submission, which I think is perfect in terms of the debate we have actually in criminal law. And so isn't then the issue can you fairly attribute a killing to a person when, under the most favourable narrative of our case, the killing has been committed by a third actor? In this case, Serb forces.

Would it be fair in this situation -- now, let's talk about fairness, reasonableness. Would it be reasonable and fair under these circumstances if we assume this factual scenario -- we have a problem here, of course, of the factual scenario. But *in dubio pro reo*, we have to assume it. Would it then be fair and reasonable, call it as you like, *novus actus*, supervening event -- anyway, that's an academic debate. But would it be fair to attribute this person, under these circumstances, these factual circumstances, the killing when we cannot prove, when we are not convinced as a Trial Panel that he shoot the person, that he directly killed, we have no evidence on that, would it then be fair to impute him the killing?

MR. BAARLINK: Unequivocally yes, because Mr. Mustafa and his co-perpetrators, his BIA subordinates, had him in their custody. They had complete control of what was going to happen to the murder victim. They -- rather than treating him in accordance with the

Geneva Conventions, they mistreated him by lethal means. They left him, in fact, at the brink of death, and the Trial Panel's findings are that he would have died in any event. In the ordinary course of events he would have died.

He's then -- Mr. Mustafa refuses to release him with the other prisoners. He refuses to evacuate him. He refuses to provide him medical care, as was his duty under the Geneva Conventions. He, in fact, did everything -- or together they did everything possible -- everything necessary to kill him. The only question that may have been unresolved is how the death would happen.

And under those circumstances, why should he be absolved of his criminal responsibility? It's a similar situation as in the Australian case of Hallett, for example, where the tide drowns the --

JUDGE AMBOS: That's exactly not comparable because that's nature. These are different cases. But, anyway, we have no time. I know we have to stop this.

But let me just ask you a last question here, and that's about modes of liability, because you also in your submission, also today, you talked about substantial contribution, causation in aiding and abetting, and I wondered if you think that's the same?

I mean, because you indicted the defendant as a perpetrator, no? Not as an assistant, not as an aider and abettor, but under JCE I as a perpetrator.

MR. BAARLINK: Yeah.

JUDGE AMBOS: So is this a kind of fallback then, assistance? I

mean, if we came to the conclusion that there is no sufficient causal nexus, legal nexus in terms of perpetration, would we then say, yes, but in any case, it's a kind of assistance, because, of course, he did something and there was a contribution to the final result.

MR. BAARLINK: It's an alternative submission that's available to Your Honours. The plain reading of the causal element of the *actus reus* of aiding and abetting, the plain reading is it's very similar words, so it's the same words essentially. Contribution and cause are used interchangeably, it's substantial.

We made this point in our brief that the *actus reus* of aiding and abetting essentially turns on that test whether there's a substantial contribution to the crime. So we set out that jurisprudence to give Your Honours some assistance in interpreting what substantial contribution means.

If by some -- well, I'll put it this way. It would only be the application of this exception that could theoretically absolve Mr. Mustafa of responsibility as a direct perpetrator. In other words, the application of the substantial contribution test, the substantial cause test, in our submission, you cannot get around finding that he substantially contributed to the death. He's left him at the brink of death and then evacuated the -- and he would have died within days and likely did die within days.

So that factual scenario, it must establish the substantial -- must fulfil the substantial cause test. So it's only by the application of some other principle, some exception that you could

get to a point where you might have to consider aiding and abetting. And that's available to you.

JUDGE AMBOS: Thank you very much.

PRESIDING JUDGE PICARD: We are running out of time, so may I suggest that you finish your submission about the sentence tomorrow.

MR. BAARLINK: Yes, Your Honour.

PRESIDING JUDGE PICARD: So we can stop now the hearing and start tomorrow with your final submission on sentencing, unless you have something to add?

MR. BAARLINK: Well, one area I have not covered is --

PRESIDING JUDGE PICARD: But quickly --

MR. BAARLINK: -- the *mens rea* for murder standard which Your Honours asked some questions about, but I can either make further written submissions on that or I can leave that for tomorrow as well.

PRESIDING JUDGE PICARD: Yes, but then -- yes, okay. And then, of course, the Defence lawyer will have also more time to answer your submissions.

So I suggest now that we end the hearing. And we'll reconvene tomorrow at 9.30. And we'll start not by hearing the Victims' Counsel, but we'll start hearing your last submissions, and then the Victims' Counsel, and then back to the Defence counsel, and Mr. Mustafa, of course, at the end.

So the hearing is adjourned for the day.

--- Whereupon the hearing adjourned at 5.31 p.m.