Friday, 16 May 2025

[Open session]

[Appeal Hearing]

[The appellant appeared via videolink]

--- Upon commencing at 10.00 a.m.

JUDGE PICARD: Good morning, everyone.

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

THE COURT OFFICER: Good morning, Your Honours. 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, like yesterday, Mr. Shala is not physically present in the courtroom but is attending this hearing via video-conference.

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

MR. GILISSEN: Good morning, Your Honour. This is the same team than yesterday. As you said, Mr. Shala is with us by videolink. So we are here, Mr. Aouini, Ms. Cariolou, Ms. Petravica, Ms. Kolbe, Ms. Goncalves, Ms. Ameziane and Ms. Mustafai, and myself, Mr. Gilissen. Thank you very much.

JUDGE PICARD: Thank you.

And now for the Specialist Prosecutor's Office.

MR. DE MINICIS: Good morning, Your Honours. For the SPO, Kimberly West, Specialist Prosecutor, Maria Wong, Line Pedersen, Max Karakul, Sarah Clanton, and myself, Filippo de Minicis.

JUDGE PICARD: Thank you.

And now for the Victims' Counsel.

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

JUDGE PICARD: Thank you.

So today we are resuming the appeal hearing concerning Mr. Shala's appeal lodged against the Trial Panel's judgment of 16 July 2024. We will proceed as follows: The schedule has been modified a little bit in order to allow sufficient time for the parties to address the additional questions from the Panel.

We will first continue with hearing the remaining submissions from the SPO with respect to Ground 14 on sentencing as well as its answers to the Panel's question for a total of 50 minutes. That will be until 10.50. We will then hear Victims' Counsel's response for one hour until 11.50. We will take a break for 20 minutes from 11.50 to 12.10. Then, Mr. Shala's counsel will have a total of 40 minutes for his final submissions as well as to address the Panel's questions from 12.10 to 12.50. We will finally proceed to hear Mr. Shala's personal remarks for ten minutes from 12.50 to 1.00.

We will now hear counsel for the SPO. You have until 10.50, 50 minutes.

MS. CLANTON: Good morning, Your Honours.

In relation to Ground 14 of the appeal, we were asked to provide our view on whether the Constitutional Court judgment issued on

17 April 2025 impacts the Trial Panel's findings on sentencing.

The Constitutional Court judgment does not impact the Trial Panel's findings on the sentence for Shala. What it does do is confirm and reinforce the correctness of the Trial Panel's sentencing analysis.

In its judgment, the Constitutional Court Chamber clarified certain requirements for sentencing. In particular, in endorsing the prior finding of the Appeals Panel that the *lex mitior* principle is only applicable to laws which bind the KSC, the Constitutional Court Chamber re-established and clarified an important principle. The determinations of the Constitutional Court Chamber are binding on the judiciary and all persons and institutions of the Republic of Kosovo.

This is the plain language of Article 116(1) of the Constitution.

Contrary to what is claimed in Ground 14 of the appeal brief, the Trial Panel did not err in interpreting the legal requirements of Article 44(2)(a) and (b). The Trial Panel duly took into account the law at the time of the offences and any subsequent more lenient law. It found that the subsequent laws, which were enacted after the commission of the crime, were equal to or more severe than the law in force from the relevant time.

It considered relevant sources of law and other principles governing sentencing before arriving at an appropriate sentence that reflects the gravity of the crimes and the totality of the appellant's criminal conduct.

Yesterday, counsel for the appellant stated that the Trial Panel erred in not applying the law from the relevant time. This is a different argument than that made in the appeal brief, so I will briefly note that it is settled law that domestic law sentencing ranges are not binding on the KSC. The Constitutional Court Chamber, the Supreme Court Chamber, the Appeals Panel, and the Trial Panels in the Mustafa and Shala cases have all confirmed this.

Previous decisions of the Appeals Panel have found that applying the law of the KSC does not breach the principle of legality. I refer Your Honours to filing F10 on 11 February 2022, paragraphs 24 to 31. In that same decision, the Appeals Panel upheld the decision of the Pre-Trial Judge concerning the foreseeability and accessibility of JCE to Mr. Shala.

Contrary to what was stated yesterday, it was foreseeable to Shala that he could be punished in 1999 as it is an obvious corollary to prosecution that the result may be punishment. The reasons include those at paragraph 36 of filing F10.

While the sentencing ranges are not set in customary international law, other courts have noted that there could be no doubt that war crimes, as among the most serious crimes, are subject to the punishment of imprisonment and attract the most severe punishments. Your Honours, I'm referring to the Mladic appeal judgment, paragraph 564, which is referring to the Celebici appeal judgment, paragraph 817.

Briefly, the SPO notes that following the clarifications from

17 April 2025 Constitutional Court judgment, the following principles govern sentencing. First, no domestic law sentencing ranges are binding on this Court. Further, *lex mitior* does not apply to Article 44(2).

Second, for the analysis under Article 44(2)(a), the contemporaneous sentencing range is from the 1976 SFRY Criminal Code. This is the conclusion of the Trial Panel and the Mustafa appeal judgment.

Furthermore, this is the case before the ICTY, which consistently found that it was not bound by the sentencing practices of the former Yugoslavia. Noting, however, that the 1976 SFRY Criminal Code was the relevant domestic law. I refer Your Honours to footnote 291 of the Constitutional Court Chamber's judgment.

Third, the sentencing ranges for Article 44(2)(b) purposes are those found at footnote 2190 of the trial judgment which are identical to those found in footnote 1284 of the first Mustafa appeal judgment. Though none of them are more lenient than the 1976 SFRY code as amended by UNMIK Regulation 1999/24 or, indeed, the law, which prescribes no minimum penalty.

The sentencing practices related to the domestic law ranges are also to be considered, and this was done at paragraph 1070 of the trial judgment. Finally, it is worth noting that the Constitutional Court's judgment endorsed the statements of law from the Appeals Panel including as found in the first Mustafa appeal judgment of 14 December 2023. Specifically, the Constitutional Court

judgment concurred with statements of law of the Appeals Bench including where the Mustafa appeals judgment conflicts with the subsequent Supreme Court Chamber legality decision.

In this regard, the SPO notes that the Shala Trial Panel mirrored the analysis in the Mustafa appeal judgment of 14 December 2023. No subsequent errors committed in the Supreme Court legality decision or in the Mustafa resentencing decision should be considered binding or even persuasive on this Appeals Panel. Following, for example, the Mustafa re-sentencing decision would only be to perpetuate an error which has been found to stem from the incorrect analysis of the applicable law by this Court's Constitutional Court Chamber.

The Defence yesterday has also challenged the correctness of Mr. Shala's statement based on other factors, including the sentences of other people and the circumstances of the accused. This challenge should be rejected both because the sentence imposed was proportionate and because Shala identifies no discernible error in the Trial Panel's analysis. The majority of the matters raised yesterday are addressed in paragraphs 262 to 268 of the response brief. I will not repeat them now.

The sentence in this case was determined with regard to the requisite factors, being the gravity and consequences of the crimes, the contribution of the accused, the personal circumstances of the accused, and for any of the factors I have named, the existence of mitigating or aggravating factors.

The trier of fact has broad discretion in weighing the relevant factors and determining a sentence.

In its sentencing analysis, the Trial Panel extensively described the gravity of the crimes and the suffering of the victims of those crimes. It concluded that both the gravity of the crimes and gravity of the consequences were high. It further assessed Mr. Shala's personal participation, noting his active role and personal mistreatment of victims, and found a high level of participation and a high level of criminal intent.

The Panel considered all relevant circumstances, including Shala's lack of a formal commanding role. The Panel considered the Defence submissions on the personal circumstances of the accused. The Panel explained how none of these circumstances warranted a reduction in sentence in this case.

The Panel provided detailed reasons for its conclusions. While acknowledging the difficulties related to the conflict experienced by the accused, it found that it could give little weight to the fact of these difficulties, and, as such, they did not warrant a reduction in sentence. Counsel's remarks yesterday that the sentence did not individualise -- I'm sorry, that the Panel did not individualise a sentence, or, put another way, consider the individual circumstances of the appellant, ignores that that analysis was conducted at paragraphs 1109 to 1118 of the judgment.

These findings I've just noted all explain and support the sentence received. The Trial Panel concluded that it was appropriate

to issue a sentence of considerable duration. The sentence imposed is well within the bounds of the Panel's appropriate exercise of its discretion. Mr. Shala's sentence does not approach the statutory maximum of life imprisonment. While no domestic law sentencing range is binding, and taking into account the domestic sentencing ranges, both those in effect at the time and thereafter, it is the case that Kosovo laws allowed for a significantly longer term of imprisonment than that of 18 years.

Importantly, the Trial Panel was entitled to impose a greater or lesser sentence than that provided for under domestic law, subject to Article 44(1).

Responding to the complaint that Mustafa, unlike Shala, had authority and received a lower sentence than Shala, it is important to recall the differences between the two cases, including in respect of the murder conviction. In Mustafa's case, the Trial Panel found Mustafa responsible based on, *inter alia*, his personal participation and lethal mistreatment which it found that he intended. This is the trial judgment paragraph 754, 818.

Mustafa was not sentenced for physically perpetrating the murder in his case. This is a completely different factual scenario than that found to have occurred with the murder in this case.

In this case, Shala was present and participating in the extremely violent beating of the murder victim. His role was as a direct, deliberate participant. The modality of participation revealed Mr. Shala's resolve and determination to kill the murder

victim.

The evidence provided by other detainees, touched on yesterday by my colleague, about the visible volume of blood loss as well as of the impaired state of the victim foreclosed any argument that Shala did not know that the murder victim was in critical condition at the critical time. This detainee, having been shot *[REDACTED] Pursuant to In Court Redaction Order F62RED.* *[REDACTED] Pursuant to In Court Redaction Order F62RED.* and thereafter beaten, subsequently died from his injuries. The Panel described the agony as an aggravating factor.

Without in any way suggesting that Mustafa's conduct was less culpable or cruel, it is important to recall what Mr. Shala did to the murder victim and the other victims in this case when given the opportunity. The 15-year sentence of Mustafa complained of by counsel for Mr. Shala is a result of the Supreme Court Chamber's legality decision, which the Constitutional Court Chamber has now determined was based on an erroneous interpretation of law. It is, therefore, not a useful or safe source of comparison.

Part of the predicate for the Appeals Panel's reduction of Mustafa's sentence was the identification of a sentencing range by the Supreme Court Chamber which was itself erroneous. The legal basis for the Supreme Court Chamber's legality decision and the subsequent re-sentencing decision thus contained legal errors which should not be replicated nor impact the correct analysis of the Shala Trial Panel.

It's been stated before but is worth noting that comparisons of

sentences and efforts to transpose the determinations of one Panel to the case of another are fraught exercises which are incompatible with the need to tailor a sentence to the particulars of a case. The dangers in attempting to compare sentences and cases in this manner has been recognised by the ICTY appeals chamber and this Appeals Panel in the Mustafa appeal judgment. I refer Your Honours to paragraph 266 of our response brief.

I noted before that one aggravating factor found by the Panel was the agony, the prolonged agony of the death of the murder victim. The Panel found two aggravating factors: The commission of crime with particular cruelty, related to the agony of the murder victim as well; and committing crimes against particularly vulnerable or defenceless persons.

The Panel noted how the cruelty employed, specifically in respect to the murder, was shown as well by the vicious mental torment inflicted on the victims. This is at paragraph 1097 of the trial judgment.

In all respects, not just the murder, the evidence on the record shows the sheer brutality of the detention and mistreatment. As a willing participant who was found, at paragraph 655 of the judgment, to have smiled while beating detainees, who was found, at paragraph 1106 of the judgment, to be the first one to hit, and who was found to share the common criminal purpose, Shala's sentence is a fair reflection of the gravity of the crimes and his role in the commission of them.

Your Honours, I would like to move to answering the questions at this time, the additional questions.

Yesterday, the first question we were asked states that: 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? And this is stemming from submissions I made that the jurisprudence of other tribunals supports that the evidence that a Panel may consider to satisfy itself that no security concerns justified detention includes the evidence coming from the detained persons.

As I noted yesterday, reliance on the evidence of detainees is found in multiple trial judgments, including the ones mentioned and in the Delalic appeal judgment.

To respond to the question, there are factual differences between cases related to location, scale, the type of perpetrators, the duration of operation of camps, just to name a few factors. However, the fact that there are different fact patterns in different cases does not mean that the evidence of detainees should be considered differently or found less probative or conclusive because of the factual distinctions or differences in the cases.

The evidence of the detainees who provided evidence in this case is direct evidence of various important matters. First, they provided direct evidence of who they were before this experience, before being detained. They provide direct evidence of the circumstances that immediately preceded the beginning of their

detention and what explanation was given, if any, for depriving them of their liberty. Many detainees provide direct evidence about the allegations made against them, including details on the setting in which those allegations were made.

Admitted evidence must meet the requirements of Rule 138. Following that, in this case, the Trial Panel conducted extensive credibility assessments of all witnesses. I'm referring to the trial judgment paragraph 71, and 96 to 283. The Panel found that the detainees' statements concerning their arrest, the layout of the detention facility, the detention conditions, the presence and mistreatment of other detainees, and the role of the KLA members were amply corroborated by mutually reinforcing testimony and statements including that of the forensic expert and of each other. I refer to the trial judgment at paragraphs, for example, 103, 123, 130, 140, 166, and 180.

It is worth noting that in the judgment the Panel notes the consistency across witnesses on the nature of their questioning. This is at paragraph 590.

Further submissions about witness credibility can be found in paragraphs 54 to 101 of our brief.

To finish answering this first question, I want to go back to something that I said yesterday. I mentioned that the Delalic appeal judgment endorsed the approach of the trial judgment. The specific words in the judgment are that following receipt of testimony from detainees, it was open to the trial chamber to accept the evidence of

those detainees.

Having heard all of these details of the individual detainees in this case, it was open to the Trial Panel to reach conclusions about the nature of the detention operation and conclude that the detainees were not detained on the basis of serious and legitimate reasons related to serious security concerns. That conclusion of the Trial Panel should be upheld unless it is shown that no reasonable trier of fact could have reached that conclusion.

With Your Honours' leave, I'll move to the second question.

Judge Ambos requested: 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?

In addition to the evidence of the detainees, the evidence of the family members supports the finding that certain detainees were not detained based on serious and legitimate reasons supporting any serious or specific security concern. Now, certain aspects of their evidence were within their personal knowledge, other aspects were from another source. The SPO has made submissions at paragraph 83 of its brief concerning the reliability of this evidence.

Out of an abundance of caution, I'd ask to go into private session briefly.

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

[Private session]

[Private session text removed]

[Open session]

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

MS. CLANTON: Your Honour's question raises an issue that's important to mention. It is a fact that detainees were held in May and June 1999 at the Kukes metal factory. This is found in the trial judgment. A plethora of evidence adduced at trial describes the Kukes metal factory, the facilities there, and the persons who were detained there.

In addition, adjudicated facts 51, 53, and 55 describe the converted premises and confirm the detention of nine of the detainees. It might seem prosaic to mention these adjudicated facts, but, bar one exception, the KLA members present at the Kukes metal factory denied having any knowledge of the detention building or of the presence of the detainees.

Yesterday, during his opening remarks, my colleague briefly noted how KLA members who worked at the Kukes metal factory, including those who testified for the Defence, were not credible on simple factual matters such as the existence of an entire building in a central location in the courtyard of a complex. As explained in detail in our response to Ground 10 at paragraphs 188 to 196, several of these witnesses had worked in this gated facility for months. They proved unwilling to acknowledge basic facts, let alone acknowledge that they knew anything about detainees.

I ask to go into private session briefly again.

JUDGE PICARD: Can we go into 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.

MS. CLANTON: Your Honours, I mention this witness and the other KLA members to explain that, in this case, members of the KLA, who were the other people present at the KMF, a military base, have proven entirely unwilling to provide full and complete accounts of anything to do with detention. The Trial Panel could not rely on the evidence of others besides the detainees and their families to determine whether security concerns could have existed for any individual detainee because those who were involved with detainees or who may know something about the detention regime denied all knowledge of basic facts about the facility.

To conclude, I refer Your Honours to paragraphs 96 to 97 of the trial judgment. There, the Panel found that the continuing pervasive climate of fear and intimidation in Kosovo, which applies against witnesses, also applies to those who are potential witnesses and

their families and, more broadly, to persons who provide evidence of crimes allegedly committed by former KLA members. The Panel described the "visible impact" this factor had on certain witnesses. This factor should also remain foremost in any determination of any negative inference that could be drawn, we would say wrongly, related to the source of evidence presented in this case.

With Your Honours' leave, I will go to the next question.

The third question of Judge Ambos concerns a hypothetical. It says that:

"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, an armed conflict ... 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? In this scenario, it's possible -- if this scenario is possible and a mistake of fact or maybe this situation."

I think this is a two-part question. And I'm sorry for butchering reading it.

First, yes, it is conceivable that members of one side of an armed conflict may think that the other side uses persons to spy on them. I referred yesterday to the fact that espionage and sabotage may be situations that constitute security concerns allowing for detention.

Second, it is conceivable that a person mistakenly thinks that a person detained from the other side may be a spy. That said, there are parts of these scenarios, as explained, and as I've understood them from the question, that are very different than this case. If I may, first, in the question it is implicit that the persons who may be spies or who may be mistakenly suspected are, in fact, persons from the other side of the conflict. There is no evidence in this case that the detainees were part of the opposing party. They were not combatants, not even former professional soldiers.

The detainee who was a retired police officer was not alleged to be linked to any part of the Serbian Ministry of the Interior involved in the conflict. He was an ordinary police officer.

I mention this because of the factual differences between the scenario suggested by the question and the facts, but also because the jurisprudence shows that being a person of military age or being alleged to support or belong to a group having opposing political views is not an adequate basis to find that an individual poses a security concern. This is found at Delalic trial judgment, paragraph 567, 576 and 577.

It is also insufficient for a detaining power to detain civilians on the suspicion that if they are free, they could theoretically in the future support the opposing party or separately undermine the security of the detaining party.

The detainees were not informed of the details of the spying allegations. Asking people if they are friendly with certain Serbs

or accusing them of having relationships with Serbs does not prove any spying allegation. If a person were to confess to being friendly with Serbs, what would that prove? Getting a confession that you have a social relationship with a person of whatever ethnic background is not determinative of your security profile.

The facts of this case do not support a finding that the decision to detain without the existence of security concerns to the requisite level was a mistake or even two or three. This is shown by the detainees, their personal circumstances, and the vagueness -- I'm sorry, the number of detainees, their personal circumstances, and the vagueness of the allegations which were made against them.

Mistakes can be grounded in legitimate and serious information which ultimately proves to be wrong, or they can be based on implausible or fanciful reasons. Given the backgrounds of many of these detainees, it was implausible that they were Serb commanders or otherwise involved in activities that posed a serious threat to the KLA's present or future security.

Your Honours, regardless of the initial assessment, the subsequent mistreatment of the detainees and the denial of basic procedural guarantees rendered their detention unlawful.

I have one more point to make, Your Honours. I am mindful of the time. Could I ask for a five-minute extension?

JUDGE PICARD: I'm sorry, but this morning it will be difficult, because we are very tight also for the hearing. So if you could try to finish on time, that would be nice.

MS. CLANTON: Okay.

I'll briefly note, then, Your Honours, that even if the initial decision to detain is lawful, the detaining party is under an obligation to establish that the personal circumstances of the individual require their continuing detention.

Your Honours, I refer to the Delalic appeal judgment where there is a discussion of the length of time that is reasonable for detaining somebody to make these assessments, with particular findings that it must be the minimum time necessary, and that what is a reasonable time is not something to be assessed solely by the detaining power.

The facts in this case show that some of the detainees were held for multiple weeks. They were beaten when they tried to answer questions. They were forced to sing Serb songs. None of these facts show that an investigation was conducted in the minimum time necessary. These facts also do not support a finding that if there was a potential legitimate mistake, it was resolved in accordance with the protections afforded to detained persons.

Thank you, Your Honours.

JUDGE PICARD: Thank you.

MR. DE MINICIS: Good morning. I will now address the questions asked by Judge Ambos and by Judge Jorgensen. I will try to do so within the eight minutes left. Perhaps we will request two additional minutes to make it ten.

Judge Ambos, yesterday, your question about JCE was broken into

three parts. The first one was whether we are assuming that the killing of detained persons was part of the joint criminal enterprise in our case. Our position is: Yes, we confirm that. The killing was part of the joint criminal enterprise in this case for the reasons explained by the Panel in paragraphs 1016 to 1023 of the trial judgment.

Second part of your question concerned the intent for JCE *vis-à-vis* that of the crimes involved in the common purpose, and you asked: If so, the intent required for the specific killing, is that the same intent as general intent as to the joint criminal enterprise? And you continued, but I think this summarises your question.

Our answer is that the intent in relation to the common purpose and that required for the crimes part of the common purpose are the same; that is, the *mens rea* of the crimes involved in the common purpose is the *mens rea* required for the JCE members. This conclusions stems, in our view, from a literal interpretation of the jurisprudence which requires that each JCE member needs to have the intent for the crimes forming part of the common plan. This is, for example, to be found in Brdjanin appeal judgment paragraph 430, on the Stanisic and Simatovic appeal judgment at paragraph 77. This also stems from the requirement that the JCE members need to share the intent of the principal perpetrators. And this is to be found in Kvocka appeal judgment paragraph 110, for cases where there is a distinction between principal perpetrators and JCE members.

The requirement that the common plan amounts -- that if the common plan amounts to or involves the commission of special intent crimes, then the JCE members need to possess the special intent for these crimes, in our view, further confirms the equivalence of the two *mens reas*.

Now, the jurisprudence is also consistent in stating that the common plan may be inferred from a plurality of persons acting in unison to put into effect a joint criminal enterprise. This is, for example, Tadic appeal judgment paragraphs 227, or Brdjanin appeal judgment paragraph 430.

In this case, the Panel correctly determined that murder was part of the common plan on the basis of the actions and statements of the JCE members. And their summary of this finding is to be found in paragraphs 1016 to 1019. These actions, for instance, include the fact that the perpetrators, on June 4th, 1999, continued to mistreat the murder victim despite the fact that he was bleeding from the gunshot wounds. Paragraphs 1016 of the trial judgment.

This evidence, however, was also correctly, in our view, relied on to establish that Mr. Shala acted with the *mens rea* required for murder. And this is to be found in paragraphs 1034 of the trial judgment. This is further demonstration that, in fact, there is often, as in this case, a complete overlap between the general intent of the common purpose and the *mens rea* of the crimes part of the JCE.

Now, I'd like to draw an example from the Khmer Rouge leadership case at the ECCC.

The Supreme Court Chamber discussion on the type of *mens rea* required for the single crimes involved in the pursuit of the common purpose confirms that JCE members need to have the *mens rea* required for those crimes. Now, I'll give the reference. This is the appeal judgment in case 002/19-09-2007/ECCC/SC dated 23 November 2016, and this is to be found in paragraphs 1054 to 1055.

For example, as far as murder is concerned, the *mens rea* requirement, as established in that appeals judgment, is satisfied both in cases where -- when the accused possessed direct intent and in cases where the accused knew that there was a substantial likelihood the murder would be committed in the furtherance of the common objective.

In this case, in the case against Mr. Shala, the Panel found that JCE members shared the common purpose to arbitrarily detain, interrogate, torture, and murder detainees at the KMF who were perceived to collaborate with, be associated with, or sympathise with the Serbian authorities, or who were considered not sufficiently supportive of the KLA effort. Trial judgment paragraph 1024.

Now, in this case, as you can appreciate by the definition of the common purpose, the common purpose is inherently criminal. And, therefore, the analysis of the common purpose *mens rea* and that for the crimes part of the common purpose is the same.

I'll conclude with a remark on something that the Defence said yesterday. They argued that there is a requirement that the JCE members shared the intent to commit -- to, for example, as far as

murder is concerned, to murder a specific individual. There is no such requirement in jurisprudence, Your Honours. No such requirements that the JCE members shared the intent to commit the particular manifestation of any crime, like, for example, to murder a specific person. This is, in our view, also evident by the rejection in the Brdjanin appeals judgment of the proposition that for JCE liability to arise, there must be an agreement between two or more persons that they will commit a crime within the statute. This is to be found at paragraph 390 of the Brdjanin appeal judgment.

I'll now move on to the last part of your question, Judge, which concerns our understanding of direct or indirect intent.

In our view, and for the purposes of this discussion, indirect intent is the one described in the second limb of the *mens rea* definition for murder adopted by the Trial Panel in paragraph 987 of the trial judgment. That is, intent is indirect when the perpetrator should reasonably have known that the wilful infliction of serious bodily harm, or, to provide another example, the denial of medical care, might lead to death. This is well-established in jurisprudence. And I can provide the examples of the Karadzic trial judgment at paragraph 448; the Hadzihasanovic and Kubura trial judgment, paragraph 31; the Delic trial judgment, paragraph 48; the Stakic trial judgment, paragraphs 587, 616; or the Perisic trial judgment, paragraph 104. These are all ICTY cases.

Now, that this state of mind satisfies the *mens rea* requirements for murder is established also in those judgments that do not

explicitly adopt or make a difference between direct and indirect intent. That is, they initiate the *mens rea* standard that we've just discussed without calling one direct or the other one indirect, such as, for instance, the ICTR case of Akayesu. And I'm referring to the trial judgment in Akayesu, paragraph 589.

This, Your Honour, concludes our answer to your question unless you have any further question for us.

JUDGE AMBOS: So thank you very much. I just want to clarify. So are you arguing that there is a double intent? Double intent, what I mean by double intent is the following: You have an intent with regard to the common purpose. You are a member of a JCE I, and you must have a mental state with regard to the common purpose. That's the first intent. Okay?

MR. DE MINICIS: Yes.

JUDGE AMBOS: And then you may arguably have a second intent with regard to the respective offence, for example, murder. So I understood from the first part of your answer that you would agree with this, what I call double intent. But from the second part, and that's -- I'm a bit confused, and I really want to know what you think, I understood that for you, if you have a JCE I, as in this case, confirmed or considered by the trial judgment, which includes killing, this in itself -- and you are a member of the JCE, and that means that you also have a common purpose and you have a *mens rea* with regard to this killing, this in itself is sufficient to be liable for a possible killing, and that not mean that you need a

second intent.

So you understand my problem? Are there two intents, or is this -- in a JCE I, which includes killing, as it is assumed here, on the basis of the trial judgment, you would not need with regard to the specific killing another intent but the intent is already anticipated or contained, so to say, in this general intent with regard to the JCE I where you are a member of?

MR. DE MINICIS: Well, Your Honour, thank you for allowing me to clarify.

First off, in this case, the intent -- the fact that Mr. Shala possessed intent to commit murder as a JCE member is inferred from the fact that he possessed the intent to kill that specific person. So in that sense, there is an overlap.

Now, on the duality of the requirement, whether there is a requirement to prove the common purpose intent and the crimes involved in the common -- and the intent for the crimes involved in the common purpose, that is also -- can be also a case-specific thing depending on how the common purpose is formulated. In cases where a common purpose contains something that is not inherently criminal, but, for example, involves the pursuit of --

JUDGE AMBOS: No, but in this case -- let's now not be hypothetical.

MR. DE MINICIS: Yeah.

JUDGE AMBOS: I mean, in this case we start from the assumption -- you just quoted the trial judgment paragraph 1024 where the

Trial Panel says the common purpose includes killing.

MR. DE MINICIS: Yes.

JUDGE AMBOS: Okay. Let's start for the sake of -- from this assumption. If this is the situation, I am a member of the JCE I. Of this JCE, being a member of a JCE which includes killings anticipates or assumes that my intent goes to the killing even if I do not prove for the specific killing the intent. And then I would not have a second intent. I only have the general intent, which is a direct intent, by the way, just in parentheses, not an indirect intent. Can you follow my -- maybe it's too complicated, but that's the issue.

MR. DE MINICIS: I can. If I may have just one second.

Your Honours, in this case it is the same intent. It is the same intent. In larger cases -- in larger-scale JCEs we may have different considerations, but in this case it's the same intent. Mr. Shala undoubtedly possessed the intent to kill the murder victim, and that is in itself also evidence of the fact that he intended murder to be part of the JCE.

JUDGE AMBOS: Thank you very much.

MR. DE MINICIS: I'm sorry, Judge. I sat down. I didn't mean to.

So, Judge Jorgensen, your question concerned our interpretation of Rule 144 on the requirement that in order to -- you asked whether -- essentially, what is our position on whether untested evidence, for example, the statement of a witness who did not appear

at trial, can be sufficient to prove an incident, a single incident which is part, for example, of a number of incidents which form the basis for a conviction, say, for torture or arbitrary detention; is that correct.

JUDGE JORGENSEN: Yes, and your view on the relevant authorities.

MR. DE MINICIS: Yes.

JUDGE JORGENSEN: So Karadzic and Popovic. Thank you.

MR. DE MINICIS: So, Your Honours, in our view, both international and criminal human rights jurisprudence allow for the possibility of establishing a single criminal incident on the basis of untested evidence if it's not the sole and decisive basis for a conviction, but I'll elaborate.

Now, in the Djordjevic, Popovic, and Karadzic appeal judgments, the ICTY upheld the principle that a single incident can be established on the basis of untested evidence when it is accompanied by some corroboration. Now, this is also a fact-specific analysis on what this corroboration needs to be. According to these judgments, it can take different forms. For instance, the form of adjudicated facts which corroborate the evidence of that single witness, or also evidence that demonstrates a pattern of conduct similar to that testified or stated by the witness who didn't appear in court. And here I'm referring to the Popovic appeals judgment, paragraph 104; Karadzic appeals judgment, paragraphs 457 and 459; and the Djordjevic appeal judgment, in paragraph 808.

Now, the application of this principle. Evidence of witnesses such as Trial *[REDACTED] Pursuant to In Court Redaction Order F62RED.*, who testified, for instance, that all the detainees in Room 1 - all of them - were beaten can provide corroboration to evidence of Rule 153 and Rule 155 witnesses who testified about similar episodes happened within the same location or in the room next to Room 1 within the same timeframe. Now, in these circumstances, reliance on their written evidence would be, in our view, entirely legitimate.

I will add that the possibility for the Defence to cross-examine witnesses such as Trial *[REDACTED] Pursuant to In Court Redaction Order F62RED.* and *[REDACTED] Pursuant to In Court Redaction Order F62RED.* who were detained at the same time of witnesses whose evidence was introduced in writing and were detained by the same perpetrators and within the same location, that also amounts to a counterbalancing factor that amounts to something that the Panel should take into account in assessing whether reliance on written evidence was appropriate.

Finally, Your Honours, I just want to conclude that, in any event, Rule 144 contains a prohibition against the use of untested evidence as the sole or decisive basis for a conviction. And this is in line with the case law of the European Court of Human Rights which defines as "decisive," evidence of such significance and importance that it is likely to be determinative of the outcome of the case. And this is, for example, most recently was affirmed in *Jaupi v. Albania*, 23369/16, in paragraph 99.

So this is the framework under which Your Honours should assess reliance by the Trial Panel on the evidence of Rule 153, Rule 155

witnesses, which, in our submission, was entirely legitimate throughout the judgment and in relation to each single fact for which this evidence was relied on.

JUDGE JORGENSEN: Thank you. That's helpful.

JUDGE PICARD: Thank you, counsel.

I would now like to invite the Victims' Counsel to present his response. You have one hour.

MR. LAWS: Your Honour, thank you. I want to start by saying that for the victims in this case, this appeal hearing marks another significant milestone in their long and arduous pursuit of justice.

At the trial, and in the closing arguments, and in their appeal brief, the Defence sought to criticise the victims who testified, labelling them as untruthful or unreliable, and considerable effort was expended yesterday in pursuit of the same aim. We reject those criticisms just as Trial Panel I rejected them.

On behalf of the victims, we want to say clearly and emphatically that their accounts have been shown to be truthful and correctly accepted as being so by the Judges who heard this case.

We have addressed in some detail in writing the Defence arguments which engage the direct interests of the victims, and we do not propose to repeat those here today in any detail. Some we will need to touch on.

But our overall submission is that there is nothing in the grounds that we have addressed that comes close to being a reason to set aside the judgment of Trial Panel I. To the contrary, the trial

judgment in this case is the product of a diligent and fair analysis, setting out in appropriately fine detail the basis for the Panel's conclusions.

We are not going to elaborate at all on what we have said in writing in respect of Grounds 4 and 7. I'm going to address you today in respect of Ground 6, and my co-counsel, Ms. Radziejowska, will address you in respect of Ground 14, the appeal against sentence, and answer your question in relation to the relevance of the Constitutional Court decision.

So that's where we are going, Your Honours, and I'm going to start then straightaway with what is called the abuse of discretion by the Defence under Ground 6.

Now, in challenging the Trial Panel's conclusions, the Defence has sought to focus on inconsistencies and on alleged difficulties in the evidence. And as I said a moment ago, a great deal of effort has gone into attempts to assail their credibility, to accuse the victims of lying, of being unreliable, and by doing so, to seek to undermine them.

At the trial, all those efforts came to nothing. The Trial Panel explicitly accepted that the victims were both reliable and credible in the key aspects of the case.

Having suffered this setback, the Defence has now widened their attack by blaming the Judges for having accepted the testimony of the victims as true. Their argument goes that the problems in the case were of such a magnitude that no reasonable Panel would have

convicted and that, therefore, this Panel must have been not impartial. And we find references to the supposed lack of impartiality at paragraphs 80, 93, 112, 196, and 203 of the Defence appeal brief.

The recurring theme is that, for reasons unknown, the Trial Panel had, and I'm quoting here, a "preferred narrative" which favoured the victims and the Prosecution. No proper basis, still less any actual evidence, has been presented to support this proposition.

The argument appears to rely on nothing more than the fact that the Judges accepted the evidence of the victims and rejected the case put forward by Mr. Shala. As such, it is an argument that cannot succeed. It is incapable of meeting the test established by the jurisprudence of this Court and summarised in the first Mustafa appeal by this Appeals Panel. And if you'll forgive me for reciting your own words to you, they were these:

"The Panel recalls that there is a presumption of impartiality which attaches to the judges of a trial panel, and it is for the appealing party to rebut this presumption on the basis of adequate and reliable evidence."

And that's paragraph 40 of the decision.

So the evidence must be both adequate and reliable. And we say we're still waiting to hear of any evidence at all to rebut the presumption of impartiality, still less any that is adequate or reliable.

So I would like to turn to the evidence and deal with some of the specific criticisms that were made yesterday of the victims' evidence. And we, of course, adopt the test set out in Article 46(5) of the Law, which I'm not going to trouble Your Honours with. Your Honours know the test very well and applied it in paragraph 24 of the Mustafa appeal decision.

A good place to start, we submit, is the credibility analysis of the Trial Panel. And I'm going to deal, first of all, with Ground 6A, relating to Trial Witness 01.

At paragraphs 98 to 118 of the judgment, the Panel makes a very detailed credibility assessment of Trial Witness 01, and it is important to stress the very compelling nature of that assessment. It brings together a significant array of different evidential material and uses it to ask whether Trial Witness 01 was credible. In paragraph 101, the Panel found that the nature of his testimony was compelling and his manner was pervasive. His account was "abundant in detail," and his demeanour impressed them too. He remained "firm and consistent," they found.

So both the content and his presentation in the courtroom impressed the Judges to a very significant degree. And those are important conclusions for them to have reached. They are the basis of a positive credibility assessment.

But what's important here is the wealth of other material that was available to them that offered support to Trial Witness 01, and there is no point in me taking you through it all. But briefly, and

looking at some of the highlights before we turn to the Defence's criticisms. Paragraph 102, the nuance of his account, the care that he took not to implicate Shala where he couldn't recall the detail of an incident and whether Shala was there. Paragraph 103, the support that his account had from other witnesses, and it was considerable. And so it goes on.

So may we move now, please, into private session so that I can address certain of the features of the submissions from yesterday more fully.

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

[Private session]

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[Open session]

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

MR. LAWS: I move on to 4733, which is Ground 6B. The Trial Panel's analysis is at paragraphs 179 to 188, and at 695. Taken together, it is fair to describe these paragraphs as being closely reasoned and scrupulously fair. Again, nothing the Defence has said or done comes close to undermining the merits of that analysis.

The high point of their argument is that when the Defence witness's testimony was found to have inconsistencies, the Trial Panel rejected it; and on other occasions, they accepted Prosecution evidence despite its apparent inconsistencies. That's an argument that becomes called the double-standard argument by the Defence.

And we suggest that the answer to that, which we've set out in more detail in our response brief - see paragraph 58 - is that not all inconsistencies carry the same weight. And that submission reflects the rules, Rule 139(2) and Rule 139(6), dealing specifically

with inconsistencies and an approach entirely reflected in the findings of the Trial Panel.

So let me move on in relation to 4733 to the criticisms, the highlights of the criticisms from yesterday.

First of all, identification. And the dark complexion is the focus of the Defence submissions, and the Trial Panel dealt with that, the Defence say, in a completely inadequate way. Simply noting, as is inevitably true, that appearances change over time, and, we would add, change sometimes in the course of a year, depending on the weather.

But it's a highly selective quotation. If one reads on in the paragraph that's being cited to, paragraph 451, there's far more to it than that. 4733 recognised Mr. Shala from photographs he had seen before the war. Mr. Shala was being referred to by other KLA members in the presence of 4733 by what he accepts to be his nickname, Ujku, the Wolf, and he was also making his distinctive wolf howl in the presence of 4733. Again, a call that Mr. Shala accepts he used by way of greeting.

On a similar theme, this question of whether 4733 was identifying Mr. Shala correctly. On page 26 of yesterday's transcript, it's said that Prosecution Witness 09 also said that this man they discovered to be Pjeter Shala came from Croatia. And that is put before Your Honours as a source of undermining material.

But if one goes to the transcript at page 1007, we'll find it's not quite as simple as that. Trial Witness 09 said that:

"One person said that he" - Shala - "came from Croatia to here ... One person told me this."

So it's somebody in his village who tells him something about Shala and where he has been, and that witness shares that information with the Panel when asked. That, we respectfully submit, can have no weight at all in any consideration of Witness 09's credibility.

At page 25 of yesterday's transcript, Defence counsel told Your Honours that *[REDACTED] Pursuant to In Court Redaction Order F62RED.*

[REDACTED] Pursuant to In Court Redaction Order F62RED.

[REDACTED] Pursuant to In Court Redaction Order F62RED. Again, that's not the whole picture. *[REDACTED] Pursuant to In Court Redaction Order F62RED.*,

but it was in the place where he was first detained. That was his evidence. That's a place called Rromanat. See paragraph 448 of the trial judgment.

All the Defence can really say is that Trial Witness 06 thought it was Kukes. And in the context of the many different humiliations and assaults that 4733 endured and then related to his family, this is a minor discrepancy. The fact that a family member may have misheard or misremembered the location of that mistreatment is no justification for asserting that 4733 was not credible.

And the same observation applies to the other criticisms of the evidence from the family.

Again, can I just emphasize one point from our response at paragraph 64. At the trial, the Defence placed particular emphasis on the inconsistencies in the testimony of 4733's family members. See the judgment paragraphs 149 to 150 for that.

If we look at the Defence appeal brief at paragraph 101, emphasis is given to the similarities in their testimony, which are said to suggest that they had been engaged in, and I quote, "jointly rehearsing their forthcoming testimony." Yesterday, the Defence submissions went back to saying that their stories don't match.

So it seems to be the case that if the stories match, there must have been collusion. And if the stories don't match, then they're unreliable. And with this approach, no group of witnesses could ever be accepted as credible by any trier of fact. What it indicates is that what is being advanced here is a generic and unhelpful argument based upon no more than a stock response to incriminating evidence.

Having been convicted on the strength of credible testimony, the Defence has, as I set out at the beginning of this address, now sought to undermine that conviction by advancing the bias of the Judges as the reason for this outcome. All they are really saying is that there must be a preferred narrative because no reasonable trier of fact could have found as this Panel did. In other words, Shala was first falsely accused and then he was falsely tried.

There is a much simpler explanation than this conspiracy theory advanced by the Defence and that is that the Panel simply got it right, that they knew the truth when they heard it, and that they could spot the obviously untruthful case being advanced on behalf of Mr. Shala.

The reality, we say, is that the Defence is driven to this serious and entirely unsupported proposition because it chooses not

to accept this obvious fact. The victims were, in all key aspects of the case, simply telling the truth.

There is a preferred narrative at play here, but it is not that of Trial Panel I.

And so we invite the Appeals Panel to dismiss the grounds that we have argued.

And unless Your Honours have any questions for me, I propose to give the floor to my co-counsel Ms. Radziejowska to address you in relation to Ground 12 and the Constitutional Court.

MS. RADZIEJOWSKA: Your Honours, in my submissions I will start by responding to Your Honours' question concerning Ground 14 of the Defence appeal, and then I will respond to some of the issues raised by the Defence in their oral submissions in relation to the alleged errors concerning sentencing.

Your Honours have asked about our views on whether Mustafa Constitutional Court judgment of 17 April 2025 impacts the Trial Panel's finding on sentencing, and our answer to this question is simple: It does not. This is because the Trial Panel's findings on sentencing are in line with the Constitutional Court's judgment.

And we completely agree with the submissions made on this point earlier today by the Prosecution. Allow me just briefly to explain our position.

The Mustafa Constitutional Court judgment has two layers of implications. The first concerns the sentencing regime applicable before the Specialist Chambers. And the Constitutional Court made it

clear that - I will note only the key findings - the Specialist Chambers uphold the fundamental rights and freedoms guaranteed in the Constitution of Kosovo, including the *lex mitior* principle. However, they do that within the autonomous legal framework of the Specialist Chambers.

The only law that must be applied to sentencing by the Specialist Chambers is the law that binds the Specialist Chambers. And *lex mitior* principle is applicable to the laws that bind the Specialist Chambers.

Finally, Article 42(2)(a) and (b) of the Law cannot be read as imposing on the Specialist Chambers an obligation to apply the sentencing ranges applied for in contemporaneous or subsequent criminal laws or codes of Kosovo. Therefore, *lex mitior* principle does not apply to Article 44(2)(a) and (b).

Looking back at the trial judgment in light of the Constitutional Court's findings, it is clear that the Trial Panel has correctly identified and interpreted the applicable law and set out the sentencing regime. The Trial Panel has correctly considered that the maximum sentence that it may impose is lifelong imprisonment. And it has correctly identified the laws applicable in Kosovo at the time of the commission of the crimes and the subsequent relevant laws or codes adopted in Kosovo. Then, it had correctly found that it is required to take these punishments provided for in Kosovo laws into account, but it is not bound by such considerations.

The second layer of implications of the Constitutional Court's

judgment concerns its impact on the new determination of Mr. Mustafa's sentence from September 2024. Specifically, whether this new sentence can be a reference for this and, in fact, any other case before the Specialist Chambers.

The decision on new determination of Mr. Mustafa's sentence was necessary because of the Supreme Court's decision on Mustafa's request for protection of legality.

In this decision, the Supreme Court found that Mustafa appeals judgment from December 2023 was in relation to the sentence in violation of criminal law. According to the Supreme Court, the Appeals Panel did not identify the more lenient sentencing range under Kosovo law to be taken into account in accordance with Article 44(2)(b) of the Law and the *lex mitior* principle.

But the Constitutional Court, in its judgment from April this year, made it clear that the Supreme Court's findings were erroneous.

Therefore, the Supreme Court's instruction for the Appeals Panel, which required Your Honours to redetermine the sentence of Mr. Mustafa and be guided by, among others, the sentencing range of 5 to 25 years envisaged under Kosovo Criminal Code of 2019 was also erroneous.

The extent to which that error was reflected, so to say, mathematically, in the calculation of the second sentence is impossible for us to determine. It is unclear what weight was given to that consideration. Nonetheless, and with respect, it is difficult to see how Mustafa's second sentencing decision can serve

as a valid point of reference. It has taken into account a factor that it should not have.

The sentence imposed on Mr. Mustafa in that decision, that is, 15 years of imprisonment, cannot be relied on as a point of reference before the Specialist Chambers. Otherwise, the Supreme Court's erroneous interpretation of the law would be perpetuated.

And, finally, Your Honours, the Constitutional Court's finding makes it clear that the appeal judgment from December 2023 has correctly interpreted and applied the law applicable to sentencing, and the Trial Panel in the Shala case was correct to have followed the Mustafa appeal judgment from 2023.

Your Honours, I will now turn to my response to the Defence oral submissions from yesterday in relation to sentencing.

First, I will address the Defence's submission that concerned Article 7 of the European Convention on Human Rights.

The Defence argues that the Trial Panel failed to apply the contemporaneous sentencing range and that it was therefore in breach of Mr. Shala's right under Article 7 of the Convention. This is at page 46, lines 22, to page 47, line 1, of yesterday's live transcript.

The Defence has further developed the argument in relation to Article 7 and suggested:

"If we consider that 1999 sentencing range is not binding, then we ... 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."

And this is at page 47, lines 9 to 12 of yesterday's live transcript.

And just to add to the Prosecution's response to this point. Your Honours, the Defence's submission omits the fact that paragraph 2 of Article 7 of the European Convention provides following:

"This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

We cannot ignore the existence of this provision.

Neither can we ignore that Mr. Shala was not convicted and sentenced on the basis of the former Yugoslavians's 1976 Criminal Code. Mr. Shala was convicted on the basis of Article 14(1)(c) of the Law, which defines war crimes under customary international law, and he was sentenced pursuant to Article 44(1), (2), and (5) of the Law.

Importantly, Article 44(2)(c) of the Law refers specifically to the second paragraph of Article 7 of the Convention. It states that the Specialist Chambers shall take into consideration the extent to which the punishment of any act or omission which was criminal according to the general principles of law recognised by civilised nations would be prejudiced by consideration of contemporaneous or subsequent sentencing ranges.

Your Honours, the Defence is wrong in suggesting that unless the 1976 Criminal Code of the former Yugoslavia is applied, Mr. Shala's rights under Article 7 of the Convention will be violated.

The second issue raised by the Defence yesterday that I will address concerns the Trial Panel's alleged failure to ensure proportionality in sentencing.

The Defence claims that this failure is manifested by the disproportion between the sentence imposed on Mr. Shala and those imposed on Xhemshit Krasniqi, Sabit Geci, and on Salih Mustafa.

As to the sentence imposed on Mr. Mustafa, we consider that the second sentencing decision should not be a reference point for the Panel for the reasons I have given earlier.

As to the alleged disproportion between the sentence imposed on Mr. Shala and those imposed on Xhemshit Krasniqi and Sabit Geci, we submit that the comparison conducted by the Defence is flawed, and it has led the Defence to a wrong conclusion.

To properly compare these sentences, one needs to look at the specific crimes for which Xhemshit Krasniqi and Sabit Geci were convicted and individual sentences imposed for each of these crimes. And for a detailed explanation and analysis of these convictions, I refer Your Honours to our response to the Defence appeal brief, paragraphs 114 to 119.

Just to give an example. The Defence omits the fact that neither Xhemshit Krasniqi nor Sabit Geci were convicted and punished for murder. Although their case concerned similar facts, they were

not convicted for the same acts.

A proper analysis of the individual sentences imposed on Sabit Geci and Xhemshit Krasniqi for each of the counts they were convicted of makes it clear and makes it clearly impossible to reach a conclusion that Mr. Shala's sentence is unreasonably disproportionate, capricious, or excessive.

Your Honours, to conclude, we stand by our submissions made in Victims' Response to Defence Appeal Brief, and we ask Your Honours to affirm the sentence and conviction imposed on Mr. Shala by the Trial Panel.

Thank you.

JUDGE PICARD: Thank you.

JUDGE AMBOS: So I have one question to Ms. Radziejowska. I hope I pronounce your name correctly. You said that this Appeals Panel, I quote, "has taken into account a factor it should not have" in its second sentencing decision on Mustafa.

Could you please tell us which factor this Appeals Panel should not have taken into account?

MS. RADZIEJOWSKA: The range of the -- the most lenient sentencing provided in the guidance of the Supreme Court. I think it was the second point of the guidance.

So it was not necessary for the Panel to identify the most lenient sentencing range and to take it into account.

JUDGE AMBOS: Thank you.

JUDGE PICARD: Thank you.

We will now adjourn the hearing for a 20-minute break. So we will reconvene at ten past 12.00.

--- Recess taken at 11.48 a.m.

--- On resuming at 12.13 p.m.

JUDGE PICARD: Welcome back. The Appeals Panel will now hear Mr. Shala's reply.

Counsel for Mr. Shala, you have 40 minutes, until 12.50.

MR. GILISSEN: So thank you very much, Your Honours. I will start, Mr. Aouini will continue, and Ms. Cariolou will finish.

I would like to make a point about yesterday. It seems that yesterday some people understood some of my words, as pronounced in the transcript of yesterday, page 55, line 14 to 18, in the official transcript of today, page 75, line 14 to 18, while I was speaking about sentencing were misinterpreted into Albanian or, at least, misunderstood by a part of the Albanian-speaking public. That's what I'm aware of.

So, Your Honours, please allow me to be very clear: I have, of course, never said that Mr. Shala, when he moved to Belgium, has quit a criminal group or some criminal activities. This seemed to have led some people to think that I said KLA was a criminal group. This is not true, of course, and this has never come to my mind or come out of my mouth. It must be clear the KLA was the people's defence and liberation group that allowed the state of Kosovo to exist today. This group never has been criminal, it is not prosecuted, and, I have to say, that it defended the population about the state aggression.

That is why Mr. Shala is proud to have been part of the KLA.

So that's what I say, that's what I repeat. Mr. Shala went to Belgium to live a life of dignity and respect of law, free of any type of criminality or illegality in Belgium. It was clear, it is clear, that's all. And I can go to my second and last point.

Your Honour, please reflect on what was done regarding the JCE in the judgment on the appeal. The JCE concerned a mode of participation in a crime, as you know perfectly well, but in any way cannot be a way to attribute or borrow criminal responsibility. A criminal responsibility must be personal, of course, based on fact committed by someone acting under a special mindset. There is no question of mixing these two elements with the situation of another individual to obtain the criminal responsibility by suction or aspiration of one to another.

So what is the established fact? I ask the question: What is the established fact committed by Mr. Shala? That would be in certain connection with death as it has occurred in the case. In a JCE I, there is no question of considering the acceptance of giving death or of the risk of a death when nothing has been established that there is a common plan to use that which Mr. Shala would have to adhere to.

If you confirm the trial judgment and the interpretation it did with JCE I, you will confirm and set up a real catastrophic evolution in law, a catastrophe that would be to allow a *mens rea* of eventually and possibility for crimes of murder to exist with a JCE I including

a crime as the murder as one of its aims.

So what's next? A conviction for crime without *actus reus* and without *mens rea*? All this hurts the principle of legality and have to -- and I have to tell it clearly. If you follow what is proposed by the Prosecutor team and the trial judgment, what is the foreseeability for the crime for the people in 1999?

So we will respectfully request that you reverse the conviction and acquit for all counts. Thank you very much.

MR. AOUINI: Thank you, Mr. Gilissen.

Good morning, Your Honours. I will briefly deal with a reply to the answer of my learned colleague from the SPO yesterday at pages 81 to 88 related to an answer to your second question, Your Honours, pertaining to Ground 7, where Your Honours requested references to live evidence as to the detention of four specific individuals.

Your Honours, I wish to reply in public, and I will endeavour not to mention any identifying information. And for that, I will follow the same order of the individuals as mentioned by the SPO so it is sufficiently clear in public session, Your Honours.

So as to the first individual referred to by the SPO, our colleagues from the Prosecutor referred to Prosecution Witness 01. But in reality, this Prosecution witness only mentions a first name of a man and a first name of the son of this name. And that's to be found at transcript pages 1433 and 1434. The rest of the hints the Prosecution attempted to collect comes from untested evidence. We don't have a last name, we don't have any specific identification of

the person, of the son, or any sons, or any origin, or any close identification of a specific individual.

This is more evident also with the second individual I would refer to as female detainee. The live evidence of the Prosecution is also, again, to Prosecution Witness 01, which is an abstract reference to, I quote, "two sisters from Gjakove," without even knowledge of any names. That's to be found at pages 1565 and 1567 -- to 1567 of the transcript of yesterday [sic].

The first name of a female detainee is mentioned in untested evidence. Only a first name. No last name is available. No mention of a sister. No mention of any village of origin. No photos of identification. Nothing. Only suppositions, algorithms, and suggestions attempted by the Prosecution which have no place in criminal proceedings.

It doesn't get better with the third individual, Your Honours, Witness 04. Again, no live evidence. And the Prosecutor refers to the same witness, Prosecution Witness 01. In fact, Your Honours, *[REDACTED] Pursuant to In Court Redaction Order F62RED.* *[REDACTED] Pursuant to In Court Redaction Order F62RED.*, and he simply denied. That's to be found at transcript page 1908.

And finishing with the fourth individual, the cherry on the cake. The Prosecution tried to qualify Prosecution Witness 11's live testimony that he was detained together with *[REDACTED] Pursuant to In Court Redaction Order F62RED.* as evidence in support of this allegation for this individual. Yet, during this testimony of this Witness 11, this witness identified another person,

Witness 4733, as *[REDACTED] Pursuant to In Court Redaction Order F62RED.* when he was shown a picture. That's to be found at transcript pages 1307 to 1309, and at page 1328.

This is telling, Your Honours, on the level of approximation and stretching we are in, as well as the danger of untested evidence without confrontation in court. The Trial Panel themselves stated in paragraph 426 that, and I quote:

"The fact that [Prosecution Witness 11] erroneously believed that [Witness 4733] was *[REDACTED] Pursuant to In Court Redaction Order F62RED.* is based on what he heard from others and could also be explained by the fact that several of the detainees held at the KMF were *[REDACTED] Pursuant to In Court Redaction Order F62RED.* and that he therefore mixed them up."

The Prosecution tried hard yesterday to fill in the blanks and stitch different fabrics, falling short of testifying themselves. But, Your Honours, the fact is that those allegations and the conviction of Mr. Shala for completed crimes on those four individuals rests solely and exclusively on untested evidence, which is unspecified and, on its own, insufficient.

Now, turning to brief answers to what was said today on three points. I would need, Your Honours, to move to private session in order to elicit my answers, please.

JUDGE PICARD: Okay. Can we move into private session, please.

[Private session]

[Private session text removed]

[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, Your Honours. I'll pass on to Ms. Cariolou now to resume and finish our submissions.

MS. CARIOLOU: Good afternoon, Your Honours.

I'm mindful of the time, so I will try to respond to as many points made and, of course, to the questions made as quickly as possible.

First, I would like to restate our position that it is not sufficient in law to argue that the members of the alleged JCE at Kukes intended to kill detainees generally, and that the murder victim was a detainee and that therefore Mr. Shala, who is deemed to be a member of the JCE, is deemed to have intended to kill the specific murder victim.

As we argued yesterday, there needs to be an alignment between the *actus reus* of the crime and the *mens rea* with regard to the particular purpose. In our case, the purpose to kill the murder victim.

Second, we were requested to address the required *mens rea* for the war crime of murder, and we recited yesterday settled case law, which is consistent with the judgment of this honourable Panel in the Mustafa case that has accepted indirect intent as sufficient for the *mens rea* of murder.

I would like to add this: The Defence does not agree that oblique intent suffices for the war crime of murder, especially in the present circumstances. Accepting oblique intent as sufficient is a legal tool, if you like. It's a legal tool designed to assist the Prosecution to fill gaps in its case when it cannot show direct intent. The same goes for the mode of liability of JCE. The combination of both in a single case lends the Prosecution such assistance which renders the whole exercise of mental acrobatics involved to make a finding of sufficient intent unfair, and this is our submission.

In any event, this discussion is *obiter* here as the Prosecution's case, which was restated yesterday and again today, is that Shala had the direct intent to kill. This appears to have been accepted by the Trial Panel. The Panel's choice, if you like, of the mode liability for the conviction on murder - namely, the first form of joint criminal enterprise - required showing direct intent. Therefore, a position on appeal questions whether the finding on Shala's intent to kill the murder victim is legally and factually sound. In our submission, it isn't.

As submitted yesterday, there needs to be an alignment between the *actus reus* of the crime, which, in this case, was analysed in the Panel's finding as to the cause of death, and Mr. Shala's cognitive state. In our submission, there isn't. And this suffices to reverse the Panel's controversial finding that Shala intended to kill the murder victim on 4 June.

The Panel found that Mr. Shala possessed the intent to kill on or about 20 May because of the degree of violence used on the detainees. However, there was no unlawful killing on that date. There needs to be coincidence of the *actus reus* and the *mens rea*, and the Prosecution must show that the *actus reus* and the *mens rea* occurred at the same time.

The Panel found that Mr. Shala had the intent to kill because of the statement attributed to him according to which Mr. Shala had told another detainee, not the murder victim, on a date other than the date that the murder victim died, that he would kill him. However,

that particular detainee, W4733, did not die at Kukes.

Lastly, the Panel concluded that Mr. Shala had the intent to kill because of his participation in the mistreatment of the murder victim after he had witnessed him being shot.

First, we repeat, the Defence does not accept that Mr. Shala was present when the murder victim was mistreated or shot. The only evidence placing him there is the controversial evidence by Witness 01 which, for the extensive reasons set out in our brief, we consider unreliable.

The fault element needs to be present with regard to each element of the *actus reus*. The evidence does not support entering a finding with virtual certainty that Shala's proven actions satisfy the required fault element. Murder is not a strict liability offence.

The Prosecution was requested by the Panel to identify the evidence showing Shala's *mens rea*, his cognitive state. If we focus on the evidence relied upon as to the night of the murder, they referred, this morning, I believe, the Panel to evidence suggesting that -- no, sorry, it was yesterday. They relied on evidence suggesting that when the murder victim was returned to the detention room at an unspecified hour, he was bleeding profusely. However, even on their evidence, Shala was not present at that detention room and is not reported to have seen the murder victim bleeding profusely.

The evidence referred to does not suffice to show with virtual

certainty the required culpable state of mind. And this is our submission.

I will now turn to address the question posed by the Panel concerning the rule that no conviction can be based solely or to a decisive extent on untested evidence.

The Panel inquired about the parties' reliance on the Popovic appeal judgment by the Prosecution and the Karadzic appeal judgment in our brief. With respect, the Prosecution today is misstating the case law.

The Djordjevic, Popovic, and Karadzic appeal judgments do not say that relying for a conviction on untested evidence is fine so long as there is, and I believe I'm quoting, "some" corroboration. No. These authorities simply do not require some corroboration. These judgments are consistent and state that corroboration is required.

And, indeed, the corroboration found sufficient in those cases was solid evidence as to a pattern of conduct.

I would like to draw the Panel's attention to paragraphs 457 and 458 of the appeals chamber judgment in Karadzic where the precise issue which is raised in the Panel's question was addressed by the Appeals Chamber.

As noted by the appeals chamber in those paragraphs and in the footnotes in those paragraphs, there is no disagreement in the case law. Popovic is consistent with Djordjevic and is consistent with settled IHL principle on point: There cannot be a conviction based

solely or to a decisive extent on untested evidence.

The Prosecution's reliance on paragraph 103 of the Popovic appeal judgment was specifically addressed by the appeals chamber in Karadzic.

Apologies, I'll slow down.

In addition, and in precisely the same vein as the reasoning adopted by the appeals chamber in Karadzic, paragraph 103 of the Popovic appeal judgment, in fact, confirms the rule. And I quote from that particular paragraph, where the appeals chamber there said that it must examine whether Popovic's and Beara's convictions rest solely, or in a decisive manner, on the untested and uncorroborated evidence of the particular witness that they were dealing with.

On this point, I would also like to respond to the reference made by the Prosecution to the grand chamber judgment in Al-Khawaja of the European Court of Human Rights.

First, Al-Khawaja is not supporting the proposition made by the Prosecution. The Panel can confirm this when it reads the reliance made by the grand chamber that examined the case to the safeguard existing in the UK law concerning reliance on untested evidence. I refer the Panel in this respect to paragraph 156 of the grand chamber's judgment, where, in addition to the safeguard offered by the rules on admissibility of evidence, which, much to my frustration, we don't have in international criminal proceedings, the grand chamber took into consideration that the untested evidence was, first, recorded in proper form; second, was supported by evidence of

a contemporaneous complaint made not only to one but to two separate persons who appeared and were cross-examined and gave entirely consistent evidence as the untested evidence; and, third, the existence of a separate complaint by another female patient of Dr. Al-Khawaja, who was a consultant physician by profession, who gave evidence that she also was indecently assaulted by Dr. Al-Khawaja in a private consultation with him, and there was absolutely no evidence of collusion. Her reliability was tested in extensive cross-examination, and, Your Honours, just to conclude, this is not what we have here at all.

Lastly, it is important to note that Al-Khawaja is a very special judgment. It is a judgment that needs to be assessed in its proper context, in our submission. It followed the UK Supreme Court's judgment in the case of Horncastle in which the UK Supreme Court --

THE INTERPRETER: The interpreters kindly ask the speaker to slow down when quoting the references. Thank you.

MS. CARIOLOU: Al-Khawaja followed the UK Supreme Court judgment in the case of Horncastle in which the UK Supreme Court declined to follow binding Strasbourg jurisprudence.

I also wanted to add this: The Karadzic appeal judgment was issued after the Al-Khawaja grand chamber judgment. The two separate opinions that are attached to the Karadzic appeal judgment indicate that there was extensive discussion on this point.

It is important to note that the appeals chamber in Karadzic,

after Al-Khawaja, unequivocally enforced the rule prohibiting convictions based solely or in a decisive manner on untested evidence as an absolute rule. This, in our respectful submission, was entirely correct.

Now, I would like to say a few words as to the question addressing or inquiring about additional evidence as to security concerns. And very briefly, in response to the submissions we heard yesterday and today, we would like to say this: That spies do not need to be combatants. Spies don't tend to visibly and openly be members, and I'm quoting, of the other side. Spies are not only to be found close to the front. Spies do not avoid refugee camps, and spies may very well and often do take refuge in refugee camps.

The submissions we heard, with respect, do not correspond to the realities of unarmed conflict. In our submission, the evidence coming from the detainees as to their questioning and whether the reasons which may have required the detention were justified evidently need to be approached with caution.

As we said just before, in international criminal proceedings there are hardly any rules prohibiting the admission of evidence. Therefore, the fact that the evidence of detainees is admissible and can't be taken into consideration on which the Prosecution relied is not surprising. However, Your Honours, and evidently, such evidence needs to be taken with caution.

The same goes for evidence of family members. We are talking about allegations that some individuals were spies. The Prosecution

response, that the suspicion was unreasonable, among other reasons, because the family members of such individuals denied that such individuals were spies. However, with respect, Your Honours, would the families of spies even know that their beloved family member is a spy? Is it not a reasonable possibility that, in fact, they wouldn't even be aware of such status?

Turning to the question about independent evidence or evidence not coming from the detainees themselves. In addition to our submission on this point made yesterday, we would like to add the evidence of Witness 10 who stated, I believe in live evidence, that the commanders at Kukes, and I quote, "investigated cases there." And this is another quote, they "did investigation work [as to] whether somebody was suspected of having been sent from Serbia to obtain information." And this was -- and I refer the Panel to the transcript of 1 May 2023, pages 1051, 1052 and, subsequently, 1067, where, in the last page I believe, the witness stated that the detainees were kept in the room as suspects "to verify if Serbia had sent somebody over to gather information or intelligence."

And perhaps another minor point. Witness 1448 stated with regard to a specific female detainee that given that we're in open session I'm not going to name -- was interrogated supposedly for having relationships with Serbs. This witness also says, and his evidence on this point is corroborated by Witness 4733, that, in fact, this particular female detainee was questioned as to whether she had information about possible links of other detainees she was

personally aware of with Serbs.

I'm not mentioning the names or any identification as to the other two detainees that this reference refers to.

Lastly, as to the Prosecution's submission about the different factual circumstances in the cases that they relied upon in their submissions before the Panel.

Very briefly, and by means of an example, we just wanted to note that evidently the facts are completely and entirely different. The Celebici case, for instance, concerned the unlawful detention of several hundred detainees, I believe 700 detainees. This is entirely different to what we have in our case, where the sheer number of detainees that were detained and suspected of posing security concerns is a factor indicating that there were concrete allegations, in our submission.

We were pleased to see that the Prosecution took our submission seriously; namely, that the Panel should have considered the length of detention. And we were very pleased to hear, I believe for the first time in this case, someone considering even roughly the length of such detention.

Your Honours, these were considerations that should have properly been addressed at trial. They weren't. Your Honours don't need the Defence to point to the possible means of redress of this error. In our submission, if the Panel is not inclined to acquit, such considerations should properly be addressed in a new trial, a new trial that takes place and applies - this time - the correct law

on arbitrary detention in a non-international armed conflict.

And, lastly, as to some remarks made today on sentencing. The second paragraph of Article 7 or the allegations that the crimes and modes of liability for which and on which Mr. Shala was convicted were part of customary international law do not change the fact on which we relied before you and we referred to in our appeal brief. I refer to paragraphs 256 and 260 of our appeal brief. There needs to be a sentence that is accessible and foreseeable at the time that the offence was committed.

Second, that sentence was, as recognised by the Trial Panel, providing for a particular sentencing range, 5 to 15 years; yet, we have a sentence of 18 years imposed on the basis of retrospective and, from the perspective of the accused, worse law that provides for a heavier sentence.

Your Honours, our position remains that this is a clear breach of Article 7. Thank you.

JUDGE AMBOS: Ms. Cariolou, I have one follow-up question on JCE I. Assuming that we have in this case a JCE I including killing, as indeed confirmed by the trial judgment, would it then not be sufficient if a member of this JCE I, like the defendant, shared the common purpose, which included killing, to convict this person for the killing?

MS. CARIOLOU: Can I quickly confer?

[Specialist Counsel confer]

MS. CARIOLOU: Your Honours, and I hope that I will be

responding to your question, in our view this would not suffice. There needs to be intent to kill a specific victim by the particular defendant, in our view, for this to be sufficient.

JUDGE AMBOS: Thank you.

JUDGE PICARD: Thank you.

The last item on the agenda of our hearing today is Mr. Shala's personal statement.

Please proceed, Mr. Shala. You have ten minutes. And I remind you of what I stated at the beginning of yesterday's hearing concerning not revealing any non-public information during your statement unless you ask for the hearing to go into private or closed session for this purpose. Please, Mr. Shala.

THE APPELLANT: [via videolink] [Interpretation] Good afternoon, everyone. I won't be disclosing any confidential information because my counsel has already been taking care of that.

Well, you gave me ten minutes, but I'm not going to use all of those ten minutes. Probably I'll be as long as five minutes.

The first point that I have to raise is that everything that has happened and that has been allegedly been related to me is totally inaccurate and is totally fake. So I'm being sentenced for 18 victims. And from those victims, they're all living, but there is only one victim out of these victims, and I'm quite confident that you know who am I talking about, and there is the other person that is dead. So it's only two persons that give testimony against me, and you consider them as being reliable.

About these two victims, and I know that you understand me, you know who am I talking about, but they have been people involved in *[REDACTED] Pursuant to In Court Redaction Order F62RED.* *[REDACTED] Pursuant to In Court Redaction Order F62RED.* and to other sources as well.

Now, *[REDACTED] Pursuant to In Court Redaction Order F62RED.* has already been squashed. But how is it possible for the Prosecution office to rely on those two people when everybody knows that those people have been included in criminal activity?

I'm not asking for mercy, dear Judges, but I'm asking for justice. I deserve justice. I have no relation, no connection whatsoever with the murder. I have not been aware of anything up until 2015, up until I've been telephoned. I mean, how is it possible for me to have an intention of killing the person when I had no information whatsoever about him?

And the Victims' Counsel was saying before that I've been -- I mean, he was referring to *[REDACTED] Pursuant to In Court Redaction Order F62RED.* as well.

I mean, *[REDACTED] Pursuant to In Court Redaction Order F62RED.* *[REDACTED] Pursuant to In Court Redaction Order F62RED.* *[REDACTED] Pursuant to In Court Redaction Order F62RED.* But I can tell you that I had no knowledge whatsoever what was happening, and I'm not aware of what has happened to this person. But the person that is allegedly been involved into doing whatever happened to the person, what has happened is that the *[REDACTED] Pursuant to In Court Redaction Order F62RED.* *[REDACTED] Pursuant to In Court Redaction Order F62RED.* *[REDACTED] Pursuant to In Court Redaction Order F62RED.*

So I just understood that *[REDACTED] Pursuant to In Court Redaction Order F62RED.* I had no idea whatsoever what had happened to this person, because, otherwise, I *[REDACTED] Pursuant to In Court Redaction Order F62RED.*

So you can consider the reliability of these persons. You see *[REDACTED] Pursuant to In Court Redaction Order F62RED.* and you can also see on whether this person is seen as reliable in the past.

I can tell you I am not guilty for what you accuse me of. I don't pretend that I am an angel, but I have no relation whatsoever to the charges that you are putting on to me and for the sentences that you have taken against me.

Thank you very much, indeed. And please do justice to me. Don't give me more or less, but please do give me the justice that I really deserve.

Thank you very much for your attention.

JUDGE PICARD: Thank you, Mr. Shala.

So this concludes the appeal hearing in this case. Before we adjourn, I would like to take this moment to thank the parties and participants and the Registry for their work on this case and their attendance today. I would also like to express my gratitude to the interpreters, stenographers, audio-visual technicians, and security personnel for their excellent assistance.

The Appeals Panel will render its judgment on Mr. Shala's appeal against the trial judgment in due course.

The hearing is adjourned.

--- Whereupon the hearing adjourned at 1.00 p.m.