



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Date: 14 December 2023

Original language: English

Classification: **Public**

Public Redacted Version of Appeal Judgment

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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 Honoré [...] 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.