Thursday, 15 May 2025
[Open session]
[Appeal Hearing]
[The appellant appeared via videolink]
--- Upon commencing at 1.31 p.m.

JUDGE PICARD: So good afternoon and welcome, everyone.

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

THE COURT OFFICER: Thank you, Your Honours. Good afternoon. This is the file number KSC-CA-2024-03, The Specialist Prosecutor versus Pjeter Shala. Thank you, Your Honours.

JUDGE PICARD: Thank you, Mr. Court Officer.

I note that Mr. Shala is not physically present in the courtroom but is attending this hearing via video-conference.

Mr. Shala, can you follow the proceeding in a language you understand?

THE APPELLANT: [via videolink][Interpretation] Good morning. I can hear you very clearly and understand you clearly.

JUDGE PICARD: Thank you.

I will kindly now ask the parties and Victims' Counsel to introduce themselves, starting with counsel for Mr. Shala.

MR. GILISSEN: Thank you very much, Your Honour. So, as you said, Mr. Shala is with us by videolink. I am the lead counsel of the Defence team of Mr. Shala. We are here with two co-counsel, Mr. Aouini and Ms. Leto Cariolou, with the Case Manager Dzeneta Petravica, our assistant legal officer Judit Kolbe, legal

assistant Alana Goncalves, and two interns, Ms. Seloua Ameziane and Mr. Imelda Mustafai. I am Mr. Gilissen, I'm afraid, the lead counsel of this team. Thank you very much.

JUDGE PICARD: Thank you very much.

I will now ask the Specialist Prosecutor's Office.

MR. DE MINICIS: Good afternoon, Your Honours. Appearing today for the SPO are Kimberly West, Specialist Prosecutor, then Maria Wong, Line Pederson, Max Karakul, Sarah Clanton, and myself, Filippo de Minicis.

JUDGE PICARD: Thank you very much.

I turn now to the Victims' Counsels.

MR. LAWS: Good afternoon, Your Honours. I am Simon Laws, counsel for the victims in this case, together with my co-counsel, Maria Radziejowska.

JUDGE PICARD: Thank you.

And now, 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 judgment and findings regarding the responsibility of Mr. Shala, a member of the Kosovo Liberation Army, or KLA, in a series of events between approximately 17 May 1999 and 5 June 1999 at a former metal works factory in Kukes, Republic of Albania, the Kukes metal factory, or KMF.

In its judgment of 17 July 2024, the Trial Panel found that at

least 18 persons were deprived of their liberty by Shala and other KLA members; that detainees held at the KMF were held in inhumane and degrading conditions and routinely assaulted, both physically and psychologically, and that these were inflicted for a prohibitive purpose; and, finally, that one person died while in detention at the KMF on or about 5 June 1999 from the consequences of the gunshot wounds inflicted by a KLA member in the presence of Shala, combined with denial of appropriate medical treatment.

The Trial Panel found the accused guilty of three counts of the indictment for committing war crimes, namely, having committed, as a 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. Shala to individual sentences of six years of imprisonment for the war crime of arbitrary detention, 16 years of imprisonment for the war crime of torture, and 18 years of imprisonment for the war crime of murder. The Trial Panel then imposed an overall single sentence of 18 years of imprisonment, with credit for the time served.

Mr. Shala raises 14 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. Shala requests

that the Appeals Panel quash his conviction and acquit him on all counts; and/or remit the case to the Trial Panel for retrial; and/or impose, if necessary, an appropriate 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 1 April 2025, the Appeals Panel will hear today and tomorrow oral submissions further to the appeals filed by Mr. Shala, the responses from the SPO and Victims' Counsels, and Mr. Shala's reply.

In that regard, the Panel notes the following with regard to submissions from Victims' Counsels. The Panel recalls that, in its Decision on Modalities of Victim Participation in Appellate Pleadings, issued on 24 July 2024, 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 appeal 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 arguments.

The Panel also recalls that, in its Order for the Preparation of the Appeal Hearing issued on 5 May 2025, it has invited the parties and participants, as relevant, to address a number of specific questions regarding the reliance by the Trial Panel on untested evidence, ground of appeal 7; Mr. Shala's conviction for the war crime of arbitrary detention, ground of appeal 12; and murder, ground of appeal 13; and the sentence imposed by the Trial Panel in this case, ground of appeal 14.

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 emphasizes that it is

familiar with the briefs and would therefore urge counsel not to repeat verbatim or to summarise extensively their written argument 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 microphones. 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 of a seconds of pause between speakers.

I also remind counsel to give prior notice should any submission require the disclosure of confidential information so that 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 witness and victim.

In accordance with the Scheduling Order issued on 1 April 2025, setting out the agenda for today, the hearing will proceed as follows. Today we shall hear submissions from Mr. Shala's counsel for one hour and 30 minutes. Following a break of 30 minutes, the SPO will respond to Mr. Shala for one hour and 30 minutes. Tomorrow morning, starting at 10.00, Victims' Counsel will respond to

Mr. Shala for one hour. Mr. Shala's counsel will then have 20 minutes to reply. After that, Mr. Shala will have the opportunity to make a brief personal remark to the Panel.

I would now like to invite the counsel for Mr. Shala to begin. You have until ten past 3.00, perhaps a little bit more because we are starting a bit late.

Sorry for the delay. I had some computer problems.

MR. GILISSEN: Absolutely no problem.

JUDGE PICARD: Please go ahead.

MR. GILISSEN: Thank you very much.

So, Mrs. President, Your Honours, members of this honourable Panel, I thank you for giving me the floor and having this opportunity to present and develop the core of our arguments. Due to the limited speaking time, we intend to use this opportunity for arguments that seem to us worthy of particular development and attention.

Mr. Shala and his Defence decided to introduce an appeal before this honourable Appeal Panel because we believe we are facing some significant issue with the decision issued by the Trial Panel. Indeed, we believe that there are some issues in the procedure as used by the Trial Panel as well as in the enforcement of the Law as it is pertained to the decision issued by the honourable Trial Panel on 16 July 2024.

First of all, we consider we are facing a real and significant problem regarding the Panel's reliance on some of Shala's statements.

But we also consider the decision to use some of the statements in the manner they were used by the Trial Chamber is a real and huge problem as well. This is the basis of ground number 1 of our appeal.

Indeed, we consider the decision to admit some of the statements provided by Mr. Shala as well as to use them in the manner they were used are, for Mr. Shala, the basis of a real damage of extreme severity by its very nature: namely, Mr. Shala's conviction on three counts of war crimes.

Over more than 20 years of investigation, Mr. Shala provided several statements, as you know, in 2005, 2007, 2016, and 2019. On these occasions, as you know perfectly well, he was never questioned in the presence of a lawyer. Moreover, he was questioned without being afforded an opportunity to consult one or, indeed, it was recognised by the Appeals Panel in its decision issued on 5 May 2023, during the interview by the Belgian Federal Judicial Police in 2016, Mr. Shala's right to legal assistance was violated. So it appears from the Appeals Panel's decision that Mr. Shala's right to legal assistance was not effectively guaranteed. Nevertheless, the judgment on conviction, which is under appeal, decided for the very first time to admit in evidence the statement made by Mr. Shala in 2016 as well as the subsequent to those declaration made in 2019 by him.

Indeed, before the issuance of the decision of the Appeals Panel, the Trial Panel stated that the declarations made in 2016 and 2019 were, and I quote, "available for consideration" for

its deliberation. So I ask the question: What is the status -- what is the status for these statements? How can the Defence position itself facing such a type of elements?

Indeed, I can say, I think so, I can say: What is it? What is it about? These elements were not admitted into evidence. They didn't receive a number, MFI or something else, so where could the Defence find this type of non-evidence because it's not in the record, and where could the Defence find some specific rules or regulation about these very special elements? I say "very special" because these elements are not in evidence before being admitted as such and included in the record. They just are elements. They are not evidence. It is obvious to consider these elements to suggest they should still be taken into consideration and could be used to convict Mr. Shala.

What probative value is associated with such a concept? Does not exist. That is for sure. And the quality of, I'm sorry to say, evidence in the pipeline -- of evidence in the pipeline or evidence possibly becoming cannot exist without creating huge and important problems. So the same question must be asked about the status of this so-called new category of element which is not admitted and not included in the record.

In addition, it appears for the judgment that the declaration made in 2019 was used at least ten occasions as a form of probative evidence upon which the conviction of Mr. Shala was based. And he has -- in my opinion, here is the key legal issue: The violation of

Mr. Shala's right to a fair trial. Because if the Defence contests the Trial Panel's decision to admit Mr. Shala's incriminatory statement, and particularly those of 2016 and 2019, that is above all and particularly the manner in which some information and content of those statements were used against Mr. Shala which form the basis of the appeal.

So this is not only a question of seeking reconsideration of Panel admissibility decision. It is far more than that. Indeed, Mr. Shala was not a witness. He didn't decide to take the stand under oath or testify during his own trial. It is therefore the way in which his statements are taken into account that is highly problematic.

How can statements made by an accused which have not been tested and contradicted in a hearing be used in that way? It is essential to consider the implication of using untested statement in legal proceedings. Please take note that no one - no one - could otherwise process or use a testimony of a witness - of a witness - in this way.

What is prohibited with witness statement that has not been tested at the hearing cannot be permitted with an untested accused's statement. Nobody can rely or -- can rely exclusively or to a decisive extent to such witness statement. And I insist, Mr. Shala has not been a witness. He was and he is an accused.

So guess what? The Panel did. It did it with the statements of the accused. It did that.

And, in addition, if an accused cannot be forced to testify in

his own trial, how can disputed statements be used even though they were not contradicted at the hearing? This is even when the condition under which these statements were collected are considered problematic and are contested in the very content.

It is useful to recall that part of the recordings of Shala's statement could never be provided to the Defence. And the Defence would like to verify the alterability, *l'altérité*, the alterability of this element administrated by the Prosecutor because a recording has been lost, has been lost, in a condition we don't know anything about.

So it means that there is no possibility for the Defence, but also for the Judges - but also for the Judges - to verify the quality of the elements administrated or a part of the elements administrated by the Prosecutor in the case. Nothing about this in the decision issued by the Trial Panel.

Furthermore, it appears that the way in which the Panel used certain parts of this statement was really to reverse the burden of proof. The Panel has, in fact, stated that the statement made by Mr. Shala, and I quote, "have not succeeded in discrediting" the evidence presented at trial. But, sorry, the Defence does not have to discredit. It's not our job. It's not our duty. The Defence does not have to discredit, and Mr. Shala's statements were not made to discredit anyone or even to disprove the Prosecution's evidence. Mr. Shala was just providing his position, and there is no reason to put on his shoulder a burden of proof that he doesn't need to have.

I think we have to focus on the fact that Mr. Shala's statements do not even address many of the points the Panel wrongfully expected these statements to prove or disprove. So more than drawing conclusions to the detriment of Mr. Shala about the weight of proof or the burden of proof, the Panel took conclusion about the silence of Mr. Shala on certain aspects, and these conclusions are negative for him and his presumption of innocence. This is what I can call a double or even a triple prejudice.

Well, in addition, it appears essential to understand how much the statements made in 2019 were totally inspired by those made in 2016. Indeed, the 2016 statement of Mr. Shala are the basis, the real basis, of his 2019 statements. These 2019 statements are the continuation of those in 2016. The reality is that in 2019 the investigators' knowledge is based on the 2016 Shala statement. We have to realise information contained in this statement is the material on which the investigators prepared their interview and conducted it in 2019. The 2016 statement is the source and the guiding thread of the content in 2019 Shala's statement. And I can conclude on that, one thing is certain: Mr. Shala's statement in 2019, the Shala 2019 statements, would have never been the same if those in 2016 has not existed or if the investigators could not have had any regard for them.

This is the reason why we are referring to the well-known "doctrine of the poisoned tree." You are perfectly aware about that.

The irregularity and the illegality that reach these statements

must prevent their use in court as well, of course, in a conviction decision. That the fairness of the procedure itself, which is in question, because all of this is tainted by irregularity and illegality process. In my view, I really cannot see how a declaration and conviction under such conditions could not be tainted by the multiple problems we are discussing.

That is why the Defence raise these legal and procedural issues as the first ground of appeal.

The trial admitted these statements into evidence, and this is what we are strongly contesting. Indeed, at the moment of interviews, Mr. Shala, who did not complete schooling, was a really vulnerable one. He was also unable to fully appreciate the severity of the situation, and that is incredible, I think, and, in my opinion, unacceptable in such a situation he was not informed of the significance of the right to legal assistance. So even to have legal assistance free of charge was not provided to him.

So how is it possible when you have professional investigators who have the duty to explain the rights Mr. Shala has at his disposal by the law to make a summary of these rights by the words, and I quote, "blah, blah, blah"? That's absolutely incredible to read that. That's the only explanation Mr. Shala received, "blah, blah, blah." It tells a long [sic] about the professionalism of these investigators and the information Mr. Shala received.

So in addition, I have to say to appears Mr. Shala felt compelled not to rely on the interpreter, so he preferred to

communicate in French despite his limited command of this language and the real complexity of the issue discussed. Moreover, it appears the interpreters at the Belgian interviews were not independent but associates of the Belgian police. And, indeed - indeed - we have no information about competence, quality, compliance, or even training or diploma of these interpreters. And this is a very important issue because I would like to stress on the fact that this type of recurring problem has consequences in Belgium. Indeed, the Belgian legislator had to change the law because of this, and they adapted the law of 5 May 2019 - and it's important, this date is very important - which was followed by a circular number 284, dated 1 March 2021, to avoid this kind of unacceptable situation. This is why it is important for Shala's Defence to have an access to the recording of this interview to be able to check quality, the real quality or not, of these elements provided by the Prosecutor. But it appears, as I said, it's absolutely impossible for us and it's absolutely impossible for you, My Honours -- Your Honours, I'm sorry. So it's incredible to hear that these recordings are not accessible. They were lost, we don't know in which condition, but I can say, in such a case, in incredible conditions.

If it was a joke, nobody will laugh. I think so. So how to react and sanction so many breaches and failures in the procedure? That's amazing, but it appears that for the judgment it's very simple. Nevertheless, and despite all this, the Trial Panel admitted these statements into evidence as if all these issues doesn't exist.

Not a single word about that.

But the Trial Panel also decided to rely on these statements. The 2016 and 2019 statement even play a prominent role in the judgment and are fully part of the probative evidence upon which a conviction was based. I have to underline that, under the conditions set out previously, this is highly prejudicial to compliance with the rules guaranteeing the quality of the elements that might be admitted on record.

In addition, the Defence state that to decide to use these statements in the core of some conviction, as the Trial Panel did, is even more problematic and prejudicial for the legal point of view and in compliance with the fundamental rules of presumption of innocence as well as guarantees for the fairness of the procedure.

I want to add that to use these statements is unfair. But to use them without any single attempt to remedy the situation in the course of the trial is definitely and absolutely unfair. And I tell you, the violation of Mr. Shala's right as recognised by the appeal decision issued on 5 May 2023 has, according to the judgment, no consequences, absolutely no consequences at all, even - even - in the sentencing.

Well, it was the first point we would like to raise, but in addition, and this is still another topic, I would like to focus on the fact that by acting as the Trial Panel did, it failed to ensure there is certainty regarding the evidence record of the proceedings. This is the basis of our second ground of appeal, ground number 2,

prejudice caused by uncertainty as to the evidentiary records.

Indeed, the Trial Panel has to decide on the admissibility of the evidence submitted to it, to the Panel, as you know perfectly well. It means the Panel has to determine whether evidence should be admitted or not. To do it, the Panel has to issue - it is required to issue - an admissibility decision or some admissibility decisions about all evidence submitted to it.

Of course, the timing for issuing such decisions is essential, and it is essential for all the parties but especially for the Defence. Why? Because it's crucial for the Defence to be fully aware and informed - fully informed - of the evidence in the case because that is what we are going to discuss. So these admissibility decisions define what the evidence against the accused actually is and why the evidence against the accused is this one and not another.

So, evidently, the right time for issuing admissibility decision, it is at any time prior the close of evidentiary proceedings. Before the Kosovo Specialist Chambers, the procedure is very clear, and I can say it makes sense. Indeed, according to Article 40(6)(h), for the admissibility decision, this moment, and I quote, "to close the evidentiary record" is "prior to or during the course of the trial," because it must be allowed to the parties to have an effective opportunity to address the evidentiary record, of course, to decide how to develop their case, of course, but also to discuss the evidence on the record. This is required by the choice of the proceeding themselves. Things must be perfectly clear before

the closing statement of the party. I repeat, it makes sense.

So to do it in the trial itself does not fit and, indeed, the words "during the course of the trial" cannot be considered as "in the trial judgment," of course.

As you know, in the course of the proceedings, the Trial Panel found that the 2016 and 2019 statements were, and I quote, "not inadmissible" and "could be considered by the Panel in accordance with Rule 139(1)." But the Trial Panel added that, and I quote, "concerning the question of whether to admit into evidence" the two statements, "it will issue in due course a decision on the submission and the admissibility of the non-oral evidence."

I can say that "whether to admit into evidence" clearly means "if we have to" or "if we should admit it." At the moment to take stance and to issue its final statement, the Defence had to face a very special situation, an unpleasant and uncomfortable one, but I sustain it was an unlawful situation, in any case, an unfair one.

The admissibility usage and merits of these incriminatory statements made by Mr. Shala were highly and consistently contested by the Defence, and nothing, no decision, no motivated decision about the Defence contestation were issued in due time.

The Panel never addressed the arguments of the Defence about all these problems, including the arguments included in the Defence pre-trial brief.

The Trial Panel held erroneously the contrary. But it's a mistake, and this mistake could explain the situation we have all

together to deal with in appeal. In reality, the Defence has been deprived of any effective opportunity to respond to the merit of the issues raised in evidence tendered but not yet admitted. I remind all of you we are talking about statements and not oral evidence. Statements made by Mr. Shala, who is not a witness but an accused, who has the right to maintain or to remain silent, the right not to incriminate himself, and even the right to lie, as you know.

So, by acting as it did, the Trial Panel, first, did not respect the KSC's, the Kosovo Specialist Chambers' procedure and rules; second, it violated Mr. Shala's rights; third, it seriously prejudiced the right of the Defence to be fully aware of the evidence in the case, to have adequate time and facilities to prepare its case, and prejudiced the manner for the Defence to present its case.

How is it possible to deal properly with some incriminatory statement when you are a Defence and you don't know if they are in the evidentiary record or not? To have a guess, a pleading guess?

I have to underline that at this moment there was no possibility for the Defence to go to the Appeals Panel and to try to avoid the consequences of such a situation. I must add that it is important to note that such a situation in which the Defence was placed in has been repeated and replicated at other levels during the proceedings.

Indeed, what is in the indictment referred to nine clearly identified victims and sued Mr. Shala for criminal responsibility of these nine clearly identified victims, the conviction in the trial judgment related to 18 identified victims, without any changes in the

indictment at any moment being made.

Mr. Shala was convicted and sentenced for crimes which were not charged in the indictment. These additionally identified victims were not part of the Prosecution case, which never identified them or interviewed them or even summoned them to the hearing, and the Prosecution never sustained during the trial these identified individuals were victims.

All this means that the Defence was never given the opportunity, first, to investigate; second, to contest; third, to discuss or present defence regarding these nine additional so-called identified victims. And the Prosecutor never asked to change its position about these additional so-called identified victims who, I repeat, were not included in the indictment or called or summoned to appear in the court.

This is the basis of ground 5 of our appeal: no possibility to have a real and effective Defence work about these people. We even don't know what these people have to say, even today, to say about their so-called victimhood or lack of it.

Furthermore, the Trial Judgment identified and added certain persons to those referred to the -- or in the indictment as part of criminal enterprise that allegedly acted in Kukes. The Trial Judgment added these person, whereas the Prosecutor never supported such a version of facts and any participation of these person in the joint criminal enterprise or in the prosecuted crimes. One more time, it is not the Prosecution case. And I have to add that some of

these additional persons were witnesses for the Prosecution itself, which has created additional and new problem concerning the decision under appeal, and this is why it's part of our appeal.

Once again, the Defence was deprived of any opportunity to investigate, to contest, to discuss or present a defence about these persons. So placed in such a situation, such a procedural situation, at the end of the proceedings it was the first time we heard these persons were part of the so-called criminal enterprise, at the end of the proceedings, with the decision being pronounced, where Mr. Shala and his Defence discover such a new criminal scenario.

We fully understand that Mr. Shala considers he did not benefit of a fair trial. Indeed, the Defence was never notified of this new procedural situation or criminal scenario, as I said, before the closure of the proceeding and so before the end of the debate. In such conditions, it's understandable that Mr. Shala considered himself to be the object of a real trap.

So I stop here, and with your leave, Your Honours, and under your control, of course, I propose to give the floor to Mr. Aouini first and then to Ms. Cariolou. Mr. Aouini is going to develop arguments on grounds 6 to 11, and Ms. Cariolou will continue by responding to your questions as requested in your order dated 5 May 2025.

Thank you very much. Thank you very much for your attention and your patience. I will present, with your leave, argument about sentencing before briefly concluding. Thank you.

JUDGE PICARD: Thank you.

So, Mr. Aouini.

MR. AOUINI: Thank you, Mr. Gilissen.

Good afternoon, Ms. President, Honourable Panel.

With Your Honours' leave, I propose to address a number of points relevant to our submissions on grounds 6 to 11 of our appeal brief.

And starting from where Mr. Gilissen left off, depicting errors of law in assessment of the evidence and, in particular, in the use of Mr. Shala's statements and the flagrant violation of his rights. Grounds 6 to 11 of the Defence brief -- of the Defence appeal turn to similar and not less problematic errors in the treatment that the Trial Panel reserved to the evidence of the witnesses in this case.

So starting with ground number 6, Your Honours. We submit that the Trial Panel made serious errors in the assessment and acceptance of the credibility of three key Prosecution witnesses which invalidate all the convictions and have resulted in a miscarriage of justice. These errors were compounded by applying double standards in assessing exculpatory and incriminating evidence, it breached the principle of *in dubio pro reo*, and constituted abuse of discretion.

No reasonable trier of facts would have reached the conclusions the Trial Panel reached in its judgment, and this is due not only to errors in evidence assessment resulting from abuse of discretion but also due to errors in the application of the law when approaching the evidence, its order of precedence, and its weight in light of the

totality of the evidence.

Your Honours, due to time constraints, I will mention two major examples for each of the three key witnesses in this case, starting with Prosecution Witness number 1.

No reasonable trier of fact would conclude that all the facts surrounding this witness's presence, both before his arrival and after his departure from Kukes, are immaterial to the charges and irrelevant to the credibility of the witness. This is more so when the context in which this witness arrived and departed from Kukes is the real demonstrative evidence of the unreliability of his account and the lack of credibility of his story when it comes to who did what, for what reason, when it happened, and in what circumstances.

When the case revolves around the exaggeration of facts and the implication of persons by way of revenge towards of them or towards investigative institutions, no trier of fact would ignore those decisive elements in its credibility assessment.

These errors, in our submissions, were possible when the Trial Panel decided, for example, that it could correct a date of arrival of a witness to Albania, which was tested and discredited, Your Honours, through objective elements during hearings at cross-examination simply by giving precedence to other evidence which was untested and coming from the statements of deceased witnesses. Here I refer Your Honours to paragraphs 377 to 379 of the trial judgment as well as evidence number DPS00124, and pages 1610 to 1615 of the transcript.

The same type of errors could be mentioned for the evidence regarding the circumstances of release, and the same evidence could never be reasonably considered by a trier of fact as immaterial or irrelevant to the credibility assessment of a witness account.

For the second example on this witness, Your Honours, I would need to move briefly to private session.

JUDGE PICARD: Can we go in private session, please.

[Private session]

[Private session text removed]

[Private session text removed]

[Open session]

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

MR. AOUINI: Thank you.

So to conclude on this second example, Your Honours, no reasonable trier of fact would trust such evidence of placing Pjeter Shala at the scenes where the main proven deficiency of this evidence is the placing of people in events and scenes.

Turning now to the second witness, Witness 4733, also with two examples relating to identification and corroboration.

First, identification. No reasonable trier of fact would accept the identification made by this witness of Mr. Shala when the description made is that of a person of a dark complexion, almost black. Not only the trial judgment accepts this description and relies on it to convict Pjeter Shala, it does even justify it by concluding, and I quote, "appearances change over time, and a

witness's memory may be affected by the passage of time."

Your Honours, have a look at Pjeter Shala. Please have a look at his skin colour. Is it reasonable to think that this might have changed over time? No reasonable trier of fact would conclude that, Your Honours.

And since this section mentions the passage of time, the Defence submits that this element is one of the key topics where a double standard was made evident throughout the trial judgment. This passage of time that excused a Prosecution witness to describe a white man as black, or almost black, is the same passage of time that didn't excuse a Defence witness's inability to place within the KMF a toilet it may or may not have used 25 years ago or to give the number - exact number - and position of truck or trucks in a yard it hasn't been to in over 25 years.

How many of us still remember similar details in our college or school buildings?

It is, Your Honours, this double standard in treating incriminating and exonerating material that made those errors and those unreasonable conclusions possible.

Now, the second example on Witness 4733. No reasonable trier of fact would conclude that the evidence of the family member is corroborative of Witness 4733's evidence. In fact, it disproved his story in almost every possible aspect. Prosecution Witness 06 said that Witness 4733 called Prosecution Witness 06 over the phone from the metal factory in 1999, over the phone, to tell this witness he is

doing well. And I refer Your Honours to the transcript page 808.

[REDACTED] Pursuant to In Court Redaction Order F61RED.

[REDACTED] Pursuant to In Court Redaction Order F61RED.

[REDACTED] Pursuant to In Court Redaction Order F61RED. to be found in pages 648 and page 752 of the transcript.

Prosecution Witness 09 said they discovered the name Pjeter Shala after the war, in 2000, and that Witness 4733 didn't know who Pjeter Shala was. No wonder he describes him as he does.

Prosecution Witness 09 also said that this man they discovered to be Pjeter Shala came from Croatia. This is to be found at page 1007 of the transcript.

Witness 4733 claimed that Prosecution Witness 06 told him that this person was, in 1998, in front of their house with his son, meaning the person meant to be Pjeter Shala. That's to be found at Exhibit 082892-TR-ET Part 1 RED3, page 36. This fact is both contradicted by Prosecution Witness 06 at pages 857 to 858 of the transcript and incompatible with the person being Pjeter Shala.

No reasonable trier of fact, Your Honours, would conclude that this is corroboration.

And, finally, turning to the third witness, Witness 1448. The Panel erred in fact and in law in its assessment of Witness 1448's evidence by failing to consider key elements related to the wrong identification made by this witness of Pjeter Shala as well as, again, applying double standard in assessing evidence of the same type depending on its incriminating or exonerating nature.

And again two examples to quickly illustrate this.

First, Witness 1448 had falsely identified Mr. Shala in a photo board identification procedure, and the identification was based on information given to him by a witness. And I'll get back to this with more precision in private session.

The Panel found, and I quote, "the fact that Witness W01448 identified another individual as Mr. Shala amongst a series of photos - none of which actually depicted Mr. Shala - does not have any bearing on the Panel's finding." This is to be found at paragraph 713 of the trial judgment. No reasonable trier of fact would have come to this conclusion, Your Honours.

It is our submission that the Panel erred when it failed to draw the consequences of the misidentification of Pjeter Shala by this witness as well as the source of the knowledge that this witness had about Pjeter Shala.

And this leads me to the second point on this witness, which is interconnected to the first one, and which needs to be addressed in a private session, Your Honours, with your leave.

JUDGE PICARD: Can we go in private session, please.

[Private session]

[Private session text removed]

[Private session text removed]

[Private session text removed]

[Open session]

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

MR. AOUINI: Thank you, Mr. Court Officer. Thank you, Your Honours.

Turning now, transiting now to ground number 7, Your Honours, related to unavailable witnesses and the extensive and decisive reliance on the untested evidence in the trial judgment.

We have explained in our brief how the errors made in the trial judgment invalidate all convictions entered and have resulted in a miscarriage of justice. But in essence, we submit that the Trial Panel erred in law and in fact when it denied the request of the Defence to have Prosecution Witnesses 02 and 04 attend the hearings and be cross-examined since they were alive and available and were the only ones capable of testifying about specific topics like detention room number 2 and other key aspects like the change of the guards after the death of the murder victim.

After such denial, the Panel compounded the prejudice to the Defence by relying on their untested witness statements to a decisive extent, sometimes discrediting the account of one of them based on the account of the other, and made findings adverse to Mr. Shala on issues about which those very witnesses had exculpatory material.

In total, and as explained in detail in our brief at paragraphs 115 to 143, the Panel concluded to Mr. Shala's individual criminal responsibility through the JCE for the crimes charged on the basis of seven crucial findings to be found at paragraph 1025 of the judgment. Out of these seven findings, four findings are based solely or to a decisive extent on untested evidence and some of which are not due to the death or unavailability of witnesses concerned but due to the Panel's own decisions not to hear them in court.

Ms. Cariolou will revisit this ground, Your Honours, to answer some of your questions, so for time efficiency, I will move to grounds 8 and 11.

Turning now to grounds 8 and 11, like I said, which is related to the resort to unwarranted and unfounded inferences.

It is our submission that the Trial Panel has not only drawn inferences which were not the only inferences reasonably available to them that could be drawn from the available evidence, the Trial Panel, in our submission, had a more problematic approach when it drew inferences where there were no inferences to be drawn because evidence, for example, simply and directly negated the fact or didn't address it at all or there was simply no evidence about that fact.

This was even done in the assessment of Mr. Shala's statements itself, Your Honours, as Mr. Gilissen told you earlier in our submissions.

This is also the case with regard to findings of judicial control and informations on the reasons of arrest, as to findings on the accusations of collaboration, and, more generally, on the purpose of the common plan.

Those inferences, Your Honours, were coupled with dangerous analogies, where a casuistic approach was mandatory. The absence of information on the reasons of detention of one victim was the basis for the inference by the Panel for the lack of the same for another victim. This is impermissible. The circumstances of independent release of one victim, 4743, was the basis to infer that the release

of others didn't result from due process or a competent authority's decision. This included victims even not named in the indictment, not debated in the trial, and for which no evidence was adduced concerning the elements of due process or procedural guarantees or interrogation.

This very point will also be revisited by Ms. Cariolou in response to Your Honours' questions. But simply to conclude on this ground, the Defence submits that the Panel's unwarranted inferences played a big role in the findings of the trial judgment forming the base to the conviction on all counts Mr. Shala was charged with and must be remedied as they invalidate all the convictions.

And I will finish, Your Honours, my address with submissions on ground 10 of our appeal simply by observing the drastic contrast of approach that was reserved to Defence witnesses and more generally to exonerating evidence throughout the trial judgment when compared to the treatment reserved to incriminating and charging material.

The Panel abused of its discretionary power, in our submission, when it weighed and considered some key Defence evidence.

And due to time limitation, if only one example is to be mentioned, we would refer Your Honours to the evidence of Defence Witness 06, Mr. Bardhyl Mahmuti, who was called by the Defence of Mr. Shala to specifically meet the allegations made by Prosecution Witness 4733 that Mr. Mahmuti was in Kukes taking part in interrogations and mistreatments, and also as evidence of the Defence's contention that this witness placed multiple names of

personalities, and even his neighbours, and did so falsely in order to implicate them wrongfully.

Mr. Mahmuti attended this trial and provided his passport of the relevant time, which was a refugee passport, along with his evidence that he wasn't in Albania during the relevant time but all around Europe, trying to gather help and support for the liberation of Kosovo politically and diplomatically. This evidence, Your Honours, which was the heart and soul of Mr. Mahmuti's evidence and the reason why he came to The Hague to testify under oath, was thrown away by the Trial Panel in its judgment, without addressing it in a single conclusion of the judgment. Stating instead that Mr. Mahmuti's personal political opinion about the KSC as an institution showed his bias and propensity to lie in order to protect Pjeter Shala, and, as a result, he was found fully and entirely not credible.

Your Honours, in this trial, in this judgment, a witness *[REDACTED] Pursuant to In Court Redaction Order F61RED.* *[REDACTED] Pursuant to In Court Redaction Order F61RED.* is not an indicator of a possibility to lie on the same facts, same topics, and same evidence, even when it is coupled with threats to the accused inside the courtroom, to him and to his family, while a politician's Facebook post depicting personal opinions of what he perceives and believes, based on his own work and his own books, right or wrong, which are intellectual and academic, would be an indicator of a possibility to lie or hide and shield the accused from responsibility.

This is one of many examples of the same trend of double standards, Your Honours, which resulted in the errors of law and the

errors of fact developed throughout our grounds 6 to 11.

This concludes my address. And without further delay, I pass on to Ms. Cariolou, who will provide the Defence's answer to Your Honours' questions.

Thank you for your attention, Your Honours.

JUDGE PICARD: Thank you.

So, Ms. Cariolou.

MS. CARIOLOU: Good afternoon, Your Honours. I am mindful of the time, so I will be as brief as possible and try to address the Panel's questions in a little more than 20 minutes.

I will first provide a brief answer to the Panel's first question and move to develop our response to the rest. References to the evidence and authorities are provided in writing so that the members of the Panel, as well as the other parties, can follow our submissions.

As to live evidence that concerns the two findings identified by the Panel, we will restrict our answer in stating that with regard to the period after 5 June, the Panel found that new guards were placed in charge and that the conditions of detention improved. The Defence did not challenge this finding. In any event, this finding is supported by the live evidence of Witness 01 as well as the written evidence of Witness 1448 and 04.

As stated in our brief, this finding is important for Mr. Shala's case as it directly contradicts the Panel's finding that the death of the murder victim was the agreed aim of those considered

involved.

Turning to the second question. We were requested to develop our submissions with regard to the sources of law relied upon as authority for the requirements concerning the procedural safeguards considered by the Panel as elements of the crime of arbitrary detention.

In our view, the Trial Panel constructed new requirements as elements of the crime of arbitrary detention in a non-international armed conflict, and it did so by transposing procedural safeguards taken from either the law as it applies to international armed conflicts or general human rights law. In doing so, it did not rely on any contemporaneous and binding authority dating from 1999. It violated the principle of legality, in our submission, by failing to respect the rule that criminal law needs to be defined with certainty and, in any event, be applied as it was at the time of commission.

First, the Panel relied on the ICRC study from 2005. However, this study relies on principles concerning international armed conflict or, as said, general human rights law. What the ICRC study makes clear is the need for a valid reason for the deprivation of liberty both as the initial reason for the arrest as well as the continuation of the deprivation of liberty. It does not expand on the procedural safeguards that must be put in place by non-state entities when detaining individuals due to security concerns.

In our case, there is ample evidence suggesting that the initial reason for deprivation of liberty was the investigation of security

concerns; in particular, the suspected collaboration with enemy Serb forces. There is evidence that all the detainees were questioned with regard to specific allegations. Some were even released after such questioning.

As to the references in the ICRC study to general human rights law, and as the study acknowledges, both requirements under consideration are derogable. This means that a contracting state, in the event of circumstances that threaten the life of a nation, can derogate from its obligation to ensure respect for the specific requirements. This is an important element to consider, in our submission, particularly in circumstances such as this, where the acts under examination are those of a non-state entity, an armed group, operating outside an area it effectively controls, extraterritorially. An armed group not directly bound by all provisions in human rights treaties and certainly not in a position to derogate from obligations following from them.

The case of *Lawless v Ireland* to which the Panel referred to is not on point --

THE INTERPRETER: The interpreters kindly ask the speaker to slow down when reading. It is very difficult to follow.

JUDGE PICARD: Ms. Cariolou.

MS. CARIOLOU: Yes.

JUDGE PICARD: Could you please slow down --

MS. CARIOLOU: Oh, yes, of course. Apologies.

JUDGE PICARD: -- so the interpreters can interpret.

MS. CARIOLOU: Now, the case of *Lawless v Ireland* to which the Panel referred to is not on point as it concerns the convention obligations of a contracting state in response to the activities of a secret army and the steady increase of terrorism.

The Panel's reliance on Article 75(4) of Additional Protocol I to the Geneva Conventions is not of assistance. The first protocol's application is restricted to international armed conflicts or the event of an occupation of a territory of a high contracting party.

Now, although Additional Protocol II does apply to non-international armed conflicts, the Panel's reference to this article is inapposite. Tellingly, this provision relates, as hinted by its title, to penal prosecutions. What the Prosecution's evidence presents as happening at the Kukes metal factory has nothing to do with ongoing or completed trials. The Prosecution evidence describes the detention of individuals to further an investigation into the suspicion that these individuals pose a security concern.

The reference relied upon by the Trial Panel, and I quote, "to a court offering the essential guarantees of independence and impartiality" is taken from the very different obligation imposed by Article 6 which provides that no penalty shall be executed unless a person is found guilty by a court offering such guarantees, found guilty by a court offering these guarantees.

The Prosecution's case indicates that those individuals were detained to be interrogated on suspicion that they pose a risk. They were not put to trial. They were not convicted. They were not

serving a sentence.

As a matter of principle, an individual's detention for the purposes of an investigation cannot be considered unlawful so long as there are valid grounds for the arrest and continuing detention. Meaning, so long as there is a reasonable suspicion that such an individual poses a security concern. Such detention cannot be considered lawful indefinitely, yes, yet the length of each detainee's detention was not a ground that even featured in the analysis of whether the said detention was arbitrary.

What is evidently lacking in the Trial Panel's analysis is a thorough assessment of the evidence suggesting that there was a suspicion that each detainee posed a security threat, and whether that suspicion could be considered at the time reasonable. That is the test that, in our submission, should have guided their analysis. Dismissing in a cursory manner the evidence suggesting that such a suspicion existed or, indeed, that it could be considered reasonable was an error that, in our submission, requires appellate intervention.

This leads us to the second question regarding the Trial Panel's finding that no security concerns made detention absolutely necessary. And before I address the evidence, I wanted to pause and point to the high standard applied by the Panel on this point. It required the existence of security concerns which made detention absolutely necessary. With the greatest respect, this is the wrong test.

Now, the evidence relied upon by this finding indicates that detainees had been interrogated by KLA officers as to concrete suspicions concerning their relationships with enemy forces. Osman Kryeziu and Sokol Dobruna are described in the evidence as prosecutors or investigative judges conducting such questionings and taking written statements from the detainees.

With Your Honours' leave, we should perhaps move to private session.

JUDGE PICARD: Yes. Let's go in private session, please.

[Private session]

[Private session text removed]

[Private session text removed]

[Private session text removed]

[Open session]

THE COURT OFFICER: Your Honours, we are in public session. Thank you.

MS. CARIOLOU: To conclude our answer to this question, the trial record did not permit the findings drawn by the Panel, particularly when considering the applicable standard of proof.

Now turning to the Panel's third question. The commission of the war crime of murder requires the intent to kill. In our case, the intent to kill the murder victim or the intent to wilfully cause the murder victim serious bodily harm or the intent to omit to provide the murder victim with medical care, which the perpetrator should reasonably have known that it might lead to death.

Consistent case law has explained this:

"Thus, the *mens rea* of murder includes both direct intent ... which is a state of mind in which the perpetrator desired the death of the individual to be the result of his act or omission, and indirect intent ... which is knowledge on the part of the perpetrator that the death ... was a probable consequence of his act or omission."

A probable consequence of his act or omission.

And I refer the Panel to paragraph 448 of the Karadzic trial judgment, and the references relied upon on this point, which include the Oric, Djordjevic, Popovic, Milutinovic, and Lukic and Lukic trial judgments.

Now, under the first form of JCE liability, each participant in

the said JCE needs to share the *mens rea* as to the agreed criminal purpose of the JCE. The *mens rea* for this specific intended crime needs to be the same with regard to each participant. Liability under the first form of a joint criminal enterprise is liability as a principal perpetrator. Each perpetrator is meant to have been willingly participating in a joint criminal enterprise having the same aim which is shared with all the other participants. In our case, the aim to murder, the aim to kill the murder victim or wilfully cause him such bodily harm that it would lead to his death or deny life saving medical treatment knowing that this would lead to his death. The intent of each participant, therefore, must be equal to that of the others, and this is what allows for this mode of liability to attribute to each participant an equal share, if you like, of responsibility for the crime in question.

In our submission, it is not permitted to infer the requisite intent by relying on a presumption that Mr. Shala intended the death of the murder victim or foresaw that his death would be the probable consequence. An adequately reasoned judgment should assess his separate and individual intent and ensure that this suffices to the requisite standard and is equal to the intent of the other principal perpetrators.

Our first objection with the Panel's decision on this point is that it breached Mr. Shala's fair trial rights and the presumption of innocence by failing to explain its findings as to Mr. Shala's intent with reference to Mr. Shala's acts or omissions and how they feature

in the line of causation leading to death.

The Trial Panel's reasoning and attribution of intent resembles exactly the automatic attribution of intent that is in breach of Article 6 and the presumption of innocence. In this respect, I refer the Panel to the Strasbourg judgments in *Goktepe v Belgium*, in *Delespesse against Belgium*, and in *Haxhishabani v. Luxembourg* for the following proposition: the automatic attribution of liability to all participants in a joint venture would breach Article 6 in the absence of a careful assessment of their subjective and individual intent and corresponding share of responsibility.

Now, the error in the Trial Panel's finding as to the *mens rea* for murder is founded on its findings as to the cause of death. According to the Trial Panel, a person who is not Mr. Shala shot the murder victim on 4 June in the leg. The bullet hit a vital artery which supplied blood to the entire leg. This led to profuse bleeding and was the serious bodily injury that in the normal turn of events, as confirmed by the Prosecution's expert Dr. Gasior, would have led to the murder victim's death. In addition to that, in addition to the serious bodily injury caused by the bullet which left the murder victim bleeding to death, a KLA member other than Mr. Shala did not allow the murder victim's transfer to a hospital to be given life-saving treatment. This was despite the fact that a doctor had made clear that the murder victim would not survive unless given such medical care.

The cause of death, as found by the Panel, is this:

"... the Panel has established that the Murder Victim died ... from the consequences of the gunshot wounds inflicted on his leg, combined with the denial of appropriate medical treatment."

Mr. Shala is not mentioned in the findings that describe the cause of death. The death, we are told by the Trial Panel, was caused by the person who shot and hit the artery and the person who denied vital medical treatment. Any direct or indirect intent to kill lays with these two actors. Mr. Shala, even on the Prosecution's case, did not pull that trigger, did not fire the bullet, did not deny the murder victim potentially life-saving medical treatment. It is not at all evident that even the person who shot the murder victim on the leg had the intent to kill. Shooting someone in the leg shows an intent to injure, perhaps an intent to immobilise. It does not show necessarily an intent to kill. The person denying medical treatment, presumably knowing that the murder victim would not survive without it, must have had the direct or indirect intent to kill. However, was this shared with the shooter? Was this shared with the other persons found to be present?

The Prosecution's evidence suggests that at least one other person, if not more, called for medical assistance. The Prosecution's case shows an attempt made to stop the profuse bleeding with whatever means or bandages were available at the Kukes metal factory. At least some persons, therefore, had intended to stop the bleeding and tried to save the murder victim.

The Prosecution's case also shows that immediately after the

death, the guards were changed, and there was a drastic improvement in the conditions of detention to ensure that this would never happen again. What we don't know, because of the blurred reasoning of the Panel, is what is the conclusion as to Mr. Shala's intent at the relevant time. Even on the Prosecution's case, it is unclear whether he knew that guns would be used to shoot the murder victim. *[REDACTED] Pursuant to In Court Redaction Order F61RED.* *[REDACTED] Pursuant to In Court Redaction Order F61RED.* *[REDACTED] Pursuant to In Court Redaction Order F61RED.* I will not mention further details as we are in open session. It is entirely unclear that he was aware or could foresee that, if shot, the murder victim would be denied life-saving medical treatment and would be left to die.

To convict Mr. Shala for murder, the Panel needed to be certain that Shala had intended to murder the victim. The Defence contests for the reasons set out in our brief that Shala was present during this incident. Even taking the Prosecution's case at its highest, it is our respectful submission that the Panel erred in finding that Shala himself intended to kill, that Shala himself had shared the exact same intent to kill as the shooter and the person denying medical assistance. It is therefore not fair, in our respectful submission, that Shala should share equally the responsibility for the murder.

I will now briefly turn to the last question.

JUDGE PICARD: [Microphone not activated].

We have to break now for the interpreters.

May I ask the interpreters whether we have to take the break now?

[Trial Panel and Court Officer confers]

JUDGE PICARD: I have no answer --

THE INTERPRETER: No, Your Honour, we don't need a break. Thank you.

JUDGE PICARD: Okay. So you have ten minutes to finish now.

MS. CARIOLOU: I think I should need less than that.

JUDGE PICARD: You said five minutes? Five minutes is fine.

MS. CARIOLOU: So turning to the Panel's last question.

At the time of commission, the applicable law, as acknowledged by the Trial Panel, provided for a specific sentencing range. No more lenient sentencing range was ever introduced under the relevant Kosovo laws. Failure to impose a sentence that was provided by law but applied at the time of commission was a breach of Mr. Shala's rights under Article 7 of the Convention.

This does not change, in our submission, by the Constitutional Court judgment in Mustafa.

Article 7 of the ECHR provides this:

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

When the Panel will be interpreting the Constitutional Court's judgment, it needs to do so bearing in mind the requirements of Article 7, which is a norm that hierarchically has priority and, as such, trumps contrary provisions.

We must also be careful with this: If we consider that the 1999 sentencing range is not binding, then we may make the more fundamental mistake to consider that there was no law providing for a sentence for the crimes for which Mr. Shala was convicted at the time of their commission. Then, the sentence imposed on Mr. Shala would emanate only from the subsequent sentence introduced retrospectively by the Kosovo Specialist Chambers Law. This would entail an even greater breach of the principle of legality.

There is also an additional requirement imposed by Article 7 and that is that the law both in terms of what constitutes an offence as well as the sentence for such offence be clear. Not only that it is clear today, retrospectively, but that it was clear in 1999 at the time of the commission of the relevant offences, and that is the requirement that requires that it is foreseeable to a perpetrator at the time of commission of an offence.

In our respectful submission, the back and forth between the Trial Panel, the Appeal, the Supreme, and the Constitutional Court Panels demonstrate exactly the lack of clarity in the quality in the law on sentencing that violates Article 7.

Mr. Gilissen will now, or perhaps after the break, make some final submissions on sentencing.

Thank you, Your Honours.

JUDGE PICARD: Okay. Thank you. So we'll take the break now, and we'll reconvene at 3.50; that is, ten to 4.00.

--- Recess taken at 3.21 p.m.

--- On resuming at 3.53 p.m.

JUDGE PICARD: Welcome back.

So before I invite the counsel for the SPO, I understand that Mr. Shala's counsel asked for 25 more minutes. Is that right?

MR. GILISSEN: Yes, indeed.

JUDGE PICARD: Yes. So we considered this request, and really we're going short of time. Ten minutes, please, if you can.

MR. GILISSEN: We will try. That's sure.

JUDGE PICARD: Thank you very much. So you have the floor.

MR. GILISSEN: Thank you very much, Your Honour, Ms. President, Judge, honourable members of this Appeals Chamber. It's always difficult to plea on sentence when your argument is for an acquittal. But it's not -- of course, it's not my point today. We are indeed discussing the manner in which the judgment has punished and sentenced Mr. Shala.

You have the written pleadings, and the content of those procedural documents remain fully current, may I say. I, therefore, propose to confine, of course, my argument to three aspects of the arguments developed there.

This is the specific, I think, argument which seems to me to constitute a serious type of error, taken separately or together, invalidate the process that plead to the determination of Mr. Shala's sentence.

The Defence of Mr. Shala is absolutely - absolutely - aware that sentencing is undoubtedly the most complex aspects of judicial

practice. It requires some technicality, of course, and we know how difficult and delicate the search for the rule to apply in imposing sentencing, particularly when we are dealing with some international matters.

According to Defence, the first error committed by the Trial Panel in the trial judgment is found of this very first stage, may I say, and invalidate alone the judgment regarding sentencing. The Defence of Mr. Shala finds the judgment erred in choosing not to apply the applicable law but also choosing not to enforce a sentencing range of the applicable law, as Ms. Cariolou explained just before.

And I have to say, the applicable of the principle of legality imposed to the Trial Panel to have regard to and to take into account some elements, including the Kosovo law as applied at the time of commission of the alleged crimes and its sentencing range, what means a maximum of 15 years' imprisonment. And, indeed, the Constitutional Court or Supreme Court considers this sentencing range as the correct legal basis for determining the adequate sentence.

I recall that Mr. Shala was given a sentence of 18 years for crimes that are part of war crimes against a civilian population.

The second error we would like to point out concerns a breach of one of the fundamental principles of governing -- principle governing sentencing. This is principle which ensures and guarantees quality in sentencing process and that a sentence is not out of reasonable proportion and in line with sentences passed in comparable and

related cases.

We can say without committing an error that in this case we have three specific precedents that appears to be of major importance to guide the confines of sentence that ensures proportionality when compared to very serious cases: namely, the cases involving Mr. Geci, Mr. Krasniqi, and, finally, Mr. Mustafa.

As you know, Mr. Geci and Mr. Krasniqi were convicted for crimes committed against civilian population. These crimes were committed in 1999 in Kukes, Albania, in what the Specialist Prosecutor considered to be the same context as in the charges against Mr. Shala. However, these two individuals were convicted by an internationalized Kosovar jurisdiction for more numerous crimes, facts, even though those individuals were considered to be the person of authority on the spot in Kukes metal factory. They were also considered to be the ones who organised the arrestation, the detention, and the treatment reserved to the detainee including during the interviews or questioning.

It should also be noted that it was judged that these two individuals were the ones who designed and implemented the entire organisation in the Kukes metal factory which allowed for the commission of crimes there.

So the nature, in quality and quantity, of the involvement of those two individuals was at the most important level. It is assumed, and everyone agrees on this point, that all of this, as well detention and interviews, began before Mr. Shala arrived in Albania

in 1999 and, of course, before he was sent to Kukes. So in any case, all the situation in Kukes metal factory started and process was done without any involvement of Mr. Shala. And even if you will consider Mr. Shala took part in any criminal acts after his arrival in Kukes, which he denies strongly, it means his alleged involvement would not have been necessary in the functioning of the organisation itself. It was put in place on the spot without him.

And, indeed, according to the Prosecution, the organisation on the spot start without him and continued to function after Mr. Shala left Kukes metal factory. So this means the functioning of the organisation put in place did not need him to operate.

Mr. Geci was sentenced to 15 years for crimes committed in Kukes but also in Cahan, another detention camp.

Mr. Krasniqi was sentenced to seven years, while Mr. Shala was sentenced to 18 years, as you know.

So I believe I can say the trial judgment fails to ensure equality in sentencing. It fails to attach appropriate weight to sentence in comparable and related cases.

Today, nobody claimed Mr. Shala was a shooter in relation to murder committed on 5 June 1999 or that he was part of the decision not to send the murder victim to a hospital. But he could be the only one to be declared guilty and sentenced for a murder that he did not commit. The Trial Panel considered Mr. Krasniqi, who was acquitted, to be responsible for this murder. But despite this, because of the incredible effect of the joint criminal enterprise,

Mr. Shala risks to be the only one convicted and sentenced for this murder he didn't commit.

What an irony. So what a real ironic situation when you go too harsh and apply different standard to the same complex of facts. It is not the same in Mitrovice or in The Hague? Is it possible?

Moreover, the Panel's judgment fails to provide a reasoned opinion as to why it chose to significantly depart from the sentences of those two cases concerning Mr. Geci and Mr. Krasniqi. This is another error in law. All these points are crucial in understanding why the Defence considers the fairness in sentencing and fairness of the procedure was broken in the Shala's case.

We also refer the Mustafa case. This one is a very interesting decision, you know it perfectly well, because it was issued by a Chamber of the Kosovo Specialist Chambers. Mr. Mustafa was sentenced to 26 years of imprisonment, but after appeal, the sentence was set at 15 years.

If the Mustafa case seems to be similar in law to that of Mr. Shala, I have to say there is at least one major difference between respective situations of these two individuals undoubtedly - undoubtedly - in the position of the situation of authority that characterised Mr. Mustafa.

Throughout more than 20 years of investigation, no one has claimed to have been under order or direction of Mr. Shala or to have depended on him. On the contrary, according the most important witness of the Prosecution, Witness 01, Mr. Shala would only act

under the order, control, and direction of those who were recognised as hierarchical superior and responsible for the detention centre and its functioning in Kukes metal factory.

In light of an existence and content of such a decision, particularly in a similar case and in the specific cases concerning crimes committed in Kukes metal factory, the Defence of Mr. Shala maintains the following finding: The judgment whose appeal imposed inadequate sentence on Mr. Shala, a sentence which is also disproportionate as it establishes excessive and unjustified disparity between the faith reserved for him and that reserved for Mr. Geci, Krasniqi, and Mr. Mustafa in their own trial.

If the Trial Panel concludes that it was not bound by the practical sentencing of other international or domestic courts, it appears that the judgment issued by the Trial Panel ventured outside of the Panel's discretionary bounds and limits in imposing a disproportionate sentence.

JUDGE PICARD: Mr. Gilissen, may I interrupt you?

MR. GILISSEN: Yeah.

JUDGE PICARD: I may? So, I mean, I think your ten minutes are done now. Do you have many things to say more?

MR. GILISSEN: I cut a lot of what I had to say.

JUDGE PICARD: So are you finished now?

MR. GILISSEN: No, I would like to finish. And I, really, I swear, I am cutting a lot, really.

JUDGE PICARD: Okay. All what you said we read in your brief,

if I may say. But, of course, you have the right to explain orally to us what you want. Can you be a little bit -- can you go faster and can you finish, please?

MR. GILISSEN: Yeah.

JUDGE PICARD: Thank you.

MR. GILISSEN: Thank you very much. I appreciate. I have to say I appreciate. Yeah.

So it is the very first point I wanted to develop in front of Your Honour. But I consider that to -- it's very important to succeed to individualise the sentence because that is the best way to introduce the ability to humanise the sentence, to include what I could call "human element" to sentence, because you are sentencing a person, not a case, not a fire.

And a person is made of complex set of circumstances often experienced and suffered but not chosen by the individual itself.

Mr. Shala was, as you know, in Kosovo until the war. So all his life he was suffering of the segregation and violent oppression organised by the Serbian state. A daily life so severe, segregated, whilst apartheid system going so far as to force to lose their job to a significant part of the population on the basis that the crime was to speak Albanian. It was the only crime of these persons, and it was the only crime of Mr. Shala, to speak Albanian, to be born, to be just born in an Albanian-speaking family.

So you can have your own feeling about Mr. Shala, but I have to say don't forget that this man was also a victim, and a victim of a

policy from a state against the civilian population.

I want to focus on this context because it's essential to understand how to deal with. How do you think, Your Honours, such a violent action and criminal policy shape the victim population and individual persons? How do you think, Your Honours, such systematic issues affect people in their identity, their resilience, and what did you think are the long-term psychological effects of such an unlawful and unfair situation?

On this point, I am sure that you will sanction and amend the judgment that is on appeal because there are some, may I say, some important mitigating circumstances.

And, finally, we have to observe that the passage of time and its consequences was not taken into account in sentencing by the Trial Panel. We consider it's an error of law. The age of facts allow us to plead at sentencing as to include this reality as construction of a new life, an honourable one, in Belgium, the distance taken from any group or criminal activity, it is the case of Mr. Shala.

And, second, I must mention that the assessment of whether a reasonable time has been exceeded or not because if it is, exceeding a reasonable time limit in a judicial process has legal consequences.

JUDGE PICARD: Mr. Gilissen, really, you have to finish now.

MR. GILISSEN: Yeah, it's almost finished.

And so - and so - we consider that, indeed, it's crucial to correct this error.

I would just say one thing. We are confident you will take this aspect into consideration by sanctioning and amending the judgment by the issuing the legal process for the establishment of legal and less severe sentence.

So it's time to wrap up, as you ask me. And I just have to say we consider that the errors we mention during all this hearing must have consequences as a whole or separately. And I'm sure that justice will be served fairly and that the consequences of this error will lead to a just outcome.

Thank you very much for your patience.

JUDGE PICARD: Thank you. And thank you for the efforts you made.

May I ask now the -- may I invite the counsel for the SPO to present its response. You have until 5.30. And if you need more time, we'll see tomorrow morning. Thank you.

MR. DE MINICIS: Good afternoon, Your Honours. And good afternoon, everyone else in the courtroom.

Ms. Clanton and I will be mainly addressing the questions posed by Your Honours this afternoon. I will address those relating to Grounds 7 and 13, while my colleague those pertaining to Grounds 12 and 14.

Before that, I will just make some brief remarks about the trial. We have listened to the submissions made by the Defence, and we consider that they are mostly duplicative of submissions made in their appeal brief to which we have already responded in our response

brief. With the exception of some remarks that I will make now, we won't address the submissions further unless Your Honours want us to and have specific queries.

Mr. Shala, the appellant, was found guilty of arbitrary detention, torture, and murder after a fair trial. The evidence irrefutably established that he was at the Kukes metal factory during the indictment period, that he personally participated, with appalling brutality, in the detention and torture of prisoners. The evidence irrefutably establishes that he participated in the killing of the murder victim. The evidence leaves no doubt that he committed all these crimes with the required *mens rea*.

The Trial Panel reached its conclusions on Mr. Shala's culpability based on the evidence of 33 witnesses and over 500 exhibits. 22 of these 33 witnesses testified live and included victims who were detained at the KMF and were personally beaten by Mr. Shala, KLA members, and expert witnesses. As is evident from the judgment, the Panel carried out a careful, thorough, and transparent assessment of the evidence.

There were no bias, double standards, or preferred narratives. The Judges of the Trial Panel demonstrated sound judgment and common sense in their credibility assessments of all witnesses, looking at factors such as corroboration, bias, ulterior motives, and demeanour in court.

Prosecution witnesses provided a coherent and consistent account of their detention at the KMF and of Mr. Shala's presence and role.

Their accounts are mutually corroborating. They all testified that they were detained in the same location, subject to the same vague allegations, and heavily mistreated. Those who had the misfortune of meeting and dealing with Mr. Shala provide a clear, consistent, and measured account of his role in the crimes.

Conversely, a number of Defence witnesses gave selective and clearly implausible accounts when giving evidence under oath before the Trial Panel. One particular example which the Defence omitted to mention does not concern the location of a toilet or the position of a truck. It concerns the existence of a whole building, the building where the victims in this case were detained.

The Panel received the evidence of multiple witnesses who were detained in the detention building of the Kukes metal factory. These witnesses as well as blueprints and photographic evidence of the Kukes metal factory show that this building was located in the middle of the Kukes metal factory, in the middle of the courtyard, in a very visible location, as found in paragraphs 316 and 318 of the trial judgment.

I invite Your Honours to look at page 1 of Exhibit P17. That's a blueprint, an original document, a blueprint of the Kukes metal factory. The detention building, as found in paragraphs 316 of the trial judgment, is located between buildings marked with numbers 2 and 4 in this blueprint. That document really shows how conspicuous this building was. Now, Defence Witnesses 4280, 3887, 4754 and Defence Witness 05 were both stationed at the factory during the

indictment period, and they all denied knowledge of this building, the building that where the crimes were committed, where the murder victim was killed, where people were detained and mistreated.

Now, 3887 and DW4-05 worked for months in building number 4. Building number 4 is just right across from the detention building. When you get in and out of that building, you see the detention building every day, when you come to work and when you go home. They all denied that this building even existed.

Now, this, I think, well exemplifies how the Trial Panel's assessment of the credibility of Defence witnesses was not grounded on bias and double standards but on common sense, Your Honours. The Panel found the testimonies of this group of witnesses to be implausible given that they were all stationed and working at the KMF during the indictment period. Meaning, their categorical claims that they had never seen, noticed or could not recall the presence of a building in the middle of the yard cannot possibly be true. This is paragraph 316 of the trial judgment.

This denial was then considered with other factors, like bias or -- these factors are all well explained in the credibility section of the judgment, in order to assess their credibility.

The trial was in all respects fair and conducted in full compliance with the law, the rules, and applicable human rights law standards. The Defence spent considerable time re-arguing the issue of the statements. We have already addressed this in our response brief and during extensive litigation before both the Trial Panel and

the Appeals Panel.

Similarly, we have addressed the issues of the number of victims pleaded in the indictment, the assessment of the evidence, and the credibility of single witnesses. Now, as they did in their closing statements at trial, the Defence have decided to continue ignoring the evidence provided by Mr. Shala in the statements, which, by the way, the Trial Panel, as we submitted, only relied on when corroborated.

And so in telling you that 4733 was wrong when he identified Mr. Shala, they omitted to say that Mr. Shala himself saw 4733 at the KMF.

Again, this is all addressed in our response brief, so if Your Honours have questions, we'd be happy to answer.

Now, this phase of the proceedings is not a trial *de novo*, so it's not an opportunity for reconsideration of all evidence. It is also not an exercise in requesting the Appeals Panel to agree or disagree with the findings of the Trial Panel. Absent a finding of discernible errors in the judgment, this Panel should dismiss the appeal and uphold the trial judgment in its entirety.

I will now address your first question, which relates to Ground 7 and concerns evidence of mistreatment and inhumane detention conditions after the death of the murder victim.

Your Honours, at the outset I need to recall that Mr. Shala was not charged with any crime nor convicted of any crime which occurred after June 5th, the day of the death of the murder victim. This is

clear from the language of the indictment as well as from the verdict section of the trial judgment, which found Shala guilty of arbitrary detention, torture, and murder committed between 17 May and 5 June 1999.

So with 5 June being the cut-off date of all the charges in this case, the evidence presented at trial must be focused on what happened before then. Nevertheless, to briefly answer Your Honours' question, the evidence does show that, despite some marginal improvements in the detainees' conditions, their collective mistreatment and inhumane detention conditions did continue after June 5th. And I'm referring, for instance, to *[REDACTED] Pursuant to In Court Redaction Order F61RED.*

[REDACTED] Pursuant to In Court Redaction Order F61RED.

[REDACTED] Pursuant to In Court Redaction Order F61RED. I'm referring to the cramped condition that remained in the detention building, the heat, the scarcity of food and lack of medical care even for those who needed it.

Thus, Your Honours, the collective mistreatment of detainees and their inhumane treatment did continue after June 5th, but Mr. Shala is neither charged with it nor has the Panel convicted him for it. So should the Panel want a list of the arguments supporting the post-indictment mistreatment, we would be happy to provide it in writing or, if Your Honours want, at the end of the hearing. But unless there is a specific request in that regard, we will now move on to the second part of Ground 7.

I will now address the live evidence supporting the detention of

the four individuals discussed in paragraphs 133 to 136 of the Defence appeal brief.

Your Honours asked: The Defence challenges Shala's conviction for torture in respect of four specific individuals. What live evidence on the trial record supports or rebuts the allegation that these four individuals were detained at the KMF prior to June 5th?

I don't believe that the Defence has addressed this point. We will now.

[REDACTED] Pursuant to In Court Redaction Order F61RED. [REDACTED] Pursuant to In Court Redaction Order F61RED. [REDACTED] Pursuant to In Court Redaction Order F61RED. [REDACTED] Pursuant to In Court Redaction Order F61RED.

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[REDACTED] Pursuant to In Court Redaction Order F61RED.

Now, Trial Witness 01 was asked what detainees were in Room 1 when he was brought there the first time. The answer is that the Roma musicians --

JUDGE PICARD: I'm sorry to interrupt, but I believe we should go in private session.

MR. DE MINICIS: Okay, Your Honours.

JUDGE PICARD: So can we go in private session, please.

[Private session]

[Private session text removed]

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[Open session]

THE COURT OFFICER: Your Honours, we are in public session. Thank you.

MR. DE MINICIS: As it is clear from paragraph 87 of the trial judgment, the Panel was fully aware of the limitations that the law imposes on the use of written evidence and on the rights of the accused when it comes to his right to examine the evidence against him. And not only paragraph 87 shows that the Panel was aware of it, but, as discussed in our response brief in relation to our response to Ground 7, the Panel took great care in making sure that when relying on untested evidence, especially when it concerned the acts and conduct of the accused, always relied on it in conjunction with

corroboration.

Now, the core principle, according to the European Court of Human Rights, when assessing whether the admission of written evidence was in violation of an accused's rights is whether it formed the sole basis or had the decisive role for an accused's conviction. For example, this is a well-established principle, but it is restated in *Keskin v. the Netherlands* at paragraph 63. Evidence has a decisive role when it's of such significance or importance that it was likely to have been determinative of the outcome of the trial.

None of the evidence, for example, concerned these four witnesses. None of the written evidence, as we have shown, was considered by itself. It was not determinative in relation to findings on the single incidents, and it was certainly not determinative of Shala's overall responsibility when it comes to the crimes of arbitrary detention and torture.

There are two elements here to be considered. First is the element of corroboration, which, as shown throughout the judgment and as highlighted in our response brief, was always present in the Trial Panel's findings. Secondly, there is another principle to be considered, which was enshrined by the -- in a recent judgment of the -- fairly recent judgment of the European Court of Human Rights which is *Al-Khawaja and Tahery v. the United Kingdom*.

The principle that was established there is what -- to assess whether reliance on a piece of untested evidence violated a defendant's rights. The Court can look whether the defendant was

able to cross-examine witnesses who were victims of the same crimes by the same perpetrators.

Now, the Defence was able to cross-examine both Trial Witness 01 and Trial Witness 11, who were detained for possibly the longest period of time at the Kukes metal factory, on the same conditions, mistreatments that the witnesses introduced in writing testified about.

To conclude, Your Honours, the Defence has not demonstrated nor there is any violation of Mr. Shala's right to test the evidence against him. The Trial Panel took great care of that. And I refer Your Honours more fully to our submissions in the response brief for the details for each of the witnesses.

I've now finished with my submissions, and I give the floor to my colleague unless Your Honours have any questions.

JUDGE PICARD: Not now at least. So, please.

MS. CLANTON: Good afternoon, Your Honours. I'll be responding to your questions at Ground 12.

The first question, which my learned friend has already answered from their perspective, refers to paragraphs 208 and 209 and 212 of their appeal brief, referring to paragraphs 942 and 943 of the trial judgment. The question gave the Defence an opportunity to challenge or to explain why they had said that certain sources relied upon were relied upon in error.

To respond to this question and what we heard previously, the answer from the SPO is that the Trial Panel did not commit any error

of law. The Panel was correct to rely upon the sources of law cited in those paragraphs of the judgment and interpretation of the second and third basic procedural safeguards.

The Defence submission in their brief at paragraph 208 that the Panel simply referred to institutional guidelines is incorrect and misrepresents the judgment. We refer Your Honours to paragraphs 219, 220 of our response brief.

The Trial Panel relied primarily upon the ICRC customary IHL study, which concerns international and non-international armed conflicts, in addition to the guidance issued by the UN General Assembly, the UN Human Rights Committee, and the European Court of Human Rights. Reliance on this study has been approved by an Appeals Panel in the Thaci case, which noted that the study refers to various sources of international humanitarian law of customary nature. And this is at filing F30, paragraph 99, in Case 06, and is also found, the original source, in paragraph 154 of filing F412.

The reliance on this source by the Pre-Trial Judge was considered by the same Appeals Panel as support for its conclusion that the Pre-Trial Judge correctly found that there exists a set of basic minimum guarantees stemming from international humanitarian law that are of a customary international law in nature and must be afforded to any person detained regardless of the legality of their detention and of the international or non-international nature of the armed conflict, the violation of which constitutes a serious violation of Common Article 3.

Your Honour, here I'm referring to the same decision, F30, of 23 December 2021, paragraph 99.

I won't belabour the point. I have one more comment to make which is that this conclusion is not based solely on a review of customary international law with the assistance of ICRC studies and commentaries. It is also consistent with the jurisprudence of the ICTY Appeals Chamber.

In Prosecutor versus Karadzic, in the 11 December 2012 Decision on Appeal from Denial of Judgement of Acquittal for Hostage-Taking at paragraph 18, that chamber confirmed that one of the fundamental purposes of Common Article 3 is to provide minimum and absolute protections to detained individuals, whether combatants or not, and rejected any interpretation of Article 3 which would deprive detainees of any basic protection.

Your Honours, moving to the second part of this question for Ground 12.

The SPO understands this question to be about the Trial Panel's treatment of evidence which supported its conclusion that the detention of the KMF detainees was arbitrary and unlawful because it was not absolutely necessary, related to criminal charges or security concerns. Before addressing the evidence, I will briefly note the legal principles relevant to the assessment of detention without legal basis.

First, though, as a preliminary matter, and as explained in the trial judgment, starting at paragraph 936, there are two manners in

which the *actus reus* for arbitrary detention are found. Firstly, the *actus reus* for the crime of arbitrary detention is found where detention is without legal basis. The *actus reus* element is also met where detention is rendered unlawful by the denial of basic procedural guarantees.

This is so because the failure to abide by the principle of humane treatment makes the detention unlawful irrespective of whether there was a legal basis to detain. This has been confirmed by a Bench of the Appeals Panel in the Thaci case, decision F30, 23 December 2021, at paragraphs 97 and 99, and in the Shala jurisdiction appeal decision of 11 February 2022, paragraph 45.

It is also confirmed by international criminal law jurisprudence, including from the ICTY in Delalic, which makes clear that even if there existed legitimate reasons to detain, that detention will become unlawful absent the provision of basic procedural guarantees.

Turning back now to the legal principles for assessing security concerns.

The Trial Panel found that the deprivation of liberty is without legal basis when it is justified neither by criminal proceedings nor by reasonable grounds to believe that the security concerns make it absolutely necessary. This matches the standard from Mustafa at paragraph 647 of the trial judgment, which is supported by the jurisprudence of other international courts. I mentioned previously the Delalic case.

In the trial judgment in Delalic at the ICTY, paragraph 1134, that Panel concluded that the deprivation of liberty was without legal basis where a significant number of civilians were detained in a camp "although there existed no serious and legitimate reason to conclude that they seriously prejudiced the security of the detaining power."

To deprive a person of their liberty, the conclusion that an individual represented a security concern has to be a reasonable conclusion supported by a serious and legitimate reason. This is enumerated at Delalic trial judgment paragraphs 576 to 577, and also in the Prlic trial judgment, volume 1, paragraph 134.

Furthermore, the security concern at issue that concerned itself must be specific and serious. Meaning that not every alleged concern rises to the level of allowing for the deprivation of liberty. While espionage may amount to a serious security concern, the detaining power must have serious and legitimate reasons constituting reasonable grounds to believe the security of the state or detaining party is at risk.

Finally, to justify recourse of detention, it was also found in Delalic that the detaining party must have "good reason" to think that the individual concerned, by virtue of his or her activities, knowledge, or qualifications, represents a real threat to present or future security.

The jurisprudence shows that the evidence that a Panel can consider to satisfy itself that no security concerns justify

detention includes the evidence of the detained person. To determine whether detainees were held pursuant to serious and legitimate security concerns, the Delalic trial chamber primarily relied on witness testimony that they had not participated in any military activity and posed no genuine threat to forces that occupy the area. Witnesses had further testified to their lack of political activity and denied association with any village defence. I'm referring to paragraphs 1133 and 1134 of the trial judgment.

That trial chamber saw no reason to question the testimonies of these witnesses in reaching their conclusion that no security concerns existed. The ICTY appeals chamber subsequently endorsed this approach. Acknowledging the deference to be afforded to a trial chamber's evaluation of the evidence they have heard and to the findings of fact, the appeals chamber concluded, at paragraph 330 of the appeal judgment, that:

"It was open to the Trial Chamber to accept the evidence of a number of witnesses that they had not borne arms, nor been active in political or any other activity which would give rise to a legitimate concern that they posed a security risk."

Your Honours, similar approaches were adopted in the Stanisic and Zupljanin and Prlic trial judgments, where the respective chambers relied upon witness evidence on the profile of detainees, the circumstances in which they were initially detained, and noted that some detainees were held without evidence or indication that they had been involved in armed rebellion or subversive activities

and/or without the detaining authority making any individual assessment of the security reasons that could have led to detention. I refer here to the Stanisic and Zupljanin trial judgment, paragraphs 222 to 223; the appeal judgment in the same case, paragraphs 881 to --

THE INTERPRETER: Interpreter's note: The speaker is kindly requested to slow down. As we do not have the text, we do not have the references. It is impossible to interpret at this speed. Thank you.

MS. CLANTON: I apologise.

Appeal judgment paragraph 881 to 884; and the Prlic trial judgment volume 3, paragraph 599, 950 to 1001.

Moving now, Your Honours, to the evidence about the absence of security concerns in this case.

As noted by the Panel at paragraph 946 and 947 of the trial judgment, the accusations faced by the detainees is one indicator which shows that the levying of vague allegations was used by the Panel to support their finding that detention was without legal basis. The information provided to detainees related to the possible reason for their detention reveals that they were not detained because they could seriously prejudice or put at risk the KLA's security.

With the remaining time that I have on this ground -- or on this question, excuse me, I will give but a few examples.

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The Trial Panel heard extensive evidence that such accusations were made against multiple detainees. Being "friendly with Serbs" is

an evidently vague and imprecise claim that would not justify detention. In addition to the hollow and unsubstantiated character of these accusations, the fact that many of the detainees were subject to the same accusations undermines any argument that an individualised assessment was made in respect of their detention.

Some allegations were so farcical that they reveal that there was no real effort to determine whether security concerns existed. For example, TW4-04's interrogators asked about who he knew, his activities 18 years before his detention, and then focused the questioning on whether he had been leading the Serb army against the Albanian people. I refer to paragraph 513 of the trial judgment; P00156; and to paragraph 128 of the trial judgment for this person's personal details.

The female detainee named at paragraph 564 of the judgment was mistreated only because she was alleged to have had relationships with the Serbs. Such an accusation is not, to use the language from Delalic, a "good reason" to think that the person, by virtue of their activities, knowledge, or qualifications, represents a real threat to present or future security of the detaining power.

Similarly, there were some instances where allegations had no connection to any alleged crime or the ongoing conduct of the war. For example, W01448 was told that he was detained for not contributing enough money to the KLA. This accusation was repeated from the time of his arrest and then again during his detention. No security concern is implicated in the donations a person, an

individual made to the KLA.

Your Honours, it is relevant that the evidence before the Trial Panel included that the detainees all denied the truth of these allegations. TW4-11 vehemently denied the allegations as did TW4-01 who repeatedly testified that no one in his family was a spy or collaborator. TW4-04, *[REDACTED] Pursuant to In Court Redaction Order F61RED.*, stated that he was so shocked by this claim he had no words. Your Honours, that's at P156, page 9.

These denials made at the time and thereafter support the Panel's conclusion that no security concerns made it absolutely necessary for any of these detainees to be deprived of their liberty.

Finally, it bears mention that the conduct of the KLA at the Kukes metal factory further undermines the argument that the detainees were considered security risks. TW4-05 and three Roma musicians were allowed out of Room 1 to perform forced labour in other areas of the compound. It is illogical that persons detained on the basis of constituting a serious security concern would be permitted to leave their detention area and observe the larger operations of the KLA at that location, involving the risk of sabotage, in addition to information gathering.

Your Honours, the evidence is also unequivocal that those detained at the Kukes metal factory were not detained based on criminal charges. On their face, the accusations faced by some detainees, including serious crimes such as rape and murder, may appear criminal in nature. However, the circumstances of the

victims' detention and their mistreatment makes clear this was not the case.

For example, TW4-01 was accused of *[REDACTED] Pursuant to In Court Redaction Order F61RED.*

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[REDACTED] Pursuant to In Court Redaction Order F61RED.

[REDACTED] Pursuant to In Court Redaction Order F61RED.

[REDACTED] Pursuant to In Court Redaction Order F61RED.

While he was being mistreated, the same detainee, TW4-01, was told that if he confessed to a murder, he would be safe. This is at trial judgment paragraph 404. Such a statement is entirely inconsistent with detention related to criminal charges for murder.

As I stated before, another witness, W04733, was also accused of being a murderer and a rapist, although there is no evidence that he was provided with any specific information on the alleged victims or any other facts about these alleged crimes. He could not answer anyways as he was beaten whenever he tried. Your Honours, the accusations made against him were on their face implausible, murdering and raping hundreds, and there is no evidence that he was ever investigated for such allegations at any time.

It bears mention that in addition to the lack of precise information that was provided to the detainees, they were also not provided with any documentation authorising their arrest or outlining the crimes of which they were suspected.

The individuals who arrested W01448 did not tell him on whose

behalf they were acting. He was later told that he would be released after an interview or trial, but no trial ever took place. This is at trial judgment paragraphs 491 to 493.

Again, he was accused of not having contributed enough financially to the KLA, which undermines any argument that his detention was justified on the basis of criminal charges.

To conclude on this question, the evidence in this case supports the Trial Panel's conclusion that the detainees were not held pursuant to criminal charges or security concerns that made their detention absolutely necessary. This evidence, provided by individual witnesses, and considered against the totality of the evidence about the detention regime, was sufficient to reach this finding.

The evidence on the record and the precise finding of the Panel at paragraph 947 shows that the levying of vague allegations against detainees supported their finding that detention was without a legal basis. As the trier of fact, a margin of deference should be afforded to the Panel's conclusion about the unlawful nature of the detention of the victims in this case.

Your Honour, I will now allow for my colleague to address your next questions.

MR. DE MINICIS: Your Honours, I will now address the questions that you asked in relation to Ground 13. The first question is: Could the parties explain the *mens rea* necessary for the crime of murder and how this is affected by the mode of liability employed,

especially committing as part of a joint criminal enterprise in its basic form, what is called JCE I.

Your Honours, we agree -- I will be reducing the length of my submissions because we do agree with the Defence that the *mens rea* for murder includes both direct and indirect intent as per the definition applied by the Trial Panel and approved in paragraph 987, and approved by the Appeals Chamber in the Mustafa appeal judgment at paragraph 388.

This means that the *mens rea* for murder encompasses both situations in which the death of the victim was the desired outcome of the perpetrator's conduct in a situation where it was the consequence of the infliction of serious injury in reckless disregard for human life.

I would just, for instance, refer to the definition in Akayesu from the International Criminal Tribunal for Rwanda. They define *mens rea* for murder as "the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensures or not."

Now, it is settled jurisprudence that under customary international law both direct and indirect intent are sufficient to be convicted for murder as a war crime. I can list just but a few of the many judgments who have established that, like the Perisic trial judgment, paragraph 104; Strugar trial judgment, paragraphs 235 to 236; the Strugar appeal judgment at paragraph 270. These are all

ICTY cases.

This principle is also acknowledged in paragraph 634 of the ICRC Commentary to Geneva Convention III, Article 3, which states that both the intentional killing and causing of death of protected persons and the reckless killing or causing of their death amount to murder.

To provide one example from a case which bears similarities to the case at hand, as I will be discussing in a minute, in paragraph 908 of the Celebici trial judgment, an ICTY chamber found that the beating of a victim affected by a serious medical condition demonstrates an intent to kill or to inflict serious injury in reckless disregard for human life and it amounts to murder.

Now, Your Honours asked how this standard applies when an accused's responsibility for murder is judged under the lens of the first form of joint criminal enterprise. Well, the answer is that there is an equivalence between the *mens rea* required for murder and that required for JCE I.

Either form of intent contained in the definition of the *mens rea* for murder is sufficient for a conviction under JCE I. A *mens rea* does not change. I can provide, for example, a couple of examples -- or just one for brevity. The conviction of Khieu Samphan by the ECCC as a member of the joint criminal enterprise is illustrative of this, and this is JCE I because the pre-trial chamber of the ECCC found that JCE III did not apply, so every conviction before that court is under JCE I.

In affirming its conviction for JCE I, in paragraph 1054 of the appeal judgment in Case 02 dated 23 November 2016, the Supreme Court found that for a conviction of murder under JCE I, both direct and indirect intent are sufficient. It made then -- in application of this principle, they confirmed the findings in paragraph 1062 with regard to the accused because he knew that the killings could occur in furtherance of the common plan. And this is probability standard. I am not talking about a possibility standard, which is required for JCE III.

Thus, Your Honours, as submitted in paragraph 255 of our response brief, the Panel could have entered a conviction under JCE I both if the evidence showed, as it does, and I will get to that point in a second, that the appellant desired death of the victim, and if it showed that the appellant should reasonably have known that the victim might die as a consequence of his actions.

Just a word on the agreement between the members of the joint criminal enterprise, which Defence counsel has referred to on at least two occasions during her submissions.

Proof of an explicit agreement is not necessary under JCE, and the existence -- a plan may materialise extemporaneously and be inferred from the fact that the participants in the joint criminal enterprise act in unison towards the same goal, to put in effect the joint criminal enterprise. This principle has been first established in Tadic, paragraph 227 of the appeal judgment, and has been repeatedly upheld, for instance, in the Kvocka appeal judgment at

paragraph 96.

Now I'll get to the last part of Your Honour's question, which is if the SPO could elaborate on the evidence that was relied upon by the Trial Panel to conclude that Shala had direct intent to commit the crime of murder as part of a JCE, the first four.

Your Honours, I'd rather do this in public, and I'll be careful to only state information that is unredacted in the public redacted version of the judgment.

The Trial Panel correctly held that the JCE members, paragraph 990 of the judgment, including the appellant, Mr. Shala, paragraphs 1033, possessed direct intent in relation to murder. It bears recalling in this regard that the *mens rea* for a crime, including for murder, may be evidenced either directly or inferred circumstantially from the evidence in the case. This is a well-established principle, for example, in the Brdjanin trial judgment, paragraph 387; Celebici trial judgment, 437; and others.

The Trial Panel's finding that Mr. Shala acted with direct intent is grounded on three main circumstances: His participation in the 20 May beatings, in paragraph 132 of the judgment; his participation in the 4 June mistreatments, paragraph 1034 of the judgment; and the statements he made to 4733 when he told him that he will be executed, paragraph 1033 of the judgment.

For the reasons I will explain now, the evidence of Mr. Shala's behaviour on 20 May and 4 June leaves no doubt as to his murderous intent, and he provides powerful corroboration to the statement of

4733 that Mr. Shala told him that he will be executed.

Mr. Shala's continued participation in the beatings of 20 May 1999, in spite of the victim's pleading and repeatedly losing consciousness, is evidence of murderous intent.

Mr. Shala's actions on 4 June are, if possible, even more powerful evidence that Mr. Shala wanted the death of the murder victim.

In this regard, I invite Your Honours to consider what Mr. Shala saw on 4 June 1999 and the knowledge that accompanied his conduct. This is a very important consideration as held by the Stanisic and Simatovic appeals chamber of the MICT in the appeal judgment of 31 May 2023, paragraphs 525, 529, and 535. An accused's awareness of certain circumstances is highly relevant to assessing his *mens rea* in connection with his contribution.

The Appeals Chamber held this in the context of assessing the accused's responsibility for murder under JCE I.

So if Your Honours consider what Mr. Shala saw and knew as he engaged in the mistreatment of the murder victim, the only conclusion you will be able to reach is that they shared the intent to kill that person.

The Trial Panel found that Mr. Shala - and this is paragraph 1034 of the judgment - was present while other members of the JCE shot the murder victim, who began bleeding profusely as a consequence of the shooting. In spite of the extreme gravity of that wound, which I will discuss in a second, the perpetrators, including

Mr. Shala, continued beating the murder victim until the morning. This is a very important consideration.

Now, the testimony of several witnesses and of the Prosecution's forensic expert depict a very clear, a vivid picture of what Shala must have seen and realised at the time. A very vivid picture of the knowledge that accompanied his conduct.

The SPO forensic expert, Dr. Gasior, testified that the gunshot inflicted on the murder victim caused the total destruction of a major artery, passing through the major artery, causing extensive beating which only a correct and prompt surgical intervention could have possibly stopped. This evidence is consistent with that of other witnesses who testified that when the murder victim *[REDACTED] Pursuant to In Court Redaction Order F61RED.* *[REDACTED] Pursuant to In Court Redaction Order F61RED.* they were unable to stop the bleeding. One portion of 1448's evidence is particularly powerful in this regard in helping Your Honours to visualise the amount of blood lost, the same amount of blood loss that Mr. Shala saw. The blankets that were used in the failed attempt to stop the bleeding became all red. They became soaked in the blood of the murder victim.

Now, Your Honours, any person would have realised the critical position in which the perpetrators had reduced the murder victim after the shot. Any person. Mr. Shala, however, was not any person. He was a seasoned soldier who only a few days before the murder had driven back wounded and dead comrades from the battlefield. And this is to be found in P139, pages 141, 143 to 145. There is no doubt that he was aware of the wound suffered by the murder victim whom,

nevertheless, he continued to abuse.

This is clear evidence of direct intent, Your Honours. This evidence is also consistent with and corroborates the Panel's findings on his conduct on 20 May and on what he told another witness who, luckily, managed to escape the same fate.

To conclude, the Trial Panel correctly found that Mr. Shala had direct intent in relation to murder. However, I want to make it clear that he would incur liability for murder under the JCE I even if Your Honours were to find that he possessed only direct intent; that is, that he inflicted severe bodily harm on the murder victim which he should reasonably have known might lead to his death.

But, Your Honours, the evidence shows without any doubt that, in fact, he intended to kill him.

This, Your Honours, concludes my submissions on Ground 14. And unless you have any question, I will give the floor to my colleague to conclude our submissions in relation to sentencing.

MS. CLANTON: Your Honours, I'm mindful of the time, that you said we would go until 5.30. I do have more than nine minutes on sentencing.

JUDGE PICARD: Then I don't think we can continue this evening, so perhaps you could finish tomorrow morning. Start now ...

[Trial Panel and Court Officer confers]

JUDGE PICARD: You could start now and then finish tomorrow morning, if it's possible for you. I know it's not so easy to split an argument.

MS. CLANTON: If that is your preference, I can do that.

JUDGE PICARD: That would be okay, unless one can continue ...

[Trial Panel and Legal Officer confers]

JUDGE PICARD: So after some consultation with my colleagues and with the legal officer, what we would do now would be that we ask questions now so you can reflect to answer the questions until tomorrow morning, and you can finish on Ground 14 tomorrow morning. How long would it take on Ground 14?

MS. CLANTON: Your Honours, my estimate would be between 15 and 20 minutes. My estimate would be between 15 and 20 minutes for Ground 14.

JUDGE PICARD: Okay. So we ask the questions now, if you don't mind, and you will continue tomorrow morning.

And I understand that, Mr. De Minicis, you offered to provide references in writing under Ground 7, to question 1 under Ground 7.

MR. DE MINICIS: That's correct, Your Honour.

JUDGE PICARD: Okay. So may I ask you to provide this reference tomorrow morning.

MR. DE MINICIS: Tomorrow morning. Yes, so orally at the hearing. I'm prepared to do that.

JUDGE PICARD: In writing.

MR. DE MINICIS: In writing. Okay.

JUDGE PICARD: Yes.

MR. DE MINICIS: So to be --

JUDGE PICARD: Unless you have them in writing now?

MR. DE MINICIS: I do not.

JUDGE PICARD: No, no yet.

MR. DE MINICIS: No.

JUDGE PICARD: Okay. So tomorrow morning. Okay. You wanted to add something before we adjourn the hearing?

MR. DE MINICIS: Yes, Your Honour. I apologise for the interruption.

Earlier I talked about a portion of 1448's evidence concerning the blankets being soaked in blood. I omitted to tell the Your Honours where you can find this evidence. And I have the ERN. Unfortunately, I did not note down the P number, but it is in evidence. The ERN is SITF00013852-00013869 RED6 at page SITF00013859.

JUDGE PICARD: Okay. Thank you.

Judge Ambos will start asking questions.

JUDGE AMBOS: Thank you very much for your -- can you hear me, actually?

MR. DE MINICIS: [Microphone not activated].

JUDGE AMBOS: Okay. For your explanations. I have two sets of questions: one referring to the arbitrary detention, and the other is to JCE.

So let me start with one statement you just made, I quote:

"The jurisprudence shows that the evidence that a Panel can consider to satisfy itself that no security concerns justify detention includes the evidence of the detained person."

So two questions on this statement. First question: Are there any elements that factually distinguish the ICTY cases you referred to from the facts of this case such that the evidence of detained persons may not be conclusive to the relevant standard?

Second question: Can the parties comment on other evidence on the record that does not come from detained persons which is relevant to the Trial Panel's finding at paragraph 947 that the detainees "were not held at the KMF pursuant to any criminal charges and no security concerns made it absolutely necessary for any of them to be detained"?

So my third question now, not referring to this statement of yours, is a more hypothetical question: In a situation of armed conflict as the one we are talking about here, is it not conceivable that one party to the conflict thinks that the other party uses persons to spy on this party? So is this general situation for you a conceivable situation in this conflict, armed conflict, but generally in an armed conflict scenario; and, if so, is it conceivable that one person thinks, perhaps mistakenly, that a person from the other side of the conflict detained may be a spy? Okay? If this scenario is possible and a mistake of fact or maybe this situation.

So as to joint criminal enterprise, I have a few concerns or doubts, really.

First, are you assuming that killing detained persons was part of the joint criminal enterprise of our case? First question. If so, the intent required for the specific killing, it's the same

intent as the general intent as to the joint criminal enterprise? In other words, is there a double-intent requirement in a JCE? You know, you have a general intent as to the common purpose established and you have a specific intent to the specific crime, for example, a murder. So that would be a general -- what is your understanding on this?

And then as to the understanding of intent, because you made an interesting remark saying that there is agreement, and that also goes to the Defence, if this is so, if this is in agreement, on the understanding that the intent includes indirect intent. No, if I understood you correctly, you said there is no disagreement between the parties.

MR. DE MINICIS: We consider that it includes indirect intent.

JUDGE AMBOS: Yes.

MR. DE MINICIS: And I seem to have heard that coming from the other side.

JUDGE AMBOS: Exactly. So perhaps tomorrow you could say something on your understanding of indirect intent. And this indirect intent, what do you understand by indirect intent? That's maybe a point you could elaborate on. What is your understanding of indirect intent? I understand that you think anyway there is a direct intent on the evidence, yes, but still it would be important to know what would be your understanding of indirect intent.

So these are some questions you may reflect upon, and tomorrow we can come back to these questions. Thank you very much.

JUDGE PICARD: Thank you very much.

Now, Judge Jorgensen will have some questions for us.

JUDGE JORGENSEN: Thank you. So my question relates to Ground 7 and the Prosecution's interpretation of Rule 144(a) of the Rules. You mentioned in your submissions that untested evidence isn't determinative of any single incident in this instance, but what would your interpretation be? Do the rules permit a Trial Panel to rely solely and decisively on untested evidence to enter findings on individual charged criminal incidents as long as those incidents are not indispensable for a conviction? And if you could answer that then with reference to relevant jurisprudence. The SPO referred to the Popovic *et al.* appeal judgment, that's at footnote 501 of your brief, and the Defence cited the Karadzic appeal judgment.

So we'd like to hear some more from -- actually, from both parties on those authorities. Thank you.

JUDGE PICARD: So I think there are no more questions. So we will adjourn today's hearing now. We will reconvene tomorrow morning at 10.00, and we will start with the end of the submission of the Prosecutor under Article 14, and then with the answers to the questions. And then we'll start by hearing the Victims' Counsel's response to Mr. Shala's submissions, and then, at the end, the reply from counsel for Mr. Shala.

MR. DE MINICIS: Your Honour, may I just seek some guidance as to what our deadline is to submit the list of evidence supporting the post-indictment mistreatments in writing? It may have been that

Your Honours were clear, but I'm not clear as to when Your Honours would like us to file.

[Trial Panel confers]

[Trial Panel and Legal Officer confers]

JUDGE PICARD: How much time would you need? A few days? I don't know.

MR. DE MINICIS: Yes, that would be fine for us.

JUDGE PICARD: By Monday?

MR. DE MINICIS: Yes, of course, we will do that.

JUDGE PICARD: Thank you.

So the hearing is adjourned.

--- Whereupon the hearing adjourned at 5.36 p.m.