



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

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

Registrar: Fidelma Donlon

Date: **10 September 2024**

Original language: English

Classification: **Public**

Decision on New Determination of Salih Mustafa's Sentence

Specialist Prosecutor's Office:
Kimberly P. West

Counsel for Salih Mustafa:
Julius von Bóné

Counsel for Victims:
Anni Pues

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel”, “Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rules 172 and 194(1)(b) of the Rules of Procedure and Evidence (“Rules”), and further to the “Decision on Salih Mustafa’s Request for Protection of Legality” (“Supreme Court Decision”) issued on 29 July 2024 by the Panel of the Supreme Court Chamber (“Supreme Court Panel”),² hereby issues a new determination of the sentence of Mr Salih Mustafa (“Mustafa”).

I. BACKGROUND

1. On 16 December 2022, Trial Panel I delivered its judgment (“Trial Judgment”) convicting Mustafa, commander of the BIA,³ of having committed: (i) as part of a joint criminal enterprise I (“JCE I”),⁴ the war crime of arbitrary detention against at least six persons between approximately 1 April 1999 and on or around 19 April 1999 at a compound in Zllash/Zlaš, Kosovo (“ZDC”) (Count 1); (ii) directly and as part of a JCE I, the war crime of torture against at least six persons during the same timeframe and at the same location (Count 3); and (iii) as part of a JCE I, the war crime of murder against one person between on or around 19 April 1999 and around the end of April 1999 at the ZDC (Count 4).⁵ The Trial Panel sentenced Mustafa to a single sentence of 26 years of imprisonment, with credit for time served.⁶

¹ F00044, Decision Assigning a Court of Appeals Panel, 31 July 2024.

² KSC-SC-2024-02, F00018, Decision on Salih Mustafa’s Request for Protection of Legality, 29 July 2024 (“Supreme Court Decision”).

³ “BIA” designates the BIA Guerrilla Unit, a unit within the Llap Operational Zone of the Kosovo Liberation Army.

⁴ JCE I designates the basic form of joint criminal enterprise (“JCE”).

⁵ KSC-BC-2020-05, F00494/RED3/COR, Further redacted version of Corrected version of Public redacted version of Trial Judgment, 8 June 2023 (confidential version filed on 16 December 2022) (“Trial Judgment”), paras 758-760, 831. The Trial Panel considered that the charge of the war crime of cruel treatment was “fully consumed” by the charge of the war crime of torture and consequently found Mustafa not guilty of the war crime of cruel treatment (Count 2). See Trial Judgment, paras 667, 831.

⁶ Trial Judgment, paras 829-831.

2. On 2 February 2023, Mustafa filed his notice of appeal against the Trial Judgment,⁷ and on 24 April 2023, his appeal brief,⁸ in which he raised nine grounds of appeal, and requested, *inter alia*, that the Court of Appeals Panel reverse all convictions, or should the Appeals Panel uphold the convictions, reduce the imposed sentence.⁹ On 5 June 2023, Victims' Counsel and the Specialist Prosecutor's Office ("SPO") filed their response briefs,¹⁰ and on 16 June 2023, Mustafa filed his reply.¹¹

3. On 6 April 2023, the Trial Panel issued an order against Mustafa, awarding reparations to eight victims participating in the proceedings ("Reparation Order").¹² Mustafa did not appeal the Reparation Order.

4. On 14 December 2023, the Court of Appeals Panel issued the Appeal Judgment, wherein it affirmed Mustafa's convictions for arbitrary detention, torture and murder as war crimes, but granted his appeal, in part, against his sentence.¹³ To that end, the Court of Appeals Panel reduced the individual sentences that the Trial Panel imposed

⁷ F00006/RED2, Public Redacted Version of Defence Notice of Appeal pursuant to Rule 176 (of Rules of Procedure and Evidence) against the Judgment of the Trial Panel I of 16 December 2022, 13 February 2023 (confidential version filed on 2 February 2023) ("Notice of Appeal").

⁸ F00021/COR/RED3, Second Further Public Redacted Version of Corrected Version of Defense Appeal Brief pursuant to Rule 179(1) of Rules of Procedure and Evidence ("Rules"), 15 September 2023 (uncorrected confidential version filed on 24 April 2023, corrected confidential version filed on 2 May 2023) ("Appeal Brief").

⁹ Notice of Appeal, para. 2; Appeal Brief, paras 3, 446. See also Appeal Brief, paras 323, 341, 367, 378, 390, 400, 438.

¹⁰ F00026/RED3, Second Further Public Redacted Version of Victims' Counsel response to the Defence Appeal Brief F00021, 15 September 2023 (confidential version filed on 5 June 2023); F00027/RED/COR, Corrected version of 'Public redacted version of Prosecution Brief in Response to Defence Appeal', KSC-CA-2023-02/F00027/RED, 23 June 2023 (uncorrected confidential version filed on 5 June 2023, uncorrected public redacted version filed on 21 June 2023) ("SPO Response Brief").

¹¹ F00028/RED, Public Redacted Version of the Defence Brief in Reply to The Prosecutions' Brief in Response to Defence Appeal and Victims' Counsel Response to Defence Appeal Brief F00021 pursuant to Rule 179 (3) of Rules of Procedure and Evidence ("Rules"), 3 July 2023 (confidential version filed on 16 June 2023).

¹² KSC-BC-2020-05, F00517/RED/COR, Corrected version of Public redacted version of Reparation Order against Salih Mustafa, 14 April 2023 (confidential version filed on 6 April 2023) ("Reparation Order").

¹³ F00038/RED, Public Redacted Version of Appeal Judgment, 14 December 2023 (confidential version filed on 14 December 2023) ("Appeal Judgment"), para. 484.

on Mustafa to the following: (i) eight years of imprisonment (previously ten years) for Count 1 (war crime of arbitrary detention committed against at least six persons); 20 years of imprisonment (previously 22 years) for Count 3 (war crime of torture, committed against at least six persons); and (iii) 22 years of imprisonment (previously 25 years) for Count 4 (war crime of murder, committed against one person).¹⁴ The Appeals Panel then lowered Mustafa's single sentence to 22 years of imprisonment, with credit for time served, considering that this reflected the totality of Mustafa's criminal conduct in this case.¹⁵

5. On 14 March 2024, Mustafa filed a request for protection of legality ("Protection of Legality Request"), wherein, under Grounds 1 and 3, he argued that notwithstanding the Appeals Panel's reduction of his sentence, its assessment – including with respect to the principle of *lex mitior* and the applicable sentencing ranges – violated Article 44(2) of the Law and Articles 22, 33(2) and (4) of the Constitution of the Republic of Kosovo ("Constitution").¹⁶ Mustafa requested that the Supreme Court Panel grant these grounds and either modify the Appeal Judgment or annul the Appeal Judgment and return the case, pursuant to Rule 194(1)(a) and (b) of the Rules, to the competent panel for a new judgment or retrial.¹⁷

¹⁴ Appeal Judgment, paras 480, 484.

¹⁵ Appeal Judgment, paras 480, 484.

¹⁶ KSC-SC-2024-02, 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 ("Protection of Legality Request"), paras 23-49, 67-87, 117. With respect to sentencing, Mustafa also challenged, under Ground 2, the Appeals Panel's interpretation of Article 44(2) of the Law, contending that the Appeals Panel incorrectly understood the language "shall take into account" to indicate that the list enumerated thereafter contains "factors" rather than laws containing the relevant sentence ranges that a Panel is *obliged* to be taken into account. See in particular Protection of Legality Request, paras 52-54.

Furthermore, under Ground 4, Mustafa challenged the Appeals Panel's findings on the war crime of murder, and under Ground 5, raised a challenge concerning the timing of the translation of the Appeal Judgment. See Protection of Legality Request, paras 88-116.

¹⁷ Protection of Legality Request, paras 66, 87, 117.

6. On 12 and 15 April 2024 respectively, Victims' Counsel and the SPO filed their response to the Protection of Legality Request.¹⁸ On 3 May 2024, Mustafa filed his replies.¹⁹

7. On 29 July 2024, the Supreme Court Panel issued the Supreme Court Decision in which it, *inter alia*: (i) granted Grounds 1 and 3 of the Protection of Legality Request for the reasons outlined below; (ii) annulled the Appeal Judgment in respect of Mustafa's sentence pursuant to Rule 194(1)(b) of the Rules; and (iii) returned the Appeal Judgment to the Appeals Panel for a new determination thereon.²⁰

II. DISCUSSION

8. The Appeals Panel will first outline the guiding principles set out by the Supreme Court Panel before turning to a new determination of Mustafa's sentence.

A. SUPREME COURT PANEL'S GUIDANCE

9. The Supreme Court Panel affirmed the Appeals Panel's interpretation of Article 44(2) of the Law that the elements listed under this provision, namely the domestic sentencing ranges, are "factors" that the lower panel "shall take into account" and not ranges that the lower panels are required to apply.²¹

¹⁸ KSC-SC-2024-02, F00013, VC Response to the Request on the Protection of Legality, 12 April 2024 ("Victims' Counsel Response to Protection of Legality Request"); KSC-SC-2024-02, F00014, Prosecution response to request for protection of legality, 15 April 2024 ("SPO Response to Protection of Legality Request").

¹⁹ KSC-SC-2024-02, F00016, Reply to Prosecution's Response to Defence Request for Protection of Legality, 3 May 2024; KSC-SC-2024-02, F00017, Reply to Victims' Counsel Response to Defence Request for Protection of Legality, 3 May 2024.

²⁰ Supreme Court Decision, paras 74-112. See below, paras 9-15. The Supreme Court Panel also rejected Grounds 2 and 5 and summarily dismissed Ground 4. See Supreme Court Decision, paras 44, 57, 63, 112. The Supreme Court further ordered the continued detention of Mustafa while a new determination of his sentence is considered by the Court of Appeals Panel. See Supreme Court Decision, para. 112.

²¹ Supreme Court Decision, paras 62, 106; Appeal Judgment, para. 466.

10. However, the Supreme Court Panel found that the Appeals Panel erred and “violated the criminal law” within the meaning of Article 48(7) of the Law in three respects.²²

11. First, the Supreme Court Panel found that the Appeals Panel erred in concluding 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.²³ To the contrary, the Supreme Court Panel held that the Specialist Chambers are bound to consider which of the relevant sentencing ranges under Kosovo law is the most lenient in accordance with the *lex mitior* principle and to take this range into account when determining the sentence of imprisonment.²⁴

12. Second, the Supreme Court Panel found that the Appeals Panel erred in “not first identifying a definitive sentencing range [...] before determining the sentence”.²⁵ In this regard, the Supreme Court Panel clarified the applicable law, finding that the Criminal Code of the Socialist Federal Republic of Yugoslavia of 1976 (“1976 SFRY Criminal Code”) and any amendments thereto are inapplicable when considering the sentencing ranges to be taken into account, in accordance with Article 44(2)(a) and (b) of the Law.²⁶ As to the Kosovo law that is applicable to the determination of the most lenient sentencing range, the Supreme Court Panel reviewed the relevant Kosovo criminal codes which it considered corresponded “most closely” to war crimes under customary international law as set forth in Article 14(1)(c) of the Law,²⁷ and ultimately concluded that “the more lenient sentencing range to be taken into account in

²² Supreme Court Decision, paras 75, 108.

²³ Supreme Court Decision, paras 86-87 and reasoning therein, 108. See also Appeal Judgment, paras 467-469.

²⁴ Supreme Court Decision, paras 87 and reasoning therein, 88.

²⁵ Supreme Court Decision, para. 92. See also Supreme Court Decision, para. 108.

²⁶ Supreme Court Decision, para. 97 and reasoning therein. See also Supreme Court Decision, fn. 159. By contrast, the Appeals Panel acknowledged that the Trial Panel accurately referred to Articles 38 and 142 of the 1976 SFRY Criminal Code as the relevant applicable law in accordance with Article 44(2)(a) of the Law. See Appeal Judgment, para. 473.

²⁷ Supreme Court Decision, paras 99-102.

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 Criminal Code of the Republic of Kosovo] is five to 25 years of imprisonment".²⁸

13. Third, the Supreme Court Panel found that the Appeals Panel failed to properly reason how it arrived at a reduction of four years in relation to Mustafa's sentence.²⁹

14. Having established the relevant sentencing range, the Supreme Court Panel agreed with the Appeals Panel's finding that there was a disparity between Mustafa's sentences and those analysed from international and Kosovo jurisprudence.³⁰ The Supreme Court Panel observed in this respect that sentences of significantly less than 22 years were imposed in cases it examined which it considered to be akin to Mustafa's in terms of the scope, underlying crimes charged and the number of victims.³¹ The Supreme Court Panel further shared the view of the Appeals Panel that the individual sentences handed down by the Trial Panel, in particular for torture and murder, are "outside of the Trial Panel's 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".³²

²⁸ Supreme Court Decision, para. 102. By contrast, the Appeals Panel found that (i) from the adoption of UNMIK Regulation 1999/24 abolishing capital punishment, the sentencing range under the 1976 SFRY Criminal Code became five to 15 years; and (ii) the subsequent Kosovo criminal codes provide for higher maximum sentences. See Appeal Judgment, paras 473-474.

²⁹ Supreme Court Decision, paras 75, 103, 108. To this end, the Supreme Court Panel considered that "[b]ecause no sentencing range was determined [by the Appeals Panel], it is impossible to know the maximum sentence [it] had in mind". See Supreme Court Decision, para. 103.

³⁰ Supreme Court Decision, para. 104. See also Appeal Judgment, paras 478-479.

³¹ Supreme Court Decision, para. 105.

³² Supreme Court Decision, para. 105, quoting Appeal Judgment, para. 479, where the Appeals Panel, while fully cognisant of the Trial Panel's broad discretion in sentencing, concluded that "the disparity between Mustafa's sentences and those sentences it has analysed, shows that the Trial Panel has ventured outside of its discretionary bounds by imposing sentences on Mustafa which are out of reasonable proportion with a line of sentences imposed in similar circumstances for similar offences, and thereby committed a discernible error in sentencing".

15. Notwithstanding the Supreme Court Panel's acknowledgment that the 22-year sentence imposed by the Appeals Panel is within the sentencing range the Supreme Court Panel identified, the broad sentencing discretion of lower panels, and the non-binding nature of the relevant domestic sentencing range, once identified,³³ the Supreme Court Panel considered that the Appeals Panel may have come to a different determination of the appropriate sentence for Mustafa had it correctly identified the five to 25 years of imprisonment sentencing range as the one to be taken into account.³⁴ Having considered that the Appeals Panel was best placed to determine an appropriate sentence for Mustafa,³⁵ the Supreme Court Panel returned the matter to it for a new determination in relation to the above identified errors, directing that the Appeals Panel be guided by:

(i) Rule 163 of the Rules; (ii) the sentencing range of five to 25 years identified by [the Supreme Court] Panel in Mr Mustafa's case; (iii) the sentencing factors identified by the Appeals Panel; (iv) the jurisprudence analysed by the Appeals Panel and by [the Supreme Court] Panel; and (v) the specific circumstances of Mr Mustafa's case.³⁶

B. APPEALS PANEL'S ANALYSIS

16. The Appeals Panel will now proceed to assess the effect, if any, of the above identified errors on Mustafa's sentence following the guidance provided by the Supreme Court Panel. In so doing, the Appeals Panel is further informed by the Parties' and Victims' Counsel's previous submissions in these proceedings on sentencing.³⁷

³³ Supreme Court Decision, para. 106.

³⁴ Supreme Court Decision, para. 107.

³⁵ Supreme Court Decision, para. 110.

³⁶ Supreme Court Decision, paras 109-112.

³⁷ Protection of Legality Request, paras 23-49, 67-87; SPO Response to Protection of Legality Request, paras 11-18, 23-27, Victims' Counsel Response to Protection of Legality Request, paras 4-12; Appeal Brief, paras 401-445; SPO Response Brief, paras 195-238; KSC-BC-2020-05, Transcript, 15 September 2022, pp. 4792-4800; KSC-BC-2020-05, F00505/A01, Public Redacted Version of Annex 1

17. The Appeals Panel recalls that the applicable law on sentencing is contained in, *inter alia*, Article 33 of the Constitution,³⁸ Article 44 of the Law³⁹ and Rule 163 of the Rules.⁴⁰

18. Turning to the applicable sentencing range, the Appeals Panel recalls that in its previous findings on Mustafa's sentence,⁴¹ it considered life imprisonment to be the maximum sentence of imprisonment it may impose and analysed international and Kosovo jurisprudence as well as the specific circumstances of Mustafa's case from this perspective.⁴² In light of the Supreme Court Panel's guidance, the Appeals Panel will now take into account and be guided by the sentencing range of five to 25 years of imprisonment, as identified by the Supreme Court Panel.⁴³ With this sentencing range

to "Corrected version of 'Prosecution Final Trial Brief pursuant to Rule 134(b) with Confidential Annex 1 and Public Annex 2'", filing F00459/COR/A01, dated 22 July 2022, 31 January 2023 (KSC-BC-2020-05, F00459/COR/A01, Annex 1 to Corrected version of 'Prosecution Final Trial Brief pursuant to Rule 134(b)', 22 July 2022 (confidential) (uncorrected confidential version filed on 21 July 2022)), paras 344-386; KSC-BC-2020-05, F00456/COR/RED2, Public lesser redacted version of Corrected version of Victims' Counsel statement on the impact of the crimes on the participating victims, 20 March 2023 (uncorrected and strictly confidential version filed on 20 July 2022), paras 70-79. See also CRSPD16, Email from the Appeals Panel to CMU on Message to the Parties and Participants regarding Clarification, 7 August 2024 in which the Appeals Panel clarified that no further submissions were necessary for a new determination of Mustafa's sentence pursuant to Rule 194(1)(b) of the Rules in light of the scope of the matter returned to the Appeals Panel by the Supreme Court Panel.

³⁸ Article 33 of the Constitution provides for the principles of legality and proportionality in criminal cases. See Supreme Court Decision, paras 82, 88.

³⁹ In particular, Article 44(1) of the Law establishes that the Specialist Chambers may impose a maximum term of life imprisonment. Article 44(2) of the Law specifies that, in deliberating on an appropriate sentence for an international crime, the Specialist Chambers shall take into account: "a. the sentencing range for the crime provided under Kosovo Law at the time of commission, b. any subsequent more lenient sentencing range for the crime provided in Kosovo Law, [...]". See also Supreme Court Decision, paras 81-82, 87-89, 96-97, 102, 106.

⁴⁰ See Supreme Court Decision, paras 110-111(i).

⁴¹ The Appeals Panel recalls that it reduced the single sentence of 26 years of imprisonment imposed by the Trial Panel to a sentence of 22 years of imprisonment. See Appeal Judgment, paras 480, 484.

⁴² Appeal Judgment, paras 449-450, 478-479. See also Appeal Judgment, para. 469.

⁴³ See above, paras 12, 15. The Appeals Panel clarifies that, in accordance with the Supreme Court Panel's guidance, the sentencing range of five to 25 years is not binding, and in principle, life imprisonment remains the maximum sentence a Panel may impose pursuant to Article 44(1) of the Law. See Supreme Court Decision, para. 106, where the Supreme Court Panel found that "[t]he Panel is further mindful that the lower Panels are not required to apply the identified sentencing range, but shall take it into account."

in mind, the Appeals Panel will assess the remaining factors set out by the Supreme Court Panel⁴⁴ and will, accordingly, determine Mustafa's sentence anew.

19. Concerning the specific circumstances of Mustafa's case, the Appeals Panel clarifies that they are: (i) the gravity of the crimes and their consequences;⁴⁵ (ii) Mustafa's personal contribution to the crimes;⁴⁶ (iii) aggravating and mitigating circumstances;⁴⁷ and (iv) Mustafa's individual circumstances.⁴⁸ The Appeals Panel recalls that it has rejected all of Mustafa's challenges in these respects⁴⁹ and thus endorses the Trial Panel's assessment for the purpose of determining Mustafa's sentence.

20. In accordance with the Supreme Court Panel's guidance,⁵⁰ and the five to 25 year sentencing range identified by the Supreme Court Panel, the Appeals Panel has re-examined international jurisprudence,⁵¹ including the jurisprudence identified

⁴⁴ See Supreme Court Decision, para. 111.

⁴⁵ The Appeals Panel recalls that the Trial Panel assessed the gravity of Mustafa's crimes as high. In particular, the Trial Panel considered: (i) the intrinsically grave nature of the war crimes of arbitrary detention, torture and murder and the specific circumstances of their commission in this case, including the number of victims (at least six victims of arbitrary detention and torture and one victim of murder); and (ii) the fact that these crimes caused significant and long-lasting consequences, both physical and psychological, to the detained victims, and, psychological, to the family members of the Murder Victim. See Trial Judgment paras 796-804, 812.

⁴⁶ The Appeals Panel recalls the Trial Panel findings, *inter alia*, on: (i) Mustafa's direct commission of the crime of torture and commission of the crime of arbitrary detention, torture, and murder as part of a JCE with other BIA members; (ii) Mustafa's superior position and central role in a system of illegal detentions and tortures at the ZDC, together with his continued approval and endorsement of the same acts in the period between approximately 1 April 1999 and on and around 19 April 1999; and (iii) Mustafa personally and intentionally subjecting two detainees to acts of torture and witnessing and ordering the mistreatment of these and other detainees. The Trial Panel ultimately assessed the degree of his personal participation in the crimes and intent, as very high. See Trial Judgment, paras 813-819.

⁴⁷ The Appeals Panel recalls that the Trial Panel considered as aggravating circumstances that the crime of torture was committed with particular cruelty and the victims in this case were vulnerable and defenceless. See Trial Judgment, paras 805-811.

⁴⁸ The Appeals Panel recalls that the Trial Panel considered that Mustafa's individual circumstances could not be given any significant weight. See Trial Judgment, paras 821-826.

⁴⁹ Appeal Judgment, paras 457-464.

⁵⁰ Supreme Court Decision, para. 111(iv).

⁵¹ Based on the Supreme Court Panel's finding that the 1976 SFRY Criminal Code is inapplicable, the Appeals Panel has set aside the Kosovo jurisprudence it initially considered in the Appeal Judgment.

by the Supreme Court Panel, concerning war crimes comparable to those for which Mustafa was sentenced.⁵² In undertaking this analysis, the Appeals Panel has considered the factors it had identified in the Appeal Judgment, as endorsed by the Supreme Court Panel, namely: (i) the mode of liability; (ii) the gravity of the crime, including the number of victims, the effect of the crimes on them, the accused's individual culpability, and other indicators of gravity in the circumstances of the case; (iii) the various aggravating and mitigating factors; (iv) whether the trial chamber set out both individual sentences and an overall sentence, or only an overall sentence; and (v) the other crimes, if any, for which an accused was also sentenced.⁵³ The Appeals Panel has also kept in mind that international courts and tribunals are not bound by the same legal frameworks in respect of sentencing.⁵⁴

As the Supreme Court Panel noted, the Kosovo cases concern convictions for crimes under the 1976 SFRY Criminal Code. See Supreme Court Decision, fn. 159. See also Supreme Court Decision, para. 97.⁵² Appeal Judgment, fn. 1292 and references cited therein; Supreme Court Decision, fn. 161. See also Supreme Court Decision, paras 104-105, 111. The Appeals Panel has considered in particular the following cases: ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Judgement, 10 July 2008 ("*Boškoski and Tarčulovski* Judgement"), paras 607-608 (see also ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Judgement, 19 May 2010); ICTY, *Prosecutor v. Zelenović*, IT-96-23/2-S, Sentencing Judgement, 4 April 2007 ("*Zelenović* Judgement"), paras 70-71 (see also ICTY, *Prosecutor v. Zelenović*, IT-96-23/2-A, Judgement on Sentencing Appeal, 31 October 2007); ICTY, *Prosecutor v. Rajić*, IT-95-12-S, Sentencing Judgement, 8 May 2006 ("*Rajić* Judgement"), paras 13-18, 49, 96, 184; ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgement, 30 November 2005 ("*Limaj et al.* Judgement"), paras 741-742 (see also ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-A, Judgement, 27 September 2007); ICTY, *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement"), paras 147, 182 (see also ICTY, *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, 29 November 2002); ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-Abis, Judgment on Sentence Appeal, 8 April 2003 ("*Mucić et al.* Judgment on Sentence Appeal"), paras 1, 5, 61 (see also ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-Tbis-R117, Sentencing Judgement, 9 October 2001 ("*Mucić et al.* Sentencing Judgement"); ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001 ("*Delalić et al.* Appeal Judgement"); ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998 ("*Delalić et al.* Trial Judgement"). The Appeals Panel notes that while there are similarities between these cases and that of Mustafa, they may be distinguished from Mustafa's, *inter alia*, on the basis of: (i) the existence of a plea agreement (See *Rajić* Judgement; *Zelenović* Judgement); (ii) the convicted person's lack of position of authority (see e.g. *Limaj et al.* Judgement (with respect to Haradin Bala)); (iii) accessory liability, in whole or in part (see e.g. *Vasiljević* Judgement; *Boškoski and Tarčulovski* Judgement (with respect to Johan Tarčulovski)); and (iv) a comparatively larger numbers of victims (see e.g. *Rajić* Judgement; *Boškoski and Tarčulovski* Judgement (with respect to Johan Tarčulovski)).

⁵³ See Appeal Judgment, para. 478; Supreme Court Decision, para. 111(iii).

⁵⁴ The Supreme Court Panel found that "the Specialist Chambers are *bound* to consider which of the relevant sentencing ranges under Kosovo law contains the most lenient sentencing range in accordance

21. The Appeals Panel emphasises that the analysed jurisprudence does not include any perfectly analogous cases due to the number of variables relevant to sentencing and recalls that its primary responsibility is to tailor the sentence to fit the specific circumstances of Mustafa's case.⁵⁵ Nonetheless, with the above caveat, the Appeals Panel concurs with the Supreme Court Panel's observation that sentences significantly less than 22 years were imposed in the analysed cases.⁵⁶

22. The Appeals Panel has taken particular note of the similarities between Mustafa's case and the *Limaj et al.* and *Mucić et al.* cases at the ICTY, observing that these cases concern, *inter alia*: (i) individuals who were convicted as principal perpetrators of (ii) war crimes, including murder (or wilful killing) and torture, (iii) committed in a detention centre context, (iv) against a similar number of victims

with the *lex mitior* principle. The sentencing panel shall thereafter take this range into account when determining the sentence of imprisonment." See Supreme Court Decision, para. 87. Compare with ICTY, *Prosecutor v. Dragan Nikolić*, IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, paras 80-85.

⁵⁵ ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgement, 30 January 2015, para. 1998; ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, para. 1837; *Gucati and Haradinaj* Appeal Judgment, para. 435. The Appeals Panel further recalls that a previous decision on sentence may provide guidance if it relates to the same offence and was committed in substantially similar circumstances; however, the guidance is limited and the transposition of sentences from one case to another is impossible, given the overriding obligation to individualise the sentence to appropriately reflect the particular facts of the case and the individual circumstances of the convicted person. See Appeal Judgment, para. 478; *Gucati and Haradinaj* Appeal Judgment, para. 434; ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 348; ICTY, *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006, para. 38; ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 250.

⁵⁶ See Supreme Court Decision, para. 105.

for the above referred crimes.⁵⁷ The Panel further notes that Bala, Landžo and Delić were sentenced to 13, 15 and 18 years, respectively.⁵⁸

23. The Appeals Panel now turns to the determination of Mustafa's sentence.

24. The Appeals Panel remains of the view that the Trial Panel ventured outside of its discretionary bounds by imposing sentences on Mustafa which are out of reasonable proportion with a line of sentences imposed in similar circumstances for similar offences.⁵⁹ The Appeals Panel has reached this conclusion following the Supreme Court Panel's guidance and in light of Rule 163 of the Rules,⁶⁰ the most lenient sentencing range to be taken into account in accordance with the constitutional principle of *lex mitior* and Article 44(2)(b) of the Law (which, at its highest, provides for 25 years of imprisonment),⁶¹ the specific circumstances of Mustafa's case,⁶² and the line of sentences imposed in the cases it has analysed.⁶³ The Appeals Panel considers that this disproportionality warrants a significant reduction in the individual sentences for Counts 3 (war crime of torture committed against at least six persons) and 4 (war crime of murder committed against one person). With respect to arbitrary detention, the Appeals Panel notes that the individual sentence the Appeals Panel had imposed for Count 1 (war crime of arbitrary detention committed against at least six

⁵⁷ *Limaj et al.* Judgement, paras 741-742; *Mucić et al.* Judgment on Sentence Appeal, paras 1, 5, 61. However, the Appeals Panel also observes notable differences in that: (i) unlike Mustafa, neither Bala nor Landžo were in a position of command; (ii) in the *Mucić et al.* case, a considerable number of prisoners were detained in the Čelebići prison camp during the period of the charges; and (iii) in contrast to Mustafa, Landžo and Delić were found to be "sadistic" individuals. See *Delalić et al.* Trial Judgement, paras 146-157, 1130, 1261-1269, 1272-1275. See also *Delalić et al.* Appeal Judgement, paras 825, 834; *Mucić et al.* Sentencing Judgement, paras 29-30, 37-38; *Mucić et al.* Judgment on Sentence Appeal, para. 40.

⁵⁸ *Limaj et al.* Judgement, para. 742; *Mucić et al.* Judgment on Sentence Appeal, paras 1, 61.

⁵⁹ See Appeal Judgment, para. 479. See also above, fn. 32.

⁶⁰ Supreme Court Decision, para. 111(i).

⁶¹ See above, paras 11-12, 15, 18. See also Supreme Court Decision, paras 102, 107, 111(ii).

⁶² See above, paras 15, 19. See also Supreme Court Decision, para. 111(v).

⁶³ See above, paras 15, 20-22. See also Supreme Court Decision, para. 111(iii) and (iv).

persons), namely eight years, is already at the low end of the sentencing range⁶⁴ and finds it appropriate to maintain this sentence.

25. Accordingly, the Appeals Panel imposes the following sentences:

- (i) eight years of imprisonment for the war crime of arbitrary detention (Count 1);
- (ii) 13 years of imprisonment for the war crime of torture (Count 3); and
- (iii) 15 years of imprisonment for the war crime of murder (Count 4).

26. Having determined these individual sentences, the Appeals Panel further finds that the single sentence of 22 years imprisonment imposed by the Appeals Panel is out of reasonable proportion in light of the identified sentencing range, the jurisprudence analysed, and the specific circumstances of Mustafa's case. Accordingly, the Panel considers that a single sentence of 15 years of imprisonment, with credit for the time served since his arrest on 24 September 2020, reflects the totality of Mustafa's criminal conduct in this case.

27. Finally, the Appeals Panel reiterates that the crimes for which Mustafa was convicted and sentenced are grave and its new determination on the sentences does not detract from the gravity of the crimes.⁶⁵

III. DISPOSITION

28. For these reasons, the Court of Appeals Panel, pursuant to the Supreme Court Decision and Rule 194(1)(b) of the Rules:

IMPOSES a sentence of eight years of imprisonment with respect to Count 1;

⁶⁴ The Appeals Panel recalls that with respect to Count 1, it reduced the 10 year sentence imposed by the Trial Panel to a sentence of 8 years of imprisonment. See Appeal Judgment, paras 480, 484.

⁶⁵ See Appeal Judgment, para. 482.

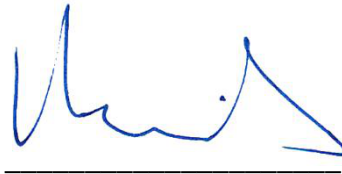
IMPOSES a sentence of 13 years of imprisonment with respect to Count 3;

IMPOSES a sentence of 15 years of imprisonment with respect to Count 4; and

IMPOSES a single sentence of 15 years of imprisonment on Mustafa, with credit for the time served;

RULES that this Decision shall be enforced immediately pursuant to Rule 185(1) of the Rules; and

ORDERS that, in accordance with Article 50(1) of the Law and Rule 166(3) of the Rules, Mustafa shall remain in the custody of the Specialist Chambers pending the finalisation of the arrangements for his transfer to the State where his sentence will be served.



**Judge Michèle Picard,
Presiding Judge**

Dated this Tuesday, 10 September 2024

At The Hague, the Netherlands