

In: KSC-BC-2020-05
The Specialist Prosecutor v. Mr. 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

Filing Participant: Defence

Date: 15 February 2022

Language: English

Classification: Public redacted

Public redacted version for the Defence Rule 130 (1) Motion to dismiss any or all charges of the Indictment

Specialist Prosecutor

Jack Smith

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Mr. Julius von Bóné

Victims' Counsel

Anni Pues

I. Introduction

1. The defense gave Notice of its intention to file a motion to dismiss any or all of the charges of the Indictment. It was filed on 4 February 2021. The current document is the Motion that follows the Notice.

II. Charges

2. The charges against Salih Mustafa are arbitrary detention (count 1), cruel treatment (count 2), torture (count 3) and murder (count 4).

III. The period of the alleged crimes

3. The period of time in which the charges would have taken place is between 1st and the 19th of April 1999.

IV. The location at which these crimes would have taken place.

4. The alleged crimes would have taken place in the Gollak region. The SPO mentions Zllash in the indictment even though no defined area has been determined for Zllash. In the view of the SPO the charges to place on a location that is described as a compound, a group of structures located in the mountainous area of the Gollak region. As the word mountain and forest in the Albanian language are in ordinary speech and in the Kosovo context the same, it is possible to easily confuse this terminology, and moreover, when witnesses testify using the word, one has to be extra cautious how to interpret what the witness is trying to explain.
5. The same caution has to be taken with "Zllash" or "Zllash village". "Zllash" indicates an area. "Zllash village" in itself does not exist as it is part of the village of Mramor which is located much further away and is not located in the mountainous area. Mramor is, as some other villages, a village at the foot of the mountainous area. That mountainous area is Gollak.
6. Zllash does not have a village. The buildings that are in the Gollak area are scattered around with sometimes here and there groups of houses.
7. The Gollak area, and the Zllash area, fell at the time of the conflict within in the Llap Operationa Zone, a zone in which the Kosovo Liberation Army (KLA) operated during the period of April 1999. In that zone eventually the Brigade 153 was established and its preceding formations was located. It had its seat at several places along the period of 1998 and 1999.
8. The charges of the SPO regarding the accused specify the *locus delicti* at the location of the compound. The SPO submitted to this end the "Zllash Prison Camp Photograph Book" at which the alleged events would have taken place.
9. In the current motion the defense will discuss a number of issues related to these charges.
10. Without prejudice to any other submission that might be filed at any later stage of the proceedings, if any, concerning the background of the conflict, the qualification of the conflict, issues regarding the question whether there is or was a joint criminal enterprise,

issues regarding command/superior responsibility, individual criminal responsibility, the mode of the conduct of the accused (physical commission, instigating, ordering aiding or abetting) or whether there were subordinates acting under his command, there will be no submissions in the current document. Neither will be discussed whether the Accused had knowledge of incidents or occurrences about which a number of witnesses testified in court, nor whether he had reason to know that such things might allegedly have happened to the witnesses about things that they have testified. If proceedings would continue for whatever reason, then at a later stage the defense will submit its position regarding these issues and any other issue that the defense deems necessary for the defense of the accused. Only a few times the defense touches on some of these topics when assessing the testimony of the witnesses.

11. Lastly, the command structure will not be discussed in the current motion, without prejudice that that might be done at any other time if proceedings would continue in case the motion would be rejected.
12. For the purpose of this motion the defense will discuss the testimonies of the witnesses that it sees fit enough to conclude that the charges are to be dismissed.
13. The base for the charges under count 1, 2 and 3 relies in essence on a number of witnesses who have testified about their respective alleged detention.
14. Regarding count 4 a couple of witnesses have testified about the victim as he was detained, however not one witness has ever testified about the actual death of that victim and the cause of it and/or the circumstances in which he died.
15. The SPO relies in essence on a number of witnesses regarding all of the charges. These witnesses will be discussed. They are at the heart of the charges.

V. The testimony of the witness-W 05393

16. W 05393 was appearing in court on 20, 21st and 22nd September 2021. He testified as to what had happened to him. According to W 05393, he went to Zllash.
17. According to W 05393, he was unable to specify in what month it had happened; he did not specify the year. He just knew it was the 4th, without being able to tell from which month it was.
18. According to W 05393, he stated that 2 people from the Military Police approached him and he was put at some point into a car; in the car were 2 other persons, so in total they were 5 in the car. The witness testifies that he had no reason to doubt that the people were from the Military police. While in the car he had a sack or a bag over his head. He stated that he was upon arrival at a location he was put into a barn, and that he was beaten there.¹
19. According to W 05393, he was unable to recognize anybody in the car. He briefly saw a person with a red hat, but immediately after him being seated in the back of the car, they put a sack over W 05393's head, so he couldn't see. He was unable to even give a description of the person with the red hat, of whom he even did not see his face.²
20. According to W 05393, he was unable know where he was going precisely; he just knew he was going in the direction of Zllash.³
21. Upon his arrival in the room of the barn, his sack was removed from his head.⁴

¹ Transcript 20/09/'21, p.395:9, p. 395 :11, 17- 18, and p. 387 :9 - 16 and Transcript 21/09/'21 p.556: 18 -20.

² Transcript 20/09/'21, p. 397: 13-20 and Transcript 21/09/'21 p. 559 :25 -p. 560: 8; and Transcript 22/09/'21 p. 509: 19 - p. 510 :8.

³ Transcript 20/09/'21, p. 401: 2 - 6

⁴ Transcript 20/09/'21, p. 403: 13 -14.

22. At some point in time on the same day, about 1 hour after his arrival in the bar, W 05393 was removed from it, and with a sack over his head taken to another place, where they beat him up. W 05393 was unable to identify anybody, nor describe the type of dress that the people wore who took him. The next place where W 05393 was dragged into was about 5 or 6 meters away from the initial barn.⁵
23. Yet again, W 05393 was unable to identify anybody (in that second place), nor did he hear any names from the people who were beating him. W 05393 was unable to identify anybody who was beating him. He described the place as dark. W 05393 said that the beating lasted approximately a number of hours; W 05393 fainted a couple of times and water was put over him. The next thing he knows is that he was being dragged again to the other room he woke up probably the next day⁶
24. W 05393 recalled that at some point while he was lying, a revolver was put on his (fore-)head by a person, but the revolver did not shoot. It just clicked. W 05393 stated that it was not the purpose of the person to kill him but to make him afraid.⁷
25. W 05393 claims that it was the Accused who did this. W 05393 did not want to use or mention the name of the Accused. Even though W 05393 acknowledges that he did not know the person by name, his "identification" of the Accused was the fact that afterwards he got to know that he was the only person wearing a red hat.⁸
26. Not a single person in the room where this occurred addressed the person who used the revolver addressed that person by his name, or by any nickname.⁹
27. When W 05393 was questioned about the basis for stating that it was the accused, the W 05393 replied that "he based his saying that the other soldiers would not do a thing without the accused telling them what to do, so the accused was the main person and that's what it is".¹⁰
28. W 05393 claimed that the Accused questioned him. This was 6 or 7 days before his release on the 18th. The questions related to theft, and W 05393 claimed that the Accused used wordings like "Who is a thief" and "You have to tell us who the biggest thief is".
29. When W 05393 was questioned about the basis for stating that it was the accused, the W 05393 replied that "I know. I didn't know back then, but I got to know that he was the person". In addition to that: "So if I see him today, I would not recognize him. I would not recognize him because he has no interest for me, and I hope that I never see this person in my entire life".¹¹
30. W 05393 further described that he was beaten with a baseball bat, or whatever it is called on several parts of his body. According to the W 05393 he was hit over 200 times.¹²
31. When W 05393 was questioned about the fact if anybody on the scene referred to the perpetrator with a name or nickname, W 05393 replied simply: "No".
32. When W 05393 was questioned about the basis for stating that the Accused was a commander and whether anybody on the location -where he said he was beaten- had referred to him as a commander, W 05393 replied: I couldn't hear, I wasn't able to hear" and: "No only that later I found out, I was told by others and that he was the main commander there."¹³

⁵ Transcript 20/09/'21, p. 407:4-p.408:7; and p. 408: 10 - 16

⁶ Transcript 20/09/'21, p. 410 :2 - 8; p. 410: 9 -21 as well as p. 411:1 -16.

⁷ Transcript 20/09/'21, p. 411 :21 - p. 422 :17.

⁸ Transcript 20/09/'21, p.412 :20 -p. 413: 11.

⁹ Transcript 20/09/'21, p.413 :12 -15 as well as p. 414 :21 -22.

¹⁰ Transcript 20/09/'21, p. 413:23 -p. 414 :10.

¹¹ Transcript 20/09/'21, p. 420: 13- 14.

¹² Transcript 20/09/'21, p.425: 29 - p. 426: 3.

¹³ Transcript 20/09/'21, p. 426: 20 - 23; as well as p.427: 3 - 11.

33. The issue of how the witness W03593 actually first heard about the Accused being the commander in Zllash, he replied that he learned this about a month or so after he was released.¹⁴
34. When W 05393 was confronted with the fact that -at an earlier statement- about the fact if anybody on the scene referred to the perpetrator with a name or nickname of Salih, W 05393 replied: "No".¹⁵
35. The witness explicated it further stating: "No, because I have seen this person two times altogether, so the first time he beat me up, and the other time, and I've never seen him again in my life".¹⁶
36. Lastly, a number of photographs were shown to the witness, it was clear that the witness was uncertain about the building in which he says that he was being kept. He clarified that in his testimony as follow: "To tell you the truth, I think that the location, as I said I couldn't see because my eyes were covered, but it is most probably that".¹⁷

VI. Analysis of the statement of Witness W05393

37. The defence submits that the statement of W05393 holds no evidence capable of supporting a conviction beyond a reasonable doubt to any of the charges of the confirmed indictment.
38. To this effect the defence submits that the witness does not in any manner identify properly the accused. He has no knowledge in any manner of the identity of the Accused before the events about which he gave his testimony.
39. Neither even in court did the witness pronounce the name of the Accused, nor has he done so before his testimony. He has failed even to identify the Accused during his testimony. In fact, he said, as is stated above that he has only seen him twice. He never saw him before the events and never saw him after the events that he has testified about. The witness even testified that he was unable to see the Accused during the events about which he testified, as he had a bag or sack over his head during the events about which he testified.
40. The witness is unable to identify properly the date on which the events that he has testified about. He is not capable in determining the month or even the year in which the events that he has testified about, took place. In addition, he was unable to refer to any point in time to which he could possibly connect the events about which he testified.
41. The defence submits that the witness does not in any manner identify the location of the events about which he has given testimony. As he was unable to look around at the moment of his said capture due to the fact that nearly immediately after entering the car, he was put a sack or bag over his head, it is simply impossible to state that he was in or at the scene of the Zllash location as referred to in the indictment. Upon his arrival at the scene, he was most of the time in a place that he had never been before, nor did he after the events ever visit the site where the events took place.
42. The standard of Proof beyond reasonable doubt requires that it is applied to facts constituting the elements of the crime and the mode of liability of the accused as charged. The witness stated by his own account that he was arrested or taken by members of the Military Police. Salih Mustafa had no authority over the Military Police nor over the Brigade that was operating in the Gollak area in which Zllash (whatever that word might even indicate

¹⁴ Transcript 20/09/'21, p. 428: 7 - 9.

¹⁵ Transcript 20/09/'21, p. 435: 22 - 24.

¹⁶ Transcript 20/09/'21, p.436 :4 -8.

¹⁷ Transcript 21/09/'21, p. 512: 22 -25; and p. 513 :18 -24.

considering the fact that no geographical or cadastral determination has been made about it). He had no authority to arrest people to detain or question them, as simply the Brigade Command would have such authority. Fatmir Sopi¹⁸ and Sejdi Veseli¹⁹ confirmed that in their respective testimonies.

43. As to the location, Zllash has not been narrowed down to specific location. The witness stated that he was taken to Zllash, even though his vision was impaired. One wonders how he could have possibly determined the correct and specific location where the vents about which he testified took place, given the fact that he was unable to have any view of it. He could have been taken anywhere in Zllash. Zllash is the word for an undetermined area within the Gollak area.
44. The Accused denies inflicting any wrongdoing to witness W05393.
45. The witness has given not in any manner any testimony about the alleged fact that the Accused had any knowledge about the events that the witness testified about.
46. The witness has given not in any manner any testimony about the alleged fact that the Accused had any authority over the location where the witness testified about.
47. The witness has given not in any manner any testimony about the alleged fact that the Accused had any knowledge about the events that the witness testified about.
48. The witness has given not in any manner any testimony about the alleged fact that the Accused had any authority over anybody who allegedly inflicted any alleged injuries upon him.
49. The witness has given not in any manner any testimony about the alleged fact that the Accused had any control over the situation, location or circumstances in which the events that the witness testified about. Nor is there any indication that the Accused fell under the orders of a command who had ordered the alleged arrest, detention, cruel and mistreatment of W 05393 or the conditions under which the witness claims to have been.
50. The witness has given not in any manner any testimony that his alleged interrogation and mistreatment was done by the Accused, and or anybody that would be subordinate to him. No proof in any manner has been given that the accused would have the authority to instigate, aid or abet to the events that the witness testified about.
51. Considering the above, the defence submits that W05393 is in no manner an eyewitness. Not as to the perpetrator who inflicted the injuries that he claims to have been inflicted upon him there and then. Not as to the location where the injuries might have been inflicted. Not as to the dates he has indicated. Not as to the date that the witness has indicated when the alleged offenses towards him were inflicted upon him.
52. The witness W05393 is unreliable and not credible as to the place and the date and the perpetrator and therefore his testimony bares no intrinsic probative value as to any of the charges of the Accused in the confirmed indictment.

VII. The Testimony of the Witness W01679

53. W 01679 testified in court on 4 and 5 October 2021. His account of events is in brief that he went as a volunteer to join the KLA. In order to do that he went to a village, and from that village he was sent to a school in Zllash. In that school he is said to have joined the KLA and received training. W01679 is not from Zllash and never went there before.²⁰

¹⁸ Transcript 18/01/'22, p.2094: 21- p.2095: 8;

¹⁹ Transcript 25/01/'22, p.2196: 18 -25 and p.2263 :19-24

²⁰ Transcript 5 /10/'21, p. 963: 21-964 :5

54. He went together with friends, all neighbours from him, to Zilash and one of them was a female. Females would stay in the same school building as where the male soldiers would stay, just in a different room. W01679 could not recall how many females were in the school. Np particular assessment was taken before one could enter the KLA at that location.²¹
55. On the 5th day of his training, he claims to have been approached by 4 armed soldiers dressed in black, -who apparently came out of nowhere- and approached him in the yard of the school. The 4 soldiers took him from the school and told him to go with them.
56. Apparently, the other neighbours with whom W01679 went to the school to join the KLA, left as he had been taken by these 4 soldiers. He learned that later from them.²²
57. W01679 said that the soldiers told him that the Commander needed to talk with him. None of the soldiers introduced himself, but they told W01679 that they were from a special unit Skifterat. Upon walking the way, W 01679 arrived at a place. It was the first time that W01679 was seeing that place.²³
58. While walking towards the eventual place where he would meet the commander, W 01679 was put on a bag on his head. It was when he was inside the building that the bag was taken off his head.²⁴
59. Later on, W 01679 learned who actually got to fetch him from the school. He described these persons with the name of BIMI and DARDANIA.²⁵
60. W01679 testified that as he had been taken into the room of the building, that the commander there. The soldiers had brought him there. The commander did not introduce himself. W 01679 said that he did not understand the name there and then. The soldiers did not address the person in any other way then "commander". It was only later that the W 01679 heard that he was Commander Cali.²⁶
61. Questioned about whether he could describe the person, the commander, W 01679 was unable to describe the person. He just spoke about the clothes he wore, but in no manner indicated a description of the person.²⁷
62. The commander, at the time still unknown to the witness, asked W 01679 "why are you here, and things like that". As the witness answered that he had come to join and make his contribution, the commander allegedly started shouting and would say things like "you are lying, tell me the truth" and he got up and hit W 01679. Then the other persons started hitting him too. The other soldiers asked him (the commander), what shall we do with him (W 01679), the commander said "Finish him off".²⁸
63. W 01679 testified that he was kept in a barn or cow shed during 17 nights. He was released on the 18th day. The witness was unable to describe the barn or cow shed in detail in which he was held for that period. He gave some information about it. He could not recall whether there was any window, or how many steps it would take from one side to the other side of it. There was a wooden door, and there would come some light between the slats of the door. The witness said it was not a big space but could give no dimensions. It was damp.²⁹
64. W 01679 testified that he was detained and stayed in detention for 18 days when he was released. He was released on the 18th day. And within time frame up to the 18th day of his

²¹ Transcript 5 /10/'21, p. 962: 17 -p.963: 8; p. 963: 14 -15, p. 973: 25- p.974 :2 and 5 -20.

²² Transcript 5 /10/'21, p. 975:12-18

²³ Transcript 4 /10/'21, p. 866 :11-p.867: 6.

²⁴ Transcript 5 /10/'21, p. 980 :9-14.

²⁵ Transcript 5 /10/'21, p. 978: 24 -p.879:15

²⁶ Transcript 4 /10/'21, p. 867 :11-p.868:3

²⁷ Transcript 5 /10/'21, p. 980: 21-p. 981: 10

²⁸ Transcript 5 /10/'21, p. 981 :3-11

²⁹ Transcript 5 /10/'21, p. 982: 6 - p. 983:2

detention he claims to have been beaten almost every day. And it was not only him, but W 01679 also testified that each of the people with whom he was detained in a barn, was beaten every day.³⁰

65. When the witness was asked whether there were any questions being put to him, the witness answered that sometimes they would ask him some questions and other times they would call him a thief and call him all sorts of names. Participating in the beatings were 2 females and one of them injured W 01679 him in a manner that left a scar on him. The female injured W 01679 with a hot iron and burned him with it. W 01679 testified over that event also that he was maltreated with electricity and that wires had been put to his feet and those were connected to a box upon which a button was attached. It was usually done by Dardan and Afrim. The witness did not know whether the commander would be present. None of them would wear a mask while ill-treating the witness. A person with the name of Bahri -according to the witness the deputy of Cali- did not participate in him being tortured.³¹
66. When he spoke about the participation of commander Cali in all of the beatings, the witness stated that the commander Cali the witness explained that Commander Cali was only beating him on the first occasion, but that he did not beat him at any other occasion. The witness did not recall clearly whether the commander was present during the other beatings. Whereas he stated that one time he replied "Perhaps he was there, but didn't beat me" and in the same line he stated that he was present there and was looking on". The discrepancy was not solved in the questioning.³²

VIII. Analysis of the testimony of Witness W01679

67. The defence is of the opinion that the statement of Witness 01679 is completely unreliable and at times false. Later on, another witness (W 03594) will be discussed whose testimony contradicts the testimony of Witness 01679.
68. The defence is strongly of the opinion that this witness simply fabricates large parts of his statement.
69. The witness is unable to identify properly the date on which the events that he has testified about. He is not capable in determining the month or even the year in which the events that he has testified about, took place. In addition, he was unable to refer to any point in time to which he could possibly connect the events about which he testified.³³
70. The standard of Proof beyond reasonable doubt requires that it is applied to facts constituting the elements of the crime and the mode of liability of the accused as charged. Salih Mustafa had no authority over the Military Police nor over the Brigade that was operating in the Gollak area in which Zllash (whatever that word might even indicate considering the fact that no geographical or cadastral determination has been made about it). He had no authority to arrest people to detain or question them, as simply the Brigade Command would have such authority. Fatmir Sopi³⁴ and Sejdi Veseli³⁵ confirmed that in their respective testimonies.
71. As to the location, Zllash has not been narrowed down to specific location. The witness stated that he was taken to the location where he claims to have eventually been held Zllash, even

³⁰ Transcript 5 /10/'21, p. 983: 3-12

³¹ Transcript 5 /10/'21, p. 983:18 -p. 984: 23; p. 984 :22 - p. 986 :1 as well as p.986 :17 - p. 988: 22.

³² Transcript 5 /10/'21, p. 1005: 19 -p. 1006: 9

³³ See SITF 00035212 p.6 and DSC-DC-2020-05DSM00359-00365 is the number for the document that the defence supplied.

³⁴ Transcript 18/01/'22, p. 2094: 21- p.2095:8;

³⁵ Transcript 25/01/'22, p. 2196: 18 -25 and p.2263:19-24

- though his vision was impaired. The witness has never been to Zllash before in his entire life. And he has never returned to it. He has no idea about the area and the locations.
72. One wonders how he could have possibly determined the correct and specific location where the vents about which he testified took place, given the fact that he was unable to have any view of it. He could have been taken anywhere in Zllash. Zllash is the word for an undetermined area within the Gollak area.
73. W 01679 is a citizen who claims to have joined the KLA. Without ever having seen W01679 in his entire life, there is no good reason to think that Salih Mustafa would select a completely unknown person to him to be apprehended, questioned and detained. How could Salih Mustafa -if he was in Zllash at all at the time- even know that W 01679 was in the school as part of a training there. There is absolutely no evidence that even suggests that Salih Mustafa would ever come to the school or have any dealings with recruits or volunteers who were in the school.
74. It is simply not credible to state that suddenly and randomly W 01679 would have been selected to be questioned and beaten up in any other location.
75. To date, the W 01679 never supplied any material regarding his claimed injuries, nor has he delivered anything that even slightly suggests that indeed he would have suffered the claimed injuries. Considering the statements of W 01679 regarding the treatment (daily beatings) that he had -as he claims for no reason- by people who would not have any authority to detain or question anybody in that area. The Accused certainly had not any authority in the area.
76. His account of being injured by a female soldier with a hot iron is untrue. His account regarding maltreatment in the form of applying electricity upon him is untrue. The location in Zllash most probably did not even have electricity, at least not in the parts where witness claims to have stayed. which he described had no electricity.
77. The defence produced earlier in the proceeding's material (as did the SPO) in which it became clear that the witness had previously been in a regular court, and never mentioned this entire episode of his claimed ill-treatment. The defence believes that the witness has been adding issues of severity in order to make his testimony and claimed treatment appear more severe, and thus more reliable. At the time of his previous testimony the witness was unable to give any kind of information regarding the accused, even though it was specifically asked to him. However, 18 years later he is able to produce all kinds of specificities regarding the Accused. He even amplified the role of the Accused 18 years later. By doing that it is clear for the defence that the testimony of W 01679 is unreliable and that he is not a credible witness, upon which any conviction could be built.³⁶
78. The defence is of the opinion that the testimony of the W 01679 bears no probative value of any kind, is neither reliable nor credible. It should therefore already be rejected, and in doing so, it cannot be the base for a conviction to any or all of the charges of which the Accused is charged.

IX. Testimony of the Witness 03594

79. The witness W 03594 has been one of the people who has been detained. He was at some point in time asked to come to Zlash as apparently Sejdi Veseli wanted to speak with him. Therefore 3 people came to his home and he went with them to Zllash wint a Niva car.
80. Even though he had never been in Zllash, the witness knew where he was going.

³⁶ See SITF 00035212 p. 1-7 and DSC-DC-2020-05DSM00359-00365 is the number for the document that the defence supplied

81. W03594 was not at any point impaired in his vision. He had no bag over his head whatsoever. Not when he went to Zllash, not when he was there, and not when he was called for questioning and not when he was eventually released.
82. Upon his arrival at a for him unknown location, he found out that he was in fact not going to speak with mr. Veseli. Instead, he was being put by two masked men who fetched him, and directed towards a barn, in which he had to stay. W 03594 has been detained in Zllash, and according to his account of the events he was placed in a barn in which at least 2 other occupants were staying.
83. According to the witness, it was on the 4th of April (1999).³⁷
84. Questioned about the barn, and what he would see when he left the barn the witness described the scene. In his words the witness stated: "If you went out of the barn, you could see nothing because there was this haystack just opposite the barn. But if you would go a bit further up, it was an elevated area where I was taken to have that conversation with that -- when I went to that elevated area, I saw it was a flat area and that's when I saw that there was another house".³⁸
85. The witness went further to describe the situation around the barn. The witness described the situation where there was no other building attached or nearly attached to the barn where he stayed. Just opposite the barn was a stack of hay.
86. "If you went out of the barn, you could see nothing because there was this haystack just opposite the barn. But if you would go a bit further up, it was an elevated area where I was taken to have that conversation with that -- when I went to that elevated area, I saw it was a flat area and that's when I saw that there was another house". The witness described the location as a flat area where there was just a single house at the opposite side of the yard.³⁹
87. As far as the witness described the area, as far as he could recollect, there was no fence around it.⁴⁰
88. The very issue where this witness diverts from other witnesses that have been discussed is the issue whether the people who were with him in the barn, have been taken out of the barn and whether they have been maltreated. The witness stated in this respect the following:
89. "I declare publicly that I have not said this in Prishtine nor am I telling you here that they would take the people from out of the barn or from the barn. So, I have declared that they have not taken anyone away from the barn during my stay there. So, this is the declaration that I've given in Prishtine and this is what I'm telling you here. If you have misunderstood me, that's a different story altogether. Because if people were taken away from the barn, I would have said that today before you. But I have told you back then and telling you right now that during my stay there, nobody was taken away from the barn, neither during day-time nor during night-time, to be maltreated or to be sent away for any matter. That has not happened to me and that has not happened to anyone else during that time".⁴¹The witness insisted on this point:
90. "So, Your Honours, Mr. Prosecutor, I'm not here to defend anyone, but I don't have to accuse anyone if that is not what has happened. So this is the declaration that I have given. So, no person has been taken away to be maltreated, either during the day-time or the night-time, during the time that I was taken there and I was staying at the barn."⁴²

³⁷ Transcript 13/10/'21, p. 1035:23-24

³⁸ Transcript 13/10/'21, p. 1178:10-25

³⁹ Transcript 13/10/'21, p. 1177:10-25

⁴⁰ Transcript 13/10/'21, p. 1181:1-4.

⁴¹ Transcript 12 /10/'21, p.1053:18 -p. 1054:5.

⁴² Transcript 12 /10/'21, p.1054: 19 -24.

"I understood myself, because during those two, three days, they didn't have any signs or marks on their hands, legs, head. But I noticed that their backs were red, and there I understood that this could be from the beating. But, otherwise, they could move freely, they could take their clothes off and exercise, and none of their legs or arms were swollen. I did not see any marks on their head. I also stated in Prishtine that the backs of three of them were red. There were no marks on them but they were red. Maybe they didn't go into details to explain to me what had happened to them, but I guarantee to you that none of them told me that they had been maltreated by someone else".⁴³

91. The witness even explained his position on this issue further:

"I would like to clarify something, Your Honour and Mr. Prosecutor. I'm quite aware of what I said. It is true, and the interview I gave in Prishtine was recorded. If somewhere in there, there exists that I've said that, that somebody was taken from that barn and maltreated, then I can be held here as an accused and not as a witness. It is not true that somebody was brought out of the barn. There were discussions about beating, but I did not know what was going on. If I heard something like that, I would have gone crazy. I could not believe anything because I did not see any signs on their body. I had no idea that they had been maltreated to that degree as said. But nobody, nobody was taken out of the room. So this interview has been recorded and I request that we look at it. And I hereby state again that none of those with me was taken out. I'm speaking from the time I was there, from the 4th until the 19th. I never said that they were taken out of the room and maltreated. If they were maltreated, then that must have happened before I arrived there. This is what I said even before the Prosecutor in Prishtine. And I hereby publicly state again that all those who were with me in the room, none of them had injuries on their faces, heads, limbs, knees, except the fact that their backs were a bit red. With the exception of this person who came later in, who was brought in later in, who said that he had been badly beaten. But, again, I did not see signs of beatings on his body either. I'm telling here, using his words, what he said. This is all what I wanted to say".⁴⁴

92. The witness expressed this part over and over again. When being asked by the SPO whether the people that he met in the barn had told him that they were beaten, he responded once again:

"It is true that they told me that, but I did not believe them because I did not see any marks on their bodies. I'm not here going into details what they said. I did not see anyone beat them and I'm not responsible for that. But in my view, because I have experience from other prisons, we could not move for weeks when we would be beaten. That's why I'm repeating again, I did not see any marks on their faces, heads, limbs. I said this in Prishtine as well. Two or three persons told me that they had been badly beaten. But as I said, when they would take their clothes off, I only saw some red marks on their back. I did not see any marks on their limbs. This is what I also stated in Prishtine".⁴⁵

⁴³ Transcript 12 /10/'21, p.1059: 7 -17.

⁴⁴ Transcript 12 /10/'21, p.1059: 19 -p. 1061: 21.

⁴⁵ Transcript 12/10/ '21, p.1063 line 23 until p. 1064 line 8.

93. So, the witness W03594 did not even believe what he heard from the people that were kept in the barn, as he could actually see with his own eyes that their stories did not correspond with the absence of any injuries that they claimed to have, and as W 03593 and W 01679 testified in Court.
94. As to the treatment that he got he responded to another question of the Prosecutor. The witness seemed to be ambivalent to the people who kept him in the barn, and the conditions:
95. When the SPO asked the question: "But you did suggest that you were somewhat grateful to the people who held you there because you had been treated well. That -- do you maintain that you were grateful and you had been treated well during your stay there?"

The witness responded as follow

"It is true. It was not their mistake that I was there. You asked me how I felt there, and I said I didn't know whether the evening or morning would find me there. But the personnel who gave us food, who took us to the toilet, I'm very thankful to them. They also brought me cigarettes. If they did not respect me, they would not bring me cigarettes inside a prison. And this is true, and I'm grateful to these persons. Most of them I don't know to this day. This is the reality. As to how I felt, I cannot explain it to others. I felt very badly. That was my second death. My first death was caused by the Serb occupier and this was my second death, which was even more grave than that of the Serbian occupiers. For me, it was very difficult to find myself in a barn and to be treated like an animal. Were you personally ever physically mistreated in that stable? Never. No offence whatsoever, no beating, physical beating, or threat from no one".⁴⁶

96. The Prosecutor confronted the witness with a passage of a previous statement about being hit himself. The witness had a different view towards the Prosecutor with regard of being hit, and whether that hitting had actually hurt him or whether that was a beating at all.

"But then you stated in line 7: "Yes, they hit me as well. They said, 'Put your hands out,' and there was no explanation there. You couldn't have asked for any explanation hands out." Do you as to not to put your hands out. I could have not put my recall a time where somebody came in and asked you to put your hands out?"

97. The witness W03594 answered the following:

"It is true, Mr. Prosecutor, Your Honour, Madam Judge, and I explained this very well, and I did not understand it as a maltreatment or beating. I told the Prosecutor as well; this person was very young who came into the room. He was 17 years, so he could have been my own child. And he said, "Put out your hands," and I did that. But this was not a beating. For me, it was -- I felt very bad to see a young person doing that amongst us. It wasn't, for me, painful to get two or three hits with a thin wooden stick. But for me, it was very painful to see this person who was very young. He is now grown up, but I'm sure he did it without being aware of what he was doing. So, this was the only time something like this happened during my stay there. And I did not consider it as beating or a threat or something else".⁴⁷

⁴⁶ Transcript 12 /10/'21, p.1066: 16 -p. 1067:10.

⁴⁷ ERN 061016-TR-ET, Part 4, page 2: 7 – 10; Transcript 12 /10/'21. p.1067: 15 - p. 1068 :15.

98. As to the Accused and his alleged presence in Zllash when asked by the Defence Counsel about the presence of Salih Mustafa or Cali in Zllash the witness was very clear again:

“Mr. Lawyer, I know Salih Mustafa personally. I know him personally. Had anyone mentioned his name, I would say yes, but nobody mentioned him”.

99. When asked whether hear anybody speak anybody about Salih Mustafa the witness responded:

“When I went upstairs, I saw everybody who was there. Had I seen Salih there, I would have recognized him, but I didn't see him there. As long as I was in Zllash, I never saw him there. When I got out, I received information from other people that he was not there in that area. He was in another area called Majac. Had I seen him there, I would not have defended him, even if he were my brother. But I didn't see him there. And I would have seen him upstairs when I went upstairs, but I didn't see him there”.⁴⁸

X. Analysis of the testimony of the Witness W 03594

100. The witness contradicts the previously discussed witnesses (W03593 and W 01679) to the extent that the previous witnesses can hardly be believed in their account of the events about which they testified.
101. The location which W03594 described must have been an entirely different location than the other 2 witnesses said. The other 2 witnesses could not even give a plausible account of the location as their vision was clearly impaired according to their own statements.
102. W 03594 had not at all such problem. He could clearly look around and was in no manner impaired in his vision and therefore his observations regarding the location where the people were kept.
103. His account is fundamentally different than the Zllash Prison Camp as is envisaged in the indictment. The Zllash location as envisaged by the SPO in the indictment and according to the “Zllash Prison Camp Photograph Book” (ERN SPOE00128386-00128410).
104. The Zllash Hamlet as it is laid down in Section A of the Photograph Book is not and cannot be the location at which the alleged crimes in the indictment took place. It simply does not in any manner correspond with the statement of W03594.
105. As the location is the fundamental issue at stake, it is the view of the Defence that the witness W03594' account of the location does not in any manner correspond with that location. With that fact, the case of the SPO cannot be proved beyond a reasonable doubt.
106. Besides that, the accused had no authority to detain anybody in the Gollak area, and in particular in the area that was being controlled in the Llap Operational Zone where Brigade 153 was operating. The standard of Proof beyond reasonable doubt requires that it is applied to facts constituting the elements of the crime and the mode of liability of the accused as charged. Salih Mustafa had no authority over the Military Police nor over the Brigade that was operating in the Gollak area in which Zllash (whatever that word might even indicate considering the fact that no geographical or cadastral determination has been made about it). He had no authority to arrest people to detain or question them, as simply the Brigade Command would have such authority. Fatmir Sopi and Sejdi Veseli confirmed that in their respective testimonies.

⁴⁸ Transcript 13/10/'21, p.1210:13 -25

107. Apart from that there is good cause to be extraordinary reluctant to accept the testimonies of both W 03593 and W 01679. They do not corroborate each other but are completely in contradiction with the testimony of W03594.
108. Witness W03594 last but not least never ever saw the accused in Zllash in the period of the indictment. He knows him from before the war, and therefore could have known him well during the period of the indictment. His comments regarding any wrongdoing or being present in Zllash at the period of the indictment and the period in which the witness)3594 was held there speak very clear about the fact that he was not there at the location wherever the witness was held in the area.
109. If the location of the indictment is not the location where the people were allegedly held than there is no point in continuing with the case any further. If the Accused was not on that location, had no authority there whatsoever and if the location itself is repeatedly being described by a witness that was there at the time, than there is simply at this point in time enough to dismiss the charges of which the accused is being charged with.
110. Witness W03594 contradicts the basic matters of the other witnesses to the extent that any further going forward with the case should be stopped.

XI. The alleged Murder

111. The Special Prosecution with Count 4 of the Indictment, accuses Salih Mustafa that in the detention complex in Zllash (The Zllash Compound) approximately between 19 April 1999 and around the end of April 1999, he committed Illegal Murders, War Crimes charged under Articles 14 (1) (c) (i), 16 (1) (a) and 16 (1) (c) of the law, as Salih Mustafa had the necessary intent and knowledge of the crime of unlawful murder. That the Accused was present when his victims were initially brought to the detention complex in Zllash (The Zllash Compound), where they were targeted by several KLA members, beaten and tortured more than other detainees.
112. The victim of this murder case was last seen alive on or around 19 April 1999. His family did not hear more from him. According to the indictment around the end of April 1999, the BIA unit left Zllash. The victim's body was discovered at some point in time.
113. In order to achieve the standard of proof beyond reasonable doubt, that Salih Mustafa is the perpetrator of the criminal offense of Illegal Murder a War Crime, the SPO during the main trial has invited witnesses W03593, W04600, W01679, W03594, W04669, W04676, W04603, W04390, W04391, W04674, W04485, W04484 and W04849.

XII. The testimony of the witness-W 04600

114. The SPO considers that the alleged presence of Salih Mustafa in the Detention Center in Zllash -at the time when witness W04600 sent the victim to this complex- is confirmed by the testimony of witness W04600. W04600 appeared in court on 23,24 and 27 September 2021
115. According to the testimony of witness W04600, he was the [Redacted].⁴⁹
116. The witness W04600 stated, that the military police dealt with matters of -- that had to do with the soldiers, i.e., not to allow soldiers to stray outside the rules of the army. That was all.⁵⁰

⁴⁹ Transcript 23/09/'21, p.714:24.

⁵⁰ Transcript 23/09/'21, p.715:4-6.

117. Witness W04600 further stated that sometime in April 1999 he was at the BIA base.⁵¹
118. Witness W04600 stated that the reason he went to the BIA base somewhere in April 1999, is that he accompanied the victim their base on the order of Agron Xhemajli. He received an order from Agron Xhemajli to accompany the victim to a place called BIA in Zllash. They have called it the Skifterat.⁵²
119. The witness W04600 stated that he didn't give me any other details. But upon leaving, Xhemajli said that, "If you take W 04603 – you take W 04603 and another person, because W 04603 is from that very neighborhood and knows the area" of the person that they mentioned. So, he said, "Take these two and take that person and escort him to Zllash".⁵³
120. The witness W04600 stated that next they got on the vehicle. It was a Mercedes. And they wanted to leave.⁵⁴
121. The witness W04600 stated that, the eventual victim (of the alleged murder) came with him and the other two (i.e., W04603 and another soldier). We set off. The road to Zllash passes by Buna 29, so we went up hill, up to the point, the base of Skifterat.⁵⁵
122. The witness W04600 stated that, that he, W04600 and the other soldier were wearing black uniforms, while the witness W04603 had a camouflage uniform. This other soldier was not part of the military police unit. He was just a soldier at Buna 29.⁵⁶
123. The witness W4600 stated that, thee stopped at the gate, in front of the gate, and a soldier opened the gate. We entered in the yard. And I said the words that I have mentioned already, that, "Agron Xhemajli told us to bring this person here to you."⁵⁷
124. The witness W4600 stated that he spoke to Salih Mustafa, Cali. But they only greeted each other. He was at a distance. He was in a building upstairs. He just greeted them, signing "Boys, how are you?" and that was all, and the distance between them and Commander Cali when they exchanged these greetings it was about 20-30 meters.⁵⁸
125. The witness W04600, after the prosecutor show a photograph number 6 in the exhibit list for this witness, with ERN SPOE00213478, an aerial photograph, (of the alleged Zllash compound) in within in the -surrounded by countryside, nature -, stated that "It looks similar, but he is not sure whether it is it is the one".⁵⁹
126. The witness W04600, also stated that, the entrance below looks similar. With regard to the buildings, I'm not sure about them. But the entrance looks like the one he saw. However, he cannot assess whether the buildings were the same as the ones that he sees in photograph.⁶⁰
127. The witness W04600, stated that as he saw the buildings were used as a barn, it is on the left. But "if you see the door there, it is on the left. However, I can't pinpoint where it was because there were other people, there were other families living there, and maybe they had barns as well. But from what I see here, I think it was on the left of the yard".⁶¹
128. The witness W04600, stated that the buildings resembled each other not only in this

⁵¹ Transcript 23/09/'21, p.723: 3.

⁵² Transcript 23/09/'21, p.723: 5-8.

⁵³ Transcript 23/09/'21, p.724:20-25.

⁵⁴ Transcript 23/09/'21, p.725:22-23.

⁵⁵ Transcript 23/09/'21, p.727:18-20.

⁵⁶ Transcript 23/09/'21, p.728:10-12.

⁵⁷ Transcript 23/09/'21, p.728:18-21.

⁵⁸ Transcript 23/09/'21, p.729:8-10, and 13.

⁵⁹ Transcript 24/09/'21, p.750:16-17.

⁶⁰ Transcript 24/09/'21, p.750:22-25.

⁶¹ Transcript 24/09/'21, p.756:5-9.

- compound but in the entire village. The houses look like each other.⁶²
129. The witness W 04600 found out from the person who he met after the offensive that the victim was dead. Because the offensive scattered them. So, he learned directly from Fatmir Sopi that the victim was dead.⁶³
130. The witness W04600, stated that in times that he was at Skifterat bas., Initially there it was Salih Mustafa, Rrahman Dini, Agron Xhemajli, and many others. They would rotate. He met them and then he went back to base.⁶⁴
131. The witness W04600, stated that at BIA base, there were civilians, because the Serbian forces had expelled people from Prishtina and from other areas and they had been displaced. There were men, women, children, elderly people.⁶⁵
132. The witness W04600, stated that he doesn't remember that he saw any tents there to (the so called) BIA base, because it was a short time when he saw it. "Perhaps there were, within the compound and outside the compound, but I can't say. There were refugees everywhere, in the compound, outside, with the neighbors" but the witness could not indicate and doesn't know how many.⁶⁶
133. The witness is unable to identify properly the date on which the events that he has testified about, he was also unable to refer to any point in time to which he could possibly connect the events about which he testified.
134. The defence submits that the witness was not 100% sure about location, when the SPO showed him the aerial photograph of BIA base, he stated that "It looks similar, but he is not sure whether it is it is the one".
135. The standard of Proof beyond reasonable doubt requires that it is applied to facts constituting the elements of the crime and the mode of liability of the accused as charged. The witness stated by his own account that he was [Redacted] and that he accompanies the victim (of the alleged murder) to Zllash, based on Agron Xhemajli's order.
136. Salih Mustafa had no authority over the Military Police nor over the Brigade that was operating in the Gollak area, also he had no authority to detain the civilian nor to detain soldiers.

XIII. The testimony of the witness-W 04603

137. The SPO considers that the presence of Salih Mustafa in the alleged Detention Center in Zllash would be confirmed by the testimony of witness W04603, however, from the statement of this witness, who appeared in court on 2 and 3 November 2021, can not to be proved.
138. Since from the testimony of this witness (W04603), it is proved that he at the time when witness W04600 accompanied the victim to the BIA base, W04603 was not with him, so that he could not declare that he saw Salih Mustafa at the time when the victim was escorted to the BIA base.
139. Nor did he (W 04603) receive information from witness W 04600 that the victim was sent to the BIA base in Zllash. He only heard that the victim was somewhere in Zllash, without determining the exact location of the victim.

⁶² Transcript 24/09/'21, p.759:3-4.

⁶³ Transcript 24/09/'21, p.767:17-19.

⁶⁴ Transcript 24/09/'21, p.794:23-25.

⁶⁵ Transcript 24/09/'21, p.796:3-6.

⁶⁶ Transcript 24/09/'21, p.799:19-23.

140. The witness W04603 stated that he became a member of the KLA from December 1998.⁶⁷
The witness W04603 stated that his role at Buna 29 was a car mechanic.⁶⁸
141. The witness W04603, stated that it was W04600 who admitted him in KLA in December 1998.⁶⁹
The witness W04603 stated that the unit where he was had a military police squad attached to it.⁷⁰
142. The witness W04603 stated that most of member of his unite wore black uniforms.⁷¹
143. The witness W04603 stated that he went to Grastica village, after the witness W04600 told him that he (W04603) had to go with him because he was not familiar with that part, so he went with him to show him that part, that house.⁷²
144. The witness W04603 stated that they went to Grasztica by car, Mercedes.⁷³
145. The witness W04603 stated that a young soldier accompanied them. W 04603 didn't know him, he didn't know his name, and that he was a young man. The young soldier went with him (W04603) and witness W04600 to village Grasztica.⁷⁴
146. The witness W04603 stated that he saw the young soldier for the first time that day and he was from another unit.⁷⁵
147. The witness W04603 stated that, after they arrived to [Redacted], they stopped the car there. And all three went out of the car. Witness W04600 told him (W04603) to check the terrain. They were near a main road, so the witness W04600 asked him to secure the road. And the witness W 04600 told him (the eventual alleged victim of the murder), "You have to come with us."⁷⁶
148. The witness W04603 stated once they returned to their unit, parked the car inside the yard of the unit. They took him (the eventual alleged victim of the murder) from the Mercedes and moved him into a jeep, a black jeep.⁷⁷
149. The witness W04603, stated that after he (the eventual alleged victim of the murder) entered the jeep, they left, and he (W04603) don't know where to.⁷⁸
150. The witness W04603, stated that he doesn't know exactly what was the role of Agron Xhemajli, but he thinks he was leader of the military police. That's how knew him.⁷⁹
151. The witness W04603, stated that he heard, when he was at Buna 29, that the victim was taken or held at Zllash, but he didn't have any further information.⁸⁰
152. The witness W04603, stated that as far as he knows, no any particular person would have contact from Buna 29 with Skifterat. And that Skifterat did not have any authority over Buna 29.⁸¹
153. The witness W04603, stated that the black jeep did not return to Buna 29 afterwards and he did not see ever that jeep again.⁸²
154. The witness W04603 stated that he doesn't remember whether he met witness W04600 the

⁶⁷ Transcript 2/11/'21, p.1290:3.

⁶⁸ Transcript 2/11/'21, p.1290:22.

⁶⁹ Transcript 2/11/'21, p.1291:7

⁷⁰ Transcript 2/11/'21, p.1291:20.

⁷¹ Transcript 2/11/'21, p.1291:23.

⁷² Transcript 2/11/'21, p.1299:11-13.

⁷³ Transcript 2/11/'21, p.1299:16.

⁷⁴ Transcript 2/11/'21, p.1299:18-19.

⁷⁵ Transcript 2/11/'21, p.1299:21-22

⁷⁶ Transcript 2/11/'21, p.1302:17-20.

⁷⁷ Transcript 2/11/'21, p.1304:3-5.

⁷⁸ Transcript 2/11/'21, p.1304:13-14.

⁷⁹ Transcript 2/11/'21, p.1308:17-19.

⁸⁰ Transcript 2/11/'21, p.1311:8-9.

⁸¹ Transcript 2/11/'21, p.1316:16.

⁸² Transcript 2/11/'21, p.1334:19 and 21.

following day in the unit.⁸³

XIV. The testimony of the witness -W 04669

155. The SPO considers, according to the indictment, that with witness W04669 it will be able to prove that this witness was detained on the “base of BIA” and that acts of ill-treatment and illegal beating were undertaken against him.
156. This witness should testify that those who were under the command of Salih Mustafës would have taken arbitrary detention actions, treated detainees cruelly and tortured the detained people and eventual victim of the alleged murder. In addition, as the victim (of the murder) and other detainees had been under the alleged supervision of BIA members they were also responsible for the unlawful killing of the victim. The accused is charged that he even ordered them or instigated their conduct, or had knowledge of it.
157. However, from the statement of this witness W04669, who appeared in court on 10 and 11 November 2021, the defense thinks that the prosecution failed to prove that this witness W04669 was detained on the base of BIA and also, that with the testimony of this witness the SPO failed to prove that on the indicated location of the indictment the victim was also detained.
158. The defense submits that with the testimony of this witness, the prosecution failed to prove that the place/ location where the witness W04669 was detained was the alleged base of the BIA and that this location was under the control of the BIA.
159. With the testimony of this witness, it has been proved that witness W04600 did not only accompany a person one time, but that he (W04600) is the person who also made the decision to detain witness W04669.
160. Witness 04669 gave his testimony on 23,24 and 27 September 2021, and should be very carefully analyzed and cannot be seen as corroborating any evidence given by witness W 04600. Reviewing the testimony of W 04669 it can be concluded that W04600 gave false testimony and /or withheld information while in court about the fact that W04600 during the period April-May 1999 he had detained at least one other person, in this particular case the witness W04669. So apart from his “escorting the eventual alleged victim of the alleged murder, he played a vital role in the eventual detention of W 04669.
161. The witness W04669 stated, that the primary purpose of going to Zllash was to undergo the training, and he undertake the training, for a week or ten days. They lasted ten, 12 days, but not more than that.⁸⁴
162. The witness W04669 stated, that in in the vicinity of that house, the house where he spent a time with Fatmir Sopi, Sejdi Veseli and others. There were four or five or six houses in total, and in one of them we would have our theory classes. There were like classrooms. Probably that building used to be a school in the past.⁸⁵
163. The witness W04669 stated, that on road leading to Zllash was a check-point. The road was not paved. It was a road leading to Zllash. “ But while I went to Zllash the previous two or three times, I never had a problem passing that check-point. Whereas when I went there this time, I was stopped. The guards stopped me. They called someone by radio. I

⁸³ Transcript 2/11/'21, p.1336:9.

⁸⁴ Transcript 10/11/'21, p.1399:24-25.

⁸⁵ Transcript 10/11/'21, p.1402:8-11.

- think they called him Halim; I don't recall his name properly, but probably it was Halim. If I see his picture, I would be able to recognize him. I know where he used to work, I know where he works now. I mean, this person was called and he came. He came by a Mercedes-type car of a green color. It was type 240, if I'm not mistaken. Whereas the number plates were PR, if I'm not mistaken. I don't know exactly the numbers of the number plate".
164. And this person (W04600) asked me, "Why is it that you have come to this part of the country, because that's not allowed?" And I told him the reason why I am coming here. And he (W04600) told me to get in the car. So, it was only himself in the car, he was driving the car, so I got in the car in the front seat. This person was wearing a military uniform. He (W04600) had a Kalashnikov-type weapon in the car and he told me that, "Now I'm telling you what will happen." So this person sent me to Zllash. I had no idea that there was a detention center anywhere there in Zllash. I was not thinking that when I go there,⁸⁶
165. The witness W04669 stated, that after he reached Zllash he was handed over to a guard that was standing in front of a gate of a building, I once I entered into that room, I understood that it was a barn. It was a place where the animals would stay normally. And it was there that I saw two other people, when I got inside that room.⁸⁷
166. The witness W04669 stated, how the guard was dressed. "He was dressed -- I mean, he had this beret on his head and he was dressed in black clothing. I'm not sure on whether he was holding an emblem of the KLA in his arm or not, though. Usually some of them were wearing emblems and insignia and some others were not because they didn't have enough supplies of this nature".⁸⁸
167. The witness W04669 stated that he understood that the guard [Redacted]. So he got this order from him that I would be placed inside and that's what happened.⁸⁹
168. The witness W04669, in his statement described the barn. He stated that it was sort of a room, big in size, something like a stable. There was something like a trough, a feed trough for animals in there. It was made of wood. The walls were made of wood and earth, mud. And there were openings here and there. And from there, you could see a bit outside.⁹⁰
169. The witness W04669 in his statement spoke about the victims in Zllash. He stated, that at a certain moment, they brought the victim (of the alleged murder) where we were staying. " His hands were tied with a wire. He wanted his hands to be a bit released because they were very tightly tied. He was black from the beatings. Everything on his face, his eyes, nose, everything was black. And he was swollen. But he could stand on his feet and he could speak a bit. He, however, could not open his eyes. He could just open them slightly. As I said, they were all black".⁹¹
170. The witness W04669 stated that the base for what we talk about, for all the soldiers, departments or units, was Zllash. And we know who were the persons in charge. For some time, Fatmir Sopi and then Sejdi Veseli, and the last one, until NATO came, the person who carried out those duties was Adem Shehu.⁹²

⁸⁶ Transcript 10/11/'21, p.1410, 1411 and 1412:1.

⁸⁷ Transcript 10/11/'21, p.1415:14-18.

⁸⁸ Transcript 10/11/'21, p.1416:16-20.

⁸⁹ Transcript 10/11/'21, p.1416:25-1417:1-2.

⁹⁰ Transcript 10/11/'21, p.1416:25.

⁹¹ Transcript 10/11/'21, p.1432:2-9.

⁹² Transcript 11/11/'21, p.1519:18-22.

171. The witness W04669 stated that he is talking for the base where he was held, and he stated: "yes, it is there. All the houses that you see served as a base for those who were leaders. They served as a logistical base, food-supply base, training base, sleeping quarters. But at no time did I have any knowledge that there was also a detention location there, until I myself was detained".⁹³
172. The witness W04669, stated that he doesn't remember that there was gate to the yard, to go outside. There was only the door of the building.⁹⁴
173. The witness W04669, when he referred to a person called [Redacted], he doesn't know correct his last name is, he stated: "I do. I don't exactly know what his correct last name is, but I know that his name is [Redacted], and that person is from the [Redacted], What I am telling you is accurate. And what I mean by that is that this is information that has been verified. Because back then, I only knew that this person was called by the name [Redacted], and that he was from the [Redacted]. About his last name, I don't know. I don't know whether his last name is [Redacted], I've not taken an interest in that ever. But I know where his house is and I know where he belongs to in terms of the [Redacted]. The most important thing is that I can recognize his face out of 1.000 faces, or 1 million faces for that matter".⁹⁵
174. The witness W04669, stated, that he knows where [Redacted], has worked after the war and so what was his [Redacted].⁹⁶
175. The witness W04669, stated, that that person used to work [Redacted]. And I know that he has been in [Redacted].⁹⁷

XV. Analysis of these statements relevant to the murder charge

176. According to the Defense, W 04600 is an unreliable witness and not credible in any manner. He apparently diminished his own role in the entire events regarding the eventual arrest and the whereabouts of victim of the alleged murder as referred to in the indictment.
177. Not any other single witness came forward stating that the Accused had anything at all to do with the alleged murder of the victim.
178. Apart from that, the date of the death of the victim, the cause of his death has never been established. Neither has the location of his death been established.
179. The case file does not present anything else than photographic material of a deceased person. The cause of his death, nor the circumstances of his death have been in any manner established by the SPO with the witnesses that have been heard in Chambers.
180. As the cause of death cannot be established, and no eyewitness whatsoever has said anything about it, the charge of murder is simply at this point a charge that cannot be established beyond reasonable doubt.
181. Having said that, any allegation of willful killing of this individual cannot be proved. With that, the charge must be dismissed.

⁹³ Transcript 11/11/'21, p.1519:25-1520:1-4.

⁹⁴ Transcript 11/11/'21, p.1549:21-22.

⁹⁵ Transcript 11/11/'21, p.1552:13-23.

⁹⁶ Transcript 11/11/'21, p.1553:8-9.

⁹⁷ Transcript 11/11/'21, p.1553:13-19.

182. The defense is of the opinion that in no manner beyond any reasonable doubt has been established by the SPO 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.
183. There is simply not any direct relation between the alleged crime in the indictment and the role that the Accused allegedly played in the events concerning the victim that allegedly was murdered.

XVI. Conclusion

184. For the above reasons the defense submits that the Panel, when deciding on the current Motion, must at least assess these witnesses.
185. The defense submits that the testimonies of witnesses W03593, W 01679 and W04600 can simply be not brought in line with 2 other witnesses of the SPO, namely W03594 W0669 and W04603.
186. Witnesses W03594, W0669 and W04603 contradict to a crucial extent the testimonies of witnesses W03593, W 01679 and W04600.
187. The defense submits that having heard the testimonies of witnesses W03593, W 01679 and W04600, these are not reliable nor credible. The issues have been to a large extent in the assessment that the defense has made about each of them. Witnesses W03593, W01679 cannot be regarded as eyewitnesses, nor is there account of the events accurate on date, location, circumstances, or possibility to even see where and when they have been.
188. The accounts of both W03594, W0669 contradict their entire account of events.
189. The testimonies of W03593 and W 01679 do not implicate the Accused. They have learned the name of the Accused only after the conflict but had never any prior knowledge of the Accused. They have never been able to identify the person. They just say a name, and “glue or paste” that name on the Accused.
190. Witness W03594 testified in an exculpatory manner about whether the Accused had anything to do with his detention, or whether the Accused was in any manner involved. He even withdrew himself as a “victim” in the case during the proceedings.
191. His account, which is an eyewitness account, is that the co-detainees W03593 and W 01679 have never spoken about the Accused, and exaggerated to a crucial extent their claimed maltreatment, the circumstances and the people that might have been involved in their detention. Witness W04603 indicated another location as being envisaged in the indictment.
192. None of the testimonies of any of the witnesses was convinced that the *locus delicti* was the one as indicated by the SPO, let alone that the Accused would have any authority over that location.
193. As for witness W04600, the defense submits that this witness gave either false testimony or withheld information about his real acts during the period of the indictment and his conduct towards a victim (that has been allegedly murdered). W04603 contradict to a crucial extent the testimonies of witnesses W04600.
194. As for the murder of the victim referred to in the indictment, there is simply no proof at all at this time to suggest that the accused had anything to do with that. None of the witnesses of the SPO ever gave an account that comes even close the killing of this person by the Accused.

195. The defense submits that considering the testimonies of the witnesses for the charges of the Accused being arbitrary detention (count 1), cruel treatment (count 2), torture (count 3) and murder (count 4) do not fulfil the threshold for guilt beyond a reasonable doubt as prescribed in Rule 140 (1) and (2) of the Rules.
196. For the purpose of further submissions and clarifications and for a further assessment whether any or all of the charges be dismissed, the defense requests to a hearing as foreseen under Rule 130 (2) will be scheduled. In it, any further oral arguments could be made. It will in the view of the defense assist the Panel to make a better determination about the issues that have been brought forward in this motion, including issues regarding location, analysis of witnesses, or any other issues that can be valuable for a decision on the Motion. In addition, it is of interest for the accused if he can voice his findings and assessment of the entire case so far. For the Accused there is a lot at stake.
197. For the reasons above mentioned, the defense submits that, upon hearing the Parties for oral arguments, any or all of the charges of which the Accused is charged, are to be dismissed.

I. **Word count: 12471**

II. **Pages**



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At The Hague, the Netherlands

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