

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

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

**Registrar:** Fidelma Donlon  
**Filing Participant:** Defense of Salih Mustafa  
**Date:** 01 November 2023  
**Language:** English  
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**Answer to question pursuant to the Order of the Appeals Panel**  
**with Annex 1**

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## I. INTRODUCTION

1. On 26 and 27 of October 2023, The Panel of Court of Appeals heard the oral arguments in the appeal case of Mr. Salih Mustafa. The Panel asked the Defense about its views concerning Article 21 of the Kosovo Criminal Code (KCC) in light of the Article 12 of the KSC Law.<sup>1</sup> In addition, can the Article 21 of the KCC, which allows for *Dolus eventualis*, be applied?<sup>2</sup>

## II. ANSWER

2. *Dolus eventualis*, as envisaged in Article 21 of the Kosovo Criminal Code, cannot be applied.
3. Article 12 of the KSC Law dictates that Customary International Law and the substantive Law of Kosovo, shall be applied.
4. *Dolus eventualis* is not part of customary international law.
5. Customary international law, derives from “a general practice accepted as law”. Such practice can be found in official accounts of military operations but is also reflected in a variety of other official documents, including military manuals, national legislation and case law. The requirement that this practice be “accepted as law” is often referred to as “*opinio juris*”. Rules of Customary International law are unwritten and research into State practice is required to determine their existence.<sup>3</sup>
6. At the time of the alleged commission of the criminal offense in case at hand, the Criminal Code of the former Yugoslavia (CCSFRY) was the applicable law<sup>4</sup>. Under Chapter Two of that Code, criminal conduct was described. The heading of the chapter reads: Criminal conduct and criminal liability.

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<sup>1</sup> Draft transcript, 27 October 2023, page 156, line 16-19.

<sup>2</sup> Draft transcript, 27 October 2023, page 157, line 6-8 and line 18.

<sup>3</sup> ICRC, questions and answers on Customary International Law, answers to questions 1 and 2  
<https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm#a1>

<sup>4</sup> See Annex 1 The Criminal Code of Socialist Federal Republic of Yugoslavia, 1 July 1977

7. Article 11 of the CCSFRY reads: “An offender is considered criminally liable if he is responsible and if he has committed a criminal act with premeditation or by negligence”.
8. The heading of Article 13 of the CCSFRY reads: “Premeditation”
9. The Article of the CCSFRY 13 reads: “A criminal act is premeditated if the offender is conscious of his deed and wants its commission; or when he is conscious that a prohibited consequence might result from his act or omission and consents to its occurring”.
10. Important is that each of the elements need to be proved beyond a reasonable doubt.
11. The Defense submits that the *dolus eventualis* had no place in the criminal code at the time that the offenses in the case at hand, took place. It is clear from the wording “premeditated”, that it was *dolus directus* applied at the time that the events took place and was the substantive Kosovo Law at the time of the events. Premeditated implies intent on the deed of the perpetrator as well as intent to result of such deed. The perpetrator’s decisions to act are taken conscientiously in order to achieve his desired objective.
12. Customary International Law is formed by *opinio iuris* and State practice. It is clear from the State Practice in Kosovo, as can be concluded from the heading of Article 13 of the CCSFRY (premeditation) that the *dolus directus* is the common state practice applied as the form of intent at the time of commission of the alleged criminal offence.
13. It is important to note that the *dolus eventualis* must somehow include the factor time. Because, even when applying the *dolus eventualis*, the subsequent death of a victim must occur within a (rather) short time frame in order to relate such death to conduct such as (severe) mistreatment.
14. If time as an element would not be implemented, then the initial perpetrator could be held accountable for any other subsequent and potentially lethal event taking place at any later time. Even if such an event would occur independently of the initial perpetrator.

15. Accountability for a criminal offense therefore cannot be “expanded” to an indefinite time period. That is untenable, as there must be some demarcation to hold either the initial perpetrator accountable, or to hold other perpetrator(s) accountable for committing a (potential lethal) offense against the same victim.
16. The element of time is therefore a very important factor.
17. The (cause of) death of a victim therefore cannot be related to some criminal conduct for an undetermined amount of time, certainly not when multiple people might have been involved, or cannot be excluded. In any case, the direct cause of death and the conduct of a perpetrator causing it, must be established beyond a reasonable doubt.
18. Lastly, Article 12 of the KSC Law once again reiterates the importance of the several conventions that contain and apply the *lex mitior*.

### III. CONCLUSION

19. In the virtue of the foregoing the Defense submits that *Dolus eventualis*, as written in Article 21 of the Kosovo Criminal Code, in light of Article 12 of the KSC Law, cannot be applied.

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**01 November 2023  
At The Hague, the Netherlands**

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