



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

Before: **A Panel of the Court of Appeals Chamber**
Judge Michèle Picard, Presiding Judge
Judge Kai Ambos
Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

Date: 23 June 2023

Language: English

Classification: Public

**Corrected version of 'Public redacted version of Prosecution Brief in Response to
Defence Appeal', KSC-CA-2023-02/F00027/RED**

Specialist Prosecutor's Office

Alex Whiting

Counsel for the Accused

Julius von Bóné

Counsel for Victims

Anni Pues

CONTENTS

I. Introduction	3
II. Standard of review	4
III. Submissions	4
Formal deficiencies justifying summary dismissal	4
1. Waiver	5
2. Failure to address standard of review	7
3. Abandoned grounds of appeal	9
No discernible error prior to judgment	9
1. Sub-ground 1F	10
2. Sub-ground 1G	11
3. Sub-ground 1N	11
4. Sub-ground 2D	13
5. Ground 3	14
No discernible errors in Trial panel’s approach to evidence	17
1. Sub-ground 1B	19
2. Sub-ground 1C	20
3. Sub-ground 1D	23
4. Sub-ground 1E	25
5. Sub-ground 1H	27
6. Sub-ground 1I	27
7. Sub-grounds 1J, 2I, 2J, 2K, 2L, 2M, 2N	28
8. Sub-ground 1K	37
No discernible error in Trial Panel’s findings	38
1. Sub-ground 1A (armed conflict)	38
2. No error in Trial Panel’s rejection of MUSTAFA’s alibi	41
3. No error in the Trial Panel’s finding about BIA’s control of the ZDC	43
4. No error in Trial Panel’s findings about the location of the ZDC	46
5. No error in Trial Panel’s findings about MUSTAFA’s presence at ZDC on 1 April 1999 (Sub-ground 2P)	50

Murder (Count 4).....	51
1. MUSTAFA’s submissions under ground 3.....	51
2. Sub-grounds 4A, 4B.....	52
3. Sub-ground 4C.....	60
4. Sub-ground 4D.....	70
5. Sub-ground 5A.....	71
6. Sub-ground 5B.....	72
Torture (Grounds 6, 7).....	74
1. Ground 6.....	74
2. Ground 7.....	75
Arbitrary detention (Count 1).....	76
1. Ground 8.....	76
Sentencing.....	77
1. The 26-year term of imprisonment imposed was a proper exercise of discretion.....	77
2. Sub-grounds 9A, B (Aims and purposes of sentencing).....	78
3. Sub-grounds 9C-H (Application of the principle of <i>lex mitior</i>).....	80
4. Sub-ground 9I.....	84
5. Sub-ground 9J.....	84
6. Sub-ground 9K.....	86
IV. CLASSIFICATION AND DISCLOSURE DECLARATION	88
V. RELIEF SOUGHT	89

I. INTRODUCTION

1. The Appeals Panel should dismiss the Appeal in its entirety.
2. Salih MUSTAFA ('MUSTAFA') was found guilty of arbitrary detention, torture and murder as war crimes, and was sentenced to 26 years' imprisonment. During this trial, the Prosecution bore the burden of proof. Though MUSTAFA had no obligation to produce evidence, he offered a substantial defence case focusing primarily on seeking to establish an alibi.¹ MUSTAFA was afforded a fair trial, was provided a full opportunity to test and challenge the evidence presented against him, and was allowed to introduce all proposed evidence supporting his case. MUSTAFA's defence strategy was ultimately unsuccessful, as the Trial Panel rejected his alibi and found his responsibility for the charged crimes proven beyond reasonable doubt.²
3. As the Appellant, MUSTAFA now carries the primary burden to prosecute his appeal.³ This shift of the burden demands that he must present his case clearly, logically and exhaustively in order to succeed.⁴ Instead, MUSTAFA presents his appeal in a fragmented manner, largely repeating submissions about the credibility and reliability of witnesses he called at trial, without explaining why or how the Trial Panel erred in rejecting their testimony. The Appeal Brief lacks even basic

¹ Defence Rule 130 (1) Motion to dismiss any or all charges of the Indictment, KSC-BC-2020-05/F00320, 15 February 2022; Defense Final Trial Brief, KSC-BC-2020-05/F00457, 21 July 2022. Out of 16 Defence witnesses, 9 were 'pure' alibi witnesses (Jakup ISMAILI, Hazir BOROVC, Gani SOPI, Nazmi VRBOVC, Bislim NRECI, Kapllan PARDUZI, Nuredin IBISHI, Sheqir RRAHIMI, Ahmet ADEMI).

² Trial Judgment, KSC-BC-2020-05/F00494, 16 December 2022, confidential ('Judgment'), paras 652-659, 674-685, 689-695, 729-733, 742-760. The Trial Panel found that Count 2 (cruel treatment) was fully consumed by Count 3 (torture), see paras 664-667.

³ ICTY, *Prosecutor v. Mladić*, MICT-13-56-A, Judgment ('Mladić AJ'), 8 June 2021, paras 37, 90.

⁴ *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023 ('Case 07 AJ'), para.29, citing STL, *Al Jadeed and Al Khayat*, STL-14-05/A/AP, Public Redacted Version of Judgment of Appeal ('*Al Jadeed and Al Khayat AJ*'), 8 March 2016, para.17. See also ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-A, Judgment ('*Stanišić and Simatović AJ*'), 9 December 2015, para.21; *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021, para.28; Decision on the Defence Appeals Against Decision on Preliminary Motions, KSC-BC-2020-07/IA004/F00007, 23 June 2021, para.14; *Specialist Prosecutor v. Shala*, Decision on Pjetër Shala's Appeal Against Decision on Provisional Release, KSC-BC-2020-04/IA001/F00005, 20 August 2021, para.7.

requirements of the Practice Direction on Filings,⁵ such as precise references to the Judgment, evidence or legal authorities.⁶ MUSTAFA neglects to include arguments explaining how the alleged legal errors invalidate the judgment, or how alleged factual errors occasioned a miscarriage of justice.⁷

4. More problematic still are MUSTAFA's attempts to reopen a range of issues that he did not contest at trial. The Trial Panel afforded MUSTAFA full opportunity to pursue his defence strategy in the way he chose. It was not required, or even authorised, to dictate to him how to conduct his case.⁸ Having failed at first instance, MUSTAFA treats the appeals proceeding as a second trial.

5. The Trial Panel thoroughly adjudicated the charges against MUSTAFA, assessing his defences and fair trial claims, issuing reasoned decisions, and granting relief where appropriate. The judgment is detailed, reasoned and based on credible, reliable evidence; it should be upheld.

II. STANDARD OF REVIEW

6. The Appeals Judgment in *Gucati & Haradinaj* set out the standard of review and general considerations applicable to appellate proceedings before the Kosovo Specialist Chambers ('SC').⁹

III. SUBMISSIONS

FORMAL DEFICIENCIES JUSTIFYING SUMMARY DISMISSAL

7. Appeals proceedings are of a corrective nature, aimed at identifying and correcting only those specific errors capable of invalidating the Judgment or

⁵ Article 48(1)(b)(1), (2), (3) of the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, KSC-BD-15, 17 May 2019 ('Practice Direction on Filings').

⁶ Art.48(1)(b) of the Practice Direction on Filings.

⁷ Art.48(1)(b) of the Practice Direction on Filings.

⁸ ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgment ('*Krajišnik AJ*'), 17 March 2009, para.42; ICTR, *Prosecutor v. Bikindi*, ICTR-01-72-A, Judgment ('*Bikindi AJ*'), 18 March 2010, para.44.

⁹ Case 07 AJ, paras 20-37.

occasioning a miscarriage of justice.¹⁰ The Appeals Panel should reject MUSTAFA's strategy to elevate breadth over substance by raising 51 appeal grounds, and substantiating none, in the hope that the Appeals Panel will fill in the blanks of his deficient submissions. While the Appeals Panel will occasionally step in to prevent a miscarriage of justice, such *proprio moto* intervention is exceptional. MUSTAFA cannot abdicate his responsibility to properly articulate his appeal grounds, hoping that the Appeals Panel will dedicate its limited resources to rummage through his submissions for the necessary building blocks of a compliant appeal. MUSTAFA's approach is antithetical to the effective and expeditious functioning of appeal proceedings and warrants summary dismissal.

1. Waiver

8. MUSTAFA fails to acknowledge that many of the decisions he now challenges were uncontested at trial. An appeal is not a trial *de novo*.¹¹ Absent special circumstances,¹² an appellant cannot remain silent on a matter at trial only to raise it for the first time on appeal.¹³ This is more than a mere formality. In adversarial proceedings like those before the SC, a trial panel makes findings primarily on the basis of the issues identified – and arguments advanced – by the parties.¹⁴ As the ICC Appeals Chamber in *Ongwen* stated:

The Appeals Chamber recalls that if it were to address the substance of arguments that could have reasonably been raised before the first-instance chamber, but were raised for the first time

¹⁰ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06 A 5, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction ('*Lubanga AJ*'), 1 December 2014, para.56.

¹¹ Article 46(2) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

¹² For an example of special circumstances, see IRMCT, *Mladić AJ*, para.88; *Prosecutor v. Karadžić*, MICT-13-55-A, Judgment ('*Karadžić AJ*'), 20 March 2019, para.25.

¹³ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgment ('*Prlić et al. AJ*'), 29 November 2017, para.165; *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgment, 19 July 2010, para.112; *Prosecutor v. Boškoski*, IT-04-82-A, Judgment, 19 May 2010, para.185; *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, paras 170, 183; *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgment ('*Šainović et al. AJ*'), 23 January 2014, paras 125, 223; *Prosecutor v. Tadić*, IT-94-1-A, Judgment ('*Tadić AJ*'), 15 July 1999, para.55.

¹⁴ ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23/1-A, Judgment ('*Kunarac AJ*'), 12 June 2002, para.43.

only on appeal, this “would exceed the scope of its review”, as there would be no finding from the trial chamber to review.¹⁵

9. Allowing an appellant to revisit decisions on appeal that were uncontested at trial would have far-reaching consequences for the fair and expeditious conduct of trial proceedings, because trial panels would be required to render every decision as if it is contested and be on the lookout for issues not raised by the parties. Such an approach runs counter to jurisprudence holding that the parties have primary responsibility for raising issues during trial.¹⁶ Further, allowing parties to raise new, previously uncontested matters on appeal for the first time encourages manipulation of the process and gamesmanship; it allows parties to contest different matters at trial and on appeal, and it seeks to force the appeals panel to address arguments without the benefit of a full record developed before the trial panel. In relation to the admission of evidence, the duty to raise issues early is also enshrined in Rule 138(1), which demands that parties raise an issue at the time the evidence is admitted, and only permits parties to raise an issue subsequently in ‘exceptional circumstances, when the Panel is satisfied that [the] issue was not known at the time when the evidence was submitted’.¹⁷ For these reasons, a party who fails to raise an issue at the appropriate time is generally considered to have waived the right to raise the issue on appeal.¹⁸

¹⁵ ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15 A2, Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled “Sentence” (*Ongwen AJ*), 15 December 2022, para.108; see also ICC, *Ongwen AJ*, para.45; ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-A, Judgment, 14 December 2011, para.167.

¹⁶ ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para.19; ICTR, *Prosecutor v. Kambanda*, ICTR-97-23-A, Judgment, 19 October 2000, para.23; ICTY, *Tadić AJ*, para.55; see also regarding a party’s duty to identify mitigating circumstances for sentencing ICTR, *Bikindi AJ*, para.165; IRMCT, *Mladić AJ*, para.88; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgment (*Popović et al. AJ*), 30 January 2015, para.2060; see also Rule 138(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (*Rules*); Decision on the submission and the admissibility of evidence (*‘25 August decision’*), KSC-BC-2020-05/F00169, paras 36, 41.

¹⁷ 25 August decision, paras 36, 41.

¹⁸ ICTY, *Prlić et al. AJ*, para.165.

10. MUSTAFA has not identified any special circumstances justifying his change of position in relation to previously uncontested matters. Indeed, MUSTAFA fails to even acknowledge having changed his position on any of the grounds. Consequently, MUSTAFA has waived his right to raise these grounds on appeal and they should be dismissed *in limine*.

2. Failure to address standard of review

11. None of MUSTAFA's appeal grounds adequately identify and address the requisite standard of review.

12. Article 46 of the Law limits appeals to three categories of errors, namely:¹⁹

- a. an error on a question of law invalidating the judgement;
- b. an error of fact which has occasioned a miscarriage of justice; or
- c. an error in sentencing.

13. Therefore, the starting point for any ground of appeal is to identify which of the three categories of error under Article 46 is alleged. This step is important because each category of error brings about a different standard of review.²⁰

14. To establish an **error of law**, an appellant must not only identify and substantiate the error, but also explain how that error invalidates the judgment.²¹ Submissions that are incapable of invalidating the Judgment may be immediately dismissed and need not be considered on the merits.²²

15. For **errors of fact**, an appellant is required to show that the Trial Panel's evaluation of the evidence is wholly erroneous, or that such evidence could not have

¹⁹ See also Rules, Rule 173(1).

²⁰ ICC, *Lubanga* AJ, para.31.

²¹ Case 07 AJ, para.22. See also authorities referred to therein, including: IRMCT, *Prosecutor v. Fatuma et al.*, MICT-18-116-A, Judgment, 29 June 2022, para.14; STL, *Al Jadeed and Al Khayat* AJ, para.12; IRMCT, *Prosecutor v. Šešelj*, MICT-16-99-A, Judgment, 11 April 2018, para.13; ICTR, *Prosecutor v. Nshogoza*, ICTR-07-91-A, Judgment, 15 March 2010, para.13; ICTY, *Stanišić and Simatović* AJ, para.16; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgment ('*Nyiramasuhuko* AJ'), Volume I, 14 December 2015, para.30; IRMCT, *Prosecutor v. Ngirabatware*, MICT-12-29-A, Judgment, 18 December 2014, para.8; SCSL, *Prosecutor against Taylor*, SCSL-03-01-A, Judgment ('*Taylor* AJ'), 26 September 2013, para.25.

²² ICTY, *Prosecutor v. Galić*, IT-98-29-A, Judgment ('*Galić* AJ'), 30 November 2006, para.10.

been accepted by any reasonable trier of fact.²³ Moreover, only errors of fact occasioning a miscarriage of justice will cause the Appeals Panel to overturn the Trial Panel's finding.²⁴

16. Contrary to the statutes of the ICC and SCSL,²⁵ the SC's Law does not explicitly provide an avenue of appeal for **procedural errors**,²⁶ though a request for protection of legality under Article 48(7) may be based on a substantial procedural violation. The ICTY Appeals Chamber has considered that an alleged violation of a party's fair trial rights constitutes an error of law where the violation caused such prejudice as to invalidate the judgment.²⁷ In *Kordić and Čerkez*, the ICTY Appeals Chamber set out the relevant standard of review, requiring the appellant to prove:

- (1) that provisions of the Statute and/or the Rules were violated, and
- (2) that the violation caused prejudice or "unfairness" to the alleging party, such as to amount to an error of law invalidating the Trial Judgement.²⁸

17. In a subsequent judgment, the ICTY Appeals Panel explained that: 'the element of prejudice forms an essential aspect of proof required of an appellant in relation to the appeal alleging a violation of his fair trial rights'.²⁹

18. Where the alleged fair trial rights violation concerns a **discretionary decision**, the appellant must show that the Trial Panel committed a discernible error resulting in prejudice to that appellant.³⁰

19. Although the Notice of Appeal distinguishes between errors of law, errors of fact, and errors of sentencing, these distinctions are almost entirely absent in the

²³ Law, Art.46(5); Case 07 AJ, paras 25-26.

²⁴ Case 07 AJ, para.26.

²⁵ Article 81 of the ICC Statute; Article 20 of the SCSL Statute. *See also* ICC, *Lubanga* AJ, para.32.

²⁶ *See also* Case 07 AJ, para.42: 'The Panel is confronted with a request to further review an administrative decision issued by the President, rather than an appeal against an alleged error committed by the Trial Panel in issuing the Trial Judgment. Therefore, Ground 2 of Haradinaj's Appeal Brief falls outside of the Panel's scope of review.'

²⁷ ICTY, *Galić* AJ, para.21; *Prosecutor v. Hadžihasanović*, IT-01-47-A, Judgment ('*Hadžihasanović* AJ'), 22 April 2008, para.130; IRMCT, *Karadžić* AJ, para.26.

²⁸ ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004, para.119.

²⁹ ICTY, *Hadžihasanović* AJ, para.130, *see also* para.131.

³⁰ Case 07 AJ, para.34; IRMCT, *Mladić* AJ, paras 63, 107; ICTY, *Prlić et al.* AJ, para.119.

Appeal Brief. As a result, MUSTAFA makes conceptually confused submissions, oscillating between alleged errors of law, errors of fact and procedural errors. MUSTAFA's bare, unsubstantiated submissions alleging a general deficiency throughout the Judgement and requesting review of unspecified findings are wholly insufficient to discharge his appellate burden.³¹ MUSTAFA fails to show that his alleged errors of law invalidate the judgment, that his alleged errors of fact occasion a miscarriage of justice, or that the challenged discretionary decisions prejudiced him. As a result, the Appeal should be dismissed *in limine*.³²

3. Abandoned grounds of appeal

20. MUSTAFA offers no submissions in support of grounds 1M, 2H, and 5B,³³ merely referring to submissions under a different ground. Having failed to seek leave to vary his Notice of Appeal, these grounds should be treated as abandoned and dismissed.³⁴

NO DISCERNIBLE ERROR PRIOR TO JUDGMENT

21. Five of MUSTAFA's grounds of appeal relate to the conduct of trial proceedings. Four of them are raised for the first time on appeal and the fifth is based on a misrepresentation of the Indictment and a misstatement of the requirement for notice. The Appeals Panel should dismiss these sub-grounds *in limine*.

22. On the merits, MUSTAFA's arguments are unsubstantiated and undeveloped, amounting to mere disagreement with the Trial Panel's decisions, and failing to show that the Trial Panel erred in the exercise of its broad discretionary powers in managing the conduct of proceedings.³⁵ Even if MUSTAFA had established any error, none of

³¹ ICTY, *Krajišnik* AJ, para.142.

³² Case 07 AJ, para.31.

³³ Corrected Version of Defense Appeal Brief pursuant to Rule 179(1) of Rules of Procedure and Evidence ("Rules") with confidential Annex 1, 2 and 3, KSC-CA-2023-02/F00021/COR, 2 May 2023, confidential ('Appeal Brief'), paras 77, 179, 377.

³⁴ See similarly SCSL, *Taylor* AJ, paras 61-62, 406.

³⁵ Law, Art.40; Rules, Rule 116; *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Thaçi and Selimi's Appeals against Decisions F01057 and F01058, KSC-BC-2020-

the matters raised would have caused him such prejudice as to invalidate the Judgment.

1. Sub-ground 1F

23. MUSTAFA alleges that the Trial Panel erred in the exercise of its discretion when permitting the SPO to cross-examine W03594 as hostile.³⁶ To the extent MUSTAFA's submissions under this ground complain about the Trial Panel's rejection of parts of W03594's evidence,³⁷ they fall outside the scope of the Notice of Appeal and should be rejected outright.³⁸

24. MUSTAFA's remaining submissions emanate from a misrepresentation of the trial record because the Trial Panel did not make any ruling permitting the SPO to cross-examine W03594 as 'hostile'.³⁹ Rather, the Trial Panel granted leave to the Prosecution to refresh W03594's memory pursuant to its discretion under Rule 143(1).⁴⁰ MUSTAFA raised no objections at the time and has therefore waived his right to appeal these decisions. Moreover, MUSTAFA does not address the standard of review for discretionary decisions, fails to point to any prejudice capable of invalidating the Judgment, and offers no more than mere disagreement with the Trial Panel's decisions. Having thus failed to demonstrate any error, his submissions should be dismissed.

06/IA025/F00007/RED, 18 April 2023, para.20; *see also* paras 21-24; Decision setting the dates for trial preparation conferences and requesting submissions, KSC-BC-2020-05/F00123 ('Trial dates decision'), 20 May 2021, para.8.

³⁶ Appeal Brief, paras 40-50. Although the Notice of Appeal also cites to parts of the Judgment referring to W04669 (para.89) and W03593 (para.551), in the Appeal Brief MUSTAFA only makes submissions concerning W03594.

³⁷ Appeal Brief, paras 45-50.

³⁸ Defence Notice of Appeal pursuant to Rule 176 (of Rules of Procedure and Evidence) against the Judgment of the Trial Panel I of 16 December 2022, KSC-CA-2023-02/F00006 ('Notice of Appeals'), 2 February 2023, p.3.

³⁹ Appeal Brief, para.44.

⁴⁰ *See for example*, W03594, Transcript (Trial Hearing), 12 October 2021, pp.1043-1044, 1047-1048.

2. Sub-ground 1G

25. MUSTAFA fails to show how the assurances provided to W04600 under Rule 151(3) prejudiced him,⁴¹ particularly since the Trial Panel's decision to compel a witness to testify under Rule 151(2) is not contingent on assurances under Rule 151(3). Furthermore, MUSTAFA offers no cogent arguments or authorities in support of his submission that a decision under Rule 151(3) requires written reasons. While the right to a reasoned decision is a fair trial right, the scope of this right is contingent on the nature of the decision.⁴² Not every ruling during a trial requires detailed written reasons, especially when the ruling concerns routine matters and, as is the case here, the matter was not contested at the time,⁴³ despite ample notice.⁴⁴

3. Sub-ground 1N

26. MUSTAFA complains that the Trial Panel did not give him adequate time to file submissions before admitting into evidence certain medical reports 'in a form of IMMO in relation to victims 08, 05 and 09'.⁴⁵

27. MUSTAFA claims that a decision from the Trial Panel on 23 June 2022 required him to file submissions within six days 'regarding the reports', but fails to provide any

⁴¹ Appeal Brief, paras 51-52.

⁴² *Specialist Prosecutor v. Thaçi et al.*, Decision on Krasniqi Defence Request for Certification to Appeal the "Order on the Conduct of Proceedings", KSC-BC-2020-06/F01300, 16 February 2023, paras 15-17 (and citations therein); *Specialist Prosecutor v. Thaçi et al.*, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers" ("*Thaçi et al.* Decision"), KSC-BC-2020-06/IA009/F00030, 23 December 2021, para.154; Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, KSC-CC-PR-2017-01, 26 April 2017, para.143.

⁴³ ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-I-A, Judgment, 1 June 2001, para.165 (stating that it is 'sufficient for the Trial Chamber to explain its position on the main issues raised').

⁴⁴ Prosecution's notice of potential need for assurances pursuant to Rule 151(3), KSC-BC-2020-05/F00175, 1 September 2021, confidential; Submission of an application for assurances to the Decision on the conduct of proceedings and Rule 151(3) of the Rules, KSC-BC-2020-05/F00195, 9 September 2021, confidential; Oral order in Transcript (Trial Hearing), 20 September 2021, p.489, line 14 to p.490, line 11; Transcript (Trial Hearing), 23 September 2021, p.706, line 10 to p.707, line 13.

⁴⁵ Appeal Brief, paras 78-81.

citation.⁴⁶ Additionally, MUSTAFA omits to address the standard of review for discretionary decisions. Consequently, MUSTAFA's submissions on this ground are formally defective and should be dismissed *in limine*.

28. Even if considered on the merits, this sub-ground fails to establish any error. MUSTAFA was on notice from 24 January 2022 – before the close of the Prosecution's case – that the Victim's Counsel sought admission of expert 'medical forensic evidence for the purpose of individual reparations and truth-finding'.⁴⁷ On 24 May 2022 – before the close of the Defence case – Victim's Counsel submitted medical reports prepared by *the Instituut voor Mensenrechten en Medisch Onderzoek* ('iMMO'), following that organisation's appointment by the Trial Panel on 21 March 2022.⁴⁸ In accordance with Rule 149(2), MUSTAFA had seven days to file a notice indicating whether he challenged the reports. By 3 June 2022, ten days after receiving the reports, he had not filed any submissions, nor had he sought any extension of deadline to do so.⁴⁹ On 9 June 2022, after the reports had been admitted into evidence, MUSTAFA filed submissions, taking note of the iMMO expert reports, indicating that he does not request to present evidence in rejoinder in relation to the reports, and further indicating that 'the defence will reflect at a later stage of the proceedings on (parts of) the iMMO Expert Reports'.⁵⁰

29. Consequently, MUSTAFA clearly waived his opportunity to comment on the reports, and has failed to establish any prejudice, let alone to the extent required to invalidate the Judgment. Sub-ground 1N should therefore be dismissed.

⁴⁶ Appeal Brief, para.79. The SPO understands that MUSTAFA refers to Decision under Rules 132 and 149 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers on evidence called by the Panel, KSC-BC-2020-05/F00430 ('Rule 132 Decision'), 3 June 2022.

⁴⁷ Victims' Counsel request pursuant to the Second decision on the conduct of the proceedings dated 21 January 2022, KSC-BC-2020-05/F00297, 24 January 2022, para.4.

⁴⁸ Rule 132 Decision, paras 1, 4.

⁴⁹ Rule 132 Decision, para.4.

⁵⁰ Defence request to present evidence in rejoinder and related matters, following the order of the Panel as prescribed in filing F00430 with confidential Annex 1, KSC-BC-2020-05/F00434, 9 June 2022, confidential, paras 4-5.

4. Sub-ground 2D

30. MUSTAFA complains that the SPO changed its position regarding location of the crimes, thereby rendering the proceedings unfair.⁵¹ In particular, MUSTAFA states that the Indictment, Pre-Trial Brief and opening statement specified that one building at the ZDC was used to detain prisoners, whereas the SPO alleged at the end of the case that prisoners were kept in three separate buildings.⁵² This, according to MUSTAFA, deprived him of the opportunity to cross-examine the relevant witnesses on this matter, in violation of Article 6 of the ECHR.⁵³ These submissions are factually incorrect.

31. Contrary to MUSTAFA's submission,⁵⁴ the Indictment did not single out one building of the ZDC, but charged him with unlawful detention, cruel treatment, torture and murder committed at the ZDC, without specifying in which of the buildings of the compound the crimes took place.⁵⁵ MUSTAFA made no challenge to the form of the Indictment.⁵⁶

32. MUSTAFA's references to the Pre-Trial Brief ignore the purpose and scope of that document, which constitutes a *summary* of the evidence the SPO intends to present regarding the commission of the alleged crimes and the alleged modes of liability.⁵⁷ It is not intended to be – and indeed, by its very nature and timing⁵⁸ cannot

⁵¹ Appeal Brief, paras 97-114.

⁵² Appeal Brief, paras 99-107, referring to Prosecution submissions pursuant to Decision F00468 setting the agenda for the hearing on the closing statements and related matters, KSC-BC-2020-05/F00471, 8 September 2022.

⁵³ Appeal Brief, para.108.

⁵⁴ Appeal Brief, para.99.

⁵⁵ ANNEX 1 to Submission of confirmed indictment, KSC-BC-2020-05/F00011/A01, 19 June 2020, confidential, *see e.g.* paras 5, 18, 21, 31-32.

⁵⁶ Rules, Rule 97(1).

⁵⁷ Rules, Rule 95(4)(a).

⁵⁸ The Pre-Trial Brief is filed at the pre-trial stage before the SPO tenders any evidence or calls any witnesses.

be - exhaustive.⁵⁹ The same applies to the opening statement. MUSTAFA provides no authority to the contrary.

33. Likewise, MUSTAFA's citations to the Confirmation of Charges Decision are irrelevant to his argument, because that document is even less designed to serve as notice of the charges; its function is to provide reasons for the Pre-Trial Judge's decision to confirm or dismiss the indictment.⁶⁰

34. The indictment is the primary accusatory instrument that 'provides the Accused with sufficient information to understand clearly and fully the nature and cause of the charges against him or her with a view to preparing an adequate defence'.⁶¹ The Trial Panel correctly found that the charges in the Indictment encompass 'all buildings within the BIA base in Zllash/Zlaš'.⁶² MUSTAFA fails to establish any error, let alone prejudice capable of invalidating the Judgment, particularly noting the small size of the ZDC and the fact that the structures in question are conjoined buildings in the same corner of it.⁶³

5. Ground 3

35. Ground 3 complains that the SPO failed to apply for, and the Trial Panel failed to authorise, an exhumation and examination of the body of the Murder Victim pursuant to Rule 40.⁶⁴

36. MUSTAFA raises this issue for the first time on appeal. Rule 40 concerns investigative measures,⁶⁵ and MUSTAFA could have raised it before transmission of

⁵⁹ Submission of Pre-Trial-Brief, with witness and exhibit lists with strictly confidential and *ex parte* Annexes 1-3, KSC-BC-2020-05/F00082, 15 February 2021, para.1 (noting that the Pre-Trial Brief constitutes a summary of the evidence the SPO intends to present to prove its case).

⁶⁰ Rules, Rule 86(5).

⁶¹ Public Redacted Version of Decision on the Confirmation of the Indictment Against Salih Mustafa, KSC-BC-2020-05/F00008/RED, 12 June 2020, para.33; *Specialist Prosecutor v. Thaçi et al.*, Decision on Defence Appeals Against Decision on Motions Alleging Defects in the Form of the Indictment, KSC-BC-2020-06/IA012/F00015, 22 August 2022, para.17. *See also* ICTY, *Prlić et al. AJ*, paras 67-68.

⁶² Judgment, para.373.

⁶³ REG00-015, REG00-013.

⁶⁴ Appeal Brief, paras 324-342.

⁶⁵ Rules, Chapter I (Investigations), Section I (Investigative Measures).

the case file to the Trial Panel.⁶⁶ Moreover, MUSTAFA had a specific opportunity to raise the matter when he received SPO submissions addressing this issue on 20 August 2021,⁶⁷ prior to the opening statements.⁶⁸ MUSTAFA has therefore waived his right to raise this issue on appeal and Ground 3 should be dismissed *in limine*.

37. Even if considered on the merits, MUSTAFA's submissions fail because they are based on a fundamental misunderstanding of Rule 40. Contrary to MUSTAFA's assertions,⁶⁹ the presence of the word 'shall' in Rule 40 does not create an obligation on the Specialist Prosecutor to conduct exhumations or post-mortem examinations. It rather obliges him to seek judicial authorisation prior to conducting any such exhumation, in particular in light of the potential for unjustified exhumations to violate Article 8 of the ECHR.⁷⁰

38. Furthermore, Articles 24(2) and 35 give the Specialist Prosecutor sole responsibility for conducting investigations and vest him with 'a degree of freedom and a margin of discretion' in the performance of his functions.⁷¹ MUSTAFA's

⁶⁶ See Trial dates decision, para.13-14.

⁶⁷ Annex 1 to Submissions of confidential version of Annex 2 to Prosecution submission pursuant to KSC-BC-2020-05/F00123, KSC-BC-2020-05/F00167/A01, 20 August 2021, confidential, paras 12-14. Prior to commencement of trial, the Trial Panel sought submissions from the SPO *ex parte* as to whether any forensics examination had ever been performed on the murder victim's body. See Annex 2 to Decision setting the dates for trial preparation conferences and requesting submissions, KSC-BC-2020-05/F00123/A02, 20 May 2021, strictly confidential and *ex parte*. The SPO's submissions pursuant to this decision were initially filed as strictly confidential and *ex parte*. A confidential redacted version was filed on 20 August 2021.

⁶⁸ The opening statements began on 15 September 2021.

⁶⁹ Appeal Brief, para.319.

⁷⁰ See e.g. ECtHR, *Skolska and Rybicka v Poland*, 3049/17, 31083/17, Judgment, 20 September 2018, para.121 (where the court highlighted the importance of finding a due balance between the requirements of an effective investigation and the protection of the right to respect for private and family life of the parties to the investigation and other persons affected).

⁷¹ Law, Arts 24(2), 35(1) and (5); Case 07 AJ, paras 151, 184; *The Specialist Chamber of the Constitutional Court*, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 29 May 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chamber and Specialist Prosecutor's Office, KSC-CC-PR-2017-03/F00006, 28 June 2017, para.18.

contention that Rule 40 creates a 'mandatory' obligation for the Specialist Prosecutor to seek to conduct exhumations should be rejected.⁷²

39. MUSTAFA's submission that the Trial Panel should have ordered an exhumation *proprio motu* is equally baseless. Rule 40 is only engaged upon a request from the Specialist Prosecutor, as is evident from the plain language of the provision. It does not confer any power on the Trial Panel to order such investigative measures independent of the Specialist Prosecutor's request.

40. Even if the above obstacles were disregarded, MUSTAFA fails to show that an exhumation and post-mortem examination of the Murder Victim's body would have been justified.

41. During the investigation, the SPO determined that an exhumation and post-mortem examination would not have significantly advanced the matter.⁷³ When exhumed [REDACTED] in July 1999, the body of the Murder Victim was already badly decomposed,⁷⁴ and it would have been impossible to make any meaningful findings more than 20 years later.⁷⁵ Other factors also militated against conducting an exhumation, as the SPO submitted prior to the commencement of the trial:

[REDACTED]⁷⁶

42. MUSTAFA claims that the lack of an autopsy report resulted in failure by the Trial Panel to properly establish the identity of the body, cause and time of death, and the nature of any injuries.⁷⁷ He considers testimonial and photographic evidence, relied upon by the Trial Panel, insufficient.⁷⁸

⁷² *Contra* Appeal Brief, para.324.

⁷³ Annex 1 to Submissions of confidential version of Annex 2 to Prosecution submission pursuant to KSC-BC-2020-05/F00123, KSC-BC-2020-05/F00167/A01, 20 August 2021, confidential, para.14.

⁷⁴ Judgment, para.614.

⁷⁵ See ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision on the Defence motion requesting an inspection of the site and the conduct of a forensic analysis, 17 February 1998, para.13.

⁷⁶ Annex 1 to Submissions of confidential version of Annex 2 to Prosecution submission pursuant to KSC-BC-2020-05/F00123, KSC-BC-2020-05/F00167/A01, 20 August 2021, confidential, para.14.

⁷⁷ Appeal Brief, paras 325, 330-341.

⁷⁸ Appeal Brief, paras 329-331.

43. The Trial Panel acknowledged the absence of an autopsy report,⁷⁹ and explained in detail what evidence it considered to prove the identity of the body,⁸⁰ the cause of death,⁸¹ its approximate time,⁸² and the nature of injuries.⁸³ It found this evidence sufficient and did not require corroboration in the form of post-mortem examination.⁸⁴ MUSTAFA fails to show any error in the Trial Panel's reliance on such evidence to prove these facts. Indeed, it is well established that the elements of murder can be proven even in the absence of a body altogether.⁸⁵

44. MUSTAFA's remaining submissions under Ground 3 challenge various factual findings of the Trial Panel. Since MUSTAFA has anchored these submissions to his ground of appeal alleging an abuse of discretion on an interlocutory decision, they fail to correspond to the Notice of Appeal and should be summarily dismissed.⁸⁶ Nevertheless, in light of the significance of the issues raised, and out of fairness to MUSTAFA, the SPO responds to these submissions below.⁸⁷

NO DISCERNIBLE ERRORS IN TRIAL PANEL'S APPROACH TO EVIDENCE

⁷⁹ Judgment, para.620.

⁸⁰ Judgment, paras 614-618.

⁸¹ Judgment, paras 621 (severe mistreatment, denial of medical aid), 622-623 (bullet wounds) and 624.

⁸² Judgment, paras 616, 635-639.

⁸³ Judgment, para.619.

⁸⁴ Judgment, para.639.

⁸⁵ ICTY, *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, Judgment ('Lukić & Lukić TJ'), 20 July 2009, para.904; ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Judgment, 8 July 2019, para.862; ICTY, *Prosecutor v. Dorđević*, IT-05-87/1-T, Public Judgment with Confidential Annex ('Dorđević TJ'), Vol II, 23 February 2011, para.1708; *Prosecutor v. Perišić*, IT-04-81-T, Judgment, 6 September 2011, para.103; *Prosecutor v. Tolimir*, IT-05-88/2-T, Judgment, 12 December 2012, para.715; SCSL, *Prosecutor against Sesay, Kallon, Gbao*. SCSL-04-15-T, Judgment, 2 March 2009, para.139; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of The Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para.133; *see also Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgment pursuant to article 74 of the Statute, 7 March 2014, para.768; *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para.88; *See also* ICTY, *Popović et al.*, IT-05-88-T, Judgment ('Popović et al. TJ'), 10 June 2010, para.789; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgment ('Kvočka et al. AJ'), 28 February 2005, para.260; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgment ('Krnojelac TJ'), 15 March 2002, paras 326-327.

⁸⁶ Appeal Brief, paras 333-340.

⁸⁷ Paras 130-132.

45. MUSTAFA advances several sub-grounds of appeal challenging the Trial Panel's discretionary decisions as to the admission and assessment of evidence. Like the remainder of the Appeal, MUSTAFA's submissions under these sub-grounds are unclear, unsubstantiated and unmerited. Many of the matters raised – particularly those concerning admission of evidence – were uncontested at trial. In line with the general maxim of appellate proceedings that a party waives its right of appeal when failing to raise an issue at first instance, the Rules also explicitly require issues concerning the admissibility of evidence to be raised at the time of tender.⁸⁸ The only exception provided for under Rule 138(1) applies in 'exceptional circumstances, when the Panel is satisfied that an issue was not known at the time when the evidence was submitted'. Even then, it must be raised 'immediately after it has become known'.

46. In addition to having waived his right to appeal on these grounds, MUSTAFA also fails to identify and articulate any errors of law, errors of fact, or abuse of discretion. In the absence of cogent arguments establishing error, the Appeals Panel should follow settled jurisprudence to defer to the Trial Panel's broad discretion to admit evidence under Rule 138(1) and only intervene in very limited circumstances.⁸⁹ None of MUSTAFA's submissions rise to this high bar.

47. Similarly, it is primarily the Trial Panel's task to hear, assess and weigh the evidence presented at trial, and the Trial Panel enjoys broad discretion in this regard.⁹⁰ The Appeals Panel will generally defer to the Trial Panel, since the latter 'has the advantage of observing witnesses in person and so is better positioned [...] to assess the reliability and credibility of the evidence'.⁹¹ MUSTAFA offers no more than mere

⁸⁸ Rules, Rule 138(1); *see also* 25 August decision, paras 36 (fn.37), 41 (fn.42).

⁸⁹ Rules, Rules 137-139; Case 07 AJ, paras 35-36.

⁹⁰ Case 07 AJ, para.26.

⁹¹ ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Judgment ('*Kupreškić AJ*'), 23 October 2001, para.32; Case 07 AJ, paras 26, 33, 243, 371.

disagreement with the Trial Panel's findings, and thus fails to show how its discretion miscarried.⁹²

1. Sub-ground 1B

48. Sub-round 1B challenges the admission of the MUSTAFA's SPO suspect interview on the basis that he was not informed of the nature and cause of the allegations against him, in violation of Article 30(1) and (2) of the Kosovo Constitution.⁹³ MUSTAFA never challenged the admission of this evidence at trial,⁹⁴ and now fails entirely to substantiate his claim in the Appeal Brief. Consequently, sub-ground 1B should be summarily dismissed.

49. It also fails on its merits. In the *Shala* case, the Appeals Panel has recently considered and rejected similar submissions to those in sub-ground 1B. The Appeals Panel held that the level of detail to be provided during a suspect interview is 'generally not as high as the one expected to be provided when the person interviewed has been charged following the issuance of an indictment against him or her'.⁹⁵ Like Article 6(3) of the ECHR, the purpose of Article 30(1) of the Kosovo Constitution is to protect a person's ability to prepare his or her defence at trial. That purpose does not require the prosecution to disclose its investigative focus to each suspect it interviews.⁹⁶ Indeed, with reference to the ECHR, the Appeals Panel confirmed that

⁹² *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, KSC-BC-2020-07/IA006/F00006, 7 January 2022, para.18.

⁹³ Appeal Brief, paras 21-26.

⁹⁴ Judgment, para.238; Decision on the admission of evidence collected prior to the establishment of the Specialist Chambers and other material, KSC-BC-2020-05/F00281 ('13 December decision'), 13 December 2021, paras 4, 20-23.

⁹⁵ *Specialist Prosecutor v. Shala*, Decision on Shala's Appeal Against Decision Concerning Prior Statements, KSC-BC-2020-04/IA006/F00007 ('*Shala* Decision on Prior Statements'), 5 May 2023, paras 42-43.

⁹⁶ The distinction between the investigative and trial stages has also been recognised by the UN Human Rights Committee in interpreting equivalent provisions contained in the ICCPR (HRC, *Khachatrian v. Armenia*, no. 1056/2002, 28 October 2005, para.6.4. See also HRC *Evelio Ramon Gimenez v. Paraguay*, no. 2372/2014, 25 July 2018, para.7.10; HRC *Kelly v. Jamaica*, no. 253/1987, 10 April 1991, para.5.8. HRC, General Comment no. 32, Article 14: Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/CG/32, para.31). Trial Chambers at the ICTY have also consistently rejected

'there is no general or standard requirement to notify a suspect of the time, location, and specific conduct he or she is suspected of.'⁹⁷

50. At the time of the interview no indictment had been issued. MUSTAFA was informed of his rights under Article 38(2), including that there were grounds to believe he had committed a crime under the jurisdiction of the SC,⁹⁸ which the Trial Panel found was sufficient in concluding that the accused's rights had not been violated.⁹⁹ MUSTAFA therefore fails to establish any violation of Rule 138(2) warranting the exclusion of the SPO interviews.

51. MUSTAFA's argument alleging an error in the application of the principle against self-incrimination is equally baseless. On several occasions, MUSTAFA was reminded of his right to remain silent,¹⁰⁰ as well as his right to counsel, which he exercised by having his chosen defence counsel present throughout the interview.¹⁰¹ At the end of his interview, he confirmed that he did not object to the manner in which the interview had been conducted.¹⁰²

52. Lastly, MUSTAFA's submission that the Trial Panel was selective in relying on parts of the interview unfavourable to him, and ignoring favourable parts, is undeveloped and falls outside the sub-ground of appeal.¹⁰³ Moreover, the Trial Panel plainly has broad discretion to credit parts of witness's or suspect's evidence and not others.

2. Sub-ground 1C

attempts to rely upon the full scope of Article 14(3)(a) of the ICCPR in the context of investigative interviews (ICTY, *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4, Decision on Bajrush Morina's Request for a Declaration of Inadmissibility and Exclusion of Evidence, 28 August 2008, para.30; *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on the Admissibility of the Borovčanin Interview and the amendment of the Rule 65 *Ter* Exhibit List, 25 October 2007, para.35).

⁹⁷ *Shala* Decision on Prior Statements, 5 May 2023, para.42.

⁹⁸ 069404-TR-ET, Part 1, p.3, lines 3-7.

⁹⁹ 13 December decision, para.22.

¹⁰⁰ 069404-TR-ET, Part 1, p.3, lines 11-15.

¹⁰¹ 069404-TR-ET, Part 1, p.3, lines 16-19.

¹⁰² 069404-TR-ET, Part 1, p.3, line 25 to p.4, line 2; 069404-TR-ET, Part 8, p.32, lines 1-5.

¹⁰³ Appeal Brief, para.26.

53. Sub-ground 1C challenges the Trial Panel's questioning of W01679 in relation to a photograph depicting MUSTAFA, which was shown to the witness.¹⁰⁴ MUSTAFA failed to raise any objections at the time,¹⁰⁵ failed to explore the issue with the witness,¹⁰⁶ and even clarified that he had no objection to the Trial Panel's questioning.¹⁰⁷ MUSTAFA also fails to identify the applicable legal provision,¹⁰⁸ fails to identify the impugned evidence with precision,¹⁰⁹ and fails to identify any findings in the Judgment that are impacted.¹¹⁰ On these bases alone, sub-ground 1C should be dismissed *in limine*.

54. Further, it is unclear on what basis MUSTAFA objects to the impugned evidence. MUSTAFA variously alleges: (i) a violation of Rule 139(2) on the basis that the evidence was 'unethically admitted and subsequently seriously damaged the integrity of the proceedings';¹¹¹ (ii) that the Trial Panel was biased in its consideration of Defence submissions on the topic;¹¹² and (iii) a violation of Rule 138(2) on the basis that the evidence has no 'probative bearing as to the identification of MUSTAFA by the witness'.¹¹³

55. The first two issues are entirely unsubstantiated and fall outside of the Notice of Appeal. These submissions should be summarily dismissed.

¹⁰⁴ Appeal Brief, paras 27-30, challenging the questioning of W01679 on 5 October 2021.

¹⁰⁵ Decision on items used with witnesses W03593, W04600, W01679, and W03594 during their in-court testimony, KSC-BC-2020-05/F00285, 17 December 2021, paras 7-8.

¹⁰⁶ Transcript (W01679), 5 October 2021, pp. 949-997.

¹⁰⁷ Transcript (Procedural Matters), 12 October 2021, pp.1017-1020, 1023-1024, see in particular p.1020, ln 2-4.

¹⁰⁸ MUSTAFA's references to Rule 138(2) and 139(2) appear to be incorrect, because Rule 138(2) does not mention probative value, and Rule 139(2) does not concern admission of evidence that would seriously damage the integrity of proceedings.

¹⁰⁹ MUSTAFA does not cite to the portions of the transcript to which he objects. It is also unclear whether MUSTAFA objects to admission of W01679's testimony or the photo marked by the witness, admitted as REG00-008 (SPOE00222547).

¹¹⁰ Appeal Brief, para.30.

¹¹¹ Appeal Brief, para.29(a)-(b).

¹¹² Appeal Brief, para.29(c).

¹¹³ Appeal Brief, paras 27(a)&(c), 29(d)-(f).

56. In support of the third point, MUSTAFA baselessly asserts that: (i) the ‘photos were largely shown in Kosovo Media’; (ii) they were shown ‘in public in opening statements by the SPO’; and (iii) witnesses could have become aware of the people in the photograph.¹¹⁴ In light of MUSTAFA’s failure to question W01679 about whether he had seen the photo before, or to point to any evidence that the photo shown to the witness was broadcast in the Kosovo media, his submissions remain hypothetical and unsubstantiated with respect to this witness.¹¹⁵

57. Moreover, contrary to MUSTAFA’s bald assertions,¹¹⁶ W01679’s identification evidence bears sufficient indicia of reliability to satisfy the relatively low threshold required for admissibility.¹¹⁷ When shown a photograph of four men in military uniform carrying weapons by the Trial Panel, W01679 identified the man he knew as ‘Cali’ during his detention.¹¹⁸ He did so in response to a non-leading question, without any suggestion as to who these men were.¹¹⁹ The reliability of W01679’s identification evidence is further illustrated by his refusal to identify another man from a photo shown to him.¹²⁰ Importantly, W01679’s identification of ‘Cali’ was not made in difficult circumstances and was, in any event, only corroborative of other evidence leading to MUSTAFA’s identification.¹²¹ Hence, this is not a case where the Trial Panel

¹¹⁴ Appeal Brief, paras 27, 29.

¹¹⁵ Appeal Brief, paras 27(a), 29(e)-(f).

¹¹⁶ Appeal Brief, para.28.

¹¹⁷ Rules, Rule 138(1); *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on the Prosecution Request for Admission of Items Through the Bar Table, KSC-BC-2020-07/F00334 (‘Case 07 Decision’), 29 September 2021, para.14 (and citations therein).

¹¹⁸ Transcript (W01679), 5 October 2021, p.1005, lines 12-24: ‘PRESIDING JUDGE VELDT-FOGLIA: [...] Mr. Witness, please have a look at these pictures. Do you recognise anyone in this picture? A. From what I can see, the one sitting down, here, on the left, resembles to Cali. PRESIDING JUDGE VELDT-FOGLIA: I will ask the Madam Court Usher to come up to you and make you mark with a pen the person you are referring to. A. This one. PRESIDING JUDGE VELDT-FOGLIA: Thank you. I will now ask the Court Officer to put on another picture. Could you please put on SPOE00222547. Do you recognise anyone in this picture? A. Yes. He resembles him.’

¹¹⁹ Transcript (W01679), 5 October 2021, p.1005, lines 12-24.

¹²⁰ Transcript (W01679), 4 October 2021, p.900.

¹²¹ Judgment, paras 330, 541-545, 551-554.

was required to exercise extreme caution before relying on W01679's photo identification of MUSTAFA.¹²²

58. Finally, MUSTAFA's suggestion, in passing, that the Trial Panel exceeded its authority by asking questions of the witness is contrary to the Trial Panel's wide powers to manage proceedings,¹²³ including the express wording of Rule 127(3), which states that judges 'may at any stage put any question to the witness'. Established jurisprudence confirms the broad powers of the trial panel in questioning witnesses.¹²⁴

3. Sub-ground 1D

59. Sub-ground 1D challenges the Trial Panel's reliance on a list of prisoners.¹²⁵ MUSTAFA did not challenge the admission of this document at trial,¹²⁶ and only made equivocal submissions about it during closing arguments.¹²⁷ In particular, submissions

¹²² See e.g. ICTY, *Popović et al.* AJ, paras 380-387; *Prosecutor v. Lukić & Lukić*, IT-98-31/1-A, Judgment ('Lukić & Lukić AJ'), 4 December 2012, paras 182-203; *Kupreškić* AJ, paras 34-41; ICTR, *Prosecutor v. Kamuhanda*, ICTR-99-54A-A, Judgment ('Kamuhanda AJ'), 19 September 2005, paras 237-241; ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-A, Judgment ('Limaj et al. AJ'), 27 September 2007, paras 30-32; c.f. para.196. The Notice of Appeal incorrectly refers to the impugned evidence as 'in-court identification evidence'. W01679 did not directly identify MUSTAFA, let alone identifying the accused in the courtroom. Rather, he identified the man he knew as 'Cali' in the photo. See Notice of Appeal, sub-ground 1C; Appeal Brief, paras 27, 29(d); Transcript (W01679), 5 October 2021, p.1005, lines 12-24. For a discussion of in-court identification, see ICTR, *Kamuhanda* AJ, paras 242-244; ICTY, *Kunarac* AJ, para.320 *Limaj et al.* AJ, paras 27-28.

¹²³ Law, Art.40; Rules, Rules 116, 127(3), 132, 137 and 138.

¹²⁴ ICTY, *Prosecutor v. Hadzihasanovic et al.*, IT-01-47-A, Judgment, 22 April 2008, para.102; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2360, Decision on Judicial Questioning, 18 March 2010; *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, para.7; *Specialist Prosecutor v. Thiçi et al.*, T.20 April 2023, p.3267 (this oral order is currently under appeal). See also Decision on the conduct of the proceedings, KSC-BC-2020-05/F00170, 26 August 2021, para.27; *Specialist Prosecutor v. Shala*, Decision on the conduct of the proceedings, KSC-BC-2020-04/F00434, 24 February 2023, para.38; *Specialist Prosecutor v. Gucati and Haradinaj*, Order on the Conduct of Proceedings, KSC-BC-2020-07/F00314/A01, 17 September 2021, para.77.

¹²⁵ U001-0310-U001-0322-ET, admitted through Decision on items used with witnesses W04484, W04485 and W04849 during their in-court testimony and on evidence collected prior to the establishment of the Specialist Chambers, with one public annex, KSC-BC-2020-05/F00369 ('Decision on items'), 29 March 2022.

¹²⁶ Decision on items, paras 21-23.

¹²⁷ Transcript (Closing Statements), 14 September 2022, p.4711, lines 23 to p.4713, line 6; 15 September, p.4839, lines 16-20.

about manipulated entries,¹²⁸ the need for expert evidence,¹²⁹ and references to MUSTAFA's alias on the list,¹³⁰ are raised for the first time on appeal. MUSTAFA has therefore waived his right to raise these issues.

60. Even if these submissions were entertained, they are at best capable of displaying MUSTAFA's disagreement with the Trial Panel's evaluation of the evidence.

- a. His submission that certain details on the list 'could be manipulated entries' is speculative, especially since this was not explored at trial.¹³¹
- b. The contention that documentary evidence can only be assessed through an expert witness is unsupported and plainly incorrect.¹³²
- c. The submission that the list does not refer to the location of the ZDZ ignores the Trial Panel's reliance on other evidence to establish location.¹³³
- d. MUSTAFA misrepresents the Judgment by claiming that the Trial Panel found that 'since the List has 19 names there, [...] therefore the six detainees must have been there in the ZDC'.¹³⁴ The Trial Panel merely found that the number of names on the list corroborates other evidence 'according to which there were more than six detainees at the ZDC in April 1999'.¹³⁵
- e. MUSTAFA's submission that the annotation 'for Cali' has nothing to do with his presence at the ZDC during the critical dates ignores:¹³⁶ (i) his own admission that he went by that nickname;¹³⁷ and (ii) the other evidence relied on by the Trial Panel to establish his presence.¹³⁸

¹²⁸ Appeal Brief, para.31(a).

¹²⁹ Appeal Brief, para.31(b).

¹³⁰ Appeal Brief, para.31(e)-(g).

¹³¹ Appeal Brief, para.31(a).

¹³² Appeal Brief, para.31(b).

¹³³ Appeal Brief, para.31(c); Judgment, paras 348-378.

¹³⁴ Appeal Brief, para.31(d).

¹³⁵ Judgment, para.226.

¹³⁶ Appeal Brief, para.31(e).

¹³⁷ Judgment, para.340.

¹³⁸ Judgment, paras 468-473, 541-545, 551-554.

- f. Likewise, MUSTAFA's unsubstantiated assertion that the Trial Panel 'has no factual grounds' to connect him to the list is contradicted by his own admission that he went by the nickname 'Cali'.¹³⁹
- g. MUSTAFA again misrepresents the Judgment by submitting that the Trial Panel contradicted itself with respect to the indicia of authenticity and reliability set forth in paragraph 42 of the Judgment. That paragraph states that 'the Panel has taken into account indicia of authenticity and reliability, when available, such as origin, authorship or source, chain of custody, specific references to names, locations, presence of logos or other identifying signs or symbols, and any other relevant information.' The Panel considered these indicia in relation to the list and concluded that it is reliable, 'regardless of the lack of indications as to the authorship'.¹⁴⁰ MUSTAFA fails to show any error in the Trial Panel's evaluation.

61. In addition, MUSTAFA neglects to connect his submissions about the list's authenticity and reliability to even a single finding that would be impacted had the Trial Panel not relied on it.¹⁴¹ Crucially, MUSTAFA does not explain why his conviction should not stand on the basis of the remaining evidence.¹⁴² MUSTAFA's sweeping submission that reliance on the impugned document 'compromises the facts established through this evidence and consequently all other facts and evidence related to it' is wholly inadequate to fulfil his appellate burden.¹⁴³

4. Sub-ground 1E

62. Under sub-ground 1E, MUSTAFA submits that the Trial Panel committed an error of law in admitting, and relying on, the written statements of W04648 and W04712.¹⁴⁴ MUSTAFA did not challenge the admission of W04648's written statement

¹³⁹ Appeal Brief, para.31(f).

¹⁴⁰ Judgment, paras 226-227.

¹⁴¹ Appeal Brief, para.31.

¹⁴² Case 07 AJ, para.32.

¹⁴³ Appeal Brief, para.30; paras 11-19 above.

¹⁴⁴ Appeal Brief, paras 33-39.

into evidence,¹⁴⁵ and his submissions on the admission of W04712's written statement do not reflect his submissions on appeal.¹⁴⁶ MUSTAFA offered no submissions relevant to the impugned evidence in his Final Trial Brief¹⁴⁷ or closing submissions,¹⁴⁸ and has therefore waived the right to appeal the Trial Panel's decisions to admit and rely on this evidence.

63. In any event, MUSTAFA fails to establish any error. MUSTAFA wrongly – and without support – claims that statements of deceased persons 'cannot be verified in any manner', and that evidence from a witness who is not an eye witness 'bears no relevance at all'.¹⁴⁹ With respect to the 'oral statement of [REDACTED]',¹⁵⁰ MUSTAFA wrongly asserts that he had no personal experience of events prior to the death of the Murder Victim.¹⁵¹ In fact, [REDACTED] was present at the scene of the Murder Victim's arrest.¹⁵²

64. Lastly, MUSTAFA fails to show how any of these alleged errors could change the outcome of the case, only stating generally that they invalidate the Judgment 'as to the evidence regarding the murder victim, the cause or circumstances of his death'.¹⁵³

65. For these reasons, sub-ground 1E should be rejected.

¹⁴⁵ Public redacted version of Decision on the Prosecution application for the admission of prior statements of witness W04648 and related documents, KSC-BC-2020-05/F00235/RED, 15 October 2021, para.4.

¹⁴⁶ Confidential Version of Defence response to Prosecution Application 'KSCBC-2020/F00263, dated 19 November 2021 and on Addendum to Prosecution Application KSC-BC-2020/F00263, dated 22 November 2021, KSC-BC-2020-05/F00278, 3 December 2021, confidential, paras 10-16.

¹⁴⁷ Defense Final Trial Brief, KSC-BC-2020-05/F00457/A01, confidential, 21 July 2022.

¹⁴⁸ Transcript (Closing Statements), 14 September 2022, pp.4633-4744; 15 September 2022, pp.4749-4801, 4829-4841.

¹⁴⁹ Appeal Brief, paras 35, 37.

¹⁵⁰ Appeal Brief, para.38. MUSTAFA fails to identify the impugned evidence.

¹⁵¹ Appeal Brief, para.38.

¹⁵² Judgment, para.461. The Trial Panel relied on hearsay evidence from W04391, who 'learned the circumstances of the Murder Victim's apprehension from [REDACTED] [...]'.
¹⁵³ Appeal Brief, para.39.

5. Sub-ground 1H

66. MUSTAFA argues that the Trial Panel erred by failing to exercise ‘special caution’ before relying on [REDACTED], because this evidence was not corroborated.¹⁵⁴ MUSTAFA offers no authority for the proposition that uncorroborated evidence must be rejected, which is contrary to established jurisprudence and the express wording of Rule 139(3).¹⁵⁵ This sub-ground of appeal lacks any merit and should be summarily dismissed.

67. The Trial Panel’s wide discretion in assessing evidence is equally applicable to uncorroborated but credible witness testimony of persons who may have been directly implicated in the events, provided that appropriate caution is exercised.¹⁵⁶ In the case at hand, the Trial Panel provided its reasons for accepting parts of W04600’s testimony,¹⁵⁷ while noting the impact of his direct implication in the events on his testimony.¹⁵⁸

6. Sub-ground 1I

68. Sub-ground 1I argues that the Trial Panel erred in relying on the testimony from [REDACTED], because that evidence was not corroborated.¹⁵⁹ As under sub-ground 1H, MUSTAFA offers no authority for the claim that uncorroborated evidence must be rejected. This submission should be summarily dismissed for the same reasons.

69. MUSTAFA also argues that the exchange is not relevant to the *mens rea* of the charged crimes.¹⁶⁰ Evidence is relevant if it is directly or indirectly connected to elements of the offences or modes of liability pleaded in the indictment or other facts

¹⁵⁴ Appeal Brief, paras 53-56.

¹⁵⁵ Case 07 AJ, para.36; Case 07 Decision, para.36; SCSL, *Taylor* AJ, para.78.

¹⁵⁶ ICTY, *Popović et al.* AJ, para.135.

¹⁵⁷ Judgment, paras 102-105.

¹⁵⁸ Judgment, para.106.

¹⁵⁹ Appeal Brief, paras 57-61.

¹⁶⁰ Appeal Brief, paras 59-60.

or circumstances material to the case of the Parties.¹⁶¹ This connection must be more than tenuous or remote.¹⁶² The Trial Panel considered the conversation between [REDACTED] relevant to the mental element for murder as a war crime (Count 4).¹⁶³ In particular, the Trial Panel found that this conversation ‘fits within the evidentiary picture whereby the Accused intended to kill the Murder Victim and, subsequently, avoid any proceedings launched regarding his death’.¹⁶⁴ An effort to avoid or thwart legitimate inquiry into the circumstances of a crime plainly can indicate consciousness of guilt, bearing on *mens rea*. MUSTAFA fails to show that this finding is wholly erroneous, or that no reasonable trial panel could have made it. Also lacking is any attempt to show that the Trial Panel’s conclusion as to MUSTAFA’s *mens rea* for Count 4 could not stand in light of the remaining evidence.

70. While the Appeal Brief contains no further arguments in support of this sub-ground, the Notice of Appeal additionally complains that the impugned statement does not constitute an admission made by MUSTAFA.¹⁶⁵ This claim misrepresents the Judgment, which explains that the Trial Panel relied on [REDACTED] that: [REDACTED].¹⁶⁶ The Trial Panel relied on the other parts of the conversation for its finding that [REDACTED] evidence (recounting the conversation) is credible.¹⁶⁷

7. Sub-grounds 1J, 2I, 2J, 2K, 2L, 2M, 2N

71. MUSTAFA advances several grounds of appeal challenging the Trial Panel’s assessment of the credibility and reliability of witnesses. The Trial Panel has primary responsibility and wide discretion in relation to the evaluation of witness testimony, and the Appeals Panel will generally defer to the Trial Panel’s assessment.¹⁶⁸

¹⁶¹ Case 07 Decision, para.12.

¹⁶² Case 07 Decision, para.12.

¹⁶³ Judgment, para.694.

¹⁶⁴ Judgment, para.694.

¹⁶⁵ Notice of Appeals, para.4 (1I), quoting [REDACTED]

¹⁶⁶ Judgment, para.694.

¹⁶⁷ Judgment, para.694.

¹⁶⁸ Case 07 AJ, para.36; ICTY, *Kupreškić* AJ, para.32.

MUSTAFA merely disagrees with the Trial Panel's findings without showing how its discretion miscarried.

(i) *No errors of law*

72. Under sub-ground 1J, MUSTAFA alleges that the Trial Panel erred in law by only, or predominately, considering two out of ten criteria in its assessment of defence witnesses.¹⁶⁹ As a starting point, MUSTAFA identifies no legal error in the principles according to which the Trial Panel assessed witness testimony.¹⁷⁰ Rather, he claims that the Trial Panel erred in the application of these principles, which would be an error of fact, not law.¹⁷¹ Since MUSTAFA fails to address the requisite standard of review for errors of fact, sub-ground 1J should be rejected *in limine*.

73. In any case, MUSTAFA has not shown any error. The list of criteria in paragraph 35 of the Judgment is a non-exhaustive list of factors, which merely clarifies the Trial Panel's approach to evaluating witness testimony. As the ICC Trial Chamber stated in *Ongwen*, such a list should not be treated as a 'check-list'.¹⁷² The Trial Panel was therefore not required to consider each of the factors in relation to every witness. More importantly, the Trial Panel was not required to articulate every step of its reasoning for each individual witness;¹⁷³ nor was it required to set out in detail why it accepted or rejected a particular witness's testimony.¹⁷⁴

¹⁶⁹ Appeal Brief, paras 62-66, referring to Judgment, para.35.

¹⁷⁰ Judgment, paras 34-41, *see also* paras 31-33.

¹⁷¹ ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-A ('*Blagojević and Jokić AJ*'), Judgment, 9 May 2007, paras 143-146.

¹⁷² ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgment, 4 February 2021, para.260.

¹⁷³ ICTY, *Kupreškić AJ*, para.32.

¹⁷⁴ ICTY, *Krajišnik AJ*, para.139.

(ii) No errors of fact

74. Sub-grounds **2I**,¹⁷⁵ **2J**,¹⁷⁶ **2K**,¹⁷⁷ **2L**,¹⁷⁸ **2M**,¹⁷⁹ **2N**,¹⁸⁰ and **2G**¹⁸¹ allege errors of fact concerning various, but similar aspects of credibility and reliability of Defence witnesses. The corresponding submissions in the Appeal Brief are undeveloped,¹⁸² unsupported, chaotic,¹⁸³ and repetitive.¹⁸⁴ MUSTAFA frequently confuses error of fact with error of law,¹⁸⁵ and at times departs significantly from the grounds indicated in the Notice of Appeal.¹⁸⁶ While alleging error, MUSTAFA often fails to clearly explain how such error occasions a miscarriage of justice, to show that the Trial Panel's evaluation of the evidence is wholly erroneous, or that the impugned evidence could not have been accepted by any reasonable trier of fact.¹⁸⁷ Many of MUSTAFA's submissions amount to nothing more than his mere disagreement with selected findings in the Judgment.

75. The thrust of MUSTAFA's contention under these sub-grounds is that the Trial Panel: (i) was biased against him in its evaluation of witness testimony;¹⁸⁸ and ii) dismissed testimonies of Defence witnesses on the basis of irrelevant considerations.¹⁸⁹ Both arguments fail.

¹⁷⁵ Appeal Brief, paras 180-189.

¹⁷⁶ Appeal Brief, paras 190-203.

¹⁷⁷ Appeal Brief, paras 204-209.

¹⁷⁸ Appeal Brief, paras 210-218.

¹⁷⁹ Appeal Brief, paras 219-299.

¹⁸⁰ Appeal Brief, paras 300-303.

¹⁸¹ Appeal Brief, paras 158-178.

¹⁸² Appeal Brief, Sub-grounds 2I, 2L, 2K.

¹⁸³ Appeal Brief, Sub-grounds 2I, 2L, 2K, 2M.

¹⁸⁴ Appeal Brief, Sub-grounds 2G, 2K, 2M.

¹⁸⁵ Appeal Brief, Sub-grounds 2K, 2M.

¹⁸⁶ Appeal Brief, Sub-grounds 2K, 2L.

¹⁸⁷ See for example, Appeal Brief, sub-grounds 2I, 2K, 2L.

¹⁸⁸ Appeal Brief, sub-grounds 2G, paras 158-160, 169, 171, 174; 2I, paras 183-185, 187-189; 2J, paras 193, 199; 2L, para.217; 2M, paras 225, 229, 233, 237, 239, 241, 245, 253, 257, 262, 265-269, 273-275, 279, 291, 297; 2N, para.303.

¹⁸⁹ Appeal Brief, sub-grounds 2G, paras 161, 165-168, 172; 2I, paras 182, 186, 188; 2J, para.202; 2K, paras 205-206; 2L, para.211; 2M, paras 221-224, 227-228, 230, 232, 234-237, 243-244, 246-248, 251, 253, 259, 261, 276, 278, 283-286, 295-296.

76. As for its **approach to evidence**, the Trial Panel clearly spelled out factors it considered in assessing witness testimony,¹⁹⁰ and highlighted its powers under Rule 139(6) to accept parts of a witness's account and to reject others.¹⁹¹ It also emphasised its broad discretion in assessing the credibility and reliability of the witnesses, and in dealing with inconsistencies in the evidence.¹⁹² After having outlined its approach, the Trial Panel conducted a meticulous and detailed analysis of testimonies of both Prosecution¹⁹³ and Defence witnesses,¹⁹⁴ including their reliability and credibility.

77. The central theme of MUSTAFA's challenge is that the Trial Panel was predisposed to accept testimony favourable to the Prosecution, and to dismiss testimony favourable to the Defence. MUSTAFA attempts to substantiate this contention by presenting a tally of findings according to which Defence witnesses scored worse than Prosecution witnesses in the Trial Panel's assessment of credibility and reliability. However, MUSTAFA fails to refute the alternative explanation for the unfavourable scoreboard, namely: the Trial Panel's rejection of Defence witnesses is the natural consequence of MUSTAFA's decision to field witnesses with glaring credibility deficits. Some of the most significant of these are:

- Brahim MEHMETAJ was himself a high-ranking BIA member and long-time friend of MUSTAFA implicated in the charged crimes.¹⁹⁵ Within days of MUSTAFA's arrest, he posted a photo on Facebook wearing a t-shirt with the face of Mr MUSTAFA on the side of his heart and expressed 'hatred against the locals who voted for the Specialist Chambers and in so doing offered a great service to the enemy and became subservient to some internationals'.¹⁹⁶ There

¹⁹⁰ Judgment, paras 34-41, *see also* paras 31-33.

¹⁹¹ Judgment, para.37.

¹⁹² Judgment, paras 35-36.

¹⁹³ Judgment, paras 58-137.

¹⁹⁴ Judgment, paras 138-223.

¹⁹⁵ Judgment, paras 140-143.

¹⁹⁶ Judgment, para.143.

are also strong indications regarding co-ordination between MUSTAFA and MEHMETAJ.¹⁹⁷

- Ahmet ADEMI initially denied membership in the KLA and KLA Veterans' Association, a fact which he only admitted when confronted with contrary evidence.¹⁹⁸ He also denied knowing what 'BIA' means, despite admitting that he reposted the guerrilla unit's logo on social media,¹⁹⁹ and denied knowing Mr MEHMETAJ, which the Trial Panel assessed as 'plainly not true'.²⁰⁰
- Bislim NRECI answered a simple yes-or-no question whether he was a member of the BIA 'in an evasive and meaningless manner', stating: '[o]fficially and based on documentation, I don't know'.²⁰¹ He also admitted having followed the evidence of several other witnesses before testifying.²⁰²
- Nazmi VRBOVCI admitted in cross-examination that, after giving a statement to the Defence, he spoke to fellow KLA members, including his friend Bislim NRECI, 'to make sure he had stated the correct date(s) as regards his alleged meetings with the Accused'.²⁰³ He subsequently changed his evidence when testifying in court, so that it was consistent with Bislim NRECI's evidence on that point.²⁰⁴ He also admitted having followed the evidence of several other witnesses before testifying.²⁰⁵
- Kaplan PARDUZI, responded to questions posed by the SPO with 'general hostility and reticence'.²⁰⁶ At one point he stated that he considered the arrest of MUSTAFA 'unjust' and said: 'there is no basis and there are no facts, and we

¹⁹⁷ Judgment, para.144.

¹⁹⁸ Judgment, para.146.

¹⁹⁹ Judgment, para.147.

²⁰⁰ Judgment, para.147.

²⁰¹ Judgment, para.168.

²⁰² Judgment, para.169.

²⁰³ Judgment, para.174.

²⁰⁴ Judgment, para.174.

²⁰⁵ Judgment, para.175.

²⁰⁶ Judgment, para.179.

think this is all lies or fake witnesses and of the Serbian prosecutor's office'.²⁰⁷

This witness followed testimonies of Defence witnesses before testifying.²⁰⁸

- Musli HALIMI denied knowing that the BIA unit had a base in Zllash/Zlaš, despite being the commander of a KLA training centre in that village, located within a short distance from BIA's base.²⁰⁹ He also denied that he and MUSTAFA had each other's phone numbers until challenged with evidence to the contrary.²¹⁰
- Selatin KRASNIQI, whose family owned the compound used as BIA base during the indictment period, provided detailed evidence on the layout of the compound. However, in a sketch produced during his first interview with the Defence, he omitted the building where the prisoners were detained. He subsequently sought to correct that 'mistake' in a second interview with the Defence, but could not recall how he came to realise his mistake.²¹¹

78. Furthermore, MUSTAFA overlooks the context in which SPO witnesses testified in this trial. The prevailing climate of intimidation in Kosovo was a generic factor that pressured witnesses against giving evidence for the prosecution.²¹² Witnesses who nevertheless gave incriminating evidence did so in spite of grave concerns for their own and their families' safety and security. The Trial Panel correctly factored this into its assessment of the credibility of these witnesses.²¹³

79. The second argument under these sub-grounds – that the Trial Panel dismissed Defence witnesses on the basis of **factors unrelated to the substance of their testimonies** – are equally unfounded. MUSTAFA confuses reliability with credibility. Pursuant to Rule 139(4), the Trial Panel was obliged to assess both reliability *and*

²⁰⁷ Judgment, para.179.

²⁰⁸ Judgment, para.180.

²⁰⁹ Judgment, para.198.

²¹⁰ Judgment, para.199.

²¹¹ Judgment, para.207; Transcript (Selatin KRASNIQI) 21 April 2022, pp.3928-3934.

²¹² Judgment, paras 50-57.

²¹³ Judgment, paras 49-57.

credibility in determining the weight to be given to the testimony of a witness.²¹⁴ The Trial Panel properly took into account factors relevant to the credibility of witnesses, including: glaring internal contradictions and inconsistencies; incoherence with other evidence; collusion; memory problems; passage of time; strong bias in favour of MUSTAFA, BIA and the KLA and, in some cases, against the SPO or the SC.²¹⁵ MUSTAFA fails to show any error.

(iii) *Sub-ground 2J*

80. Contrary to MUSTAFA's submissions under sub-ground **2J**,²¹⁶ the Trial Panel reasonably concluded that Defence witnesses Hazir BOROVCIC and Gani SOPI coordinated their testimony with respect to the date of their departure from Prishtinë/Priština to Butovc, which is relevant to MUSTAFA's alibi.²¹⁷ The Trial Panel based its findings on, *inter alia*: i) striking, unexplained, and identical changes of dates crucial to the charges;²¹⁸ ii) the fact that Mr BOROVCIC, prior to trial, consulted on his evidence with third persons;²¹⁹ iii) strong and long-lasting personal bonds between both witnesses;²²⁰ iv) their membership in BIA;²²¹ and v) a particularly close relationship with MUSTAFA.²²²

81. To support his claim, MUSTAFA puts forward only one argument: that the Trial Panel misinterpreted the timespan of the religious celebration of *Eid al-Adha* in 1999.²²³ This is clearly not the case. Gani SOPI's first interaction with MUSTAFA occurred on the day of *Eid al-Adha*. According to this witness, *Eid al-Adha* commenced

²¹⁴ Judgment, para.35.

²¹⁵ Judgment, paras 144,147-148,151-152,154, 157-158, 160-166,170-171, 174-176, 181-182, 188, 199-200, 203-204, 206, 212-213, 223.

²¹⁶ Appeal Brief, paras 190-203.

²¹⁷ Judgment, paras 157, 164, 281-286.

²¹⁸ Judgment, paras 157, 164, 281-286.

²¹⁹ Judgment, paras 279, 281.

²²⁰ Judgment, paras 157, 281.

²²¹ Judgment, paras 154, 160-162.

²²² Judgment, paras 155-156, 158, 163, 165.

²²³ Appeal Brief, paras 194-200.

on 31 March 1999,²²⁴ which is contradicted by an open source table indicating that this holiday commenced on 28 March 1999.²²⁵ Mr SOPI also conceded that he could not remember on which day of the celebration MUSTAFA went to Butovc, speculating that it could be the third, fourth or fifth day.²²⁶ He added that he would rather not refer to dates 'because of the time that has passed and I might have forgotten after 23 years'.²²⁷

82. Hazir BOROVC I was not sure about the date of his alleged encounter with MUSTAFA in March/April 1999.²²⁸ Similarly, he was not certain about dates of *Eid al-Adha*.²²⁹ When confronted with the moving nature of that religious holiday, and the fact that it falls on a different date each year, Mr BOROVC I acknowledged that he was not good at remembering dates of Muslim holidays.²³⁰ Being uncertain about the dates, he consulted the Muslim priest who allegedly told him that in 1999 that *Eid al-Adha* was on 31 March 1999.²³¹ This assertion, however, is contradicted by the objective and verifiable table.²³²

83. In any event, MUSTAFA fails to show that the Trial Panel's rejection of the testimony of these witnesses on this point was unreasonable in light of the remaining factors indicated in the Judgment.²³³ No error of fact occasioning the miscarriage of justice is therefore established.

²²⁴ Transcript (Gani SOPI), 4 April 2022, pp.3096, 3098-3099.

²²⁵ Transcript (Gani SOPI), 4 April 2022, pp.3115-3119; SPOE00325819-00325819; SPOE00325820-00325820, SPOE00325821-00325821 (Table with Eid Al-Adha dates).

²²⁶ Transcript (Gani SOPI), 4 April 2022, p.3166.

²²⁷ Transcript (Gani SOPI), 4 April 2022, pp.3090, 3114-3115. The witness admitted also having memory problems, which he linked to his severe mistreatment he was subjected to in the past. *See* Transcript (Gani SOPI), 4 April 2022, pp.3122-3124; 104551-TR-ET Part 1, p.17.

²²⁸ Transcript (Hazir BOROVC I), 30 March 2022, pp.2963, 3038, 3045-3046.

²²⁹ Judgment, para.280.

²³⁰ Transcript (Hazir BOROVC I), 30 March 2022, p.3027.

²³¹ Transcript (Hazir BOROVC I), 30 March 2022, p.3030.

²³² SPOE00325821-00325821 (Table with Eid Al-Adha dates).

²³³ Apart from findings concerning co-ordination, others, that invalidate witnesses' credibility, include: i) lapse of time; ii) admitted memory problems; iii) reluctance to discuss membership in BIA; iv) clear deference and respect displayed to BIA and its members. *See* Judgment, paras 154,158, 160-162, 165-166, 284, 286-287.

(iv) Sub-ground 2K

Under sub-ground 2K, in addition to the unfounded submissions discussed above, MUSTAFA argues that the Trial Panel should have put him on notice of the factors it would consider to assess the credibility and reliability of witnesses.²³⁴ This argument is without any merit, as the principles regulating the assessment of testimonial evidence is clearly provided for in the Rules,²³⁵ and MUSTAFA cannot reasonably claim that he became aware of it only upon reading the Judgment. The same applies to the applicable jurisprudence cited by the Trial Panel, which Counsel should have been cognisant of in the discharge of his professional duties.²³⁶

(i) Sub-ground 2M

84. Relatedly, in sub-ground 2M MUSTAFA submits that some of his witnesses should have been 'cautioned or otherwise warned' that their testimony could be considered untruthful and may be inconsistent with the evidence of Victims.²³⁷ Before commencing their testimony, all Defence witnesses were duly warned to tell the truth.²³⁸ MUSTAFA fails to provide any authority for the proposition that an additional caution was required.

(ii) Sub-ground 2N

85. Under 2N, MUSTAFA makes cursory submissions alleging that the Trial Panel erred in rejecting the evidence of Fatmir HUMOLLI concerning the location of the ZDC, and the alleged lack of authority of BIA to arrest or detain.²³⁹

86. Submissions concerning Mr HUMOLLI's evidence at the ZDC are addressed under sub-ground 2G.

²³⁴ See Appeal Brief, sub-grounds 2K, para.209.

²³⁵ Rules, Rules 137(2) and 139(2) and (6), 139(2) and (4).

²³⁶ See Article 6(h) of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, KSC-BD-07/Rev1/2021, 28 April 2021.

²³⁷ Appeal Brief, paras 223, 231, 277.

²³⁸ See *for example* Transcript (Brahim MEHMETAJ), 23 March 2022, pp.2609-2611.

²³⁹ Appeal Brief, paras 300-303.

87. Regarding BIA's powers to arrest or detain, this witness had only general and anecdotal knowledge. Within the Llap Operational Zone, Fatmir HUMOLLI dealt with civil administration matters,²⁴⁰ and acting in that capacity had no particular dealings with BIA, which was directly subordinated to the Zone Command.²⁴¹ Considering the sensitivity of BIA's operations,²⁴² and substantial credibility issues affecting Mr HUMOLLI's testimony,²⁴³ the Trial Panel reasonably rejected his evidence on this point.

8. Sub-ground 1K

88. Sub-ground 1K complains that the Trial Panel erred in failing 'to acknowledge and consider the possible financial motive to lie, fabricate or distort information, on the part of dual status victim/witnesses who claim reparations'.²⁴⁴ MUSTAFA's allegation that SPO witnesses were motivated by 'lust for money', substantiated with a single citation to two pages of W03593's testimony,²⁴⁵ is a gross distortion of that witness's evidence, potentially violating counsel's professional obligations.²⁴⁶ When asked why he had not sought compensation in Kosovo, the witness replied:

A: To tell you the truth, I didn't look for a place because I wasn't aware. I didn't know.

Q. And could you not seek any help in order to find that in Kosovo?

A. No, never. I wasn't interested.

Q. And why are you suddenly now interested in it then? Because here you ask for compensation, so what -- could you explain why are you suddenly now interested in that?

A. Sir, I'm mostly interested in compensation because I have suffered injuries. I'm not able to work. I'm not a judge, I'm not an investigator, and I'm not the one who decides whether one will be convicted or not. I'm here for my compensation because I do need compensation.

Q. And how much compensation are you seeking, actually?

²⁴⁰ Judgment, para.132.

²⁴¹ Transcript (Fatmir HUMOLLI), 2 February 2022, p.2417.

²⁴² Transcript (Fatmir HUMOLLI), 2 February 2022, p.2417.

²⁴³ Judgment, paras 133-136.

²⁴⁴ Appeal Brief, para.69.

²⁴⁵ Appeal Brief, fn.9, citing W03593, Transcript (W03593), 22 September 2021, pp.623-624 (date corrected).

²⁴⁶ Appeal Brief, para.67; Art.34 of the Registry Practice Direction on Files and Filings; Art.10 of the Code of Professional Conduct; *see also* Decision on the closing of the evidentiary proceedings and related matters, KSC-BC-2020-05/F00439, 20 June 2022, para.21.

A. As I said, I don't know to what I'm entitled. I just want to get what I'm entitled to. I'm not a judge here, as I said.

89. This exchange was followed by brief oral submissions about the relevance and pertinence of the questions posed by Defence counsel, in which Defence counsel stated that the issue of compensation was not a 'prime topic'.²⁴⁷ The Trial Panel ruled that: '[t]he witness can be asked about the motives or motivations behind their testimony to the extent that this may affect their credibility'.²⁴⁸ However:

No questions to the witnesses are allowed that aim at eliciting his or her views on the type or amount of compensation that he or she wants to receive. Scope and modalities of the reparations, if any, shall only be discussed at a later stage.²⁴⁹

90. The Trial Panel made it clear that it permitted Counsel to ask the witness *why* he is seeking compensation, but disallowed questions as to *what type of compensation* the witness was seeking.²⁵⁰ Given that MUSTAFA did not raise this issue again in his Final Trial Brief or closing submissions, coupled with Counsel's indication that the issue of compensation was not a 'prime topic', the Trial Panel was not required to address it in the Judgment.²⁵¹

NO DISCERNIBLE ERROR IN TRIAL PANEL'S FINDINGS

1. Sub-ground 1A (armed conflict)

91. Sub-ground 1A argues that the Trial Panel committed several errors of law which affect its finding that a non-international armed conflict existed during the indictment period.²⁵²

92. First, MUSTAFA wrongly asserts that the Trial Panel took into account inapplicable criteria in deciding whether a non-state entity can carry out 'protracted

²⁴⁷ Transcript (W03593), 22 September 2021, p.629.

²⁴⁸ Transcript (W03593), 22 September 2021, p.640, lines 13-14.

²⁴⁹ Transcript (W03593), 22 September 2021, p.640, lines 21-25.

²⁵⁰ Transcript (W03593), 22 September 2021, p.641, lines 1-9.

²⁵¹ ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgment (Čelebići AJ), 20 February 2001, para.498; see also ICTY, *Krajišnik* AJ, para.379.

²⁵² Appeal Brief, paras 5-20.

armed violence',²⁵³ which is a threshold requirement for the application of Article 14(1)(c).²⁵⁴ The criteria applied by the Trial Panel originate from the *Boškoski and Tarčulovski* trial judgment,²⁵⁵ in which the ICTY Trial Chamber undertook a detailed analysis of the 'required degree of organisation of [...] an armed group for the purpose of Common Article 3' in customary international law.²⁵⁶ MUSTAFA fails to explain why the Trial Panel erred in applying this jurisprudence.

93. Second, MUSTAFA submits that Additional Protocol II to the Geneva Conventions creates additional criteria for the existence of a non-international armed conflict, which the Trial Panel failed to apply.²⁵⁷ As the Trial Panel acknowledged,²⁵⁸ Additional Protocol II²⁵⁹ creates a higher threshold for the existence of an armed conflict than Common Article 3.²⁶⁰ This higher threshold is inapplicable because the charges in this case alleged serious violations of Common Article 3, not Additional Protocol II, in accordance with Article 14(1)(c).²⁶¹

94. Aside from these discrete legal issues, MUSTAFA also disagrees with the Trial Panel's conclusion that 'a non-international armed conflict existed between the KLA and the Serbian forces at the time of the crimes charged'.²⁶² MUSTAFA's primary argument in support of his contention is that the Trial Panel erred in not categorising the armed conflict as international.²⁶³ However, MUSTAFA fails to show any error in

²⁵³ Appeal Brief, para.9, wrongly citing Judgment, para.693. The correct citation is para.697.

²⁵⁴ Law, Art. 14(2).

²⁵⁵ See Judgment, para.697, fn.1503.

²⁵⁶ Judgment, para.697, fn.1503, citing ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Judgment ('*Boškoski and Tarčulovski* Judgement'), 10 July 2008, paras 194-203.

²⁵⁷ Appeal Brief, para.11.

²⁵⁸ Judgment, fn.1503.

²⁵⁹ Additional Protocol II develops and supplements Common Article 3, see Article 1(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

²⁶⁰ ICTY, *Boškoski and Tarčulovski* Judgement, para.197.

²⁶¹ See also Law, Art.14(2).

²⁶² Appeal Brief, paras 14-15, 17-20; Judgment, paras 701-710.

²⁶³ Notice of Appeals, para.4, Ground 1, 1(A).

the Trial Panel's reliance on well-established jurisprudence that a non-international armed conflict may exist alongside an international armed conflict.²⁶⁴

95. Included in this line of authority are the judgments of the ICTY Trial and Appeals Chambers in *Dorđević*. MUSTAFA falsely asserts that the ICTY in *Dorđević* made no conclusive finding about the existence of an internal armed conflict in Kosovo.²⁶⁵ In reality, the Trial Chamber in that case held that: 'as of the end of May 1998 an armed conflict existed in Kosovo between Serbian forces [...] and the KLA. This armed conflict continued until at least June 1999'.²⁶⁶ The ICTY Appeals Chamber clarified that the Trial Chamber 'considered the conflict between the KLA and the Serbian forces to be an internal armed conflict'.²⁶⁷ MUSTAFA fails to show how 'the facts of the Dordevic Case (sic) were of a different nature'.²⁶⁸

96. Lastly, several of MUSTAFA's submissions under sub-ground 1A should be summarily dismissed because they fail to articulate any clear argument,²⁶⁹ fail to identify the relevant jurisprudence or the Trial Panel's findings with any precision,²⁷⁰ challenge findings that have no bearing on the validity of the judgment,²⁷¹ or fall outside the Notice of Appeal.²⁷²

²⁶⁴ The Trial Panel found the existence of a non-international armed conflict proven primarily on the basis of adjudicated facts that remained unchallenged by the Defence throughout the trial. Judgment, paras 701-702, 707.

²⁶⁵ Appeal Brief, para.17.

²⁶⁶ ICTY, *Dorđević* TJ, para.1579.

²⁶⁷ ICTY, *Prosecutor v. Dorđević*, IT-05-87/1-A, Judgment ('*Dorđević* AJ'), 27 January 2014, para.521.

²⁶⁸ Appeal Brief, para.17.

²⁶⁹ Appeal Brief, paras 13, 17, 19.

²⁷⁰ Appeal Brief, paras 12-13. MUSTAFA refers to footnote 1403 of the Judgment, which concerns legal findings on Count 1, and fn.1503, which only cites ICTY, *Boškoski and Tarčulovski* Judgment and does not cite to any ICTR jurisprudence.

²⁷¹ Appeal Brief, paras 14-15, 18.

²⁷² Appeal Brief, paras 16, 19.

2. No error in Trial Panel's rejection of MUSTAFA's alibi

97. MUSTAFA raises several issues with respect to the Trial Panel's rejection of his alibi.

(i) *Alleged errors of law (sub-grounds 1L, 1M)*

98. First, MUSTAFA submits that the Trial Panel should have considered his alibi evidence as tending to show that he was unlikely to have been at the place where the offences were allegedly committed, even if it remained a possibility.²⁷³ This submission misrepresents the Judgment, which correctly summarised the principles applicable to alibi evidence,²⁷⁴ and considered – repeatedly – whether MUSTAFA's alleged alibi created a reasonable doubt in the Prosecution's case.²⁷⁵ Ultimately, the Trial Panel accepted evidence establishing MUSTAFA's presence at the ZDC at times relevant to the charges, including: (i) on 1 April 1999, [REDACTED]; and (ii) on at least two occasions during the first week of April 1999, when MUSTAFA interrogated and mistreated W01679 and W03593.²⁷⁶ The Trial Panel correctly found that the alibi did not raise a reasonable doubt about these findings.²⁷⁷ MUSTAFA fails to show any error in the Trial Panel's approach.

99. Moreover, MUSTAFA misapprehends the nature of alibi evidence, which merely creates an additional barrier to the prosecution's duty to prove an accused's guilt beyond reasonable doubt. An accused may raise an alibi by producing evidence that he or she was elsewhere at the relevant time and was thus not in a position to commit (or participate in) the charged crime.²⁷⁸ If the alibi evidence *prima facie* accounts for the accused's activities during the relevant time, it falls to the prosecution to disprove the alibi by establishing beyond reasonable doubt that the alibi evidence

²⁷³ Sub-grounds 1L; Appeal Brief, para.74.

²⁷⁴ Judgment, para.46.

²⁷⁵ Judgment, paras 46, 241, 274, 276, 287, 290, 299, 301, 311, 315, 320, 331, 333.

²⁷⁶ Judgment, paras 330, 541-545, 551-554, 468-473.

²⁷⁷ Judgment, paras 330-331.

²⁷⁸ Judgment, para.46. The accused does not bear any burden of proof with respect to the alibi, but need merely raise a reasonable doubt in the prosecution's case, *see* ICTY, *Popović et al.* AJ, para.343.

should be rejected.²⁷⁹ In the present case, MUSTAFA's alibi failed on the first hurdle because the evidence adduced in support of his alibi, even if accepted, did not reasonably account for the period when he was alleged to have participated in the commission of the charged crimes.²⁸⁰

100. Second, MUSTAFA argues that the Trial Panel reversed the burden of proof by requiring him to prove his alibi beyond reasonable doubt, but fails entirely to develop or substantiate this assertion.²⁸¹ In any event, this contention appears to result from the same misapprehension about alibi evidence discussed above.

(ii) Alleged errors of fact (sub-ground 2O)

101. MUSTAFA argues that the Trial Panel erred in finding that he could realistically have been in multiple locations in one and the same day.²⁸²

102. In support of this contention, MUSTAFA submits that the Trial Panel ignored 'the extreme difficulties in movement' that he and Defence witnesses mentioned in their statements.²⁸³ This submission misrepresents the Judgment, which acknowledges the difficulties caused by the presence of enemy forces and the intensification of the Serbian offensive as a result of NATO bombing.²⁸⁴ The Trial Panel found that MUSTAFA could nonetheless move quickly between various locations and Zllash/Zlaš,²⁸⁵ in light of: (i) the relatively short distances between relevant locations;²⁸⁶ (ii) his use of, and access to, various means of transportation,²⁸⁷ (iii) the relative safety of Zllash/Zlaš and surrounding areas;²⁸⁸ (iv) MUSTAFA's experience and knowledge

²⁷⁹ ICTY, *Popović et al.* AJ, para.343; *Čelebići* AJ, para.581.

²⁸⁰ Judgment, paras 326-331. See similarly *Prosecutor v. Nchamihigo*, ICTR-01-63-A, Judgment, 18 March 2010, para.93.

²⁸¹ Sub-ground 1M: 'by reversing the burden of proof in relation to alibi.' Appeal Brief, para.75. See paras 11-19 above.

²⁸² Sub-ground 2O; Appeal Brief, paras 304-315.

²⁸³ Appeal Brief, paras 72, 305-307.

²⁸⁴ Judgment, paras 254, 257, 310.

²⁸⁵ Judgment, paras 254-255, 260-261.

²⁸⁶ Judgment, paras 256, 259-261, 274, 289, 310, 315.

²⁸⁷ Judgment, paras 254-256, 274, 293, 319, 332.

²⁸⁸ Judgment, para.261.

of the terrain;²⁸⁹ and (v) the nature of his assignments requiring him to be regularly on the move and to move easily.²⁹⁰

103. Next, MUSTAFA repeats the evidence of several defence witnesses, without showing that no reasonable trier of fact could have rejected their evidence or come to the same conclusion as the Trial Panel.²⁹¹

104. Further, MUSTAFA claims that the Trial Panel did not establish that he used a car during the Indictment period.²⁹² Contrary to MUSTAFA's misleading submission, the Trial Panel relied on multiple pieces of evidence demonstrating MUSTAFA's use of vehicles, including his own admissions,²⁹³ as well as the testimony of Defence witnesses Bislim NRECI,²⁹⁴ Nazmi VRBOVCI,²⁹⁵ and Fatmir HUMOLLI.²⁹⁶

105. MUSTAFA fails to show that no reasonable trier of fact could have found that during April 1999 he was able to move across the territory surrounding Zllash/Zlaš, and moved in and out of Zllash/Zlaš.

3.No error in the Trial Panel's finding about BIA's control of the ZDC

106. MUSTAFA advances seven sub-grounds of appeal that challenge the Trial Panel's findings about the location of the ZDC.

(i) Ground 2A

107. Under Ground 2A, MUSTAFA argues that the Trial Panel, in the Judgment, prematurely labelled the compound of houses in Zllash/Zlaš as the 'ZDC', thereby treating it as a detention centre at the outset, before making the necessary factual finding in a subsequent section of the Judgment.²⁹⁷

²⁸⁹ Judgment, para.261.

²⁹⁰ Judgment, paras 255, 261, 261, 282, 288, 293, 297, 299, 300, 332.

²⁹¹ Appeal Brief, paras 308-310.

²⁹² Appeal Brief, paras 313-314.

²⁹³ Judgment, para.254.

²⁹⁴ Judgment, paras 255, 293.

²⁹⁵ Judgment, para.255.

²⁹⁶ Judgment, para.255.

²⁹⁷ Appeal Brief, paras 83-84.

108. In effect, MUSTAFA alleges that the Trial Panel was biased in its evaluation of the evidence,²⁹⁸ without addressing the relevant standard or adducing sufficient and convincing evidence.²⁹⁹ MUSTAFA's oblique allegations are incapable of rebutting the strong presumption of impartiality applicable to the Judges.³⁰⁰

109. Moreover, MUSTAFA misrepresents the nature and purpose of the Judgment, which serves as a reasoned opinion for the Panel's findings.³⁰¹ By the time the Judgment is pronounced, the Trial Panel has already deliberated on the charges in the Indictment.³⁰² For this reason, the Trial Panel may organise the Judgment as it sees fit.³⁰³

110. MUSTAFA's submissions about the credibility of certain witnesses are addressed below.³⁰⁴

(ii) *Ground 2B*

111. Under sub-ground 2B, MUSTAFA challenges various findings regarding BIA's control over the ZDC.³⁰⁵ MUSTAFA fails to substantiate this sub-ground, beyond selectively misrepresenting the evidence of Fatmir SOPI,³⁰⁶ Sejdi VESELI and W04600.³⁰⁷ Contrary to MUSTAFA's submission that Fatmir SOPI's testimony gives no indication that BIA controlled the compound, this witness told the Trial Panel that:

²⁹⁸ Appeal Brief, para.84.

²⁹⁹ See ICTY, *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgment ('*Furundzija* AJ'), 21 July 2000, paras 189, 197.

³⁰⁰ *Specialist Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on Kadri Veseli's Appeal Against Decision on Remanded Detention Review and Periodic Review of Detention, KSC-BC-2020-06/IA014-F00008, 31 March 2022, para.34; ICTY, *Furundzija* AJ, para.197; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001, para.91.

³⁰¹ Rules, Rule 159(3); Law, Art.43.

³⁰² Rules, Rule 158.

³⁰³ IRMCT, *Mladić* AJ, para.243.

³⁰⁴ Appeal Brief, para.83(a-h). See above, paras 71-87.

³⁰⁵ Appeal Brief, paras 85-91.

³⁰⁶ Appeal Brief, paras 85-88.

³⁰⁷ Appeal Brief, paras 89-91.

BIA occupied a compound “in the highest point” of Zllash/Zlaš,³⁰⁸ this compound was regarded as BIA’s base;³⁰⁹ and MUSTAFA was BIA’s commander.³¹⁰

112. Likewise, MUSTAFA incorrectly claims that Sejdi VESELI and W04600 were not present at the ZDC during the Indictment period.³¹¹ W04600, [REDACTED],³¹² was at the ZDC on 1 April 1999 [REDACTED].³¹³ At that moment, [REDACTED]³¹⁴ [REDACTED]. W04600 knew the ZDC well and was able not only to describe its layout in detail, but even to make a corresponding sketch.³¹⁵

113. Sejdi VESELI, was also familiar with the ZDC and BIA stationed there. He was deputy commander of Brigade 153³¹⁶ which cooperated with BIA.³¹⁷ During the Indictment period, he was permanently present in the brigade’s headquarters located close to the ZDC.³¹⁸ He also knew some prominent members of the BIA unit, including MUSTAFA,³¹⁹ whom he frequently saw in Zllash/ Zlaš in April 1999.³²⁰

114. MUSTAFA himself clearly indicated that BIA occupied a specific location in Zllash/Zlaš in April 1999,³²¹ and that he was BIA’s commander.³²²

³⁰⁸ Judgment, para.350; *see also* Transcript (Fatmir SOPI), 18 January 2022, pp.2045, 2048-2049, 2054, 2089.

³⁰⁹ Judgment, para.352, fn.719; *see also* transcript (Fatmir SOPI), 18 January 2022, p.2054, and 19 January 2022, p.2172.

³¹⁰ Transcript (Fatmir SOPI), 18 January 2022, p.2060.

³¹¹ Appeal Brief, paras 89-91.

³¹² Transcript (W04600), 23 September 2021, pp.717-718.

³¹³ Judgment, paras 472-474.

³¹⁴ Judgment, para.468; *see also* Transcript (W04600), 23 September 2021, p.721, 729.

³¹⁵ Transcript (W04600), 23 September 2021, pp.712-714, 719-722, 730-733, 739-740; 24 September 2021, pp.811-812, 814; 27 September 2021, pp.845-846.

³¹⁶ Transcript (Sejdi VESELI), 25 January 2022, p.2191.

³¹⁷ Transcript (Sejdi VESELI), 25 January 2022, pp.2228, 2264-2265.

³¹⁸ Transcript (Sejdi VESELI), 25 January 2022, pp.2192-2193, 2197, 2223.

³¹⁹ Transcript (Sejdi VESELI), 25 January 2022, pp.2195-2196, 2199-2202.

³²⁰ Transcript (Sejdi VESELI), 25 January 2022, p.2233.

³²¹ 069404-TR-ET Part 3, pp.14, 16, 18, 20; Part 7, p.5; Part 8, p.1; 069401-069404 RED, p.069403; 7000650-7000660, pp.7-8.

³²² 069404-TR-ET Part 1, pp.28-29, 31-32; Part 3, p.24; Part 7, p.30, Part 8, p.7; Records of Witness Hearing with Salih MUSTAFA, 12 March 2003, 7000650-7000660, pp.2, 7.

Thus, MUSTAFA fails to establish any error in the Trial Panel's holistic evaluation of the evidence,³²³ including MUSTAFA's own admissions, establishing BIA's control of the ZDC.³²⁴

(iii) Sub-ground 2C

115. MUSTAFA's claim that the Trial Panel misquoted him is misleading.³²⁵ In paragraph 349 of the Judgment, the Trial Panel did not literally quote MUSTAFA, but only described what he himself admitted and what flows from his own statement.³²⁶ The only literal quotation that the Trial Panel used refers to 'safe house', the term MUSTAFA indeed used in his SPO statement.³²⁷

116. MUSTAFA's submissions about BIA's control over ZDC are addressed above under sub-ground 2B.³²⁸

4. No error in Trial Panel's findings about the location of the ZDC

117. In sub-grounds 2E-H, MUSTAFA makes a series of unsubstantiated claims regarding the Trial Panel's allegedly erroneous identification of the ZDC.³²⁹ MUSTAFA selectively presents evidence out of context and fails to meet the high threshold required to effectively challenge judicial discretion.³³⁰

(iv) Sub-ground 2E

118. Contrary to MUSTAFA's submissions under sub-ground 2E,³³¹ W01679, W3593, and W04669 had a sufficient opportunity to observe the ZDC shortly after their release.³³² All three of them, independently from each other, identified the ZDC

³²³ Judgment, paras 349-352, 354, 364-373; *see* Rules, Rule 139(2).

³²⁴ Judgment, paras 349-353.

³²⁵ Appeal Brief, paras 92, 94-95.

³²⁶ 069404-TR-ET, Part 8, pp.1-4.

³²⁷ 069404-TR-ET, Part 3, pp.14, 18; Part 7, p.5.

³²⁸ Appeal Brief, paras 93, 95-96; *see* above, paras 111-114.

³²⁹ Appeal Brief, paras 115-179.

³³⁰ *See* paras 11-19.

³³¹ Appeal Brief, paras 115-150.

³³² Transcript (W01679) 4 October 2021, pp.905-906, 920; (W03593) 21 September 2021, p.517; 22 September 2021, p.609; (W04669) 11 November 2021, p.1575.

buildings on photographs presented to them.³³³ W03593 even drew a sketch of the buildings where he was detained and interrogated.³³⁴ The evidence of these witnesses was also consistent with descriptions of the ZDC given by Defence witnesses and W04600.³³⁵ MUSTAFA fails to show that no reasonable trier of fact could accept this evidence, or that the Trial Panel's finding is wholly erroneous.

119. MUSTAFA additionally alleges that the photo identification of the ZDC was suggestive.³³⁶ This is not the case. During their SPO interviews, all three witnesses were presented with a photo-album containing photographs of many buildings in the village of Zllash/Zlaš from which they spontaneously chose only the ZDC photographs.³³⁷ Consequently, only these photographs were then shown to them in court, where they confirmed their prior recognition. MUSTAFA fails to substantiate any error.

120. MUSTAFA's remaining submissions merely repeat the evidence of other witnesses, without showing how the Trial Panel erred in its discretion to accept the testimonies of W01679, W3593, and W04669.³³⁸

(v) Sub-ground 2F

121. Under sub-ground 2F, in the Notice of Appeal, MUSTAFA claims that, concerning his identification of the detention location, W04600 was misquoted by the Trial Panel.³³⁹ However, the Appeal Brief acknowledges that the witness was cited correctly, but then proceeds to challenge the Trial Panel's assessment of that statement.³⁴⁰ MUSTAFA then takes issue with one of the factual findings in the Judgment that the ZDC 'was lent to the KLA for the establishment of the BIA base',

³³³ Judgment, para.364.

³³⁴ Judgment, paras 368-369.

³³⁵ Judgment, paras 365-369.

³³⁶ Appeal Brief, paras 128-129, 140.

³³⁷ W01679: 100807-TR-ET Part 1, pp.7, 10-12, 16, 20; W03593: 100957-TR-ET Part 1, pp.4-5, 7-9, 11; W04669: 082023-TR-ET Part 2, pp.28-29.

³³⁸ Appeal Brief, paras 143-147.

³³⁹ Appeal Brief, paras 151-157.

³⁴⁰ Appeal Brief, paras 152, 155.

and argues that W04600's evidence on this point lacked corroboration.³⁴¹ As such, the sub-ground as formulated in the Notice of Appeal is moot. Moreover, such lack of coherence between the Notice of Appeal and the Appeal Brief warrants summary dismissal of the subsequent divergent submissions.³⁴²

122. Nonetheless, it is noted that the Trial Panel correctly assessed W04600's identification of this location, in the context of the entirety of his evidence and the evidence of other witnesses.³⁴³ In particular, W04600 described the ZDC,³⁴⁴ recognised the buildings within the compound on ground and aerial photographs shown to him both during the investigation and at trial, and commented on them during his testimony.³⁴⁵ While discussing at length [REDACTED], he described the location as the 'BIA base in Zllash' or 'Skifterat base' located uphill from other buildings in that village,³⁴⁶ and explained his own sketch of part of the compound,³⁴⁷ leaving no doubt that he was indeed referring to the ZDC which he properly identified.

(vi) Sub-ground 2G

123. In sub-ground **2G**, MUSTAFA complains about the basis for rejection by the Trial Panel of certain Defence witness evidence regarding the ZDC.³⁴⁸ He specifically argues that evidence of Selatin KRASNIQI,³⁴⁹ Muhamet AJETI,³⁵⁰ Teuta HADRI,³⁵¹ Ibadete CANOLLI-KACIU,³⁵² and Fatmir HUMOLLI,³⁵³ was not properly considered

³⁴¹ Appeal Brief, paras 151-155, 157.

³⁴² Should these submissions be considered, it is noted that the specific purpose for which the property was lent to the KLA is not a material finding in the context of the multitude of evidence upon which the finding of control is based (Judgment, paras 348-378).

³⁴³ Judgment, paras 365-368.

³⁴⁴ Transcript (W04600), 23 September 2021, pp.720, 731-732.

³⁴⁵ Transcript (W04600), 24 September 2021, pp.750-753,756-757; SPOE00213459-00213487 (REG00-006), pp. SPOE00213478.

³⁴⁶ Transcript (W04600), 23 September 2021, pp.719-720.

³⁴⁷ Transcript (W04600), 23 September 2021, pp.730-733, 749-750.

³⁴⁸ Appeal Brief, paras 158-178.

³⁴⁹ Appeal Brief, paras 158-162.

³⁵⁰ Appeal Brief, paras 164-167.

³⁵¹ Appeal Brief, paras 168-170.

³⁵² Appeal Brief, paras 168, 171-172.

³⁵³ Appeal Brief, paras 173-176.

and assessed, which occasioned a miscarriage of justice.³⁵⁴ However, in claiming the Trial Panel ‘rejected’ the evidence of Defence witnesses, MUSTAFA repeatedly fails to cite to the findings purportedly at issue. Instead, references are made to the section where the Trial Panel provided its General Assessment.³⁵⁵ Notably, nowhere in that section did the Trial Panel ‘reject’ the evidence of any of the Defence witnesses referenced in the sub-ground 2G.

124. Rather, as part of its statutory obligation to approach the evidence holistically,³⁵⁶ the Trial Panel rightly considered various relevant factors that had or could have a clear impact on the reliability of their evidence, including: i) close ties to the KLA and/or the Accused; ii) bias against the SC/SPO; iii) selective approach to facts; and iv) reluctance or evasion in addressing certain matters, in particular those potentially inculcating the Appellant.³⁵⁷ Rather, as part of its statutory obligation to approach the evidence holistically,³⁵⁸ the Trial Panel rightly considered various relevant factors that had or could have a clear impact on the reliability of their evidence, including: i) close ties to the KLA and/or MUSTAFA; ii) bias against the SC/SPO; iii) selective approach to facts; and iv) reluctance or evasion in addressing certain matters, in particular those potentially inculcating MUSTAFA.³⁵⁹ As such, the Trial Panel, appropriately, approached certain evidence with caution, and provided extensive explanation as to why such caution was warranted.³⁶⁰ MUSTAFA, by contrast, argues for a segregated approach, pursuant to which portions of the evidence of witnesses would be assessed in isolation, without any regard to relevant factors which may have impacted its reliability. The approach is misguided, and no error in the Trial Panel’s exercise of discretion has been demonstrated.

³⁵⁴ Appeal Brief, para.177.

³⁵⁵ Judgment, paras 138-223.

³⁵⁶ Rules, Rule 139(2).

³⁵⁷ Judgment, paras 202-203, 206, 209-213, 220-223.

³⁵⁸ Rules, Rule 139(2).

³⁵⁹ Judgment, paras 202-203, 206, 209-213, 220-223.

³⁶⁰ Judgment, paras 137, 207, 213, 223, 316.

125. MUSTAFA in fact merely expresses disagreement with the Trial Panel's factual findings and its assessment of evidence. Notably, in contrast to MUSTAFA's submissions, on the specific question of the ZDC – and notwithstanding the caution appropriate to certain of their evidence - the Trial Panel actually found that a number of the Defence witnesses had been able to provide a 'more complete and possibly accurate description' of the ZDC.³⁶¹ The submissions therefore also misrepresent the Judgment. MUSTAFA additionally entirely fails to explain how any of the alleged errors claimed, whether individually or collectively, would occasion a miscarriage of justice or invalidate the Judgment.

126. MUSTAFA provides no specific submissions for sub-ground 2H, instead simply cross-referring to sub-ground 2E. The SPO has addressed those submissions above.³⁶² W01679, W03593, and W04669 were perfectly able to properly describe the detention location. As indicated earlier,³⁶³ even if their descriptions of the ZDC were naturally limited by their respective situations and experiences at the compound, they still identified that location in sufficient detail, and their identification is corroborated.

5. No error in Trial Panel's findings about MUSTAFA's presence at ZDC on 1 April 1999 (Sub-ground 2P)

127. Contrary to MUSTAFA's assertions,³⁶⁴ his presence at the ZDC on 1 April 1999 [REDACTED] is without question. In the Notice of Appeal MUSTAFA alleges the Trial Panel's error in finding that [REDACTED]. In developing this argument, MUSTAFA claims that [REDACTED].³⁶⁵ These same submissions were already considered and rejected by the Trial Panel³⁶⁶

128. MUSTAFA's allegations, even if they were correct, are hardly meaningful, as they do not deny his presence at the ZDC at the moment pivotal to the case, and his

³⁶¹ Judgment, para.369.

³⁶² Paras 117-120.

³⁶³ Paras 118-119, 122.

³⁶⁴ Appeal Brief, paras 316-323.

³⁶⁵ Appeal Brief, paras 318-320.

³⁶⁶ Judgment, paras 469-473.

awareness that the Murder Victim was delivered and handed over to his BIA soldier.

But they are factually incorrect. At trial, as acknowledged by the Trial Panel,³⁶⁷

[REDACTED]:

[REDACTED]

[REDACTED]³⁶⁸

129. Moreover, at the moment of delivery of the Murder Victim, [REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁶⁹

[REDACTED]³⁷⁰

MURDER (COUNT 4)

1. MUSTAFA's submissions under ground 3

130. MUSTAFA invalidly submits that the Murder Victim may have died after the Indictment period.³⁷¹ This submission is raised under an unrelated ground of appeal, disintegrated from any coherent appellate argument, and factually unfounded.

131. The Trial Panel correctly found that the Murder Victim was killed between 'on or around 19 April 1999 and around the end of April 1999'.³⁷² This finding was based, *inter alia*, on the testimony of W04600, who stated that he found out about the Murder Victim's death 'five, six days following the [Serb] offensive'.³⁷³ W04600 learned about the death of the Murder Victim from Fatmir SOPI – deputy commander of Brigade 153 stationed in Zllash/Zlaš – which makes this hearsay evidence particularly reliable.³⁷⁴

³⁶⁷ Judgment, para.472.

³⁶⁸ Transcript (W04600), 23 September 2021, p.728, lines 16-21.

³⁶⁹ Transcript (W04600), 23 September 2021, p.729, lines 4-10.

³⁷⁰ Judgment, para.472.

³⁷¹ Appeal Brief, paras 335-339.

³⁷² Judgment, para.639.

³⁷³ Judgment, para.616.

³⁷⁴ Transcript (W04600), 24 September 2021, p.767.

W04600 was also present in Zilash/Zlaš during the relevant period, and had detailed knowledge of BIA and Brigade 153 in that location.³⁷⁵

132. Additionally, [REDACTED] after the Serbian offensive³⁷⁶ and would have been alerted by local inhabitants if he was still alive at that time. Finally, at the beginning of July 1999,³⁷⁷ the body of the Murder Victim was already badly decomposed, which shows that his death must have occurred months earlier.

2. Sub-grounds 4A, 4B

(i) MUSTAFA's submissions

133. Under sub-ground 4A,³⁷⁸ MUSTAFA alleges that the Trial Panel erred in finding that the Murder Victim's injuries pre-gunshot were operative causes at the time of death.³⁷⁹

134. Like elsewhere in the Appeal Brief, MUSTAFA's submissions in support of this sub-ground amount to no more than unsubstantiated and demonstrably incorrect assertions. For instance, MUSTAFA advances the erroneous claim that death due to ill-treatment or denial of medical aid cannot form the basis of a murder conviction, without presenting any authority.³⁸⁰ Likewise, MUSTAFA's challenge to the finding that the Murder Victim was not able to move at the time of release is solely buttressed by his declaration that the Trial Panel did not establish this finding 'in an unequivocal way'.³⁸¹ Next, MUSTAFA wrongly asserts that no evidence proves that the Murder Victim was shot with bullets.³⁸² Had MUSTAFA followed his own reference to the Judgment, he would have realised that this finding is based on the evidence of several

³⁷⁵ Judgment, paras 101, 365, 459, 468, 472, 594-597.

³⁷⁶ Judgment, paras 593-611.

³⁷⁷ Judgment, paras 614, 622.

³⁷⁸ Notice of Appeal, para.7.

³⁷⁹ Appeal Brief, paras 342-348.

³⁸⁰ Appeal Brief, para.345; *contra* ICTY, *Kvočka et al.* AJ, para.270; ICRC, Commentary to Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 3 – Conflicts of an international character, 2020, para.635.

³⁸¹ Appeal Brief, para.343.

³⁸² Appeal Brief, para.346.

witnesses who exhumed the Murder Victim's body within months of his death and directly observed entry and exit holes at the front and back of the body.³⁸³

135. MUSTAFA's remaining submissions are either cryptically obscure or contain no more than undeveloped claims that 'there are no factual bases' or that '[t]he Defence cannot agree'.³⁸⁴

136. Under sub-ground 4B,³⁸⁵ MUSTAFA claims that the Trial Panel's finding that the Murder Victim died as a result of MUSTAFA's actions was not the only reasonable inference, as it was reasonably open to find that he had died solely as a result of gunshot wound(s).³⁸⁶

137. MUSTAFA's submissions in support of this sub-ground are obscure, vague and in many cases plainly incorrect. So it is with MUSTAFA's claim that criminal responsibility requires proof of 'the time of committing the criminal offense, the place, the cause-motive, the way, the means used, the consequences'.³⁸⁷ Applying this maxim to the facts of the case, MUSTAFA states that 'the TP did not fully establish the place of the murder, then it did not determine the time of death, nor the cause of death or the nature of the injuries'.³⁸⁸ Leaving aside the dubious legal foundation for this submission, it also misrepresents the Judgment, which sets out the factual findings underpinning Count 4 in detail, including in relation to the matters raised.³⁸⁹ MUSTAFA further claims, incorrectly and without supporting authority, that an accused's acts and/or omissions must be the sole cause of death.³⁹⁰

138. MUSTAFA's submissions that the Trial Panel's findings are 'unsupported by any evidence' are based on a mistaken assumption that a conviction cannot be

³⁸³ Judgment, paras 622, 627.

³⁸⁴ Appeal Brief, paras 343, 348.

³⁸⁵ Notice of Appeal, para.7, (4B).

³⁸⁶ Appeal Brief, paras 349-357.

³⁸⁷ Appeal Brief, para.352.

³⁸⁸ Appeal Brief, para.353, *see also* para.355.

³⁸⁹ Judgment, paras 589-639. Regarding **place**, *see* paras 603-618; 636-638; regarding **time**, *see* paras 603-617, 639; regarding **cause**, *see* paras 620-639; regarding **injuries**, *see* paras 619-624.

³⁹⁰ Appeal Brief, para.354; *contra* Judgment, para.687, and citations therein.

supported by circumstantial evidence.³⁹¹ This misunderstanding leads MUSTAFA to declare that the Trial Panel ‘failed to establish with any piece of evidence that the Murder Victim was not evacuated from the ZDC’, and that no evidence establishes that MUSTAFA made the decision not to evacuate him.³⁹² The Trial Panel transparently stated that it inferred these findings from circumstantial evidence, including the testimonies of W01679, W03593 and W03594, as well as evidence concerning MUSTAFA’s command over ZDC, the BIA unit, and his admitted role in the evacuation of the wounded.³⁹³ MUSTAFA merely disagrees with the Trial Panel’s factual findings without articulating any error.

(ii) *The Notice of Appeal*

139. Sub-grounds 4A and 4B – as articulated in the Notice of Appeal – allege an error of fact,³⁹⁴ namely that it was not reasonably open to the Trial Panel to find that MUSTAFA and his subordinates substantially contributed to the Murder Victim’s death. These sub-grounds would not succeed even if MUSTAFA had developed a coherent argument in support.

140. Sub-ground 4A³⁹⁵ conflates the question of medical (or pathological) cause of death with legal causation. They are not one and the same.³⁹⁶ The Trial Panel correctly set out the legal standard for causation applicable to murder: ‘[t]he perpetrator’s conduct does not have to be the sole cause of death of the victim, but it must at a

³⁹¹ Appeal Brief, paras 345, 349-351. *See, e.g.,* ICTY, *Kupreškić* AJ, para.303. *See also* Judgment, paras 29, 45; Rules, Rule 139(5) and Rule 140(3).

³⁹² Appeal Brief, paras 356-357; Judgment, paras 636, 692.

³⁹³ Judgment, para.636.

³⁹⁴ The erroneous application of a correct legal standard is an error of fact, not law. *See* ICTY, *Blagojević and Jokić* AJ, paras 143-146.

³⁹⁵ Notice of Appeal, para.7, (4A).

³⁹⁶ *See e.g.* Australia, Supreme court of South Australia, *R v. Hallett* [1969], SASR 141; paras 146-150 below.

minimum have contributed substantially thereto'.³⁹⁷ The standard of substantial contributing cause is well established in customary international law.³⁹⁸

141. As the Trial Panel found, the most probable conclusion from the evidence is that BIA members fired bullets at the Murder Victim before leaving the ZDC.³⁹⁹ However, since a reasonable doubt remained about the attribution of the bullets, the Trial Panel also considered, *in dubio pro reo*, the possibility that the bullet wounds emanated from shots fired by Serbian forces.⁴⁰⁰ The Trial Panel found that, even in that scenario, MUSTAFA and his subordinates substantially contributed to the Murder Victim's death by leaving him incapacitated in the direct path of a deadly peril.⁴⁰¹ Thus, the acts and omissions of MUSTAFA and his subordinates legally contributed to the Murder Victim's death even if the pathological cause of his death were gunshot wounds inflicted by Serb forces. To put it another way: at the time of death, the Murder Victim's arms and legs were still seriously injured, which prevented him from fleeing the advancing military offensive. Thus, the injuries were operative substantial and causes at the time of death.

142. Similarly, sub-ground 4B erroneously attempts to identify a single cause of death, when that is not what the law demands. MUSTAFA wrongly assumes that the causation element is not satisfied because it cannot be proven beyond reasonable doubt that the Murder Victim died solely of the injuries inflicted during his mistreatment at the ZDC. This contention is fallacious because (even in the unlikely scenario in which the bullets came from Serb forces) the acts and conduct of

³⁹⁷ Judgment, para.687.

³⁹⁸ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgment ('*Karadžić TJ*'), Volume I of IV, 24 March 2016, para.446; *Popović et al TJ*, para.788; *Dorđević TJ*, para.1708; *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgment ('*Kupreškić TJ*'), 14 January 2000, para.560; *Lukić & Lukić TJ*, para.899; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Judgment ('*Milutinović et al. TJ*'), 26 February 2009, para.137; *Prosecutor v. Orić*, IT-03-68-T, Judgment ('*Orić TJ*'), 20 June 2006, para.347. See also ICRC, *Commentary to Convention (I) for the Amelioration of the Condition of the Wounded and Sick and Armed Forces in the Field*, Geneva, 12 August 1949 (2016), Article 50, para.2952.

³⁹⁹ Judgment, para.637.

⁴⁰⁰ Judgment, para.637.

⁴⁰¹ Judgment, paras 638, 689.

MUSTAFA and other BIA members substantially contributed to the Murder Victim's death by placing him in a situation in which he was unable to escape the military offensive. In other words, the acts and omissions of MUSTAFA and his subordinates had a substantial effect on the Murder Victim being shot, which in turn medically caused his death. MUSTAFA's argument would foreclose holding anybody accountable in cases of murder resulting from multiple causes.

143. Moreover, the seductive fallacy of focusing unduly on intermediate steps between the perpetrator's conduct and the victim's pathological cause of death invariably leads to absurdity. Even in a straightforward example of murder, one can identify any number of intermediate steps between the perpetrator's act and the victim's death. For instance: a perpetrator pulls a trigger. The trigger ignites an explosive substance. The explosion propels a bullet forward. The bullet ruptures a vital organ. That injury sets in motion a complex chain of biochemical processes ending in death.

144. Once these red herrings are cast aside, a simple enquiry remains: did the acts and omissions of MUSTAFA and his subordinates substantially contribute to the Murder Victim's death? The Trial Panel resolved this question in the affirmative, based on well-grounded factual findings, for both alternative factual scenarios (i.e. whether the bullets were fired by BIA members or Serb forces). Since this is quintessentially a question of fact, the Appeals Panel should not substitute its own view for that of the Trial Panel and should only overturn the Trial Panel's finding if it was wholly erroneous, or if no reasonable trier of fact could have reached the same conclusion. Moreover, the enquiry should be approached in the context of two facts that are firmly established in the Judgment: (i) MUSTAFA intended to kill the Murder Victim;⁴⁰² and (ii) but for MUSTAFA's (and his subordinates) acts and omissions, the Murder Victim would have survived.⁴⁰³

⁴⁰² Judgment, paras 691-695.

⁴⁰³ Judgment, paras 624, 689.

145. The jurisprudence of international tribunals offers some guidance about the application of the substantial contribution standard as an element of murder. These tribunals tend to focus on criminal responsibility for senior leaders and those most responsible.⁴⁰⁴ Such cases commonly involve ‘collective criminality’, where the perpetrator’s criminal acts must simply ‘form a link in the chain of causation, it is not necessary that this participation be a *sine qua non*, or that the offence would not have occurred but for his participation’.⁴⁰⁵

146. Similarly, in at least two cases, an accused person was convicted as a direct perpetrator of murder on the basis of his substantial contribution, even where the contribution of others had a more direct effect on death.

147. The ICTY Appeals Chamber in *Limaj* confirmed Haradin Bala’s conviction for murdering nine prisoners as a direct perpetrator, even though it could not be established that he shot all nine prisoners himself.⁴⁰⁶

148. Likewise, a Trial Chamber of the ICTY convicted Milan Lukić for the murder of five persons, even though the evidence only established that he directly shot one of the five victims. The Trial Chamber found:

...that Milan Lukić’s role and actions in the events leading up to the killings, at Sase and, particularly, at the river’s edge before and during the killings, were such that were it not for his presence and directions, including regarding the manner in which the men were to be killed, the killings would not have been committed.⁴⁰⁷

149. The Trial Chamber relied on findings of the ICTR Appeals Chambers in *Seromba* and *Gacumbitsi*, made in the context of genocide, and held that:

⁴⁰⁴ See e.g. UNSC Resolution 1534 (2004), para.5; Article 8(1) of the ICC Statute; Cryer, *Prosecuting International Crimes*, Cambridge University Press (ed.), 2005, p.105.

⁴⁰⁵ ICTY, *Tadić* AJ, para.199. See also: *United States of America v. Brandt et al., Medical Case*, Judgment, 20 August 1947, pp.198, 206-207; p.61; *United States of America v. Tashiro et al., Review of the Staff Judge Advocate*, 7 January 1949, pp. 5-7, 67-69, 71-72; Law Reports of Trials of war criminals, UN War Crimes Commission, Volume XV Digest of Laws ad Cases, 1949, reference to the Justice Trial, p.61 (available at: https://tile.loc.gov/storage-service/l1/lmlp/Law-Reports_Vol-15/Law-Reports_Vol-15.pdf).

⁴⁰⁶ ICTY, *Limaj et al.* AJ, paras 47-50. See also *Prosecutor v. Limaj et al., IT-03-66-T, Judgment* (*Limaj et al. TJ*), 30 November 2005, paras 664, 670, 741.

⁴⁰⁷ ICTY, *Lukić & Lukić* TJ, para.908.

...a person who did not personally physically commit a crime – in the present case, personally shooting each victim – can nonetheless be liable for committing the crime of murder if there is evidence that the perpetrator's acts were as much an integral part of the murder as the killings which the crime enabled.⁴⁰⁸

150. The Appeals Chamber, noting the precedent in the *Limaj* case, confirmed *Lukić's* conviction for directly committing murder, and not as a co-perpetrator.⁴⁰⁹

151. In addition to these precedents, there is a wealth of jurisprudence considering the substantial contribution standard in the context of aiding and abetting.⁴¹⁰ This comparison is especially helpful because the *actus reus* of aiding and abetting essentially turns on the question of whether the accused's acts and omissions substantially contributed to the underlying crime.⁴¹¹ Although the commonly accepted definition of the *actus reus* also refers to 'practical assistance, encouragement, or moral support', the Appeals Chamber in *Taylor* clarified that 'the essential question is whether the acts and conduct of an accused can be said to have had a substantial effect on the commission of the crime charged'.⁴¹² It also conducted a thorough review of the relevant case law and concluded that: '[i]nternational tribunals have never required that, as a matter of law, an aider and abettor must provide assistance to the crime in a particular manner'.⁴¹³

152. In *Mrkšić and Šljivančanin*, the accused withdrew their JNA guards without evacuating the non-Serb prisoners, which exposed the prisoners to advancing Serb paramilitary forces.⁴¹⁴ The accused, through their orders and failure to act,

⁴⁰⁸ ICTY, *Lukić & Lukić* TJ, para.908, citing ICTR, *Prosecutor v. Seromba*, ICTR-2001-66-A, Judgment, 12 March 2008, para.161; ICTR, *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgment, 7 July 2006, para.60.

⁴⁰⁹ ICTY, *Lukić & Lukić* AJ, paras 155-162.

⁴¹⁰ SCSL, *Taylor* AJ, paras 368-385.

⁴¹¹ SCSL, *Taylor* AJ, paras 352, 550.

⁴¹² SCSL, *Taylor* AJ, para.368. See also Ambos, *Treatise on International Criminal Law*, Oxford University Press (ed.), 2014, Chapter IV: Individual Criminal Responsibility, p.130 ('...the only limiting element is the 'substantial effect' requirement'.)

⁴¹³ SCSL, *Taylor* AJ, para.371. See also paras 368-385. See also ICTY, *Šainović et al.* AJ, para.1649; ICTY, *Stanišić and Simatović* AJ, para.108, where the ICTY Appeals Chamber confirmed that the acts of the aider and abettor need not be specifically directed to assist the commission of a crime.

⁴¹⁴ ICTY, *Prosecutor v. Mrkšić*, IT-95-13/1-T, Judgment ('*Mrkšić* TJ'), 27 September 2007, para.621.

substantially contributed to the deaths of the prisoners, who were killed by the paramilitary forces.⁴¹⁵

153. In *Popović*, the accused failed in his legal duty to protect prisoners, which substantially contributed to their subsequent murder.⁴¹⁶

154. In *Krnojelac*, the ICTY Trial Chamber left open the possibility that the accused could be responsible for a victim's death by suicide, on the basis that the acts or omissions for which the accused bore responsibility induced the victim to commit suicide.⁴¹⁷ Ultimately, the Trial Chamber found that the prosecution had failed to establish causation, but on the basis that the reasons for the victim's suicide were unclear.⁴¹⁸ In the same case, the Trial Chamber found that the accused's failure to use his authority to prevent outsiders from coming into the prison camp had a substantial effect on the killing of detainees.⁴¹⁹

155. In *Vasiljević*, the accused substantially contributed to murder by pointing his gun at the victims and preventing them from fleeing.⁴²⁰

156. In *Brđanin*, the accused substantially contributed to deaths that occurred during attacks on non-Serb towns and villages, because his governmental decisions (that non-Serbs should disarm) made non-Serb civilians more vulnerable and less able to defend themselves from attacks by Bosnian Serb forces.⁴²¹

157. In *Naletilić*,⁴²² the victim was found buried with gunshot wounds. The ICTY Trial Chamber inferred the accused's substantial contribution to the victim's death on

⁴¹⁵ ICTY, *Mrkšić* TJ, para.621; *Prosecutor v. Mrkšić et al.*, IT-95-13/1-A, Judgment ('*Mrkšić* AJ'), 5 May 2009, para.97.

⁴¹⁶ ICTY, *Popović et al* TJ, para.1988.

⁴¹⁷ ICTY, *Krnojelac* TJ, paras 328-329.

⁴¹⁸ ICTY, *Krnojelac* TJ, para.342.

⁴¹⁹ ICTY, *Krnojelac* TJ. The accused was found not guilty because it was not established that he was aware of the crimes which were being committed.

⁴²⁰ ICTY, *Prosecutor v. Vasiljević*, IT-98-32-A, Judgment, 25 February 2004, paras 134, 143.

⁴²¹ ICTY, *Prosecutor v. Brđanin*, IT-99-36-T, Judgment, 1 September 2004, para.369.

⁴²² ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgment, 31 March 2003, paras 466, 497-503.

the basis of circumstantial evidence, in the absence of direct evidence of how the victim died.

158. In *Karera*, a Trial Chamber of the ICTR found that the accused substantially contributed to the death of a victim by ordering his arrest and leaving him in the hands of the 'Interahamve' and telling them he was an 'Inyenzi', which he must have understood would result in the victim's murder.⁴²³

159. Self-evidently, these cases do not bind the determination of factual issues by a Panel of the SC.⁴²⁴ However, they provide some guidance as to the application of the substantial contribution standard and thus illustrate the reasonableness of the Trial Panel's finding. Similarly, the mere fact that a trial chamber of another tribunal may have decided differently when confronted with comparable facts would not in and of itself show the Trial Panel's conclusions to be wholly erroneous.

160. The Trial Panel's finding that the acts and omissions of MUSTAFA and his subordinates substantially contributed to the Murder Victim's death are within the range of findings that have been considered reasonable by chambers of other tribunals. MUSTAFA has failed to establish any error of fact in the Trial Panel's assessment.

3. Sub-ground 4C

(i) The Appeal Brief

161. Sub-ground 4C complains that the Trial Panel erred in law by failing to consider the principle of *novus actus interveniens*. MUSTAFA offers no submissions in support of this sub-ground, and instead merely repeats arguments relevant to errors of fact alleged under sub-grounds 4A and 4B.⁴²⁵ Moreover, MUSTAFA should have alerted the Trial Panel's attention to this issue at least by closing arguments. Having failed to do so, he cannot expect the Trial Panel to have addressed it in the Judgment.

⁴²³ ICTR, *Prosecutor v. Karera*, ICTR-01-74-T, Judgment, 7 December 2007, para.322.

⁴²⁴ See ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR98bis.1, Judgment, 11 July 2013, para.94.

⁴²⁵ Appeal Brief, paras 358-362.

This, coupled with MUSTAFA's failure to even attempt to substantiate an error of law, should lead to dismissal of sub-ground 4C *in limine*.

(ii) *Notice of Appeal*

162. Even if these shortcomings were overlooked, sub-ground 4C would not succeed. The Trial Panel applied the correct standard of causation under customary international law. The principle of *novus actus interveniens* is unique to Anglo-American common law jurisdictions and does not reflect customary international law. Nor is there any legitimate path for this principle into the substantive law applicable to Count 4.⁴²⁶ In any event, even under the common law doctrine, MUSTAFA would still be liable for his omissions.

The Trial Panel applied the correct causation test

163. Any interpretive quandary should be resolved in accordance with the hierarchy of legal sources under Article 3, which includes recourse to the jurisprudence of the international *ad hoc* tribunals.⁴²⁷ The ICTY Trial Chamber in the *Čelebići* case examined various domestic legal systems to arrive at the 'substantial cause' test for causation, many of which applied a less stringent standard than 'substantial'.⁴²⁸ The substantial contribution standard was subsequently applied by ICTY Trial Chambers in *Orić*⁴²⁹ *Kupreškić*,⁴³⁰ *Karadžić*,⁴³¹ *Lukić*,⁴³² and *Milutinović*.⁴³³ It is also reflected in the ICRC Commentary on the Geneva Conventions,⁴³⁴ which is especially persuasive because Count 4 charged MUSTAFA with murder as a war crime, and the definition of this crime has been held to be consistent across the Geneva

⁴²⁶ Law, Arts 3(2), 12, 14(1)(c).

⁴²⁷ Law, Art 3(3).

⁴²⁸ ICTY. *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment ('*Čelebići* TJ'), 16 November 1998, para.424, *see* fn.435.

⁴²⁹ ICTY, *Orić* TJ, para.347.

⁴³⁰ ICTY, *Kupreškić* TJ, para.560.

⁴³¹ ICTY, *Karadžić* TJ, Volume I of IV, para.446.

⁴³² ICTY, *Lukić & Lukić* TJ, para.899.

⁴³³ ICTY, *Milutinović et al.* TJ, para.137.

⁴³⁴ ICRC, Commentary to Convention (I) for the Amelioration of the Condition of the Wounded and Sick and Armed Forces in the Field, Geneva, 12 August 1949 (2016), Article 50, para.2952.

Conventions.⁴³⁵ The Trial Panel correctly applied this jurisprudence in interpreting the causation test for murder as a war crime under customary international law.⁴³⁶

164. Domestic jurisdictions approach causation in different ways. The starting point in most common and civil law systems is factual causation, which is satisfied when the accused's conduct is a *conditio sine qua non* for the resulting crime.⁴³⁷ Since the application of this test is generally considered to involve a risk of overdetermination, most jurisdictions also apply a normative requirement to the causation test.⁴³⁸ The purpose of this 'legal causation' element is to fairly attribute criminal responsibility, so that only acts that are sufficiently deserving of criminal punishment are captured by the test.⁴³⁹

165. The basis and nature of this normative attribution changes between jurisdictions. In the USA, legal causation is satisfied where the resulting death was the natural and reasonably foreseeable consequence of the accused's conduct.⁴⁴⁰ It suffices to show that the death was a possible consequence which might reasonably have been contemplated.⁴⁴¹ In other common law countries, there are competing lines of authority applying different tests for legal causation, including 'significant contribution',⁴⁴² 'more than *de minimis*',⁴⁴³ 'substantial operating cause' and 'reasonable

⁴³⁵ See e.g. ICTY, *Čelebići* TJ, paras 421-424.

⁴³⁶ Judgment, para.687.

⁴³⁷ See e.g. Model Penal Code USA, section 2.03(1); D.Bock, *Strafrecht Allgemeiner Teil*, 2018, Kapitel 7, pp.121-122.

⁴³⁸ Moore, *Causation in the Criminal Law*, in *The Oxford Handbook of Philosophy of Criminal Law*, John Deigh (ed.), David Dolinko (ed.), 2011, Chapter 7; D Bock, *Strafrecht Allgemeiner Teil*, Springer (ed.), 2018, Kapitel 7, pp.121-122.

⁴³⁹ Colvin, *Causation in Criminal Law*, Bond Law Review (ed.), 1989, Vol. 1: Iss. 2, Article 7, pp.254, 258-259; United Kingdom, *R v. Blaue* [1975], 1 WLR 1411, at 1414.

⁴⁴⁰ United States of America, Supreme Court of California, *People v. Cervantes*, 2001, 26 Cal.4th 860, p.7; Model Penal Code USA, section 2.03(2)(b).

⁴⁴¹ US, *People v. Cervantes*, p.7.

⁴⁴² UK, *R. v. Pagett* (1983) 76 Cr. App. R. 279, at 288; UK, *R. v. Warburton* [2006] EWCA Crim 627, para.23.

⁴⁴³ United Kingdom, *R v. Cato* [1976], 1 WLR 110, at 117; Canada, Supreme court, *R v. Smithers* [1978], 1 S.C.R. 506, at 519-520; Ireland, Supreme Court, *Dunne v. the Director of Public Prosecutions* (2016), 06/2015, para.67 ('more than minimal').

foreseeability'.⁴⁴⁴ Poland and France apply 'but-for' causation and otherwise leave the normative attribution to the *dolus*, or *mens rea*, elements of the crime.⁴⁴⁵ In Italy, the chain of causation is only broken by 'completely independent' causes which create a chain of causation separate and autonomous from that established by the accused, or those characterised by absolute anomaly and exceptionality, falling outside 'the realm of normal, reasonable probability', and thus unforeseeable.⁴⁴⁶ Likewise, in Germany an intervening event will only break the chain of causation when it is 'outside of all life experience'.⁴⁴⁷ Dutch courts apportion liability where the death is only partly attributable to the accused's actions.⁴⁴⁸ In Spain, a new action may exceptionally break the chain of causation.⁴⁴⁹

166. Although these approaches vary across jurisdictions, they share a common objective, which is to place some normative restriction on the attribution of criminal responsibility for the consequences of a person's acts and omissions. In customary international law, this objective is achieved through the 'substantial cause' test discussed above, which – when combined with the necessity of establishing the requisite *mens rea* – fairly apportions responsibility for the commission of murder.

The application of a different causation test would not change the outcome

167. The causal contribution of MUSTAFA and his subordinates to the Murder Victim's death would satisfy any version of the causation test. On the evidence, the

⁴⁴⁴ Colvin, *Causation in Criminal Law*, Bond Law Review (ed.), 1989, Vol. 1: Iss. 2, Article 7, pp.259-265.

⁴⁴⁵ Poland, Judgment of the Supreme Court, IV KR 153/72, 10 August 1972; Poland, Decision of the Supreme Court, III KK 420/19, 20 February 2020; France, Cour de cassation, chambre criminelle, 1 October 2019, no. 19-84.315; Cour de cassation, chambre criminelle, 26 February 1997, no. 98-81-046.

⁴⁴⁶ Italy, Judgment of the Supreme Court of Cassation, Fifth Criminal Section, 9 November 2022, no. 7205/23, para.6.2.1, 6.2.2. (and jurisprudence cited therein); *similarly*: Italy, Judgment of the Supreme Court of Cassation, Fifth Criminal Section, 4 April 2022, no. 18396, paras 7.5-7.7 (and jurisprudence cited therein); Italy, Judgment of the Supreme Court of Cassation, Fourth Criminal Section, 11 July 2007, no. 39617/07, p.3.

⁴⁴⁷ Germany, Bundesgerichtshof, 3 July 1959, 4 StR 196/59, para.7.

⁴⁴⁸ The Netherlands, Supreme Court, 4 April 2023, Case No. 21/04302, ECLI:NL:HR:2023:493, paras 2.3, 2.4.2.

⁴⁴⁹ Spain, Supreme Court, 22 April 2005, STS 2493/2005 – ECLI:ES:TS:2005:2493; *see also* Spain, Supreme Court, 2 April 2019, STS 186/2019 – ES:TS:2019:1375.

most probable version of events is that the Murder Victim was shot by BIA members shortly before the evacuation of the ZDC.⁴⁵⁰ However, the Trial Panel could not exclude the reasonable possibility that the Murder Victim was shot by Serb forces.⁴⁵¹ In the case of the former, no question of causation arises.⁴⁵² The latter version of events was nevertheless a natural and foreseeable consequence of the acts and omissions of

⁴⁵⁰ Judgment, para.637.

⁴⁵¹ Judgment, para.637.

⁴⁵² Judgment, paras 635-637.

MUSTAFA and his subordinates.⁴⁵³ Any reasonable person in MUSTAFA's position⁴⁵⁴ would certainly have appreciated the likelihood that the Murder Victim would perish in these circumstances. Indeed, MUSTAFA implicitly acknowledged the danger posed by the Serb advance when he detailed the BIA's involvement in evacuating injured civilians from the war area and moving them to the military hospital on the Llap

⁴⁵³ See e.g. ERN SPOE00054488-SPOE00054488-ET (Radio Free Kosovo archive of early April 1999 on Serb forces shooting 80 Albanian civilians in Gjakove); SPOE00061248-00061251 (OSCE report of 29 March 1999 on the execution of 50 Albanian men in Malisevo and Suva Recka); SPOE00061266-00061269 (OSCE report of 6 April 1999 on the VJ and paramilitary groups committing 'alleged executions, killings, forced displacement, and destruction of property, looting, arrests, abduction, and harassment' of Albanian civilians); U000-4205-U000-4206-ET (Order from commander of KLA 153rd Brigade dated 12 April 1999 referring to 'a broad campaign of ethnic cleansing of the Albanian population of Kosovo' by the Serb forces); U003-8552-U003-8690, p.25 (Paris AFP report on Serb operations causing around 300 casualties), pp. 72-73 (KLA memorandum of October 1998 on 'Serbian barbarism against the civilian population, the murders and massacres, the looting of property, the destruction and burning of houses [...]'); IT-05-87.1 P01029, p.28 (OSCE report of January 1999 on VJ and MUP forces and the Racak massacre of 45 Albanian civilians), p.55 (OSCE report of March 1999 warning of MUP and VJ Serb forces systematically burning houses in Albanian villages), p.129 (OSCE report of March 1999 on FRY security forces conducting a mass execution in the stadium of Srbica), p.135 (OSCE report of March 1999 on FRY forces carrying out mass lootings, burnings and killings, with armed Serb civilians), p.143 (OSCE report from 29 March 1999 on the Serb Forces' siege in Suva Reka and following casualties estimated between 100-500), p.145 (OSCE report of March 1999 warning of Serbian police killings in Mitrovice); SPOE40000796-SPOE40000796-ET Revised (KLA communique no. 67 published in The Voice of Kosovo of 31 December 1998, warning about Serb forces retaliating against Albanian civilians); Transcript, 24 September 2021, p.800 (W04600 stating that civilians in Gollak at that time sought KLA protection from the Serbs); p.802 (W04600 stating that Serb forces shelled indiscriminately, they did not care whether they shelled civilians); Transcript, 21 September 2021, pp.552-553 (W03593 was told to 'run, because it's a huge offensive'); Transcript, 10 November 2021, pp.1458-1459 (W04669 described an indiscriminate execution committed by Serbian forces after his release); Transcript, October 2021, p.1244 (W03594 shaved so the Serb forces would not think he was a KLA soldier); Transcript, 18 January 2022, p.2043 (F. SOPI describing constant Serb attacks and the burning of houses), pp.2178-2179 (F. SOPI describing the Serb offensive of 7 April 1999 and the many losses of civilians shelled indiscriminately); Transcript, 25 January 2022 p.2224 (S. VESELI stating that the Serb forces killed 135 civilians in Makovce); Transcript, 23 March 2022, p.2626 (B. Mehmetaj describing the serb forces burning and looting houses during Bajram); Transcript, 29 March 2022, p.2871 (J. ISMAILI describing the Serb forces retaliating for the NATO air strikes of 24 March 1999 against the civilian population 'without sparing women, elderly, children, paralysed'); Transcript, 4 April 2022, p.3085 (G. SOPI explaining how 'The Serb police and paramilitaries exerted great violence'), p.3108 (G. SOPI stating that the Serb forces 'resorted to all kinds of methods to torture the people'); Transcript 5 April 2022, p.3186 (B. NRECI explaining that after 25 March 1999, the Serb forces became 'very aggressive'); Transcript, 12 April 2022, p.3558 (N. IBISHI explaining that on 10 April 1999 began the Operation Horseshoe for the ethnic cleansing by the Serb forces).

⁴⁵⁴ MUSTAFA was heading BIA's intelligence, was actively tracking movements of Serb forces in the region (e.g. 069404-TR-ET Part 6 RED, p.7), and must have been well aware of their merciless treatment of K-Albanians found at KLA premises.

side.⁴⁵⁵ According to MUSTAFA, over 130 civilians were killed in Zllash/Zlaš alone during the offensive.⁴⁵⁶ The fact that none of the released detainees died in the days following the offensive at least illustrates the reasonableness of the Trial Panel's finding.

The principle of *novus actus interveniens* is inapplicable

168. The principle of *novus actus interveniens* is an exception to the ordinary principles of causation in Anglo-American common law jurisdictions. One aspect of this principle is that the voluntary criminal act of another usually breaks the chain of causation.⁴⁵⁷ However, in reality this principle does not significantly modify the ordinary principles of causation set forth above; in most cases where a voluntary, criminal act has been found to break the chain of causation, that act was also not reasonably foreseeable. Moreover, even where a subsequent voluntary, criminal act breaks the chain of causation, the original actor then faces aiding and abetting liability, set forth in more detail below.

⁴⁵⁵ 069404-TR-ET Part 7, pp.14, 18-19, 22-23.

⁴⁵⁶ 069404-TR-ET Part 7, p.19.

⁴⁵⁷ Cervantes, citing Hart and Honoré, *Causation in the Law*, Oxford University press (2nd ed.), 1985, p.326; Colvin, *Causation in Criminal Law*, Bond Law Review (ed.), 1989, Vol. 1: Iss. 2, Article 7, p.265. For a critique of this doctrine, see Moore, *Causation and Responsibility, An Essay in Law, Morals and Metaphysics*, in Oxford University press (ed.), 2009, Chapter 12, Part V: Libertarian Metaphysics for Human Choices and Acts of God, pp.268-279.

169. Further, civil law systems do not share this restriction on causation.⁴⁵⁸ German courts, for example, have consistently held that even the criminal conduct of a third person does not necessarily sever the chain of causation.⁴⁵⁹

170. Indeed, in a comparable case to the present one, the German Federal Court (Bundesgerichtshof) held that the elements of causation and attribution were satisfied where the accused weakened the victim and thereby rendered him unable to defend himself against the mortal blow of a third person ('creation of a legally relevant danger' that materialises in the death of the victim).⁴⁶⁰ In that case, the accused should have foreseen that the victim's reduced capacity to defend himself, which itself was the result of the accused's punches, could lead to the third person continuing the fight and inflicting the fatal punches.⁴⁶¹

171. To isolate a domestic legal concept from the legal order within which it has organically developed over centuries, and import it directly into international criminal law, is a fraught and legally erroneous undertaking.⁴⁶² Domestic jurisdictions base their concepts of criminality on their own values and principles, which are not always

⁴⁵⁸ In German law, stricter causation rules apply to a specific type of offences that impose liability for consequences beyond the perpetrator's *mens rea* ('Erfolgsqualifizierte Delikte'). In these specific contexts, the intentional, rather than negligent, conduct of a third party interrupts the causal attribution ('Zurechnungszusammenhang') See German Criminal Code, Section 227; Bock, *Strafrecht Allgemeiner Teil*, Springer (ed.), 2018, pp 518-519, 521-523. The only other relevant references to equivalent doctrines in civil law jurisdictions that the SPO has been able to locate are: (i) a decision of the German case from 1888 (RGSt 19 (1888), 141), discussed in Hart and Honoré, *Causation in the Law*, 2nd ed, 1985, pp.460-461; and (ii) a mention in the same book that the Spanish Criminal Code includes an exception to the general rules of causation when there is a 'voluntary act of a third person', see p.461. However, the current Spanish Criminal Code does not appear to include this exception.

⁴⁵⁹ Germany, Bundesgerichtshof, 6 July 1956, 5 StR 434/55, para.3(a); Germany, Bundesgerichtshof, 30 August 2000, 2 StR 204/00; Germany, Bundesgerichtshof, 30 March 1993, 5 StR 720/92, paras 9-10. *C.f.* fn.458 above regarding 'Erfolgsqualifizierte Delikte'. See also, for Italy, G.Fiandaca, E.Musco, *Diritto Penale Parte Generale*, 6th ed., Zanichelli ed., pp.251-253, 227.

⁴⁶⁰ Germany, Bundesgerichtshof, 12 May 2020, 1 StR 368/19, paras 8-15, 24, 27-28.

⁴⁶¹ Germany, Bundesgerichtshof, 12 May 2020, 1 StR 368/19, para.12. The accused was convicted of negligent killing. The Court held that he could not be convicted for bodily harm resulting in death because that specific provision required a stricter causation element. See paras 58-65 and footnote 458 above discussing 'Erfolgsqualifizierte Delikte'.

⁴⁶² ICTY, *Čelebići* TJ, paras 414, 431.

universally shared.⁴⁶³ While domestic criminal law rules can in appropriate circumstances be a guide to interpreting customary international law, the threshold for the incorporation of a domestic rule is that it is 'common to the major legal systems of the world'.⁴⁶⁴ As illustrated above, that is not the case here.

172. Nor is there any compelling moral or policy argument for the inclusion of this principle. Indeed, the goals of international criminal law to prevent and punish the occurrence of harm are not well-served when those who substantially contribute to the causation of that harm escape liability.⁴⁶⁵

MUSTAFA would in any event be liable for his omissions

173. Even in common law jurisdictions, the criminal actions of a third person do not necessarily exempt liability for *omissions*, particularly where the accused is under a duty to intervene.⁴⁶⁶ Similar norms exist in civil law jurisdictions.⁴⁶⁷ Established jurisprudence of the ICTY and ICTR also confirms liability as a direct perpetrator for omission.⁴⁶⁸ The conditions for direct perpetration by omission were articulated by the *Ntagerura et al.* Judgement, in which the Trial Chamber stated:

...the following elements must be established: (a) the accused must have had a duty to act mandated by a rule of criminal law;⁴⁶⁹ (b) the accused must have had the ability to act; (c) the accused failed to act intending the criminal sanctioned consequences or with awareness and

⁴⁶³ SCSL, *Taylor* AJ, para.429.

⁴⁶⁴ ICTY, *Kupreškić* TJ, para.591.

⁴⁶⁵ See Ambos, *Treatise on International Criminal Law*, Oxford University Press (ed.), 2014, Vol 2, p.181.

⁴⁶⁶ See Moore, *Causation and Responsibility, An Essay in Law, Morals and Metaphysics*, in Oxford University Press (ed.), 2009, pp. 146-149; Colvin, *Causation in Criminal Law*, *Bond Law Review* (ed.), 1989, Vol. 1: Iss. 2, Article 7, p.265; Canada, Ontario Court of Appeals, *R v. Popen* [1981], 60 C.C.C. (2d) 232, at 239; United States of America, Court of Appeals of Maryland, *Palmer v. State*, 1960, 164 Atl. 2d 467; United States of America, Court of Appeals of the District of Columbia, *Story v. United States*, 1926, 16 F. 2d 342.

⁴⁶⁷ See e.g. Spanish Criminal Code, Article 11; Italian Penal Code, Article 40; German Criminal Code, Sections 13, 221; Art.2 of the Polish Criminal Code; Ambos, *Treatise on International Criminal Law*, Oxford University Press (ed.), 2014, p.184.

⁴⁶⁸ ICTY, *Čelebići* AJ, para.379; *Orić* TJ, para.302; ICTR, *Prosecutor v. Kambanda*, ICTR-97-23-S, Judgment and Sentence, 4 September 1998, para.40; Ambos, *Treatise on International Criminal Law*, Oxford University Press (ed.), 2014, pp.190-192.

⁴⁶⁹ The ICTY Trial Chamber has held that the duty may also arise from a rule of IHL, see ICTY, *Orić* TJ, para.304; *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment ('*Vasiljević* Trial Judgment'), 29 November 2002, para.62. See Cassese, *International Criminal Law*, Oxford University Press (3rd ed), 2013, p.181; Ambos, *Treatise on International Criminal Law*, Oxford University Press (ed.), 2014, pp.194-195.

consent that the consequences would occur; and (d) the failure to act resulted in the commission of the crime.⁴⁷⁰

174. Such was the case here because MUSTAFA was obliged, under Common Article 3 and Additional Protocol II to the Geneva Conventions,⁴⁷¹ to provide medical care to the Murder Victim,⁴⁷² not to endanger his physical health and integrity by any unjustified act or omission,⁴⁷³ and to take necessary measures to ensure his safety.⁴⁷⁴

175. Thus, even if the *novus actus interveniens* principle applied in customary international law, MUSTAFA would still be liable for his failure to evacuate the Murder Victim and to provide medical care.⁴⁷⁵ From around 1 April 1999, MUSTAFA was the master of the Murder Victim's destiny when he received him into his custody.⁴⁷⁶ From that day forward, MUSTAFA had control over the Murder Victim's fate. Even after overseeing the brutal mistreatment of the Murder Victim, which rendered him grievously injured and helpless, MUSTAFA had the authority, the means and the legal duty to evacuate him together with the remaining prisoners under his care. He intentionally omitted to do this, knowing that this would condemn the Murder Victim to a high probability of death, bordering on certainty, and consenting to that result.⁴⁷⁷ MUSTAFA thus bears both moral and legal responsibility for the Murder Victim's death.

⁴⁷⁰ ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Judgment ('Ntagerura TJ'), 25 February 2004, para.659.

⁴⁷¹ See similarly in the context of aiding and abetting: ICTY, *Mrkšić* AJ, paras 73-74; see also regarding criminal liability for murder on the basis of omission, ICTY, *Čelebići* TJ, para.424.

⁴⁷² Geneva Conventions, Common Article 3, Article 3.1(2); Additional Protocol II to the Geneva Conventions, Articles 5(1)(a), 7; see also ICTY, *Kvočka et al.* AJ, para.270; ICRC, Commentary to Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 3 – Conflicts of an international character, 2020, 3 para.635.

⁴⁷³ Additional Protocol II to the Geneva Conventions, Article 5(2)(e).

⁴⁷⁴ Additional Protocol II to the Geneva Conventions, Articles 5(4).

⁴⁷⁵ Judgment, para.689.

⁴⁷⁶ Judgment, para.467.

⁴⁷⁷ Judgment, para.688; ICTR, *Ntagerura* TJ, para.659: '...the accused failed to act intending the criminal sanctioned consequences or with awareness and consent that the consequences would occur'; ECCC, *Nuon & Khieu*, 002/19-09-2007-ECCC/SC/F36, Appeal Judgment ('*Nuon & Khieu* AJ'), 23 November 2016, paras 390-410.

MUSTAFA would also be liable as an aider and abettor

176. For the same reasons, MUSTAFA's liability for aiding and abetting would also be proven.⁴⁷⁸ Even on the unlikely possibility that MUSTAFA's BIA did not themselves shoot the Murder Victim, MUSTAFA substantially contributed to the Murder Victim's death by his acts and omissions. He performed these acts and omissions in the full knowledge of the advancing Serb offensive, and with full appreciation of the probability that the Murder Victim would be killed.

4. Sub-ground 4D

177. Whereas in his Notice of Appeal MUSTAFA claims an insufficiency of evidence regarding his role and responsibility for the death of the Murder Victim,⁴⁷⁹ in the Appeal Brief his argumentation is confined to only one fact, i.e. that the soldier who released the remaining detainees from ZDC was no longer MUSTAFA's deputy in BIA at the time of the release.⁴⁸⁰

178. Findings regarding the responsibility of MUSTAFA for the death of the Murder Victim have solid evidentiary foundations, as clearly and exhaustively explained in the Judgment,⁴⁸¹ and the alleged error regarding the formal position of one of the KLA soldiers does not invalidate them. The releasing soldier, Brahim MEHMETAJ, was a long-serving BIA member,⁴⁸² former MUSTAFA's deputy and assistant in that unit,⁴⁸³ and his close associate who deeply admired and respected his superior.⁴⁸⁴ In April 1999, even while remotely performing functions for the Llap Operational Zone command, MEHMETAJ continued to be a member of BIA, and hence MUSTAFA's subordinate. MEHMETAJ himself described it as '[...] doing two tasks simultaneously. One with BIA and one for the staff where I was not physically

⁴⁷⁸ See Article 46(6).

⁴⁷⁹ Notice of Appeal, sub-ground 4D, p.10.

⁴⁸⁰ Appeal Brief, para.365.

⁴⁸¹ Judgment, paras 686-695.

⁴⁸² Judgment, para.142.

⁴⁸³ Judgment, para.140.

⁴⁸⁴ Judgment, paras 142-144.

present.⁴⁸⁵ Moreover, the Trial Panel's finding regarding MUSTAFA's responsibility for the decision not to release or evacuate the Murder Victim was based on 'the evidence as a whole',⁴⁸⁶ including *inter alia* MUSTAFA's roles as overall commander of BIA at the ZDC, and responsibility for the evacuation of the wounded from Zllash/Zlaš.⁴⁸⁷ As such, no error, let alone one capable of invalidating the judgment, has been established. With regard to the alleged error of law, MUSTAFA fails to identify any such error, or make any submissions thereon.

5. Sub-ground 5A

179. MUSTAFA never specifically raised the alleged insufficiency of evidence regarding the intent to kill at trial, cites no relevant authorities underpinning his submissions, and selectively points to some facts, while ignoring others.⁴⁸⁸ Moreover, in his submissions he indicates facts and circumstances that, on their own, have little or nothing to do with intent,⁴⁸⁹ and confuses intent to kill with motive to commit this crime.⁴⁹⁰ For these reasons, this sub-ground should be summarily rejected.

180. On the merits, MUSTAFA primarily alleges that the Trial Panel's findings rest on the motive to dispose of the Murder Victim in order to prevent him from reporting the perpetrators or otherwise retaliate against them.⁴⁹¹ While this, well-based factor, was one of the elements relied upon by the Trial Panel in reaching its finding of intent,⁴⁹² it was just one of several factors, which MUSTAFA fails to mention, including: i) his acceptance that victims under his custody may be killed, demonstrated by his own words and propensity for using weapons against them;⁴⁹³ ii)

⁴⁸⁵ Transcript (Brahim MEHMETAJ), 23 March 2022, p.2658.

⁴⁸⁶ Judgment, para.636.

⁴⁸⁷ Judgment, para.636.

⁴⁸⁸ Appeal Brief, paras 371 [REDACTED], 374 (alleged absence of evidence proving the cause of death).

⁴⁸⁹ Appeal Brief, paras 373 (concerning superior-subordinate relationship between MUSTAFA and one of his BIA soldiers), or 374 (concerning the cause of death).

⁴⁹⁰ Appeal Brief, paras 368, 375. *See, for example* ICTY, *Kvočka et al.* AJ, para.106; ICTY, *Tadić* AJ, paras 268-269.

⁴⁹¹ Appeal Brief, paras 370-372.

⁴⁹² Judgment, para.693.

⁴⁹³ Judgment, para.691.

intentional infliction of a severe mistreatment within a prolonged period of time by MUSTAFA's subordinates;⁴⁹⁴ iii) singling the Murder Victim out for such exceptionally harsh mistreatment;⁴⁹⁵ iv) using potentially lethal objects in the course of such mistreatment;⁴⁹⁶ v) denial of medical aid that was otherwise available;⁴⁹⁷ vi) MUSTAFA's decision not to release or evacuate the Murder Victim in light of an impending Serbian offensive;⁴⁹⁸ vii) abandoning him in a near-death condition in a locked shed, thereby denying him a last opportunity to be saved;⁴⁹⁹ and viii) MUSTAFA's subsequent expressions of intent to frustrate any proceedings concerning that murder.⁵⁰⁰

181. All these findings were extensively, exhaustively and repeatedly explained and sourced in the Judgment, drawing from the entirety of evidence adduced at trial.⁵⁰¹ MUSTAFA fails to establish that no reasonable Trial Panel could have found an intent to kill on the basis of these multiple, mutually reinforcing, elements.

182. No error is established.

6. Sub-ground 5B

183. In his Notice of Appeal, MUSTAFA challenges the *mens rea* standard applied for the war crime of murder. The Appeal Brief does not clarify or develop this argument in any meaningful way, effectively abandoning this sub-ground.⁵⁰² It should be rejected *in limine*.

184. Liability for murder may arise not only from a wilful act (e.g. causing serious bodily harm), but also a wilful omission, such as denying necessary medical care to a

⁴⁹⁴ Judgment, paras 569-571, 574, 586, 625-626, 638.

⁴⁹⁵ Judgment, paras 569, 635.

⁴⁹⁶ Judgment, para.635.

⁴⁹⁷ Judgment, paras 621, 625-626, 635, 638.

⁴⁹⁸ Judgment, paras 636, 638, 692.

⁴⁹⁹ Judgment, paras 625, 635-636, 692.

⁵⁰⁰ Judgment, para.694.

⁵⁰¹ See fn. 491-499.

⁵⁰² Appeal Brief, para.377 (cross-referring to sub-ground (a) which does not elaborate any relevant arguments). See para.20.

detainee. In both cases, the relevant test and as supported by an abundance of international jurisprudence,⁵⁰³ is either intention to kill, or wilfully causing serious bodily harm where the perpetrator should reasonably have known that the act or omission might lead to death. It is well established that the wilful denial of medical care to a detainee constitutes an omission which can give rise to responsibility for murder.⁵⁰⁴

185. As discussed above, the Trial Panel found an intent to kill on the basis of multiple, mutually reinforcing elements.⁵⁰⁵ In any case, there is overwhelming evidence that MUSTAFA and his subordinates had at least an intent to cause serious bodily harm. For instance, W01679, W03593 and W04669 testified that the Murder Victim was 'beaten until he until he could no longer stand, burnt with an iron and stabbed with a knife'.⁵⁰⁶ When the other detainees were released, the Murder Victim could no longer stand or walk on his own.⁵⁰⁷ Consequently, MUSTAFA's claim that 'the correct *mens rea* for murder requires at a minimum the intention to wilfully cause serious bodily harm' could not change the outcome of the Judgment.

186. In the Notice of Appeal, MUSTAFA additionally notes the *mens rea* applicable to JCE 1, seemingly suggesting that it was not applied by the Trial Panel. This

⁵⁰³ ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Judgment Vol. III, 22 November 2017, para.3050; *Kvočka et al.* AJ, para.261; *Vasiljević* Trial Judgment, para.205; *Krnojelac* TJ, paras 324, 329; *Prosecutor v. Krstić*, IT-98-33-T, Judgment, 2 August 2001, para.485; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Judgment, 26 February 2001, paras 235-236; *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgment, 2 November 2001, para.132; *Prosecutor v. Stakić*, IT-97-24-T, Judgment ('*Stakić* TJ'), 31 July 2003, paras 584; *Kupreškić* TJ, paras 560-561; *Dorđević* AJ, para.548; ICTR, *Ntagerura* TJ, para.659; ECCC, *Nuon & Khieu* AJ, paras 390-410.

⁵⁰⁴ See for example: ICTY, *Kvočka et al.* AJ, para.270; *Krnojelac* TJ, para.145; ECCC, *Prosecutor v. Ev*, 001/18-07-2007/ECCCC/TC/E188, Judgment, 26 July 2010, paras 117, 339-341; *Prosecutor v. Nuon & Khieu*, 002/19-09-2007/ECCCC/TC/E313, Judgment, 7 August 2014, paras 556-559. See also ICRC, *Commentary to Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949, Article 3 – Conflicts of an international character, 2020, para.635.

⁵⁰⁵ Paras 180-181.

⁵⁰⁶ Judgment, para.570.

⁵⁰⁷ Judgment, para.570.

submission simply ignores the fact that the Trial Panel clearly set out,⁵⁰⁸ and applied,⁵⁰⁹ the correct standard. No error arises.

TORTURE (GROUNDS 6, 7)

1. Ground 6

187. Contrary to MUSTAFA's selective and undeveloped submissions,⁵¹⁰ there was sufficient evidence establishing the *actus reus* and *mens rea* for Count 3 (torture).

188. MUSTAFA's submission that 'the physical assault was never witnessed', because the victims were assaulted individually, appears to repeat his legally incorrect assertion that witness testimony requires corroboration.⁵¹¹ Aside from this false premise, MUSTAFA also misrepresents the Judgment. The Trial Panel found that, even if victims were mostly assaulted individually outside the detention barn,⁵¹² all of the victims who testified in this case also attested to the mistreatment of others.⁵¹³ Moreover, physical mistreatment was not the only form of torture found by the Trial Panel. Others included prolonged psychological assault;⁵¹⁴ keeping the detainees in inhumane detention conditions; and depriving them of sufficient food, water, sanitation, and medical treatment.⁵¹⁵ And all victims coherently, extensively and credibly testified to that.

⁵⁰⁸ Judgment, para.752.

⁵⁰⁹ See Judgment, para.756: 'In the Panel's assessment, the evidence concerning: (i) the initial order to arrest the Murder Victim; (ii) the torture which the Accused intended to inflict upon him, resulting in his near-to-death condition; (iii) the violent quashing [REDACTED] (iv) the denial of medical aid by BIA members; (v) the decisions taken by the Accused on or around 19 April 1999 to release some detainees, but not others (including the Murder Victim, which effectively equalled a decision to kill him), and which was executed by his BIA subordinates; and (vi) the attempts by the Accused and others to prevent any investigation and prosecution regarding those events, when viewed altogether, prove that the JCE members shared the intent to kill the Murder Victim and, thus, to commit the murder charged under Count 4 of the Confirmed Indictment.'

⁵¹⁰ Appeal Brief, paras 379-385.

⁵¹¹ Appeal Brief, para.375. See paras 66-68.

⁵¹² Appeal Brief, para.381.

⁵¹³ W01679, W03593, W03594, W04669. See Judgment, paras 530-531, 585, 675.

⁵¹⁴ Judgment, para.675.

⁵¹⁵ Judgment, para.676.

189. Regarding the *mens rea* for torture, MUSTAFA claims that the requisite purpose of the mistreatment has not been established.⁵¹⁶ MUSTAFA's sole argument in support is that the perpetrators never admitted, confessed or stated that the infliction of pain was for any particular purpose.⁵¹⁷ Given that the Trial Panel relied on other evidence for this finding,⁵¹⁸ MUSTAFA fails to show any error of fact occasioning a miscarriage of justice.

2. Ground 7

190. MUSTAFA argues that the Trial Panel erred in convicting him for the torture of six persons, when he only personally participated in the torture of two persons.⁵¹⁹

191. MUSTAFA's submission that he cannot be held accountable for the acts of his subordinates fails to grapple with the reality that he was convicted under joint criminal enterprise (JCE) liability,⁵²⁰ whose *raison d'être* is to apportion individual criminal responsibility for the acts of subordinates. The Trial Panel correctly set out the elements of JCE I liability,⁵²¹ including the required level of contribution.⁵²² The Trial Panel found that MUSTAFA made a significant contribution to the execution of the common purpose, 'far beyond what is required to meet this element'.⁵²³ MUSTAFA's challenge to this finding amounts to no more than a bare assertion that 'the presumed common purpose that he and or others had was wrongly found and established as being JCE'.⁵²⁴ It should be dismissed accordingly.

⁵¹⁶ Appeal Brief, para.383-385.

⁵¹⁷ Appeal Brief, para.383.

⁵¹⁸ Judgment, paras 679-685.

⁵¹⁹ Appeal Brief, paras 380-384.

⁵²⁰ Judgment, paras 742-757, 759. MUSTAFA was convicted as a direct perpetrator for the torture of W01679 and W03593.

⁵²¹ Judgment, paras 737-741. JCE1 is a mode of liability firmly established in CIL (*Thaçi et al.* Decision, paras 138, 153, 155) and recognised as applicable by the Court of Appeals in cases tried before the KSC (*Thaçi et al.* Decision, paras 136, 153, 172).

⁵²² Judgment, para.740.

⁵²³ Judgment, para.749.

⁵²⁴ Appeal Brief, para.383.

ARBITRARY DETENTION (COUNT 1)

1. Ground 8

192. As MUSTAFA acknowledges,⁵²⁵ the Appeals Panel has already twice considered and rejected identical arguments as those advanced under ground 8.⁵²⁶ It is therefore settled law that arbitrary detention in a non-international armed conflict constitutes a war crime within the jurisdiction of the SC.⁵²⁷ The Trial Panel was bound to follow this jurisprudence, as is evident from the Appeals Panel's role under the SC's legal framework to correct the legal errors of lower panels,⁵²⁸ as well as the Appeals Panel's determination to only depart from its own decisions for cogent reasons in the interests of justice.⁵²⁹ Similarly constituted international tribunals have also applied the doctrine of binding precedent.⁵³⁰ MUSTAFA has not identified any cogent reasons why the Appeals Panel should, in the interests of justice, depart from its previous decisions.⁵³¹

193. MUSTAFA's submission suggesting a stay of proceedings and referral to the Specialist Chamber of the Constitutional Court is contrary to that Chamber's express

⁵²⁵ Appeal Brief, para.391.

⁵²⁶ *Thaçi et al.* Decision, paras 85-111.

⁵²⁷ *Thaçi et al.* Decision, paras 87-89, 94-102, 106-111; *Specialist Prosecutor v. Shala*, Decision on Pjetër Shala's Appeal Against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, KSC-BC-2020-04/IA002/F00010, 11 February 2022, paras 44-47.

⁵²⁸ See e.g. Law, Art.46(4); Rules, Rule 77(2).

⁵²⁹ Judgment, paras 642-645.

⁵³⁰ See ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment ('*Aleksovski AJ*'), 24 March 2000, paras 89-113; *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.6, Decision on Reopening Prosecution Case, 1 July 2010, para.24, fn.66; ICTR, *Prosecutor v. Semanza*, ICTR-97-20-A, Decision, 31 May 2000, para.92, fn.125; IRMCT, *Prosecutor v. Semanza*, MICT-13-36-R, Decision on a Request for Access and Review, 9 April 2018, para.15; SCSL, *Prosecutor against Samuel Hinga Norman*, SCSL-2003-08-PT and *Prosecutor Against Morris Kallon*, SCSL-2003-07-PT, Decision on The Defence Motion On The Denial Of Right To Appeal, 7 November 2003, para.3; ECCC, Case No. 002119-09-2007-ECCC/OCIJ (PTC-09), Appeal Against Order Concerning Provisional Detention Conditions, 14 July 2008, paras 8-10.

⁵³¹ *Specialist Prosecutor v. Shala*, Decision on Pjetër Shala's Appeal Against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, KSC-BC-2020-04/IA002/F00010, 11 February 2022, para.15.

admonition to first exhaust all effective legal remedies, including second and third instance appeals.⁵³²

194. MUSTAFA also disjointedly challenges the Appeals Panel's interpretation of Article 1,⁵³³ having failed to challenge the SC's jurisdiction at the appropriate juncture.⁵³⁴ These submissions do not correspond to the Notice of Appeal, and are so obscure as to justify summary dismissal.

SENTENCING

1. The 26-year term of imprisonment imposed was a proper exercise of discretion

195. MUSTAFA fails to demonstrate that in imposing a sentence of 26 years of imprisonment the Trial Panel committed a discernible error in exercising its discretion, or that it failed to follow the applicable law.⁵³⁵

196. The Judgment clearly establishes that the Trial Panel based its sentence on a correct interpretation of the governing law⁵³⁶ and on correct conclusions of fact.⁵³⁷ The sentence was fair and reasonable, giving sufficient weight to relevant considerations.⁵³⁸ Accordingly, the Appeals Panel should not disturb the sentence imposed by the Trial Panel.⁵³⁹

⁵³² Appeal Brief, para.397; *Specialist Prosecutor v. Thaçi et al.*, Decision on the Referral of Jakup Krasniqi Concerning the Legality of Charging Joint Criminal Enterprise and the Referral of Kadri Veseli Concerning Decision of the Appeals Panel on Challenges to the Jurisdiction of the Specialist Chambers, KSC-CC-2022-14/F00009, 13 June 2022, para.56.

⁵³³ Appeal Brief, para.398.

⁵³⁴ Rules, Rules 97, 98(1); Law, Arts 33(1)(b), 39(1), 40(1), 45(2); Decision dismissing "Salih Mustafa's Preliminary Defence Motion to Oppose KSC Jurisdiction", KSC-BC-2020-05/F00155, 15 July 2021, para.8 (stating that 'the Law and the Rules establish a legal framework where issues related to the SC jurisdiction must be resolved, including at the appellate level, in principle, before the case is transmitted to the Panel').

⁵³⁵ See Case 07 AJ, para.414.

⁵³⁶ Judgment, paras 778-795.

⁵³⁷ Judgment, paras 796-826.

⁵³⁸ Judgment, paras 778-826.

⁵³⁹ See Case 07 AJ, para.414.

2. Sub-grounds 9A, B (Aims and purposes of sentencing)

(i) *The Trial Panel considered the relevant purposes of sentencing*

197. The Trial Panel's reference to the primary purposes of sentencing⁵⁴⁰ is fully consistent with the applicable law, and with jurisprudence, including the Appeals Panel's judgement in *Gucati and Haradinaj*.⁵⁴¹

198. Article 38 of the 2019 Criminal Code of Kosovo ('2019 KCC'),⁵⁴² setting out purposes of punishment, is not explicitly incorporated in the Law.⁵⁴³ As such, it is not binding on the Trial Panel.⁵⁴⁴ Nevertheless, the Trial Panel took note thereof.⁵⁴⁵ Further, contrary to the Defence assertion,⁵⁴⁶ the primary purposes of sentencing set out by the Panel⁵⁴⁷ fully reflect those in 2019 KCC Article 38, which similarly refers, *inter alia*, to specific and general deterrence,⁵⁴⁸ rehabilitation,⁵⁴⁹ as well as retribution.⁵⁵⁰

199. The Defence merely describes the sentence imposed as '[d]raconian', asserts the sentence conflicts with Article 38 of the 2019 KCC, and claims that paragraphs 772-777 of the Judgement misapply the purposes of sentencing set forth in the KCC,⁵⁵¹ in each case failing to support these arguments or even attempting to explain how the Trial Panel allegedly erred and/or how such error impacted the sentence.⁵⁵²

⁵⁴⁰ See Judgment, para.772.

⁵⁴¹ Case 07 AJ, para.410; ICTY, *Čelebići* AJ, paras 805-806; ICTY, *Krajišnik* AJ, para.802.

⁵⁴² Criminal Code of Kosovo, 14 January 2019, Code No. 06/L074.

⁵⁴³ Article 38 of the 2019 KCC corresponds to Article 41 of the 2012 KCC. Even in relation to crimes under Art.15(2), this article is not explicitly incorporated, *see* Law, Art.16(3).

⁵⁴⁴ *See* Law, Art.3(2)(c) and (4); *See also Specialist Prosecutor v. Gucati and Haradinaj*, Trial Judgment, KSC-BC-2020-07/F00611, 18 May 2022, para.166.

⁵⁴⁵ *See* Judgment, para.772, fn.1623, para.774, fn.1625.

⁵⁴⁶ Appeal Brief, para.409.

⁵⁴⁷ Judgment, para.772.

⁵⁴⁸ KCC 2019, Art.38(1) (1.1) ('to prevent the perpetrator from committing criminal offenses in the future [...]') and (1.2) ('to prevent other persons from committing criminal offenses').

⁵⁴⁹ KCC 2019, Art.38(1) (1.1) ('to rehabilitate the perpetrator').

⁵⁵⁰ KCC 2019, Article 38(1) (1.4) ('to express the judgment of society for criminal offenses [...]'). *See* ICTY, *Aleksovski* Appeal Judgment, para.185; *Prosecutor v. Krajišnik*, Judgment, IT-00-39-A, 17 March 2009, para.775.

⁵⁵¹ Appeal Brief, paras 410-411.

⁵⁵² *See* Art.48(1)(b)(3) of the Practice Direction on Filings.

200. These unsubstantiated arguments should be dismissed not just because Article 38 of the 2019 KCC is not binding, but also because the Trial Panel referred to appropriate purposes of sentencing and, crucially, the sentence imposed and the reasons underpinning it, are fully consistent with the applicable law and jurisprudence on sentencing principles, appropriately reflecting the gravity of the crimes.⁵⁵³

201. Further, contrary to the Defence assertion,⁵⁵⁴ paragraphs 772-777 of the Judgement do not *apply* the purposes of sentencing. Rather certain of these paragraphs merely *note* such purposes. In relation to paragraphs 775 and 776 in particular,⁵⁵⁵ the former refers to reconciliation in an excerpt which is *obiter dictum*, while the latter mirrors a principle enshrined, *inter alia*, in Article 38(1)(1.4) of the 2019 KCC which refers to the strengthening of ‘the obligation to respect the law’.

202. The Defence fails to establish how the fact that the Trial Panel noted certain relevant sentencing considerations, including some explicitly reflected in Article 38 of the 2019 KCC,⁵⁵⁶ had any adverse impact on the sentence imposed or otherwise amounted to any error in the exercise of its sentencing discretion.

203. Finally, given that the Appeal Brief does not develop the allegation, contained in sub-ground 9B of the Notice, that the Trial Panel’s reliance on certain ICTY jurisprudence is inapposite since the MUSTAFA was never a politician,⁵⁵⁷ this argument should not be considered. Nevertheless, the SPO notes that the jurisprudence cited by the Trial Panel is apt, referring to principles the relevance of which is independent from the profile of the person standing trial.

204. Sub-grounds 9A and B should be rejected.

⁵⁵³ Judgment, paras 796-800.

⁵⁵⁴ Appeal Brief, para.411.

⁵⁵⁵ See Appeal Brief, paras 412-413.

⁵⁵⁶ See Judgment, para.774, fn.1625 citing KCC 2019 Art.38(1)(1.3).

⁵⁵⁷ See Notice of Appeal, para.12 (9B), referring to Judgment, fn.1626, which cites ICTY, *Stakić TJ*, para.901 and *Prosecutor v. Nikolić*, IT-94-2-S, Judgment, 18 December 2003, para.124.

3. Sub-grounds 9C-H (Application of the principle of *lex mitior*)

- (i) *The Trial Panel fulfilled the requirements of Article 44(2) and appropriately individualised the penalty*

205. Article 44(2) provides that '[i]n considering the punishment to be imposed on a person adjudged guilty of an international crime under this Law, the Specialist Chambers shall take into account' certain factors listed in the same sub-article. In paragraph 780 of the Judgment, the Trial Panel found that the wording 'shall take into account' meant that it was required to take the factors listed in Article 44(2) into consideration in determining the sentence, which it did,⁵⁵⁸ but that it was not bound by such factors.

206. This approach is logical and unassailable. Had the legislator intended to impose an *obligation* to apply the factors listed in Article 44(2), the Law would not have used 'take into account', but, rather, terms such as 'must apply' or 'shall apply'.

207. Although the language, and therefore the legislator's intention, is clear, further support for the Trial Panel's interpretation is found in the approach taken at the ICTY, where Rule 101(B) of the ICTY Rules of Procedure and Evidence is similar in certain respects to Article 44(2) - both including the words 'shall take into account'.⁵⁵⁹ When assessing recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia, the ICTY repeatedly interpreted 'shall take into account' to mean that such practice should be used for guidance, but it was not binding.⁵⁶⁰

⁵⁵⁸ Judgment, para.781, fn.1629.

⁵⁵⁹ Rule 101(B) provides that '(B) In determining the sentence, the Trial Chamber *shall take into account* the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute' (*emphasis added*).

⁵⁶⁰ See, e.g., ICTY, *Čelebići* AJ, paras 813-816; *Prosecutor v. Tadić*, IT-94-1-A and IT-94-1-Abis, Judgment in Sentencing Appeals ('*Tadić* JSA'), 26 January 2000, para.21; *Prosecutor v. Tadić*, IT-94-1-T bis-R117, Sentencing Judgment, 11 November 1999, paras 11-12; *Limaj et al.* TJ, para.734; *Prosecutor v. Haradinaj et*

208. MUSTAFA merely asserts error,⁵⁶¹ without providing any explanation or justification for the assertions made, and simply repeating arguments that were unsuccessful at trial⁵⁶² without any demonstration that their rejection by the Trial Panel constituted an error warranting the intervention of the Appeals Panel.

209. As set out by an ICTY Appeals Chamber and noted by an SC Court of Appeals Panel, it is an inherent element of the principle of *lex mitior* that the relevant law must be binding upon the court.⁵⁶³ Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range *must* be applied to them. The principle of *lex mitior* is therefore only applicable if a law that binds the SC is subsequently changed to a more favourable law by which the SC is also obliged to abide.⁵⁶⁴ That is not the case here.

210. Before the SC, the Trial Panel is obliged to adjudicate and function in accordance with, *inter alia*: (i) the Law, which functions as *lex specialis*;⁵⁶⁵ and (ii) Kosovo law, but only as expressly incorporated and applied in the Law.

211. Article 44(1), which grants a Trial Panel the authority to imprison a convicted person up to a maximum term of life-long imprisonment, shows that a Trial Panel's discretion in imposing sentence is not bound by any maximum terms of imprisonment applied in the national system.⁵⁶⁶

al., IT-04-84-T, Judgment, 3 April 2008, para.497; see also ICTR, *Prosecutor v. Serushago*, ICTR-98-39-A, Reasons for Judgment, 6 April 2000, para.30.

⁵⁶¹ MUSTAFA claims that that the Trial Panel's interpretation of Art.44(2) is erroneous, that it renders this sub-article unconstitutional and leads to a violation of Article 33(2) of the Constitution of Kosovo (which provides that 'No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed.') and that the Trial Panel erred in the application of the *lex mitior* principle, which invalidates the sentence (Appeal Brief, paras 408-416).

⁵⁶² Judgment, paras 770-771, 780, fn.1628.

⁵⁶³ ICTY, *Prosecutor v. Nikolić*, IT-94-2-A, Judgment on Sentencing Appeal (*Nikolić* AJ), 04 February 2005, para.81, cited in *Thaçi et al.* Decision, para.57, fn.143.

⁵⁶⁴ ICTY, *Nikolić* AJ, para.81.

⁵⁶⁵ Law, Art.3(2)(b); *See also* Law, Art.3(2)(c).

⁵⁶⁶ *See* ICTY, *Tadić* JSA, para.21.

212. The argument that a lower sentence applied at the time of the commission of the crimes is also illogical when one considers that, as MUSTAFA concedes,⁵⁶⁷ a death penalty could have been imposed under the then applicable law for similar offences.⁵⁶⁸ Imprisonment up to life is more lenient than the death penalty.⁵⁶⁹ Insofar as the SFRY Code provides for prison terms of no more than 20 years for acts eligible for the death penalty, this provision was discretionary⁵⁷⁰ and, in any event, cannot be read in isolation without regard to the full sentencing range available, including the death penalty. To consider otherwise would undermine legislative intent – in relation to both the SFRY Code and the Law – to ensure that the most severe punishments would be available for grave crimes, including war crimes.

213. MUSTAFA's reliance on a Kosovo Supreme Court judgment⁵⁷¹ is inapt since, for the reasons set out above, the sentencing range for the crime provided under Kosovo Law at the time of commission was not binding on the Trial Panel.

214. The Panel explicitly took into account the sentencing range for the crimes provided under Kosovo Law at the time of commission and any subsequent more lenient sentencing range for the crime provided in Kosovo Law,⁵⁷² thereby fully satisfying the requirements of Article 44(2).⁵⁷³

215. Similarly, the Trial Panel was not under any obligation to 'follow the general sentencing principles and practice of the former Yugoslavia at the time of commission' of the crimes,⁵⁷⁴ or to take into account the range of sentences imposed on persons

⁵⁶⁷ Appeal Brief, para.424.

⁵⁶⁸ See SFRY Code, Articles 34, 37(4), 142; ICTY, *Tadić* JSA, para.21.

⁵⁶⁹ ECtHR, *Ruban v Ukraine*, 8927/11, Judgment, 12 July 2016, para.46; See also ICTY, *Stakić* TJ, para.890; ECtHR, *Karmo v Bulgaria*, 76965/01, Decision on Admissibility, 9 February 2006, section C.

⁵⁷⁰ SFRY Code, Article 38(2).

⁵⁷¹ Appeal Brief, paras 414, 428; KSC-CA-2023-02/F00021/COR/A02.

⁵⁷² Judgment, para.781, fn.1629.

⁵⁷³ *Contra* Appeal Brief, paras 419, 430.

⁵⁷⁴ *Contra* Appeal Brief, para.417.

convicted of similar offences by courts in Kosovo, the ICTY and/or ICTR.⁵⁷⁵ MUSTAFA fails to refer to any basis for such assertions.

216. As correctly previously noted by this Appeals Panel, the determination of an appropriate sentence is highly dependent on the circumstances of each specific case.⁵⁷⁶ This means that any attempt to compare an accused's case with others that have already been the subject of final determination is of limited assistance.

217. There is certainly no obligation on the Trial Panel to consider whether the same sentence has been given for a more or less serious charge in another case. Indeed, other courts have noted that the precedential effect of previous sentences is not necessarily a proper avenue to challenge a trial panel's finding in exercising its discretion to impose a sentence.⁵⁷⁷

218. In view of the combination of various relevant factors, including the number, type and gravity of the crimes, MUSTAFA's contribution thereto, and the aggravating factors established, any comparison would not be meaningful.

219. The Trial Panel was fully aware that it could, if it so elected, consider sentencing practices of both national and international courts for similar crimes,⁵⁷⁸ and in considering principles and factors relevant to sentencing, it relied on jurisprudence of this and other courts.⁵⁷⁹

220. Further, neither at trial nor in his Appeal, did MUSTAFA propose a single case, domestic or otherwise, which would allegedly be comparable to his for sentencing

⁵⁷⁵ *Contra* Appeal Brief, para.418.

⁵⁷⁶ Case 07 AJ, para.434.

⁵⁷⁷ See SCSL, *Taylor* AJ, para.705; ICTY, *Prosecutor v. Babić*, IT-03-72-A, Judgment on Sentencing Appeal ('*Babić* JSA'), 18 July 2005, paras 32-33; *Čelebići* AJ, paras 717, 757; *Prosecutor v. Krstić*, IT-98-33-A, Judgment ('*Krstić* AJ'), 19 April 2004, para.248; ICTR, *Prosecutor v. Semanza*, ICTR-97-20-A, Judgment, 20 May 2005, para.394; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06 A 4 A 6, 1 December 2014, para.76; *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, 27 September 2016, para.107. On length of sentence, see also: ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13, Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aime Kilolo Musamba and Mr Jean-Jacques Magenda Kabongo, 17 September 2018, para.36.

⁵⁷⁸ Judgment, para.794.

⁵⁷⁹ See, e.g. Judgment, para.786, fn 1631-1633, paras 790, 792-793, fn 1635-1641, para.824, fn.1697.

purposes, let alone demonstrate that the sentence imposed is out of reasonable proportion with a *line of sentences* passed in similar circumstances for the same offences.⁵⁸⁰

221. Finally, for the same reasons set out above, no referral of the matter of the compatibility of Article 44(2) with the Constitution to the Specialist Chamber of the Constitutional Court is warranted.⁵⁸¹

222. Sub-grounds 9C-H should be rejected.

4. Sub-ground 9I

(i) *The Trial Panel correctly based the sentence for Count 3 on all established incidents of torture*

223. MUSTAFA's unfounded challenge to the Trial Panel's finding that he is criminally liable for the torture of at least six persons is addressed in the SPO's response to Ground 7 above.⁵⁸² Given that MUSTAFA fails to establish any error in relation to the finding on the number of victims of torture, sub-ground 9I, which rests entirely on this premise,⁵⁸³ should be rejected.

224. Sub-ground 9I should be rejected.

5. Sub-ground 9J

(i) *The Trial Panel correctly gave no significant weight to MUSTAFA's individual circumstances*

225. Although, as noted by the Trial Panel, the Defence did not, at trial, expressly put forward any submissions with a view to mitigating MUSTAFA's eventual

⁵⁸⁰ See ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Judgment, 17 July 2008, para.349; *Babić* JSA, para.33; ICTR, *Prosecutor v. Ntabakuze*, ICTR-98-41A-A, 8 May 2012, para.300.

⁵⁸¹ See Law, Art.49(4).

⁵⁸² See para.191.

⁵⁸³ See Appeal Brief, paras 434-438.

sentence,⁵⁸⁴ it *propriu motu* considered a number of circumstances and factors.⁵⁸⁵ Having duly considered them,⁵⁸⁶ in paragraph 826 of the Judgment the Trial Panel determined that ‘Mr Mustafa’s individual circumstances cannot be given any significant weight considering the nature and gravity of the proven crimes and his contribution to them.’⁵⁸⁷

226. MUSTAFA’s allegation that the Trial Panel erred in carrying out the balancing exercise in paragraph 826 of the Judgment, and that it meant the Trial Panel used the nature and gravity of the crime as an aggravating circumstance,⁵⁸⁸ is unfounded and erroneous.

227. The Trial Panel correctly set out,⁵⁸⁹ and applied, the relevant test in relation to double-counting. The balancing exercise the Trial Panel undertook was a logical one mandated by Rule 163(1). Further, no excerpt of the Judgment indicates the Trial Panel considered the absence of mitigating circumstances to constitute an aggravating circumstance. The two factors the Trial Panel considered in aggravation are clearly set out in the Judgment;⁵⁹⁰ the absence of mitigating circumstances is not one of them.

228. The Trial Panel had wide discretion in determining the weight, if any, to be accorded to any mitigating circumstances,⁵⁹¹ and the existence of mitigating factors does not automatically imply a reduction of sentence or preclude the imposition of a particular sentence.⁵⁹² MUSTAFA fails to demonstrate that the Trial Panel’s finding that the mitigating circumstances it considered *propriu motu* cannot be given any significant weight is unreasonable.

⁵⁸⁴ Judgment, para.820.

⁵⁸⁵ Judgment, paras 820-825.

⁵⁸⁶ Judgment, paras 820-825, esp. paras 824-825, fn.1697.

⁵⁸⁷ Judgment, para.826.

⁵⁸⁸ Appeal Brief, para.441.

⁵⁸⁹ Judgment, paras 789, 793.

⁵⁹⁰ Judgment, paras 805-812.

⁵⁹¹ ICTR, *Prosecutor v. Nshogoza*, ICTR-07-91-T, Judgment, 7 July 2009, para.220; *Bikindi* AJ, para.158; *Nyiramasuhuko* AJ, para.3394.

⁵⁹² IRMCT, *Mladić* AJ, para.553; ICTR, *Nyiramasuhuko* AJ, para.3394.

229. Sub-ground 9J should be rejected.

6. Sub-ground 9K

(i) *The sentence imposed is proportional to the gravity of MUSTAFA's criminal conduct*

230. In sub-ground 9K, MUSTAFA asserts the sentence imposed on him is capricious and manifestly excessive.⁵⁹³ The arguments in support of these assertions are unclear and/or undeveloped.⁵⁹⁴ Further, given that MUSTAFA failed to provide any submissions concerning mitigation of sentence at trial,⁵⁹⁵ he cannot raise his age and/or other factors as mitigating circumstances for the first time on appeal.⁵⁹⁶ As such, sub-ground 9K should be rejected *in limine*.⁵⁹⁷

231. Should the Appeals Panel nevertheless consider the merits of this sub-ground, they should be rejected. None of the submissions in Ground 9 detract from the validity and proportionality of the sentence imposed.

(ii) *The sentence imposed is fair and in line with international human rights jurisprudence*

232. The assertions that the sentence imposed is tantamount to life imprisonment,⁵⁹⁸ that there will be no possibility for rehabilitation,⁵⁹⁹ and that MUSTAFA will effectively be deprived of his family life,⁶⁰⁰ are speculative.

233. No sentence of life imprisonment was imposed. Regardless, there is nothing prohibiting such a sentence and restrictions on family life where justified.⁶⁰¹

⁵⁹³ Appeal Brief, paras 443-444.

⁵⁹⁴ Appeal Brief, para.444.

⁵⁹⁵ See Judgment, para.820, fn.1690.

⁵⁹⁶ See Appeal Brief, para.444(a)(b)(c).

⁵⁹⁷ See ICTR, *Bikindi* AJ, para.165; IRMCT, *Mladić* AJ, para.555; See also Practice Direction, Art.48(1)(b).

⁵⁹⁸ Appeal Brief, para.444(a).

⁵⁹⁹ Appeal Brief, para.444(b).

⁶⁰⁰ Appeal Brief, para.444(c).

⁶⁰¹ See Articles 5(1)(a) and 8(2) of the ECHR.

Contentions that sentences tantamount to life imprisonment would constitute inhumane or degrading punishment have rightly been rejected.⁶⁰² In particular, there is no international human rights law prohibition against the imposition of a sentence, including a life sentence, on an offender of an advanced age.⁶⁰³

234. Further, and despite the lack of Defence submissions on sentencing at trial, the Trial Panel took note, *inter alia*, of MUSTAFA's age as part of its determination as to the penalty to impose.⁶⁰⁴ MUSTAFA fails to establish any error in the Trial Panel's determination that his individual circumstances cannot be given any significant weight considering the nature and gravity of the proven crimes and his contribution to them.⁶⁰⁵ Indeed, this approach is in line with jurisprudence, *inter alia* that establishing that the family situation of an accused is generally not accorded much or great weight, when the crimes committed are of a certain gravity, in particular where no exceptional family circumstances have been submitted for consideration.⁶⁰⁶ No such circumstances have been presented in this case. MUSTAFA's submissions also ignore, for example, possibilities for visitations while serving the imposed sentence.

235. As to the possibility of rehabilitation, the Trial Panel correctly set out that this is a less relevant purpose of sentencing,⁶⁰⁷ and this Appeals Panel, citing relevant jurisprudence and commentary, similarly noted that 'rehabilitation is relevant but should not play a predominant role.'⁶⁰⁸ As noted by the Trial Panel, MUSTAFA has not acknowledged responsibility for his crimes or expressed or displayed any sympathy for the victims; rather he attempted to prevent any investigation and case

⁶⁰² See ICTY, *Prosecutor v. Plavšić*, IT-00-39&40/1, Sentencing Judgment (*Plavšić* SJ), 27 February 2003, para.104; ECtHR, *Sawoniuk v United Kingdom*, 63716/00, Decision on Admissibility ('*Sawoniuk* decision'), 29 May 2001, pp.15-16.

⁶⁰³ See ICTY, *Plavšić* SJ, para.104; ECtHR, *Sawoniuk* decision, pp.15-16.

⁶⁰⁴ Judgment, para.821.

⁶⁰⁵ Judgment, para.826.

⁶⁰⁶ See ICTR, *Prosecutor v. Nahimana et al.*, ICTR-00-52-A, Judgment, para.1108; ICTY, *Kunarac* AJ, para.413.

⁶⁰⁷ Judgment, para.772.

⁶⁰⁸ Case 07 AJ, para.410, fn.904.

regarding the death of the Murder Victim.⁶⁰⁹ Accordingly, there is no indication of any desire for rehabilitation. Regardless, as is the case with MUSTAFA's age and family circumstances, the possibility of rehabilitation cannot be given priority over the gravity of the crimes.

(iii) The specific circumstances of MUSTAFA's case render comparisons to other cases for sentencing purposes inappropriate

236. As noted above,⁶¹⁰ any attempt to compare MUSTAFA's case with others that have already been the subject of final determination is of limited assistance, and there is no obligation on the Trial Panel to consider whether the same sentence has been given for a more or less serious charge in another case.⁶¹¹ Further, MUSTAFA fails to cite a single case before international tribunals which dealt with 'the same type of crimes' as his.⁶¹²

237. While other international courts and tribunals have imposed sentences of over twenty years for war crimes,⁶¹³ the multiple, relevant differences between such cases, in particular the specific role of the accused, renders any attempt at comparison an exercise in futility.

238. MUSTAFA's challenges to his sentence, in sub-ground 9K and throughout the Appeal, should be rejected.

IV. CLASSIFICATION AND DISCLOSURE DECLARATION

239. The present brief is submitted confidentially in accordance with Rule 82(4).

240. In accordance with Rule 179(5), the SPO has disclosed all material in its custody or control falling under its disclosure obligations.

⁶⁰⁹ Judgment, para.825.

⁶¹⁰ See paras 213-218.

⁶¹¹ See Appeal Brief, para.444(d).

⁶¹² Appeal Brief, para.444(d).

⁶¹³ ICTY, *Galić* AJ, para.185 (life imprisonment); *Prosecutor v. Stakić*, IT-97-24-A, Judgment, 22 March 2006, para.428 (40 years imprisonment); *Krstić* AJ, para.275 (35 years imprisonment).

V. RELIEF SOUGHT

241. For the reasons above, the relief sought in the MUSTAFA's appeal should be rejected.

Word count: 28,351



Alex Whiting

Acting Specialist Prosecutor

Friday, 23 June 2023

At The Hague, the Netherlands.

Explanatory Note

The following correction has been made to the original filing:

- Missing footnote number 370 was re-inserted