



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

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor's Office

**Date:** 31 October 2023

**Language:** English

**Classification:** Public

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**Further prosecution submissions on *mens rea* for murder**

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**Specialist Prosecutor's Office**

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1. During the oral hearing on the appeal of Mr Salih MUSTAFA ('MUSTAFA') on 27 October 2023, Judge Ambos queried<sup>1</sup> whether Article 21<sup>2</sup> of the Kosovo Criminal Code could be applicable to the charge of murder in this case, in light of Article 12<sup>3</sup> of the Law. The Specialist Prosecutor's Office files these further written submissions in response.

2. Article 21 of the Kosovo Criminal Code is inapplicable to the charges in the present case because: (i) it was not in force at the time the crimes were committed, as would be required under Article 12 of the Law; and, in any event, (ii) Count 4 of the Indictment charged MUSTAFA with murder as a war crime under Article 14 of the Law.<sup>4</sup> This provision specifically defines war crimes 'under customary international law' without reference to the substantive criminal law of Kosovo.

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<sup>1</sup> Transcript (Appeal Hearing), 27 October 2023, pp. 135-136, lines 20-11: 'JUDGE AMBOS: You referred to Article 21 of the Kosovo code, which clearly includes *dolus eventualis*. Actually, that was the door I wanted to open, but the SPO didn't jump on the door -- didn't use the entrance. So thanks for having taken this up. But my question is the following. Article 12 of our Law says that we can apply the substantive criminal law of Kosovo insofar as it is in compliance with customary international law. Now, if you say generally -- not you, personally, but the SPO and you perhaps. Customary international law only allows for direct intent. Now looking at the case law, we have a lower standard in Kosovo law. Would that mean that the Kosovo law is not applicable because it would be incompatible with customary international law? Just for your -- I mean, there is a tension between Article 3 and Article 12. You should maybe should reflect on that for the next cases. There is a certain tension in our Law. But this is just a question now, the compatibility with customary international law of Article 21 of the Kosovo Criminal Code. Is it compatible or not?'; Transcript, 27 October 2023, p.156, lines 16-19: 'JUDGE AMBOS: I would like to ask the SPO and Defence as to the question we discussed before with the Victims' Counsel, how do you see the application of Article 21 of the Kosovo Criminal Code in light of Article 12 of our Law?'

<sup>2</sup> Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Official Gazette of the Republic of Kosovo No.2, 14 January 2019, Article 21 – Intent: '(1) A criminal offense may be committed with direct or eventual intent. (2) A person acts with direct intent when he or she is aware of his or her act and desires its commission. (3) A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence.'

<sup>3</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'), Article 12: 'The Specialist Chambers shall apply customary international law and the substantive criminal law of Kosovo insofar as it is in compliance with customary international law, both as applicable at the time the crimes were committed, in accordance with Article 7(2) of the European Convention of Human Rights and Fundamental Freedoms and Article 15(2) of the International Covenant on Civil and Political Rights, as incorporated and protected by Articles 19(2), 22(2), 22(3) and 33(1) of the Constitution.'

<sup>4</sup> ANNEX 1 to Submission of confirmed indictment, KSC-BC-2020-05/F00011/A01, 19 June 2020, confidential, p.1, para.35.

3. The general reference to the substantive criminal law of Kosovo in Article 12 of the Law should not be read in isolation, but rather in the context of the subsequent provisions, namely: Article 13 (Crimes Against Humanity under International Law), Article 14 (War Crimes under International Law), and Article 15 (Other Crimes under Kosovo Law). Reading Article 12 together with these substantive criminal law provisions reveals that the ‘substantive criminal law of Kosovo’ referred to in Article 12 is confined to those laws identified in Article 15. Because MUSTAFA has not been charged under Article 15, the domestic criminal law set out within it is inapplicable in this case.

4. This interpretation is also consistent with previous decisions in which the Appeals Panel, when considering subsidiary sources,<sup>5</sup> turned first to the jurisprudence of the *ad hoc* tribunals in determining customary international law.<sup>6</sup> In addition, such jurisprudence is a recognised source for the interpretation and clarification of, *inter alia*, elements of crimes under customary international law.<sup>7</sup> The jurisprudence of *ad hoc* and other international(ised) tribunals establishes that the meaning of ‘intent’, as

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<sup>5</sup> Article 3(3) of the Law.

<sup>6</sup> See e.g. Decision on Appeals Against “Decision on Motions Challenging the Jurisdiction of the Specialist Chambers”, KSC-BC-2020-06/IA009/F00030, 23 December 2021, paras 152-153, 187, 192, see also para.96, fn.263.

<sup>7</sup> See e.g. ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, paras 126-127 (finding, *inter alia*, that previous decisions may be relied upon to interpret the meaning ascribed to particular ingredients of a crime); ECCC, *Case against Kaing*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, para.234.

an element of war crimes such as murder, includes both direct and indirect intent,<sup>8</sup> which is also consistent with the ICRC Commentary on the Geneva Conventions.<sup>9</sup>

**Word count: 1211**



**Kimberly P. West**

**Specialist Prosecutor**

Tuesday, 31 October 2023

At The Hague, the Netherlands.

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<sup>8</sup> See e.g. ICTY, *Prosecutor v. Strugar*, IT-01-42-T, Judgment, 31 January 2005, paras 235-236; ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Judgment, 17 July 2008, para.270 (confirming that 'wilfully' includes indirect intent, or recklessness, but not mere negligence); ICTY, *Prosecutor v. Orić*, IT-03-68-T, Judgment, 30 June 2006, para.348; ICTY, *Prosecutor v. Delić*, IT-04-83-T, Judgment, 15 September 2008, para.48; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgment, 24 March 2016, para.448; ICTY, *Prosecutor v. Dorđević*, IT-05-87/1-T, Judgment, Vol. II, 23 February 2011, para.1708; ICTY, *Prosecutor v. Galić*, IT-98-29-A, Judgment, 30 November 2006, para.140 (confirming that 'wilfully' includes recklessness); ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Judgment, 10 July 2008, para.358 (defining indirect intent as knowledge that the result was a probable consequence of the accused's acts); SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgment, 26 September 2013, fn.1289 (defining indirect intent as awareness and acceptance of a substantial likelihood); ICTR, *Prosecutor v. Ndindabahizi*, ICTR-2001-71-I, Judgment and Sentence, 15 July 2004, para.487; ICTR, *Prosecutor v. Rukundo*, ICTR-2001-70-T, Judgment, 27 February 2009, para.579; ICTR, *Prosecutor v. Nzabirinda*, ICTR-2001-77-T, Sentencing Judgment, 23 February 2007, para.25; ICTR, *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgment, 7 June 2001, para.895; ECCC, *Case against Nuon and Khieu*, 002/19-09-2007-ECCC/SC, Appeal Judgment, 23 November 2016, paras 390-391, 395-410; c.f., concerning the *mens rea* for joint criminal enterprise liability, ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Judgment, Vol. II, 30 May 2013, para.2414, fn.2193; ICTY, *Prosecutor v. Mladić*, IT-09-92-T, Judgment, Vol. IV, 22 November 2017, fn.13437; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgment, 30 January 2015, para.1432 (stating that JCE III liability does not require an understanding that 'the deviatory crime would probably be committed'). See also Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Asser Press, 2003), pp.49-50.

<sup>9</sup> ICRC, [Commentary of 2020 to Geneva Convention III](#), Article 3, para.635; ICRC, [Commentary of 2016 to Geneva Convention I](#), Article 50, para.2956-2958. ICRC, [Commentary of 1987 to Additional Protocol I](#), Article 85, para.3474; see also ICTY, *Prosecutor v. Galić*, IT-98-29-A, Judgment, 30 November 2006, para.140.