

1 Friday, 27 October 2023  
2 [Open session]  
3 [Appeal hearing]  
4 [The appellant entered the courtroom]  
5 --- Upon commencing at 9.32 a.m.

6 PRESIDING JUDGE PICARD: Good morning, everyone.

7 So today we are resuming the appeal hearing concerning  
8 Mr. Mustafa's appeal lodged against the Trial Panel's judgment of  
9 16 December 2022. We will proceed as follows. And the schedule has  
10 changed a little bit since it was originally set.

11 So we will hear first the SPO for 15 more minutes, as we decided  
12 yesterday, so you can have the opportunity to speak about the  
13 sentencing. So that will be until 9.45. From 9.45 until 11.00, that  
14 is during one hour and 15 minutes, we will hear the Victims' Counsel.  
15 Then at 11.00, we will take a pause of 30 minutes. From 11.30 until  
16 12.00, we will hear, during 30 minutes, Counsel von Bone to hear his  
17 final submissions. And then for ten minutes, from 12.00 to 12.10, to  
18 hear Mr. Mustafa, and then we shall conclude the hearing.

19 And before I give the floor to the SPO, I ask the parties and  
20 Victims' Counsel to provide the Panel with electronic copies of any  
21 national jurisprudence to which they refer in their briefs or oral  
22 submissions at the earliest convenience following the hearing. And  
23 additionally, as relevant, any English translations in your  
24 possessions would be appreciated by the Panel.

25 So I invite now -- I forgot to call the case, but the case will

1 be called now.

2 THE COURT OFFICER: Good morning, Your Honours. This is the  
3 file number KSC-CA-2023-02, The Specialist Prosecutor versus  
4 Salih Mustafa.

5 PRESIDING JUDGE PICARD: Thank you. Sorry about that.

6 So we shall hear now the SPO during 15 minutes.

7 MR. BAARLINK: [Microphone not activated] ... extra time.

8 The one issue that I didn't get to yesterday was the issue of  
9 *mens rea* for murder, and Your Honours asked questions about that in  
10 your order, F30.

11 And the first question that Your Honours asked was what kind of  
12 intent is required for the charge of murder.

13 And our response to that is that the *mens rea* for murder is  
14 settled. The elements are either an intention to kill or wilfully  
15 causing serious bodily harm where the perpetrator should reasonably  
16 have known that the act or omission might lead to death. So it's  
17 intention to kill or wilfully causing serious bodily harm with the  
18 requisite awareness.

19 The second question Your Honours asked is how was the applicable  
20 intent to be defined.

21 And in our submission, this is not a question that Your Honours  
22 need to resolve in this case because the Trial Panel reasonably found  
23 that Mr. Mustafa and his BIA subordinates intentionally killed the  
24 murder victim. And Your Honours should first assess whether the  
25 Trial Panel's findings of Mr. Mustafa's intent is erroneous, meaning

1 that the Trial Panel's evaluation of the evidence is wholly erroneous  
2 or that such evidence could not have been accepted by any reasonable  
3 trier of fact.

4 And in particular, Your Honours should assess whether  
5 Mr. Mustafa's intent cannot be inferred on either of the two  
6 alternative limbs of the *mens rea* standard. In other words, of  
7 course, the Trial Panel found that he had an intent to kill, but  
8 unless the evidence could not establish that he had at least a  
9 wilful -- he had at least an intent to cause serious bodily harm  
10 where he should have reasonably known that his acts or omissions  
11 might lead to death, unless Your Honours are satisfied that the  
12 evidence could not establish that, then Your Honours need not concern  
13 yourselves with the definition of intent.

14 And in our submission, the evidence establishes unequivocally  
15 that Mr. Mustafa had at least an intent -- he at least wilfully  
16 caused serious injury with an awareness that this might lead to  
17 death. And there are numerous factors in the trial judgment from  
18 which that can be inferred. The first one being Mr. Mustafa's  
19 presence at the compound. And this is a small compound. His direct  
20 participation in the mistreatment of other prisoners, including the  
21 use of a firearm, the use of a baseball bat.

22 So from those aspects, one can infer both knowledge and also a  
23 volitional element.

24 The specific targeting of the murder victim by direct  
25 subordinates of Mr. Mustafa. The decision not to release him or to

1 evacuate him, which the Trial Panel found could only have been made  
2 by Mr. Mustafa. The motive to prevent the murder victim from  
3 reporting because he knew many of the people involved. The  
4 subsequent expressions by Mr. Mustafa to frustrate proceedings.

5 And, again, I emphasise that the most favourable version to  
6 Mr. Mustafa, the most favourable version is that he abandoned a man  
7 who could not walk and who was close to death, a man under his care,  
8 a man under his custody, and from that, it must be inferred that he  
9 had at least an intent to cause serious bodily harm which he ought  
10 reasonably have known might lead to death.

11 PRESIDING JUDGE PICARD: We have a question for you.

12 MR. BAARLINK: Yes.

13 JUDGE AMBOS: Yes, good morning. On the question of intent, two  
14 questions.

15 In 688, the Trial Panel defines the intent required,  
16 intentionally or wilfully caused. We do not have a general intent  
17 definition in our law. Would you consider that a lesser degree of  
18 intent than direct intent, i.e., for example, *dolus eventualis*, is  
19 within our law? First question. Okay? A lower than direct intent.

20 And the second question is as to the defendant's knowledge of  
21 the condition of the murder victim. Can it be inferred from the  
22 trial judgment that the defendant knew - knew - was aware of the  
23 conditions of the murder victim, and when? And if this is so, from  
24 what can it be inferred? Thank you.

25 MR. BAARLINK: Yes. To answer your first question, there is

1 some authority for the proposition that intention to kill also  
2 includes something lower than meaning to bring about that result.  
3 That is a recklessness, often -- sometimes referred to as a  
4 recklessness standard. The ECCC Appeals Chamber in the Case 002, in  
5 that case, established that an intention to kill also includes  
6 recklessness or *dolus eventualis*. The Karadzic trial judgment came  
7 to a similar finding. The references there are Nuon and Khieu of  
8 Case 002 judgment, at paragraph 390 to 410, the appeals judgment; and  
9 the Karadzic trial judgment, paragraphs 447 to 448.

10 JUDGE AMBOS: Mr. Baarlink, why is this relevant for us? I  
11 think we have referred to our -- we have a law and we have, of  
12 course, Kosovo law as a kind of fallback. Why don't you apply the  
13 Kosovo criminal law to define the intent? Why do you refer to ICTY  
14 case law?

15 MR. BAARLINK: Well, because, Your Honours, you're applying  
16 customary international law, and in our submission, the Kosovo --  
17 substantive Kosovo criminal law, even though we're a Kosovo  
18 institution, a Kosovo -- substantive Kosovo criminal law has no more  
19 bearing on the definition of the *mens rea* of murder under customary  
20 international law than any other domestic criminal law.

21 And again, I've referred to Article 3, which guides Your Honours  
22 as to how to resolve in the interpretation of customary international  
23 law. And then, again, you can go to the statute of the International  
24 Court of Justice, Article 38. In following those hierarchies or  
25 those sources, in my submission, the judgments of the *ad hoc*

1 tribunals are far more persuasive than the substantive criminal law  
2 of a single jurisdiction.

3 To answer your second question. Essentially, well, it's an  
4 inference. Mr. Mustafa's knowledge is inferred, but it's inferred  
5 from a range of factors, a range of persuasive factors, and some of  
6 them I mentioned before.

7 First of all, he's present during key periods of the murder  
8 victim's detention. He's present the day that he arrives, and he's  
9 present during multiple times afterwards, and he's present by his own  
10 admission a few days before he's released. And the Trial Panel found  
11 that the decision to release and the decision not to evacuate and the  
12 decision not to provide medical care could only have been made by  
13 Mr. Mustafa. And from that, one can infer -- or that has to be based  
14 on knowledge of his detention, and it has to -- one can safely infer  
15 from that that he knew something about the condition of the murder  
16 victim.

17 And, again, this is a small compound. There are only a small  
18 number of prisoners there. And given the layout of the compound, the  
19 only reasonable conclusion is that he must have had sufficient  
20 knowledge of this man's detention, who was, in the Trial Panel's  
21 words, lethally mistreated. He was close to death. And at that  
22 point, on the version most favourable to Mr. Mustafa, he's left a man  
23 who cannot walk and who is close to death in a situation where  
24 everybody else has evacuated, where that person, again, is close to  
25 death. And, in our submission, that can only lead to the conclusion

1 that he must have known about his condition, and he must have known  
2 about the consequences that would ensue.

3 JUDGE AMBOS: Thank you.

4 MR. BAARLINK: Yes, just to wrap up the point about -- the  
5 submission about the *mens rea*.

6 In our submission, even if Your Honours were to depart from any  
7 of the jurisprudence interpreting what intent to kill means, in our  
8 submission, it would not change the outcome because, at the very  
9 least, Mr. Mustafa was wilfully causing serious bodily harm which he  
10 should reasonably have known might lead to death.

11 So unless there are any further questions, I hand over to  
12 Ms. Lawson.

13 PRESIDING JUDGE PICARD: No. And we went over time.

14 Are you finished now, or you still want to make some oral  
15 submissions about sentencing?

16 MR. BAARLINK: We're in the Court's hands, Your Honour. We're  
17 in the Court's hands. I believe --

18 PRESIDING JUDGE PICARD: Yes, you have some minutes to ...

19 MR. BAARLINK: Thank you, Your Honour.

20 MS. LAWSON: Good morning, Your Honours, and we're grateful for  
21 the additional time.

22 On sentencing, in respect of the constitutional submissions made  
23 yesterday, I would refer the Panel to paragraphs 32 and 33 of filing  
24 F00262 in the Thaci *et al.* case. There, we discuss those  
25 constitutional provisions and explain that because the KSC law

1 addresses customary international law crimes, there's no conflicting  
2 sentencing regime in Kosovo which could be globally understood to  
3 apply.

4 And there are also related relevant findings of the  
5 Appeals Panel in IA009-F0030, including in particular at paragraphs  
6 39, 56, and 57.

7 That said, I will turn briefly to the question posed in the  
8 order issued by the Panel.

9 The sentence of 26 years' imprisonment is fair and  
10 proportionate. And proportionality in this context refers primarily  
11 to the relationship between the gravity of the offences and  
12 Mr. Mustafa's responsibility for them. That is his blameworthiness.  
13 The Trial Panel made that assessment carefully in this case, making a  
14 number of significant and distinguishing findings.

15 The Defence has made a bare assertion that, for the same type of  
16 crimes, no sentence of this length exists in international tribunals.  
17 There are a number of reasons why this fails to demonstrate error.  
18 Primary amongst them is, of course, the Trial Panel's overriding  
19 obligation to tailor a penalty to fit the individual circumstances of  
20 the accused and the gravity of the crime. And properly evaluating  
21 those factors, including any relevant aggravating or mitigating  
22 circumstances, means that sentences can vary substantially, even  
23 where they relate to the same type of crimes. It's not often  
24 possible to just transpose a sentence from one case to another. And  
25 we noted relevant jurisprudence on this point in our brief, including



1 the finding of this Panel at paragraph 434 of the appeal judgment in  
2 the Gucati and Haradinaj case.

3 In order to raise an inference that a sentence may be capricious  
4 or excessive, it would have to be out of any reasonable proportion  
5 with a line of sentences passed in similar circumstances for the same  
6 offences. No such line of cases has been identified. Even  
7 yesterday, not a single case was identified despite the Panel's  
8 invitation.

9 Nonetheless, if a comparison exercise is to be conducted, we  
10 would make two points. First, regard should be had to the applicable  
11 sentencing range, as, indeed, Your Honours did in the Gucati appeal.  
12 It would have been open to the Trial Panel in this case to impose a  
13 sentence of life imprisonment. As was correctly noted by the  
14 Trial Panel, under Kosovo law at the time, war crime offences were  
15 eligible for the harshest available sentences.

16 And in consideration of the inherent gravity of the crimes at  
17 issue, the existence of multiple aggravating factors, and  
18 Mr. Mustafa's very high level of contribution to those crimes, the  
19 sentence imposed by the Panel was, in fact, at the mid-range, perhaps  
20 the lower end of the mid-range of what was actually available to the  
21 Trial Panel.

22 Second, a comparison should not just be confined just to  
23 international tribunals. In current practice, it's likely that the  
24 majority of international crimes are now being prosecuted before  
25 domestic courts, and they're being punished with sentences

1 commensurate to the gravity of those offences. Simply by way of  
2 example, Chuckie Taylor is currently serving a 90-year sentence in  
3 the United States having been convicted for acts of torture and  
4 conspiracy to commit torture. That sentence is comprised of a number  
5 of consecutive terms, but even broken down to its component parts, we  
6 see that, for example, Count 1 alone, a charge of conspiracy to  
7 commit torture, attracted 20 years; while Counts 5, 6, and 7, each  
8 relating to the torture of one individual victim, attracted ten years  
9 each. That's United States versus Belfast, and we will provide a  
10 copy in line with Your Honours' direction.

11 In 2021, a Dutch court imposed a sentence of 20 years on a  
12 Syrian man for the war crime of murder. And significantly, that  
13 sentence related to a single murder without the added gravity of  
14 running an illegal detention centre where multiple vulnerable  
15 civilian victims were detained, threatened, and tortured.

16 And the UK Court of Appeal upheld a life sentence for the  
17 killing of two persons as war crimes.

18 And, again, we will provide copies and references of each of  
19 these.

20 However, the same caveats that I mentioned in relation to  
21 international jurisprudence also apply to these domestic cases.  
22 We're not drawing a direct factual comparison. Our point is simply  
23 that the submission is both overly simplistic and not accurate. It's  
24 certainly not a basis for finding any abuse of discretion by the  
25 Trial Panel.

1           And our final point. We do not consider that the sentence  
2           should be significantly or at all impacted, even in the event  
3           Mr. Mustafa's conviction on one of the charges were to be overturned.  
4           The Panel's factual findings on the gravity of the accused's criminal  
5           conduct, his individual circumstances, and mitigating and aggravating  
6           factors are not materially affected even if a specific element of any  
7           particular crime is not found to be proven.

8           This is consistent with the case law of international tribunals  
9           where overturning certain convictions, even for serious crimes, does  
10          not necessarily result in a reduction of sentence where the affirmed  
11          convictions are still for very serious crimes.

12          The Renzaho appeal judgment, paragraphs 620 and 621, are  
13          examples of this.

14          And it is the case that that applies in this instance where, for  
15          example, the offence of torture, which was committed with particular  
16          cruelty, and in which Mr. Mustafa directly committed offences against  
17          two victims, fully warranted the 22-year sentence imposed for that  
18          count.

19          These are our submissions, Your Honour. Thank you very much.

20          PRESIDING JUDGE PICARD: We have one question for you.

21          JUDGE AMBOS: Thank you very much.

22          My question refers to Article 44 and para 781 of the trial  
23          judgment.

24          We do not really have sentencing ranges. What we have is an  
25          upper limit in 44(1). And so to get to concrete sentence, either you

1 refer to what you would call customary international law - i.e., case  
2 law of other tribunals - or you refer to Kosovo law.

3 In Article 44(2), it is said we shall take into account the  
4 Kosovo law and any subsequent more lenient sentencing range.

5 The trial judgment, in this paragraph, para 781, referred to the  
6 former Yugoslav code, but it did not compare this sentencing range in  
7 this code to the sentencing range in the currently applicable Kosovo  
8 law.

9 For you, is this okay for you, or do you see any problem in  
10 terms of our 44, 7(2) of the European Convention, *lex mitior*?

11 MS. LAWSON: Your Honour, the Trial Panel found that subsequent  
12 Kosovo law applied either similar or higher lowest minimum sentencing  
13 provisions.

14 JUDGE AMBOS: Where did you find that? I didn't find this.  
15 That would have been very helpful. Where? In 781 I didn't find it.  
16 No footnote. Where exactly did it make this comparison?

17 MS. LAWSON: This was at -- so, Your Honour, it was the footnote  
18 to that same paragraph, footnote 1629, where:

19 "The Panel also notes that subsequent relevant laws or codes  
20 adopted in Kosovo provide equal or more severe sentencing ranges ..."

21 JUDGE AMBOS: Okay. Thank you.

22 PRESIDING JUDGE PICARD: Thank you. So that concludes your  
23 submission.

24 I would like to invite now the counsel for the victims. You  
25 have more than one hour, but the idea would be to take a pause at

1 11.00. So if you need more time, perhaps we can continue after the  
2 pause.

3 MS. PUES: Good morning, Your Honours, first of all. Good  
4 morning, everybody inside and outside this courtroom. And thank you  
5 very much for giving me the floor.

6 Just to provide you with an indication and to allow for a bit  
7 further planning for everybody, I will not need an hour, or even an  
8 hour and 15, but I will be much shorter. I've indeed rewritten  
9 everything after yesterday's hearing in order to ensure that we do  
10 not duplicate any submissions.

11 But let me first get the lectern, set myself up, and then I'm  
12 ready to go.

13 Your Honours, the victims participating in this case are hoping  
14 that this hearing will be the penultimate step for them in finding  
15 closure.

16 When this trial started, I emphasised how long they have been  
17 waiting for justice to be done, and now we are finally, hopefully,  
18 getting to a point where an end may be in sight. The SPO, as I have  
19 just said, has made extensive and very substantial submissions on the  
20 questions posed by Your Honours, and, therefore, there is no need for  
21 me to reiterate, for example, much of the case law on questions of  
22 causality and the substantial contribution standard.

23 The SPO counsel have also reiterated some key findings by the  
24 Trial Panel of relevant and important aspects of what the evidence  
25 brought to light throughout the trial. I do not want to make any

1 repetitive submissions here.

2 What has become clear, though, just to put it all back into  
3 context, is that international case law as well as major legal  
4 systems around the world all require a causal link between an action  
5 or omission of an accused with the death of a person in murder cases.  
6 And equally, the Kosovo criminal law applies the notion of *conditio*  
7 *sine qua non* and, therefore, can firmly be placed within precisely  
8 those practices.

9 But it is also clear, and we've reviewed that, that this  
10 attribution is subject to normative correction based on what is  
11 ultimately and has well been broken down to questions of what is  
12 reasonable and what is fair.

13 And this is what I want to focus on today, with regard to this  
14 key sticking point in the appeals proceedings, the murder charge. It  
15 is critical for the indirect victims participating in this case to  
16 have acknowledgement that their loved one was not only a victim of  
17 torture but that his loss of life was the result of murder. Which  
18 brings me to this question posed by Your Honours to the SPO during  
19 yesterday's hearing: Would it be fair and would it be reasonable if  
20 we attribute the murder of the victim to Salih Mustafa even if the  
21 final blow may have been delivered by enemy Serbian forces?

22 Now, let me remind the audience, everybody here, that this  
23 assumption is more of a hypothetical exercise, but it is one that the  
24 law requires. Indeed, it is a rule that if in doubt, the facts of a  
25 case must be assessed in the most favourable way to the accused. So

1 would it be fair? Would it be reasonable if Salih Mustafa's  
2 conviction for murder is upheld?

3 And here, from the victims' perspective, there is only one  
4 answer and that is a resounding yes, loud and clear. Yes, it is the  
5 only reasonable and fair conclusion. And let me explain why.

6 To do so, I want to take you back to the day when I travelled to  
7 Kosovo and also visited Zllash when I first took on this case in  
8 2021. I've been up there, and I can tell you it's a very isolated  
9 place, high up in the mountains. This place is surrounded by fields  
10 and woods. Your Honours have seen some of the imagery yesterday.  
11 It's very rural. Now there are roads, but this wasn't always the  
12 case.

13 One can only imagine what it's like if you are left out there,  
14 if you have no place to go. There is nothing to help you, there's  
15 nothing to shelter you. Certainly not if you are gravely injured,  
16 with all limbs broken, and that in a situation of war, of advancing  
17 enemy forces. And these are the facts that the Trial Panel  
18 established clearly, beyond reasonable doubt, that this was the  
19 situation in which the victim found itself.

20 The murder victim was a young person who was, up to the point  
21 when the KLA detained him, a healthy young man, nowhere remotely near  
22 Zllash. It was the detention, the torture, the abhorrent treatment  
23 by Salih Mustafa and his men that made the victim, not just a very  
24 vulnerable human being, but someone who was no longer capable at all  
25 of fending for himself at all. A man with broken legs, with broken

1 arms, with flesh that already smelled because of the severity of his  
2 injuries. He was malnourished and massacred.

3 Leaving this person in a place like Zllash, where there is no  
4 help available, where there is nothing that anybody in that situation  
5 could possibly do to escape from death, it is this situation we have  
6 to look at, and this is the situation that is fully attributable to  
7 Salih Mustafa. It's only his actions that put the victim in this  
8 situation.

9 To Salih Mustafa, it's attributable as a perpetrator of murder,  
10 as the commander and as the leader of the BIA unit which, under his  
11 my supervision and command, delivered tortured and ill-treatment day  
12 by day. The murder victim would not have been, as I've said,  
13 anywhere near Zllash, nowhere near any other dangers there at that  
14 point in time if it hadn't been for Salih Mustafa, and this is why it  
15 is fair and also reasonable to attribute his death, this murder, to  
16 him.

17 Anybody who leaves someone behind in that situation, in the path  
18 of advancing enemy forces, forces known for persecuting the Kosovo  
19 Albanian population, not just would have known but knew that this was  
20 a death sentence. It nearly wouldn't have mattered if it had been,  
21 say, a pack of wolves, bears, enemy bullets, shells. We yesterday  
22 discussed case law and there was this question of whether there was a  
23 distinction between what nature does or what enemy forces do. There  
24 is a point when as long as it is a clear inevitable scenario that  
25 will unfold that this distinction becomes moot.



1           Salih Mustafa knew, and certainly foresaw, that leaving someone  
2           like that there and then would lead to his death.

3           As a reminder, we heard by actually a Defence witness, Teuta  
4           Hadri, that it was Salih Mustafa who organised, on the day when the  
5           murder victim was left behind, the evacuation of others present in  
6           Zllash. He was the one who saw the danger and who was busy helping  
7           people escaping from that, bar two, the murder victim and one other  
8           person left behind.

9           It cannot be emphasised enough that it was no entirely new  
10          autonomous event that materialised here.

11          If we work -- again, in my view, more hypothetically than  
12          anything else, but if we work on the assumption of Serbian fire as  
13          the cause of death, that was foreseeable. And only for the avoidance  
14          of doubt, and this is a reminder, this is not the probable scenario  
15          here. Indeed, it is the least likely, but, as I said, it is the one  
16          most in favour of Salih Mustafa. The danger was clear. The whole  
17          point of evacuating Zllash, this detention compound, was to protect  
18          those present in Zllash.

19          So if you do so for everybody but two gravely injured people you  
20          leave behind, them being hit possibly by Serbian bullets does not  
21          constitute a new autonomous free event that can break the chain of  
22          causation. It would not diminish criminal attribution in this case.

23          Let me now just for a moment take a step back from Salih Mustafa  
24          and the facts of this case and all the case law that was so  
25          thoroughly covered in the SPO's presentation yesterday.

1           The war crime of murder, of murder of all kinds, in  
2 non-international armed conflict, exists because it is a grave  
3 violation of Common Article 3 of the Geneva Conventions. This war  
4 crimes provision exists to enforce compliance with international  
5 humanitarian law. It exists and is designed to do one thing, which  
6 is to protect the civilian population from the dangers that such war  
7 poses. It is the dangers of civil war, of non-international armed  
8 conflict, of any war, indeed.

9           In many ways, non-international armed conflicts are probably the  
10 most dangerous of circumstances for civilian populations because war  
11 is brought to the doorsteps in one country, not on the classic  
12 battlefield. It's in the villages. It's in the most remote rural  
13 compounds as well as in the cities. So we must bear in mind that the  
14 war crimes provision that we are debating here is a criminalisation  
15 of those violations of Common Article 3.

16           And if we were to deny attribution in a situation as the one at  
17 issue here today, it would become so easy for a perpetrator to  
18 absolve themselves of murder, of murder of any kind, in this kind of  
19 wartime situation. All they would have to do is do enough, just  
20 enough, torture, injure, just to the extent that then the enemy  
21 forces are doing the rest. Just enough to get rid of those civilians  
22 they want to have finished off.

23           If we were to raise the attribution bar to such standard that we  
24 attribute foreseeable enemy fire, then you ultimately allow  
25 situations to go unpunished as murder in which you use and turn enemy

1 fire into your own murder weapon, and you can absolve yourself of  
2 that responsibility.

3 It would leave the danger of rendering this war crimes provision  
4 ineffective, and this cannot be a reasonable result. Any  
5 interpretation of the law must aim to give effect to the object and  
6 purpose of the provision. And the object and purpose of the  
7 provision of "murder of all kinds" in Common Article 3 is to protect  
8 civilians from the dangers of war and the heightened risk of murder,  
9 of being killed in these wartime situations.

10 Let me now from here also briefly look at the further aspect of  
11 intent that you discussed this morning, and we've heard of  
12 international case law, and you quite rightly ask why not look at  
13 Kosovan law. And, actually, indeed, it's pretty clear, the Kosovo  
14 criminal law, in Article 21, clearly provides for lesser than a  
15 direct intent. Let me see -- oh, I can't move the screen.

16 So Article 21 says that a criminal offence may be committed with  
17 direct or eventual intent, and then specifies further, in paragraph  
18 (3):

19 "A person acts with eventual intent when he or she is aware that  
20 a prohibited consequence can occur as a result of his or her act or  
21 omission and he or she accedes to its occurrence."

22 And this is now drawing on the legislation as published in the  
23 Official Gazette of the Republic of Kosovo on 14 January 2019, which  
24 is Gazette II, and there on page 5 and 6, for Your Honours as a  
25 source of reference.

1           So even if we turn in our questions of whether next to  
2 attribution and causality, intent, questions of intent, the  
3 applicable *mens rea* are not drawn from customary international law  
4 but we look to questions of Kosovan law, we do have a very clear  
5 answer here.

6           Your Honours, I will not discuss all the questions that you  
7 posed in your recent order simply because I am here to represent the  
8 victims' interests, their concerns, and, therefore, limit my  
9 submissions to those most relevant points. But I do want to add one  
10 more observation in response to the Defence submission yesterday that  
11 directly concerns them.

12           The Defence suggested, in a nutshell, that the Trial Panel had  
13 been biased and it had applied double standards when considering  
14 witness evidence. And although Your Honours didn't invite a legal  
15 discussion of this, but to us, it is very important to address this  
16 as justice, of course, can only be done and seen to be done if a  
17 trial is conducted in a fair and impartial manner. And therefore,  
18 this, of course, is vital to the victims' quest in searching for  
19 justice and the truth.

20           And this assertion of double standards, of bias, couldn't be  
21 further from the truth. And to illustrate this point, I'd want to  
22 take you, and indeed everybody, back to the start of the trial phase  
23 in which we initially heard some of the [REDACTED] Pursuant to In-Court  
Redaction Order F00032RED.

24 [REDACTED] Pursuant to In-Court Redaction Order F00032RED. in this case  
testifying about their plight.

25           The first witness, Witness 03593, underwent four days of

1 examination in court. Nearly a day and a half were given to the  
2 Defence to conduct a hugely testing cross-examination. It was hugely  
3 testing [REDACTED] Pursuant to In-Court Redaction Order F00032RED.. And  
the Trial Panel equally -- because this  
4 was the assertion made, the Trial Panel took nearly half a day to put  
5 additional questions to this witness. Indeed, [REDACTED] Pursuant to  
*In-Court Redaction Order F00032RED.*  
6 [REDACTED] Pursuant to *In-Court Redaction Order F00032RED.* were most  
thoroughly examined by not just the parties but  
7 also the Judges.

8 It wasn't that their testimony was just waved through. Far from  
9 it. It was tested and tried as it must be done in search of fully  
10 establishing what happened and of the truth. But this mustn't be  
11 forgotten, and this is why it's wrong to state that there were any  
12 double standards. The Judges were very critical in each and every  
13 situation with each and every witness.

14 This trial and the way it's been conducted has provided the  
15 Defence and Salih Mustafa with ample opportunity to put their case.  
16 That their case wasn't convincing is a different matter entirely.

17 Another point that was raised by the Defence, and this I only  
18 want to mention in passing before I can already draw to a close, but  
19 a point that directly affects the interests of victims is the  
20 Defence's request for a petition to the Constitutional Court of  
21 Kosovo. In my view, it's nothing more than an attempt by the Defence  
22 to delay these proceedings. There's no issue of law here that  
23 requires constitutional review or would merit a constitutional  
24 petition.

25 It is in the victims' interest to reach closure without any

1 undue delay. The importance of bringing this case to a close and the  
2 impact that closure will have on victims cannot be overemphasised.  
3 And with that, I actually want to just allow some of what victims  
4 told me when we met after the announcement of the trial judgment.

5 One of those indirect victims said to me that this pronouncement  
6 of the judgment had felt like another funeral to them and to their  
7 family, and it was for them as if they were finally able to put their  
8 loved one to rest. And nearly every single victim participating here  
9 clearly expressed that the judgment, including the sentence, was  
10 perceived as a fair and a just announcement reflective of their  
11 experiences.

12 Now the participating victims place their faith in Your Honours,  
13 in the Appeals Panel, to render a just verdict here at this stage,  
14 one that will be another step for them towards putting the events of  
15 April 1999 that have fed so many nightmares behind them.

16 Thank you for your attention. Thank you.

17 PRESIDING JUDGE PICARD: We have one question.

18 JUDGE AMBOS: Actually, I have many questions, sorry.

19 PRESIDING JUDGE PICARD: More than one.

20 JUDGE AMBOS: Thanks a lot for the very substantive discussion  
21 of the causation issue, and that you took it up to rewrite your  
22 submission.

23 So if we have this scenario which is a consequence of the  
24 application *in dubio pro reo*, that Serbian forces killed the victim,  
25 wouldn't you agree that these Serbian forces or the person who killed

1 this victim would be responsible for murder?

2 MS. PUES: Depends. It depends on the situation in which there  
3 was any fire, because obviously we know -- well, it's a war. It's a  
4 wartime situation. Not every shot fired in a war equates to murder.  
5 It depends on whether it was a shot that was directed at him as a  
6 civilian; if so, yes. And if so, yes, we may have two different  
7 perpetrators committing the same crime, which can happen, but it  
8 doesn't -- but one doesn't overtake the other and disrupt the chain  
9 of causation.

10 JUDGE AMBOS: Okay. That was actually a simple question. I  
11 think we do not have to expand on it. Exactly, that's the situation.  
12 If we start from this assumption, then we have responsibility on the  
13 other side of the forces. Of course, in this situation, it's a clear  
14 civilian target, *hors de combat* if it were a combatant, so it's no  
15 question, actually. So it's absolutely clear because you made the  
16 argument that you must -- you cannot distinguish between the cases  
17 where you leave a person helplessly behind and this person is killed  
18 by nature. This is a case where actually the German case law or  
19 other case law where causation has been affirmed and -- legal  
20 causation, and the situation where you have an intervening autonomous  
21 agent. And this I want to challenge. Because what you perhaps  
22 forgot in your argument, that there is the other side. There is no  
23 impunity in these situations because you will have responsibility.

24 And then the only question would be if you have a kind of  
25 double-responsibility. Okay? In this case, in our concrete case, we

1 have the responsibility of the defendant and you have the  
2 responsibility of the Serb forces. So that would be the legal  
3 question.

4 And so that must be taken into account in the equation, in your  
5 argument, wouldn't you agree?

6 MS. PUES: Yes, I agree. But you can have two perpetrators  
7 committing the same crime or acting towards the same success, and  
8 then it can't just be left to coincidence of which danger now  
9 materialises more quickly on who is responsible for completed murder  
10 and who possibly only for, say, attempted murder. Yeah?

11 JUDGE AMBOS: Yes.

12 MS. PUES: That would be arbitrarily leading to results in which  
13 ultimately then probably you might have two attempts of murder  
14 because you can't possibly say which is the cause that did this --  
15 which delivered this final last straw until death actually occurred.

16 JUDGE AMBOS: Yes. So the next question would be if you say  
17 it's reasonable and fair to impute the murder to the defendant, but  
18 how we deal then with these other cases?

19 I have a variety of cases where someone is responsible for  
20 killing someone. I can shoot you directly, I can leave you in a  
21 helpless situation - we have case law on this - and you are killed  
22 because you are freezing at night or whatever. But here we have a  
23 situation, you know, for *in dubio pro reo*, that an intervening actor  
24 is acting. So you would treat all these cases equal, because you are  
25 saying, and the SPO, too, that he is responsible for murder in any



1 situation.

2 If we had had enough evidence to prove that the defendant had  
3 directly killed the victim, there wouldn't be a problem. We would  
4 not have this discussion. But this result, what you are defending,  
5 and also SPO, means that it's all the same. So there is no  
6 difference. What's a standard difference between a situation which  
7 we now discuss and the situation of a direct killing?

8 MS. PUES: See, if we go to some of the case law, actually you  
9 find quite a few examples where even where someone else then, say --  
10 to mind comes, for example, a German case, and forgive me for sort of  
11 the domestic lawyer coming up in me here. If you -- where even if  
12 someone else delivers another shot at the already heavily injured  
13 person as a sort of mercy to free themselves, even then you continue  
14 to have an attribution as murder because you don't disrupt the chain  
15 of causation.

16 It's not the -- see, in my view, the causation -- the disruption  
17 of causation only comes in when you have something that is, indeed,  
18 entirely new, and it's not the intent of a danger that --

19 JUDGE AMBOS: I get your point.

20 MS. PUES: -- unfolds --

21 JUDGE AMBOS: So then please give me an example of when you  
22 would agree -- we are talking about legal causation, not factual  
23 causation. Under what situation then would the chain of legal  
24 causation be broken?

25 MS. PUES: If something entirely new, a new danger came to light

1 and -- let me -- no, I'm not going to dig through my notes now. But  
2 if, for example, say someone plants a bomb that hasn't gone off yet  
3 or anything, and someone else totally independently shoots this  
4 person before the bomb goes off -- or can I think of a better example  
5 now? Not from the top of my head but --

6 JUDGE AMBOS: No, I think it's a good example. Thanks. Thank  
7 you.

8 MS. PUES: But it is one of those examples where --

9 JUDGE AMBOS: Okay.

10 MS. PUES: -- you have not someone basically building on top of  
11 what has been --

12 JUDGE AMBOS: Yes, yes, I understand. I understand.

13 MS. PUES: -- prepared by the perpetrator --

14 JUDGE AMBOS: It's very helpful. I have another question  
15 because now -- because you made this argument of objective and  
16 purpose and you know that we discussed this, for the German speakers,  
17 *an der Schutzzweckzusammenhang*. And you made the argument that the  
18 purpose of the provision -- and that's the question: What is the  
19 purpose of a murder provision? Is the purpose of any murder  
20 provision, also in normal criminal law, the question is always if you  
21 talk about purpose, is it the purpose to prevent this result from  
22 happening, i.e., the result that a third actor intervenes, is that  
23 the purpose of the provision? Or is the purpose of the provision to  
24 exactly prevent the result that the person which is on the dock in --  
25 the defendant in this situation kills a person?

1           So the argument of the purpose or the object of the provision is  
2           a double sword in a way, you know, because it could be interpreted  
3           the other way around. Maybe you can reflect on it again. I mean --  
4           because in your submission, which I find very helpful, you didn't  
5           consider the responsibility of this third actor, and that makes,  
6           perhaps, things a bit more complicated.

7           MS. PUES: See, in my view, the war crime of murder in this  
8           specific situation is perhaps a bit more complex than murder in the  
9           ordinary criminal law scenario because we are specifically looking to  
10          protect civilians in times of war. That's what Common Article 3  
11          tries to do.

12          And this is where it tries to do so regardless of who acts on  
13          which side and what they are doing. And I think this is where we  
14          have to start by looking at the civilians rather than thinking about  
15          the perpetrators in the first instance, and trying to make it as  
16          effective a provision by preventing anybody from acting in any way  
17          that could lead to the killing of civilians.

18          JUDGE AMBOS: So the last question refers to the intent again.

19          MS. PUES: [Microphone not activated]

20          JUDGE AMBOS: You referred to Article 21 of the Kosovo code,  
21          which clearly includes *dolus eventualis*. Actually, that was the door  
22          I wanted to open, but the SPO didn't jump on the door -- didn't use  
23          the entrance. So thanks for having taken this up.

24          But my question is the following. Article 12 of our Law says  
25          that we can apply the substantive criminal law of Kosovo insofar as

1 it is in compliance with customary international law.

2 Now, if you say generally -- not you, personally, but the SPO  
3 and you perhaps, customary international law only allows for direct  
4 intent. Now looking at the case law, we have a lower standard in  
5 Kosovo law. Would that mean that the Kosovo law is not applicable  
6 because it would be incompatible with customary international law?  
7 Just for your -- I mean, there is a tension between Article 3 and  
8 Article 12. You should maybe should reflect on that for the next  
9 cases. There is a certain tension in our Law. But this is just a  
10 question now, the compatibility with customary international law of  
11 Article 21 of the Kosovo Criminal Code. Is it compatible or not?

12 MS. PUES: It's a good question but one which -- when you try to  
13 give an answer to that, I am not entirely sure that they are quite as  
14 opposing as they are. Wilfully -- well, how was it framed? As  
15 committing bodily harm knowing that this could lead to death. Is  
16 this always direct intent? Is it not? Possibly. You can't quite  
17 categorise it in the same way. See, I'm not sure that they are so  
18 far away from one another, because primarily they quite work in the  
19 same sort of language, so to speak, and this is why I think it's  
20 slightly more complex than just saying yes or no here in that sense.

21 JUDGE AMBOS: Yes, doesn't it show to us - and that's my last  
22 remark here - that it is sometimes not helpful to invoke customary  
23 international law which by definition is very imprecise. And if we  
24 look at our Article 12, it's hard to answer sometimes, in this case  
25 and in others, the question when is Kosovo law compatible or not. I

1 ask this question for you on law - French law, German law, US law -  
2 when is this compatible with customary international law.

3 This implies that we have clear-cut standards and customs, and  
4 that's not the case. And that is actually a big issue for us here.  
5 But thank you very much for your very thoughtful considerations, and  
6 certainly very helpful for us. Thank you very much.

7 MS. PUES: Thank you.

8 PRESIDING JUDGE PICARD: I think we are not finished with the  
9 questions.

10 MS. PUES: [Microphone not activated]

11 JUDGE JORGENSEN: Thank you. I'd had a question about modes of  
12 liability, other modes of liability.

13 So in your submission, would it amount to absolving someone of  
14 murder, those are the terms you used, or amount to unfairness if, for  
15 example, aiding and abetting liability would be applied in this  
16 context?

17 MS. PUES: Do you mean would it be unfair as in how victims  
18 perceive it?

19 JUDGE JORGENSEN: From the perspective of the victims, yes.

20 MS. PUES: I am not sure that the victims -- because this is,  
21 obviously, their -- I've got to marry sort of the perceptions and the  
22 views of laypeople with my own legal positions here. But for them  
23 and how they perceived it, Salih Mustafa was more than an aider and  
24 an abettor because he was the person in charge.

25 JUDGE JORGENSEN: Thank you.

1           PRESIDING JUDGE PICARD: Thank you. So that concludes finally  
2 your submission.

3           MS. PUES: Thank you.

4           PRESIDING JUDGE PICARD: So we still have about 20 minutes.

5           May I ask Mr. Mustafa's counsel to make his submission? And if  
6 you need more time -- we'll stop at 11.00, and then if you need more  
7 time, we can continue after the pause.

8           MR. VON BONE: To be quite honest, Your Honour, it would be  
9 preferable to take a short break now, and then I can fulfil all the  
10 other elements, rather than doing it now, so that I can digest a  
11 little bit the rest and compile it.

12          PRESIDING JUDGE PICARD: I understand your point, but we have to  
13 check with the interpreters, because the idea of the pause is that  
14 the interpreters can have some rest after time.

15          Let me check.

16          THE INTERPRETER: Interpreter's note: We think having a break  
17 now would be all right.

18          PRESIDING JUDGE PICARD: So we'll take a break now, it seems,  
19 and we'll reconvene at 11.15.

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

21                         --- Recess taken at 10.42 a.m.

22                         --- On resuming at 11.15 a.m.

23          PRESIDING JUDGE PICARD: So now I invite the accused's counsel  
24 to make his submissions.

25          You have more or less half an hour.

1 MR. VON BONE: Thank you very much, Your Honours, honourable  
2 members of the Court. I will discuss a number of the issues that  
3 have come up.

4 Let me start with the issues that were brought up by the  
5 Prosecution. The Prosecution showed a document which was a list of  
6 prisoners. We've seen it. And that document, in fact, for whatever  
7 it is worth, it is not worth anything in this case because the  
8 document does not indicate at all where the people were detained.  
9 And in addition, it did not say anything about the release of any of  
10 the enumerated people on that, at least not anybody who is relevant  
11 in this case.

12 That document, Your Honour, was part of a file, and in that file  
13 there was on some other page an annotation, and that annotation  
14 indicated the name of a person called Cali. And here is what  
15 happened. The Prosecution combined these documents and said, well,  
16 you see, he is in charge with this related to that document. Such  
17 relation has not been established, neither by the SPO nor by the  
18 Trial Panel in its judgment.

19 Therefore, that document, as far as the Defence is concerned, is  
20 not relevant and cannot bear -- cannot be any evidence related to  
21 whether the accused was the one who detained people or where these  
22 people were detained and until when these people were detained.

23 The SPO made submissions regarding the causation issue and  
24 extensive jurisprudence on that issue. However, Your Honour, the  
25 examples that the SPO gave regarding that are presumptions,

1 presumptions that equally were made by the Trial Panel. For example,  
2 that the victim was in the custody of Salih Mustafa. It is a  
3 presumption. Whether there was any contact with Mr. Mustafa and that  
4 victim is an equal presumption. Then that he was left behind for  
5 death or on the brink of death. For such an assertion, there is no  
6 evidence in the case file. It is indeed a presumption.

7 The refusal to release him is an equal presumption. The refusal  
8 to release somebody indicates some kind of positive action from  
9 somebody in order to make such judgment, whether that person were to  
10 be released or not. The only thing we know is that people were  
11 released, and the people that testified here in court, they went  
12 elsewhere, and they had no further contact with this person.

13 So whether the victim, the murder victim in this case was  
14 released or not released is -- and that that would be even a decision  
15 of the accused, is a mere presumption and rests on speculation.

16 The same with the denial of medical aid. What we know is that  
17 these people were in a barn, and wherever they were kept in the barn,  
18 in whatever location that might have been, they did not get medical  
19 aid. But that has nothing to do -- or maybe we can only say  
20 something until the -- until the other persons were released, we have  
21 no information whatsoever what happened afterwards and whether at  
22 that moment that person would have been denied medical aid.

23 Denial also means, again, some kind of positive specific  
24 decision. We don't know whether there was anything available, but we  
25 don't really, really, know whether that was denied to that person.



1 Maybe he got even medical aid and died. We simply do not know. And  
2 therefore that is based on speculation, and it's a presumption again.

3 Another example that the SPO used was they refused to evacuate  
4 him. Who says that? We don't know whether this person was evacuated  
5 or whether there was a refusal to evacuate him. Such evidence needs  
6 to be established in the case.

7 And, lastly, there was the citation -- or not the citation but  
8 paraphrasing, that Witness 4600 heard that this person was dead.  
9 And, indeed, 4600 testified about that. But, in fact, we requested  
10 him, and we asked the question specifically: From who did you hear  
11 that then? And he answered to that question it was from [REDACTED]  
*Pursuant to In-Court Redaction Order F00032RED..*

12 I will give you the reference, which I will give in a minute, but I  
13 do have the specific reference for that, Your Honour.

14 And [REDACTED] *Pursuant to In-Court Redaction Order F00032RED.*  
answered to that question, when he was asked the  
15 specific question on that murder victim's name: [REDACTED] *Pursuant to*  
*In-Court Redaction Order F00032RED.*

16 [REDACTED] *Pursuant to In-Court Redaction Order F00032RED.* That's  
basically what it  
17 was, what he said in answer to that.

18 So 4600 cannot -- it cannot be possibly part of the evidence  
19 that we relate to hearsay evidence and that hearsay evidence  
20 remaining even uncorroborated evidence, uncorroborated from the  
21 alleged source of this particular thing was being told to 4600.

22 Therefore, Your Honours, the basis upon which this entire  
23 causation was based was based on presumptions. And the most  
24 important presumption was left aside here by the Trial Panel, and  
25 that is the presumption of innocence. We need to make sure from the  
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1 basic, proper start of any approach to a criminal case, we presume  
2 that this person is innocent. And only when there is clear and  
3 unequivocal evidence to the contrary, then one can be found guilty.  
4 But on the basis of these presumptions, I do not believe that the  
5 accused could have been found guilty.

6 I turn to the sentencing part, issue.

7 The relevant applicable law at the time was Article 38 of the  
8 Criminal Code of Yugoslavia. That law provided, under provision (1),  
9 the following:

10 "The punishment of imprisonment may not be shorter than 15 days  
11 nor longer than 15 years."

12 The provision (2) of the same article read:

13 "The court may impose a punishment of imprisonment for a term of  
14 20 years for criminal acts eligible for the death penalty."

15 The crime here in this case would be eligible for the death  
16 penalty. However, with the abolishment of the death penalty by UNMIK  
17 Regulation 24 of 12 December 1999, Article 1.5 of that regulation  
18 stipulated that the death penalty was removed. The regulation  
19 entered into force on 10 June 1999.

20 The next step was that the Regulation 24 was amended. The new  
21 regulation that came into place was Regulation 2000/59, dated October  
22 27, 2000. Article 1.5 of the previous regulation remained in place.  
23 However, there came an extra article, and that was Article 1.6, and  
24 that provided a maximum term of 40 years for acts previously  
25 punishable by the death penalty.

1           Section 4 of this UNMIK regulation provided a transitional  
2 provision regarding this regulation. It would enter into force on  
3 27 October 2000, and specified that the new section, 1.6, only  
4 applies to offences committed after 27 October 2000.

5           Therefore, taking into account the principle of prohibition of  
6 retroactive effect of the criminal code, there was no legal basis for  
7 imposing a maximum sentence for offences committed before 27 October  
8 2000, and, therefore, the CC SFRY, so the Criminal Code of the  
9 Socialist Federal Republic of Yugoslavia, article remained as the  
10 legal basis to impose a sentence of a maximum of 15 years for  
11 offences committed before 27 October 2000.

12           The Defence provided in its appeal brief the judgment of the  
13 Supreme Court of Kosovo. In that judgment, we can read the exact  
14 position of the Supreme Court on the issue. That is the issue of the  
15 application of the law that was in force at the time of the offence  
16 of the indictment of Mr. Mustafa. And the decision -- and a recent  
17 decision on this issue said, and I quote: With the UNMIK Regulation  
18 No. 99/24 of 12 December 1999, which entered into force on 10 June  
19 1999, the death sentence was abolished and no long-term prison  
20 sentences were determined as a substitute. So no alternative death  
21 -- to the death penalty, a prison sentence of up to 15 years  
22 remained.

23           The Trial Panel, in paragraph 781, which we just heard from the  
24 Prosecution also, noted that the applicable law at the time was the  
25 Criminal Code of the former Yugoslavia. In the footnote that it

1 stated, the Panel also notes that subsequent relevant laws or codes  
2 adopted in Kosovo provide equal or more sentencing ranges.

3 However, the Defence submits that the Trial Panel's observations  
4 on this issue is irrelevant. None of the subsequent laws are  
5 applicable. And I just cited the UNMIK regulation. And in the  
6 footnote which we just earlier discussed, the other regulation,  
7 namely, the regulations which did not -- which said that Article 1.6  
8 would apply only to crimes committed after that day. And I'm  
9 referring here to Regulation 2000/59, which amends the previous  
10 regulation. That regulation clearly specifies that the new section  
11 shall apply only to crimes committed after 27 October, signed by  
12 Bernard Kouchner, Special Representative of the Secretary-General at  
13 the time.

14 In any event, Your Honour, the UNMIK regulation cited in that  
15 Trial Panel's footnote, 781, that footnote is incomplete because it  
16 left out this particular regulation.

17 The UNMIK --

18 JUDGE AMBOS: Excuse me, can I ask you. The footnote is  
19 incomplete, you say, but the paragraph is still correct, no? Because  
20 you yourself quoted the code of the former socialist republic of  
21 Yugoslavia, and that's what was applied. So I don't understand  
22 exactly what is your point here because --

23 MR. VON BONE: I understand, Your Honour. The point that I'm  
24 trying to make is that even in the footnote it refers that subsequent  
25 laws were more harsh, so to speak, but that is not the case, because

1 those came only into place with this amended regulation, and that  
2 regulation regulated only things from 27 October 2000 onward but not  
3 retroactively. In that case, it would remain as Article 38 of the  
4 former Yugoslavia law, so to speak, which imposed a prison sentence  
5 of up to 15 years.

6 So that is the -- the Trial Panel also cited Article 150 of the  
7 criminal code of 20 April 2012, and that law is also not relevant for  
8 what we here speak about, that's obviously the *lex mitior*, as it  
9 entered into force only after 2013, on 1 January 2013.

10 So all to say, Your Honour, that the Defence submits that the  
11 Trial Panel is bound by Article 44(2), but certainly by the  
12 constitution which enshrines *lex mitior* as well. And as stated  
13 earlier, the *lex mitior* is enshrined in the Kosovo Constitution,  
14 Article 33(2) and (4), and, as stated earlier on, it is an  
15 international standard as well.

16 And, therefore, Your Honour, the Trial Panel erred in applying  
17 higher sentences for both the crime of torture and murder, that is  
18 respectively 22 and 25 years. The Trial Panel exceeded the  
19 applicable law on punishment that is in violation with the  
20 constitution, and that was basically the entire argument why this  
21 invalidates the judgment regarding the sentencing.

22 Therefore, the correct applicable sentence at the time punishes  
23 the crimes with a maximum of 15 years.

24 And let me just briefly address one thing, Your Honour. As we  
25 suppose -- or propose that it is well worth in case - in case - the

1 Appeals Court would be of the opinion that -- or would be of the same  
2 opinion than the Trial Panel, we propose the constitutional  
3 compatibility of the law towards the constitution. And in the same  
4 paragraph, it says that the Kosovo Specialist Chambers must apply or  
5 take into consideration or -- no, "shall apply," that is the correct  
6 wording, "shall apply" the Constitution of Kosovo.

7 That is exactly why we have argued this, and this is -- in order  
8 to get back to the Victims' Counsel, this is not at all - at all -  
9 any reason to stall proceedings or whatever. What is critical in  
10 this case is that the law that is applied is correct and that the  
11 truth is determined correctly. But when the law -- yes, Your Honour.

12 JUDGE AMBOS: Excuse me. I really have to clarify this.

13 MR. VON BONE: Yes.

14 JUDGE AMBOS: I don't understand your argument.

15 In footnote 1629 --

16 MR. VON BONE: Let me just get it.

17 JUDGE AMBOS: I mean, one thing is that you are saying the  
18 Trial Panel did not make the test if there is a more lenient sentence  
19 applicable. Is that your argument? So then you must show that what  
20 has been quoted in 1629 is incomplete and there is a more lenient  
21 sentence under current Kosovo law.

22 So you know there are two arguments. One is --

23 MR. VON BONE: Yeah.

24 JUDGE AMBOS: Where is the *lex mitior* violation here? I mean,  
25 there has been a comparison, as we have discussed before, in this

1 footnote. You may say that it has been incomplete, but the  
2 Trial Panel tried to compare. But what is then the provision which  
3 gives you a lower sentence, a more lenient sentence than Article 38  
4 of the applied provision, which goes up to 15 years?

5 MR. VON BONE: Let me be once again clear, Your Honour. The  
6 argument stands as follows.

7 We believe that Article 38 of the Yugoslav code was applicable  
8 and only applicable. Let there be no mistake about it. Just I  
9 wanted to show that in Article [sic] 1629, that the Trial Panel said  
10 that there were not more lenient sentences subsequently, but that in  
11 that case they did not see this particular regulation that left  
12 simply that part open. The death penalty was abolished, yet there  
13 was no new subsequent punishment installed for it.

14 That was with that new regulation implemented. However, then  
15 they said that counts only for crimes after 27 October 2000. And,  
16 therefore, in that perspective, the footnote is incomplete.

17 JUDGE AMBOS: Yes, I understand. But the Trial Panel --  
18 wouldn't you say, Mr. von Bone, that the Trial Panel made the  
19 comparison necessary under our law and the constitution because it  
20 tried to look for a more lenient law? That's what the Trial Panel  
21 did, didn't it?

22 MR. VON BONE: Well, they certainly did not apply the more  
23 lenient law because that was --

24 JUDGE AMBOS: Why? But you say -- I don't understand. You say  
25 Article 38 is applicable.

1 MR. VON BONE: Yes.

2 JUDGE AMBOS: Where is the more lenient law here? Where? Can  
3 you quote, please, the more lenient provision in the Kosovo law which  
4 gives you a more lower sentence? That would be a more lenient law.

5 MR. VON BONE: There is no more lenient law, we are agreeing on  
6 that, because any subsequent law was not more lenient. Therefore,  
7 *lex mitior* dictates that we need to get to the most favourable law  
8 that was applicable at the time of when the events took place. That  
9 is the entire issue, and that is why I just spoke about footnote 1629  
10 in perspective.

11 And these issues, they have also been done, Your Honour, in case  
12 law of Kosovo. And one of the Supreme Court judgments in this case  
13 was that one of 20 March 2023. That was case number 2020-017884, and  
14 the file number is 26/2023. And from that -- and we have put this  
15 one into our annex. The Supreme Court of Kosovo, on page 10, in the  
16 last paragraph, at that moment spoke about it.

17 I just referred to it to you. It is on page 10 on the last  
18 paragraph of that judgment.

19 And another case law from Kosovo regarding to this matter is the  
20 Darko Tasic case of 31 March 2022, case number 1971. And that is a  
21 decision of the Constitutional Court. It is a ruling of 5 May 2021.  
22 And we have a Kosovo original available, but, Your Honours, we will  
23 provide Your Honours with an English version of this, an English  
24 translated version of this document.

25 Important in this regard is that the court in that case



1 considered, and I cite paragraph 48:

2 "Taking into account the principle of prohibiting the  
3 retroactive effect of the criminal code, as well as that there is no  
4 legal basis for imposing the maximum sentences, as well as the  
5 principle of applying the most favourable law, the Supreme Court  
6 finds that for all crimes, criminal war crimes, and other criminal  
7 offences committed before 27 October 2000 for which the code of the  
8 former Yugoslavia is applicable, the maximum sentence of 15 years."

9 Now, Your Honours, I would still, apart from this local  
10 Kosovo -- that is just two quotations of Kosovo law. If we look at  
11 cases of the ICTY, what could be basically an analysis, so to speak,  
12 or case law provides many times either murder under grave breaches or  
13 murder under crimes against humanity, or we see torture. And in many  
14 of the cases, sentences were much more lenient than the one that we  
15 have until now.

16 I take it for ICTY case in the case of Kupreskic *et al.*, the  
17 trial judgment, which is IT-95-16-T, it's Mr. Drago Josipovic who  
18 committed a murder to multiple people with a maximum sentence of 15  
19 years sentenced by the trial chamber.

20 If we take a look at other case law. For example, the Kvocka  
21 case, it's ICTY 98-31-T, that's Kvocka *et al.*, we see many times  
22 multiple murders, multiple torture. Kvocka himself was found guilty  
23 for murder and torture, received seven years; Kos, for murder and  
24 torture, six years; Radic, four cases of torture, he received -- with  
25 persecution and other elements, and personal participation in all

1 these crimes, he was sentenced to 20 years.

2 In the great many other cases, such as Delalic and Mucic, I  
3 can -- I could go on. In the Kvocka case, once again, Miroslav  
4 Kvocka was found on three counts - persecution, murder, torture,  
5 sexual assault, rape, murder, and torture under -- murder under Count  
6 5, further, plus murder under Count 9, he was sentenced to a single  
7 sentence of seven years' imprisonment.

8 With Mr. Prcac, I spell, P-r-c-a-c, he was found guilty on three  
9 charges. Murder, torture, beating, sexual harassment in the part of  
10 the persecution. Apart from that, murder as a violation of the laws  
11 and customs of war, and torture as a violation of the customs of war.  
12 He was sentenced to a single sentence of five years.

13 Now, I could go, of course, endlessly on, and, of course, I  
14 understand, Your Honour, that you might say, well, you know, you  
15 picked that argument, and you picked that argument, whatever suits  
16 your case. But what we do find if we review ICTY cases, and I take  
17 case law which is related a little bit to the time or the same  
18 timeframe of events as we are speaking here, here we are speaking in  
19 1999. There it was 1992. People were sentenced sometimes ten years  
20 after. And obviously sentence ranges changes, but the red line in  
21 there is constantly that it is about multiple murders that are  
22 committed if the sentences are to very -- very high.

23 And that is, in our case, I believe we speak about a single  
24 murder here of one particular person and that amounts to 25 years.  
25 And we speak about torture regarding two particular people only, in

1 which the accused was committing himself. I would say the direct  
2 *dolus*, so to speak. At least the Trial Panel found that. So in that  
3 sense at least we see that the jurisprudence of the ICTY also is very  
4 different and much lower in case.

5 In any event, Mr. Mustafa has pleaded from the beginning on that  
6 he was innocent to the charges --

7 PRESIDING JUDGE PICARD: May we interrupt you?

8 MR. VON BONE: Excuse me?

9 JUDGE JORGENSEN: I just had a question relating to the ICTY  
10 cases.

11 MR. VON BONE: Yes.

12 JUDGE JORGENSEN: Because in your ground 9(d) of your Notice of  
13 Appeal, you allude to an argument that a distinction should be drawn  
14 between those who hold political office, in terms of sentencing, and  
15 those who don't. I was wondering if you could elaborate on that  
16 point, please.

17 MR. VON BONE: Yes. Those who hold political offices, we see  
18 many times that there is some kind of extra responsibility, not  
19 regarding specific people, but even more to civilians in even the  
20 abstract manner of the sense. In the other cases, we see many times  
21 that it is the personal perpetrator, so to speak. If we take the  
22 case of -- I think it is Krnojelac. I never know how to -- it was a  
23 prison, a huge prison at the time, in Bosnia-Herzegovina, I believe  
24 it was. It was the KP Dom prison. Where people were either in  
25 higher office and were sentenced for the commission of crimes which

1 were taking place in that largest prison at the time.

2 So I think that there is, indeed, a distinction that is being  
3 made in ICTY cases as well as when people hold particular offices,  
4 Ministry of Internal Affairs which has a particular specific  
5 obligation towards its own population or these kind of things.

6 Here we are much more busy, so to speak, with perpetrators who  
7 are in the field, so to speak. And still, if I see the cases of the  
8 ICTY, and that is also an issue that I found very important to  
9 stress, the time is an element constantly coming back in that. Many  
10 times we have a perpetrator, he commits some crime. Other people are  
11 standing outside. They saw the person. Then later on they come back  
12 and they see that he is dead.

13 Obviously, when the time is short or relatively short, in that  
14 cases, a causal connection can be made. But if we have 11 weeks  
15 after a dead body of somebody who saw a person on 19 April lastly, we  
16 have a huge time gap, and therefore we cannot fill in the blanks, as  
17 I say in my argument regarding that. I hope that this is an answer  
18 to your question.

19 And then I will conclude, Your Honour, because I think I even  
20 went over the time.

21 Mr. Mustafa has pleaded not guilty from the beginning on. He  
22 doesn't know people. He has no knowledge of these people who were  
23 there. It is attributed in a manner that he finds -- he resents  
24 clearly. That is people to him who are unknown. He even said that  
25 in court. My client says he doesn't even know you. And one of the

1 victims -- Victims' Counsel even stated that this person was  
2 questioned over and over again.

3 Yes, of course we questioned that person. It is a person who  
4 says: I just know he did it. But how do you know? And we  
5 constantly moved on that. How do you know that? From what? Did you  
6 see him, or did you speak with him? Did you know him before or did  
7 you know him after? No, nothing to that effect.

8 So that is why Mr. Mustafa finds it really wrong that he was  
9 convicted and found guilty, and that is -- that his sentencing, apart  
10 from that, is excessive and disproportionate.

11 Your Honours, I thank you very much for your attention. I would  
12 like to conclude with that. Thank you.

13 PRESIDING JUDGE PICARD: Thank you, counsel.

14 I think we might have some more questions before we give the  
15 floor to Mr. Mustafa to conclude.

16 MR. VON BONE: Oh, yes. I do have the citations of the  
17 transcript, Your Honour. I spoke about -- thank you very much.

18 The transcript regarding Witness 4600, and we can see that on  
19 the transcript of 24 September, that is 2021, 4600, on page 767, line  
20 1 to 19, says that he heard it from [REDACTED] Pursuant to In-Court  
Redaction Order F00032RED.

21 [REDACTED] Pursuant to In-Court Redaction Order F00032RED.

22 [REDACTED] Pursuant to In-Court Redaction Order F00032RED.

23 [REDACTED] Pursuant to In-Court Redaction Order F00032RED.

24 [REDACTED] Pursuant to In-Court Redaction Order F00032RED.

25 [REDACTED] Pursuant to In-Court Redaction Order F00032RED.

1 [REDACTED] Pursuant to In-Court Redaction Order F00032RED. So that was  
my hearsay evidence which, in the view of

2 the Defence, was uncorroborated by the source, by the alleged source.

3 Thank you very much.

4 Unless there is questions --

5 PRESIDING JUDGE PICARD: Thank you. There will be questions.

6 Yes.

7 MR. VON BONE: Yes.

8 JUDGE JORGENSEN: I had a question, but it -- I'll perhaps  
9 present it to the SPO first, and then come back to you, Mr. von Bone.

10 MR. VON BONE: Okay.

11 JUDGE JORGENSEN: I'm afraid it goes back to the murder charge.  
12 There was an outstanding question relating to omissions. So I just  
13 wanted some clarification on how -- focusing on liability for  
14 omissions rather than conduct, there was both positive acts and  
15 omissions or simply positive acts.

16 If we focus on omissions, how would that overcome the question  
17 of a possible intervening new act if the new act could also be said  
18 to have caused the death? And then related to that, how would the  
19 intent for murder then be framed in the context of an omission?

20 MR. BAARLINK: To answer your first question. As we've  
21 submitted yesterday, the causal contribution here under the ordinary  
22 principles of causation passes that test. So it's a substantial  
23 cause, substantial contribution. It's only by the application of  
24 some exception that I've referred to as the common law concept of  
25 *novus actus interveniens*, which is the conscious intervention of --

1 conscious and voluntary intervention of a third person. So by that  
2 application -- by the application of this common law principle, that  
3 could sever the chain.

4 But even in common law jurisdictions -- and we've provided some  
5 authority in our brief. Even in common law jurisdictions, the *novus*  
6 *actus interveniens* principle does not apply to omissions. And so  
7 even if Your Honours found that *novus actus interveniens* is part of  
8 customary international law, that would not absolve Mr. Mustafa of  
9 his responsibility for an omission.

10 And liability for murder on the basis of an omission has been  
11 recognised in other international cases. Again, there are citations  
12 in our brief.

13 And in relation to the *mens rea* element -- if Your Honour could  
14 bear with me one moment. So there's a reference - and, again, we've  
15 cited this in our brief as well - to the ICTR judgment in the - and I  
16 certainly am mispronouncing the name - Ntagerura trial judgment, at  
17 paragraph 659, that:

18 "... the accused failed to act intending the criminal sanctioned  
19 consequences or with awareness and consent that the consequences  
20 would occur."

21 Yes. So for the *mens rea* of an omission, that would be the  
22 applicable *mens rea* standard.

23 JUDGE JORGENSEN: Thank you.

24 PRESIDING JUDGE PICARD: Mr. von Bone, do you want to answer  
25 that question?

1 MR. VON BONE: [Microphone not activated].

2 Excuse me. Focusing on omissions, how would that overcome the  
3 question of new intervening events.

4 The short answer is, Your Honour, it makes no change because,  
5 even with omissions, there must be proof of that omission and that is  
6 some kind of positive action of that omission. And it's why I cited  
7 earlier on the Tadic case, the paragraph I don't recall exactly. But  
8 in that case it says it must be clear that that -- whatever act that  
9 was or omission resulted in the death of that person.

10 So in our view, that needs to be proven. And the Trial Panel,  
11 in our view, did not. It just speculated on it. Denial, not  
12 releasing, not evacuating, all kinds of omissions for which there  
13 were no proof in our case.

14 That is my answer, Your Honour.

15 JUDGE JORGENSEN: Thank you.

16 JUDGE AMBOS: I would like to ask the SPO and Defence as to the  
17 question we discussed before with the Victims' Counsel, how do you  
18 see the application of Article 21 of the Kosovo Criminal Code in  
19 light of Article 12 of our Law?

20 MR. BAARLINK: Well, the key qualification there is that it has  
21 to be consistent with customary international law. So to the extent  
22 that there is a difference, then customary international law should  
23 prevail.

24 JUDGE AMBOS: So is there a difference?

25 MR. BAARLINK: I don't know the answer to that, Your Honour. I



1 don't have the provision in front of me. I'd have to look at it.  
2 We're happy to make further submissions in writing on that point.

3 JUDGE AMBOS: Yes, maybe there could be a quick submission  
4 within the next days on this.

5 MR. BAARLINK: Certainly.

6 JUDGE AMBOS: Short submission. I mean, it would be important  
7 to have your views if you could apply basically Article 21, that's  
8 the question, you know, in your view.

9 MR. BAARLINK: Certainly. We're happy to make further  
10 submissions on that in writing.

11 But just to emphasise, Your Honours, my earlier submission, that  
12 in the circumstances of this case, it makes no difference.

13 MR. VON BONE: That is Article 12 of the Law, of KSC Law, in  
14 relation to that new Article 21 that the Victims' Counsel cited.  
15 That is the question?

16 JUDGE AMBOS: Yes.

17 MR. VON BONE: Okay.

18 JUDGE AMBOS: Kosovo code which allows for *dolus eventualis*.

19 MR. VON BONE: Yes.

20 JUDGE AMBOS: That's the main provision in the Kosovo law.

21 MR. VON BONE: Yes. We would like to also make a written  
22 submission about that, if that is possible.

23 [Appeals Panel confers]

24 PRESIDING JUDGE PICARD: So I believe it's the end of the  
25 questions.

1           May I ask the parties -- both parties to give their written  
2           submissions during the next three days.

3           MR. BAARLINK: Yes, Your Honour.

4           PRESIDING JUDGE PICARD: So today is Friday. Before next  
5           Wednesday.

6           MR. BAARLINK: Yes.

7           MR. VON BONE: Yes, Your Honour.

8           PRESIDING JUDGE PICARD: Thank you.

9           So we will now hear Mr. Mustafa's personal statement, if he  
10          wishes so.

11          You have ten minutes, Mr. Mustafa.

12          THE APPELLANT: [Interpretation] Your Honours, I want to stress  
13          that I morally and practically feel not guilty although I was found  
14          guilty by the Trial Panel. I'm convinced that I did not commit any  
15          of the crimes that I was charged with by the Prosecution. The  
16          Prosecution has the evidence, all the evidence, and knows exactly  
17          what happened, and it's not even so -- even that close to the reality  
18          that happened. The Prosecution -- the Trial Chamber refused to look  
19          at the statements that were taken by the SPO.

20          I am quite certain that morally and practically I am not guilty.

21          If you have any question, I'm here to answer them.

22          PRESIDING JUDGE PICARD: We have no questions. Are you  
23          finished?

24          THE APPELLANT: Yes.

25          PRESIDING JUDGE PICARD: Okay. Thank you, Mr. Mustafa.

1 THE APPELLANT: You're welcome. Thank you.

2 PRESIDING JUDGE PICARD: So this concludes the appeal hearing in  
3 this case. So before we adjourn, I would like to take this moment to  
4 thank the parties and participants and the Registry for their work in  
5 this case and their attendance today. I would also like to express  
6 my gratitude to the interpreters, stenographers, audio-visual  
7 technicians, and security personnel for their excellent assistance.

8 The Appeal Panel will render its judgment in due course.

9 The hearing is adjourned.

10 --- Whereupon the hearing adjourned at 12.08 p.m.

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