

**In:** KSC-CA-2023-02  
The Specialist Prosecutor v. Mr. Salih Mustafa

**Before:** A Panel of the Court of Appeals Chamber

Judge Michèle Picard, Presiding Judge

Judge Kai Ambos

Judge Nina Jørgensen

**Registrar:** Fidelma Donlon  
**Filing Participant:** Defence of Salih Mustafa  
**Date:** 3 July 2023  
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**Public Redacted Version of the Defence Brief in Reply to  
The Prosecutions' Brief in Response to Defence Appeal and  
Victims' Counsel Response to Defence Appeal Brief F00021 with one Public Annex  
pursuant to Rule 179 (3) of Rules of Procedure and Evidence ("Rules")**

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## I INTRODUCTION

1. The Appellant, Salih Mustafa, was found guilty by a Judgment of a Trial Panel 1 of 16 December 2022.<sup>1</sup> Mr. Mustafa was found guilty of arbitrary detention, torture and murder and was sentenced to 26 years imprisonment. The Defence filed its Notice of Appeal on 2 February 2023.<sup>2</sup> The Defence filed a Defence Appeal Brief (hereafter “Appeal Brief or **AB**”) on 24 April 2023 and a Corrected Version of its Defence Appeal Brief on 2 May 2023.<sup>3</sup>
2. The present document will reply to both the Brief in Response of the SPO<sup>4</sup> (Part 1), (hereinafter “Response or **PB**”) and the Brief in Response of the Victims’ Counsel<sup>5</sup> (Part 2). It follows the same order as in their respective briefs in response.
3. The Defence persist in its entirety with the submissions put forward in its Appeal Brief. None of the submissions of either the SPO or the Victims’ Counsel changes or makes any difference to the submissions and conclusions of the Defence in its Appeal Brief.
4. Submissions put forward by both the SPO and the Victims’ Counsel must be rejected in its entirety. Essentially the SPO and Victims’ Counsel connect all of their submission to that of the wrong findings or conclusions of Judgment (hereafter the “Judgment”) of the Trial Panel I (hereafter TP).<sup>6</sup>

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<sup>1</sup> KSC-BC-2022-05/ F00494/ Judgment of the Trial Panel I of 16 December 2022.

<sup>2</sup> KSC-CA-2023-02/ F00006/ filed on 02 February 2023.

<sup>3</sup> KSC-CA-2023-02/ F00021/COR, filed on 2 May 2023 (earlier version filed on 24 April 2023).

<sup>4</sup> KSC-CA-2023-02/ F00027/ filed on 5 June 2023.

<sup>5</sup> KSC-CA-2023-02/ F00026/ filed on 5 June 2023.

<sup>6</sup> KSC-BC-2022-05/ F00494/ Judgment of the Trial Panel I of 16 December 2022.

5. The Appellant has submitted grounds of appeal and worked out each of these in the Appeal Brief. The grounds of appeal, individually and in its connection with each other either invalidate the Judgment or occasion a miscarriage of justice.
6. The core source of the Appeal Brief is obviously the Judgement and the material used in the Judgment, such as transcripts and any other case material. It has been extensively used in the Appeal Brief.
7. The Defence will single out a number of the issues raised in the respective Briefs in Response of SPO and Victims' Counsel.

## **PART 1- DEFENCE REPLY TO THE PROSECUTION BRIEF IN RESPONSE**

### **II. SUBMISSIONS**

#### SUB-GROUND 1-F

8. Witness W03594, an SPO witness, testified favourable to the Accused. However, it would occur that this witness, in course of his examination by the SPO, was confronted with his previous statement. Indeed, confronted, as this was simply not to "refresh" the memory of the witness.<sup>7</sup>
9. The Defence submits that this was to ensure that favourable testimony would be qualified as unreliable or not credible. The witness, favourable to the Appellant, would be treated as if he were "hostile" witness in the sense that favourable issues that he would mention were to be discredited. The SPO with this witness even clearly expressed that the witness: "tried consistently to downplay and belittle the

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<sup>7</sup> T. 13 October 2021, p.1216 line 23 to-p. 1224 line 1.

experience [REDACTED] suffered during this period in detention and which is in stark contrast with what [REDACTED] stated to the Prosecution at the time. We believe that this may have to do with a consequence of fear by the witness”.<sup>8</sup>

10. In fact, the witness simply testified in an opposing manner with regard to the other witnesses. This does not make [REDACTED] account unreliable or not credible. This was explained by the SPO as it believed the witness explanations of the witness explained discrepancies or reasons in an earlier statement that [REDACTED] might have been misunderstood.<sup>9</sup>

11. The same with the acclaimed consideration of the TP where it considered the witness was afraid to implicate the Accused (para 82 of the Judgment) “fear for the Accused or of other KLA members”. In fact, the witness expressed clearly that [REDACTED] did not know “whom to be afraid of”,<sup>10</sup> and in [REDACTED] testimony never expressed any particular fear.

12. The witness simply stated [REDACTED] own experiences and circumstances of [REDACTED] detention. However, [REDACTED] account for many parts contradicted the accounts of other SPO witnesses that were co-detained with [REDACTED]. In addition, the witness testified that the Appellant was not on the alleged crime scene.<sup>11</sup>

13. The Defence submits that there was no fair and impartial evaluation of the content of [REDACTED] testimony. TP lacked to give proper reasons as to why a clearly favourable account for the Accused was rejected. Even if the TP has the discretion of rejecting a witness’ testimony, such cannot be done without proper reasons given for it.

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<sup>8</sup> Ibid, p. 1222, line 7-14.

<sup>9</sup> Ibid, p. 1133, line 2-25, p. 1140 line 8-15, p. 1142, line 23, p. 1148, line 5-12, p. 1150, line 7-11, p. 1160, line 24.

<sup>10</sup> T. 14 Oct. p. 1273, line 8-13 and from p. 1273, line 25-until p. 1275, line 7.

<sup>11</sup> T. 13 October 2021, p. 1210, line 10-25.

## SUB-GROUND 1-G

14. The Oral Order was given with lack of any reasons. For a fair trial and appropriate conduct of proceedings, an order, upon request of the SPO, must set out the reasons as to why, for this witness, it was appropriate to grant the request. The Oral Order merely stated that the request was granted without providing any reasons thereof.

15. The Defence submits that it is of a no relevance whether requests or decisions are routinely made. Assurances are beneficial for a witness to the extent that he is inviolable from prosecution regarding his testimony. Any incriminating matters that the witness testifies about should therefore be used with extreme caution. The Defence submits that the TP failed to do this with regard to the parts of his testimony which directly implicated the Appellant as to his presence at the alleged crime scene location at the time the witness [REDACTED]

## SUB GROUND 1-N

16. The Defence maintains its position as taken in the Appeal Brief. The time frame for introducing any evidence in rejoinder in relation to the iMMO Reports is too short of a time period to present any such evidence.<sup>12</sup> Even though the time frame is according to the rules, it is nevertheless a time frame in which the defence cannot possibly introduce evidence of such kind.

## SUB-GROUND 2-D

17. Defence maintains that it has been the SPO's case that the detainees were kept in one building and in 1 room of that building (the "Oda"). The building has been from the start at the heart of the case.

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<sup>12</sup> KSC-BC-2020-05/F00430/ Decision of 3 June 2022.

18. The confirmed indictment served constantly as the document on the bases of which the entire case was built and the prolongation of the detention.
19. The Defence contests the SPO's position that they did not change the precise location of the detention. It is factually wrong to state that such change did not occur.
20. Contrary to what SPO claims, the documents of the Confirmed Indictment and the Pre-Trial Brief speak out about one single building. The fact that the TP says that it must be satisfied that the crimes charged took place in one or more of the buildings identified above (...) <sup>13</sup> diverts from the precise location that the SPO envisaged from the beginning. The examples of it have been extensively discussed in the AB (paras 97-119 of the AB).
21. TPs' reasoning amounts to an erroneous and incomplete establishment of facts of the case as a result of the TP acting *ultra vires*, since the Indictment has focused the whole locus of the alleged crime scene into a one building.

### GROUND 3

22. The Defence maintains its position as done in the Appeal Brief. The submissions of the SPO should be rejected.
23. The facts of the present case are that the cause of death<sup>14</sup>, time of death<sup>15</sup> (only an estimate of the period of time is given) as well as the nature of the injuries<sup>16</sup> of the deceased, never got established objectively and properly. Instead, some of these

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<sup>13</sup> Para. 372 of the Judgment.

<sup>14</sup> Ibid. 621 and 624.

<sup>15</sup> Ibid. 616, 634, 639.

<sup>16</sup> Ibid. 619.



elements were presumed, or hypothesized based on observation of some witnesses lacking any medical or forensic background.<sup>17</sup> TP inferred, on the bases of statements of the co-detainees, the condition of the Murder Victim even though after their departure there is no factual bases to rely on their statements. They cannot give any conclusive medical evaluation about the status of Murder Victim's condition. TP could not reasonably come to such conclusion.<sup>18</sup>

24. TP could not reasonable have made any findings due to a lack of objective material in which the time of death, the cause of death and the nature of any injuries were established. Any of these elements are of a decisive nature to establish that the victim was indeed murdered.
25. TP acknowledged the fact that no evidence was provided in form of an official autopsy.<sup>19</sup>
26. Nevertheless, TP concluded that the Murder Victim died as a result of the combination between the severe mistreatment inflicted by BIA members who detained him, causing serious bodily harm; the denial of medical aid by BIA members; and gunshot wounds.<sup>20</sup>
27. Moreover, the injuries, the cause of death have been attributed to the Appellant, without any indication that the Appellant was ever present at the time the deceased sustained the alleged injuries. The injuries are attributed to unknown and unnamed BIA members, or in any event none of the named BIA members were ever investigated or testified in this case. No evidence exists that the Appellant committed any act against the Murder Victim.

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<sup>17</sup> Ibid. 621,571,570.

<sup>18</sup> Ibid. 570,571 and 621.

<sup>19</sup> Ibid. 620: *"The Panel notes that no evidence was provided in the form of an official autopsy report regarding the cause(s) and modalities of death of the Murder Victim"*.

<sup>20</sup> Ibid. 624.

28. TP attributed the denial of medical aid by BIA members to the Appellant. The co-detainees, after being released, never saw the Murder Victim again. Neither did they testify about seeing any BIA members again. As TP concludes that the Murder Victim died [REDACTED],<sup>21</sup> while there is no evidence that BIA members were still present at the crime location after the release of the detainees.
29. TP attributes the murder also in the form of an omission of the Appellant, namely that he did not release the Murder Victim,<sup>22</sup> as well as that he denied medical aid to the Murder Victim.<sup>23</sup>
30. The lack of medical aid has been unjustly attributed to the Appellant even though at the time of death the Appellant or any of his subordinates were not at all present at the time of the death of Murder Victim.
31. It is a fact that, whatever injuries the deceased might have had, any of those injuries resulted in his death, in particular as none of the witnesses ever testified that the Appellant or any other BIA members ever used a gun towards the Murder Victim.
32. Therefore, no reasonable conclusion can be drawn as to the cause of death of the Murder Victim and the attribution of it to the Appellant.
33. Even in case of the above, the conclusion cannot be that the Accused intended to kill the Murder Victim, the above would rather indicate death by negligence rather than committing an act with the intent to kill someone, or intending to kill someone through the form of denial of medical aid.

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<sup>21</sup> Ibid. 639

<sup>22</sup> Ibid. 636

<sup>23</sup> Ibid. 637

34. The Defence submits that TP's satisfaction that extreme mistreatment coupled with lack of medical aid were substantial causes of the victim's death is of a speculative nature rather than based on fact. The reason for this is that the time of death of the Murder Victim, as admitted by TP itself, was never established. In addition, no ballistics test or [REDACTED] ever took place to conclusively establish the time and cause of death.<sup>24</sup>
35. The Defence submits that no reasonable Court could have arrived to TP's conclusion that the accused's decision to neither release nor to evacuate the Murder Victim effectively equalled the decision to kill him. In other words, individual criminal responsibility cannot be based on speculations by making equal all individual behaviour and social phenomena (war, conflict, military offensive etc.). It should be built instead on detailed descriptions of individual behaviour and specific circumstances describing us to how they relate to the criminal conduct and intent of the Appellant. This was not the case with the TP.
36. Lastly, even the TP considered another possible cause of death, however rejected it and nevertheless attributed the death of the Murder Victim to the Appellant. In the Judgment one can read the following in para. 637:
- In light of the above, the Panel finds that, while the most probable conclusion is that the BIA members fired the bullets at the Murder Victim before leaving the ZDC, this is not the only reasonable conclusion based on the totality of the evidence. There exists, in fact, a reasonable doubt as to whether the bullet holes identified on the Murder Victim's body can be attributed to the BIA members or to the Serbian troops. The Panel considers that this doubt is not imaginary. Rather, it has a rational link to the evidence indicating that the Serbian forces fired at the ZDC, and to the lack of evidence as to whether or not the Murder Victim was moved, and if so when, from the detention barn after he was last seen by his co-detainees, as well as the lack of evidence as to when he died; ...*

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<sup>24</sup> Ibid. 626

and in para. 638:

*However, even if the gunshots were attributable exclusively to the Serbian forces, the Panel considers that this would not relieve the Accused of his responsibility, as he had, in his capacity as overall and only BIA commander at the ZDC, full decisional powers regarding: (i) the severe mistreatment inflicted against the Murder Victim by his BIA subordinates; (ii) the denial of medical aid to the victim; and (iii) the refusal to either release him together with the other detainees or to evacuate him with the wounded, in light of the impending Serbian offensive. In this perspective, firing directly at the Murder Victim or putting him in a position to be fired at by the advancing Serbian forces — by abandoning him without protection in a near-to-death state at the ZDC — leads exactly to the same conclusion, namely that the required causation between the Accused's acts and omissions and the death of the victim remains unaffected. This is the case because the extreme level of mistreatment to which the Murder Victim was subject, jointly with the denial of medical aid, in the context of the Accused's decisions to neither release nor evacuate him, constitute substantial causes of the victim's death, irrespective of whether the victim was hit by one or more Serbian bullets. As a consequence, the Accused bears responsibility for the Murder Victim's death.*

37. The Defence submits that by not considering such possibility TP's assessment on the death of Murder Victim has erroneously implicated the Appellant, whereas other possible perpetrators were excluded by its reasoning. The Defence submits that no reasonable court could have arrived to TP's conclusion as it established its conclusion on an erroneous and incomplete establishment of factual situation.

#### SUB-GROUND 1-B

38. The Defence submits that at the time of the interview of the Appellant, no specific indictment or charges were levelled against him. Since he was not aware of a precise nature of an indictment against him or whatever criminal charges to be levelled against him, how could he as a suspect be aware of details of his actions

and of their implications for him. In other words, statements of the Appellant given at any stage before the filing of an indictment should not be taken for granted as to their precision.

39. If one is unaware of the precise nature of the charges and the acts that one is suspected of, one's statements should be also viewed within this context. If the level of detail is not provided to the suspect, then the suspect can hardly be expected to be precise in his answers. His statements will equally lack detail and precision regarding his acts, whereabouts, authority, the fact whether appellant knew certain people (e.g., detention centres, detainees) or whether he had any reason or motive to act as in later on alleged charges.

40. Therefore, it is not appropriate to place reliance upon the suspects' interviews while he is unaware of the precise nature and cause of the allegations against him. TP nevertheless used the statements of the Appellant without taking into the account this context. The Defence submits that usage of such statements without placing them in this proper context seriously damaged the integrity of the proceedings.

#### SUB-GROUND 1-C

41. The Defence maintains its position on the submissions made in the Appeal Brief. The Defence submits that there is no probative value in showing photographs to the witness W01679 as TP did. TP also used it as evidence in the Judgment. In the terminology of the TP, the witness unequivocally recognized the accused as Cali: "...Lastly, when shown photographs of the Accused in court, W01679 unequivocally recognized the Accused as Cali.<sup>25</sup>

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<sup>25</sup> Para. 541 of the Judgment

42. However, the records only show that W01679 did not do so but only said that the person on the photo resembled the Accused.<sup>26</sup>
43. In sum the Defence submits that relying on such evidence is not in line with the proper integrity of the proceedings.
44. The Defence submits that where a witness only states that a person resembles his perpetrator, no reasonable inference can be drawn from such answer, as the TP did in this case. Taking for real the testimony of someone who states that the person on the photograph resembles the perpetrator seriously violates or damages integrity of the proceedings and leads to great factual error, since it prevents the TP to holistically evaluate the evidence before it.

#### SUB-GROUND 1-D

45. The Defence maintains its position on the submissions made in the Appeal brief. TP relied on the List of Prisoners; however, the Defence submits that it is wrong to rely on documentary evidence of a document which lacked indicia of authenticity and reliability. This is not a matter of disagreement with TP evaluation. Reliability of a document that was not researched in any manner cannot be taken for granted as it lacks the above-mentioned indicia.
46. The inference that appeared in the words “for Cali” in the document does not connect the Appellant to the people that appear on the list. In fact, the apparent page on which the words “for Cali” appeared it is not established that this page actually belongs to the pages on which the people appear who allegedly were detained. Lastly, the list itself does not connect in any manner that the people appearing on that list were detained at the crime scene location. Therefore, the

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<sup>26</sup> T. 5 October 2021, p. 1005 line 14-15 and line 24.

Defence submits that the inferences in which the appellant is connected to both the people on the list as well as to the location of the “ZDC” could not reasonably be drawn from the document.

#### SUB-GROUND 1-E

47. The Defence noted indeed an error in its AB. Victims’ Counsel correctly pointed this out. Witness W04712 is not deceased; he is alive but he never testified in the court. It is witness W04648 [REDACTED] that is deceased. His self-written statement should not have been relied upon. The same counts for W07412 who only gave a statement to the SPO.
48. Lastly the statement of [REDACTED] was used as evidence. He was indeed present at the place and the time of the apprehension of the Murder Victim; however, he was not in any manner a witness as to what happened later to the Murder Victim.
49. That being said, witness W04390 [REDACTED] provided evidence confirming the account of W04391. [REDACTED]confirmation however was based on hearsay evidence that [REDACTED] would have heard from [REDACTED].
50. The Defence maintains that the credibility of the testimonies of the witnesses W04712, W04648 and the statement of [REDACTED] cannot properly be relied on. As to the first witness W04648 [REDACTED] the Defence notes, that his testimony is self-made and has never passed a cross examination validity test or similar threshold legally valid at the time of its production. The same counts for W04712 and for [REDACTED].
51. Such evidence therefore cannot be relied on regarding any factual situation.

## SUB-GROUND 1-H

52. The Defence maintains its position on the submissions made in the Appeal Brief. The SPO does not respond to those, but instead focusses on the issue of the discretion of the TP to assess evidence.
53. From paragraphs W04600 it is clear that the TP relied on the testimony of W04600, but to the extent that his was corroborated by [REDACTED].<sup>27</sup>
54. However, on the key factor, where W04600 implicated the Appellant, TP relied on his evidence without any such corroboration. W04600 testified about the existence of an “Order” (from [REDACTED] to arrest the Murder Victim), but the existence of such “Order” was never corroborated. It was certainly not corroborated by [REDACTED], to whom the TP specified it would rely when assessing the testimony of W04600.
55. Corroboration by W04603, the one who accompanied W04600 when they apprehended the Murder Victim, is also non-existent. W04603 only learned that the alleged “Order” existed, through the same source, namely from W04600.
56. The W04603’s account of (existence of) the “Order” is only hearsay evidence with his only source being W04600.
57. The W04391 could not possibly have corroborated the existence of an order as his testimony simply states that when he went to look for [REDACTED] (Murder Victim), he met W04600, who told him that “it was an Order, even though W04391 specifically asked about whether there existed an arrest warrant for

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<sup>27</sup> Paras. 100-106 of the Judgment



[REDACTED].<sup>28</sup> Hence, W04391's account does not corroborate at all the existence of any such "Order".

58. As W04600 testified that he delivered the Murder Victim to the "BIA base" and handed him over to an (unidentified) "BIA member nicknamed "[REDACTED]" and stating: "[REDACTED] told us to bring this person here to you".<sup>29</sup> Upon this moment W04600 would have greeted the Appellant, thus placing the Appellant on the alleged scene at the time of this alleged hand-over. The implication of this entire situation for the Appellant is highly relevant as the panel concludes that the Appellant was present at the alleged detention location on [REDACTED].<sup>30</sup>

59. It remains the position of the Defence that the existence of an "Order" has not been corroborated at all. In particular not by the one who allegedly issued the "Order".

60. TPs failed to recognize the need for and thereafter exercise special caution before placing reliance upon the testimony of the testimony of W04600, in particular where he implicated the Appellant.

61. The Defence recognised the wide discretion of the TP in the evaluation of the uncorroborated evidence, which it may consider as credible if supported by other circumstantial evidence. The object of this evidence was the existence - or not- of oral "Order". The testimony of W04600, it is very clear, was not corroborated by [REDACTED]. Therefore, the TP had no discretion whatsoever to give credence to the testimony of witness W04600.

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<sup>28</sup> Ibid. 460

<sup>29</sup> Ibid. 468

<sup>30</sup> Ibid. 473

## SUB-GROUND 1-I

62. In ground 1H the Defence already contested TP's unreasonable and unfounded reliance upon the testimony of W04600. Similarly, the TP placed reliance upon an alleged conversation between W04600 and the Appellant. The reliance extends to an intent that would have allegedly existed with the appellant as for the killing of the Murder Victim, and contributing to an alleged *mens rea* existing with the Appellant.
63. The Defence submits that no reasonable court could have come to place reliance to the statement of W04600 as this was never admitted by the Appellant. It certainly has impact for the Appellant as the intent (to kill the Murder Victim) is derived from this conversation. In para. 492 TP states that it fits the evidentiary picture that the Appellant intended to kill the Murder Victim.
64. The Defence contests the reasoning of the TP in this regard. An alleged conversation, that allegedly took place [REDACTED] cannot possibly attest to the (alleged) intent to kill a person. It seems a retroactive establishment of the intent to kill.
65. The conversation referred to by the Panel can "at best" attest to the fact that possible proceedings simply would not or could not go ahead. The alleged words of the Appellant as described: [REDACTED]"<sup>31</sup>, the TP cannot infer or conclude from it any intent to kill.
66. Once again, this alleged conversation is uncorroborated (not even by family members). The Appellant is clearly implicated by W04600 since [REDACTED] the

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<sup>31</sup> [REDACTED]

Murder Victim. TP wonders as to how could a testimony of the witness,<sup>32</sup> himself implicated in the [REDACTED], be fabricated or embellished. TP by considering the exchange as wholly plausible for the simple reason that within that conversation the TP construed the intent to kill, contained in an abstract thought of the Appellant allegedly aiming [REDACTED] in the case of the Murder Victim.

67. The quoted conversation cannot in any manner be relied upon, and the TP erred where it placed reliance on it given the fact that the Appellant never admitted to [REDACTED] with W04600. The implication that TP gave in the mentioned paragraph in the context of the existence of a mental element existing by the Appellant is in the opinion of the defence a conclusion or inference that cannot be drawn from it, especially considering the non-existence of any admission to such by the appellant. TP could not have reasonably relied on the claimed conversation.

#### SUB-GROUNDS 1-J,2-I,2-J,2-K,2-L,2-M,2-N

68. The SPO in its PB combined its discussion of these sub-grounds altogether (paras. 71 until 87 of the PB).

#### SUB-GROUNDS 1-J,2-I and 2-J.

69. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

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<sup>32</sup> Ibid para. 694

## SUB-GROUND 2-K

70. Regarding the response of the SPO in its PB to this sub-ground the Defence notes that SPO in its para. 83 alleges that the AB does not have merits since Mustafa and his Defence should have been aware of the provisions of the Rule 139. However, the Defence stresses that Rules 137 and 139 do not relate neither elaborate in their content the case law as indicated under footnotes (51 to 59) of para 35 of the Judgment. Those criteria for the evaluation of credibility and reliability of the evidence became known to Mr. Mustafa and its Defence only upon rendering of the Judgment. In other words, Mr. Mustafa and his Defence were prepared based on Rules 137 and 139 to thrash out the matters of admissibility of evidence and not credibility and reliability in the manner as are presented in the Judgment (post-festum).

71. Therefore, the Defence maintains its position as elaborated under Ground 2-K- paras 204 to 209 of the AB. The Defence cannot anticipate on factors designed beyond the scope of the Rules 137 and 139.

## SUB-GROUNDS 2-L, 2-M AND 2-N

72. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

## SUB-GROUND 1-K

73. With regards to what SPO submitted to this sub-ground in para. 88-90 in its PB, the Defence submits the following:

74. A possible and sudden financial motive can never be excluded in a criminal case. Even though W03593 in his testimony indeed stated [REDACTED],<sup>33</sup> nevertheless [REDACTED].
75. The Defence questioned W03593 extensively but it remains unclear how the witness could assert that the Appellant was the perpetrator of the fact on which he testified. The witness just testified [REDACTED]: [REDACTED]. [REDACTED]? [REDACTED].”,<sup>34</sup> even though he was unable to explain [REDACTED], as he could not describe his perpetrator, identify him or otherwise give objective factors for the reasons of his knowledge that the Appellant was “his” perpetrator. He did not come further than saying that [REDACTED], but at the same time he was not willing to tell [REDACTED]. The witness was unable to explain it. It is therefore all the inexplicable that in the [REDACTED].
76. It is not true what the PB asserts in para 90 that the TP was not supposed to address the issue of the compensation of the victims because it was not raised in final arguments of the defence. The truth of the matter is that TP should have evaluated the credibility and reliability of each and every witness.

NO DISCERNIBLE ERROR IN TP’S FINDINGS  
SUB-GROUND 1-A (Armed Conflict)

77. In the PB, paras. 91-96, the SPO submits its position. Apart from paragraph 95, the rest of the paragraphs misinterpret allegation from the AB. This remains to be evaluated by the Appeals Chamber.

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<sup>33</sup> [REDACTED].

<sup>34</sup> [REDACTED].

78. In paragraph 95, second sentence, the PB reiterates the views of TP that “as of the end of May 1998 an armed conflict existed in Kosovo between the Serbian forces [...] and the KLA. This armed conflict continued at least until June 1999”. This is wrong. The whole idea of the AP is that once NATO started its air military campaign against Milosevic regime on 24 March 1999, the conflict became an international one absorbing the internal conflict and lasted until 10<sup>th</sup> of June 1999. After this date no conflict has existed that can be legitimately claimed according to the standards of international criminal law.
79. The conflict being international between 24 March – 10 June, 1999, intensity of the armed confrontation has been different as have been human actions, meaning that KLA activities during this period have been decreased substantially.
80. In light of these circumstances should be evaluated the findings of the TP in its Judgement appealed by the accused. Therefore, the Appellant firmly stands behind the AB as to these contested grounds from the PB, dismissing them altogether as unfounded.

NO ERROR IN TP REJECTIONS OF MUSTAFA'S ALIBI  
SUB-GROUNDS 1-L AND 1-M

81. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB

SUB-GROUND 2-O

82. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

NO ERROR IN TP'S FINDING ABOUT BIA'S CONTROL OF THE ZDC  
SUB-GROUND 2-A,2-B and 2-C

83. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

84. In relation to the inference and suggestion of the TP that the BIA allegedly had "control of the ZDC" the Defence submits that this does not flow from the statement of the Appellant

85. Neither in 069044-TR-ET part 8, pages 1 to 4 nor from the footnotes referred in para 349 in the Judgment,<sup>35</sup> one can read or infer that the Appellant stated that "*BIA occupied a specific compound, with a safe house*". The formulation that BIA occupied a specific compound suggests as if BIA or the Appellant would have had control over the compound.

When questioned by the SPO about the issue at hand the Appellant replied as follows:

"Q. [REDACTED].

A. [REDACTED].

Q. [REDACTED].

A. [REDACTED]"<sup>36</sup>

With this clarification of the statement of the Appellant about the control over the ZDC, the Defence maintains to its position as outlined in its AB.

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<sup>35</sup> Para. 349 of the Judgment: Footnote 709: Mr. Mustafa: 069404-TR-ET, Part 8, p. 1, line to 19 to-p. 4, line 15; Footnote 710: Mr. Mustafa: 069404-TR-ET, Part 3, p. 14, lines 14-15; p. 18, lines 19-22; Part 7, p. 5, lines 11-12.

<sup>36</sup> [REDACTED].

NO ERROR IN TP FINDINGS ABOUT THE LOCATION OF THE ZDC.  
SUB-GROUND 2-E and 2-H as well as SUB-GROUNDS 2-F and 2-G

86. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

NO ERROR IN TP'S FINDINGS ABOUT MUSTAFA'S PRESENCE AT ZDC OF 1ST OF APRIL 1999  
SUB-GROUND 2-P

87. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

GROUND 3 (MURDER) UNDER COUNT 4  
MUSTAFA'S SUBMISSIONS UNDER-GROUND 3

88. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

SUB-GROUNDS 4-A and 4-B

89. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

SUB-GROUND 4-C

90. In paragraph 162, PB alleges that, *inter alia*, "the principle of *novus actus interveniens* is unique to Anglo-American Common Law jurisdictions and does not reflect customary international law." It admits itself that there has been a wrong



application of material law, basing its judgement entirely on principles of one legal system, e.g. Anglo-American Common Law. The Law on Special Chambers does not belong to the material law of the Common Law system. Besides this, it is international customary law that applies, not specific legal national system. Whether Mustafa would have been liable based on material law of certain national legal systems, as the PB says in this paragraph, remains a speculative allegation to be discussed from a sociological point of view, which, in view of the Appellant, is not relevant for the purposes of the Appeal in this case.

91. In paragraph 167, the PB states *inter alia*, that “[...] In the case of the former, no question of causation arises. The latter version of events was nevertheless a natural and foreseeable consequence of the acts and omissions of MUSTAFA and his subordinates.” After this line, the PB describes actions by Mustafa saving civilians. Based on this statement, Mustafa should be criminally liable and incur upon himself criminal responsibility for any murder that has occurred within the Zilash area.
92. Paragraphs 168 and 170 of the PB are not relevant at all as they engage in lecturing on matters outside the scope of the AB. Conclusions of the paragraphs 171 and 172 of the PB do not explain how “domestic rule that ‘it is common to the major legal systems of the world’ is applicable in the case of Mustafa.
93. Paragraphs 173-174 of the PB discuss issues of fact, as to whether Mustafa could have acted otherwise to avoid individual criminal responsibility. We reiterate again that the factual evidence from the case files conclusively show that Mustafa could not have acted otherwise and that he did his best to cure and offer medicine to the victim. This will be further elaborated in the Appeal Trial. The same applies for paragraphs 175-176: the PB says that Mustafa would have been liable based on any legal system, either for his acts, omissions of knowledge of the advance of the

Serb forces and that victim could be murdered. In particular the statement from last sentence of the paragraph 176, is unreasonable, where the PB says: “[...] He performed these acts and omissions in the full knowledge of the advancing Serb offensive, and with full appreciation of the probability that the Murder Victim would be killed.” The PB effectively says that Mustafa is guilty for the Serbian forces’ actions.

94. In the virtue of the above, the Defence submits that parts of the submissions from the PB are misplaced while in majority they are unfounded.

#### SUB-GROUND 4-D

95. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal’s Chamber to decide upon the submissions of the Defence made in the AB.

#### SUB-GROUND 5-A

96. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal’s Chamber to decide upon the submissions of the Defence made in the AB.

#### SUB-GROUND 5-B

97. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal’s Chamber to decide upon the submissions of the Defence made in the AB.

## GROUND 6 -TORTURE

98. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

## GROUND 7-TORTURE

99. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

## GROUND 8-ARBITRARY DETENTION

100. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

## GROUND-9

## AIMS AND PURPOSES AND SENTENCES- SUB-GROUND 9-A AND 9-B

101. The Defence submits that the Appeals Panel's Judgement in *Gucati and Haradinaj*, mentioned in para. 197 of the PB, has no bearing in the present case as the cases cannot be compared with the TP's Judgement challenged by Mustafa's defence.

102. Paras. 198-204 in essence represent an appeal *de novo* on the side of the SPO as they create in their PB new factual and legal ground of appeal not related whatsoever with the AB of the Defence.

103. As far as this part of the PB, based on the above, the Defence submits that parts of the submissions from the PB are misplaced while in majority they are unfounded.

SUB-GROUNDS 9-C AND 9-H  
APPLICATION OF *LEX MITIOR*

104. Regarding the submissions of the SPO from paras. 205-208, the Defence submits that they are simply an error on the side of the Prosecution as it interprets an obvious wording of the meaning of the verb “shall” in an adverse meaning. The plain text and meaning of the auxiliary verb “shall” is next to the verb “must”, meaning that they have an equal meaning and are used interchangeably. Ultimately, the standard *in dubious pro reo* must be applied by the TP at all stages of proceedings. The way the PB construes the meaning of the word “shall” is incorrect, wherefrom originates a substantial error upon the individualization of penalty of Mustafa by the TP.
105. The Defence submits that in paras. 209-217, the PB misconstrues the applicable law of Kosovo at the critical time of the commission of alleged crimes. The Defence therefore stand firmly in its submissions expressed in the AB.
106. In para. 218, the PB makes a conclusion as if it were the TP taking the stance that all findings of the TP are correct and right, almost substituting itself for the court of final instance. The same applies to the para. 219.
107. In para. 220, PB argues that Mustafa did not offer any single precedent to argue against the harsh sentence imposed against him. How could he know that he will be found guilty and sentenced the way he was in course of the trial proceedings. The Defence therefore stand firmly in our submissions expressed in the AB.
108. In para. 221, using the same arguments from paras. 209-220, PB argues that there is no ground for the review of constitutionality of compatibility of art. 44 (2) of the Law with the Constitution of Kosovo. Defence has extensively argued in its AB that by imposing the sentencing of 25 years imprisonment, the TP has violated constitutional and international customary law principle of *lex mitior* as it is

obvious that in Kosovo at the time of the commission of the alleged crimes in force have been much more lenient provisions, which, if applied properly, could have led at most to a cumulative sentence of 15 years imprisonments.

#### SUB-GROUND 9-I

109. Regarding the response to these sub-grounds, the Defence maintains its position on the submissions made in the AB and considers that it is a prerogative of the Appeal's Chamber to decide upon the submissions of the Defence made in the AB.

#### SUB GROUND 9-J

110. Paragraphs 225-229 of the PB are simply repetitions forming a tautological discourse leading to an illogical statement that "[...] the existence of mitigating factors does not automatically imply a reduction of sentence or preclude the imposition of a particular sentence." The wording of the reasoning of these paragraphs clearly reveals the main purpose of the prosecution – sentencing as harsh as possible without taking into account any mitigating circumstances of the accused.

#### SUB-GROUND 9-K

111. Regarding the submissions of the SPO from paragraph 230, the PB again reiterates arguments from paragraph 220 *supra*, that is, that "given that MUSTAFA failed to provide any submissions concerning mitigation of sentence at trial [...]". This is a very clear statement with a heavy prejudice as to the sentencing decision, since neither Mr. Mustafa nor his Defence could have known at that time the decision of the TP.

112. As to Paragraphs 231-238 of the PB, the Defence maintains its submissions in AB.

## PART II- DEFENCE REPLY TO THE VICTIMS' COUNSEL BRIEF IN RESPONSE

113. The Victims' Counsel makes submissions regarding Defence Appeal Grounds 1-C, 1-E, 1I-K, 1-N, 2-E, 2-H and grounds 3-8. The Defence shall "group" its reply to these submissions where appropriate.

### VICTIMS' PERSONAL INTERESTS AND RIGHTS.

114. Victims' Counsel submits that certain grounds of appeal center around, among others, acknowledgement of the victims' sufferings.<sup>37</sup>

115. The Defence submits that acknowledgement of the victims' sufferings is not what was set out in the Decision of the Appeals Panel.<sup>38</sup> The personal interests amount not further than just acknowledgement. The Defence submits that the personal interests of victims regarding acknowledgement simply means that the participating victims are recognized and acknowledged as victim. That follows from the decision that victims were allowed to participate in the proceedings, and ultimately were allowed to claim reparations.

116. In the appeal proceeding, the Defence submits that the victims **are** acknowledged. That does not mean that, where the Defence in its Appeal Brief contests the findings of the Trial Panel or where it challenges the reasoning or assessment of testimony or any other issues, the Defence by no means denies the acknowledgement or tries to diminish or present it as inexistent.

117. The Defence challenges the content of the testimony, evidence, reasoning, usage and other such matters, but not an individual person (who is already

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<sup>37</sup> KSC-CA-2023-02/F00026/ para.7

<sup>38</sup> KSC-CA-2023-02/F00011/ Decision on Modalities of Victim Participation in Appellate Proceedings/ para. 9

acknowledged by the KSC as a victim in the case). The Defence rather focuses on the content of testimony of a witness [REDACTED]. The content of it and in furtherance of it the usage of it by the TP or whether the reasoning of the TP or the conclusion it inferred from the testimony was not sufficient to rely on.

118. It is the content of the (witness') testimony or the evidence taken from a witness that is challenged, not the victim as a person or his or her sufferings or experiences, that is not acknowledged.

119. This being said, the Defence will discuss Victims' Counsel's response.

1-C

120. The Defence submits that under this ground the acknowledgement of W01679 experiences is not the issue. It is simply about in-court identification, the probative weight of it and exclusion of such evidence.

Therefore, Victims' Counsel submissions must be dismissed.

1-E

121. In this sub-ground the Defence indeed erroneously stated that W04712 [REDACTED]. That is incorrect. It has been stated earlier in this Brief in Reply. It is W04648 [REDACTED]. [REDACTED].

122. However, further to this ground the Defence submits that under this ground the admission and placing reliance on written statements as formulated in the Notice of Appeal is the issue.

123. The personal interest of a witness [REDACTED] is not that he or she has a personal interest that his or her statement (or testimony) or evidence is included. Therefore, Victims' Counsel submissions must be dismissed.

1-I

124. The Defence submits that under this ground the issue is a claimed exchange by W04600 with the Appellant. There is no correlation whatsoever to any of the victims in these proceedings.

Therefore, Victims' Counsel submissions must be dismissed.

1-J

125. The Defence submits that under this ground Victims' Counsel submissions do not need to be addressed as there is no personal interest involved that impacts of any of the victims.

Therefore, Victims' Counsel submissions must be dismissed.

1-K

126. The Defence submits that under this ground the issue of consideration possible financial motive. Such motive can should never be excluded, and at least be able to be explored by the Defence. However, the TP did not allow the Defence to do so. As this could not be explored, and therefore not be established, the Defence addresses this issue *vis-a-vis* the decision of the TP. It did not address the issue *vis-a-vis* any victim in particular, at least the ground was not meant to be like that. The issue is more abstract rather than personal.

Therefore, Victims' Counsel submissions must be dismissed.

1-N

127. The Defence submits that under this ground Victims' Counsel submissions do not need to be addressed as there is no personal interest involved of any of the victims. It is about the issue of the Defence being deprived from adequate time to time and facilities. That does not impact any personal interest of any of the victims.

Therefore, Victims' Counsel submissions must be dismissed.



2-E and 2-H

128. The Defence submits that under this ground Victims' Counsel submissions do not need to be addressed as there is no personal interest that impacts of any of the victims.

129. The personal interest of a witness [REDACTED] is not that he or she has a personal interest that his or her statement (or testimony) and/or evidence is included.

Therefore, Victims' Counsel submissions must be dismissed.

Ground-3

130. The Defence submits that under this ground the issue is about the failure of the TP to make a decision under Rule 40, as formulated in the Notice of Appeal.

131. Such decision was not made, which is precisely the point of the Defence. The decision as such, or the failure to take it, is not in any of the personal interests of the victims. It is a procedural issue that is the focus of the ground of Appeal. The eventual execution of such decision is not issue here. Victims' Counsel tends to look more at the consequence of such (eventual) decision for the indirect victims, even though such decision was never made.

Therefore, Victims' Counsel submissions must be dismissed.

Ground-4

132. Establishing the circumstances of the death in a case where one is accused of murder, is critical in a criminal case. It might lead to the attribution of such murder to one or more person.

133. The Defence submits that (only) establishing the circumstances of the death itself does not form the basis of a claim for reparations. It is most probably the attribution of the death that might do that.

Therefore, Victims' Counsel submissions must be dismissed.

#### Ground-5

134. Victims' Counsel's submissions do not give rise to the Defence to address them.

The *existence* of the intent to kill and or whether the *mens rea* was properly established of a perpetrator by a tribunal does not affect any personal interest of any of the victims. The victims have no role in such findings, even though the outcome of such decision or finding would probably interest them. But it is not a personal interest of them (in the meaning of that it impacts them).

Therefore, Victims' Counsel submissions must be dismissed.

#### Ground - 6 - 7

135. The Defence submits that under this ground the issue is the qualification of certain acts and whether they amount to torture. And if not torture what qualification the acts would amount to (i.e. cruel treatment).

136. The qualification of acts, when established, is not a matter that personally impacts the interests of the victims. It is a rather technical judicial matter that will be established by a tribunal. That does not in any manner diminish or cease any sufferings that victims might have suffered. But the qualification as such is not a personal interest of them (in the meaning of that it impacts them).

### III. CONCLUSION

137. Submissions of the SPO and Victims' Counsel must be rejected in their entirety.
138. The Defence maintains its conclusion formulated in the Notice of Appeal and developed in the AB.

**Word count: 8718**

**3 July 2023  
At The Hague, the Netherlands**



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**Julius von Bóné  
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