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In: **KSC-CA-2023-02**

The Specialist Prosecutor v. Mr. Salih Mustafa

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

Judge Michele Picard

Judge Kai Ambos

Judge Nina Jorgensen

Registrar: Fidelma Donlon

Filing Participant: Defense of Salih Mustafa

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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

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I. INTRODUCTION

1. On 24th of September 2020 Mr. Mustafa was arrested and transferred to the detention facilities of the KSC.

2. On 16 December 2022, TP I rendered its judgment in the case of Mr. Salih Mustafa. Mr. Mustafa was convicted for the crimes of Count 1 (Arbitrary Detention), Count 3 (Torture) and Count 4 (Murder) for a period of 26-year imprisonment. On 2 February 2023 the Defense filed a Notice of Appeal. Upon motions of the Defense to extend the time limit, the Chamber of the Court of Appeals granted the filing of the Notice of Appeal and an extension of the filing of the Appeal brief.

3. The Appellant seeks the following overall relief:

   (a)-the reversal of convictions on counts 1, 3 and 4, to be replaced with:

   (i)-acquittals on each count; or

   (ii)-an order returning the case to the TP; or

   (b)-if any/all convictions are affirmed, a reduction in sentence.

4. Footnote references are to paragraphs in the Judgment, unless otherwise stated.
   TP- means Trial Panel I;
   Judgment- means the Judgment KSC-BC-2020-05, 16 December 2022/F00494;
   Para. - indicates paragraph of the Judgment;
   T.-Indicates Transcript of the Trial Hearing
   Appellant- means the Accused Mr. Salih Mustafa
   The grounds of appeal as set out in the Notice of Appeal are reproduced for convenience in Annex 1.

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II. SUBMISSIONS

The Defense submits the following Grounds of Appeal.

GROUND 1

All Counts

TP erred in Law:

Ground-1-(1A)

5. TP erred in law by finding that the facts as of April 1999 established in a non-International Conflict where in fact the Conflict was properly characterized as International. The relevant paragraphs of the Judgment are para. 707-709.

6. In para. 709 the TP defines an International Armed Conflict upon conditioning it on the fact that if the KLA acted under the overall control of one or more NATO states, then it would have a nature of such conflict. It is defined by the involvement of two or more states in the conflict. In other words, the nature of an international armed conflict is defined by the involvement or not in an armed conflict of state actors.[1]

7. Besides, the nature of an international conflict is not as same as an internal conflict. NATO bombing of Serbia involved all NATO members and their military power with aerial sorties daily exceeding hundreds.

8. As the NATO bombing commenced as of 24th of March 1999 and lasted until 10th of June 1999 these bombings were not incidental but sustained aerial campaign.

[1] The Max Planck Encyclopedia of Public International Law, Oxford University Press 2012, p. 613, 618, 619, 626 and 627.

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9. The Judgement, in para. 693, gives criteria for international armed conflict and non-international armed conflict. The Judgement correctly says that organized armed groups "do not necessarily need to be as organized as the armed forces of a State". However, when it comes to the preparation of its reasoning as to the criteria how these armed groups are different from regular armies, it arbitrarily lists several indicative factors. In support of this view, in footnote no. 1503, the Judgement quotes basic legal text regulating non international armed conflict and with a stroke of arms it quotes few judgements which it takes for granted to be part of the international customary law. In this regard, there are several legal omissions in this regard:

10. First, these factors listed therein are in fact applicable only to regular army formations;

11. Second, the Article does not offer any hint as to the additional criteria that may be taken into account when deciding on the war-time posture of armed groups. The Art. 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977 (Additional Protocol II), is therefore quoted and applied erroneously. It clearly states, *inter alia*, that the armed groups should be: "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations".

12. Third, in this sense, the Judgement goes *ultra vires* as it invents additional criteria for judging war-time position of KLA as a non-armed group for the purposes of establishing international criminal responsibility of its members. In support of its views and quoted legal text, the Judgement quotes jurisprudence of the ICTY and the ICTR. In all quoted case, but the Haradinaj Trial Judgement, there is no mentioning of such factors as being decisive in establishing the legal status of armed groups in a non-armed conflict. Besides, in all other cases quoted in footnote no. 1403, with the exception of Haradinaj Case, the parties to the conflict fulfilled the criteria of the legal texts itself as they had responsible

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command and political assemblies in charge of military politics of those non-armed groups taking part in hostilities. This was not the case with Kosovo. This is a huge difference between Kosovo and non-international armed conflicts in former Yugoslavia and Rwanda, where armed groups fulfilled legal criteria mentioned in the above-mentioned Article 1. The Trial Judgement in this case lists factors which are applicable form military formations in international armed conflicts and, besides, they do not appear in that form as such in none of the cases used in footnote no. 1503.

13. Fourth, it can be said the Judgement has fictitiously quoted, that is, interpreted the legal text and the case law quoted in the above-noted footnote in order what appears as to pre-determine its final conclusion regarding the criminal responsibility of Mr. Sali Mustafa.

14. The Judgement, in paragraph 694, states that a non-international armed conflict may turn into an armed conflict of international character if an organized armed group is under the overall control of a third state. In its footnote no. 1507, it quotes Tadic Case (Appeals), one case from the Rwanda conflict and the Commentary of the ICRC regarding Art. 3. A careful reading of these cases (although Commentary cannot serve as a source of law under any circumstances) reveals that by "state" is not meant a "state" in terms of international law but a "state" in the sense of the de facto state, such was the case with República Srpska, for the purposes of outlining criteria for international criminal responsibility. Kosovo at no time during the war, including KLA, possessed any de facto state features, having political bodies and an executive organ in charge of executing certain political decisions. Kosovo was neither under the control of a third state, nor was the KLA. In this sense, this parallel with the current case of Mr. Sali Mustafa, taking into account circumstances under which he acted, are entirely inappropriate from the legal point of view.

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15. The Judgement, in para. 700, correctly concludes about the territorial and temporal scope of armed conflicts of non-international character. But then, again by quoting a source that cannot serve as a source of law, e.g., the Commentary of the ICRC, it wrongly states that "International Humanitarian Law continues to apply until such deprivation or restriction of liberty comes to an end". This is not true at all and contradicts Judgement's right conclusion that once the peace settlement is achieved, this body of law ceases to apply. From then on, it is domestic law that applies.

16. The Judgement, in para. 706, rejects the arguments of Defense bases on an erroneous interpretation of the right of the parties to present evidence on facts, assuming that they can be presented only at trial phase, not later than that. This is legally wrong based on the Law on Specialist Chambers, RPE of the Specialist Chambers and, above all, on the Constitution of Kosovo, to which it is bound to apply. Based on the case of the Constitutional Court of Kosovo, one of the ingredients of the free and fair trial is the possibility to present evidence until the closure of the first instance trial, which includes closing statements of the parties.

17. The Judgement, in para. 707, concludes that "the ICTY established that, as of the end of May 1998 and until at least June 1999, an armed conflict existed in Kosovo between the Serbian forces and the KLA, which was characterized as non-international in nature". In support of this view, in its footnote no.1524, it quotes Dordevic Case (both Trial and Appeals Judgements). This is not legally accurate: in both Judgements, the ICTY has used the phrase "it may exist", meaning that an internal conflict may exist along an international armed conflict. In other words, it did not say that it existed in Kosovo in a conclusive manner. The facts of the Dordevic Case were of a different nature.

18. As Defense has rightly submitted, this in not jurisdictional issue but an issue of legal fact of the case which needs to be proved anew, and not established based on judicial notice of adjudicated facts. Furthermore, the Judgement in its footnote no. 1525 takes it for

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granted that in Kosovo a situation of an internal armed conflict has existed "until 16 September 1999, when a lasting absence of armed confrontations was achieved and the situation had sufficiently stabilized, so as to equate a peaceful settlement". This is entirely wrong. Which parameters TP used? What if a demobilization of the KLA did not take place on 16 September 1999, but one year later? Would that serve as a parameter to judge that there was still an ongoing armed conflict of internal nature?

19. Even if it were true the statement of the TP that since March 24,1999 there had coexisted two types of armed conflicts, one international and the other internal, intensity of the human interaction cannot be the same in that case, that is, it was not the same as when NATO bombarded FRY (Serbia and Montenegro) 24/7. In the latter case, human movements have been restricted in absolute terms and, consequently, the movements of the Appellant could not be the same as previously, that is, before March 24 1999. This is why the alibi presented by the Defense is highly plausible taking into account this mere fact, that is, the fact that the intensity of the human movements drastically changed throughout the territory of FRY (Serbia and Montenegro), Kosovo included.

20. By mischaracterizing the legal nature of the Armed Conflict this mischaracterization invalidates the Judgement as far as the Indictment is based on Art. 14 1 (c) of the Law.

Ground-1-(1B)

21. Under the Constitution of Kosovo Art. 30 paragraph 1, sub paragraph 2, the Appellant has to be informed about the nature and the cause of the alleged crimes and in which capacity he or she is being interviewed.

22. Article 3 of the KSC LAW dictates 3(2) (a) that the KSC shall adjudicate and function in accordance with the Constitution of the Republic of Kosovo.

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23. TP used as evidence the statements of the Appellant, thereby violating Art. 3 of the Law as well as Rule 138 (2) which provides that the admission of evidence would be anti-ethical or would seriously damage the integrity of the proceedings.

24. By admitting (parts of) the statements of the Appellant given to the SPO and the usage of it by the TP, the TP erred in the application of principle of self-incrimination as per Art. 31 (1) (2) of the Constitution of Kosovo in conjunction with Article 6.1 of ECHR.

25. Moreover, the International Conventions, as cited, have superior authority over the Kosovo domestic laws as envisaged in the Art. 22 of the Constitution of the Republic of Kosovo.

26. TP erred where it used the statements of the Appellant in the Judgment. The Defense submits that it is unjust and an error of the TP that when it comes to charge the Appellant with the crime, statements of the Appellant are taken for true, when they are working unfavorably for him, while statements working in his favor are simply rejected. Such evidence should have been excluded and cannot be relied upon. It invalidates the Judgment and amount to miscarriage of justice

Ground-1-(1C)

27. TP has *proprio motu* showed [Redacted] able to identify the Appellant in these photos resulting in a framed answered by the witness due to the following facts.
    a) The photos were largely shown in Kosovo Media as noted by the Defense at the trial.
    b) SPO submitted to the TP the said photos not for the purpose of the identification of the Appellant, as demonstrated by the fact that the SPO did not propose the identification in the court, as they are supposed to, but leaving the matter at the discretion of the TP which randomly has put forward the identification issue in camera accompanied with the said photos.

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c) The above-mentioned factors constitute clear violation of the Art. 138 (2) of RPE regarding the probative weight of the said evidence.

28. This evidence should be, or should have been, excluded in accordance with the said Rule.

29. The consequences of using it are manifold:

a) TP erred where it admitted the evidence. The Defense submits that such evidence is unethically admitted and subsequently seriously damaged the integrity of the proceedings. TP erred where it applied this evidence as it violates rule 139 (2) of the RPE.

b) The evidence elicited from the witness is to be excluded due to the violation and misapplication of the said Rule.

c) TP obviously took sides regarding the value of this evidence, as can be seen from the records of the main trial [Redacted] [2], by constantly questioning the verbal submissions about that probative value of the evidence raised by the Defense.

d) Lastly, the evidence as elicited by TP from the [Redacted] based on the shown photos cannot have any probative bearing as to the identification of the Appellant by the witness.

e) TP admits itself as can be seen in the records that the photographs were show in public in opening statements by the SPO at an early stage even before they were shown to [Redacted].[3]

f) This even reinforces further that witnesses can have easily become aware of the people on the photograph and therefore the probative value of the evidence elicited by the TP is compromised and has no probative value.

[2] T. [Redacted]

[3] https://www.youtube.com/watch?v=8GTXsIViu1o&list=PLNKD8XZAcCnMOngt1NWFR6o9NuGFRvhFm&index=3&t=3s (*The transcript of 15th of September 2021)*

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30. Therefore, the TP cannot rely on this evidence. The combination of the above invalidates the Judgment with regard to the identification of the Appellant and compromises the fact established through this evidence and consequently all other facts and evidence related to it. The evidence allows for other reasonable conclusions to be drawn.

Ground-1-(1D)

31. The document titled [Redacted] lacks indicia of authenticity and reliability for the following reasons.

   a. The [Redacted].

   b. The assessment of its authenticity and reliability could have only been done through an expert witness which in the case at hand there was none.

   c. The testimonial evidence does not relate to the [Redacted] does not in any manner refer to the location where [Redacted] would have been detained.

   d. It is an arbitrary conclusion of the TP which says that [Redacted].[4] There is no evidence to support such conclusion.

   e. Last but not least the annotation [Redacted] has nothing to do with the presence or not of the Appellant in the critical dates at the compound in Zllash.

   f. TP has no factual grounds to connect the [Redacted] to the Appellant.

   g. The annotation' [Redacted], demonstrates quite the opposite of what the TP asserted, meaning: the Appellant was not there at the compound at the critical days as envisaged in the indictment.

[4] Para. 226

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h. In addition to the above TP findings contradict themselves as it can be seen from the wording of paragraph 42, in its second sentence, where it lists its own indicia of authenticity and reliability. Among those indicia, are in the following order: origin, authorship or source, chain of custody. None of those criteria are met upon assessing the [Redacted].

32. The combination of the above invalidates the Judgment with regard to the document and compromises the facts established through this evidence and consequently all other facts and evidence related to it. The evidence allows for other reasonable conclusions to be drawn.

Ground-1-(1E)

33. In its Decision of 15th of October 2020[5] the TP admitted the [Redacted], in the same manner TP admitted [Redacted].

34. These statements do not have any probative values and the TP could not have reasonably afford any weight to these statements.

35. The witness [Redacted].

36. The intrinsic value [Redacted] could not have been afforded any weight.

37. In the same manner the [Redacted] ought to have been afforded any weight. The statement of such bears no relevance at all as evidence as [Redacted] has not been an eye witness either to the events on the compound or the alleged events regarding [Redacted].

38. The [Redacted] has equally no weight or any probative value as [Redacted].

[5] F00235

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39. TP erred by placing any reliance in either one of those statements. It invalidates the Judgment as to the evidence [Redacted].

Ground-1-(1F)

40. The testimony of [Redacted] is about the testimony of a person who was detained. [Redacted] account about the circumstances of his detention, and of those whom he was with is in a stark contrast with testimony of other witnesses such [Redacted]. In the paragraphs 75 until 83, [Redacted] testimony was laid down in the Judgment.

41. Even though [Redacted] account was detailed, graphic and emotional and the TP concluded that by these factors [Redacted] testimony was about events that [Redacted] had personally experienced, [Redacted] account of the events was very different about the circumstances of [Redacted] regarding the detention, the treatment of each of the detainees and [Redacted] regarding alleged injuries of co-detainees.

42. As [Redacted] was basically that none of the people with whom [Redacted] was detained had serious injuries. TP in para. 82 stated that from [Redacted] testimony it was apparent to the TP that [Redacted] was afraid to implicate the Appellant. However, [Redacted] stated overwhelmingly clear that the Appellant was simply not there and did not in any manner mistreated [Redacted] or any other detainee.

43. As [Redacted][6].

44. Upon denying any injuries [Redacted] or mistreatment of any kind the SPO was permitted to cross-exam its own witness as a hostile witness.

[6] [Redacted].

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45. TP erred in one hand when found the testimony [Redacted] credible but on the other hand found [Redacted] on the treatment suffering at the detention be of a limited value and only relied on it to the extent of what is corroborated by other witnesses.

46. The Defense submits that there is no reason whatsoever as to why the testimony [Redacted] could not be relied upon in.

47. The Defense submits that apparently favorable testimony for the Appellant, simply because in is in the contrast with other co-detainees, was determined selectively reliable. Any ground for it, is absent.

48. The Defense submits that TP failed to exercise its discretion properly when it permitted the SPO to cross-examined [Redacted]. The Defense submits that any reasonable tribunal would not have excluded, or otherwise afford no or limited weight, to [Redacted] testimony.

49. Therefore, TP erred when it failed to fairly evaluate the [Redacted].

50. The Defense submits that by this action the TP invalidated the Judgment, as such action demonstrates that TP was not impartial when favorable evidence for the Appellant emerged in the trial proceedings.

Ground-1-(1G)

51. TP provided [Redacted], without giving any reasoning of the bases for such a decision.

52. This exercise over the discretion is entirely arbitrary since the Rule 151 (3) makes it clear that there should be a reasoned decision in place [Redacted]. Hence the usage of the evidence of [Redacted] violates the RPE and as such cannot legally hold ground. It

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invalidates the Judgment where reliance is placed on the witness and consequently could not have reasonably used in evidence.

Ground-1-(1H)

53. [Redacted]:

> "**Q.** *Okay.* [Redacted]. *And this is what we want to talk about. So, what can you tell us about that?*
>
> ***A.*** [Redacted]."[7]

54. For the factual finding regarding the existence of an [Redacted] the TP only relied [Redacted] however the TP failed to put proper reliance on [Redacted]. Moreover, [Redacted].

55. Para. 591-595; para. 459-462, 345 and 468, these are paragraphs referring to [Redacted]. However, the only source relied upon for the existence of [Redacted], it has not been corroborated by any other evidence.

56. Therefore, where reliance is placed upon a single testimony about existence of an [Redacted] the TP should have recognized the need for special caution to such testimony. By failing to do so TP erred and it invalidates the evidence elicited from the testimony [Redacted]

Ground-1-(1I)

57. From para. 691 to 694 the TP discusses the mental elements of the killing of the victim. None of the paragraphs in the Judgment reflect a specific criminal intent by the Appellant to commit arbitrary detention, torture and murder against the victims. In particular the

[7] [Redacted]

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purported [Redacted], as cited in para. 694, is not in any manner corroborated by any other evidence.

58. TP considered [Redacted] wholly plausible[8] as it fits within the evidentiary picture whereby the Appellant intended to kill the murder victim and subsequently avoid any proceedings launched regarding his death. The sole ground upon which this claimed [Redacted].

59. TP erred as this entire [Redacted] bears no relevance to either the mental element of the crimes committed nor that [Redacted] ever took place. This [Redacted] has not been substantiated and the Judgement relies only on the testimony [Redacted]. Therefore, the presence of mental element by the Appellant regarding the crimes is not satisfied.

60. The [Redacted] therefore cannot, without any corroboration, be used as evidence of the existence of [Redacted]. Neither does it give evidence about an alleged mental element by the Appellant. The Appellant never corroborated [Redacted]. Hence no reliance of any kind should have been given by the TP to the [Redacted]

61. By failing to do so the TP erred where it placed reliance upon the claim [Redacted]. It invalidates the evidence elicited from [Redacted] and should have given rise to the non-credibility and non-reliability of [Redacted] testimony. It invalidates the Judgment where reliance is placed on the witness and consequently could not have reasonably used in evidence.

Ground-1-(1J)

62. From the assessment of the testimonies of the Defense witnesses the TP relied only, or to a very large extent, on 2 subjective criteria find under VIII and IX, arbitrarily ignoring all other objective parameters of assessment of testimonies of the Defense witnesses from

[8] Para. 694

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criteria I to VII and X. The criteria in paragraph 35 of the Judgment. This shows that TP has erroneously and selectively applied the criteria of assessment which in the Appellant's view should have passed the test cumulatively, in other words each and every parameter of assessment forms solid ground for assessment to the credibility and reliability of the testimonies of each and every witness.

63. TP, in its selective usage in the assessment of Defense witnesses failed to apply the same fair and impartial standard when weighing the evidence, it therefore invalidates the Judgment.

64. [Redacted] given full credence and reliability despite the fact that through the proceedings [Redacted] showed [Redacted] towards the Appellant.

65. [Redacted] expressed in court openly [Redacted] hostility towards the Appellant. [Redacted] did not even want to see or speak out the name of the Appellant. Nevertheless, [Redacted] was sure it was "*him*", without ever properly identifying "*him*", without ever meeting Appellant in [Redacted], and without being able to explain how could [Redacted] be so sure. In other words what were the bases for [Redacted] claimed knowledge that the Appellant was perpetrator of alleged facts.

66. TP erred therefore to apply the same fair and impartial standard when weighing up the evidence of witnesses, an error which invalidates the Judgment. It invalidates the Judgment as no impartial standard was applied.

Ground-1-(1K)

67. As opposed to the witnesses of the Defense, which, as noted above were evaluated based only in two subjective criteria, the witnesses for the SPO were vested credence and

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reliability despite the open admission from their side that it is the lust for money, which is the key driving force behind their testimony.[9]

68. And it is at this stage that the TP violated the equality of arms as it can be seen on the official transcript of Cross-examination by the Defense on which occasion the TP intervened, including Victims counsel and the SPO, and the Defense was cut short in cross- examining the [Redacted] about his financial motives.[10]

69. Failing to acknowledge and consider the possible financial motive to lie, fabricate or distort information, on the part of [Redacted] who claim reparations, therefore invalidates the Judgment. The evidence allows for other reasonable conclusions to be drawn.

Ground-1-(1L)

70. The standard of assessment of Alibi according the paragraph 46 of the Judgment is that the SPO should have eliminated the alibi beyond the reasonable doubt, while fact contained in the testimonies of the witnesses of the both sides prove the opposite:

71. In paragraph 247 the TP stated that it had relied on the evidence under the light of the following factors:

   a. That the Appellant had the ability to move across the territory by variety of means of transportation during the period of indictment.

   b. That the distances between different locations relevant to the case were comparatively small and could therefore be covered in a reasonable amount of time.

   c. All locations mentioned by the Defense including Zllash are within limited area North-East of Prishtina.

[9] [Redacted]
[10] [Redacted]

72. TP has completely ignored in this respect the extreme difficulties in movement, that both the Appellant as well as the Defense witnesses mentioned in their statements.

73. Striking examples to this effect are:

a. Following the NATO airstrikes was utterly difficult to move around.

b. KVM report from their observers on the ground during this difficult time:

"Multiple but unconfirmed reports indicate that ethnic Albanian families are being forced from their homes systematically by neighborhood and being marched to the Prishtine sports stadium. Some groups are being taken directly to the train station for onward movement to FYROM." That is Macedonia." Large groups of armed civilians, some in makeshift uniforms, these are large groups of armed Serb -- Serbian civilians, were -- some of them were in makeshift uniforms and they are reportedly involved in these expulsions as well as with the general harassment of the ethnic Albanians and the looting and vandalism of their homes and shops. This modus operandi is apparently to scare Kosovars from their residences by burning buildings and firing weapons. After exit, the Kosovars are herded to the train station in Prishtine for forward movement to the FYROM border. 7.000 Kosovars were shipped out during the evening of 31 March and 1 April."[11]

c. Kapllan Parduzi who stated that his transfer from Orllan to Potok took nearly 3 days, which would under normal circumstances would take only few hours. [12]

d. Tremendous efforts of which Sheqir Rrahimi had to go through in order reach a short distance from village Kalatice to Rimanishte. [13]

e. Ahmet Ademi who stated that he had tremendous difficulties to reach his destinations of aid distribution even bearing the visible Red Cross insignia as he was a Kosovan Red Cross worker. [14]

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[11] Defense Opening statement p. 2560-2562, quoting the OSCE-KVM Report/ IT-05-87.1, p. 01029, that is p. 164 in the case file, number should read 03525497.

[12] Mr. Parduzi, T. of 11th of April 2022, p. 3429, line 22-23.

[13] Sheqir Rrahimi, T. of 13 April 2022, p. 3666, line 7-8

[14] Ahmet Ademi: T. 28 March 2022/p. 2785 until 2788.

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74. TP should have to the least considered the evidence to be relevant to likelihood (i.e., evidence tending to show that by reason of the presence or absence of the Appellant at a particular place or in a particular area at a particular time he was unlikely to have been at the place where the offences allegedly had been committed at the time of commission, even if it remained a possibility).

75. In para. 332 of the Judgment, rejecting the alibi witnesses the TP in fact reversed the burden of proof without even considering properly the likelihood of the Appellant being elsewhere. thus, forcing the appellant to prove his alibi beyond reasonable doubt.

76. TP therefore erred and unfairly rejected evidence of Alibi which invalidates the Judgment and or occasions a miscarriage of justice. The evidence allows for other reasonable conclusions to be drawn.

Ground-1-(1M)

77. As regard to sub-ground 1M, Appellant refers to the submissions above in relation to sub-ground 1L

Ground-1-(1N)

78. TP erroneously admitted additional evidence in form of the [Redacted].

79. In its decision of 23 of June 2022 TP gave the Defense only 6 days to file submissions regarding [Redacted].

80. According to basic principles of International Criminal Law including Art. 6 of the ECHR an Appellant has under provision 6(3)(b), in conjunction with Art. 31 of the Constitution of Republic of Kosovo (right to fair and impartial trial), have adequate time to prepare a strategy with respect to his case, including where it concerns medical reports.

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81. TP erred in law by not applying this fundamental principle and as a consequence this invalidates the Judgment for the admission of this evidence and consequently use it in the Judgment as well the reparation order.

GROUND 2

All Counts

82. TP erred in fact in making the following of fact for which there was no evidence, or no sufficient evidence, upon which a reasonable tribunal could so find, namely:

Ground-2-(2A)

Determining the location as the Zllash Detention Centre

83. In the general assessment of the SPO witnesses, the TP, evaluated witnesses as to their credibility and reliability, for each of the victims that were allegedly detained, the TP concedes that the victims in question were in fact detained at the location known as the ZDC. For example:

   a. in para. 65 of the Judgement TP concludes: [Redacted] is credible and it relies on his evidence. In the earlier para. 59, TP states that [Redacted] provided evidence about his detention at the **ZDC** and mistreatment he and other detainees suffered **there.**

   b. in para. 74 of the Judgement TP concludes: [Redacted] is credible and it relies on his evidence. In the earlier paragraph 67, TP states that [Redacted] provided evidence about his detention at the **ZDC** and the treatment he and other detainees suffered while **in detention.**

   c. in para. 83 of the Judgement TP concludes: [Redacted] is credible as regards his detention at the **ZDC**, the presence of other detainees at the **ZDC**. The TP concludes furthermore that, with regards to the treatment he and other detainees suffered was of a limited value.

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d. However, the limited value does not concern the place of these said mistreatments. The TP notes that the testimony about his treatment is in stark contrast with the accounts of other witnesses detained **at the ZDC**.

e. Other examples of the usage of the term ZDC can be found in other paragraphs as well.[15]

f. TP found that even if people who were present at the compound, during the period in which the alleged crimes took place, that such witnesses testimonies were discarded as for what a witness saw and experienced; an example in this context is that, once again the TP heard evidence from witness Teuta Hadri who was in the words of the TP stayed **at the ZDC.**[16] This witness testified: "*No one was detained and I saw no one being detained. The civilians from the village came there wearing uniforms and wearing civilian clothes, and the area where we were, that was an area where also civilians had access to. Fatmir Humolli's wife was there with his family. There was no opportunity for anyone to be detained there. There were no such opportunities*".[17] This is another example of TP labelling and qualifying the compound as a detention compound. Even though witnesses explicitly testified that no people were detained at that compound.

g. The testimonies of both witnesses, Fatmir Sopi and Sejdi Veseli are assessed as non-credible and unreliable were these witnesses state that no people were detained in Zllash.[18] This is simply because their statement contradicts statements of witnesses [Redacted].

h. The TP found witness Humolli's testimony not credible even though the witness visited his family members who had sought shelter there. With the same reasoning the TP disregarded his testimony where he stated that BIA had no mandate to arrest anyone by referring once again to other SPO witnesses. [19]

[15] Para. 76, 90 and 85, [Redacted]
[16] Para. 215
[17] T. 11 May 2022 (lines 14 to 19, p. 4209).
[18] Para. 119-120 (F.Sopi); Para. 128, 129 and 130 (S. Veseli)
[19] Para. 133

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i. In sum despite the fact that only later in the Judgment the TP comes to answer the question whether the compound of houses in Zllash was in fact a Detention Center.[20] It is overwhelmingly clear that the TP came to that conclusion much earlier on as it consistently labeled the premises as a detention center or location where people were detained.

j. In light of the above it is incomprehensible that TP says only in para. 348 that it must determine whether the location mentioned by the SPO in the confirmed indictment is in fact the location where the charged crime was allegedly perpetrated.

84. In light of the above the narrative of the TP is such that compound was already established before coming to the answer of this crucial answer to this case.

Ground-2-(2B)

85. The TP erred in its finding (para. 352) that the BIA "*controlled*" the compound and used it as a base. In fact, Mr. Fatmir Sopi in his statement was quoted only partially.

86. First of all, the compound was used by several users such as: KLA soldiers from "Karadak Zone".[21]

87. Second, Fatmir Sopi testified that there was nothing special about this location, apart that it could be used by the KLA soldiers, it was an ordinary house.[22]

88. Nowhere the testimony of Mr. Sopi can give any indication that, in the words of the TP, the BIA "*Controlled the compound*", neither in the testimony of 18th nor 19th January 2022

[20] Para. 348
[21] T. 18 January 2022, p. 2089 line 23 up to the next p. 2090 line 1.
[22] T. 18 January 2022, p. 2090, line 6-10.

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one can find any indication in the testimony of Fatmir Sopi that BIA "*Controlled*" the compound.

89. TP mischaracterized the nature of the presence of members of BIA at the compound. The TP initially stated that "*the BIA occupied a specific compound with a safe house*". This quotation, in para. 349, will be further elaborated under Ground 2C, but for here it suffices to say that it is simply wrong. Later on, it characterizes this occupation as if the BIA had "*Control*" over the compound[23]. As for this control the TP refers to the statement of [Redacted] as well as statement of Sejdi Veseli.[24]

90. Neither [Redacted] nor Sejdi Veseli have been actually present at the compound in the time frame of the indictment. Their knowledge therefore about control over the compound is baseless. Therefore, it is wrong of the TP to state that the control over the compound was corroborated by these two witnesses. As stated before, the Appellant himself never stated that he or BIA had control over the compound, but only referred to the compound as the location where they had safe house available to get rest from their activities in Prishtina.

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[23] Para. 349: footnotes: *([708] Mr Mustafa: 069404-TR-ET, Part 3, p. 18, lines 6-13. In this respect, the Accused was consistent with his previous statement in the Agron Zeqiri case (Mr Mustafa: 7000650-7000660, p. 8.*
[709] Mr Mustafa: 069404-TR-ET, Part 8, p. 1, line to 19 to p. 4, line 15.
[710] Mr Mustafa: 069404-TR-ET, Part 3, p. 14, lines 14-15; p. 18, lines 19-22; Part 7, p. 5, lines 11-12.
[711] Mr Mustafa: 069404-TR-ET, Part 3, p. 20, lines 8-16; see also para. 338.
[712] Mr Mustafa: 069404-TR-ET, Part 1, p. 32, lines 13-14; Part 3, p. 24, line 22; Part 7, p. 30, lines 18-19; Part 8, p. 7, lines 3-9; p. 34, lines 4-6. The Panel notes that the Accused was consistent with his previous statementin the Agron Zeqiri case regarding his role as BIA commander Mr Mustafa: 7000650-7000660, p. 7000651. See also Mr F. Sopi: T. 18 January 2022, public, p. 2060, lines 4-7; Mr Veseli: T. 25 January 2022, public, p. 2195, line 25 to p. 2196, line 2; Mr Humolli: T. 1 February 2022, public, p. 2303, lines 20-22)
[24] Para. 352.

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91. TP quoted Sejdi Veseli as saying that BIA was in charge of the base. However, Sejdi Veseli had no factual knowledge of such control as he had never been into the compound or the base[25] and furthermore that he did not want to interfere in someone else's business. [26]

Ground-2-(2C)

92. TP erred in fact when it states in the paragraph 349 of the Judgment that the Appellant said that BIA occupied a specific compound with a safe house. The TP quotes for its finding about BIA occupying a specific compound the statement of the Appellant Mr. Salih Mustafa, part 8, p. 1 line 19 to p. 4 line 15.[27] Within these four p.s the Appellant speaks only about specific houses in the compound, however he does not indicate in any manner that BIA occupies the compound. He simply explains that there was a house on the compound in which he and others could stay. The house that he drew he mentioned on the drawing BIA. But he equally wrote KLA, indicating that that specific house where he stayed was also shared with other KLA soldiers.

93. Therefore, the conclusion and finding that "*BIA occupied a specific compound*" is wrong. In furtherance of this finding, it is equally wrong, as stated by the TP in paragraph 352 of the Judgment that BIA would have control over compound.

94. The Part 8 of the Appellant's statement dated 19th of November 2019 is quoted for this particular finding however the quote given for this alleged statement of the Appellant simply does not say that BIA occupied a specific compound or any compound at all for that matter.

95. Moreover, if the Appellant said anything about the compound, he spoke only about one or two rooms that people from BIA could use. This was within what the Appellant called

[25] T. 25th of January 2022, p. 2197/line 23-25; p. 2233 line 13-19.
[26] T. 25th of January 2022, p. 2198/line 11-55.
[27] 069404-TR-ET Part 8, p. 1 line 19 to p. 4 line 15.

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the "Safe House". It was made clear by the Appellant that neither he nor BIA ever "*occupied the compound*" and let alone hand "control" over the compound. In his own words the Appellant stated: "*we were guest there*".[28]

96. As the TP consistently took the stance that BIA controlled the compound, and therefore everything occurring there fell under the responsibility of BIA or its commander, the Defense submits that this presumption is fundamentally wrong and subsequently provides the bases for everything that allegedly happened in that compound; consequently, it invalidates the Judgment.

Ground-2-(2D)

SPO indicating the specific location where the alleged crimes took place

97. The Defense submits that not only the SPO but also the Confirmed Indictment singles out one single building of the compound.

98. This can be found from the case material and throughout the proceedings starting from the Pre-Trial Judge until the end of the Proceedings.

99. The Pre-Trial Judge confirmed the Indictment on 5th of October 2020.[29] In the confirmation of the Indictment on multiple occasions the Pre-Trial Judge established that the detainees were kept and cruelly treated within one single building. It is clear from the wording of the Confirmed Indictment. Examples are as following: "*The detainees concerned were kept in a room that was locked with chains and guarded. [Redacted] detainees were kept in custody for 18 days, until on or around 19 April 1999*"[30]; "*The detainees concerned were beaten almost daily, sometimes twice a day, both in the room where they were kept and, in another*

[28] 069404-TR-ET Part 7/p.5/lines 19 to 25

[29] KSC-BC-2020-05/F00008/CONF/RED/1 of 64, 5 October 2020 Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Salih Mustafa

[30] Para. 95

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room, situated upstairs"; "From the barn where they were kept, detainees could hear the other inmates screaming while being beaten upstairs, before they were taken back to the barn."[31]

100. The SPO in its Pre-Trial Brief/ F00088/AO1,11 October 2020, also singled out one building only, and we quote: "*The evidence will show that prisoners were kept on the ground floor of the* ***building*** *used by the BIA unit as their base. This building formed part of the Zllash/Zlaš Detention Compound, where the crimes alleged in the Indictment were committed"*[32]*; "The detainees were kept in the stable of an old house, a sort of barn for animals, which was locked with chains. The door was guarded. The place was in poor condition, with hay on the ground, no proper windows, and no light or air coming in from the outside"*[33]; "*[Redacted] heard other detainees being beaten on the floor above the stable where he was detained"*[34]; "*[Redacted] was beaten both in the stable and upstairs. When upstairs (…)"*[35].

101. The SPO had its opening statement at the beginning of the Trial Proceedings. Once again, the SPO singled out only one building as where the detainees were kept. It was in fact the SPO that singled out only one single building in which the SPO stated that the charges took place. To this effect the Defense submits that in the opening statement the SPO, it showed the very building in which the alleged crimes of arbitrary detention, cruel treatment and torture took place as from where the murder victim was not released. The footage of the Opening Statement of the 15th of September 2021 of the SPO is conclusive as to where the alleged crimes according to the SPO took place. From minute 55.57 until 1.03.37 of the opening statement clearly indicate that it is in one single building where the victims were allegedly held[36].

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[31] Para. 105
[32] The SPO in its Trial Brief F00088/AO1,11 October 2020, para. 30.
[33] Para. 64
[34] Para. 69; citing [Redacted]
[35] Para. 70; citing [Redacted]
[36] T.15th of September 2021; p. 328, line 19 until line 21 on the p. 329. (https://www.youtube.com/watch?v=8GTXsIViu1o&list=PLNKD8XZAcCnMOngt1NWFR6o9NuGFRvhFm&index=3&t=3s.

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102. When the witnesses testified in court, each time they were confronted with a picture of a single building which they had been marking on earlier occasions in their respective statements. Examples of this are:

a) [Redacted] was shown picture of the "Oda" [Redacted] as early as [Redacted] [37]. The witness encircled at that time the "ODA" the two-story house. In addition, the witness also testified during the trial proceedings: "*They took me to the same building, but downstairs. There was a barn there*".[38]

b) [Redacted] pointed out with his finger the very same building known as the Oda, in his interview of [Redacted].[39]

c) [Redacted] testified that he himself did not encircle any building in the photograph, and stated that probably someone else did it.[40]

103. Even for the TP of the Trial Chamber it was unclear in which of the building(s) the detainees were held. This became very clear that during the Trial hearing of witness Selatin Krasniqi which took place nearly by the end of the Trial, 21st of April 2022, TP asked for clarifications from the SPO about this. It must be understood that all SPO witnesses including the once that were allegedly detained had been heard already almost six months earlier. The exchange during the Trial taking place between the SPO and the Presiding Judge[41], is as follows:

"PRESIDING JUDGE VELDT-FOGLIA:

Mr. Prosecutor, I have a question for you, and that is if you could indicate to the TP which are allegedly the structures in which the -- allegedly people were held? And then we can use a photograph, like the one we have been using today of the --

MR. DE MINICIS: If I understand correctly, Your Honor would like me to state now to the TP what the Prosecution case with respect to that is.

[37] T. SPO interview of [Redacted]
[38] T. 4 October 2021, p. 882, line 19-19
[39] T. SPO interview of [Redacted]
[40] T.10 November 2021, p.1471.
[41] T. 21st of April 2022, p. 3970 and 3971.

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PRESIDING JUDGE VELDT-FOGLIA: Yes.

(….)

MR. DE MINICIS: Your Honour, this would be with no prejudice for the final submissions that we'll make in the end when all the evidence is before us. But our case is that building 4A is a place where people were detained, and we have witnesses who indicated the path they walked as they were being led out of that building and then upstairs. And I think that we have at least three witnesses who, as we will make it clear in our final submissions, indicated that that was the main building. And we also believe that building where room 4 was used for interrogation purposes and perhaps a brief detention. So, these are the two buildings that the Prosecution is stating the detention, torture, and cruel treatment were committed.

104. To add to the confusion, The SPO in its Final Trial Brief under paragraph 70 wrote the following: "*At the ZDC, detainees were beaten almost every day. Every time the soldiers entered the stable, they would kick, punch, or slap those detained there. Detainees were also taken upstairs individually, where they were brutally beaten. The downstairs mistreatments took place in front of the other detainees, while upstairs the detainees were taken one at the time*"[42]. Here the focus is once again on one single building.

105. TP requested clarification regarding this issue in a Decision setting the agenda for the hearing on the closing statements and related matters, KSC-BC-2020-05/F00468/RED, 31 August 2022 ('Decision'), paras 10-14, 21. So it is very clear that this issue was to be resolved in this very late stage but before the oral arguments.

106. The SPO replied on this specific matter in filing KSC-BC-2020-05/F00471/[43].

[42] KSC-BC-2020-05/F00459/COR/A01/ Corrected version of 'Prosecution Final Trial Brief pursuant to Rule 134(b)', 21/07/2022, paragraph 70.

[43] KSC-BC-2020-05/F00471/Prosecution submissions pursuant to Decision F00468 setting the agenda for the hearing on the closing statements and related matters, 8 September 2022.

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107. TP even requested clarifications in a Filing of 8 September 2022 i.e F00471 where it asked the SPO to clarify which of the specific buildings located at the compound were allegedly used to detain, interrogate and mistreat individuals during the time frame of the charges. It was only then in the SPO response to the request of the TP that they stated it was the building 4A where the individuals were detained. The building 4A was not the "ODA". In its response the SPO shifted its position that the people were not kept in one building but in three buildings. This was the first time the SPO made it clear to the Defense and the TP.

108. The Defense submits that it has been deceived by the SPO as it shifted nearly at the end of the trial the precise location in which people were kept and mistreated. All witnesses systematically were questioned about one single building. The Defense submits that the Trial Proceedings are unfair, and not in accordance or Article 6 of the European Convention on Human Rights.

109. The Defense, had it known earlier, would have been able to cross examined the witnesses who were allegedly detained on this matter.

110. The Proceedings in this regard have been unfair for the Defense in particular where the TP in its Judgment stated that this matter was immaterial to the determination of the charges to assess, with absolute precision which detainee was detained in which of these buildings and for how long. [44]

111. The TP have erred in fact when it found that it is immaterial to the determination of the charges to assess, with absolute precision which detainee was detained in which of these buildings and for how long.[45]

[44] Para. 372
[45] Para. 372

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112. The TP erred where it said that it must be satisfied – beyond a reasonable doubt and based on evidence as a whole that the crimes charged took place in one or more of the buildings identified above, in the BIA base between 1st April and 19th of April 1999.[46]

113. The TP dismissed the claim of the Defense that the SPO deceived the Defense by changing its case with regards to the specific building (s) with the ZDC in which the victims were allegedly detained, rendering the proceedings unfair.

114. The TP diverted from the SPOs' charges as to where these charges took place. This amounts to a miscarriage of justice as it is fundamental in a criminal case that it is the SPO making a charge whereas the TP must assess whether the alleged crimes took place there (the specific building) and then. For the above-mentioned reasons, the error invalidates the Judgment.

Ground-2-(2E)

Identification of the location by SPO witnesses

115. TP considered that at the very least at the time of their release the alleged victims were able to see the detention location.

116. TP states that very identification evidence across these witnesses indicates that they must have formerly seen the building that thy ultimately recognized in court.[47] On this issue, that they must have formerly seen the building, the Defense submits the following:

a. [Redacted] testified that he had never been in that location before;[48]

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[46] Para. 372.
[47] Para. 368
[48] [Redacted]

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b. when he was allegedly transferred [Redacted] to the alleged location where he was kept, he was put a sack over his head. [49]

c. each time the witness was transferred from the barn to the interrogation room he was once again put a sack over his head.[50]

d. the witness upon his release did not describe any buildings.

117. Therefore, the TP stated that the evidence does not suggest that the alleged victim had their respective heads covered all the times, at the very least according to the TP the alleged victims were able to see the location and to leave the location freely.

118. As described above the witness [Redacted] did not describe the detention location upon his release.

119. Under these circumstances, as described by witness [Redacted] himself it is impossible, implausible and not credible that while in court and confronted with the photographs of the building he cannot possibly state that the building, shown to him, resembled the building in which he was kept and illtreated.

120. The photographic evidence therefore cannot be reasonably contributed to a proper identification of the building in which might have been kept.[51]

121. [Redacted] stated that nearly immediately upon his arrest he had been but a sack over his head.

a. When transferred from the very first place to the second place where he was kept during his entire duration of his detention, each time he would be mistreated he would again have a sack over his head.[52]

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[49] [Redacted]
[50] [Redacted]
[51] [Redacted]
[52] [Redacted]

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b. Upon his release [Redacted] stated he that he paid no attention as to the location or the building in which he had been kept. [53]

c. Lastly [Redacted].[54]

122. The above factors indicate contrary to what the TP found would any indication that the witness must have formerly seen the buildings which they ultimately recognize in court.

123. The Defense once again stresses and submits that on the bases of his own account the [Redacted] could not have possibly, plausibly and credibly state that: "I have seen a little bit to know where I was" and that he had seen enough to be able to recognize the building where he was detained in the photographs presented to him.

124. The fact that [Redacted] was able to draw a sketch of a building is irrelevant. Such a sketch simply indicates the type of building; it does not indicate whether it was on that specific location and in that specific building where he was kept.

125. Therefore, the TP erred in fact and could not reasonably come to the conclusion that the witness [Redacted].

126. The circumstances cannot plausibly, reasonably and credibly constitute the bases of the knowledge and ability to photographically identify the physical structure in court.

127. TP has erroneously determined that the witnesses had factual bases and bases for his knowledge to identify the building when shown photographs.

128. Lastly [Redacted] was each time confronted with the same building when photographs were shown to him. Therefore, leaving him no other building to choose from.

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[53] [Redacted]

[54] [Redacted]

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129. In this regard it is worth to mentioned that in all photographs shown to him there was only one building with lower and upper part [55]

130. [Redacted] contrary to what the TP says in para. 368, the witness [Redacted] does not give any indications that he has formerly seen the building where he was kept. [56]

131. Even though this witness [Redacted], it was his testimony that the place where in which he was kept was not further that 200 m from the school. This is in the stark contrast with the factual situation, as the compound was at least a good 20-minute walk uphill from the school.[57]

132. TP erred in fact where witness [Redacted] identified in closed session the building in which he was kept. In fact, in closed session the witness 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.

133. TP erred in para. 364 that [Redacted] identified the very same building as the [Redacted] and [Redacted]. In fact, he spoke about and entirely different building, and therefore his testimony cannot be found mutually corroborative and credible with [Redacted] and [Redacted].

134. In addition, even [Redacted] testified that when he and other would be transferred from one (part of) building (s) in order to be interrogated that a bag would be placed over their heads, it is therefore impossible that based upon his own account the witness could identify the building in which he or the others were kept.

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[55] [Redacted]
[56] [Redacted]
[57] [Redacted]

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135. TP erred where it states that at the very least, at the time of release of [Redacted] he was able to see the detention location. Be that as may witness [Redacted] did not in his testimony describe how the place looked like (his detention location) upon his release. [58]

136. The photograph which was presented to the witness could not credibly identify the building in which he was held.

137. Apart from this the witness does not give any specific indication about the entire location where he was kept, the only indication he gives that the location where he was detained was about 200 m from the school, [Redacted].

138. As for the description of the fence as referred to in paragraph 270 of the Judgment, such fence might have very well existed elsewhere at a location near by the school. A fence, whether it was there entirely or partially, as such is not a distinctive feature of the location. [59]

139. The Defense submits that based on the own accounts of [Redacted]. It cannot possibly be concluded of them having knowledge upon which they can base their alleged recognition or identification of the location and the building where they were held.

140. The photographs shown to each of the witnesses were suggestive. The photographs shown to the witnesses each and every time featured a single two-story building. One of the witnesses did not even identify the building in which the people were allegedly interrogated.

[58] [Redacted]
[59] [Redacted]

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141. In sum, the TP erred in fact where in the Judgment that the victims were able, and did actually see the detention location, is wrong. They did not, or upon their release, did not pay any attention to that.

142. It therefore constitutes an error of fact where the TP determined so, and occasions a miscarriage of justice as the Appellant has been found guilty on the count of arbitrary detention, torture, and murder in this place and in the period of the indictment.

143. Lastly the Defense submits that the identification of the location by witness [Redacted] bears no relevance as to the detention of any of the people. [Redacted].

144. Mr. Fatmir Sopi, who knows the location denied that any person was ever detained there.

145. Mr. Fatmir Humolli, whose family was staying in the location, denied that anyone was detained there.

146. Both Mr. Krasniqi and Mr. Ajeti who were there nearly all the time and know the place denied that anybody has been detained there in that period of time.

147. Mrs. Hadri and Ibadete Canolli-Kaciu who were also there in the period of the indictment also denied that any person was detained in that location.

148. It is completely implausible all these people separate from each other and not even knowing about each other's testimonies would align their testimonies to this fact.

149. Accordingly, the Defense submits that with regard to the identification of the location by the SPO witnesses is wrong as far as it identifies the detention location of the victims.

150. The Judgement as for this finding occasioned a miscarriage of justice.

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Ground-2-(2F)

The quote was not properly assessed in the context.

151. In para. 365 among other the identification evidence of the three victims is said to be corroborated. The corroboration consists of witness [Redacted], F. Sopi and Mr. Krasniqi. The TP observed in this respect that [Redacted] stated that the building resembled each other not only in this compound but even in the entire village.

152. The quote as such is correct, however in furtherance of the quotations the TP says that: "as established that the Sfarc property: "*as established was Adem Krasniqi's property lend to the KLA for the establishment of the BIA base in Zllash*".

153. It is this very finding of the TP that the Defense contests. The Defense envisaged here that contrary to the finding of the TP none of the witnesses ever stated the "Sfarc" property was "*lent to the KLA for the establishment of the BIA base*". Mr. Sopi never stated this even though he has been cited for this. The correct quote of Mr. Sopi should read that the family of Adem Krasniqi was willing to lend the property to the KLA.[60] In fact Mr. Sopi did not corroborate the statement of [Redacted].

154. In the same vein Mr. S. Krasniqi has been cited as corroborating evidence for the above-mentioned finding ("*lent to the KLA for the establishment of the BIA base*"). Mr. S. Krasniqi did not in any manner say that the lending of the property to the KLA had anything specific purpose, such as establishing a BIA base.

155. Even though [Redacted]was quoted correctly the Defense submits that the additional quotes do not corroborate [Redacted]evidence and therefore the finding of the TP is

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[60] Mr. Fatmir Sopi: T. 18 January 2022, public, p. 2048, lines 5 to 13; p. 2088, line 25 to p. 2089, line 19; see Para. 350.

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wrong and misrepresents the evidence given by [Redacted], Mr. Fatmir Sopi and Mr. S. Krasniqi.

156. TP constitutes an error that leads to invalidation of the Judgment as well as miscarriage of justice as it is upon this finding that the TP based its findings that BIA would be either in control, in charge of or had any authority over the compound. It is also on this erroneous finding that the Appellant would be in command of the compound or the people from his unit that might stay overnight there, taking rest from their activities in Prishtina.

157. In sum nothing to the effect of: "*lent to the KLA for the establishment of the BIA base*" could have been by any reasonable Tribunal established or could be deducted from the testimonies of the [Redacted], Mr. Fatmir Sopi and Mr. S. Krasniqi.

Ground-2-(2G)

158. TP has consistently lacked to give proper weight to Defense witnesses who were able to observe the location center to this case (the compound). TP misrepresented even what witnesses have stated regarding the compound. A good example to this approach is para. 203 of the Judgment in which the TP states that when repeatedly asked "*who was in charge of the BIA Base?*" Mr. Krasniqi mentioned a variety of names but remarkably never mentioned the name of the Appellant among those in in command. Indeed Mr. Krasniqi admitted that the Appellant was his commander in BIA and that he had authority over the BIA members in Zllash. However, this does not concern about who was "*in charge of the BIA base in Zllash*". The question "*who was in charge of the BIA Base?*" was never asked to the witness as quoted in this paragraph. Mr. S. Krasniqi was asked about the location by the Defense as well as by the SPO. The SPO in its questioning formulated its question as: "Q. *So at the compound -- at the BIA -- the compound which hosted BIA, where Salih Mustafa and his men would occasionally stay…*".[61] Even the TP itself, when the Presiding Judge

[61] T. 21st of April 2022, Testimony of Mr. Selatin Krasniqi, p. 3995, lines 23 and 24.

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questioned Mr. S. Krasniqi by quoting an earlier question posed by the prosecutor, used the wording "*the location*"[62].

159. TP has erroneously mixed up the authority that the Appellant had over BIA members with whoever was in charge of the compound. Even the Appellant did not say, contrary to what the TP states in the para. 203 that he was, that even though the Appellant said that he was the BIA commander he clearly stated that BIA was in Zllash a guest on the compound.

160. Clearly the TP misrepresented the questions to witness S. Krasniqi and subsequently made an erroneous finding. Moreover, it determined that the testimony of Mr. S. Krasniqi was wholly implausible and contradictory.

161. The Defense submits that there is absolutely no implausibility or contradiction of Mr. S. Krasniqi Testimony with evidence provided by the Appellant. The Defense further submits that other factors considered by the TP as to the reliability and credibility of his evidence are completely irrelevant as to what Mr. Krasniqi eye-witnessed while at the compound. The TP deducts some kind of inclination of Mr. Krasniqi to provide evidence favorable to the Appellant, however on improper and irrelevant grounds. Whatever the bond between Mr. S. Krasniqi and the Appellant might be it does not in any manner… about what he saw, experienced and heard at the compound. The Defense submits that the TP searched for arguments in order to reject his testimony.

162. Mr. S. Krasniqi's testimony does not in any manner contradict what the Appellant said and what he said himself. The witness testified that he had never seen anybody being detained in any of the other buildings on the compound. The witness said in full belief that nobody was ever detained there, and that he never saw any such people. Of all the buildings on the location that has been discussed with the witness, the witness testified

[62] T. 21st of April 2022, Testimony of Mr. Selatin Krasniqi, p. 3994, lines 3 to 11.

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that has never seen people there detained, he never heard about that. The SPO's document that the discussed location would have been the Zllash Prison Camp, and asked about his reaction to that the witness stated that according to him "there has never been a detention center in Zllash village". None of the buildings was guarded. There was no need for it.[63]

163. Other Defense witnesses were misrepresented or their relevant observations were rejected on completely irrelevant grounds.

164. The Defense witness Mr. Ajeti arrived in late March 1999 at the compound in Zllash and stayed there, with the exception of two or three days, through the entire period of the indictment. Mr. Ajeti.: "*If I'm not mistaken, it was 30 or 31 March 1999. That is the date when I left Prishtine. These two dates, these are the two possible dates when I left. I'm not very certain about the accurate date*".[64] The witness explained his routine in Zllash. He had first gone to Kecekolle, and when he returned, he stayed in Zllash until the offensive. The offensive started according to the witness' thought on 16th of April in Viti of Marec. The witness further explained that he would most of the time go to his family and eat there and stay overnight, and the next morning he would go back to the Compound in Zllash, where he would stay in the daytime.[65] His observations on what he heard and what he saw and his activities there can be found through his testimony.

165. The TP rejected the testimony of Mr. Ajeti on the grounds of telephone contacts of 2020, a Facebook post and the fact that he did not initially mention other BIA members. Even though names of these members were never asked before, nevertheless he truthfully testified that he knew them.

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[63] S. Krasniqi, T. 21st of April 2022, p.3909 line 21-22, p.3910 line 22-25, p.3911 line 1 and 21-25, p.3912 line 1415.

[64] T. 22 April 2022, p.4057, lines 23-25

[65] T. 22 April 2022, p.4063

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166. A Facebook post of Mr. Ajeti where Mr. Ajeti says that he is proud that as young fighter of only 18 years of age to have had a commander such as Mr. Mustafa, does not in any manner affect his observation at the period of indictment on the compound in Zllash.

167. These completely unrelated issues do not in any manner diminish or eliminate his personal observations and experiences in his testimony about the situation on the compound.

168. The testimonies of Mrs. Teuta Hadri and Mrs. Canolli-Kaciu were also rejected, the first one the bases on proper personal knowledge (paragraph 216) and the other one based on one Facebook posting. Both women who worked on the compound trying to save lives of wounded and injured people their testimonies are rejected. It is incomprehensible how the TP can do as these women were 24 hours a day busy with their medical tasks and would be unable to familiarize themselves with the surrounding environment.

169. Mrs. Hadri said indeed that she did not have much time to go outside her room, however while working on the compound multiple days in a row it is obvious that she was in fact able to look around clearly at the compound. It is inconceivable, that while Mrs. Hadri was treating her patients in the very same building that is at the heart of the indictment, to state that she had a very limited bases of knowledge to testify about the events relevant to the charges. Mrs. Hadri refuted SPO claims that individuals were detained in Zllash. It is further biased that TP uses the testimony of Mrs. Hadri to the extent that where she was at the time (on the compound) she was very busy with patients examining them and therefore she did not have much time to go outside the room.[66]

[66] TP cites Mrs. T. Hadri's testimony in footnote 431.

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170. It is a distortion of facts to rely on such testimony and interpret it in a manner as if she would have no time at all to observe the location. No reasonable tribunal can interpret as statement in such a manner as this TP did.

171. As for Mrs. Canolli-Kaciu, it is equally a distortion of the facts when interpreting that as she stayed mostly inside her room because she had a lot of work to do and would not have had any opportunity to look around on the compound where she was working as a nurse. Their view was never impaired by anything, which the TP even concedes in paragraph 369 of the Judgment, where the TP considered that: "*more complete and possibly accurate description of the ZDC* (… *Is logical, as there is no evidence indication that their freedom of movement or observation was restricted*)[67].

172. Mrs. Canolli-Kaciu's testimony was equally rejected or at least not objectively considered in para. 222 and 223 is demonstrated by a striking example as the one about a Facebook post with a "*like*" in the account of Mr. Mehmetaj apparently to give some moral support to the Appellant does not in any manner affect the observations that Mrs. Canolli-Kaciu had during the time she was present on the compound.

173. The very same counts for Mr. Humolli whose family was present on the premises and who spoke extensively about him visiting his family there outside in the yard.[68] Whatever the function of Mr. Humolli might have been at that time his observations cannot be affected by it.

174. Mr. Fatmir Humolli's family, his wife and children, were staying in the compound. He in person visited them regularly in that location. It seems from the Judgment that the skepticism about the Specialist Chambers is a decisive factor to reject personal observation he made at the compound. Whatever the views of Mr. Humolli might be the

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[67] Para. 369

[68] T. 1st February 2022, p. 2361 line 20-25; p. 2362-2363 line 11-12 and 24-25 until p. 2364 line1-3; T. 2nd of February 2022, p. 2405 line 5 up to p. 2409 line 21, p. 2424 line 16 up to p. 2425 line 15.

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TP did not in any manner argue why his testimony regarding his observations and experiences at the compound could not be credible and reliable.

175. Indeed Mr. Humolli was among the five eyewitnesses with knowledge of the compound, and whose vison was in no manner impaired that he was able to make a more complete and accurate description of the location as can be seen in para. 369 of the Judgment.

176. Therefore, the TP erred in fact and erred to the extent that they rejected the testimony of Mr. Humolli and the four witnesses mentioned above and did not give any substantial arguments as to why their observations are regarded as not credible and reliable.

177. The Defense submits that this invalidates the Judgment and occasions a miscarriage of justice.

178. This ground 2G should be read in conjunction with ground 2I, in which a presumed inclination of witnesses is discussed.

Ground-2-(2H)

179. As regards to sub-ground 2 H, Appellant refers to the submissions above in relation to sub-ground 2E

Ground-2-(2I)

180. In para. 375 of the Judgment the TP states that the TP has received evidence by KLA members who categorically denied the existence of any detention and mistreatment practices in Zllash at any point in time. It cited, inter alia, statements of Fatmir Sopi, Sejdi Veseli, Nuredin Ibishi, Selatin Krasniqi, Muhamet Ajeti. Beside these witnesses even other witnesses testifies to the same effect, for ex. Teuta Hadri, Ibadete Canolli-Kaciu, Ibrahim Mehmetaj were among those.[69]

[69] Para. 375.

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181. In para. 376 TP considered such refutation evidence unpersuasive weighted against the evidence of only three victims, each of them giving very limited information about their precise location of detention.

182. The reasons for that would be that TP believes that these people have a strong inclination to provide evidence more favorable to the Appellant, to BIA or to the KLA. Accordingly, TP is of a view that they had incentive to deny any detention and mistreatment practices in Zllash. Apart from this refutation evidence would be in contradiction with the evidence of the Appellant who admitted that soldiers and possibly civilians were detained at the "BIA base" in Zllash.

183. TP considers the evidence of the Appellant on this matter authoritative and credible, inter alia because of his, what TP calls first-hand knowledge and control of a BIA base.

184. TP found that the evidence of the Appellant is corroborated by [Redacted] and to some extent to the photographic identification by these witnesses.

185. TP in fact categorically denies the observations of at least seven Defense witnesses who have been present at the compound in Zllash.

186. TP rejects the observations of these people on a single ground that these people for some reason would have a strong inclination to provide evidence favorable to the Appellant.

187. With regard to the evidence given by the Appellant, one must understand what Appellant actually said. Close reading of his testimony indicates that he has been only a few times and for a brief period of time at the compound in Zllash during the period of the indictment. All the other Defense witnesses were there for much longer time and some of them nearly constantly. The Appellant never indicated any time frame, and certainly not the timeframe of the period of the indictment that soldiers might have been

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detained there, given the fact that he himself was no present in Zllash the consideration that the Appellant evidence can be reasonably found authoritative and credible is wrong and incomprehensible.

188. TP did never assess the actual observations that the Defense witnesses made regarding the absence of a detention room; any building guarded. Whether witnesses were members of the KLA or not does not in any manner affect their observations. TP itself even considered a para. 369 of the Judgment that a more complete and possible description of the ZDC by some Defense witnesses, such as Mr. Hadri, Mrs. Canolli-Kaciu, Mr. Krasniqi, Mr. Ajeti and Mr. Humolli as logical as their freedom of movement or observation was not restricted. Their observations were made as people who were free to move on the compound, and which had a bearing on how they were able to observe their environment.

189. TP therefore did not reject their observations but only when it comes to the fact that these people never observed any detention place or any people being detained, only then TP resorts to the presumption that these people would have some inclination to distort their own observations. Apparently, the TP has the narrative that people were detained on that compound and that all witnesses with knowledge of location would deny the existence of people being detained at that location. The conclusion is simple: The denial of witnesses (3 of them even SPO witnesses) of the existence of detention room on the compound simply does not fit the narrative of the TP which determined on the bases of only three victim's testimonies (with none of them describing the location of their captivity) that such detention room existed on the compound. The observations of these three witnesses have been discussed earlier.

Ground-2-(2J)

190. TP stated that they do pay regard to Mr. Borovci's evidence as the alibi timeframe of 2 and 3 of April 1999.

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191. Mr. Gani Sopi testified that he interacted with the Appellant "*at the beginning of April 1999*" in the first weeks of April 1999, more specifically that it was on 2nd and 3 of April 1999 when Mr. Sopi talked with the Appellant.

192. Both Mr. Borovci and Mr. G. Sopi – both for different reasons- were not conclusive on which precise date they have come from Pristina to Butovc.

193. TP focused on the dates either 28 March 1999 or 31st March 1999, and used their respective testimonies in the sense that both were unable to be conclusive about their respective signposts from which they calculated their interactions.

194. TP used a table found on internet which indicates a celebration called "*-Eid al Adha*" [70], where that table indicated that the celebration took place on 28th of March 1999.[71]

195. However, TP did not actually take into consideration that in Kosovo the "S*mall Bajram [Small Aid]*" is not a celebration that comes down to one single day, in fact it is common knowledge that the small Bajram celebrated in Kosovo has a time span of 4 days. It is therefore irrelevant whether the small Bajram started on 28th or 31st of March 1999.

196. The importance of the testimony is that both witnesses connect their interaction with the Appellant within the period of the "S*mall Bajram*" celebrations.

197. Both dates 28th and 31st of March fall under within the timespan of the "Small Bajram" celebrations. Their interactions with the Appellant took place in the beginning of the time of these Bajram celebrations further developing-as for Mr. G. Sopi- in the first and second week of April, and for Mr. Borovci his interactions with the Appellant were on the 2nd or 3 of April 1999.

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[70] [Redacted]
[71] Para. 280

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198. These witnesses therefore did not in any manner coordinated any of their changes in their respective testimonies but simply were unable to exactly determine which date the celebration of" Small *Bajram"* would start.

199. TP has wrongly put weight on the specific dates by simply discarding the celebrations as such and the timeframe within which this took place. The importance is: witnesses connected it to the "Small Bajram".

200. Whether Mr. Borovci verified later on for himself with a third person (a Hoxha-an Imam) is entirely irrelevant. Mr. Borovci was simply uncertain whether it was on 28th of March and later received information from Hoxha that the small Bajram was on 31st of March.

201. TP erred in fact where a simple verification of his own testimony within person who is not related at all to Mr. G. Sopi, would justify a conclusion for coordination between Mr. Sopi and Mr. Borovci regarding this date.

202. Neither of both witnesses would have not have any incentive or reason as they would have no idea whether these dates would serve to the benefit of the Appellant.

203. This error in fact where it presumes and suggests any coordination between the two witnesses is groundless. It occasions a miscarriage of justice as for the wrong reasons TP regards the testimony of both men non reliable and non-credible.

Ground-2-(2K)

204. As already stated under Ground 1J the significance that TP considered the testimony of Defense witnesses one sided and biased and failed to apply self-imposed factors, even failed to consider the testimony of Defense witnesses in holistic manner.

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205. A holistic evaluation of Defense witnesses did not take place, in fact TP only weighted individual circumstances of Defense witnesses which carry no weight at all as to their observations, experiences and eye-witness testimonies.

206. The personal contact of a witness with the Appellant has been each time rejected on a presumed and unfounded connections that the witness had with the Appellant which would lead TP to the conclusion that therefore the observations, interactions that these people had about or with the Appellant would therefore result in a non-credibility of the evidence provided or that with these witness's great caution was exercised.

207. The constant template used by the TP for of these witnesses proves the copy paste method of the TP when rejecting the testimonies of Defense witnesses.

208. The Defense submits that TP never gave a proper weight to the testimony given by the Defense witnesses. The copy-paste pattern is overwhelmingly present when rejecting many if not all testimonies of the Defense witnesses.

209. By creating factors to assess credibility and reliability only at the time of the Judgment and not in any manner before the testimonies of witness are heard is also unjust. To set standards only at the end of the Trial is simply not right as the Defense is unable to anticipate upon which criteria witnesses will be assessed.

Ground-2-(2L)

210. TP assessed all Defense witnesses. The witnesses listed under 1,2,4,8,9,11,12,13 is consistently not taken seriously into consideration and their testimony is systematically rejected with the sentence "*These factors greatly affect the witness's credibility therefore has been considered with extreme caution*"

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211. The witnesses listed under 3,5,6,7,14, were also not considered seriously as the same sentence is used as a ground for rejecting the credibility of these witnesses. With these witnesses the TP each time singles out a factor that potentially affects the reliability of the witnesses' evidence.

212. In essence TP has used this template systematically for all the Defense witnesses. Rule 143 of the Rules prescribes: "*If the evidence allows for other reasonable conclusions to be drawn the standard of proof beyond a reasonable doubt is not satisfied* ".

213. The testimony of the witnesses that provided evidence for the presence of the Appellant in Butovc is rejected.[72]

214. The testimony of the witnesses that provided evidence for the presence of the Appellant in Barrileve is rejected.[73]

215. The testimony of the witnesses that provided evidence for the presence of the Appellant in Rimanishte and Bellopoje is rejected.[74]

216. The testimony of the witnesses that provided evidence for the presence of the Appellant in Prishtina is rejected.[75]

217. The testimony of the witnesses that provided evidence for the non-presence of the Appellant in Zllash is rejected.[76] Each time the TP finds something in the testimony of the witness in order to reject the testimony of the witnesses. Thereby it relies to a large, if not to a sole extent, to only two witnesses who were allegedly mistreated in the compound and one witness who said that he saw the Appellant one single and short

[72] Para. 263, 273,274,264-267,268-269,270-272,273-290,
[73] Para. 291-292,293-295,296-301
[74] Para. 302-303,304-306,307-311,
[75] Para. 312-320
[76] Para. 321-322 and 323 until 333

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occasion on the compound. Mr. Veseli was not specific on the date and time when he said that the Appellant was "often in Zllash", but nevertheless the TP used this vague statement as a bases for the presence of the Appellant on the compound. Lastly the TP used the statement of the Appellant even though he never gave any precision about the time(s) and date(s) that he was staying overnight at the compound.

218. It is obvious that the TP could not draw reasonably, objectively and impartially the conclusion and that the Appellant was either elsewhere or his non-presence at the compound was rejected.

Ground-2-(2M)

219. TP must assess testimonial evidence on the bases under Rule 139 (4) of the Rules. Credibility of the witness, in the words of the TP, relates to whether a witness testified truthfully. Reliability refers to whether facts on which a witness testified maybe confirmed or put in doubt by other evidence or surrounding circumstances.[77]

220. As already elaborated in in Ground 2 G, TP has consistently lacked to give proper weight to Defense witnesses. TP in fact categorically denied the observations of at least seven Defense witnesses who have been present at the compound in Zllash. Other Defense witnesses' observations were simply rejected. Defense witnesses' testimonies were rejected on completely irrelevant grounds. TP considered that the denial of existence of any detention and mistreatment in Zllash was unpersuasive weighted against the evidence of only [Redacted].[78]

221. The Defense submits that factors considered by the TP have nothing to do with the reliability and credibility of the evidence provided by Defense witnesses. In fact,

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[77] Para. 34
[78] Para. 375 and 376

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completely irrelevant factors concerning the person himself were considered. Therefore, the TP erred in its application of Rule 139 (4).

222. The TP systematically used factors that they do not relate in any manner to the truthfulness of a testimony or to the implausibility of a fact as testified about by the witnesses.

Ibrahim Mehmetaj

223. His testimony was affected because he read the confirmed indictment[79]; TP considers that his willingness to answer specific questions truthfully, citing that he had only heard about detention in Zllash long after the war. A Facebook posting with a photo of him with Mr. Mustafa seems to show strong expression of disbelief against Judicial process before the KSC against the Appellant. The conclusion is that Mehmetaj provided evidence general favorable to the Apellant and unfavorable to the SPO. Never during the time of testimony of Mehmetaj neither the TP nor the SPO ever cautioned or otherwise warned Mehmetaj that his testimony was untruthful. And never was Mehmetaj confronted by the TP or the SPO that his experience and observations at the compound were either untruthful or implausible due to other testimonies from victims.

224. TP concluded that Mehmetaj had a clear intention to distance himself and the accused from any involvement in BIA related issues in Zllash, especially concerning KLA actions against alleged collaborators and detention practices, para.141 of the Judgment. This Conclusion followed regarding what the panel called a strong reluctance by Mr. Mehmetaj to answer questions regarding those allegedly collaborating against the KLA and his awareness of detentions at the compound. And it included instances where the witness was confronted with prior statements or was prompted by the Presiding Judge to response. TP relies in this regard on the testimony of 23 March 2022.[80].

[79] Para. 141
[80] T. 23 March 2022.[80] Page 2677/line 19 to page 2685 line 1.

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225. Further scrutiny of this particular transcript however in the defenses view does not show a reluctance by Mr. Mehmetaj to answer questions. What actually can be concluded is that Mr. Mehmetaj consistently tries to express the fact that he is aware of the rumors about detentions at the compound. He has no personal knowledge of it, does not know the source from where those rumors came let alone that he would have personal knowledge about it, therefore to conclude, as the TP does a clear intention to distance himself from either the accused or KLA actions against alleged collaborators and detention practices is simply wrong. TP simply derives and unsubstantiated intention by the witness regarding his willingness to truthfully answer specific questions. TP states that this negatively impacts the witness's overall credibility.

226. Defense submits that the Mr. Mehmetaj's statement was simply consistent in the fact that he himself was not aware of these issues and spoke only about rumors and here-says from sources from which he could not determine either the value or the personal knowledge that these sources might or might not have had.

Ahmet Ademi

227. TP observes that he is very active on social media citing a Facebook post of support to Cali.[81] A careful reading of a testimony of Mr. Ademi shows clearly that this man did not know Mr. Brahim Mehmetaj neither during the war nor after the war in Kosovo. He just simply commented on a Facebook post. TP cannot draw far reaching conclusions on how social media participant behave, sometimes they post themselves and sometimes they like, share or other time re-tweet (as in Twitter). It does not mean that there is any direct relationship between a person on the photo and a person who puts a like or comment on such photo. Therefore, it is completely wrong where TP considers it "*plainly not true*" that Ademi said that he did not know Mehmetaj.

[81] Para. 147

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Jakup Ismaili

228. The credibility of this witness is being considered.[82] This is not done on the bases of the experiences and observations of Ismaili when he testified about his meetings with the Appellant. It is only based on the fact that these Ismail and the Appellant had contact by telephone. The fact that people know each other for over 20 years make it entirely logical that those people have contacts with each other. Therefore, the assumption that for that reason Ismaili was inclined to provide only evidence generally favorable to the Appellant and unfavorable to the SPO, is groundless. TP could in such instance, if they were to seek the truth in a criminal case, simply question the witness about it before resorting to an assumption without any factual ground.

229. The TP assumed a theoretical subordinate-superior relationship between Ismaili and the Appellant. This express a clear mischaracterization of BIA, which were a group of people consisting only of untrained, unarmed, non-combatants who were involved of helping the civilian population during the period of the conflict. In many paragraphs, despite overwhelming testimonial of evidence of BIA members about what the task of BIA were, show that the TP never actually considered it.[83] TP portrays BIA as a military structure, where it was simply consisted of volunteered civilians

230. Many people in Kosovo support people who fought for the KLA. It does not mean that their testimony in court is to be disregarded or considered with extreme caution.

231. Again, with testimony of Ismaili, the TP never warned the witness as to the implausibility of his account of events during testimony, or that Ismaili would not tell the truth. Ismaili testified about his encounters with the Appellant while being in village Butovc. That part of his testimony was not even, or hardly, addressed when assessing the real content of his testimony.

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[82] Para. 149
[83] Para. 334-337,

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Hazir Borovci

232. Hazir Borovci testified in court that he is a friend of the Appellant and that the two share "*the common work for freedom of the country, for the liberation of Kosovo*".[84] Facebook postings of Borovci in relation to the Appellant are again cited by the TP.

233. TP misrepresented the superior-subordinate relationship between Mehmetaj and this witness.[85] Mr. Mehmetaj left his position as a deputy of the Appellant already in February 1999.[86] Borovci testified about whereabouts of and his interactions with the Appellant at the end of March 1999. Therefore, the assumption of a Subordinate-Superior relationship is groundless and without any fact.

234. As for Borovci's Facebook postings these are in line with any person in Kosovo who support those who fought for the liberation of Kosovo. It does not in any manner diminish the testimony about what these people experienced, eye-witnessed, observed or with whom they interacted and where and when.

Gani Sopi

235. TP assessed Mr. G. Sopi's testimony.[87] In their general assessment TP focused on non-eyewitness related matters as a factor affecting credibility. These factors are for TP a signal for an inclination to provide mora favorable evidence to the Appellant and unfavorable to the SPO, and to even align his evidence to that of other witnesses.

236. The TP in no manner considers the content of the evidence provided by Mr. G. Sopi regarding the moments when he met the Appellant. The TP resorts to supposed memory lapses that the witness spoke about especially when he could not exactly recall when Small Bajram in 1999 took place.

[84] Para. 155
[85] Para. 158.
[86] T. 23 March 2022, p. 2657, lines 6-12.
[87] Para. 159 until 166.

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237. Mr. G. Sopi connected his encounter with the Appellant in Butovc to the "*Small Bajram*" holiday that took place in 1999. TP, overlooked, despite general internet sources, that those holidays cover four days.[88] No matter on which day it precisely falls is therefore after the 23 years not really a memory lapse. However, the TP simply uses this to reject the eye-witness testimony of this witness where he described his encounters with Mr. Mustafa.

238. TP, even with this witness, further states that even if Mr. G. Sopi had encounters with the Appellant that this would have not prevented that the Appellant "*could have covered*" the distance between Butovc and Zllash within the same day. The TP failed to take into account the situation and difficulties that people had, including the Appellant, when going from one place to another. This has been discussed earlier in this document.

239. Moreover, it is important to note that the TP failed to factually establish that the Appellant indeed went to Zllash from Butovc on the days that Sopi had his encounters with the Appellant. The TP merely uses here a theoretical possibility.

240. The Defense submits that without establishing facts in criminal case the TP cannot use any theoretical possibilities for movements of the Appellant. The Defense submits that the core of the witness testimony was not properly considered by the TP.

Bislim Nreci

241. Mr. Nreci's testimony was rejected as he was unable to provide an exact date, also when questioned 23 years after, his meeting with the Appellant. Apparently simply stating that the encounter took place four or five days before the 22nd April 1999 did not suffice. Even though the 22nd of April 1999 was for him an important date as he encountered in village of Barileve an event that he could not forget. That was an event to which he connected

[88] https://www.britannica.com/topic/Eid-al-Adha

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the date of 22nd of April to the death of two people, Bedri Kurti and Mr. Kaciu. In fact, these people died on 12th of April 1999. In his testimony to the Defense, he was confronted with the gravesite photographs of these two people and also with the Kosovo Memory Book data. The witness than apologized and said that he had just the 22nd of April as a date of death of these two people.[89]

242. Here again it is the event to which Mr. Nreci connects his encounter with the Appellant.

243. In paragraphs 167 until 171 the TP did not consider any factor as to the content of the testimony but rather used the fact that he stated he was a KLA soldier but did not know whether he was a BIA member as a factor to render his testimony as implausible. Even though in the entire case a full list of BIA members was never produced nor the fact that even such document even existed during the period of the conflict. It is entirely understandable that people are not aware of lists made by others long after the conflict.

244. In addition, the fact that Mr. Nreci commented on a Facebook post with words: "*eternal respect for the liberators and their families*" is another factor for the TP to conclude that information provided in his testimony about the Appellant and BIA has further affected that Mr. Nreci provided truthful information. Here time and again the TP, without any factual bases come to some sort of conclusion about Mr. Nreci's testimony about what he experienced.

245. Furthermore, the TP's assumption of a subordinate-superior relationship between Mr. Nreci and the Appellant is without any grounds. In fact, is a mischaracterization of the relationship as BIA consisted of non-combative, volunteer inhabitants that supported the efforts against Serbian regime. A vertical or any hierarchy for that matter was nonexistent in BIA. Bia was a loosely formation of volunteers that provided assistance to other KLA units.

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[89] Bislim Nreci, DSM00068-DSM00075, 19th of April 2021, p. 3

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246. Moreover, it is important to note that the TP did not factually establish that the witness provided not truthful information about his encounters with the Appellant during the time of the conflict. The TP only resorted to irrelevant issues in order to reject the real content of the witness's testimony. The Defense submits that the core of the witness testimony was not properly considered by the TP.

Nazmi Vrbovci

247. Mr. Vrbovci provided testimony that he encounters the Appellant on the 1st or 2nd of April or in 2nd or 3 of April 1999. As he contemplated after giving the evidence to the Defense (about 2nd or 3d of April meeting Mustafa)[90], he sought to refresh his memory with other people including Mr. Nreci. TP concludes that this impairs the credibility of the witness testimony in court and its use as evidence by the TP.[91] However, in both testimonies at least the 2nd of April remains unaffected as the date for his encounter with the Appellant. The TP simply discards and eyewitness testimony by the fact that a witness is trying to be as accurate as possible when he is questioned about it 23 years after.

248. It is unjust for a TP, when seeking the truth in a criminal case to measure and eye-witness testimony by the standard of not being accurate on the date. Rather than establishing that the witness for some reason did not tell the truth the TP resorts to irrelevant matter to reject the core of the testimony of the witness. In fact, in the case of Mr. Vrbovci the TP did not make any allowance at all for the memory fading over time.

249. The Defense submits that this is wrong and that the core of the witness's testimony was not properly considered by the TP.

[90] DSM 00076-00089, p. 9, 22 March 2021
[91] Para. 174.

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Kapllan Parduzi

250. The TP stated that there are factors affecting the credibility and reliability of the witness Mr. Parduzi.

251. As for the credibility the TP uses factors such as: being in contact with brother of the Appellant, being a friend of a Defense witness Nuredin Ibishi, considering the arrest of the Appellant unjust and that Parduzi' s wife followed the trials "*90 percent of the time*". TP signaled an inclination of the witness to provide evidence generally favorable to the Appellant and unfavorable to the SPO.

252. The above factors do not in fact undermine whether the witness testified truthfully. The only determining factor for someone's credibility is whether witness is telling the truth. None of the factors of the previous paragraph can be evaluated as not telling the truth. In fact, it is a demonstration that he is telling the truth. Never was his testimony to these factors challenged by the TP. The Defense submits that therefore the finding of the TP that these factors greatly affect Mr. Parduzi's credibility is groundless.

253. As to the reliability of his testimony, the TP considered that his testimony in court was severely undermined by a number of factors. Among them are vague recollections of events, medication taken, weather and his health condition.[92] TP cites parts of the transcript. [93]. The part of the transcript it cites are p. 3479, line 11 -14, is not about **whether** Mr. Parduzi saw Mr. Mustafa, but it is about **<u>where</u>** he saw him. The cited transcript from p. 3480 line 6 to p. 3841-line 13[94], is also not about **whether** Mr. Paduzi saw Mr. Mustafa but about **<u>when</u>** he saw him. TP therefore uses two different factors which have nothing to with the fact Mr. Parduzi saw Mr. Mustafa.

[92] Para. 182
[93] Mr. Parduzi, T. of 11th of April 2022, p. 3479, line 11 -14
[94] Para. 182, footnote 359; Mr. Parduzi, T. of 11th of April 2022p. 3480 line 6 up to p. 3841-line 13

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254. The fact that Mr. Parduzi actually saw Mr. Mustafa is not in dispute at all and we quote:[95]

> Q. *How could you recognise Mr. Mustafa? You said you were in dire conditions.*
>
> A. *It is true are that I was in dire health condition, but mentally, I was fine.*
>
> Q. *And so can you tell us how you recognised him?*
>
> A. *I don't understand you, how I recognised him. I explained this already. I saw him in person. I recognized him. I don't know how else I can describe this to you.*

255. It is crystal clear from the above that Mr. Parduzi recognized Mr. Mustafa during the transport undertaken for him and Mr. Ibishi when both of them got shot and wounded on April 10th 1999. Therefore, the finding of the TP that Mr. Parduzi's testimony on whether he saw Mr. Mustafa or not, cannot reasonably affect his reliability on this transport and his recognition of Mustafa during the transport.

256. No reasonable tribunal could have come to any other conclusion that it was Mr. Mustafa who accompanied Mr. Parduzi during the transport up to the hospital in Potok, a trip that lasted almost 3 days.

257. As to whether the Alibi provided by Mr. Parduzi with regards to late April and beginning of May is irrelevant, the Defense submits this is not true. Mr. Parduzi, upon leaving the hospital in Potok, was transported from Potok to Zllash, and from Zllash to Bullaj eventually reaching North Macedonia. Again, it was Mr. Mustafa who escorted Parduzi from Zllash to Bullaj, therefore the earlier recognition as discussed above is reinforced because against it is the same man that accompanied him on this second transport.

Nuredin Ibishi

258. The TP stated that there are factors affecting the credibility and reliability of the witness Mr. Ibishi.

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[95] Mr. Parduzi, T. of 11th of April 2022, p. 3478, line 6-13.

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259. TP enumerates a number of factors unrelated to the eye-witness testimonies and experiences. TP states that he may have been inclined to provide evidence generally favorable to the Appellant and unfavorable to the SPO. TP regarded these factors as greatly affecting his credibility.[96]

260. These factors do not in fact undermine whether the witness testified truthfully. The only determining factor for someone's credibility is whether witness is telling the truth None of the factors of the previous paragraph can be evaluated as not telling the truth. In fact, it is a demonstration that he is telling the truth. Never was his testimony to these factors challenged by the TP. The Defense submits that therefore the finding of the TP that these factors greatly affect Mr. Ibishi's credibility is groundless.

261. The reliability of his testimony was addressed in the sense that like Mr. Parduzi the medical and travel conditions severely undermined reliability of his account.

262. TP randomly uses or leaves out elements that support the Alibi of Mr. Mustafa. The Defense submits that on this point the Judgment is biased.

Sheqir Rrahimi

263. Mr. Rrahimi's testimony was not relied on by the TP, the reason was that the TP found that the account given by this witness was wholly unreliable.[97] The reasons would be that his evidence was so unclear that it is essentially impossible to extract meaningful information from it.

264. Mr. Rrahimi was the driver of the tractor with the trailer upon which the wounded Mr. Parduzi and Mr. Ibishi were loaded. Mr. Parduzi confirmed that it was the Appellant who was among the persons escorting him. The nickname of the Appellant is "Cali".

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[96] Para. 184-189

[97] Para. 193.

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265. The TP's view is that Mr. Rrahimi's firsthand account is of a limited importance for the Appellant Alibi. The TP explains this as purportedly Mr. Rrahimi's recollection of number of tractors constituting the medical convoy, the location and the time they joined and parted ways is confused and inconclusive. In addition, TP states that his contact with someone named Cali is contradictory and vague.

266. The "contact" is neither contradictory nor vague. Mr. Rrahimi is crystal clear about the nature of his "contact". In course of the examination of this witness in the court the Defense raised the issue of a different perception of the word "contact "the witness has, because witness himself stated: ""*Contact. This is how I understand it, a contact: We did not talk. It was just what happened. Nothing. Let' s go. So that' s why I did not say that we had a contact. I didn' t call it a contact"*[98], hence this issue was extensively debated with arguments from TP, SPO and the Defense, finally to come to the conclusion that it was an "exchange" of few words so limited that for the witness it did not qualify even to call it as a conversation nor as a meaningfully contact[99].

267. The issue is as follows; Mr. Rrahimi is driving a tractor following another tractor, he needs to relieve himself and therefore gets of his tractor, the tractor in front of him stops and starts reversing, the driver of that tactor asks the witness "*what happened"*, to which Mr. Rrahimi replies "*nothing happened, personal needs*".[100] This is only exchange that took place between the two and Mr. Rrahimi neither calls it a contact as there was no particular exchange nor he calls it a conversation. In sum there is nothing contradictory about this and the TP mischaracterized this explanation as a contradiction.

268. Mr. Rrahimi at some other point in time overheard two people who were sitting on a tractor and overtook his tractor. TP claims that Mr. Rrahimi's recollection of number of

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[98] Sheqir Rrahimi, T. of 13 April 2022, p. 3699 line 25 to 3670 line 3
[99] Ibid, p.3698,3699,3700, 3701, 3702 and 3703.
[100] Ibid, p.3705 line 25 to 3706 line 1

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tractors constituting the medical convoy, the location and the time they joined and parted ways is confused and inconclusive.[101]

269. However, Mr. Rrahimi consistently spoke about the number of tractors, location and the route of the convoy and the time when he parted with other two tractors and where the third tractor joined to lead the way.[102]

270. To render the account of Rrahimi as wholly unreliable is a qualification and finding that no reasonable tribunal could have come to. Therefore, the TP erred in fact when it did not rely at all on the evidence given by Mr. Rrahimi. This error amounts to miscarriage of justice as, when properly and reasonably considered in connection with Parduzi's testimony provides an alibi for the Appellant.

Musli Halimi

271. Mr. Halimi was a commander of the training center of [Redacted] located at the elementary school in Zllash. He worked there, trained there and slept there. [Redacted] [Redacted], [Redacted], [Redacted].

272. Mr. Halimi said that it was simply impossible [Redacted] and in this regard, he was consistent and unwavering about people being admitted, released or leaving the training.

273. Mr. Halimi, contrary to what the TP says in para. 196 did not contradict himself when he further explained that only few people would be sent home following to sickness. TP in fact misses the point that [Redacted]. According to Mr. Halimi that could not happen and certainly not without his knowledge.

[101] Para. 192
[102] Ibid, p.3687, line 8-19

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274. TP erred where it stated that Halimi lacked a proper bases of knowledge to accurately testify about recruits' attendance during various trainings. The fact that he does not know all the names of the recruits is irrelevant.

275. Mr. Halimi at all times was present during the time when [Redacted], and if such an event took place it would never go unnoticed by Mr. Halimi, because it would be a highly extraordinary event. Mr. Halimi clearly explained [Redacted]: "*They had no --* [*Redacted*]. *That is, the instructors. So, this was strictly prohibited for third parties*".[103]

276. TP in para.199 of the Judgment resorts to the issue of a Mr. Halimi's phone number found in the phonebook registry of the Appellant. No phone exchanges, or SMS exchanges between Mr. Halimi and the Appellant were ever produced as evidence in the court. The mere fact that Halimi's phone number appears in the phone contents of the Appellant cannot reasonably be a finding from which any conclusion can be drawn. Mr. Halimi himself cannot know who has his phone number. It is irrelevant issue as to the testimony of Mr. Halimi, neither it is a fact from which one can conclude that Mr. Halimi has an intention to distance himself from the Appellant. TP conclusion with regards to the phone number is baseless.

277. TP states that his testimony appears to lack credibility, yet in no manner in course of the proceedings was he ever cautioned about not telling the truth. The wording appears to lack credibility is certainly not enough to set aside his testimony or to conclude that Mr. Halimi was not telling the truth. TP certainly did not test it. The consideration "*appears to lack credibility*" is therefore meaningless.

Selatin Krasniqi

278. Mr. S. Krasniqi is a member of the family that owes, and even constructed the houses on the compound. Reviewing the considerations regarding Mr. Krasniqi the point that

[103] [Redacted]

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stands out in all the paragraphs is the sentence: "*the stance taken by the witness in this respect and his strong bond with the Accused lead the TP to believe that Mr. Mr. S. Krasniqi had a marked inclination to provide favorable evidence to the Accused and unfavorable to the SPO*".[104] The TP establishes in no manner any factual grounds for this conclusion. The wording "*lead to believe*" is once again demonstration of a feeling rather than it is based on actual finding. Apparently, the TP could not find any factual bases for this assertion.

279. The TP did not give proper consideration to the testimony of Mr. S. Krasniqi, who was present at the compound during the entire period of the charges of the indictment. He had of all witnesses the best knowledge of the compound and what was happening there. His testimony, about the absence of any detention place in the compound, his firsthand account that nobody was mistreated, detained or killed at the compound, the presence of many refugees on the compound, the fact the "Oda" was turned into a hospital, and that the Appellant was hardly present during the period of the indictment on the compound, are all elements and details that are simply in contrast with testimonies of only 2 witnesses of the SPO. It perhaps because this reason alone that the TP disregarded his testimony.

280. The Defense submits that the testimony of Krasniqi was not properly considered by the TP and no reasonable tribunal would have left out his detailed account about the compound and what was happening at the compound in the period the Indictment.

281. This error amounts to miscarriage of justice as, when properly and reasonably considered in the light of all facts this witness provided in his testimony.

[104] Para. 206

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Muhamet Ajeti

282. Mr. Ajeti is another person that was present at the compound during the period of the indictment. His firsthand account corroborated in many aspects the account of Mr. S. Krasniqi.

283. The TP disregarded his testimony and considered completely irrelevant issues as greatly affecting the witness's credibility.

284. The fact the Mr. Ajeti continued his contacts with the Appellant after the conflict is used by the TP as a factor to support the TP's claim that Ajeti has a very strong inclination to provide evidence generally favorable to the Appellant and in support of BIA and unfavorable to the SPO.

285. It is entirely logical that both Ajeti and the Appellant are connected due to their joint effort for the liberation of Kosovo. They were on the same side. That does not mean that Ajeti would provide any other evidence but the truth. It is the inclination of the TP by suggesting and presuming that such ties imply that Mr. Ajeti did not testify truthfully and the credibility of his testimony was affected.

286. The Defense submits that the TP did not properly consider the testimony of Mr. Ajeti and no reasonable tribunal would disregard his testimony based on irrelevant points including "Facebook" postings, "What's App" contacts and calling each other by certain nicknames. TP used the ties between the two to the detriment of the Appellant without any factual grounds to substantiate it.

287. This error of fact amounts to miscarriage of justice as, when properly and reasonably considered in the light of all facts this witness provided in his testimony.

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Dr. Teuta Hadri

288. Mrs. Hadri was a doctor who eventually went to Zllash , that is the compound, in order to provide medical services to wounded there. She has marked the very same building and compound as the SPO witnesses did who claimed to be victims of being detained at the very same location. TP came to the same conclusion as can be seen on the footnote 637 of the of the para. 323 of the Judgment.[105]

289. As noted under Ground 2G, her observations have been discussed.

290. Dr. Teuta Hadri who in the words of the TP stayed at the ZDC.[106] This witness testified: *"No one was detained and I saw no one being detained. The civilians from the village came there wearing uniforms and wearing civilian clothes, and the area where we were, that was an area where also civilians had access to. Fatmir Humolli's wife was there with his family. There was no opportunity for anyone to be detained there. There were no such opportunities."*[107]

291. TP never questioned the credibility or reliability of this witness; in fact, TP considered her testimony *"generally credible but a large part of her evidence is essentially irrelevant to the charges, or lacks a proper bases of knowledge to be reliably used"*.[108] This consideration is incomprehensible as the charges relate to the arbitrary detention of some people on the very same compound and in the very same building of that compound in which Hadri

[105] Mrs Hadri: T. 11 May 2022, public, p. 4206, lines 19-25, p. 4207, lines 1-6. The Panel notes that Ms Hadri has identified the compound, and specific buildings where she stayed, based on a photograph from the UNMIK Aerial Booklet (REG00-020) and a photograph from the UNMIK Ground Booklet (DSM00134-00143, p. DSM00144), which are exactly the same as identified by Mr. Krasniqi as being his family property (REG00-013, REG00-017). These are also the same photographs identified by several crime-based witnesses and KLA members (…)

[106] Para. 215

[107] T. 11 May 2022 (lines 14 to 19, p. 4209).

[108] Para. 217

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was working. In addition, she was working there during the period of the Indictment up to the moment when the alleged detainees were released.

292. Without any further explanation the above consideration cannot be brought into line with the fact that the TP established that the location of the confirmed indictment was the place where the crimes charged were committed.[109]

293. The testimonies of the [Redacted] about their place and location of detention is simply incompatible with the testimonies of the 6 Defense witnesses who were present on the very same location in the period of the Indictment, among them Mrs. Hadri. Even SPO witnesses Mr. F. Sopi and Mr. S. Veseli categorically denied that on that place any people were detained. Therefore, the Defense submits that ruling out the firsthand accounts of these witnesses is an error of factual situation on the compound, in the building, and during the relevant period of the indictment.

294. This error of fact amounts to miscarriage of justice as, when properly and reasonably considered in the light of all facts this witness provided in her testimony

Ibadete Canolli-Kaciu

295. The TP considered some factors greatly affecting the credibility of witness Mrs. Canolli-Kaciu. These are irrelevant factors as they do not relate to what she saw or experienced while on the compound. Once again, a Facebook posting from someone else upon which the witness commented with an "icon" or a "like" were used by the TP as demonstrations as some kind of support for the Appellant.

296. TP focused on witness's personae rather than testimony that the witness provided.

[109] Para. 348 until 378, in particular Para. 369, 376, 377 and 378.

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297. As already mentioned in Ground 2G it is equally a distortion of the facts when interpreting that as Mrs. Canolli-Kaciu stayed mostly inside her room because she had a lot of work to do and would not have had any opportunity to look around on the compound where she was working as a nurse. Their view was never impaired by anything, which the TP even concedes in paragraph 369 of the Judgment, where the TP considered that a "*more complete and possibly accurate description of the ZDC* (… *Is logical, as there is no evidence indication that their freedom of movement or observation was restricted*)[110].

298. The TP erred in fact where it rejected the testimony of Mrs. Canolli-Kaciu on the bases of the above factors and in light of consideration that the witness had indeed a more complete and possible accurate description of the compound. The TP could not reasonably come to the conclusion that the factual issues which the witness testified greatly affected her credibility

299. This error of fact amounts to miscarriage of justice as, when properly and reasonably considered in the light of all facts this witness provided in her testimony.

Ground-2-(2N)

300. Mr. Humolli's observations and the description of the location (the compound) was discussed in paragraphs 16,17,18 and 19 of the **Ground 2G**.

301. We refer for these observations and descriptions in **Ground 2 G**.

302. As for his testimony regarding BIA not having any authority or mandate to arrest or detain anyone will be discussed hereunder.

[110] Para. 369

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303. TP erred in fact when it left out the evidence and testimony of Humolli on this issue. Humolli was, as one of the leaders of Llap Operational Zone, in a best position to outline the structure and authorities of units or brigades operating in that zone.[111] Witness Nuredin Ibishi who was at the time the Chief of Staff.[112] of the Llap Operational Zone, testified to the same effect[113] by explaining the role of the BIA unit.

Ground-2-(2O)

Whether Mustafa could be at more than one place in the same day

304. On multiple occasions the TP stated that it was for the Appellant very possible to be within the same day in both or multiple places. TP discusses this in para. 258 and 259 as well as 253 to 332.

305. TP did not consider genuinely and realistically that factors that impaired freedom of movement between places. Factors such as the means of transportation (on foot), the nature of weather conditions at the relevant times, state of the roads that could be used by civilians, KLA or Kosovar people at the time, the Serb forces that were controlling the roads, fact that many times road crossings could only be taken during the night and often after long observations to ensure that a safe passage could be undertaken.

306. The overwhelming number of testimonies from Defense witnesses described that people encountered extreme difficulties when travelling even a short distance from one place to another.[114]

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[111] T. 2nd of February 2022, p. 2429 (Line 14-22)
[112] T. 12 April 2022, p. 3547 line 24
[113] T. 12 April 2022, p. 3557 line 3-15
[114] Brahim Mehmetaj: T. 23 March 2022/ P. 2626/ Line 14 to 12; p. 2657 line 23 to 25, next p. 2658 lines 1-2; Kapllan Parduzi: T. 11 April 2022/ P. 3422 line 4 up to p. 3423 line 14, P. 3469 line 18 to 23, P. 3481 line 5-13; Nuredin Ibishi: T. 12 April 2022, p. 3559, line 9 to 21. Bislim Nreci: T. 05 April 2022/ p. 3228 line 17-22, p. 3199 line 20-25, p. 3200, line 1 and 2, p. 3201 line 1-18, P. 3275 line 8-18;Nazmi Vrbovci: T. of 6 April 2022/p. 3312, lines 12-24, p. 3307, lines 08-12, p. 3361, lines 2-5.

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307. TP states indeed that: "*the TP believes that the distances between Rimanishte, Bellopoje, and Zlash were so limited that even in critical travel conditions the Accused could have well been in all these locations in one and the same day*".[115] The wording "*could have well been* "indicates that the TP is only making a prejudiced assumption rather than establishing this by fact. It is in stark contrast with testimonies of the people who lived and experienced this.

308. And even disregarding S. Krasniqi's statement that it took him 12 to 13 hours to reach Prishtina from Zllash it is clear that the TP only selectively used the testimonies of the various witnesses.

309. Mr. Ajeti states that it is 4 or 5 hours maybe 6 hours on foot. In the same line 3593 speaks about 5 to 6 hours on foot for the same distance. Mr. Ajeti actually went to Zllash and did not return to Prishtina, Mr. Ajeti vent there on 1st of April. After the 1st of April, Mr. Ajeti did not go back to Prishtina, and therefore the calculation of his time to travel is irrelevant.

310. Mr. S. Krasniqi went on some other occasions from Zllash to Prishtina which would take him 12 to 13 hours to get there with a tractor. So, it is clear that during the time of the Indictment the situation on the ground as far as the travel time is concerned changed dramatically.

311. The Testimony of [Redacted] as he did not indicate whether his travel time (5 or six hours) was actually done by him within the period of Indictment. Therefore, the TP completely miscalculated the times needed during the period oof indictment to travel from Prishtina to Zllash.

[115] Para. 310

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312. Mr. Halimi's testimony is irrelevant regarding the time he needed to travel from Zllash to Prapashtica. As these two locations were located within the relatively free zone of the Gollak Area.

313. In sum, the selection of the time in travel that the TP did cannot be generalized for the period of the Indictment. Once Again, the TP did not establish when Mustafa actually used a car, or when he went on foot.

314. The TP just generalized on the bases of the assumed availability of means of transportation, the possibility of the Appellant moving around with a car without establishing in their findings whether the Appellant indeed and effectively used a car to move (to Zllash).

315. Lastly, TP erred in fact regarding possibility for the Appellant to have been in multiple locations in one and the same day. It invalidates the Judgment and occasions miscarriage of Justice

Ground-2-(2P)

[Redacted]

316. The TP in paragraph 472 that [Redacted] but in fact it completely left out the fact that the witness [Redacted] and also during his in-court testimony he marked his position in a picture provided by the SPO.[116]

317. The issue here is about the moment and the position of [Redacted]. As for the moment [Redacted]. As for his position [Redacted].

[116] Close up of p. 20 of [Redacted].

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318. During the final oral arguments, the Defense submitted that from his position [Redacted] one of the judges of the TP asked for clarifications from the Defense.

319. The following exchange ensued between the Lead Defense Counsel and the Trial Judge[117]:

JUDGE BITTI: Yes. So, if I understood you correctly, somebody entering through 9, that's what you're saying, if I understood correctly –
MR. VON BONE: Yes. JUDGE BITTI: -- would see the buildings on the left - 10, 11, and 12. But would not see, because of building 7, maybe also because of the tree, but would not see 2, 3, 4, 5, 6. Do I understand that correctly?
MR. VON BONE: You understand that correctly. And to be clear, [Redacted].
JUDGE BITTI: Okay. So, your position is that [Redacted], according to what you're telling us, Mr. Mustafa at that time would have been on the right and not on the left?
MR. VON BONE: That is exactly what the [Redacted]
JUDGE BITTI: Okay. Thank you.
MR. VON BONE: Thank you very much.

320. It is not in dispute that the single building with a veranda was on the right-hand side viewed from the gate of the compound. The TP erred in fact where it considered the testimony of [Redacted] as credible and reliable as to this point and certainly erred where it states that [Redacted]. The errors amount to miscarriage of justice as the TP has erroneously [Redacted] and took that as starting point to establish the presence of the Appellant at the compound on 1st of April 1999.

321. The [Redacted] [118]

322. TP erred where it found the testimony of [Redacted] credible and reliable as it did not consider the above-mentioned factors when it gave the assessment on [Redacted]. No reasonable tribunal could have vested proper credence to his testimony.[119]

[117] T. 4 September 2022, Closing Statements, p. 4669, line 3 to 21; p. 839 line 25 to p. 840 line 1 to 19;
[118] [Redacted]
[119] [Redacted]

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323. The errors in grounds 1 and 2 above, individually and cumulatively, ITJ/OMJ in relation to the actus reus and/or *mens rea* of counts 1, 3 and 4 as the evidence allows for other reasonable conclusions to be drawn and the convictions should be reversed.

GROUND 3

Murder

324. TP erred in law by failing to make a decision under Rule 40 and exercise the power to authorize an [Redacted] with a view to establishing inter alia:

(a) the identity of the body,

(b) the cause and time of death; and

(c) the nature of any injuries, following the preceding failure of the Specialist Prosecutor to make a mandatory application for authorization.[120]

325. Where it is the obligation of any criminal court to determine the truth upon a matter first and foremost it is the SPO to unequivocally prove the identity of a deceased in the indictment. In order to do that under Rule 40 of the Rules the SPO, when it has reasons to believe that the body of a person whose death may be caused by a crime, to be found at a specific location he shall request authorization from the TP to conduct an [Redacted]. Also, the examination would prove whether the clothes of the murder victim were damaged by the firearm or not.

326. The SPO failed to do so. Neither did the TP exercised its power to authorized and [Redacted]. The TP points out that there is no evidence in the form of an official autopsy report regarding the cause(s) and manner of death of the murder victim, and despite this TP found the defendant guilty of the criminal offense of Murder, tried to give reasons not supported by material evidence.

[120] Para. 614, 619

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327. In light of this the evidence produced in the case as for the cause and time of death, nature of injuries and identity of the person has not been established.

328. TP points out that there is no evidence in the form of an official autopsy report regarding the cause(s) and manner of death of the murder victim, and despite this TP found the defendant guilty of the criminal offense of Murder, tried to give reasons not supported by material evidence.

329. TP relied only on testimonial and photographic evidence. Such evidence cannot conclusively lead to establishing the identity of the body, cause of death, time of death and the nature of any injuries thereof.

Cause of death

330. Whatever [Redacted], they are in no manner experts on the cause of death, time of death and nature of any injuries.

331. The testimony of the [Redacted] is corroborated by the photo documentation- [Redacted], respectively by the evidence [Redacted] in which only one entry hole is observed. No material evidence as to the cause, nature and origin of this hole was not produced. TP in its assessment in para. 624 of the Judgment, considers that such holes could only have been caused by a bullet, since there is no evidence to the contrary.

332. Without examining the body of the murder victim and without examining the victim's clothes, it is impossible to conclude, the nature of the injuries and cause of death of the murdered victim. Concluding that the victim was murdered is baseless.

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Time of death

333. In para. 634 of the Judgment, the TP is not able to determine, at least with some approximation, when the murder victim died, during the above-mentioned time gap or after, so it did not determine the time of the murder victim's death.

334. If the time of death of the person who is the victim of the criminal offense has been determined with at least one approximation, then we have an essential violation of the provisions of the criminal procedure, because no clear and well-argued reasons have been given for the decisive fact, considering that the characteristic of the criminal offense of murder is, among other things, the occurrence of death as a result of the activity aimed at depriving the life of another person, for this reason it is more than necessary to determine the time of death.

335. Determining the time of death as accurately as possible would allow the place of death to be confirmed as well as the place of burial. Also, in some cases, the time of commission of the criminal offense is a constitutive element of some criminal offences, such as if the criminal offense was committed in time of peace, war, state of emergency, during an epidemic, etc.

336. According to TP [Redacted].[121] The hostilities of the parties in the conflict ceased on 11th of June 1999 when NATO forces entered in Kosovo.

337. The possibility that the time of the victim's death was [Redacted] is reinforced with the statement of the [Redacted].”[122]

[121] Para. 611

[122] [Redacted]

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338. Analyzing this statement, it is established that at the time when they identified the grave, they found a fresh hump at the burial site..., which means that the burial took place recently. The exhumation date, which according to the TP happened [Redacted], then it is more than clear that the time of death could be any date after the indictment period.

339. The time of death is relevant as the Appellant was convicted for murder in the period of Indictment while there remains a reasonably likelihood that the victim died after the period of the indictment.

340. If the time of death of a person who is a victim of a criminal offense is determined too broadly and superficially, then a significant violation of the provisions of the criminal procedure has been committed. No clear and well-argued reasons have been given for the decisive fact, which is the occurrence of death as a consequence of the activity directed at depriving the life of another person. Hence it is indispensable to determine the time of death.

341. TP erred in its findings on the cause of death, nature of injuries, time and date of death and therefore the conviction in count 4 must be reversed. The reasoning of the TP cannot stand on any of the elements of listed in Rule 40 (3) of the Rules and does not have any foundation in objective and impartial findings by experts. The error invalidates the Judgment on this count as the evidence allows for other reasonable conclusions to be drawn.

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GROUND 4

Murder

TP erred in law and fact:

Ground-4-(4A)

342. While determining the injuries of the Murder Victim's limbs is not crucial for the charge of murder – given that it is established that the body belonged to the Murder Victim – the TP considers that the evidence taken as a whole is consistent in indicating serious injuries on the [Redacted]. The TP notes, in this respect, that such injuries are compatible with the harsh mistreatment suffered by the Murder Victim during his detention at the ZDC and the fact that, by the end of the detention period, he was no longer [Redacted].

343. The Defense cannot agree with the findings of the TP. The TP did not establish in an unequivocal way the fact that at the time of the release of the other prisoners, the murder victim was [Redacted].

344. The TP, in presenting its evaluation for the criminal offense of murder, has foreseen three real possibilities for the death of the murder victim, however, when presenting the legal requirements, it has taken as a fact that the murder victim died because the victim was caused a serious physical injury or inaction/refusal of medical assistance.

345. TP failed to establish whether the victim was killed or died because of his mistreatment or the denial of medical aid by BIA members. If we have death due to ill-treatment or the denial of medical aid, then we do not have a criminal offense of murder, but of ill-treatment or the denial of medical aid resulting in death.

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346. It is more than unclear for the Defense on the basis of which evidence the TP found the third cause of death (gunshot wounds from bullets fired at the victim),[123] not a single piece of evidence proves the TP's assessment that the victim was shot with bullets.

347. Nothing substantiates the conclusion that the victim died of mistreatment by BIA members. Nothing substantiates the conclusion that the victim died from denial of medical aid by BIA members. Lastly, nothing substantiates the conclusion that the death is attributable to the Appellant.

348. There are no factual bases for the conclusion that the case of death by gunshot wounds caused by BIA members or can be attributed to the Appellant.

Ground-4-(4B)

349. In order for an *actus reus* to be committed there must have been an act. The act in this case has never been established. The actor committing the act has also not been established. Any objective and conclusive proof of both the act, the actor as well as the cause of death lacks in the case at hand. TP resorted to argue on how possibly the victim of Count 4 died.

350. In its factual findings, the TP found that the only reasonable conclusion as to the death of the Murder Victim is that he was killed between on or around 19 April 1999 and around the end of April 1999, as a result of the combination between: (i) the severe mistreatment inflicted by BIA members who detained him, causing serious bodily harm; (ii) the denial of medical aid by BIA members; and (iii) gunshot wounds caused by bullets, in respect of which the TP has established that there exists a reasonable doubt as to their attribution to the BIA members or to the Serbian forces. The TP also established in its factual findings that the causes of death mentioned under (i) and (ii) above constitute substantial causes of the Murder Victim’s death and are attributable to the

[123] Para. 627

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Appellant, in the context of his decisions to neither release nor evacuate the Murder Victim, and irrespective of whether the Murder Victim was hit by one or more Serbian bullets.[124]

351. The TP in its elaboration mentioned all the facts on the basis of which it can be also estimated that the murder victim was killed, but that it cannot be accurately estimated whether he was killed by KLA soldiers or by Serbian forces. On the other hand, to give the assessment that the victim died as a result of the Appellant's actions or inactions is an assessment not supported by any evidence.

352. The other elements of this criminal offense are the same as other criminal offenses. It means that for the existence of this criminal offense, the time of committing the criminal offense, the place, the cause-motive, the way, the means used, the consequences must be proven.

353. The 3 (three) material elements which the TP evaluates as a reasonable conclusion cannot be taken as truth. First, 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, without determining these factors, it is not even possible to determine the criminal offense of murder.

354. Since we have as the cause of death the bullets, which the TP attributes to either the members of the BIA or the Serbian forces, then the cause of death is not the action or inaction of the defendant, so the cause of death is neither ill-treatment nor absence of actions to provide medical assistance. To determine the death of a person, all three factors, which the TP has taken as the cause of death, cannot be taken, but only one can be taken, or the murder, or the ill-treatment or absence of actions to provide medical assistance.

[124] Para. 689

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355. The TP's findings that the only reasonable inference based on the totality of the evidence is that the murder victim died as a result of the combination of extreme ill-treatment inflicted by the BIA members who restrained him, causing him serious bodily injuries; denial of medical assistance by BIA members; and gunshot injuries, which is not based on any material evidence and also contrary to the statements of [Redacted] who never spoke about any other cause of death apart from what they observed that looked like a bullet hole.

356. On the other hand, the assessment that the victim died as a result of the defendant's actions or inactions is an assessment unsupported by any evidence. So, in this case the in *dubio pro reo* principle provided for in Article 3 of the Kosovo Code of Criminal Procedure shall be applied.

357. TP failed to establish with any piece of evidence that the murder victim was not evacuated from the ZDC and with no evidence it has established that the Appellant brought a decision that the murder victim should not be evacuated.

Ground-4-(4C)

358. The TP does not exclude that the victim was hit by bullets shot from Serbian Forces. But irrespective whether victim was hit by one or more Serbian bullets his death is attributed to the Appellant. The time of release of other victims has been established on or around of 19th of April 1999. The body of the victim was found around [Redacted]. There is a wide time gap between the last time that the murder victim was seen alive and the discovery of the dead corpse. Within this time span, the causal connection between an alleged crime of murder committed by the defendant and subsequent events is such that no direct relation can be established between the Appellant's alleged actions and the death of the victim can be established.

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359. In the circumstances of the time when Serbian Forces launched the offensive in the area- many new intervening factors could have caused the death of the victim.

360. To determine the cause of death, TP can neither one by one nor cumulatively establish these three causes of death, since with the subsequent manifestation of any cause, the causal link for determining the cause of death is interrupted.

361. Due to these factors the Appellant is to be acquitted of any responsibility for the death of the murdered victim. It was not established that his death was foreseeable in one way or another.

362. TP erred as it established a theory regarding the death of the person and searched for facts to substantiate its own theory. TP failed to reasonably exclude that the victim died of/by other causes or perpetrators.

Ground-4-(4D)

363. The substantial causes of death as enumerated under paragraph 689 about the murder victim have been discussed earlier on this document. The question is whether the death of a murder victim can be attributed to the Appellant. TP attributed his death in the context of his decision to neither release nor evacuate the murder victim.

364. TP finds that the murder victim was not released, based on decision taken by the Appellant, in his capacity as commander-in-chief of the BIA in the detention complex in Zllash. As a confirmation that the decision not to release the murder victim could only be taken by the Appellant, as the BIA commander, the TP underlines that the release of other detainees was carried out by the Appellant's subordinates from the BIA, among them his deputy, Mr. Mehmetaj a.k.a. Bimi.

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365. TP erroneously assesses that Bimi was Cali's deputy at the time of the release of the detainees. In time of release of the detainees, deputy commander of BIA unite it was Isa Kastrati (witness Brahim Mehmetaj,[125] and in that time Brahim Mehmetaj was the Commander of Moral and Politics at level of the Llap Operational Zone.[126]

366. TP failed to establish that the Appellant made any decision that the murder victim should not be evacuated. No findings to substantiate this were made. It is an inference of the TP without any factual bases.

367. **The errors in ground 4 above, individually and cumulatively, invalidates the Judgment / occasions a miscarriage of justice on the actus reus of Count 4 as the evidence allows for other reasonable conclusions to be drawn, and the conviction should be reversed.**

GROUND 5

Murder

TP erred in law and fact:

Ground-5-(5A)

368. A killing is usually for some reason. The perpetrator will have one way or another a reason to kill. Such reason, on many occasions, is the bases for intent. It is a purposeful rationalized decision. It is a willful killing.

369. The cause of death has already been discussed in this document. Whether the Appellant had had any specific will to deny the medical aid to the detainee, has not been established. In addition, no reasonable fact has been established that the Appellant knew about the condition of the murdered victim. In paragraph 692 the TP considered that the

[125] T.23 March 2022 P.2641 L.10-11
[126] T.23 March 2022, P.2657, L.6-12

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decision not to evacuate the murder victim equaled a decision to kill a murdered victim.[127]

370. TP construed the intent to kill as follow: "TP finds that the intent to kill the murder victim, is also confirmed by another important circumstance, specifically by the fact that [Redacted] BIA members who [Redacted], including the Appellant. As a result, if [Redacted], [Redacted], including the Appellant, to [Redacted]. Consequently, the TP finds that the Appellant, as well as the subordinates of the BIA [Redacted].[128]

371. The presumption that [Redacted] Appellant is based on the transcript of hearing of [Redacted][129]. This transcript however indicates that it is the SPO [Redacted]. It is not [Redacted] who, from [Redacted] would [Redacted]. It has not been established [Redacted].

372. Moreover, even if [Redacted]. If that were to be the case then why would the perpetrators [Redacted]. The [Redacted]. In sum the supposed reason given by the TP cannot hold for only [Redacted] alone. It simply makes no sense.

373. The Appellant was absent during the release of the alleged detainees. And "Bimi" was not any more involved in BIA. Therefore, if it was "Bimi" who released the people there was no superior -subordinate relationship any more between "Bimi" and the Appellant. The decision therefore of releasing some and not releasing others cannot be attributed to the Appellant.

374. Furthermore, the intent to kill, without precisely establishing the cause of death, cannot simply be attributed to the Appellant and consequently to find him guilty of committing the criminal offense of murder. The intention to kill, without proving the cause of death,

[127] Para. 692
[128] [Redacted]
[129] [Redacted]

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does not even represent, by itself, a constitutive element of the criminal offense of murder.

375. The intent to kill by the Appellant has been wrongly construed by the TP as if the Appellant had some motive to willfully commit murder, either by commission of an act or by omission. In any event no specific evidence as to what the will of the Appellant was has been established by the TP.

376. The TP therefore cannot conclude that there was an (alleged) intent to kill, and no reasonable tribunal could be sure of such intent of the Appellant to kill.

Ground-5-(5B)

377. As regard to sub-ground 5B, Appellant refers to the submissions above in relation to sub-ground 5(A).

378. The errors in ground 5, individually and cumulatively, ITJ/OMJ on the *mens rea* of Count 4 as the evidence allows for other reasonable conclusions to be drawn, and the conviction should be reversed.

GROUND 6

Torture

379. TP erred in fact by finding that the actus reus and *mens rea* for torture was established when there was no evidence, or no sufficient evidence, upon which a reasonable tribunal could so find.[130]

380. The Defense submits that the material elements of torture as well as the mental elements of torture, as well as legal requirements of torture have not been established.

[130] Para. 678,685

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381. As to the material elements the TP in its findings that at [Redacted], [Redacted] by the Appellant and other Bia members at the compound.[131] [Redacted] was never witnessed by the witnesses as each of them [Redacted] individually.[132] [Redacted],[133] and even named one [Redacted] as the one [Redacted] and even described him as: "[*Redacted*]. *And* [*Redacted*]. *So -- and I would*"[134], never stated that it was the Appellant or the BIA members who [Redacted].

382. Therefore, the *actus reus* for torture was not established.

383. As for the *mens rea* element regardless of whether the Appellant or anybody else inflicted pain or suffering intentionally nothing has been established as to the purpose of such infliction of pain. None of the people who would have allegedly inflicted this pain have ever admitted, confessed or stated that mistreatment of any kind took place. And none of them ever admitted, confessed, or stated anything about whether infliction of pain would have had any particular purpose.

384. Therefore, as the purpose of infliction of pain is only presumed by the TP.

385. The presumed bases as noted in para. 684 of the Judgment is groundless, as the Defense submits that no evidence has been established. TP's, reasoning is unsubstantiated.

GROUND 7

Torture

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[131][Redacted]
[132] [Redacted]
[133] [Redacted]
[134] [Redacted]

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386. TP erred in law and fact when finding that the *actus reus* and *mens rea* for the count of torture, which particularised the torture of at least six persons, were established when, on the TP's findings, the Appellant participated in the torture [Redacted] with the relevant specific purpose.[135]

387. In the findings regarding the torture TP established that the Appellant personally slapped a person and [Redacted] and [Redacted] and [Redacted].[136]

388. Even if the *actus reus* and *mens rea* would have been met for crime of torture then still he cannot be held accountable for the infliction of pain that other allegedly might have inflicted to [Redacted] [Redacted] as the TP states.[137]

389. TP therefore wrongly held the Appellant accountable for crimes allegedly committed by others, the presumed common purpose that he and or others had was wrongly found and established as being JCE[138], and found the Appellant guilty on Counts 1, 3 and 4 of the Indictment.[139]

390. **The errors in ground 6 and 7 invalidate the Judgment / occasion a miscarriage of justice on Count 3 as the evidence allows for other reasonable conclusions to be drawn, and Judgment and the conviction should be reversed.**

GROUND 8

Arbitrary Detention

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[135] [Redacted]
[136] [Redacted]
[137] [Redacted]
[138] Para. 748, Para. 7t53 and Para. 754
[139] Para. 757

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391. TP erred in law when finding that arbitrary detention in a non-international armed conflict constitutes a war crime within the jurisdiction of the Kosovo Specialist Chambers (previously considered by the KSC Court of Appeals but yet to be considered the KSC Supreme Court).[140]

392. As the TP itself concedes (admits) that the Arbitrary detention does not fall under the list of offences under Art. 14 (1(c)) nor under Article 3 common to the Geneva conventions of 1949, one wonders how and where the Appellant should find constitutional and international guaranties of the principal of legality.

393. In the constitution of Kosovo Art. 33 (1) is enshrined the principle of legality in conjunction with the Article 7 (1) of the European Convention of Human Rights. Article 3 (2a) of the Law of the KSC dictates that the KSC shall apply the law in accordance with the constitution of the republic of Kosovo.

394. TP in the last sentence of its paragraph 612 of the Judgment establishes in an arbitrary manner that the Arbitrary detention as a war crime is a nor of International Criminal Law by quoting its own jurisdiction only.

395. By doing this the TP legislates on behalf of Kosovo Assembly. Owing to the fact that it well known that norms of International Customary Law being that criminal or else cannot be establish post festum and through an act only. They are rather formed as a result of a continuous acts of the legally authorized actors making it clear the standard or behavior in the future of subjects of law once the customary standard is formed.

396. Interlocutory decision referred by the TP in Judgment,[141] is not reasoned as it does not explain how and when the internationally customary rule is created only through its own

[140] Para. 645

[141] Footnotes 1387 (KSC-22-04/1A002/ F00010, para 44 until para 47 of the Para. 642

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interlocutory decision of the KSC Appeals TP. Moreover, the interlocutory decision quoted by the TP says only that the list is not exhaustive but it does not authorize TP or anyone else to extend the list of crimes and as noted legislate on behalf of Kosovo Assembly or international community as a whole.

397. However, if the appeal finds the same interpretation as quoted it para. 642 of the Judgment, then it should stay the proceedings and refer the matter to the constitutional chamber as the application of this article of the KSC Law as a rule of customary law violates the constitution in terms of Art. 113 (8), which reads: *"The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue"*.

398. As the key argument of the Defense for the above noted arguments is to be found in Art. 162 (1) of the Constitution of Kosovo and Art. 6 (1) of the KSC Law, which hierarchy and legal force is turned upside down by the Appeals Chamber in paragraph 66 and 67 of the Interlocutory Decision dated on 23 December 2021 (KSC-BC-2020-06/1A0009/F00030, Motion challenging the jurisdiction of the Specialist Chambers). Through this decision the TP extends beyond any limits its own material jurisdiction by giving precedence to the term: "relate to" instead of relaying in constitutional expression: "in relation to". This effectively means that the KSC have jurisdiction over any crime that relates to the period 1998-2000 no matter whether they are in relation to the findings of the Council of Europe Report on which findings the criminal investigation of the SPO Prosecutor relied on.

399. In sum the TP erred in Law when finding that Arbitrary Detention in a non -international Armed Conflict constitutes a war crime within the jurisdiction of the KSC, thus invalidating the Judgment on Count 1- Arbitrary Detention.

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400. **The error in ground 8 invalidates the Judgment on Count 1 as the Indictment is based on Article 41 (c) of the Law and the conviction should be reversed.**

GROUND 9

Sentencing

401. The TP made discernible errors in sentencing.

Ground-9-(9A)

Aims and purposes of sentencing

402. TP in the outset says that the primary purpose of sentencing is rooted in retribution, deterrence (specific and general) and to a lesser extend to the rehabilitation of the perpetrator.

403. To the contrary Art. 38 of the Law 06/L074 (Kosovo Criminal Code) envisages that the primary purpose of the punishment is to prevent the perpetrator from committing criminal offence in the future and to rehabilitate the perpetrator.

404. The Defense submits that the Draconian punishment of 26 years of imprisonment conflicts with Art. 38 of the Kosovo Criminal Code of 2019.

405. In para. 772 until para. 777 of the Judgment TP erred as it misapplied the purposes of sentencing set forth in the Kosovo Criminal Code.

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Ground-9-(9B)

406. In para. 775 and para. 776 of the Judgment the TP gives an assessment which has nothing to do with legal provisions of material law neither within Kosovo law nor as far as international customary law is concerned. All of them are extra-legal arguments which are not supposed to be used in the court of law.

407. The Defense submits that TP erred as it used an incorrect standard and used extra-legal arguments, therefore the sentencing must be reversed.

Ground-9-(9C)

Application of the principle of lex mitior

408. TP erred were it states in para. 780 that TP is not bound by these provisions. How can a court of law render justice by picking and choosing the legal provisions it is supposed to apply.

409. This error of TP led to the violation of constitutional guarantees from Art. 33 (2) of the Constitution of Kosovo as it construed the provision of Art. 44 (2) of the Law in a manner that renders it unconstitutional as against Art. 33 (2) of the Constitution. To this effect Defense submits that the Appeals Court refers for constitutional review, under the incidental control of constitutionality from Art. 113 (8) of the constitution of Kosovo, the compatibility of the said provision of Art. 44 (2) of the Law.

410. As the TP erred in its application of the *lex mitior*. It invalidates the sentencing. And the Court of Appeal must do what the TP lacked to do.

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Ground-9-(9D)

411. As referred to under grounds 9C and 9 E, TP failed to apply the *lex mitior* principle, thus violating the constitutional rights of the appellant and as consequence the sentencing part of the judgement is invalidated. The court of appeal must do what the trial should have done which is to impose a sentence while applying *lex-mitior.*

412. From the standard " *the application of the law that was in force at the time the criminal offense was committed* " can be deviated only if the later law is more favorable to the defendant (*lex mitior).* With regards to this defendant, this principle has been violated, because the law that is unfavorable to the defendant has been applied, due to the fact that the Criminal Code of Kosovo provides for long-term imprisonment of up to 40 years, while the law that was in force provided for a sentence of up to 15 years of imprisonment.

413. According to the standard of applying the most favorable law (*lex mitior*), if the law has changed several times after the commission of the criminal offense until the final Judgment, the law that is most favorable to the defendant is applied.[142] , and that in the situation at hand, the most favorable is the UNMIK regulation, which abolished the death penalty and left the CLY in force which envisages 15 years.

414. In order to support the claim that in this particular case, the later law was applied to the defendant, which is unfavorable to the defendant, we consider it necessary that the TP of the Court of Appeal of the Specialized Chambers is made available the Judgment of the Supreme Court, where with the Judgment PML.26 /2023 provides it positioning on the issue of application of the law, since we are dealing with the identical criminal situation.[143]

[142] Commentary on the Law of Bosnia and Herzegovina, 2005 edition, p. 65.
[143] Judgment of the Supreme Court of Kosovo, PML.26/2023.dt. February 16, 2023, p.8.

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Ground-9-(9E)

415. As regard to sub-ground 9E, the Appellant refers to the submissions above in relation to sub-ground 9C. The Defense adds:

416. Further to the above, the Defense reiterates that the Art. 44(2) of the Law, where it reads *inter alia*: "Specialist Chambers shall take into the account", and this wording must be understood as an imperative. Furthermore, the items a, b, and c of the said Art. 44 (2) are to be applied cumulatively. Similarly, as under article 3 (2) of the KSC Law reads inter alia: "The Specialist Chamber shall adjudicate and function in accordance with the Constitution of the Republic of Kosovo", there is no question that the formulation "shall" has an imperative character.

Ground-9-(9F)

General

417. TP did not in any manner follow the general sentencing principles and practice of the former Yugoslavia at the time of commission.

418. TP did not take into account the range of sentences imposed on persons convicted of similar offences, neither of the courts in Kosovo, nor of the ICTY and Rwanda Tribunals.

419. When it comes to the application of the provisions of the CCSFRY, TP failed to give reasons for departing from the provisions of the CCSFRY at the time of the commission of the alleged crime(s).[144]

420. The court in the present case, when weighing the sentence and in its sentencing, applied the law which was not in force at the time of the commission of the criminal offense.

[144] Para. 781

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421. The court, by sentencing the defendant to 26 years of imprisonment, violated a fundamental principle "*Nulum crimen, nulla poena sine lege*" meaning "*there is no criminal offense and no criminal sanction if, at the time of action, was not envisaged by law*".

422. The defendant is charged with the criminal offenses committed during 1999 when the Criminal Law of Yugoslavia (CLY) was in force, where Art. 38 par. 1 of this law provides: „The prison sentence cannot be shorter than fifteen days nor more than fifteen years." Whereas par. 2 of the same law provides that: „For criminal offenses for which the death penalty is prescribed, the court may also impose a prison sentence of up to twenty years."[145]

423. With the UNMIK regulation, no. 199/24 dated 12.12.1999, which entered into force on 10 June, 1999, death sentences were abolished and long-term imprisonment sentences were not determined as a substitute, with this amendment the legal basis for the possibility of imposing a sentence of 20 years of imprisonment was also removed, and that the maximum sentence of imprisonment of fifteen years remained.[146]

424. TP considered that the sentencing ranges applicable under CCSFRY show that the most serious crimes such as war Crimes attracted the most severe sentences. Art. 142 of the CCSFRY contains the punishment of war crimes against civilian population which shall be punishment no less than 5 years or by death penalty.

425. The provisions of the CCSFRY regarding the combination of criminal acts state that the maximum sentence would be the death penalty. In case of combination of criminal acts, the CCSFRY Article 48 (2) states that the court shall impose the integrated punishment by the following rules.

[145] Article 38 of the CLY of 1975.
[146] UNMIK Regulation, no. 199/24 dated 12.12.1999.

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1) If capital punishment has been inflicted by the court for one of the combined criminal acts, it shall pronounce that punishment only;
2) If the court has decided upon punishment of 20 years' imprisonment for one of the combined criminal acts, it shall impose that punishment only;
3) If court has decided upon punishments of imprisonment for the combined criminal acts, the integrated punishment shall consist of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments, and may not exceed a period of 15 year's imprisonment.

426. Therefore, the conclusion is that in this case while the CCSFRY was applicable at the time of the commission of the crimes in the current case, TP did not at all consider the sentencing regime as it was in place during the time of commission of the crimes.

427. In this case, where the Appellant is charged with combination of crimes the ultimate punishment should be no more than 15 years of imprisonment.

428. This is in line with the latest Court Decision of Kosovo in which convicted persons are local Serbs sentenced *ad literam* for the same crimes. The Supreme Court of Kosovo ruled in this case that the court cannot exceed 15 years of imprisonment.[147]

429. In the determination of the sentence the TP weighted the following factors

a. gravity of the crimes and their consequences
b. personal contribution to the crimes
c. individual circumstances

[147] Judgment of the Supreme Court of Kosovo, [Redacted]

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430. In para. 828, TP weighted and balanced these factors. Contrary to Art. 44 (2) (a) of the KSC Law, the TP did not at all take into consideration the sentencing range for the crime provided for under Kosovo Law at the time of commission.

431. In the virtue of foregoing reasons this error in sentencing invalidates the imposed sentence.

Ground-9-(9G)

432. As regard to sub-ground 9E, the Appellant refers to the submissions above in relation to sub-ground 9F.

Ground-9-(9H)

433. As regard to sub-ground 9E, the Appellant refers to the submissions above in relation to sub-ground 9F.

Ground-9-(9I)

434. In ground 7 of this document the Defense has already addressed the issue where the Appellant was found guilty of torture which particularized the torture of at least 6 persons. However, TP's findings enumerated only to occasions in which the appellant participated in the torture of only two persons.

435. Equally where no *acus reus* and *mens rea* exists for the torture at least six people neither can the sentencing of the Appellant be based on the torture of these six persons where he only participated in torture of two persons.

436. TP erred where it sentenced the Appellant for count 3 of the Indictment on the bases of committing it in relation to six persons rather on two persons.

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437. TP therefore erred in sentencing range applied without taking its own findings into considerations and thus and consequently applying a sentence (of 22 years) too harsh in relation to his actual crimes on which he was found guilty.

438. If applied properly the overall sentence should have been mitigated.

Ground-9-(9J)

439. In paragraph 826 of the Judgment the TP is of the view that Mr. Mustafa's individual circumstances cannot be given any significant weight considering nature and the gravity of the proven crimes and his contribution to them.

440. This conclusion contradicts the parameters established by the TP itself in 789 and 793, in which it states that any factors taken into consideration as aspects of gravity of the crime cannot additionally be considered as separate aggravating circumstances, and vice-versa (789), and the absence of mitigating circumstances does not serve as an aggravating circumstance.

441. TP says that the gravity of the crime cannot serve as an aggravated circumstance. TP nevertheless used the nature and the gravity of the crime as an aggravating circumstance. This can be seen in paragraph 826 where the TP does not give any weight to individual circumstances of the Appellant by considering the nature and gravity of the proven crimes and his contribution to them as the only factor. Therefore, TP erred when it weighted individual circumstances of the Appellant versus the nature and gravity of the crimes and his contribution to them. TP erred as it should not have balanced out these two.

442. The errors listed in Ground 9 impacts the sentence imposed on the Appellant to the extent that no sentence should have been imposed or that a more lenient sentence should have been applied.

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Ground-9-(9K)

Overall

443. In rendering the sentence 26 years of imprisonment TP rendered a sentence which was capricious and manifest excessive in all circumstances.

444. The imprisonment of 26 years is excessive for the following reasons:

a) Given the fact that the Appellant is 50 years old a sentence of 26 years is virtually the same as life imprisonment.

b) There is no factual possibility for any rehabilitation taking into the account the life expectancy of the people in Kosovo as being the poorest country in Europe.

c) The Appellant will effectively have no possibility for family life in accordance with the standards set forth by the European convention of human rights. (Citation: Kosovo constitution and ECtHR).

d) For the same type of crimes not a single sentence exists for this excessive amount of period of time in international tribunals.

445. The errors listed in Ground 9 impacts the sentence imposed on the Appellant to the extent that no sentence should have been imposed or that a more lenient sentence should have been applied.

III. CONCLUSION

446. For the above Grounds of Appeal, individually, cumulatively and/or in conjunction with one another, the Defense seeks on behalf of the Appellant:

(a) -the reversal of convictions on counts 1,3 and 4, to be replaced with:

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(i) -acquittals on each count; or

(ii) -an order returning the case to the TP; or

(b) -if any/all convictions are affirmed, a reduction in sentence.

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02 May 2023 **Julius von Bóné**

At The Hague, the Netherlands **Defence Counsel**