



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2020-05**

The Prosecutor v. Salih Mustafa

Before: **Trial Panel I**

Judge Mappie Veldt-Foglia, Presiding Judge

Judge Roland Dekkers

Judge Gilbert Bitti

Judge Vladimir Mikula, Reserve Judge

Registrar: Fidelma Donlon

Date: 23 February 2022

Language: English

Classification: **Public**

**Public redacted version of Decision on the Defence Rule 130(1) motion to dismiss
any or all charges of the Indictment**

To be notified to:

Specialist Prosecutor

Jack Smith

Counsel for the Accused

Julius von Bóné

Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel) hereby renders this decision on the Defence Rule 130(1) motion to dismiss any or all charges of the Indictment.

I. PROCEDURAL BACKGROUND

1. On 12 June 2020, the Pre-Trial Judge confirmed the indictment submitted by the Specialist Prosecutor's Office (SPO) against Salih Mustafa (Mr Mustafa or Accused)¹.
2. On 19 June 2020, the SPO submitted the indictment, as confirmed, in which the SPO charged Mr Mustafa with the war crimes of arbitrary detention (Count 1), cruel treatment (Count 2), and torture (Count 3), allegedly committed at the Zllash Detention Compound between approximately 1 April 1999 and 19 April 1999, and murder (Count 4) allegedly committed at the Zllash Detention Compound between approximately 19 April 1999 and around the end of April 1999 (Indictment).²
3. On 20 September 2021, the first SPO witness began his testimony at trial.³
4. On 4 February 2022, the SPO closed its case⁴ and the Defence notified the Panel of its intention to submit a motion to dismiss any or all charges in the Indictment.⁵

¹ KSC-BC-2020-05, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Salih Mustafa*, 12 June 2020, strictly confidential and *ex parte*. A public redacted version was filed on 5 October 2020, F00008/RED.

² KSC-BC-2020-05, F00011/RED, Specialist Prosecutor, *Public Redacted Version of "Submission of confirmed indictment"*, filing KSC-BC-2020-05-F00011 dated 19 June 2020, 19 June 2020, with Annexes 1-2, public. A further redacted version of the Indictment was filed on 28 September 2020, F00019/A01.

³ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, public, p. 386.

⁴ KSC-BC-2020-05, F00308, Specialist Prosecutor, *Prosecution Notice of the Closing of its Case pursuant to Rule 129*, 4 February 2022, public.

⁵ KSC-BC-2020-05, F00309, Defence, *Defence Rule 130(1) Notice to Panel of Defence's intention to file a motion to dismiss any or all charges of the Indictment*, 4 February 2022, public.

5. On 15 February 2022, as requested by the Panel,⁶ the Defence filed the “Defence Rule 130(1) Motion to dismiss any or all charges of the Indictment” (Motion).⁷

6. On 21 February 2022, the SPO filed the “Prosecution Response to Defence Rule 130(1) Motion to dismiss any or all charges of the Indictment” (SPO Response).⁸

7. On 21 February 2022, Victims’ Counsel filed the “Victims’ Counsel response to the Rule 130(1) Motion by the Defence on 15 February 2022” (Victims’ Counsel Response).⁹

II. APPLICABLE LAW

8. The Panel notes Article 40(2) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (Law) and Rule 130 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).

III. LEGAL STANDARD

9. Pursuant to Rule 130 of the Rules, after the closing of the SPO case, having heard the Parties and, where applicable, Victims’ Counsel, the Panel may dismiss some or all charges in the Indictment, “if there is no evidence capable of supporting a conviction beyond reasonable doubt on the particular charge in

⁶ KSC-BC-2020-05, F00318, Trial Panel I, *Third decision on the conduct of the proceedings*, 9 February 2022, public, para. 16(b).

⁷ KSC-BC-2020-05, F00320, Defence, *Defence Rule 130(1) Motion to dismiss any or all charges of the Indictment*, 15 February 2022, confidential.

⁸ KSC-BC-2020-05, F00324, Specialist Prosecutor, *Prosecution Response to Defence Rule 130(1) Motion to dismiss any or all charges of the Indictment*, 21 February 2022, confidential.

⁹ KSC-BC-2020-05, F00325, Victims’ Counsel, *Victims’ Counsel response to the Rule 130(1) Motion by the Defence on 15 February 2022*, 21 February 2022, confidential.

question". In this respect, the Panel notes that the possibility to submit motions to dismiss charges, in whole or in part, at the end of the prosecution case, is available under the legal framework of the Specialist Chambers and, paying heed to subsidiary sources,¹⁰ such motions are subject to a consistent legal standard applied across a number of international criminal tribunals.¹¹ Accordingly, the Panel does not see any reason to depart from such established legal standard, which is summarised below.

10. The Panel recalls that a decision on a motion to dismiss charges does not involve an evaluation of the guilt or innocence of the Accused in light of all the evidence adduced by the end of the SPO case.¹² Therefore, the Panel should not be drawn into evaluations of the credibility of witnesses, the quality and reliability of the evidence and/or the strengths and weaknesses of contradictory or different evidence.¹³ These matters shall only be assessed when deliberating in order to pronounce a judgment pursuant to Rules 139 and 158 of the Rules. The function of Rule 130 of the Rules is not to terminate prematurely cases where the evidence appears to be weak.¹⁴ Instead, the Panel shall merely assess the *capability* of the evidence to support a conviction; accordingly, if one possible view of the facts

¹⁰ See Article 3(3) of the Law.

¹¹ See also KSC-BC-2020-07, F00450, Trial Panel II, *Decision on the Defence Motions to Dismiss Charges*, 26 November 2022, public, paras 18-24, and references therein. Motions for dismissal of charges at the end of the prosecution case are foreseen in the rules of procedure and evidence of the ICTY (Rule 98 bis), ICTR (Rule 98 bis), STL (Rule 167), SCSL (Rule 98), and IRMCT (Rule 121).

¹² Similarly, ICTY, *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber, [Decision on Defence Motion Requesting Judgment of Acquittal Pursuant to Rule 98bis](#) (*Strugar 98bis Decision*), 21 June 2004, para. 10.

¹³ Similarly, SCSL, *Prosecutor v. Norman et al.*, SCSL-04-14-T, Trial Chamber, [Decision on Motions for Judgement of Acquittal Pursuant to Rule 98](#), 21 October 2005, para. 38; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Chamber, [Decision on the Defence Motions for Judgment of Acquittal Pursuant to Rule 98](#) (*Brima et al. 98bis Decision*), 31 March 2006, para. 8; ICTY, *Prosecutor v. D. Milošević*, IT-98-29/1, Trial Chamber, *Oral Decision on Rule 98bis Motions*, 3 May 2007, [Transcript](#), p. 5640; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber, *Oral Decision on Rule 98bis Motions (Popović et al 98bis Oral Decision)*, 3 March 2008, [Transcript](#), p. 21461.

¹⁴ Similarly, ICTY, [Strugar 98bis Decision](#), para. 20; *Prosecutor v. Hadzihasanović and Kubura*, IT-01-47-T, Trial Chamber, [Decision on Motions for Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence](#), 27 September 2004, para. 20.

could support a conviction, then the Panel cannot dismiss the charge(s) at stake.¹⁵ Thus, the test is not whether the Panel *would* in fact arrive at a conviction beyond reasonable doubt on the SPO evidence, if accepted, but whether it *could*.¹⁶

11. As a consequence, denying a motion to dismiss a particular charge at the close of the SPO case is not incompatible with an acquittal of the Accused on that same count at the end of the trial.¹⁷ At the close of the SPO case, the Panel may find that the SPO evidence is *sufficient* to sustain a conviction beyond reasonable doubt and yet, proceed to acquit at the end of the trial, if in the Panel's own view of the evidence, the SPO has not in fact *proved* the guilt of the Accused beyond reasonable doubt.¹⁸

12. When determining a motion to dismiss charges, the Panel must assume that the evidence adduced during the prosecution case is entitled to credence unless incapable of belief and must take such evidence at its highest, rather than pick and choose among parts of that evidence.¹⁹ Where there is no evidence to sustain a charge or where the only relevant evidence is so incapable of belief that it could not properly sustain a conviction, even when the evidence is taken at its highest credence, the particular charge must be dismissed.²⁰ To be incapable of belief, the evidence must be manifestly unreliable.²¹

¹⁵ Similarly, SCSL, [Brima et al. 98bis Decision](#), para. 8.

¹⁶ Similarly, ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Appeals Chamber, [Judgement \(Jelisić Appeal Judgment\)](#), 5 July 2001, para. 37; *Prosecutor v. Milošević*, IT-02-54-T, Trial Chamber, [Decision on Motion for Judgement of Acquittal \(Milošević 98bis Decision\)](#), 16 June 2004, para. 13(6); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Trial Chamber, [Oral Decision on the Oneissi Defence Application for a Judgment of Acquittal Under Rule 167\(A\) \(Ayyash et al. 167\(A\) Oral Decision\)](#), 7 March 2018, Transcript, p. 3.

¹⁷ Similarly, MICT, *Prosecutor v. Ngirabatware*, MICT-12-29-A, Appeals Chamber, [Judgement](#), 18 December 2014, para. 20.

¹⁸ Similarly, ICTY, [Jelisić Appeal Judgment](#), para. 37; [Milošević 98bis Decision](#), para. 13(6).

¹⁹ Similarly, SCSL, [Brima et al. 98bis Decision](#), para. 11; ICTY, *Prosecutor v. Karadžić*, IT-95-5-18-AR98bis.1, Appeals Chamber, [Judgement](#), 11 July 2013, para. 37; STL, [Ayyash et al. 167\(A\) Oral Decision](#), p. 3.

²⁰ Similarly, SCSL, [Brima et al. 98bis Decision](#), para. 11; ICTY, [Popović et al 98bis Oral Decision](#), p. 21461.

²¹ Similarly, SCSL, [Brima et al. 98bis Decision](#), para. 11.

13. The evidence to be considered for the purpose of the Panel's determination under Rule 130(3) of the Rules encompasses both oral evidence received through witnesses testifying live or via video link at trial, as well as all non-oral material admitted, as per Article 37 of the Law and Rules 153-155 of the Rules, or considered as part of the evidentiary record available for consideration by the Panel in the judgment.²²

14. Furthermore, for the purpose of dealing with the Motion, the evidence should be examined in relation to each count, as opposed to each paragraph of the Indictment, as clarified by the reference to the word "charge" in Rule 130(1) and (3) of the Rules.²³

15. The determination whether there is evidence on the basis of which the Panel could convict under a specific count should be made on the basis of the evidence taken as a whole,²⁴ including Defence evidence adduced during the prosecution case.²⁵ Where the Accused is charged under multiple modes of liability, it is sufficient if there is evidence capable of supporting a conviction on the basis of one of those modes of liability.²⁶

See, *inter alia*, KSC-BC-2020-05, F00235/RED, Trial Panel I, *Public redacted version of Decision on the Prosecution application for the admission of prior statements of witness W04648 and related documents*, 15 October 2021, public; F00281/RED, Trial Panel I, *Public redacted version of Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material*, 13 December 2021, public; F00285/RED, Trial Panel I, *Public redacted version of Decision on items used with witnesses W03593, W04600, W01679, and W03594 during their in-court testimony*, 17 December 2021, public; F00286/RED, Trial Panel I, *Public redacted version of Decision on the Prosecution application pursuant to Rule 153 of the Rules*, 17 December 2021, public; F00304, Trial Panel I, *Public redacted version of Decision on items used with witnesses W04603, W04669, W04676, W04391, W04390, and W04674 during their in-court testimony*, 3 February 2022, public.

²³ Similarly, SCSL, [Brima et al. 98bis Decision](#), para. 12.

²⁴ Similarly, ICTY, [Milošević 98bis Decision](#), para. 13(4).

²⁵ Similarly, ICTY, *Prosecutor v. Hadzihasanović and Kubura*, IT-01-47-A, Appeals Chamber, [Judgement](#), 22 April 2008, para. 55; STL, [Ayyash et al. 167\(A\) Oral Decision](#), p. 4.

²⁶ Similarly, ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Chamber, Oral Decision on Rule 98bis Motions, 18 May 2007, [Transcript](#), p. 12772.

16. Where the Panel refers to specific evidence in support of its findings for the purpose of this particular decision, it does so for illustrative purposes. The fact that some evidence has been considered for the purpose of a decision under Rule 130 of the Rules is no indication that the Panel will ultimately accept that evidence or any part of it for the purposes of the judgment. Similarly, the fact that the Panel does not mention certain evidence in a decision under Rule 130 of the Rules does not mean that the Panel does not accept that evidence, nor does it mean that the Panel may not rely upon it in the judgment.²⁷

IV. SUBMISSIONS

A. DEFENCE

17. The Defence requests that all charges in Counts 1-4 of the Indictment against the Accused be dismissed.²⁸ With regard to Counts 1-3, the Defence undertakes a comparative analysis of the testimonies provided in court by SPO witnesses W03593, W01679, and W03594.²⁹ The Defence contends that these witnesses do not identify properly the time and/or location of the alleged events,³⁰ are unreliable, not credible and at times false,³¹ are contradictory,³² do not identify properly the Accused, including his presence at the location of the alleged crimes,³³ and that the Accused had no authority, role, or involvement in the alleged arrest, detention, interrogation, and mistreatment as charged in the Indictment.³⁴

²⁷ Similarly, ICTY, [Popović et al 98bis Oral Decision](#), p. 21462; STL, [Ayyash et al. 167\(A\) Oral Decision](#), p. 6.

²⁸ Motion, para. 197.

²⁹ Motion, paras 4-110.

³⁰ Motion, paras 40-41, 43, 71, 105.

³¹ Motion, paras 67-68, 74, 76-77.

³² Motion, paras 100-104, 107.

³³ Motion, paras 38-39, 60-61, 108.

³⁴ Motion, paras 42, 45-50, 70, 73, 75, 106.

18. Similarly, for Count 4 of the Indictment, the Defence undertakes a comparative analysis of the testimonies provided in court by SPO witnesses W04600, W04603, and W04669.³⁵ The Defence submits that witness W04600 is unreliable and not credible, [REDACTED].³⁶ The Defence further submits that not a single witness testified that the Accused had anything to do with the alleged murder.³⁷ Moreover, the Defence contends that neither the cause nor the location of the death of the alleged victim have been established by the SPO.³⁸ Accordingly, the Defence submits that the SPO has not established beyond reasonable doubt that “the Accused had anything to do with the alleged arrest, the detention, the maltreatment, the torture or the conditions in which the victim has been held”,³⁹ and that there is no “direct relation between the alleged crime [of murder] in the Indictment and the role that the Accused allegedly played in the events concerning the victim [...]”.⁴⁰

19. The Defence also requests the Panel to convene a hearing pursuant to Rule 130(2) of the Rules, for the purpose of further submissions and clarifications on the Motion, as well as to allow the Accused to convey his findings and assessment in relation to the entire case, with a view to assisting the Panel to take an informed decision on the Motion.⁴¹

³⁵ Motion, paras 114-175.

³⁶ Motion, para. 176.

³⁷ Motion, para. 177.

³⁸ Motion, paras 178-179.

³⁹ Motion, para. 182.

⁴⁰ Motion, para. 183.

⁴¹ Motion, para. 196.

B. SPO

20. The SPO submits that the Motion exceeds the maximum word limit of 6,000 words, provided for in the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers (KSC-BD-15) (PD on Files and Filings). Therefore, the SPO requests an extension of word limit to 7,525 words for the purpose of its submissions.⁴²

21. The SPO further submits that the Motion should be dismissed in its entirety.⁴³ The SPO contends that the Defence wrongly applied the test required by Rule 130 of the Rules, and that the Motion contains selective and compartmentalised summaries of the evidence of individual witnesses, followed by unsupported Defence assertions or submissions focusing on particular details, which are irrelevant to the determination at issue.⁴⁴ The SPO submits that the Panel shall assess whether the SPO evidence could (rather than would) lead to a conviction, and in so doing the test under Rule 130(3) of the Rules requires that the Panel should take the SPO evidence at its highest, without compartmentalising it.⁴⁵ Accordingly, the SPO submits that a charge should be dismissed only if the Panel finds that the SPO case in that respect has “completely broken down”.⁴⁶ The SPO also submits that the Defence applied a conviction test, which would lead to a misapplication of the Rule 130(3) standard.⁴⁷ The SPO analyses the evidence provided in court by witnesses W03593, W01679, W03594, W04600, W04603, W04669, W04390, W04391, and W04674 in relation to Counts 1 to 4 of the Indictment.⁴⁸

⁴² SPO Response, para. 3.

⁴³ SPO Response, paras 1, 52.

⁴⁴ SPO Response, para. 2.

⁴⁵ SPO Response, paras 4-5.

⁴⁶ SPO Response, para. 5 and references therein.

⁴⁷ SPO Response, para. 7.

⁴⁸ SPO Response, paras 9-49.

22. With regard to the modes of liability charged in the Indictment, which are not expressly challenged by the Defence,⁴⁹ the SPO contends that, in so far as the charges are sustainable on even only one mode of liability among those charged, the Motion should be rejected on this basis.⁵⁰

C. VICTIMS' COUNSEL

23. Victims' Counsel submits that the Panel shall determine that there is no case to answer only if the evidence presented thus far is not capable of supporting a conviction beyond reasonable doubt.⁵¹ In the view of Victims' Counsel, the Panel shall assess the body of evidence presented, holistically and in its entirety, bearing in mind that possible inconsistencies do not necessarily require the Panel to dismiss the evidence in full.⁵² Victims' Counsel contends that the Defence approach is flawed to the extent that it assesses witness testimonies in isolation, and disregards cross-corroborative evidence.⁵³ In this respect, Victim's Counsel makes reference to several SPO witnesses whose credibility is supported by cross-corroborating elements.⁵⁴

24. Victims' Counsel further submits that the Panel shall consider the SPO evidence "in its best light", therefore undistracted, unobstructed or unopposed by evidence introduced on behalf of the Defence.⁵⁵ In this context, Victims' Counsel contends that the SPO evidence is entitled to credence unless it is incapable of belief, i.e. is obviously incredible or unreliable, taking into account that this is not

⁴⁹ Motion, para. 10.

⁵⁰ SPO Response, para. 50.

⁵¹ Victim's Counsel Response, para. 7.

⁵² Victim's Counsel Response, para. 9.

⁵³ Victims' Counsel Response, para. 10.

⁵⁴ Victim's Counsel Response, paras 16-19.

⁵⁵ Victim's Counsel Response, para. 11.

the stage to make a fine assessment of credibility or reliability.⁵⁶ Victims' Counsel submits that, based on this approach, the SPO has offered ample evidence supporting the charges and, accordingly, the Motion should be dismissed.⁵⁷

25. Finally, should the Panel at this stage consider dismissing any of the dual-status witnesses as not credible or not reliable, Victims' Counsel recalls its request to appoint a medical expert to conduct an assessment as to the physical and psychological harm suffered by those witnesses.⁵⁸

V. ANALYSIS

A. EXTENSION OF WORD LIMIT

26. The Panel notes that the word count in the Motion amounts to 12,471 words, thus abundantly above the word limit prescribed in Article 41 of the PD on Files and Filings. The Panel also notes that the Defence did not request an extension of the word limit as foreseen in Article 36 of the PD on Files and Filings.

27. Pursuant to Article 36(3) of the PD on Files and Filings, considering the importance of the subject matter of the Motion for the Defence, and by implication of the SPO submissions in response thereto, the Panel considers that good cause exists to recognise the Motion exceeding the word limit as validly made. In the same vein, the Panel considers that good cause exists to grant the requested extension of word limit to the SPO.

28. However, the Panel reminds that the PD on Files and Filings, along with other internal regulations, is part of the legal framework of the Specialist Chambers, as stipulated in Article 34(3) of the Law. Accordingly, the Panel expects the Parties

⁵⁶ Victim's Counsel Response, para. 14.

⁵⁷ Victim's Counsel Response, paras 15, 21.

⁵⁸ Victims' Counsel Response, para. 20.

and Victims' Counsel to abide by such internal regulations, and to follow the procedures set out therein, at all times.

B. THE MOTION

29. At the outset, the Panel stresses that the evidence recalled in this decision in relation to Counts 1-4 of the Indictment is for illustrative purposes only, and no inference as to the guilt or innocence of Mr Mustafa shall be made from the Panel's findings or the wording used in the present decision.

1. Counts 1-3 of the Indictment

30. Regarding Counts 1-3 of the Indictment, the Panel notes that it has heard evidence that individuals were arrested without being provided with any documentation or reason,⁵⁹ taken to a compound and locked into a barn,⁶⁰ with no possibility to be brought before a judge or prosecutor.⁶¹ According to the evidence received, at that location, they were interrogated⁶² on account of being allegedly

⁵⁹ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 397, lines 17-19; p. 399; lines 19-20; Transcript of Hearing, 4 October 2021, confidential, p. 866, lines 15-18; Transcript of Hearing, 10 November 2021, confidential, p. 1456, lines 22-25.

⁶⁰ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 402, lines 3-8; p. 403, lines 15-19; Transcript of Hearing, 4 October 2021, confidential, p. 870, lines 6-7; Transcript of Hearing, 12 October 2021, confidential, p. 1039, lines 18-19; Transcript of Hearing, 10 November 2021, confidential, p. 1415, lines 14-16.

⁶¹ KSC-BC-2020-05, Transcript of Hearing, 21 September 2021, confidential, p. 510, lines 9-11.

⁶² KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 409, line 18 to p. 410, line 1; p. 419, line 22 to p. 420, line 12; Transcript of Hearing, 10 November 2021, confidential, p. 1443, line 15 to p. 1444, line 5.

Serbian collaborators,⁶³ spies,⁶⁴ and/or thieves⁶⁵, and mistreated in various ways, including by being slapped, beaten, including with a stick, subjected to [REDACTED], and by the infliction of [REDACTED], [REDACTED], and/or forms of humiliation.⁶⁶ The Panel has also heard evidence of allegedly inadequate conditions of detention, including deprivation of food and water, poor sleeping conditions, denial of family contacts, visits, sanitary facilities, medical care and personal hygiene.⁶⁷ The Panel heard evidence about the serious and long lasting harm suffered by the aforementioned individuals as a result of those acts and omissions.⁶⁸ Further, the Panel received evidence that such events allegedly occurred in the area of Zllash/Zlaš between approximately 1 April and 19 April 1999, thus potentially falling within the temporal⁶⁹ and geographical⁷⁰ scope of the charges.

⁶³ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, public, p. 409, line 25 to p. 410, line 1; Transcript of Hearing, 12 October 2021, confidential, p. 1048, lines 10-12; Transcript of Hearing, 10 November 2021, p. 1438, lines 16-17.

⁶⁴ KSC-BC-2020-05, Transcript of Hearing, 4 October 2021, confidential, p. 895, line 5; Transcript of Hearing, 10 November 2021, p. 1444, lines 2-5.

⁶⁵ KSC-BC-2020-05, Transcript of Hearing, 4 October 2021, confidential, p. 892, line 21 to p. 893, line 5; Transcript of Hearing, 12 October 2021, confidential, p. 1049, line 11.

⁶⁶ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 408, lines 13-16; p. 411, line 17 to p. 412, line 2; p. 425, line 23 to p. 426, line 1; p. 454, lines 10-13; p. 474, lines 5-8; Transcript of Hearing, 4 October 2021, confidential, p. 867, lines 10-16; p. 870, lines 3-4; p. 883, lines 14-20; p. 884, line 22 to p. 885, line 6; Transcript of Hearing, 10 November 2021, confidential, p. 1426, lines 7-10; p. 1443, line 11 to p. 1444, line 16.

⁶⁷ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 477, line 19 to p. 480, line 21; p. 480, line 25 to p. 418, line 1; Transcript of Hearing, 4 October 2021, confidential, p. 902, line 8 to p. 903, line 19; Transcript of Hearing, 12 October 2021, confidential, p. 1040, line 22 to p. 1041, line 4; p. 1042, line 4 to p. 1043, line 3; Transcript of Hearing, 10 November 2021, confidential, p. 1467, lines 7-25 to p. 1468, line 6.

⁶⁸ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 409, lines 2-6; Transcript of Hearing, 5 October 2021, confidential, p. 942, line 23 to p. 943, line 19; p. 944, line 11 to p. 945, line 6.

⁶⁹ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 394, line 12 to p. 395, line 6; Transcript of Hearing, 24 September 2021, confidential, p. 801, lines 11-21; Transcript of Hearing, 4 October 2021, confidential, p. 883, lines 9-10; Transcript of Hearing, 12 October 2021, confidential, p. 1035, lines 23-24; p. 1040, lines 19-21.

⁷⁰ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 394, lines 24-25, p. 400, lines 7-8; p. 401, lines 5-6; Transcript of Hearing, 24 September 2021, confidential, p. 804, lines 4-23; Transcript of Hearing, 4 October 2021, confidential, p. 863, lines 22-25; Transcript of Hearing,

31. The Panel also notes that it has heard evidence according to which the Accused was the commander of the BIA/Skifterat unit, a unit of the *Ushtria Çlirimtare e Kosovës* (UÇK), known in English as the Kosovo Liberation Army (KLA).⁷¹ Moreover, the Accused was identified by the nickname of Cali or commander Cali.⁷² According to the evidence received, commander Cali was in charge of the detention centre where prisoners were allegedly held,⁷³ as he was the one giving the order to beat or stop beating detainees.⁷⁴ Furthermore, the Panel heard evidence according to which the Accused's participation in the events was not only confined to giving orders, but extended to personally beating and questioning detainees.⁷⁵ On one occasion, he also allegedly carried out [REDACTED] against one of the prisoners.⁷⁶ In addition, witnesses have identified the Accused by the red hat he used to wear,⁷⁷ and one witness also recognized him, when confronted with a picture of the Accused.⁷⁸

5 October 2021, confidential, p. 980, lines 5-8; Transcript of Hearing, 10 November 2021, confidential, p. 1411, lines 15-16.

⁷¹ KSC-BC-2020-05, Transcript of Hearing, 2 November 2021, public, p. 1292, line 25 to p. 1293, line 1; Transcript of Hearing, 13 December 2021, confidential, p. 1938, line 20 to p. 1939, line 2; Transcript of Hearing, 18 January 2022, public, p. 2060, lines 4-7; Transcript of Hearing, 25 January 2022, public, p. 2195, line 25 to p. 2196, line 2; Transcript of Hearing, 2 February 2022, public, p. 2417, lines 18-20; p. 2418, lines 1-4.

⁷² KSC-BC-2020-05, Transcript of Hearing, 4 October 2021, confidential, p. 867, lines 11-25; p. 873, lines 16-18; p. 877, lines 13-21, p. 882, lines 6-12; Transcript of Hearing, 10 November 2021, confidential, p. 1473, lines 3-6; Transcript of Hearing, 18 January 2022, confidential, p. 2061, lines 3-6; Transcript of Hearing, 25 January 2022, confidential, p. 2196, lines 3-6.

⁷³ KSC-BC-2020-05, SPOE00128063 RED1.

⁷⁴ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 413, lines 12-16; p. 413, line 23 to p. 414, line 14; Transcript of Hearing, 4 October 2021, confidential, p. 869, line 19 to p. 870, line 1.

⁷⁵ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 419, line 22 to p. 420, line 12; p. 425, line 23 to p. 426, line 10; p. 438, lines 18-23; Transcript of Hearing, 4 October 2021, confidential, p. 867, lines 11-16; p. 869, lines 12-18; p. 876, line 24 to p. 877, line 5; Transcript of Hearing, 5 October 2021, confidential, p. 1005, lines 5-6.

⁷⁶ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 411, line 21 to p. 412, line 22.

⁷⁷ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 420, lines 17-18; p. 421, lines 15-19; p. 429, lines 9-12; Transcript of Hearing, 24 September 2021, confidential, p. 765, lines 7-14.

⁷⁸ KSC-BC-2020-05, Transcript of Hearing, 5 October 2021, confidential, p. 1005, lines 12-19.

32. The Panel considers that this evidence relates to the SPO's allegations under Counts 1-3 of the Indictment.⁷⁹ In line with the applicable legal standard under Rule 130 of the Rules, as outlined above, the Panel shall not assess the reliability, strength and weaknesses of this evidence, the credibility of the witnesses and, ultimately, the probative value of such evidence.

33. In light of the above, for the purposes of Rule 130 of the Rules, the Panel finds that the evidence presented during the SPO case, if accepted, is capable of supporting a conviction under Counts 1-3 of the Indictment, under one or more of the modes of individual criminal responsibility with which the Accused is charged.

2. Count 4 of the Indictment

34. The Panel notes the arguments of the Defence whereby there is no direct relationship between the alleged crime of murder, as charged in the Indictment, and "the role that the Accused allegedly played in the events concerning the victim that allegedly was murdered",⁸⁰ and that "[n]one of the witnesses of the SPO ever gave an account that comes even close to the killing of this person by the Accused".⁸¹

35. The Panel recalls that the Accused is charged with murder under Count 4 of the Indictment pursuant to the doctrine of joint criminal enterprise (including its third form), and/or aiding and abetting, and/or under superior responsibility, in accordance with Article 16(1)(a) and (c) of the Law, respectively.⁸² Notwithstanding the wording of the Indictment, the Defence appears to make

⁷⁹ Indictment, paras 7-17, 18-30, 34-35.

⁸⁰ Motion, para. 183.

⁸¹ Motion, para. 194.

⁸² Indictment, paras 34-35.

submissions on the assumption that the Accused is alleged to have directly perpetrated the murder charged under Count 4. In this respect, the Panel considers that the Defence misrepresents the charge of murder under Count 4 of the Indictment. Accordingly, the Panel is of the view that the Defence's submissions as to the purported absence of a direct relationship between the Accused and the alleged murder are not persuasive.

36. In addition, the Panel received evidence according to which the alleged murder victim named in the Indictment, after his arrest, was brought to the Skifterat/BIA base,⁸³ was detained in the same location as other witnesses,⁸⁴ and was [REDACTED]: in addition to beating, he was allegedly [REDACTED].⁸⁵ [REDACTED] were either not given information or misinformed about the place where the murder victim could be found and were all denied any possibility to see him, although they did on several occasions request to see him.⁸⁶ In addition, they were told repeatedly that they would not see [REDACTED] again alive.⁸⁷ On the basis of the evidence received, the murder victim was in a debilitated state as a result of such mistreatment,⁸⁸ he could not stand up because he was injured,⁸⁹ he was massacred⁹⁰ and almost dead.⁹¹ Some witnesses testified that once the other

⁸³ KSC-BC-2020-05, Transcript of Hearing, 23 September 2021, confidential, p. 729, line 4 to p. 730, line 7; p. 732, line 5 to p. 733, line 4; p. 739, line 23 to p. 740, line 12.

⁸⁴ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 403, lines 20-25; p. 445, lines 6-8; Transcript of Hearing, 10 November 2021, confidential, p. 1428, lines 1-2; p. 1431, line 21 to p. 1432, line 3; Transcript of Hearing, 22 November 2021, confidential, p. 1739, lines 3-5.

⁸⁵ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 404, lines 11-19; p. 405, lines 4-9; p. 454, lines 11-22; p. 474, lines 2-4; Transcript of Hearing, 4 October 2021, confidential, p. 891, line 22 to p. 892, line 18; Transcript of Hearing, 10 November 2021, confidential, p. 1432, lines 1-9; p. 1434, lines 6-9; p. 1441, lines 12-20.

⁸⁶ KSC-BC-2020-05, Transcript of Hearing, 22 November 2021, confidential, p. 1738, line 2 to p. 1739, line 4; p. 1740, line 1 to p. 1741, line 18; SPOE00128339 RED1.

⁸⁷ KSC-BC-2020-05, Transcript of Hearing, 22 November 2021, confidential, p. 1739, lines 8-9; SPOE00128334 RED1.

⁸⁸ KSC-BC-2020-05, Transcript of Hearing, 4 October 2021, confidential, p. 906, lines 5-9.

⁸⁹ KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 404, lines 17-19.

⁹⁰ KSC-BC-2020-05, Transcript of Hearing, 4 October 2021, confidential, p. 892, lines 7-8; p. 907, line 8.

⁹¹ KSC-BC-2020-05, Transcript of Hearing, 10 November 2021, confidential, p. 1434, line 6.

detainees were released, the [REDACTED].⁹² According to the evidence heard by the Panel, the murder victim was found dead [REDACTED],⁹³ [REDACTED].⁹⁴ The Panel also received evidence that the death of the murder victim occurred back in April 1999.⁹⁵ When his body was found [REDACTED].⁹⁶

37. As recalled above in paragraph 31 above, the Panel notes that it has heard evidence in relation to the alleged role and involvement of the Accused in the crimes charged in Indictment.

38. The Panel considers that this evidence relates to the SPO's allegations under Count 4 of the Indictment.⁹⁷ In line with the applicable legal standard under Rule 130 of the Rules, as outlined above, the Panel shall not assess the reliability, strength and weaknesses of this evidence, the credibility of the witnesses and, ultimately, the probative value of such evidence.

39. In light of the above, for the purposes of Rule 130 of the Rules, the Panel finds that the evidence presented during the SPO case, if accepted, is capable of supporting a conviction under Count 4 of the Indictment, under one or more of the modes of individual criminal responsibility with which Mr Mustafa is charged.

⁹² KSC-BC-2020-05, Transcript of Hearing, 20 September 2021, confidential, p. 484, lines 19-22; Transcript of Hearing, 4 October 2021, confidential, p. 905, lines 19-22; Transcript of Hearing, 13 October 2021, confidential, p. 1145, lines 11-12; SPOE00128333 RED1; KSC-BC-2020-05, SPOE00128339 RED1.

⁹³ KSC-BC-2020-05, Transcript of Hearing, 24 September 2021, confidential, p. 766, lines 23-25; p. 767, lines 6-8; Transcript of Hearing, 17 November 2021, confidential, p. 1608, lines 8-11, 7; p. 1624, lines 3-7; SPOE00128158 RED1.

⁹⁴ KSC-BC-2020-05, Transcript of Hearing, 3 November 2021, confidential, p. 1364, line 25 to p. 1365, line 8; Transcript of Hearing, 22 November 2021, confidential, p. 1755, line 22 to p. 1756, line 4; SPOE00128333 RED1; SPOE00128340 RED1; SPOE00128158 RED1.

⁹⁵ KSC-BC-2020-05, Transcript of Hearing, 24 September 2021, confidential, p. 766, line 13.

⁹⁶ KSC-BC-2020-05, Transcript of Hearing, 22 November 2021, confidential, p. 1757, lines 23-25; p. 1759, lines 18-20; Transcript of Hearing, 17 November 2021, confidential, p. 1619, lines 18-22; p. 1620, lines 5-8.

⁹⁷ Indictment, paras 8, 11, 16, 31-35.

3. Request for a Hearing

40. With regard to the Defence request for a hearing prior to deciding on the Motion, the Panel recalls that convening a hearing for the purpose of receiving further submissions on the Motion is a matter of discretion for the Panel, as expressly foreseen in Rule 130(2) of the Rules. With a view to deciding on the Motion, the Panel does not consider a hearing to be necessary, as it received sufficiently detailed and comprehensive submissions in writing, which enabled the Panel to deliberate on the issues at stake. The request for a hearing is therefore rejected.

C. CLASSIFICATION

41. The Panel recalls that the Parties and Victims' Counsel filed their respective submissions as confidential. Given the relevance of a decision under Rule 130(3) of the Rules, however, the Panel decided to issue a public redacted version of the present decision, in addition to a confidential version thereof, without revealing information that could compromise the safety, physical and psychological well-being, dignity and privacy of the witnesses and victims.

42. Considering the amount of non-public information in the submissions filed by the Parties and Victims' Counsel, the Panel does not consider it necessary, at this stage, to request public redacted versions of such submissions.


VI. DISPOSITION

43. For the above-mentioned reasons, the Panel hereby:

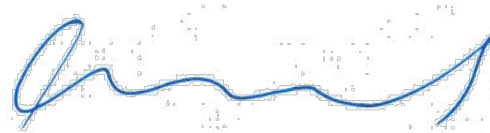
- a. **DECIDES** to recognise the Motion exceeding the word limit as validly made;
- b. **GRANTS** the requested extension of word limit to the SPO;
- c. **REJECTS** the Motion;
- d. **REJECTS** the Defence request for a hearing under Rule 130(2) of the Rules;
and
- e. **ORDERS** the Parties and Victims' Counsel to adhere to the calendar of procedural steps set out in paragraph 16(c) of the "Third decision on the conduct of the proceedings" dated 9 February 2022 (F00318), and to file the relevant material and/or submissions accordingly.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Wednesday, 23 February 2022

At The Hague, the Netherlands.