



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

File number: KSC-SC-2024-02

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

Judge Ekaterina Trendafilova, Presiding
Judge Christine van den Wyngaert
Judge Daniel Fransen

Registrar: Fidelma Donlon

Date: 29 July 2024

Original language: English

Classification: **Public**

Decision on Salih Mustafa's Request for Protection of Legality

Specialist Prosecutor:

Kimberly P. West

Counsel for Salih Mustafa:

Julius von Bóné

Counsel for Victims:

Anni Pues

THE PANEL OF THE SUPREME COURT CHAMBER of the Kosovo Specialist Chambers (“Supreme Court Panel” or “Panel”) noting Articles 33(4), 53 and 162(2) of the Constitution,¹ Articles 3, 12, 14(1), 15(1), 16, 44(2), (3) and 48(6), (7), (8) and 64 of the Law on Specialist Chambers and Specialist Prosecutor’s Office² (“Law”) and Rules 193 and 194(1)(b) of the Rules of Procedure and Evidence (“Rules”)³ is seised of the “Defence Request for Protection of Legality with Confidential Annex 1 and 2 pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules” (“Request”).⁴

I. PROCEDURAL BACKGROUND

1. On 16 December 2022, Trial Panel I rendered the “Trial Judgment”, wherein it convicted Mr Salih Mustafa (“Mr Mustafa”) of arbitrary detention, torture and murder as war crimes and acquitted him of the war crime of cruel treatment.⁵ The Trial Panel sentenced Mr Mustafa to 26 years of imprisonment.⁶

2. On 6 April 2023, Trial Panel I issued the “Reparation Order against Salih Mustafa with 4 Annexes Strictly Confidential and *Ex Parte*”, wherein it ordered Mr Mustafa to pay 207,000 Euros as compensation for the harm inflicted on the victims of the crimes for which he was convicted.⁷

3. On 14 December 2023, the Court of Appeals Panel issued the “Appeal Judgment”, wherein it affirmed Mr Mustafa’s convictions for arbitrary detention,

¹ Constitution of Kosovo (with amendments I-XXIV), 5 August 2015.

² Law on the Specialist Chambers and Specialist Prosecutor’s Office, No. 05/L-053.

³ Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, (adopted on 17 March 2017, revised on 29 May 2017, amended on 29 and 30 April 2020).

⁴ F00011, Defence Request for Protection of Legality with Confidential Annex 1 and 2 pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules, 14 March 2024.

⁵ KSC-BC-2020-05/F00494, Trial Judgment, 16 December 2022 (confidential), para. 831. A corrected version was filed on 24 January 2023 and a public redacted version on 8 June 2023.

⁶ Trial Judgment, para. 831.

⁷ KSC-BC-2020-05/F00517, Reparation Order against Salih Mustafa with 4 Annexes Strictly Confidential and *Ex Parte*, 6 April 2023 (confidential), para. 283. A public redacted version of the Reparation Order was issued on the same day (KSC-BC-2020-05/F00517/RED) and a corrected version of the public redacted version on 14 April 2023 (KSC-BC-2020-05/F00517/RED/COR).

torture and murder as war crimes, but granted Mr Mustafa's appeal, in part, against his sentence.⁸ To that end, the Court of Appeals Panel reduced Mr Mustafa's sentence to 22 years of imprisonment, with credit for time served.⁹

4. On 17 January 2024, the President assigned the Supreme Court Panel to adjudicate, *inter alia*, any request for protection of legality to be filed by Mr Mustafa.¹⁰

5. On 14 March 2024, Mr Mustafa filed the Request.

6. On 12 April 2024, the Victims' Counsel filed the "[Victims' Counsel] Response to the Request for Protection of Legality" ("Victims' Counsel's Response").¹¹

7. On 15 April 2024, the Specialist Prosecutor's Office ("SPO") filed the "Prosecution Response to Request for Protection of Legality with One Public Annex" ("SPO Response").¹²

8. On 3 May 2024, Mr Mustafa filed the "Reply to Prosecution's Response to Defence Request for Protection of Legality" ("Reply to SPO")¹³ and the "Reply to Victims' Counsel Response to Defence Request for Protection of Legality" ("Reply to Victims' Counsel").¹⁴

II. ADMISSIBILITY

9. The Panel notes that the Appeal Judgment is final and that Mr Mustafa filed the Request within the three-month time limit prescribed in Article 48(6) of the Law, following the issuance of said Judgment. The Request is accordingly admissible in this

⁸ KSC-CA-2023-02/F00038, Appeal Judgment, 14 December 2023 (confidential), para. 484. A public redacted version of the Appeal Judgment was issued on the same day (KSC-CA-2023-02/F00038/RED).

⁹ Appeal Judgment, para. 484.

¹⁰ F00003, Decision Assigning a Supreme Court Panel, 17 January 2024.

¹¹ F00013, VC Response to the Request for Protection of Legality, 12 April 2024.

¹² F00014, Prosecution Response to Request for Protection of Legality with One Public Annex, 15 April 2024.

¹³ F00016, Reply to Prosecution's Response to Defence Request for Protection of Legality, 3 May 2024.

¹⁴ F00017, Reply to Victims' Counsel Response to Defence Request for Protection of Legality, 3 May 2024.

respect and the Panel will therefore proceed with the assessment of each ground therein.

10. Should a ground not comply with any of the admissibility criteria of the standard of review as established and set forth below,¹⁵ the Panel shall dismiss the ground without addressing its merits.

III. STANDARD OF REVIEW

11. The Panel recalls that protection of legality cannot be characterized as a third instance appeal, as set forth in Article 47 of the Law, nor does it raise matters under Article 48(1) to (5) of the Law. It is an extraordinary legal remedy provided for in Article 48(6) and (7) of the Law and Rules 193 and 194 of the Rules. It is not meant to create another general avenue of appeal.¹⁶ Rather, and similar to the Kosovo Criminal Procedure Code,¹⁷ protection of legality is limited to the specific instances defined in the Law and the Rules. As the Kosovo Supreme Court stated:

[t]he request for protection of legality, as one of the extraordinary legal remedies, is the exceptional legal remedy aiming to correct possibly wrong application of the material and procedural law. Strict requirements of the admissibility are designed to ensure that this legal remedy would not be used as a general third instance against all decisions in the criminal proceedings.¹⁸

12. Strict admissibility requirements accordingly apply to the grounds underlying a request for protection of legality.

13. In the assessment of each ground, the Panel shall determine whether a violation of the criminal law contained within the Law or a substantial violation of the

¹⁵ See *infra*, paras 11-24.

¹⁶ KSC-SC-2023-01/F00021, Decision on Requests for Protection of Legality, 18 September 2023 (“Gucati and Haradinaj Decision”), para. 9; KSC-BC-2020-06, PL001/F00008, Decision on Kadri Veseli’s Request for Protection of Legality, 15 August 2022 (“Veseli Decision”), para. 21.

¹⁷ See Article 432 of the Kosovo Criminal Procedure Code No. 08/L-032, Official Gazette No. 24, 17 August 2022.

¹⁸ Kosovo, Supreme Court, S.S., Pml.Kzz 42/2017, Judgment, 10 May 2017, para. 23.

procedures set out in the Law and in the Rules has been identified.

14. Arguments that reasonably could have been advanced before the first and second instance panels, cannot be raised *de novo* before the Supreme Court Panel.¹⁹

15. Furthermore, grounds underlying a request for protection of legality alleging erroneous or incomplete determinations of the facts are beyond the competence of this Panel and are thus inadmissible.²⁰

16. Mere disagreement with the factual assessment of the first and second instance courts or verbatim repetitions of submissions of the previous appeal without engaging substantively with the impugned decision or final judgment identifying the specific alleged error or violation are equally insufficient to meet the admissibility threshold for such grounds.²¹

17. With respect to violations pursuant to Article 48(7) of the Law invoking protection of legality proceedings, the Supreme Court Chamber recalls that it has previously set forth the standard of review applicable to requests for protection of legality based on *substantial violations of the procedures* regarding final judgments.²² The Panel recalls the high threshold established by Article 48(7)(b) of the Law in relation to substantial procedural violations.²³ More specifically, the Panel ruled that “substantial violation” of the procedures occurs when it “materially affects the judicial finding”.²⁴ An alleged substantial violation of the procedures set out in the Law and the Rules should be assessed on a *case-by-case* basis in view of the circumstances

¹⁹ Gucati and Haradinaj Decision, para. 10.

²⁰ Rule 193(3) of the Rules. See also Gucati and Haradinaj Decision, para. 10; Veseli Decision, para. 25.

²¹ Gucati and Haradinaj Decision, para. 10; Veseli Decision, para. 25.

²² Gucati and Haradinaj Decision, para. 13.

²³ Gucati and Haradinaj Decision, para. 14; Veseli Decision, para. 23.

²⁴ Gucati and Haradinaj Decision, para. 14; Veseli Decision, para. 23.

underlying each particular request.²⁵

18. The Supreme Court Panel further recalls that it may find a substantial violation of the procedures if the Court of Appeals Panel, for example: (i) omitted to apply a provision of the Law or the Rules; (ii) incorrectly applied the Law and/or the Rules; or (iii) violated the rights of the Defence in a manner which has influenced the rendering of a lawful and fair decision.²⁶

19. The Panel also established the applicable standard of review with respect to violation(s) of the criminal law as set out in Article 48(7)(a) of the Law.²⁷ The Panel found that this article does not require that a violation of the criminal law be “substantial”.²⁸

20. The Panel further observes the exhaustive list of violations of the criminal law provided for in Article 385(1) of the Kosovo Criminal Procedure Code and considers that violations of the criminal law are confined to those enumerated therein. Specifically, such violations exist where: (i) the offence for which the accused is prosecuted is not a criminal offence; (ii) circumstances exist which preclude criminal liability and, in particular, if criminal prosecution is prohibited by the period of statutory limitation or precluded due to an amnesty or pardon, or prior adjudication by a final judgment; (iii) circumstances exist which preclude criminal prosecution; (iv) an inapplicable law was applied to the criminal offence; (v) in rendering a decision on punishment, alternative punishment or judicial admonition, or in ordering a measure of mandatory rehabilitation treatment or the confiscation, the court exceeded its authority under a law; or (vi) provisions were violated in respect of crediting the period of detention, house arrest, any period of deprivation of liberty and an earlier

²⁵ See also Kosovo Supreme Court, *NV*, Pml.Kzz 91/2015, Judgment, 14 May 2015, paras 4, 10-12; *AM*, Pml.Kzz 84/2015, Judgment, 12 May 2015, pp 3-4; *M.I.*, Pml.Kzz 26/2015, Judgment, 18 March 2015, pp 5-7.

²⁶ Gucati and Haradinaj Decision, para. 14; Veseli Decision, para. 24.

²⁷ Gucati and Haradinaj Decision, para. 17.

²⁸ Gucati and Haradinaj Decision, para. 17.

served sentence related to the criminal offence subject to the criminal proceedings.²⁹

21. The Panel notes that a request for protection of legality could also be premised on Article 48(8) of the Law, which stipulates that an extraordinary legal remedy may also be filed on the basis of rights available under the Law, which are also protected under the European Convention on Human Rights (“ECHR”). The Panel considers that any alleged violation of the rights available under the Law, which are also protected under the ECHR, must meet the same standard of review as set out above.³⁰

22. The Panel has further held that a party requesting protection of legality must clearly identify the alleged legal violation, substantiate it, and, in case of a procedural violation, demonstrate how it materially affected the impugned judgment.³¹

23. Lastly, the Panel recalls Rule 194(1) of the Rules, which stipulates that where the Supreme Court Panel grants a request for protection of legality, depending on the nature of the violation, it may either:

- (a) modify the impugned decision or judgment;
- (b) annul in whole or in part the impugned decision or judgment and return the case for a new decision or retrial to the competent Panel; or
- (c) confine itself only to establishing the existence of a violation of law.

24. Having recalled the standard of review, the Supreme Court Panel shall address certain preliminary matters and will then proceed to consider the grounds underlying the Request.

IV. PRELIMINARY MATTER

25. The Panel will first address whether the participating victims have standing to make submissions in relation to the Request.

²⁹ Article 385(1)(1.1-1.6) of the Kosovo Criminal Procedure Code. See also Gucati and Haradinaj Decision, para. 17.

³⁰ See Gucati and Haradinaj Decision, para. 18; Veseli Decision, para. 33.

³¹ Gucati and Haradinaj Decision, para. 19; Veseli Decision, para. 23.

26. Mr Mustafa contests the participating victims' right to make submissions before the Panel. In his view, Victims' Counsel has not demonstrated how the victims' rights are affected by the legal discussions raised in the Request and have therefore no standing to file any submissions in this respect.³² According to Mr Mustafa, the Victims' Counsel's Response to the Request should thus be dismissed.³³

27. The Panel recalls that the Request before it does not represent a third instance appeal, but instead is an extraordinary legal remedy concerning a request for protection of legality. The Panel observes that the Law and the Rules are silent on whether Victims' Counsel can respond to a request for protection of legality. Nevertheless, the Panel is of the view that victims who have been granted participatory status in proceedings before the Specialist Chambers may, *via* their Victims' Counsel, respond to parties' submissions, including to a request for protection of legality of an appeal judgment, where their personal interests are affected and their response is not prejudicial to or inconsistent with the rights of the accused.³⁴ These submissions shall be confined to the grounds raised in the request for protection of legality and must set forth how the participating victims' personal interests are impacted thereby. With these requirements in mind, the Panel will determine on a *case-by-case* basis whether it will consider the submissions filed by Victims' Counsel.

28. Victims' Counsel asserts that the participating victims have thus far not made any submissions regarding the applicable law as far as sentencing is concerned, as "their interests were not squarely affected" and they "based their trust in the respective Panel of judges to do justice and find the appropriate punishment for the crimes [Mr] Mustafa committed".³⁵ According to Victims' Counsel, the participating

³² Reply to Victims' Counsel, paras 10-14.

³³ Reply to Victims' Counsel, para. 14.

³⁴ See Article 22(3) of the Law.

³⁵ Victims' Counsel's Response, para. 4.

victims were satisfied overall with the sentence handed down by the Trial Panel and disappointed by the reduction by the Appeals Panel.³⁶ Victims' Counsel therefore contends that it is in the victims' interest to ensure that the sentence is reflective of the gravity of the crimes and harm they suffered".³⁷ Victims' Counsel asserts that they also should be able to make submissions on the arguments related to Mr Mustafa's conviction for murder as a war crime, as any annulment thereof will "directly affect the interests of the indirect victims participating in this case".³⁸

29. The Panel observes that Victims' Counsel makes submissions in relation to Grounds 1 through 4 of the Request.³⁹ When it comes to Grounds 1 through 3, which relate to sentencing, the Panel recognises that participating victims may have a personal interest in a determination by this Panel on Mr Mustafa's challenges to the length of the sentence of imprisonment imposed upon him. Whether victims' personal interest may be affected will depend on the nature of the challenges raised and whether they are strictly legal in character.

30. The Panel is mindful that Victims' Counsel has not previously made submissions on legal questions related to Mr Mustafa's sentence of imprisonment. However, the Panel is satisfied that Victims' Counsel has demonstrated that the participating victims' personal interests could be affected by the Panel's potential finding on Mr Mustafa's sentencing grounds. Moreover, the Panel notes that the SPO has similarly responded to Grounds 1 through 3 of the Request and it is therefore satisfied that victims' participation on these grounds is neither prejudicial to nor inconsistent with the rights of Mr Mustafa. Accordingly, the Panel will consider Victims' Counsel's submissions in relation to Grounds 1 through 3.

31. With respect to Ground 4, which relates to Mr Mustafa's conviction for murder

³⁶ Victims' Counsel's Response, para. 5.

³⁷ Victims' Counsel's Response, para. 5.

³⁸ Victims' Counsel's Response, para. 13.

³⁹ See Victims' Counsel's Response, paras 4-18.

as a war crime, the Panel notes that Victims' Counsel argues that any potential reversal of this count by the Panel would directly affect the personal interests of the indirect victims participating in this case.⁴⁰

32. The Panel is satisfied that Victims' Counsel's submissions on this ground affect the personal interests of the participating victims, including their right to acknowledgment for any harm suffered and, as part thereof, their right to obtain reparation for the harm suffered as a result of the crime for which Mr Mustafa was convicted. Indeed, any decision taken by this Panel in accordance with Rule 194 of the Rules could have a direct impact on the personal interests of the participating victims. Furthermore, the Panel is satisfied that victims' participation on these grounds is neither prejudicial to nor inconsistent with the rights of Mr Mustafa. Accordingly, the Panel will consider Victims' Counsel's submissions in relation to Ground 4.

33. Having clarified the participating victims' standing to respond to the Request by way of submissions, the Panel will turn to the grounds raised by Mr Mustafa.

V. DISCUSSION

34. The Panel notes that Mr Mustafa raises allegations of substantial violations of the procedures set out in the Law and the Rules, as well as violations of the criminal law with respect to the Appeal Judgment. The Panel will first address Ground 5 as it raises issues related to the fundamental fairness of the proceedings. The Panel will thereafter consider Ground 4, which concerns challenges to Mr Mustafa's conviction for murder as a war crime, as any determination on this Ground could have a potential impact on the Panel's consideration of Grounds 1 to 3, involving challenges to the duration of Mr Mustafa's sentence of imprisonment. Accordingly, the assessment of Grounds 1 through 3 will be adjudicated last. Grounds 1 and 3 will be addressed together, as any determination on the Kosovo law to be taken into account for

⁴⁰ See Victims' Counsel's Response, para. 13.

purposes of the *lex mitior* principle may have an impact on the assessment of Mr Mustafa's sentence.

A. ALLEGED VIOLATION OF FAIR TRIAL RIGHTS (GROUND 5)

35. The Panel observes that the arguments advanced under Ground 5 in relation to the translation of the Appeal Judgment cannot be characterised as a violation of the criminal law contained within the Law or a substantial violation of the procedures set out in the Law or the Rules, as set forth in Article 48(7) of the Law, by either the first or the second instance panel. Instead, Mr Mustafa's arguments related to the timing of his receipt of the Albanian translation of the Appeal Judgment are best understood as allegations of violations of his right to a fair trial in proceedings before the Supreme Court Panel. Indeed, the Panel considers that the rights afforded to an accused to a fair trial include the proceedings before the Supreme Court Panel and it is therefore incumbent upon this Panel to ensure that Mr Mustafa's rights are respected in this regard.

1. Submissions

36. Mr Mustafa submits that the rights afforded to him pursuant to Articles 6(3)(a) and (b) of the ECHR, as well as Articles 22(2), 30(1) and (3) of the Constitution to receive the Appeal Judgment in a language he understands at "an earlier stage" has been violated.⁴¹ Mr Mustafa contends that he was not afforded sufficient time to prepare for his defence and to be promptly informed in a language he understands of the nature and cause of the convictions entered against him.⁴² Mr Mustafa asserts that this violation was compounded by the appointment of a new Counsel for the purpose of preparing the Request.⁴³

37. The SPO contends that Mr Mustafa failed to establish any violation of the

⁴¹ Request, para. 112. See also Request, paras 111, 114-115; Reply to SPO, paras 47, 49.

⁴² Request, para. 112. See also Reply to SPO, paras 50-54.

⁴³ Request, para. 113.

procedure and asserts that Mr Mustafa's request for relief in accordance with Rule 194 of the Rules should be summarily dismissed.⁴⁴ The SPO submits that even if the Panel were to consider this ground, the Appeal Judgment was issued in English, which was the working language of the appeal proceedings.⁴⁵ The SPO further argues that a draft of the Albanian version of the Appeal Judgment was made available to Mr Mustafa on 12 February 2024, more than a month before the filing of the Request, and that an interpreter was made available to assist with his understanding of the Appeal Judgment.⁴⁶ The SPO asserts that Mr Mustafa has not demonstrated that he suffered any prejudice and that, in any event, requests for protection of legality center exclusively on legal questions, "which primarily fall within the purview of Defence Counsel".⁴⁷

38. Mr Mustafa replies that it took professional translators nearly two months to translate the Appeal Judgment and it is therefore not reasonable to expect an interpreter to assist Mr Mustafa in understanding fully a document as extensive as the Appeal Judgment before an official translation is filed.⁴⁸

2. The Panel's assessment

39. The Panel notes that Rule 183(4) of the Rules provides that a copy of the Appeal Judgment shall be served on the Accused in a language he or she understands and speaks "as soon as possible". The Panel further recalls that the Appeal Judgment was issued in English on 14 December 2023, which is the working language in this case.⁴⁹

40. With respect to the fairness of the proceedings, the Panel is mindful that there was some loss of time in the preparation of the Request as a result of a change of

⁴⁴ SPO Response, para. 36.

⁴⁵ SPO Response, para. 37.

⁴⁶ SPO Response, paras 37-38.

⁴⁷ SPO Response, para. 38.

⁴⁸ Reply to SPO, paras 50-51.

⁴⁹ KSC-BC-2020-05/F00032, Decision on Working Language, 8 October 2020, para. 31. See also KSC-CA-2023-02/F00003, Decision on Working Language, 9 January 2023, para. 5.

Counsel, proceedings related thereto and the subsequent re-appointment of Mr von Bóné as Mr Mustafa's Counsel.⁵⁰ The Panel is further mindful of its finding that the Law precludes any variation of the time-limit for the filing of a request for protection of legality.⁵¹ Nevertheless, the Panel notes that Mr Mustafa received a draft translation of the Appeal Judgment on 12 February 2024, which was a month before his request for protection of legality was to be filed.⁵² Mr Mustafa was assisted by an interpreter before this time to gain an understanding of the Appeal Judgment.⁵³ The Panel further notes that Mr von Bóné is familiar with Mr Mustafa's case, having represented Mr Mustafa throughout the trial and appeal proceedings.

41. The Panel observes that Mr von Bóné did not set forth any submissions suggesting that he was unable to advance all the arguments or grounds he had otherwise intended to include within the Request as a result of his re-appointment at a later stage. Rather, Mr von Bóné's arguments focus on the receipt of the Albanian translation by Mr Mustafa of the Appeal Judgment. Thus, the Panel considers that Mr Mustafa's rights were at all times respected and that he continued to be represented by Counsel in order to prepare the Request.⁵⁴

42. Importantly, the Panel recalls that a request for protection of legality is entirely of a legal nature, which falls primarily within the responsibility of Defence Counsel. Thus, Mr von Bóné was in a position to advise Mr Mustafa on the potential grounds for a request for protection of legality without any official translation of the Appeal

⁵⁰ See F00008, Decision on Prosecution Motion Regarding Conflict of Interest of Defence Counsel, 25 January 2024; F00010, Notification of Assignment of Duty Counsel to Salih Mustafa with One Confidential Annex, 29 January 2024 ("Notification Assignment Duty Counsel").

⁵¹ F00009, Decision on the Request for an Extension of Time, 25 January 2024.

⁵² See Request, para. 111.

⁵³ See SPO Response, para. 37.

⁵⁴ See, e.g., KSC-CA-2023-02/F00041, Notification of Approval of Counsel for Salih Mustafa with One Confidential Annex, 11 January 2024 ("Notification of Approval of Counsel"); F00004, Information Additional to Notification of Approval of Counsel for Salih Mustafa with Two Confidential and *Ex Parte* Annexes, 18 January 2024 ("Information Additional to Notification of Approval of Counsel"); Notification Assignment Duty Counsel.

Judgment.⁵⁵

43. The Panel acknowledges that as a result of choices made by Mr Mustafa, Mr von Bóné had less time in the preparation of the Request in view of his re-appointment at a later stage. However, the Panel considers that the strict admissibility standard applicable to a request for protection of legality limits the nature of the grounds that can be advanced. The Panel further recalls that Mr Mustafa's rights were at all times respected and that he continued to be represented by Counsel in order to prepare the Request.⁵⁶ The Panel observes that Mr von Bóné did not set forth any arguments suggesting that he was unable to advance all the arguments or grounds he had otherwise intended to include within the Request as a result of his re-appointment at a later stage. Rather, Mr von Bóné's arguments focus on the receipt of the Albanian translation by Mr Mustafa of the Appeal Judgment.

44. In light of the above, the Panel, while recognising the importance of Mr Mustafa's right to receive the Appeal Judgment in a language he understands, considers that the fairness of the proceedings before this Panel have not been impaired by the timing of receipt by Mr Mustafa of the Albanian translation of the Appeal Judgment. Accordingly, the Panel dismisses Mr Mustafa's Ground 5.

B. ALLEGED VIOLATION OF ARTICLE 14(1)(C) OF THE LAW AND RULES 159(3) AND 183(3)
OF THE RULES (GROUND 4)

1. Submissions

45. Mr Mustafa submits that "the murder, as defined in Article 14(1)(c) [of the Law] was not appropriately adjudicated in his case",⁵⁷ which amounts to "substantial

⁵⁵ Cf. KSC-CA-2022-01/F00005, Decision on Haradinaj's Request for Clarification on Appeal Timescale, 25 May 2022, para. 4, and citations therein.

⁵⁶ See, e.g., Notification of Approval of Counsel; Information Additional to Notification of Approval of Counsel; Notification Assignment Duty Counsel.

⁵⁷ Request, para. 88.

violations of the Rules”.⁵⁸ Specifically, Mr Mustafa contends that both the Trial Judgment and the Appeal Judgment did not provide “clear and consistent reasons” or “failed to address key evidence” as required by Rules 159(3), 164(2) and 183(3) of the Rules.⁵⁹ To that end, Mr Mustafa argues that the lower courts failed to properly substantiate the elements required to make a finding as to his responsibility in view of a third-party intervention.⁶⁰

46. The SPO contends that Mr Mustafa advances arguments that are mostly factual in nature, which are inadmissible as set forth by the standard of review applicable to a request for protection of legality.⁶¹ The SPO further asserts that Mr Mustafa’s arguments related to a lack of reasoning are raised for the first time before this Panel and should therefore be equally dismissed.⁶² The SPO submits that, even if considered on the merits, Mr Mustafa’s arguments related to a lack of reasoning should be dismissed, as there was sufficient reasoning in both the Trial and the Appeal Judgments.⁶³

47. Victims’ Counsel contends that Mr Mustafa fails to clarify whether his allegations under this ground are procedural or substantive in nature and asserts that, in any event, the Appeal Judgment contains extensive discussion and reasoning regarding the principle of *novus actus interveniens*.⁶⁴ Victims’ Counsel submits that Mr Mustafa appears instead to “trigger a reconsideration of evidence heard throughout the trial stage” and this ground should thus be dismissed as inadmissible.⁶⁵

48. Mr Mustafa replies that it has challenged the three new elements introduced by

⁵⁸ Request, para. 89.

⁵⁹ Request, para. 90.

⁶⁰ Request, paras 91-103, 105-109. See also Reply to SPO, para. 42.

⁶¹ SPO Response, paras 28-29, 35.

⁶² SPO Response, para. 30.

⁶³ SPO Response, paras 31-34.

⁶⁴ Victims’ Counsel’s Response, paras 14-17.

⁶⁵ Victims’ Counsel’s Response, para. 18.

the Appeals Panel, which were not discussed in the Trial Judgment.⁶⁶ According to Mr Mustafa, for someone to be found guilty of a crime under Article 14(1)(c) of the Law, such a finding should be reasoned pursuant to Rule 159(3) of the Rules.⁶⁷ Mr Mustafa contends that the Trial Panel's failure to articulate these three elements are a substantial violation of the procedures.⁶⁸

2. The Panel's assessment

49. The Panel observes that while Mr Mustafa refers to Article 14(1)(c) of the Law, he thereafter appears to argue that there has been a substantial violation of the procedures given that the Trial and Appeal Judgments were insufficiently reasoned.⁶⁹ The Panel notes that, in support of the alleged substantial violation of the procedures, Mr Mustafa relies mostly on the factual conclusions drawn by the Trial and/or the Appeals Panel, which he contends do not support the legal findings made.

50. The Panel observes at the outset that Mr Mustafa disputes the factual findings made by the Trial Panel and the analysis undertaken thereafter by the Appeals Panel. Notably, Mr Mustafa's arguments centre on the assumption that a finding on a third-party intervention by the Trial or Appeals Panel in relation to the Serbian forces and the origin of the bullet(s) found in the murder victim, would have altered the outcome in relation to his criminal responsibility for the victim's death.⁷⁰

⁶⁶ Reply to SPO, paras 43-45.

⁶⁷ Reply to SPO, para. 45.

⁶⁸ Reply to SPO, para. 45.

⁶⁹ Request, para. 90.

⁷⁰ See Request, paras 96 ("However, this assumption (the risk to the Murder Victim's life) has not been supported by any evidence, not by a reasoning as to why the advancement of Serbian troops would in fact pose a risk to life. It is an unsupported, assumption and without any reasoning as to why, or what kind of risk the victim would in fact have with the advancing forces"), 97 ("Neither the Trial Panel nor the AP established at which point in time the Serbian Forces actually advanced to the location where the murder victim was located. In fact, no findings were established if the Serbian forces at all entered the location where the murdered victim was, or that the Serbian forces remained far away from the location"), 98 ("Even if the Serbian forces advanced at some point in time and assumed gunshots by Serb forces constituted a third-party intervention, it is important to know at which point in time that happened in order to assess whether there would be a break in the chain of causation"), 99 ("As the Murder Victim allegedly was in a near to death state, one would not be able to determine whether the

51. In this respect, the Panel notes that the Trial Panel concluded that the death of the victim was a result of a combination of: (i) the severe mistreatment by BIA members who detained him; (ii) lack of medical aid by BIA members; and (iii) gunshot wounds caused by bullet(s), “in respect of which the Panel has established that there exists a reasonable doubt as to their attribution to the BIA members or to Serbian forces”.⁷¹ The Trial Panel, however, concluded that irrespective of whether the murder victim was killed by one or more Serbian bullets, the conduct mentioned under (i) and (ii) above substantially caused the death of the murder victim and that these causes are attributable to Mr Mustafa.⁷²

52. The Appeals Panel thereafter determined that the Trial Panel had correctly applied the “substantial contribution test”, which was not, as such, challenged by Mr Mustafa.⁷³ The Appeals Panel, however, found that the Trial Panel should have addressed more explicitly whether the gunshots constituted a third-party intervention so as to break the chain of causation.⁷⁴ For that reason, the Appeals Panel undertook a lengthy analysis to ascertain whether, if the gunshots had come from Serb forces, this would have relieved Mr Mustafa of his responsibility for the death of the murder victim.⁷⁵

53. Specifically, the Appeals Panel found, by a comparative analysis of a number of jurisdictions, that “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”.⁷⁶ The Appeals Panel

Serbian forces - if they arrived at the location at all - would in fact not help the victim, or otherwise do something with him. He was apparently unarmed, so why would they kill him? Or why would it be Serbs at all that killed him? It remains simply undetermined, as no findings were made to this effect”).

⁷¹ Trial Judgment, para. 689.

⁷² Trial Judgment, para. 689.

⁷³ Appeal Judgment, para. 344.

⁷⁴ See Appeal Judgment, para. 348.

⁷⁵ Appeal Judgment, paras 345-349.

⁷⁶ Appeal Judgment, para. 347.

concluded that the Trial Panel's finding supported the conclusion that the conduct attributable to Mr Mustafa was foreseeable, that it was part of the original sphere of risk and that the risk posed by the advancing Serb forces was not so potent as to render the original risk triggered by Mr Mustafa insignificant.⁷⁷ The Appeals Panel therefore concluded that the *actus reus* of murder had been satisfied.⁷⁸ The Appeals Panel also noted that Mr Mustafa appears to confuse the medical cause of death with legal causation.⁷⁹

54. The Panel observes in this respect that Mr Mustafa's arguments are factual in nature. Mr Mustafa disagrees with inferences drawn by the Trial Panel, upheld thereafter by the Appeals Panel, regarding the attribution of the death of the murder victim to members of Mr Mustafa's unit as opposed to the later arriving Serbian forces.⁸⁰ In this respect, Mr Mustafa contends that a certain assumption, namely the "risk to the life of the Murder Victim [was] not supported by any evidence, [or][...] reasoning as to why the advancement of Serbian troops would in fact pose a risk to life".⁸¹ Similarly, Mr Mustafa contends that neither the Trial Panel nor the Appeals Panel "established at which point in time the Serbian Forces actually advanced to the location where the murder victim was located" and "no findings were established" as to whether these forces actually entered this location or remained distant from it.⁸²

55. The Panel notes that Mr Mustafa specifically challenges that the elements identified by the Appeals Panel⁸³ regarding a third-party intervention have not been

⁷⁷ Appeal Judgment, para. 348.

⁷⁸ Appeal Judgment, para. 349.

⁷⁹ Appeal Judgment, para. 350.

⁸⁰ Request, para. 91.

⁸¹ Request, para. 96.

⁸² Request, para. 97. See also Request, paras 105 ("was not established"), 106 ("no proper assessment was made"), 108 ("murder could not be established").

⁸³ The Appeals Panel identified the following three elements: "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". See Appeal Judgment, para. 347.

supported by any evidence.⁸⁴ The Panel, however, notes that the Appeals Panel undertook its analysis of these elements in the light most favourable to Mr Mustafa in order to assess whether a third-party intervention would have broken the chain of causality.⁸⁵ Therefore, even if these elements would have been proven beyond reasonable doubt, this would not have changed the outcome of the Appeals Panel's reasoning.

56. The Panel notes that, in any event, the Appeals Panel found that the Trial Panel reasonably concluded that there may have been more than one cause leading to the death of a victim and that ill-treatment and denial of medical care may also result in the death of a person.⁸⁶ In other words, Mr Mustafa's challenges in relation to the origin of the bullet(s) found in the murder victim's body are irrelevant, as the Trial and Appeals Panels concluded that the victim would have died, even without the gunshot wounds, as a result of the ill-treatment inflicted upon him by BIA forces under Mr Mustafa's command, or by "putting [the victim] in a position to be fired at by the advancing Serbian forces – by abandoning him without protection in a near-to-death state", and the denial of medical treatment for this victim.⁸⁷

57. Given the above, the Panel concludes that even though Mr Mustafa submits that the Appeals Panel's judgment lacks legal reasoning, in essence Mr Mustafa's argument is based on a factual disagreement. The Panel recalls that Rule 193(3) of the Rules and the standard of review provide that a request for protection of legality shall not be filed on the basis of an erroneous or incomplete determination of the facts of the case. The Panel further recalls that the standard of review requires that the alleged violation materially affects the outcome of the Appeal Judgment. The Panel notes that even if a finding were to have been made on the origin of the bullet(s) and the

⁸⁴ Request, paras 95-96.

⁸⁵ See Appeal Judgment, para. 347.

⁸⁶ Appeal Judgment, paras 350-351.

⁸⁷ Trial Judgment, para. 638; Appeal Judgment, paras 348, 350- 351,353, 394.

consequence of the gunshot wound(s) found in the murder victim, this would not have changed the outcome of the Trial or Appeals Panels' findings in relation to Mr Mustafa's criminal responsibility. In particular, the Trial Panel found, and the Appeals Panel agreed, that the severe mistreatment of the murder victim and denial of medical aid to that victim were "solely attributable" to Mr Mustafa and his BIA subordinates and that these were the substantial causes of the victim's death.⁸⁸ The Trial and Appeals Panels determined that even if a finding had been made in relation to a third-party intervention, this would have not broken the chain of causation leading to the death of the victim.⁸⁹ Mr Mustafa's Ground 4 is therefore summarily dismissed.

C. ALLEGED VIOLATION OF ARTICLE 44(2) OF THE LAW, ARTICLE 33(2) OF THE CONSTITUTION AND ARTICLE 7 OF THE ECHR (GROUND 2)

1. Submissions

58. Mr Mustafa submits that the Appeals Panel "wrongly interpreted and wrongly applied Article 44(2) of the Law".⁹⁰ Specifically, Mr Mustafa contends that the Appeals Panel incorrectly construed the wording of "shall take into account" as factors, rather than an obligation to apply the list enumerated after "shall take into account" as "[l]aws that give the range of sentencing regarding crimes".⁹¹ According to Mr Mustafa, the reference to Kosovo law under Article 44(2)(a) of the Law "suggests that it cannot be merely qualified as a 'factor'".⁹² Mr Mustafa asserts that factors "are of a different kind, usually undefined and dealt with within circumstances and particularities of a case".⁹³

59. The SPO submits that Mr Mustafa's arguments regarding the binding nature of

⁸⁸ Trial Judgment, para. 625.

⁸⁹ Trial Judgment, para. 638; Appeal Judgment, para. 348.

⁹⁰ Request, para. 51. See also Request, paras 56-63; Reply to SPO, para. 23.

⁹¹ Request, paras 52-54. See also Request, para. 35.

⁹² Request, para. 54.

⁹³ Request, para. 55.

Kosovo law when it comes to his sentencing “ignores that Article 44(2) [of the Law] requires a panel to ‘consider’, rather than ‘apply’, sentencing ranges under Kosovo Law”.⁹⁴

60. Mr Mustafa replies that the SPO wrongly reads Article 44(2) of the Law by stating that the panels shall “consider” rather than “apply” sentencing ranges as provided for by Kosovo law.⁹⁵ Mr Mustafa maintains that Article 44(2) of the Law imposes on the Appeals Panel an obligation to apply Kosovo law, rather than qualify it as a factor to be considered.⁹⁶

2. The Panel’s Assessment

61. The Panel notes that Mr Mustafa does not explain whether his submissions under this ground may be qualified as a violation of the criminal law or a substantial violation of the procedures. Mr Mustafa only asserts that the interpretation given by the Trial and Appeals Panels violates his constitutional rights.⁹⁷

62. In addition, the Panel notes that Mr Mustafa merely disagrees with the ordinary meaning attributed by the lower courts to the terms of Article 44(2) of the Law⁹⁸ without substantiating his contention that the elements listed under Article 44(2) are to be construed as anything other than “factors”. By contrast, the Appeals Panel engaged extensively with Mr Mustafa’s arguments in this respect and relied on jurisprudence as further support for its reasoning.⁹⁹ The Panel agrees with the ordinary meaning ascribed by the Appeals Panel to the consideration to be given to the factors listed under Article 44(2) of the Law.¹⁰⁰

⁹⁴ SPO Response, para. 19. See also SPO Response, paras 13-14, 20-21.

⁹⁵ Reply to SPO, paras 24-27.

⁹⁶ Reply to SPO, paras 28-30. See also Reply to SPO, paras 31-32.

⁹⁷ See Request, paras 63-64.

⁹⁸ Cf. Article 31(1) of the Vienna Convention on the Law of Treaties.

⁹⁹ Appeal Judgment, para. 466; Appeal Judgment, fn. 1269.

¹⁰⁰ See Appeal Judgment, para. 466.

63. In light of the above, the Supreme Court Panel therefore rejects Ground 2.

D. ALLEGED VIOLATION OF ARTICLE 44(2) OF THE LAW AND ARTICLES 22, 33(2) AND (4)
OF THE CONSTITUTION (GROUNDS 1 AND 3)

1. Submissions

64. Mr Mustafa argues that the Appeals Panel's understanding of the *lex mitior* concept "is too limited and therefore wrong" as it focused solely on the criminal offence, rather than the sentencing range for that criminal offence.¹⁰¹ Mr Mustafa contends that the Specialist Chambers is bound to apply Kosovo law as referenced in Article 44(2)(a) and (b) of the Law in conjunction with Article 33(2) of the Kosovo Constitution and is thus bound by Kosovo's sentencing ranges.¹⁰² Mr Mustafa asserts in this respect that the Specialist Chambers is a domestic court and not an international one.¹⁰³ Mr Mustafa submits that the lower courts erred when they did not adhere to the *lex mitior* principle and did not apply the sentencing range set forth in Articles 38 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia of 1976 ("1976 SFRY Criminal Code"), which Mr Mustafa argues provides for a range between 5 to 15 years for war crimes.¹⁰⁴

65. Mr Mustafa contends that the application of *lex mitior* and, as a result, the 1976 SFRY Criminal Code, is also consistent with Article 7 of the ECHR.¹⁰⁵ Similarly, Mr Mustafa submits that Articles 3 of the 2019 Criminal Code of the Republic of Kosovo ("2019 Kosovo Criminal Code")¹⁰⁶ and of the 2012 Criminal Code of the Republic of Kosovo ("2012 Kosovo Criminal Code"),¹⁰⁷ as well as Article 2 of the 2003

¹⁰¹ Request, paras 25-26. See also Request, paras 28-29, 48.

¹⁰² Request, paras 28-34, 41, 46-47. See also Request, paras 42, 83-84; Reply to SPO, para. 12.

¹⁰³ Request, paras 30-31.

¹⁰⁴ Request, paras 34, 37-38. See also Request, para. 71.

¹⁰⁵ Request, paras 34, 37, 40, 43-45. See also Reply to SPO, paras 13-14.

¹⁰⁶ Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Official Gazette No. 2, 14 January 2019.

¹⁰⁷ Criminal Code of the Republic of Kosovo, Code No. 04/L-082, Official Gazette No. 19, 13 July 2012.

Provisional Criminal Code of Kosovo (“2003 Kosovo Provisional Criminal Code”)¹⁰⁸ also provide that the *lex mitior* principle should be applied to the sentencing range for his war crimes’ conviction.¹⁰⁹ Mr Mustafa contends that the principle of *nulla poena sine lege* is equally violated where there is no legal basis for a court to give a higher sentence.¹¹⁰

66. Mr Mustafa asserts that even if it were accepted that Kosovo’s sentencing ranges are to be considered as “factors” they were still not taken into account by the Appeals Panel when determining his sentencing range for his war crimes’ conviction in violation of Article 44(2) of the Law and Article 33(2) and (4) of the Constitution.¹¹¹ Mr Mustafa contends that the Appeals Panel in its analysis of international and domestic jurisprudence on sentencing ranges for war crimes erroneously concluded that the applicable sentencing ranged between 18 to 35 years.¹¹² According to Mr Mustafa, the Appeals Panel should have relied on the cited Kosovo cases, as they are more similar to his own case and frequently applied the 1976 SFRY Criminal Code in this respect, while taking into account the Nations Interim Administration Mission in Kosovo Regulation No. 1999/24 (“UNMIK Regulation 1999/24”), which abolished capital punishment.¹¹³

67. Mr Mustafa requests that the Panel grant these Grounds and apply Rule 194(1) of the Rules.¹¹⁴

68. The SPO responds that, contrary to Mr Mustafa’s contention, the principle of *lex mitior* enshrined in Article 44(2) of the Law only applies to laws that bind the

¹⁰⁸ Provisional Criminal Code of Kosovo, UNMIK/REG/2003/25, 6 July 2003.

¹⁰⁹ Request, para. 39. See also Reply to SPO, paras 13-14.

¹¹⁰ Request, para. 44. See also Request, para. 45; Reply to SPO, para. 19.

¹¹¹ Request, paras 82-86. See also Request, paras 69-70.

¹¹² Request, paras 73-75.

¹¹³ Request, para. 76. See also Request, paras 77-81; Reply to SPO, paras 36-38; United Nations Interim Administration Mission in Kosovo Regulation No. 1999/24, UNMIK/REG/1999/24, 12 December 1999.

¹¹⁴ Request, paras 49, 87.

Specialist Chambers.¹¹⁵ The SPO asserts that the Appeals Panel correctly concluded that the law applicable to the crimes for which Mr Mustafa was convicted is based on customary international law.¹¹⁶ According to the SPO, Article 44(2) of the Law therefore does not impose on the Specialist Chambers an obligation to apply to an international crime sentencing ranges found in the Kosovo criminal codes.¹¹⁷ The SPO asserts that Mr Mustafa's reference to the *lex mitior* principle as guaranteed by the Kosovo Constitution and the ECHR do not detract from the fact that this principle only applies to laws that bind the Specialist Chambers.¹¹⁸

69. The SPO further contends that Mr Mustafa fails to explain what additional information "beyond legislated sentencing ranges and relevant jurisprudence" the Appeals Panel should have considered.¹¹⁹ The SPO submits that Mr Mustafa's assertion that the Appeals Panel should have considered Kosovo cases as they are more akin to his own, including cases Mr Mustafa identified, are factual arguments and should be summarily dismissed.¹²⁰

70. The SPO further argues that Mr Mustafa failed to make any relevant submissions on these or other comparable cases during the trial or appeal hearings, despite being expressly invited to do so. According to the SPO, Mr Mustafa's "*de novo* submissions to the Supreme Court" should therefore be summarily dismissed.¹²¹ Finally, the SPO submits that Mr Mustafa merely disagrees with the Appeals Panel's conclusions without identifying any clear violation of law and his grounds should therefore be summarily dismissed.¹²²

71. Victims' Counsel notes that, while not expressly stated, Mr Mustafa appears to

¹¹⁵ SPO Response, para. 11.

¹¹⁶ SPO Response, para. 11. See also SPO Response, paras 12, 17.

¹¹⁷ SPO Response, paras 12-14.

¹¹⁸ SPO Response, para. 15.

¹¹⁹ SPO Response, para. 24.

¹²⁰ SPO Response, para. 25.

¹²¹ SPO Response, para. 26.

¹²² SPO Response, para. 27.

be arguing a violation of the criminal law.¹²³ Victims' Counsel asserts in this respect that the Supreme Court Panel has set forth an exhaustive list of what may qualify as a violation of the criminal law for a request for protection of legality to be admissible and contends that Mr Mustafa failed to identify which among this list has been violated.¹²⁴ According to Victims' Counsel, Mr Mustafa's submissions should be dismissed on this basis alone.¹²⁵

72. Moreover, Victims' Counsel contends that Mr Mustafa selectively quotes the Appeals Panel's findings in relation to the principle of *lex mitior* and that he fails to acknowledge the Appeals Panel's central findings regarding the law that the Specialist Chambers is bound to apply.¹²⁶ Victims' Counsel submits that the Appeals Panel's findings in this respect are not contradicted by the jurisprudence of the European Court of Human Rights ("ECtHR"), on which Mr Mustafa relies.¹²⁷ Victims' Counsel further argues that Mr Mustafa incorrectly represents the sentencing ranges found in the 1976 SFRY Criminal Code and contends that Articles 38 and 142 of this Code instead provide for a sentencing range between five to 20 years.¹²⁸

73. Mr Mustafa replies that Article 44(2) of the Law imposes on the Panels the obligation to apply the *lex mitior* principle and submits that this principle cannot be limited by the Law.¹²⁹ Mr Mustafa further asserts that the ECHR is directly applicable through Article 22 of the Constitution and, accordingly, the ECtHR jurisprudence makes clear that a court cannot impose a higher sentence in contravention of the *lex mitior* principle as upheld by the ECtHR.¹³⁰ Finally, Mr Mustafa contends that he

¹²³ Victims' Counsel's Response, para. 5.

¹²⁴ Victims' Counsel's Response, paras 6-7.

¹²⁵ Victims' Counsel's Response, para. 7.

¹²⁶ Victims' Counsel's Response, para. 9.

¹²⁷ Victims' Counsel's Response, para. 10.

¹²⁸ Victims' Counsel's Response, para. 11.

¹²⁹ Reply to SPO, paras 14-17.

¹³⁰ Reply to SPO, paras 18-21.

clearly identified the violations under these grounds.¹³¹

2. The Panel's assessment

74. The Panel observes that Mr Mustafa does not set forth whether the grounds are substantial violations of the procedures or violations of the criminal law. Nevertheless, the Panel understands Mr Mustafa's arguments to involve violations of criminal law, in particular regarding a decision on punishment whereby the lower instance panels are alleged to have abused their authority in relation to Article 44(2) of the Law. Accordingly, the Panel finds Mr Mustafa's Grounds 1 and 3 admissible and will consider the merits thereof.

75. For the reasons set forth below, the Panel finds that the Appeals Panel should have: (i) identified the relevant Kosovo law in accordance with Article 44(2)(b) of the Law and as required by the principle of *lex mitior* (Ground 1); (ii) identified on that basis the more lenient sentencing range to be taken into account in Mr Mustafa's case, and, in this context, properly reason how it arrived at a reduction of Mr Mustafa's sentence by four years (Ground 3). The Panel therefore finds that the Appeals Panel violated the criminal law within the meaning of Article 48(7) of the Law.

76. The Panel first notes Mr Mustafa's arguments regarding the applicable law in the context of the nature of the Specialist Chamber as a domestic or an international court. As the Court of Appeals Panel previously stated: "it is not the categorisation of the Specialist Chambers as a particular type of court that determines the applicable law, but the Law itself", and that the nature of a court "is not dispositive of the applicable law."¹³²

77. In respect of the applicable law, the Panel recalls that according to Article 162(1) of the Constitution the "organisation, functioning and jurisdiction of the Specialist

¹³¹ Reply to SPO, paras 4, 40.

¹³² KSC-BC-2020-04/IA002/F00010, Decision on Pjetër Shala's Appeal Against Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 11 February 2022, para. 19.

Chambers [...] shall be regulated by this Article” of the Constitution, as well as by a specific law, namely the Law.

78. Article 3(2) of the Law similarly provides that the “Specialist Chambers shall adjudicate and function in accordance with” the Kosovo Constitution, this Law as the *lex specialis*, as well as other provisions of the Kosovo law as expressly incorporated and applied by the Law, customary international law (as given superiority over domestic laws), and international human rights law.

79. Article 12 of the Law entitled “Applicable law” further specifies that “[t]he Specialist Chambers shall apply customary international law and the substantive criminal law of Kosovo, insofar as it complies with customary international law, both as applicable at the time the crimes were committed. Accordingly, Mr Mustafa’s submissions regarding the nature of the Specialist Chamber and the law to be applied in his case are unfounded and are therefore dismissed.

80. Next, the Panel turns to Mr Mustafa’s submissions in relation to the principle of *lex mitior* and its application to his sentence in the context of Article 44(2) of the Law.

81. The Panel recalls Article 44(2)(a)-(c) of the Law, which requires that in considering the punishment to be imposed on a person adjudged guilty of an international crime under this Law, the Specialist Chambers shall take into account: (i) the sentencing range for the crime under Kosovo Law at the time of commission; (ii) any subsequent more lenient sentencing range for the crime provided in Kosovo Law; and (iii) various regional and international conventions, as incorporated by Articles 22(2), 22(3) and 33(1) of the Constitution, and the extent to which the punishment of any act or omission which was criminal according to the general principles of law recognised by civilised nations would be prejudiced by the application of Article 44(2)(a) and (b) of the Law.

82. The Panel specifically notes Article 33(2) of the Constitution, which stipulates

that “[n]o punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed”. Article 33(4) further provides that any “[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 favourable to the perpetrator.” Thus, the principle of *lex mitior* is applicable before the Specialist Chambers through Articles 33 and 162(2) of the Constitution in conjunction with Articles 3(2)(a) and 44(2)(b) of the Law.

83. The *lex mitior* principle is also provided by Article 7(1) of the ECHR and has been applied in the jurisprudence of the ECtHR,¹³³ which is binding on the Specialist Chambers by virtue of Article 3(2)(e) of the Law and Articles 22(2), 53 and 162(2) of the Constitution.

84. The Panel notes that Mr Mustafa disputes the definition of *lex mitior* as set by the Appeals Panel,¹³⁴ including that the sentencing law must be binding on the Specialist Chambers. He argues, however, that the Trial and Appeals Panels erroneously found that the 1976 SFRY Criminal Code as later amended by the UNMIK Regulation 1999/24, does not bind the Specialist Chambers and that it should have been applied by the lower courts as required by Article 33(4) of the Constitution and Article 44(2) of the Law.¹³⁵

85. The Panel observes that when the Appeals Panel addressed Mr Mustafa’s arguments, it first noted that Article 14(1) of the Law defines war crimes under customary international law.¹³⁶ The Appeals Panel therefore further observed that “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

¹³³ See, e.g., ECtHR, *Ruban v. Ukraine*, no. 8927/11, Judgment, 28 November 2016, para. 37, citing *Scoppola v. Italy* (No 2), no. 10249/03, Judgment, 17 September 2009, para. 109.

¹³⁴ Appeal Judgment, para. 465; Request, paras 25, 28.

¹³⁵ Request, paras 25-28, 32-34, 38-44, 82-84.

¹³⁶ Appeal Judgment, para. 469.

provisions of Kosovo law as expressly incorporated and applied by the Law”.¹³⁷ The Appeals Panel noted that Article 3(4) of the Law provides that “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”.¹³⁸

86. Accordingly, the Appeals Panel determined that since these 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”.¹³⁹ As a result, the Appeals Panel did not identify the most lenient sentencing range in Mr Mustafa’s case.

87. The Panel finds that the Appeals Panel erred when it concluded that the Specialist Chambers are not required to consider the various domestic laws on war crimes to comply with the *lex mitior* principle under the Constitution. The Panel notes that while Article 44(2) of the Law does not contain references to specific domestic laws, it does expressly require that the Specialist Chambers identify the applicable sentencing ranges provided under Kosovo law pursuant to subparagraphs (a) and (b). In this context, the Specialist Chambers are *bound* to consider which of the relevant sentencing ranges under Kosovo law contains the most lenient sentencing range in accordance with the *lex mitior* principle. The sentencing panel shall thereafter take this range into account when determining the sentence of imprisonment.

88. In other words, the Specialist Chambers are *bound* to first review the relevant Kosovo law, identify the sentencing ranges provided therein and determine the most lenient one in accordance with the *lex mitior* principle. Having identified the most lenient sentencing range, the Specialist Chambers shall take this range into account to determine the punishment to be imposed. The Panel is of the view that while panels have discretion in their determination of a sentence, the language “*shall take into*

¹³⁷ Appeal Judgment, para. 469.

¹³⁸ Appeal Judgment, para. 469.

¹³⁹ Appeal Judgment, para. 469. See also Appeal Judgment, paras 466-468.

*account*¹⁴⁰ must be interpreted in line with the *lex mitior* principle set out in Article 33(4) of the Constitution, Article 7(1) of the ECHR and as reflected in Article 44(2)(b) of the Law.

89. The Panel notes that even though the Appeals Panel determined that the Specialist Chambers are not bound to consider domestic law when determining a sentence of imprisonment, it nevertheless undertook an analysis of the Trial Panel's determinations in accordance with Article 44(2)(a) and (b) of the Law.¹⁴¹

90. Specifically, the Appeals Panel found that the Trial Panel correctly referred to Articles 38 and 142 of the 1976 SFRY Criminal Code as the applicable law in accordance with Article 44(2)(a) of the Law.¹⁴² It further noted that with the adoption of the UNMIK Regulation 1999/24 abolishing capital punishment, but without specifying an alternative thereto, the resulting sentencing range (in accordance with Article 44(2)(b) of the Law) from that point in time was five to 15 years.¹⁴³

91. The Appeals Panel thereafter continued its analysis of the Trial Panel's consideration of other subsequent more lenient sentencing ranges.¹⁴⁴ In so doing, the Appeals Panel noted the international nature of the crimes set forth in Article 14 of the Law.¹⁴⁵ However, it did not draw any conclusions therefrom nor did it determine how this impacted the applicability of the 1976 SFRY Criminal Code and the UNMIK Regulations related thereto in the case of Mr Mustafa.¹⁴⁶ Instead, the Appeals Panel proceeded immediately to undertake its own analysis of international and domestic jurisprudence.¹⁴⁷

¹⁴⁰ Emphasis added.

¹⁴¹ Appeal Judgment, paras 472-475.

¹⁴² Appeal Judgment, para. 473.

¹⁴³ Appeal Judgment, para. 473.

¹⁴⁴ Appeal Judgment, paras 474-479.

¹⁴⁵ Appeal Judgment, para. 470.

¹⁴⁶ Appeal Judgment, para. 470.

¹⁴⁷ Appeal Judgment, para. 478.

92. The Panel is of the view that the Appeals Panel erred by not first identifying a definitive sentencing range in Mr Mustafa's case before determining the sentence. Therefore, the Panel will proceed to set forth the applicable law and the sentencing range to be taken into account in the present circumstances.

93. Setting forth the applicable law, the Panel recalls the distinction the Law makes between "War Crimes under International Law" (Article 14) and "Other Crimes under Kosovo Law" (Article 15). The present case concerns murder, torture and arbitrary detention as war crimes under international law pursuant to Article 14 of the Law, as distinct from murder under domestic law provided under Article 15 of the Law. It is noteworthy that Article 15 of the Law refers to the 1976 SFRY Criminal Code, as amended by "UNMIK [R]egulation 2000/59", as well as to other Kosovo law provisions,¹⁴⁸ whereas Article 14 of the Law, pursuant to which Mr Mustafa was convicted, only refers to customary international law. Accordingly, the Panel finds that there is a material distinction in the substantive crimes provided for in Article 14 and Article 15(1)(a) of the Law.

94. This distinction is further evident by the additional substantive crimes found in Article 14 of the Law compared to the substantive crimes listed in Article 142 of the 1976 SFRY Criminal Code. If the Panel were to accept that the sentencing range in the 1976 SFRY Criminal Code should be taken into account in accordance with Article 44(2)(a) of the Law, as Mr Mustafa contends, this would mean that the sentencing range found in the 1976 SFRY Criminal Code would be applicable only to *some* but not to *all* of the crimes found in Article 14 of the Law. Thus, the sentencing range to be identified for the purposes of Article 44(2)(a) of the Law and the identification of the most lenient sentencing range in accordance with the *lex mitior* principle as set out in Article 44(2)(b) of the Law would differ depending on whether the war crimes charged

¹⁴⁸ See Article 15(1), 15(1)(a) and (b), 15(2) of the Law and the references to specific Kosovo provisions therein.

under Article 14 of the Law are also reflected in the 1976 SFRY Criminal Code.

95. The distinction between war crimes under Article 14 of the Law and other crimes under Kosovo Law, pursuant to Article 15 of the Law is also found in Article 16 of the Law, which provides for different modes of individual criminal responsibility for international crimes under Article 16(1) of the Law versus domestic crimes as set forth in Article 16(2) of the Law. The Panel recalls in this respect that Mr Mustafa was found guilty of war crimes pursuant to the mode of individual criminal liability for international crimes, namely Article 16(1)(a) of the Law.¹⁴⁹

96. More specifically, as far as “Punishments” are concerned in Article 44 of the Law, the Law distinguishes between international crimes and domestic crimes when considering the punishment to be imposed. Article 44(2) of the Law refers to “a person adjudged guilty of an international crime under this Law”, whereas Article 44(3) refers to “a person adjudged guilty of a domestic crime under Article 15(1)”. Moreover, Article 44(2)(c) of the Law provides that “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 Article 44(2)(a) and (b) of the Law. By contrast, Article 44(3) of the Law, which relates to domestic crimes under Article 15(1) of the Law, does not include this latter requirement when determining a sentencing range for domestic crimes.

97. Given the above, and the fact that Mr Mustafa was found guilty of and sentenced for war crimes under customary international law in accordance with Article 14 of the Law, the 1976 SFRY Criminal Code and any amendments thereto are not applicable when considering the sentencing ranges to be taken into account, in accordance with Article 44(2)(a) and (b) of the Law.¹⁵⁰

¹⁴⁹ Trial Judgment, para. 831; Appeal Judgment, para. 484.

¹⁵⁰ In any event, Article 142 of the 1976 SFRY Criminal Code provided, at its highest, for the death penalty. Accordingly, this Article would not be considered the *lex mitior*.

98. For this reason, the ECtHR case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, on which Mr Mustafa relies, is not instructive for this case because it is based on the 1976 SFRY Criminal Code, as amended by UNMIK Regulation 1999/24, which is not applicable in Mr Mustafa's case.¹⁵¹

99. The Panel now turns to the determination of the specific sentencing range in the case of Mr Mustafa. The Panel notes that customary international law does not provide for any specific sentencing ranges for war crimes.¹⁵² It follows that the Specialist Chambers should look to Kosovo laws that most closely reflect the international crimes set forth in Article 14 of the Law. To that end, the Panel will review the relevant Kosovo Criminal Codes which correspond most closely to war crimes under customary international law as set forth in Article 14(1)(c) of the Law, to determine the more lenient sentencing range.

100. The Panel considered the following relevant Kosovo Criminal Codes: (i) Article 120(1) of the 2003 Kosovo Provisional Criminal Code (setting out, when read together with Articles 37(2) of the same Code, a sentencing range of five to 40 years of imprisonment, but no life-long imprisonment); (ii) Article 152(1) of the 2012 Kosovo Criminal Code (setting out, when read together with Article 45(1) of the same Code, a sentencing range of five to 25 years or life-long imprisonment; and (iii) Article 146(1) of the 2019 Kosovo Criminal Code (setting out, when read together with Article 42(1)-(2) of the same Code, a sentencing range of five to 25 years or life-long imprisonment, the latter of which can also be replaced by up to 35 years of imprisonment).¹⁵³

101. Having carefully reviewed the subsequent Kosovo Criminal Codes, the Panel finds that the sentencing range in Article 120(1) of the 2003 Kosovo Provisional Criminal Code is, in the abstract, the lowest (five to 40 years), because it does not

¹⁵¹ See ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, nos. 2312/08 and 34179/08, Judgment, 18 July 2013. See also Request, para. 40.

¹⁵² Cf. Appeal Judgment, para. 478.

¹⁵³ See also Appeal Judgment, fn. 1292.

provide for life-long imprisonment. By contrast, the 2012 and 2019 Codes provide lower ranges for sentences (five to 25 years) but, at their highest, include a possibility of life-long imprisonment. The Panel notes that Mr Mustafa has been sentenced to 22 years of imprisonment,¹⁵⁴ i.e. not to life-long imprisonment.

102. Upon comparison with the 2003 Kosovo Provisional Criminal Code, which provides at its highest 40 years of imprisonment, the 2019 Kosovo Criminal Code includes the more lenient sentencing range of five to 25 years.¹⁵⁵ Accordingly, Article 146(1) in conjunction with Article 42(1)-(2) of the 2019 Kosovo Criminal Code sets forth in Mr Mustafa's case the most lenient sentencing range in compliance with the *lex mitior*. The Panel therefore finds that the more lenient sentencing range to be taken into account in Mr Mustafa's case in accordance with Article 44(2)(b) of the Law and Article 146(1) in conjunction with Articles 42(1) of the 2019 Kosovo Criminal Code is five to 25 years of imprisonment.

103. The Panel now turns to the Appeals Panel's decision to reduce Mr Mustafa's sentence by four years (Ground 3). The Panel observes that the Appeals Panel found that both international and domestic jurisprudence "imposed shorter sentences than those imposed [by the Trial Panel] on [Mr] Mustafa".¹⁵⁶ The Appeals Panel determined that the Trial Panel "ventured outside of its discretionary bounds by imposing sentences on [Mr] Mustafa which are out of reasonable proportion with a line of sentences imposed in similar circumstances for similar offences".¹⁵⁷ However, the Appeals Panel did not explain how it arrived at a reduction of four years in relation to Mr Mustafa's sentence.¹⁵⁸ Because no sentencing range was determined, it is

¹⁵⁴ Appeal Judgment, para. 480.

¹⁵⁵ The Panel observes that the 2012 Kosovo Criminal Code includes the same sentencing ranges as provided for in the 2019 Kosovo Criminal Code. In line with the purpose of Article 64 of the Law, the Panel will look toward the "successor legislation" governing the same subject matter, namely the 2019 Kosovo Criminal Code.

¹⁵⁶ Appeal Judgment, para. 479.

¹⁵⁷ Appeal Judgment, para. 479.

¹⁵⁸ See Appeal Judgment, paras 476-480.

impossible to know the maximum sentence the Appeals Panel had in mind.

104. The Panel notes in this respect that the Appeals Panel analysed and compared international jurisprudence with the circumstances of Mr Mustafa's case, specifically the scope of the cases, crime base, modes of liabilities, and number of victims.¹⁵⁹ The Panel recalls that Article 3(3) of the Law provides that Judges may consider, *inter alia*, sources such as the jurisprudence from the international tribunals and courts, in their determination of customary international law at the time the crimes were committed. The Panel agrees with the finding of the Appeals Panel that there is a "disparity between [Mr] Mustafa's sentences and those sentences [the Trial Panel] has analysed".¹⁶⁰

105. The Panel also considered cases that are akin to Mr Mustafa's case in terms of the scope, underlying crimes charged and number of victims, and in which sentences significantly less than 22 years were imposed.¹⁶¹ To that end, the Panel further shares the view of the Appeals Panel that the individual sentences handed down for

¹⁵⁹ See Appeal Judgment, fn. 1292. The Panel notes the Appeals Panel's finding that the Kosovo jurisprudence it had analysed showed that there is a disparity between the sentences handed down in those cases compared to the single sentence imposed on Mr Mustafa by the Trial Panel. See Appeal Judgment, para. 479; Trial Judgment, para. 829. The Panel recalls, however, that the Kosovo cases concern convictions for crimes under the 1976 SFRY Criminal Code. The Panel also recalls the international nature of the crimes set forth in Article 14(1)(c) of the Law and the inapplicability of this Code.

¹⁶⁰ Appeal Judgment, para. 479.

¹⁶¹ See ICTY, *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, IT-04-82-T, Trial Judgment, 10 July 2008 (Mr Tarčulovski was sentenced to 12 years for having ordered, planned and instigated the murder of three persons, the wanton destruction of the houses or other property of twelve ethnic Albanian residents and the cruel treatment of 23 persons), para. 608; *Prosecutor v. Dragan Zelenović*, IT-96-23/2-S, Sentencing Judgment, 4 April 2007, (Mr Zelenović was sentenced to 15 years for torture and rape of multiple victims as a crime against humanity), para. 70; *Prosecutor v. Ivica Rajić*, IT-95-12-S, Sentencing Judgment, 8 May 2006 (Mr Rajić was sentenced to 12 years for wilful killing, inhumane treatment, appropriation of property, extensive destruction not justified by military necessity and carried out unlawfully and wantonly as grave breaches of the Geneva Conventions), para. 184; *Prosecutor v. Fatmir Limaj et al.*, IT-03-66-T, Trial Judgment, 30 November 2005 (Mr Bala was sentenced to 13 years for having personally participated in the murder of nine prisoners at a prison camp), para. 742; *Prosecutor v. Mitar Vasiljević*, IT-98-32-A, Appeal Judgment, 25 February 2004 (Mr Vasiljević was sentenced to 15 years of imprisonment for an aiding and abetting murder as a war crime as well as persecution and a crime against humanity (murder and inhumane acts) of five men), para. 182.

Mr Mustafa by the Trial Panel, in particular for torture and murder, are “outside of the Trial Panel discretionary bounds by imposing sentences on [Mr] Mustafa which are out of reasonable proportion with a line of sentences imposed in similar circumstances for similar offences”.¹⁶²

106. The Panel acknowledges that the 22-year sentence imposed by the Appeals Panel is within the identified sentencing range of five to 25 years, and that the underlying panels have broad discretion in determining a sentence of imprisonment. The Panel is further mindful that the lower Panels are not required to apply the identified sentencing range, but shall take it into account. Indeed, other factors, including consideration of Article 44(2)(c) of the Law and the particular circumstances of the case will also form part of a panel’s determination on the appropriate sentence of imprisonment.

107. However, the Panel considers that the Appeals Panel may have come to a different determination on Mr Mustafa’s sentence if it would have had identified the correct sentencing range to be taken into account, which, at its highest, provides for 25 years of imprisonment.¹⁶³

108. In view of the above, the Panel therefore grants Mr Mustafa’s Grounds 1 and 3 of the Request. The Panel finds that the Appeals Panel violated the criminal law by failing to: (i) identify the relevant Kosovo law in accordance with Article 44(2)(b) of the Law and as required by the principle of *lex mitior*; (ii) identify the applicable sentencing range and (iii) properly reason how it arrived at reducing Mr Mustafa’s sentence by four years.

109. According to Rule 194(1) of the Rules, “[w]here the Supreme Court Panel grants a request for protection of legality, depending on the nature of the violation, it shall: (a) modify the impugned decision or judgment; (b) annul in whole or in part the

¹⁶² See Appeal Judgment, para. 479.

¹⁶³ See *supra*, para. 102.

impugned decision or judgment and return the case for a new decision [...] to the competent Panel; or (c) confine itself only to establishing the existence of a violation of law”.

110. The Panel recalls that Rule 163 of the Rules requires that a wide range of factors be considered when determining a sentence. With this in mind, the Panel finds that the Appeals Panel is best placed to determine an appropriate sentence for Mr Mustafa, as it has previously considered the record of the case in detail and analysed Mr Mustafa’s grounds of appeal in this respect. The Panel therefore annuls the Appeal Judgment only insofar as it relates to Mr Mustafa’s sentence pursuant to Rule 194(1)(b) of the Rules, and returns the Appeal Judgment to the Appeals Panel for a new determination thereon. The Panel is of the view that the Appeals Panel should be given an opportunity to reassess whether the 22 years imprisonment of Mr Mustafa’s sentence is still reasonable in light of the sentencing range identified and the jurisprudence analysed.

111. In its new assessment of Mr Mustafa’s sentence, the Appeals Panel should be guided by: (i) Rule 163 of the Rules; (ii) the sentencing range of five to 25 years identified by this Panel in Mr Mustafa’s case; (iii) the sentencing factors identified by the Appeals Panel;¹⁶⁴ (iv) the jurisprudence analysed by the Appeals Panel and by this Panel;¹⁶⁵ and (v) the specific circumstances of Mr Mustafa’s case.

VI. DISPOSITION

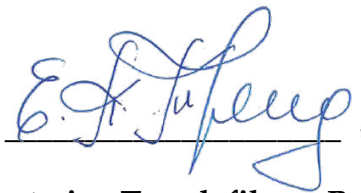
112. For these reasons, the Supreme Court Panel hereby:

- a) **REJECTS** Ground 2 and 5;
- b) **SUMMARILY DISMISSES** Ground 4;

¹⁶⁴ Appeal Judgment, para. 478.

¹⁶⁵ See *supra*, paras 104-105 and fn. 161.

- c) **GRANTS** Grounds 1 and 3;
- d) **ANNULS** the Appeal Judgment only insofar as it relates to Mr Mustafa's sentence;
- e) **RETURNS** the Appeal Judgment to the Appeals Panel for a new determination of Mr Mustafa's sentence pursuant to Rule 194(1)(b) of the Rules; and
- f) **ORDERS** the continued detention of Mr Mustafa while a new determination of his sentence is considered by the Court of Appeals Panel.



Judge Ekaterina Trendafilova, Presiding

Dated this Monday, 29 July 2024

At The Hague, the Netherlands