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| **In:** | **KSC-CA-2023-02** |
| | **The Prosecutor v. Salih Mustafa** |
| **Before:** | **A Panel of the Court of Appeals Chamber** |
| | Judge Michèle Picard<br>Judge Kai Ambos<br>Judge Nina Jørgensen |
| **Registrar:** | Dr Fidelma Donlon |
| **Filed by:** | Dr Anni Pues, Victims' Counsel |
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# Further Public Redacted Version of Victims' Counsel response to the Defence Appeal Brief F00021

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## I. INTRODUCTION

1. On 16 December 2022, Trial Panel I (hereafter: Trial Panel) found Salih Mustafa (hereafter: Mustafa) guilty of the war crimes of arbitrary detention, torture and murder. This judgment is currently on appeal.[1] In this submission, Victims' Counsel will respond only to those grounds of appeals raised by the Defence that directly affect the personal interests of participating victims in this case[2]; an explanation of how these interests are affected is provided at relevant points throughout this submission.

2. The appeal grounds at issue in that respect are 1C, 1E, 1I-K, 1N, 2E, 2H, and 3-8. Victims' Counsels' conclusion is that they have no merit and requests the Appeals Chamber to dismiss them in their entirety.

## II. PROCEDURAL HISTORY

3. On 2 February 2023, the Defence filed their Notice of Appeal listing the grounds of appeal the Defence relies on.[3] The full Appeal Brief was filed by the Defence on 24 April 2023, with a corrected version filed on 2 May.[4] In light of extensions to time limits granted to the Defence in submission of the Appeal Brief, and in response to requests made by the SPO and Victims' Counsel, on 5 May 2023 the Appeals Chamber exercised its power under Rule 9(5)(a) of the Rules on Procedure and Evidence (hereafter: Rules) and granted SPO and Victims' Counsel an extension of 10 days to submit their responses to the

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[1] KSC-CA-2023-02/F00006/RED2 (Defence), *Public Redacted Version of Defence Notice of Appeal pursuant to Rule 176 (of the Rules of Procedure and Evidence) against the Judgment of the Trial Panel I of 16 December 2022* (public), 13 February 2023 (confidential version filed on 2 February 2023) (Notice of Appeal).

[2] KSC-CA-2023-02/F00011 (Appeals Chamber), *Decision on Modalities of Victim Participation in Appellate Proceedings* (public), 15 February 2023, para 13: "Counsel for Victims must explicitly set out how the submissions [made before the Appeals Panel] are related to the participating victims' personal interests." [emphasis added].

[3] KSC-CA-2023-02/F00006/RED2 (Defence), *Public Redacted Version of Defence Notice of Appeal pursuant to Rule 176 (of the Rules of Procedure and Evidence) against the Judgment of the Trial Panel I of 16 December 2022* (public), 13 February 2023 (confidential version filed on 2 February 2023).

[4] KSC-CA-2023-02/F00021COR (Defence), *Corrected Version of Defence Appeal Brief pursuant to Rule 179(1) of Rules of Procedure and Evidence* ("Rules") with confidential Annex 1, 2 and 3 (confidential), 2 May 2023 (Appeal Brief).

Appeal Brief, in addition to the 30 days proscribed by Rule 179(2), with the new deadline of 5 June 2023.

## III. APPLICABLE LAW

4. Victims' personal interests and rights before the Kosovo Specialist Chambers are governed by Articles 22(3), (5)-(6) and 23 of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (hereinafter: the Law) and Rules 80, 114 and 132 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (hereinafter: the Rules); these apply *mutatis mutandis* to participation in appeals proceedings as confirmed by the Appeals Panel.[5]

5. Article 46(1) of the Law specifies that the following grounds of appeal may be heard: (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. Paragraph two furthermore clarifies that an appeal is not a trial *de novo.* For any error of fact, it is set out in paragraph five that the Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.

6. Critical for the assessment of evidence are Rule 138 on the admissibility of evidence and Rule 139(2) of the Rules requiring a Panel to assess each piece of evidence in light of the entire body of evidence admitted carrying out a holistic evaluation and weighing of the evidence as a whole.

[5] KSC-CA-2023-02/F00011 (Appeals Chamber), *Decision on Modalities of Victim Participation in Appellate Proceedings* (public), 15 February 2023, para 7.

# IV. SUBMISSIONS

*Observations on victims' personal interests and rights*

7. Victims' Counsel considers the relevant rights and personal interests of victims arising from certain grounds of appeal to centre around (i) the acknowledgement of the victims' suffering, (ii) submissions concerning the credibility of the dual status witnesses and the reliability of their testimony, (iii) the victims' interest in having their voices heard, and (iv) the material basis for their reparations claim. Victims' Counsel refrains from substantial submissions on any other points, such as sentencing. It may only be remarked at this point that victims felt that the sentence issued was just punishment for the harm they suffered.

*Appeal Ground 1C*

**1. Statement of victims' rights and personal interests**

8. The Defence calls into question the validity of part of the testimony of [REDACTED] witness W01679, contending that Trial Panel did not act impartially when hearing the testimony of this witness. This directly affects this [REDACTED] witnesses' interests, as it challenges the acknowledgement of his experiences, as expressed in the judgement.

**2. Submissions**

9. The Defence purports that the testimony of witness W01679 is inadmissible according to Rule 138(2) of the Rules, submitting that such evidence is unethically admitted and subsequently seriously damaged the integrity of the proceedings.[6] Rule 138(2) proscribes that a precondition for rendering evidence inadmissible, is that there has been a violation of the Law, any of the other Rules, or a standard of international human rights law.

[6] Defence Appeal Brief, para 29(a), a reflection of Rule 138(2)(b) of the Rules of Procedure and Evidence.

10. The Defence suggests a violation of Rule 139(2) of the Rules[7], which requires the Trial Panel "to assess each piece of evidence in light of the entire body of evidence admitted before it at trial. The Panel shall carry out a holistic evaluation and weighing of all the evidence taken as a whole to establish whether or not the facts at issue have been established."

11. Contrary to what the Defence suggests, this is precisely what the Trial Panel did. Regarding the identification of Mustafa by W01679, the Trial Panel reasoned that "the only reasonable conclusion based on the evidence *as a whole* is that the individual who first interrogated W01679, slapped him and gave the order to 'finish him' was the Accused."[8]

12. Moreover, when exercising its duty to freely assess all evidence[9] and the reliability of W01679's testimony, the Trial Panel did not rely on any section of that testimony relating to the identification of Mustafa in any of the publicly shown photographs.[10]

13. [REDACTED].[11] [REDACTED],[12] [REDACTED].

14. The approach taken by the Trial Panel corresponds with established practice in which in-court identifications hold little to no probative value on their own but can be allowed provided no special emphasis is placed solely on such evidence.[13] Indeed, in-court identifications are not *a priori* dismissed; in the

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7 KSC-CA-2023-02/F00021COR (Defence), *Corrected Version of Defence Appeal Brief pursuant to Rule 179(1) of Rules of Procedure and Evidence ("Rules") with confidential Annex 1, 2 and 3* (confidential), 2 May 2023, para 29(a).

8 Trial Judgement, para 542. Emphasis added.

9 Rule 137(2) of the Rules.

10 Trial Judgement, paras 58-65.

11 Trial Judgement, para 61.

12 KSC-CA-2023-02/F00006RED2 (Defence), *Public Redacted Version of Defence Notice of Appeal pursuant to Rule 176 (of the Rules of Procedure and Evidence) against the Judgement of the Trial Panel I of 16 December 2022* (public), 2 February 2023, page 3.

13 *The Prosecutor v Limaj et al* (IT-03-66-A/A1805-A1670), Appeal Judgement, 27 September 2007, para. 27; *The Prosecutor v Lukić* (IT-98-32/1-A), Appeal Judgement, 4 December 2012, para. 120: "The Appeals Chamber recalls that in-court identification is generally permissible […] However, in-court identification should be given "'little or no credence' given the signals that can identify an accused aside from prior acquaintance". A trial chamber must therefore exercise caution in assessing such evidence."
*The Prosecutor v Kamuhanda* (ICTR-99-54A-A), Appeal Judgement, 19 September 2005, para 244: "The Appeals Chamber does not consider, however, that this misleading suggestion of the Trial Chamber amounted to an error invalidating the decision. The Trial Chamber made clear that the in-court identification was considered

end, the assessment is conducted based on the cumulative effect of the evidence presented as a whole and in-court identifications can weigh into this.[14]

*Appeal Ground 1E*

**1. Statement of victims' rights and personal interests**

15. In ground 1E, the Defence contends that the written statement of [REDACTED] witness W04712 should not have been admitted or relied upon by the Trial Panel. As the Defence is suggesting that evidence provided by the aforementioned witness holds no probative value, this directly links to the personal interests of that victim, who has an interest in having their evidence included, specifically as this evidence serves to illustrate the harm suffered by the indirect victims in this case.[15]

**2. Submissions**

16. The Defence asserts that W04712 is [REDACTED].[16] [REDACTED].[17] This mistake alone already impacts on the validity of the Defence submission related to this ground of appeal.

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only as one element in a larger 'process'. Moreover, in the course of its evaluation of the evidence, the Trial Chamber apparently gave little weight to these identifications."
The respective case law of other international tribunals regarding to identification evidence, suggests an agreement with the ICTY and ICTR evaluation. For the evaluation of identification evidence, see *The Prosecutor v Bemba* (ICC-01/05-01/08-3343), Trial Judgement, 21 March 2016, paras. 240-244: "[244] […] In case a single identifying factor or piece of evidence is not sufficient to satisfy the Chamber beyond reasonable doubt as to the identification of an individual, the Chamber may still be satisfied based on the cumulative effect of the relevant evidence as a whole." See also *The Prosecutor v Ntaganda* (ICC-01/04-02/06), Trial Judgement, 8 July 2019, para. 71-74

[14] Ibid.

[15] The written statement by W04712 is mentioned in KSC-BC-2020-05/F00517 (Trial Panel), *Reparation Order against Salih Mustafa with 4 annexes strictly confidential and ex parte* (confidential), 6 April 2023, para 118: "In determining whether the victims have demonstrated the existence of the harm alleged and the causal nexus between the harm and the crimes of which Mr Mustafa was convicted, the Panel will consider […] (iii) [REDACTED], clarifying in fn 176 that [REDACTED].

[16] Appeal Brief, para 35.

[17] [REDACTED].

17. Based on the content of this appeal ground, Victims' Counsel believes that paragraph 35 of the Appeal Brief is a mistake and is probably meant to refer to W04868, who [REDACTED] and whose testimony was admitted according to Rule 155 of the Rules.

18. Regarding W04712's testimony, Victims' Counsel further submits that the admission of written statements and transcripts in lieu of oral testimony is within the discretion of the Trial Panel as provided in Rule 153 of the Rules, and that this discretion has been exercised correctly.[18] The Panel identified all of the factors necessary under Rule 153(1) to militate the acceptance into evidence of W04712's written statement, including that the material related to matters other than the acts and conduct of the Appellant;[19] its cumulative and corroborative nature with the in-court testimonies of several other witnesses;[20] the relevance of the material for sentencing;[21] and the ability of the Defence to cross-examine this material through other witnesses,[22] all alongside positive considerations on the procedural requirements outlined in Rule 153(2).[23]

19. The Defence fails to identify any factors which would have militated *against* the admission of that statement as foreseen in Rule 153(b). Whilst it did object to the admission of that statement[24] as provided for in Rule 153(b)(i), it failed to demonstrate that the nature of this written statement would render it unreliable or that it has a prejudicial effect outweighing its probative value.

20. The Defence furthermore claims that W04712's testimony "ought [not] to have been afforded any weight."[25] However, the Defence fails to provide any

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[18] KSC-BC-2020-05/F00286RED (Trial Panel), *Public redacted version of Decision on the Prosecution application pursuant to Rule 153 of the Rules* (public), 17 December 2021.

[19] Ibid., para 24.

[20] Ibid., para 25.

[21] Ibid., para 26.

[22] Ibid., para 27.

[23] Ibid., paras 28-31.

[24] KSC-BC-2020-05/F00278 (Defence), *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* (confidential), 3 December 2021.

[25] Appeal Brief, para 37.

arguments as to why the Trial Panel would have been bound not to do so. The Trial Panel correctly relied on W04712's testimony only to a limited extent. It considered it in relation to the climate of fear and intimidation that the witnesses have to endure[26] and with regard to the circumstances surrounding the murder victim's apprehension and subsequent search for him. The process of assessing W04712's testimony was therefore cumulative in nature, and the Trial Panel correctly considered it together with that of other witnesses who testified on the same or similar facts.[27]

*Appeal Ground 1I*

**1. Statement of victims' rights and personal interests**

21. Ground 1I directly links to the rights and interest of the indirect victims as it is linked to findings discussing Mustafa's specific criminal intent to murder the indirect victims' family member.

**2. Submissions**

22. The Defence asserts that a specific incident described by W04600 which was considered by the Trial Panel, should have held no probative value in the investigation towards establishing a *mens rea* for murder.

23. Victims' Counsel notes that by focusing solely on the reliability of this particular exchange, the Defence fails to acknowledge the significant number of other facts also considered by the Trial Panel, that - taken as a whole - led to the establishment of Mustafa's *mens rea* for the charge of murder.[28] If accepted, this ground of appeal would therefore misrepresent the Trial Panel's cumulative process in the finding of *mens rea*.

[26] Trial Judgement, para 57.
[27] Trial Judgement, para 92.
[28] Trial Judgement, paras 691-693.

24. Additionally, the Defence seems to suggest that the Trial Panel erred in considering the specific exchange between the witness and Mustafa at all, as no further corroborating evidence was available.[29] This submission disregards the Trial Panel's sole authority to assess admissibility and weight of any evidence before it, as provided in Rule 137(2) of the Rules. Indeed, no legal requirement exists in the Law applicable to the KSC which would require such corroboration.[30]

*Appeal Ground 1J*

**1. Statement of victims' rights and personal interests**

25. In the Appeal Brief in relation to ground 1J, the Defence has misrepresented the conduct and testimony of the victims throughout their in-court testimonies.[31] The legal reasoning presented by the Defence is geared towards an alleged breach of fairness and impartiality with regard to the weighing of evidence by the Panel. However, the misrepresentations in question directly affect the personal interests of the victims as they have a right to have their contributions to the truth-seeking efforts of the Trial Panel, adequately considered.

**2. Submissions**

26. The Defence purports that "through the proceedings [the indirect victims] showed a hostility towards the Appellant."[32] However, the Defence fails to provide any examples of what it considers to be "hostile" behaviour. Mustafa himself was not present in the courtroom on the days of the testimonies of the victims, as he had opted to follow large parts of the proceedings via video-

[29] Appeal Brief, para 59: "This claimed exchange has not been substantiated and the Judgement relies only on the testimony of W04600."
[30] Only few legal systems in the world, such as the Scottish, require corroborative evidence for essential facts.
[31] Appeal Brief, para 64.
[32] Ibid.

link only. The indirect victims were ready and willing to respond to questions during their in-court testimony whether posed by the Trial Panel, SPO, Victims' Counsel, or the Defence.[33]

27. Regarding W03593, the Defence suggested that "W03593 was sure it was 'him', without ever properly identifying 'him', without ever meeting Appellant in his life".[34] This is wholly unfounded and a mere factual counterclaim by the Defence which falls short of the threshold required to establish errors of fact that the Trial Panel's factual assessment be "wholly erroneous."[35] The Defence fails to establish an error of fact occasioning a miscarriage of justice, as required by article 46(1)(b) of the Law. Indeed, the Trial Judgement explicitly acknowledged that "W03593 did not attempt to incriminate the Accused at all costs and acknowledged outright that the did not see him properly, and that he could not recognise him even today".[36] That is substantially different from having never met Mustafa at all. The Panel furthermore considered that the witness "had come to believe that the person was the Accused based on his headgear, his role and authority over the other perpetrators, and his nickname".[37] The Trial Panel assessed the testimony of W03593 in light of these and other relevant factors to determine their credibility.[38]

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[33] See, for example, cross-examination of W04676 (T. 17 November 2021, page 1637 ff), cross-examination of W04391 (T. 23 November 2021, page 1795 ff), and cross-examination of W04674 (T. 13 December 2021, page 1971 ff).

[34] Appeal Brief, para 65.

[35] KSC Law, Article 46(5).

[36] Trial Judgment, para. 69.

[37] Trial Judgement, para 69.

[38] Trial Judgement, paras 66-74.

*Appeal Ground 1K*

**1. Statement of victims' rights and personal interests**

28. In the Appeal Brief, the Defence states that it was cut short in cross-examining W03593 about his financial motives, stating outright that a "lust for money […] is the key driving force behind their testimony."[39] Article 23(1) of the Law requires the protection of victims and witnesses including their dignity. It is in the victims' interest not to be represented in this unfair, inappropriate and denigrating fashion. As with regard to appeal ground 1J, such misrepresentations of the motivation for participating in this trial directly affect the personal interests of the victims as they have a right to have their contributions to the truth-seeking efforts of the KSC, in particular their testimonies, adequately considered.

**2. Submissions**

29. The Appeal Brief submits that the victims shared a "lust for money"[40]. The only example provided in this respect is a reference to the testimony of W03593, which the Defence not only misrepresents but also appears to baselessly extend to the other participating victims.

30. The right to reparations is a right to which victims are entitled as acknowledged in Article 22(9) of the Law. As is clear from the passage in the transcript referred to by the Defence, it was only in response to a question from the Defence that W03593 made any reference to reparations at all. In that respect, W03593 merely mentioned that he wanted compensation, and only to the extent he might be entitled to reparations as a result of the injuries he sustained. At no point did W03593 say anything that might suggest that a "lust for money" (or even a right to reparations) was his primary motivation

[39] Appeal Brief, para 67.
[40] Ibid.

for testifying. More specifically, when asked about compensation W03593 answered as follows:

> "Sir, I'm mostly interested in compensation because I have suffered injuries. [REDACTED]. I'm not a judge, I'm not an investigator […] I'm here for my compensation because I do need compensation […] As I said, I don't know to what I'm entitled. I just want to get what I'm entitled to."[41]

It is wildly inappropriate to suggest that this could be interpreted as a "lust for money."

31. Insofar as the Defence may suggest that Defence Counsel was curtailed in his effort to explore credibility issues during this testimony, this is also incorrect. During the segment of the cross-examination in which Defence Counsel raised the matter of compensation in this respect, the Trial Panel in fact emphasised that in questioning witnesses according to Rule 143(3) of the Rules, matters affecting their credibility can be explored.[42] The only limitation set by the Trial Panel is that because victims have a right to reparations, it would not be permitted to ask such victims questions about why they wanted compensation. That being said, the Trial Panel emphasized that Defence Counsel could question witnesses on possible motives for their testimony.[43] Furthermore, from the opening of the trial, Victims' Counsel had made clear that the participating victims in this case were seeking reparations, so this was known to the Defence at the time.

32. Victims' Counsel concludes that it was because of the suggestive framing of the Defence questions on the issue of compensation, that this particular line of questioning was indeed stopped by the Trial Panel. However, if Defence Counsel had reframed this line of questioning in accordance with the

[41] T. 22 September 2021, pages 623-624.
[42] T. 22 September 2021, page 640, lines 6-8.
[43] Ibid., page 640, lines 13-14.

guidance provided by the Trial Panel on this topic, questions related to compensation would have been possible. The fact that this was not done, was a choice the Defence itself made.

*Appeal Ground 1N*

**1. Statement of victims' rights and personal interests**

33. Appeal ground 1N decries the time given for the Defence to respond to evidence called by the Trial Panel requested and facilitated by Victims' Counsel, that were submitted on 24 May 2022. [44] Given that this ground for appeal concerns the proper scrutiny of evidence submitted on behalf of the victims, it is in their interest to make submissions on this point.

**2. Submissions**

a) Defence response of 9 June 2022

34. Victims' Counsel notes that the Defence did in fact respond to the Trial Panel's order of 3 June 2022 within the 6-day time limit given to request to present evidence in rejoinder.[45] In the submissions it filed on 9 June 2022, the Defence explicitly stated that it "does not request to present evidence in rejoinder in relation to the iMMO expert Reports."[46] The decision not to present any such evidence in rejoinder is the strategy apparently adopted by the Defence itself in relation to these medical reports. The Defence's position in that respect was acknowledged by the Trial Panel in its Decision of 20 June 2022.[47]

[44] KSC-BC-2020-05/F00417 (Victims' Counsel), *Victims' Counsel's Submission of medical reports pertaining to Victims 08-05 and 09-05* (public, with 2 strictly confidential annexes), 24 May 2022.
[45] KSC-BC-2020-05/F00434 (Defence), *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* (confidential), 9 June 2022.
[46] ibid., para 4, also para 7.
[47] KSC-BC-2020-05/F00436 (Trial Panel), *Decision on items used with Witnesses WDSM 600 to 1100, 1300 to 1700 and W01679* (confidential), 20 June 2022, para 13.

35. Already for this reason, the Defence's claim in Appeal Ground 1N that it did not have "adequate time to prepare a strategy with respect to this case, including where it concerns the medical reports"[48] lacks merit.

b) Prior notice of submission of medical reports and possible evidentiary value

36. The assertion by the Defence that it did not have adequate time to prepare a strategy to this case with regard to the medical reports equally lacks merit.

37. In this respect, the Defence refers only to a decision of "23 June 2022"[49]. As no decision was taken in Case 05 on that date, Victims' Counsel assumes the Defence actually intended to refer to the Trial Panel Decision of 3 June 2022 in its Appeal Brief. In that decision, a time limit of 6 days was indeed given to respond to the decision by the Trial Panel to call the medical reports into evidence pursuant to Rule 132 of the Rules.

38. However, the Defence's claim that it only had six days to formulate a strategy in response to these reports at all is incorrect. In reality, the Defence had much longer to do so, given that the reports were first submitted to both the Trial Panel and the parties on 24 May 2022.[50]

39. Assuming the Defence had harboured any wish to contest the content of these reports or to cross-examine the expert witnesses, Rule 149(2) proscribes that it should have filed a notice to that extent within 7 days of receipt of those reports. Victims' Counsel also notes that the Defence could have requested an extension of the 7-day time limit provided by Rule 149(2), if it had required more time to formulate a strategy with regard to those reports. Given that the Defence failed to take any steps in response to the submission of the medical

48 Appeal Brief, para 80.
49 Appeal Brief, para 79.
50 KSC-BC-2020-05/F00417 (Victims' Counsel), *Victims' Counsel's Submission of medical reports pertaining to Victims 08-05 and 09-05* (public, with 2 strictly confidential annexes), 24 May 2022.

reports, the Trial Panel was free to admit them into evidence on 3 June 2022 pursuant to Rule 149(3). It is in this decision that the Defence was ordered to notify the Trial Panel if it wished to present evidence in rejoinder within a deadline of 6 days, thereby exercising its discretion under Rule 127(2)(e) of the Rules in favour of the Defence.

40. Not only did the Defence choose not to take any steps within the aforementioned time frames, it also failed to respond to any of the submissions pertaining to the medical examination of the direct victims filed by Victims' Counsel during the course of the trial proceedings. The first submission pertaining to this type of examination was filed on 24 January 2022.[51] Several subsequent submissions and decisions were then filed respectively taken on this subject in the following weeks,[52] culminating in the Trial Panel's oral order of on 21 March 2022 to appoint the iMMO to examine the direct victims.[53]

41. In sum, both the deadline for Victims' Counsel's submission of the medical reports and the possibility that these reports might be admitted into evidence, were known to the Defence for months before they were submitted. Arguably therefore, the Defence had ample time and opportunity to devise a strategy with regard to the reports and their potential evidentiary value in the case against Mustafa from the moment they were first discussed in January 2022.

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[51] KSC-BC-2020-05/F00297 (Victims' Counsel), *Victims' Counsel request pursuant to the Second decision on the conduct of the proceedings dated 21 January 2022* (confidential), 24 January 2022. In Chap. IV if this submission, the request was made to appoint an expert on medical forensic evidence with regard to the three direct victims.

[52] KSC-BC-2020-05/F00310 (Trial Panel), *Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information* (confidential), 4 February 2022, para 42 (in which Victims' Counsel was given the opportunity to supplement her submissions of 24 January 2022, noting also that "The Defence may respond to any such submissions by Wednesday, 16 February 2022, at noon, if it so wishes"; KSC-BC-2020-05/F00334 (Victims' Counsel), *Victims' Counsel submissions pursuant to the Third decision on the conduct of the proceedings* (confidential), 1 March 2022, Chap IV; KSC-BC-2020-05, In-Court Oral Order 'Order on the Presentation of Evidence Requested by Victims' Counsel' (public), 09 March 2022, page 2519 Line 18 to Page 2521 Line 24; KSC-BC-2020-05/F00346 (Victims' Counsel), *Victims' Counsel request for clarification and reconsideration regarding the Oral Order of 9 March 2022 to appoint a medical expert to examine Victims 08-05, 09-05 and 10-05 and submissions* (strictly confidential), 18 March 2022.

[53] KSC-BC-2020-05, In-Court Oral Order 'Order Regarding Appointment of iMMO' (public), 21 March 2022, page 2533 Line 12 to Page 2534 Line 4.

c) The admission into evidence of the expert reports

42. While the Defence seeks to rely on Article 6 ECHR to contest the aforementioned time limits, it is a fact that, under that provision, the fairness of the proceedings should be assessed as a whole.[54] Article 6 does not lay down rules on admissibility, which is a matter for Kosovo national law.[55] Its relevance for evidentiary matters is stronger where the applicant has not been given an opportunity to contest that evidence, the reliability of that evidence is disputable, it is the sole basis for a conviction, or indeed a mix of these factors,[56] none of which are applicable to the iMMO reports.

43. Indeed, after the 7-day time limit from 24 May 2022 provided by Rule 149(2) had lapsed with no notice to file any challenge to the expert reports, the Trial Panel was obligated in the interests of a fair and expeditious trial to act swiftly to ensure that there was no undue delay in this final stage of the trial proceedings. Given the absence of any indication that the Defence wished to challenge or respond to those reports, Victims' Counsel considers the discretionary 6-day deadline to file a request to present rejoinder evidence to be wholly appropriate.

*Appeal Grounds 2E and 2H*

**1. Statement of victims' rights and personal interests**

44. These grounds of appeal directly link to the personal interests of the victims, who have an interest in having their voices heard and their evidence included. Misrepresentations of the evidence the victims have provided directly affects their personal interests as they have a right to have their contributions to the

[54] ECtHR, *Ibrahim et al v the United Kingdom* 50541/08, 50571/08, 50573/08 and 40351/09, Judgement [GC] 2016, s250 in which the General Court stated that "[t]he Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings."

[55] ECtHR, *Schenk v Switzerland* 10862/84, Judgement [Court (Plenary)] 1988, ss45-46.

[56] ECtHR, *Bykov v Russia* 4378/02, Judgement [GC] 2009, ss-95-98.

truth-seeking efforts of the KSC, in particular their testimonies, adequately considered.

**2. Submissions**

45. In appeal ground 2E, the Defence submits that "witnesses (W01679, W03593, W04669) had no time to look around properly erred in fact when it stated that these witnesses were able to describe and see the detention location upon them leaving the area".[57] Both in the Appeal Brief and Annex 1 thereto, the Defence describes at length the various reasons why this is the case in its view.[58] Appeal ground 2H contains a similar challenge to the Trial Panel's findings about the direct victims' awareness of the place they were held. This appeal ground is not substantiated in the Appeal Brief, other than by reference to appeal ground 2E.[59] What is submitted below with regard to 2E applies equally to 2H.

46. Victims' Counsel will now discuss how the submissions made by the Defence do note meet the requisite standard of review for alleged errors in fact. Indeed, the Defence's submissions, if considered in full, would amount to a review of the full body of evidentiary material *de novo* and thereby well-exceed the boundaries of what is permissible on appeal. Victims' Counsel will also discuss how the Defence frequently misrepresents the testimony of the direct victims that it cites in support of its positions.

a) Standard of review for alleged errors of fact

47. As indicated, the appellate proceedings are not a trial *de novo*. Indeed, it is established practice that the only evidence that an appeals chamber will consider, is evidence that is referred to in the body of the judgment rendered by the trial chamber or in a related footnote, evidence contained in the trial

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[57] Appeal Brief, Annex 1, p. 4 (ground 2(E)).
[58] Appeal Brief, para 115-150.
[59] Appeal Brief, para 179.

record and referred to by the parties and additional evidence admitted in appeal (if any).[60]

48. It is furthermore well-established that an appeals chamber will not lightly overturn findings of fact made by a trial chamber, and must give deference to the trial chamber that received the evidence at trial.[61] An appeals chamber will only interfere in such findings of fact if (i) no reasonable trier of fact could have reached the same finding, or (ii) where the finding is wholly erroneous.[62] On appeal, parties cannot merely repeat arguments that did not succeed in trial and arguments that do not have the potential to cause the impugned decision to be reversed or revised can be dismissed outright. Additionally, in order for an appeals chamber to be able to assess arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages and paragraphs in the decision or judgment to which the challenges are being made.[63]

b) Alleged error of fact pertaining to the testimony of W01679

49. The key claim made by the Defence is that it "cannot possibly be concluded" that W01679 had knowledge upon which he could base his recognition or identification of the location in Zllash and the building where he was held.[64] This is an attempt to rehash the arguments made in the trial phase. Insofar as the Defence refers to the testimony provided by the victims in court, that

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[60] *The Prosecutor v. Tihomir Blaškić* (IT-95-14-A), Appeal Judgement, 29 July 2004, para 13; *The Prosecutor v. Radoslav Brdjanin* (IT-99-36-A), Appeal Judgement, 3 April 2007, para 15.

[61] *The Prosecutor v Taylor* (SCSL-03-01-A(10766-11114)), Appeal Judgment, 26 September 2013, para 26; *The Prosecutor v Bemba* (ICC-01/05-01/08-3636-Red) Appeal Judgment, 8 June 2018, para 39.

[62] KSC Law, Article 46(5).

[63] *Mikaeli Muhimana v. The Prosecutor* (ICTR-95-1B-A), Appeal Judgement, 21 May 2007 para 8-10, citing *Sylvestre Gacumbitsi v. The Prosecutor* (ICTR-2001-64-A), Appeal Judgement, 7 July 2006, paras 8-10, *The Prosecutor v. Radislav Krstić* (IT-98-33-A), Appeal Judgement, 19 April 2004, para 40 and *Juvénal Kajelijeli v. The Prosecutor* (ICTR-98-44A-A), Appeal Judgement, 23 May 2005, para 5. See also *The Prosecutor v. Tihomir Blaškić* (IT-95-14-A), Appeal Judgement, 29 July 2004, para 13; ; *The Prosecutor v. Radoslav Brdjanin* (IT-99-36-A), Appeal Judgement, 3 April 2007, para 15.

[64] Appeal Brief, paras 115, 139.

testimony is (often) misrepresented and cannot in any case support a conclusion of an error of fact.

50. In support of its position regarding W01679, the Defence states that the witness had never been in the location before, that on the occasions where he might have been able to see the buildings from the outside he had a sack over his head, and he did not describe the detention location upon release.

51. With respect to the first point, the Defence refers to the segment of W01679's testimony where he describes being brought from the school (training centre) to the Zllash Detention Compound ("headquarters").[65] With regard to arriving at this location, W01679 states that "[i]t was the first time [he] was seeing that place". Rather than showing that he could not see the location as the Defence seems to suggest, in these lines from W01679's testimony the witness in fact plainly states that he could.

52. The Defence's position that the witness had a sack over his head "when he was allegedly transferred from the school to the alleged location where he was kept",[66] is equally incorrect. In the lines from the transcript of W01679's testimony cited by the Defence in this respect, the witness plainly states that a sack was put over his head after they had arrived at the place where he was later held, and that it happened "when [they] got closer to some buildings" and before he was taken inside one of those buildings.

53. As to the statement by the Defence that W01679 did not describe any buildings upon release,[67] Victims' Counsel notes that this is based on a factual assumption only. The Defence does not point to any specific aspect of the testimony of W01679 that would support this assumption, which the standard of review for alleged errors in fact does require, and has therefore failed to demonstrate that the Trial Panel's assessment of W01679's testimony "could

[65] Appeal Brief, para 116 sub (a) and fn. 48 in which reference is made to T. 4 October 2021, p. 867, lines 2-6.
[66] Appeal Brief, para 116 sub (b) and fn. 49 in which reference is made to T. 4 October 2021, p. 867, lines 7-9
[67] Appeal Brief, para 116 sub (d), 118.

not have been accepted by any reasonable trier of fact [or that] the evaluation […] is wholly erroneous."[68] That being said, W01679 actually testified that the building he was shown a photograph of, "[…] resembles a lot to the image I had in front of my eyes when I was released. The basement is down there and there's this part when they would take us and bring us upstairs, so it resembles a lot. To me, at least, looks familiar."[69] In other words, contrary to what the Defence asserts, W01679 saw where he was when he was released and testified about this in court.

54. In sum, insofar as it concerns W01679, appeal grounds 2E and 2H find no basis in the evidence cited by the Defence, indeed misrepresents W01679's testimony in court on several points and fails to meet the standard of review for alleged errors in fact.

c) Alleged error of fact pertaining to the testimony of W03593

55. The key claim made by the Defence is that it "cannot possibly be concluded" that W03593 had knowledge upon which he could base his recognition or identification of the location in Zllash and the building where he was held.[70] In the Appeal Brief, as with W01679, the Defence rehashes previous arguments and (often) misrepresents the testimony provided by this victim in court. In any case, the submissions made by the Defence cannot support the conclusion of an error of fact.

56. In support of its position regarding W03593, the Defence states that on the occasions where W03593 might have been able to see the buildings from the outside he had a sack over his head[71], that he testified that he did not pay attention to the location or the building where he was kept upon his release[72]

[68] KSC Law, Article 46(5).
[69] T. 4 October 2021, p. 920, lines 9-12. See p. 919, lines 22-25 re: the photograph shown to W01679 in court.
[70] Appeal Brief, paras 115, 139.
[71] Appeal Brief, para 121 sub (a).
[72] Appeal Brief, para 121 sub (b).

and that he "did not state that he did not know if he had ever been before to that very location", but "only stated that he might have been in Zllash some [REDACTED] earlier.[73]

57. In relation to the awareness W03593 had of his surroundings upon his release, the Defence cites three lines of the witnesses' testimony[74] in which W03593 offers additional information about the people he testified he saw outside upon his release.[75] After confirming that he indeed saw many people there, W03593 explains that "[…] we all just wanted to run away as soon as we could. That's why I didn't look around. I was not interested to look around. I was just concerned about my own life."[76] W03593 goes on to explain however, that upon his release, he did see enough of the building where he was held to recognise it in the photographs shown to him in court: "It's normal – it's not that I have seen in full, but I have seen a little bit to know where I was."[77]

58. The Defence also incorrectly suggests that W03593 was [REDACTED]. W03593 however, clearly testified that [REDACTED][78] and [REDACTED].[79] During the cross-examination, W03593 confirmed that "the only location that [he calls] Zllash" is the photographs that were shown to him.[80] Moreover, during cross-examination, in response to being asked if he had been at the location where he was held prior to his arrest, W03593 responded: "It might happen [REDACTED]."[81] In sum and contrary to what the Defence states, the testimony provided by W03593 shows that he was in fact familiar with the area before he was ever held captive there, and that he indeed had some

[73] Appeal Brief, para 121 sub (c).
[74] Appeal Brief, para 121 sub (b), fn 53 with reference to T. 21 September 2021, p. 516 lines 12-15.
[75] T. 21 September 2021, p. 516, lines 9-11: "One question before we move on. So, please case your mind back to the moment you were being released. You told us yesterday that when you were released you saw many people outside; is that correct?"
[76] T. 21 September 2021, p. 516 lines 12-15.
[77] T. 21 September 2021, p. 517, lines 7-13.
[78] [REDACTED]. [REDACTED]. See also [REDACTED].
[79] [REDACTED].
[80] T. 21 September 2021, p. 558, lines 1-6.
[81] T. 22 September 2021, p. 609, lines 4-7.

occasion to see the location and the buildings on the compound where he had been held upon his release.

59. In sum, insofar as it concerns W03593, appeal grounds 2E and 2H find no basis in the evidence cited by the Defence, misrepresents W03593's testimony in court on several points and fails to meet the standard of review for alleged errors of fact.

d) Alleged error of fact pertaining to the testimony of W04669

60. The key claim made by the Defence is that it "cannot possibly be concluded" that W04669 had knowledge upon which he could base his recognition or identification of the location in Zllash and the building where he was held.[82]

61. As with the other direct victims, in the Appeal Brief the Defence attempts to reargue previous submissions, (often) misrepresenting the testimony provided by this W04669 in court. In any case, its submissions cannot support the conclusion of an error of fact.

62. In paras 130 and 135, the Defence cites lines of testimony referenced in footnotes 56 and 58 of the Appeal Brief which are segments from W04669's testimony where he states that upon release he left without looking back, did not want to look around, but states for example that "from that place, from that position, you can see every object or every building that is around".[83] Contrary to the suggestion made by the Defence, W04669's testimony does not preclude that he saw the location where he was held.

63. Particularly, defence misrepresents the testimony provided by W04669 during the photograph-identification.[84] Victims' Counsel notes that the

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[82] Appeal Brief, paras 115, 139.

[83] T. 11 November 2021, p. 1549, lines 16-17; *idem* p. 1575, lines 3-9: "[A] I did not see any of them, but I think that one could see those two objects from there, because the buildings are visible. [Q] But why could you not see them? [A] I didn't want to see them. It's not that I turned my head back to see anything. I just continued straight ahead. But from that place, from that position, you can see every object or every building that is around."

[84] Appeal Brief, para 132-133.

Defence fails to indicate with specificity which lines of the testimony supposedly support its assertions. Victims' Counsel assumes however, that the Defence is referring to T. 10 November 2021, page 1471, lines 18-20. However, contrary to what the Defence asserts in paragraph 132 of the Appeal Brief, this segment of the testimony does not show that W04669 "did not identify the building himself as he stated that someone else had marked the photographs from the UNMIK found booklet that was shown to him."[85] In court, W04669 merely indicated that he did not remember that he had circled the buildings himself, but goes on to explain "so probably someone else has done that. He asked first on whether this was the place and probably they have encircled the place."[86] In other words, though the circles were probably made by someone else, they were drawn upon instructions from W04669. Indeed, the photograph with circles was signed by W04669 himself.[87] W04669 then goes on to discuss details of the buildings on the picture, and how those images relate to his memory of the place where he was held. In sum, the Defence is clearly misrepresenting the plain language of W04669's testimony on this matter.[88]

64. In paragraph 133 the Defence also erroneously asserts that W04669 identified an "entirely different building" to the one identified by the other two direct victims.[89] Again, the Defence fails to specify which segment of the testimony of W04669 it refers to here. For this reason alone, Victims' Counsel submits that the requirements for an alleged error of fact are not met.

65. However, Victims' Counsel also wishes to highlight that the Defence assertion that the witness described an "entirely different building" is factually

[85] Appeal Brief, para 132.
[86] T. 10 November 2021, p. 1471, lines 18-20.
[87] T. 10 November 2021, p. 1471, lines 10-13.
[88] T. 10 November 2021, p. 1471, lines 21-25 and p. 1472, lines 1-6.
[89] Appeal Brief, para 133.

incorrect. W04669 described a setting[90] that largely aligns with the testimonies of W03593[91] and W01679.[92] While small details may differ in the description of the building, which is a natural occurrence in testimonies after a long period of time, the Trial Panel exercised their discretion in weighing the evidence as a whole.

66. In sum, insofar as it concerns W04669, appeal grounds 2E and 2H find no basis in the evidence cited by the Defence, misrepresents W04669's testimony in court on several points and fails to meet the standard of review for alleged errors in fact.

*Appeal Ground 3*

**1. Statement of victims' rights and personal interests**

67. This ground relates to the personal rights and interests of the indirect victims as it relates to the exhumation and examination of the body of their deceased family member. An unnecessary exhumation would revive the trauma of uncovering and burying the deceased victim and would serve no further purpose in the verdict or sentencing considerations in the Trial Judgement.

**2. Submissions**

68. As acknowledged by the Defence in their Appeal Brief,[93] Rule 40 of the Rules on Procedure and Evidence, which the Defence relies on heavily in this ground of appeal, obliges only the SPO and not the Trial Panel itself.

69. Should the Trial Panel be obligated by Rule 40 *proprio motu*, this would only come by virtue of Rule 132 meaning that the Panel could only have permitted the exhumation and examination of the deceased victims' body if there was a need to do so in fulfilment of the right to identification and the determination

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[90] See T. 10 November 2021, p 1471, lines 18-20.

[93] Appeal Brief, para 325-326.

of truth. Furthermore, Rule 132 leaves entirely at the discretion of the Trial Panel the question of whether it deems measures taken under that rule to be necessary in the determination of truth. There was no need for identification of the body as other evidence derived from ample witness testimony positively identified the victim through factors including his body size, clothing, and [REDACTED].[94]

70. Therefore, the Trial Panel was correct not to consider an exhumation in light of both the recognised right of the deceased victim to rest in peace[95] and the personal rights of the indirect victims themselves to privacy, humane treatment, and religious freedom which would all be violated should they all be forced [REDACTED].[96]

71. As in many cultures, traditions and religions (both ancient and modern), respect for human dignity extends beyond death. In [REDACTED], for example, significance is placed on burial and the final resting of the body upon death. Graves ought not to be disturbed *unnecessarily*.[97] [REDACTED]. Even if the Trial Panel had felt compelled to consider the order of exhumation *proprio motu*, it would have had to consider the important reasons that militated against such an order. No need for identification was necessary due to

[94] T. 17 November 2021, page 1608 line 15 to page 1610 line 8; page 1621 line 14 to page 1622 line 1; T. 22 November 2021, page 1749, lines 21-22; T. 13 December 2021, page 1958 line 24 to page 1959 line 1.

[95] A. Petrig, 'The war dead and their gravesites', *International Review of the Red Cross* 91/874 pp.341-369, June 2009, pp. 342-343: "First, numerous bilateral or multilateral agreements between states – e.g. agreements on co-operation and mutual relations, peace treaties, or agreements exclusively dealing with war cemeteries – contain rules on the dead and their graves. Secondly, where such concrete rules are absent, fragmentary, non-binding or incompatible with international law, general norms of international humanitarian law and international human rights law can provide answers. Thirdly, international norms engaging individual criminal responsibility or state responsibility become relevant when primary norms laying down obligations towards the dead and their graves are violated. Fourthly, domestic law may be relevant, such as fundamental rights enshrined in constitutions or bills of rights, military law, public health law or criminal law." [footnotes omitted]; see *idem* p. 350: "The command that mortal remains must be respected is a concretization of the general obligation to protect the dignity of persons and the prohibition of outrages upon personal dignity." [footnotes omitted]; *idem* 358: "Various provisions stipulate that graves must be respected" and *idem* p. 360: "The drafters of AP I, the only treaty explicitly dealing with exhumations, sought to strike a balance between respect for graves and the recognition of legitimate grounds for exhumation […]"

[96] T. 24 November 2021, page 1897 lines 7-12.

[97] [REDACTED].

available evidence on this point. To needlessly disturb the murder victim's rest after over 20 years while reminding [REDACTED], would have been contrary to the Court's general obligation to act in a way which is respectful of the victims' interests, their family life, and respect for human dignity.

*Appeal Grounds 4 and 5*

**1. Statement of victims' rights and personal interests**

72. Victims' Counsel will address appeal ground 4 and 5 jointly as these relating to the finding of murder and the victims' interests in addressing both are the same. Those interests revolve around establishing the circumstances of the death of their close family member, which also forms the basis of their claims for reparations from Mustafa, and to have acknowledged by the Court the mistreatment and murder of that family member.

**2. Submissions**

73. It has been established through evidence presented during the trial proceedings that the murder victim had been gravely injured by BIA members, was unable to walk or stand, was denied medical aid, and was not released alongside the other prisoners but was instead left behind during the evacuation of the ZDC.[98] As the Trial Panel correctly reasoned, these are circumstances which Mustafa must have reasonably known would lead to the death of the deceased.

74. Under Article 14(c)(i) of the Law, murder of all kinds constitutes a war crime in non-international armed conflict and is a crime under the jurisdiction of the Court. In paragraph 345 of the Appeal Brief, the Defence contends that the Trial Panel failed to establish whether the victim was killed or died as a result of the mistreatment or the denial of medical aid by BIA members. The Appeal

[98] Trial Judgement, paras 477-481, 569-574, 619-621 and 624.

Brief specifies that "[i]f we have death due to ill-treatment or the denial of medical aid, then we do not have the criminal offence of murder."[99]

75. This fails to acknowledge that, under the Law, the war crime of murder in NIAC can be committed in a variety of ways by act or omission.[100] Taking wilful steps leading to the foreseeable and likely death of a victim, whatever those steps may be, is the very basis of the war crime of murder. Required is the that the perpetrator's conduct substantially contributed to the death of the person, for which circumstantial evidence is sufficient.[101] Such circumstantial evidence may include proof of incidents of mistreatment against the alleged victim or patterns of mistreatment.[102] The ICTY in *Martić* stated that "[t]he *mens rea* of murder is the intent to kill, including indirect intent, that is the knowledge that the death of the victim was a probable consequence of the act or omission."[103] In this case, evidence substantiated the mistreatment of the murder victim and other victims as well as the denial of medical aid to the deceased. Even if no direct evidence establishes the final act of killing either by Mustafa or other BIA members present in Zllash, the only other remotely plausible scenario was that they left a gravely tortured and half-dead man without shelter in the path of hostile advancing enemy forces. contained the probable consequence of that victim dying.

76. The ground of appeal misrepresents the reasoning of the Trial Panel, which is to take all of the factors mentioned in combination with one another to find that Mustafa's conduct amounts to murder. The Panel "[considered] that the only reasonable conclusion based on the evidence as a whole, is that the Murder Victim died as a result of the *combination* between the severe

99 Appeal Brief, para 345.
100 *The Prosecutor v Naser Orić* (IT-03-68-T), Trial Judgement, 30 June 2006, para 348; *The Prosecutor v Milan Martić* (IT-95-11-T), Trial Judgement, 12 June 2007 para 60.
101 *Prosecutor v Taylor* (SCSL-03-01-T), Trial Judgement, 18 May 2012, para 413. See also with further references O. Triffterer and A. Ambos, *Commentary of the Rome Statute* (3rd ed., 2016), para 892.
102 Triffterer and Ambos, ibid.
103 *The Prosecutor v Milan Martić* (IT-95-11-T), Trial Judgement, 12 June 2007 para 60.

mistreatment inflicted by BIA members who detained him, causing serious bodily harm; the denial of medial aid by BIA members; and gunshot wounds."[104] Contrary to the claims made by the Defence, the Trial Panel assessed the totality of evidence available to substantiate its findings on the injuries to the murder victim.[105]

77. The Trial Panel correctly considered that the actions of the BIA need not be the sole cause of death but "must at a minimum have contributed substantially thereto."[106]

78. The Defence contends that a new act may have broken the legal chain of causation, which would relieve Mustafa of responsibility. The contributing factor in a chain of causation is one "but for" which the result would not have occurred. A break in this chain of causation occurs if "the second cause is so overwhelming as to make the original [act] merely part of the history,"[107] meaning in this case that a new act which breaks the chain of causation (*novus actus interveniens*) must constitute a significant contributing factor in the death of the victim.

79. No alternative explanation is offered by the Defence as to how the causal link between the BIA's actions and the death could have been broken, asserting only that "many new intervening factors could have caused the death of the victim."[108] The Defence therefore seeks to establish a break in the causal chain by an act which for which no indication or substantial evidence exists – this proposition remains merely hypothetical.

80. Finally, through grounds 4 and 5 the Defence asserts that the totality of evidence was incorrectly assessed. This is a misinterpretation of the purpose of appeals proceedings, which are not meant to reassess evidence presented

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[104] Trial Judgement, para 624 (emphasis added).
[105] Trial Judgement, paras 619-624.
[106] Trial Judgement, para 687.
[107] Lord Parker CJ in R v Smith [1959] 2 QB 35 at 42-43.
[108] Appeal Brief, para 359.

before the Trial Panel, unless the evaluation of that evidence is "wholly erroneous."[109] The Defence has failed to establish an error of fact or of law, and merely suggest a different assessment of the same evidence, which is not an activity the Appeals Court has been appointed to undertake.

*Appeal Grounds 6 and 7*

**1. Statement of victims' rights and personal interests**

81. Appeal grounds 6 and 7 both claim that the Trial Panel failed to properly establish the *actus reus* and *mens rea* for torture. This conflicts with the victims' right to acknowledgement by the Court that they were subjected to the crime of torture and of their suffering at the hands of Mustafa and other BIA members. Since these rights and interests are the same for both grounds 6 and 7, Victims' Counsel will address these grounds together.

**2. Submissions**

82. These grounds of appeal concern the legal definition of the war crime of torture in non-international armed conflict.

83. The *actus reus* and *mens rea* are interpreted consistently in international criminal law. The elements of the crime militate the infliction, by act or omission, of severe mental or physical pain or suffering upon another person.[110] Central to appeal ground 6 is that a prerequisite purpose of such infliction of pain[111] does not exist in the present case.[112]

84. It is the view of Victims' Counsel that the Trial Panel correctly defined the elements constituting torture, including purpose.[113] The standard used by the

[109] KSC Law, Article 46(5).
[110] *The Prosecutor v Haradinaj et al* (IT-04-84-A), Appeal Judgement, 19 July 2010, para 290; *The Prosecutor v Ongwen* (ICC-02/04-01/15), Trial Judgement, 4 February 2021, para 2700 with reference to Article 7(2)(e) of the Rome Statute and para 1 of the Elements of Crimes of Articles 7(1)(f) and 8(2)(c)(i)-4 of the Rome Statute.
[111] See e.g. *The Prosecutor v Ongwen* (ICC-02/04-01/15), Trial Judgement, 4 February 2021, para 2705.
[112] Appeal Brief, para 38-384.
[113] Trial Judgement, para 672.

Trial Panel is consistent with international case law and treaty law.[114] The Trial Panel applied this standard to the evidence before it,[115] correctly concluding that, based on the evidence as a whole, the mental elements of the war crime of torture had been met, namely that the perpetrators "must have inflicted the pain or suffering intentionally and for such purpose as obtaining information or a confession, or punishing, intimidating, coercing or discriminating against, on any ground, the victim or a third person."[116]

85. In support of this purpose, the Trial Panel heard from the in-court testimonies of all direct victims that they were variously accused of being thieves, spies and Serbian collaborators while being beaten in Zllash.[117] W04669 felt they were not really suspected of being spies but that the beatings were punishment for their political convictions,[118] which is nevertheless a purpose consistent with the requisite *mens rea* for torture. When describing the mock execution he was subjected to, W03593 stated that "[h]e just wanted to make me afraid,"[119] referring to Mustafa.[120] When each direct victim was taken away and tortured, this inflicted pain not only on that victim but on the entire group, who could hear screams from the beating "like dogs […and] cats"[121] and this made them too afraid to sleep,[122] which certainly had the effect of further intimidating each victim leading him to fear at all times the same treatment. After being beaten, the direct victims were ordered to collectively say "[d]eath to the traitors, death to the thieves, death to the thugs,"[123] which

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[114] For the interpretation of the war crime of torture in the context of the Rome Statue, see Rome Statute, Elements of the Crimes, Article 8(2)(c)(i)-4, para 2.
[115] Trial Judgement, paras 681-685.
[116] Trial Judgement, para 672.
[117] T. 20 September 2021, page 409 line 25; T. 4 October 2021, page 867 lines 11-16; page 896 line 22 to page 897 line 1; T. 10 November 2021, page 1438 lines 12-17.
[118] T. 10 November 2021, page 1446 lines 8-19.
[119] T. 20 September 2021, page 412 lines 12-13.
[120] T. 20 September 2021, page 412 line 21 to page 413 line 1.
[121] T. 4 October 2021, page 890 lines 23-25.
[122] T. 20 September 2021, page 476 lines 15-17.
[123] T. 10 November 2021, page 1434 lines 18-21.

provides an insight into the accusations levelled against those victims by the perpetrators and the purpose to be found in their torment.

86. It is suggested in appeal ground 7 that, in respect of those direct victims (including W04669) who were not personally tortured at the hands of the Mustafa, he was not responsible for the actions of other BIA members.[124] The Defence here fails to appreciate that the third objective element of JCE I does not require Mustafa to perform the objective elements of the crime but only that he provide a "significant" contribution.[125] On the sum of the evidence provided, the Panel found that Mustafa's actions extended beyond the threshold of a significant contribution, [126] stating that his personal conduct, including the torture inflicted on two of the direct victims, was more than enough to incentivise the other BIA members and that his personal involvement in their torture is therefore not necessary for a finding of culpability under JCE I.[127]

*Appeal Ground 8*

**1. Statement of victims' rights and personal interests**

As this ground seeks to reverse the finding that the direct victims suffered the war crime of arbitrary detention, it is in their interests to respond to this argument. It is important for the victims' specific interest in acknowledgement that they have suffered this serious violation of international humanitarian law during a non-international armed conflict (NIAC).

**2. Submissions**

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[124] Appeal Brief, para 388.
[125] See e.g. *Prosecutor v Kvočka et al* (IT-98-30/1-A), Appeal Judgement, 28 February 2005, paras 97-98.
[126] Trial Judgement, para 749.
[127] Trial Judgement, para 750.

87. The Appeals Chamber has already identified that the list of war crimes in NIAC is non-exhaustive. The textual analysis provided in its Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers"[128] (Interlocutory Appeal) makes this abundantly clear and this point requires no further discussion. In addition, Victims' Counsel emphasises the importance of the finding that arbitrary detention in NIAC is a specific war crime as it highlights the distinct dimension of suffering and acknowledges the experiences of the victims of arbitrary detention.

88. The Appeals Chamber in its Interlocutory Appeal has already discussed the relevance of humane treatment under Common Article 3 of the Geneva Conventions.[129] In addition to those findings, the customary status of the war crime of arbitrary detention in armed conflict can be identified in the existing state practice which shows that a large number of states explicitly criminalise this act in armed conflict, not excluding NIAC.[130] In addition to national rules governing armed conflict, it is a fact that domestic penal codes in regions near Kosovo criminalise the act of unlawful detention regardless of the existence of conflict.[131]

89. Similarly, the act of deprivation of liberty constitutes a violation of various global and regional human rights instruments applicable in Kosovo at the time.[132] This points to a well-established consensus on the illegality of

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[128] KSC-BC-2020-06/IA009/F00030 (Appeals Chamber), *Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers"* (public), 23 December 2021, para 87.

[129] ibid., paras 94-102.

[130] See e.g. Bosnia & Herzegovina, *Criminal Code* (1998), Article 154(1) (Article 173(1) as amended) and Bulgaria, *Penal Code as amended* (1968), Article 412(c); a full list of national legislation can be found in Henckaerts and Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume II: Practice* (ICRC: 2005), pages 2331-2337.

[131] See Criminal Code, *Official Gazette of the Republic of Macedonia* (first published 37/1996, most recent update 248/2018), Article 140: "Whosoever unlawfully confines, keeps another confined or in any other manner deprives or limits the freedom of movement to another, shall be fined or sentenced to imprisonment of up to one year"; for application see ECtHR, *El-Masri v The Former Yugoslav Republic of Macedonia* 39630/09, Judgement [GC] 2012, para 81.

[132] Universal Declaration of Human Rights Article 3; European Convention on Human Rights Article 5; *El-Masri* (ibid.).

depravation of liberty which will, or should, have been known to the Appellant at the time, undermining the notion that the Trial Judgement infringed upon the principle of legality in their finding that arbitrary detention constitutes a war crime in NIAC.

## V. RELIEF REQUESTED

90. On the basis of the above, Victims' Counsel requests that appeal grounds 1C, 1E, 1I-K, 1N, 2E, 2H, and 3-8 are dismissed by the Appeals Chamber.

## VI. CLASSIFICATION

91. This filing includes references to confidential material including the Appeal Brief, testimonies heard in private session, and information that would allow identification of the victims participating in the proceedings. Given the nature and content of this filing, Victims' Counsel therefore files this submission as 'confidential'.

**Word count: 11,121**

**Anni Pues**
**Victims' Counsel**

5 June 2023

At The Hague, the Netherlands