



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

Specialist Prosecutor v. Salih Mustafa

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

Registrar: Fidelma Donlon

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Specialist Prosecutor's Office:
Kimberly P. West

Counsel for Salih Mustafa:
Julius von Bóné

Counsel for Victims:
Anni Pues

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THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Articles 33(1)(c) and 46 of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 172, 176 and 183 of the Rules of Procedure and Evidence (“Rules”), is seised of an appeal by Mr Salih Mustafa (“Mustafa” or “the Accused”, who is the appellant) against the Trial Judgment in the case of the *Specialist Prosecutor v. Salih Mustafa*, KSC-BC-2020-05 (“Trial Judgment”), which was pronounced and filed in writing on 16 December 2022 in accordance with Rule 159 of the Rules. The Appeals Panel hereby issues the present Judgment, together with Annex 1 detailing the abbreviations used and materials cited in this Judgment.

I. BACKGROUND

A. TRIAL PROCEEDINGS

1. The Trial in this case opened on 15 September 2021 and closed on 15 September 2022. Between 20 September 2021 and 26 May 2022, the Trial Panel received evidence from 30 witnesses and heard the views and concerns of one victim participating in the proceedings.² During the trial proceedings, the Trial Panel admitted into evidence, *inter alia*, oral evidence of *viva voce* witnesses, written statements of witnesses and of the Accused, documentary evidence and expert reports.³

2. The Trial Panel found that the facts giving rise to this case took place in the context of a non-international armed conflict between the KLA and Serbian forces,⁴ between approximately 1 April 1999 and on or around 19 April 1999 at a compound

¹ Decision on Assignment.

² Trial Judgment, paras 9, 11, 13, 30.

³ Trial Judgment, para. 30.

⁴ Trial Judgment, para. 710.

in Zllash/Zlaš, Kosovo – referred to as the Zllash/Zlaš Detention Compound, which was the base of the BIA Guerrilla unit in Zllash/Zlaš. The Trial Panel also found that, at this location, at least six persons – including W01679, W03593, W03594, W04669, the Murder Victim, [REDACTED] and [REDACTED] – were deprived of their liberty by BIA members under the control and authority of the BIA commander, the Accused.⁵ The Trial Panel further found that, during the same time frame, the Accused and other BIA members under his authority held the detainees at the ZDC in inhumane and degrading conditions and routinely assaulted them, both physically and psychologically, for the purpose of obtaining information or a confession from them, and/or to punish, intimidate, coerce and/or discriminate against them on political grounds.⁶ Lastly, the Trial Panel found that the Murder Victim died “between on or around 19 April 1999 and around the end of April 1999”, as a result of acts and omissions attributable to the Accused and his BIA subordinates.⁷

3. On 16 December 2022, the Trial Panel delivered the Trial Judgment, convicting the Accused of having directly committed the war crime of torture (Count 3) and of having committed, as part of a JCE I, the war crimes of arbitrary detention (Count 1), torture (Count 3) and murder (Count 4).⁸ The Trial Panel considered that the charge of the war crime of cruel treatment was “fully consumed” by the charge of the war crime of torture and consequently found the Accused not guilty of the war crime of cruel treatment (Count 2).⁹ The Trial Panel sentenced Mustafa to a single sentence of 26 years of imprisonment, with credit for time served.¹⁰

⁵ Trial Judgment, para. 495. See also Trial Judgment, fn. 703, where the Trial Panel explains that it uses the formulation “at least six persons” throughout the Trial Judgment, although it identifies seven victims, as such formulation reflects the charges presented by the Specialist Prosecutor’s Office, as set out in the Confirmed Indictment. See in particular, Indictment, para. 18; Trial Judgment, para. 347.

⁶ Trial Judgment, paras 584-588.

⁷ Trial Judgment, paras 638-639, 695.

⁸ Trial Judgment, paras 758-760, 831.

⁹ Trial Judgment, paras 667, 831.

¹⁰ The Trial Panel imposed the following individual sentences on the Accused: (i) Count 1 (war crime of arbitrary detention, committed against at least six persons) – ten years of imprisonment; (ii) Count 3

4. On 6 April 2023, the Trial Panel issued an order against the Accused, awarding reparations to eight victims participating in the proceedings.¹¹ Mustafa has not appealed this Reparation Order.

B. APPELLATE PROCEEDINGS

5. On 9 January 2023, pursuant to a request by the Accused, the Appeals Panel granted an extension of time to 3 February 2023 for filing any notice of appeal against the Trial Judgment.¹²

6. On 2 February 2023, the Accused filed his notice of appeal against the Trial Judgment, in which he raised nine grounds of appeal, divided into 51 sub-grounds.¹³ The Accused requests that the Court of Appeals Panel: (a) reverse the convictions on Counts 1, 3 and 4 and either (i) acquit him of all counts or (ii) return the case to the Trial Panel; or (b) in case all, or any, convictions are affirmed, reduce the imposed sentence.¹⁴

7. On 13 February 2023, the Accused filed a motion objecting to Victims' Counsel's participation in the pre-appeal conference and further appeal proceedings.¹⁵ On 15 February 2023, the Panel dismissed the Accused's motion and adopted modalities for victim participation.¹⁶

(war crime of torture, committed against at least six persons) – 22 years of imprisonment; and (iii) Count 4 (war crime of murder, committed against one person) – 25 years of imprisonment. Based on these individual sentences, the Trial Panel imposed a single sentence of 26 years of imprisonment, reflecting the totality of the Accused's criminal conduct, and deducted from the sentence the time he had spent in detention since his arrest on 24 September 2020. See Trial Judgment, paras 829-831.

¹¹ Reparation Order.

¹² Decision on Extension of Time to File Notice of Appeal, para. 11; Defence Motion for Extension of Time to File Notice of Appeal.

¹³ Notice of Appeal. The Panel notes that, in this Appeal Judgment, it will refer to each sub-ground as a "ground of appeal".

¹⁴ Notice of Appeal, para. 2; Appeal Brief, paras 3, 446. See also Appeal Brief, paras 323, 341, 367, 378, 390, 400, 438; Reply Brief, paras 3, 5, 138.

¹⁵ Defence Motion Regarding Victim Participation in Appellate Proceedings.

¹⁶ Decision on Victim Participation in Appellate Proceedings, paras 4-14, 17.

8. On 16 February 2023, the Presiding Judge of the Appeals Panel held a pre-appeal conference on behalf of the Panel.¹⁷
9. On 21 March 2023, the Panel denied the Accused's request for certification to appeal the Decision on Victim Participation in Appellate Proceedings.¹⁸
10. On 3 April 2023, the Panel granted the Accused's request for an extension of time for the filing of his appeal brief against the Trial Judgment, and denied his request for an extension of the word limit thereof.¹⁹
11. On 24 April 2023, the Accused filed his appeal brief and, on 2 May 2023, a corrected version thereof.²⁰
12. On 5 May 2023, the Appeals Panel granted in part the requests of the SPO and Victims' Counsel for an extension of time to file their briefs in response.²¹
13. On 5 June 2023, Victims' Counsel and the SPO filed their response briefs.²²
14. On 16 June 2023, the Accused filed a reply.²³
15. On 26 and 27 October 2023, the Appeals Panel heard oral submissions from the Parties and Participants regarding the appeal.²⁴ Further to questions raised by the

¹⁷ Order Scheduling Pre-Appeal Conference, paras 7, 11; Transcript, 16 February 2023.

¹⁸ Decision on Certification to Appeal Decision on Victim Participation, paras 9, 12; Defence Request for Leave to Appeal Decision on Victim Participation. See also Victims Response to Defence Request for Leave to Appeal Decision on Victim Participation; SPO Response to Defence Request for Leave to Appeal Decision on Victim Participation.

¹⁹ Decision on Variation of Time and Word Limits to File Appeal Brief.

²⁰ For the purposes of the present Judgment, the corrected version of appeal brief filed by the Accused on 2 May 2023 is referred to as "Appeal Brief".

²¹ Decision on Extension of Time Limit to File Response Briefs; SPO Request for Extension of Time to File Response Brief; Victims Request for Extension of Time to File Response Brief.

²² Victims Response Brief; SPO Response Brief.

²³ Reply Brief. Mustafa submits, *inter alia*, that the SPO Response Brief and the Victims Response Brief should be rejected in their entirety. See Reply Brief, para. 4.

²⁴ Order Scheduling Appeal Hearing; Transcript, 26 October 2023; Transcript, 27 October 2023. See also Order for Preparation of Appeal Hearing.

Panel during the Appeal Hearing, the Parties filed additional written submissions relating to the charge of murder.²⁵

16. In accordance with the Order Scheduling Appeal Judgment dated 27 November 2023, the Panel decided to issue the Appeal Judgment on Thursday, 14 December 2023.²⁶

II. STANDARD OF REVIEW

17. Article 46 of the Law sets out the standard of review for appeals against trial judgments. Under Article 46 of the Law, the Appeals Panel may affirm, reverse or revise the Trial Judgment, and take any other appropriate action, on the following grounds: (i) “an error on a question of law invalidating the judgement”; (ii) “an error of fact which has occasioned a miscarriage of justice”; or (iii) “an error in sentencing”.²⁷

18. The party alleging an error of law must identify it, present arguments in support of its claim and explain how the error invalidates the decision.²⁸ In addition, when a party alleges an error of law on the basis of a lack of a reasoned opinion, it must identify the specific issues, factual findings or arguments which the Trial Panel is alleged to have omitted, and explain why this omission invalidates the decision.²⁹ The Appeals Panel considers that an alleged error of law which has no prospect of changing the outcome of the decision may be rejected on that basis.³⁰ However, even

²⁵ Further SPO Submissions on *Mens Rea* for Murder; Further Defence Submissions on *Mens Rea* for Murder.

²⁶ Order Scheduling Appeal Judgment, paras 3, 5.

²⁷ Article 46(1)(a)-(c), (3) of the Law. See also *Gucati and Haradinaj* Appeal Judgment, para. 21.

²⁸ *Gucati and Haradinaj* Appeal Judgment, para. 22 and jurisprudence cited therein. See also *Ongwen* Appeal Judgment, para. 76; *Mladić* Appeal Judgement, para. 16; *Nyiramasuhuko et al.* Appeal Judgement, para. 30; *Merhi and Oneissi* Appeal Judgment, para. 29.

²⁹ *Gucati and Haradinaj* Appeal Judgment, para. 22 and jurisprudence cited therein. See also *Ongwen* Appeal Judgment, para. 88; *Mladić* Appeal Judgement, para. 16; *Merhi and Oneissi* Appeal Judgment, para. 29.

³⁰ *Gucati and Haradinaj* Appeal Judgment, para. 22 and jurisprudence cited therein. See also *Mladić* Appeal Judgement, para. 16; *Merhi and Oneissi* Appeal Judgment, para. 29.

if a party's arguments are insufficient to support the contention of an error, the Panel may find an error of law based on other reasons.³¹ The Appeals Panel will review the Trial Panel's findings of law to determine whether they are correct.³²

19. Moreover, Article 46(4) of the Law specifies that:

When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.

20. Where the Appeals Panel itself applies the correct legal standard to the evidence contained in the trial record and determines whether it is satisfied as to the requisite standard of proof of the challenged factual finding,³³ it will only take into account evidence referenced in the Trial Judgment, evidence contained in the trial record to which the parties refer, and, where applicable, additional evidence admitted on appeal pursuant to Rule 181 of the Rules.³⁴

21. In exceptional circumstances, the Appeals Panel may also consider arguments raised by a party in an appeal concerning errors of law that would not lead to the

³¹ *Gucati and Haradinaj* Appeal Judgment, para. 22 and jurisprudence cited therein. See also *Karadžić* Appeal Judgment, para. 15; *Šešelj* Appeal Judgment, para. 13; *Merhi and Oneissi* Appeal Judgment, para. 29.

³² *Gucati and Haradinaj* Appeal Judgment, para. 22 and jurisprudence cited therein. See *Merhi and Oneissi* Appeal Judgment, para. 29.

³³ *Gucati and Haradinaj* Appeal Judgment, para. 24 and jurisprudence cited therein. See also *Mladić* Appeal Judgment, para. 17; *Nyiramasuhuko et al.* Appeal Judgment, para. 31.

³⁴ *Gucati and Haradinaj* Appeal Judgment, para. 24 and jurisprudence cited therein. See also *Mladić* Appeal Judgment, para. 17; *Karadžić* Appeal Judgment, para. 17; *Nyiramasuhuko et al.* Appeal Judgment, para. 31.

invalidation of the Trial Judgment if they are of general significance to the Specialist Chambers' jurisprudence.³⁵

22. The Panel further notes that, when a party alleges on appeal that its right to a fair trial has been infringed, it must demonstrate that this violation caused prejudice amounting to an error of law which, in turn, invalidates the challenged decision.³⁶

23. On errors of fact, Article 46(5) of the Law provides that:

In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.

24. The same standard applies to alleged errors of fact regardless of whether the impugned finding was based on direct or circumstantial evidence.³⁷ The Appeals Panel will not lightly overturn a trial panel's factual findings, as it is primarily the latter's task to hear, assess and weigh the evidence presented at trial.³⁸ The Appeals Panel will only overturn a decision by a trial panel where an error of fact occasioned a miscarriage of justice.³⁹ In this regard, the Panel notes that mere disagreement with

³⁵ See *Prlić et al.* Appeal Judgment, para. 18 and jurisprudence cited therein; *Krnojelac* Appeal Judgment, paras 6-8; *Haradinaj et al.* Appeal Judgment, para. 9; *Boškoski and Tarčulovski* Appeal Judgment, para. 9; *Nahimana et al.* Appeal Judgment, para. 12.

³⁶ *Gucati and Haradinaj* First Appeal Decision on Haradinaj's Detention, para. 44. See also *Galić* Appeal Judgment, para. 21; *Hadžihasanović and Kubura* Appeal Judgment, para. 130; *Karadžić* Appeal Judgment, para. 26; *Kordić and Čerkez* Appeal Judgment, para. 119.

³⁷ *Gucati and Haradinaj* Appeal Judgment, para. 26 and jurisprudence cited therein. See *Mladić* Appeal Judgment, para. 18; *Karadžić* Appeal Judgment, para. 17; *Merhi and Oneissi* Appeal Judgment, para. 32.

³⁸ *Gucati and Haradinaj* Appeal Judgment, para. 26 and jurisprudence cited therein. See *Ongwen* Appeal Judgment, paras 78, 80, 82; *Mladić* Appeal Judgment, para. 18; *Karadžić* Appeal Judgment, para. 17; *Nyiramasuhuko et al.* Appeal Judgment, para. 32; *Merhi and Oneissi* Appeal Judgment, para. 31.

³⁹ *Gucati and Haradinaj* Appeal Judgment, para. 26. See also *Mladić* Appeal Judgment, para. 18; *Karadžić* Appeal Judgment, para. 17; *Nyiramasuhuko et al.* Appeal Judgment, para. 32; *Lubanga* Appeal Judgment, para. 25; *Merhi and Oneissi* Appeal Judgment, para. 31.

the conclusions that the Trial Panel drew from available facts or the weight it accorded to particular factors is not enough to establish a clear error.⁴⁰

25. The Appeals Panel is not bound by a party's characterisation of an alleged error as a question of law or fact.⁴¹ Where a party mischaracterises an alleged error, the Appeals Panel will apply the correct standard of review.⁴² In this regard, the Appeals Panel notes that Mustafa at times mischaracterises or fails to clearly articulate the nature of the alleged error.⁴³ In such instances, the Appeals Panel has applied the relevant standard of review in light of Mustafa's arguments.

26. Furthermore, where the Panel identifies a mixed error of law and fact, the Appeals Panel will first examine the applicable law and then determine whether the factual conclusion reached by the trial panel was one which no reasonable trier of fact could have reached.⁴⁴

III. GENERAL CONSIDERATIONS

27. The Panel notes that, in the Trial Judgment, the Trial Panel considered Article 31(5) of the Kosovo Constitution, Articles 3(2), 14(1)(c) and (2), 16(1)(a), 21, 23(1), 34, 40(5), 43, and 44(1), (2) and (5) of the Law and Rules 23(1), 24(1) to (3), 138, 139, 140, 158, 159(1) to (4) and (6), and 163(1), (3), (4) and (6) of the Rules.⁴⁵

28. In adjudicating this Appeal, the Panel recalls that the Law clearly states that Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the ICC and other

⁴⁰ *Gucati and Haradinaj* Appeal Decision on Gucati's Arrest and Detention, para. 64.

⁴¹ See *Dragomir Milošević* Appeal Judgement, para. 18; *Strugar* Appeal Judgement, paras 252, 269; *Blagojević and Jokić* Appeal Judgement, paras 144-145.

⁴² See *Dragomir Milošević* Appeal Judgement, para. 18; *Strugar* Appeal Judgement, paras 252, 269; *Blagojević and Jokić* Appeal Judgement, paras 144-145.

⁴³ See e.g. Grounds 1L, 1M, 5B.

⁴⁴ See *Strugar* Appeal Judgement, para. 269.

⁴⁵ Trial Judgment, para. 21.

criminal courts.⁴⁶ These subsidiary sources can guide the Judges' reflection in instances where primary sources do not provide guidance on a specific matter.⁴⁷

A. FORMAL REQUIREMENTS ON APPEAL AND SUMMARY DISMISSAL

29. The Appeals Panel notes that its ability to assess a party's arguments depends on the latter presenting its case clearly, logically and exhaustively.⁴⁸ The appealing party is required to provide precise references to relevant paragraphs in the impugned judgment or transcript pages of testimony to which a challenge is being made, and to the jurisprudence cited in support thereof.⁴⁹ The Appeals Panel cannot be expected to consider a party's submissions if they are obscure, contradictory, vague, unsubstantiated or suffer from other formal and obvious insufficiencies.⁵⁰ In this respect, the Panel notes that, in several grounds of appeal, Mustafa does not substantiate his arguments with relevant jurisprudence, does not identify the Trial Panel's specific findings that he is challenging or reference relevant paragraphs of the Trial Judgment, and at times even fails to formulate complete sentences.⁵¹ While, in principle, such deficiencies warrant summary dismissal of the ground of appeal, the Appeals Panel may exceptionally decide to consider vague or unsubstantiated submissions where it is nonetheless able to deduce which specific findings or evidence

⁴⁶ Article 3(3) of the Law.

⁴⁷ *Gucati and Haradinaj* Appeal Judgment, para. 28; *Gucati and Haradinaj* Appeal Decision on *Gucati's* Arrest and Detention, para. 11.

⁴⁸ *Gucati and Haradinaj* Appeal Judgment, para. 29 and jurisprudence cited therein.

⁴⁹ Practice Direction on Filings, Articles 32(2), 47(1)(b)(2)-(3), 48(1)(b)(1)-(2). See also *Gucati and Haradinaj* Appeal Judgment, para. 29; *Ongwen* Appeal Judgment, para. 88; *Mladić* Appeal Judgement, para. 21; *Nyiramasuhuko et al.* Appeal Judgement, para. 35. The appeal brief shall also contain an annex containing the list of authorities referred to in the appeal brief. See Practice Direction on Filings, Article 48(1)(e).

⁵⁰ *Gucati and Haradinaj* Appeal Judgment, para. 29; *Mladić* Appeal Judgement, para. 21; *Nyiramasuhuko et al.* Appeal Judgement, para. 35.

⁵¹ See e.g. Grounds 1B, 1J, 1K, 2G, 2I, 2J, 2K, 2L and 2M. See also SPO Response Brief, para. 19, noting that Mustafa's "bare, unsubstantiated submissions alleging a general deficiency throughout the Judgement and requesting review of unspecified findings are wholly insufficient to discharge his appellate burden".

Mustafa is challenging and finds it necessary to consider them out of fairness to the Accused and in the interests of justice.

30. An appeal is not a trial *de novo*.⁵² A party may not merely repeat arguments that did not succeed at trial, unless it can demonstrate that the Trial Panel's rejection of those arguments constituted an error warranting the Appeals Panel's intervention.⁵³ Furthermore, a party should not remain silent on a matter which was apparent during the course of the trial, only to raise it for the first time on appeal.⁵⁴ The importance of a timely objection rests on the fact that a panel must be afforded an opportunity to remedy the alleged deficiencies. The Appeals Panel considers that, absent special circumstances, if a party fails to raise an issue in a timely manner during trial, when it reasonably could have done so, it has effectively waived its right to raise it on appeal.⁵⁵ Similarly, pursuant to Rule 138(1) of the Rules, an objection to the admissibility of evidence must be made as soon as its basis becomes apparent.⁵⁶ In this respect, the Panel notes that, in several grounds of appeal, Mustafa challenges the admissibility of evidence that he did not contest during the trial proceedings.⁵⁷ In principle, a party's failure to make formal and timely objections to the admissibility of evidence at trial

⁵² Article 46(2) of the Law; *Gucati and Haradinaj* Appeal Judgment, para. 21; *Šainović et al.* Appeal Judgment, para. 223; *Tadić* Appeal Judgment, para. 55.

⁵³ *Gucati and Haradinaj* Appeal Judgment, para. 29. See also *Mladić* Appeal Judgment, para. 20; *Njiramasuhuko et al.* Appeal Judgment, para. 34.

⁵⁴ *Karadžić* Appeal Judgment, paras 25, 312; *Haradinaj et al.* Appeal Judgment, para. 112; *Tolimir* Appeal Judgment, para. 183; *Šainović et al.* Appeal Judgment, paras 125, 223; *Kayishema and Ruzindana* Appeal Judgment, para. 91; *Niyitegeka* Appeal Judgment, para. 199.

⁵⁵ *Karadžić* Appeal Judgment, paras 25, 312; *Prlić et al.* Appeal Judgment, para. 165; *Boškoski and Tarčulovski* Appeal Judgment, para. 185; *Tolimir* Appeal Judgment, para. 170; *Šainović et al.* Appeal Judgment, para. 223; *Kunarac et al.* Appeal Judgment, para. 61; *Niyitegeka* Appeal Judgment, para. 199. See also *Ongwen* Sentencing Appeal Judgment, para. 108.

⁵⁶ Rule 138(1) of the Rules specifically requires that the parties raise issue at the time the evidence is tendered, allowing the parties to later raise an issue "immediately after it has become known" only in "exceptional circumstances, when the Panel is satisfied that [the] issue was not known at the time when the evidence was submitted".

⁵⁷ See e.g. Grounds 1B, 1C, 1D, 1E in part, 1F, 1G, 1N and 2E. See also SPO Response Brief, paras 8-10, noting that many of Mustafa's challenges relate to the admissibility of evidence that was uncontested at trial and having identified no special circumstances for his failure to raise the issue at the time of admission, he "has waived his right to raise these grounds on appeal".

warrants summary dismissal of the objection raised for the first time on appeal. Only exceptionally, the Appeals Panel may decide to consider such submissions where necessary out of fairness to the Accused and in the interests of justice.

31. The Appeals Panel may also decline to consider issues raised in an appeal brief or brief in reply which were not contained in the notice of appeal,⁵⁸ unless a timely request for an amendment has been made and authorised by the Appeals Panel, in accordance with Rule 176(3) of the Rules. The Appeals Panel may also decline to consider arguments raised for the first time during an appeal hearing. Furthermore, the grounds of appeal and arguments in the appeal brief shall be set out and numbered in the same order as in the appellant's notice of appeal, unless otherwise varied with leave of the Appeals Panel.⁵⁹ In principle, failure to do so warrants summary dismissal. However, the Appeals Panel may exceptionally decide to consider such submissions where the Panel deems it necessary out of fairness to the Accused and in the interests of justice.

32. The Panel may also decline to consider issues raised in a notice of appeal that are not subsequently developed in an appeal brief.⁶⁰ Generally, arguments made in a notice of appeal should be developed in the appeal brief, or they are deemed to have been "abandoned".⁶¹ However, the Appeals Panel may nevertheless, as a matter of fairness, decide to consider such arguments.⁶²

33. Moreover, arguments which do not have the potential to cause the impugned decision to be reversed or revised may be dismissed by the Panel immediately and

⁵⁸ *Gucati and Haradinaj* Appeal Judgment, para. 30, referring to *Marijačić and Rebić* Appeal Judgment, para. 18. See also *Ntakirutimana and Ntakirutimana* Appeal Judgment, paras 370, 524; *Vasiljević* Appeal Judgment, para. 15; *Galić* Appeal Judgment, para. 78; *Orić* Appeal Judgment, para. 65.

⁵⁹ Practice Direction on Filings, Article 48(2). See also *Gucati and Haradinaj* Appeal Judgment, para. 30, referring to *Boskoški and Tarčulovski* Decision on Notice of Appeal, para. 19.

⁶⁰ See *Brima et al.* Appeal Judgment, fn. 69; *Nyiramasuhuko et al.* Appeal Judgment, fn. 441; *Rutaganda* Appeal Judgment, fn. 1081; *Kayishema and Ruzindana* Appeal Judgment, para. 46.

⁶¹ *Nyiramasuhuko et al.* Appeal Judgment, fn. 441.

⁶² *Nyiramasuhuko et al.* Appeal Judgment, fn. 441.

need not be considered on the merits.⁶³ The Appeals Panel has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and may dismiss arguments which are evidently unfounded without providing detailed reasoning.⁶⁴ In particular, the Appeals Panel notes that the following types of arguments may be summarily dismissed:

- (i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings;
- (ii) mere assertions that the trial chamber must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the trial chamber;
- (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding;
- (iv) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence;
- (v) arguments contrary to common sense;
- (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party;
- (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals [Panel];
- (viii) allegations based on material not on the trial record;
- (ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate an error; and

⁶³ *Gucati and Haradinaj* Appeal Judgment, para. 31. See also *Mladić* Appeal Judgment, para. 20; *Nyiramasuhuko et al.* Appeal Judgment, para. 34; *Merhi and Oneissi* Appeal Judgment, para. 33; *Ongwen* Appeal Judgment, para. 89.

⁶⁴ *Gucati and Haradinaj* Appeal Judgment, para. 31. See also *Mladić* Appeal Judgment, para. 21; *Nyiramasuhuko et al.* Appeal Judgment, para. 35; *Merhi and Oneissi* Appeal Judgment, para. 33.

- (x) mere assertions that the trial [panel] failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.⁶⁵

B. LIMITED GROUNDS FOR APPELLATE INTERVENTION

1. Trial Panel's Reasoned Opinion

34. The Appeals Panel notes that, in order to fulfil its obligation to provide a reasoned opinion, a trial panel must provide reasoning in support of its findings on the substantive considerations relevant for a decision. However, it is neither required to articulate every step of its reasoning, nor to address all of the arguments raised by the parties or every item of evidence relevant to a particular finding, provided that it indicates with sufficient clarity the basis for its decision.⁶⁶ It is presumed that a trial panel evaluated all of the evidence before it, as long as there is no indication that it completely disregarded any particular piece of evidence.⁶⁷ Accordingly, if a trial panel did not refer to a specific piece of evidence in its findings, it is to be presumed that it assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings. This presumption may be rebutted when evidence which is clearly relevant to the findings is not addressed by a trial panel's reasoning.⁶⁸

35. Furthermore, an accused's right to a reasoned opinion does not require a detailed analysis of the credibility of witnesses, as long as the trial panel provides

⁶⁵ *Gucati and Haradinaj* Appeal Judgment, para. 32. See also *Boškoski and Tarčulovski* Appeal Judgement, para. 18; *Gucati and Haradinaj* First Appeal Decision on Haradinaj's Detention, para. 29; *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 15; *Shala* Appeal Decision on Provisional Release, para. 8; *Thaçi et al.* Appeal Decision on Fourth Victim Participation, paras 8, 17, 24; *Thaçi et al.* Appeal Decision on Fifth Victim Participation, para. 29.

⁶⁶ *Gucati and Haradinaj* Appeal Judgment, para. 33, referring to *Bemba et al.* Appeal Judgment, para. 105; *Veseli* Appeal Decision on Interim Release, para. 72; *Thaçi et al.* Appeal Decision on Jurisdiction, para. 154.

⁶⁷ *Gucati and Haradinaj* Appeal Judgment, para. 33, referring to *Bemba et al.* Appeal Judgment, para. 105. See also *Halilović* Appeal Judgement, para. 121; *Kvočka et al.* Appeal Judgement, para. 23.

⁶⁸ *Gucati and Haradinaj* Appeal Judgment, para. 33, referring to *Bemba et al.* Appeal Judgment, para. 105. See also *Halilović* Appeal Judgement, para. 188; *Kvočka et al.* Appeal Judgement, para. 23.

reasons for accepting a witness's testimony despite any alleged or material inconsistencies.⁶⁹

2. Trial Panel's Discretion

36. The Appeals Panel recalls that, where the decision that is being challenged is a discretionary decision, a party must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.⁷⁰

37. The Panel recalls that a decision on whether to admit or exclude evidence pursuant to Rule 138(1) of the Rules is one that lies within a trial panel's discretion in its assessment of the relevance, authenticity and probative value of the submitted evidence.⁷¹ A trial panel may refuse to admit evidence where no reasonable showing of relevance has been made.⁷² For the purposes of deciding on the admissibility of evidence, relevance is assessed on the basis of whether the proposed evidence relates to elements of the offence(s) or mode(s) of liability pleaded in the indictment, or to other facts or circumstances material to the parties' case.⁷³ Moreover, appellate

⁶⁹ See *Popović et al.* Appeal Judgement, para. 133. See also *Kajelijeli* Appeal Judgement, paras 60-61.

⁷⁰ *Shala* Appeal Decision on Prior Statements, para. 8; *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 14 and jurisprudence cited therein. With regard to the Trial Panel's discretion in sentencing, see below, para. 453.

⁷¹ *Gucati and Haradinaj* Appeal Judgment, para. 35; *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 14.

⁷² *Gucati and Haradinaj* Appeal Judgment, para. 35; *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 20. See also *Prlić et al.* Appeal Decision on Admission of Evidence, para. 17; *Bagosora et al.* Decision on Admission of Binder, para. 7; Rules 137(1) and 138(1) of the Rules.

⁷³ *Gucati and Haradinaj* Appeal Judgment, para. 35; *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 20. See also e.g. *Prlić et al.* Appeal Decision on Admission of Evidence, para. 17; *Ruto et al.* Confirmation Decision, para. 66; *Katanga and Ngudjolo* Bar Table Decision, para. 16.

intervention in decisions relating to the admission of evidence is warranted only in very limited circumstances.⁷⁴

38. The Panel also recalls that a trial panel is best placed to assess the credibility of a witness and the reliability of the evidence presented by the parties,⁷⁵ and therefore has broad discretion in assessing the appropriate weight to be given to witness testimony.⁷⁶ There is no general requirement that the testimony of a witness be corroborated if otherwise deemed credible.⁷⁷ In fact, corroboration is neither a condition nor a guarantee of reliability of a single piece of evidence.⁷⁸ A trial panel has the discretion to decide, in the circumstances of each case, whether corroboration of evidence is necessary, and to rely on uncorroborated, but otherwise credible, witness testimony.⁷⁹

39. The Panel further notes that, where an alleged violation of fair trial rights concerns a discretionary decision, the appellant must show that the Trial Panel committed a discernible error resulting in prejudice to that appellant.⁸⁰

⁷⁴ *Gucati and Haradinaj* Appeal Judgment, para. 35; *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 14, referring to *Simba* Appeal Judgment, para. 19; *Bagosora et al.* Appeal Decision on Exclusion of Evidence, para. 11.

⁷⁵ *Gucati and Haradinaj* Appeal Judgment, para. 36, referring to *Popović et al.* Appeal Judgment, paras 131, 1228. See also *Šainović et al.* Appeal Judgment, paras 437, 464, 1296; *Lukić and Lukić* Appeal Judgment, para. 296; *Dorđević* Appeal Judgment, para. 395; *Limaj et al.* Appeal Judgment, para. 88; *Aleksovski* Appeal Judgment, para. 63; *Kayishema and Ruzindana* Appeal Judgment, para. 187.

⁷⁶ *Popović et al.* Appeal Judgment, para. 131; *Dorđević* Appeal Judgment, paras 781, 797, 819; *Ndahimana* Appeal Judgment, paras 43, 93; *Lukić and Lukić* Appeal Judgment, paras 86, 235, 363, 375; *Kupreškić et al.* Appeal Judgment, para. 32; *Rutaganda* Appeal Judgment, para. 28.

⁷⁷ Rule 139(3) of the Rules; *Gucati and Haradinaj* Appeal Judgment, para. 36. See also *Ntaganda* Appeal Judgment, para. 782; *Dragomir Milošević* Appeal Judgment, para. 215; *Ntawukulilyayo* Appeal Judgment, para. 21.

⁷⁸ *Dragomir Milošević* Appeal Judgment, para. 248; *Limaj et al.* Appeal Judgment, para. 203 and jurisprudence cited therein.

⁷⁹ *Karera* Appeal Judgment, para. 45; *Ntawukulilyayo* Appeal Judgment, para. 21; *Dragomir Milošević* Appeal Judgment, para. 215. See also *Musema* Appeal Judgment, para. 36; *Aleksovski* Appeal Judgment, para. 63.

⁸⁰ *Mladić* Appeal Judgment, paras 63, 107; *Nyiramasuhuko et al.* Appeal Judgment, para. 431. See also *Prlić et al.* Appeal Judgment, para. 119.

3. Trial Panel's Presumption of Impartiality

40. The Panel recalls that there is a presumption of impartiality which attaches to the judges of a trial panel, and it is for the appealing party to rebut this presumption on the basis of adequate and reliable evidence.⁸¹

C. LEGAL CERTAINTY

41. The Panel notes that, in the interests of legal certainty and predictability, an appeals panel is expected to follow previous decisions by the Court of Appeals Chamber and should only depart from them for cogent reasons in the interests of justice.⁸² Therefore, a party requesting such departure must demonstrate that it is justified for cogent reasons.⁸³

IV. ADMISSIBILITY OF VICTIMS' COUNSEL'S SUBMISSIONS

42. In the Decision on Victim Participation in Appellate Proceedings, the Appeals Panel decided that the victims who participated in the pre-trial and trial proceedings may participate in the appellate proceedings, but confined their participation to issues arising from the grounds of appeal.⁸⁴ The Panel further determined that Victims' Counsel may file responses and replies to any submissions made before the Panel, including appellate briefs, but must explicitly set out how the submissions are related to the participating victims' personal interests.⁸⁵ The Panel specified that "[f]ailure to

⁸¹ See e.g. *Veseli* Appeal Decision on Detention Review, para. 34; *Akayesu* Appeal Judgment, para. 91; *Furundžija* Appeal Judgment, paras 196-197.

⁸² *Gucati and Haradinaj* Appeal Judgment, para. 37; *Thaçi et al.* Appeal Decision on Fifth Victim Participation, para. 10; *Shala* Appeal Decision on Jurisdiction, para. 15. See also *Mladić* Appeal Judgment, para. 14; *Karadžić* Appeal Judgment, para. 13; *Semanza* Appeal Decision, para. 92; *Aleksovski* Appeal Judgment, paras 107-111; *Šešelj* Appeal Judgment, para. 11 (wherein the IRMCT Appeals Chamber held, *inter alia*, that instances where cogent reasons in the interests of justice would require departure from previous appeals decisions include where decisions were made on the basis of a wrong legal principle or where the judges were ill-informed about the applicable law).

⁸³ *Mladić* Appeal Judgment, para. 14; *Karadžić* Appeal Judgment, para. 13; *Šešelj* Appeal Judgment, para. 11.

⁸⁴ Decision on Victim Participation in Appellate Proceedings, paras 7-8.

⁸⁵ Decision on Victim Participation in Appellate Proceedings, para. 13.

satisfy the Panel of this relationship may [...] lead to the summary dismissal of the submissions”.⁸⁶

43. The Appeals Panel notes that, in the Victims Response Brief, Victims’ Counsel responds only to the grounds of appeal that “directly affect the personal interests of participating victims”, and “refrains from substantial submissions on any other points”.⁸⁷ The Panel further notes that, for each ground of appeal, Victims’ Counsel describes how the ground impacts the victims’ rights and personal interests.⁸⁸ In particular, Victims’ Counsel submits that the relevant grounds of appeal relate to: “(i) the acknowledgement of the victims’ suffering, (ii) [...] the credibility of the dual status witnesses and the reliability of their testimony, (iii) the victims’ interest in having their voices heard, and (iv) the material basis for their reparations claim”.⁸⁹

44. In his Reply Brief, Mustafa requests that Victims’ Counsel’s submissions be dismissed insofar as they concern grounds of appeal that do not affect the participating victims’ personal interests.⁹⁰ Specifically, Mustafa submits, *inter alia*, that the participating victims do not have a personal interest in having their evidence “included”,⁹¹ in the qualification and the establishment of crimes,⁹² or in the procedural matters raised by the Defence.⁹³ Mustafa also argues that he does not challenge the “acknowledgment” of the victims or their suffering, but rather the

⁸⁶ Decision on Victim Participation in Appellate Proceedings, para. 13.

⁸⁷ Victims Response Brief, paras 1-2, 7. The Panel notes that Victims’ Counsel made submissions on Grounds 1C, 1E, 1I, 1J, 1K, 1N, 2E, 2H, 3, 4, 5, 6, 7 and 8, and refrained from making any submissions on all other grounds of appeal raised by the Defence (namely Grounds 1A, 1B, 1D, 1F, 1G, 1H, 1L, 1M, 2A to 2D, 2F, 2G, 2I to 2P, and 9A to 9K).

⁸⁸ Victims Response Brief, paras 8 (Ground 1C), 15 (Ground 1E), 21 (Ground 1I), 25 (Ground 1J), 28 (Ground 1K), 33 (Ground 1N), 44 (Grounds 2E and 2H), 67 (Ground 3), 72 (Grounds 4 and 5), 81 (Grounds 6 and 7), 87 (Ground 8).

⁸⁹ Victims Response Brief, para. 7.

⁹⁰ Reply Brief, paras 114-137. The Panel observes that, while requesting that Victims’ Counsel’s submissions be rejected in their entirety, Mustafa does not specifically challenge Victims’ Counsel’s submissions under Ground 8.

⁹¹ Reply Brief, paras 123, 129. See also Reply Brief, para. 120.

⁹² Reply Brief, paras 134-136.

⁹³ Reply Brief, paras 127, 131.

“content” of the evidence they brought.⁹⁴ As such, Mustafa argues that Victims’ Counsel’s submissions asserting an interest based on the acknowledgement of the victims’ suffering should be dismissed.⁹⁵

45. The Panel recalls that, pursuant to Article 22(3) of the Law and further to its Decision on Victim Participation in Appellate Proceedings, it shall dismiss submissions by Victims’ Counsel on issues that do not affect the personal interests of the participating victims,⁹⁶ and must ensure that victims’ participation is neither prejudicial nor inconsistent with the rights of the Accused.⁹⁷

46. Having been convicted of three counts of war crimes, Mustafa now seeks the reversal of all convictions or, alternatively, an order to remand the case to the Trial Panel or, should the Appeals Panel uphold the convictions, a reduction of his sentence.⁹⁸ While the Panel considers that, in general terms, the participating victims’ interests are affected by the Defence’s appeal, the Panel must be satisfied that their personal interests are affected in relation to each individual ground of appeal on which they make submissions.⁹⁹

47. The Panel observes that Victims’ Counsel’s submissions are limited to 14 out of the 51 grounds of appeal raised by the Defence and that seven of these grounds pertain to the testimony and evidence provided by or related to [REDACTED].¹⁰⁰ With respect to these seven grounds, the Panel is satisfied that Victims’ Counsel’s submissions relate to the personal interests of the participating victims, including their right to

⁹⁴ Reply Brief, paras 116-118, 120. Under Ground 1C, Mustafa submits that the acknowledgment of W01679’s experiences is not the issue. See also Reply Brief, paras 114-115.

⁹⁵ Reply Brief, paras 114-119.

⁹⁶ Decision on Victim Participation in Appellate Proceedings, para. 13.

⁹⁷ Decision on Victim Participation in Appellate Proceedings, para. 10.

⁹⁸ Notice of Appeal, para. 2; Appeal Brief, paras 3, 446; Reply Brief, para. 138.

⁹⁹ See similarly *Ayyash et al.* Appeal Decision on Modalities of Victim Participation in Appeal, paras 51-52, 62.

¹⁰⁰ Grounds 1C, 1E, 1J, 1K, 1N, 2E and 2H. The Panel notes that, at the Appeal Hearing, Victims’ Counsel also responded to Mustafa’s request to refer an issue to the Specialist Chamber of the Constitutional Court for review. See below, paras 439, 444; Transcript, 27 October 2023, pp. 129-130.

recognition for any harm suffered and to contribute to the establishment of the truth. Further, participating victims have a particular interest in having evidence provided by [REDACTED] admitted by the Trial Panel and relied upon in the Trial Judgment. The Panel further notes that six other grounds of appeal relate to the participating victims' right to acknowledgement by the Court that they or their family member were subjected to the crimes of arbitrary detention, torture and/or murder, and, therefore, have a direct impact on their right to obtain reparation for the harm suffered.¹⁰¹ Finally, the Panel notes that the Defence's arguments under Ground 3 with respect to the exhumation of the body of their deceased family member affects the respective participating victims' most personal interests, namely their right to privacy, dignity and psychological well-being, as well as their right to recognition for any harm suffered.¹⁰²

48. In light of the above, the Panel is satisfied that Victims' Counsel's submissions on Grounds 1C, 1E, 1I, 1J, 1K, 1N, 2E, 2H, 3, 4, 5, 6, 7 and 8 affect the participating victims' personal interests. Furthermore, the Appeals Panel finds that victim participation on these grounds is neither prejudicial nor inconsistent with the rights of the Accused. Accordingly, the Defence's request for the dismissal of Victims' Counsel's submissions is denied.

¹⁰¹ Grounds 1I, 4, 5, 6, 7 and 8.

¹⁰² In the Decision on Victim Participation in Appellate Proceedings, the Panel found that, "in light of Article 23 of the Law, the protection of victims' safety, physical and psychological well-being, dignity and privacy is a fourth personal interest and right that participating victims have in the proceedings". See Decision on Victim Participation in Appellate Proceedings, para. 9, referring to Decision on Victims' Procedural Rights at Trial, paras 9-19.

V. DISCUSSION

A. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S CHARACTERISATION OF THE CONFLICT AS NON-INTERNATIONAL (GROUND 1A)

49. The Panel recalls that Mustafa was charged with and has been convicted of several counts of war crimes under Article 14(1)(c) of the Law, which constitute serious violations of Common Article 3 committed in the context of a non-international armed conflict.¹⁰³ The qualification of the conflict, namely as a non-international one, is therefore relevant for the determination of Mustafa's criminal responsibility under Article 14(1)(c) of the Law.

50. Considering the threshold requirements of Article 14(1)(c) of the Law, the Trial Panel found that: (i) a non-international armed conflict existed between the KLA and the Serbian forces at the time of the crimes charged;¹⁰⁴ (ii) the crimes charged under Counts 1, 3 and 4 of the Indictment had the requisite nexus with the non-international armed conflict;¹⁰⁵ (iii) Mustafa and the BIA members present at the ZDC in April 1999 were aware of the existence of the non-international armed conflict;¹⁰⁶ and (iv) the victims were taking no active part in hostilities due to their detention at the ZDC at the time the offences were committed, and as a result were entitled to the protection of Common Article 3.¹⁰⁷

51. Mustafa challenges the Trial Panel's characterisation of the conflict in Kosovo during the time frame of the charges as a non-international armed conflict.¹⁰⁸ The SPO

¹⁰³ Indictment, para. 35. See also Trial Judgment, paras 23, 758-760 (especially Counts 1, 3 and 4), 831.

¹⁰⁴ Trial Judgment, para. 710.

¹⁰⁵ Trial Judgment, para. 717.

¹⁰⁶ Trial Judgment, para. 721.

¹⁰⁷ Trial Judgment, para. 722.

¹⁰⁸ Appeal Brief, paras 5-20; Reply Brief, paras 77-80.

responds that Mustafa fails to demonstrate any error in this respect and that several of his submissions should be summarily dismissed.¹⁰⁹

1. Submissions of the Parties

52. Mustafa submits that the Trial Panel erred in law by finding that a non-international armed conflict existed during the Indictment period, when in fact the conflict should have been characterised as international,¹¹⁰ and that, as a consequence, Article 14(1)(c) of the Law is not applicable in the present case.¹¹¹

53. First, Mustafa argues that, contrary to the Trial Panel's findings, the Defence should be permitted to present evidence on the characterisation of the conflict as late as the closing statements.¹¹² He submits that the characterisation of the conflict is "an issue of legal fact" that cannot be established based on judicial notice of adjudicated facts, as he asserts the Trial Panel erroneously did.¹¹³

54. Second, in relation to the Trial Panel's assessment of the requirements under Article 14(2) of the Law for a determination on the application of Article 14(1)(c) of the Law, Mustafa submits that the Trial Panel applied the wrong criteria in defining the "organised armed groups" that can carry out "protracted armed violence".¹¹⁴ In his view, the Trial Panel failed to apply the criteria listed under Article 1(1) of Additional

¹⁰⁹ SPO Response Brief, paras 91-96.

¹¹⁰ Appeal Brief, paras 5-8, 14, 17-18, 20; Notice of Appeal, Ground 1A, para. 4; Reply Brief, paras 78-79. The Panel notes that, in paragraph 18 of the Appeal Brief, Mustafa appears to refer erroneously to footnote 1525 of the Trial Judgment instead of footnote 1524.

¹¹¹ Appeal Brief, para. 20. The Panel has addressed Mustafa's arguments in paragraph 19 of the Appeal Brief regarding alibi in the section on Mustafa's Alibi Claim. See below, Section N, paras 310-324.

¹¹² Appeal Brief, para. 16, referring to Trial Judgment, para. 706.

¹¹³ Appeal Brief, para. 18.

¹¹⁴ Appeal Brief, paras 9-13. The Panel notes that, in paragraph 9 of the Appeal Brief, Mustafa appears to refer erroneously to paragraph 693 of the Trial Judgment instead of paragraph 697. In addition, in paragraph 12 of the Appeal Brief, Mustafa erroneously refers to footnote 1403 of the Trial Judgment instead of footnotes 1503-1504.

Protocol II, and instead “invent[ed] additional criteria” by referring to the jurisprudence of the ICTY and ICTR.¹¹⁵

55. Third, Mustafa submits that, contrary to the Trial Panel’s interpretation, the ICTY judgments in the *Dorđević* case did not state “in a conclusive manner” that a non-international armed conflict existed in Kosovo between the Serbian forces and the KLA, between the end of May 1998 and at least June 1999.¹¹⁶

56. Fourth, Mustafa contends that, given that an international armed conflict is defined by the involvement of two or more states in the conflict,¹¹⁷ the NATO bombing of Serbia, which started on 24 March 1999, gave the conflict in Kosovo an international character.¹¹⁸ Mustafa goes on to state that the Trial Panel found that “a non-international armed conflict may turn into an armed conflict of international character if an organised armed group is under the overall control of a third state”,¹¹⁹ and submits that neither Kosovo nor the KLA were under the control of a third State.¹²⁰

57. The SPO responds that Mustafa fails to explain why the Trial Panel erred in applying the criteria from ICTY jurisprudence, namely the *Boškoski and Tarčulovski* Trial Judgement, in assessing the “required degree of organisation of [...] an armed group for the purpose of Common Article 3”.¹²¹ In the SPO’s view, the additional criteria and higher threshold stemming from Additional Protocol II are inapplicable because the charges in this case allege serious violations of Common Article 3, and not of Additional Protocol II.¹²²

¹¹⁵ Appeal Brief, paras 9-12.

¹¹⁶ Appeal Brief, para. 17.

¹¹⁷ Appeal Brief, para. 6.

¹¹⁸ Appeal Brief, paras 7-8, 19; Reply Brief, paras 78-79.

¹¹⁹ Appeal Brief, para. 14. The Panel notes that, in paragraph 14 of the Appeal Brief, Mustafa appears to refer erroneously to paragraph 694 of the Trial Judgment, instead of paragraph 709.

¹²⁰ Appeal Brief, para. 14.

¹²¹ SPO Response Brief, para. 92, referring to Trial Judgment para. 697 and *Boškoski and Tarčulovski* Trial Judgement, paras 194-203.

¹²² SPO Response Brief, para. 93.

58. With respect to Mustafa's claim that the armed conflict was international, the SPO responds that Mustafa fails to show any error in the Trial Panel's reliance on well-established jurisprudence that a non-international armed conflict may exist alongside an international armed conflict.¹²³ In this regard, the SPO also submits that Mustafa did not challenge, at any point during the trial proceedings, the adjudicated facts on which the Trial Panel based its conclusion regarding the existence of a non-international armed conflict.¹²⁴

59. The SPO further challenges as false and unsubstantiated Mustafa's assertion that the ICTY judgments in the *Dorđević* case did not make a conclusive finding that a non-international armed conflict existed in Kosovo between the end of May 1998 and at least June 1999.¹²⁵ Finally, the SPO argues that the remainder of Mustafa's submissions should be summarily dismissed.¹²⁶

2. Assessment of the Court of Appeals Panel

60. The Panel first addresses Mustafa's argument that the existence of a non-international armed conflict in Kosovo could not be established based on judicial notice of adjudicated facts as it is "an issue of legal fact of the case".¹²⁷

61. In this respect, the Panel observes that Rule 157(2) of the Rules limits a panel's taking of judicial notice to findings of *fact*.¹²⁸ To determine whether a proposed fact is truly a factual finding, it is necessary to assess on a case-by-case basis whether the

¹²³ SPO Response Brief, para. 94.

¹²⁴ SPO Response Brief, fn. 264.

¹²⁵ SPO Response Brief, para. 95, referring to *Dorđević* Trial Judgement, para. 1579; *Dorđević* Appeal Judgement, para. 521.

¹²⁶ SPO Response Brief, para. 96.

¹²⁷ Appeal Brief, para. 18.

¹²⁸ See similarly *Thaçi et al.* Decision on Defence Motion on Adjudicated Facts, para. 31.

proposed fact contains findings or characterisations which are of an essentially legal nature and which must, therefore, be excluded.¹²⁹

62. At the outset, the Appeals Panel observes that the Trial Panel's conclusion in the Trial Judgment, that it had taken judicial notice in its Decision on Adjudicated Facts of the existence of a non-international armed conflict between the KLA and Serbian forces during the time frame of the charges, is misleading.¹³⁰ The Appeals Panel considers that the Trial Panel did not explicitly take judicial notice of other tribunals' findings on the existence of a non-international armed conflict between the KLA and the Serbian forces at the time of the crimes charged.¹³¹ Rather, it took judicial notice of *facts* relevant to establishing the existence, nature and time frame of such a conflict. The Appeals Panel observes that the Trial Panel then considered these facts in concluding in the Trial Judgment that a non-international armed conflict existed.¹³² Therefore, the Appeals Panel finds that the Trial Panel did not err by referring to adjudicated facts and its Decision on Adjudicated Facts in reaching its finding on the existence of a non-international armed conflict and dismisses the Defence's argument in this regard.

¹²⁹ *Stanišić and Simatović* Decision on Adjudicated Facts, para. 39; *Popović et al.* Decision on Adjudicated Facts, para. 10. See also Decision on Adjudicated Facts, para. 10 and jurisprudence cited therein. The Appeals Panel notes that ICTY Chambers have considered that "many findings have a legal aspect, if one is to construe this expression broadly". See *Dragomir Milošević* Appeal Decision on Adjudicated Facts, para. 22; *Krajišnik* Decision on Adjudicated Facts, para. 15.

¹³⁰ See Trial Judgment, paras 701-702, 710.

¹³¹ Decision on Adjudicated Facts, para. 12; List of Adjudicated Facts, Nos 1-6, 32-52; Trial Judgment, paras 701, 710. See also *Thaçi et al.* Decision on Defence Motion on Adjudicated Facts, para. 32.

¹³² The Panel observes that in its Decision on Adjudicated Facts, the Trial Panel only "*note[d]*" that the proposed facts *relate* mainly to the existence of an armed conflict [...] between the [KLA] and forces of the former Federal Republic of Yugoslavia fighting jointly with Serbian forces [...]. See Decision on Adjudicated Facts, para. 12 (emphasis added). See also Trial Judgment, para. 48. The Panel considers that all of the adjudicated facts noted under the heading "The Armed Conflict" (Agreed Facts Nos 1-6) describe factual situations, as do the adjudicated facts noted under the heading "The Kosovo Liberation Army ('KLA')" (Agreed Facts Nos 32-52). See List of Adjudicated Facts.

63. As to Mustafa's claim regarding the timing of his challenges to the accuracy of the adjudicated facts,¹³³ the Panel notes that the Trial Panel did not reject the Defence's arguments solely on the basis that they were submitted late, but also because the Defence should have presented evidence at trial instead of making "mere assertions or arguments [...] as late as during the closing statements".¹³⁴ The Appeals Panel finds no error in the Trial Panel's approach.

64. Turning to Mustafa's substantive arguments regarding the characterisation of the armed conflict, the Panel observes that there are two criteria which are "now widely acknowledged as being the most relevant in assessing the existence of a non-international armed conflict", namely that the violence needs to have reached a certain intensity and that it must be between at least two organised parties/armed groups.¹³⁵ Following the ICTY Appeals Chamber's foundational decision in the *Tadić* case, ICTY and ICTR Chambers established and consistently applied the following test: "an armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*".¹³⁶

65. In this regard, the Panel recalls that the language of Article 14(2) of the Law mirrors the international *ad hoc* tribunals' approach.¹³⁷ The Panel therefore considers

¹³³ Appeal Brief, para. 16.

¹³⁴ See Trial Judgment, para. 706.

¹³⁵ See 2020 ICRC Commentary GCIII, Common Article 3, para. 455. See also Zimmermann, A., Geiß, R., in *Ambos Rome Statute Commentary*, Article 8, mns 883-885.

¹³⁶ *Tadić* Appeal Decision on Jurisdiction, para. 70 (emphasis added); *Boškoski and Tarčulovski* Appeal Judgement, para. 21; *Boškoski and Tarčulovski* Trial Judgement, para. 175; *Tadić* Trial Judgement, para. 562; *Milutinović et al.* Trial Judgement (Vol. I), para. 791; *Limaj et al.* Trial Judgement, para. 84; *Akayesu* Trial Judgement, paras 619-620; *Rutaganda* Trial Judgment, paras 91-92. See also *Ongwen* Trial Judgment, para. 2683; *Katanga* Trial Judgment, para. 1173; *Lubanga* Trial Judgment, paras 537-538. The ICRC observed that the ICTY and ICTR jurisprudence made an important contribution to the clarification of the definition or constitutive criteria of non-international armed conflicts. See 2020 ICRC Commentary GCIII, Common Article 3, paras 460-462.

¹³⁷ Article 14(2) of the Law provides that armed conflicts not of an international character "take place in the territory of a state when there is protracted armed conflict between the organs of authority and organised armed groups or between such groups".

that, to establish the existence of an armed conflict of a non-international character under Article 14(1)(c) and (2) of the Law, a panel must assess two factors: (i) the level of intensity of the conflict; and (ii) the degree of organisation of the non-state armed group(s) involved in the conflict.¹³⁸ The Panel notes that the Defence does not challenge the Trial Panel's findings in relation to the level of intensity of the conflict, but only in relation to the degree of organisation of one of the parties to the conflict, namely the KLA.¹³⁹

66. In this respect, the Panel finds unpersuasive Mustafa's unsubstantiated arguments that the Trial Panel applied the wrong criteria to define the KLA as an "organised armed group".¹⁴⁰ First, with respect to Mustafa's argument that the Trial Judgment "with a stroke of arms [...] quotes few judgements which it takes for granted to be part of [...] international customary law",¹⁴¹ the Appeals Panel observes that the ICRC has noted with approval the test identified by the ICTY¹⁴² and set out by the Trial Panel.¹⁴³ The Appeals Panel further observes that these factors have been

¹³⁸ See Trial Judgment, paras 697-698, 708.

¹³⁹ Appeal Brief, paras 5-20. See also Trial Judgment, para. 708, referring to *Dorđević* Trial Judgement, para. 1536, wherein the ICTY Trial Chamber found that, as of the end of May 1998, the conflict in Kosovo between the Serbian forces (which constituted governmental authorities) and the KLA had the requisite level of intensity to be considered an armed conflict.

¹⁴⁰ Appeal Brief, paras 9-13.

¹⁴¹ Appeal Brief, para. 9.

¹⁴² See 2020 ICRC Commentary GCIII, Common Article 3, para. 464.

¹⁴³ See Trial Judgment, para. 697, where the Trial Panel outlined a list of indicative factors that may be taken into account when deciding whether a non-state entity can carry out protracted armed violence: (i) existence of a command structure, including headquarters, a general staff or high command, identifiable ranks and positions, and internal regulations; (ii) issuance of political statements or communiqués and the use of spokespersons; (iii) operational capacity and the ability to carry out military operations; (iv) logistical capacity, including the availability of weapons and equipment, and the capacity to move troops and to recruit and train personnel; (v) territorial control, including a division into zones of responsibility; (vi) internal disciplinary system, including the implementation of international humanitarian law through the armed group's ranks; and (vii) ability to speak with one voice on behalf of the armed group, for example in political negotiations or cease-fire agreements.

applied in a consistent manner not only by ICTY Chambers,¹⁴⁴ but also by the ICC.¹⁴⁵ The Panel finds that Mustafa fails to explain why the Trial Panel erred in relying on the jurisprudence from the ICTY to determine the level of the KLA's organisation as a non-state armed group.¹⁴⁶ Moreover, although it would have been preferable for the Trial Panel to explain further its application of the factors discussed in ICTY jurisprudence, it was open for the Trial Panel, on the basis of this jurisprudence, to reach its conclusion that "as of May 1998, the KLA possessed sufficient characteristics of an organised armed group to be able to engage in a non-international armed conflict".¹⁴⁷ In this regard, the Appeals Panel understands the Trial Panel's reliance on the findings in the *Dorđević* case as supporting the Trial Panel's ultimate conclusion on the degree of organisation of the KLA.

67. Second, contrary to the Defence's argument, the Panel considers that to establish the degree of organisation of the KLA, the Trial Panel did not have to apply the (higher) standard set out in Article 1(1) of Additional Protocol II.¹⁴⁸ As noted above, in accordance with Article 14(1)(c) of the Law, the charges in this case concern serious violations of Common Article 3, not of Additional Protocol II. Therefore, the Appeals Panel agrees with the Trial Panel's finding that the higher threshold of Additional Protocol II is inapplicable.¹⁴⁹

¹⁴⁴ *Boškoski and Tarčulovski* Trial Judgement, paras 198-203. See also *Haradinaj et al.* Re-Trial Judgement, paras 17-124, 395, 406-409; *Dorđević* Trial Judgement, paras 1526, 1537-1577; *Milutinović et al.* Trial Judgement (Vol. I), paras 821-840; *Martić* Trial Judgement, para. 344; *Limaj et al.* Trial Judgement, paras 90, 94-133; *Slobodan Milošević* Decision on Acquittal, paras 23-24; *Tadić* Appeal Judgement, para. 120.

¹⁴⁵ *Ongwen* Trial Judgment, para. 2685; *Ntaganda* Trial Judgment, para. 704. See also *Katanga* Trial Judgment, para. 1186; *Lubanga* Trial Judgment, para. 537.

¹⁴⁶ Contra Appeal Brief, para. 12, arguing that the Trial Judgment "invent[ed] additional criteria" and listed factors which are applicable in international armed conflicts.

¹⁴⁷ Trial Judgment, para. 708, referring to *Dorđević* Trial Judgment, paras 1532-1578.

¹⁴⁸ Additional Protocol II requires that "dissident armed forces or other organized armed groups [are] under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations". See Additional Protocol II, Article 1(1).

¹⁴⁹ Trial Judgment, fn. 1503. See also *Boškoski and Tarčulovski* Trial Judgement, para. 197; *Lubanga* Trial Judgment, para. 536; *Katanga* Trial Judgment, paras 1185-1186.

68. Finally, as to Mustafa's argument regarding the impact of the NATO intervention, which in his view turned the on-going conflict in Kosovo into an international one between NATO and the Serbian forces as of 24 March 1999,¹⁵⁰ the Appeals Panel agrees with the Trial Panel that (i) it is settled under international humanitarian law that a non-international armed conflict may exist alongside an international armed conflict;¹⁵¹ and (ii) a non-international armed conflict may become international if an organised armed group is under the "overall control" of a third state.¹⁵² With respect to the second scenario, the Panel notes that Mustafa contradicts himself by claiming that the KLA was not under the "overall control" of one or more NATO States – which undercuts his argument for the classification of the conflict as international.¹⁵³ Having noted the settled law on the question whether a non-international armed conflict and an international armed conflict can co-exist, the Panel will not consider Mustafa's argument under the second scenario further.

69. In light of the above, the Panel finds that Mustafa fails to demonstrate an error in the Trial Panel's findings on the existence of a non-international armed conflict between the KLA and the Serbian forces. Accordingly, the Panel dismisses Mustafa's Ground 1A.¹⁵⁴

¹⁵⁰ Appeal Brief, paras 5-8; Reply Brief, paras 78-79.

¹⁵¹ Trial Judgment, paras 699, 707, referring to *Dorđević* Appeal Judgment, para. 521; *Tadić* Appeal Judgment, para. 84; *Lubanga* Trial Judgment, para. 540. See also 2020 ICRC Commentary GCIII, Common Article 3, paras 438-439, 447.

¹⁵² Trial Judgment, paras 699, 709, referring to *Tadić* Appeal Judgment, paras 120, 137; *Ntaganda* Trial Judgment, para. 727. See also *Kordić and Čerkez* Trial Judgment, paras 306-307; *Delalić et al.* Appeal Judgment, para. 14; *Ongwen* Trial Judgment, para. 2687; 2020 ICRC Commentary GCIII, Common Article 3, paras 440-444.

¹⁵³ Appeal Brief, para. 14.

¹⁵⁴ The Panel has addressed Mustafa's arguments regarding alibi in paragraph 19 of the Appeal Brief in the section on Mustafa's Alibi Claim. See below, Section N, paras 310-324.

B. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S RELIANCE ON MUSTAFA'S SUSPECT STATEMENT (GROUND 1B)

70. The Trial Panel relied on Mustafa's statement to the SPO in the Trial Judgment.¹⁵⁵ Mustafa challenges this reliance,¹⁵⁶ asserting a violation of Article 3 of the Law and Rule 138(2) of the Rules, and of his right against self-incrimination.¹⁵⁷ The SPO responds that Mustafa did not challenge its admission at trial and fails to demonstrate a discernible error in the Trial Panel's consideration of the statement.¹⁵⁸

1. Submissions of the Parties

71. Mustafa submits that the Trial Panel erred in admitting and relying on the Suspect Statement.¹⁵⁹ In support, Mustafa asserts that he had not been informed of the nature and cause of the allegation under investigation and that this violation cast substantial doubt on the reliability of the Suspect Statement and seriously damaged the integrity of the proceedings pursuant to Rule 138(2) of the Rules.¹⁶⁰ Moreover, Mustafa argues that, by admitting and relying on the Suspect Statement, the Trial

¹⁵⁵ Trial Judgment, paras 235-239. See also Trial Judgment, para. 30. In particular, the Trial Panel relied on Mustafa's statements regarding: (i) the Accused's presence at relevant times in April 1999 at the alleged crime location in Zllash/Zlaš; (ii) his ability to move to and from Zllash/Zlaš and across the surrounding territory during April 1999; (iii) the availability of different vehicles, including vehicles suitable for difficult and mountainous terrain; (iv) the ownership of the ZDC, which housed the BIA base; and (v) the commanding position of the Accused within the BIA and his power to give binding orders to his BIA subordinates. See Trial Judgment, para. 236. See also Trial Judgment, paras 248-252.

¹⁵⁶ The Panel understands Mustafa to challenge the statement Mustafa provided to the SPO as a suspect. See P00111 to P00118 (Salih Mustafa), 19 and 20 November 2019 (confidential). While in his Appeal Brief, Mustafa submits in a general manner that the Trial Panel erred in admitting and relying on the "statements of the Appellant given to the SPO", Mustafa more precisely refers in the Notice of Appeal to the "suspect interviews of the Appellant". See Appeal Brief, para. 24; Notice of Appeal, Ground 1B, para. 4, fn. 2, referring to Trial Judgment, para. 238, where the Trial Panel addresses the Suspect Statement.

¹⁵⁷ Appeal Brief, paras 21-25; Reply Brief, paras 38-40.

¹⁵⁸ SPO Response Brief, para. 48.

¹⁵⁹ Notice of Appeal, Ground 1B, para. 4; Appeal Brief, paras 21-26.

¹⁶⁰ Notice of Appeal, Ground 1B, para. 4; Appeal Brief, paras 21, 23.

Panel violated his privilege against self-incrimination, protected under Article 31(1) and (2) of the Kosovo Constitution and Article 6(1) of the ECHR.¹⁶¹

72. The SPO responds that Mustafa failed to challenge the admissibility of the Suspect Statement during the trial proceedings and fails to substantiate his claim on appeal, and that his submissions should accordingly be summarily dismissed.¹⁶² On the merits, the SPO asserts that Mustafa's rights as a suspect were fully respected and that he fails to demonstrate any error on the Trial Panel's part.¹⁶³ Specifically, the SPO argues that, at the time of the Suspect Statement, Mustafa was informed of his rights under Article 38(2) of the Law, including that "there were grounds to believe he had committed a crime under the jurisdiction of the [Specialist Chambers]",¹⁶⁴ and was also "reminded" on "several occasions" of his right to remain silent and of his right to counsel.¹⁶⁵ Further, the SPO argues that Article 30(1) of the Kosovo Constitution and Article 6(3) of the ECHR do not "require the prosecution to disclose its investigative focus" to a suspect, and that "there is no general or standard requirement to notify a suspect of the time, location, and specific conduct he or she is suspected of".¹⁶⁶ Accordingly, the SPO argues that the level of detail provided to Mustafa was sufficient and the Trial Panel correctly found that there was no violation of Mustafa's rights that would warrant exclusion of the Suspect Statement.¹⁶⁷

73. Mustafa replies that the Trial Panel erred in relying on the Suspect Statement without considering the "context" in which the statement was made,¹⁶⁸ namely that Mustafa was not aware of the "precise nature of the charges" against him and the acts

¹⁶¹ Appeal Brief, paras 24, 26.

¹⁶² SPO Response Brief, para. 48.

¹⁶³ SPO Response Brief, para. 50.

¹⁶⁴ SPO Response Brief, para. 50.

¹⁶⁵ SPO Response Brief, para. 51.

¹⁶⁶ SPO Response Brief, para. 49, referring to *Shala* Appeal Decision on Prior Statements, para. 42.

¹⁶⁷ SPO Response Brief, para. 50.

¹⁶⁸ Reply Brief, para. 40.

of which he was suspected, as a result of which Mustafa's answers "equally lack[ed] detail and precision".¹⁶⁹

2. Assessment of the Court of Appeals Panel

74. The Appeals Panel observes that Mustafa takes issue for the first time on appeal with the Trial Panel's admission of the Suspect Statement, while he had ample opportunity to do so at first instance. Specifically, the Panel notes that, on 13 September 2021, the SPO applied for the admission of, *inter alia*, the Suspect Statement,¹⁷⁰ to which Mustafa did not respond. The Panel further notes that the Trial Panel issued its decision on the admissibility of the Suspect Statement on 13 December 2021, which Mustafa did not challenge.¹⁷¹ Accordingly, the Appeals Panel finds that, in principle, Mustafa has waived his right to raise this issue on appeal and to claim any prejudice resulting from the admission of the Suspect Statement into evidence.¹⁷²

75. In addition, the Appeals Panel notes that Mustafa fails to identify the specific findings that he is challenging in relation to which the Trial Panel relied on the Suspect Statement,¹⁷³ and further, it is only through a footnote in the Notice of Appeal that the Panel is able to deduce that Mustafa's arguments specifically relate to the Suspect Statement.¹⁷⁴ The Panel recalls that such unsubstantiated arguments warrant summary dismissal.¹⁷⁵ Nevertheless, despite these deficiencies, the Appeals Panel is able to deduce to which evidence and findings Mustafa refers. For this reason, and additionally considering that the challenged evidence implicates fair trial rights, the

¹⁶⁹ Reply Brief, para. 39. See also Reply Brief, paras 38, 40.

¹⁷⁰ SPO Article 37 and Other Material Application, paras 33-34, 41; Annex 1 to SPO Article 37 and Other Material Application, Items 87-95.

¹⁷¹ Decision on Article 37 and Other Material, paras 23, 26(f).

¹⁷² See above, para. 30.

¹⁷³ See Appeal Brief, paras 21-26; Notice of Appeal, Ground 1B, para. 4.

¹⁷⁴ Notice of Appeal, Ground 1B, fn. 2, referring to Trial Judgment, para. 238, in which the Trial Panel found that "there is no prejudice in using the Accused's SPO statement for the purpose of the judgment". See also above, fn. 155.

¹⁷⁵ See above, para. 29. See also *Gucati and Haradinaj* Appeal Judgment, para. 32(i).

Panel will exceptionally consider Mustafa's arguments under Ground 1B out of fairness to the Accused and in the interests of justice.

76. The Panel recalls that Article 38(3) of the Law and Rule 43(2) of the Rules govern the rights of suspects during questioning before the Specialist Chambers. In addition, Rule 138(2) of the Rules provides for the exclusion of evidence obtained by means of a violation of the Law, the Rules or standards of international human rights law. In this regard, and as underlined by the Trial Panel, a two-pronged test applies to an inquiry under Rule 138(2) of the Rules. First, the evidence must have been obtained by a violation of the Law, the Rules or standards of international human rights law. Only if such a violation is affirmatively established will the Panel proceed to the second step of the inquiry and consider the two alternative conditions set out under Rule 138(2)(a) and (b) of the Rules.¹⁷⁶

77. The Panel recalls that international human rights standards protecting the right to a fair trial are guaranteed under Article 6 of the ECHR.¹⁷⁷ Article 6(3)(a) of the ECHR does not impose any specific formal requirement as to the manner in which an accused is to be informed of the nature and cause of the accusation against him.¹⁷⁸ The level of detail expected to be provided during a suspect interview is generally lower than what is required when the person interviewed has been charged pursuant to an indictment.¹⁷⁹ This is consistent with the ECtHR's observation that the manner in which Article 6(3)(a) of the ECHR is to be applied during the investigative stage, as well as the extent of the information referred to in this provision, varies depending on the particular circumstances of each case.¹⁸⁰ The Panel further recalls that the right to

¹⁷⁶ See e.g. Decision on Article 37 and Other Material, para. 21.

¹⁷⁷ See in particular Article 6(3)(a) of the ECHR which guarantees the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". See also Article 3(2)(e) of the Law.

¹⁷⁸ *Shala* Appeal Decision on Prior Statements, para. 42.

¹⁷⁹ *Shala* Appeal Decision on Prior Statements, para. 43.

¹⁸⁰ *Shala* Appeal Decision on Prior Statements, para. 43.

a fair trial under Article 6 of the ECHR includes a person's right to be notified of the privilege against self-incrimination and of the right to remain silent when interviewed as a suspect.¹⁸¹

78. The Appeals Panel observes that, in the Trial Judgment, the Trial Panel recalled that the Suspect Statement was "available for consideration".¹⁸² Stressing that it had not found any violation of the Law or Rules with regard to the Suspect Statement and that the Defence never challenged its admissibility or use as evidence at trial, the Trial Panel found that there was no prejudice in relying on it in the Trial Judgment.¹⁸³

79. When deciding on the admissibility of the Suspect Statement, the Trial Panel noted in its Decision on Article 37 and Other Material that, at the start of his interview with the SPO, Mustafa was informed in a language that he speaks and understands that, *inter alia*, there were grounds to believe that he had committed a crime within the jurisdiction of the Specialist Chambers and, in response, Mustafa confirmed that he understood both his rights and his obligations.¹⁸⁴ Additionally, Mustafa was advised, with the assistance of an interpreter and in the presence of counsel, of his right to remain silent and of his right to obtain counsel of his own choosing.¹⁸⁵

80. The Appeals Panel recalls that Article 38(3)(a) of the Law specifically requires that a suspect questioned by the SPO be informed "that there are grounds to believe that he or she ha[d] committed a crime within the jurisdiction of the Specialist Chambers". Mustafa was informed in similar terms at the start of his interview.¹⁸⁶ The Panel considers that the information Mustafa received satisfies the above

¹⁸¹ *Ibrahim and Others* Judgment, para. 272. See also *O'Halloran and Francis* Judgment, para. 45; *Murray* Judgment, para. 45.

¹⁸² Trial Judgment, para. 235, referring to Decision on Article 37 and Other Material, paras 23, 26(f).

¹⁸³ Trial Judgment, para. 238.

¹⁸⁴ Decision on Article 37 and Other Material, para. 22, referring to P00111 (Salih Mustafa) (confidential), pp. 3-4 and P00118 (Salih Mustafa) (confidential), p. 32.

¹⁸⁵ Decision on Article 37 and Other Material, para. 22.

¹⁸⁶ P00111 (Salih Mustafa) (confidential), p. 3.

requirement of Article 38(3)(a) of the Law and that the SPO was under no obligation to provide further details to Mustafa.

81. The Appeals Panel further recalls that Article 38(3)(b) of the Law specifically requires that a suspect questioned by the SPO be informed of “the right to remain silent [...]” and that any statement he or she makes “may be used in evidence”. The Panel notes that Mustafa was also informed in similar terms during his interview,¹⁸⁷ and consequently considers that the information Mustafa received was adequate and satisfied the requirement of Article 38(3)(b) of the Law.

82. In light of the above, the Appeals Panel is satisfied that the Suspect Statement was obtained in accordance with Article 38(3)(a) and (b) of the Law and Rule 43 of the Rules, which govern the rights of suspects before the Specialist Chambers. Having found no violation of the Law, the Rules or standards of international human rights law, the Appeals Panel need not consider the second prong of Rule 138(2) of the Rules, and accordingly dismisses Mustafa’s arguments with respect to the admissibility of the Suspect Statement.

83. Turning to Mustafa’s submission that the Trial Panel erred in relying on the Suspect Statement,¹⁸⁸ the Appeals Panel notes that Mustafa fails to develop any arguments in support of his general assertion.¹⁸⁹ Consequently, the Appeals Panel finds that Mustafa fails to demonstrate that the Trial Panel erred in finding the Suspect Statement to be “highly relevant, authentic and corroborative of other evidence” relevant to the case.¹⁹⁰ Accordingly, Mustafa’s submissions in this regard are dismissed.

¹⁸⁷ P00111 (Salih Mustafa) (confidential), p. 3. See also P00118 (Salih Mustafa) (confidential), p. 32.

¹⁸⁸ Notice of Appeal, Ground 1B, para. 4; Appeal Brief, paras 23-24, 26.

¹⁸⁹ However, the Panel notes that Mustafa raises challenges relating to the Suspect Statement under Grounds 2B and 2I. See Appeal Brief, paras 90, 182-187. These challenges, which rest on different grounds, are addressed under those Grounds. See below, paras 190, 276.

¹⁹⁰ Trial Judgment, para. 236.

84. In light of the above, the Appeals Panel dismisses Mustafa's Ground 1B.

C. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S ADMISSION OF AND RELIANCE ON THE IN-COURT PHOTOGRAPHIC IDENTIFICATION OF MUSTAFA (GROUND 1C)

85. The Trial Panel admitted into evidence and relied on the in-court photographic identification of Mustafa by W01679.¹⁹¹ Mustafa challenges this reliance, asserting that the identification was improperly obtained and accordingly should have been excluded pursuant to Rule 138 of the Rules.¹⁹² The SPO and Victims' Counsel respond that Mustafa fails to demonstrate any error in the Trial Panel's consideration of the in-court identification.¹⁹³

1. Submissions of the Parties and Participants

86. Mustafa submits that the Trial Panel erred in admitting the in-court identification of Mustafa by W01679, when such evidence has no probative value and should have been excluded pursuant to Rule 138 of the Rules.¹⁹⁴ Specifically, Mustafa argues that: (i) the photographs shown to W01679 had been displayed in the Kosovo media and in the SPO's public opening statement, compromising the probative value of the identification evidence; and (ii) the Trial Panel's questioning of W01679 regarding the photographs showed bias and resulted in a "framed" answer by the witness.¹⁹⁵ Mustafa further submits that, as a result, the in-court identification by

¹⁹¹ Trial Judgment, para. 541.

¹⁹² Appeal Brief, paras 27-30; Reply Brief, paras 41-44. See also Notice of Appeal, Ground 1C, para. 4. The Panel notes that in the Notice of Appeal, Mustafa refers to paragraphs 404 and 541 of the Trial Judgment. However, paragraph 404 concerns the identification by W01679 of another perpetrator, namely Mr Brahim Mehmetaj ("Mr Mehmetaj"), and not of Mustafa. See Notice of Appeal, Ground 1C, fn. 3.

¹⁹³ SPO Response Brief, paras 53-57; Victims Response Brief, paras 11-12, 14.

¹⁹⁴ Appeal Brief, paras 27-29; Reply Brief, paras 41-42; Notice of Appeal, Ground 1C, para. 4. The Appeals Panel notes that Mustafa refers to Rule 138(2) of the Rules in paragraph 27(c) of the Appeal Brief, when arguing that the evidence should have been excluded because it lacks probative value, whereas the relevant provision is actually Rule 138(1) of the Rules. The Appeals Panel has assessed Mustafa's arguments in light of the correct provision.

¹⁹⁵ Appeal Brief, paras 27, 29.

W01679 was “unethically admitted” in violation of Rule 139(2) of the Rules and “seriously damaged the integrity of the proceedings”.¹⁹⁶ Accordingly, Mustafa asserts that the Trial Panel’s reliance on the in-court identification by W01679 was in error and invalidates the Trial Judgment with respect to his identification.¹⁹⁷

87. The SPO responds that Mustafa’s submissions should be dismissed *in limine* as he failed to object to the in-court identification at the time the Trial Panel questioned W01679, and also failed to explore the issue with the witness during his testimony.¹⁹⁸ The SPO further asserts that: (i) Mustafa’s submissions alleging a violation of Rule 139(2) of the Rules and a biased consideration of his submissions in that regard are unsubstantiated and fall outside of the Notice of Appeal, and should be summarily dismissed;¹⁹⁹ and (ii) Mustafa’s submission alleging a violation of Rule 138(2) of the Rules is hypothetical and unsubstantiated, as he failed to question W01679 about whether he had previously seen the photograph or otherwise raise evidence in support of his objection.²⁰⁰ Regardless, the SPO asserts that W01679’s identification meets the criteria for admissibility, and was only corroborative of other evidence leading to Mustafa’s identification.²⁰¹

88. Victims’ Counsel responds that the Trial Panel correctly assessed W01679’s identification of Mustafa in light of the evidence as a whole, as required under Rule 139(2) of the Rules.²⁰² Moreover, Victims’ Counsel submits that, in assessing the reliability of W01679’s testimony, the Trial Panel did not place “special emphasis” on

¹⁹⁶ Appeal Brief, para. 29; Reply Brief, paras 43-44. The Appeals Panel notes that, while Mustafa refers to Rule 139(2) of the Rules in paragraph 29 of the Appeal Brief, he states that the admission of identification evidence by W01679 “seriously damaged the integrity of the proceedings”, which actually mirrors the language of Rule 138(2) of the Rules. The Appeals Panel has assessed Mustafa’s arguments in light of the correct provision.

¹⁹⁷ Appeal Brief, para. 30; Reply Brief, paras 43-44. See also Transcript, 26 October 2023, p. 38.

¹⁹⁸ SPO Response Brief, para. 53.

¹⁹⁹ SPO Response Brief, paras 54-55. See also SPO Response Brief, para. 58.

²⁰⁰ SPO Response Brief, paras 54, 56.

²⁰¹ SPO Response Brief, para. 57.

²⁰² Victims Response Brief, paras 10-11.

the in-court identification, and further did not rely on W01679's identification of Mustafa from any of the public photographs.²⁰³

89. Mustafa replies that the Trial Panel erred in relying on an "unequivocal[]" identification of him by W01679, while W01679 had instead merely stated that the person in the photograph "resembled the Accused".²⁰⁴ Mustafa asserts that no such inference could have reasonably been drawn from the evidence and, accordingly, that the Trial Panel erred in its assessment of and reliance on the in-court identification.²⁰⁵

2. Assessment of the Court of Appeals Panel

90. The Appeals Panel notes at the outset that Mustafa did not object at trial to the admission of W01679's in-court photographic identification, nor take issue with the identification in his final trial brief or closing statements.²⁰⁶ Furthermore, Mustafa has not demonstrated special circumstances justifying consideration of his submissions. Accordingly, the Appeals Panel finds that Mustafa has waived his right to raise the issue on appeal,²⁰⁷ and summarily dismisses his submissions with respect to the admissibility of the identification under Rule 138 of the Rules.

91. Turning to Mustafa's submission that the Trial Panel erred in its assessment of and reliance on W01679's in-court identification,²⁰⁸ the Appeals Panel notes that Mustafa's submissions fall outside of the scope of his Notice of Appeal, which warrants their summary dismissal.²⁰⁹ In any event, the Appeals Panel observes that,

²⁰³ Victims Response Brief, paras 12, 14.

²⁰⁴ Reply Brief, paras 41-42.

²⁰⁵ Reply Brief, paras 43-44.

²⁰⁶ The Appeals Panel notes that, while the Defence made a reference following the witness's testimony that the photographs had been publicly displayed in the media, he did not object to their admission, nor later take issue with their admissibility. See Transcript (W01679), 5 October 2021, pp. 1005, 1014.

²⁰⁷ See above, para. 30.

²⁰⁸ See Appeal Brief, para. 30; Reply Brief, paras 43-44.

²⁰⁹ Notice of Appeal, Ground 1C, para. 4, where Mustafa challenges the admissibility of the in-court identification and submits that it "has no probative weight, and should accordingly be excluded in accordance with Rule 138" of the Rules. The Panel notes that Mustafa does not challenge in the Notice of Appeal the Trial Panel's reliance on the identification.

in its assessment, the Trial Panel carefully weighed the reliability of W01679's testimony in light of other evidence on the record, and treated W01679's identification of the Accused with caution.²¹⁰ In particular, the Trial Panel considered that, while W01679 had not identified the Accused by name but as "Commander Cali", and did not know him at the time, his account was consistent with other evidence presented at trial regarding Mustafa's position as sole commander of the BIA during the relevant time frame, and the testimony of other witnesses confirming Mustafa's own admission that he used the nickname "Cali".²¹¹ The Trial Panel then concluded that W01679's identification evidence corroborated the "overwhelming evidence pointing to the fact that the commander in question was the Accused".²¹² In these circumstances, the Appeals Panel is of the view that the Trial Panel did not attribute undue weight to W01679's in-court photographic identification of Mustafa.

92. In light of the above, the Appeals Panel finds that, even if they had been properly raised, Mustafa's submissions fail to demonstrate any error in the Trial Panel's assessment of and reliance on the in-court photographic identification of the Accused by W01679, and the Appeals Panel accordingly dismisses Mustafa's Ground 1C.

²¹⁰ The Appeals Panel further recalls that the determination of the weight, if any, to be accorded to a witness's identification of an accused lies within the discretion of the Trial Panel. See *Lukić and Lukić* Appeal Judgement, para. 187. However, particular caution must be exercised when assessing identification evidence of an accused made by a witness under difficult circumstances, such as in the dark, with an obstructed view, while sick or unconscious, or during a fleeting glance. See *Popović et al.* Appeal Judgement, para. 382; *Haradinaj et al.* Appeal Judgement, paras 152-156; *Kupreškić et al.* Appeal Judgement, paras 39-40. To this end, a trial panel must provide a reasoned opinion, clearly articulating the factors relied upon in support of the identification, and address any factors negatively impacting on the reliability of the evidence. See *Haradinaj et al.* Appeal Judgement, paras 152-156; *Kupreškić et al.* Appeal Judgement, paras 39-40.

²¹¹ Trial Judgment, paras 340, 541.

²¹² Trial Judgment, para. 542.

D. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S ASSESSMENT OF AND RELIANCE ON THE LIST OF PRISONERS (GROUND 1D)

93. The Trial Panel relied on the List of Prisoners²¹³ in the Trial Judgment.²¹⁴ Mustafa challenges this reliance, asserting that the document lacks indicia of authenticity and reliability, and does not support the Trial Panel's findings.²¹⁵ The SPO responds that Mustafa has waived his right to challenge the exhibit's admissibility by not raising it at trial and has failed to demonstrate any error in the Trial Panel's reliance on the document.²¹⁶

1. Submissions of the Parties

94. Mustafa submits that the Trial Panel erred in relying on the List of Prisoners, which he asserts lacks indicia of authenticity and reliability.²¹⁷ Specifically, Mustafa argues that: (i) the entries regarding W01679, W03593 and W03594 could have been manipulated; (ii) the assessment concerning the authenticity and reliability of the document required expert testimony, which was not presented at trial; (iii) the List of Prisoners does not support the Trial Panel's findings regarding the location of the detainees and their presence in the ZDC; (iv) the annotation "for Cali" on the document does not support the Trial Panel's findings regarding Mustafa's presence at the compound; and (v) the indicia of authenticity of (a) origin, (b) authority or source, and (c) chain of custody, have not been established.²¹⁸ Accordingly, Mustafa asserts that these errors invalidate the Trial Judgment with respect to this evidence and

²¹³ P00305 (confidential). The List of Prisoners "is a compilation of hand-written notes, belonging to a larger collection of material seized by the Serbian forces in various KLA bases in Kosovo between 1998 and 1999 and which was handed over to the ICTY, and subsequently to the Special Investigative Task Force, the predecessor of the SPO". See Trial Judgment, para. 225.

²¹⁴ Trial Judgment, paras 225-228. See also Trial Judgment, paras 389, 394, 396, 400, 403, 413, 424, 433, 436, 465, 475, 490-492, 534.

²¹⁵ Appeal Brief, paras 31-32; Reply Brief, paras 45-46.

²¹⁶ SPO Response Brief, paras 59-61.

²¹⁷ Appeal Brief, para. 31; Notice of Appeal, Ground 1D, para. 4; Reply Brief, para. 45.

²¹⁸ Appeal Brief, para. 31; Reply Brief, paras 45-46. See also Transcript, 27 October 2023, p. 139.

“compromise[] the facts” established through and in relation to it.²¹⁹ Mustafa also asserts that other reasonable conclusions can be drawn from the evidence.²²⁰

95. The SPO responds that Mustafa did not challenge the admission of the List of Prisoners at trial and only made “equivocal submissions” in his closing statements, which did not address alleged “manipulated entries”, the “need for expert evidence”, or the annotation of “Mustafa’s alias on the list”.²²¹ Accordingly, the SPO argues that Mustafa has waived his right to raise these issues on appeal and they should be dismissed.²²² In any event, the SPO argues that Mustafa’s submissions only demonstrate a disagreement with the Trial Panel’s assessment of the evidence, and that Mustafa fails to demonstrate what specific findings would be invalidated by the error, leading to a different outcome.²²³

2. Assessment of the Court of Appeals Panel

96. The Appeals Panel recalls that, on 4 February 2022, the SPO tendered for admission, pursuant to Article 37 of the Law, items collected prior to the establishment of the Specialist Chambers which included the List of Prisoners.²²⁴

97. On 29 March 2022, the Trial Panel issued its decision assessing the admissibility of, *inter alia*, the List of Prisoners, and admitted the document.²²⁵

98. The Appeals Panel observes that, while Mustafa now takes issue with the authenticity of and the Trial Panel’s reliance on the List of Prisoners, he did not object to its admission during the trial proceedings, while he had ample opportunity to do

²¹⁹ Appeal Brief, para. 32.

²²⁰ Appeal Brief, para. 32.

²²¹ SPO Response Brief, para. 59.

²²² SPO Response Brief, para. 59.

²²³ SPO Response Brief, paras 60-61.

²²⁴ SPO Article 37 Application; Annex 1 to SPO Article 37 Application.

²²⁵ Decision on Items Used with W04484, W04485 and W04849 and Article 37 Material, paras 21-23, 25; Annex 1 to Decision on Items Used with W04484, W04485 and W04849 and Article 37 Material, p. 3.

so. Specifically, the Appeals Panel notes that: (i) Mustafa neither responded to the SPO's application for the admission of the document, nor challenged the Trial Panel's decision concerning its admission;²²⁶ and (ii) he did not take issue with its authenticity in his final trial brief or closing statements.²²⁷ Rather, Mustafa merely referenced the List of Prisoners during his closing statements to challenge the SPO's arguments by pointing to the inconsistencies between the dates on the List of Prisoners and the SPO's narrative of the events,²²⁸ and made a vague reference regarding the possibility that the List of Prisoners may not be "correct" and accordingly does not have any probative value.²²⁹ In the Panel's view, such general statements do not constitute an objection to the evidence and in the absence of a formal objection, Mustafa has in principle waived his right to raise the issue on appeal.²³⁰ Nonetheless, the Appeals Panel decides to exceptionally address Mustafa's arguments out of fairness to the Accused and in the interests of justice.

99. The Appeals Panel emphasises the broad discretion afforded to the Trial Panel in determining a document's authenticity.²³¹ In this regard, the Appeals Panel recalls that absolute proof of authenticity is not required for admissibility. Rather, it is a consideration in the Trial Panel's determination of the weight to be given to the evidence.²³²

²²⁶ Decision on Items Used with W04484, W04485 and W04849 and Article 37 Material, paras 7, 23.

²²⁷ While Mustafa raised the probative value of the List of Prisoners during his closing statements, he did not specifically challenge the document's authenticity. See Transcript, 14 September 2022, pp. 4711-4713.

²²⁸ Transcript, 14 September 2022, pp. 4710, 4712; Transcript, 15 September 2022, p. 4839.

²²⁹ Transcript, 14 September 2022, p. 4713: "Well, if the document called list of prisoners is correct, then it is not the 4th. According to that document, it's the 2nd. So maybe the witness is right. Then the conclusion is that the list of prisoners document is not correct and has no probative value and does not corroborate anything in that perspective."

²³⁰ See above, para. 30.

²³¹ *Halilović* Appeal Judgement, para. 39; *Delalić et al.* Appeal Judgement, para. 533.

²³² *Prlić et al.* Appeal Decision on Admission of Documentary Evidence, paras 34-35, citing *Popović et al.* Decision on Defence Appeal Concerning Expert Witness, para. 22 and *Delalić et al.* Decision on Leave to Appeal Decision for Admissibility of Evidence, para. 20.

100. The Appeals Panel will first consider Mustafa's arguments that the Trial Panel failed to consider the indicia of authenticity of (i) origin, (ii) authority or source, and (iii) chain of custody, in its assessment of the List of Prisoners, and that the entries in the document could have been manipulated.²³³ The Panel observes in this regard that, contrary to Mustafa's assertion, the Trial Panel took into account the origin and reported chain of custody of the List of Prisoners, noting that the document "is a compilation of hand-written notes, belonging to a larger collection of material seized by the Serbian forces in various KLA bases in Kosovo between 1998 and 1999 and which was handed over to the ICTY and, subsequently to the Special Investigative Task Force, the predecessor of the SPO".²³⁴

101. With respect to its authority or source, the Trial Panel found that, while the List of Prisoners lacked indicators of authorship, such as a signature, logo, or its time of creation, the document did display "numerous details that lend credence to its authenticity and reliability".²³⁵ Specifically, the Trial Panel found that the document correctly recorded the personal details and date of arrest of W01679, W03593, W03594, the Murder Victim and other detainees, and that its contents corroborated the testimony of several witnesses and other documentary evidence regarding the detainees' presence at the ZDC.²³⁶ Further, the Trial Panel found that the List of Prisoners contained the annotation "[f]or Cali", which was determined to be Mustafa's nickname during the relevant time frame, based on Mustafa's own admission and as corroborated by multiple other sources.²³⁷ The Trial Panel concluded that "the entries in relation to the personal details of the prisoners as well as the details of their interrogation could have been compiled only by people with knowledge of the

²³³ Appeal Brief, para. 31(a), (h).

²³⁴ Trial Judgment, para. 225, referring to SPO Rule 102 Disclosure Notice, paras 2-3. See also Decision on Items Used with W04484, W04485 and W04849 and Article 37 Material, paras 21-23, 25(d).

²³⁵ Trial Judgment, para. 226.

²³⁶ Trial Judgment, para. 226.

²³⁷ Trial Judgment, para. 226. See also Trial Judgment, paras 340, 541, 551-552.

detention status of such victims” and, accordingly, found the List of Prisoners to be a “contemporaneous document” that is highly unlikely to have been forged, or even altered, after the events.²³⁸

102. The Appeals Panel finds no error in the Trial Panel’s finding, which acknowledges the absence of certain features indicative of a document’s authenticity, but nevertheless finds sufficient indicia of authenticity to support its reliability. Furthermore, Mustafa provides no support for his contention that these limitations should have precluded the Trial Panel from relying on the document. Accordingly, the Appeals Panel dismisses Mustafa’s submissions with respect to the Trial Panel’s assessment of the authenticity of the List of Prisoners.

103. Turning to Mustafa’s submission that the assessment of the authenticity and reliability of the List of Prisoners required expert testimony,²³⁹ the Appeals Panel recalls that the purpose of expert testimony is to provide specialised knowledge that might assist the trier of fact in understanding the evidence before it.²⁴⁰ Notably, expert testimony must not usurp the functions of the Trial Panel as the ultimate arbiter of fact and law.²⁴¹ In the Appeals Panel’s view, the assessment of a document’s authenticity and reliability is a question falling within the scope of the Trial Panel’s responsibilities, and one that does not *require* expert testimony where the Trial Panel, as in this instance, is capable of reaching a determination based on its own knowledge and expertise. Accordingly, the Appeals Panel dismisses Mustafa’s submissions in this regard.

²³⁸ Trial Judgment, para. 227.

²³⁹ Appeal Brief, para. 31(b). See also Reply Brief, para. 45.

²⁴⁰ *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 28. See also *Popović et al.* Appeal Judgement, para. 375; *Nahimana et al.* Appeal Judgement, para. 198.

²⁴¹ *Gucati and Haradinaj* Appeal Decision on Defence Witnesses, para. 26. See also *Ntaganda* Decision on Expert Witnesses, para. 8; *Ruto et al.* Decision on Expert Report, para. 12.

104. Mustafa also asserts that the List of Prisoners does not support the Trial Panel's findings with respect to the presence and location of the detainees in the ZDC and Mustafa's presence at the compound during the relevant time period.²⁴² The Appeals Panel first observes in this regard that, in finding that the evidence established the Accused's presence at the ZDC, the Trial Panel did not rely on the List of Prisoners, but rather on witness identification testimony and other testimonial evidence, including Mustafa's own admissions, establishing his role within the BIA and his use of the nickname "Cali".²⁴³ With respect to the Trial Panel's findings regarding the presence of the detainees in the ZDC, the Appeals Panel observes that Mustafa ignores considerable other evidence in this regard, and further notes that, in making its findings, the Trial Panel relied on the List of Prisoners merely as corroborative of such other evidence.²⁴⁴ Finally, Mustafa does not demonstrate how the alleged error in the Trial Panel's findings would lead to a different outcome. Accordingly, the Appeals Panel dismisses Mustafa's submissions in this respect.

105. In light of the above, the Appeals Panel finds that, even if they had been properly raised, Mustafa's submissions fail to demonstrate any error in the Trial Panel's assessment of and reliance on the List of Prisoners, and accordingly dismisses Mustafa's Ground 1D.

²⁴² Appeal Brief, para. 31(c)-(g); Reply Brief, para. 46.

²⁴³ See e.g. Trial Judgment, paras 341, 349, 352, 468-473, 541-542, 545, 551-554, 556.

²⁴⁴ See Trial Judgment, paras 226, 389, 394, 397, 400, 413, 424, 436, 465, 475, 490-492.

E. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S ADMISSION OF AND RELIANCE ON THE WRITTEN STATEMENTS OF W04648 AND W04712 AND "ORAL STATEMENT" OF [REDACTED] (GROUND 1E)

106. The Trial Panel admitted and relied on the written statements of W04648 and W04712 pursuant to Rules 155(1) and 153(1) of the Rules, respectively,²⁴⁵ and the hearsay statements of [REDACTED] through the testimony of W04390.²⁴⁶ Mustafa challenges the probative value of the statements,²⁴⁷ while the SPO and Victims' Counsel respond that Mustafa has failed to demonstrate any error in the Trial Panel's consideration of the statements.²⁴⁸

1. Submissions of the Parties and Participants

107. Mustafa submits that the Trial Panel erred in admitting and relying on the written statements of W04648 and W04712 and the "oral statement" of [REDACTED].²⁴⁹ Mustafa asserts that the witness statements have no probative value and should have been excluded or afforded no weight.²⁵⁰ In support, Mustafa argues that these witnesses did not personally observe the alleged events on the compound or those leading up to the Murder Victim's death.²⁵¹ Mustafa further submits that W04648 is now deceased and, as a result, his statement cannot be verified.²⁵² Accordingly, Mustafa asserts that the Trial Panel's reliance on these statements

²⁴⁵ Trial Judgment, paras 91, 99. See also Decision on SPO Rule 155 Application, para. 16(b) admitting, *inter alia*, P00001 (W04648) (confidential); Decision on SPO Rule 153 Application, para. 37(b) admitting, *inter alia*, P00013 (W04712) (confidential), and P00014 (W04712) (confidential).

²⁴⁶ Trial Judgment, para. 461, referring to Transcript (W04390), 24 November 2021, pp. 1861-1865 (redacted).

²⁴⁷ Appeal Brief, paras 34, 36-39.

²⁴⁸ SPO Response Brief, para. 63; Victims Response Brief, paras 18, 20.

²⁴⁹ Appeal Brief, paras 33-39; Notice of Appeal, Ground 1E, para. 4; Reply Brief, paras 48-51.

²⁵⁰ Appeal Brief, paras 34, 36-38; Notice of Appeal, para. 4.

²⁵¹ Appeal Brief, paras 37-38; Reply Brief, paras 48-49.

²⁵² Appeal Brief, para. 35. The Appeals Panel notes that, in his Appeal Brief, Mustafa erroneously refers to W04712 as a deceased witness, which should instead refer to W04648, whose statement was admitted pursuant to Rule 155 of the Rules. However, the Appeals Panel notes that in the Reply Brief, Mustafa acknowledges the error made in the Appeal Brief. See Reply Brief, paras 47, 121. See also Victims Response Brief, paras 16-17.

invalidates the Trial Judgment with respect to the cause or circumstances of the Murder Victim's death.²⁵³

108. The SPO responds that Mustafa's submissions fail to establish any error, and should accordingly be rejected.²⁵⁴ The SPO argues that Mustafa fails to support his claims that W04648's statement cannot be verified and that W04712's statement bears no relevance, and wrongfully asserts that [REDACTED], as [REDACTED].²⁵⁵ The SPO further argues that: (i) Mustafa did not challenge the admission of W04648's written statement; (ii) his submissions at trial concerning W04712's statement do not reflect his submissions on appeal; and (iii) he did not address the written statements in his final trial brief or closing statements.²⁵⁶ As a result, the SPO asserts that Mustafa has waived his right to appeal their admission and the Trial Panel's reliance on them.²⁵⁷ Nonetheless, the SPO asserts that Mustafa fails to establish how these alleged errors could change the outcome of the case.²⁵⁸

109. Victims' Counsel responds that the Trial Panel properly considered all requisite factors when admitting W04712's written statement, within the exercise of its discretion under Rule 153(1) of the Rules.²⁵⁹ Victims' Counsel asserts that, while Mustafa did object to its admission, he failed to demonstrate the statement's unreliability or a prejudicial effect outweighing its probative value.²⁶⁰ With respect to the weight afforded to W04712's written statement, Victims' Counsel argues that the Trial Panel correctly considered the statement, together with other corroborating

²⁵³ Appeal Brief, para. 39.

²⁵⁴ SPO Response Brief, paras 63-65.

²⁵⁵ SPO Response Brief, para. [REDACTED].

²⁵⁶ SPO Response Brief, para. 62.

²⁵⁷ SPO Response Brief, para. 62.

²⁵⁸ SPO Response Brief, para. 64.

²⁵⁹ Victims Response Brief, para. 18.

²⁶⁰ Victims Response Brief, para. 19.

witness statements, for the limited purpose of establishing the “climate of fear and intimidation” endured by the witnesses.²⁶¹

110. In reply, Mustafa submits that the Trial Panel erred in relying on W04648’s self-written statement, W04712’s statement to the SPO, and [REDACTED]’s “oral statement”, as their statements are not credible and none of them were subject to cross-examination or to a “similar threshold”.²⁶² Finally, Mustafa submits, as a clarification to his submission in the Appeal Brief, that while [REDACTED] was [REDACTED], [REDACTED] did not [REDACTED].²⁶³

2. Assessment of the Court of Appeals Panel

(a) W04648

111. The Appeals Panel recalls that the SPO applied for the admission of the prior statements of W04648 and related documents on 13 September 2021, pursuant to Rule 155(1) of the Rules.²⁶⁴

112. On 15 October 2021, the Trial Panel issued its decision assessing the admissibility of W04648’s written statements, and admitted the statements.²⁶⁵

113. The Appeals Panel observes that, while Mustafa now takes issue with the Trial Panel’s admission of W04648’s written statement, he raises this issue for the first time on appeal while he had ample opportunity to do so at first instance. Specifically, the Panel notes that: (i) Mustafa did not respond to the SPO’s application for the admission of W04648’s prior statements and related documents;²⁶⁶ and (ii) he did not challenge W04648’s written statement either in his final trial brief or during closing

²⁶¹ Victims Response Brief, para. 20.

²⁶² Reply Brief, para. 50.

²⁶³ Reply Brief, para. 48. The Appeals Panel notes Mustafa’s earlier submission in his Appeal Brief that [REDACTED]. See Appeal Brief, para. 38.

²⁶⁴ SPO Rule 155 Application.

²⁶⁵ Decision on SPO Rule 155 Application, para. 16(b).

²⁶⁶ Decision on SPO Rule 155 Application, para. 4.

statements. For these reasons, the Appeals Panel considers that Mustafa has waived his right to raise this issue on appeal.²⁶⁷ Furthermore, Mustafa has not demonstrated special circumstances justifying consideration of his submissions. Accordingly, the Appeals Panel dismisses Mustafa's submissions with respect to the admissibility of W04648's written statement.

114. Turning to Mustafa's argument that the Trial Panel erred in relying on W04648's written statement because it was "self-written" (or "self-made") and not subject to cross-examination, and accordingly should not have been afforded any weight,²⁶⁸ the Appeals Panel first notes that the Trial Panel admitted several statements by W04648 that were collected within the framework of an [REDACTED], including an "undated and unsigned statement".²⁶⁹ The Appeals Panel further notes that Mustafa does not support his arguments with precise references to relevant paragraphs in the Trial Judgment or a specific ERN for the challenged statement. Such deficiencies in principle warrant summary dismissal of Mustafa's submissions.²⁷⁰ Nonetheless, while Mustafa does not specify to which statement he refers, the Appeals Panel deduces from the description "self-made" and the fact that W04648's other statements were recorded on official [REDACTED] or [REDACTED] forms, or by [REDACTED] and [REDACTED] investigators, that Mustafa refers to the "undated and unsigned statement".²⁷¹

115. In this regard, the Appeals Panel notes that the Trial Panel carefully assessed the reliability of W04648's written statements, noting the inconsistencies across the various statements, "including, among others, several [REDACTED] statements and

²⁶⁷ See above, para. 30.

²⁶⁸ Appeal Brief, paras 34, 36, 39; Reply Brief, paras 47, 50-51.

²⁶⁹ See Decision on SPO Rule 155 Application, para. 16(b); SPO Rule 155 Application; Trial Judgment, para. 97.

²⁷⁰ See above, para. 29.

²⁷¹ See Trial Judgment, para. 97, referring to P00001 (confidential), pp. 7-11; P00009 (confidential), pp. 2-3.

an undated and unsigned statement”.²⁷² In particular, the Trial Panel noted “visible discrepancies regarding dates and persons present at certain encounters”.²⁷³ While finding that these inconsistencies did not affect W04648’s general credibility, the Trial Panel then explicitly noted that, in light of these inconsistencies, it had not relied on any part of W04648’s undated and unsigned statement.²⁷⁴ In light of these findings, the Appeals Panel dismisses Mustafa’s arguments challenging the Trial Panel’s reliance on W04648’s “self-made” statement.

116. The Appeals Panel finds that Mustafa fails to demonstrate that the Trial Panel erred in finding W04648 to be credible and his testimony reliable.²⁷⁵ Accordingly, the Appeals Panel dismisses Mustafa’s submissions under Ground 1E with respect to the Trial Panel’s assessment of W04648’s written statement.

(b) W04712

117. The Appeals Panel recalls that, pursuant to Rule 153 of the Rules, and subject to Rule 155 of the Rules, the Trial Panel may admit, in lieu of oral testimony, the written statements of a witness, or a transcript of evidence and associated exhibits provided by a witness in proceedings before the Specialist Chambers, when they go to proof of a matter other than the acts and conduct of the Accused as charged in the indictment.

118. The Appeals Panel observes that the SPO sought the admission of the prior statements of W04712 on 19 November 2021 pursuant to Rule 153(1) of the Rules.²⁷⁶ In response, Mustafa objected to the admissibility of the statements on the basis that: (i) the statements are not merely corroborative, as the evidence given by other witnesses on the same issues differs greatly; (ii) the statements constitute significant

²⁷² Trial Judgment, para. 97.

²⁷³ Trial Judgment, para. 97.

²⁷⁴ Trial Judgment, paras 97-98.

²⁷⁵ Trial Judgment, paras 91-99.

²⁷⁶ SPO Rule 153 Application.

evidence impacting a possible sentence; and (iii) he is unable to challenge the veracity of the statements through cross-examination of the witness.²⁷⁷

119. The Appeals Panel further observes that, on 17 December 2021, the Trial Panel issued its decision on the SPO's application, and admitted W04712's written statements and associated exhibits.²⁷⁸ In its admissibility assessment, the Trial Panel first considered that W04712's statement "provides solely crime-base evidence, and does not mention or provide information concerning the Accused or his role or involvement in the crimes charged", and accordingly "goes to proof of matters other than the acts and conduct of the Accused".²⁷⁹ The Trial Panel further noted that, while W04712's statement does "relate[] to factors to be taken into account in determining the sentence, if any, such as the gravity of the crimes" pursuant to Rule 153(1)(a)(vii) of the Rules, "such a factor militates in favour of the admission of such evidence, rather than against [it]".²⁸⁰ The Trial Panel further considered that W04712's statement was cumulative with and corroborated by the in-court testimony of eight other witnesses,²⁸¹ as well as the evidence in W04648's written statements, and that Mustafa was given the opportunity to cross-examine several witnesses on the same matters found in W04712's statement.²⁸² In light of the above, the Appeals Panel is of the view that it was appropriately within the exercise of the Trial Panel's discretion to admit W04712's written statement.

²⁷⁷ Defence Response to SPO Rule 153 Application, paras 14-16.

²⁷⁸ Decision on SPO Rule 153 Application, para. 37(b).

²⁷⁹ Decision on SPO Rule 153 Application, para. 24. Namely, the Trial Panel noted that W04712's statement provided information on: (i) the arrest of [REDACTED] by persons other than the Accused; (ii) the identification of the KLA soldiers who carried out the arrest; (iii) the attempts made by [REDACTED] to locate [REDACTED] after the arrest; (iv) a visit made by [REDACTED]; and (v) the exhumation of [REDACTED].

²⁸⁰ Decision on SPO Rule 153 Application, para. 26.

²⁸¹ Namely [REDACTED].

²⁸² Decision on SPO Rule 153 Application, paras 25, 27.

120. Therefore, the Appeals Panel finds that Mustafa fails to demonstrate that the Trial Panel erred in admitting W04712's statement, and accordingly dismisses his submissions in that regard.

121. Turning to Mustafa's argument that the Trial Panel erred in relying on W04712's written statement, Mustafa asserts that W04712's statement: (i) is not relevant because he did not personally observe the events on the compound related to the cause or circumstances of the Murder Victim's death;²⁸³ and (ii) is not credible because he was not subject to cross-examination.²⁸⁴ The Appeals Panel first observes that the Trial Panel carefully assessed W04712's credibility and the reliability of his written statement,²⁸⁵ taking into account the presence or absence of factors affecting his credibility,²⁸⁶ and any inconsistencies between his statement and the testimony of other witnesses.²⁸⁷ While noting that these inconsistencies did not affect W04712's general credibility, the Trial Panel considered any relevant inconsistencies in its factual findings²⁸⁸ and relied upon W04712's statement to the extent that it was corroborated by other credible and reliable evidence.²⁸⁹

122. In light of the above, the Appeals Panel finds that Mustafa fails to demonstrate that the Trial Panel erred in finding W04712 to be credible and his testimony reliable.²⁹⁰ Accordingly, the Appeals Panel dismisses Mustafa's submissions with respect to the Trial Panel's reliance on W04712's written statement.

²⁸³ Appeal Brief, para. 37.

²⁸⁴ Reply Brief, para. 50.

²⁸⁵ Trial Judgment, paras 40, 91-99. The Panel notes that, while Mustafa specifically challenges W04712's individual written statement, the Trial Panel evaluated W04712's statement within the context of the statements of [REDACTED] as a whole.

²⁸⁶ Trial Judgment, paras 35, 93-95.

²⁸⁷ Trial Judgment, paras 36, 96.

²⁸⁸ See e.g. Trial Judgment, paras 608 (noting diverging accounts regarding [REDACTED]), 613 (noting diverging accounts regarding [REDACTED]). See also Trial Judgment, para. 37.

²⁸⁹ See e.g. Trial Judgment, paras 37, 606-609, 612-613.

²⁹⁰ Trial Judgment, para. 99.

(c) [REDACTED]

123. The Appeals Panel first notes that the challenged “oral statement” of [REDACTED] consists of hearsay statements to which W04390 testified in court regarding the circumstances of the Murder Victim’s arrest.²⁹¹ The Appeals Panel further notes that, according to W04390, [REDACTED], as also acknowledged by Mustafa in his submissions.²⁹²

124. The Appeals Panel observes that Mustafa challenges the hearsay statements for the first time on appeal, while he had a reasonable opportunity to do so at first instance. Specifically, the Appeals Panel notes that Mustafa did not object to the hearsay statements during W04390’s testimony, nor take issue with their admissibility in his final trial brief or closing statements, which in principle warrants summary dismissal of his submissions.²⁹³ However, in view of the circumstances in which these statements arose and in light of the nature and substance of the evidence which implicates fair trial rights, and notwithstanding Mustafa’s failure to raise a challenge when a reasonable opportunity presented itself, the Appeals Panel will exceptionally address the submissions out of fairness to the Accused and in the interests of justice.

125. The Appeals Panel first notes that, in its assessment, the Trial Panel evaluated hearsay evidence cautiously “in order to minimise the potential prejudice to the Accused arising out of the impossibility to confront the primary source of the information”.²⁹⁴ With regard to [REDACTED], the Appeals Panel notes that the Trial Panel made a single reference to [REDACTED] hearsay statements, noting that “[i]n addition, W04390 provided hearsay evidence confirming W04391’s account, as [REDACTED] learned the circumstances of the Murder Victim’s apprehension from

²⁹¹ See Trial Judgment, para. 461.

²⁹² Trial Judgment, para. 461; [REDACTED].

²⁹³ See above, para. 30.

²⁹⁴ Trial Judgment, para. 44.

[REDACTED].²⁹⁵ In the Appeals Panel's view, the Trial Panel did not afford undue weight to [REDACTED]'s hearsay statements introduced during W04390's testimony, but rather relied on them as corroborative of other testimonial evidence.²⁹⁶ Furthermore, both W04390 and W04391 testified in court, and their account was subject to cross-examination.²⁹⁷ Mustafa was therefore not prejudiced by the admission of the statements.

126. The Appeals Panel recalls that, when challenging a trial panel's reliance on hearsay statements, an appellant must demonstrate that no reasonable trier of fact would have considered the hearsay evidence or that the trial panel's evaluation of the evidence is wholly erroneous,²⁹⁸ which Mustafa has failed to do. Accordingly, the Appeals Panel dismisses Mustafa's submissions with respect to the Trial Panel's admission and reliance on [REDACTED]'s "oral statement".

127. In light of the above, the Appeals Panel finds that, even if properly raised, Mustafa's submissions fail to demonstrate that the Trial Panel erred in its assessment and reliance on the hearsay statements, and accordingly dismisses Mustafa's Ground 1E.

F. ALLEGED ERRORS CONCERNING THE QUESTIONING OF W03594 AND THE TRIAL PANEL'S ASSESSMENT OF HIS TESTIMONY (GROUND 1F)

128. The Trial Panel permitted the SPO to confront W03594 with his prior inconsistent statements²⁹⁹ and found W03594's testimony concerning his treatment

²⁹⁵ Trial Judgment, para. 461.

²⁹⁶ The Panel recalls that hearsay evidence is generally admissible, but the weight and probative value, if any, to be afforded to the evidence must be assessed on a case-by-case basis, including a consideration of the Defence's opportunity to test and challenge the evidence. See *Aleksovski* Appeal Decision on Admissibility, para. 15; *Bemba et al.* Appeal Judgment, para. 874. See also *Gucati and Haradinaj* Trial Judgment, paras 24-25, 43; *Karadžić* Trial Judgement, para. 13.

²⁹⁷ Transcript (W04390), 24 November 2021; Transcript (W04391), 22 and 23 November 2021.

²⁹⁸ See Article 46(5) of the Law; *Nahimana et al.* Appeal Judgement, para. 509. See also above, para. 23.

²⁹⁹ See e.g. Transcript (W03594), 12 October 2021, pp. 1043-1072; Transcript (W03594), 13 October 2021, pp. 1132-1156.

while in detention to be unreliable, in light of its contradictions with other witness testimony.³⁰⁰ Mustafa submits that the Trial Panel erred by allowing the SPO to cross-examine W03594 as a “hostile witness” and by disregarding evidence favourable to the Accused when assessing W03594’s testimony, without providing a reasoned opinion for its rejection.³⁰¹ The SPO responds that Mustafa’s submissions fail to demonstrate an error in the Trial Panel’s decision and should be dismissed.³⁰²

1. Submissions of the Parties

129. Mustafa submits that the Trial Panel erred by permitting the SPO to “cross-examine” W03594 as a “hostile witness” when the witness denied that any of the detainees had been subject to mistreatment or sustained any injuries.³⁰³ Mustafa further submits that the Trial Panel erred in its assessment of W03594’s testimony when it: (i) discounted testimony favourable to the Accused concerning the conditions of detention because it stood in contrast to that of his co-detainees; (ii) “selectively” relied on W03594’s testimony only to the extent that it was corroborated by other witness testimony; and (iii) failed to provide a reasoned opinion for rejecting parts of W03594’s testimony.³⁰⁴ In support, Mustafa asserts that the Trial Panel incorrectly found that, based on his testimony, it was apparent that W03594 did not want to implicate the Accused, arguing that the witness was “overwhelmingly clear” that the Accused was not present but that he “would have certainly not spared him” if he had been.³⁰⁵ As such, Mustafa asserts that no reasonable tribunal would have excluded, or otherwise afforded no or limited weight, to W03594’s testimony.³⁰⁶

³⁰⁰ Trial Judgment, paras 78-83.

³⁰¹ Appeal Brief, paras 40-50; Reply Brief, paras 8-13.

³⁰² SPO Response Brief, paras 23-24.

³⁰³ Appeal Brief, paras 42, 44, 48.

³⁰⁴ Appeal Brief, paras 40-41, 45-50; Reply Brief, paras 10-13.

³⁰⁵ Appeal Brief, paras 42-43; Reply Brief, paras 11-12.

³⁰⁶ Appeal Brief, para. 48.

130. The SPO responds that Mustafa's submissions regarding the Trial Panel's rejection of parts of W03594's testimony fall outside of the scope of the Notice of Appeal and should accordingly be dismissed.³⁰⁷ The SPO further submits that Mustafa's assertion that the SPO was permitted to "cross-examine" W03594 as a "hostile" witness misrepresents the Trial Panel's ruling, which instead granted the SPO leave to refresh the witness's memory, pursuant to Rule 143(1) of the Rules.³⁰⁸ Furthermore, the SPO asserts that Mustafa failed to object during W03594's testimony and thus has waived his right to raise the issue on appeal.³⁰⁹

131. Mustafa replies that the SPO did not "refresh" the witness's memory, but rather "confronted" him with his prior statement.³¹⁰ As such, Mustafa argues that W03594 was treated as a hostile witness, resulting in discrediting his testimony which was favourable to the Accused.³¹¹

2. Assessment of the Court of Appeals Panel

132. At the outset, the Appeals Panel observes that Mustafa's submissions regarding the Trial Panel's assessment of W03594's testimony fall outside of the scope of the Notice of Appeal,³¹² which warrants their summary dismissal.³¹³ Furthermore, Mustafa has not demonstrated special circumstances justifying their consideration. Accordingly, the Appeals Panel dismisses Mustafa's submissions in this regard.

³⁰⁷ SPO Response Brief, para. 23.

³⁰⁸ SPO Response Brief, para. 24.

³⁰⁹ SPO Response Brief, para. 24.

³¹⁰ Reply Brief, para. 8.

³¹¹ Reply Brief, para. 9.

³¹² *Compare* Notice of Appeal, Ground 1F, para. 4 *with* Appeal Brief, paras 45-50.

³¹³ See above, para. 31. Moreover, the Panel notes that the Trial Panel is vested with broad discretion in assessing the credibility of a witness and the reliability of his or her testimony. See above, para. 38.

133. Turning to Mustafa's assertion that the Trial Panel permitted the SPO to "cross-examine" W03594 as a "hostile" witness,³¹⁴ the Appeals Panel first notes that Mustafa did not object to the SPO's questioning of W03594 as a "hostile witness" during the trial proceedings.³¹⁵ This warrants summary dismissal of this submission.³¹⁶ Nevertheless, the Appeals Panel decides to exceptionally consider Mustafa's arguments out of fairness to the Accused and in the interests of justice, in view of the significance of the issue concerning the scope of questioning in the context of the witness's testimony.

134. In this regard, the Appeals Panel notes that, during his in-court testimony, W03594 provided answers to the SPO's questions that were inconsistent with his prior statements. As a result, the SPO sought leave to "refresh" W03594's memory with his prior statements.³¹⁷ Specifically, the SPO read the relevant portions of the prior statements to the witness and was permitted to ask leading questions in order to clarify his testimony.³¹⁸

135. In the Appeals Panel's view, while W03594 did not indicate that he could not remember facts to which he had previously attested, as provided under Rule 143(1) of the Rules, he testified in a manner which was inconsistent with his prior statements.³¹⁹

³¹⁴ The Panel notes that paragraphs 89 and 551 of the Trial Judgment, referenced in footnote 6 of the Notice of Appeal, concern the testimony of other witnesses, and are not relevant to the issue raised under Ground 1F.

³¹⁵ See in particular, Transcript (W03594), 12 October 2021, pp. 1043-1091; Transcript (W03594), 13 October 2021, pp. 1132-1160.

³¹⁶ See above, para. 30.

³¹⁷ See e.g. Transcript (W03594), 12 October 2021, pp. 1043-1044, 1047-1053, 1058-1060, 1067-1072; Transcript (W03594), 13 October 2021, pp. 1132-1133, 1138, 1140-1141, 1146-1147, 1155-1156.

³¹⁸ While Mustafa states that the Trial Panel permitted the SPO to "cross-examine" W03594, the Appeals Panel understands this to mean that the SPO was permitted to ask leading questions of the witness. See Appeal Brief, paras 44, 48.

³¹⁹ See e.g. Transcript (W03594), 12 October 2021, pp. 1043-1044 (where, after the witness provided an answer inconsistent with his prior statement, the SPO stated: "if I could perhaps refresh the witness's memory by reading a small part of his statement to the SPO"), 1058-1060 (where, after the witness provided an answer inconsistent with his prior statement, the SPO read portions of the statement and asked the witness: "what you told the Prosecution during your interview is quite different from what you're telling the Panel today. Does me reading [...] this portion of your interview somewhat refresh

Under these circumstances, the Appeals Panel finds no error in the Trial Panel's decision to allow the SPO to confront W03594 with his prior statements, as permitted under Rule 143(2) of the Rules.³²⁰ Furthermore, the Appeals Panel finds that the Trial Panel's decision to allow the SPO to ask leading questions of W03594 falls within the Trial Panel's discretionary powers to exercise control over the mode of witness questioning, in order to facilitate the effective presentation of the evidence and the ascertainment of the truth.³²¹ Accordingly, the Appeals Panel finds no error in the Trial Panel's decision.

136. In light of the above, the Appeals Panel finds that, even if they had been properly raised, Mustafa's submissions do not establish an error and accordingly dismisses Mustafa's Ground 1F.

G. ALLEGED ERRORS CONCERNING ASSURANCES PROVIDED TO W04600 PURSUANT TO RULE 151(3) OF THE RULES (GROUND 1G)

137. On 20 September 2021, the Trial Panel granted an application by W04600 to be provided with assurances with respect to self-incrimination under Rule 151(3) of the Rules.³²² The Trial Panel then provided these assurances to W04600 orally on 23 September 2021 prior to the start of his testimony.³²³ Mustafa challenges the Trial

your memory as to what you said about this?"), 1067-1072 (where, after the witness denied ever having been physically beaten during his detention, the SPO read portions of his prior statement and asked the witness: "I note two slight contradictions to what you told the Panel today [...] after I've read you this part, can you tell the Panel whether, in fact, there were one person or more than one person hitting with a thick rubber stick?"). See also SPO Response Brief, para. 24.

³²⁰ The Appeals Panel also notes that the SPO's use of leading questions with W03594 was limited to clarifying answers provided during his in-court testimony which contradicted his prior statements.

³²¹ See Rule 143(4) of the Rules.

³²² Oral Order on Assurances for W04600; Rule 151(3) Application. See also SPO Rule 151(3) Notice. The SPO did not object to the application. See SPO Rule 151(3) Submissions.

³²³ Transcript (W04600), 23 September 2021, pp. 706-707. See also Trial Judgment, para. 100.

Panel's decision to provide W04600 with such assurances.³²⁴ The SPO responds that Mustafa fails to demonstrate any error in the Trial Panel's decision.³²⁵

1. Submissions of the Parties

138. Mustafa submits that the Trial Panel erred by providing assurances to W04600 pursuant to Rule 151(3) of the Rules "in oral form", and by failing to provide a reasoned decision to compel the witness to testify.³²⁶ Mustafa argues that, as a result, the Trial Panel's reliance on W04600's evidence violates the Rules and "invalidates the Judgment where reliance is placed on the witness".³²⁷

139. The SPO responds that Mustafa fails to show how the assurances provided to W04600 under Rule 151(3) of the Rules prejudiced him, and that he presents no cogent arguments or authorities in support of his submission that a decision under Rule 151(3) of the Rules requires written reasons.³²⁸ The SPO argues that the right to a reasoned opinion is contingent on the nature of the decision, and that not every ruling requires detailed written reasons, in particular when the ruling concerns routine matters or, as in this case, was not contested at the time.³²⁹

140. Mustafa replies that the fact that a ruling is routine is not relevant to whether it should be well-reasoned.³³⁰ He further replies that any incriminating matters discussed by a witness should be "used with extreme caution", which the Trial Panel failed to do with regard to W04600's testimony.³³¹

³²⁴ Appeal Brief, paras 51-52; Notice of Appeal, Ground 1G, para. 4, fn. 7. See also Reply Brief, para. 14.

³²⁵ SPO Response Brief, para. 25.

³²⁶ Appeal Brief, paras 51-52; Notice of Appeal, Ground 1G, para. 4, fn. 7; Reply Brief, para. 14. The Appeals Panel notes that Mustafa refers in footnote 7 of the Notice of Appeal to "para. 185", but it should instead refer to footnote 185. See Trial Judgment, para. 100, fn. 185.

³²⁷ Appeal Brief, para. 52.

³²⁸ SPO Response Brief, para. 25.

³²⁹ SPO Response Brief, para. 25.

³³⁰ Reply Brief, paras 14-15.

³³¹ Reply Brief, para. 15.

2. Assessment of the Court of Appeals Panel

141. The Appeals Panel recalls that, according to Rule 151(1) and (2) of the Rules, if a witness objects to providing testimony that might tend to incriminate him or her, the Panel may compel the witness to testify, having considered: (a) the importance of the anticipated evidence; (b) whether the witness would be providing unique evidence relevant to the case; (c) the nature of the possible incrimination, if known; and (d) the sufficiency of the protective measures for the witness, in the particular circumstances.

142. In addition, pursuant to Rule 151(3) of the Rules, in the event that a panel decides to compel a witness to testify, it may determine that an assurance with respect to self-incrimination should be provided prior to the witness's testimony, having sought the *ex parte* views of the Specialist Prosecutor. The panel shall assure the witness that the evidence provided in response to questions: (a) shall be given *in camera* and shall not be disclosed, in any manner, to the public, Kosovo or any third State; and (b) will not be used either directly or indirectly against that person in any subsequent prosecution before the Specialist Chambers, except as provided under Article 15(2) of the Law and Rule 65 of the Rules.

143. The Appeals Panel observes that, while Mustafa now challenges the Oral Order on Assurances for W04600, Mustafa raises this issue for the first time on appeal, while he had ample opportunity to do so at first instance. More specifically, the Panel notes that Mustafa did not: (i) respond to the SPO Rule 151(3) Notice or Rule 151(3) Application; (ii) raise an objection at the time the Trial Panel issued the Oral Order on Assurances for W04600; or (iii) challenge the Oral Order on Assurances for W04600 in his final trial brief or closing statements. For these reasons, the Appeals Panel considers that Mustafa has waived his right to raise this issue on appeal. Furthermore,

he has not demonstrated special circumstances justifying consideration of his submissions.³³² Accordingly, the Panel dismisses Mustafa's Ground 1G.

H. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S RELIANCE ON EVIDENCE PROVIDED BY [REDACTED] (GROUNDS 1H, 1I)

144. Mustafa challenges the Trial Panel's reliance on [REDACTED] in relation to: (i) the arrest of the Murder Victim;³³³ and (ii) Mustafa's intent to commit murder.³³⁴ The SPO and Victims' Counsel respond that Mustafa's challenges are unsubstantiated and fail to establish any error, and should accordingly be dismissed.³³⁵

1. Submissions of the Parties and Participants

145. Mustafa submits that the Trial Panel erred by failing to exercise special caution when relying on [REDACTED] implicating Mustafa in [REDACTED].³³⁶ The Defence argues that the Trial Panel relied on evidence provided by [REDACTED] in its factual findings regarding the existence [REDACTED], but relied only on [REDACTED].³³⁷ Mustafa submits that [REDACTED].³³⁸

146. Mustafa further submits that the Trial Panel erred when relying on [REDACTED] evidence regarding an exchange between [REDACTED] in its findings on Mustafa's intent to commit murder.³³⁹ Mustafa argues that this exchange is not relevant to establish "the mental element of the crimes committed" or that "the

³³² See above, para. 30.

³³³ Appeal Brief, paras 53-56 (Ground 1H); Reply Brief, paras 52-61 (Ground 1H).

³³⁴ Appeal Brief, paras 57-61 (Ground 1I); Reply Brief, paras 62-67 (Ground 1I).

³³⁵ SPO Response Brief, paras 66-70; Victims Response Brief, paras 23-24.

³³⁶ Appeal Brief, para. 56; Notice of Appeal, Ground 1H, para. 4; Reply Brief, paras 52, 54, 57-60.

³³⁷ Appeal Brief, paras 53-56; [REDACTED].

³³⁸ Appeal Brief, paras 53-54; Reply Brief, para. 59.

³³⁹ Appeal Brief, paras 57-61; Notice of Appeal, Ground 1I, para. 4; Reply Brief, paras 62-64, 66-67.

exchange ever took place”, and, that Mustafa’s statement as recalled by [REDACTED] does not constitute an admission.³⁴⁰

147. The SPO and Victims’ Counsel respond that Mustafa does not provide any support for his assertion that [REDACTED] evidence must be rejected and moreover, this argument is contrary to the express wording of Rule 139(3) of the Rules and established jurisprudence.³⁴¹ The SPO further responds that the Trial Panel has wide discretion in assessing evidence, including of [REDACTED] but credible witness testimony of persons who may have been directly implicated in the events, as long as appropriate caution is exercised.³⁴² The SPO submits that, [REDACTED].³⁴³

148. The SPO also responds that the Trial Panel considered the exchange between [REDACTED] to be relevant to the crimes, and that Mustafa fails to show that the Trial Panel’s findings in this regard are wholly erroneous or that no reasonable trial panel could have reached the same conclusion.³⁴⁴ Further, the SPO and Victims’ Counsel respond that Mustafa fails to acknowledge the other facts considered by the Trial Panel when finding Mustafa’s intent to commit murder, and that he fails to demonstrate that its findings on Mustafa’s *mens rea* for the charge of murder could not stand in light of the remaining evidence.³⁴⁵ Finally, with regard to the argument that [REDACTED] – does not constitute an admission, the SPO submits that Mustafa misrepresents the Trial Panel’s findings, as the Trial Panel relied on other parts of the exchange to find that [REDACTED]’s evidence is credible.³⁴⁶

³⁴⁰ Appeal Brief, paras 59-60; Reply Brief, paras 63, 65, 67.

³⁴¹ SPO Response Brief, paras 66, 68; Victims Response Brief, para. 24, wherein Victims’ Counsel further responds that, pursuant to Rule 137(2) of the Rules, the Trial Panel has the authority to assess the admissibility and weight to be given to any evidence before it.

³⁴² SPO Response Brief, para. 67.

³⁴³ SPO Response Brief, para. [REDACTED].

³⁴⁴ SPO Response Brief, para. 69.

³⁴⁵ SPO Response Brief, para. 69; Victims Response Brief, para. 23.

³⁴⁶ SPO Response Brief, para. 70, referring to Trial Judgment, para. 694.

149. Mustafa replies that the Trial Panel generally relied on [REDACTED]'s testimony to the extent that it was [REDACTED] by [REDACTED].³⁴⁷ However, Mustafa asserts that, while the Trial Panel may have wide discretion to find [REDACTED] evidence credible if supported by other circumstantial evidence, [REDACTED]'s testimony concerning the [REDACTED] was not [REDACTED] by [REDACTED] and accordingly should not have been found credible.³⁴⁸

2. Assessment of the Court of Appeals Panel

150. The Panel first notes that the Trial Panel found [REDACTED] generally credible regarding core aspects of his testimony, taking into account, in particular, that the witness [REDACTED] – a fact which was “[REDACTED]”.³⁴⁹ The Trial Panel also found that [REDACTED] gave a chronological and detailed account of the circumstances and sequence of events surrounding [REDACTED].³⁵⁰ Finally, the Trial Panel found [REDACTED]'s account of events [REDACTED] to be [REDACTED] by [REDACTED] and W04391, including that [REDACTED].³⁵¹

151. The Trial Panel further found that, [REDACTED].³⁵² The Trial Panel also noted that, according to [REDACTED].³⁵³

152. The Trial Panel considered the credibility of [REDACTED]'s evidence about this exchange, and found that “[REDACTED]”.³⁵⁴ The Trial Panel thus found the exchange to be wholly plausible, and that it demonstrated that the Accused intended to kill the Murder Victim and, subsequently, avoid any proceedings related to his

³⁴⁷ Reply Brief, para. 53, [REDACTED].

³⁴⁸ Reply Brief, paras 54, 61. See also Reply Brief, paras 55-59.

³⁴⁹ Trial Judgment, para. [REDACTED]. See also Trial Judgment, paras [REDACTED].

³⁵⁰ Trial Judgment, paras [REDACTED].

³⁵¹ Trial Judgment, paras [REDACTED]. The Panel also recalls the Trial Panel's findings that, based on [REDACTED] testimony that [REDACTED]. See Trial Judgment, para. [REDACTED]. See also Trial Judgment, para. 345.

³⁵² Trial Judgment, para. [REDACTED], referring to [REDACTED].

³⁵³ Trial Judgment, para. [REDACTED], referring to [REDACTED].

³⁵⁴ Trial Judgment, para. [REDACTED].

death.³⁵⁵ On the basis of this evidence, and other factors it considered in the Trial Judgment, the Trial Panel found that the only reasonable conclusion was that, thus establishing the mental element for murder as a war crime.³⁵⁶

153. The Panel recalls that there is no general requirement that a witness's testimony be corroborated if otherwise deemed credible.³⁵⁷ In particular, a trial panel has discretion to rely on uncorroborated evidence of witnesses who may have a motive to implicate the accused, provided that appropriate caution is exercised in the evaluation of their testimony.³⁵⁸ The Panel further recalls that a trial panel is best placed to assess the credibility of witnesses and is vested with broad discretion in evaluating the reliability of their testimony.³⁵⁹

154. Based on the Trial Panel's findings, as recalled above,³⁶⁰ the Appeals Panel finds that the Trial Panel provided a detailed and cautious assessment of [REDACTED]'s credibility. Namely, the Trial Panel found [REDACTED] generally credible regarding core aspects of his testimony, noting that he gave detailed evidence of specific events that he personally experienced, including about facts which were "[REDACTED]", and that his account of the events surrounding [REDACTED] were corroborated by other witnesses.³⁶¹ The Panel therefore finds no error in the Trial Panel's reliance on [REDACTED]'s evidence in its findings on the [REDACTED]. Accordingly, the Panel dismisses Mustafa's Ground 1H.

155. Turning to Ground 1I, the Panel notes that Mustafa challenges the Trial Panel's findings concerning [REDACTED]'s evidence about a conversation between

³⁵⁵ Trial Judgment, para. [REDACTED].

³⁵⁶ Trial Judgment, para. [REDACTED]. See also below, para. [REDACTED].

³⁵⁷ See above, para. 38.

³⁵⁸ See e.g. *Popović et al.* Appeal Judgement, para. 135; *Šainović et al.* Appeal Judgement, para. 1101.

³⁵⁹ See above, para. 38.

³⁶⁰ See above, paras 150-152.

³⁶¹ See Trial Judgment, paras [REDACTED]. See also above, para. 150.

[REDACTED]. The Panel recalls the Trial Panel's findings in this regard³⁶² and notes that the Trial Panel did not rely solely on the conversation between [REDACTED] to find that Mustafa intended to commit the crime of murder. Rather, it considered the exchange "in addition"³⁶³ to several other factors, including: (i) factors indicating that Mustafa "accepted that some of the detainees in his custody might die as a result of the mistreatment";³⁶⁴ (ii) Mustafa's decisions not to release or evacuate the Murder Victim which, in the Trial Panel's view, "effectively equalled a decision to kill the Murder Victim";³⁶⁵ and (iii) the fact that the Murder Victim [REDACTED], and as a result they could not afford to keep him alive.³⁶⁶

156. In the Panel's view, these findings reinforce the conclusion that the Trial Panel's findings on [REDACTED]'s evidence about the exchange were not such that no reasonable trial panel could have made them. The substance of the conversation showing Mustafa's knowledge of and the circumstances surrounding the Murder Victim's death, makes the exchange not only plausible, but also relevant to establishing the mental element of the crime. Therefore, the Appeals Panel finds no error in the Trial Panel's exercise of its discretion to rely on [REDACTED]'s evidence in its findings on the mental element for murder as a war crime. Accordingly, the Panel dismisses Mustafa's Ground 1I.

I. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S CONSIDERATION OF FINANCIAL MOTIVE IN ITS ASSESSMENT OF [REDACTED]'S TESTIMONY (GROUND 1K)

157. In the Trial Judgment, the Trial Panel did not explicitly identify in its reasoning a possible "financial motive to lie" as a factor it relied upon in its assessment of the

³⁶² See above, paras 151-152.

³⁶³ Trial Judgment, para. 694.

³⁶⁴ Trial Judgment, para. 691.

³⁶⁵ Trial Judgment, para. 692.

³⁶⁶ Trial Judgment, para. 693.

credibility of [REDACTED], including of [REDACTED].³⁶⁷ Mustafa asserts that the Trial Panel erred by failing to consider [REDACTED]'s financial motive for testifying, and by not allowing him to question the witness in that regard.³⁶⁸ The SPO and Victims' Counsel respond that Mustafa fails to demonstrate any error in the Trial Panel's assessment.³⁶⁹

1. Submissions of the Parties and Participants

158. Mustafa submits that the Trial Panel erred when it failed to "acknowledge and consider" the potential "financial motive to lie, fabricate or distort information" on the part of [REDACTED].³⁷⁰ Specifically, Mustafa asserts that the Trial Panel accorded these witnesses "credence and reliability", ignoring their "open admission" that their testimony was driven by a "lust for money".³⁷¹ Mustafa further asserts that the Trial Panel violated his right to equality of arms by not allowing him to cross-examine [REDACTED] about [REDACTED] financial motives.³⁷²

159. The SPO and Victims' Counsel respond that Mustafa's assertion that SPO witnesses were motivated by a "lust for money" is baseless and that his single reference to [REDACTED]'s testimony "grossly distorts" the witness's evidence.³⁷³ The SPO and Victims' Counsel further submit that, contrary to Mustafa's assertion, the Trial Panel did not disallow, but instead limited the scope of cross-examination of witnesses regarding a potential financial motive for their testimony.³⁷⁴ In support, they assert that the Trial Panel specifically indicated that, while witnesses could be questioned on the issue of compensation to the extent that it might affect their

³⁶⁷ Trial Judgment, paras [REDACTED].

³⁶⁸ Appeal Brief, paras 67-69; Reply Brief, paras 73-76, 126.

³⁶⁹ SPO Response Brief, paras 89-90; Victims Response Brief, paras 31-32.

³⁷⁰ Appeal Brief, para. 69.

³⁷¹ Appeal Brief, para. 67.

³⁷² Appeal Brief, para. 68. See also Reply Brief, para. 126.

³⁷³ SPO Response Brief, para. 88; Victims Response Brief, paras 29-30.

³⁷⁴ SPO Response Brief, paras 89-90; Victims Response Brief, paras 31-32.

credibility, no questions would be permitted as to the type or amount of compensation, noting that “the scope and modalities of the reparations, if any, shall only be discussed at a later stage”.³⁷⁵ Finally, the SPO submits that the Trial Panel was not required to address the issue in the Trial Judgment.³⁷⁶

160. In reply, Mustafa asserts that a witness’s financial motive “can never be excluded in a criminal case”,³⁷⁷ and that the Trial Panel should have evaluated the credibility and reliability of every witness in this respect.³⁷⁸

2. Assessment of the Court of Appeals Panel

161. At the outset, the Appeals Panel notes that Mustafa challenges the Trial Panel’s intervention during the Defence’s cross-examination of [REDACTED] regarding a possible financial motive, asserting a violation of “equality of arms”, while he did not raise this specific issue in his Notice of Appeal.³⁷⁹ However, the Panel finds that this issue is closely connected to Mustafa’s challenge in respect of the Trial Panel’s consideration of a potential financial motive of [REDACTED] and, as such, will consider the Defence’s submissions on this issue.

162. The Appeals Panel notes that, while Mustafa generally refers to “witnesses of the SPO” and “[REDACTED]”,³⁸⁰ he only cites the testimony of one witness, [REDACTED], in support of his argument.³⁸¹ Accordingly, the Appeals Panel will only consider Mustafa’s arguments to the extent that they are supported by precise

³⁷⁵ SPO Response Brief, paras 89-90; Victims Response Brief, paras 31-32.

³⁷⁶ SPO Response Brief, para. 90.

³⁷⁷ Reply Brief, paras 74, 126.

³⁷⁸ Reply Brief, para. 76.

³⁷⁹ *Compare* Notice of Appeal, Ground 1K, para. 4 *with* Appeal Brief, para. 68.

³⁸⁰ Appeal Brief, paras 67, 69; Notice of Appeal, Ground 1K, para. 4.

³⁸¹ Appeal Brief, para. 68.

references to relevant paragraphs in the Trial Judgment, or transcript pages of witness testimony.³⁸²

163. Turning to the substance of Mustafa's argument, the Appeals Panel observes that, in assessing the credibility of witness testimony, the Trial Panel referred to its consideration of a number of factors, including any "incentive or motive to lie, fabricate, distort or withhold information".³⁸³ The Appeals Panel further observes that, the Trial Panel evaluated in detail the credibility of [REDACTED] and the reliability of [REDACTED] testimony in light of these factors.³⁸⁴ The Panel notes that, while the Trial Panel does not specifically reference a "financial motive to lie" in its assessment of [REDACTED]'s testimony,³⁸⁵ the fact that a particular factor is not referenced in the Trial Panel's reasoning does not necessarily mean that the Trial Panel did not consider it.³⁸⁶ Furthermore, the Panel finds that Mustafa fails to demonstrate how the evidence was "clearly relevant" to any specific findings, and further fails to point to any evidence to support his contention that the Trial Panel disregarded the evidence.³⁸⁷

164. Moreover, the Appeals Panel observes that, as the SPO and Victims' Counsel noted, Mustafa misrepresents [REDACTED]'s testimony and the basis for the Trial Panel's intervention during the Defence's questioning of the witness. In particular, the Appeals Panel notes that the Trial Panel did not prevent the Defence from exploring a possible financial motive with the witness, but rather limited the nature of the questions. Specifically, while emphasising that cross-examination on matters affecting a witness's credibility, including any reasons for testifying, is permitted pursuant to Rule 143(3) of the Rules, the Trial Panel found that questions aimed at eliciting views on why they are seeking compensation or the type of compensation they seek would

³⁸² See above, para. 29.

³⁸³ Trial Judgment, para. 35.

³⁸⁴ Trial Judgment, paras [REDACTED].

³⁸⁵ Trial Judgment, paras [REDACTED].

³⁸⁶ See above, para. 34.

³⁸⁷ See above, para. 34. See also *Gucati and Haradinaj* Appeal Judgment, para. 33.

not be allowed. Rather, the Trial Panel noted that the “scope and modalities of the reparations, if any, shall only be discussed at a later stage” in the proceedings.³⁸⁸ In the Appeals Panel’s view, the Trial Panel did not prevent Mustafa from challenging [REDACTED]’s credibility with respect to a potential financial motive for [REDACTED] testimony, but rather imposed appropriate limitations on the scope of cross-examination.

165. With respect to the alleged violation of the equality of arms principle,³⁸⁹ the Appeals Panel notes that Mustafa does not identify how he was placed at a disadvantage with respect to the cross-examination of witnesses, nor does he support this general assertion with references to relevant paragraphs in the Trial Judgment, or transcript pages of witness testimony where he alleges that the Trial Panel applied a different standard to the SPO’s cross-examination of witnesses. Accordingly, the Appeals Panel dismisses Mustafa’s submissions in that regard.³⁹⁰

166. In light of the above, the Appeals Panel finds that Mustafa fails to demonstrate that the Trial Panel erred in its assessment of the credibility of [REDACTED], and accordingly dismisses Mustafa’s Ground 1K.

³⁸⁸ Transcript ([REDACTED]), [REDACTED]. The Panel further notes that the scope and modalities of reparations were addressed during closing statements and that the Defence was also given an opportunity to submit written observations on reparations. See Decision on Closing Statements and Related Matters, paras 7, 20.

³⁸⁹ The Appeals Panel recalls that the principle of equality of arms between the prosecutor and an accused in a criminal trial is encompassed under the right to a fair trial guaranteed under Article 21 of the Law. This principle embodies the obligation of ensuring procedural equality between the parties and that neither party is placed at a disadvantage when presenting its case. In other words, the same set of rules must apply to both parties. See *Gucati and Haradinaj* Appeal Judgment, para. 50.

³⁹⁰ See above, para. 29.

J. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S ADMISSION INTO EVIDENCE OF EXPERT MEDICAL REPORTS (GROUND 1N)

167. The Trial Panel admitted into evidence expert medical reports concerning Victims 08/05 and 09/05 [REDACTED], under Rule 132 of the Rules.³⁹¹ Mustafa challenges their admission, arguing that the time frame to make submissions regarding their admissibility was inadequate and violated his fair trial right to adequate time and facilities to prepare his defence.³⁹² The SPO and Victims' Counsel respond that Mustafa fails to demonstrate any error or prejudice that would invalidate the Trial Judgment.³⁹³

1. Submissions of the Parties and Participants

168. Mustafa submits that the Trial Panel erred in admitting into evidence expert medical reports in relation to Victims 08/05 and 09/05 after the closure of the Defence case.³⁹⁴ Specifically, Mustafa argues that the six-day time frame imposed by the Trial Panel to file submissions and introduce rejoinder evidence on the iMMO Expert Reports was "too short" and deprived him of adequate time and facilities to prepare a strategy in response, in violation of his right to a fair trial protected under Article 6 of the ECHR and Article 31 of the Kosovo Constitution.³⁹⁵

³⁹¹ Trial Judgment, para. 30; Rule 132 Decision, paras 8-9, 13(a); iMMO Expert Report on [REDACTED]; iMMO Expert Report on [REDACTED].

³⁹² Appeal Brief, paras 78-81; Reply Brief, para. 16.

³⁹³ SPO Response Brief, paras 28-29; Victims Response Brief, paras 34-43.

³⁹⁴ Appeal Brief, paras 78-81; Notice of Appeal, Ground 1N, para. 4. The Appeals Panel notes that Mustafa also refers in his Appeal Brief to "Victim 05". See Appeal Brief, para. 78. However, it is unclear to which victim he refers. The Appeals Panel recalls that no expert examination was in fact conducted with regard to Victim 10/05, as the initial request was withdrawn, and thus no report was produced – nor admitted – with regard to that victim. See Rule 132 Decision, para. 2; iMMO Expert Reports Submission, para. 2. See also Victims Observations on Reparations, paras 5, 12-13. As to Victim 05/05, who was not called as a witness pursuant to Rule 132 of the Rules, no request for a medical examination was made, as [REDACTED]. See Oral Order on Victims Evidence; Oral Order on iMMO Appointment.

³⁹⁵ Appeal Brief, paras 79-81; Reply Brief, para. 16; Notice of Appeal, Ground 1N, para. 4, referring to Rule 132 Decision. The Appeals Panel assumes that, while Mustafa mentions a "23 of June 2022" decision, he in fact refers to the Rule 132 Decision (of 3 June 2022). See Appeal Brief, para. 79.

169. The SPO responds that Mustafa's submissions are formally defective and should be dismissed *in limine*.³⁹⁶ On the merits, the SPO and Victims' Counsel argue that Mustafa was on notice as early as 24 January 2022, before the close of the SPO's case, that Victims' Counsel sought the admission of expert medical forensic evidence, and accordingly had ample time to prepare a strategy in that regard.³⁹⁷ Further, the SPO and Victims' Counsel assert that Mustafa did not file any submissions pursuant to Rule 149(2) of the Rules challenging the admission of the iMMO Expert Reports, or seek an extension of time to do so,³⁹⁸ and in fact indicated following their admission that he did not request to present evidence in rejoinder in relation to the reports.³⁹⁹ The SPO contends that, as a result, Mustafa waived his right to challenge the admission of the reports and, furthermore, fails to establish any prejudice resulting from their admission.⁴⁰⁰ Victims' Counsel adds that Article 6 of the ECHR is of limited relevance to Mustafa's challenge to the time limitations for responding to the Trial Panel's admission of the iMMO reports, as Mustafa was given an opportunity to contest the reports and does not dispute their reliability.⁴⁰¹

2. Assessment of the Court of Appeals Panel

170. The Appeals Panel recalls that, at the request of Victims' Counsel, the Trial Panel appointed the iMMO to evaluate the psychiatric condition of [REDACTED], Victims 08/05 and 09/05, and the symptoms of any physical and psychological injuries they may have sustained as a result of their mistreatment, and to prepare a report of

³⁹⁶ SPO Response Brief, para. 27.

³⁹⁷ SPO Response Brief, para. 28; Victims Response Brief, paras 36, 38, 40-41, 43. Victims' Counsel adds that since the reports were submitted on 24 March 2022, the Defence had in fact much longer than six days to respond. See Victims Response Brief, para. 38.

³⁹⁸ SPO Response Brief, para. 28; Victims Response Brief, paras 39-40, 43.

³⁹⁹ SPO Response Brief, para. 28; Victims Response Brief, para. 34.

⁴⁰⁰ SPO Response Brief, para. 29.

⁴⁰¹ Victims Response Brief, para. 42.

its assessment.⁴⁰² Victims' Counsel submitted these expert reports on 24 May 2022.⁴⁰³ The Trial Panel subsequently decided on 3 June 2022 to call the iMMO Expert Reports into evidence pursuant to Rule 132 of the Rules,⁴⁰⁴ and ordered the Defence to file any request to present evidence in rejoinder, including in relation to the iMMO Expert Reports, by 9 June 2022.⁴⁰⁵

171. The Appeals Panel observes that, while Mustafa now takes issue with the six-day time frame to file submissions and introduce rejoinder evidence regarding the iMMO Expert Reports, he raises this issue for the first time on appeal while he had ample opportunity to do so at first instance. More specifically, the Panel notes that Mustafa: (i) did not respond to the Victims' Counsel's initial request to have iMMO experts appointed;⁴⁰⁶ (ii) neither challenged the qualifications of the experts or their reports, nor expressed his wish to cross-examine the experts,⁴⁰⁷ despite the Trial Panel's clear indication that the procedure laid down in Rule 149(2) to (5) of the Rules should apply following the submission of the iMMO Expert Reports;⁴⁰⁸ (iii) at no point indicated that the time allocated by the Trial Panel to request to present evidence in rejoinder in relation to the iMMO Expert Reports was not sufficient to prepare a strategy, nor did he seek an extension of time to do so; (iv) expressly indicated that he did not intend to present rejoinder evidence regarding the iMMO Expert Reports;⁴⁰⁹ and (v) did not challenge these issues either in his final trial brief or during closing statements. For these reasons, the Appeals Panel considers that Mustafa has waived

⁴⁰² See Rule 132 Decision, para. 1; Oral Order on Victims Evidence, pp. 2519-2521; Oral Order on iMMO Appointment, pp. 2533-2534. See also Victims Request on Conduct of Proceedings, paras 23-26, 31(a).

⁴⁰³ iMMO Expert Reports Submission; iMMO Expert Report on [REDACTED]; iMMO Expert Report on [REDACTED].

⁴⁰⁴ See Rule 132 Decision, paras 8, 13(a). See also Trial Judgment, paras 15, 30. Ultimately, the Trial Panel relied on [REDACTED]. See e.g. Trial Judgment, paras [REDACTED].

⁴⁰⁵ Rule 132 Decision, paras 12, 13(e). See also Decision on Evidentiary Matters, para. 7.

⁴⁰⁶ See Rule 132 Decision, fn. 1 (noting that no response was filed).

⁴⁰⁷ Rule 132 Decision, para. 9. See also Trial Judgment, para. 30, fn. 46.

⁴⁰⁸ See Rule 132 Decision, para. 7; Oral Order on Victims Evidence, p. 2521. See also Transcript, 22 April 2022, p. 4089.

⁴⁰⁹ Defence Rejoinder Request, paras 4, 7; Decision on Evidentiary Matters, para. 13.

his right to raise this issue on appeal.⁴¹⁰ Furthermore, Mustafa has not demonstrated special circumstances justifying consideration of his submissions.

172. Accordingly, the Appeals Panel dismisses Mustafa's Ground 1N.

K. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S FINDINGS ON THE LOCATION OF THE ALLEGED CRIMES (GROUNDS 2A IN PART, 2B, 2C, 2D, 2E IN PART, 2F, 2H IN PART)

173. The Trial Panel found that the BIA had a base in Zllash/Zlaš at the time of the relevant charges, which was under the control and authority of the BIA commander, Mustafa.⁴¹¹ It further found that one of the purposes of the BIA base in Zllash/Zlaš was to detain people.⁴¹² The Trial Panel concluded, primarily based on photographic identification evidence given by witnesses who testified in court,⁴¹³ that the BIA base in Zllash/Zlaš corresponded to the ZDC referred to in the Indictment as the location of the crimes charged.⁴¹⁴

174. Mustafa challenges the Trial Panel's findings, asserting that the Trial Panel erred when it: (i) prematurely labelled the compound of houses in Zllash/Zlaš as a detention compound (namely the ZDC);⁴¹⁵ (ii) found that the BIA occupied the compound;⁴¹⁶ (iii) found that the BIA "controlled" it;⁴¹⁷ (iv) dismissed the Defence's claim that the SPO changed its case with regard to the specific building(s) in which victims were allegedly detained, rendering the trial proceedings unfair;⁴¹⁸ (v) found

⁴¹⁰ See above, para. 30.

⁴¹¹ Trial Judgment, para. 353. See also Trial Judgment, para. 355.

⁴¹² Trial Judgment, para. 377. See also Trial Judgment, paras 374-376.

⁴¹³ Trial Judgment, paras 364-373.

⁴¹⁴ Trial Judgment, para. 378.

⁴¹⁵ Appeal Brief, paras 83-84; Reply Brief, para. 83. Part of Mustafa's arguments under Ground 2A overlap with his arguments under Ground 2G and have been addressed in the section on Assessment of Witnesses. See below, Section L, paras 249-278.

⁴¹⁶ Appeal Brief, paras 92-96; Reply Brief, paras 83, 85.

⁴¹⁷ Appeal Brief, paras 85-91; Reply Brief, paras 83-85.

⁴¹⁸ Appeal Brief, paras 97-114; Reply Brief, paras 17-21; Transcript, 26 October 2023, pp. 23-33, 36-38.

credible the identification of the detention location by SPO witnesses;⁴¹⁹ and (vi) quoted and assessed W04600's testimony identifying the detention location.⁴²⁰ The SPO and Victims' Counsel respond that Mustafa has failed to meet the relevant standard of review and to establish an error in the Trial Panel's findings.⁴²¹

1. Alleged Errors Regarding the Trial Panel Prematurely "Labelling" the Compound of Houses in Zllash/Zlaš as a Detention Compound (Ground 2A in part)

(a) Submissions of the Parties

175. Mustafa submits that the Trial Panel erred in its assessment of SPO witnesses by accepting that the ZDC was an established detention compound before making that factual determination.⁴²² Moreover, he asserts that the testimony of witnesses Ms Teuta Hadri ("Ms Hadri"), Mr Fatmir Sopi ("Mr Fatmir Sopi"), Mr Sejdi Veseli ("Mr Veseli") and Mr Fatmir Humolli ("Mr Humolli") – who were present at the ZDC at the relevant time and claimed that no people were detained there – were "discarded" by the Trial Panel.⁴²³ Mustafa contends that it is "overwhelmingly clear" that the Trial Panel prematurely determined that the ZDC was in fact a detention

⁴¹⁹ Appeal Brief, paras 115-150, 179; Reply Brief, para. 86; Transcript, 26 October 2023, pp. 33-36. The Panel notes that, in the Appeal Brief, under Ground 2H, Mustafa only cross-refers to Ground 2E and makes no further submissions. The Panel understands that Ground 2H is now subsumed under Ground 2E. Furthermore, part of Mustafa's arguments under Grounds 2E and 2H overlap with his arguments under Ground 2G and have been addressed in the section on Assessment of Witnesses. See below, Section L, paras 249-278.

⁴²⁰ Appeal Brief, paras 151-157; Reply Brief, para. 86.

⁴²¹ SPO Response Brief, paras 107-122; Victims Response Brief, paras 45-66 (with respect to Grounds 2E and 2H).

⁴²² Appeal Brief, paras 83-84; Notice of Appeal, Ground 2A, para. 5. Mustafa points in particular to the assessment of SPO witnesses W01679, W03593, W04669 and W03594. See Appeal Brief, para. 83(a)-(e). See also Appeal Brief, para. 82; Reply Brief, para. 83.

⁴²³ Appeal Brief, para. 83(f)-(h). Mustafa's argument that the Trial Panel "discarded" the testimony of witnesses who claimed that no one was detained at the ZDC overlaps with his arguments under Ground 2G and have therefore been addressed under that ground. See below, paras 271-278. See also Grounds 2E and 2H, where Mustafa advances the same argument. See below, para. 250.

compound where the charged crimes occurred, while only making that finding at paragraph 348 of the Trial Judgment.⁴²⁴

176. The SPO responds that Mustafa's "oblique allegations" fail to rebut the Trial Panel's strong presumption of impartiality.⁴²⁵ The SPO adds that Mustafa misrepresents the nature and purpose of the Trial Judgment, which follows the Trial Panel's deliberations on the charges in the Indictment, and that the Trial Panel may organise the Trial Judgment as it sees fit.⁴²⁶

(b) Assessment of the Court of Appeals Panel

177. Under this Ground, Mustafa submits that the Trial Panel prematurely labelled the ZDC premises as a *detention* compound. To the extent that his submission is to be understood as a claim of bias against the Trial Panel in its evaluation of the relevant evidence,⁴²⁷ the Panel notes that Mustafa does not advance any arguments that could rebut the presumption of impartiality which attaches to the Judges of the Trial Panel.⁴²⁸ The Panel therefore rejects this contention.

178. The Appeals Panel considers that the fact that the section of the Trial Judgment concerning the general assessment of the credibility of SPO witnesses and the reliability of their testimony⁴²⁹ precedes the Trial Panel's findings on the location of the crimes charged is irrelevant, as trial panels have discretion to organise their judgments as they see fit.⁴³⁰ Mustafa does not demonstrate any error in the Trial Panel's exercise of its discretion in this regard nor that such an error, if established, would change the outcome of the decision. A plain reading of the relevant sections of the Trial Judgment shows no indication that the Trial Panel "prejudged" the nature

⁴²⁴ Appeal Brief, paras 83(i)-(j), 84.

⁴²⁵ SPO Response Brief, para. 108.

⁴²⁶ SPO Response Brief, para. 109.

⁴²⁷ See Appeal Brief, paras 83-84.

⁴²⁸ See above, para. 40.

⁴²⁹ See Trial Judgment, paras 49, 58-137.

⁴³⁰ *Mladić* Appeal Judgement, para. 243.

and purpose of the ZDC before hearing and assessing the evidence, or that it failed to provide a reasoned opinion in its determination thereof. Accordingly, the Panel dismisses Mustafa's Ground 2A in part.⁴³¹

2. Alleged Errors Regarding the Trial Panel's Findings on the Occupation of the Compound by the BIA (Ground 2C)⁴³²

(a) Submissions of the Parties

179. Mustafa submits that the Trial Panel erred in finding that the BIA occupied a specific compound and, in particular, that the Trial Panel erred by misquoting him when making that finding.⁴³³ According to Mustafa, he simply explained during his interview with the SPO that "there was a house on the compound in which he and others could stay", and that on the sketch he drew during his interview, he did not only write "BIA" but also "KLA", meaning that the house was also shared with KLA soldiers.⁴³⁴

180. The SPO responds that Mustafa's claim that the Trial Panel misquoted him is misleading, as it did not literally quote Mustafa but only described "what he himself admitted".⁴³⁵

⁴³¹ The remainder of Ground 2A has been addressed in the section on Assessment of Witnesses. See below, Section L, paras 218-278.

⁴³² The Appeals Panel will address Mustafa's submission under Ground 2C concerning whether the BIA occupied a compound at the ZDC, prior to turning to his submission under Ground 2B with respect to whether the BIA controlled the ZDC.

⁴³³ Appeal Brief, paras 92-93, referring to Trial Judgment, para. 349; Notice of Appeal, Ground 2C, para. 5. See also Appeal Brief, paras 82, 89, 94-96; Reply Brief, paras 83-85.

⁴³⁴ Appeal Brief, para. 92. Mustafa adds that he only spoke about one or two rooms called the "Safe House" that people from BIA could use, and made clear that they "were guest[s] there". See Appeal Brief, para. 95, referring to P00117 (Salih Mustafa) (confidential), p. 5. See also Reply Brief, para. 85. Even though Mustafa does not provide the references to the sketch he drew during his interview with the SPO, the Panel understands that he refers to P00110. See P00110 (confidential).

⁴³⁵ SPO Response Brief, para. 115, referring to Trial Judgment, para. 349. See also SPO Response Brief, para. 114. The SPO further responds regarding BIA's control over the ZDC under Ground 2B. See below, para. 185.

(b) Assessment of the Court of Appeals Panel

181. The Trial Panel observed that the Accused himself, in his previous statements, provided evidence as to the presence of BIA members in Zllash/Zlaš during the period relevant to the charges, and stated that the BIA occupied a specific compound, in a “safe house”.⁴³⁶ In light of Mustafa’s admission that he was the BIA commander, the Trial Panel found that he possessed first-hand knowledge of that location, making him the best placed person to describe it in an accurate and reliable manner.⁴³⁷ The Trial Panel further found that there was corroborating testimonial evidence by KLA members, including Mr Fatmir Sopi, Mr Veseli and W04600, that the BIA controlled the compound.⁴³⁸

182. The Appeals Panel observes that while Mustafa claims that the Trial Panel “misquoted” him when it noted that “Mustafa stated that the BIA occupied a specific compound”, the Trial Panel in fact did not directly quote Mustafa in that respect but rather recalled what he had said in his statement.⁴³⁹ In the Panel’s view, the Trial Panel accurately recalled the substance of Mustafa’s statements,⁴⁴⁰ as Mustafa had indeed confirmed the presence of BIA soldiers, including himself, on the compound during the relevant period.⁴⁴¹ The Appeals Panel also notes that the Trial Panel found this evidence to be corroborated by other witnesses, and further notes that Mustafa does not challenge the Trial Panel’s finding that there was corroborating evidence on this

⁴³⁶ Trial Judgment, para. 349.

⁴³⁷ Trial Judgment, para. 349.

⁴³⁸ Trial Judgment, para. 352.

⁴³⁹ See Trial Judgment, para. 349.

⁴⁴⁰ Trial Judgment, para. 349, fn. 709, referring to P00118 (Salih Mustafa) (confidential), pp. 1-4.

⁴⁴¹ See e.g. P00118 (Salih Mustafa) (confidential), pp. 2-4, 7 (where Mustafa admitted having stayed at the ZDC and his soldiers sleeping there); P00117 (Salih Mustafa) (confidential), p. 5 (where Mustafa indicated that he visited the safe house in ZDC “many times” as his soldiers slept there); P00113 (Salih Mustafa) (confidential), pp. 18 (where Mustafa, although taking issue with the SPO’s suggestion that the BIA soldiers were “based” in Zllash/Zlaš, confirmed their “presence”), 20 (where Mustafa confirmed having spent several days at the safe house).

issue in his appeal.⁴⁴² The Appeals Panel finds no error in the Trial Panel's assessment of Mustafa's statements and findings thereon.⁴⁴³ The Panel therefore dismisses Mustafa's arguments in this regard.

183. In light of the above, the Panel dismisses Mustafa's Ground 2C.

3. Alleged Errors Regarding the Trial Panel's Findings on the BIA's Control over the ZDC (Ground 2B)

(a) Submissions of the Parties

184. Mustafa submits that the Trial Panel erred in presumptively finding that the BIA "controlled" the ZDC.⁴⁴⁴ In that regard, he contends that the Trial Panel quoted Mr Fatmir Sopi's evidence only partially, and that his testimony does not support such a finding.⁴⁴⁵ He further contends that the Trial Panel mischaracterised the nature of the BIA's presence at the compound and erroneously relied on W04600 and Mr Veseli to corroborate Mr Fatmir Sopi's evidence, when finding that the BIA had "control" over the compound.⁴⁴⁶ In that regard, Mustafa argues that neither of them was actually present at the compound during the time frame of the Indictment.⁴⁴⁷ Finally, Mustafa

⁴⁴² See Trial Judgment, paras 350-351 and the evidence cited therein. However, Mustafa specifically challenges the Trial Panel's quotation, and later assessment, of W04600's evidence on an aspect of the identification of the ZDC under Ground 2F. The Panel has addressed Ground 2F below. See below, paras 213-217.

⁴⁴³ In relation to the Defence's argument that the Trial Panel erred in "misquoting" Mustafa on this issue, the Appeals Panel observes that the only statement that the Trial Panel referenced in quotation marks was to a "safe house", which is a term Mustafa acknowledges using in the Suspect Statement. See Trial Judgment, para. 349; Appeal Brief, para. 95, referring to P00117 (Salih Mustafa) (confidential), p. 5. See also P00113 (Salih Mustafa) (confidential), pp. 14, 17-18, 20.

⁴⁴⁴ Appeal Brief, para. 85; Notice of Appeal, Ground 2B, para. 5. See also Appeal Brief, paras 82, 93, 95-96; Reply Brief, para. 83.

⁴⁴⁵ Appeal Brief, paras 85, 87-88. Mustafa further states that Mr Fatmir Sopi testified that there was nothing special about this location and that it was an ordinary house. See Appeal Brief, para. 87. Moreover, Mustafa adds that the compound was used by several other persons, such as KLA soldiers from "Karadak Zone". See Appeal Brief, para. 86.

⁴⁴⁶ Appeal Brief, para. 89.

⁴⁴⁷ Appeal Brief, paras 90-91. The Panel notes, however, that at the Appeal Hearing, the Defence stated that Mr Veseli was "a KLA commander familiar with the compound" and that the Trial Panel erred in finding implausible his account that there were no people detained or mistreated in Zllash/Zlaš. See Transcript, 26 October 2023, pp. 19-21.

submits that he himself never stated, in the Suspect Statement, that he or the BIA had control over the compound.⁴⁴⁸

185. The SPO responds that Mustafa “selectively misrepresent[s]” the evidence of Mr Fatmir Sopi, W04600 and Mr Veseli, as: (i) Mr Fatmir Sopi testified that the ZDC compound was regarded as BIA’s base and that Mustafa was BIA’s commander; (ii) W04600 [REDACTED] was able to describe the ZDC’s layout in detail and draw a sketch; (iii) Mr Veseli was “familiar with the ZDC and BIA stationed there”, and he frequently saw members of the BIA unit, including Mustafa, in Zllash/Zlaš in April 1999; and (iv) Mustafa himself clearly indicated, in the Suspect Statement, that the BIA occupied a specific location in Zllash/Zlaš in April 1999 and that he was the BIA’s commander.⁴⁴⁹

(b) Assessment of the Court of Appeals Panel

186. With regard to the Trial Panel’s assessment of Mr Fatmir Sopi’s evidence on the BIA’s control of the compound, the Panel observes that Mr Fatmir Sopi testified that the compound where the BIA was located in Zllash/Zlaš was a proper military establishment⁴⁵⁰ and was “regarded as the base of the BIA gue[r]rilla or Skifteris”,⁴⁵¹ and further that Mustafa was the BIA’s commander.⁴⁵² Contrary to Mustafa’s submission, the Appeals Panel agrees with the Trial Panel that Mr Fatmir Sopi’s evidence supports the finding that the BIA controlled the compound and used it as a base.⁴⁵³

⁴⁴⁸ Appeal Brief, para. 90. See also Appeal Brief, para. 95; Reply Brief, paras 84-85. In the Notice of Appeal, Mustafa also argues that the Trial Panel erred in finding that he gave evidence that he was in charge of the base. See Notice of Appeal, Ground 2B, para. 5.

⁴⁴⁹ SPO Response Brief, paras 111-114. See also SPO Response Brief, para. 116.

⁴⁵⁰ Transcript (Fatmir Sopi), 18 January 2022, p. 2049.

⁴⁵¹ Transcript (Fatmir Sopi), 18 January 2022, p. 2089. See also Transcript (Fatmir Sopi), 19 January 2022, p. 2172.

⁴⁵² Transcript (Fatmir Sopi), 18 January 2022, p. 2060.

⁴⁵³ Trial Judgment, para. 352. Contra Appeal Brief, paras 85, 88. Furthermore, Mr Fatmir Sopi’s answer, when asked why the BIA was using that specific location, namely that there was “nothing special”

187. The Appeals Panel further notes that the Trial Panel considered evidence, including Mr Fatmir Sopi's testimony, indicating that soldiers from other KLA units or civilians may also have been present at the ZDC at the relevant time.⁴⁵⁴ The Panel considers that Mustafa fails to show that the Trial Panel erred in finding that this evidence did not alter its conclusion that the base was in fact controlled by the BIA.⁴⁵⁵

188. With respect to Mustafa's claim that W04600 and Mr Veseli had no factual knowledge of such control because they were not present at the compound during the relevant time frame of the Indictment,⁴⁵⁶ the Appeals Panel observes that Mustafa misrepresents their evidence. In fact, and as the Trial Panel recalled, W04600, [REDACTED],⁴⁵⁷ testified that [REDACTED].⁴⁵⁸ W04600 explained that [REDACTED],⁴⁵⁹ and that [REDACTED].⁴⁶⁰ The Panel found that W04600 was [REDACTED].⁴⁶¹ The Panel therefore dismisses Mustafa's arguments with respect to W04600's evidence.

189. With regard to Mr Veseli's evidence, the Appeals Panel notes that the Trial Panel relied notably on his testimony when finding that the BIA had a base in

about the location and that "[i]t was an ordinary house", does not undermine the correctness of the Trial Panel's conclusion. See Transcript (Fatmir Sopi), 18 January 2022, p. 2090. See also Transcript (Fatmir Sopi), 19 January 2022, p. 2172 (where Mr Fatmir Sopi specifies that there was nothing special about that base and that it was "just like any other base of the KLA").

⁴⁵⁴ Trial Judgment, para. 352. See Appeal Brief, paras 86, 92.

⁴⁵⁵ Trial Judgment, para. 352.

⁴⁵⁶ Appeal Brief, paras 90-91.

⁴⁵⁷ Trial Judgment, paras 101, [REDACTED]. See also Transcript (W04600), 23 September 2021, pp. [REDACTED].

⁴⁵⁸ Trial Judgment, paras [REDACTED]. See also, *inter alia*, Transcript (W04600), 23 September 2021, pp. 722-723 (redacted); Transcript (W04600), 24 September 2021, pp. 801-803 (redacted).

⁴⁵⁹ Trial Judgment, para. [REDACTED]. See also Transcript (W04600), 23 September 2021, pp. 721, 728-729 (redacted).

⁴⁶⁰ Trial Judgment, paras [REDACTED]. See also Transcript (W04600), 23 September 2021, pp. [REDACTED].

⁴⁶¹ Trial Judgment, para. [REDACTED].

Zllash/Zlaš⁴⁶² and that the Accused was in charge of that base.⁴⁶³ While Mr Veseli did state that he never entered the BIA base,⁴⁶⁴ the Panel considers that it was not unreasonable for the Trial Panel to take into account Mr Veseli's knowledge of the BIA's occupation of the base.⁴⁶⁵ In fact, the Trial Panel noted that: (i) during the Indictment period, Mr Veseli was deputy commander of Brigade 153;⁴⁶⁶ (ii) he was based at the Brigade 153's headquarters located a short distance from the ZDC;⁴⁶⁷ and (iii) Mr Veseli stated that he knew the Accused,⁴⁶⁸ who was often in Zllash/Zlaš in April 1999.⁴⁶⁹ Accordingly, the Panel finds no error in the Trial Panel's finding with respect to Mr Veseli's evidence.⁴⁷⁰

190. Turning to Mustafa's challenge to the Trial Panel's reliance on the Accused's Suspect Statement as corroborating evidence,⁴⁷¹ the Appeals Panel observes that, while Mustafa did not state that the BIA had control over the compound, he clearly acknowledged being the BIA commander⁴⁷² and admitted that the BIA had a specific

⁴⁶² Trial Judgment, para. 352, fn. 719, referring, *inter alia*, to Transcript (Sejdi Veseli), 25 January 2022, pp. 2195-2197.

⁴⁶³ Trial Judgment, para. 352, fn. 720, referring, *inter alia*, to Transcript (Sejdi Veseli), 25 January 2022, pp. 2198-2199.

⁴⁶⁴ Transcript (Sejdi Veseli), 25 January 2022, p. 2197. See also Appeal Brief, paras 90-91.

⁴⁶⁵ Trial Judgment, para. 352, fns 719-721.

⁴⁶⁶ Trial Judgment, para. 344 and references cited therein. See also Trial Judgment, para. 124.

⁴⁶⁷ Trial Judgment, para. 342. See also Trial Judgment, para. 124; Transcript (Sejdi Veseli), 25 January 2022, pp. 2192, 2194-2195, 2197, 2226.

⁴⁶⁸ Trial Judgment, para. 127, referring to Transcript (Sejdi Veseli), 25 January 2022, pp. 2202-2203. See also Transcript (Sejdi Veseli), 25 January 2022, pp. 2195-2196.

⁴⁶⁹ Trial Judgment, para. 330, referring to Transcript (Sejdi Veseli), 25 January 2022, p. 2233. See also Trial Judgment, fn. 219.

⁴⁷⁰ The Appeals Panel notes that the Defence itself stated, at the Appeal Hearing, that Mr Veseli was "a KLA commander familiar with the compound" and argued that the Trial Panel should have considered his testimony and his knowledge of Zllash/Zlaš. This statement contradicts Mustafa's argument under the present ground of appeal that Mr Veseli had no factual knowledge of the BIA's control of the ZDC because he had never been to the ZDC. *Compare* Transcript, 26 October 2023, pp. 19-20 with Appeal Brief, paras 90-91.

⁴⁷¹ Appeal Brief, para. 90. See Trial Judgment, para. 352, fn. 721.

⁴⁷² P00111 (Salih Mustafa) (confidential), pp. 28, 31-32; P00113 (Salih Mustafa) (confidential), p. 24; P00117 (Salih Mustafa) (confidential), p. 30; P00118 (Salih Mustafa) (confidential), pp. 7, 34. See also the Accused's previous statement in the *Agron Zeqiri* case, P00046 (confidential), pp. 2, 6-7. See Trial Judgment, paras 203, 338.

location within the ZDC “under control”.⁴⁷³ The Panel therefore finds no error in the Trial Panel’s finding in that respect.

191. In light of the above, the Panel dismisses Mustafa’s Ground 2B.

4. Alleged Errors Regarding the Trial Panel’s Findings on the “Shift” in the SPO’s Case Regarding the Location of the Crimes (Ground 2D)

(a) Submissions of the Parties

192. Mustafa submits that the Trial Panel erred in dismissing his claim that the SPO deceived the Defence by changing its case with regard to the specific building(s) within the ZDC in which victims were allegedly detained.⁴⁷⁴ He argues that, throughout the proceedings, the SPO specified one building on the compound in which detainees were held,⁴⁷⁵ while, in response to the Trial Panel’s request for clarification “nearly at the end of the trial”, the SPO then shifted its position and argued that detainees were held in not one, but three, buildings.⁴⁷⁶ In light of this, Mustafa challenges the Trial Panel’s finding 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”, and argues that the shift in the SPO’s case renders the proceedings unfair.⁴⁷⁷ At the Appeal Hearing, Mustafa further

⁴⁷³ See P00117 (Salih Mustafa) (confidential), p. 5 (where he states: “[m]yself and my soldiers had under control these two particular rooms, which we used for ourselves”).

⁴⁷⁴ Notice of Appeal, Ground 2D, para. 5; Appeal Brief, paras 97, 108, 113; Reply Brief, paras 17-21; Transcript, 26 October 2023, pp. 23-33. See also Trial Judgment, para. 373; Transcript, 15 September 2022, pp. 4771, 4782-4785.

⁴⁷⁵ Appeal Brief, paras 97-102, 104; Transcript, 26 October 2023, pp. 23-32, 37-38. Specifically, Mustafa points to the Indictment, the Confirmation Decision, the SPO Pre-Trial Brief, the SPO’s opening statements, and the SPO Final Trial Brief, as well as the examination in chief of W01679, W03593 and W04669. See also Reply Brief, paras 17, 20-21.

⁴⁷⁶ Appeal Brief, paras 103, 105-108, referring, *inter alia*, to Decision on Closing Statements and Related Matters; SPO Submissions on Closing Statements and Related Matters. See also Transcript, 26 October 2023, p. 27.

⁴⁷⁷ Appeal Brief, paras 108, 110-114, referring to Trial Judgment, para. 372. See also Reply Brief, paras 20-21; Transcript, 26 October 2023, pp. 28-33, 37-38. Mustafa submits that had the Defence known earlier that the crimes were allegedly committed in multiple buildings, it would have cross-examined the witnesses differently. See Appeal Brief, paras 108-109; Transcript, 26 October 2023, pp. 27-29, 31. At

stressed that the SPO should have amended the Indictment to reflect this change⁴⁷⁸ and that the Trial Panel “may not fill in the blanks of an indictment or amend or interpret them in order to make them fit the charges”.⁴⁷⁹

193. The SPO responds that Mustafa’s submissions are factually incorrect as the Indictment did not identify one building in the ZDC, but charged the Accused with relevant crimes committed at the ZDC, without specifying in which of the buildings on the compound the crimes occurred.⁴⁸⁰ The SPO contends that the Trial Panel correctly found that the charges in the Indictment encompass “all buildings within the BIA base in Zllash/Zlaš”.⁴⁸¹ In the SPO’s view, Mustafa ignores the purpose and scope of its Pre-Trial Brief, which is not exhaustive, but only constitutes a summary of the evidence that the SPO intends to present⁴⁸² and, further, Mustafa’s reliance on the Confirmation Decision is “irrelevant” as the latter is not designed to provide notice of the charges.⁴⁸³

(b) Assessment of the Court of Appeals Panel

194. The Appeals Panel recalls that the Trial Panel found that the detainees were held in three specific buildings at the ZDC, located “on the left side of the property”.⁴⁸⁴ In making this finding, the Trial Panel highlighted that “it is immaterial to the determination of the charges to assess, with absolute precision, which detainee was

the Appeal Hearing, the Defence further submitted that it would have also investigated and searched for other evidence or witnesses relating to the use of other buildings on the compound. See Transcript, 26 October 2023, p. 28.

⁴⁷⁸ Transcript, 26 October 2023, p. 27.

⁴⁷⁹ Transcript, 26 October 2023, p. 33.

⁴⁸⁰ SPO Response Brief, paras 30-31; Transcript, 26 October 2023, pp. 64-65. The SPO adds that Mustafa did not challenge the form of the Indictment. See SPO Response Brief, para. 31.

⁴⁸¹ SPO Response Brief, para. 34, referring to Trial Judgment, para. 373.

⁴⁸² SPO Response Brief, para. 32. The SPO argues that the same applies to Mustafa’s arguments concerning the SPO’s opening statements. See SPO Response Brief, para. 32.

⁴⁸³ SPO Response Brief, para. 33.

⁴⁸⁴ Trial Judgment, para. 372, where the Trial Panel found that the buildings marked by Mr Selatin Krasniqi (“Mr Selatin Krasniqi”) with numbers 4, 4A and 5 (ground view) corresponding to buildings 12, 11 and 10, respectively (aerial view), were the “buildings relevant” to the charged crimes.

detained in which of these buildings, and for how long”, as it had to be satisfied that the crimes charged “took place in one or more of the buildings” in the BIA base during the Indictment period.⁴⁸⁵ The Trial Panel thus dismissed the Defence’s claim that the SPO “deceived the Defence by changing its case with regard to the specific building(s) within the ZDC in which the victims were allegedly detained”, stressing that “[t]he Defence had the opportunity to examine the SPO witnesses and tender evidence throughout trial based on the geographical scope of the charges, which clearly encompass[ed] all buildings within the BIA base in Zllash/Zlaš”.⁴⁸⁶

195. As to Mustafa’s claim that the SPO changed its position regarding the location of the alleged crimes throughout the proceedings, the Panel notes, at the outset, that Mustafa seems to confuse the “Confirmed Indictment”, filed by the SPO, and the “Confirmation Decision”, issued by the Pre-Trial Judge.⁴⁸⁷ Most importantly, the Panel observes that the Indictment does not “single out” one building of the ZDC, but charges Mustafa with the war crimes of arbitrary detention, cruel treatment, torture and murder committed at the ZDC, without specifying in which of the buildings on the compound the alleged crimes occurred.⁴⁸⁸ In fact, the Indictment states that, during the relevant period, “the BIA unit operated from a compound consisting of a number of buildings in Zllash/Zlaš” and that “[t]he BIA unit used the compound as a safe house, and as a detention and interrogation site”.⁴⁸⁹ The Panel further notes that, in the Confirmation Decision, the Pre-Trial Judge found that there was a well-grounded suspicion that the alleged crimes were “committed at the Zllash/Zlaš Detention Compound”.⁴⁹⁰ Moreover, the Panel observes that the submissions made in the SPO

⁴⁸⁵ Trial Judgment, para. 372.

⁴⁸⁶ Trial Judgment, para. 373.

⁴⁸⁷ See Appeal Brief, paras 97, 99. See also Transcript, 26 October 2023, pp. 31-32, 37-38.

⁴⁸⁸ Indictment, paras 5, 18, 21, 31-32, 35. Contra Appeal Brief, para. 97. See also Transcript, 26 October 2023, p. 36.

⁴⁸⁹ Indictment, para. 5.

⁴⁹⁰ See for example, Confirmation Decision, paras 102, 110, 115, 120. See also Confirmation Decision, paras 125-127, 132, 135, 143, 147, 149-150.

Pre-Trial Brief⁴⁹¹ and the SPO's opening statements⁴⁹² did not contradict the language of the Indictment, but provided further detail regarding the location of the alleged crimes.⁴⁹³

196. The Panel recalls that the Indictment is the primary accusatory instrument that must set forth with sufficient specificity and clarity the facts underpinning the charged crimes, so as to inform the Accused of the nature and cause of the accusation against him and enable him to prepare a meaningful defence.⁴⁹⁴ In this regard, the Panel notes that Mustafa did not challenge the form of the Indictment, including whether it was vague or ambiguous as to the location where the alleged crimes were committed, in a preliminary motion⁴⁹⁵ or at trial.⁴⁹⁶

197. Furthermore, the Panel considers that in its Submissions on Closing Statements and Related Matters and its closing statements, the SPO did not modify the geographical scope of the Indictment and the allegations pleaded therein, but simply specified, based on the evidence adduced at trial, in which buildings within the ZDC

⁴⁹¹ See for example, SPO Pre-Trial Brief, paras 2-4, 30, 51-59, 63, 74, 82, 91, 104-105, 107, 109, 111, 116-117, 119-123, 125, referring to "the Zllash/Zlaš Detention Compound".

⁴⁹² See for example, Transcript, 15 September 2021, pp. 319-321, 324, 327-328.

⁴⁹³ Compare Indictment, paras 5, 18, 21, 31-32, 35 with SPO Pre-Trial Brief, paras 1-2, 29-30, 64, 69, 71, 73; Transcript, 15 September 2021, pp. 328-329.

⁴⁹⁴ *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, paras 35-36, 49 and references cited therein. See also *Thaçi et al.* Appeal Decision on Defects in the Indictment, paras 17-19; *Shala* Appeal Decision on Defects in the Indictment, para. 15; *Blaškić* Appeal Judgement, para. 220.

⁴⁹⁵ See Article 40(1) of the Law and Rule 97(1)(b) of the Rules with regard to challenges to the form of the indictment.

⁴⁹⁶ The Panel notes that the Defence submitted for the first time at the Appeal Hearing that the SPO should have amended the Indictment. See Transcript, 26 October 2023, p. 27.

the crimes allegedly took place.⁴⁹⁷ The Panel also observes that the ZDC is a relatively small property and that the three relevant buildings were adjacent to each other.⁴⁹⁸

198. In light of the above, the Panel finds no merit in Mustafa's claim that the SPO deceived the Defence by shifting its case with respect to the location of the alleged crimes, or that the proceedings were unfair as a result.⁴⁹⁹ Accordingly, the Panel dismisses Mustafa's Ground 2D.

5. Alleged Errors in the Trial Panel's Findings on the Ability of SPO Witnesses to Identify the ZDC (Grounds 2E in part, 2H in part)

(a) Submissions of the Parties and Participants

199. Mustafa submits that the Trial Panel erred in fact in finding that SPO witnesses W01679, W03593 and W04669 were able to identify and describe the specific detention location at the ZDC, despite the Trial Panel conceding that these witnesses were not able to properly observe the location.⁵⁰⁰

200. According to Mustafa, the in-court photographic identification by W01679, W03593 and W04669 cannot constitute a proper identification of the building in which

⁴⁹⁷ Compare Indictment, paras 5, 18, 21, 31-32, 35 with SPO Submissions on Closing Statements and Related Matters, paras 4-6; Transcript, 13 September 2022, pp. 4525-4527. See also Trial Judgment, para. 372. The Panel also notes that in the SPO Final Trial Brief, the SPO mentioned "[a]t least two buildings within the ZDC" where the BIA, including the Accused, detained, interrogated, and tortured Kosovo-Albanian civilians. See SPO Final Trial Brief, para. 23. See also SPO Final Trial Brief, paras 24-27.

⁴⁹⁸ See D00016 (confidential); D00014 (confidential). At the Appeal Hearing, the Defence indicated that the entire compound "is less than a quarter of a football field". See Transcript, 26 October 2023, p. 40.

⁴⁹⁹ Trial Judgment, para. 373.

⁵⁰⁰ Notice of Appeal, Ground 2E, para. 5; Notice of Appeal, Ground 2H, para. 5; Appeal Brief, paras 82, 115, 141-142, 149; Transcript, 26 October 2023, pp. 33-35. See also Reply Brief, para. 86. In light of Mustafa's cross-reference to Ground 2E under Ground 2H, the Panel considers that Ground 2H is subsumed under Ground 2E. See Appeal Brief, para. 179. At the Appeal Hearing, Mustafa further submitted that "the three witnesses" not only did not identify the location of their detention, but that their identification of the Accused was not a "proper identification". See Transcript, 26 October 2023, pp. 38-39. The Panel will not address this argument which exceeds the scope of the Notice of Appeal.

they were allegedly detained.⁵⁰¹ He argues that such evidence does not support the Trial Panel's conclusion that these witnesses "must have formerly seen the building that th[e]y ultimately recognized in court",⁵⁰² as they: (i) were not familiar with the detention location;⁵⁰³ (ii) testified that they each had a sack over their heads when they were arrested and transferred to be interrogated;⁵⁰⁴ and (iii) did not pay attention to their detention location upon release nor describe it in court.⁵⁰⁵

201. Moreover, Mustafa submits that, contrary to the Trial Panel's findings: (i) W03593's sketch of the detention location is irrelevant to his credibility;⁵⁰⁶ (ii) W04669's testimony that the location was not further than 200 meters from the school in Zllash/Zlaš, which he visited multiple times, stands in "stark contrast" with the factual situation;⁵⁰⁷ and (iii) W04669 did not identify the building himself, but stated that someone else had marked the photographs shown to him,⁵⁰⁸ and identified an "entirely different building" than W01679 and W03593.⁵⁰⁹ Mustafa further argues that the photographs shown to each witness were suggestive and always featured a single two-storey building.⁵¹⁰

⁵⁰¹ Appeal Brief, paras 120, 125-127, 136, 139. See also Appeal Brief, paras 119, 124, 141-142; Transcript, 26 October 2023, pp. 34-36. At the Appeal Hearing, Mustafa further stressed that "none of the witnesses ever indicated [the] specific building [that the SPO identified in its opening statements], and only one merely stated that it resembled a building where he was allegedly kept". See Transcript, 26 October 2023, p. 30.

⁵⁰² Appeal Brief, paras 116, 122, 125.

⁵⁰³ Appeal Brief, paras 116 (W01679), 121 (W03593).

⁵⁰⁴ Appeal Brief, paras 116-117 (W01679), 121 (W03593), 130, 134 (W04669). See also Transcript, 26 October 2023, pp. 30, 34-35.

⁵⁰⁵ Appeal Brief, paras 116, 118 (W01679), 121-123 (W03593), 135 (W04669), 141.

⁵⁰⁶ Appeal Brief, para. 124.

⁵⁰⁷ Appeal Brief, paras 131, 137.

⁵⁰⁸ Appeal Brief, para. 132.

⁵⁰⁹ Appeal Brief, para. 133. See also Transcript, 26 October 2023, p. 22. Mustafa also argues that the fence which W04669 described in court is not a distinctive feature of the location. See Appeal Brief, para. 138.

⁵¹⁰ Appeal Brief, para. 140; Transcript, 26 October 2023, p. 34. See also Appeal Brief, paras 119-120, 128-129, 132, 136.

202. Additionally, Mustafa argues that W04600's identification of the location is not relevant, as he never testified that anyone was detained there.⁵¹¹ Finally, Mustafa points to the opposing evidence of witnesses who denied that anyone was detained at the ZDC.⁵¹²

203. The SPO and Victims' Counsel respond that the Defence misrepresents the evidence of W01679, W03593 and W04669, and that Mustafa's submissions should be dismissed as they fail to meet the standard of review for alleged errors of fact.⁵¹³ The SPO and Victims' Counsel argue that these witnesses were able to observe the ZDC, notably after their release,⁵¹⁴ and that they independently identified the ZDC buildings in photographs presented to them.⁵¹⁵ Victims' Counsel further submits with respect to W04669's evidence that: (i) although someone else may have drawn the circles on the photographs, this was done according to W04669's instructions and he signed the photographs;⁵¹⁶ and (ii) W04669's description of the building "largely

⁵¹¹ Appeal Brief, para. 143.

⁵¹² Mr Fatmir Sopi, Mr Humolli, Mr Selatin Krasniqi, Mr Muhamet Ajeti ("Mr Ajeti"), Ms Hadri and Ms Ibadete Canolli-Kaciu ("Ms Canolli-Kaciu"). Appeal Brief, paras 144-148. See also Appeal Brief, paras 149-150. The Panel notes that, with respect to Mr Humolli, Mr Selatin Krasniqi, Ms Hadri and Ms Canolli-Kaciu, Mustafa also develops these arguments under Ground 2G. See Appeal Brief, paras 158-177. The Panel has addressed any repetitive arguments under Ground 2G. See below, paras 249-278. Even though Mustafa did not mention Mr Fatmir Sopi under Ground 2G, the Panel finds it more appropriate to assess Mustafa's arguments related to his testimony under that same ground. See below, paras 271-278.

⁵¹³ SPO Response Brief, paras 117-119; Victims Response Brief, paras 45-49, 54-55, 59, 61, 64, 66.

⁵¹⁴ SPO Response Brief, para. 118; Victims Response Brief, paras 49-53, 57, 62. In particular, Victims' Counsel submits that, while W03593 stated that he was not interested in looking around upon his release as he was concerned about his own life, he then explained that he did see enough of the building to recognise it on the photographs shown to him in court. Victims' Counsel also argues that W04669's testimony does not preclude the fact that he saw the location where he was held.

⁵¹⁵ SPO Response Brief, para. 118; Victims Response Brief, paras 53, 57-58, 62. In particular, Victims' Counsel submits that W01679 testified that the building he was shown a photograph of "resembles a lot" what he saw when he was released, and that W04669's testimony does not preclude the fact that he saw the location where he was held. Victims' Counsel also asserts that, contrary to the Defence's submissions, W03593 had in fact been familiar with the area before he was held captive there.

⁵¹⁶ Victims Response Brief, para. 63.

aligns” with the testimony of W03593 and W01679, although small details may differ.⁵¹⁷

204. The SPO further argues that Mustafa fails to show that the Trial Panel erred in the exercise of its discretion by accepting the testimony of W01679, W03593 and W04669, and, moreover, that their evidence was consistent with descriptions of the location provided by Defence witnesses and W04600.⁵¹⁸ Finally, the SPO challenges Mustafa’s allegation that the photographic identification of the ZDC was suggestive, submitting that, during their SPO interviews, all three of the witnesses were shown a photographic album of many buildings in Zllash/Zlaš and “spontaneously chose only the ZDC photographs”.⁵¹⁹ The SPO notes that, as a result, these were the only photographs that the SPO showed the witnesses during their testimony.⁵²⁰

(b) Assessment of the Court of Appeals Panel

205. The Panel notes that the Trial Panel rejected Mustafa’s challenges to the photographic identification and testimony by these witnesses regarding the detention location.⁵²¹ In particular, the Trial Panel found that the witnesses were able to properly describe the detention location⁵²² and that, based on their evidence, together with the evidence of W04600, Mr Fatmir Sopi and Mr Selatin Krasniqi, “they must have formerly seen the buildings that they ultimately recognised in court”.⁵²³ The Trial Panel further found that, contrary to the Defence’s claim, the alleged victims did not

⁵¹⁷ Victims Response Brief, para. 65. Victims’ Counsel adds that the Defence fails to identify to which part of W04669’s testimony he refers. See Victims Response Brief, para. 64.

⁵¹⁸ SPO Response Brief, paras 118, 120.

⁵¹⁹ SPO Response Brief, para. 119.

⁵²⁰ SPO Response Brief, para. 119.

⁵²¹ Trial Judgment, paras 364-371.

⁵²² Trial Judgment, para. 368. See also Trial Judgment, paras 364, 366.

⁵²³ Trial Judgment, para. 368.

have their respective heads covered at all times, and that, at the very least, they were each able to see the detention location at the time of their release.⁵²⁴

206. The Appeals Panel recalls that, pursuant to Rule 139(2) of the Rules, a panel shall evaluate the evidence holistically to determine whether or not the facts at issue have been established. Recalling that trial panels are best placed to hear, assess and weigh the evidence, including witness testimony, presented at trial,⁵²⁵ the Appeals Panel will not lightly overturn findings of fact, and will only intervene where the evidence relied on could not have been accepted by any reasonable trier of fact, or where the evaluation of the evidence is wholly erroneous.⁵²⁶

207. Specifically, with regard to W01679's evidence, the Panel notes that Mustafa fails to explain why the fact that W01679 had not seen the ZDC prior to being detained there would have any impact on his ability to identify the location.⁵²⁷ Moreover, the part of W01679's testimony to which Mustafa refers supports the fact that the witness could in fact see where he was brought.⁵²⁸ Furthermore, contrary to Mustafa's assertion, the witness did not testify that he had a sack over his head when he was transferred from the school to the detention location, but rather that a sack was placed over his head after they had arrived at the location, "[w]hen [they] got closer to some buildings".⁵²⁹ As to Mustafa's assertion that "the witness[,] upon his release[,] did not describe any buildings", the Appeals Panel notes that W01679's testimony actually supports the fact that he saw his surroundings when he was released and was able to identify them in court.⁵³⁰ Therefore, the Panel dismisses Mustafa's argument that

⁵²⁴ Trial Judgment, para. 368.

⁵²⁵ See above, paras 24, 38.

⁵²⁶ See above, paras 23-24.

⁵²⁷ See Appeal Brief, paras 116, 120.

⁵²⁸ See Appeal Brief, para. 116(a), referring to Transcript (W01679), 4 October 2021, p. 867.

⁵²⁹ Transcript (W01679), 4 October 2021, p. 867.

⁵³⁰ Transcript (W01679), 4 October 2021, pp. 905-906 (where W01679 testified that, at the time of his release, he was standing "in front of [a] building for sometime"), 919-920 (where W01679 testified that the building he was shown a photograph of "[...] resembles a lot to the image I had in front of my eyes when I was released. The basement is down there and there's this part when they would take us and

W01679 “[could not] possibly state that the building, shown to him [in court], resembled the building in which he was kept and ill[-]treated”.⁵³¹

208. With regard to W03593, the Appeals Panel notes that, while he testified that he had not paid attention to his surroundings upon release,⁵³² he also explained that he had seen enough to be able to recognise the buildings presented to him in photographs in court.⁵³³ Moreover, the Panel notes that Mustafa misrepresents W03593’s testimony when he argues that W03593 was unfamiliar with the detention location, and with Zllash/ Zlaš in general.⁵³⁴ In fact, W03593 testified that [REDACTED].⁵³⁵ Furthermore, the Panel considers that, as the Trial Panel found, W03593’s sketch of the location where he was detained is relevant and corroborates other witnesses’ testimony.⁵³⁶

209. Turning to W04669, the Panel notes that the Defence misrepresents the witness’s testimony,⁵³⁷ who in fact testified that, even though he “did [not] want” to

bring us upstairs, so it resembles a lot. To me, at least, looks familiar”). Contra Appeal Brief, para. 116(d).

⁵³¹ See Appeal Brief, para. 119.

⁵³² Transcript (W03593), 21 September 2021, p. 516, where W03593 stated: “when I went out to the yard, I saw there many people. And we all just wanted to run away as soon as we could. That’s why I didn’t look around. I was not interested to look around. I was just concerned about my own life.” See Appeal Brief, para. 121(b).

⁵³³ Trial Judgment, para. 368, referring to Transcript (W03593), 21 September 2021, p. 517. See also Transcript (W03593), 21 September 2021, p. 558.

⁵³⁴ See Appeal Brief, paras 121(c), 122.

⁵³⁵ Transcript (W03593), 21 September 2021, p. 555 (redacted); Transcript (W03593), 20 September 2021, p. 401. W03593 testified that he had been in Zllash/Zlaš “every now and then” and that prior to his arrest, he might have passed by the location where he was detained. See Transcript (W03593), 21 September 2021, p. 557; Transcript (W03593), 22 September 2021, p. 609. See also Transcript (W03593), 22 September 2021, p. 649 (redacted).

⁵³⁶ Transcript (W03593), 21 September 2021, pp. 517-518, referring to P00020 (confidential), p. 2, where he stated that the lower part (“stable”) was where the detainees were kept, and the upper part was “used for beating”. See Trial Judgment, para. 368. The Panel notes that W01679 testified that he and the other detainees were held in a basement and brought upstairs to be interrogated and ill-treated. See Transcript (W01679), 4 October 2021, pp. 920-922. W03594 also stated that the detainees were brought upstairs. See Transcript (W03594), 12 October 2021, p. 1073.

⁵³⁷ Mustafa argues that W04669 had a bag over his head when he was transferred from one part of the building to another, or that he did not see the detention location at the time of his release. See Appeal Brief, paras 134-135. The Panel notes that during its closing statements, the Defence argued the opposite, stating that W04669 “had no sack over his head or was not impaired in his vision”. See Transcript, 14 September 2022, p. 4649.

look around, he had seen the location where he had been held, stating that, “from that place, from that position, you can see every object or every building that is around”.⁵³⁸ With regard to the Defence’s arguments that W04669 identified an “entirely different building” than the one identified by W01679 and W03593,⁵³⁹ and that he located it 200 meters from the school,⁵⁴⁰ the Panel observes that W04669 actually identified the same set of buildings on the photograph shown to him in court.⁵⁴¹ The Panel agrees with the Trial Panel that any difference that may exist in the witnesses’ description of the ZDC is due to the fact that the detainees were moved between a detention barn and an interrogation and mistreatment room, and thus did not have the possibility to look around properly.⁵⁴² Furthermore, and as found above, the Panel considers that it is immaterial to the determination of the charges to assess, with absolute precision, where each detainee was detained in the buildings and for how long.⁵⁴³

210. With regard to Mustafa’s claim that the SPO was “suggestive” in its presentation of photographs of the ZDC to the witnesses,⁵⁴⁴ the Panel notes that Mustafa did not object during trial to the SPO showing photographs of the same set of buildings to the witnesses,⁵⁴⁵ nor did he object to the admission of the said

⁵³⁸ Transcript (W04669), 11 November 2021, pp. 1574-1575. W04669 also testified, *inter alia*, that he saw the buildings around him when going to the toilet. See Transcript (W04669), 11 November 2021, pp. 1542-1543. Contra Appeal Brief, para. 130. Furthermore, the Panel notes that the Defence again distorts the witness’s testimony when arguing that he “did not identify the building himself”. In fact, it is clear from W04669’s testimony that he identified the building during his interview with the SPO but that another person present marked the document upon his indications. See Transcript (W04669), 10 November 2021, pp. 1471-1472. Contra Appeal Brief, para. 132.

⁵³⁹ See Appeal Brief, para. 133.

⁵⁴⁰ See Appeal Brief, paras 131, 137.

⁵⁴¹ Transcript (W04669), 10 November 2021, pp. 1470-1472, referring to P00202 (confidential), p. 3 (wherein W04669 identified the first building from the left of the photograph); Transcript (W01679), 4 October 2021, pp. 919-925; P00029 (confidential), p. 3; Transcript (W03593), 21 September 2021, pp. 512-518; P00018 (confidential), p. 3.

⁵⁴² Trial Judgment, para. 369.

⁵⁴³ See above, paras 194-198.

⁵⁴⁴ Appeal Brief, paras 128-129, 140.

⁵⁴⁵ See e.g. Transcript (W01679), 4 October 2021, pp. 919-926 (where the SPO presented to the witness P00029 (confidential), pp. 3, 5-6; P00065 (confidential), p. 3; P00030 (confidential)); Transcript (W03593), 21 September 2021, pp. 512-518 (where the SPO presented to the witness P00018 (confidential), p. 3;

photographs. In particular, Mustafa did not respond to the SPO's requests for admission of the exhibits tendered during the examination in chief of W01679, W03593 and W04669,⁵⁴⁶ including the photographs, and did not challenge the decisions granting such admission.⁵⁴⁷ During the closing statements, Mustafa challenged for the first time as "suggestive" the SPO having showed W01679 and W03593 a single photograph, instead of multiple photographs of similar buildings amongst which they could have made a choice.⁵⁴⁸

211. In the Panel's view, such a general statement does not constitute an objection to the evidence and, in the absence of a formal objection, Mustafa has waived his right to raise the issue on appeal.⁵⁴⁹ Furthermore, Mustafa has not demonstrated special circumstances justifying consideration of his submissions. Accordingly, the Appeals Panel dismisses Mustafa's submissions with respect to the photographic identification of the ZDC.⁵⁵⁰

P00065 (confidential), p. 3); Transcript (W04669), 10 November 2021, pp. 1470-1472 (where the SPO presented to the witness P00202 (confidential), p. 3).

⁵⁴⁶ See SPO Request for Admission of Exhibits (W03593 and W04600) and its annex; SPO Request for Admission of Exhibits (W01679 and W03594) and its annex; Decision on Items Used with W03593, W04600, W01679, and W03594, paras 5, 8; SPO Request for Admission of Exhibits (W04603, W04669, W04676, W04391, and W04390) and its annex; Decision on Items Used with W04603, W04669, W04676, W04391, W04390, and W04674, para. 4.

⁵⁴⁷ Decision on Items Used with W03593, W04600, W01679, and W03594, para. 20(c); Decision on Items Used with W04603, W04669, W04676, W04391, W04390, and W04674, para. 16(c).

⁵⁴⁸ See Transcript, 14 September 2022, pp. 4675, 4690.

⁵⁴⁹ See above, para. 30.

⁵⁵⁰ In any event, the Panel notes that Mustafa fails to provide any support for the allegation that the methodology used by the SPO would be inadequate or that the photographs were "suggestive". The Appeals Panel agrees with the Trial Panel that the identification of the detention location based on a single photograph is not improper, as the witnesses could have simply stated that they did not remember and refrained from identifying the buildings. See Trial Judgment, para. 364. Furthermore, the said photographs had already been shown to the witnesses during their interviews with the SPO, and the witnesses confirmed their prior recognition of them in court. See Transcript (W01679), 4 October 2021, pp. 921-925; P00029 (confidential), pp. 3, 5-6; Transcript (W03593), 21 September 2021, pp. 514-515; P00018 (confidential), p. 3; Transcript (W04669), 10 November 2021, pp. 1470-1471; P00202 (confidential), p. 3.

212. In light of the above, the Panel finds that Mustafa fails to show that no reasonable trier of fact could have accepted the evidence of W01679, W03593 and W04669 identifying the detention location, or that the Trial Panel's findings are wholly erroneous. Accordingly, the Panel dismisses Mustafa's Grounds 2E in part and 2H in part.⁵⁵¹

6. Alleged Errors in the Trial Panel's Assessment of W04600's Testimony Concerning the Identification of the ZDC (Ground 2F)

(a) Submissions of the Parties

213. Mustafa submits in the Notice of Appeal that the Trial Panel misquoted W04600 when it noted that he identified the detention location.⁵⁵² In the Appeal Brief, Mustafa then contends that, while the Trial Panel quoted the witness correctly, his evidence was not properly assessed in context.⁵⁵³ Mustafa further submits that none of the witnesses that the Trial Panel relied on in its finding, namely W04600, Mr Fatmir Sopi and Mr Selatin Krasniqi, stated that the "Sfarc" property was "lent to the KLA for the establishment of the BIA base".⁵⁵⁴ According to Mustafa, the Trial Panel erred in relying on that assertion to find that the BIA was in control of the compound and that the Accused was in command of the compound.⁵⁵⁵

214. The SPO responds that, as a result of variations between Mustafa's arguments in the Notice of Appeal and in the Appeal Brief,⁵⁵⁶ Ground 2F should be summarily dismissed for "lack of coherence" between the submissions.⁵⁵⁷ Moreover, the SPO submits that the Trial Panel correctly assessed W04600's identification of the ZDC in

⁵⁵¹ The remainder of Grounds 2E and 2H have been addressed in the section on Assessment of Witnesses. See below, Section L, paras 249-278.

⁵⁵² Notice of Appeal, Ground 2F, para. 5, referring to Trial Judgment, paras 365, 368.

⁵⁵³ Appeal Brief, p.40, paras 151-152, 155. See also Reply Brief, para. 86.

⁵⁵⁴ Appeal Brief, paras 153-155, 157.

⁵⁵⁵ Appeal Brief, para. 156. See also Appeal Brief, para. 82.

⁵⁵⁶ SPO Response Brief, para. 121.

⁵⁵⁷ SPO Response Brief, para. 121.

the context of his evidence as a whole and that of other witnesses, and that his description of the location leaves no doubt that he was indeed referring to the ZDC.⁵⁵⁸

(b) Assessment of the Court of Appeals Panel

215. At the outset, the Appeals Panel considers that the variations of Mustafa's arguments under Ground 2F between the Notice of Appeal and the Appeal Brief in principle warrant summary dismissal.⁵⁵⁹

216. In any event, and contrary to Mustafa's submissions, the Panel notes that the Trial Panel did not base its finding that the ZDC was controlled by the BIA on its conclusion that Mr Adem Krasniqi's property was lent to the KLA *for the establishment* of the BIA base in Zllash/Zlaš.⁵⁶⁰ In fact, the Appeals Panel considers that the specific purpose for which the property was lent to the KLA is immaterial to a finding regarding the BIA's control over this property. Therefore, even if Mustafa's arguments had been properly raised, they would have no effect on the outcome of the Trial Judgment. Consequently, the Panel dismisses Mustafa's submissions in this regard.⁵⁶¹

217. Accordingly, the Panel dismisses Mustafa's Ground 2F.

⁵⁵⁸ SPO Response Brief, para. 122.

⁵⁵⁹ See above, para. 31. The Panel notes that, while Mustafa claims in his Notice of Appeal that the Trial Panel "misquoted" W04600 with regard to his identification of the detention location, he then acknowledges in the Appeal Brief that W04600 was quoted correctly. *Compare* Notice of Appeal, Ground 2F, para. 5 *with* Appeal Brief, paras 152, 155. Furthermore, in the Appeal Brief, Mustafa does not confine his challenge to the assessment of W04600's evidence, but extends it to Mr Fatmir Sopi's and Mr Selatin Krasniqi's evidence. *Compare* Notice of Appeal, Ground 2F, para. 5 *with* Appeal Brief, paras 153-154.

⁵⁶⁰ Trial Judgment, para. 352. See also Trial Judgment, paras 349-351. The Panel also refers to its findings under Ground 2B. See above, paras 186-190.

⁵⁶¹ See above, para. 33.

L. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S ASSESSMENT OF WITNESSES
(GROUNDS 1J, 2A IN PART, 2E IN PART, 2G, 2H IN PART, 2I, 2J, 2K, 2L, 2M IN PART, 2N)

218. At the outset, the Court of Appeals Panel considers that Grounds 1J, 2A in part, 2E in part, 2G, 2H in part, 2I, 2J, 2K, 2L, 2M in part, and 2N, are repetitive and substantially overlap in that they all allege errors committed by the Trial Panel in the assessment of the credibility of SPO and Defence witnesses and the reliability of their testimony; therefore, the Panel will consider these grounds together.

219. In the Trial Judgment, the Trial Panel assessed the credibility of SPO and Defence witnesses and the reliability of their testimony, taking into consideration a non-exhaustive list of factors.⁵⁶²

220. Mustafa challenges the Trial Panel's assessment, asserting that the Trial Panel failed to fairly and impartially evaluate the testimony of Defence witnesses against the same standard as the testimony of SPO witnesses.⁵⁶³ Mustafa further argues that the

⁵⁶² Trial Judgment, paras 49, 58-223. See also Trial Judgment, paras 34-39, and in particular para. 35, where the Trial Panel outlined the various credibility factors considered in its assessment of witness testimony, including: (i) the level of detail provided by the witness, indicating that the witness experienced the events personally; (ii) the coherence and consistency of the witness's account, including the consistency of their testimony with their written statement(s) and the explanations provided by the witness for any inconsistencies, as discussed with them in court; (iii) the coherence and consistency of the witness's testimony with other evidence before the Panel; (iv) the plausibility of the witness's account; (v) attempts or efforts made by the witness to be accurate (for instance, acknowledging difficulties in recalling certain events or details, or differentiating between what the witness experienced personally and what they learned from others); (vi) the effects of time and trauma on the witness's memory, which may have an impact on their ability to reconstruct the events; (vii) the witness's demeanour when testifying in court, including their readiness and willingness to respond to questions and any changes in attitude when questioned by the opposing Party; (viii) the witness's relationship to either Party or Victims' Counsel, including any ties to, bias towards, or motives to implicate or exculpate, the Accused, any ties to the BIA or the KLA, any involvement in the events under consideration, and any other incentive or motive to lie, fabricate, distort or withhold information; (ix) any bias towards the Specialist Chambers and/or the SPO, which may have undermined the witness's willingness and sense of obligation to provide the Panel with evidence to assist it in its determination of the truth; and (x) any indications that the witness may have been intimidated, threatened, pressured or influenced, or that they have colluded with other witnesses.

⁵⁶³ Appeal Brief, paras 62-66 (Ground 1J); Reply Brief, para. 69; Transcript, 26 October 2023, pp. 17-18, 21. See also Notice of Appeal, Ground 1J, para. 4.

Trial Panel dismissed witness evidence which was favourable to the Defence based on irrelevant grounds, and presumed that some of these witnesses had an inclination to provide evidence favourable to the Accused.⁵⁶⁴ The SPO and Victims' Counsel respond that Mustafa has failed to demonstrate an error in the Trial Panel's assessment of witnesses.⁵⁶⁵

1. Formal Deficiencies Warranting Summary Dismissal

221. At the outset, the Panel notes that the majority of Mustafa's submissions under Grounds 1J, 2G, 2I, 2J, 2K, 2L, and 2M do not satisfy the formal requirements for an appeal.

222. The Panel considers that one of the most striking deficiencies in Mustafa's submissions under these grounds of appeal, which the Panel notes is a recurring issue throughout his appellate submissions, is that he repeatedly fails to identify the specific Trial Panel findings he seeks to challenge.⁵⁶⁶ First, the Panel notes that, in the Notice of Appeal, under Grounds 1J, 2K, 2L, and 2M, Mustafa refers to large, and mostly identical, ranges of paragraphs in the Trial Judgment.⁵⁶⁷ In this regard, the Panel

⁵⁶⁴ Appeal Brief, paras 83(f)-(h) (Ground 2A), 144-149 (Ground 2E), 158-161, 163, 166-167, 168, 172, 174, 176 (Ground 2G), 179 (Ground 2H), 181-182, 185-186, 188-189 (Ground 2I), 193, 199-203 (Ground 2J), 205-208 (Ground 2K), 210-211, 217 (Ground 2L), 220-225, 227-229, 233, 235, 237, 239, 241, 244-245, 251, 253, 257, 259, 262, 265-269, 274, 276, 278-279, 284-286, 291, 295-297 (Ground 2M), 303 (Ground 2N). See also Notice of Appeal, Ground 2G, 2I-2N, para. 5; Reply Brief, paras 68-72; Transcript, 26 October 2023, pp. 18-23, 40-45.

⁵⁶⁵ SPO Response Brief, paras 71-87, 110, 123-126; Victims Response Brief, paras 25-27. See also Transcript, 26 October 2023, pp. 71-72; Transcript, 27 October 2023, pp. 128-129.

⁵⁶⁶ Appeal Brief, paras 160-161, 163, 165, 168, 172, 174, 176 (Ground 2G), arguing that the Trial Panel "rejected" the observations of Defence witnesses Mr Selatin Krasniqi, Mr Ajeti, Ms Hadri, Ms Canolli-Kaciu, and Mr Humolli on the ZDC. The Panel observes that, in his Appeal Brief, Mustafa refers to some of the Trial Panel's considerations in the "General Assessment" section (see Appeal Brief, paras 158-161, 165-166, 168-169, 172, 174), but fails to identify the factual findings in which the Trial Panel "rejected" any of the Defence witnesses' accounts about the ZDC. While, in the Notice of Appeal, Mustafa refers to paragraphs 368 to 370 of the Trial Judgment, he does not discuss them in the Appeal Brief. See also Appeal Brief, paras 189 (Ground 2I), 190-203 (Ground 2J), 204-209 (Ground 2K), where Mustafa does not provide references for any of the findings he challenges.

⁵⁶⁷ Notice of Appeal, Ground 1J, para. 4, referring to Trial Judgment, paras 34-39, 49-223 (181 paragraphs in total); Notice of Appeal, Grounds 2K-2M, para. 5, wherein under each sub-ground, Mustafa refers to paragraphs 138-223, 263-333 of the Trial Judgment (157 paragraphs in total).

recalls that a notice of appeal must contain “an identification of the challenged finding or ruling in the judgment, with specific reference to the relevant page and/or paragraph numbers”.⁵⁶⁸ The Appeals Panel finds that Mustafa fails to comply with this requirement in the Notice of Appeal for these grounds. Moreover, in the Appeal Brief, the Panel observes that, under the respective grounds of appeal, Mustafa then fails to even refer to the majority of these extensive ranges of paragraphs of the Trial Judgment, which he cited to in the Notice of Appeal.⁵⁶⁹

223. The Appeals Panel recalls that it has inherent discretion to determine which of the Parties’ submissions merit a written reasoned opinion and that it may dismiss arguments which are clearly unfounded without providing detailed reasoning.⁵⁷⁰ The Panel also recalls that an appeal is not a trial *de novo* and that a party cannot expect an appeals panel to review entire sections of a trial judgment without the party having identified a specific finding that is being challenged.⁵⁷¹ In principle, such irregularities warrant the submissions’ summary dismissal.⁵⁷²

224. The Panel also observes that, in particular under Grounds 2K and 2L, Mustafa’s submissions in the Appeal Brief depart significantly from the relevant grounds outlined in the Notice of Appeal.⁵⁷³ In light of the gravity of the irregularities affecting Mustafa’s Grounds 2K and 2L, the Panel summarily dismisses them.

⁵⁶⁸ Practice Direction on Filings, Article 47(1)(b)(2). See similarly *Boskoški and Tarčulovski* Decision on Notice of Appeal, para. 30.

⁵⁶⁹ In particular, in the Appeal Brief under Ground 2K, Mustafa fails to cite to any paragraph of the Trial Judgment. Under Ground 2L, Mustafa cites to several ranges of paragraphs in the Trial Judgment, without specifying the alleged error committed by the Trial Panel. See Appeal Brief, paras 213-216.

⁵⁷⁰ See above, para. 33.

⁵⁷¹ See above, paras 29-30.

⁵⁷² See above, paras 29-30.

⁵⁷³ Compare Notice of Appeal, Ground 2K, para. 5 with Appeal Brief, paras 204-209 (Ground 2K). See also Reply Brief, paras 70-71. Compare Notice of Appeal, Ground 2L, para. 5 with Appeal Brief, paras 210-218 (Ground 2L). The Panel notes the same inconsistencies under Ground 2I. However, the Panel finds that these are not as serious and has considered Mustafa’s arguments under Ground 2I below. Compare Notice of Appeal, Ground 2I, para. 5 with Appeal Brief, paras 180-189 (Ground 2I), where Mustafa does not challenge the same findings by the Trial Panel. See below, paras 242-278.

225. Furthermore, the Appeals Panel observes that, under Ground 1J, Mustafa makes a general reference to the Trial Panel’s assessment of “Defence witnesses” and fails to identify the specific witnesses whose testimony he alleges the Trial Panel failed to fairly and impartially assess. The Panel also notes that Mustafa fails to support this general assertion with precise references to relevant paragraphs in the Trial Judgment or transcript pages of witness testimony. The Appeals Panel stresses that such generalised, unsubstantiated arguments warrant summary dismissal,⁵⁷⁴ and accordingly dismisses Mustafa’s submissions in Ground 1J with respect to the Trial Panel’s assessment of Defence witnesses.⁵⁷⁵

226. Under Ground 2M, the Panel notes that Mustafa does not raise, in the Notice of Appeal, the argument he develops in the Appeal Brief that the Trial Panel made a “clear mischaracterization of BIA”.⁵⁷⁶ Recalling that the Panel may decline to consider an issue raised for the first time in the Appeal Brief,⁵⁷⁷ the Panel accordingly dismisses Mustafa’s argument in this regard.⁵⁷⁸

227. For the remaining grounds, namely Grounds 1J in part, 2A in part, 2E in part, 2G, 2H in part, 2I, 2J, 2M in part, and 2N, the Panel considers that, despite notable deficiencies,⁵⁷⁹ it can sufficiently understand Mustafa’s arguments and decides, out of

⁵⁷⁴ See above, para. 29.

⁵⁷⁵ See Appeal Brief, paras 62-63.

⁵⁷⁶ Appeal Brief, para. 229. See also Appeal Brief, paras 243, 245.

⁵⁷⁷ See above, para. 31.

⁵⁷⁸ In the Notice of Appeal, Mustafa does not indicate that he challenges the Trial Panel’s factual findings on the structure of the BIA. See Trial Judgment, paras 334-337. *Compare* Appeal Brief, para. 229, referring to Trial Judgment, paras 334-337 *with* Notice of Appeal, Ground 2M, para. 5, referring to 157 paragraphs of the Trial Judgment that do not include paragraphs 334 to 337. The Panel has addressed the remaining arguments under Ground 2M below. See below, paras 242-296.

⁵⁷⁹ The Panel observes in particular that many of Mustafa’s submissions are obscure, contradictory, undeveloped and unsupported. For example, under Ground 2G, some words are missing in Mustafa’s arguments and Mustafa uses “...” instead. See Appeal Brief, para. 161. Under Ground 2I, Mustafa argues that the Trial Panel “rejected” the observations of seven Defence witnesses, without identifying them or providing any references, and then, three paragraphs later in the Appeal Brief, he states that the Trial Panel “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”. See Appeal Brief, paras 185-186, 189. The Panel observes that none of the grounds of appeal discussed under this section are supported

fairness to the Accused and in the interests of justice, to exceptionally address them below.

2. Alleged Errors Regarding the Trial Panel's Assessment of Witnesses

228. The Appeals Panel first recalls that the Trial Panel is vested with broad discretion in evaluating the credibility and reliability of witness testimony, and that the Panel will not lightly overturn its factual findings in that respect unless the evidence it relied upon could not have been accepted by any reasonable trier of fact, or the evaluation of the evidence is wholly erroneous.⁵⁸⁰ The Panel also recalls that an accused's right to a reasoned opinion does not require a detailed analysis of the credibility of witnesses, as long as the relevant chamber provides reasons for accepting a witness's testimony despite any alleged or material inconsistencies.⁵⁸¹

229. The Appeals Panel further recalls that Rule 139(4) of the Rules provides that, in determining the weight to be given to the testimony of a witness, a panel shall assess the credibility of the witness and the reliability of his or her testimony. The Appeals Panel notes that credibility relates to the truthfulness of the witness (i.e. whether the witness is speaking the truth),⁵⁸² and further notes that the fact that a witness gives

by applicable law or jurisprudence. The Panel also notes that Mustafa includes elements under grounds of appeal which should have been raised under a different ground based on the arguments presented in the Notice of Appeal, or that he repeats the same submissions under multiple grounds. For example, the Panel observes that Mustafa argued under Ground 2E that it is "completely implausible" that all of the witnesses who testified about the ZDC and claimed that no one was detained there, namely Mr Fatmir Sopi, Mr Humolli, Mr Selatin Krasniqi, Ms Hadri and Ms Canolli-Kaciu, would "align their testimonies" on this matter, while this argument would have been better placed under Ground 2G. *Compare* Notice of Appeal, Ground 2E, para. 5 and Appeal Brief, paras 144-148 *with* Notice of Appeal, Ground 2G, para. 5 and Appeal Brief, paras 158-178. The Panel also notes that, in the Appeal Brief under Grounds 2G, 2I and 2M in particular, Mustafa develops the same arguments that the Trial Panel rejected the testimony of Defence witnesses based on factors unrelated to the events and facts that the witnesses testified about, and challenges the assessment of the same witnesses (Mr Selatin Krasniqi, Mr Ajeti, Ms Hadri, Ms Canolli-Kaciu, Mr Humolli). See also Grounds 2A in part, 2E in part, 2H in part, and 2N.

⁵⁸⁰ See above, paras 23-24.

⁵⁸¹ See above, para. 35.

⁵⁸² *Lubanga* Appeal Judgment, para. 239; *Kunarac et al.* Decision on Acquittal, para. 7. See also Trial Judgment, para. 34.

evidence honestly is not in itself sufficient to establish the reliability of that evidence.⁵⁸³ The Panel observes that reliability relates to whether the evidence, if accepted, proves the fact to which it is directed, or whether it can be put in doubt by other evidence or surrounding circumstances.⁵⁸⁴

(a) Alleged Errors Regarding the Trial Panel’s Application of the Same Standard to SPO and Defence Witnesses (Ground 1J in part)

(i) Submissions of the Parties and Participants

230. Mustafa submits that the Trial Panel selectively applied the relevant criteria when assessing the credibility of Defence witnesses and the reliability of their testimony, and as a result failed to apply the “same fair and impartial standard” to all witness testimony in reaching its findings in the Trial Judgment.⁵⁸⁵ Specifically, Mustafa asserts that the Trial Panel relied exclusively or extensively on two “subjective criteria” out of the ten identified in the Trial Judgment, ignoring all of the other factors.⁵⁸⁶ Mustafa further asserts that, in assessing SPO witnesses, the Trial Panel failed to consider the witnesses’ [REDACTED] and their expressed hostility towards the Accused.⁵⁸⁷ Finally, Mustafa submits that the Trial Panel did not equally weigh the evidence provided by SPO witnesses when their testimony favoured the Defence.⁵⁸⁸

231. The SPO responds that the Trial Panel has wide discretion in evaluating witness testimony.⁵⁸⁹ The SPO further submits that Mustafa’s arguments that the Trial Panel

⁵⁸³ *Brđanin* Trial Judgement, para. 25. See also *Lubanga* Appeal Judgment, para. 239; Trial Judgment, para. 34.

⁵⁸⁴ *Kunarac et al.* Decision on Acquittal, para. 7; *Lubanga* Appeal Judgment, para. 239. See also Trial Judgment, para. 34.

⁵⁸⁵ Appeal Brief, paras 63, 66; Transcript, 26 October 2023, pp. 17-18, 21. See also Notice of Appeal, Ground 1J, para. 4, referring to Trial Judgment, paras 34-39.

⁵⁸⁶ Appeal Brief, para. 62; Transcript, 26 October 2023, pp. 17-18.

⁵⁸⁷ Appeal Brief, paras 64-65.

⁵⁸⁸ Notice of Appeal, Ground 1J, para. 4. See also Appeal Brief, paras 63, 66; Transcript, 26 October 2023, pp. 20-22.

⁵⁸⁹ SPO Response Brief, para. 71.

failed to apply the same standard in its assessment of Defence and SPO witnesses allege a factual error and not a legal error, and that Mustafa fails to address the required standard of review for factual errors, warranting dismissal.⁵⁹⁰ In any event, the SPO argues that the credibility factors are non-exhaustive and are not to be treated as a “check-list”, and accordingly, the Trial Panel was not required to consider each factor in its assessment.⁵⁹¹ Finally, the SPO asserts that the Trial Panel is not required to set out in detail the reasons for rejecting or accepting a particular witness’s testimony.⁵⁹²

232. Victims’ Counsel responds that Mustafa misrepresents the in-court testimony of witnesses and further, fails to substantiate his argument with specific examples of “hostility” towards the Accused.⁵⁹³ Victims’ Counsel also submits that the Trial Panel correctly considered all relevant factors in its assessment of W03593’s testimony.⁵⁹⁴

(ii) Assessment of the Court of Appeals Panel

233. The Appeals Panel observes that the Trial Panel correctly articulated its approach to assessing evidence in this case, in particular with respect to evaluating the credibility and reliability of witnesses, before relying on their evidence.⁵⁹⁵ The Appeals Panel also recalls that the Trial Panel identified a non-exhaustive list of factors that it considered in its assessment of the credibility of all witnesses and the reliability of their testimony.⁵⁹⁶ The Panel notes that, as the SPO points out, these factors do not operate as a “check-list” of requirements, and their relevance must be assessed on a case-by-case basis.⁵⁹⁷ Accordingly, the Trial Panel’s consideration and application of

⁵⁹⁰ SPO Response Brief, para. 72.

⁵⁹¹ SPO Response Brief, para. 73.

⁵⁹² SPO Response Brief, para. 73.

⁵⁹³ Victims Response Brief, paras 25-26.

⁵⁹⁴ Victims Response Brief, para. 27.

⁵⁹⁵ Trial Judgment, paras 31-46.

⁵⁹⁶ See above, para. 219, fn. 562. See also Trial Judgment, para. 35.

⁵⁹⁷ *Popović et al.* Appeal Judgement, para. 132; *Nchamihigo* Appeal Judgement, para. 47.

these factors in determining a witness's credibility will vary according to each witness's testimony.

234. With respect to Mustafa's remaining submissions under Ground 1J⁵⁹⁸ regarding the Trial Panel's assessment of SPO witnesses, the Appeals Panel notes that Mustafa only refers to [REDACTED]⁵⁹⁹ and W03593.⁶⁰⁰ Accordingly, the Panel will limit its consideration of Mustafa's submissions to those witnesses.

235. In this regard, the Appeals Panel observes that the Trial Panel carefully assessed the credibility of SPO witnesses, noting any inconsistencies in a witness's testimony and the reasons for accepting or rejecting the testimony, in whole or in part, in light of those discrepancies.⁶⁰¹ In particular, with respect to W04674, W04676, W04390, and W04391, the Trial Panel considered in its assessment the [REDACTED] the witnesses, but found "no signs of collusion" or any "incentive or motive to lie, conceal, fabricate or distort information".⁶⁰²

236. In its assessment, the Trial Panel further considered the existence of "certain discrepancies across the witnesses' testimonies and/or statements, in particular, [REDACTED]".⁶⁰³ However, the Trial Panel found that the "essence of the witnesses' evidence is consistent across their testimonies", and that the noted discrepancies did not affect their general credibility.⁶⁰⁴

⁵⁹⁸ See above, para. 230.

⁵⁹⁹ Although Mustafa does not identify the specific witnesses, the Appeals Panel understands that he refers to W04674, W04676, W04390, and W04391, who testified before the Trial Panel.

⁶⁰⁰ See Appeal Brief, paras 64-65. The Panel notes that, at the Appeal Hearing, Mustafa also raised challenges to the Trial Panel's assessment of Mr Fatmir Sopi's and Mr Veseli's testimony in relation to Ground 1J of his appeal. See Transcript, 26 October 2023, pp. 18-20, 43. However, the Panel considers that these arguments in fact relate to Mustafa's overarching argument that the Trial Panel erred in applying irrelevant factors to dismiss the evidence of witnesses favourable to the Defence, and has addressed them in the relevant section below. See below, fn. 656.

⁶⁰¹ Trial Judgment, paras 58-137.

⁶⁰² Trial Judgment, para. 93.

⁶⁰³ Trial Judgment, para. 96.

⁶⁰⁴ Trial Judgment, para. 96.

237. In light of the above, the Appeals Panel finds no error in the Trial Panel's assessment of W04674, W04676, W04390, and W04391, in which it evaluated the witnesses' credibility against the same set of factors as other witnesses, including any bias or incentive to lie, but found no evidence that would impact the reliability of their testimony.

238. The Appeals Panel now turns to Mustafa's submission that "W03593 did not even want to see or speak out the name" of the Accused, which he asserts is behaviour showing hostility towards the Accused.⁶⁰⁵ The Appeals Panel first observes in this regard that Mustafa fails to substantiate this assertion with precise references to transcript pages of witness testimony, and further does not demonstrate how such an expression amounts to hostility towards the Accused with regard to the substance of the witness's testimony.

239. Nevertheless, the Appeals Panel notes that the Trial Panel considered W03593's demeanour when testifying, including the witness's readiness and willingness to respond to questions and any changes in his response or attitude when questioned by the Defence.⁶⁰⁶ Specifically, the Trial Panel found that W03593 was "generally forthcoming in his testimony and remained consistent on critical aspects of his account" and "did not waver" in his answers.⁶⁰⁷ In particular, the Trial Panel noted that, when questioned extensively by both Parties and the Panel on how he identified the Accused, "W03593 did not attempt to incriminate the Accused at all costs and acknowledged outright that he did not see him properly, that he was not acquainted with him, and that he could not recognise him even today."⁶⁰⁸

⁶⁰⁵ Appeal Brief, para. 65. While Mustafa fails to reference specific statements in the witness's testimony, the Appeals Panel notes that W03593 stated about the Accused, on one occasion, that: "I hope that I never see this person in my entire life". See Transcript (W03593), 20 September 2021, p. 420.

⁶⁰⁶ Trial Judgment, paras 69-70.

⁶⁰⁷ Trial Judgment, para. 69.

⁶⁰⁸ Trial Judgment, para. 69.

240. Furthermore, the Trial Panel noted that W03593 was at times hesitant to disclose the names of persons who provided him with information, but ultimately concluded that, in light of the “climate of fear and witness intimidation prevailing in Kosovo”, “W03593’s hesitation was grounded in fear and not in an intention to withhold information from the Panel.”⁶⁰⁹ In the Appeals Panel’s view, the Trial Panel did not err in its assessment of W03593’s in-court demeanour towards, and responses to, both Parties, and in ultimately not finding any evidence of bias or incentive to lie affecting W03593’s credibility and the reliability of his testimony.⁶¹⁰

241. In light of the above, the Appeals Panel dismisses Mustafa’s argument that the Trial Panel failed to fairly and impartially assess the testimony of Defence witnesses against the same standard as the testimony of SPO witnesses. Moreover, Mustafa does not demonstrate that no reasonable trier of fact would have accepted the evidence relied upon by the Trial Panel in its assessment, or how the alleged error in the Trial Panel’s assessment would lead to a different outcome. Accordingly, the Appeals Panel dismisses the remainder of Mustafa’s Ground 1J.

(b) Alleged Errors Regarding Bias in the Trial Panel’s Assessment of Witnesses
(Grounds 2G in part, 2I in part, 2J in part, 2M in part, 2N in part)

(i) Submissions of the Parties

242. Mustafa submits that the Trial Panel erred when it rejected the evidence of certain Defence witnesses, and even some SPO witnesses, because they would have an “inclination” to provide evidence favourable to the Accused, and unfavourable to the SPO.⁶¹¹

⁶⁰⁹ Trial Judgment, para. 73.

⁶¹⁰ Contra Appeal Brief, para. 65. See also Trial Judgment, para. 35(viii).

⁶¹¹ Appeal Brief, paras 158-161, 166, 169, 172, 174, 178 (Ground 2G), 181-182, 185-186 (Ground 2I), 193, 199, 202 (Ground 2J), 223-225, 227-229, 233, 235, 244-245, 247, 251-253, 259, 262, 276, 278, 284-285, 291, 295 (Ground 2M), 303 (Ground 2N). See also Transcript, 26 October 2023, pp. 18-21, 40-42.

243. The SPO responds that Mustafa presents undeveloped, unsupported, chaotic and repetitive submissions, and that at times he departs significantly from the grounds in the Notice of Appeal.⁶¹² The SPO submits that Mustafa merely disagrees with the Trial Panel's findings on the assessment of the credibility of witnesses and the reliability of their testimony.⁶¹³ The SPO further argues that Mustafa fails to show how these alleged errors occasioned a miscarriage of justice, that the evaluation of the evidence is wholly erroneous, or that the impugned evidence could not have been accepted by any reasonable trier of fact.⁶¹⁴

244. In response to Mustafa's argument that the Trial Panel was biased against him in its assessment of witness evidence, the SPO submits that the Trial Panel conducted a meticulous analysis of the testimony of both SPO and Defence witnesses, addressing their credibility and the reliability of their testimony.⁶¹⁵ The SPO further argues that the Trial Panel did not reject the testimony of Defence witnesses due to an alleged predisposition to accept testimony favourable to the Prosecution and dismiss testimony favourable to the Defence, but rather as a result of Mustafa's decision to call witnesses with "glaring credibility deficits".⁶¹⁶ In particular, the SPO highlights "the most significant" deficits that affected the credibility of Defence witnesses, such as the long-time friendship between a witness and the Accused; indications of collusion between witnesses or with the Accused; the reluctance of some witnesses to be associated with the KLA and the BIA or to answer questions; and the fact that some witnesses followed the evidence of other witnesses before testifying.⁶¹⁷ The SPO further submits that, while overlooked by Mustafa, the Trial Panel correctly

⁶¹² SPO Response Brief, para. 74. The SPO submits that this is the case in particular under Mustafa's Grounds 2I, 2J, 2M, and 2N.

⁶¹³ SPO Response Brief, para. 74.

⁶¹⁴ SPO Response Brief, paras 71, 74.

⁶¹⁵ SPO Response Brief, para. 76.

⁶¹⁶ SPO Response Brief, para. 77.

⁶¹⁷ SPO Response Brief, para. 77.

considered the prevailing climate of intimidation in Kosovo in which the SPO witnesses testified.⁶¹⁸

(ii) Assessment of the Court of Appeals Panel

245. The Panel understands Mustafa's contention that the Trial Panel presumed that Defence witnesses would provide evidence favourable to the Accused⁶¹⁹ to mean that the Trial Panel showed bias in its consideration of Defence witnesses.

246. The Panel observes that Mustafa does not point to any evidence in support of this general assertion which could rebut the presumption of impartiality attaching to the Judges of the Trial Panel.⁶²⁰

247. In any event, Mustafa did not provide any support to indicate that the Trial Panel failed to "objectively" and "properly" consider the testimony of Defence witnesses or, more generally, witnesses who provided evidence favourable to the Defence.⁶²¹ In fact, the Appeals Panel observes that, as noted above, the Trial Panel applied the same standard to both SPO and Defence witnesses, and carefully identified for each witness any inconsistencies in their evidence, personal circumstances or other factors that might impact the witness's credibility.⁶²² The Panel therefore dismisses Mustafa's arguments on the Trial Panel's alleged bias in this regard.

248. Accordingly, the Appeals Panel dismisses Mustafa's Grounds 2G in part, 2I in part, 2J in part, 2M in part, and 2N in part.

⁶¹⁸ SPO Response Brief, para. 78.

⁶¹⁹ See for example Appeal Brief, paras 161, 169, 172, 186, 189, 244, 262, 278, 285, 295, 297.

⁶²⁰ See above, para. 40.

⁶²¹ Contra Appeal Brief, paras 172, 229, 236, 240, 246, 249, 270, 279-281, 286-287, 294. See also Appeal Brief, paras 229, 236, 279, 299.

⁶²² See below, paras 263-296; Trial Judgment, paras 139-223. See also above, paras 233, 241.

(c) Alleged Errors Regarding the Trial Panel’s Application of “Irrelevant” Factors to Dismiss the Evidence of Witnesses Favourable to the Defence (Grounds 2A in part, 2E in part, 2G in part, 2H in part, 2I in part, 2J in part, 2M in part, 2N in part)

(i) Submissions of the Parties

249. Mustafa submits that the Trial Panel erred in dismissing the testimony of witnesses favourable to the Defence on irrelevant grounds, such as personal circumstances unrelated to the substance of their testimony.⁶²³ Mustafa further submits that the only factor determinative of a witness’s credibility is whether he or she is “telling the truth”.⁶²⁴ In this respect, Mustafa argues that the Trial Panel and the SPO failed to caution certain witnesses that their testimony was untruthful or to confront them with contradictory evidence and factors impacting their credibility before rejecting their evidence.⁶²⁵

250. With respect to the witnesses who were present at the ZDC at the relevant time, including Mr Selatin Krasniqi, Mr Ajeti, Ms Hadri, Ms Canolli-Kaciu and Mr Humolli, Mustafa contends that the Trial Panel rejected their evidence on “completely irrelevant grounds”, while at the same time conceding that these witnesses gave a “more complete and possibly accurate description” of the location.⁶²⁶ According to

⁶²³ Appeal Brief, paras 161, 163, 165-168, 172, 174 (Ground 2G), 182, 186, 188 (Ground 2I), 199 (Ground 2J), 220-222, 224, 227-228, 230, 234, 236-237, 243-244, 246-248, 251, 253, 259, 261-262, 276, 278, 283, 286, 295-296, 298 (Ground 2M). See also Transcript, 26 October 2023, pp. 40-45; Appeal Brief, para. 82.

⁶²⁴ Appeal Brief, paras 248, 252, 260, 277. See also Appeal Brief, para. 219.

⁶²⁵ Appeal Brief, paras 223 (Mr Mehmetaj), 228, 231 (Mr Jakup Ismaili (“Mr Ismaili")), 246 (Mr Bislim Nreci (“Mr Nreci")), 252 (Mr Kapllan Parduzy (“Mr Parduzy")), 260 (Mr Nuredin Ibishi (“Mr Ibishi")), 277 (Mr Musli Halimi (“Mr Halimi")) (Ground 2M).

⁶²⁶ Appeal Brief, paras 158, 162-163, 169, 171, 175-177 (Ground 2G), referring to Trial Judgment, para. 369; Notice of Appeal, Grounds 2G and 2N, para. 5. See also Appeal Brief, paras 297-298 (Ground 2M), 300-301 (Ground 2N); Reply Brief, paras 68, 72, 86; Transcript, 26 October 2023, pp. 40-45. Mustafa further submits that Ground 2G should be read in conjunction with Ground 2I regarding a “presumed inclination of witnesses”. See Appeal Brief, paras 178, 180-189; Transcript, 26 October 2023, p. 40. Furthermore, the Panel notes that Mustafa also makes similar arguments under Grounds 2A, 2E and 2H, which overlap with Ground 2G and has thus addressed them together. See above, paras 175, 199-202. See Appeal Brief, paras 83(f)-(h) (Ground 2A), 144-150, 179 (Grounds 2E and 2H).

Mustafa, these witnesses had the best knowledge of the compound and were able to observe what occurred there.⁶²⁷ He argues that the Trial Panel erred in finding unpersuasive their “refutation evidence” – claiming that no people were detained there – which the Trial Panel weighed against (i) the evidence of “only three victims” who provided limited information about the location of their detention;⁶²⁸ and (ii) Mustafa’s own evidence.⁶²⁹

251. In particular, Mustafa argues that the Trial Panel misrepresented and did not properly consider Mr Selatin Krasniqi’s evidence because, *inter alia*: (i) while Mr Selatin Krasniqi admitted that Mustafa was his commander in the BIA, he was never asked “who was in charge of the BIA Base” in Zllash/Zlaš; (ii) any “bond” between Mr Selatin Krasniqi and Mustafa would not change the fact that he did not witness anyone detained at the compound; and (iii) there are no inconsistencies between his evidence and that of the Accused.⁶³⁰

252. Regarding Mr Ajeti, Mustafa submits that the Trial Panel rejected his testimony on the basis of unrelated issues which do not diminish his experience at the compound.⁶³¹

⁶²⁷ Appeal Brief, paras 164, 169, 171, 175 (Ground 2G), 187-188 (Ground 2I), 279, 282, 288, 291, 293, 297-298 (Ground 2M). See also Appeal Brief, paras 144-149 (Ground 2E); Transcript, 26 October 2023, pp. 18-21, 40-41, 45.

⁶²⁸ Appeal Brief, paras 180-185, 189 (Ground 2I). See also Appeal Brief, paras 220, 293 (Ground 2M). See also Transcript, 26 October 2023, pp. 22, 40-42.

⁶²⁹ Appeal Brief, paras 182-184, 187 (Ground 2I). The Panel understands that Mustafa’s reference to “the evidence of the Appellant” means the Suspect Statement (P00111-P00118) (confidential). Mustafa argues that the Trial Panel incorrectly found his own evidence that soldiers and possibly civilians were detained at the ZDC to be “authoritative and credible” based on his first-hand knowledge and control of a BIA base. See Appeal Brief, paras 182-183. He submits that the Accused testified that he was only at the ZDC briefly during the Indictment period, while the other Defence witnesses were there for a longer, and continuous, period. See Appeal Brief, para. 187.

⁶³⁰ Appeal Brief, paras 158-162 (Ground 2 G), 278-281 (Ground 2M).

⁶³¹ Appeal Brief, paras 164-167 (Ground 2G), 282-287 (Ground 2M). Under Ground 2G, Mustafa submits that the Trial Panel rejected the witness’s testimony on the following unrelated grounds: the witness’s telephone contacts with the Accused in 2020; a Facebook post; and the fact that he did not initially mention other BIA members during his testimony. See Appeal Brief, paras 165-167. See also Transcript, 26 October 2023, pp. 43-44. Under Ground 2M, Mustafa argues that the Trial Panel implied that Mr Ajeti

253. Moreover, in relation to Ms Hadri's and Ms Canolli-Kaciu's evidence, Mustafa argues that the Trial Panel erred in finding that, despite having worked at the compound during the relevant time period, they had a very limited basis of knowledge to testify regarding the charged events because they mostly stayed in their rooms.⁶³²

254. With respect to Mr Humolli, Mustafa argues that the Trial Panel failed to make a finding as to why his observations and experiences at the compound could not be credible and reliable, while implying that his scepticism about the Specialist Chambers was a decisive factor in rejecting his evidence.⁶³³ Mustafa further argues that the Trial Panel erred in rejecting Mr Humolli's evidence regarding the BIA's authority to arrest or detain people as, given his leadership role in the Llap Operational Zone, he was in the best position to provide details on the structure and authorities of units operating there.⁶³⁴

255. Mustafa further argues that the Trial Panel erred in rejecting witness evidence on Mustafa's alibi claim⁶³⁵ by, *inter alia*: (i) drawing "far reaching conclusions" based on the witnesses' social media activities;⁶³⁶ (ii) misinterpreting the witnesses' responses as an intention to distance themselves and the Accused from any

did not testify truthfully because of "ties" between him and the Accused. See Appeal Brief, paras 285-286.

⁶³² Appeal Brief, paras 168-171 (Ground 2G), 288-292, 297-299 (Ground 2M). Mustafa further argues that the fact that Ms Canolli-Kaciu "like[d]" a Facebook post, seemingly to provide moral support to the Accused, does not affect her observations at the compound. See Appeal Brief, paras 168, 172 (Ground 2G), 295, 298 (Ground 2M). See also Appeal Brief, para. 147 (Ground 2E); Trial Judgment, paras 216, 222-223.

⁶³³ Appeal Brief, paras 173-175 (Ground 2G), 300-301 (Ground 2N). See also Appeal Brief, para. 145 (Ground 2E); Transcript, 26 October 2023, pp. 20, 44.

⁶³⁴ Appeal Brief, paras 83(h) (Ground 2A), 302-303 (Ground 2N). See also Transcript, 26 October 2023, p. 20.

⁶³⁵ The Panel notes that some of Mustafa's arguments under Ground 2M overlap with those under Grounds 1L and 2O and has thus addressed them together in the section on Mustafa's Alibi Claim. See Appeal Brief, paras 238-240. See also below, Section N, paras 310-324.

⁶³⁶ Appeal Brief, paras 223 (Mr Mehmetaj), 227 (Mr Ahmet Ademi ("Mr Ademi")), 232, 234 (Mr Hazir Borovci ("Mr Borovci")), 244 (Mr Nreci).

involvement in the events or to distance themselves from the Accused;⁶³⁷ (iii) inferring that they provided evidence favourable to the Accused based on the witnesses' relationship or contacts with the Accused, their relatives, or other witnesses;⁶³⁸ (iv) mischaracterising the alleged superior-subordinate relationship between the Accused and certain witnesses;⁶³⁹ (v) qualifying as a memory lapse certain witnesses' difficulty in remembering a specific date;⁶⁴⁰ (vi) considering that a witness had been influenced because he sought to refresh his memory;⁶⁴¹ and (vii) mischaracterising a witness's recollection of events as "confused and inconclusive".⁶⁴²

256. Mustafa also specifically argues that the Trial Panel erred in presuming that Defence witnesses, namely Mr Borovci and Mr Gani Sopi, coordinated their testimony with respect to their departure from Prishtina/Priština to Butovac, which is relevant to Mustafa's alibi claim.⁶⁴³ In particular, Mustafa argues, *inter alia*, that the Trial Panel erred in its consideration of the timespan of the religious celebration of Eid al-Adha (or "Small Bajram") in 1999.⁶⁴⁴

257. Concerning Mr Halimi, who was a commander of the training centre in Zllash/Zlaš and called as a Defence witness in relation to the arbitrary detention

⁶³⁷ Appeal Brief, paras 224-226 (Mr Mehmetaj), 276 (Mr Halimi).

⁶³⁸ Appeal Brief, paras 228 (Mr Ismaili), 232-233 (Mr Borovci), 244 (Mr Nreci). Mustafa also argues that the fact that the Accused had Mr Halimi's telephone number is irrelevant to the latter's credibility. See Appeal Brief, para. 276.

⁶³⁹ Appeal Brief, paras 229-230 (Mr Ismaili), 233 (Mr Borovci), 243, 245 (Mr Nreci).

⁶⁴⁰ Appeal Brief, paras 236-237 (Mr Gani Sopi ("Mr Gani Sopi")), 241-242 (Mr Nreci).

⁶⁴¹ Appeal Brief, para. 247 (Mr Nazmi Vrbovci ("Mr Vrbovci")).

⁶⁴² Appeal Brief, paras 263-270 (Mr Sheqir Rrahimi ("Mr Rrahimi")). With regard to Mr Ibishi, Mustafa generally submits that the factors considered by the Trial Panel as affecting the witness's credibility are groundless, as the Trial Panel never challenged his testimony on these factors, and that the Trial Panel is biased as it arbitrarily uses or leaves out portions of the testimony. See Appeal Brief, paras 258-262.

⁶⁴³ Notice of Appeal, Ground 2J, para. 5; Appeal Brief, paras 190-203. See below, Section N, paras 310-324.

⁶⁴⁴ Mustafa argues the Trial Panel erred in placing weight on the specific dates, and that the fact that Mr Borovci asked a third person (the hoxha) about the dates of the "Small Bajram" is irrelevant. See Appeal Brief, paras 194-195, 198-201. See also Appeal Brief, paras 191-193, 196-197, 237.

charge, Mustafa argues that, contrary to the Trial Panel's findings, he would have known if W01679 had been picked up there.⁶⁴⁵

258. The SPO responds that Mustafa confuses reliability with credibility and that, contrary to his submissions, the Trial Panel properly considered factors relevant to the Defence witnesses' credibility, including internal contradictions and inconsistencies, incoherence with other evidence, collusion, memory problems, passage of time, and a strong bias in favour of Mustafa, the BIA and the KLA.⁶⁴⁶

259. The SPO further responds that Mustafa repeatedly fails to cite to the Trial Panel's findings which he is challenging with respect to the five witnesses who testified about the ZDC,⁶⁴⁷ and instead refers to the "General Assessment" sections of the Trial Judgment.⁶⁴⁸ According to the SPO, Mustafa fails to meet the "high threshold required to effectively challenge judicial discretion",⁶⁴⁹ and the Trial Panel appropriately considered relevant factors which had, or could have, an impact on the reliability of the witnesses' evidence, and, as a result, approached certain evidence with caution.⁶⁵⁰ The SPO further argues that Mustafa merely expresses disagreement with the Trial Panel's factual findings and assessment of the evidence, and submits that, contrary to Mustafa's assertions, the Trial Panel did find that a number of

⁶⁴⁵ Appeal Brief, paras 271-275, referring to Trial Judgment, para. 196.

⁶⁴⁶ SPO Response Brief, para. 79.

⁶⁴⁷ Mr Selatin Krasniqi, Mr Ajeti, Ms Hadri, Ms Canolli-Kaciu, and Mr Humolli.

⁶⁴⁸ SPO Response Brief, para. 123.

⁶⁴⁹ SPO Response Brief, para. 117.

⁶⁵⁰ SPO Response Brief, para. 124. See also SPO Response Brief, paras 74-75, 85-86. The SPO submits that the Trial Panel "rightly considered various relevant factors", such as: close ties to the KLA or the Accused; bias against the Specialist Chambers or SPO; a selective approach to the facts; and reluctance to address certain matters, in particular those potentially inculcating the Accused. See SPO Response Brief, para. 124.

Defence witnesses had been able to provide a “more complete and possibly accurate description” of the ZDC.⁶⁵¹

260. Specifically, with respect to Mr Humolli, the SPO responds that the witness only had general and anecdotal knowledge regarding the BIA’s powers to arrest or detain, and that, considering the sensitivity of the BIA’s operations and credibility issues in relation to his testimony, the Trial Panel reasonably rejected his evidence in this regard.⁶⁵²

261. The SPO further responds that the Trial Panel reasonably concluded that Mr Borovci and Mr Gani Sopi coordinated their testimony regarding the date of their departure from Prishtina/Priština to Butovac, having based its findings on a consideration of multiple factors.⁶⁵³ The SPO also submits that Mustafa’s argument that the Trial Panel misinterpreted the timespan of Eid al-Adha in 1999 is erroneous, as both witnesses testified, *inter alia*, that Eid al-Adha commenced on 31 March 1999, which is contradicted by an open source table indicating that this holiday started on 28 March 1999.⁶⁵⁴

262. Finally, the SPO responds that Mustafa’s argument that some Defence witnesses should have been “cautioned or otherwise warned” that their testimony was untruthful is unsubstantiated and that, prior to their testimony, all Defence witnesses were duly warned to tell the truth.⁶⁵⁵

⁶⁵¹ SPO Response Brief, para. 125, referring to Trial Judgment, para. 369. See also SPO Response Brief, paras 85-86 (Ground 2N), wherein the SPO indicated that the Defence submissions concerning Mr Humolli’s evidence at the ZDC are addressed under Ground 2G.

⁶⁵² SPO Response Brief, para. 87. See also SPO Response Brief, paras 85-86.

⁶⁵³ SPO Response Brief, para. 80. See also SPO Response Brief, para. 83.

⁶⁵⁴ SPO Response Brief, paras 81-82.

⁶⁵⁵ SPO Response Brief, para. 84.

(ii) Assessment of the Court of Appeals Panel

a. General Allegations of Errors Regarding the Assessment of Witnesses

263. The Panel notes that Mustafa's main argument under Grounds 2A in part, 2E in part, 2G in part, 2H in part, 2I in part, 2J in part, 2M in part, and 2N in part, is that the Trial Panel dismissed the testimony of witnesses who provided evidence favourable to the Defence based on irrelevant considerations and, specifically, according to Mustafa, for reasons unrelated to the substance of their testimony.

264. First, the Panel observes that, contrary to Mustafa's claim,⁶⁵⁶ when assessing the witnesses' credibility, the Trial Panel did consider their testimony on the facts and events on which they were called to testify. On the one hand, the Trial Panel noted when witnesses were forthcoming and provided clear and realistic evidence related to the charges and, on that basis, found their evidence to be credible.⁶⁵⁷ On the other hand, the Trial Panel noted when witnesses: (i) were reluctant or evasive in answering questions related to the charges, in particular regarding the detention and mistreatment of persons in Zllash/Zlaš, the BIA and issues potentially incriminating

⁶⁵⁶ The Panel notes that Mustafa challenges the Trial Panel's assessment of the testimony of the following witnesses: Mr Selatin Krasniqi (Grounds 2E, 2G, 2I, 2M), Mr Ajeti (Grounds 2E, 2G, 2I, 2M), Ms Hadri (Grounds 2E, 2G, 2I, 2M), Ms Canolli-Kaciu (Grounds 2E, 2G, 2I, 2M), Mr Humolli (Grounds 2A, 2E, 2G, 2N), Mr Mehmetaj (Grounds 2I, 2M), Mr Ademi (Ground 2M), Mr Ismaili (Ground 2M), Mr Borovci (Grounds 2J, 2M), Mr Gani Sopi (Grounds 2J, 2M), Mr Nreci (Ground 2M), Mr Vrbovci (Ground 2M), Mr Parduzi (Ground 2M), Mr Ibishi (Grounds 2I, 2M), Mr Rrahimi (Ground 2M), Mr Halimi (Ground 2M). The Panel notes that Mustafa, in his Appeal Brief, also challenges the Trial Panel's assessment of the testimony of SPO witnesses Mr Fatmir Sopi (Grounds 2A, 2E, 2I) and Mr Veseli (Grounds 2A, 2E, 2I), but fails to develop or substantiate any arguments in that respect. Moreover, Mustafa only presented brief arguments with regard to the assessment of Mr Fatmir Sopi's and Mr Veseli's testimony for the first time at the Appeal Hearing. In these circumstances, the Appeals Panel will not address Mustafa's specific challenges to the evidence of Mr Fatmir Sopi nor Mr Veseli individually, but will refer to the Trial Panel's approach to the assessment of their evidence more generally when addressing Mustafa's challenges below. See Appeal Brief, paras 83(g), 144, 180; Transcript, 26 October 2023, pp. 18-20, 43.

⁶⁵⁷ See, in particular, Trial Judgment, paras 115-117, 122 (Mr Fatmir Sopi), 125-126, 130 (Mr Veseli), 195 (Mr Halimi), 207 (Mr Selatin Krasniqi), 217 (Ms Hadri). The Trial Panel also found that some Defence witnesses provided a "more complete and possibly accurate description" of the ZDC. See Trial Judgment, para. 369.

for the Accused;⁶⁵⁸ (ii) contradicted themselves when testifying about the relevant events;⁶⁵⁹ (iii) provided testimony contradictory to or inconsistent with other evidence;⁶⁶⁰ or (iv) changed fundamental aspects of their testimony in such a striking, similar manner that it indicated a collusion between witnesses.⁶⁶¹

265. Second, the Panel observes that the Trial Panel also considered other factors that, according to Mustafa, were “unrelated to the events” and therefore irrelevant.⁶⁶² In particular, the Trial Panel found, in its assessment of the witnesses, that the following factors were established: (i) close ties to the KLA and/or the Accused and support displayed on social media;⁶⁶³ (ii) bias expressed against the Specialist Chambers or the SPO;⁶⁶⁴ (iii) indications that witnesses have colluded with each other or with the Accused;⁶⁶⁵ (iv) the fact that a witness followed the proceedings and/or the testimony of other witnesses;⁶⁶⁶ (v) memory lapses;⁶⁶⁷ or (vi) limited basis of

⁶⁵⁸ See, in particular, Trial Judgment, paras 118-121 (noting that “[Fatmir] Sopi was confrontational and evasive when answering questions about his possible knowledge of the detention and/or mistreatment of persons in Zllash/Zlaš”), 127, 129 (Mr Veseli), 133 (Mr Humolli), 141 (Mr Mehmetaj), 148 (Mr Ademi), 154 (Mr Borovci), 160-162 (Mr Gani Sopi), 168-169 (Mr Nreci), 198-199 (Mr Halimi), 202-203, 206 (Mr Selatin Krasniqi), 212 (Mr Ajeti). See also Trial Judgment, paras 375-376.

⁶⁵⁹ See, in particular, Trial Judgment, paras 120 (Mr Fatmir Sopi), 128 (Mr Veseli), 133 (Mr Humolli), 147 (Mr Ademi), 154 (Mr Borovci), 192 (Mr Rrahimi), 196, 198 (Mr Halimi), 202-203 (Mr Selatin Krasniqi).

⁶⁶⁰ See, in particular, Trial Judgment, paras 119 (Mr Fatmir Sopi), 128 (Mr Veseli), 133 (Mr Humolli), 141 (Mr Mehmetaj), 147 (Mr Ademi), 161-162 (Mr Gani Sopi).

⁶⁶¹ See, in particular, Trial Judgment, paras 156-157 (Mr Borovci), 164 (Mr Gani Sopi). See also Trial Judgment, paras 279-281, 287.

⁶⁶² Notice of Appeal, Ground 2M, para. 5. See also Notice of Appeal, Ground 2G, para. 5; Appeal Brief, paras 161, 163, 235, 246, 248, 259, 295.

⁶⁶³ Trial Judgment, paras 135-136 (Mr Humolli), 142-144 (Mr Mehmetaj), 147 (Mr Ademi), 151 (Mr Ismaili), 155-158 (Mr Borovci), 163, 165 (Mr Gani Sopi), 169 (Mr Nreci), 178 (Mr Parduzi), 204, 206 (Mr Selatin Krasniqi), 210-211, 213 (Mr Ajeti), 220-223 (Ms Canolli-Kaciu).

⁶⁶⁴ Trial Judgment, paras 134 (Mr Humolli), 143 (Mr Mehmetaj), 179, 181 (Mr Parduzi), 186-188 (Mr Ibishi).

⁶⁶⁵ Trial Judgment, paras 143-144 (Mr Mehmetaj), 156-158 (Mr Borovci), 164-165 (Mr Gani Sopi), 170 (Mr Nreci), 173-175 (Mr Vrbovci). See also Trial Judgment, paras 281, 286.

⁶⁶⁶ Trial Judgment, paras 141 (Mr Mehmetaj), 169 (Mr Nreci), 175 (Mr Vrbovci), 180 (Mr Parduzi), 187 (Mr Ibishi).

⁶⁶⁷ Trial Judgment, paras 152 (Mr Ismaili), 166 (Mr Gani Sopi), 171 (Mr Nreci), 176 (Mr Vrbovci). See also Trial Judgment, paras 264, 267, 275-276, 284.

knowledge to testify about the events relevant to the charges.⁶⁶⁸ The Panel notes that Mustafa does not substantiate his general assertion that such factors are irrelevant and, moreover, fails to acknowledge that the factors set out by the Trial Panel find support in jurisprudence.⁶⁶⁹

266. The Appeals Panel recalls its prior finding that the Trial Panel correctly articulated its approach to assessing evidence in this case, in particular with respect to evaluating the credibility of witnesses and the reliability of their testimony before relying on their evidence.⁶⁷⁰ In the Appeals Panel's view, the Trial Panel provided appropriate and extensive reasoning for approaching certain witness testimony with caution.⁶⁷¹ It did not assess the credibility of these witnesses piecemeal but, having heard all of the evidence, it accepted certain portions of their testimony, for example, regarding the Accused's role and his authority over the BIA, but found not credible some accounts by the same witnesses, such as those denying any detention or mistreatment in Zllash/Zlaš.⁶⁷² By contrast, the Panel considers that Mustafa's suggested approach of assessing a witness's testimony in isolation, without

⁶⁶⁸ Trial Judgment, paras 197 (Mr Halimi), 216 (Ms Hadri), 219 (Ms Canolli-Kaciu).

⁶⁶⁹ See Trial Judgment, para. 35 and references cited therein.

⁶⁷⁰ See above, para. 233.

⁶⁷¹ See, in particular, Trial Judgment, paras 133-137 (Mr Humolli), 140-144 (Mr Mehmetaj), 146-148 (Mr Ademi), 151-152 (Mr Ismaili), 154-158 (Mr Borovci), 160-166 (Mr Gani Sopi), 168-171 (Mr Nreci), 173-176 (Mr Vrbovci), 178-181 (Mr Parduži), 185-188 (Mr Ibishi), 196-200 (Mr Halimi), 202-207 (Mr Selatin Krasniqi), 209-213 (Mr Ajeti), 219-223 (Ms Canolli-Kaciu). See also Trial Judgment, paras 118-122 (Mr Fatmir Sopi), 127-130 (Mr Veseli), 192-193 (Mr Rrahimi).

⁶⁷² See e.g. Trial Judgment, paras 115-122 (Mr Fatmir Sopi), 125-130 (Mr Veseli), wherein the Trial Panel found generally credible Mr Fatmir Sopi's and Mr Veseli's accounts on the structures and operations of the KLA in the Zllash/Zlaš area and the Accused's role, his authority over the BIA and his presence in Zllash/Zlaš during the relevant time, but found not credible their testimony on the detention and mistreatment of detainees in Zllash/Zlaš. See also Trial Judgment, paras 195-200 (Mr Halimi), wherein the Trial Panel found credible evidence provided by Mr Halimi on the activities and routine of the training at the school in Zllash/Zlaš, while finding that other parts of his testimony affected his credibility; Trial Judgment, paras 77-83 (W03594), wherein the Trial Panel found credible W03594's account of his apprehension by the KLA, his detention at the ZDC, the presence of other detainees at the ZDC, and the circumstances of his release, but did not find credible his testimony about his treatment and that of other detainees in detention. See also below, paras 271-296.

consideration of any other factors, such as personal circumstances or coherence with other evidence,⁶⁷³ is groundless.⁶⁷⁴

267. Mustafa argues that “[t]he only determining factor for someone’s credibility is whether [the] witness is telling the truth” and that the Trial Panel should have factually established that a witness did not testify truthfully before rejecting his or her testimony.⁶⁷⁵ The Appeals Panel considers that, although statements made by witnesses in court are presumed to be credible, and that the fact that witnesses give evidence under oath and can be cross-examined is an indicator of reliability, the Trial Panel retains full discretionary power over the appropriate weight and credibility to be accorded to the testimony of a witness.⁶⁷⁶ The Panel notes in this regard that a credibility determination does not necessarily depend on a judicial finding that a witness gave false testimony.⁶⁷⁷

268. The Panel observes that, before giving evidence, the witnesses took an oath and were warned about the consequences of not testifying truthfully, and that Mustafa fails to support his argument that witnesses should have additionally been “cautioned or otherwise warned” that their testimony could be considered untruthful.⁶⁷⁸

⁶⁷³ Mustafa suggests that the Trial Panel should have only considered the substance of the witnesses’ evidence without considering, for example, personal circumstances. See e.g. Appeal Brief, paras 161, 166-167, 172-173.

⁶⁷⁴ The Appeals Panel notes that Mustafa’s approach has no basis in the Specialist Chambers’ legal framework and practice, nor in international jurisprudence. See in particular Rule 139(2), (6) of the Rules; *Gucati and Haradinaj* Trial Judgment, para. 44; *Popović et al.* Appeal Judgement, paras 132, 137, 1228; *Prlić et al.* Appeal Judgement, paras 200-201; *Kanyarukiga* Appeal Judgement, paras 121, 136; *Ongwen* Trial Judgment, paras 227, 239, 260.

⁶⁷⁵ See Appeal Brief, paras 222, 246, 248, 252, 260, 285.

⁶⁷⁶ *Ntagerura et al.* Appeal Judgement, para. 388; *Nahimana et al.* Appeal Judgement, para. 194. See also above, para. 38.

⁶⁷⁷ *Bikindi* Appeal Judgement, para. 115; *Simba* Appeal Judgement, para. 31.

⁶⁷⁸ Appeal Brief, paras 223, 231, 277. In any event, the Panel notes that several witnesses had been reminded by the Trial Panel, during their testimony, to tell the truth. See for example, Transcript (Brahim Mehmetaj), 23 March 2022, pp. 2682-2683; Transcript (Sheqir Rrahimi), 13 April 2022, pp. 3697-3699.

269. Moreover, the Panel is not convinced by Mustafa's unsupported arguments that the Trial Panel and the SPO should have confronted certain Defence witnesses with the testimonies of victims that contradict their evidence⁶⁷⁹ or questioned them about factors impacting their credibility.⁶⁸⁰ The Panel recalls that while the Rules vest a trial panel with the authority and discretion to question witnesses or call evidence regarding facts and issues not explored by the parties, it does not have an obligation to do so.⁶⁸¹ Moreover, the Panel observes that the SPO extensively questioned Defence witnesses on matters affecting their credibility,⁶⁸² and confronted them with the portion of its case which conflicted with their evidence.⁶⁸³ In light of the above, the Panel finds that the Trial Panel did not have an obligation to confront the witnesses with any discrepancies or contradictions in their evidence or with factors affecting their credibility.⁶⁸⁴ Accordingly, the Panel dismisses Mustafa's unsubstantiated arguments in this regard.

270. In light of Mustafa's specific arguments,⁶⁸⁵ the Panel will now analyse the Trial Panel's credibility assessment of: (i) witnesses who testified about the ZDC and claimed that no one was detained there ("refutation evidence", in Mustafa's

⁶⁷⁹ Appeal Brief, para. 223 (concerning Mr. Mehmetaj's testimony).

⁶⁸⁰ Appeal Brief, paras 228, 252, 260, 277 (concerning Mr Ismaili's, Mr Parduzi's, Mr Ibishi's and Mr Halimi's testimony).

⁶⁸¹ *Thaçi et al.* Appeal Decision on Judicial Questioning, para. 34.

⁶⁸² See, in particular, Transcript (Jakup Ismaili), 29 March 2022, pp. 2923-2925, 2929-2930; Transcript (Kapllan Parduzi), 11 April 2022, pp. 3499-3500, 3503-3506; Transcript (Nuredin Ibishi), 12 April 2022, pp. 3634-3637, 3640-3645; Transcript (Musli Halimi), 20 April 2022, pp. 3815-3821.

⁶⁸³ See, in particular, Transcript (Brahim Mehmetaj), 23 March 2022, pp. 2679-2681, 2688-2689. See also Rule 143(3) of the Rules.

⁶⁸⁴ *Contra* Appeal Brief, paras 223, 228, 252, 260, 277.

⁶⁸⁵ The Panel notes that Mustafa challenges the Trial Panel's assessment of the testimony of the 15 Defence witnesses and one SPO witness (Mr Humolli) who was originally proposed as a witness by the Defence. See Trial Judgment, para. 131. The concerned witnesses are as follows: Mr Selatin Krasniqi (Grounds 2E, 2G, 2I, 2M), Mr Ajeti (Grounds 2E, 2G, 2I, 2M), Ms Hadri (Grounds 2E, 2G, 2I, 2M), Ms Canolli-Kaciu (Grounds 2E, 2G, 2I, 2M); Mr Humolli (Grounds 2A, 2E, 2G, 2N), Mr Mehmetaj (Grounds 2I, 2M); Mr Ademi (Ground 2M), Mr Ismaili (Ground 2M), Mr Borovci (Grounds 2J, 2M), Mr Gani Sopi (Grounds 2J, 2M), Mr Nreci (Ground 2M), Mr Vrbovc (Ground 2M), Mr Parduzi (Ground 2M), Mr Ibishi (Grounds 2I, 2M), Mr Rrahimi (Ground 2M), Mr Halimi (Ground 2M).

submission),⁶⁸⁶ (ii) witnesses who provided evidence on the Accused's alibi claim;⁶⁸⁷ and (iii) Defence witness, Mr Halimi, who provided evidence with regard to the charge of arbitrary detention.⁶⁸⁸

- b. Alleged Errors Regarding the Trial Panel's Assessment of Witnesses Who Testified About the ZDC (Grounds 2A in part, 2E in part, 2G in part, 2H in part, 2I in part, 2M in part, 2N in part)

271. With respect to Mr Selatin Krasniqi, the Panel finds unpersuasive Mustafa's argument that the Trial Panel misrepresented his evidence.⁶⁸⁹ The Panel notes that, while it is true that Mr Selatin Krasniqi was not specifically asked "who was in charge of the BIA Base",⁶⁹⁰ this was the essence of the questions put to him.⁶⁹¹ Moreover, the Panel notes that, during his testimony, Mr Selatin Krasniqi was reluctant to admit that Mustafa had been in Zllash/Zlaš and had authority over the BIA members in Zllash/Zlaš.⁶⁹²

272. Furthermore, the Panel observes that Mustafa merely disagrees with the Trial Panel's assessment and its finding that Mr Selatin Krasniqi's credibility was affected by the "stance taken by the witness" regarding the use of his family compound as a detention centre and "his strong bond with the Accused".⁶⁹³ However, the Appeals Panel considers that the Trial Panel's conclusion is supported by several factual

⁶⁸⁶ Mr Selatin Krasniqi, Mr Ajeti, Ms Hadri, Ms Canolli-Kaciu, Mr Humolli. As noted above, Mustafa also mentions Mr Fatmir Sopi (Grounds 2A, 2E, 2I) and Mr Veseli (Grounds 2A, 2E, 2I), but does not develop any arguments in relation to these witnesses. The Appeals Panel will not address Mr Fatmir Sopi and Mr Veseli individually. See above, fn. 656.

⁶⁸⁷ Namely Mr Mehmetaj, Mr Ademi, Mr Ismaili, Mr Nreci, Mr Vrbovci, Mr Parduzi, Mr Ibishi, Mr Rrahimi, Mr Borovci and Mr Gani Sopi.

⁶⁸⁸ The Panel notes that for each witness, Mustafa only challenges one, or at times a few, of the relevant factors considered by the Trial Panel in its assessment of the witnesses' evidence, while ignoring other factors that the Trial Panel also considered. See below, paras 271-296.

⁶⁸⁹ Trial Judgment, paras 202-203. Contra Appeal Brief, paras 158-160.

⁶⁹⁰ Appeal Brief, paras 158-160.

⁶⁹¹ See Transcript (Selatin Krasniqi), 21 April 2022, pp. 3912-3913, 3988, 3994-3995.

⁶⁹² See e.g. Transcript (Selatin Krasniqi), 21 April 2022, pp. 3995-3997.

⁶⁹³ Trial Judgment, para. 206. See Appeal Brief, paras 161, 278.

findings.⁶⁹⁴ Contrary to Mustafa's contention, the Trial Panel did not disregard Mr Selatin Krasniqi's testimony; rather, it noted his "detailed evidence" but, because his credibility was "severely affected", the Trial Panel considered it with caution and "on very discrete topics only".⁶⁹⁵ The Panel finds that such a finding is in line with the Trial Panel's discretion to accept some aspects of a witness's testimony, while rejecting others.⁶⁹⁶

273. With respect to Mr Ajeti, the Panel again notes that Mustafa merely disagrees with the Trial Panel's credibility assessment of this witness.⁶⁹⁷ Contrary to Mustafa's contention, the factors considered by the Trial Panel, including the "extremely close ties" between the witness and the Accused, the extensive exchange of messages between the two of them, and the witness's reluctance to respond to questions related to high-ranking members of the BIA unit, are relevant to the assessment of his credibility.⁶⁹⁸ Accordingly, the Panel dismisses Mustafa's arguments in this regard.

274. With respect to Ms Hadri and Ms Canolli-Kaciu, the Panel finds unpersuasive Mustafa's argument that the Trial Panel misinterpreted their evidence when finding that they possessed limited knowledge of the relevant events that occurred in Zllash/Zlaš.⁶⁹⁹ In fact, the Panel notes that both witnesses stated that they had a lot of work to do and had no time to go outside and visit other buildings.⁷⁰⁰ As to the

⁶⁹⁴ The Appeals Panel notes that the Trial Panel took into account the "contradictory, evasive and implausible responses" given by the witness to the SPO, showing a "very strong reticence by the witness to provide any meaningful information concerning the BIA and even to associate himself with that unit" and his "strong emotional bond" with the Accused. See Trial Judgment, paras 202, 204, 206.

⁶⁹⁵ Trial Judgment, para. 207.

⁶⁹⁶ Rule 139(6) of the Rules. See below, para. 307.

⁶⁹⁷ Appeal Brief, paras 283-286; Transcript, 26 October 2023, pp. 43-44.

⁶⁹⁸ Trial Judgment, paras 209-213. Contra Appeal Brief, paras 165-167, 283-286.

⁶⁹⁹ Appeal Brief, paras 168-172, 289, 291-292, 297. See Trial Judgment, paras 216, 219.

⁷⁰⁰ Transcript (Teuta Hadri), 11 May 2022, pp. 4235-4236; Transcript (Ibadete Canolli-Kaciu), 12 May 2022, pp. 4325-4326, 4378-4379, 4381. The Panel further finds that Mustafa's argument that Ms Hadri "was working there during the period of the Indictment up to the moment when the alleged detainees were released" is misleading, as Ms Hadri stated in court that she only stayed in Zllash/Zlaš "three nights and four days, which includes the last day when [they] were evacuated together with the

assessment of Ms Canolli-Kaciu's credibility, the Panel observes that Mustafa's arguments regarding her Facebook activities misrepresent the Trial Panel's findings and ignore the witness's statements in court.⁷⁰¹ The Panel therefore dismisses Mustafa's arguments in this regard.

275. With respect to SPO witness Mr Humolli, the Panel notes that Mustafa does not substantiate his general assertion that the Trial Panel erred in finding Mr Humolli not credible or in rejecting his testimony on irrelevant grounds.⁷⁰² In the Appeals Panel's view, the Trial Panel correctly considered Mr Humolli's expressed bias towards the Specialist Chambers, his personal support for and close personal ties with the Accused,⁷⁰³ in addition to the contradictions and discrepancies in his evidence,⁷⁰⁴ to find that these factors greatly affected the witness's credibility.⁷⁰⁵ Therefore, the Appeals Panel considers that the Trial Panel, having heard the testimony of all witnesses, including victims testifying regarding their detention conditions in Zllash/Zlaš, and having assessed the evidence as a whole, did not err in finding unpersuasive Mr Humolli's account that the BIA did not have the authority to arrest or detain anyone.⁷⁰⁶ The Appeals Panel thus dismisses Mustafa's arguments in this regard.

276. With respect to the assessment of Mustafa's own evidence in the Suspect Statement, the Appeals Panel first notes that Mustafa does not challenge the Trial

wounded from the Zllash area to another area". See Transcript (Teuta Hadri), 11 May 2022, pp. 4212, 4234-4235.

⁷⁰¹ The Panel notes that, contrary to Mustafa's claim, the Trial Panel did not merely consider Ms Canolli-Kaciu's use of an "icon" or a "like" on Facebook, as a demonstration of support for the Accused, but considered her explanation in court that she wanted to express moral support for the Accused. See Trial Judgment, para. 222, referring to Transcript (Ibadete Canolli-Kaciu), 12 May 2022, pp. 4383-4385. Contra Appeal Brief, paras 172, 295.

⁷⁰² Appeal Brief, paras 173-176. See also Appeal Brief, para. 163; Transcript, 26 October 2023, pp. 20-21, 44.

⁷⁰³ Trial Judgment, paras 134-135.

⁷⁰⁴ Trial Judgment, para. 133.

⁷⁰⁵ Trial Judgment, para. 136.

⁷⁰⁶ Trial Judgment, paras 375-376. Contra Appeal Brief, paras 302-303.

Panel's reliance on the Suspect Statement but merely takes issue with its interpretation of the evidence he provided therein.⁷⁰⁷ According to the Panel, the Trial Panel did not err in its assessment of the evidence provided by the Accused in finding that "the Accused himself conceded that soldiers were detained at the BIA base" and that the Accused had admitted that "there were rumours that civilians were being detained".⁷⁰⁸ The Panel further finds unpersuasive Mustafa's argument that, as he was only briefly present at the ZDC during the relevant period, Defence witnesses were in a better position than the Accused to testify about the presence of detainees.⁷⁰⁹ In this respect, the Appeals Panel recalls that it found no error in the Trial Panel's conclusions regarding the credibility of Defence witnesses⁷¹⁰ or its rejection of Mustafa's alibi claim.⁷¹¹ Third, the Panel finds that the Trial Panel's assessment of the Suspect Statement was not unreasonable, based on the evidence as a whole, and in particular considering Mustafa's role as the BIA commander.⁷¹² Accordingly, the Panel dismisses Mustafa's argument regarding the Trial Panel's interpretation of his evidence in the Suspect Statement.

277. The Panel now turns to Mustafa's argument that the Trial Panel erred in giving more weight to the evidence of three victims,⁷¹³ who according to him provided

⁷⁰⁷ Appeal Brief, paras 182-184, 187. The Panel notes that Mustafa challenges the Trial Panel's reliance on the Suspect Statement under Grounds 1B and 2B. These challenges, which rest on different arguments, are addressed under those Grounds. See above, paras 83, 190.

⁷⁰⁸ Trial Judgment, para. 374, referring to P00117 (Salih Mustafa) (confidential), pp. 2-8, 15, 18; P00118 (Salih Mustafa) (confidential), pp. 1-4, 6. See also Trial Judgment, paras 119, 141, 376, 654. The Panel also notes that, when asked whether he "actually witness[ed] people, soldiers being detained at this location", Mustafa clearly responded in the affirmative. See P00117 (Salih Mustafa) (confidential), p. 6. Contra Appeal Brief, para. 187.

⁷⁰⁹ Appeal Brief, para. 187.

⁷¹⁰ See above, paras 271-275. See also Trial Judgment, paras 136-137, 207, 213, 223. With respect to Ms Hadri, the Trial Panel considered her generally credible but found that she lacked a proper basis of personal knowledge for her evidence to be reliably used. See Trial Judgment, paras 216-217.

⁷¹¹ See below, paras 315-324. See also Trial Judgment, para. 333.

⁷¹² See Trial Judgment, paras 374, 376.

⁷¹³ While Mustafa fails to identify in the Appeal Brief the "three victims" whose evidence he challenges against the "refutation evidence" provided by other witnesses, the Panel understands the victims to be W01679, W03593 and W04669.

limited information about the location of their detention, rather than to the evidence of the other witnesses present at the ZDC, who provided “refutation evidence”.⁷¹⁴ The Panel notes that Mustafa merely disagrees with the Trial Panel’s relevant findings without articulating any error in the Trial Panel’s exercise of its discretion over the appropriate credibility and weight to be accorded to witness testimony.⁷¹⁵ The Panel recalls its finding above that Mustafa fails to show that no reasonable trier of fact could have accepted the evidence of W01679, W03593 and W04669 identifying the detention location.⁷¹⁶ Moreover, the Panel finds that the Trial Panel provided sufficient reasoning as to why it afforded more weight to the testimony of W01679, W03593 and W04669 compared to that of the witnesses who gave “refutation evidence” with regard to the presence of detainees at the ZDC.⁷¹⁷ The Panel, therefore, dismisses Mustafa’s arguments in this regard.

278. In light of the above, the Appeals Panel dismisses Mustafa’s arguments under Grounds 2A in part, 2E in part, 2G in part, 2H in part, 2I in part, 2M in part, and 2N in part, that the Trial Panel erred in dismissing the testimony of witnesses who were present at the ZDC and provided “refutation evidence”.

⁷¹⁴ Appeal Brief, paras 181, 189, 220. The concerned witnesses are Mr Selatin Krasniqi, Mr Ajeti, Ms Hadri, Ms Canolli-Kaciu, Mr Humolli as well as Mr Fatmir Sopi and Mr Veseli. See above, fn. 656.

⁷¹⁵ See above, paras 24, 36, 38.

⁷¹⁶ See above, para. 212. See also below, paras 406-408.

⁷¹⁷ In particular, the Trial Panel explained that the “refutation evidence” provided by these witnesses was unpersuasive as they were found by the Trial Panel to show a strong inclination to provide evidence favourable to the Accused, to the BIA or to the KLA. The Trial Panel also found that this “refutation” is in plain contradiction with the Accused’s own evidence on the detention of soldiers, and possibly civilians, at the ZDC, which is corroborated by a Defence witness, Mr Mehmetaj, as well as by the evidence of the victims who provided credible accounts regarding their own detention circumstances. See, in particular, Trial Judgment, paras 374-376. Moreover, as noted by the Trial Panel, even one Defence witness, Mr Mehmetaj, had heard of the existence of a room located in the BIA base, in Zllash/Zlaš, where people were held. See Trial Judgment, para. 374, referring to Transcript (Brahim Mehmetaj), 23 March 2022, pp. 2683-2684.

- c. Alleged Errors Regarding the Trial Panel's Assessment of Witnesses Who Provided Evidence on the Accused's Alibi Claim (Grounds 2J in part, 2M in part)

279. With respect to Mr Mehmetaj, the Appeals Panel notes that Mustafa does not substantiate his claim that the Trial Panel considered irrelevant factors in its assessment of his evidence.⁷¹⁸ The Panel notes that the only factor that Mustafa challenges specifically is the witness's reluctance to answer questions regarding the KLA's actions against alleged collaborators and its detention practices.⁷¹⁹ In light of other factors considered by the Trial Panel, in particular his close relationship with the Accused, the Panel finds that, even if this challenge were successful, it would have no impact on the Trial Panel's conclusion that Mr Mehmetaj's credibility was greatly affected and that his evidence should be considered with extreme caution.⁷²⁰ The Panel therefore dismisses Mustafa's arguments in this regard.

280. With respect to Mr Ademi, the Panel notes that Mustafa challenges the Trial Panel's finding that Mr Ademi knew Mr Mehmetaj based on social media activities,⁷²¹ but leaves aside the other relevant factors considered by the Trial Panel in assessing the witness's evidence.⁷²² The Panel finds that Mustafa fails to demonstrate how a different conclusion regarding this relationship would have any impact on the Trial

⁷¹⁸ Appeal Brief, paras 220-223. The factors considered by the Trial Panel include Mr Mehmetaj's close relationship with the Accused, his activities on social media, and his interaction with the Accused before and after Mr Mehmetaj's interview with the SPO. See Trial Judgment, paras 140-144.

⁷¹⁹ Appeal Brief, paras 224-226.

⁷²⁰ Trial Judgment, para. 144. The Panel notes, in particular, that the Trial Panel's conclusion on a "possible coordination" between them and an inclination by Mr Mehmetaj to provide evidence generally favourable to the Accused and unfavourable to the SPO is based on the "strong and deep ties between Mr Mehmetaj and the Accused", the "close interaction that Mr Mehmetaj and the Accused had before and after Mr Mehmetaj's SPO interview", and the "strong expressions of disbelief that Mr Mehmetaj showed on social media against the judicial processes before the Specialist Chambers".

⁷²¹ Appeal Brief, para. 227.

⁷²² These factors include the witness's reticence to answer questions related to the KLA, his activity on social media in support of the Accused, and other discrepancies in his testimony. See Trial Judgment, paras 146-148.

Panel's finding that Mr Ademi's evidence should have been considered with caution.⁷²³ The Panel therefore dismisses Mustafa's arguments in this regard.

281. With respect to Mr Ismaili, the Panel notes that, in challenging the Trial Panel's assessment of the witness's credibility, Mustafa refers to only one aspect of the assessment which was not based solely on contacts between the witness and the Accused.⁷²⁴ The Panel further notes that Mustafa also fails to mention that the witness had "systematic difficulties" in remembering dates, which the Trial Panel considered in its finding on the reliability of his evidence regarding the Accused's alibi claim.⁷²⁵ On this basis, the Panel finds that Mustafa fails to show any error in the Trial Panel's assessment of Mr Ismaili and dismisses his arguments.

282. With respect to Mr Nreci, the Panel finds that Mustafa fails to support his assertion that the factors considered by the Trial Panel are irrelevant, and therefore finds that he merely disagrees with the Trial Panel's assessment of the witness's credibility.⁷²⁶ Moreover, Mustafa ignores the witness's contradictions during his

⁷²³ Trial Judgment, para. 148. The Appeals Panel notes, in particular, that the Trial Panel's conclusion that Mr Ademi seems to have had an "inclination to provide evidence generally favourable to the Accused and unfavourable to the SPO" is based on his "reticence [...] to respond to questions related to the KLA and the BIA", together with his "active support shown to Mr Mehmetaj and the Accused", not the mere fact that he knew Mr Mehmetaj.

⁷²⁴ The Panel observes that Mustafa misreads the Trial Judgment when asserting that it is because the witness had "contact by telephone" with the Accused that the Trial Panel concluded that Mr Ismaili was inclined to provide (only) evidence generally favourable to the Accused and unfavourable to the SPO. In fact, the Trial Panel came to that conclusion after noting the "staggering amount of interaction between the two in the pre- and post-arrest period of the Accused", the "strong ties" between the two, and the "expressed [...] discontent regarding the charges against the Accused". See Trial Judgment, para. 151. Contra Appeal Brief, para. 228.

⁷²⁵ Trial Judgment, para. 152.

⁷²⁶ Appeal Brief, paras 243-246. The factors considered by the Trial Panel include the witness's reticence to associate himself with the BIA and to answer related questions, his social media posts in support of the Accused, his subordinate-superior relationship with the Accused, and his knowledge of other witnesses' testimony. See Trial Judgment, paras 168-170. Mustafa's argument on the mischaracterisation of the BIA has been summarily dismissed. See above, para. 226.

testimony, and the witness's admission that he "cannot give an exact date",⁷²⁷ which affected the reliability of his testimony on the alibi claim. Therefore, the Panel dismisses Mustafa's arguments in this regard.

283. With respect to Mr Vrbovci, the Panel finds that Mustafa merely disagrees with the Trial Panel's conclusion that the change in his evidence, following the testimony of Mr Nreci and other witnesses, indicates that the witness did not give his statement independently, but colluded with others.⁷²⁸ Accordingly, the Panel dismisses Mustafa's arguments in this regard.

284. With respect to Mr Parduži, the Panel notes that Mustafa fails to explain why the factors considered by the Trial Panel in its credibility assessment are irrelevant or inaccurate,⁷²⁹ and that he ignores the witness's "general hostility and reticence" when responding to the SPO's questions.⁷³⁰ Moreover, with respect to the Trial Panel's findings that the witness's reliability is severely undermined,⁷³¹ the Panel notes that Mustafa does not discuss many of the factors the Trial Panel, in fact, considered, such as his medical condition, the medications he took, and the poor weather conditions

⁷²⁷ Trial Judgment, para. 294. See also Trial Judgment, para. 171. *Compare* Transcript (Bislim Nreci), 5 April 2022, p. 3218, D00006 (confidential), p. 6 *with* Transcript (Bislim Nreci), 5 April 2022, pp. 3236-3237.

⁷²⁸ Appeal Brief, paras 247-248. See Trial Judgment, paras 174-175. In particular, the Panel finds unpersuasive Mustafa's suggestion that, by consulting with some former fellow KLA members, including another Defence witness, Mr Nreci, on the date of his alleged meetings with the Accused, Mr Vrbovci simply sought to "refresh his memory".

⁷²⁹ The Panel notes that Mustafa only enumerates the factors considered by the Panel, without developing any arguments. See Appeal Brief, paras 250-252. The factors which, according to the Trial Panel, greatly affect Mr Parduži's credibility include his "profound bias against the Specialist Chambers and the SPO", his "statement of support for the Accused", his "reluctance to respond to the SPO questions" and his "general knowledge of the content of other testimonies as he was following the proceedings and discussing these testimonies with his wife". See Trial Judgment, para. 181. See also Trial Judgment, paras 178-180.

⁷³⁰ Trial Judgment, para. 179. See also Transcript (Kapllan Parduži), 11 April 2022, p. 3506, where Mr Parduži stated: "there is no basis and there are no facts, and we think this is all lies of fake witnesses and of the Serbian prosecutor's office, because you have also gave them commendations. To the people who have killed us, you have cooperated with them, and you have given them high praise".

⁷³¹ Trial Judgment, para. 182.

during the relevant period of time.⁷³² The only factor which Mustafa takes issue with is Mr Parduži's vague recollection of the event.⁷³³ However, the Panel considers that, given that the Defence called Mr Parduži to testify about a possible *alibi*, Mustafa cannot reasonably argue that the time and location at which the witness allegedly saw the Accused are not relevant to the reliability of his testimony.⁷³⁴ Furthermore, the Appeals Panel finds that Mustafa merely disagrees with the Trial Panel's finding that Mr Parduži's evidence about his encounter with the Accused in late April or early May 1999 is irrelevant.⁷³⁵ Therefore, the Panel dismisses Mustafa's arguments.

285. With respect to Mr Ibishi, the Panel observes that Mustafa merely repeats the same generic arguments that he raised concerning the Trial Panel's assessment of Mr Parduži's testimony, without substantiating any of them,⁷³⁶ and finds that he fails to identify any error in the Trial Panel's assessment of Mr Ibishi's testimony.⁷³⁷ Accordingly, the Panel dismisses these arguments.⁷³⁸

286. With respect to Mr Rrahimi, the Panel notes the Trial Panel's finding that his evidence "is so unclear that it is essentially impossible to extract meaningful information from it".⁷³⁹ Moreover, the Panel finds that Mustafa does not identify an error in the Trial Panel's finding that "the time span when Mr Rrahimi would have

⁷³² Mustafa only enumerates the factors considered by the Panel without developing any arguments. See Appeal Brief, para. 253.

⁷³³ Appeal Brief, paras 253-256.

⁷³⁴ See Trial Judgment, para. 182. Contra Appeal Brief, para. 253.

⁷³⁵ See Appeal Brief, para. 257; Trial Judgment, para. 183.

⁷³⁶ Compare Appeal Brief, para. 260 with Appeal Brief, para. 252. See also Appeal Brief, paras 258-259, 261-262. The Panel also notes that Mustafa argues that the Trial Panel "randomly uses or leaves out elements that support the Alibi of Mr. Mustafa", but fails to cite which of the Trial Panel's findings he actually challenges.

⁷³⁷ Trial Judgment, paras 185-189.

⁷³⁸ See above, para. 284. See also above, paras 29-30.

⁷³⁹ Trial Judgment, para. 193. The Appeals Panel notes that the SPO and the Trial Panel questioned Mr Rrahimi about the circumstances in which (i) he heard a person calling another "Cali"; and (ii) he had contact with the Accused and why he indicated during examination in chief that he did not have any contact with him. In both instances, the Panel observes that Mr Rrahimi responded in an evasive and confusing way, denying his own previous in-court statements. See Transcript (Sheqir Rrahimi), 13 April 2022, pp. 3686-3707.

allegedly seen the Accused and the surrounding conditions of the medical convoy are such that they render the account given by the witness wholly unreliable".⁷⁴⁰ Therefore, the Panel dismisses Mustafa's arguments in this regard.

287. With respect to Mr Borovci, the Panel finds that Mustafa merely disagrees with the Trial Panel's findings on the witness's superior-subordinate relationship with Mr Mehmetaj and his social media posts, but does not challenge other factors which the Trial Panel considered and found to more significantly affect the witness's credibility.⁷⁴¹ The Panel therefore dismisses Mustafa's arguments.⁷⁴²

288. With respect to Mr Gani Sopi, the Panel finds that Mustafa does not identify any error in the Trial Panel's credibility assessment.⁷⁴³

289. The Appeals Panel will now address Mustafa's argument that the Trial Panel erred in finding that Mr Borovci and Mr Gani Sopi may have colluded in their testimony regarding their departure date from Prishtina/Priština to Butovac, which is relevant to Mustafa's alibi claim.⁷⁴⁴ The Panel notes that, in making such a finding, the Trial Panel considered several factors, including that: (i) Mr Borovci and Mr Gani Sopi

⁷⁴⁰ Trial Judgment, para. 193. Contra Appeal Brief, para. 270. The Panel notes that Mustafa, despite recalling the Trial Panel's findings, does not demonstrate any error in its finding that the witness's first-hand account is of "limited importance from the perspective of providing an alibi defence to the Accused". See Trial Judgment, para. 192. Contra Appeal Brief, para. 265.

⁷⁴¹ Appeal Brief, paras 232-234. The other factors considered by the Trial Panel include his reluctance to speak about the BIA and his association to it, as well as his friendship with the Accused and other Defence witnesses. See Trial Judgment, paras 154-158.

⁷⁴² See also below, paras 289-291.

⁷⁴³ Appeal Brief, paras 235-236. Mustafa argues that the Trial Panel "focused on non-eyewitness related matters as a factor affecting credibility", but fails to substantiate this assertion. In fact, Mustafa merely repeats the same arguments under Ground 2M that he develops under Ground 2J, which are addressed below. Appeal Brief, paras 236-237. See below, paras 289-291. See also below, paras 318-320, addressing Mustafa's arguments in paragraphs 238 to 240 of the Appeal Brief. The Appeals Panel notes that, among the factors that the Trial Panel considered, there are: (i) the witness's strong reticence to be associated with, or to respond truthfully to questions about, the BIA; (ii) his strong relationship with Mustafa, including as a family member and as his superior in the BIA; (iii) his deference to the Accused; (iv) his strong sense of camaraderie for other BIA members, including Mr Borovci; (v) his memory lapses and difficulty remembering dates; and (vi) the alignment between the evidence of Mr Borovci and Mr Gani Sopi. See Trial Judgment, paras 160-166.

⁷⁴⁴ See Appeal Brief, paras 190-203; Trial Judgment, paras 157-158, 164-165, 281, 286.

changed, in a strikingly similar manner, the date from 28 March 1999 (as declared in their prior statements to the Defence) to 31 March 1999 (as declared during trial); (ii) they share a strong and long friendship; (iii) Mr Borovci sought advice from third persons on his evidence; and (iv) they both have strong personal bonds with the Accused.⁷⁴⁵ On that basis, the Panel finds no error in the Trial Panel's assessment.

290. Moreover, contrary to Mustafa's assertion,⁷⁴⁶ the Panel considers that the Trial Panel did not misunderstand the time span of the religious celebration of Eid al-Adha (Small Bajram) in 1999. The Panel notes that the Trial Panel appropriately verified the dates by referring to a table submitted as evidence by the SPO – an open source item from the internet listing the dates of Eid al-Adha for each year – and found that Eid al-Adha was on 28 March 1999.⁷⁴⁷ The Panel further notes that the Defence itself admits that "it is common knowledge that the [S]mall Bajram celebrated in Kosovo has a time span of 4 days",⁷⁴⁸ which, based on the Trial Panel's finding regarding the date of 28 March 1999, means that the celebrations took place from 28 to 31 March 1999. The Panel also notes that Mr Borovci and Mr Gani Sopi both testified that they met the Accused during the Small Bajram celebrations.⁷⁴⁹ On this basis, the Appeals Panel finds no error in the Trial Panel's finding that such a meeting may have taken place,

⁷⁴⁵ Trial Judgment, paras 155-158, 163-165, 279, 281, 286.

⁷⁴⁶ See Appeal Brief, paras 193-199, 237.

⁷⁴⁷ Trial Judgment, paras 280, 285, referring to P00255 (confidential).

⁷⁴⁸ Appeal Brief, para. 195.

⁷⁴⁹ The Appeals Panel notes that the Trial Panel observed that both of the witnesses "took the celebration of [S]mall Bajram as signpost to determine the time of [their] alleged meeting or encounter with the Accused in Butov[a]c". See Trial Judgment, paras 279-280, 285. The Appeals Panel notes that indeed, at trial: (i) Mr Borovci indicated that he left Prishtina/Priština for Butovac on 31 March 1999, which he explained to be *the day of the Small Bajram celebration*, and that, a few days later, on 2 or 3 April 1999, he met the Accused who was celebrating Bajram; and (ii) Mr Gani Sopi declared that he went to Butovac at the end of March 1999 and met with the Accused at the beginning of April *as it was still Bajram*, adding that he could not remember whether it was on the third, fourth or fifth day of Bajram. See Transcript (Hazir Borovci), 30 March 2022, pp. 2958, 2963-2964, 3026-3027; Transcript (Gani Sopi), 4 April 2022, pp. 3079, 3084, 3089-3090, 3098-3099, 3165-3166. In the Appeal Brief, Mustafa argues that Mr Borovci's and Mr Gani Sopi's "interactions with the Appellant took place *in the beginning* of the time of these Bajram celebrations". See Appeal Brief, para. 197 (emphasis added).

if at all, at the end of March 1999,⁷⁵⁰ and not on 2 or 3 April 1999 as asserted by the Defence.⁷⁵¹

291. In any event, Mustafa fails to show that, absent a finding of collusion between Mr Borovci and Mr Gani Sopi, the Trial Panel's conclusion as to the presence of the Accused in Butovac would be different.⁷⁵² Thus, the Panel finds that Mustafa has not established an error of fact by the Trial Panel, occasioning a miscarriage of justice. The Appeals Panel therefore dismisses Mustafa's remaining arguments under Ground 2J.

292. In light of the above, the Appeals Panel dismisses Mustafa's arguments, under Ground 2J in part and Ground 2M in part, that the Trial Panel erred in dismissing the testimony of witnesses who provided evidence on the Accused's claim of alibi.

d. Alleged Errors Regarding the Trial Panel's Assessment of the Defence Witness Who Provided Evidence on the Charge of Arbitrary Detention (Ground 2M in part)

293. Finally, the Panel turns to Mustafa's argument with respect to Mr Halimi, who was the commander of the training centre for recruits located at the school in Zllash/Zlaš, and who was called by the Defence to, *inter alia*, challenge the allegation

⁷⁵⁰ Trial Judgment, para. 280. The Appeals Panel notes that the Trial Panel did not make a specific finding on the duration of the celebrations of Eid al-Adha (Small Bajram), but understands from the language it used in paragraph 280 of the Trial Judgment that it considered the celebrations to have ended on 31 March 1999. See Trial Judgment, para. 280, where the Trial Panel stated that it "is convinced that such meeting, if at all, may have taken place at the end of March 1999".

⁷⁵¹ Appeal Brief, paras 190-191, 197. The Panel also finds that Mustafa contradicts his own argument on the duration of Small Bajram when he submits that "[i]t is therefore irrelevant whether the small Bajram started on 28th or 31st of March 1999". See Appeal Brief, para. 195.

⁷⁵² The Trial Panel noted, *inter alia*, that: (i) the credibility of witnesses who testified on the Accused's presence in Butovac during the time of the charges, namely Mr Borovci, Mr Gani Sopi, Mr Mehmetaj and Mr Ismaili, is undermined by many factors; and (ii) Mr Borovci, Mr Gani Sopi, Mr Mehmetaj and Mr Ismaili provided generic evidence encompassing large time frames which is compatible with the Accused's ability to cover the limited distance between Butovac and Zllash/Zlaš within the same day, even multiple times if necessary. See Trial Judgment, paras 140-144 (Mr Mehmetaj), 150-152 (Mr Ismaili), 154-156, 158 (Mr Borovci), 160-163, 165-166 (Mr Gani Sopi), 274-277, 282-284, 287-289. See also above, paras 287-288. The Panel notes that it has dismissed Mustafa's argument that the Trial Panel "failed to factually establish" his movement between Butovac and Zllash/Zlaš, and instead merely used a "theoretical possibility" finding. See below, para. 318.

that W01679 was apprehended while he was at the school training with the KLA and then brought to the ZDC.⁷⁵³

294. The Panel finds that, contrary to Mustafa's claim,⁷⁵⁴ the Trial Panel did not misinterpret the witness's testimony when it found that Mr Halimi: (i) "partly contradicted himself in cross-examination" by first stating that no one could leave the training before completion, and then declaring that recruits were sent home due to sickness;⁷⁵⁵ and (ii) "lack[ed] a proper basis of knowledge" to accurately testify about recruits' attendance during the various trainings.⁷⁵⁶ Therefore, the Panel finds unpersuasive Mustafa's argument that Mr Halimi would have known that W01679 had been picked up at the school.⁷⁵⁷ Further, the Panel finds no error in the Trial Panel's finding that the witness's "tangible reluctance" to admit that Mustafa had his telephone number and to answer questions about the BIA and the Accused, combined with his defensive and confrontational demeanour during questioning by the SPO, showed that he was inclined to give evidence generally favourable to the Accused.⁷⁵⁸ Moreover, the Panel finds unconvincing Mustafa's argument that the fact that Mr Halimi's telephone number was saved in the Accused's telephone is irrelevant to the witness's credibility.⁷⁵⁹ Accordingly, the Panel dismisses Mustafa's arguments under Ground 2M with regard to the Trial Panel's assessment of Mr Halimi's evidence.

⁷⁵³ See, in particular, Trial Judgment, paras 380-386.

⁷⁵⁴ Appeal Brief, paras 271-275.

⁷⁵⁵ See Trial Judgment, para. 196. *Compare* Transcript (Musli Halimi), 20 April 2022, pp. 3758, 3761 *with* Transcript (Musli Halimi), 20 April 2022, pp. 3784, 3788.

⁷⁵⁶ See Trial Judgment, para. 197. Mr Halimi declared in court that it was impossible for him to remember all their names, that he remembered only "a small percentage" of those coming for training and that he was not sure "100 per cent" that everything was reported to him. See Transcript (Musli Halimi), 20 April 2022, pp. 3778, 3811. See also Transcript (Musli Halimi), 20 April 2022, p. 3756 (private session).

⁷⁵⁷ See Appeal Brief, para. 275.

⁷⁵⁸ See Trial Judgment, paras 198-200.

⁷⁵⁹ See Appeal Brief, para. 276. See also Transcript (Musli Halimi), 20 April 2022, pp. 3818-3820.

295. In light of all of the above, the Appeals Panel dismisses Mustafa's arguments that the Trial Panel erred in dismissing the testimony of witnesses, either Defence or SPO, who gave evidence favourable to the Defence.

296. Accordingly, the Appeals Panel dismisses the remainder of Mustafa's Grounds 2A, 2E, 2G, 2H, 2I, 2J, and 2N, and dismisses Mustafa's Ground 2M in part.⁷⁶⁰

M. ALLEGED ERRORS IN THE TRIAL PANEL'S ASSESSMENT OF [REDACTED]'S TESTIMONY CONCERNING MUSTAFA'S PRESENCE AT THE ZDC (GROUND 2P)

297. The Trial Panel relied on [REDACTED]'s testimony in its findings regarding the Murder Victim's detention at the ZDC compound and Mustafa's presence at the compound at the time of the [REDACTED].⁷⁶¹ Mustafa challenges the Trial Panel's assessment of and reliance on [REDACTED]'s testimony concerning [REDACTED],⁷⁶² while the SPO responds that Mustafa's submissions are factually incorrect and, in any event, Mustafa fails to demonstrate any error in the Trial Panel's findings concerning Mustafa's presence at the ZDC on [REDACTED] April 1999.⁷⁶³

1. Submissions of the Parties

298. Mustafa submits that the Trial Panel erred in its factual findings regarding [REDACTED],⁷⁶⁴ and in finding [REDACTED]'s testimony to be credible in establishing Mustafa's presence at the compound on [REDACTED] April 1999.⁷⁶⁵ Specifically, Mustafa argues that the Trial Panel erred in finding that [REDACTED], asserting that [REDACTED] instead "repeatedly" stated during [REDACTED]

⁷⁶⁰ The remainder of Ground 2M has been addressed in the section on Mustafa's alibi claim. See below, Section N, paras 310-324.

⁷⁶¹ Trial Judgment, paras 468-475.

⁷⁶² Appeal Brief, paras 316-322; Notice of Appeal, Ground 2P, para. 5; Reply Brief, para. 87.

⁷⁶³ SPO Response Brief, paras 127-129.

⁷⁶⁴ Appeal Brief, paras 316-317.

⁷⁶⁵ Appeal Brief, paras 320-322.

testimony that [REDACTED].⁷⁶⁶ On that basis, Mustafa asserts that [REDACTED].⁷⁶⁷ Mustafa further argues that the Trial Panel's erroneous interpretation of [REDACTED]'s testimony in this regard formed the "starting point" in establishing Mustafa's presence at the compound at the relevant time, which amounts to a "miscarriage of justice".⁷⁶⁸

299. Mustafa also submits that the Trial Panel erred by failing to consider inconsistencies in [REDACTED]'s testimony [REDACTED], when assessing [REDACTED] credibility and the reliability of [REDACTED] testimony.⁷⁶⁹ Specifically, Mustafa argues that [REDACTED] was inconsistent when [REDACTED] testified that [REDACTED] sometime in April 1999, but that, when confronted by [REDACTED], [REDACTED] answered that [REDACTED] did not know [REDACTED].⁷⁷⁰ Mustafa asserts that this inconsistency renders [REDACTED] testimony not credible, and that the Trial Panel erred by not considering it in its assessment.⁷⁷¹

300. The SPO responds that Mustafa's presence at the ZDC on [REDACTED] April 1999 [REDACTED] is indisputable.⁷⁷² The SPO also submits that Mustafa put forth the same arguments during the trial proceedings, asserting that [REDACTED] and accordingly [REDACTED], which the Trial Panel rejected, and on that basis should be dismissed.⁷⁷³ Further, the SPO submits that Mustafa's claims are factually inaccurate,

⁷⁶⁶ Appeal Brief, paras 316-317, 320.

⁷⁶⁷ Appeal Brief, para. 318.

⁷⁶⁸ Appeal Brief, para. 320.

⁷⁶⁹ Appeal Brief, paras 321-322.

⁷⁷⁰ Appeal Brief, para. 321. The Panel notes that at the Appeal Hearing, Mustafa also argued for the first time during the appeal proceedings that [REDACTED]'s evidence is inconsistent [REDACTED]. The Appeals Panel will not address this new argument. See Transcript, 27 October 2023, pp. [REDACTED], [REDACTED].

⁷⁷¹ Appeal Brief, paras 321-322. The Panel notes that, in support of his assertion that "[n]o reasonable tribunal could have vested proper credence to [REDACTED] testimony", Mustafa references the transcript of [REDACTED]'s answers to the Trial Panel's questions, clarifying [REDACTED] earlier testimony on another issue. The Panel notes, however, that Mustafa does not make any submissions with respect to that specific part of the testimony. See Appeal Brief, fn. 119, referring to [REDACTED].

⁷⁷² SPO Response Brief, para. 127.

⁷⁷³ SPO Response Brief, para. 127.

as [REDACTED] clearly stated during [REDACTED] testimony that [REDACTED], after which [REDACTED].⁷⁷⁴ Regardless, the SPO asserts that Mustafa's claims neither refute his presence at the ZDC at the moment pivotal to the case nor his [REDACTED].⁷⁷⁵

2. Assessment of the Court of Appeals Panel

301. The Appeals Panel recalls that the Trial Panel relied, *inter alia*, on [REDACTED]'s testimony in finding that the Murder Victim had been detained at the ZDC compound during the relevant time frame, noting that [REDACTED]'s testimony corroborated other testimonial and documentary evidence regarding the Murder Victim's presence at the compound in April 1999.⁷⁷⁶ The Trial Panel further relied on [REDACTED]'s testimony in support of its finding that Mustafa was present at the ZDC when [REDACTED] on or around [REDACTED] April 1999.⁷⁷⁷ In reaching its conclusion, the Trial Panel considered Mustafa's objection during the trial proceedings that [REDACTED].⁷⁷⁸ However, the Trial Panel found that [REDACTED] and, in light of photographic evidence of the ZDC, found that [REDACTED].⁷⁷⁹

302. Mustafa challenges the Trial Panel's assessment of [REDACTED]'s testimony, arguing that: (i) the Trial Panel's finding regarding [REDACTED] is inconsistent with [REDACTED] testimony; and (ii) the Trial Panel failed to consider inconsistencies in [REDACTED]'s testimony in its assessment of [REDACTED]'s credibility and the reliability of [REDACTED] testimony.⁷⁸⁰

303. The Panel notes that Mustafa's submissions regarding [REDACTED] merely repeat arguments that were already addressed by the Trial Panel, without

⁷⁷⁴ SPO Response Brief, paras 128-129.

⁷⁷⁵ SPO Response Brief, para. [REDACTED].

⁷⁷⁶ Trial Judgment, para. 475.

⁷⁷⁷ Trial Judgment, paras 472-473.

⁷⁷⁸ Trial Judgment, paras 469-473, in particular para. 472.

⁷⁷⁹ Trial Judgment, paras 469-473, in particular para. 472.

⁷⁸⁰ Appeal Brief, paras 316, 320, 322.

demonstrating that the Trial Panel's rejection of them constitutes an error warranting the Appeals Panel's intervention.⁷⁸¹ Such deficiencies warrant summary dismissal.⁷⁸² In any event, the Panel finds no error in the Trial Panel's conclusion that [REDACTED] on or around [REDACTED] April 1999, which in the Appeals Panel's view accurately reflects [REDACTED]'s testimony that, [REDACTED], after which time [REDACTED], who escorted [REDACTED], and [REDACTED].⁷⁸³

304. Turning to Mustafa's arguments regarding the Trial Panel's assessment of [REDACTED]'s credibility and the reliability of [REDACTED] testimony, the Appeals Panel recalls that a trial panel is best placed to assess the credibility of a witness and is vested with broad discretion in evaluating the reliability of witness testimony.⁷⁸⁴

305. In this regard, the Appeals Panel first recalls that the Trial Panel identified a non-exhaustive list of factors that it considered in its assessment of the credibility of all witnesses and the reliability of their testimony.⁷⁸⁵ The Panel notes that the Trial Panel assessed [REDACTED]'s credibility and the reliability of [REDACTED] testimony in light of these factors, noting any inconsistencies between [REDACTED]'s testimony and that of other witnesses, and the reasons for accepting or rejecting the testimony, in whole or in part, in light of those discrepancies.⁷⁸⁶ In particular, the Trial Panel found that [REDACTED]'s testimony was at times implausible with respect to [REDACTED] and further, that [REDACTED] downplayed the circumstances of [REDACTED].⁷⁸⁷ In light of these concerns, the Trial Panel relied on these aspects of

⁷⁸¹ Compare Appeal Brief, paras 316-317 with Trial Judgment, paras 469-473. See also Appeal Brief, paras 318-319, wherein Mustafa acknowledges that the same arguments, namely that [REDACTED], were raised by Defence counsel during closing statements.

⁷⁸² See above, para. 30.

⁷⁸³ [REDACTED]. See also [REDACTED].

⁷⁸⁴ See above, para. 38.

⁷⁸⁵ Trial Judgment, para. 35. See also above, para. 219, fn. 562.

⁷⁸⁶ Trial Judgment, paras [REDACTED].

⁷⁸⁷ Trial Judgment, para. [REDACTED].

[REDACTED]'s testimony only to the extent that they were corroborated by other testimony.⁷⁸⁸

306. With respect to [REDACTED]'s account of [REDACTED], the Appeals Panel notes that the Trial Panel considered in its assessment the consistencies between [REDACTED] and Mustafa's [REDACTED] of the house where he was staying at the ZDC, and found [REDACTED]'s account to be credible and based on personal knowledge.⁷⁸⁹ Accordingly, the Appeals Panel finds no error in the Trial Panel's assessment in this regard.

307. The Appeals Panel will next consider Mustafa's argument that [REDACTED] was inconsistent in [REDACTED] testimony concerning [REDACTED], rendering his testimony not credible, and that the Trial Panel erred by not considering these inconsistencies in its assessment.⁷⁹⁰ At the outset, while Mustafa does not directly and clearly state so, the Panel understands his submission to mean that, in light of one inconsistency in [REDACTED]'s testimony, [REDACTED] testimony as a whole should be rejected as not credible. The Panel recalls in this regard that, in accordance with Rule 139(6) of the Rules, inconsistencies in a witness's testimony do not *per se* require a panel to reject the entirety of that witness's testimony, and a panel may find a witness's testimony reliable in some aspects, but unreliable in others.⁷⁹¹

308. Regardless, the Appeals Panel finds Mustafa's characterisation of [REDACTED]'s statements to be unpersuasive. In the Panel's view, [REDACTED] was consistent in [REDACTED] testimony that [REDACTED] had no knowledge of the circumstances of [REDACTED] and did not know what had happened to [REDACTED] after [REDACTED].⁷⁹² While [REDACTED] testified that [REDACTED]

⁷⁸⁸ Trial Judgment, para. [REDACTED].

⁷⁸⁹ Trial Judgment, para. 472.

⁷⁹⁰ See Appeal Brief, paras 321-322.

⁷⁹¹ See above, para. 272.

⁷⁹² See [REDACTED].

at the end of April 1999, the Panel notes that Mustafa refers to a conversation between [REDACTED] and [REDACTED] that took place several years after the war,⁷⁹³ during which [REDACTED] sought to find out “what exactly had happened” to [REDACTED] and [REDACTED] informed [REDACTED] that [REDACTED] did not know the *circumstances* of [REDACTED].⁷⁹⁴ Accordingly, the Appeals Panel finds no inconsistency in [REDACTED]’s account and consequently no error in the Trial Panel’s assessment of [REDACTED] credibility.

309. In light of the above, the Appeals Panel finds that Mustafa fails to demonstrate any error in the Trial Panel’s assessment of [REDACTED]’s testimony, and accordingly dismisses Mustafa’s Ground 2P.

N. ALLEGED ERRORS CONCERNING THE TRIAL PANEL’S CONSIDERATION OF MUSTAFA’S ALIBI CLAIM (GROUNDS 1L, 1M, 2M IN PART, 2O)

310. The Trial Panel rejected Mustafa’s alibi claim, finding that it “is incapable of raising a reasonable doubt as to the Accused’s presence at the crime scene at relevant times according to the Confirmed Indictment”.⁷⁹⁵ Mustafa challenges this finding on legal and factual grounds,⁷⁹⁶ while the SPO responds that Mustafa has failed to establish an error in the Trial Panel’s findings.⁷⁹⁷

1. Submissions of the Parties

311. Mustafa submits that the Trial Panel erred in law by “unfairly” rejecting alibi evidence as irrelevant, when it should instead have considered this evidence as

⁷⁹³ Appeal Brief, para. 321, referring to [REDACTED].

⁷⁹⁴ [REDACTED]. See also [REDACTED].

⁷⁹⁵ Trial Judgment, para. 333. See also Trial Judgment, paras 46, 240-332.

⁷⁹⁶ Notice of Appeal, Grounds 1L-1M, 2O, paras 4-5; Appeal Brief, paras 70-77, 238-240, 304-315; Reply Brief, paras 81-82. The Panel notes that in the Appeal Brief, under Ground 1M, Mustafa only cross-refers to Ground 1L and makes no further submissions. The Panel considers that Ground 1M is now subsumed under Ground 1L.

⁷⁹⁷ SPO Response Brief, paras 98-105.

relevant to showing that “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”.⁷⁹⁸ He argues that, while the Trial Panel recalled that the SPO “should have eliminated” the alibi beyond reasonable doubt, the testimony of witnesses “prove[s] the opposite”.⁷⁹⁹ Mustafa further argues that, in rejecting the alibi evidence provided by witnesses, the Trial Panel “reversed the burden” and “forc[ed] [him] to prove his alibi beyond reasonable doubt”.⁸⁰⁰

312. In addition, Mustafa submits that the Trial Panel erred in fact when it considered that, in the circumstances prevailing in April 1999, he could “realistically” have been in multiple locations on the same day.⁸⁰¹ In support, he argues that the movement-related factors which the Trial Panel took into account when assessing the alibi claim disregarded evidence concerning the “extreme difficulties in movement” between the various locations, and instead made “a prejudiced assumption” or relied on “a theoretical possibility” that the Accused could have travelled between locations.⁸⁰² Mustafa further argues that the Trial Panel’s “selection of the time in travel [...] cannot be generalized for the period of the Indictment” and that the Trial Panel did not establish when Mustafa actually used different means of transport.⁸⁰³

313. The SPO responds that Mustafa’s arguments fail to show an error and misrepresents the Trial Judgment, in which the Trial Panel correctly summarised the

⁷⁹⁸ Appeal Brief, paras 74, 76-77. See also Notice of Appeal, Ground 1L, para. 4; Reply Brief, para. 81.

⁷⁹⁹ Appeal Brief, para. 70.

⁸⁰⁰ Appeal Brief, paras 75, 77. See also Notice of Appeal, Ground 1M, para. 4.

⁸⁰¹ Appeal Brief, paras 304, 315; Notice of Appeal, Ground 2O, para. 5; Reply Brief, para. 82.

⁸⁰² Appeal Brief, paras 71-73, 238-240, 305-307. See also Appeal Brief, para. 19. The Appeals Panel notes that Mustafa characterises his arguments in paragraphs 71 to 73 of the Appeal Brief as an alleged error of law. See Notice of Appeal, Grounds 1L-1M, para. 4. However, the arguments clearly challenge the Trial Panel’s factual findings and overlap to a considerable degree with submissions made in paragraphs 305 to 307 of the Appeal Brief, which allege errors of fact. Consequently, the Appeals Panel has assessed the arguments in paragraphs 71 to 73 of the Appeal Brief as alleged errors of fact. See above, para. 25.

⁸⁰³ Appeal Brief, paras 308-314.

principles applicable to alibi evidence and correctly found that Mustafa's alleged alibi did not create a reasonable doubt in the SPO's case.⁸⁰⁴ In addition, it argues that Mustafa misrepresents the nature of alibi evidence, which in his case failed to *prima facie* account for his activities at the relevant time, which would only then trigger the SPO's burden to establish beyond reasonable doubt that the alibi evidence should be rejected.⁸⁰⁵

314. The SPO further responds that Mustafa fails to show that no reasonable trier of fact could have reached the Trial Panel's conclusion about his ability to move in the relevant area during April 1999.⁸⁰⁶ It submits that Mustafa misrepresents the Trial Judgment, which acknowledged the travel difficulties but found that Mustafa could nevertheless move quickly between Zllash/Zlaš and various locations given: (i) the relatively short distances; (ii) his access to and use of various means of transport; (iii) the relative safety of the area; (iv) his knowledge of and experience with the terrain; and (v) the nature of his assignments, which required him to move easily and regularly.⁸⁰⁷ According to the SPO, Mustafa also fails to show that no reasonable trier of fact could have: (i) rejected the witness evidence highlighted in the Appeal Brief; or (ii) come to the same conclusion as the Trial Panel.⁸⁰⁸ Finally, the SPO argues that, contrary to Mustafa's submission, the Trial Panel relied on multiple pieces of evidence showing Mustafa's use of vehicles.⁸⁰⁹

2. Assessment of the Court of Appeals Panel

315. At the outset, the Appeals Panel notes that Mustafa provides no support for his assertion that the Trial Panel: (i) should have, as a matter of law, considered his alibi evidence as relevant in undermining the "likelihood" of him having been at the place

⁸⁰⁴ SPO Response Brief, para. 98.

⁸⁰⁵ SPO Response Brief, paras 99-100.

⁸⁰⁶ SPO Response Brief, para. 105.

⁸⁰⁷ SPO Response Brief, paras 101-102.

⁸⁰⁸ SPO Response Brief, paras 103, 105.

⁸⁰⁹ SPO Response Brief, para. 104.

and time of the alleged offences, even if his presence remained a possibility; and (ii) by not doing so, erroneously forced Mustafa to prove his alibi beyond a reasonable doubt.⁸¹⁰ Such deficiencies warrant summary dismissal of his submissions.⁸¹¹ However, given the significance of this issue to Mustafa's case, the Appeals Panel decides to exceptionally consider Mustafa's arguments out of fairness to the Accused and in the interests of justice.

316. The Appeals Panel finds no error in the standard for the assessment of an alibi claim, as set out by the Trial Panel, which is well supported by the cited jurisprudence.⁸¹² In particular, the Trial Panel correctly stated that: (i) Mustafa, in raising an alibi claim, needed to produce evidence likely to raise a reasonable doubt with regard to the SPO's case, and that this evidence must *prima facie* account for his activities at the time of the commission of the crime; and (ii) only then would the SPO be required to eliminate the reasonable possibility that the alibi is true and to establish beyond reasonable doubt that, notwithstanding the alibi, the facts as alleged are true.⁸¹³ In addition, the Trial Panel specifically stated that "[a]n accused does not bear the burden of proof beyond reasonable doubt in relation to establishing an alibi", and that it considered whether there is any reasonable possibility that the alibi is true.⁸¹⁴

317. Moreover, the Trial Panel repeatedly considered whether the alibi evidence "is capable of accounting, *prima facie*, for the Accused's position elsewhere than

⁸¹⁰ Appeal Brief, paras 74-76. See also Notice of Appeal, Ground 1L, para. 4; Reply Brief, para. 81.

⁸¹¹ See above, para. 29.

⁸¹² Trial Judgment, paras 46, 245, citing, in fns 76-78, 463, *Popović et al.* Appeal Judgement, para. 343; *Delalić et al.* Appeal Judgement, para. 581; *Nchamihigo* Appeal Judgement, para. 92; *Zigiranyirazo* Appeal Judgement, para. 17; *Ongwen* Trial Judgment, para. 2449; *Setako* Appeal Judgement, para. 224; *Munyakazi* Appeal Judgement, para. 24; *Nahimana et al.* Appeal Judgement, para. 417. See also e.g. *Renzaho* Appeal Judgement, para. 303.

⁸¹³ Trial Judgment, paras 46, 241, citing, in fns 77-78, *Popović et al.* Appeal Judgement, para. 343; *Setako* Appeal Judgement, para. 224; *Munyakazi* Appeal Judgement, para. 24; *Nahimana et al.* Appeal Judgement, para. 417.

⁸¹⁴ Trial Judgment, paras 46, 245, citing, in fns 77, 463, *Popović et al.* Appeal Judgement, para. 343; *Setako* Appeal Judgement, para. 224; *Munyakazi* Appeal Judgement, para. 24.

Zllash/Zlaš, thus creating a reasonable doubt as to the SPO's case",⁸¹⁵ but found that it is "incapable of raising a reasonable doubt as to the Accused's presence at the crime scene at relevant times".⁸¹⁶ The Appeals Panel notes that, since the evidence did not *prima facie* account for the Accused's location elsewhere than Zllash/Zlaš at the relevant time, the SPO was not required to establish beyond reasonable doubt that, notwithstanding the alibi, the facts as alleged are true. The Appeals Panel therefore considers that the Trial Panel did not err in its approach. Having failed to establish an error of law in the Trial Panel's findings, the Appeals Panel dismisses Mustafa's arguments.

318. For the same reasons, the Appeals Panel also dismisses Mustafa's argument that the Trial Panel "failed to factually establish" his movement between Butovac and Zllash/Zlaš based on Mr Gani Sopi's evidence and instead merely relied on a "theoretical possibility".⁸¹⁷ In line with the standards set out immediately above, the Appeals Panel emphasises that, in dismissing the alibi claim, the Trial Panel was not required to make a finding that the Accused actually travelled from Butovac to Zllash/Zlaš. The Appeals Panel sees no error in the Trial Panel's finding that, considering the limited distance between the two locations – even assuming some degree of accuracy in Mr Gani Sopi's recounting of events – "the Accused could have covered that ground within the same day, even multiple times if necessary".⁸¹⁸

319. Turning to the remainder of Mustafa's allegations of factual errors, the Appeals Panel notes that Mustafa fails to elaborate on why, in his view, the Trial Panel erred by not establishing specifically when the Accused used a car and when he travelled

⁸¹⁵ Trial Judgment, paras 274 (quoted in text), 276, 287, 290, 301, 311, 320, 331.

⁸¹⁶ Trial Judgment, paras 299, 315, 333 (quoted in text).

⁸¹⁷ Appeal Brief, paras 239-240.

⁸¹⁸ See Trial Judgment, para. 289. The Appeals Panel recalls its finding above that Mustafa fails to show any error in the Trial Panel's credibility assessment of Mr Gani Sopi, or in its finding that Mr Gani Sopi and Mr Borovci may have colluded in their testimony regarding their departure date from Prishtina/Priština to Butovac relevant to the Accused's alibi claim. See above, paras 288-291.

on foot.⁸¹⁹ The Panel further notes that the Trial Panel did make specific findings on Mustafa's access to and use of a car or vehicles at the relevant time, based on his own evidence and that of multiple SPO and Defence witnesses.⁸²⁰ The Appeals Panel sees no deficiency or error in the Trial Panel's finding that Mustafa's ability to move in the relevant area at the relevant time was a factor in establishing whether the alibi evidence was capable of *prima facie* accounting for his position elsewhere than Zllash/Zlaš, thus creating a reasonable doubt as to the SPO's case.⁸²¹ The Appeals Panel therefore dismisses this argument.

320. Moreover, the Appeals Panel notes that Mustafa misrepresents the Trial Judgment by stating that the Trial Panel "completely ignored" evidence concerning the difficulties in movement in the relevant area during the time frame of the Indictment.⁸²² In fact, the Trial Panel explicitly took into account throughout its assessment the travel difficulties and changing conditions in the area, including the Serbian offensive, the NATO bombing, the exodus of civilians through Prishtina/Priština, and bad weather.⁸²³ The Trial Panel also specifically considered a plethora of evidence on the length of time taken to complete various journeys in the area relevant to the alibi locations and the commission of the crimes, using various means of transport, around the relevant time.⁸²⁴ Mustafa only challenges four aspects

⁸¹⁹ Appeal Brief, paras 313-314.

⁸²⁰ See Trial Judgment, paras 254-257, 274, 293, 319, 332, citing evidence from Mustafa, Mr Nreci, Mr Vrbovci, Mr Humolli, Mr Mehmetaj, Mr Borovci, Mr Selatin Krasniqi, Mr Ibishi, W04600, W03593, W03594 and [REDACTED].

⁸²¹ See Trial Judgment, paras 254-257, 261-262, 274, 282, 288, 297, 299, 310, 315, 319, 332-333.

⁸²² Appeal Brief, paras 72, 238. See also Appeal Brief, paras 19, 305.

⁸²³ See Trial Judgment, paras 241, 249, 251, 254, 257, 260-261, 303, 305, 308-310, 317-318, citing evidence from Mustafa, Mr Mehmetaj, Mr Borovci, Mr Gani Sopi, Mr Halimi, Mr Fatmir Sopi, Mr Ismaili, Mr Parduzi, Mr Ibishi, Mr Humolli, Mr Veseli, and documentary evidence P00292 (confidential), P00293 (confidential), P00294 (confidential), P00298 (confidential), P00299 (confidential), P00302 (confidential), P00303ET (confidential). Contra Appeal Brief, paras 72-73, 305. See also Appeal Brief, para. 19.

⁸²⁴ See Trial Judgment, paras 245, 247, 258-261, 289, 302, 304, citing evidence from Mr Gani Sopi, Mr Veseli, [REDACTED], Mr Humolli, [REDACTED], Mr Halimi, Mr Selatin Krasniqi, Mr Parduzi, Mr Nreci, and Mr Ajeti, regarding distances and journeys between Butovac and Zllash/Zlaš, Prishtina/Priština and Zllash/Zlaš, Zllash/Zlaš and [REDACTED], Prishtina/Priština and

of this body of evidence,⁸²⁵ each of which the Appeals Panel dismisses on the basis that Mustafa:

- (i) misrepresents the Trial Judgment when stating that the Trial Panel disregarded Mr Selatin Krasniqi's evidence regarding his trip from Zllash/Zlaš to Prishtina/Priština and back again;⁸²⁶
- (ii) fails to substantiate his claim that the evidence of Mr Halimi is irrelevant in establishing the travel time between the Zllash/Zlaš training center to Prapashtica/Prapaštica, because this was located in the "relatively free zone of the Gollak Area";⁸²⁷
- (iii) fails to explain why the fact that Mr Ajeti did not return to Prishtina/Priština following his trip of 1 April 1999 should mean that his estimate of the travel time between Zllash/Zlaš and Prishtina/Priština is irrelevant;⁸²⁸ and
- (iv) fails to explain why, in his view, the fact that W03593 was unable to indicate whether the information regarding the trip between Zllash/Zlaš

Barileva/Bariljevo, [REDACTED] and Zllash/Zlaš (BIA Base), Zllash/Zlaš (training center) and Prapashtica/Prapaštica, Bradash/Bradaš and Zllash/Zlaš, Barileva/Bariljevo and Radashec/Radoševac, and lower Butovac and Prishtina/Priština.

⁸²⁵ See Appeal Brief, paras 306-312.

⁸²⁶ See Appeal Brief, paras 308, 310; Trial Judgment, paras 256, 260. Moreover, the Appeals Panel notes that Mustafa also appears to misrepresent the substance of Mr Selatin Krasniqi's evidence: (i) since the evidence suggests that it took 12-13 hours for a *roundtrip*, rather than merely to reach Prishtina/Priština; and (ii) by stating that the trip was undertaken on a tractor, whereas the evidence is unclear on this point and indicates that this trip was sometimes undertaken on foot and sometimes by tractor. See Appeal Brief, paras 308, 310; Transcript (Selatin Krasniqi), 21 April 2022, p. 3909; Transcript (Selatin Krasniqi), 22 April 2022, p. 4041.

⁸²⁷ See Appeal Brief, para. 312; Trial Judgment, para. 260, referring to Transcript, 20 April 2022, pp. 3803-3805.

⁸²⁸ See Appeal Brief, para. 309; Trial Judgment, para. 260.

and Prishtina/Priština was within the Indictment period meant that his testimony is irrelevant to the Trial Panel's analysis.⁸²⁹

321. Further, Mustafa specifically highlights certain evidence on the conditions and duration of travel between various locations,⁸³⁰ but fails to substantiate his claim that the Trial Panel erred by not relying on this evidence⁸³¹ or to demonstrate how this alleged error undermines the Trial Panel's ultimate conclusion that it was "not satisfied that the Accused was *not* present in Zllash/Zlaš at the relevant times of the charges".⁸³² In particular, the Appeals Panel finds that:

- (i) the Trial Panel explicitly referred to Mr Parduzi's evidence on the journey between Bradash/Bradaš and Zllash/Zlaš, including his testimony that the journey could take up to 24 hours by car, and to Mr Nreci's evidence on the journey between Barileva/Bariljevo and Radashec/Radoševac, including the fact that the roundtrip was completed in one night;⁸³³ and
- (ii) Mustafa fails to explain why, in his view,⁸³⁴ the Trial Panel erred in not referring to evidence concerning the travel times and conditions between:
 - (i) Potok and Turuçica/Turučica, given that both are located north of all locations relevant to the alibi claim;⁸³⁵ and
 - (ii) Turuçica/Turučica and

⁸²⁹ See Appeal Brief, para. 311; Trial Judgment, para. 260.

⁸³⁰ Appeal Brief, paras 73, 306.

⁸³¹ Appeal Brief, para. 74.

⁸³² Trial Judgment, para. 332.

⁸³³ Trial Judgment, para. 260. See also Appeal Brief, para. 73, citing, in relevant part, Transcript (Kapllan Parduzi), 11 April 2022, pp. 3422-3423, 3481, and Transcript (Bislim Nreci), 5 April 2022, pp. 3199-3201, 3228, 3275.

⁸³⁴ See Appeal Brief, paras 73, 306, citing, in relevant part, Transcript (Kapllan Parduzi), 11 April 2022, pp. 3429, 3469, Transcript (Nuredin Ibishi), 12 April 2022, p. 3559 (see also p. 3560), and Transcript (Sheqir Rrahimi), 13 April 2022, p. 3666 (see also p. 3665).

⁸³⁵ In this regard, the Appeals Panel also notes that Mustafa misrepresents Mr Parduzi's evidence, who instead of discussing the journey between Orllan/Orlane and Potok, actually discusses the journey between Potok and Turuçica/Turučica, as noted above, and instead of stating that the trip took nearly three days, actually states that it took two days or more than 48 hours. See Transcript (Kapllan Parduzi), 11 April 2022, pp. 3429, 3469; P00108. See also P00257 (confidential), pp. 11, 13. Contra Appeal Brief, para. 73(c).

Rimanishta/Rimanište (via, *inter alia*, Rakinica/Rakitnica, Kalatica/Kaljatica and Sharban/Šarban), given that the majority of this journey was undertaken considerably to the north-west of all locations relevant to the alibi claim.⁸³⁶

322. In light of the above, the Appeals Panel finds that Mustafa fails to show that the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact, or that the evaluation of the evidence is wholly erroneous, and accordingly dismisses his arguments.⁸³⁷

323. Moreover, the Appeals Panel notes that the Trial Panel's rejection of the alibi claim in relation to Mustafa's alleged presence in Butovac, in Barileva/Bariljevo, in Raminishta/Ramanishte and Bellopoja/Belo Polje, and in Prishtina/Priština – which Mustafa challenges on appeal – did not solely rest on its finding that the Accused could have travelled between these locations and Zllash/Zlaš so as to be present at both places on the same day. Importantly, the Trial Panel's rejection of the alibi claim also rested on the Trial Panel not being satisfied that Mustafa was present at these other locations in the first place, based on its findings regarding: (i) the relevant witnesses' lack of credibility and/or reliability; (ii) these witnesses being influenced by other persons or having a bias against the Specialist Chambers; or (iii) the timing of the alleged sightings of Mustafa falling outside of the Indictment period or being too vague or unclear.⁸³⁸ Therefore, even if Mustafa's challenges to the Trial Panel's findings that he could be present in two locations within the same day were to be successful, the Accused has failed to show how the alleged error would have led to a different outcome, given that he was unable to satisfy the Trial Panel that he was present in those other locations at all. Consequently, the Panel dismisses these arguments.

⁸³⁶ See Transcript (Sheqir Rrahimi), 13 April 2022, pp. 3665-3666; P00108; Appeal Brief, para. 73(d).

⁸³⁷ Article 46(5) of the Law. See also above, para. 23.

⁸³⁸ See Trial Judgment, paras 273-290, 296-301, 307-311, 314-320.

324. In light of the above, the Appeals Panel dismisses Mustafa's Grounds 1L, 1M, 2O and the remainder of 2M.

O. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S FINDINGS ON THE WAR CRIME OF MURDER (GROUNDS 3, 4, 5)

325. While considering that there was reasonable doubt as to whether the bullet holes in the Murder Victim's body could be attributed to Mustafa and his forces,⁸³⁹ the Trial Panel found that the *actus reus* elements of the war crime of murder were satisfied.⁸⁴⁰ It further found that the only reasonable conclusion, based on the evidence of the acts and omissions attributable to Mustafa and his BIA subordinates, was that "they intended to kill the Murder Victim", thus establishing the requisite *mens rea* for the war crime of murder.⁸⁴¹

326. Under Grounds 3, 4 and 5, Mustafa challenges the Trial Panel's findings on the *actus reus* and *mens rea* of the war crime of murder, punishable under Article 14(1)(c)(i) of the Law, and underpinning his conviction under Count 4 of the Indictment.⁸⁴² The SPO and Victims' Counsel respond that Mustafa's submissions should be dismissed.⁸⁴³

1. Alleged Errors Regarding the Trial Panel's Findings on the *Actus Reus* of the War Crime of Murder (Grounds 3, 4)

327. The Trial Panel found that "the second body found in the grave [REDACTED] in early July 1999 belonged to the Murder Victim".⁸⁴⁴ It further found that the Murder Victim was killed between on or around 19 April 1999 and around the end of

⁸³⁹ Trial Judgment, para. 637.

⁸⁴⁰ Trial Judgment, para. 690.

⁸⁴¹ Trial Judgment, para. 695.

⁸⁴² Appeal Brief, paras 324-378; Reply Brief, paras 22-26, 34, 88-97.

⁸⁴³ SPO Response Brief, paras 35-44, 130-186; Victims Response Brief, paras 67-80.

⁸⁴⁴ Trial Judgment, para. 618.

April 1999.⁸⁴⁵ The Trial Panel considered that the Murder Victim's death was the result of the combination between: (i) the severe mistreatment inflicted by BIA members who detained him at the ZDC, causing serious bodily harm; (ii) the denial of medical aid by BIA members who detained him; and (iii) a gunshot wound, in respect of which the Trial Panel found that there was reasonable doubt as to whom it could be attributed (BIA members or Serbian forces).⁸⁴⁶ The Trial Panel found that causes (i) and (ii) were substantial causes of the Murder Victim's death, and could be attributed to Mustafa in the context of his decision to neither release nor evacuate the Murder Victim, and "irrespective of whether the Murder Victim was hit by one or more Serbian bullets".⁸⁴⁷ These acts and omissions formed the basis for the Trial Panel's determination of the *actus reus* of murder as a war crime.⁸⁴⁸

328. Mustafa alleges five legal errors and four factual errors concerning the Trial Panel's conclusion that the *actus reus* for the war crime of murder was satisfied.⁸⁴⁹ He submits that, on the basis of these enumerated errors, individually or cumulatively, his conviction for the war crime of murder should be reversed.⁸⁵⁰

(a) Alleged Errors of Law Concerning the Trial Panel's Findings on the *Actus Reus* of Murder

(i) Submissions of the Parties and Participants

329. Mustafa submits that the Trial Panel erred in law in that it failed to consider the principle of *novus actus interveniens*.⁸⁵¹ Specifically, he argues that the Trial Panel failed to consider whether, in the circumstances prevailing at the time the Serbian forces launched an offensive in the area, the free, deliberate and informed killing of the

⁸⁴⁵ Trial Judgment, paras 639, 689.

⁸⁴⁶ Trial Judgment, paras 624, 637, 689.

⁸⁴⁷ Trial Judgment, paras 638, 689.

⁸⁴⁸ Trial Judgment, paras 689-690.

⁸⁴⁹ Appeal Brief, paras 324-367.

⁸⁵⁰ Notice of Appeal, Ground 3, para. 6 and Ground 4, para. 7; Appeal Brief, paras 341, 367.

⁸⁵¹ Appeal Brief, paras 358-362; Notice of Appeal, Ground 4C, para. 7. See also Appeal Brief, para. 367.

Murder Victim by another person using a gun, was an intervening event which operated to break the chain of causation, thereby relieving Mustafa of any culpability for the ultimate result.⁸⁵² In this regard, Mustafa submits that there is a wide time gap between the last time the Murder Victim was seen alive and the discovery of his dead body, and that no direct causal connection can be established between Mustafa's alleged action and the Murder Victim's death.⁸⁵³

330. Mustafa further argues that the Trial Panel erred in law in that: (i) there can only be one cause of death;⁸⁵⁴ (ii) death due to ill-treatment or denial of medical aid does not amount to the criminal offence of murder;⁸⁵⁵ (iii) pursuant to Rule 40 of the Rules, the SPO failed to request authorisation and the Trial Panel failed to exercise its power to authorise an exhumation and post-mortem examination of the Murder Victim's body;⁸⁵⁶ and (iv) in the absence of an exhumation and examination of the Murder Victim's body, the Trial Panel did not establish the nature of his injuries, cause of death and time of death.⁸⁵⁷ With respect to the nature of injuries and cause of death, Mustafa submits that [REDACTED] are not experts, and that certain evidence indicates that only one entry hole was observed on the body.⁸⁵⁸ With respect to the

⁸⁵² Appeal Brief, paras 358-362; Notice of Appeal, Ground 4C, para. 7; Transcript, 26 October 2023, pp. 56-57.

⁸⁵³ Appeal Brief, para. 358.

⁸⁵⁴ Appeal Brief, para. 354; Reply Brief, paras 89, 132. See Notice of Appeal, Ground 4B, para. 7; Transcript, 26 October 2023, p. 55. See also Appeal Brief, para. 367.

⁸⁵⁵ Appeal Brief, para. 345. See also Appeal Brief, para. 367.

⁸⁵⁶ Notice of Appeal, Ground 3, para. 6; Appeal Brief, paras 324-326, 341; Reply Brief, paras 22-26, 34, 88, 130-131; Transcript, 26 October 2023, pp. 46-47.

⁸⁵⁷ Appeal Brief, paras 327-341, 352-353; Reply Brief, paras 23-26, 34; Transcript, 26 October 2023, pp. 47-50. See also Appeal Brief, para. 367. The Appeals Panel notes that, at the Appeal Hearing, Mustafa articulated for the first time during the appeal proceedings the argument that the Trial Panel failed to address the place of death of the Murder Victim. See Transcript, 26 October 2023, pp. 49-50. Accordingly, the Appeals Panel will not address this argument.

⁸⁵⁸ Appeal Brief, paras 329-332; Reply Brief, para. 23; Transcript, 26 October 2023, p. 47. Mustafa also adds that the co-detainees of the Murder Victim who provided evidence could not give any conclusive medical evidence about the Murder Victim's medical state. See Reply Brief, para. 23. See also Transcript, 26 October 2023, p. 50.

time of death, Mustafa argues that, in order to avoid a “violation of the provisions of the criminal procedure”, a finding on the time of death is “indispensable”.⁸⁵⁹

331. The SPO responds that many of Mustafa’s submissions are either obscure, cryptic, unsubstantiated or demonstrably incorrect.⁸⁶⁰ Concerning Mustafa’s *novus actus interveniens* argument, the SPO responds that it should be dismissed *in limine* as it is raised for the first time on appeal and Mustafa does not even attempt to demonstrate an error of law.⁸⁶¹ On the merits, the SPO submits that, even if these deficiencies were overlooked, the Trial Panel applied the correct causation standard under customary international law⁸⁶² and that any interpretive quandary should be resolved in accordance with the hierarchy of sources under Article 3 of the Law, including recourse to the jurisprudence of the *ad hoc* tribunals.⁸⁶³ This jurisprudence, the SPO submits, applies the substantial contribution test for causation, a test which it notes is higher than those applied in many domestic jurisdictions.⁸⁶⁴ The SPO adds that, while domestic jurisdictions approach causation in different ways, the starting point in most common and civil law jurisdictions is establishing factual causation through the *conditio sine qua non* test, with most jurisdictions then moving on to assess legal causation through an additional normative requirement.⁸⁶⁵ It submits that, while the form that this normative requirement takes varies across domestic jurisdictions, the objective of fairly attributing criminal responsibility is the same.⁸⁶⁶ The SPO further adds that under customary international law, this objective is achieved through the substantial cause test.⁸⁶⁷ The SPO also notes that Mustafa does not appear to challenge

⁸⁵⁹ Appeal Brief, paras 334-335, 340; Transcript, 26 October 2023, pp. 47-50, 55-56.

⁸⁶⁰ SPO Response Brief, paras 134-139.

⁸⁶¹ SPO Response Brief, para. 161; Transcript, 26 October 2023, pp. 75, 89.

⁸⁶² SPO Response Brief, paras 162-163.

⁸⁶³ SPO Response Brief, para. 163.

⁸⁶⁴ SPO Response Brief, para. 163; Transcript, 26 October 2023, pp. 81-84, 87-88.

⁸⁶⁵ SPO Response Brief, para. 164; Transcript, 26 October 2023, p. 84.

⁸⁶⁶ SPO Response Brief, paras 164-166.

⁸⁶⁷ SPO Response Brief, para. 166; Transcript, 26 October 2023, p. 84.

the correctness of the substantial cause test, but rather its application by the Trial Panel.⁸⁶⁸

332. Specifically concerning *novus actus interveniens*, the SPO submits that this principle is an exception to ordinary principles of causation, is unique to Anglo-American common law jurisdictions and does not reflect customary international law.⁸⁶⁹ It further submits that there is no “legitimate path for this principle into the substantive law applicable to Count 4” of the Indictment.⁸⁷⁰ The SPO cautions against directly importing a domestic legal concept into international criminal law, noting that the applicable threshold for using a domestic law rule to interpret customary international law is that the domestic rule must be “common to the major legal systems of the world”.⁸⁷¹ It submits that the *novus actus interveniens* principle does not meet this threshold.⁸⁷² Notwithstanding the above, the SPO contends that, in domestic jurisdictions, this principle does not significantly modify the ordinary principles of causation in that in most cases where a voluntary, criminal act has been found to break the chain of causation, the act was not reasonably foreseeable.⁸⁷³

333. Moreover, the SPO submits that even if *novus actus interveniens* applied in customary international law, it would not exempt Mustafa from liability, as a direct perpetrator, for his omissions in relation to his failure to evacuate the Murder Victim and to provide medical care.⁸⁷⁴ The SPO adds that on the same basis, Mustafa’s liability

⁸⁶⁸ Transcript, 26 October 2023, p. 99.

⁸⁶⁹ SPO Response Brief, paras 162, 168-170; Transcript, 26 October 2023, pp. 91-95, 97, 102-104.

⁸⁷⁰ SPO Response Brief, para. 162.

⁸⁷¹ SPO Response Brief, para. 171; Transcript, 26 October 2023, pp. 91-92, 104.

⁸⁷² SPO Response Brief, para. 171. The SPO adds that there is no compelling moral or policy argument for inclusion of the *novus actus interveniens* principle in customary international law. SPO Response Brief, para. 172.

⁸⁷³ SPO Response Brief, para. 168; Transcript, 26 October 2023, pp. 90-91, 97.

⁸⁷⁴ SPO Response Brief, paras 162, 168, 173-175; Transcript, 26 October 2023, p. 98; Transcript, 27 October 2023, p. 155.

for aiding and abetting would also be proven.⁸⁷⁵ However, it notes that the Appeals Panel would only get to the point of having to examine aiding and abetting liability if it were to apply some other exceptional principle than the substantial cause test.⁸⁷⁶

334. In response to questions raised by the Appeals Panel concerning the applicable causation standard, the SPO adds: (i) the Trial Panel made a “but for” causation finding and that regardless of whether the applicable standard for causation under customary international law includes “but for” causation, it would make no difference to the Trial Panel’s overall finding on causation for murder;⁸⁷⁷ (ii) an Appeals Panel previously held that the jurisprudence of the *ad hoc* tribunals was the most appropriate method of discerning the existence of customary international law;⁸⁷⁸ (iii) the application of the substantial cause test is consistent with the factual findings by an ICTY trial chamber in the *Limaj et al.* case and the ICTY Appeals Chamber in the *Lukić and Lukić* case where the accused were convicted as direct perpetrators while the actions of others had a more direct effect on the victims’ deaths;⁸⁷⁹ (iv) there is a wealth of cases with similar facts in international jurisprudence that provide guidance on the application of the substantial cause test in the context of aiding and abetting and illustrate the reasonableness of the Trial Panel’s findings;⁸⁸⁰ and (v) if the Panel substituted the substantial contribution test for any of the causation standards under national law, it would make no difference to the Trial Panel’s ultimate finding attributing the death of the Murder Victim to Mustafa and his BIA subordinates.⁸⁸¹ Finally, the SPO referred to a Kosovo Supreme Court judgment wherein it was held that where a victim of a legal detention is found murdered, the responsibility for that death can be attributed to those responsible for the detention if the detention or

⁸⁷⁵ SPO Response Brief, paras 162, 168, 176; Transcript, 26 October 2023, pp. 100, 106-107.

⁸⁷⁶ Transcript, 26 October 2023, pp. 107-108; 27 October 2023, pp. 154-155.

⁸⁷⁷ Transcript, 26 October 2023, pp. 78-80.

⁸⁷⁸ Transcript, 26 October 2023, p. 81.

⁸⁷⁹ Transcript, 26 October 2023, pp. 81-82.

⁸⁸⁰ Transcript, 26 October 2023, pp. 82-83.

⁸⁸¹ Transcript, 26 October 2023, pp. 83-89.

conditions of release created an opportunity for a third party to commit murder, provided that the requisite causal link and *mens rea* are satisfied.⁸⁸²

335. The SPO responds with respect to Mustafa's argument that there can only be one cause of death, that he conflates medical (or pathological) cause of death with legal causation and that while common usage of the word "cause" may imply that an accused's actions must be the sole cause of a given result, this is not how causation is defined in the law.⁸⁸³ The SPO submits that the Trial Panel correctly set out the legal standard for causation applicable to the war crime of murder, arguing that a perpetrator's conduct need not have been the sole cause of the victim's death, but it must, at a minimum, have substantially contributed to it.⁸⁸⁴ In this instance, the SPO submits that the acts and omissions of Mustafa and his subordinates had a substantial effect on the Murder Victim being shot, which in turn medically caused his death.⁸⁸⁵ The SPO responds with respect to Mustafa's further argument that death due to ill-treatment or denial of medical aid cannot form the basis of a murder conviction, that Mustafa provides no authority for this proposition.⁸⁸⁶

336. Concerning Mustafa's argument under Rule 40 of the Rules, the SPO responds that Mustafa raises this argument for the first time on appeal despite having had a specific opportunity to do so prior to opening statements,⁸⁸⁷ and therefore, it should be dismissed.⁸⁸⁸ The SPO nonetheless submits that Mustafa's argument is based on a fundamental misunderstanding of the Rule,⁸⁸⁹ in that it neither obliges the SPO to conduct exhumations or post-mortem examinations⁸⁹⁰ nor does its plain language

⁸⁸² Transcript, 26 October 2023, pp. 95-96.

⁸⁸³ SPO Response Brief, paras 140-143; Transcript, 26 October 2023, pp. 77-78.

⁸⁸⁴ SPO Response Brief, para. 140; Transcript, 26 October 2023, p. 78.

⁸⁸⁵ SPO Response Brief, para. 142.

⁸⁸⁶ SPO Response Brief, para. 134.

⁸⁸⁷ SPO Response Brief, para. 36.

⁸⁸⁸ SPO Response Brief, para. 36.

⁸⁸⁹ SPO Response Brief, para. 37.

⁸⁹⁰ SPO Response Brief, paras 37-38.

confer any power on the Trial Panel to order such measures independent of an SPO request.⁸⁹¹ Further, the SPO responds that Mustafa fails to show that the absence of an exhumation and examination of the Murder Victim's body resulted in the Trial Panel's alleged failure to identify the body, cause and time of death and the nature of the injuries.⁸⁹² Specifically, the SPO submits that the Trial Panel: (i) acknowledged the absence of an autopsy report; (ii) explained in detail what evidence it relied upon; and (iii) did not require corroboration.⁸⁹³ Moreover, the SPO argues that it is well established that the elements of murder can be proven in the absence of a body.⁸⁹⁴

337. Victims' Counsel responds, concerning Mustafa's *novus actus interveniens* argument, that a new act which breaks the chain of causation must constitute a "significant contributing factor" in the victim's death.⁸⁹⁵ Victims' Counsel further responds that Mustafa's submissions in this regard are hypothetical, asserting only that "many new intervening factors could have caused the death of the victim".⁸⁹⁶ Victims' Counsel adds that international case law, the major legal systems of the world, as well as Kosovo criminal law all clearly require a causal link between an accused's act or omission and the death of a victim of murder, and that attribution of responsibility is subject to normative correction based on what is fair and reasonable.⁸⁹⁷ Emphasising that the Serbian advance was not an entirely new, autonomous event that would break the chain of causation, Victims' Counsel submits that it is fair and reasonable for Mustafa's conviction for murder to be upheld on the basis of the facts that the Trial Panel found beyond reasonable doubt.⁸⁹⁸ Victim's

⁸⁹¹ SPO Response Brief, para. 39. The SPO further submits that Mustafa fails to demonstrate that an exhumation and post-mortem examination of the body of the Murder Victim would have been justified. See SPO Response Brief, paras 40-41.

⁸⁹² SPO Response Brief, paras 42-43. See also SPO Response Brief, para. 137.

⁸⁹³ SPO Response Brief, para. 43.

⁸⁹⁴ SPO Response Brief, para. 43.

⁸⁹⁵ Victims Response Brief, para. 78.

⁸⁹⁶ Victims Response Brief, para. 79, citing Appeal Brief, para. 359.

⁸⁹⁷ Transcript, 27 October 2023, p. 122.

⁸⁹⁸ Transcript, 27 October 2023, pp. 122-125.

Counsel contends that it is possible to have two different perpetrators committing the same crime, but one does not overtake the other, breaking the chain of causation.⁸⁹⁹ In her view, a disruption of causation only comes in when there is an entirely new event.⁹⁰⁰

338. Concerning Mustafa's arguments that there can only be one cause of death and that death due to ill-treatment or denial of medical aid cannot form the basis of a murder conviction, Victims' Counsel responds that Mustafa fails to acknowledge that, under the Law, the war crime of murder in a non-international armed conflict can be committed in a variety of ways by acts or omissions.⁹⁰¹ Victims' Counsel adds that what is required is that the perpetrator's conduct substantially contributed to the death, which may be proven through circumstantial evidence, such as proof of incidents or patterns of mistreatment.⁹⁰² Accordingly, Victims' Counsel submits that the Trial Panel correctly considered that the BIA's actions need not be the sole cause of death.⁹⁰³

339. Victims' Counsel further responds with respect to Mustafa's argument under Rule 40 of the Rules that: (i) this provision imposes an obligation on the SPO and not on the Trial Panel;⁹⁰⁴ (ii) there was no need for an identification due to the available evidence on this point;⁹⁰⁵ and (iii) the Trial Panel was correct not to consider an exhumation in light of the Specialist Chambers' obligation to act in a way that respects the victims' interests, and their rights to family life and respect for human dignity.⁹⁰⁶

⁸⁹⁹ Transcript, 27 October 2023, pp. 131-132.

⁹⁰⁰ Transcript, 27 October 2023, pp. 133-134.

⁹⁰¹ Victims Response Brief, para. 75. See also Victims Response Brief, para. 74.

⁹⁰² Victims Response Brief, para. 75. See also Victims Response Brief, para. 74.

⁹⁰³ Victims Response Brief, para. 77.

⁹⁰⁴ Victims Response Brief, para. 68.

⁹⁰⁵ Victims Response Brief, paras 69, 71.

⁹⁰⁶ Victims Response Brief, paras 67, 70-71.

340. Mustafa replies, concerning *novus actus interveniens*, that the SPO's submissions are either misplaced or unfounded.⁹⁰⁷ Specifically, he submits that: (i) he should not be criminally liable if the Murder Victim was shot by Serb forces, as he could not have acted otherwise and tried to save civilians when the Serbs were advancing on Zllash/Zlaš;⁹⁰⁸ (ii) the SPO's position in relation to the Serb advance, that under any legal system Mustafa would have been liable for the Murder Victim's death, is unreasonable;⁹⁰⁹ and (iii) the SPO's submissions on the inapplicability of the *novus actus interveniens* principle are irrelevant, as they engage in matters falling outside of the scope of the appeal.⁹¹⁰ In response to a question by the Appeals Panel concerning whether a new intervening event that resulted in lack of causation would impact other charged modes of liability, Mustafa responded that "where there is no murder, there is no responsibility for murder [...] in any form, at least by the accused".⁹¹¹

(ii) Assessment of the Court of Appeals Panel

341. The Appeals Panel notes the following definition for the *actus reus* of murder set out by the Trial Panel:

The war crime of murder, within the meaning of Article 14(1)(c)(i) of the Law, is committed through an act or omission resulting in the death of a person, including, for instance, by causing serious bodily harm or omitting/denying medical care to a detainee. The perpetrator's conduct does not have to be the sole cause of death of the victim, but it must at a minimum have contributed substantially thereto.⁹¹²

⁹⁰⁷ Reply Brief, para. 94.

⁹⁰⁸ Reply Brief, paras 91, 93. The Appeals Panel notes that at paragraph 91 of the Reply Brief, Mustafa states: "[b]ased on this statement, Mustafa should be criminally liable and incur upon himself criminal responsibility for any murder that has occurred within the Zllash area." The Appeals Panel understands Mustafa to mean that he "should not" be criminally liable.

⁹⁰⁹ Reply Brief, para. 93.

⁹¹⁰ Reply Brief, paras 90, 92.

⁹¹¹ Transcript, 26 October 2023, pp. 57-58.

⁹¹² Trial Judgment, paras 686-687. The Appeals Panel notes that different terminology is sometimes used by the Trial Panel and the Parties when referring to the causation standard set out in this definition.

342. Mustafa raises several interlinked challenges relating to the issue of causation, including the notion of *novus actus interveniens*, as it concerns the question whether his conduct satisfies the *actus reus* of murder. Causation is a component of the *actus reus* of murder. It is also a question of both fact and law.

343. As regards factual causation, the Appeals Panel notes that the Trial Panel found that the Murder Victim died as a result of a combination of: (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. Thus, the Trial Panel was unable to isolate a single factual cause of the Murder Victim's death.

344. As it concerns legal causation, the question before the Trial Panel was how to fairly attribute responsibility to Mustafa for his conduct in relation to the Murder Victim's death in view of the multiple factual causes of death. In the Appeals Panel's view, in answering this question, the Trial Panel correctly applied the "substantial contribution" test which is well-established in the jurisprudence of international courts and tribunals⁹¹³ and is not, as such, challenged by Mustafa.

345. The Trial Panel found that, based on its factual findings, it was "uncontroversial"⁹¹⁴ that the causal factors of severe mistreatment and denial of medical aid were "solely attributable" to Mustafa and his BIA subordinates⁹¹⁵ and that these were substantial causes of the Murder Victim's death.⁹¹⁶ As regards the causal factor of the bullet holes in the Murder Victim's body, the Trial Panel found that there was reasonable doubt as to whether they could be attributed to BIA members or to

References to either the "substantial cause" test or the "substantial contribution" test should be understood to refer to this causation standard.

⁹¹³ See e.g. *Delalić et al.* Trial Judgement, para. 424; *Karadžić* Trial Judgement, para. 446; *Popović et al.* Trial Judgement, para. 788; *Milutinović et al.* Trial Judgement (Vol. I), para. 137; *Brđanin* Trial Judgement, para. 382; *Kupreškić et al.* Trial Judgement, para. 818; *Duch* Trial Judgement, para. 331; *Katanga and Ngudjolo* Confirmation Decision, para. 296; *Brima et al.* Trial Judgement, para. 689.

⁹¹⁴ Trial Judgment, para. 625.

⁹¹⁵ Trial Judgment, para. 625.

⁹¹⁶ Trial Judgment, para. 626.

Serbian forces.⁹¹⁷ This being the case, and in view of the principle of *in dubio pro reo*, the Trial Panel was required to assume, and did assume, for the remainder of its analysis of legal causation, the factual scenario which is most favourable to Mustafa – namely that Serb forces shot the Murder Victim.⁹¹⁸ Having acknowledged the existence of a reasonable doubt, and with a view to the fair attribution of responsibility for the Murder Victim’s death, the Appeals Panel considers that the Trial Panel was also required to address the question whether the assumed gunshots by Serb forces constituted a third party intervention so as to break the chain of causation, which is the question raised on appeal.⁹¹⁹

346. The Appeals Panel notes in this regard that neither the Parties nor Victims’ Counsel were able to direct the Panel to any case by an international court or tribunal where there was a new third party intervening event comparable to that in the present case.⁹²⁰ Thus, the jurisprudence of international courts and tribunals does not seem to

⁹¹⁷ Trial Judgment, para. 637.

⁹¹⁸ Trial Judgment, paras 637-638.

⁹¹⁹ On the principle of *novus actus interveniens*, generally, see Colvin, E., “Causation in Criminal Law” (1989) 1 *Bond Law Review* 2, p. 266; Simester, A. P. *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing*, Oxford University Press: Oxford, 2021, pp. 112-113, 129.

⁹²⁰ In its submissions, the SPO referred to two ICTY cases as being “consistent with an application of the substantial cause test as was set out by the trial chamber in this case”, noting that the accused in each of those cases was convicted of murder as a direct perpetrator for “having made a substantial contribution even where the contribution of others had a more direct effect on death”. See Transcript, 26 October 2023, pp. 81-82, referring to *Limaj et al.* Appeal Judgement, *Lukić and Lukić* Trial Judgement and *Lukić and Lukić* Appeal Judgement. See also SPO Response Brief, paras 146-150. The Panel notes, however, that these cases involved the actions of other persons (other soldiers on the same side) who “jointly” and “acting together” with the accused all took part *at the same time* in the shooting of the victims – unlike in this case, where the “other possible cause” of death is the *subsequent*, distinct action of a third party. Additionally, in both *Limaj et al.* and *Lukić and Lukić*, the evidence supported the conclusion that the accused had directly shot and killed at least one of the victims and the accused were also present and/or involved in the events leading up to and including the shootings. On the basis of the accused’s direct participation in the shootings, the trial chambers attributed liability as a direct perpetrator for the death of all victims, regardless of whether they had personally fired the fatal bullet. See *Limaj et al.* Trial Judgement, para. 454; *Limaj et al.* Appeal Judgement, paras 47-50; *Lukić and Lukić* Trial Judgement, para. 908; *Lukić and Lukić* Appeal Judgement, paras 155-162. In the Panel’s view, these circumstances do not amount to a *novus actus* and are not factually comparable to the present case. In three other ICTY cases identified by the SPO, the trial chambers convicted the accused for killings committed by a third party, finding that the accused’s acts (decision to withdraw their guards or disarm civilians that left detainees and civilians vulnerable to other paramilitary forces) and omissions (failure

offer clear guidance as to the circumstances in which a new third party intervening event relevantly affects legal causation under the substantial contribution test for a direct perpetrator. As a consequence, there is no apparent basis on which to derive (subsidiarily) customary international law from international case law on this issue.

347. A closer look at major jurisdictions, however, offers some insights as to the proper treatment of a situation where a third party intervenes in the causal course of events. In common law jurisdictions the issue is dealt with under the heading of *novus actus interveniens*. Thus, courts consider that the chain of causation is broken where, for example, the third party intervening event is independent of an accused's conduct, superseding it either on the basis that it is: (i) not "reasonably foreseeable" or "extraordinary" (United States of America);⁹²¹ or (ii) "free, deliberate, and informed"⁹²²

to provide medical aid or otherwise protect detainees) had substantially contributed to the subsequent killings. See Transcript, 26 October 2023, p. 83, referring to *Mrkšić et al.* Trial Judgement and *Popović et al.* Trial Judgement; SPO Response Brief, paras 152-153, 156, referring to *Mrkšić et al.* Trial Judgement, para. 621; *Mrkšić and Šljivančanin* Appeal Judgement, para. 97; *Popović et al.* Trial Judgement, para. 1988; *Brđanin* Trial Judgement, para. 369. However, the Panel notes that these cases are not comparable in light of the fact that the accused were convicted for aiding and abetting by omission, for having assisted and substantially contributed to the subsequent killings by the primary perpetrators, whose conduct does not constitute a *novus actus* in relation to the aider and abettor. In contrast, the Trial Panel convicted Mustafa as a primary perpetrator, as a member of a JCE, finding that his conduct (including severe mistreatment inflicted on the Murder Victim and the denial of medical aid) satisfied the *actus reus* of murder irrespective of its further finding that a bullet wound was an additional cause of death that may have been inflicted by a third party (Serb forces) during a new intervening event.

⁹²¹ In the United States, the intervening action(s) of a third party will relieve an accused of criminal responsibility where such action(s) "supersede" the accused's conduct. A superseding cause is an independent event that is an unforeseeable and "extraordinary occurrence" (also described as "abnormal" or "unexpected") and which produces harm of a kind and degree that could not have been reasonably foreseen. See e.g. United States, Supreme Court of California, *People v. Carney*, 532 P.3d 696, 20 July 2023, p. 702; United States, Supreme Court of Washington, *State v. Frahm*, 444 P.3d 595, 11 July 2019, p. 600; United States, Supreme Court of California, *People v. Cervantes*, 29 P.3d 225, 27 August 2001, pp. 232-233; United States, Supreme Court of Arizona, *State v. Bass*, 12 P.3d 796, 9 November 2000, p. 801; United States, Supreme Court of Kansas, *State v. Anderson*, 12 P.3d 883, 27 October 2000, p. 889.

⁹²² England and Wales, House of Lords, *R v. Kennedy*, [2007] UKHL 38, Report, 17 October 2007, p. 3, citing Hart and Honoré, *Causation in the Law* (2nd edition), Oxford University Press 1985, ch. XII, and stating that the "principle is fundamental and not controversial" and that the "statement was cited by the House [of Lords] with approval" in England and Wales, House of Lords, *R v. Latif*, [1996] 1 WLR 104, 18 January 1996, p. 10. See also England and Wales, Court of Appeal, *R v. Pagett*, [1983] WL 215490, 3 February 1983, p. 7, referring to "a well-known and most distinguished treatise by Professors Hart and Honore [...] in Chapter XII".

or “unreasonable or extraneous or extrinsic”,⁹²³ being “so independent of [the accused’s] acts, and in itself so potent in causing death, that they regard the contribution made by [the accused’s] acts as insignificant”⁹²⁴ or, put another way, “so overwhelming as to make the original wound merely part of the history” (England and Wales).⁹²⁵ In civil law jurisdictions, courts may consider that the chain of causation is broken by the third party intervening event, where it is, for example: (i) “exorbitant” (Italy);⁹²⁶ (ii) “[outside] the boundaries of what was foreseeable” and justifies “a different assessment of the offence” (Germany);⁹²⁷ (iii) “completely unpredictable and

⁹²³ England and Wales, Court of Appeal, *R v. Smith*, [1959] 2 QB 35, 25 March 1959, p. 43, citing England and Wales, Court of Appeal, *The Oropesa*, [1943] 1 All ER 211, 17 December 1942.

⁹²⁴ England and Wales, Court of Appeal, *R v. Cheshire*, [1991] 1 WLR 844, 22 April 1991, p. 852.

⁹²⁵ England and Wales, Court of Appeal, *R v. Smith*, [1959] 2 QB 35, 25 March 1959, p. 43 (also cited in England and Wales, Court of Appeal, *R v. Cheshire*, [1991] 1 WLR 844, 22 April 1991, p. 850).

⁹²⁶ Italy, Supreme Court of Cassation (*Corte suprema di cassazione*), United Sections, *Espenhahn and others*, 38343/14, Judgment, 24 April 2014, p. 105 (“[A supervening cause] is ‘interruptive’ [of the causal link] [...] not because it is ‘exceptional’ but because it is exorbitant compared with the risk that the [first agent] was called upon to govern.” “[Un comportamento sopravvenuto] è ‘interruttivo’ [...] non perché ‘eccezionale’ ma perché eccentrico rispetto al rischio [...] che [il primo agente] è chiamato a governare.”]). See also Italy, Supreme Court of Cassation (*Corte suprema di cassazione*), Section IV, *Dascalu*, 11536/20, Judgment, 7 April 2020, p. 5 (“[...] the supervening cause capable of excluding the causal link [...] must trigger a new or in any case radically exorbitant risk compared with the risk determined by the first agent.” “[...] la causa sopravvenuta idonea ad escludere il nesso causale [...] deve innesicare un rischio nuovo o comunque radicalmente esorbitante rispetto a quello determinato dall’agente.”]). See also Italy, Supreme Court of Cassation (*Corte suprema di cassazione*), Section IV, *Sorrentino and others*, 33329/15, Judgment, 28 July 2015, p. 22 (“A third party’s illicit conduct does not exclude the attribution of the event to the first agent, which can occur until the third party’s intervention, in relation to the entire causal development from the initial conduct to the event, outweighs the initial risk.” “[Il fatto illecito altrui non esclude in radice l’imputazione dell’evento al primo agente, che avrà luogo fino a quando l’intervento del terzo, in relazione all’intero concreto decorso causale dalla condotta iniziale all’evento, non abbia soppiantato il rischio originario.”]). All translations in this and the following footnotes are from the Panel.

⁹²⁷ Germany, Federal Court of Justice (*Bundesgerichtshof*), 2 StR, 204/00, Judgment, 30 August 2000, p. 30 (“The offender’s actions remain causal even if a third party acting later intentionally contributes to bringing about the same result through an action aimed at the same outcome, provided that he only ties in with the offender’s actions, i.e. the latter is the condition of his own intervention. [...] Deviations from the imagined causal course are legally insignificant if they remain within the boundaries of what was foreseeable according to general life experience and do not justify a different assessment of the offence.” “[‘Ursächlich bleibt das Täterhandeln selbst dann, wenn ein später handelnder Dritter durch ein auf denselben Erfolg gerichtetes Tun vorsätzlich zu dessen Herbeiführung beiträgt, sofern er nur dabei an das Handeln des Täters anknüpft, dieses also die Bedingung seines eigenen Eingreifens ist. [...] Abweichungen vom vorgestellten Kausalverlauf sind jedoch rechtlich bedeutungslos, wenn sie sich innerhalb der Grenzen des nach allgemeiner Lebenserfahrung Voraussehbaren halten und keine andere Bewertung der Tat rechtfertigen.”]).

anomalous” (Portugal);⁹²⁸ (iv) directly the cause of the victim’s death⁹²⁹ and not part of a single scene of violence (*scène unique de violence*) (France);⁹³⁰ (v) “totally anomalous,

⁹²⁸ Portugal, Supreme Court of Justice (*Supremo Tribunal de Justiça*), Section V, 2275/15.1JAPRT.P2.S1, Judgment, 9 July 2020 (“[...] ‘the theories of interruption of the causal link require that the result occurs in a completely unpredictable and anomalous manner in relation to the defendant’s conduct.’” [“As teorias da interrupção do nexo de causalidade determinariam que o resultado morte acontecesse de modo totalmente imprevisível e anómalo face à conduta do arguido.”]). See also Portugal, Coimbra Court of Appeals (*Tribunal da Relação de Coimbra*), Criminal Section V, 174/13.0GAVZL.C1, Judgment, 7 October 2015 (“[In order to interrupt the causal link, the new event must be a completely anomalous and unpredictable circumstance.”][“[...] uma circunstância completamente anómala e imprevisível, por forma a sustentar a interrupção do nexo causal.”]).

⁹²⁹ France, Court of Cassation (*Cour de Cassation*), Criminal Chamber, 19-84.315, 1 October 2019, paras 11-13 (“[...] the death of [the victim] does not result from a cause external to the violence he admits having committed in the time preceding [the victim’s] death [...]. Her death is the direct consequence of this violence, which took place in a prior context of permanent pressure, committed with a weapon, in this case a knife, and accompanied by manoeuvres intended to prevent the young woman to flee, which resulted in her desperate and fatal attempt to escape the grip of her aggressor.” [“[...] le décès d’R... T... ne serait pas dû à une cause extérieure aux violences qu’il reconnaît avoir commises sur cette dernière dans les instants ayant précédé ce décès [...], ce décès en serait la conséquence directe, ces violences inscrites dans un contexte antérieur de pressions permanentes, exercées avec une arme, en l’occurrence un couteau, et accompagnées de manoeuvres destinées à couper court à toute fuite de la jeune femme ayant eu pour conséquence le choix d’une tentative désespérée et qui fut fatale à l’intéressée d’échapper à l’emprise de son agresseur.”]). See also France, Court of Cassation (*Cour de Cassation*), Criminal Chamber, 02-83.329, 7 January 2003 (“The kidnapping of the victim [...] and the violence carried out by the accused are incontestably at the origin of the attempted flight of the civil party who gave in to this impulse to escape the violent behaviour of [the accused], that the violence which was committed inside the apartment and continued on the balcony – the accused wanting to prevent the victim from fleeing – was of a voluntary nature and was directly the cause of the injuries caused by the fall to the balcony.” [“[L]a séquestration dont Muriel Y... a été victime et les violences exercées par le prévenu sont incontestablement à l’origine de la tentative de fuite de la partie civile qui a cédé à cette pulsion pour échapper au comportement violent de Patrick X..., que les violences commises à l’intérieur de l’appartement et poursuivies sur le balcon - le prévenu voulant empêcher la victime de s’enfuir - ont un caractère volontaire et sont directement à l’origine des blessures occasionnées par la chute au balcon.”]).

⁹³⁰ See France, Court of Cassation (*Cour de Cassation*), Criminal Chamber, 21-82.958, 23 March 2022, para. 24 (“when violence is carried out voluntarily and simultaneously, with homicidal intent, by several accused, during a single scene, the offence may be assessed as a whole, without it being necessary for the trial judges to specify the nature of the violence carried out by each of the accused on each of the victims.” [“[L]orsque des violences ont été exercées volontairement et simultanément, dans une intention homicide, par plusieurs accusés, au cours d’une scène unique, l’infraction peut être appréciée dans son ensemble, sans qu’il soit nécessaire pour les juges du fond de préciser la nature des violences exercées par chacun des accusés sur chacune des victimes.”]); France, Court of Cassation (*Cour de Cassation*), Criminal Chamber, 21-90.043, 16 February 2022, paras 6-8 (“The conviction of a defendant for violence, in application of [the *scène unique de violence* case law], implies the finding, by the trial judges [...] that he took a personal part in the indivisible violence caused by several authors. [...] [T]his jurisprudence makes it possible to repress violence without one of its perpetrators sheltering behind the participation of others to exempt themselves from the consequences of their own.” [“La déclaration de culpabilité d’un prévenu pour violences, en application de cette jurisprudence [à propos

unforeseeable and foreign to the defendant's behaviour [...] [and not] within the same sphere of the risk created or increased by the defendant's own behaviour" (Spain);⁹³¹ or (vi) "autonomous" and "generates its own causal relationship" (Argentina).⁹³² Thus, the Panel sums up the key insights gleaned from this brief review of the position in various jurisdictions as follows: to have any impact on the chain of causation set in motion by the original conduct, a new supervening event must not be foreseeable, or not form part of the original sphere of risk belonging to the accused and create a wholly new risk that is so potent as to render the original risk insignificant.

348. While it would have been preferable for the Trial Panel to have directly acknowledged and set out its methodology for assessing a new third party intervening event in relation to the substantial contribution test, the Appeals Panel nonetheless

des scènes uniques de violences], implique la constatation, par les juges du fond, [...] qu'il a pris une part personnelle aux violences indivisibles causées par plusieurs auteurs. [...] [C]ette jurisprudence permet de réprimer des violences sans qu'un de leurs auteurs s'abrite derrière la participation des autres pour s'exonérer des conséquences de la sienne propre.")). The Panel observes that in France, there is a certain lack of consistency in the way the jurisprudence has addressed breaks in the chain of causation. See Mayaud, Y., *Répertoire de droit pénal et de procédure pénale, Violences volontaires*, Dalloz, 2023, paras 59-61.

⁹³¹ Spain, Supreme Court (*Tribunal Supremo*), Chamber II – Criminal, 266/2006, Judgment, 7 March 2006, Section (2) of the Third Legal Basis ("[...] When complex causal courses occur, that is, when the conduct of the accused and another cause or causes attributable to a different person or a fortuitous event contribute to a typical result, it is usually estimated that [...] if it is [subsequent to the conduct of the accused], it may prevent such imputation when this supervening cause is something totally anomalous, unpredictable and foreign to the behaviour of the accused [...] but not in those cases in which the subsequent event is within the same sphere of the risk created or increased by the accused himself with his behaviour." "[...] Cuando se producen cursos causales complejos, esto es, cuando contribuyen a un resultado típico la conducta del acusado y además otra u otras causas atribuibles a persona distinta o a un suceso fortuito, suele estimarse que, [si es posterior a la conducta del acusado], puede impedir tal imputación cuando esta causa sobrevenida sea algo totalmente anómalo, imprevisible y extraño al comportamiento del inculpado [...] pero no en aquellos supuestos en que el suceso posterior se encuentra dentro de la misma esfera del riesgo creado o aumentado por el propio acusado con su comportamiento.")).

⁹³² Argentina, Federal Criminal Court of Cassation (*Camara Federal de Casacion Penal*), Chamber III, 786/2013, *Lizarraga, Luis Miguel et al s/*, Judgment, 17 November 2014, p. 21 ("[...] in order for the result of death not to be attributable to [the first perpetrator], it would be necessary that the injuries that led to [the victim's death] be caused by an autonomous event that generates its own causal relationship, independent of the conduct carried out by the defendant [...]" "[...] para que el resultado muerte no sea imputable [al primer autor] sería necesario que las lesiones que llevaron al deceso [de la víctima] reconozcan por causa un acontecimiento autónomo que genere su propia relación causal, independiente de la conducta llevada a cabo por los encausados [...]").

understands the Trial Panel to have addressed this matter, at least implicitly, ultimately concluding:

[E]ven if the gunshots were attributable exclusively to the Serbian forces, [...] this would not relieve the Accused of his responsibility, [as] [...] firing directly at the Murder Victim or putting him in a position to be fired at by the advancing Serbian forces [...] leads exactly to the same conclusion, namely that the required causation between the Accused's acts and omissions and the death of the victim remains unaffected.⁹³³

Moreover, applying the essence of the above referenced standards for *novus actus interveniens*, the Appeals Panel observes that Trial Panel findings support the conclusion that the risk to the Murder Victim's life posed by advancing Serb forces was *foreseeable*. The Trial Panel found that Mustafa personally went to Zilash/Zlaš on or around 20 to 21 April 1999 in order to evacuate wounded persons "because of a critical change of circumstances — the Serbian offensive".⁹³⁴ In other words, Mustafa knew about the advancing enemy Serb forces and was worried enough to move his own personnel from harm's way. The Trial Panel's findings also support the conclusion that the risk to the Murder Victim's life posed by advancing Serb forces was *part of the original sphere of risk* stemming from Mustafa's conduct. In this regard, the Trial Panel found, in the context of his knowledge of the advancing Serb forces, that Mustafa's decision to not release or evacuate the Murder Victim – a man in a "near-to-death state" when last seen by his co-detainees – "deprived [him] of any chance to survive".⁹³⁵ Finally, Trial Panel findings support the conclusion that the risk to the Murder Victim's life posed by advancing Serb forces was not so potent as to render the original risk *insignificant*. The Trial Panel found in this regard that "had the Accused and his BIA subordinates stopped such extreme mistreatment or provided medical aid to the Murder Victim, he would not have died".⁹³⁶

⁹³³ Trial Judgment, para. 638.

⁹³⁴ Trial Judgment, paras 254, 634, 658.

⁹³⁵ Trial Judgment, paras 571, 625, 635-636.

⁹³⁶ Trial Judgment, para. 626.

349. In view of the above, the Appeals Panel finds that, while the Trial Panel did not explicitly address the *novus actus interveniens* principle, Mustafa has failed to demonstrate that no reasonable trial panel could have found that Mustafa satisfied the *actus reus* of murder. The Appeals Panel therefore dismisses this argument.

350. Turning to Mustafa's argument that there can only be one cause of death, the Appeals Panel considers that Mustafa appears to confuse medical cause of death with legal causation. The Panel is of the view that, based on the principle of free evaluation of evidence, it is not necessary for a trial panel to be satisfied beyond reasonable doubt as to the medical cause of death (or even for the body of the victim to be recovered).⁹³⁷ As it concerns legal causation, there may be, and there often is, more than one cause leading to a harmful result and more than one person to whom the law may attribute that result.⁹³⁸ The Appeals Panel therefore dismisses this argument.

351. Concerning Mustafa's argument that death due to ill-treatment or denial of medical care does not amount to the "criminal offence of murder", the Appeals Panel notes that it is well-established in the jurisprudence of international courts and tribunals that both acts and omissions resulting in the death of a person may qualify as murder.⁹³⁹ Ill-treatment and denial of medical care are no different than any other act or omission. What is required is that the perpetrator's conduct substantially contributes to the victim's death,⁹⁴⁰ without having a supervening event superseding

⁹³⁷ See Rules 137(2), 139(2), 140(3) and 158(3) of the Rules. Regarding the absence of a requirement that the body of the murder victim be recovered, see *Lukić and Lukić* Appeal Judgement, para. 149; *Martić* Trial Judgement, para. 59.

⁹³⁸ See e.g. *Karadžić* Trial Judgement, para. 446; *Lukić and Lukić* Trial Judgement, para. 903; *Milutinović et al.* Trial Judgement (Vol. I), para. 137.

⁹³⁹ See e.g. *Kvočka et al.* Appeal Judgement, para. 261; *Milutinović et al.* Trial Judgement (Vol. I), para. 137; *Krstić* Trial Judgement, para. 485; *Katanga* Trial Judgment, para. 786; *Duch* Trial Judgement, para. 331; *Brima et al.* Trial Judgement, paras 688-689. The Appeals Panel notes, as an example of similar facts, that an ECCC trial chamber found an accused guilty of the grave breach of wilful killing on the basis that detainees died at a detention centre "as the result of omissions known to be likely to lead to death and as a consequence of the conditions of detention imposed upon them". *Duch* Trial Judgement, para. 437.

⁹⁴⁰ See above, para. 344. See also Trial Judgment, paras 686-687.

this substantial causal contribution. The Appeals Panel therefore dismisses this argument.

352. Concerning Mustafa's argument that the SPO failed to request authorisation, and that the Trial Panel failed to exercise its power to authorise, pursuant to Rule 40 of the Rules, an exhumation and post-mortem examination of the grave believed to be that of the Murder Victim, the Appeals Panel observes that Mustafa raises this argument for the first time on appeal, while he had ample opportunity to raise it at first instance.⁹⁴¹ For this reason, the Appeals Panel considers that Mustafa has waived his right to challenge this issue on appeal.⁹⁴² The Appeals Panel therefore dismisses this argument.

353. Concerning Mustafa's argument alleging an error in relation to the cause of death, the Appeals Panel dismisses Mustafa's assertion that the Trial Panel erred by relying on non-expert testimony given that he has not articulated a legal basis for the alleged error.⁹⁴³ The Panel therefore dismisses this unsubstantiated argument. Additionally, Mustafa submits that certain evidence is mutually corroborative of one entry hole having been observed on the Murder Victim's body.⁹⁴⁴ However, Mustafa does not explain the relevance of determining the number of entry holes in the body.⁹⁴⁵ In this regard, the Appeals Panel observes that Mustafa's conviction for the war crime of murder was not based on attribution of the bullet hole to him or to his BIA subordinates, as the Trial Panel found reasonable doubt as to its attribution. Instead, it was based on the attribution of the severe mistreatment inflicted on the Murder

⁹⁴¹ Most notably, Mustafa did not raise this argument before the start of the trial, when the SPO responded to a Trial Panel request for information on whether forensic examination had been performed on the Murder Victim's body. See SPO Response to Request for Submissions, paras 12-14.

⁹⁴² See above, para. 30.

⁹⁴³ Appeal Brief, para. 330.

⁹⁴⁴ Appeal Brief, para. 331, referring to [REDACTED] and the testimony of [REDACTED].

⁹⁴⁵ Appeal Brief, para. 331.

Victim and the denial of medical aid.⁹⁴⁶ The Panel therefore dismisses Mustafa's arguments in this regard.⁹⁴⁷

354. The Panel now turns to Mustafa's argument that, in order to avoid a "violation of the provisions of the criminal procedure", a finding on the time of death was "indispensable"⁹⁴⁸ and "more than necessary".⁹⁴⁹ In this regard, the Panel notes that the *approximate* time of death was a material fact pleaded in the Indictment, namely the SPO alleged that Mustafa was individually criminally responsible for the death of the Murder Victim between approximately 19 April 1999 and around the end of April 1999.⁹⁵⁰ The Trial Panel found that: (i) the Murder Victim was last seen alive by his co-detainees at the ZDC, in a near-to-death state, on or around 19 April 1999,⁹⁵¹ having been denied medical care after suffering an extreme level of mistreatment by BIA members for about [REDACTED] days in detention, including with a potentially lethal object;⁹⁵² (ii) the Murder Victim was not released from the ZDC on or around 19 April 1999 when other detainees were released;⁹⁵³ (iii) at some subsequent point in time, prior to when some BIA members returned to Zllash/Zlaš, on or around 20 to 21 April 1999,⁹⁵⁴ Serbian forces shelled and fired at the ZDC, at least from a distance, causing damage to its infrastructure;⁹⁵⁵ and (iv) the Murder Victim was found dead between approximately 3 and 6 July 1999, buried [REDACTED].⁹⁵⁶ On the basis of

⁹⁴⁶ See above, para. 327, referring to, *inter alia*, Trial Judgment, para. 637. See also Trial Judgment, paras 638, 689.

⁹⁴⁷ The Appeals Panel notes Mustafa's argument that since the cause of death was not proven, intent to kill could not be attributed to him. See Appeal Brief, para. 374. As the Appeals Panel has dismissed all of Mustafa's arguments alleging that the Trial Panel erred with respect to its findings on the cause of the Murder Victim's death, this argument concerning the Trial Panel's findings on intent is moot and will not be addressed.

⁹⁴⁸ Appeal Brief, para. 340.

⁹⁴⁹ Appeal Brief, paras 334-335.

⁹⁵⁰ Indictment, para. 35.

⁹⁵¹ Trial Judgment, para. 625.

⁹⁵² Trial Judgment, paras 626, 635. See also Trial Judgment, paras 521-522, 569-574, 584-588.

⁹⁵³ Trial Judgment, paras 477-481, 589, 636.

⁹⁵⁴ Trial Judgment, para. 634.

⁹⁵⁵ Trial Judgment, para. 633.

⁹⁵⁶ Trial Judgment, paras 611, 618.

these findings, the Trial Panel concluded that the Murder Victim died between on or around 19 April 1999 and around the end of April 1999.⁹⁵⁷ The Appeals Panel considers that, depending on the facts of a case, a precise determination of the time of death may be necessary in order to attribute responsibility to an accused. Yet, in this case, a more precise determination of the time of death than the one given was not necessary for the purpose of attribution. Mustafa fails to show why it should have been necessary and that no reasonable trial panel could have found that Mustafa's conduct satisfied the *actus reus* of murder in the absence of such a finding. The Panel therefore dismisses this argument.

355. In light of the above, the Appeals Panel finds that Mustafa fails to demonstrate that the Trial Panel erred in law in finding that Mustafa's conduct satisfied the *actus reus* of murder. Accordingly, the Appeals Panel dismisses Mustafa's arguments alleging errors of law under Grounds 3 and 4.

(b) Alleged Errors of Fact Concerning the Trial Panel's Findings on the *Actus Reus* of Murder

(i) Submissions of the Parties and Participants

356. As it concerns factual errors, Mustafa first alleges that, contrary to the Trial Panel's findings, it was a reasonable inference that the Murder Victim died solely as a result of the gunshot wound(s).⁹⁵⁸ To this end, he submits that the Trial Panel erred in finding that mistreatment at the ZDC prior to 19 April 1999 was a substantial cause of the Murder Victim's death.⁹⁵⁹ In support, Mustafa argues that the Trial Panel did not "unequivocally" establish the fact that the Murder Victim was unable to move at the time when other detainees were released.⁹⁶⁰

⁹⁵⁷ Trial Judgment, para. 639.

⁹⁵⁸ Notice of Appeal, Ground 4B, para. 7; Appeal Brief, para. 354. See also Appeal Brief, para. 367.

⁹⁵⁹ Notice of Appeal, Ground 4A, para. 7. See also Appeal Brief, paras 342-344, 347; Reply Brief, para. 89.

⁹⁶⁰ Appeal Brief, para. 343. See also Appeal Brief, para. 342.

357. Second, Mustafa alleges that, contrary to the Trial Panel's findings, there is a reasonable likelihood that the Murder Victim died "after the period of the [I]ndictment".⁹⁶¹

358. Third, Mustafa alleges that the Trial Panel erred in that there was no evidence that the Murder Victim: (i) died from mistreatment by BIA members;⁹⁶² (ii) died from the denial of medical aid by BIA members;⁹⁶³ (iii) was not evacuated;⁹⁶⁴ or (iv) was shot with bullets.⁹⁶⁵

359. Fourth, Mustafa alleges that the Trial Panel erred in that there was no or insufficient evidence to support the Trial Panel's finding that the Murder Victim died as a result of his acts or omissions.⁹⁶⁶ He advances two arguments to this end. Mustafa first asserts that the Trial Panel wrongly concluded that, in his capacity as commander in chief of the BIA at the detention complex in Zllash/Zlaš, he was responsible for the decision not to release and the decision not to evacuate the Murder Victim.⁹⁶⁷ In support of this argument, he submits that the decision not to release the Murder Victim was made by Mr Mehmetaj "a.k.a. Bimi" and that there was no longer a superior-subordinate relationship between Mustafa and "Bimi".⁹⁶⁸ Instead, Mustafa contends that Mr Isa Kastrati was deputy commander at the time.⁹⁶⁹ Additionally, Mustafa submits that there is no evidence that he made a decision that the Murder

⁹⁶¹ Appeal Brief, paras 336-339; Transcript, 26 October 2023, pp. 47-50, 55-56.

⁹⁶² Appeal Brief, para. 347. See also Appeal Brief, paras 344-345, 367.

⁹⁶³ Appeal Brief, para. 347. See also Appeal Brief, paras 344-345, 352-353, 367.

⁹⁶⁴ Appeal Brief, para. 357; Transcript, 26 October 2023, pp. 52-54. The Panel notes that Mustafa does not substantiate this argument in the Appeal Brief or Reply Brief. During the Appeal Hearing, he briefly developed this argument. However, the Appeals Panel will not address this argument that was only developed at the late stage of the Appeal Hearing. See also Appeal Brief, para. 367.

⁹⁶⁵ Appeal Brief, para. 346. See also Appeal Brief, paras 355, 367.

⁹⁶⁶ Notice of Appeal, Ground 4D, para. 7; Appeal Brief, paras 347-351, 356-357, 363-366; Reply Brief, paras 95, 132; Transcript, 26 October 2023, pp. 53-54. See also Appeal Brief, para. 367.

⁹⁶⁷ Appeal Brief, paras 363-364; Transcript, 26 October 2023, pp. 53-54.

⁹⁶⁸ Appeal Brief, paras 364-365, 373; Transcript, 26 October 2023, pp. 53-54.

⁹⁶⁹ Appeal Brief, paras 364-365.

Victim should not be evacuated.⁹⁷⁰ Second, Mustafa argues that the Trial Panel erred in concluding that the alleged gunshot could be attributed to him or his subordinates when there was no evidence to support such a finding.⁹⁷¹

360. The SPO responds that Mustafa provides no support for his argument that it was a reasonable inference that the Murder Victim died solely as a result of the gunshot wound(s), beyond his general assertion that the Trial Panel did not establish in an “unequivocal way” the finding that the Murder Victim was unable to move.⁹⁷²

361. The SPO further responds that Mustafa’s argument specifically alleging that the Murder Victim’s time of death could have been after the Indictment period is factually unfounded and runs contrary to the evidence on which the Trial Panel relied.⁹⁷³

362. Concerning Mustafa’s argument that certain Trial Panel findings are unsupported by any evidence, the SPO responds that this submission is based on a mistaken assumption that a conviction cannot be supported by circumstantial evidence.⁹⁷⁴ The SPO adds that the Trial Panel clearly stated that it inferred certain findings and that Mustafa merely disagrees with these findings without articulating any error.⁹⁷⁵ Regarding Mustafa’s specific assertion that there was no evidence that the Murder Victim was not evacuated from the ZDC, the SPO responds that the Trial Panel clearly stated that it inferred this finding from circumstantial evidence, including: (i) the testimony of W01679, W03593 and W03594; (ii) evidence of Mustafa’s command over the ZDC; and (iii) his admitted role in the evacuation of the wounded.⁹⁷⁶ As to Mustafa’s further assertion that there is no evidence supporting the

⁹⁷⁰ Appeal Brief, paras 357, 366; Reply Brief, para. 35. See also Appeal Brief, para. 363.

⁹⁷¹ Appeal Brief, paras 348; Reply Brief, paras 31-32. See also Appeal Brief, para. 351.

⁹⁷² SPO Response Brief, paras 134, 136-137.

⁹⁷³ SPO Response Brief, paras 130-132; Transcript, 26 October 2023, p. 98. [REDACTED].

⁹⁷⁴ SPO Response Brief, para. 138.

⁹⁷⁵ SPO Response Brief, para. 138.

⁹⁷⁶ SPO Response Brief, para. 138.

finding that the Murder Victim was shot by bullets, the SPO responds that, as is evident from Mustafa's own reference to the Trial Judgment, this finding is based on the evidence of several witnesses who exhumed the Murder Victim's body within months of his death and who directly observed the holes in the body.⁹⁷⁷

363. Concerning Mustafa's argument that there was no or insufficient evidence that the Murder Victim died as a result of his acts or omissions, the SPO responds that the Trial Panel clearly and exhaustively explained the solid evidentiary foundation of its findings regarding Mustafa's responsibility for the Murder Victim's death, and that an alleged error regarding the formal position of one of the KLA soldiers does not invalidate them.⁹⁷⁸ To this end, the SPO submits that, in April 1999, Mr Mehmetaj continued to be a member of the BIA, and hence Mustafa's subordinate, even while remotely performing functions for the Llap Operational Zone command.⁹⁷⁹ Moreover, the SPO responds that the Trial Panel's finding regarding Mustafa's responsibility for the decision not to release or evacuate the Murder Victim was based on "the evidence as a whole", including, *inter alia*, Mustafa's role as overall commander of the BIA at the ZDC, and his responsibility for the evacuation of the wounded from Zllash/Zlaš.⁹⁸⁰

364. As to Mustafa's argument that there is no evidence that the gunshot could be attributed to him, the SPO responds that the Trial Panel considered the possibility both that BIA members fired bullets at the Murder Victim before leaving the ZDC and that the bullet wounds emanated from Serb forces.⁹⁸¹ The SPO submits that, based on well-grounded factual findings, the Trial Panel ultimately concluded that, even in the latter scenario, the acts and omissions of Mustafa and other BIA members

⁹⁷⁷ SPO Response Brief, para. 134.

⁹⁷⁸ SPO Response Brief, paras 177-178. The SPO adds with regard to the denial of medical care that the Trial Panel found that medical treatment was generally available at the ZDC. Transcript, 26 October 2023, p. 99.

⁹⁷⁹ SPO Response Brief, para. 178.

⁹⁸⁰ SPO Response Brief, para. 178.

⁹⁸¹ SPO Response Brief, para. 141.

substantially contributed to the Murder Victim's death by placing him in a situation in which he was unable to escape the Serb military offensive.⁹⁸² According to the SPO, the Appeals Panel should only substitute its own view for that of the Trial Panel if the latter's conclusion is wholly erroneous or if no reasonable trier of fact could have reached it.⁹⁸³ Moreover, the SPO responds that any such enquiry should be conducted within the context of two facts firmly established by the Trial Panel, namely that: (i) Mustafa intended to kill the Murder Victim; and (ii) but for Mustafa's (and his subordinates') acts and omissions, the Murder Victim would have survived.⁹⁸⁴

365. Victims' Counsel responds that the Trial Panel assessed the totality of the available evidence to substantiate its findings on the Murder Victim's injuries.⁹⁸⁵ Victims' Counsel adds that Mustafa misrepresents the purpose of appellate proceedings by claiming that the totality of the evidence was incorrectly assessed.⁹⁸⁶

366. Mustafa replies that the SPO's submissions contain presumptions rather than assertions based on evidence and that these are the same presumptions made by the Trial Panel.⁹⁸⁷

(ii) Assessment of the Court of Appeals Panel

367. With respect to Mustafa's allegations of factual errors,⁹⁸⁸ the Appeals Panel recalls the Trial Panel's finding that the severe mistreatment inflicted on the Murder

⁹⁸² SPO Response Brief, paras 141-142, 144; Transcript, 26 October 2023, pp. 105-106. See also Transcript, 26 October 2023, pp. 88-89.

⁹⁸³ SPO Response Brief, para. 144. See also Transcript, 26 October 2023, p. 99.

⁹⁸⁴ SPO Response Brief, para. 144. The SPO provides examples from the jurisprudence of international tribunals which, in its view, offer guidance on the application of the substantial contribution standard as an element of the war crime of murder. See SPO Response Brief, paras 145-160.

⁹⁸⁵ Victims Response Brief, para. 76.

⁹⁸⁶ Victims Response Brief, para. 80.

⁹⁸⁷ Transcript, 27 October 2023, pp. 139-142, 156.

⁹⁸⁸ The Appeals Panel notes that the Reply Brief, under Ground 3, contains a number of submissions that do not reply to the SPO Response Brief, Ground 3. Recalling that, under Article 50(1) of the Practice Direction on Filings, a brief in reply shall be limited to arguments in reply to the brief in response, the Appeals Panel will not directly address these arguments. See Reply Brief, paras 27-33, 35-37. Some of

Victim by the BIA members who detained him, causing serious bodily harm, as well as the denial of medical aid by these BIA members, were substantial causes of the Murder Victim's death.⁹⁸⁹ In reaching this finding, the Trial Panel "consider[ed] it *relevant*"⁹⁹⁰ that, when the Murder Victim was last seen by his co-detainees, having endured severe mistreatment on a daily basis for almost three weeks, he was in a near-death condition and was unable to walk or stand.⁹⁹¹

368. The Appeals Panel understands Mustafa's submission that the Trial Panel should have "unequivocally" established that the Murder Victim was unable to move, to mean that this should have been found beyond reasonable doubt.⁹⁹² The Appeals Panel considers that the beyond reasonable doubt standard applies to those facts which are indispensable for entering a conviction, namely those constituting the elements of the crime(s) charged, including the causal nexus, and the alleged modes of liability.⁹⁹³ Mustafa has not demonstrated either that the Trial Panel did not reach its finding that the Murder Victim was unable to walk or stand beyond reasonable doubt, or that there were any deficiencies in the evidence on which the Trial Panel

these arguments were raised again during the Appeal Hearing and will not be addressed by the Appeals Panel on the same basis. See Transcript, 26 October 2023, pp. 50-52.

⁹⁸⁹ Trial Judgment, para. 689. See also Trial Judgment, paras 499-500 and the evidence cited therein (leading to the finding that the individuals who established and maintained the conditions of detention at the ZDC, and those who subjected the detainees, including the Murder Victim, to physical and psychological assault were KLA members belonging to the BIA unit), 520-522 (leading to the finding that detainees at the ZDC were denied medical care), 528, 569-574, 589 (leading to the finding that, while detained at the ZDC, the Murder Victim was accused of being a thief and of collaborating with Serbs, and was gravely mistreated by BIA members), 619 (leading to the finding that the serious injuries observed on the Murder Victim's arms and legs 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 able to stand or walk).

⁹⁹⁰ Trial Judgment, para. 621 (emphasis added).

⁹⁹¹ Trial Judgment, para. 621.

⁹⁹² Appeal Brief, para. 343. Article 21(3) of the Law and Rule 140(1) of the Rules stipulate that the standard of proof to be applied is beyond reasonable doubt.

⁹⁹³ *Ongwen* Appeal Judgment, para. 338; *Al Jadeed and Al Khayat* Appeal Judgment, paras 126, 169; *Mrkšić and Šljivančanin* Appeal Judgement, para. 217.

relied.⁹⁹⁴ Moreover, Mustafa does not demonstrate that a finding that the Murder Victim was unable to walk or stand is indispensable for his conviction. That is, he has not demonstrated that, without the finding that the Murder Victim was unable to walk or stand, on the basis of the remaining evidence,⁹⁹⁵ no reasonable trial panel could have reached the Trial Panel's conclusion that the Murder Victim's mistreatment at the ZDC prior to 19 April 1999 was a substantial cause of the Murder Victim's death, and ultimately, that Mustafa's conduct satisfied the *actus reus* of murder. The Appeals Panel therefore dismisses this argument.

369. The Panel notes that Mustafa points to one single piece of evidence in support of his argument that the Murder Victim's death could have occurred at "any date after the indictment period", which he defines as after 11 June 1999,⁹⁹⁶ namely a statement by W04648 collected within the framework of an [REDACTED] investigation.⁹⁹⁷ Mustafa submits that the witness's statement indicates that the burial location was "'fresh'", "[REDACTED]".⁹⁹⁸ In view of the evidence on which the Trial Panel relied to establish an approximate time for the Murder Victim's death,⁹⁹⁹ including evidence that the body was already decomposing when it was exhumed,¹⁰⁰⁰ the Panel finds that Mustafa fails to demonstrate that no reasonable trial panel could have come to the same conclusion. The Appeals Panel therefore dismisses Mustafa's arguments concerning the time of death.

⁹⁹⁴ See Trial Judgment, paras 570-571, referring in particular to Transcript (W03593), 20 September 2021, pp. 403-405; Transcript (W01679), 4 October 2021, p. 906; Transcript (W04669), 10 November 2021, p. 1438.

⁹⁹⁵ See Trial Judgment, paras 569-574, 625-626.

⁹⁹⁶ Appeal Brief, paras 337-339, referring to P00001 (W04648) (confidential). Mustafa submits that hostilities between the parties to the conflict ended on 11 June 1999, when NATO forces entered Kosovo. See Appeal Brief, para. 336.

⁹⁹⁷ See P00001 (W04648) (confidential).

⁹⁹⁸ Appeal Brief, paras 337-338. See also P00001 (W04648) (confidential), p. 1.

⁹⁹⁹ See e.g. Trial Judgment, paras 619-639.

¹⁰⁰⁰ See Trial Judgment, para. 614, fn. 1323.

370. Concerning Mustafa's argument that there was no evidence that the Murder Victim died from mistreatment by BIA members or from the denial of medical aid by BIA members,¹⁰⁰¹ the Appeals Chamber notes that Mustafa ignores the detailed evidentiary references in the Trial Judgment supporting these conclusions.¹⁰⁰² The same is true of Mustafa's argument that there was no evidence supporting the conclusion that the Murder Victim was not evacuated,¹⁰⁰³ or that the Murder Victim was shot with bullets.¹⁰⁰⁴ The Panel therefore dismisses these arguments.

371. With respect to Mustafa's argument that there was no or insufficient evidence supporting the Trial Panel's finding that the Murder Victim died as a result of Mustafa's acts or omissions, the Appeals Panel understands Mustafa to contest the Trial Panel's findings that: (i) "the decision not to release the Murder Victim could only have been made by the Accused, in his capacity as overall commander of the BIA at the ZDC";¹⁰⁰⁵ and (ii) "the Murder Victim was not evacuated from Zllash/Zlaš, a decision which must have been taken also by the Accused as he was in charge of the evacuation from Zllash/Zlaš of those wounded".¹⁰⁰⁶

372. Regarding the Trial Panel's finding as to release, the Appeals Panel notes that this conclusion was based on the evidence taken as a whole, and in view of Mustafa's

¹⁰⁰¹ Appeal Brief, para. 347.

¹⁰⁰² See above, fn. 989.

¹⁰⁰³ See e.g. Trial Judgment, paras 636, 658 and the evidence cited therein (leading to the finding that, in light of the impending Serbian offensive, on or around 19 April 1999, co-detainees of the Murder Victim (W01679, W03593 and W03594) were suddenly released from the ZDC, while the two most mistreated detainees, one of which was the Murder Victim, were not released), 571, 621 (leading to the finding that "when last seen by his co-detainees, the Murder Victim, who was severely mistreated on a daily basis for almost three weeks, was in a near-to-death condition and was unable to stand or walk"), 254 (wherein the Trial Panel refers to Mustafa's evidence that, on 20 April 1999, he went back to Zllash/Zlaš to evacuate some wounded persons), 611, 618 (leading to the finding that the Murder Victim's grave was found between approximately 3 and 6 July 1999 and was [REDACTED]).

¹⁰⁰⁴ See e.g. Trial Judgment, paras 620-623 and the evidence cited therein (leading to the finding that the evidence is consistent with the scenario that the individuals found in the grave – one being the Murder Victim – had been hit by bullets).

¹⁰⁰⁵ Trial Judgment, para. 636.

¹⁰⁰⁶ Trial Judgment, para. 636.

position as overall commander of the BIA at the ZDC.¹⁰⁰⁷ Specifically, the Trial Panel observed that the evidence, including that of the Accused, indicated that Mustafa: (i) was the overall and only BIA commander throughout the BIA's existence, including in April 1999;¹⁰⁰⁸ and (ii) had the power to issue orders to his subordinates, including in relation to monitoring the movement of Serb forces and delivering medical supplies.¹⁰⁰⁹ Moreover, the Trial Panel observed that Mustafa stated that he received information about violations committed by BIA soldiers and had the power to discipline them.¹⁰¹⁰ Regarding Mustafa's position, the Appeals Panel notes that it has previously dismissed Mustafa's argument that the Trial Panel erred in concluding that the BIA controlled the ZDC, as well as his submission that he never himself stated that he or the BIA had control of the ZDC.¹⁰¹¹

373. As additional confirmation that the decision not to release the Murder Victim could only have been made by Mustafa, the Trial Panel underlined that the evidence showed that "the release of the other detainees was executed by the Accused's BIA subordinates, including his deputy, Mr Mehmetaj (aka Bimi)".¹⁰¹² Mustafa asserts that the finding as to release is erroneous because Mr Mehmetaj was no longer Mustafa's subordinate at the time the decision was made.¹⁰¹³ In this regard, the Appeals Panel notes that the Trial Panel found that some ZDC detainees were suddenly released on or around 19 April 1999,¹⁰¹⁴ and that, in this context, the Trial Panel referred to

¹⁰⁰⁷ Trial Judgment, para. 636.

¹⁰⁰⁸ Trial Judgment, para. 338, fn. 670, referring to P00111 (Salih Mustafa) (confidential), pp. 29, 31-32; P00112 (Salih Mustafa) (confidential), pp. 14-15; Transcript (Fatmir Humolli), 2 February 2022, pp. 2418, 2443. See also Trial Judgment, para. 353.

¹⁰⁰⁹ Trial Judgment, para. 339, fn. 678, referring to P00112 (Salih Mustafa) (confidential), pp. 3-4, 8; Transcript (Brahim Mehmetaj), 23 March 2022, pp. 2621, 2665-2666, 2668; Transcript (Brahim Mehmetaj), 24 March 2022, p. 2741; Transcript (Ibadete Canolli-Kaciu), 12 May 2022, pp. 4355-4356; Transcript (W03593), 20 September 2021, p. 414.

¹⁰¹⁰ Trial Judgment, para. 339, fn. 679, referring to P00112 (Salih Mustafa) (confidential), p. 2 and P00112 (Salih Mustafa) (confidential), pp. 2-3, 5-6.

¹⁰¹¹ See above, paras 184-191.

¹⁰¹² Trial Judgment, para. 636, referring to Trial Judgment, para. [REDACTED].

¹⁰¹³ Appeal Brief, paras 364-365, 373.

¹⁰¹⁴ Trial Judgment, paras 403-406, 422-426, 440-441, 636.

Mr Mehmetaj as Mustafa's deputy.¹⁰¹⁵ At the same time, the Appeals Panel observes that the Trial Panel was aware that, in April 1999, when some of the ZDC detainees were released, Mr Mehmetaj was no longer Mustafa's deputy.¹⁰¹⁶ The Appeals Panel further observes that Mr Mehmetaj's status as no longer being Mustafa's deputy does not preclude that he nonetheless remained Mustafa's subordinate. Mustafa does not point to any evidence indicating that Mr Mehmetaj was no longer a subordinate of Mustafa. Moreover, the Appeals Panel notes that Mr Mehmetaj indicated that, even when he was appointed to a new position as the person in charge of morale and politics at the level of the Llap Operational Zone in February 1999,¹⁰¹⁷ "[he] was doing two tasks simultaneously. One with BIA and one for the staff".¹⁰¹⁸ The Appeals Panel therefore finds that Mustafa fails to demonstrate that no reasonable trial panel could have reached the same conclusion as to release and dismisses this argument.

374. Regarding the Trial Panel's finding as to evacuation, the Appeals Panel disagrees with Mustafa's contention that there is no evidence to support this finding. The Appeals Panel again notes the Trial Panel's finding that Mustafa was the overall and only BIA commander throughout the BIA's existence, including in April 1999.¹⁰¹⁹ The Trial Panel further found that the ZDC was evacuated due to the Serbian offensive,¹⁰²⁰ and that Mustafa stated more than once that, on 20 April 1999, he personally went back to Zllash/Zlaš in order to evacuate some wounded persons.¹⁰²¹ However, the Appeals Panel also notes that in reaching its finding as to evacuation, the Trial Panel did not cross-reference these earlier findings or the related evidence.¹⁰²² Nevertheless, despite this shortcoming, and reading the Trial Judgment as a whole,

¹⁰¹⁵ Trial Judgment, para. 636.

¹⁰¹⁶ Trial Judgment, para. 338.

¹⁰¹⁷ Transcript (Brahim Mehmetaj), 23 March 2022, p. 2657.

¹⁰¹⁸ Transcript (Brahim Mehmetaj), 23 March 2022, p. 2658.

¹⁰¹⁹ Trial Judgment, para. 338. See also Trial Judgment, para. 353.

¹⁰²⁰ Trial Judgment, paras 423, 634.

¹⁰²¹ Trial Judgment, para. 254, fn. 474, referring to P00117 (Salih Mustafa) (confidential), pp. 22-23. See also Trial Judgment, para. 636.

¹⁰²² Trial Judgment, para. 636.

the Appeals Panel does not consider that the Trial Panel failed to comply with its obligation to provide a reasoned opinion with respect to the finding as to evacuation. The Panel therefore dismisses Mustafa's argument.

375. Turning to Mustafa's argument that the Trial Panel erred in concluding that the alleged gunshot wounds found on the Murder Victim's body could be attributed to Mustafa or his subordinates,¹⁰²³ the Appeals Panel notes that Mustafa does not identify the precise finding that he is challenging. Such a deficiency warrants summary dismissal of this submission.¹⁰²⁴ Regardless, the Appeals Panel notes that Mustafa's conviction for the war crime of murder was not based on such a finding. On the contrary, the Trial Panel found that there was reasonable doubt as to whom the bullet holes found on the Murder Victim's body could be attributed.¹⁰²⁵ The Panel therefore dismisses this argument.

376. In light of the above, the Appeals Panel finds that Mustafa fails to demonstrate that the Trial Panel erred in fact in finding the Mustafa's conduct satisfied the *actus reus* of murder. Accordingly, the Appeals Panel dismisses all of Mustafa's factual arguments under Grounds 3 and 4.

2. Alleged Errors Regarding the Trial Panel's Findings on the *Mens Rea* of the War Crime of Murder (Grounds 5A, 5B)

377. The Trial Panel found that the *mens rea* elements of the war crime of murder were satisfied considering that, *inter alia*, Mustafa: (i) knew that, on or around [REDACTED] April 1999, the Murder Victim was handed over to the BIA at the ZDC;¹⁰²⁶ (ii) accepted that some of the detainees in his custody might die as a result of mistreatment at the ZDC;¹⁰²⁷ and (iii) as commander of the BIA at the ZDC, exercised

¹⁰²³ Appeal Brief, paras 343-348.

¹⁰²⁴ See above, paras 29, 33.

¹⁰²⁵ Trial Judgment, paras 637, 689.

¹⁰²⁶ Trial Judgment, para. 691.

¹⁰²⁷ Trial Judgment, para. 691.

his authority, as the Serbian offensive approached, to keep the Murder Victim in captivity – a man in a near to death state when last seen by his co-detainees – when, on the basis of the same authority, others were released,¹⁰²⁸ a decision which it found effectively equalled a decision to kill the Murder Victim.¹⁰²⁹ In view of all of the above, the Trial Panel found that the only reasonable conclusion was that, “through the acts and omissions attributable to the Accused and his BIA subordinates, they intended to kill the Murder Victim, thus establishing the requisite mental element for murder as a war crime”.¹⁰³⁰

378. Mustafa alleges a number of legal and factual errors concerning the Trial Panel’s conclusion that the *mens rea* for murder was satisfied. He submits that, on the basis of the enumerated errors, individually or cumulatively, his conviction for the war crime of murder should be reversed.¹⁰³¹ The SPO and Victims’ Counsel respond that Mustafa’s submissions should be dismissed.¹⁰³²

(a) Submissions of the Parties and Participants

379. The Appeals Panels understands Mustafa to argue that the Trial Panel applied the wrong *mens rea* standard for the war crime of murder. In support of this argument, he submits that the *mens rea* standard that the Trial Panel set out includes liability where an accused “wilfully omitted/denied to provide medical care” which the accused “should reasonably have known might lead to death” when, in his view, the correct standard requires, at a minimum, “intention to wilfully cause serious bodily harm with [...] knowledge that death was likely to follow/a probable

¹⁰²⁸ Trial Judgment, paras 571, 625, 635-636, 692. See also Trial Judgment, para. 638.

¹⁰²⁹ Trial Judgment, paras 636, 692.

¹⁰³⁰ Trial Judgment, para. 695.

¹⁰³¹ Appeal Brief, paras 368-378; Reply Brief, paras 96-97, 134. See also Notice of Appeal, Ground 5A and B, para. 8. The Panel notes that, in the Appeal Brief under Ground 5B, Mustafa cross-references to his submissions under Ground 5A and makes no further submissions. See Appeal Brief, para. 377. The Panel therefore considers that Ground 5B is now subsumed under Ground 5A and will refer to them collectively as Ground 5.

¹⁰³² SPO Response Brief, paras 179-186; Victims Response Brief, paras 72, 75.

consequence/would follow in the ordinary course of events".¹⁰³³ Additionally, Mustafa argues that the Trial Panel erred in finding that he had the requisite *mens rea* for the war crime of murder. In this regard, the Appeals Panel understands Mustafa to first submit, in relation to the Trial Panel's finding that the decision not to release or evacuate the Murder Victim equalled a decision to kill him,¹⁰³⁴ that it was not established that he: (i) knew about the condition of the Murder Victim;¹⁰³⁵ or (ii) had the will to deny him medical aid.¹⁰³⁶ Second, in relation to the Trial Panel's finding that, given that the Murder Victim [REDACTED], Mustafa and his BIA subordinates who mistreated the Murder Victim could not allow him to remain alive, Mustafa argues that the evidence does not establish that the Murder Victim [REDACTED].¹⁰³⁷ Specifically, Mustafa submits that the Trial Panel relied on the testimony of [REDACTED] who, in Mustafa's view, did not have personal knowledge of [REDACTED].¹⁰³⁸ Additionally, Mustafa argues that, [REDACTED].¹⁰³⁹ He submits that this is demonstrated by the perpetrators having released other detainees, [REDACTED].¹⁰⁴⁰

380. In response to a question from the Appeals Panel concerning whether lesser forms of intent than direct intent are within the applicable law, Mustafa responds that *dolus eventualis* as envisioned in Article 21 of the KCC cannot apply because *dolus eventualis* is not part of customary international law.¹⁰⁴¹

¹⁰³³ Notice of Appeal, Ground 5B, para. 8. See also Appeal Brief, paras 368, 374-376. Additionally, Mustafa states in the Notice of Appeal that liability under JCE I for murder requires that, at a minimum, all participants must intend to kill. See Notice of Appeal, Ground 5B, para. 8. The Appeals Panel observes that Mustafa does not develop this statement into an argument. Accordingly, the Appeals Panel summarily dismisses it.

¹⁰³⁴ See Trial Judgment, paras 636, 692.

¹⁰³⁵ Appeal Brief, para. 369; Transcript, 26 October 2023, p. 52.

¹⁰³⁶ Appeal Brief, para. 369; Transcript, 26 October 2023, pp. 51-52.

¹⁰³⁷ Appeal Brief, para. 370.

¹⁰³⁸ Appeal Brief, para. 371.

¹⁰³⁹ Appeal Brief, para. 372.

¹⁰⁴⁰ Appeal Brief, para. 372.

¹⁰⁴¹ Further Defence Submissions on *Mens Rea* for Murder, paras 2-12, 18-19.

381. The SPO responds that Mustafa challenges the *mens rea* standard in his Notice of Appeal, but effectively abandons this argument in his Appeal Brief and, thus, it should be rejected *in limine*.¹⁰⁴² Nonetheless, the SPO submits that liability for the war crime of murder may arise from both wilful acts and wilful omissions, where the perpetrator should reasonably have known that the act or omission might lead to death.¹⁰⁴³ The SPO submits that, in both cases, the relevant tests are supported by an abundance of international jurisprudence.¹⁰⁴⁴ The SPO adds that the Trial Panel's findings on Mustafa's intent were based on multiple, mutually reinforcing elements, and that, in any case, there is overwhelming evidence that Mustafa and his subordinates had at least an intent to cause serious bodily harm.¹⁰⁴⁵ In the latter respect, the SPO adds that Mustafa's claim that "the correct *mens rea* for murder requires at a minimum the intention to wilfully cause serious bodily harm" could not change the outcome of the Trial Judgment.¹⁰⁴⁶

382. Concerning Mustafa's claim that insufficient evidence supports the Trial Panel's finding on his intent to kill, the SPO responds that Mustafa: (i) cites no relevant authorities; (ii) selectively points to some facts while ignoring others; (iii) confuses intent with motive; and (iv) indicates facts and circumstances that, on their own, have little or nothing to do with intent.¹⁰⁴⁷ Regarding Mustafa's argument that the Trial Panel's findings rest on the motive to dispose of the Murder Victim [REDACTED], the SPO responds that this "well-based factor" was only one of several elements on which the Trial Panel relied in reaching its finding on intent.¹⁰⁴⁸ Finally, the SPO submits that

¹⁰⁴² SPO Response Brief, para. 183.

¹⁰⁴³ SPO Response Brief, para. 184.

¹⁰⁴⁴ SPO Response Brief, para. 184.

¹⁰⁴⁵ SPO Response Brief, para. 185.

¹⁰⁴⁶ SPO Response Brief, para. 185.

¹⁰⁴⁷ SPO Response Brief, para. 179. Concerning Mustafa's argument in relation to the Trial Panel's finding that the decision not to release or evacuate the Murder Victim equalled a decision to kill him, that it was not established that he had the will to deny him medical aid, the SPO adds that the Trial Panel found at paragraph 621, footnote 1346, that medical treatment was generally available at the Zilash/Zlaš detention compound. Transcript, 26 October 2023, pp. 98-99.

¹⁰⁴⁸ SPO Response Brief, para. 180.

Mustafa fails to establish that no reasonable trial panel could have found an intent to kill on the basis of these multiple, mutually reinforcing elements.¹⁰⁴⁹

383. In response to a question from the Appeals Panel about whether Mustafa's knowledge of the condition of the Murder Victim could reasonably be inferred from the Trial Panel's factual findings, the SPO states that that Mustafa's knowledge can be inferred from the following factors: (i) Mustafa's presence at key periods of the Murder Victim's detention; (ii) given the layout of the small compound, the only reasonable conclusion is that Mustafa must have had knowledge of the detention of a man who was, in the Trial Panel's words, "lethally mistreated"; and (iii) the Trial Panel's finding that the decision to neither release nor evacuate nor provide medical care could only have been taken by Mustafa, and must have been based on his knowledge of the Murder Victim's detention.¹⁰⁵⁰

384. In response to questions raised by the Appeals Panel concerning the *mens rea* standard for murder, the SPO adds that the standard is settled and that the question of how the applicable intent is to be defined is not one that the Panel has to answer in the present case because the Trial Panel reasonably found that Mustafa and his BIA subordinates intentionally killed the Murder Victim.¹⁰⁵¹ In the SPO's view, the question of how intent should be defined only arises if the Appeals Panel finds that the Trial Panel could not infer Mustafa's intent on the basis of either of the two alternative limbs of the *mens rea* standard.¹⁰⁵² According to the SPO's submission, the evidence unequivocally establishes that Mustafa had at least an intent to wilfully cause serious bodily harm with an awareness that this might lead to death.¹⁰⁵³ It adds that even on the basis of the version of events most favourable to the Accused, where

¹⁰⁴⁹ SPO Response Brief, paras 181-182.

¹⁰⁵⁰ Transcript, 27 October 2023, pp. 114-115.

¹⁰⁵¹ Transcript, 27 October 2023, p. 110.

¹⁰⁵² Transcript, 27 October 2023, pp. 110-111.

¹⁰⁵³ Transcript, 27 October 2023, pp. 111, 115.

Mustafa abandoned a man under his custody “who could not walk and who was close to death”, it must be inferred that he at least had intent to cause serious bodily harm which he ought to reasonably have known might lead to death.¹⁰⁵⁴

385. In response to a further question from the Appeals Panel concerning whether lesser forms of intent than direct intent are within the applicable law, the SPO replies that there is some authority for the proposition that intention to kill includes a recklessness standard.¹⁰⁵⁵ In the SPO’s view, since the Panel is applying customary international law, in light of Article 3 of the Law on the interpretation of customary international law, the substantive criminal law of Kosovo, including Article 21 of the KCC on intent,¹⁰⁵⁶ has no more bearing on the definition of the *mens rea* for murder under customary international law than any other domestic law.¹⁰⁵⁷ It adds that the general reference to the applicability of the substantive criminal law of Kosovo in Article 12 of the Law should be read together with Articles 13, 14 and 15 of the Law and that such a reading reveals that the applicability of the substantive criminal law of Kosovo is confined to those laws identified in Article 15 of the Law, under which Mustafa has not been charged.¹⁰⁵⁸

386. Victims’ Counsel responds by referring to the *mens rea* standard established by the ICTY in the *Martić* case, which she submits encompasses an intent to kill, including where knowledge that the death of the victim was a probable consequence of an act

¹⁰⁵⁴ Transcript, 27 October 2023, p. 112.

¹⁰⁵⁵ Transcript, 27 October 2023, pp. 112-113 (referring to *Karadžić* Trial Judgement, paras 447-448 and *Nuon and Khieu* Supreme Court Appeal Judgement, paras 390-410). The SPO adds, referring to paragraph 659 of the *Ntagerura et al.* Trial Judgement, that the *mens rea* standard for omissions is that “[...] the accused failed to act intending the criminal sanctioned consequences or with awareness and consent that the consequences would occur”. See Transcript, 27 October 2023, p. 155. See also Further SPO Submissions on *Mens Rea* for Murder, para. 4 (referring to further international jurisprudence).

¹⁰⁵⁶ Further SPO Submissions on *Mens Rea* for Murder, para. 1, fn. 2.

¹⁰⁵⁷ Transcript, 27 October 2023, p. 113. See also Transcript, 27 October 2023, p. 156.

¹⁰⁵⁸ Further SPO Submissions on *Mens Rea* for Murder, paras 3-4. The SPO adds that Article 21 of the KCC is also inapplicable because it was not in force at the time the crimes were committed as is required under Article 12 of the Law. See Further SPO Submissions on *Mens Rea* for Murder, para. 2.

or omission.¹⁰⁵⁹ Victims' Counsel adds that the evidence substantiated the Murder Victim's mistreatment and that, even if no direct evidence establishes the final act of killing by Mustafa or other BIA members, "the only other remotely plausible scenario was that they left a gravely tortured and half-dead man without shelter in the path of hostile advancing enemy forces".¹⁰⁶⁰ Victims' Counsel submits that the probable consequence of this course of conduct was the Murder Victim's death.¹⁰⁶¹

387. In response to questions raised by the Appeals Panel concerning the *mens rea* standard for murder, Victims' Counsel adds that Article 21 of the KCC clearly provides for lesser than direct intent¹⁰⁶² and that, in her view, the *mens rea* under Kosovo law is not "as opposing" from the definition under customary international law.¹⁰⁶³

(b) Assessment of the Court of Appeals Panel

388. The Appeals Panel notes that the Trial Panel set out the following definition for the *mens rea* for murder:

The perpetrator must have killed the person intentionally, or wilfully caused serious bodily harm or wilfully omitted/denied to provide medical care to a detainee, which the perpetrator should reasonably have known might lead to death.¹⁰⁶⁴

¹⁰⁵⁹ Victims Response Brief, para. 75.

¹⁰⁶⁰ Victims Response Brief, para. 75.

¹⁰⁶¹ Victims Response Brief, para. 75.

¹⁰⁶² Transcript, 27 October 2023, pp. 127-128.

¹⁰⁶³ Transcript, 27 October 2023, pp. 135-136.

¹⁰⁶⁴ Trial Judgment, para. 688.

This definition has been applied extensively and consistently in international criminal law¹⁰⁶⁵ and a number of chambers have considered that in addition to direct intent, it includes the form of indirect intent known as *dolus eventualis*.¹⁰⁶⁶

389. Turning to the Trial Panel's findings on Mustafa's intent, as a preliminary matter, the Panel recalls, as found above,¹⁰⁶⁷ that the factual scenario on the basis of which the Trial Panel considered Mustafa's liability, including his intent, was the one most favourable to Mustafa – that is, the scenario whereby Serbian forces shot the Murder Victim. The Appeals Panel observes that the Trial Panel found that Mustafa “intended to kill” the Murder Victim.¹⁰⁶⁸ The Appeals Panel considers that the Trial Panel could have been clearer in indicating which type of intent it considered that Mustafa possessed as well as the precise definition of that intent when it made this finding, given the combination of acts and omissions and range of circumstances from which the intent was inferred. However, at any rate, the Panel understands the Trial Panel to have found that Mustafa possessed direct intent.

390. The Appeals Panel considers that direct intent for murder requires that the perpetrator desired the death of the individual to be the result of his act or omission.¹⁰⁶⁹ In concluding that the Trial Panel found that Mustafa desired the death of the Murder Victim to be the result of his acts or omissions, the Appeals Panel takes into account a

¹⁰⁶⁵ See e.g. *Mladić* Trial Judgment, para. 3050; *Karadžić* Trial Judgement, para. 447; *Dragomir Milošević* Appeal Judgement, para. 108; *Delić* Trial Judgement, para. 46; *Dragomir Milošević* Trial Judgment, para. 931; *Halilović* Trial Judgement, para. 35; *Kvočka et al.* Appeal Judgement, para. 261; *Krstić* Trial Judgement, para. 485; *Karemera et al.* Appeal Judgement, para. 670; *Setako* Appeal Judgement, para. 257. With respect to the wilful denial of medical care to a detainee, see *Kvočka et al.* Appeal Judgement, para. 270; *Nuon and Khieu* Trial Judgment, paras 556-559.

¹⁰⁶⁶ *Karadžić* Trial Judgement, para. 448; *Hadžihasanović and Kubura* Trial Judgement, para. 31; *Stakić* Trial Judgment, para. 587; *Brđanin* Trial Judgment, para. 386; *Nuon and Khieu* Supreme Court Appeal Judgment, para. 409. See also *Perišić* Trial Judgment, para. 104; *Delić* Trial Judgment, para. 48; *Strugar* Trial Judgment, para. 235; *Martić* Trial Judgment, para. 60.

¹⁰⁶⁷ See above, para. 345.

¹⁰⁶⁸ See Trial Judgment, paras 693-695.

¹⁰⁶⁹ *Karadžić* Trial Judgement, para. 448; *Perišić* Trial Judgment, para. 104; *Delić* Trial Judgment, para. 48.

number of factors. First, the Trial Panel repeatedly referred to Mustafa's intent to kill.¹⁰⁷⁰ The ordinary meaning of this phrase implies direct intent. Second, the Trial Panel found that "it is uncontroversial that the mistreatment inflicted upon [the Murder Victim] and the denial of medical aid are solely attributable to [Mustafa's] acts and omissions".¹⁰⁷¹ Third, the Trial Panel further found that Mustafa:

- (i) knew, on or around [REDACTED] April 1999, that the Murder Victim was in the hands of the BIA at the ZDC;¹⁰⁷²
- (ii) accepted that detainees in his custody at the ZDC might die as a result of mistreatment;¹⁰⁷³
- (iii) decided to deny medical care to detainees at the ZDC;¹⁰⁷⁴
- (iv) knew that Serb forces were advancing on Zllash/Zlaš;¹⁰⁷⁵
- (v) went to Zllash/Zlaš, personally, on or around 20-21 April 1999, to evacuate his own wounded personnel because of the advancing Serb forces;¹⁰⁷⁶ and
- (vi) decided, on the basis of his authority as commander of the BIA at the ZDC, to keep the Murder Victim in captivity, while on the same basis, other detainees were released.¹⁰⁷⁷

391. Ultimately, on the basis of all of the evidence, the Trial Panel concluded that the decision to neither release nor evacuate the Murder Victim – which it found could

¹⁰⁷⁰ See Trial Judgment, paras 693-695.

¹⁰⁷¹ Trial Judgment, para. 625.

¹⁰⁷² Trial Judgment, paras 473, 654, 691, 754, 818.

¹⁰⁷³ Trial Judgment, para. 691.

¹⁰⁷⁴ Trial Judgment, paras 621, 750, 816.

¹⁰⁷⁵ Trial Judgment, paras 423-424, 636, 638, 654, 658, 692, 746, 750, 753, 816.

¹⁰⁷⁶ Trial Judgment, paras 254 (referring to P00117 (Salih Mustafa) (confidential), pp. 22-23), 634.

¹⁰⁷⁷ Trial Judgment, paras 636, 654, 658, 692.

only have been made by Mustafa – “equalled a decision to kill” the Murder Victim.¹⁰⁷⁸ The Appeals Panel will address Mustafa’s arguments under his grounds of appeal concerning the *mens rea* for murder against the background of these Trial Panel findings. As the Appeals Panel considers that the Trial Panel found that Mustafa possessed direct intent for murder, it will not address the Parties’ submissions concerning the applicability of Article 21 of the KCC in relation to *dolus eventualis*.¹⁰⁷⁹

392. Concerning Mustafa’s argument that the Trial Panel applied the wrong *mens rea* standard for murder in that, at a minimum, what is required is the intent to wilfully cause serious bodily harm and not the intent to wilfully omit/deny medical care,¹⁰⁸⁰ the Appeals Panel recalls the definition of the *actus reus* of murder set out by the Trial Panel.¹⁰⁸¹ It clearly states that an accused can commit murder through either an act or an omission. The definition goes on to give two examples of conduct that may satisfy the *actus reus* of murder: (i) causing serious bodily harm resulting in death; or (ii) omitting/denying medical care resulting in death. The applicable *mens rea* is the same irrespective of whether the crime is committed through an act or an omission. Accordingly, the Appeals Panel dismisses this argument.

393. Turning to Mustafa’s argument that the Trial Panel erred in concluding that the decision to neither release nor evacuate the Murder Victim equalled a decision to kill him as it was not established that he knew about the condition of the Murder

¹⁰⁷⁸ Trial Judgment, para. 692. That the Trial Panel found that Mustafa possessed direct intent is further supported by the existence of only one finding which could be seen to signify a form of indirect intent in that it indicates acceptance of a risk of death as a result of Mustafa’s conduct. The Trial Panel found that “[t]hese factors, albeit not directly related to the Murder Victim, indicate that the Accused accepted that some of the detainees in his custody might die as a result of the mistreatment”. See Trial Judgment, para. 691. However, the Appeals Panel notes that this finding relates to detainees in Mustafa’s custody in general, not to the Murder Victim specifically.

¹⁰⁷⁹ Further Defence Submissions on *Mens Rea* for Murder; Further SPO Submissions on *Mens Rea* for Murder.

¹⁰⁸⁰ Notice of Appeal, Ground 5B, para. 8.

¹⁰⁸¹ See above, para. 341. See Trial Judgment, para. 686.

Victim,¹⁰⁸² the Appeals Panel observes that the Trial Panel did not make an explicit finding that Mustafa knew about the condition of the Murder Victim. While the Appeals Panel considers that knowledge of the state of health of the Murder Victim is a relevant circumstance which Mustafa would need to have known in order for him to have intent, it considers that knowledge and intent can be reasonably inferred from relevant facts and circumstances established by the Trial Panel.¹⁰⁸³

394. The Appeals Panel notes in this regard the Trial Panel's findings that Mustafa knew that the Murder Victim was handed over to the BIA at the ZDC,¹⁰⁸⁴ and he was present at the ZDC at several points during the Murder Victim's detention,¹⁰⁸⁵ including on or around [REDACTED].¹⁰⁸⁶ The Appeals Panel further notes the Trial Panel's finding that Mustafa accepted that ZDC detainees might die as a result of mistreatment suffered at that location.¹⁰⁸⁷ In this respect, the Appeals Panel observes that it was Mustafa's personal involvement in the mistreatment of detainees at the ZDC (by using a gun during one detainee's interrogation and ordering a subordinate to "finish" another detainee),¹⁰⁸⁸ and by logical extension, his knowledge of mistreatment at the ZDC, that led the Trial Panel to conclude that he accepted that ZDC detainees might die as a result of that mistreatment.¹⁰⁸⁹ The Appeals Panel is also cognisant that the Trial Panel considered that there was a relatively small number of detainees in Mustafa's charge at the ZDC at the time that the Murder Victim was detained there. In particular, the Trial Panel found that there were "at least six individuals",¹⁰⁹⁰ including the Murder Victim, detained at the ZDC at the relevant

¹⁰⁸² Appeal Brief, para. 369; Transcript, 26 October 2023, p. 52.

¹⁰⁸³ See *Kayishema and Ruzindana* Appeal Judgment, para. 159; ICC Elements of Crimes, General introduction, p. 1, para. 3.

¹⁰⁸⁴ Trial Judgment, para. 691.

¹⁰⁸⁵ Trial Judgment, paras 541, 546.

¹⁰⁸⁶ Trial Judgment, paras 468, 472-473.

¹⁰⁸⁷ See above, para. 377. See also Trial Judgment, para. 691.

¹⁰⁸⁸ Trial Judgment, para. 691.

¹⁰⁸⁹ Trial Judgment, para. 691.

¹⁰⁹⁰ Trial Judgment, para. 493. See also Trial Judgment, paras 485, 494-495. The Panel observes that, concerning the number of detainees at the ZDC at the relevant time, the Trial Panel noted that the

time.¹⁰⁹¹ Finally, the Appeals Panel notes the Trial Panel's finding that the decision to neither release nor evacuate the Murder Victim, when others were released or evacuated as the Serbian offensive approached, was one that could only have been made by Mustafa.¹⁰⁹² In view of the above, the Appeals Panel finds that while it would have been preferable for the Trial Panel to have made an explicit finding that Mustafa knew of the condition of the Murder Victim, Mustafa fails to show that no reasonable trial panel could have reached the Trial Panel's conclusion that the decision to neither release nor evacuate the Murder Victim effectively equalled a decision to kill absent such an explicit finding. Accordingly, the Appeals Panel dismisses this argument.

395. With respect to Mustafa's argument that it was not established that he had the will to deny medical aid, the Appeals Panel notes that the Trial Panel's finding that the decision to neither release nor evacuate the Murder Victim equalled a decision to kill him was not based on Mustafa having denied medical aid to the Murder Victim. In reaching this finding, the Trial Panel referred specifically and only to Mustafa's decision to neither release nor evacuate the Murder Victim.¹⁰⁹³ This argument is therefore dismissed.

396. The Appeals Panel now turns to Mustafa's submission that the Trial Panel erred in finding that the Murder Victim [REDACTED], and that, accordingly, they could not afford to keep the Murder Victim alive [REDACTED].¹⁰⁹⁴ In this regard, Mustafa first contests the Trial Panel's finding that the Murder Victim [REDACTED], arguing that

evidence indicated: (i) a high turnover of detainees in the set of barns used for detention purposes (see Trial Judgment, para. 488); (ii) the plausibility that up to 17 detainees may have been held at once in one and the same barn (see Trial Judgment, para. 488); (iii) that the List of Prisoners indicated the arrest in April 1999 of as many as 19 individuals (see Trial Judgment, para. 491); (iv) that a large number of detainees were held at the ZDC in April 1999 (see Trial Judgment, para. 493); and (v) that at least six individuals were detained at the ZDC during the time frame of the charges (see Trial Judgment, para. 493).

¹⁰⁹¹ Trial Judgment, paras 494-495.

¹⁰⁹² Trial Judgment, para. 636.

¹⁰⁹³ Trial Judgment, para. 636.

¹⁰⁹⁴ Appeal Brief, para. 370.

[REDACTED] testimony, on which the Trial Panel erroneously relied, indicates that it was the SPO and not [REDACTED] who named the perpetrators [REDACTED].¹⁰⁹⁵ Thus, Mustafa submits that [REDACTED] did not have personal knowledge of whether the Murder Victim [REDACTED].¹⁰⁹⁶ The Appeals Panel notes, as recounted by the Trial Panel,¹⁰⁹⁷ that [REDACTED] indeed indicated that the Murder Victim [REDACTED].¹⁰⁹⁸ Moreover, contrary to Mustafa's assertion, it was [REDACTED], not the SPO, who, in the context of identifying those who mistreated him, first mentioned [REDACTED].¹⁰⁹⁹ Mustafa therefore fails to demonstrate an error in the Trial Panel's treatment of this evidence. Accordingly, the Appeals Panel dismisses this argument.

397. With respect to Mustafa's contention that the Trial Panel erred in assuming that the perpetrators acted against the Murder Victim [REDACTED] since other detainees could equally have [REDACTED], and yet were released,¹¹⁰⁰ the Appeals Panel notes that there are no evidentiary references supporting this finding by the Trial Panel.¹¹⁰¹ The Appeals Panel therefore considers that this finding is indeed an assumption, and accordingly, that the Trial Panel erred in relying on this to reach its finding. However, Mustafa has not demonstrated that this error led to a miscarriage of justice. In this regard, the Appeals Panel observes the ancillary nature of this finding in that the Trial Panel indicated that it "confirmed" its finding on Mustafa's intent to kill.¹¹⁰² Mustafa has not shown that no reasonable trial panel could have reached the Trial Panel's conclusion that the *mens rea* for the war crime of murder was satisfied in the absence of the finding that Mustafa and his subordinates could not afford to keep the Murder Victim alive [REDACTED]. Accordingly, the Appeals Panel dismisses this argument.

¹⁰⁹⁵ Appeal Brief, para. 371.

¹⁰⁹⁶ Appeal Brief, para. 371.

¹⁰⁹⁷ Trial Judgment, para. [REDACTED].

¹⁰⁹⁸ Transcript (W01679), 4 October 2021, pp. 892-893 (redacted).

¹⁰⁹⁹ Trial Judgment, para. 543. See [REDACTED].

¹¹⁰⁰ Appeal Brief, para. 372.

¹¹⁰¹ See Trial Judgment, para. 693.

¹¹⁰² Trial Judgment, para. 693.

398. In light of the above, the Appeals Panel finds that Mustafa fails to demonstrate an error in the Trial Panel's findings on the *mens rea* of the war crime of murder. Accordingly, the Appeals Panel dismisses Mustafa's Grounds 5A and 5B.

P. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S FINDINGS ON THE WAR CRIME OF TORTURE (GROUNDS 6, 7)

399. The Trial Panel concluded that the Accused's conduct fulfilled the *actus reus* and *mens rea* elements of the war crime of torture, finding that Mustafa and other BIA members intentionally inflicted severe physical and mental pain and suffering upon at least six persons detained at the ZDC, for the purpose of obtaining information or a confession, punishing, intimidating, coercing or discriminating against the detainees.¹¹⁰³ In this regard, the Trial Panel further found that, within the meaning of Article 16(1)(a) of the Law, Mustafa directly committed the war crime of torture against W01679 and W03593, and committed, as part of a JCE I, the war crime of torture against at least six persons, including W01679, W03593, W03594, W04669, the Murder Victim, [REDACTED] and [REDACTED].¹¹⁰⁴

400. Mustafa challenges the Trial Panel's findings concerning: (i) the *actus reus* and the *mens rea* of the war crime of torture under Article 14(1)(c)(i) of the Law; and (ii) JCE I as one of the modes of liability underpinning his conviction under Count 3 of the Indictment, punishable under Article 14(1)(c)(i) of the Law.¹¹⁰⁵ The SPO and Victims' Counsel respond that Mustafa fails to demonstrate any error in the Trial Panel's assessment of torture under Count 3.¹¹⁰⁶

¹¹⁰³ Trial Judgment, paras 678, 685. See also Trial Judgment, paras 674-677, 679-684.

¹¹⁰⁴ Trial Judgment, paras 758-759. See also Trial Judgment, paras 729-733, 742-757.

¹¹⁰⁵ Appeal Brief, paras 379-390; Reply Brief, paras 98-99.

¹¹⁰⁶ SPO Response Brief, paras 187-191; Victims Response Brief, paras 82-86.

1. Alleged Errors Regarding the Trial Panel's Findings on the *Actus Reus* and *Mens Rea* of the War Crime of Torture (Ground 6)

(a) Submissions of the Parties and Participants

401. Mustafa submits that the Trial Panel erred in fact by finding that there was sufficient evidence establishing the *actus reus* and *mens rea* of the war crime of torture.¹¹⁰⁷ With respect to the *actus reus*, Mustafa argues that “the physical assault was never witnessed” because the victims were assaulted individually rather than in a group.¹¹⁰⁸ In particular, Mustafa argues that the only eyewitness to another person’s assault never stated that the victim was assaulted by the Accused or other BIA members.¹¹⁰⁹ As for the *mens rea*, Mustafa submits that the Trial Panel did not establish, but only presumed, the requisite purpose of the mistreatment, notably because the perpetrators never admitted to, confessed to, or made any statements concerning the infliction of pain or its purpose.¹¹¹⁰

402. The SPO responds that Mustafa’s submissions are selective and undeveloped, and that there was sufficient evidence establishing the *actus reus* and *mens rea* of the war crime of torture.¹¹¹¹ With regard to Mustafa’s arguments on the *actus reus*, the SPO submits that Mustafa departs from the “false premise” that witness testimony requires corroboration.¹¹¹² In the SPO’s view, Mustafa also “misrepresents the Judgment”, in that it found that the victims who testified not only attested to having been assaulted themselves, but also to the physical mistreatment of others, as well as to other forms

¹¹⁰⁷ Appeal Brief, paras 379-380, 382, referring to Trial Judgment, paras 678, 685. See also Appeal Brief, para. 390; Reply Brief, para. 98.

¹¹⁰⁸ Appeal Brief, para. 381.

¹¹⁰⁹ Appeal Brief, para. 381.

¹¹¹⁰ Appeal Brief, paras 383-385. See also Appeal Brief, para. 57, where Mustafa submits under Ground II that “[n]one of the paragraphs in the Judgment reflect a specific criminal intent by the Appellant to commit arbitrary detention, torture and murder against the victims.”

¹¹¹¹ SPO Response Brief, para. 187.

¹¹¹² SPO Response Brief, para. 188, also referring to SPO Response Brief, paras 66-68, regarding similar submissions by Mustafa under Grounds 1H and 1I, namely that witness testimony requires corroboration.

of torture.¹¹¹³ As for the *mens rea* of the war crime of torture, the SPO responds that Mustafa fails to show any error of fact occasioning a miscarriage of justice, given that the Trial Panel relied on evidence other than the perpetrators' statements (on which Mustafa bases his claim) to find that the infliction of pain was for a particular purpose.¹¹¹⁴

403. Victims' Counsel responds that the Trial Panel properly defined the elements constituting the war crime of torture, and correctly concluded, based on the evidence as a whole, that the mental elements have been met.¹¹¹⁵ In particular, Victims' Counsel submits that the "in-court testimonies of all direct victims" support this conclusion.¹¹¹⁶

(b) Assessment of the Court of Appeals Panel

404. The Panel first observes that Mustafa does not *per se* challenge the definition of the legal requirements of torture as a war crime, as set out by the Trial Panel. In this regard, the Panel agrees with the Trial Panel's findings that: (i) the *actus reus* of the war crime of torture consists of an act or omission inflicting severe pain or suffering, whether physical or mental, upon another person;¹¹¹⁷ and (ii) the *mens rea* element

¹¹¹³ SPO Response Brief, para. 188, referring to Trial Judgment, paras 530-531, 585, 675. At the Appeal Hearing, the SPO also submitted that the Trial Panel "correctly established the existence of the statutory elements of *actus reus*". See Transcript, 26 October 2023, p. 69.

¹¹¹⁴ SPO Response Brief, para. 189, referring to Trial Judgment, paras 679-685. At the Appeal Hearing, the SPO further developed that, according to the Trial Panel, the existence of the *mens rea* was based, *inter alia*, on Mustafa's personal participation in the mistreatment of W01679 and W03593, the institutionalised mistreatment and interrogations of detainees by Mustafa's subordinates in the BIA, the denial of sufficient food, water, medical care, and access to sanitary facilities, and the awareness of the condition of the detainees and of the detention facility. See Transcript, 26 October 2023, pp. 69-70.

¹¹¹⁵ Victims Response Brief, paras 82-84.

¹¹¹⁶ Victims Response Brief, para. 85, referring to the testimony of several "direct victims".

¹¹¹⁷ Trial Judgment, para. 668. See also *Haradinaj et al.* Appeal Judgement, para. 290; *Kunarac et al.* Appeal Judgement, paras 142, 149; *Furundžija* Appeal Judgement, para. 111; *Limaj et al.* Trial Judgement, para. 235-237; *Kvočka et al.* Trial Judgement, paras 141-151; *Ongwen* Trial Judgment, para. 2700; *Duch* Trial Judgement, paras 354-355; Torture Convention, Article 1; Rome Statute, Article 7(2)(e); ICC Elements of Crimes, Article 8(2)(c)(i)-4. Furthermore, unlike what is mentioned under Article 1 of the Torture Convention, the involvement of an official is not a requirement for an act to constitute torture. See *Kunarac et al.* Appeal Judgement, para. 148; *Kvočka et al.* Appeal Judgement, para. 284; *Limaj et al.* Trial Judgement, para. 240; *Duch* Trial Judgement, para. 357; Trial Judgment, para. 671.

requires the perpetrator to have inflicted the pain or suffering intentionally and for the purpose of obtaining information or a confession, or punishing, intimidating, coercing or discriminating, on any ground, against the victim or a third person.¹¹¹⁸

405. Turning first to Mustafa's argument that the *actus reus* elements of torture have not been established because "[t]he physical assault was never witnessed" by other witnesses,¹¹¹⁹ the Panel notes that Mustafa's claim that witness testimony requires corroboration is repeated elsewhere in the Appeal Brief.¹¹²⁰ Once again, the Panel recalls that there is no general requirement that the testimony of a witness be corroborated if otherwise deemed credible.¹¹²¹

406. In any event, the Panel observes that Mustafa misconstrues the Trial Judgment and ignores the fact that all witnesses who had allegedly been assaulted also testified on the mistreatment suffered by others, including in their presence. For example, the Trial Panel found that "W01679 and W03593 provided mutually corroborative evidence of the physical abuse the detainees endured daily in the barn where they were kept."¹¹²² Although the Trial Panel's findings establish that the witnesses were individually taken to and assaulted in the interrogation room, the Trial Panel also

¹¹¹⁸ Trial Judgment, para. 672. See also *Haradinaj et al.* Appeal Judgement, para. 290; *Kunarac et al.* Appeal Judgement, paras 142, 153; *Furundžija* Appeal Judgement, para. 111; *Limaj et al.* Trial Judgement, paras 235, 238-239; *Ongwen* Trial Judgment, paras 2705-2706; *Duch* Trial Judgement, para. 356; Torture Convention, Article 1; Rome Statute, Article 7(2)(e); ICC Elements of Crimes, Article 8(2)(c)(i)-4.

¹¹¹⁹ Appeal Brief, para. 381.

¹¹²⁰ See e.g. Appeal Brief, paras 53-61. See also Appeal Brief, paras 90, 180-185, 217, 220, 279, 329.

¹¹²¹ See above, para. 38.

¹¹²² Trial Judgment, para. 529. For example, W01679 gave a detailed statement about the abuses suffered in the barn by detainees including W03593, the Murder Victim, [REDACTED] and [REDACTED]. See Transcript (W01679), 4 October 2021, pp. 885-886, 888-890 (redacted), 894-896 (redacted), 900-901 (redacted); Transcript (W01679), 5 October 2021, p. 983. W03593 testified that, every night, BIA members entered the barn and slapped and kicked all of the detainees, including [REDACTED] and the Murder Victim. See Transcript (W03593), 20 September 2021, pp. 441-445 (redacted); Transcript (W03593), 22 September 2021, pp. 575-577 (redacted). In addition, W03593 testified that W03594 was mistreated in the barn just the same as all of the other detainees. See Transcript (W03593), 20 September 2021, p. 453 (redacted); Transcript (W03593), 22 September 2021, pp. 576-577 (redacted). See also Trial Judgment, para. 559.

found that they witnessed other detainees being taken upstairs to that room,¹¹²³ and heard, from the barn, the other detainees' screams while the latter were being beaten.¹¹²⁴ Furthermore, the Trial Panel noted that the witnesses testified about the conditions in which the other detainees returned from the interrogation room and described their exhaustion, their injuries and the marks of beatings¹¹²⁵ – conditions that are for some detainees further corroborated by medical reports¹¹²⁶ and the testimony of witnesses who saw them on the day of their release.¹¹²⁷

407. Second, Mustafa's claim regarding the *actus reus* requirement also ignores the fact that the Trial Panel did not find that physical mistreatment was the only form of torture to which the detainees were subjected. In addition to the physical assault suffered by the detainees, the Trial Panel detailed at length how they had been subjected to psychological assault by, for example, "witness[ing] the brutal mistreatment inflicted on their co-detainees [...] and as a result [...] lived in constant fear that they could be next to be mistreated".¹¹²⁸ Mustafa also overlooks the Trial Panel's findings regarding the inhumane conditions in which the detainees were kept throughout the entire duration of their detention at the ZDC, in particular the deplorable living and sleeping conditions which were "unfit for humans", the

¹¹²³ Trial Judgment, paras 548 (referring to Transcript (W01679), 4 October 2021, pp. 895-896 (redacted)), 562 (referring to Transcript (W01679), 4 October 2021, p. 894 (redacted)), 575 (referring to Transcript (W01679), 4 October 2021, pp. 889, 894-895 (redacted)), 577 (referring to Transcript (W01679), 4 October 2021, pp. 900-901 (redacted); Transcript (W03593), 20 September 2021, pp. 444-445 (redacted)).

¹¹²⁴ Trial Judgment, para. 530, referring to Transcript (W03593), 20 September 2021, pp. 476-477; Transcript (W01679), 4 October 2021, pp. 890-891, 896 (redacted).

¹¹²⁵ Trial Judgment, para. 531, 548 (referring to the testimony of W01679 on the mistreatment of W03593), 562 (referring to the testimony of W01679 on the mistreatment of W03594), 569-574 (referring to the testimony of W01679, W03593 and W04669 on the mistreatment of the Murder Victim), 575 (referring to the testimony of W01679 on the mistreatment of [REDACTED]), 577 (referring to the testimony of W01679 and W03593 on the mistreatment of [REDACTED]).

¹¹²⁶ Trial Judgment, paras 531, 567, fn. 1199 (referring to [REDACTED]), 540 (referring to [REDACTED]), 550 (referring to P00021 (confidential), pp. 1-2 (W03593's medical records)).

¹¹²⁷ Trial Judgment, paras 548 (referring to the testimony of W04391 about W03593), 575 (referring to the testimony of W04391 about [REDACTED]). See also Trial Judgment, para. 512, referring to the testimony of W04390 and W04391 about the detainees they saw on the day of their release.

¹¹²⁸ Trial Judgment, paras 530-533, 548.

inadequate amounts of food and water, the limited to no access to sanitary facilities, the denial of medical care, and the prohibition on interacting with each other.¹¹²⁹ As the Trial Panel observed, the relevant witnesses – particularly W01679, W03593 and W04669 – gave mutually corroborative and credible evidence about these conditions or key aspects thereof.¹¹³⁰ Therefore, Mustafa fails to show any error in the Trial Panel’s assessment and findings with regard to the physical and psychological assault suffered by the detainees, and the conditions of their detention.

408. The Panel now turns to Mustafa’s claim that W04669, as the only eyewitness to another person’s assault, never stated that the victim was assaulted “by the Appellant and other B[IA] members at the [ZDC] compound”.¹¹³¹ The Panel first notes that the Trial Panel relied on the evidence provided by several eye-witnesses during the trial, including W04669, to find that those who subjected the detainees to physical and psychological abuse were KLA members belonging to the BIA unit, including the Accused.¹¹³² The Panel further notes that Mustafa’s reliance on a selective portion of W04669’s evidence to argue that W04669 “never stated that it was the Appellant or

¹¹²⁹ Trial Judgment, paras 501-527.

¹¹³⁰ Trial Judgment, paras 503-508, 511-513, 516-518, 521, 523-524 and references cited therein. With respect to Mustafa’s arguments challenging the credibility of W01679, W03593 and W04669, the Appeals Panel refers to its findings under Ground 2E, where it found that Mustafa fails to show that no reasonable trier of fact could have accepted the evidence of W01679, W03593 and W04669 identifying the detention location, or that the Trial Panel’s findings are wholly erroneous. See above, para. 212.

¹¹³¹ Appeal Brief, para. 381.

¹¹³² See, in particular, Trial Judgment, paras 498-500, 541-545, 551-556, 567-568, relying on the testimony of W01679, W03593 and W04669. See also the section on the general assessment of SPO witnesses, in particular Trial Judgment, paras 58-65 (W01679), 66-74 (W03593), 75-83 (W03594), 84-90 (W04669). With respect to W01679, the Panel recalls its findings that the Trial Panel did not attribute undue weight to W01679’s in-court photographic identification of Mustafa, and, in particular, carefully weighed the reliability of W01679’s testimony in light of other evidence on the record and treated W01679’s identification of the Accused with caution. See above, paras 91-92. With respect to W03593, the Panel recalls that it did not find any error in the Trial Panel’s assessment of the credibility of W03593, who identified the Accused as the individual who subjected him to a mock execution by putting a revolver to his head, and who beat and interrogated him during a second incident. See above, paras [REDACTED]. With respect to W03594, the Appeals Panel refers to its findings under Ground 1F where it found that W03594 testified in a manner which was inconsistent with his prior statements and that the Trial Panel did not err in allowing the SPO to confront W03594 with his prior statements and to ask leading questions. See above, para. 135.

the BIA members who assaulted that person”, is misleading.¹¹³³ Rather, looking at W04669’s evidence as a whole, the Trial Panel observed that: (i) he described the perpetrators in a similar manner to the way in which other witnesses did; (ii) he was detained at the ZDC, which was controlled by the BIA and under the control and authority of the Accused; and (iii) the perpetrators used the same *modus operandi* when mistreating the detainees.¹¹³⁴ Therefore, the Panel finds that Mustafa fails to demonstrate an error in the Trial Panel’s findings in this respect. Consequently, Mustafa’s arguments regarding the *actus reus* of torture as a war crime are dismissed.

409. With respect to the *mens rea* requirement, the Panel notes that Mustafa merely asserts, without elaboration, that the Trial Panel “only presumed” the requisite purpose of inflicting pain or suffering and that the perpetrators never admitted, confessed or stated that the infliction of pain was for any particular purpose.¹¹³⁵

410. The Panel recalls the *mens rea* element of the war crime of torture detailed above,¹¹³⁶ and observes that the Trial Panel rejected the Defence’s closing submissions that the mistreatment was inflicted with no particular aim or purpose, finding instead that the requisite purpose was “clearly” established based on the evidence.¹¹³⁷ In particular, the Trial Panel relied on the testimony of some of the ZDC detainees (namely W01679, W03593, W03594 and W04669) to conclude that BIA members, including the Accused sought to: (i) obtain information from the ZDC detainees;¹¹³⁸ (ii) make them confess that they were spies, traitors, thieves, liars, or collaborating

¹¹³³ Appeal Brief, para. 381.

¹¹³⁴ Trial Judgment, paras 499-500, 567-568. The Trial Panel noted in particular that “W01679, W03593, W04669 and W03594 testified that the individuals who mistreated or questioned the detainees, stood guard at the barns, and/or escorted them around the ZDC premises were dressed (partially) in uniforms – some bearing the BIA or the KLA emblem – were armed, and spoke Albanian”. See Trial Judgment, para. 499. See also Transcript (W04669), 10 November 2021, pp. 1437-1438, 1442.

¹¹³⁵ Appeal Brief, paras 383-385.

¹¹³⁶ See above, para. 404.

¹¹³⁷ Trial Judgment, para. 582.

¹¹³⁸ Trial Judgment, paras 582-583. See also Trial Judgment, paras 579 (referring to Trial Judgment, paras 534-535, 545, 547, 556, 567-568), 680, 682-683.

with Serbs;¹¹³⁹ (iii) intimidate them, by subjecting them to mock executions, threatening them with death, or forcing them to witness the mistreatment of their co-detainees;¹¹⁴⁰ and (iv) discriminate against them and mistreat them based on their political convictions, because some of them were members or supporters of political parties perceived as opposing the KLA.¹¹⁴¹

411. In light of these findings, the Appeals Panel considers that the Trial Panel's conclusion that the specific purpose of the mistreatment was established is supported by the evidence and is sufficiently reasoned.¹¹⁴²

412. In light of the above, the Appeals Panel finds that Mustafa fails to demonstrate any error in the Trial Panel's assessment of the *actus reus* and *mens rea* requirements of the war crime of torture, and the Appeals Panel accordingly dismisses Mustafa's Ground 6.

2. Alleged Errors Regarding the Trial Panel's Findings on the Accused's Conviction for the War Crime of Torture Under JCE I (Ground 7)

(a) Submissions of the Parties and Participants

413. Mustafa argues that the Trial Panel erred in law and in fact when it convicted him for the torture of at least six persons, while the Trial Panel only established that he personally participated in the torture of two persons.¹¹⁴³ Mustafa argues that he cannot be held accountable for crimes allegedly committed by others against "at least five other persons", and that he was thus wrongly convicted under JCE I.¹¹⁴⁴

¹¹³⁹ Trial Judgment, paras 582-583. See also Trial Judgment, paras 579 (referring to Trial Judgment, paras 534-535, 545, 556, 566-568, 572, 574-576), 679, 683.

¹¹⁴⁰ Trial Judgment, paras 582-583. See also Trial Judgment, paras 579 (referring to Trial Judgment, paras 523-525, 530-532, 546-547, 556), 679-680, 682-683.

¹¹⁴¹ Trial Judgment, paras 582-583, 683. See also Trial Judgment, para. 580.

¹¹⁴² Trial Panel, paras 684-685. Contra Appeal Brief, paras 384-385.

¹¹⁴³ Appeal Brief, paras 386-387. See also Appeal Brief, para. 390; Reply Brief, para. 99.

¹¹⁴⁴ Appeal Brief, paras 388-389. In relation to the number of victims, see above, fn. 5, referring to Trial Judgment, fn. 703.

414. The SPO responds that the Trial Panel correctly set out the elements of JCE I liability.¹¹⁴⁵ The SPO and Victims' Counsel further submit that the Trial Panel rightly found that Mustafa made a significant contribution to the execution of the common purpose, which was "far beyond what is required to meet this element".¹¹⁴⁶

(b) Assessment of the Court of Appeals Panel

415. The Panel understands Mustafa's challenge, as presented in his Appeal Brief, as relating to his conviction under JCE I for the acts of torture committed by other BIA members, claiming that he was erroneously convicted for the "torture of at least six persons" while, in his view, the Trial Panel found that he "participated in the torture of two persons only".¹¹⁴⁷

416. At the outset, the Appeals Panel notes that Mustafa challenges, in the Appeal Brief, findings regarding his conviction under JCE I which he did not identify in the Notice of Appeal.¹¹⁴⁸ Such a deficiency would in principle warrant summary dismissal of these arguments.¹¹⁴⁹ However, the Appeals Panel decides to exceptionally consider Mustafa's arguments under Ground 7 out of fairness to the Accused and in the interests of justice, in light of the significance of the issue to Mustafa's conviction for the torture of at least six persons under paragraphs 29-30 and 34-35 of the Indictment.

417. The Panel first observes that, while alleging an error of law in the Trial Panel's findings,¹¹⁵⁰ Mustafa does not challenge the definition of the objective and subjective

¹¹⁴⁵ SPO Response Brief, para. 191. See also SPO Response Brief, para. 190.

¹¹⁴⁶ SPO Response Brief, para. 191, quoting Trial Judgment, para. 749; Victims Response Brief, para. 86.

¹¹⁴⁷ See Appeal Brief, paras 386-389. The Panel notes that Mustafa mentions, in paragraph 389 of the Appeal Brief, not only Count 3 (Torture), but also Counts 1 and 4 (Arbitrary Detention and Murder, respectively). The Panel notes that Mustafa does not advance any arguments under Ground 7 with respect to his conviction for Counts 1 and 4 under JCE I, and the Panel will therefore not consider this further.

¹¹⁴⁸ Compare Notice of Appeal, para. 10, referring to Trial Judgment, paras 685, 733 with Appeal Brief, paras 386-389, additionally referring, *inter alia*, to Trial Judgment, paras 674-684, 748, 753-754, 757, 759.

¹¹⁴⁹ See above, para. 31.

¹¹⁵⁰ Appeal Brief, para. 386.

elements of JCE I liability, as set out by the Trial Panel, including the required level of contribution.¹¹⁵¹ Rather, Mustafa's ground of appeal rests on his mere assertion that "the presumed common purpose that he and or others had was wrongly found and established as being JCE".¹¹⁵²

418. In this regard, the Appeals Panel notes the Trial Panel's findings that Mustafa shared, with BIA members and other KLA members, the common purpose to detain and torture detainees on account of the alleged suspicions against them, as well as, in the Murder Victim's case, to detain, torture and ultimately kill him for the same reasons.¹¹⁵³ Moreover, the Trial Panel found that Mustafa not only made a "significant contribution" to the execution of the common purpose, but also that his contribution "went far beyond what is required to meet this element".¹¹⁵⁴

419. In light of the above, the Appeals Panel finds that Mustafa fails to demonstrate any error in the Trial Panel's findings with respect to Mustafa's conviction for the war crime of torture under JCE I. Accordingly, the Appeals Panel dismisses Mustafa's Ground 7.

Q. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S FINDINGS ON THE LEGAL BASIS OF THE WAR CRIME OF ARBITRARY DETENTION (GROUND 8)

420. The Trial Panel dismissed the Defence's argument that the war crime of arbitrary detention in a non-international armed conflict has no legal basis in the Specialist Chambers' applicable law.¹¹⁵⁵ After concluding that the *actus reus* and *mens*

¹¹⁵¹ Trial Judgment, paras 737-741. See also SPO Response Brief, para. 191.

¹¹⁵² Appeal Brief, para. 389.

¹¹⁵³ Trial Judgment, paras 745-747. See also Trial Judgment, paras 742-744.

¹¹⁵⁴ Trial Judgment, paras 749-751.

¹¹⁵⁵ Trial Judgment, paras 640-645.

rea elements were satisfied,¹¹⁵⁶ the Trial Panel found Mustafa guilty of the war crime of arbitrary detention.¹¹⁵⁷

421. Mustafa challenges the Trial Panel's finding that arbitrary detention committed in a non-international armed conflict constitutes a war crime pursuant to Article 14(1)(c) of the Law.¹¹⁵⁸ The SPO responds that Mustafa's submissions should be summarily dismissed.¹¹⁵⁹ Both the SPO and Victims' Counsel also argue that he fails to demonstrate any error in the Trial Panel's assessment.¹¹⁶⁰

1. Submissions of the Parties and Participants

422. Mustafa submits that the Trial Panel erred in law in finding that arbitrary detention committed in a non-international armed conflict constitutes a war crime within the Specialist Chambers' jurisdiction,¹¹⁶¹ and argues that this error invalidates his conviction under Count 1.¹¹⁶² In particular, Mustafa challenges the Trial Panel's reliance on two appellate decisions in which the Court of Appeals Chamber considered this issue, which is "yet to be considered [by] the [Specialist Chambers'] Supreme Court".¹¹⁶³

423. In his view, while the Court of Appeals Chamber found that the enumeration of crimes under Article 14(1)(c) of the Law is not exhaustive, it did not authorise the Trial Panel to extend such a list to arbitrary detention in a non-international armed conflict.¹¹⁶⁴ Mustafa argues that the Trial Panel failed to explain how the war crime of arbitrary detention committed during a non-international armed conflict existed

¹¹⁵⁶ Trial Judgment, paras 652-659.

¹¹⁵⁷ Trial Judgment, para. 831. See also Trial Judgment, para. 759.

¹¹⁵⁸ Appeal Brief, paras 391, 399, referring to Trial Judgment, para. 645. See also Appeal Brief, paras 392-398, 400; Reply Brief, para. 100.

¹¹⁵⁹ SPO Response Brief, paras 192-194.

¹¹⁶⁰ SPO Response Brief, paras 192-194; Victims' Response Brief, paras 88-91.

¹¹⁶¹ Appeal Brief, paras 391, 399, referring to Trial Judgment, para. 645. See also Reply Brief, para. 100.

¹¹⁶² Appeal Brief, paras 399-400.

¹¹⁶³ Appeal Brief, paras 391, 396.

¹¹⁶⁴ Appeal Brief, para. 396. See also Appeal Brief, paras 392-395.

under customary international law within the Specialist Chambers' temporal jurisdiction.¹¹⁶⁵

424. Mustafa requests that the Appeals Panel stay the appellate proceedings and refer the matter to the Specialist Chamber of the Constitutional Court, pursuant to Article 113(8) of the Kosovo Constitution, as a question of constitutional compatibility of the Law with the Kosovo Constitution.¹¹⁶⁶

425. Finally, Mustafa challenges the Court of Appeals Chamber's interpretation of the terms "in relation to" in Article 162(1) of the Kosovo Constitution and "relate to" in Article 6(1) of the Law, and the Court of Appeals Chamber's finding that the jurisdiction of the Specialist Chambers is not limited to the allegations contained in the Council of Europe Report.¹¹⁶⁷

426. The SPO responds that the Trial Panel was bound to follow the Court of Appeals Chamber's jurisprudence and settled law that arbitrary detention in a non-international armed conflict constitutes a war crime within the Specialist Chambers' jurisdiction.¹¹⁶⁸ In this respect, the SPO submits that Mustafa has not identified any cogent reasons why the Appeals Panel should depart from its previous decisions.¹¹⁶⁹ The SPO further submits that Mustafa's request for a referral to the Specialist Chamber of the Constitutional Court is contrary to the latter's express admonition to first exhaust all effective legal remedies.¹¹⁷⁰ Finally, the SPO argues that Mustafa's challenge to the Court of Appeals Chamber's interpretation of Article 1 of the Law should be summarily dismissed because (i) Mustafa failed to challenge the

¹¹⁶⁵ Appeal Brief, paras 394-396. See also Appeal Brief, para. 392. The Panel notes that, in paragraph 394 of the Appeal Brief, Mustafa erroneously refers to paragraph 612 of the Trial Judgment, instead of paragraph 642.

¹¹⁶⁶ Appeal Brief, para. 397. See also Appeal Brief, para. 393.

¹¹⁶⁷ Appeal Brief, para. 398.

¹¹⁶⁸ SPO Response Brief, para. 192.

¹¹⁶⁹ SPO Response Brief, para. 192.

¹¹⁷⁰ SPO Response Brief, para. 193, referring to *Thaçi et al.* Constitutional Court Decision on Krasniqi's and Veseli's Referrals, para. 56.

Specialist Chambers' jurisdiction at the appropriate juncture; and (ii) his submissions fall outside of the scope of the Notice of Appeal.¹¹⁷¹

427. Victims' Counsel responds that: (i) the Court of Appeals Chamber has already clearly identified the fact that the list of war crimes in a non-international armed conflict is non-exhaustive;¹¹⁷² and (ii) the customary international law status of the war crime of arbitrary detention in an armed conflict, including a non-international armed conflict, is well-established.¹¹⁷³

2. Assessment of the Court of Appeals Panel

428. At the outset, the Panel notes that Mustafa filed a preliminary motion pursuant to Rule 97(1)(a) of the Rules raising the challenge now brought under this ground of appeal.¹¹⁷⁴ The motion was dismissed on procedural grounds by the Trial Panel as it was submitted after the expiry of the relevant time limit which is designed to ensure that, in principle, issues related to the Specialist Chambers' jurisdiction are resolved, including at the appellate level, before the case is transmitted to the Trial Panel.¹¹⁷⁵ Although Mustafa failed to raise a timely challenge regarding the Specialist Chambers' jurisdiction over the war crime of arbitrary detention, the Panel decides to consider his submissions on an exceptional basis out of fairness to the Accused and in the interests of justice, as the issue raised directly impacts the finding of guilt against Mustafa for the war crime of arbitrary detention.

429. The Appeals Panel observes that, under Ground 8, Mustafa is in fact challenging two previous Court of Appeals Chamber's decisions on which the Trial

¹¹⁷¹ SPO Response Brief, para. 194. At the Appeal Hearing, the SPO further stressed that the Trial Panel established the existence of both material and mental elements of the crime of arbitrary detention, and recalled the various factors relevant to Mustafa's *mens rea*. See Transcript, 26 October 2023, pp. 68-69.

¹¹⁷² Victims Response Brief, para. 88.

¹¹⁷³ Victims Response Brief, paras 89-90.

¹¹⁷⁴ Defence Preliminary Motion on Jurisdiction, paras 130-149.

¹¹⁷⁵ Decision Dismissing Defence Jurisdiction Motion, paras 6-10. See also Articles 33(1)(b), 39(1), 40(1), 45(2) of the Law; Rules 97, 98(1) of the Rules.

Panel based its findings to conclude that arbitrary detention committed in a non-international armed conflict constituted a war crime under Article 14(1)(c) of the Law.¹¹⁷⁶

430. In this regard, the Appeals Panel recalls the Court of Appeals Chamber's previous findings that: (i) the wording of Article 14(1)(c) of the Law suggests that the list is non-exhaustive and that the Specialist Chambers' jurisdiction is not limited to those acts expressly enumerated under this provision;¹¹⁷⁷ (ii) the non-exhaustive language of the provision does not violate the principle of legal certainty (*lex certa*) considering that, for an act to be included in the Law, and thus be within the jurisdiction of the Specialist Chambers, it must have existed under customary international law during its temporal jurisdiction and must constitute a serious violation of Common Article 3;¹¹⁷⁸ (iii) arbitrary detention amounts to a serious violation of Common Article 3, and detention becomes arbitrary and constitutes a serious violation of Common Article 3 when the principle of humane treatment is violated, irrespective of whether there is a legal basis to detain a person;¹¹⁷⁹ and (iv) arbitrary detention during a non-international armed conflict was criminalised under customary international law at the material time, and this criminalisation was accessible and foreseeable to the accused at the relevant time.¹¹⁸⁰

¹¹⁷⁶ Trial Judgment, paras 642-645, referring to *Thaçi et al.* Appeal Decision on Jurisdiction, paras 87, 89, 97, 99, 102, 106-111; *Shala* Appeal Decision on Jurisdiction, paras 44-46.

¹¹⁷⁷ *Thaçi et al.* Appeal Decision on Jurisdiction, para. 87; *Shala* Appeal Decision on Jurisdiction, para. 44.

¹¹⁷⁸ *Shala* Appeal Decision on Jurisdiction, paras 44, 46. See also *Thaçi et al.* Appeal Decision on Jurisdiction, para. 89.

¹¹⁷⁹ *Thaçi et al.* Appeal Decision on Jurisdiction, paras 96-97, 102; *Shala* Appeal Decision on Jurisdiction, para. 45.

¹¹⁸⁰ *Thaçi et al.* Appeal Decision on Jurisdiction, paras 109, 111; *Shala* Appeal Decision on Jurisdiction, para. 46. This criminalisation thus complies with the principle of *nullum crimen sine lege praevia*, namely that there is no crime without a respective offence existing at the time of commission.

431. The Panel notes that Mustafa fails to explain how the Trial Panel erred except by following the Court of Appeals Chamber's decisions.¹¹⁸¹ The Panel recalls that an appeals panel is expected to follow previous decisions issued by the Court of Appeals Chamber, and should depart from them only for cogent reasons in the interests of justice.¹¹⁸² Because Mustafa has failed to demonstrate (i) any legal error in the Court of Appeals Chamber's decisions; and, therefore, (ii) the existence of any cogent reasons, in the interest of justice, to depart from the aforementioned decisions, the Appeals Panel dismisses his arguments in this regard.

432. With respect to Mustafa's request to refer the matter to the Specialist Chamber of the Constitutional Court, the Panel recalls that, in accordance with Article 113(8) of the Kosovo Constitution and Article 49(4) of the Law, a panel may refer questions of constitutional compatibility of a law to the Specialist Chamber of the Constitutional Court if, *inter alia*, it is uncertain as to the compatibility of the contested law with the Kosovo Constitution.¹¹⁸³ As demonstrated in the above assessment, no uncertainty exists. Accordingly, the Panel dismisses Mustafa's request to refer this question to the Specialist Chamber of the Constitutional Court.

433. Finally, turning to Mustafa's challenge to the Court of Appeals Chamber's interpretation of Article 162(1) of the Kosovo Constitution and Article 6(1) of the Law, arguing that the jurisdiction of the Specialist Chambers is strictly limited to crimes "in relation to the findings of the Council of Europe Report",¹¹⁸⁴ the Panel notes that these submissions clearly fall outside of the scope of the Notice of Appeal and were not

¹¹⁸¹ Appeal Brief, paras 394-396; Trial Judgment, paras 642-644, referring to *Thaçi et al.* Appeal Decision on Jurisdiction, paras 87, 89, 97, 99, 102, 106-11; *Shala* Appeal Decision on Jurisdiction, paras 44-46.

¹¹⁸² See above, para. 41.

¹¹⁸³ See similarly, *Thaçi et al.* Appeal Decision on Legality Challenge, para. 71.

¹¹⁸⁴ Appeal Brief, para. 398.

raised in accordance with Rule 97 of the Rules.¹¹⁸⁵ Accordingly, the Appeals Panel dismisses Mustafa's arguments in this regard.¹¹⁸⁶

434. In light of the above, the Panel finds that Mustafa fails to establish that the Trial Panel erred in law with respect to the legal basis of the war crime of arbitrary detention. Accordingly, the Appeals Panel dismisses Mustafa's Ground 8.

R. ALLEGED ERRORS CONCERNING THE TRIAL PANEL'S FINDINGS ON SENTENCING
(GROUNDS 9A, 9B, 9C, 9D, 9E, 9F, 9G, 9H, 9I, 9J, 9K)

435. In the Trial Judgment, the Trial Panel set out the purposes of sentencing and the applicable provisions of the Specialist Chambers' legal framework.¹¹⁸⁷ The Trial Panel found that it was required to consider the punishments under the law applicable in Kosovo at the time the crimes were committed, as well as any subsequent more lenient punishments, but ultimately found that it was "not bound by such considerations".¹¹⁸⁸ The Trial Panel further identified the factors it would consider and how it would balance them, and identified the applicable provisions concerning the determination of the overall single sentence.¹¹⁸⁹ In determining the Accused's sentence, the Trial Panel specifically considered: (i) the gravity and consequences of the crimes, including the aggravating factors of commission of torture with particular cruelty and against particularly vulnerable or defenceless victims; (ii) Mustafa's

¹¹⁸⁵ See Notice of Appeal, Ground 8, para. 11. The Panel notes that Mustafa did not submit this argument in the preliminary motion he filed pursuant to Rule 97(1)(a) of the Rules. See Defence Preliminary Motion on Jurisdiction, paras 130-149. In any event, the Panel recalls that his jurisdictional challenges were raised out of time. See Decision Dismissing Defence Jurisdiction Motion, para. 10.

¹¹⁸⁶ See above, para. 31. In any event, according to the Court of Appeals Chamber, a mere "relation" between the charges and the Council of Europe Report would suffice to meet the jurisdictional requirement under Article 6(1) of the Law. See *Thaçi et al.* Appeal Decision on Jurisdiction, para. 66. Moreover, the SCCC has endorsed the Court of Appeals Chamber's approach. See *Thaçi et al.* Constitutional Court Decision on Thaçi's Referral, paras 82-83.

¹¹⁸⁷ Trial Judgment, paras 772-779.

¹¹⁸⁸ Trial Judgment, paras 780-781.

¹¹⁸⁹ Trial Judgment, paras 782-795.

personal contribution to the crimes; and, *proprio motu*, (iii) Mustafa's individual circumstances as possible mitigating factors.¹¹⁹⁰

436. Based on the above-mentioned factors, the Trial Panel imposed the following individual sentences on the Accused:

- (i) Count 1 (war crime of arbitrary detention, committed against at least six persons) – ten years of imprisonment;
- (ii) Count 3 (war crime of torture, committed against at least six persons) – 22 years of imprisonment; and
- (iii) Count 4 (war crime of murder, committed against one person) – 25 years of imprisonment.¹¹⁹¹

Finally, based on these individual sentences, the Trial Panel imposed a single sentence of 26 years of imprisonment, reflecting the totality of the Accused's criminal conduct, and deducted from the sentence the time he had spent in detention since his arrest on 24 September 2020.¹¹⁹²

437. Mustafa submits that the Trial Panel made discernible errors in sentencing concerning the purposes of sentencing, the principle of *lex mitior*, the number of victims falling under his conviction for the war crime of torture, the weighing of individual circumstances, and the overall length of the sentence.¹¹⁹³ The SPO responds that Mustafa's challenges regarding sentencing should be rejected as they fail to establish any error.¹¹⁹⁴

¹¹⁹⁰ Trial Judgment, paras 796-826.

¹¹⁹¹ Trial Judgment, paras 827-828, 831.

¹¹⁹² Trial Judgment, paras 827, 829-830.

¹¹⁹³ Appeal Brief, paras 401-445; Notice of Appeal, Grounds 9A-9K, para. 12; Reply Brief, paras 101-112.

¹¹⁹⁴ SPO Response Brief, paras 195-238.

1. Submissions of the Parties and Participants

438. Mustafa submits that the Trial Panel made discernible errors in sentencing, such that no, or a more lenient, sentence should have been imposed.¹¹⁹⁵ Specifically, he first argues that the Trial Panel erred by not applying the purposes of sentencing as set out in Article 38 of the KCC, and that the Trial Panel relied on “extra-legal arguments” unrelated to either Kosovo law or international customary law.¹¹⁹⁶ Mustafa also argues that the Trial Panel’s reliance on ICTY jurisprudence is inapposite since he never held political office.¹¹⁹⁷

439. Next, Mustafa argues that the Trial Panel erred by incorrectly or not at all applying the *lex mitior* principle when finding that, under Article 44(2) of the Law, it is not bound by the punishments provided in laws applicable in Kosovo at the time the crimes were committed, or any subsequent more lenient punishment.¹¹⁹⁸ He submits that this interpretation violates the principles of *in dubio pro reo* and *lex mitior*, the latter of which is enshrined in Article 33(2) and (4) of the Kosovo Constitution, which the Specialist Chambers “shall adjudicate and function in accordance with” pursuant to Article 3(2) of the Law.¹¹⁹⁹ Mustafa therefore requests that the Appeals Panel refer the matter to the Specialist Chamber of the Constitutional Court for “review”, pursuant to Article 113(8) of the Kosovo Constitution and Article 49(4) of the Law.¹²⁰⁰ Mustafa also argues that, according to the principles of *lex mitior* and *nullum crimen, nulla poena sine lege*, the Trial Panel should not have

¹¹⁹⁵ Appeal Brief, paras 401, 442, 445; Notice of Appeal, para. 12; Transcript, 26 October 2023, p. 17.

¹¹⁹⁶ Appeal Brief, paras 402-407; Notice of Appeal, Grounds 9A-9B, para. 12.

¹¹⁹⁷ See Notice of Appeal, Ground 9B, para. 12; Transcript, 27 October 2023, pp. 151-152.

¹¹⁹⁸ Appeal Brief, paras 408, 410-416, 429-431, referring to Trial Judgment, paras 780, 828; Notice of Appeal, Grounds 9C-9E, para. 12; Reply Brief, paras 104, 108; Transcript, 26 October 2023, pp. 58-62.

¹¹⁹⁹ Appeal Brief, paras 409, 411, 415; Notice of Appeal, Grounds 9D-9E, para. 12; Reply Brief, paras 104, 108; Transcript, 26 October 2023, pp. 58-63; Transcript, 27 October 2023, pp. 145-146. Mustafa also argues that the principle of *lex mitior* is reflected in Article 7 of the ECHR, and that the principle is *jus cogens* and so cannot be derogated from. See Transcript, 26 October 2023, pp. 59-61.

¹²⁰⁰ Appeal Brief, paras 409, 415; Notice of Appeal, Ground 9E, para. 12; Reply Brief, para. 108; Transcript, 26 October 2023, pp. 61-63; Transcript, 27 October 2023, pp. 145-146.

applied the KCC in determining the sentence, but rather the CCSFRY in force at the time of commission, as amended by UNMIK Regulation 1999/24.¹²⁰¹ In support, Mustafa points to a judgment of the Kosovo Supreme Court on an “identical criminal situation”, which found that the sentence could not exceed 15 years of imprisonment.¹²⁰² Mustafa further submits that the Trial Panel erred in failing to consider: (i) the sentencing practice for similar offences in Kosovo or before the ICTY or ICTR; and (ii) the sentencing practice in the former Yugoslavia at the time the crimes were committed, and further failing to give reasons for not doing so.¹²⁰³

440. In addition, Mustafa argues that the Trial Panel erred in sentencing him under Count 3 for the torture of at least six persons, despite having found that he had only participated in and had the requisite *mens rea* for the torture of two persons.¹²⁰⁴ Moreover, in Mustafa’s view, the Trial Panel erred in finding that his individual circumstances, which it considered *proprio motu*, could not be given significant weight when balanced against the nature and gravity of the crimes and his contribution thereto.¹²⁰⁵ Specifically, Mustafa asserts that this finding is inconsistent with the Trial Panel’s earlier finding that factors relating to the gravity of the crime could not be

¹²⁰¹ Appeal Brief, paras 412-413, 419-427; Notice of Appeal, Ground 9G, para. 12; Reply Brief, para. 105. Specifically, Mustafa argues that the KCC allowed up to 40 years of imprisonment, whereas the CCSFRY was amended by UNMIK Regulation 1999/24 to abolish the death penalty and leave in force imprisonment of up to 15 years under the CCSFRY. He argues that the subsequent amendment to UNMIK Regulation 1999/24 is inapplicable because it specified that the relevant amendment would only apply to offences committed after 27 October 2000. Mustafa also argues that the Trial Panel erred in failing to give reasons for departing from the provisions of the CCSFRY. Moreover, Mustafa takes issue with the Trial Panel’s statement that laws subsequent to UNMIK Regulation 1999/24 “provide equal or more severe” sentencing ranges, arguing that these subsequent laws are irrelevant, and also takes issue with the Trial Panel’s failure to mention UNMIK Regulation 2000/59. See Appeal Brief, paras 419, 432; Notice of Appeal, Ground 9G, para. 12; Transcript, 27 October 2023, pp. 142-148.

¹²⁰² Appeal Brief, paras 414, 428, referring to Kosovo Supreme Court Judgment of 20 March 2023; Reply Brief, para. 108; Transcript, 27 October 2023, pp. 143, 148. See also Transcript, 27 October 2023, pp. 148-149, referring to Kosovo Constitutional Court Judgment of 31 March 2022.

¹²⁰³ Appeal Brief, paras 417-418, 430, 432-433; Notice of Appeal, Grounds 9F, 9G, 9H, para. 12. See also Appeal Brief, para. 444(d). The Panel notes that in the Appeal Brief, under Ground 9H, Mustafa only cross-refers to Ground 9F and makes no further submissions. The Panel understands that Ground 9H is now subsumed under Ground 9F.

¹²⁰⁴ Appeal Brief, paras 434-438; Notice of Appeal, Ground 9I, para. 12. See also Reply Brief, para. 109.

¹²⁰⁵ Appeal Brief, paras 439, 441; Notice of Appeal, Ground 9J, para. 12.

considered as separate aggravating circumstances, and *vice versa*, and that the absence of mitigating circumstances cannot be an aggravating circumstance.¹²⁰⁶

441. Finally, Mustafa submits that the Trial Panel erroneously rendered a “capricious and manifestly excessive” sentence, in that: (i) in light of his age, it amounts to life imprisonment; (ii) there is no possibility of rehabilitation, given life expectancy in Kosovo; (iii) he will have “no possibility for family life”, in accordance with ECHR standards; and (iv) international tribunals have not imposed a similarly lengthy sentence for these types of crimes.¹²⁰⁷

442. The SPO responds that the sentence should not be disturbed, as Mustafa fails to show an error in the Trial Panel’s findings.¹²⁰⁸ Specifically, the SPO argues that the Trial Panel’s mere reference to the primary purposes of sentencing is consistent with applicable law, jurisprudence and Article 38 of the KCC, albeit that the latter provision does not bind the Trial Panel as it is not explicitly incorporated into the Law.¹²⁰⁹ In any event, the SPO submits that Mustafa fails to substantiate his assertions in this regard.¹²¹⁰ The SPO also asserts that Mustafa’s argument that certain ICTY jurisprudence is inapposite should be dismissed as undeveloped, but notes that, in

¹²⁰⁶ Appeal Brief, paras 440-441, referring to Trial Judgment, para. 789, where the Trial Panel found that “[a]ny factors taken into consideration as aspects of the gravity of the crime cannot additionally be considered as separate aggravating circumstances, and *vice versa*.”

¹²⁰⁷ Notice of Appeal, Ground 9K, para. 12; Appeal Brief, paras 443-444. See also Reply Brief, para. 112; Transcript, 27 October 2023, pp. 149-151, referring notably to *Kupreškić et al.* Trial Judgement; *Kvočka et al.* Trial Judgement. See also Transcript, 27 October 2023, p. 153.

¹²⁰⁸ SPO Response Brief, paras 195-196, 199, 202, 204, 222, 224, 229, 238; Transcript, 27 October 2023, p. 116.

¹²⁰⁹ SPO Response Brief, paras 197-202. In particular, the SPO argues that paragraphs 772 to 777 of the Trial Judgment do not “*apply* the purposes of sentencing”, but rather “*merely note*” them. In addition, the SPO specifically submits that paragraph 775 is *obiter dictum* and that paragraph 776 mirrors a principle enshrined, *inter alia*, in Article 38 of the KCC. See SPO Response Brief, para. 201 (emphasis in original).

¹²¹⁰ SPO Response Brief, paras 199-200.

any event, the jurisprudence is relevant irrespective of whether Mustafa held political office.¹²¹¹

443. Next, the SPO submits that the Trial Panel's finding that Article 44(2) of the Law requires the Trial Panel to consider the listed factors, which it did, but that it is not bound by them, is consistent with the Article's clear wording and ICTY jurisprudence interpreting a similar provision.¹²¹² In the SPO's view, Mustafa merely repeats arguments which were unsuccessful at trial, without showing that their rejection was erroneous.¹²¹³ The SPO further argues that the *lex mitior* principle only applies to law which is binding on the Trial Panel, namely where Kosovo law is expressly incorporated into the Law.¹²¹⁴ Moreover, the SPO submits that, given that Article 44(1) of the Law authorises the imposition of a life sentence, the Trial Panel is not bound by the maximum terms of imprisonment applicable in Kosovo.¹²¹⁵ The SPO also argues that the punishment applicable at the relevant time for similar offences was the death penalty and so was not more lenient, and that the CCSFRY only discretionarily provided for prison terms of no more than 20 years, while still leaving the death penalty as part of the sentencing range.¹²¹⁶ The SPO further contends that any other interpretation undermines the legislative intent behind the CCSFRY and the Law, namely that the most severe punishments be available for grave crimes.¹²¹⁷

¹²¹¹ SPO Response Brief, para. 203.

¹²¹² SPO Response Brief, paras 205-207, 214; Transcript, 27 October 2023, pp. 119-120.

¹²¹³ SPO Response Brief, para. 208.

¹²¹⁴ SPO Response Brief, paras 209-210. The SPO also makes reference to: (i) its earlier submissions in case KSC-BC-2020-06 concerning the application of the *lex mitior* principle to the Law, which addresses customary international crimes; and (ii) the Appeals Panel's subsequent findings in that same case. See Transcript, 27 October 2023, pp. 115-116, referring to *Thaçi et al.* SPO Submissions on Preliminary Motion, paras 32-33; *Thaçi et al.* Appeal Decision on Jurisdiction, paras 39, 56-57.

¹²¹⁵ SPO Response Brief, para. 211; Transcript, 27 October 2023, p. 117.

¹²¹⁶ SPO Response Brief, para. 212; Transcript, 27 October 2023, p. 117.

¹²¹⁷ SPO Response Brief, para. 212.

Consequently, the SPO asserts that Mustafa's reliance on the Kosovo Supreme Court Judgment of 20 March 2023 is inapt.¹²¹⁸

444. The SPO also argues that Mustafa: (i) fails to show that the Trial Panel was required to follow the sentencing practices of Kosovo, the ICTY or the ICTR, or those at the time the crimes were committed; and (ii) does not put forward any comparable cases to support his assertion that his sentence was disproportionate thereto.¹²¹⁹ In addition, the SPO points out that the Trial Panel did rely on jurisprudence when considering factors relevant to sentencing.¹²²⁰ Regardless, the SPO avers that sentences are so case-specific that such comparisons are of limited assistance, and that, in any event, the sentence imposed was at "the lower end of the mid-range" available to the Trial Panel.¹²²¹ The SPO further argues that any such comparison should also include domestic practice on international crimes, with the caveat that a direct factual comparison cannot be made.¹²²² Furthermore, the SPO submits that a referral to the Specialist Chamber of the Constitutional Court is not warranted.¹²²³

445. Next, the SPO argues that, since Mustafa fails to show any error regarding the number of torture victims, his arguments on sentencing under Count 3 should be dismissed.¹²²⁴ Moreover, the SPO challenges as unfounded Mustafa's claims that the Trial Panel: (i) used the nature and gravity of the crime as an aggravating circumstance when deciding not to give significant weight to his individual circumstances; and (ii) found the absence of mitigating circumstances to be an aggravating circumstance.¹²²⁵ The SPO furthermore submits that Mustafa's arguments that the

¹²¹⁸ SPO Response Brief, para. 213.

¹²¹⁹ SPO Response Brief, paras 215, 217, 220, 236; Transcript, 27 October 2023, pp. 116-117.

¹²²⁰ SPO Response Brief, para. 219.

¹²²¹ SPO Response Brief, paras 216-218, 236-237; Transcript, 27 October 2023, pp. 116-117.

¹²²² Transcript, 27 October 2023, pp. 117-118. The SPO subsequently provided copies of domestic case law. See Email of 9 November 2023 from SPO.

¹²²³ SPO Response Brief, para. 221.

¹²²⁴ SPO Response Brief, para. 223. See also SPO Response Brief, paras 190-191.

¹²²⁵ SPO Response Brief, paras 225-228.

sentence is manifestly excessive should be summarily dismissed as undeveloped and also because he raises his age and other factors as mitigating circumstances for the first time on appeal.¹²²⁶ In the SPO's view, Mustafa's arguments concerning the length of the overall sentence relative to his life expectancy, the possibility for rehabilitation and the deprivation of family life are speculative and unsupported, and the Trial Panel's consideration of these factors was legally and factually correct.¹²²⁷

446. Finally, the SPO submits that, consistent with international jurisprudence, Mustafa's sentence should not be reduced – significantly or at all – even if his conviction on one of the charges were to be overturned, as the Trial Panel's factual findings on the gravity of the criminal conduct, his individual circumstances, and mitigating and aggravating factors would not be materially affected.¹²²⁸

447. Victims' Counsel responds that Mustafa's request for a referral to the Specialist Chamber of the Constitutional Court is an attempt to delay the proceedings and is contrary to the participating victims' interests, as there is no issue meriting such a review.¹²²⁹

448. Mustafa replies, *inter alia*, that the SPO's reliance on the *Gucati and Haradinaj* Appeal Judgment regarding the purposes of sentencing is inapposite, and that the remainder of the SPO's submissions in that regard amount to "an appeal *de n[]ovo*" and are "misplaced" or "unfounded".¹²³⁰ Mustafa also objects to the phrasing of some SPO submissions, and argues that he could not have made submissions at trial concerning sentencing because he did not know that he would be found guilty and

¹²²⁶ SPO Response Brief, paras 230-231; Transcript, 27 October 2023, pp. 116-117.

¹²²⁷ SPO Response Brief, paras 232-235.

¹²²⁸ Transcript, 27 October 2023, p. 119. See also SPO Response Brief, para. 196.

¹²²⁹ Transcript, 27 October 2023, pp. 129-130.

¹²³⁰ Reply Brief, paras 101-103.

sentenced.¹²³¹ Finally, Mustafa challenges as illogical the SPO's argument that the existence of mitigating factors does not necessarily affect the sentence imposed.¹²³²

2. Assessment of the Court of Appeals Panel

449. At the outset, the Panel recalls that, pursuant to Article 44(1) of the Law, the Specialist Chambers may impose a maximum term of life-long imprisonment. Under Article 44(2)(a) to (c) of the Law, when imposing a sentence for an international crime under the Law, the Specialist Chambers shall take into account:

- (a) the sentencing range for the crime provided under Kosovo Law at the time of commission,
- (b) any subsequent more lenient sentencing range for the crime provided in Kosovo Law, and
- (c) Article 7(2) of the European Convention for Human Rights and Fundamental Freedoms and Article 15(2) of International Covenant for Civil and Political Rights as incorporated and protected by Articles 22(2), 22(3) and 33(1) of the Constitution of the Republic of Kosovo, and the extent to which the punishment of any act or omission which was criminal according to general principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2 (a) and (b).

Moreover, according to Article 44(5) of the Law, the Specialist Chambers shall take into account aggravating and mitigating factors, including the gravity of the crime and its consequences, and the convicted person's individual circumstances.¹²³³ Rule 163(1) of the Rules also provides that the Trial Panel shall balance the aggravating and mitigating factors mentioned in Article 44(5) of the Law.¹²³⁴

450. Pursuant to Rule 163(4) of the Rules, the Specialist Chambers:

shall determine a sentence in respect of each charge in the indictment under which the Accused has been convicted and a single sentence reflecting the totality of the criminal conduct of the Accused [...].

¹²³¹ Reply Brief, paras 106-107, 111.

¹²³² Reply Brief, para. 110.

¹²³³ See also *Gucati and Haradinaj* Appeal Judgment, para. 409.

¹²³⁴ See also *Gucati and Haradinaj* Appeal Judgment, para. 409.

The single sentence shall not be less than the highest individual sentence determined in respect of each charge.

The single sentence must therefore be at least equal to the highest individual sentence imposed in the case and, since Rule 163(4) of the Rules does not specify any upper limit for the single sentence, the maximum single sentence may be as high as life imprisonment, pursuant to Article 44(1) of the Law.

451. Furthermore, the Panel recalls that, according to international criminal jurisprudence, deterrence and retribution are the primary objectives of sentencing, and rehabilitation is relevant but should not play a predominant role.¹²³⁵ The gravity of the offence is the primary consideration in imposing a sentence, and a sentence proportionate to the gravity of the criminal conduct will necessarily provide sufficient retribution and deterrence.¹²³⁶ The Panel further recalls that Article 38(1) of the KCC focuses rather on rehabilitation and deterrence, and not explicitly on retribution.¹²³⁷

452. The Panel also recalls that a sentence should be adequate to dissuade a convicted person from re-offending (individual deterrence), while also aiming to dissuade other potential perpetrators from committing the same or similar crimes (general deterrence).¹²³⁸ In addition, retribution should be understood as the imposition of an appropriate punishment which reflects the culpability of the convicted person, but it should not express revenge or vengeance, while rehabilitation is focused on the reintegration of the convicted person into society.¹²³⁹

¹²³⁵ *Gucati and Haradinaj* Appeal Judgment, para. 410, and the jurisprudence cited in fn. 904.

¹²³⁶ *Gucati and Haradinaj* Appeal Judgment, para. 410, and the jurisprudence cited in fns 905-906.

¹²³⁷ *Gucati and Haradinaj* Appeal Judgment, paras 410, 437.

¹²³⁸ *Gucati and Haradinaj* Appeal Judgment, para. 411, and the jurisprudence cited in fn. 908.

¹²³⁹ *Gucati and Haradinaj* Appeal Judgment, para. 410, and the jurisprudence cited in fns 909-910.

453. Finally, the Appeals Panel recalls that appeals against sentencing are appeals *stricto sensu*, meaning that they are corrective in nature.¹²⁴⁰ The Appeals Panel also recalls that a trial panel has broad discretion in determining an appropriate sentence, including tailoring it to reflect the gravity of the crimes, the extent of the accused's involvement in the offences and his or her individual circumstances.¹²⁴¹ The Appeals Panel will therefore not substitute its own sentence for that of a trial panel, unless the appellant shows that the trial panel committed a discernible error in exercising its discretion or failed to follow the applicable law.¹²⁴² Consequently, the Appeals Panel will only interfere with a trial panel's exercise of discretion where the sentence it imposed is: (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of its discretion. In this regard, the Appeals Panel will also consider whether a trial panel, in reaching its decision on sentencing, gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations.¹²⁴³

454. The Appeals Panel will now address Mustafa's specific arguments. First, the Panel notes that the Trial Panel's reliance on Article 38 of the KCC as sole support for the proposition that the primary purposes of sentencing "are rooted in retribution, deterrence (both specific and general) and – to a lesser extent – the rehabilitation of the perpetrator" is indeed incorrect.¹²⁴⁴ However, while Article 38(1) of the KCC

¹²⁴⁰ *Gucati and Haradinaj* Appeal Judgment, para. 413; *Mladić* Appeal Judgement, para. 539; *Krajišnik* Appeal Judgement, para. 734; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Karadžić* Appeal Judgement, para. 749.

¹²⁴¹ *Gucati and Haradinaj* Appeal Judgment, para. 413; *Lubanga* Sentencing Appeal Judgment, paras 34, 40; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349; *Limaj et al.* Appeal Judgement, para. 127; *Dragomir Milošević* Appeal Judgement, para. 297.

¹²⁴² *Gucati and Haradinaj* Appeal Judgment, para. 414; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349; *Karadžić* Appeal Judgement, para. 749; *Prlić et al.* Appeal Judgement, para. 3204.

¹²⁴³ *Gucati and Haradinaj* Appeal Judgment, para. 414; *Mladić* Appeal Judgement, para. 539; *Ngirabatware* Appeal Judgement, para. 255; *Krajišnik* Appeal Judgement, para. 735; *Lubanga* Sentencing Appeal Judgment, para. 44.

¹²⁴⁴ See Trial Judgment, para. 772, fn. 1623.

focuses on deterrence and rehabilitation, and not explicitly on retribution,¹²⁴⁵ the Trial Panel's elaboration of the primary purposes of sentencing is nevertheless in line with the Court of Appeals Chamber's previous findings on the purposes of sentencing, based on international jurisprudence.¹²⁴⁶ Moreover, the Panel notes that, while the Trial Panel could have relied on Article 38 of the KCC for guidance, it was not bound by this provision, since it is not specifically incorporated into the Law.¹²⁴⁷ Consequently, the Appeals Panel finds no error in the Trial Panel's consideration of the primary purposes of sentencing, and dismisses Mustafa's Ground 9A.

455. Mustafa also argues that the Trial Panel relied on "extra-legal arguments" in each of paragraphs 774 to 777 of the Trial Judgment.¹²⁴⁸ The Panel finds Mustafa's challenges to two of these paragraphs, namely paragraphs 774 and 777 of the Trial Judgment, unsubstantiated and accordingly dismisses them. Specifically, these arguments are exclusively mentioned in the Notice of Appeal, and Mustafa fails to develop them in the Appeal Brief, which warrants their summary dismissal.¹²⁴⁹ In any event, the Panel notes that the Trial Panel clearly cites to Article 38(1)(1.3) of the KCC and ICTY jurisprudence in support of its findings in these paragraphs of the Trial Judgment.¹²⁵⁰ The Appeals Panel is also not persuaded by Mustafa's vague and unsupported assertion that the jurisprudence cited in footnote 1626 of the Trial Judgment in support of paragraph 777 is "inappropriate" because Mustafa never held political office, and therefore dismisses this argument.¹²⁵¹

¹²⁴⁵ *Gucati and Haradinaj* Appeal Judgment, paras 410, 437.

¹²⁴⁶ *Gucati and Haradinaj* Appeal Judgment, para. 410, and the jurisprudence cited in fn. 904. In this regard, the Appeals Panel dismisses as unsubstantiated Mustafa's argument that the *Gucati and Haradinaj* Appeal Judgment "has no bearing in the present case". See Reply Brief, para. 101.

¹²⁴⁷ Article 3(2)(c), (4) of the Law; *Gucati and Haradinaj* Appeal Judgment, para. 149; *Lajçi* Appeal Decision on Investigation, para. 22.

¹²⁴⁸ Notice of Appeal, Ground 9B, para. 12; Appeal Brief, paras 406-407.

¹²⁴⁹ See above, para. 32.

¹²⁵⁰ See Trial Judgment, fns 1625-1626.

¹²⁵¹ See Notice of Appeal, Ground 9B, para. 12; Transcript, 27 October 2023, pp. 151-152. The Appeals Panel notes that this argument was only mentioned in passing, without support, in the Notice of

456. Regarding the remaining two challenged paragraphs, the Appeals Panel finds that, while placed under the heading “Purposes of Sentencing”, paragraph 775 of the Trial Judgment generally addresses the truth-establishing purpose of the Trial Judgment, and does not concern sentencing *per se*. Moreover, while paragraph 776 of the Trial Judgment does not explicitly refer to jurisprudence, the Trial Panel’s considerations are nevertheless in line with ICTY and ICTR jurisprudence.¹²⁵² Consequently, the Panel finds that Mustafa has failed to show any error in the Trial Panel’s findings in these paragraphs, and therefore dismisses Mustafa’s Ground 9B.

457. The Appeals Panel also dismisses Mustafa’s Ground 9I concerning the number of victims on which the Trial Panel made a finding against the Accused with regard to the war crime of torture, as it rests entirely on his arguments under Ground 7, which the Panel has already dismissed above.¹²⁵³

458. Turning to Mustafa’s argument that the Trial Panel erred in law by balancing his individual circumstances against the nature and gravity of, and his contributions to, the crimes for which he was convicted, the Appeals Panel finds that the Trial Panel was in fact required to do so under the Specialist Chambers’ legal framework. Specifically, Rule 163(1) of the Rules provides that the Trial Panel *shall* balance the factors mentioned in Article 44(5) of the Law, namely aggravating and mitigating factors, including the gravity of the crime and its consequences, and the convicted person’s individual circumstances.

459. In addition, the Appeals Panel finds that Mustafa fails to substantiate his claim that the Trial Panel, in balancing the relevant factors: (i) considered the absence of mitigating circumstances as an aggravating factor; or (ii) relied on the gravity of the

Appeal, and additional oral submissions in response to a question from the Appeals Panel were again vague and lacking support.

¹²⁵² See e.g. *Aleksovski* Appeal Judgement, para. 185; *Prlić et al.* Trial Judgement (Vol. IV), para. 1276; *Kambanda* Trial Judgement, para. 28.

¹²⁵³ See above, paras 415-419.

crime as a separate aggravating factor.¹²⁵⁴ Rather, the Trial Panel found that “Mustafa’s individual circumstances cannot be given any significant weight considering the nature and gravity of the proven crimes and his contribution to them”.¹²⁵⁵ Therefore, it is clear that the Trial Panel neither considered the absence of mitigating circumstances as an aggravating factor, nor used the gravity of the crimes as an aggravating circumstance. Rather, it balanced the gravity of the crimes and Mustafa’s contribution thereto, which it had previously established, against the mitigating circumstances and found that the mitigating circumstances could not be given significant weight. In this regard, the Appeals Panel recalls the Trial Panel’s broad discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to it; and accordingly, that the existence of mitigating circumstances does not automatically require a reduction of sentence.¹²⁵⁶ Consequently, the Appeals Panel finds no error in the Trial Panel declining to give significant weight to Mustafa’s individual circumstances, and accordingly dismisses Mustafa’s Ground 9J.

460. Next, the Appeals Panel turns to Mustafa’s remaining arguments concerning his individual circumstances.¹²⁵⁷ At the outset, the Appeals Panel notes that these arguments are underdeveloped and unsupported, thus warranting summary dismissal.¹²⁵⁸ Nevertheless, given the significance of the issue to Mustafa’s case, the Appeals Panel decides to exceptionally consider these arguments out of fairness to the Accused and in the interests of justice.¹²⁵⁹

¹²⁵⁴ See Appeal Brief, paras 439-441; Trial Judgment, paras 789, 826.

¹²⁵⁵ Trial Judgment, para. 826.

¹²⁵⁶ See e.g. *Nyiramasuhuko et al.* Appeal Judgement, para. 3394 and the jurisprudence cited therein. Contra Reply Brief, para. 110. See also above, para. 453.

¹²⁵⁷ Notice of Appeal, Ground 9K, para. 12; Appeal Brief, paras 443-444.

¹²⁵⁸ See above, para. 29.

¹²⁵⁹ See above, para. 29.

461. Before turning to the substance of these arguments, the Panel dismisses Mustafa's argument that he did not raise these factors at trial because he could not have known the Trial Panel's decision on his sentence.¹²⁶⁰ The Appeals Panel notes that the Trial Panel explicitly ruled that it would impose the sentence, if any, at the time of pronouncing the trial judgment, pursuant to Rule 159(6) of the Rules, and gave detailed instructions on making oral or written submissions on sentencing and the tendering of any supporting evidence.¹²⁶¹

462. Turning to the substance of Mustafa's arguments, the Appeals Panel first notes that, even if it were to accept Mustafa's unsupported factual assertion that, due to his age, the imposed sentence exceeds his life expectancy in light of the life expectancy in Kosovo, the Accused fails to show that this would be contrary to applicable law or relevant jurisprudence. In the Panel's view, not only does Article 44(1) of the Law explicitly permit the imposition of any sentence up to and including life-long imprisonment, but relevant international jurisprudence has consistently rejected the assertion that a sentence which may exceed a convicted person's life expectancy constitutes an error in sentencing.¹²⁶² In addition, the Panel notes that the Trial Panel in fact *proprio motu* considered Mustafa's age as part of its analysis of his individual circumstances.¹²⁶³ The Appeals Panel finds no error in this approach. Moreover, the Panel considers that Mustafa's argument about the possibility of rehabilitation¹²⁶⁴ rests entirely on the sentence potentially exceeding his life expectancy in light of the life expectancy in Kosovo, and accordingly must also fail for the reasons set out above.

¹²⁶⁰ Reply Brief, para. 111.

¹²⁶¹ See Decision on Closing of Evidentiary Proceedings and Related Matters, paras 13, 15-17, 22-23, 25; Decision on Closing Statements and Related Matters, paras 7-8, 11-14; Trial Judgment, fn. 1690.

¹²⁶² See e.g. *Ntawukulilyayo* Appeal Judgement, paras 238-241; *Nahimana et al.* Appeal Judgement, paras 1094-1095; *Simba* Appeal Judgement, para. 287; *Gacumbitsi* Appeal Judgement, paras 109-111; *Plavšić* Sentencing Judgement, paras 97-105.

¹²⁶³ Trial Judgment, para. 821.

¹²⁶⁴ See Appeal Brief, para. 444.

463. Second, Mustafa argues that the sentence will leave him with “effectively [...] no possibility for family life”.¹²⁶⁵ In this regard, the Appeals Panel notes that, since the enforcement stage of the proceedings has yet to be reached, Mustafa’s arguments about exercising his right to family life while serving his sentence are premature. The Appeals Panel nevertheless notes that Mustafa’s apparent contention that the sentence is erroneous merely because it imposes limitations on his family life is unsupported. Specifically, the Panel notes that the ECtHR has consistently held that:

[...] detention, like any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a prisoner’s right to respect for family life that the authorities enable him or, if need be, help him, to maintain contact with his close family [...].¹²⁶⁶

464. Consequently, the Appeals Panel finds no error in the Trial Panel’s findings concerning Mustafa’s individual circumstances, and accordingly dismisses Mustafa’s Ground 9K in part.

465. The Appeals Panel now turns to Mustafa’s arguments concerning the principle of *lex mitior*. In this regard, the Panel recalls that:

The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied. It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal concerned is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.¹²⁶⁷

¹²⁶⁵ Appeal Brief, para. 438.

¹²⁶⁶ See *Guimon* Judgment, para. 37, citing *Messina* Judgment, para. 61; *Khoroshenko* Judgment, para. 106.

¹²⁶⁷ *Thaçi et al.* Appeal Decision on Jurisdiction, para. 57, quoting *Nikolić* Sentencing Appeal Judgment, para. 81.

466. First, the Panel notes that Mustafa does not demonstrate any error in the Trial Panel's finding that the wording "shall take into account" in Article 44(2) of the Law requires it to consider the listed factors, but does not make them binding on the Trial Panel.¹²⁶⁸ While the Defence is correct in its assertion that the word "shall" indicates an imperative, the Panel finds that this refers to an obligation to "take [the factors] into account", rather than to, for example, apply them as binding sources of law. This interpretation is clear from the plain wording of the provision, as well as international jurisprudence.¹²⁶⁹ In this regard, the Appeals Panel notes that the Trial Panel also contrasted the wording of Article 44(2) of the Law with that of Article 44(4) of the Law ("shall be in line with"), in reaching its interpretation of Article 44(2) of the Law.¹²⁷⁰ The Appeals Panel finds no error in this approach. The Appeals Panel also notes that, pursuant to Article 44(2)(c) of the Law, the Trial Panel's obligation to take into account these domestic sources of law is further tempered by the need to consider whether doing so would prejudice the extent of punishment under general principles of law recognised by civilised nations. The Appeals Panel considers that this further supports the conclusion that the drafters of the Law did not intend to bind the Trial Panel to *apply* domestic law on sentencing ranges, but rather to take it into account within certain parameters.

467. Therefore, given that Article 44(2) of the Law does not make domestic sentencing ranges binding on the Specialist Chambers,¹²⁷¹ the principle of *lex mitior* is

¹²⁶⁸ Trial Judgment, para. 780.

¹²⁶⁹ See e.g. *Stakić* Appeal Judgement, para. 398; *Blaškić* Appeal Judgement, paras 681-682; *Delalić et al.* Appeal Judgement, paras 813-818; *Tadić* Sentencing Appeal Judgement, para. 21, in which the ICTY Appeals Chamber also found that the existence of a provision allowing the ICTY to impose a sentence of up to life imprisonment showed that it was not bound by the lower maximum sentences applicable under domestic law at the time of the commission of the crimes. See also Article 44(1) of the Law, which allows the Specialist Chambers to impose imprisonment up to a maximum term of life imprisonment.

¹²⁷⁰ See Trial Judgment, fn. 1627.

¹²⁷¹ See also Article 3(2)(c), (4) of the Law; *Gucati and Haradinaj* Appeal Judgment, para. 149; *Lajçi* Appeal Decision on Investigation, para. 22.

not engaged vis-à-vis these domestic provisions and, accordingly, the Appeals Panel finds no error in the Trial Panel not conducting a *lex mitior* analysis.

468. Mustafa further argues that the Trial Panel's interpretation of Article 44(2) of the Law – that domestic sentencing ranges are not binding on the Specialist Chambers – is incompatible with Article 33(2) and (4) of the Kosovo Constitution.¹²⁷² In this regard, the Appeals Panel recalls that Article 33(2) of the Kosovo Constitution states that “[n]o punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed.” In addition, Article 33(4) of the Kosovo Constitution states that “[p]unishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent applicable law are more favorable to the perpetrator.” These provisions therefore enshrine the principle of *lex mitior* in the Kosovo Constitution. This principle is, as stated above, only applicable if a law that binds the Specialist Chambers is subsequently changed to a more favourable law by which the Specialist Chambers are also bound.¹²⁷³

469. Contrary to Mustafa's submissions, the Appeals Panel finds that these constitutional provisions do not require the Specialist Chambers to apply contemporaneous and/or subsequent domestic law on war crimes as these latter laws are not binding on the Specialist Chambers. This finding results from a plain reading of the Law. First, the Appeals Panel notes that, under Article 14(1) of the Law, war crimes are defined “under customary international law”. Second, pursuant to Article 3(2)(b) and (c) of the Law, the Specialist Chambers shall adjudicate in accordance with, *inter alia*, the Law as the *lex specialis* and other provisions of Kosovo law as expressly incorporated and applied by the Law.¹²⁷⁴ Pursuant to Article 3(4) of

¹²⁷² See Appeal Brief, paras 408-409, 411; Transcript, 26 October 2023, pp. 60-61.

¹²⁷³ See also above, para. 465.

¹²⁷⁴ Article 3(2)(b) and (c) of the Law.

the Law, any other Kosovo law, or regulation which has not been expressly incorporated into the Law shall not apply to the jurisdiction of the Specialist Chambers.¹²⁷⁵ As the aforementioned domestic laws are not “expressly incorporated and applied” by the Law, the Specialist Chambers are not required to consider the various domestic laws on war crimes to comply with the *lex mitior* principle under the Kosovo Constitution. Consequently, the Panel finds that there is no conflict between Article 44(2) of the Law and Article 33(2) and (4) of the Kosovo Constitution.

470. Furthermore, given that Articles 3(2), 12 and 14(1) of the Law establish that, before the Specialist Chambers, war crimes are defined under the customary international law applicable at the time of commission, the Appeals Panel also finds that the Trial Panel did not violate the principle of *nulla poena sine lege* by not applying the domestic laws in force at the time of commission.¹²⁷⁶

471. Accordingly, the Appeals Panel also dismisses Mustafa’s request for a referral to the Specialist Chamber of the Constitutional Court under Article 49(4) of the Law, as the Appeals Panel is not “uncertain as to the compatibility of the contested law with the Constitution”.

472. Nevertheless, the Appeals Panel finds that the Trial Panel’s analysis of the domestic sentencing regime is insufficient to meet its obligation under Article 44(2) of the Law to “take [these] into account”.¹²⁷⁷ Specifically, the Appeals Panel first notes that, while the Trial Panel is not obliged to articulate every step of its reasoning,¹²⁷⁸ the Appeals Panel considers that, in this instance, the Trial Panel’s analysis under

¹²⁷⁵ Article 3(4) of the Law.

¹²⁷⁶ See *Blaškić* Appeal Judgement, para. 681, citing *Delalić et al.* Appeal Judgement, paras 816-817. Contra Appeal Brief, paras 421-422. The Appeals Panel notes that, although Mustafa also mentions the principle of *nullum crimen sine lege*, the Appeals Panel considers that the substance of his submissions only concerns the principle of *nulla poena sine lege*, as they refer to the imposition of the correct sentence. See also *Thaçi et al.* Appeal Decision on Jurisdiction, para. 38; *Shala* Appeal Decision on Jurisdiction, para. 24.

¹²⁷⁷ See Trial Judgment, para. 781.

¹²⁷⁸ See above, para. 34.

Article 44(2)(b) of the Law failed to indicate with sufficient clarity its understanding of the sentencing ranges which came into effect subsequent to the time of commission of the crimes. In addition, as addressed further below, the Appeals Panel considers that the Trial Panel's analysis under Article 44(2) of the Law should have, in this instance, encompassed judicial practice on the relevant sentencing ranges.¹²⁷⁹

473. The Appeals Panel acknowledges that, in accordance with Article 44(2)(a) of the Law, the Trial Panel accurately referred to Articles 38 and 142 of the CCSFRY.¹²⁸⁰ However, under Article 44(2)(b) of the Law, while the Trial Panel correctly noted that UNMIK Regulation 1999/24 abolished capital punishment,¹²⁸¹ it failed to reach a conclusion on the effect of this abolition on the aforementioned provisions of the CCSFRY and the resulting applicable sentencing range from that point in time. Namely, the Appeals Panel notes that the abolishment of capital punishment by UNMIK Regulation 1999/24, without specifying an alternative, resulted in an applicable sentencing range of five to 15 years of imprisonment under Articles 38 and 142 of the CCSFRY.¹²⁸²

474. In addition, the Appeals Panel notes that, in its assessment under Article 44(2)(b) of the Law, the Trial Panel relied on incorrect provisions of Kosovo's criminal codes when considering that "subsequent relevant laws or codes adopted in Kosovo provide equal or more severe sentencing ranges".¹²⁸³ The Appeals Panel observes that Mustafa was convicted of offences under Article 14(1)(c) of the Law, which concerns violations of Common Article 3 in the context of a non-international armed conflict; however, the Trial Panel referred to provisions of the Kosovo criminal

¹²⁷⁹ See below, para. 477.

¹²⁸⁰ See Trial Judgment, para. 781.

¹²⁸¹ See Trial Judgment, fn. 1629. While the Trial Panel did not mention to which part of UNMIK Regulation 1999/24 it referred, the Appeals Panel understands this to be a reference to its section 1.5.

¹²⁸² This was confirmed by Kosovo's Supreme Court and Constitutional Court. See Kosovo Constitutional Court Judgment of 31 March 2022, paras 48, 50; Kosovo Supreme Court Judgment of 20 March 2023, p. 8 (English version).

¹²⁸³ See Trial Judgment, fn. 1629.

codes concerning offences under Article 14(1)(a) and (b) of the Law.¹²⁸⁴ Nevertheless, while the Trial Panel did not identify the correct provisions under Article 44(2)(b) of the Law, the Appeals Panel does not find any error in its ultimate conclusion that the sentencing ranges are more severe – in that they provide for higher maximum sentences – than those provided by the CCSFRY, as amended by UNMIK Regulation 1999/24.¹²⁸⁵

475. Therefore, the Appeals Panel finds that these deficiencies in the Trial Panel’s analysis under Article 44(2) of the Law ultimately have no effect on the conclusions it drew with regard to the applicable sentencing ranges which it had to take into account.

476. Moreover, the Appeals Panel notes Mustafa’s argument that the Trial Panel failed to consider both domestic sentencing practice and the sentencing practice of the ICTY and ICTR.¹²⁸⁶ In this regard, the Appeals Panel observes that Mustafa failed to present the Trial Panel with any international or Kosovo jurisprudence on sentencing. The Appeals Panel dismisses Mustafa’s argument that he did not do so at trial because he could not have known that he would be convicted and sentenced as a result of the trial.¹²⁸⁷ As the Appeals Panel has found above, Mustafa had notice that the sentence

¹²⁸⁴ See Trial Judgment, fn. 1629. The Appeals Panel notes that the provisions in Kosovo’s criminal codes which correspond to Article 14(1)(c) of the Law are: (i) Article 120 of the 2003 KCC (setting out, when read together with Articles 37(2) and 38(1) of the 2003 KCC, a sentencing range of five to 20 years of imprisonment, or 21 to 40 years of imprisonment); (ii) Article 152 of the 2012 KCC (setting out, when read together with Article 45(1) of the 2012 KCC, a sentencing range of five to 25 years or life-long imprisonment); and (iii) Article 146 of the KCC (2019) (setting out, when read together with Article 42(1)-(2) of the KCC, a sentencing range of five to 25 years or life-long imprisonment, the latter of which can be replaced by up to 35 years of imprisonment).

¹²⁸⁵ See Trial Judgment, fn. 1629. The Appeals Panel also considers that, although the Trial Panel did not refer to UNMIK Regulation 2000/59 (which replaced the death penalty with a maximum of 40 years of imprisonment), this would in any event have had no effect on the Trial Panel’s conclusion about the relative severity of sentencing ranges which came into effect after UNMIK Regulation 1999/24.

¹²⁸⁶ See Appeal Brief, paras 418, 433; Notice of Appeal, Grounds 9F, 9H, para. 12. See also Appeal Brief, para. 444(d).

¹²⁸⁷ See Reply Brief, para. 107.

would be determined with the pronouncement of the judgment, and he was given ample opportunity to make sentencing submissions at trial.¹²⁸⁸

477. Nevertheless, the Trial Panel did make some references to jurisprudence from the ICC, ICTY and STL, as well as from the Specialist Chambers.¹²⁸⁹ Mustafa therefore misrepresents the Trial Judgment in this regard. However, while Article 44(2)(a) and (b) of the Law only explicitly requires the Trial Panel to take into account the sentencing ranges under domestic law, and it was therefore not obliged to apply domestic practice on sentencing, “what is required certainly goes beyond merely reciting the relevant criminal code provisions” and UNMIK Regulations.¹²⁹⁰ In the Panel’s view, the Trial Panel should therefore have included references to domestic sentencing practice relating to those ranges, where available, in determining an appropriate sentence.

478. To this end, as well as in relation to Mustafa’s separate assertion that “[f]or the same types of crimes[,] not a single sentence exists for this excessive amount [...] of time in international tribunals”,¹²⁹¹ the Appeals Panel has analysed international¹²⁹²

¹²⁸⁸ See above, para. 461.

¹²⁸⁹ See Trial Judgment, fns 1624, 1626-1627, 1631-1633, 1635-1641, 1643, 1649, 1697, 1699.

¹²⁹⁰ *Blaškić* Appeal Judgement, para. 682, quoting *Kunarac et al.* Trial Judgement, para. 29, and citing *Krstić* Appeal Judgement, para. 260; *Kunarac et al.* Appeal Judgement, paras 347-349; *Tadić* Sentencing Appeal Judgement, para. 21; *Delalić et al.* Appeal Judgement, paras 813, 820; *Kupreškić et al.* Appeal Judgement, para. 418.

¹²⁹¹ Appeal Brief, para. 444(d); Transcript, 27 October 2023, pp. 149-151. See also Transcript, 27 October 2023, p. 153.

¹²⁹² See e.g. *Lukić and Lukić* Trial Judgement and *Lukić and Lukić* Appeal Judgement (Sredoje Lukić was sentenced to a single sentence of 27 years as an aider and abettor for the war crimes and crimes against humanity of murder of at least 53 victims, and inhumane acts, cruel treatment, and persecutions); *Naletilić and Martinović* Trial Judgement and *Naletilić and Martinović* Appeal Judgement (Naletilić was sentenced to a single sentence of 20 years as a perpetrator and/or as a superior for torture as a crime against humanity and a war crime with respect to at least five victims, as well as for the crime against humanity of persecution, and the war crimes of willfully causing great suffering, unlawful labour, wanton destruction, plunder and unlawful transfers with respect to six detention centres. Martinović was sentenced to a single sentence of 18 years as a perpetrator and/or as a superior for the murder of one person as a crime against humanity and a war crime, the crimes against humanity of persecution and inhumane acts, and the war crimes of inhumane treatment, wilfully causing great suffering, unlawful transfer, unlawful labour and plunder in various locations); *Kvočka et al.* Appeal Judgement

(Žigić was sentenced to a single sentence of 25 years as co-perpetrator in a JCE for the war crime of torture of nine victims and the war crime of murder of four victims, as well as the crime against humanity of persecution and the war crime of cruel treatment); *Kordić and Čerkez* Appeal Judgement (Kordić was sentenced to a single sentence of 25 years for planning, instigating and ordering the crimes against humanity of murder, persecutions, inhumane acts and imprisonment, and the war crimes of willful killing, inhumane treatment, unlawful attack on civilians, unlawful confinement of civilians, unlawful attack on civilian objects, wanton destruction, plunder and destruction of protected buildings in 23 locations); *Krstić* Appeal Judgement (Krstić was sentenced to a single sentence of 35 years for aiding and abetting genocide, murder as a war crime and extermination and persecution as crimes against humanity for the killing of around 8,000 victims, and as a participant in a JCE for murder as a war crime and persecution as a crime against humanity for the opportunistic crimes committed in one location); *Kunarac et al.* Appeal Judgement (Kunarac was sentenced to a single sentence of 28 years as a direct perpetrator and an aider and abettor for the war crimes of torture and rape and the crimes against humanity of torture, enslavement and rape with respect to eight victims. Vuković was sentenced to a single sentence of 12 years as a direct perpetrator and an aider and abettor for the war crimes of torture and rape, and the crimes against humanity of torture and rape with respect to one victim); *Furundžija* Trial Judgement and *Furundžija* Appeal Judgement (Furundžija was sentenced to two sentences of ten years and eight years respectively, to be served concurrently, for co-perpetrating the war crimes of torture and outrages upon personal dignity including rape with respect to two victims); *Ntakirutimana and Ntakirutimana* Appeal Judgement (Gérard Ntakirutimana was sentenced to a single sentence of 25 years as a direct perpetrator for genocide and for murder as a crime against humanity with respect to one victim and for aiding and abetting genocide and the crime against humanity of extermination with regard to attacks in three different locations); *Ongwen* Sentencing Judgment and *Ongwen* Sentencing Appeal Judgment (Ongwen was sentenced to a joint total sentence of 25 years, receiving eight 14-year sentences for torture with regard to four refugee camps, as well as two 20-year sentences for the torture of four victims and another two 20-year sentences for the torture of up to one hundred of victims, all as crimes against humanity and as war crimes, Ongwen also received eight 20-year sentences for the murder of between four and 52 victims in each instance (for a total of at least 132 victims) as crimes against humanity and as war crimes; Ongwen further received several separate sentences ranging from eight to 20 years for the war crimes of attacks against a civilian population, pillaging, attempted murder, outrages upon personal dignity, destruction of property, rape, sexual slavery, the conscription of children, and forced pregnancy, as well as the crimes against humanity of enslavement, persecution, attempted murder, rape, sexual slavery, forced marriage, and forced pregnancy); *Katanga* Sentencing Judgment (Katanga was sentenced to a joint total sentence of 12 years, receiving two 12-year sentences for accessoryship to the murder of at least 30 victims as a crime against humanity and as a war crime, and separate sentences of ten years each for the war crimes of pillaging and destruction of property, as well as 12 years for the war crime of attacking a civilian population); *Ntaganda* Sentencing Judgment (Ntaganda was sentenced to a joint total sentence of 30 years, consisting, *inter alia*, of a 30-year sentence for the direct perpetration of the murder of one victim and the indirect co-perpetration of the murder of at least 73 victims and the attempted murder of five victims as crimes against humanity and war crimes; Ntaganda also received separate sentences ranging from eight to 30 years for the war crimes of attacks against the civilian population, rape, rape of children, sexual slavery, sexual slavery of children, pillage, ordering the displacement of the civilian population, conscripting and enlisting children into armed forces, attacks against protected objects, and destruction of property, as well as the crimes against humanity of persecution, rape, sexual slavery, and forcible transfer); *Fofana and Kondewa* Trial Judgement and *Fofana and Kondewa* Appeal Judgment (Fofana was sentenced to a joint total sentence of 15 years, consisting, *inter alia*, of a 15-year sentence as a superior and an aider and abettor for the murder of at least 272 victims as a war crime and a crime against humanity; Fofana also received separate sentences ranging from five to 15 years with regard to cruel

and Kosovo¹²⁹³ jurisprudence concerning war crimes comparable to those for which Mustafa was sentenced. In undertaking this analysis, the Appeals Panel was cognisant that international courts have found it inappropriate to set down a definitive list of sentencing guidelines,¹²⁹⁴ given the plethora of case-specific factors in sentencing, which cannot be easily quantified and which make the transposition of sentences from one case to another impossible.¹²⁹⁵ The Appeals Panel therefore considered factors such as: (i) the mode of liability; (ii) the gravity of the crime, including the number of victims, the effect of the crimes on them, the accused's individual culpability, and

treatment and pillage as war crimes, and inhumane acts as a crime against humanity; Kondewa received a joint total sentence of 20 years, consisting, *inter alia*, of a 20-year sentence as a superior and an aider and abettor for the murder of at least 259 victims as crimes against humanity; Kondewa also received separate sentences ranging from seven to 20 years with regard to cruel treatment and pillage as war crimes, and inhumane acts as crimes against humanity).

¹²⁹³ See e.g. Kosovo Court of Appeals Judgment of 29 October 2014 (appeal from the Kosovo Basic Court of Mitrovica Judgment of 12 September 2013; three persons, each convicted as co-perpetrators, each sentenced to 8 years of imprisonment, under Articles 22 and 142 of the CCSFRY, read in conjunction with UNMIK Regulation 1999/24, for the war crime against the civilian population of wounding and then killing one civilian); Kosovo Supreme Court Judgment of 25 November 2010 (appeal from the Kosovo District Court of Peja/Peć Judgment of 19 November 2009; one person sentenced to 14 years of imprisonment, under Article 142 of the CCSFRY, for the war crime against the civilian population of murdering one person); Kosovo Supreme Court Judgment of 8 December 2009 (appeal from the Kosovo District Court of Prishtina/Priština Judgment of 3 March 2009; see also Kosovo Supreme Court Judgment of 6 August 2010; one person sentenced to 15 years of imprisonment, under Article 142 of the CCSFRY, read in conjunction with UNMIK Regulation 2000/59, for the war crimes against the civilian population of murder of a civilian, attempted murder of a civilian, and violation of bodily integrity of two persons); Kosovo Court of Appeals Judgment of 11 September 2013 (appeals from the Kosovo District Court of Mitrovica Judgment of 13 October 2011 and Kosovo District Court of Mitrovica Judgment of 29 July 2011; see also Kosovo Supreme Court Judgment of 7 May 2014; S.G., convicted as a co-perpetrator, sentenced to 15 years of imprisonment, under Article 142 of the CCSFRY, for war crimes against the civilian population of inhumane treatment of at least eight civilians, torture of eight prisoners, and two counts of violating the bodily integrity of at least nine prisoners through severe ill-treatment and beatings; R.A. sentenced to 12 years of imprisonment, under Article 142 of the CCSFRY, for two counts of war crimes against the civilian population of violation of the bodily integrity of five prisoners by severe beatings; S.R. sentenced to five years of imprisonment, under Articles 22 and 142 of the CCSFRY, for the war crime against the civilian population of the torture of one civilian; H.H. sentenced to six years of imprisonment, under Articles 22 and 142 of the CCSFRY, for the war crime against the civilian population of the torture of one person; S.H. sentenced to seven years of imprisonment, under Articles 22 and 142 of the CCSFRY, for the war crime against the civilian population of the torture of one person).

¹²⁹⁴ See e.g. *Blaškić* Appeal Judgement, para. 680, citing *Krstić* Appeal Judgement, para. 242.

¹²⁹⁵ See *Gucati and Haradinaj* Appeal Judgment, paras 434-435, and the jurisprudence cited in fns 966-967. See also e.g. *Kalimanzira* Appeal Judgement, para. 224; *Karera* Appeal Judgement, para. 385; *Nahimana et al.* Appeal Judgement, para. 1037. See also above, paras 449, 466.

other indicators of gravity in the circumstances of the case; (iii) the various aggravating and mitigating factors; (iv) whether the trial panel or chamber set out both individual sentences and an overall sentence, or only an overall sentence; (v) the other crimes, if any, for which an accused was also sentenced; and, in relation to Kosovo judgments in particular, (vi) the sentencing ranges providing for much lower maximum incarceration durations than Article 44(1) of the Law, and keeping in mind the requirements of Article 44(2)(c) of the Law.

479. As a result of this analysis, the Appeals Panel notes that both international and Kosovo jurisprudence (the latter interpreted in the context of the available sentencing ranges) imposed shorter sentences than those imposed on Mustafa.¹²⁹⁶ While fully cognisant of the Trial Panel's broad discretion in sentencing, the Panel finds that the disparity between Mustafa's sentences and those sentences it has analysed, shows that the Trial Panel has ventured outside of its discretionary bounds by imposing sentences on Mustafa which are out of reasonable proportion with a line of sentences imposed in similar circumstances for similar offences, and thereby committed a discernible error in sentencing.¹²⁹⁷

480. The Appeals Panel therefore finds it appropriate to reduce the individual sentences imposed on Mustafa by the Trial Panel to the following sentences: (i) eight years of imprisonment for Count 1 (war crime of arbitrary detention committed against at least six persons); (ii) 20 years of imprisonment for Count 3 (war crime of torture, committed against at least six persons); and (iii) 22 years of imprisonment for Count 4 (war crime of murder, committed against one person). Accordingly, the Appeals Panel must also now determine, pursuant to Rule 163(4) of the Rules, "a

¹²⁹⁶ See above, fns 1292-1293.

¹²⁹⁷ See e.g. *Blaškić* Appeal Judgement, para. 680, citing *Krstić* Appeal Judgement, para. 242; *Karadžić* Appeal Judgement, para. 767, citing, *inter alia*, *Prlić et al.* Appeal Judgement, para. 3340; *Dorđević* Appeal Judgement, para. 949, citing *Limaj et al.* Appeal Judgement, para. 135, *Nikolić* Sentencing Appeal Judgement, para. 19, *Kvočka et al.* Appeal Judgement, para. 681, *Jelisić* Appeal Judgement, para. 96. See also above, para. 453.

single sentence reflecting the totality of the criminal conduct of the Accused” which “shall not be less than the highest individual sentence determined in respect of each charge”. In this regard, the Appeals Panel considers that a single sentence of 22 years of imprisonment, with credit for the time served since his arrest on 24 September 2020, reflects the totality of Mustafa’s criminal conduct in this case.

481. Moreover, the Appeals Panel notes that its findings on Mustafa’s sentence do not affect the Trial Panel’s findings in the Reparation Order against Mustafa,¹²⁹⁸ as: (i) Mustafa has not appealed the Reparation Order;¹²⁹⁹ and (ii) the Appeals Panel has confirmed all of the convictions which form the basis of the Reparation Order.¹³⁰⁰

482. Finally, the Appeals Panel emphasises that this reduction in Mustafa’s sentences in no way suggests that the crimes for which he has been convicted and sentenced are not grave.

483. In light of the above, the Appeals Panel grants Mustafa’s Grounds 9F in part and 9H in part, grants the remainder of Mustafa’s Ground 9K, dismisses Mustafa’s Grounds 9C, 9D, 9E and 9G, and dismisses the remainder of Mustafa’s Grounds 9F and 9H.

¹²⁹⁸ See Reparation Order, para. 283.

¹²⁹⁹ See above, para. 4.

¹³⁰⁰ See below, para. 484.

VI. DISPOSITION

484. For these reasons, having considered all of the arguments made by the Parties and the Participants, the Court of Appeals Panel, pursuant to Article 46 of the Law and Rules 182 and 183 of the Rules:

GRANTS Mustafa's Grounds 9F in part, 9H in part and 9K in part;

DISMISSES Mustafa's appeal in all other respects;

AFFIRMS Mustafa's conviction for the War Crime of Arbitrary Detention pursuant to Articles 14(1)(c)(i) and 16(1)(a) of the Law under Count 1 of the Indictment, the War Crime of Torture pursuant to Articles 14(1)(c)(i) and 16(1)(a) of the Law under Count 3 of the Indictment, and the War Crime of Murder pursuant to Articles 14(1)(c)(i) and 16(1)(a) of the Law under Count 4 of the Indictment;

SETS ASIDE the sentence of ten years of imprisonment imposed with respect to Count 1 and **IMPOSES** a sentence of eight years of imprisonment;

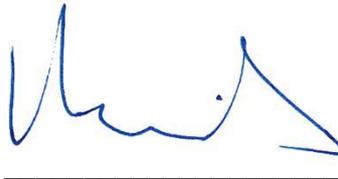
SETS ASIDE the sentence of 22 years of imprisonment imposed with respect to Count 3 and **IMPOSES** a sentence of 20 years of imprisonment;

SETS ASIDE the sentence of 25 years of imprisonment imposed with respect to Count 4 and **IMPOSES** a sentence of 22 years of imprisonment;

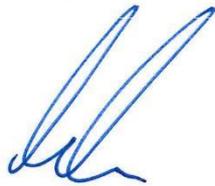
SETS ASIDE the single sentence of 26 years of imprisonment imposed on Mustafa and **IMPOSES** a single sentence of 22 years of imprisonment on Mustafa, with credit for the time served;

RULES that this Judgment shall be enforced immediately pursuant to Rule 185(1) of the Rules; and

ORDERS that, in accordance with Article 50(1) of the Law and Rule 166(3) of the Rules, Mustafa shall remain in the custody of the Specialist Chambers pending the finalisation of the arrangements for his transfer to the State where his sentence will be served.



**Judge Michèle Picard,
Presiding Judge**



Judge Kai Ambos



Judge Nina Jørgensen

Dated this Thursday, 14 December 2023

At The Hague, the Netherlands