



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

**In:** KSC-SC-2024-02  
**Specialist Prosecutor v. Salih Mustafa**

**Before:** A Panel of the Supreme Court Chamber  
Judge Ekaterina Trendafilova, Presiding  
Judge Christine van den Wyngaert  
Judge Daniel Fransen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 15 April 2024

**Language:** English

**Classification:** Public

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**Prosecution response to request for protection of legality  
with one public annex**

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## I. INTRODUCTION

1. MUSTAFA's Request for Protection of Legality<sup>1</sup> ('Request') is an inadmissible attempt to appeal at third instance against the final Judgment of the Appeals Panel.<sup>2</sup> Protection of legality requests are carefully circumscribed in the Law<sup>3</sup> and Rules,<sup>4</sup> and MUSTAFA's arguments falling outside these parameters warrant summary dismissal. To the extent MUSTAFA raises admissible challenges, he also fails to establish any violation referred to in Article 48(7) or (8) requiring protection of legality vis-à-vis the Trial Judgment<sup>5</sup> or Appeal Judgment.

## II. PROCEDURAL HISTORY

2. On 16 December 2022, the Trial Panel rendered its Judgment, convicting MUSTAFA of arbitrary detention, torture, and murder as war crimes, and sentenced him to 26 years of imprisonment.<sup>6</sup> By its Reparation Order of 6 April 2023, the Trial Panel ordered MUSTAFA to pay compensation to the victims totalling 207,000 Euro.<sup>7</sup>

3. On 14 December 2023, the Appeals Panel unanimously upheld MUSTAFA's convictions, while reducing his sentence to 22 years of imprisonment.<sup>8</sup>

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<sup>1</sup> 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, KSC-SC-2024-02/F00011, 14 March 2024.

<sup>2</sup> Public Redacted Version of Appeal Judgment, KSC-CA-2023-02/F00038/RED, 14 December 2023 ('Appeal Judgment').

<sup>3</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all subsequent references to 'Article' or 'Articles' are to the Law.

<sup>4</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all subsequent references to 'Rule' or 'Rules' are to the Rules.

<sup>5</sup> Further redacted version of Corrected version of Public redacted version of Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, 16 December 2022 ('Trial Judgment').

<sup>6</sup> Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, para.831.

<sup>7</sup> Corrected Version of Public Redacted Version of Reparation Order against Salih Mustafa with 4 Annexes Strictly Confidential and *Ex Parte*, KSC-BC-2020-05/F00517/RED/COR, 6 April 2023, para.283(e).

<sup>8</sup> Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.484.

4. On 14 March 2024, MUSTAFA filed the Request, where he alleges various violations of substantive and procedural law,<sup>9</sup> and seeks to reverse the convictions and enter acquittals for all counts or, in the alternative, to annul the judgment and return the case for retrial, or to reduce the sentence.<sup>10</sup>

### III. STANDARD OF REVIEW

5. The Supreme Court Panel in *Gucati and Haradinaj*<sup>11</sup> and in *Thaçi et al.*<sup>12</sup> set out the standard of review and general considerations applicable to protection of legality proceedings before the Kosovo Specialist Chambers ('SC').

6. This extraordinary remedy is not intended to create another, general avenue of appeal,<sup>13</sup> and does not constitute the third instance appeal, referred to in Article 47.<sup>14</sup> Only certain violations of criminal law,<sup>15</sup> substantial violations of procedure,<sup>16</sup> or violations of the applicable rights protected by the Kosovo Constitution or the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'),<sup>17</sup> render a request admissible and effective.<sup>18</sup> Violations of procedure must be substantial, be

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<sup>9</sup> See Request, KSC-SC-2024-02/F00011, Grounds 1-5.

<sup>10</sup> See Request, KSC-SC-2024-02/F00011, para.117.

<sup>11</sup> *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Requests for Protection of Legality, KSC-SC-2023-01/F00021, 18 September 2023 ('Gucati & Haradinaj Decision'), paras 9-21.

<sup>12</sup> *Specialist Prosecutor v. Thaçi et al.*, Decision on Kadri Veseli's Request for Protection of Legality, KSC-BC-2020-06/PL001/F00008, 15 August 2022 ('Veseli Decision'), paras 20-28.

<sup>13</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para.9; Veseli Decision, KSC-BC-2020-06/PL001/F00008, para.21. See also Kosovo Supreme Court, *Case of A.B.*, PKL-KZZ-137/2011, 13 April 2012, p.7; Kosovo Supreme Court, *Case of ZK*, PML 125/2014, 8 July 2014, Section III, para.f.

<sup>14</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para.7.

<sup>15</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para 17.

<sup>16</sup> Veseli Decision, KSC-BC-2020-06/PL001/F00008, paras 23-24; Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, paras 13-14.

<sup>17</sup> Council of Europe Treaty Series 005, Council of Europe, 4 November 1950.

<sup>18</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para.18.

capable of materially affecting the impugned judgment,<sup>19</sup> and should be assessed on a case-by-case basis.<sup>20</sup>

7. Alleged violations of the criminal law do not need to be ‘substantial’; however, they must remain strictly within the ambit of instances exhaustively enumerated in Article 385(1) of the Kosovo Criminal Procedure Code (‘CPC’).<sup>21</sup>

8. Protection of legality requests cannot be filed based on an erroneous or incomplete determination of the facts of the case,<sup>22</sup> including disguised attempts to relitigate the facts.<sup>23</sup>

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<sup>19</sup> Veseli Decision, KSC-BC-2020-06/PL001/F00008, para.24; Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, paras 14, 19.

<sup>20</sup> Veseli Decision, KSC-BC-2020-06/PL001/F00008, paras 23-24; Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para.14.

<sup>21</sup> Such violations include instances 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 served sentence related to the criminal offence subject to the criminal proceedings. *See* Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para.17.

<sup>22</sup> Rule 193(3); *See also* Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, paras 10, 112. *See also* Kosovo Supreme Court, *Case of N.M. et al.*, Pml.Kzz 8/2015, 18 February 2015, para.4.2; Kosovo Supreme Court, *Case of ZK*, PML 125/2014, 8 July 2014, Section III, para.e.

<sup>23</sup> Kosovo Supreme Court, *Case of A.B.*, PKL-KZZ-137/2011, 13 April 2012, p.7; Kosovo Supreme Court, *Case of N.M. et al.*, Pml.Kzz 8/2015, 18 February 2015, para.4.2.

9. Alleged violations must be clearly identified in the request.<sup>24</sup> Parties must present substantively relevant and sufficiently reasoned arguments; mere disagreement with the first and second instance judgements, or repetition of prior submissions are insufficient.<sup>25</sup>

10. Where a request is formally deficient, or where no violation has been demonstrated, the Supreme Court is entitled to dismiss it and need not repeat or rehearse findings of lower courts.<sup>26</sup>

#### IV. SUBMISSIONS

##### A. GROUND 1

11. Ground 1<sup>27</sup> is predicated on MUSTAFA's false claim that Article 44(2) imports Kosovo law as a binding source of law. As consistently held,<sup>28</sup> and apparently accepted by MUSTAFA,<sup>29</sup> the principle of *lex mitior* enshrined in Article 44(2) only applies to laws that bind the SC. The law applicable to the charges for which MUSTAFA has been convicted is customary international law, as the Appeals Panel unambiguously demonstrated.<sup>30</sup> MUSTAFA does not meaningfully challenge this, but argues that subsections (a) and (b) of Article 44(2) incorporate sentencing ranges under Kosovo law as a binding source of law.

12. However, a plain reading of the words 'shall take into account' in Article 44(2) is incompatible with MUSTAFA's assertion that a panel of the SC sentencing an offender

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<sup>24</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, paras 10, 19.

<sup>25</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, paras 10, 19; Veseli Decision, KSC-BC-2020-06/PL001/F00008, para.25; Kosovo Supreme Court, *Case of N.V. et al.*, Pml.Kzz 178/2016, 19 December 2016, para.68.

<sup>26</sup> See e.g. Kosovo Supreme Court, *Case of ZK*, PML 125/2014, 8 July 2014, Section III, para.h.

<sup>27</sup> Request, KSC-SC-2024-02/F00011, paras 23-49.

<sup>28</sup> Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, para.780; Appeal Judgment, KSC-CA-2023-02/F00038/RED, paras 465-466.

<sup>29</sup> Request, KSC-SC-2024-02/F00011, paras 34, 41.

<sup>30</sup> Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.469; see also Article 3(4) of the Law.

for an international crime is bound by the sentencing range for the crime under Kosovo Law.<sup>31</sup>

13. The provision's context further dispels any doubt that the words 'take into account' must be given their plain, ordinary meaning. Article 44(2)(c), which immediately follows the sub-sections on which MUSTAFA relies, states that:

...the Specialist Chambers shall take into account [...] the extent to which the punishment of any act or omission which was criminal according to general principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2 (a) and (b).

14. If paragraphs 2(a) and (b) created a binding obligation to apply domestic sentencing ranges, as MUSTAFA argues, then the above section would have no meaning since the responsible panel would have no discretion to which this consideration could apply.<sup>32</sup> In addition, MUSTAFA's dubious interpretation would strip Article 44(1), which explicitly legislates the maximum sentence of life imprisonment, of all meaning. As noted by the Trial and Appeals Panels, the unambiguous incorporation of Kosovo sentencing law in Article 44(4) demonstrates that – in contrast – Article 44(2) is not intended to 'bind the Trial Panel to *apply* domestic law on sentencing ranges'.<sup>33</sup>

15. MUSTAFA irrelevantly submits that the *lex mitior* principle is guaranteed under the Kosovo Constitution and the European Convention of Human Rights.<sup>34</sup> None of the provisions or authorities cited in the Request contradict the Appeals Panel's central ruling

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<sup>31</sup> See also Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.466.

<sup>32</sup> See also Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.466: '[...] the Trial Panel's obligation to take into account these domestic sources of law is further tempered by the need to consider whether doing so would prejudice the extent of punishment under general principles of law recognised by civilised nations'.

<sup>33</sup> Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.466 (emphasis in original); Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, fn.27.

<sup>34</sup> Request, KSC-SC-2024-02/F00011, paras 34, 41, 43, 47.

that *lex mitior* only applies to binding laws.<sup>35</sup> In light of the Appeals Panel's explicit acknowledgement that *lex mitior* generally applies in SC proceedings, albeit only to binding laws, these references add nothing to ground 1.

16. MUSTAFA's submissions claiming infringement of the *nulla poena sine lege* principle should be summarily dismissed as unsubstantiated, since MUSTAFA fails to explain why the application of customary international law results in punishment without law.<sup>36</sup>

17. Finally, MUSTAFA misrepresents the Appeal Judgment in certain respects. For instance, MUSTAFA contends that the Appeals Panel's understanding of the *lex mitior* principle is 'too limited and therefore wrong', as it focuses only on the criminal offence, overlooking punishment.<sup>37</sup> The paragraph quoted by MUSTAFA makes it clear that the Appeals Panel analysed the *lex mitior* principle in the context of sentencing.<sup>38</sup> Likewise, MUSTAFA misleadingly complains that the Appeals Panel characterised the SC as an international tribunal rather than a domestic court of Kosovo.<sup>39</sup> The challenged reference to international tribunals is taken from a direct quote from an ICTY appeals judgment.<sup>40</sup>

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<sup>35</sup> Request, KSC-SC-2024-02/F00011, paras 34, , 37, 40, 45, citing: ECtHR, *Scopolla v. Italy (No.2)*, Grand Chamber, 10249/03, Judgment, 17 September 2009; *Maktouf and Damjanović v. Bosnia and Herzegovina*, Grand Chamber, 2312/08 and 31479/08, Judgment, 18 July 2013; *Kokkinakis v. Greece*, Chamber, 14307/88, Judgment, 25 May 1993; *Ecer and Zeyrek v. Turkey*, First Section, 29295/92 and 29363/95, Judgment, 27 May 2001; Kosovo Supreme Court, *Case of Goran Stanisić*, PML 26/2023, 20 March 2023; Kosovo Constitutional Court, *Case of Darko Tasić*, KI210/21, 31 March 2022.

<sup>36</sup> Request, KSC-SC-2024-02/F00011, paras 44-45.

<sup>37</sup> Request, KSC-SC-2024-02/F00011, paras 25-26.

<sup>38</sup> Request, KSC-SC-2024-02/F00011, para.24, quoting Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.465.

<sup>39</sup> Request, KSC-SC-2024-02/F00011, paras 29-31.

<sup>40</sup> Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.465.

18. For these reasons, ground 1 should be rejected.

B. GROUND 2

19. Under ground 2,<sup>41</sup> MUSTAFA largely repeats submissions raised under the first ground, but additionally argues that the Appeals Panel erred by referring to sentencing ranges under Kosovo law as ‘factors’.<sup>42</sup> Even if MUSTAFA’s semantic complaint had merit, that alone could not change the Appeals Panel’s determination that sentencing ranges under Kosovo law are not binding. In particular, MUSTAFA’s argument that ‘Kosovo Law cannot be viewed as a factor that would be applied on a random basis’ ignores that Article 44(2) requires a panel to ‘consider’, rather than ‘apply’, sentencing ranges under Kosovo Law.<sup>43</sup>

20. Furthermore, MUSTAFA’s submission that jurisprudence from international tribunals ‘has little to no effect’ because the SC is a domestic court of Kosovo stands in direct contradiction to Articles 3 and 14.<sup>44</sup>

21. MUSTAFA’s remaining submissions, for the reasons detailed above,<sup>45</sup> fail to show any error in the Appeals Panel’s plain reading of Article 44(2) in the context of the SC’s legal framework.

22. Ground 2 should therefore be summarily dismissed as unsubstantiated.

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<sup>41</sup> Request, KSC-SC-2024-02/F00011, paras 50-66.

<sup>42</sup> Request, KSC-SC-2024-02/F00011, paras 50-55.

<sup>43</sup> Request, KSC-SC-2024-02/F00011, para.55.

<sup>44</sup> Request, KSC-SC-2024-02/F00011, para.60.

<sup>45</sup> See paras 11-15 above.



### C. GROUND 3

23. Under ground 3,<sup>46</sup> MUSTAFA raises two related but separate grievances.

24. First, MUSTAFA claims that the Appeals Panel failed to take sentencing ranges under Kosovo law into account, without substantiating this assertion with coherent, intelligible submissions.<sup>47</sup> In particular, MUSTAFA fails to explain what additional information – beyond legislated sentencing ranges and relevant jurisprudence – the Appeals Panel ought to have taken into account.<sup>48</sup>

25. Second, MUSTAFA takes issue with the Appeals Panel's analysis of comparable cases, which guided its review of the sentence imposed by the Trial Panel.<sup>49</sup> MUSTAFA submits that the Appeals Panel should have followed certain Kosovo cases identified *proprio motu* by the Appeals Panel, as they 'tend to better relate to the case of Mustafa'.<sup>50</sup> In addition, MUSTAFA refers to twelve additional cases,<sup>51</sup> ostensibly to establish that the Appeals Panel's analysis was insufficient. These submissions are inadmissible because they concern the assessments of factors to be taken into consideration for sentence, which are factual in nature and thus beyond the scope of a request for protection of legality.<sup>52</sup>

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<sup>46</sup> Request, KSC-SC-2024-02/F00011, paras 67-87.

<sup>47</sup> Request, KSC-SC-2024-02/F00011, paras 69, 77-80, 82. MUSTAFA illogically asserts that the Appeals Panel failed to take into account relevant factors, before conceding that one of those factors is indeed relevant, 'though based on caselaw'.

<sup>48</sup> See Request, KSC-SC-2024-02/F00011, paras 78-79.

<sup>49</sup> Request, KSC-SC-2024-02/F00011, paras 69-81.

<sup>50</sup> Request, KSC-SC-2024-02/F00011, para.76.

<sup>51</sup> Request, KSC-SC-2024-02/F00011, para.81; KSC-SC-2024-02/F00011/A01.

<sup>52</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para.111; Veseli Decision, KSC-BC-2020-06/PL001/F0008, para.48.

26. In addition, MUSTAFA failed to make any relevant submissions on these – or other – comparable cases during the trial or appeals proceedings,<sup>53</sup> despite an express invitation to do so,<sup>54</sup> so his *de novo* submissions to the Supreme Court Panel should be summarily dismissed.<sup>55</sup>

27. In any event, MUSTAFA expresses mere disagreement with the Appeals Panel's conclusions without identifying any clear violation of law.

#### D. GROUND 4

28. Ground 4<sup>56</sup> alleges erroneous or incomplete determination of the facts, which is beyond the competence of the Supreme Court Panel and thus inadmissible.<sup>57</sup>

29. Although MUSTAFA also alleges that the Trial and Appeal Judgments were insufficiently reasoned, he does so merely as a vehicle for his factual disagreements. For instance, MUSTAFA claims that the risk to the life of the murder victim 'has not been supported by any evidence, not by any reasoning'; and that it is 'an unsupported, assumption and without any reasoning'.<sup>58</sup>

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<sup>53</sup> While MUSTAFA referred to two of these cases during the appeals proceeding, he did so only in the context of his submission that the CCSFRY imposes a maximum sentence of 15 years for the charged offences in this case. *See* Second Further Public Redacted Version of Corrected Version of Defense Appeal Brief pursuant to Rule 179(1) of Rules of Procedure and Evidence ("Rules") with confidential Annex 1, 2 and 3, KSC-CA-2023-02/F00021/COR/RED3, 2 May 2023, paras 414, 428; Appeal Hearing, 27 October 2023, pp.143, 148-149, referring to Kosovo Supreme Court, *Case of Goran Stanisić*, PML 26/2023, 16 February 2023 and Kosovo Constitutional Court, *Case of Darko Tasić*, KI210/21, 31 March 2022.

<sup>54</sup> Order for the Preparation of the Appeal Hearing, KSC-CA-2023-02/F00030, 12 October 2023, para.2(iv).

<sup>55</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para.10.

<sup>56</sup> Request, KSC-SC-2024-02/F00011, paras 88-110.

<sup>57</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, paras 10, 111; Veseli Decision, KSC-BC-2020-06/PL001/F00008, paras 21, 25. *See also* Kosovo Supreme Court, *Case of A.B.*, PKL-KZZ-137/2011, 13 April 2012, p.7; Kosovo Supreme Court, *Case of ZK*, PML 125/2014, 8 July 2014, Section III, para.f ('protection of legality cannot be used as an indirect method of further appeal; any such request filed with this purpose 'is a misuse of this remedy').

<sup>58</sup> Request, KSC-SC-2024-02/F00011, para.96. *See similarly* paras 100, 105-106.

30. Moreover, MUSTAFA's submissions about the insufficiency of the Trial Judgment's reasoning in relation to count 4 should be summarily dismissed because he raises a violation of Rules 159(3) and 164(2) for the first time in the Request,<sup>59</sup> when he could have reasonably been expected to have done so before.

31. Even if considered on the merits, MUSTAFA fails to establish a substantial violation of procedure. MUSTAFA posits, without support, that:

A request for protection of legality will be well-founded where the impugned judgment does not give sufficiently clear and consistent reasons or fails to address key evidence. It must be clear from the decision that the essential issues of the case have been addressed and the grounds for the decision indicated with sufficient clarity.<sup>60</sup>

32. Leaving aside the apocryphal nature of this statement of principle, MUSTAFA evidently accepts that the Appeals Panel's obligation to provide a reasoned opinion must be viewed in light of the 'essential issues of the case', which is also consistent with the Appeals Panel's ruling that a Trial Panel must provide 'reasoning in support of its findings on the substantive considerations relevant for a decision'.<sup>61</sup> Moreover, a panel is 'neither required to articulate every step of its reasoning, nor to address all of the arguments raised by the parties or every item of evidence relevant to a particular finding, provided that it indicates with sufficient clarity the basis for its decision'.<sup>62</sup> This standard, applicable to trial panels, is well supported in the jurisprudence of other courts.<sup>63</sup> There is no reason for an appellate panel to bear a higher burden.<sup>64</sup> To the contrary, an appeals

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<sup>59</sup> Request, KSC-SC-2024-02/F00011, para.90.

<sup>60</sup> Request, KSC-SC-2024-02/F00011, para.90.

<sup>61</sup> Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.34.

<sup>62</sup> Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.34.

<sup>63</sup> *Specialist Prosecutor v. Gucati and Haradinaj*, KSC-CA-2022-01/F00114, Appeal Judgment, 2 February 2023, para.33, referring to ICC, *Bemba et al.*, ICC-01/05-01/13-2275-Red, Appeal Judgment, 8 March 2018, para.105. See also ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgment, 16 October 2007, para. 121; *Prosecutor v. Kvočka et al.* IT-98-30/1-A, Appeal Judgment, 28 February 2005, para.23.

<sup>64</sup> C.f. Kosovo Supreme Court, Pkl.Kzz 97/2010, Judgment, 1 February 2011, p.12.

panel's duty to provide a reasoned opinion must be even more confined to the discrete issues raised in an appeal, and any violation warranting protection of legality must be substantial.<sup>65</sup>

33. Next, MUSTAFA fails to clearly identify and substantiate any substantial procedural violation, or demonstrate how it materially affected the impugned judgment.<sup>66</sup> Instead, MUSTAFA refers to a plethora of legal and factual issues in relation to which he claims deficient reasoning,<sup>67</sup> without contextualising these to the issues in the appeal or explaining how the alleged deficiencies violated his rights 'in a manner which has influenced the rendering of a lawful and fair decision'.<sup>68</sup>

34. In any event, the matters raised are sufficiently addressed in the Appeal Judgment, including: (i) the foreseeability of the risk to the murder victim posed by the advancing Serbian forces;<sup>69</sup> and (ii) the original sphere of risk created by MUSTAFA.<sup>70</sup> The remaining gaps in the Appeals Panel's reasoning alleged by MUSTAFA concern questions of fact about which there is no evidence on the trial record, such as the precise 'point in time the Serbian forces actually advanced to the location where the murder victim was located'.<sup>71</sup> MUSTAFA's real challenges are to the Trial and Appeals Panel's inferences from

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<sup>65</sup> See Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para.14.

<sup>66</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para.19; ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgement, 30 June 2016, para. 18; IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019, para. 15; Kosovo Supreme Court, *Case of N.V. et al.*, Plm.Kzz 178/2016, Judgment, 19 December 2016, paras 67- 68.

<sup>67</sup> Request, KSC-SC-2024-02/F00011, paras 96-106.

<sup>68</sup> Gucati & Haradinaj Decision, KSC-SC-2023-01/F00021, para.14.

<sup>69</sup> Request, KSC-SC-2024-02/F00011, paras 95-99; Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.348.

<sup>70</sup> Request, KSC-SC-2024-02/F00011, paras 95, 100, 103-105; Appeal Judgment, KSC-CA-2023-02/F00038/RED, paras 347-348.

<sup>71</sup> Request, KSC-SC-2024-02/F00011, para.97.

circumstantial evidence, which are matters of fact and inadmissible in the present proceeding.<sup>72</sup>

35. Finally, MUSTAFA's submissions alleging a separate violation of Article 14(1)(c) are undeveloped, unsupported, and equivocal with respect to the type of error alleged.<sup>73</sup> These submissions, which appear to be entirely factual, fail at the admissibility threshold and should thus be summarily dismissed.

#### E. GROUND 5

36. Ground 5 fails because MUSTAFA fails to establish any violation of procedure,<sup>74</sup> let alone a substantial violation that could materially impact the Appeal Judgment. In this respect, MUSTAFA requests that the Supreme Court grant this ground and apply Rule 194, focusing on events that followed the Appeal Judgment. However, relief under Rule 194 is only available against final rulings or judgments;<sup>75</sup> not interlocutory matters in the context of these Article 48(6) proceedings. As the request has no legal basis, it should be summarily dismissed.

37. In any event, Ground 5 is undeveloped and without merit. The Appeal Judgment was issued in English, the working language of the appeal proceedings.<sup>76</sup> A draft version of the Albanian translation of the Appeal Judgment has been available to MUSTAFA

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<sup>72</sup> Request, KSC-SC-2024-02/F00011, paras 97-98; Trial Judgment, KSC-BC-2020-05/F00494/RED3/COR, paras 634, 637; Appeal Judgment, KSC-CA-2023-02/F00038/RED, para.345.

<sup>73</sup> Request, KSC-SC-2024-02/F00011, paras 107-108: 'The Defence submits that expose (sic) a person to further undefined risk, cannot amount to murder, or to attribute the death of a person as murder to the Accused. It can equally not satisfy the necessary actus reus of murder. The Defence submits that murder could not be established, and neither could murder be attributed in a case like the case at hand. It is therefore a violation of the (sic) Article 14(1)(c) of the Law.'

<sup>74</sup> Request, KSC-SC-2024-02/F00011, paras 111-116.

<sup>75</sup> Article 48(6) (also providing that requests for protection of legality may be filed against final decisions ordering or extending detention).

<sup>76</sup> Decision on Working Language, KSC-CA-2023-02/F00003, 9 January 2023.

since 12 February 2024, well before the time limit for filing the Request. In accordance with Article 21(4)(g), MUSTAFA has had the additional benefit of the assistance of an interpreter to confirm the accuracy of any pertinent passages of the draft translation.<sup>77</sup> The final Albanian version was uploaded to Legal Workflow on 2 April 2024.

38. MUSTAFA, who generally has a right to receive the Appeal Judgment in a language he understands,<sup>78</sup> received a draft Albanian version more than a month before filing the Request. He has not requested any relief since receiving that version, or indeed, since the final version was notified, and has not demonstrated any concrete prejudice.<sup>79</sup> Protection of legality requests are exclusively focused on legal issues,<sup>80</sup> which primarily fall within the purview of Defence Counsel, who is fully able, with language assistance, to discuss the Appeal Judgment and the subject and contents of any potential legality request.<sup>81</sup>

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<sup>77</sup> See, similarly, in the context of notices of appeal, *Specialist Prosecutor v. Gucati and Haradinaj*, Decision on Haradinaj's Request for Clarification on Appeal Timescale, KSC-CA-2022-01/F00005, 25 May 2022 ('Gucati and Haradinaj Appeal Timescale Decision'), para.4 ('Counsel are already in a position to discuss the content of the Trial Judgment with the Accused and to advise him as to potential rounds of appeal.').

<sup>78</sup> Rule 8(4); see similarly Decision on Defence Motion for Variation of Time Limit to File Notice of Appeal, KSC-CA-2023-02/F00004, 9 January 2023 ('Appeal Time Limit Decision'), para.3; Gucati and Haradinaj Appeal Timescale Decision, KSC-CA-2022-01/F00005, para.6; ICC, *Prosecutor v. Ongwen*, Decision on the Defence request for extension of time limit for the filing of the notice of appeal and the appeal brief, ICC-02/04-01/15 A2, 2 June 2021, para.8.

<sup>79</sup> Even if (as held in the Decision on the Request for an Extension of Time, KSC-SC-2024-02/F00009, 25 January 2024, para.12), the time limit for filing the Request could not be varied, MUSTAFA could still seek leave to make additional submissions, if justified and upon a showing of concrete prejudice.

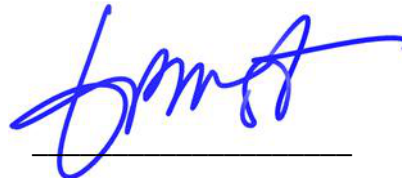
<sup>80</sup> Even during the first instance appeal, where many of the grounds of appeal concerned factual findings for which MUSTAFA could provide meaningful instructions and MUSTAFA had access to a draft version of the Trial Judgment, MUSTAFA filed his appeal brief less than one week after the final Albanian translation was made available: the final Albanian translation of the Trial Judgment was uploaded to Legal Workflow on 17 April 2023, and MUSTAFA filed his Appeal Brief on 22 April 2023.

<sup>81</sup> See, similarly, in the context of notices of appeal, Gucati and Haradinaj Appeal Timescale Decision, KSC-CA-2022-01/F00005, para.4 (and authorities cited therein); Appeal Time Limit Decision, KSC-CA-2023-02/F00004, para.3 (finding that the fairness of the proceedings was not negatively affected by the unavailability of the Albanian translation of the trial judgment prior to the filing of the notice of appeal); ICTY, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2, Decision on motions to extend time for filing Appellant's Briefs, 11 May 2001, paras 17-18; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Motions for Extension of Time for the Filing of Appeal Submissions, 22 July 2011, para.11.

V. RELIEF SOUGHT

39. For the foregoing reasons, the SPO requests the Supreme Court Panel to reject the relief sought in the Request.

**Word count: 4053**



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**Kimberly P. West**

**Specialist Prosecutor**

Monday, 15 April 2024

At The Hague, the Netherlands.