



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

In: KSC-SC-2024-04
Before: **President of the Specialist Chambers**
Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon
Filing Participant: Specialist Prosecutor's Office
Date: 10 December 2024
Language: English
Classification: Public

**Prosecution request for protection of legality against 'Decision on New
Determination of Salih Mustafa's Sentence'
with public Annex 1**

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I. INTRODUCTION

1. Pursuant to Article 48(6)-(7) of the Law¹ and Rule 194(1) of the Rules,² the Supreme Court³ should annul the Sentencing Decision,⁴ which is based on violations of the criminal law and substantial violations of procedure, resulting in an arbitrary and manifestly unreasonable decision. The case should be returned to the Appeals Panel for an assessment of the Convict's⁵ sentence that complies with the Law and Rules.

2. As set out in detail below, the Appeals Panel:

- i. did not apply Article 44(1), the only binding sentencing range before the Kosovo Specialist Chambers ('KSC'), and Article 44(2)(c), a required consideration that ensures compliance with international obligations and the KSC's mandate (Ground 1);
- ii. incorrectly applied the non-binding Article 44(2)(b) sentencing range identified in the Legality Decision⁶ (Ground 2);
- iii. did not issue a reasoned opinion (Ground 3);
- iv. failed to hear the affected Parties and participants (Ground 4); and
- v. exceeded its authority under Articles 44 and 46 (Ground 5).

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein are to the Law, unless otherwise indicated. Annex 1 includes a table of authorities.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise indicated.

³ The relevant Panels of the Supreme Court Chamber are referred to herein as the 'Supreme Court'.

⁴ Decision on New Determination of Salih Mustafa's Sentence, KSC-CA-2023-02/F00045, 10 September 2024 ('Sentencing Decision').

⁵ The convicted person, Salih MUSTAFA, is referred to herein as the 'Convict'.

⁶ Decision on Salih Mustafa's Request for Protection of Legality, KSC-SC-2024-02/F00018, 29 July 2024 ('Legality Decision').

3. This request concerns violations of the criminal law and procedure in the Sentencing Decision and is without prejudice to the submissions made by the Specialist Prosecutor's Office ('SPO')⁷ on the Convict's Referral⁸ challenging the Legality Decision before the Specialist Chamber of the Constitutional Court. As both this request and the Referral concern final decisions⁹ on distinct matters relating to the legal basis of the Convict's sentence, which are also of general importance to the functioning of the KSC,¹⁰ consideration of this request while the pending Referral is resolved is in the interests of justice and fair and expeditious proceedings.

II. BACKGROUND

A. TRIAL JUDGMENT

4. On 16 December 2022, the Trial Panel found the Convict guilty of war crimes under customary international law, namely, serious violations of Common Article 3 to the Geneva Conventions ('Common Article 3').¹¹

5. The Trial Panel found that the Accused, the overall and only commander of the BIA unit,¹² with full control over the Zllash/Zlaš detention compound:

⁷ Prosecution submissions on referral of Salih MUSTAFA (KSC-CC-2024-27/F00001), KSC-CC-2024-27/F00009, 8 November 2024 ('SPO Referral Submissions').

⁸ Referral to the Constitutional Court Panel concerning the violations of Mr. Salih Mustafa's fundamental rights guaranteed under Articles 22, 31 and 33 of the Constitution of the Republic of Kosovo and Articles 6 and 7 of the European Convention on Human Rights, KSC-CC-2024-27/F00001, 27 September 2024 ('Referral').

⁹ See para.18 below; SPO Referral Submissions, KSC-CC-2024-27/F00009, para.8.

¹⁰ See, similarly, SPO Referral Submissions, KSC-CC-2024-27/F00009, para.8.

¹¹ Trial Judgment, KSC-BC-2020-05/F00494, 16 December 2022, Confidential ('Trial Judgment'), para.831.

¹² Trial Judgment, KSC-BC-2020-05/F00494, paras 334-336, 338-339, 720. The Trial Judgment defines the BIA as 'a guerrilla unit of the KLA within the Llap OZ' and finds that the perpetrators of the crimes belonged to this unit and were the Accused's subordinates.

- i. personally tortured two victims, interrogating them, beating them, and subjecting one to a mock execution and threatening to kill him;¹³
- ii. as part of a joint criminal enterprise, arbitrarily detained and tortured at least six victims who – ‘through an institutionalised detention and mistreatment’ between approximately 1 April 1999 and 19 April 1999 – were detained ‘in barns only suitable for animals’ in inhumane conditions and systematically tortured in a variety of ways (including with electric shocks, hot irons, bats, and knives);¹⁴ and
- iii. as part of a joint criminal enterprise, murdered a victim subjected to ‘tortuous acts’ involving ‘protracted pain and unthinkable agony, which can only be characterised as vicious and brutal’. Despite the victim’s near-to-death state, the Convict denied him medical aid and decided not to release or evacuate the murder victim. A combination of these factors substantially contributed to his death.¹⁵

6. In sentencing the Convict, the Trial Panel considered that, pursuant to Article 44(1), it could impose a maximum sentence of life imprisonment.¹⁶ Further, considering sentencing ranges under the SFRY Code,¹⁷ PKCC,¹⁸ and 2012 KCC,¹⁹ the

¹³ Trial Judgment, KSC-BC-2020-05/F00494, paras 729-733.

¹⁴ See, *inter alia*, Trial Judgment, KSC-BC-2020-05/F00494, paras 61, 494, 528-530, 535, 539, 586-588, 674-675, 745-746.

¹⁵ Trial Judgment, KSC-BC-2020-05/F00494, paras 621, 624-626, 638, 808. The other factor contributing to his death was gunshot wounds from an unconfirmed source.

¹⁶ Trial Judgment, KSC-BC-2020-05/F00494, para.779.

¹⁷ Socialist Federal Republic of Yugoslavia, Criminal Code of the Socialist Republic of Yugoslavia, as published on 8 October 1976 (‘SFRY Code’), Arts 34, 37, 38, 142.

¹⁸ Kosovo, Provisional Criminal Code of Kosovo, introduced under UNMIK Regulation No.2003/25, as published on 6 July 2003 (‘PKCC’), Arts 36, 37, 118(1).

¹⁹ Kosovo, Code No. 04/L-082 Criminal Code of the Republic of Kosovo, as published on 20 April 2012 (‘2012 KCC’), Arts 43, 44, 152(1).

Trial Panel concluded that ‘the most serious crimes, such as war crimes, attracted the most severe sentences’.²⁰

7. With this conclusion in mind, the Trial Panel proceeded to assess the factors set out in Article 44(5) and Rule 163(1), finding that:²¹

- i. the gravity of the crimes was high;
- ii. the 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;
- iii. the acts of torture – which in the case of the murder victim substantially contributed to his death – were committed with particular cruelty, an aggravating factor;
- iv. the crimes were committed against particularly vulnerable or defenceless victims, an aggravating factor;
- v. the degree of the Convict’s personal participation in the crimes and intent was very high; and
- vi. there were no mitigating factors.

8. Having weighed and balanced the relevant factors, the Panel sentenced the Convict to 10 years of imprisonment for the war crime of arbitrary detention, 22 years of imprisonment for the war crime of torture, and 25 years of imprisonment for the war crime of murder.²² It imposed a single sentence of 26 years of imprisonment,

²⁰ Trial Judgment, KSC-BC-2020-05/F00494, para.781.

²¹ Trial Judgment, KSC-BC-2020-05/F00494, paras 796-800, 804-826.

²² Trial Judgment, KSC-BC-2020-05/F00494, para.828.

reflecting the totality of the criminal conduct of and multiple crimes committed by the Convict.²³

B. APPEAL JUDGMENT

9. On 14 December 2023, the Appeals Panel – after noting that life imprisonment was the maximum sentence before the KSC²⁴ – conducted its own review of relevant sentencing ranges under the SFRY Code, PKCC, 2012 KCC, and 2019 KCC,²⁵ and confirmed the Trial Panel’s conclusion that ‘the most serious crimes, such as war crimes, attracted the most severe sentences’.²⁶

10. After analysing sentencing practices in Kosovo and at international courts, the Appeals Panel considered that the Convict’s sentence should be reduced and imposed eight years of imprisonment for the war crime of arbitrary detention, 20 years of imprisonment for the war crime of torture, and 22 years of imprisonment for the war crime of murder, and a single sentence of 22 years of imprisonment, which reflected ‘the totality of [the Convict’s] criminal conduct in this case’.²⁷ All other challenges to the Trial Judgment were rejected.

C. LEGALITY DECISION

11. On 29 July 2024, the Supreme Court found that the Appeals Panel erred when it concluded that in the context of Article 44(2), for the purposes of compliance with the *lex mitior* principle, the KSC is not required to consider various, non-binding Kosovo laws on war crimes.²⁸ The Supreme Court then reviewed the SFRY Code,

²³ Trial Judgment, KSC-BC-2020-05/F00494, para.829.

²⁴ Appeal Judgment, KSC-CA-2023-02/F00038, 14 December 2023, Confidential (‘Appeal Judgment’), paras 449-450.

²⁵ Kosovo, Code No. 06/L-074 Criminal Code of the Republic of Kosovo, as published on 14 January 2019 (‘2019 KCC’), Arts 40-41, 144(1).

²⁶ Appeal Judgment, KSC-CA-2023-02/F00038, para.475.

²⁷ Appeal Judgment, KSC-CA-2023-02/F00038, paras 478-480.

²⁸ Legality Decision, KSC-SC-2024-02/F00018, paras 87-88, 92.

PKCC, 2012 KCC, and 2019 KCC to determine the most lenient sentencing range under Article 44(2).²⁹

12. The Supreme Court concluded that: (i) due to distinctions in the Law between war crimes under customary international law and domestic crimes, the SFRY Code was not applicable; and (ii) in any event, Article 142 of the SFRY Code provided for the death penalty and would not be the *lex mitior*.³⁰ The Supreme Court proceeded to find that the PKCC was the most lenient regime because it does not provide for life imprisonment, and by contrast, the 2012 KCC and 2019 KCC provide lower ranges, but at their highest, include a possibility of life imprisonment.³¹ Considering that the Convict was sentenced to 22 years of imprisonment, not life,³² the Supreme Court found that the most lenient sentencing range was five to 25 years under the 2019 KCC.³³

13. The Supreme Court acknowledged that the 22-year sentence imposed by the Appeals Panel was within the identified sentencing range, ‘underlying panels have broad discretion in determining a sentence’, and ‘lower Panels are not required to apply the identified sentencing range, but shall take it into account’.³⁴ Nevertheless, the Supreme Court considered that there was a disparity between the Convict’s sentences and the ICTY sentences analysed, that the Appeals Panel failed to properly reason how it arrived at the sentence in the Appeal Judgment, and that the Appeals Panel may have come to a different determination of the Convict’s sentence if it had identified the five- to 25-year range.³⁵

²⁹ Legality Decision, KSC-SC-2024-02/F00018, paras 92-102.

³⁰ Legality Decision, KSC-SC-2024-02/F00018, paras 93-98, fn.150.

³¹ Legality Decision, KSC-SC-2024-02/F00018, para.101.

³² Legality Decision, KSC-SC-2024-02/F00018, para.101.

³³ Legality Decision, KSC-SC-2024-02/F00018, para.102. The Panel noted that, as the 2012 KCC included the same range, it would ‘look toward the “successor legislation” governing the same subject matter, namely the [2019 KCC]’. See Legality Decision, KSC-SC-2024-02/F00018, fn.155.

³⁴ Legality Decision, KSC-SC-2024-02/F00018, para.106.

³⁵ Legality Decision, KSC-SC-2024-02/F00018, paras 104-105, 107.

14. The Supreme Court annulled the Appeal Judgment insofar as it related to the Convict's sentence and returned the case to the Appeals Panel for determination of a new sentence.³⁶ The Supreme Court directed the Appeals Panel to be guided by: (i) Rule 163; (ii) the identified sentencing range; (iii) the sentencing factors identified by the Appeals Panel; (iv) the jurisprudence analysed by the Appeals Panel and by the Supreme Court; and (v) the specific circumstances of the case.³⁷ The Supreme Court also noted in the Legality Decision that consideration of Article 44(2)(c) should form part of any sentencing assessment.³⁸

D. SENTENCING DECISION

15. On 10 September 2024, after informing the Parties and participants that no further submissions were necessary,³⁹ the Appeals Panel reassessed the Convict's sentence.⁴⁰ It maintained the eight-year sentence for arbitrary detention and significantly reduced the sentences for torture, murder, and the overall, single sentence by an additional seven years each: 13 years of imprisonment for torture, 15 years of imprisonment for murder, and 15 years of imprisonment for the single sentence.⁴¹

16. In its 10-paragraph analysis,⁴² the Appeals Panel: (i) noted, by way of reference, previous submissions of the Parties and Victims' Counsel,⁴³ the applicable law,⁴⁴ and the factors set out in the Legality Decision;⁴⁵ (ii) summarised the Trial Panel's assessment of the Article 44(5) and Rule 163(1) factors;⁴⁶ (iii) stated that it had re-

³⁶ Legality Decision, KSC-SC-2024-02/F00018, paras 110, 112(d)-(e).

³⁷ Legality Decision, KSC-SC-2024-02/F00018, para.111.

³⁸ Legality Decision, KSC-SC-2024-02/F00018, para.106.

³⁹ Sentencing Decision, KSC-CA-2023-02/F00045, fn.38.

⁴⁰ Sentencing Decision, KSC-CA-2023-02/F00045, paras 24-26.

⁴¹ Sentencing Decision, KSC-CA-2023-02/F00045, paras 24-25, 28.

⁴² Sentencing Decision, KSC-CA-2023-02/F00045, paras 16-26.

⁴³ Sentencing Decision, KSC-CA-2023-02/F00045, para.16.

⁴⁴ Sentencing Decision, KSC-CA-2023-02/F00045, para.17.

⁴⁵ Sentencing Decision, KSC-CA-2023-02/F00045, para.18.

⁴⁶ Sentencing Decision, KSC-CA-2023-02/F00045, para.19.

examined the international jurisprudence cited in the Appeal Judgment and Legality Decision, noting that international courts are not bound by the same legal framework⁴⁷ and that, while there are similarities, the cases analysed may be distinguished from this case;⁴⁸ (iv) emphasised that the analysed jurisprudence does not include any ‘perfectly analogous’ cases due to the number of variables relevant to sentencing;⁴⁹ (v) noted, in particular, similarities and ‘notable differences’ between this case and two ICTY cases, namely, *Limaj et al.* and *Mucić et al.*, in which sentences between 13 and 18 years were imposed;⁵⁰ (vi) remained of the view that the Trial Panel ventured outside of its discretionary bounds by imposing sentences out of reasonable proportion with a line of sentences in similar circumstances for similar offences;⁵¹ and (vii) stated that it reached this conclusion following the Supreme Court’s guidance and in light of Rule 163, the identified Article 44(2)(b) sentencing range, the specific circumstances of the case, and the international cases analysed.⁵²

III. SUBMISSIONS

17. As set out below, Grounds 1-5 are admissible and demonstrate interconnected violations of law and procedure that rendered the Sentencing Decision, in its entirety, arbitrary and manifestly unreasonable. The Sentencing Decision should be annulled and returned to the Appeals Panel for a lawful and reasoned determination of the Convict’s sentence that complies with the Law and Rules.

⁴⁷ Sentencing Decision, KSC-CA-2023-02/F00045, para.20.

⁴⁸ Sentencing Decision, KSC-CA-2023-02/F00045, fn.52.

⁴⁹ Sentencing Decision, KSC-CA-2023-02/F00045, para.21.

⁵⁰ Sentencing Decision, KSC-CA-2023-02/F00045, para.22, fn.57.

⁵¹ Sentencing Decision, KSC-CA-2023-02/F00045, para.24. *See also* para.21.

⁵² Sentencing Decision, KSC-CA-2023-02/F00045, paras 24. *See also* para.26 (considering the 22-year single sentence was out of reasonable proportion in light of the identified sentencing range, the jurisprudence analysed, and the specific circumstances of the case).

A. GROUNDS 1-5 ARE ADMISSIBLE.

18. This request and all grounds raised herein meet the strict admissibility requirements.⁵³ This request: (i) has been submitted within three months of the Sentencing Decision, which is final;⁵⁴ (ii) does not allege an erroneous or incomplete factual determination;⁵⁵ and (iii) the arguments reasonably could not have been raised before the Appeals Panel,⁵⁶ as the Sentencing Decision interpreted and applied the Legality Decision without hearing any submissions from the Parties or participants whose rights and interests were affected.⁵⁷

19. This request identifies and substantiates⁵⁸ procedural violations materially affecting the Sentencing Decision,⁵⁹ in its entirety, and violations of the criminal law:⁶⁰ (i) Ground 1 concerns the Appeals Panel's failure to apply Articles 44(1) and 44(2)(c);⁶¹ (ii) Ground 2 concerns the Appeals Panel's incorrect application of Article 44(2)(b) as interpreted in the Legality Decision;⁶² (iii) Ground 3 concerns the Appeals Panel's failure to issue a reasoned opinion as required by Article 46(7) and Rules 78(2) and

⁵³ Decision on Requests for Protection of Legality, KSC-SC-2023-01/F00021, 18 September 2023 ('Gucati and Haradinaj Decision'), paras 9-10.

⁵⁴ Law, Art.48(6); Rules, Rule 193(1). *See also* Decision on Kadri Veseli's Request for Protection of Legality, KSC-BC-2020-06/PL001/F00008, 15 August 2022 ('Veseli Decision'), para.18 ('A decision or judgment is final "when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them"').

⁵⁵ Rules, Rule 193(3); Gucati and Haradinaj Decision, KSC-SC-2023-01/F00021, para.10.

⁵⁶ Gucati and Haradinaj Decision, KSC-SC-2023-01/F00021, para.10 ('Arguments that reasonably could have been raised before the first and second instance panels, cannot be raised *de novo* before the Supreme Court Panel').

⁵⁷ Sentencing Decision, KSC-CA-2023-02/F00045, fn.37 (noting that the Appeals Panel informed the Parties and participants that no further submissions were necessary for a new determination of the Convict's sentence). *See also* Section III(B)(4) below.

⁵⁸ Gucati and Haradinaj Decision, KSC-SC-2023-01/F00021, paras 10, 19.

⁵⁹ Law, Art.48(7)(b); Gucati and Haradinaj Decision, KSC-SC-2023-01/F00021, para.14.

⁶⁰ Law, Art.48(7)(a); Gucati and Haradinaj Decision, KSC-SC-2023-01/F00021, para.17.

⁶¹ Veseli Decision, KSC-BC-2020-06/PL001/F00008, para.24(a substantial procedural violation may exist if the Appeals Panel 'omitted to apply a provision of the Law or the Rules'); Kosovo, Code No. 08/L-032 Criminal Procedure Code, as published on 17 August 2022 ('KCPC'), Arts 384(2)(2.1), 432(1)(1.3).

⁶² Veseli Decision, KSC-BC-2020-06/PL001/F00008, para.24 (a substantial procedural violation may exist if the Appeals Panel incorrectly applied the Law and/or Rules); KCPC, Arts 384(2)(2.1), 432(1)(1.2).

183(3);⁶³ (iv) Ground 4 concerns the Appeals Panel's failure to hear the affected Parties and participants;⁶⁴ and (v) Ground 5 demonstrates that, on the basis of the violations in Grounds 1-4, the Appeals Panel exceeded its authority under Articles 44 and 46 when rendering the Sentencing Decision.⁶⁵

B. THE SENTENCING DECISION VIOLATED THE LAW AND RULES.

20. The Sentencing Decision turned on three decisive factors: the identified Article 44(2)(b) sentencing range, the jurisprudence analysed, and the specific circumstances of the case.⁶⁶ Grounds 1-5 concern criminal law and substantial procedural violations impacting all three of these factors and the Appeals Panel's flawed analysis overall. They therefore materially affect the Sentencing Decision in its entirety.⁶⁷

21. Grounds 1-5 should be considered in the context of Article 44 and Rule 163, which establish a comprehensive framework for sentencing at the KSC and require consideration of: (i) the binding sentencing range before the KSC;⁶⁸ (ii) non-binding sentencing ranges for the crimes under Kosovo law;⁶⁹ (iii) 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 application of the non-binding sentencing ranges under Kosovo law;⁷⁰ and (iv) the gravity of the crime, its

⁶³ Veseli Decision, KSC-BC-2020-06/PL001/F00008, para.24; KCPC, Arts 384(1)(1.10) (a substantial procedural violation includes a complete lack of reasoning), 432(1)(1.2).

⁶⁴ See Section III(B)(4) below (including the relevant provisions of the Law and Rules).

⁶⁵ Gucati and Haradinaj Decision, KSC-SC-2023-01/F00021, para.17 (a violation of criminal law includes where, 'in rendering a decision on punishment [...], the court exceed its authority under a law'); KCPC, Arts 385(1), 432(1)(1.1).

⁶⁶ Sentencing Decision, KSC-CA-2023-02/F00045, para.26. See also para.24.

⁶⁷ Veseli Decision, KSC-BC-2020-06/PL001/F00008, para.23; Gucati and Haradinaj Decision, KSC-SC-2023-01/F00021, para.14.

⁶⁸ Law, Art.44(1).

⁶⁹ Law, Art.44(2)(a)-(b).

⁷⁰ Law, Art.44(2)(c).

consequences, the individual circumstances of the convicted person, and aggravating and mitigating factors.⁷¹

1. The Appeals Panel did not apply Articles 44(1) and 44(2)(c) (Ground 1).

22. While the Sentencing Decision acknowledged, in passing, that life imprisonment is the maximum sentence at the KSC,⁷² there is no further consideration or analysis of Article 44(1), including in the Appeals Panel's proportionality assessment.⁷³ Further, there is no mention or discussion of Article 44(2)(c) anywhere in the Sentencing Decision. These omissions violated the plain language of the Law, as Article 44(1) provides the only binding sentencing range before the KSC and, as emphasised in the Legality Decision,⁷⁴ Article 44(2)(c) is a required consideration.⁷⁵

(a) Article 44(1)

23. The legislator fixed the penalty (a maximum of life imprisonment) in Article 44(1) for, *inter alia*, war crimes under customary international law. This statutory provision – which does not provide any subsidiary sentencing range⁷⁶ – underscores the gravity of the international crimes concerned, reflects the fundamental nature of the rights violated, and provides Panels the required flexibility to tailor a proportionate sentence.⁷⁷ No other provision in the KSC legal framework – including the non-binding Article 44(2)(a)-(b) considerations – can be interpreted or applied in a manner that would limit Article 44(1) or deprive it of meaning and purpose.

⁷¹ Law, Art.44(5); Rules, Rule 163(1)-(3), (5).

⁷² Sentencing Decision, KSC-CA-2023-02/F00045, para.18, fns 39, 43.

⁷³ Sentencing Decision, KSC-CA-2023-02/F00045, paras 24, 26.

⁷⁴ Legality Decision, KSC-SC-2024-02/F00018, para.106.

⁷⁵ Pursuant to the chapeau of Article 44(2), the Panel 'shall take into account' the Article 44(2)(a)-(c) considerations.

⁷⁶ Under Article 44(1), a sentence of imprisonment may be any term of imprisonment, with a maximum of life.

⁷⁷ Law, Art.44(5); Kosovo, Constitution of the Republic of Kosovo, as promulgated on 15 June 2008 ('Constitution'), Art.33(3); Rules, Rule 163(1), (4). *See also* ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001 ('Čelebići AJ'), paras 716-718.

Ultimately, Panels are entitled to impose, within the limits of Article 44(1) and as part of a reasoned decision, either a greater or lesser sentence than would have been imposed under any other punitive regime in Kosovo.⁷⁸

24. Yet, there is no meaningful consideration of the Article 44(1) range in the Sentencing Decision. Instead, the Appeals Panel effectively applied⁷⁹ the identified, non-binding five- to 25-year range.⁸⁰ This error, which alone invalidates the Sentencing Decision, was further aggravated by the Appeals Panel's failure to assess, let alone reference, the required Article 44(2)(c) consideration.

(b) Article 44(2)(c)

25. The underlying purposes and rationale of Article 44(1) are reflected in Article 44(2)(c), which required the Appeals Panel to consider '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' the non-binding Article 44(2)(b) range identified in the Legality Decision.

26. Consistent with the provision's terms, an Article 44(2)(c) assessment – which is missing entirely from the Sentencing Decision – should take into account, *inter alia*, the mandate and purposes of the KSC and SPO, which were established for the Republic of Kosovo to comply with international obligations stemming from the Council of Europe Report.⁸¹ This report outlined systemic weaknesses in Kosovo's

⁷⁸ ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Judgement, 19 April 2004, para.262.

⁷⁹ *Contra* Legality Decision, KSC-SC-2024-02/F00018, para.106 (noting that the lower Panels are not required to apply the identified Article 44(2)(b) sentencing range, but shall take it into account).

⁸⁰ The Appeals Panel's conclusions were reached, to a decisive extent, on the identified Article 44(2)(b) range, the jurisprudence analysed, and the specific circumstances of the case. There is no reference to Article 44(1) in the relevant parts of the Sentencing Decision. *See* Sentencing Decision, KSC-CA-2023-02/F00045, paras 24, 26.

⁸¹ Law, Art.1(2); Kosovo, Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318*, Case No. KO26/15, AGJ

ability to ensure accountability for certain grave trans-boundary and international crimes.

27. In this respect, States have positive obligations to secure rights to life⁸² and against torture⁸³ and arbitrary detention⁸⁴ by putting in place effective provisions that deter the commission of these offences, backed by ‘law enforcement machinery’ for the prevention, suppression, and sanctioning of breaches.⁸⁵ Similar obligations apply to war crimes protecting the same values under customary international law.⁸⁶ Penalties and in turn, punitive frameworks for serious violations of fundamental rights and freedoms must reflect their grave nature.⁸⁷ In this context, the Appeals Panel was required to carefully scrutinise the case to ensure the deterrent effect of the

788/15, Judgment, 14 April 2015, paras 50-51; Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11/F00015, 26 November 2020, para.56. *See also* Council of Europe, Committee on Legal Affairs and Human Rights, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, Doc. 1246, 27 January 2011 (‘Council of Europe Report’).

⁸² European Convention on Human Rights, 4 November 1950, 213 United Nations Treaty Series 222 (‘ECHR’), Art.2; Constitution, Art.25.

⁸³ ECHR Art.3; Constitution, Art.27.

⁸⁴ ECHR Art.5; Constitution, Art.29.

⁸⁵ ECtHR, Grand Chamber, *Streletz, Kessler and Krenz v. Germany*, 34044/96, 35532/97, and 44801/98, Judgment, 22 March 2001, para.86 (in relation to the right to life); ECtHR, *Sabalić v. Croatia*, 50231/13, Judgment, 14 January 2021, para.97 (concerning torture); ECtHR, *Storck v. Germany*, 61603/00, Judgment, 16 June 2005, para.102 (concerning arbitrary detention). *See also* ECtHR, *A. v. The United Kingdom*, 100/1997/884/1096, Judgment, 23 September 1998, para.22; ECtHR, Grand Chamber, *Mustafa Tunç and Fecire Tunç v. Turkey*, 24014/05, Judgment, 14 April 2015, para.171; Kosovo, Constitutional Court, Constitutional Court, *Gëzim and Makfire Kastrati against Municipal Court in Prishtina and Kosovo Judicial Council*, Case No. KI41/12, AGJ361/13, Judgment, 25 January 2012, para.59; Kosovo, Constitutional Court, *Constitutional Review of “actions and inactions” of the Basic Court in Gjilan, the Basic Prosecutor’s Office in Gjilan, the Police Station in Gracanica, and the Basic Prosecutor’s Office in Prishtina*, Case No. KI129/21, AGJ 2146/23, Judgment, 7 March 2023, para.143; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Judgment, 17 June 2005, Series C, no.125, para.157.

⁸⁶ *See e.g.* Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge University Press, 3rd ed., 2009), pp.607-621.

⁸⁷ *See e.g.* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, GS Res 29/46, Art.4(2); United Nations, Committee Against Torture, *Kepa Urra Guridi v. Spain*, CAT/C/34/D/212/2002, 2-21 May 2005, para.6.6. *See also* ECtHR, Grand Chamber, *Streletz, Kessler and Krenz v. Germany*, 34044/96, 35532/97, and 44801/98, Judgment, 22 March 2001, paras 72-73, 85-89, 94 (noting that the right to life is ‘the supreme value in the hierarchy of human rights’); ECtHR, *Myummyun v. Bulgaria*, 67258/13, Judgment, 3 November 2015, para.67; ECtHR, *Sabalić v. Croatia*, 50231/13, Judgment, 14 January 2021, para.97; ECtHR, Grand Chamber, *Armani Da Silva v. The United Kingdom*, 5878/08, Judgment, 30 March 2016, para.285.

judicial system in place and the role it was required to play are not undermined.⁸⁸ The Sentencing Decision lacks any such scrutiny.

28. The Appeals Panel's omission of Article 44(2)(c), a required consideration intended to give effect to the Court's international obligations and mandate, invalidates the Sentencing Decision.

2. The Appeals Panel incorrectly applied the five- to 25-year range (Ground 2).

29. The identified non-binding Article 44(2)(b) range drawn from the 2019 KCC was a decisive factor in the Sentencing Decision.⁸⁹ However, other than noting it,⁹⁰ the Appeals Panel engaged in no further analysis or consideration of the 2019 KCC or related practices, ignoring legislative intent, the internal rationale of the 2019 KCC,⁹¹ and its own previous finding that, under Article 44(2), 'what is required certainly goes beyond merely reciting the relevant criminal code provisions'.⁹²

30. The crimes include grave acts of arbitrary detention, torture, and murder, with two aggravating and no mitigating circumstances.⁹³ Accordingly, the Convict would have been eligible for life imprisonment⁹⁴ or the alternative 26-35 years of

⁸⁸ ECtHR, *Sabalić v. Croatia*, 50231/13, Judgment, 14 January 2021, para.97.

⁸⁹ See fn.80 above.

⁹⁰ Sentencing Decision, KSC-CA-2023-02/F00045, paras 18, 20, 24, 26.

⁹¹ ECtHR, Grand Chamber, *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, Concurring Opinion of Judges Albuquerque and Vučinić, 18 July 2013, para.8. See also ECtHR, Grand Chamber, *Scoppola v. Italy (No. 2)*, 10249/03, Judgment, 17 September 2009, para.108.

⁹² Appeal Judgment, KSC-CA-2023-02/F00038, para.477 citing, *inter alia*, ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para.682 (also finding that '[s]hould they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice', but noting that 'because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia').

⁹³ See Appeal Judgment, KSC-CA-2023-02/F00038, paras 451, 459, 478; Trial Judgment, KSC-BC-2020-05/F00494, paras 787, 805-812.

⁹⁴ 2019 KCC, Arts 40, 41, 146(1).

imprisonment⁹⁵ under the 2019 KCC. This is a logically relevant consideration that should inform the assessment of a proportionate sentence, notwithstanding the Supreme Court's finding that these punishments did not form part of the Article 44(2)(b) range in this case.⁹⁶

31. Further, while the 2019 KCC provides a minimum sentence of five years for serious violations of Common Article 3,⁹⁷ this cannot be reasonably interpreted to mean that the legislator viewed all acts listed thereunder as of the same gravity; rather, it reflects of the unique structure of Common Article 3, which combines acts of various gravity together under the same sub-heads.⁹⁸ Holistic consideration of the 2019 KCC demonstrates that the legislature intended for, in particular, torture and murder as international crimes⁹⁹ and aggravated forms of murder in any circumstances¹⁰⁰ to be punished by no less than 10 years' imprisonment.

32. In addition to its failure to analyse and properly consider the provisions of the 2019 KCC, the Appeals Panel did not review any sentencing practices in Kosovo under the identified five- to 25-year range.¹⁰¹ For example, the Kosovo Supreme Court's Sentencing Guidelines provide that, in cases where there is significant aggravation

⁹⁵ 2019 KCC, Arts 42(2), 146(1).

⁹⁶ Legality Decision, KSC-SC-2024-02/F00018, para.101.

⁹⁷ 2019 KCC, Art.146(1).

⁹⁸ In this respect, the ECtHR has indicated that serious violations of Common Article 3 have different levels of gravity; for example, offences resulting in loss of life deserve higher penalties. See ECtHR, ECtHR, Grand Chamber, *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, para.69. See also ECtHR, Grand Chamber, *Streletz, Kessler and Krenz v. Germany*, 34044/96, 35532/97, and 44801/98, Judgment, 22 March 2001, paras 72-73, 85-89, 94 (noting that the right to life is 'the supreme value in the hierarchy of human rights').

⁹⁹ 2019 KCC, Arts 143(1), 144(1), 145(1)(1.2), 147(1)(1.2).

¹⁰⁰ 2019 KCC, Art.173. Notably, ICTY Chambers have, in appropriate cases, considered minimum and maximum penalties for the domestic crime of aggravated murder. See e.g. ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Judgment, 2 August 2001, para.697. Further examples of aggravated forms of murder that are punishable in the 2019 KCC by no less than 10 years include, *inter alia*: smuggling of migrants and human trafficking resulting in death (2019 KCC, Articles 164(7), 165(5)); sexual crimes resulting in death (2019 KCC, Articles 227(5), 228(5), 229(5)); pollution of food products resulting in death (2019 KCC, Article 265(5)); theft and robbery resulting in death (2019 KCC, Articles 316(4), 317(5)); and arson resulting in death (2019 KCC, Articles 322(4)).

¹⁰¹ See Legality Decision, KSC-SC-2024-02/F00018, para.107.

and no mitigation, a crime punishable in the five- to 25-year range should generally be punished by a sentence between 21 and 25 years, if not life.¹⁰² Consistent with these Sentencing Guidelines, Kosovo courts have imposed sentences of 21 years to life for a single aggravated murder.¹⁰³ Notably, the Sentencing Guidelines were adopted at a General Session of the Kosovo Supreme Court to respect human rights and international obligations, address flaws and disparities in sentencing by Kosovo courts, and structure judicial discretion.¹⁰⁴ In the circumstances, and considering the obligations, mandate, and purposes of the KSC,¹⁰⁵ consideration of such guidelines and relevant sentencing practice is necessary for any informed assessment of the identified, non-binding Article 44(2)(b) range under Kosovo law.

33. As the Sentencing Decision turned to a decisive extent on the non-binding Article 44(2)(b) range identified in the Legality Decision,¹⁰⁶ the Appeals Panel's failure to analyse and properly consider it invalidates the Sentencing Decision.

¹⁰² Kosovo, Supreme Court, *Sentencing Guidelines*, 1st Edition, 2018 ('Sentencing Guidelines'), pp.141-143 (setting out the factors to be taken into account when determining 'increased culpability' and 'increased harm'), 153 (setting out the factors underlying Category 9 in the sentencing table, namely, 'two or more factors of increased culpability or harm with no mitigation', 'significant aggravation with no mitigation', or 'total aggravation significantly in excess of mitigation'), 200 (Section VI(e): establishing for a crime punishable by at least five years under Category 9 as deserving of between 21 and 25 years). For Category 9 crimes with a minimum of 10-years' imprisonment (such as international crimes of torture and murder, and other forms of aggravated murder), the range is 22-25 years.

¹⁰³ See e.g. Kosovo Law Institute, *Sentencing Policy in Kosovo (Analysis on the Implementation of the Sentencing Policy Guidance by the Kosovo Courts)*, 20/2019, November 2019, pp.115-116, 119-123, 126-128 (reviewing sentences imposed in cases involving aggravated murder). See also pp.128-130 (criticising a sentence of 20 years for an aggravated murder as more lenient than the applicable range). These sentences were reached considering the five- to 25-year imprisonment range under the 2012 KCC. Under the 2019 KCC, which, unlike the 2012 KCC, provides also for an alternative sentence of 21-35 years for crimes eligible for life, higher sentences have been imposed for aggravated murder.

¹⁰⁴ Sentencing Guidelines, pp.4-5 (setting out the 'Reasoning' for the Supreme Court's adoption of the Sentencing Guidelines).

¹⁰⁵ See paras 26-27 above.

¹⁰⁶ Sentencing Decision, KSC-CA-2023-02/F00045, paras 18, 20, 24, 26.

3. The Appeals Panel failed to issue a reasoned decision (Ground 3).

34. The Appeals Panel was required to – but did not – provide a reasoned opinion¹⁰⁷ containing the established facts, relevant legal provisions, and logical relationship between them.¹⁰⁸ This failure resulted in an arbitrary decision, which did not address the essential issues of the case,¹⁰⁹ ensure that ‘each party and participant to the case is fully apprised of the outcome in a predictable manner’,¹¹⁰ and enable the Parties and participants to effectively seek appropriate remedies.¹¹¹ The Sentencing Decision provided no reasons on required considerations and the sparse reasoning it did provide on other factors was based on manifest errors, resulting in an arbitrary

¹⁰⁷ Law, Art.46(7); Rules, Rules 78(2), 183(3).

¹⁰⁸ Kosovo, Constitutional Court, *Constitutional review of Judgment E. Rev. No. 27/2017 of the Supreme Court of 24 January 2018*, 15 April 2019, Case No. KI87/18, AGJ 1347/19, Judgment, 15 April 2019, para.49 (noting that ‘a judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them’). See also Decision on Hashim Thaçi’s Appeal Against Decision on Interim Release, KSC-BC-2020-06/IA004/F00005, 30 April 2021 (‘Thaçi Appeal Decision’), para.27; *Specialist Prosecutor v. Gucati and Haradinaj*, Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023 (‘Gucati and Haradinaj Appeal Judgment’), para.33.

¹⁰⁹ Thaçi Appeal Decision, KSC-BC-2020-06/IA004/F00005, paras 27, 29; Gucati and Haradinaj Appeal Judgment, KSC-CA-2022-01/F00114, para.33; ECtHR, *Lobzhanidze and Peradze v. Georgia*, 21447/11 and 35839/11, Judgment, 27 February 2020, para.66.

¹¹⁰ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-1400 A, Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions, 31 March 2021, para.112; Thaçi Appeal Decision, KSC-BC-2020-06/IA004/F00005, paras 27, 29. See also ECtHR, *O’Carroll v. United Kingdom*, 35557/03, Decision, 15 March 2005, para.1; ECtHR, *Hirvisaari v. Finland*, 49684/99, Judgment, 27 September 2001, para.30; ECtHR, *Tatishvili v. Russia*, 1509/02, Judgment, 22 February 2007, para.58; ECtHR, *Boldea v. Romania*, 19997/02, Judgment, 15 February 2007, para.29.

¹¹¹ See Kosovo, Constitutional Court, *Constitutional review of Decision [AKPA. II. no. 163/23] of the Appellate Prosecution Office, of 1 November 2023*, KI272/23, AGJ 2520/24, Judgment, 26 August 2024, para.30; Kosovo, Constitutional Court, *Constitutional review of Decision CA. no. 2093/2017, of the Court of Appeals, of 29 January 2018*, KI86/18, VMSP 2410/24, Judgment, 3 February 2021, paras 124-125. See also ECtHR, *Boyle and Rice v. The United Kingdom*, 9659/82, 9658/82, Judgment, 27 April 1988, para.52; ECtHR, *Hirvisaari v. Finland*, 49684/99, Judgment, 27 September 2001, para.30 (‘The Court reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based [...] a lower court or authority in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal.’); ECtHR, *Tatishvili v. Russia*, 1509/02, Judgment, 22 February 2007, para.58 (‘Article 6 § 1 obliges courts to give reasons for their judgments.’); ECtHR, *Boldea v. Romania*, 19997/02, Judgment, 15 February 2007, para.29.

decision and a denial of justice.¹¹² Indeed, the need for adequate reasons was at its highest in present circumstances, considering the Appeals Panel’s decision not to hear further submissions from the affected Parties and participants, the Appeals Panel’s previous conclusion that the 22-year sentence reflected ‘the totality of [the Convict’s] criminal conduct in this case’,¹¹³ the purposes of sentencing and the multiple factors that must be taken into account, and the findings in the Legality Decision.

35. Importantly, the Supreme Court annulled and remanded the sentencing part of the Appeal Judgment because it, *inter alia*, considered that the Appeals Panel failed to properly reason how it arrived at a reduction of the Convict’s sentence by four years.¹¹⁴ The Sentencing Decision is similarly deficient, failing to properly reason how the Appeals Panel arrived at a further reduction of the Convict’s single sentence by seven years, resulting in an 11-year reduction from the sentence imposed by the Trial Panel,¹¹⁵ which was intimately familiar with the case, including the Article 44(5) and Rule 163(1) factors, and entitled to broad discretion in tailoring a sentence.¹¹⁶ The Sentencing Decision’s generic reference to the identified non-binding Article 44(2)(b) range, and citations to and brief summaries of a selection of individualised ICTY sentences, and prior findings of the Trial Panel, Appeals Panel, and Supreme Court¹¹⁷ were wholly insufficient to demonstrate that the Appeals Panel undertook ‘all

¹¹² Thaçi Appeal Decision, KSC-BC-2020-06/IA004/F00005, para.27 (noting that ‘a Panel has a duty to provide sufficient reasoning’). ECtHR, Grand Chamber, *Moreira Ferreira v. Portugal (No. 2)*, 9867/12, Judgment, 11 July 2017, para.85; ECtHR, Grand Chamber, *Yüksel Yalçinkaya v. Türkiye*, 15669/20, Judgment, 26 September 2023, para.304.

¹¹³ Appeal Judgment, KSC-CA-2023-02/F00038, paras 478-480.

¹¹⁴ Legality Decision, KSC-SC-2024-02/F00018, paras 75, 103, 108.

¹¹⁵ See paras 15-16 above.

¹¹⁶ Appeal Judgment, KSC-CA-2023-02/F00038, para.453; Legality Decision, KSC-SC-2024-02/F00018, para.106.

¹¹⁷ See para.16 above.

procedural acts and determine[d] all issues to which it has been alerted by the Supreme Court'.¹¹⁸

36. In this respect, as set out under Grounds 1-2, the Appeals Panel did not take into account and balance all required considerations; rather, it omitted Articles 44(1) and 44(2)(c) and incorrectly applied the non-binding Article 44(2)(b) range. Further, while it summarised, in one paragraph, the specific circumstances of the case,¹¹⁹ it did not meaningfully and coherently engage with them. At no point did the Appeals Panel expressly or in any detail weigh or analyse the specific circumstances – namely, the high gravity of the crimes, the significant and long-lasting consequences on the victims, the aggravating factors (including commission with particular cruelty and particularly vulnerable or defenceless victims), the Convict's very high intent and personal participation in the crimes, and the absence of mitigating factors¹²⁰ – against the identified non-binding Article 44(2)(b) range or any other required consideration.

37. Instead, the Sentencing Decision turned to a decisive extent on – in particular, two¹²¹ – individualised ICTY sentences, a consideration that, while potentially relevant, is not mandatory under any provision of the Law or Rules. For such jurisprudence to be relevant, the Appeals Panel was required to find that it constituted 'a line of sentences imposed in similar circumstances for similar offences' when compared with this case. While the Appeals Panel stated that it had done so,¹²² there is no analysis or explanation, as would logically and legally be required, considering that the 'differences [between cases] are often more significant than the similarities and the mitigating and aggravating circumstances dictate different results'.¹²³ In this

¹¹⁸ See, similarly, KCPC, Art.439(2) (setting out obligations of lower courts following annulment of a judgment and remand).

¹¹⁹ Sentencing Decision, KSC-CA-2023-02/F00045, para.20.

¹²⁰ See para.7 above.

¹²¹ Sentencing Decision, KSC-CA-2023-02/F00045, para.22.

¹²² Sentencing Decision, KSC-CA-2023-02/F00045, para.24.

¹²³ ICTY, *Prosecutor v. Babić*, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para.33.

respect, the Appeals Panel found that: (i) the analysed jurisprudence did not include any perfectly analogous cases due to the number of variables relevant to sentencing,¹²⁴ noting that international courts, such as the ICTY, operate in a different framework;¹²⁵ and (ii) the cases cited were distinguishable,¹²⁶ including ‘notable differences’ in two cases of ‘particular note’, namely, *Limaj et al.* and *Mucić et al.*,¹²⁷ which had already been considered in the Appeal Judgment.¹²⁸ Despite these significant differences, the Sentencing Decision engages in no meaningful analysis or comparison.

38. Overall, given the Appeals Panel’s overriding obligation to, within the bounds of the KSC’s penal regime, individualise sentences to the circumstances of a case and Convict,¹²⁹ its failure to provide adequate reasoning on required and decisive considerations invalidates the Sentencing Decision.

¹²⁴ Sentencing Decision, KSC-CA-2023-02/F00045, para.21.

¹²⁵ Sentencing Decision, KSC-CA-2023-02/F00045, para.20 (‘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’).

¹²⁶ Sentencing Decision, KSC-CA-2023-02/F00045, fn.52 (‘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 [...]; (ii) the convicted person’s lack of position of authority [...]; (iii) accessory liability, in whole or in part [...]; and (iv) a comparatively larger numbers of victims [...].’).

¹²⁷ Sentencing Decision, KSC-CA-2023-02/F00045, para.22, fn.57 (‘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.’).

¹²⁸ While not cited in fn.1292 of the Appeal Judgment concerning comparable international cases analysed, both *Limaj et al.* and *Delalić et al.* (which was the *Mucić et al.* case name on appeal) were cited in the sentencing part of the Appeal Judgment (*see* Appeal Judgment, KSC-CA-2023-02/F00038, fns 1241, 1269, 1276, 1290, 1297) demonstrating that the Appeals Panel was familiar with these cases when the Appeals Panel imposed a single 22-year sentence.

¹²⁹ Sentencing Decision, KSC-CA-2023-02/F00045, fn.55 (and sources cited therein); Appeal Judgment, KSC-CA-2023-02/F00038, para.478.

4. The Appeals Panel failed to hear the Parties and participants (Ground 4).

39. The Appeals Panel compounded the violations in the Sentencing Decision by not hearing the Parties and participants.¹³⁰ As reflected in the Law and Rules,¹³¹ and consistent with the adversarial nature of, *inter alia*, sentencing proceedings, Parties and participants whose interests and rights are affected have a corresponding right to be heard on matters that are decisive, particularly when a decision is reached *proprio motu* or on the basis of novel considerations and ‘important principles’.¹³² Such submissions are a safeguard against unreasoned and arbitrary decisions.¹³³

40. While the Appeals Panel considered that submissions pre-dating the Legality Decision were sufficient,¹³⁴ this conclusion was, in itself, arbitrary and substantially contributed to the violations under Grounds 1-3 because, *inter alia*: (i) prior sentencing submissions and decisions were based on an interpretation of Article 44(2)(a)-(b), consistent with international jurisprudence interpreting similar provisions, that the Supreme Court found was incorrect; (ii) no Party or participant had previously

¹³⁰ Sentencing Decision, KSC-CA-2023-02/F00045, fn.37

¹³¹ Various provisions of the Law and Rules acknowledge the rights of Parties and participants to be heard where their rights and interests are affected. *See e.g.* Law, Arts 35(2)(i), 39(8), 40(2), 40(7); Rules, Rules 8(3)(a), 19(5), 51(2), 56(2), 74(1), 79, 89(2), 90(1), 93(3), 95(3), 114(4), 116(3), 117(2), 118(1), 118(4), 119(3), 120(1), 130(3), 132, 153(3), 157(2), 159(6), 181(2). It is illogical that a Panel would, in the interest of fairness, be required to hear the affected Parties and participants before reconsidering a decision *proprio motu* (*see* Rule 79), but not when reconsidering a decision as directed by the Supreme Court.

¹³² *Čelebići* AJ, para.711 (where there have be no submissions and/or matters of important principle are involved, it is necessary to first give the parties an opportunity to make relevant submissions); ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-A15bis, Decision in the Matter of Proceedings under Rule 15bis(D), 21 June 2004, paras 8-10 (considering, *inter alia*, that ‘it is a matter of principle that the parties to a case have a right to be heard before a decision is made which can affect their rights’ and that the right to challenge a decision implies that the parties have a right to be heard before the making of that decision). *See also* ECtHR, *Bajić v. North Macedonia*, 2833/13, Judgment, 10 June 2021, paras 54, 59.

¹³³ *See, similarly*, ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Judgment, 5 July 2001, para.27 (that a Panel can decide *proprio motu* ‘does not relieve it of the normal duty of a judicial body to first hear party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber. The availability of this right to the prosecution and the exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence by the prosecution and from its arguments on the applicable law.’).

¹³⁴ Sentencing Decision, KSC-CA-2023-02/F00045, fn.37.

submitted, nor had any previous Panel found, that only the five- to 25-year range identified in the Legality Decision was to be considered under Article 44(2)(a)-(b) in this case; (iii) no Party or participant had made Article 44(2)(c) submissions on the basis of the newly identified range; and (iv) the Legality Decision identified additional ICTY jurisprudence – beyond that cited in the Appeal Judgment – to be considered. These were novel and fundamental issues, which in fairness and the interests of justice, required further submissions to enable the Appeals Panel to reach a reasoned, lawful decision.

5. The Appeals Panel exceeded its authority (Ground 5).

41. As demonstrated under Grounds 1-4, the Sentencing Decision did not apply and incorrectly applied binding provisions of the Law and Rules, failed to comply with the Legality Decision, and was not reasoned. These substantial procedural violations materially affect all decisive aspects of the Sentencing Decision, rendering it arbitrary and manifestly unreasonable. The Sentencing Decision was thus without sound legal basis, failed to provide effective safeguards against arbitrary punishment,¹³⁵ and undermined foreseeability, accessibility, and constitutional compliance.¹³⁶ Accordingly, the violations in Grounds 1-4 demonstrate that the Sentencing Decision exceeded the Appeals Panel's authority under Articles 44 and 46. Whether considered alone or together, they therefore constitute violations of the criminal law under Article 48(7)(a) and KCPC Articles 385(1) and 432(1)(1.1).

C. THE SUPREME COURT SHOULD ANNUL THE SENTENCING DECISION.

42. Considering the nature and extent of the violations under Grounds 1-5, the Supreme Court should: (i) annul the Sentencing Decision in its entirety; and (ii) return

¹³⁵ ECtHR, Grand Chamber, *Korbely v. Hungary*, 9174/02, Judgment, 19 September 2008, para.69; ECtHR, Grand Chamber, *Vasiliauskas v. Lithuania*, 35343/05, Judgment, 20 October 2015, para.153.

¹³⁶ See also ECtHR, Grand Chamber, *Kononov v. Latvia*, 3637/04, Judgment, 17 May 2010, para.198; Judgment on the Referral by Nasim Haradinaj to the Specialist Chamber of the Constitutional Court, KSC-CC-2023-22/F00011, 31 May 2024, paras 98, 140.

the case to the Appeals Panel for the limited purpose of determining a new sentence that complies with the Law and Rules.¹³⁷

43. Rule 194(2) does not foreclose the relief sought. In this respect, the violations established above demonstrate that the Sentencing Decision, in its entirety, was arbitrary, manifestly unreasonable, and exceeded the Appeals Panel's authority. As arbitrariness negates the rule of law,¹³⁸ Rule 194(2) cannot be interpreted in a manner that would prejudice the Supreme Court's powers and obligations to address non-compliance with its decisions¹³⁹ and ensure that punishments are proportionate and have a legal basis, as required by Article 33 of the Constitution.

44. Consistent with the Supreme Court's prior decisions,¹⁴⁰ Article 48 and Rule 194 should be interpreted in light of corresponding KCPC provisions. Rule 194(2) aligns conceptually and corresponds with interconnected KCPC Articles 395, 436(3), and 438(2).¹⁴¹ Under these provisions and considering the nature of the violations and this request, Rule 194(2) does not apply even if the requested relief – which would ensure

¹³⁷ Rules, Rule 194(1).

¹³⁸ ECtHR, Grand Chamber, *Al-Dulimi and Montana Management Inc. v. Switzerland*, 5809/08, Judgment, 21 October 2016, para.145; ECtHR, *Legillon v. France*, 53406/10, Judgment, 10 January 2013, para.53.

¹³⁹ In this respect, consistent with KCPC Article 439(2), other courts have found that, where a case has been remanded, the higher court necessarily retains jurisdiction to assess compliance with its instructions. See e.g. ICTR, *Karemera et al. v. Prosecutor*, ICTR-98-44-AR82, Decision on Matthieu Ngirumpatse's Further Motions for Extension of Time and Motion for Reconsideration and on the Appeal filed on 25 September 2009, 29 September 2009, para.19; ICTY, *Prosecutor v. Gotovina et al.*, Decision on Joint Request of Ante Gotovina and Mladen Markač for a Writ of Mandamus, 27 March 2009, para.5; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Decision on Prosecution Appeal Following Trial Chamber's Decision on Remand and Further Certification, 11 May 2007, paras 18-19.

¹⁴⁰ See e.g. Veseli Decision, KSC-BC-2020-06/PL001/F00008, para.24; Gucati and Haradinaj Decision, KSC-SC-2023-01/F00021, para.17.

¹⁴¹ KCPC, Art.395 ('where only an appeal in favour of the accused has been filed, the judgment may not be modified to the detriment of the accused with respect to the legal classification of the offense and the penal sanction imposed'); KCPC, Art.436(3) ('in deciding on a request for protection of legality filed in favour of the defendant, the Supreme Court of Kosovo is bound by the prohibition under Article 395 of the present Code'); KCPC, Art.438(2) ('if the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it only determines that the law was violated but without interfering in the final decision, unless if the final decision is manifestly inappropriate or based on serious error').

that the sentence imposed has a valid legal basis – could be construed as potentially being to the Convict’s disadvantage.¹⁴² In this respect, the requested relief would not undermine, but instead would serve the underlying rationale of the *reformatio in peius* principle reflected in Rule 194(2), which is intended to safeguard the Convict’s right to challenge a decision and ensure legal certainty.¹⁴³

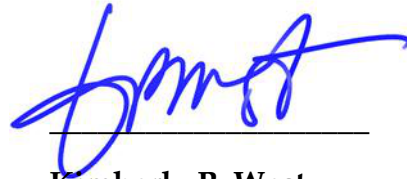
IV. RELIEF REQUESTED

45. For the foregoing reasons, the Supreme Court should: (i) find that the Sentencing Decision violated the Law and Rules for the reasons set out under Grounds 1-5; (ii) annul the Sentencing Decision in its entirety; and (iii) return the case to the Appeals Panel for the limited purpose of determining a new sentence that complies with the KSC’s legal framework.

¹⁴² See, similarly, Kosovo, Constitutional Court, *Constitutional review of Judgment PML. No. 120/17 of the Supreme Court of Kosovo of 13 December 2017*, Case No. KI70/18, RK 1335/19, Resolution on Inadmissibility, 6 February 2019 (‘Zylfaj Constitutional Court Judgment’), paras 52-56 (finding no violation of the *reformatio in peius* principle where, in a retrial ordered by an appeals court following annulment of the initial judgment (against which both parties appealed), the most severe punishment available was imposed, which was harsher than that initially imposed before annulment, and considering that the sentence complied with the principle of proportionality and the applicants benefited from adversarial proceedings); Kosovo, Supreme Court, *Pkl-Kzz-26/2010*, Judgment, 25 May 2010, p.12 (granting a protection of legality filed by the prosecutor and modifying the judgments of the lower courts to the defendant’s disadvantage); Kosovo, Constitutional Court, *Constitutional review of Judgment Pml. no. 222/2015 of the Supreme Court of Kosovo, of 17 November 2015*, Case No. KI45/16, RK 1039/17, Resolution on Inadmissibility, 14 December 2016, paras 37-38.

¹⁴³ See Kosovo, Constitutional Court, *Constitutional review of Judgment [ARJ-UZPV. No. 85/2019] of the Supreme Court of 26 June 2019*, Case No. KI189/19, RK 1665/20, Resolution on Inadmissibility, 10 November 2020, para.61; Zylfaj Constitutional Court Judgment, para.49. See also ECtHR, *Ruslan Yakovenko v. Ukraine*, 5425/11, Judgment, 4 June 2015, Concurring Opinion of Judge Zupančič. When considering complaints concerning harsher convictions or sentences than those imposed in annulled decisions, the ECtHR has generally deferred to the domestic courts so long as there are no elements of arbitrariness and has dismissed complaints based on the *reformatio in peius* principle as manifestly ill-founded. See e.g. ECtHR, *Kuokkanen and Johannesdahl v. Finland*, 38147/12, Decision, 2 June 2015, paras 26-28 (dismissing the complaint as manifestly ill-founded where the domestic Supreme Court annulled a judgment in its entirety because the relevant panel had not been competent and reopened the proceedings to the disadvantage of the applicant).

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Tuesday, 10 December 2024

At The Hague, the Netherlands.