



File number: KSC-SC-2024-03
KSC-SC-2024-04

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

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

Registrar: Fidelma Donlon

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**Decision on Mustafa's and Specialist Prosecutor's
Requests for Protection of Legality**

Specialist Prosecutor:

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THE PANEL OF THE SUPREME COURT CHAMBER of the Kosovo Specialist Chambers (“Supreme Court Panel” or “Panel”) noting Article 33(3) of the Constitution,¹ Articles 44(2), 48(6), (7), (8) and 64 of the Law on Specialist Chambers and Specialist Prosecutor’s Office² (“Law”) and Rules 193 and 194(1)(b) of the Rules of Procedure and Evidence (“Rules”)³ is seised of the “Defence Request for Protection of Legality pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules with Public Annex 1” (“Mustafa Request”) and of the “Prosecution Request for Protection of Legality against ‘Decision on New Determination of Salih Mustafa’s Sentence’ with Public Annex 1” (“SPO Request”), (collectively “Requests”).⁴

I. PRELIMINARY MATTERS

1. At the outset, the Supreme Court Panel notes that both requests arise from the same underlying decision and share substantially similar issues. The Panel will therefore address the two requests together in one decision also taking into consideration judicial economy. The Panel wishes to emphasise that while these two requests will be dealt with together, each will be resolved on its own merits in accordance with the applicable legal standards.

2. Further, Mr Mustafa requests the proceedings before the Supreme Court to be suspended pending the issuance of the Specialist Chamber of the Constitutional Court (“Constitutional Court”) decision on Mr Mustafa’s constitutional referral.⁵ The

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

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

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

⁴ KSC-SC-2024-03/F00001, Defence Request for Protection of Legality pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules with Public Annex 1, 9 December 2024; KSC-SC-2024-04/F00001, Prosecution Request for Protection of Legality against ‘Decision on New Determination of Salih Mustafa’s Sentence’ with Public Annex 1, 10 December 2024.

⁵ Mustafa Request, para. 42. See also, KSC-CC-2024-27/F00001, The Specialist Prosecutor v. Salih Mustafa 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 with public Annexes 1 to 7, 27 September 2024 (“Mustafa Constitutional Referral”).

Supreme Court Panel notes that a request for protection of legality pursuant to Article 48(6) of the Law and a referral to the Constitutional Court pursuant to Article 49(3) of the Law are two separate and, in many ways, distinct legal avenues available to Mr Mustafa – each subject to different applicable legal standards. The Supreme Court Panel further observes that these separate and distinct remedies available to Mr Mustafa target two different decisions issued by different Panels.⁶ Therefore, the Supreme Court Panel dismisses Mr Mustafa’s request to have the proceedings suspended pending the issuance of the Constitutional Court decision.

II. PROCEDURAL BACKGROUND

3. On 16 December 2022, Trial Panel I rendered the “Trial Judgment”, wherein it convicted Mr Salih Mustafa of arbitrary detention, torture and murder as war crimes and acquitted him of the war crime of cruel treatment.⁷ The Trial Panel sentenced Mr Mustafa to 26 years of imprisonment.⁸

4. On 6 April 2023, Trial Panel I issued the “Reparation Order against Salih Mustafa with 4 Annexes Strictly Confidential and *Ex Parte*”, wherein it ordered Mr Mustafa to pay 207,000 Euros as compensation for the harm inflicted on the victims of the crimes for which he was convicted.⁹

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

⁶ KSC-CA-2023-02/F00045, Decision on New Determination of Salih Mustafa’s Sentence, 10 September 2024 (“Decision on New Determination of Sentence”); KSC-SC-2024-02/F000018, Decision on Salih Mustafa’s Request for Protection of Legality, 29 July 2024 (“Decision on Mustafa’s First Protection of Legality Request” or “Supreme Court Decision”).

⁷ KSC-BC-2020-05/F00494, Trial Judgment, 16 December 2022 (confidential), para. 831. A corrected version was filed on 24 January 2023 (KSC-BC-2020-05/F00494/COR) and a public redacted version on 8 June 2023 (KSC-BC-2020-05/F00494/RED3/COR).

⁸ Trial Judgment, para. 831.

⁹ KSC-BC-2020-05/F00517, Reparation Order against Salih Mustafa with 4 Annexes Strictly Confidential and *Ex Parte*, 6 April 2023 (confidential), para. 283. A public redacted version of the Reparation Order was issued on the same day (KSC-BC-2020-05/F00517/RED) and a corrected version of the public redacted version on 14 April 2023 (KSC-BC-2020-05/F00517/RED/COR).

torture and murder as war crimes, but granted Mr Mustafa's appeal, in part, against his sentence.¹⁰ To that end, the Court of Appeals Panel reduced Mr Mustafa's sentence to 22 years of imprisonment, with credit for time served.¹¹

6. On 29 July 2024, the Supreme Court Panel issued the Decision on Mustafa's First Protection of Legality Request, wherein it, *inter alia*, annulled the Appeal Judgment insofar as it relates to Mr Mustafa's sentence and returned it for a new determination of his sentence pursuant to Rule 194(1)(b) of the Rules.¹²

7. On 10 September 2024, the Court of Appeals Panel issued the Decision on New Determination of Sentence, reducing Mr Mustafa's sentence to 15 years of imprisonment, with credit for time served.¹³

8. On 27 September 2024, Mr Mustafa filed a referral before the Constitutional Court, contesting the decision of the Supreme Court Panel.¹⁴

9. On 9 and 10 December 2024, respectively, Mr Mustafa and the Specialist Prosecutor's Office ("SPO") filed their Requests.

10. On 10 and 11 December 2024, respectively, the President assigned the Supreme Court Panel to decide on the Requests.¹⁵

11. On 31 January 2025, the SPO filed the "Prosecution response to Defence request for protection of legality with public Annex 1" ("SPO Response") and Mr Mustafa filed the "Defence Response to Prosecution Request for Protection of Legality against 'Decision on New Determination of Salih Mustafa's Sentence'" ("Mr Mustafa

¹⁰ KSC-CA-2023-02/F00038, Appeal Judgment, 14 December 2023 (confidential), para. 484. A public redacted version of the Appeal Judgment was issued on the same day (KSC-CA-2023-02/F00038/RED).

¹¹ Appeal Judgment, para. 484.

¹² Decision on Mustafa's First Protection of Legality Request, para. 112.

¹³ Decision on Mustafa's New Determination of Sentence, para. 28.

¹⁴ Mustafa Constitutional Referral.

¹⁵ KSC-SC-2024-03/F00002, Decision Assigning a Supreme Court Panel, 10 December 2024; KSC-C-2024-04/F00002, Decision Assigning a Supreme Court Panel, 11 December 2024.

Response").¹⁶

12. On 17 February, Counsel for Mr Mustafa filed the "Defense Reply to the Prosecution's Response to the Defense Request for Protection of Legality" ("Mustafa Reply") and the SPO filed the "Prosecution Reply Relating to its Protection of Legality Request with Public Annex 1" ("SPO Reply").¹⁷

III. ADMISSIBILITY

13. The Panel notes that the Decision on New Determination of Sentence is final and that both Requests were filed within the three-month time limit prescribed in Article 48(6) of the Law, following the issuance of that Decision. The Mustafa Request and the SPO Request are accordingly admissible in this respect and the Panel will therefore proceed with their assessment.

IV. STANDARD OF REVIEW

14. The Panel recalls that protection of legality cannot be characterized as a third instance appeal, as set forth in Article 47 of the Law, nor does it raise matters under Article 48(1) to (5) of the Law. It is an extraordinary legal remedy provided for in Article 48(6) and (7) of the Law and Rules 193 and 194 of the Rules. It is not meant to create another general avenue of appeal.¹⁸ Rather, and similar to the Kosovo Criminal Procedure Code,¹⁹ protection of legality is limited to the specific instances defined in

¹⁶ KSC-SC-2024-03/F00004, Prosecution Response to Defence Request for Protection of Legality with Public Annex 1, 31 January 2025; KSC-SC-2024-04/F00004, Defence Response to Prosecution Request for Protection of Legality against 'Decision on New Determination of Salih Mustafa's Sentence', 31 January 2025.

¹⁷ KSC-SC-2024-03/F00005, Defense Reply to the Prosecution's Response to the Defense Request for Protection of Legality, 17 February 2025; KSC-SC-2024-04/F00005, Prosecution Reply Relating to its Protection of Legality Request with Public Annex 1, 17 February 2025.

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

¹⁹ See Article 432 of the Kosovo Criminal Procedure Code No. 08/L-032, Official Gazette No. 24, 17 August 2022.

the Law and the Rules. As the Kosovo Supreme Court stated:

[T]he request for protection of legality, as one of the extraordinary legal remedies, is the exceptional legal remedy aiming to correct possibly wrong application of the material and procedural law. Strict requirements of the admissibility are designed to ensure that this legal remedy would not be used as a general third instance against all decisions in the criminal proceedings.²⁰

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

16. In the assessment of each ground, the Panel shall determine whether a violation of the criminal law contained within the Law or a substantial violation of the procedures set out in the Law and in the Rules has been identified.

17. Arguments that reasonably could have been advanced before the first and second instance panels, cannot be raised *de novo* before the Supreme Court Panel.²¹

18. Furthermore, grounds underlying a request for protection of legality alleging erroneous or incomplete determinations of the facts are beyond the competence of this Panel and are thus inadmissible.²²

19. Mere disagreement with the factual assessment of the first and second instance courts or verbatim repetitions of submissions of the previous appeal without engaging substantively with the impugned decision or final judgment identifying the specific alleged error or violation are equally insufficient to meet the admissibility threshold for such grounds.²³

20. With respect to violations pursuant to Article 48(7) of the Law invoking protection of legality proceedings, the Supreme Court Chamber recalls that it has previously set forth the standard of review applicable to requests for protection of

²⁰ Kosovo, Supreme Court, S.S., Pml.Kzz 42/2017, Judgment, 10 May 2017, para. 23.

²¹ Gucati and Haradinaj Decision, para. 10.

²² Rule 193(3) of the Rules. See also Gucati and Haradinaj Decision, para. 10; Veseli Decision, para. 25.

²³ Gucati and Haradinaj Decision, para. 10; Veseli Decision, para. 25.

legality based on *substantial violations of the procedures* regarding final judgments.²⁴ The Panel recalls the high threshold established by Article 48(7)(b) of the Law in relation to substantial procedural violations.²⁵ More specifically, the Panel ruled that “substantial violation” of the procedures occurs when it “materially affects the judicial finding”.²⁶ An alleged substantial violation of the procedures set out in the Law and the Rules should be assessed on a *case-by-case* basis in view of the circumstances underlying each particular request.²⁷

21. The Supreme Court Panel further recalls that it may find a substantial violation of the procedures if the Court of Appeals Panel, for example: (i) omitted to apply a provision of the Law or the Rules; (ii) incorrectly applied the Law and/or the Rules; or (iii) violated the rights of the Defence in a manner which has influenced the rendering of a lawful and fair decision.²⁸

22. The Panel also established the applicable standard of review with respect to violation(s) of the criminal law as set out in Article 48(7)(a) of the Law.²⁹ The Panel held that this article does not require that a violation of the criminal law be “substantial”.³⁰

23. The Panel observes the exhaustive list of violations of the criminal law provided for in Article 385(1) of the Kosovo Criminal Procedure Code and considers that violations of the criminal law are confined to those enumerated therein. Specifically, such violations exist where: (i) the offence for which the accused is prosecuted is not a criminal offence; (ii) circumstances exist which preclude criminal liability and, in

²⁴ Gucati and Haradinaj Decision, para. 13.

²⁵ Gucati and Haradinaj Decision, para. 14; Veseli Decision, para. 23.

²⁶ Gucati and Haradinaj Decision, para. 14; Veseli Decision, para. 23.

²⁷ See also Kosovo Supreme Court, *NV*, Pml.Kzz 91/2015, Judgment, 14 May 2015, paras 4, 10-12; *AM*, Pml.Kzz 84/2015, Judgment, 12 May 2015, pp 3-4; *M.I.*, Pml.Kzz 26/2015, Judgment, 18 March 2015, pp 5-7.

²⁸ Gucati and Haradinaj Decision, para. 14; Veseli Decision, para. 24.

²⁹ Gucati and Haradinaj Decision, para. 17.

³⁰ Gucati and Haradinaj Decision, para. 17.

particular, if criminal prosecution is prohibited by the period of statutory limitation or precluded due to an amnesty or pardon, or prior adjudication by a final judgment; (iii) circumstances exist which preclude criminal prosecution; (iv) an inapplicable law was applied to the criminal offence; (v) in rendering a decision on punishment, alternative punishment or judicial admonition, or in ordering a measure of mandatory rehabilitation treatment or the confiscation, the court exceeded its authority under a law; or (vi) provisions were violated in respect of crediting the period of detention, house arrest, any period of deprivation of liberty and an earlier served sentence related to the criminal offence subject to the criminal proceedings.³¹

24. The Panel notes that a request for protection of legality could also be premised on Article 48(8) of the Law, which stipulates that an extraordinary legal remedy may also be filed on the basis of rights available under the Law, which are also protected under the European Convention on Human Rights (“ECHR”). The Panel held that any alleged violation of the rights available under the Law, which are also protected under the ECHR, must meet the same standard of review as set out above.³²

25. The Panel has further held that a party requesting protection of legality must clearly identify the alleged legal violation, substantiate it, and, in case of a procedural violation, demonstrate how it materially affected the impugned judgment.³³

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

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

³¹ Article 385(1)(1.1-1.6) of the Kosovo Criminal Procedure Code. See also Gucati and Haradinaj Decision, para. 17.

³² See Gucati and Haradinaj Decision, para. 18; Veseli Decision, para. 33.

³³ Gucati and Haradinaj Decision, para. 19; Veseli Decision, para. 23.

27. Having recalled the standard of review, the Supreme Court Panel shall address the grounds underlying the Requests.

V. DISCUSSION

A. ALLEGED VIOLATION IN RELATION TO THE IMPOSITION OF THE SENTENCE FOR THE CONVICTION OF MURDER (GROUND 1 OF THE MUSTAFA REFERRAL)

1. Submissions

28. Mr Mustafa submits that the Appeals Panel incorrectly applied Article 44(2)(a) and (5) of the Law by imposing a 15-year prison sentence for his conviction of murder as a war crime.³⁴ Alternatively, Mr Mustafa contends that the Appeals Panel did not apply Article 44(2)(a) and (5) of the Law in accordance with Article 33(3) of the Constitution, which was not considered as such by the Appeals Panel.³⁵ Mr Mustafa requests that his sentence for murder as a war crime be reduced, resulting in an overall reduction of his 15-year sentence of imprisonment.³⁶

29. Specifically, Mr Mustafa contends that the 15-year prison sentence imposed on him for murder as a war crime is disproportionate within the meaning of Article 33(3) of the Constitution.³⁷ Mr Mustafa submits that the Appeals Panel failed to consider Kosovo jurisprudence, where lower sentences were handed down in cases similar to his and he has therefore been treated differently from individuals who were tried in Kosovo in violation of Article 33(3) of the Constitution.³⁸

30. The SPO contends that the Request should be dismissed *in limine*. The Prosecution observes that the Mustafa Request claims a violation of criminal law, but exclusively concerns Mr Mustafa's right to a proportionate sentence and therefore,

³⁴ Mustafa Request, para. 26.

³⁵ Mustafa Request, para. 26. See also Mustafa Request, paras 30-33.

³⁶ Mustafa Request, paras 26, 40-41, 43.

³⁷ Mustafa Request, para. 28. See also Mustafa Request, paras 27, 29, 38-39.

³⁸ Mustafa Request, para. 36. See also Mustafa Request, para. 37.

seeks to raise a substantial procedural violation.³⁹ The SPO further argues that the Mustafa Request improperly: (i) alleges an erroneous or incomplete factual determination; (ii) advances arguments that reasonably could have been raised before; (iii) repeats arguments already made; and (iv) challenges findings in the Trial Judgment, Appeal Judgment, and/or Supreme Court Decision, not the Decision on New Determination of Sentence.⁴⁰ The SPO therefore contends that the Mustafa Request is inadmissible and should be summarily dismissed.⁴¹

31. With respect to the merits of the Mustafa Request, the SPO responds that Mr Mustafa's participation in the crimes and the number of victims do not justify a lower sentence. The SPO argues that the Mustafa Request ignores the specific circumstances of the case and required considerations, including the sentencing range set forth in Article 44(1) of the Law applicable before the KSC and the non-binding sentencing range reflected in Article 44(2)(b) of the Law and identified in the Supreme Court Decision.⁴²

32. The SPO contends that the sentences reached under the SFRY Code do not justify a lower sentence. The SPO argues that the "[Mustafa] Request's general submissions about the number of victims and conduct of perpetrators in other cases, reached in a different legal framework, do not, without more, demonstrate 'a line of sentences imposed in similar circumstances for similar offences', as would be required for such cases to be relevant".⁴³ The SPO contends that Mr Mustafa's claim that a 'delay' in prosecution should be 'discounted' from his sentence is unsubstantiated.⁴⁴ For the forgoing reasons, the SPO submits that the Supreme Court should reject the

³⁹ SPO Response, para. 4.

⁴⁰ SPO Response, para. 5. See also SPO Response, paras 6-7.

⁴¹ SPO Response, para. 8. See also SPO Response, para. 1.

⁴² SPO Response, para. 9. See also SPO Response, paras 10-11, 13-14.

⁴³ SPO Response, para. 16. See also SPO Response, paras 17, 19.

⁴⁴ SPO Response, para. 18.

Request in its entirety.⁴⁵

33. Mr Mustafa replies that the comparison with other cases from Kosovo jurisdictions or international jurisprudence – ICTY and ICTR, demonstrates a line of sentences imposed in similar circumstances for similar offences and shows the disproportionality of Mr Mustafa’s sentence under Count 4.⁴⁶ In addition, Mr Mustafa argues that it would be unfair for him to be convicted for a single murder committed in 1999 based on recent judicial standards.⁴⁷ Mr Mustafa further argues that his rights to a fair trial as enshrined under Article 6 of the ECHR are violated by the absence of consideration of the SPO’s delayed prosecution when imposing a sentence on Mr Mustafa.⁴⁸ Mr Mustafa maintains that (i) the punishment of 15 years of imprisonment, is disproportionate to the criminal offence charged under Count 4, (ii) Article 33(3) of the Constitution was not applied, and (iii) Article 44(2)(a) of the Law was incorrectly applied by the Appeals Panel.⁴⁹

2. The Panel’s assessment

34. The Panel observes that Mr Mustafa does not set forth whether his ground constitutes a substantial violation of the procedures or a violation of the criminal law. Nevertheless, the Panel understands Mr Mustafa’s arguments to involve a violation of criminal law, insofar as it relates to the Appeals Panel’s alleged abuse of its authority in relation to its application of Article 44(2) of the Law. Accordingly, the Panel finds Mr Mustafa’s Ground 1 admissible and will consider the merits thereof.

35. The Panel recalls at the outset that the lower courts have broad discretion in their determination of a sentence of imprisonment and that it acknowledged that the original 22-year sentence imposed by the Appeals Panel in the Appeal Judgment was

⁴⁵ SPO Response, para. 15, 20.

⁴⁶ Mustafa Reply, paras 18-20, 23-24.

⁴⁷ Mustafa Reply, paras 13-16, 22.

⁴⁸ Mustafa reply, para. 21.

⁴⁹ Mustafa Reply, paras 25. See also Mustafa Reply, paras 4-11.

within the five to 25-year sentencing range identified by the Supreme Court Panel.⁵⁰ The Panel further recalls its finding that “the lower Panels are not required to apply the identified sentencing range, but shall take it into account. Indeed, other factors, including consideration of Article 44(2)(c) of the Law and the particular circumstances of the case will also form part of a panel’s determination on the appropriate sentence of imprisonment”.⁵¹

36. The Panel observes that the Appeals Panel in its Decision on New Determination of Sentence specifically followed the findings set forth in the Supreme Court Decision, the sentencing range identified therein, as well as the relevant international jurisprudence.⁵² The Panel recalls that the circumstances surrounding the crimes for which Mr Mustafa was convicted, including murder, were extensively considered by the Trial Panel and twice by the Appeals Panel.⁵³

37. The Panel notes that the Appeals Panel specified that it focussed on international jurisprudence only, rather than include Kosovo jurisprudence, in view of the inapplicability of the sentencing range set forth in the 1976 Criminal Code of the Former Federal Republic of Yugoslavia (“SFRY Code”) in Mr Mustafa’s case.⁵⁴ The Panel notes that Mr Mustafa does not challenge this aspect of the Appeals Panel’s analysis, but focuses only on the alleged disproportionate nature of his sentence for murder as a war crime.⁵⁵ Moreover, the Appeals Panel also discussed the proportionality of Mr Mustafa’s sentence within the meaning of Article 33(3) of the Constitution.⁵⁶

38. The Panel observes that the 15-year sentence handed down by the Appeals

⁵⁰ Supreme Court Decision, para. 106.

⁵¹ Supreme Court Decision, para. 106.

⁵² Decision on New Determination of Sentence, paras 9-16, 18-21.

⁵³ See Trial Judgment, paras 689, 692, 695, 798, 802, 812-826; Appeal Judgment, paras 350, 352-354, 458-463; Decision on New Determination of Sentence, paras 16, 19.

⁵⁴ Decision on New Determination of Sentence, fn. 51.

⁵⁵ See generally Mustafa Request.

⁵⁶ Decision on New Determination of Sentence, paras 17, 24, 26.

Panel for murder as a war crime is well within the five to 25-year sentencing range identified by the Supreme Court Panel in accordance with Article 44(2)(a) of the Law. Therefore, the Panel is of the view that Mr Mustafa fails to demonstrate how the Appeals Panel could have come to a different determination in this context.⁵⁷ The Panel finds that Mr Mustafa merely disagrees with the Appeals Panel's exercise of its discretion and that he has failed to identify how the 15-year sentence constitutes a violation of the criminal law. Similarly, the Panel dismisses Mr Mustafa's argument that he has been convicted on a "recently established standard" on sentencing. Mr Mustafa merely disagrees with the findings of the Supreme Court Panel regarding the sentencing range identified, and the application of the *lex mitior* in an attempt to relitigate the same issue that has already been decided upon. Accordingly, Mr Mustafa's Ground 1 is hereby dismissed.

B. ALLEGED VIOLATION OF ARTICLE 44(1), 44(2) (B) AND (C) OF THE LAW (GROUNDS 1 AND 2 OF THE SPO REFERRAL)

3. Submissions

39. The SPO submits that the Appeals Panel failed to consider Article 44(1) of the Law, which provides that the maximum sentence that can be imposed at the Specialist Chambers for war crimes is of life imprisonment.⁵⁸ The SPO further contends that the Appeals Panel failed to refer to Article 44(2)(c) of the Law in deciding on Mr Mustafa's reduced sentence.⁵⁹ According to the SPO, Article 44(1) of the Law is the only sentencing range that is binding on the Specialist Chambers and the Appeals Panel was also required to consider Article 44(2)(c) of the Law.⁶⁰

40. The SPO asserts that the legal framework of the Specialist Chambers does not allow for the binding sentencing range of life imprisonment to be limited in any way,

⁵⁷ Cf. Supreme Court Decision, para. 107.

⁵⁸ SPO Request, para. 22.

⁵⁹ SPO Request, para. 22.

⁶⁰ SPO Request, para. 22. See also SPO Request, paras 25-28.

including by the non-binding consideration of the sentencing ranges in Article 44(2)(a) and (b) of the Law.⁶¹

41. The SPO further submits that while the Appeals Panel referred to the sentencing range of five to 25 years in accordance with Article 44(2)(b) of the Law, it failed to further engage with or analyse the origin of the sentencing range, namely the 2019 Kosovo Criminal Code.⁶² The SPO contends that the Appeals panel further failed to consider Kosovo's sentencing practices in relation to the 2019 Kosovo Criminal Code, which reflect that Mr Mustafa could have been given a prison sentence of 21 years to life for a single murder.⁶³

42. Mr Mustafa contends that the SPO is raising the issues under Ground 1 for the first time in this Request, having never challenged them in prior stages—including the Appeal Judgment and the Supreme Court Decision.⁶⁴ Mr Mustafa argues that these issues cannot be raised in the SPO request making Ground 1 inadmissible for non-exhaustion of available remedies.⁶⁵

43. Mr Mustafa responds that there is no binding obligation upon the Appeals Panel to make a proportionality assessment of Article 44(1) of the Law nor to mention or discuss Article 44(2)(c) of the Law, as envisaged by the SPO.⁶⁶ Mr Mustafa further argues that, if an alleged omission is about the fact whether something was or was not being analysed or discussed, it, by itself, cannot constitute a violation of the Law.⁶⁷ Mr Mustafa submits that the argument put forward by the SPO is based on a “wrong interpretation of Article 44(2)(c) in the context of Article 44(2)(a) and (b), and in the context of respective conventions and constitutional articles contained within it”.⁶⁸ In

⁶¹ SPO Request, para. 23. See also SPO Request, para. 24.

⁶² SPO Request, para. 29. See also SPO Request, paras 30-31, 33.

⁶³ SPO Request, para. 32, referring to the Sentencing Guidelines, Supreme Court, 2018, pp. 141-143.

⁶⁴ Mustafa Response, paras 22, 24. See also Mustafa Response, para. 27.

⁶⁵ Mustafa Response, para. 33, 45. See also Mustafa Response, paras 27, 31-32.

⁶⁶ Mustafa Response, paras 35, 45. See also Mustafa Response, paras 36-42.

⁶⁷ Mustafa Response, paras 35, 48. See also Mustafa Response, paras 43, 49.

⁶⁸ Mustafa Response, para. 66. See also Mustafa Response, paras 50-63.

addition, Mr Mustafa argues that the Appeals Panel did take Article 44(2)(c) of the Law in consideration.⁶⁹ For the above reasons, Mr Mustafa contends that Ground 1 should be rejected.⁷⁰

44. As the SPO clearly stated that the Supreme Court Decision was final, Mr Mustafa submits that it cannot be challenged anew in these proceedings.⁷¹ Mr Mustafa argues that Ground 2 does not meet the admissibility standard and must be ruled inadmissible or alternatively summarily dismissed or rejected.⁷²

45. Mr Mustafa argues that the SPO's submission that the Appeals Panel wrongly applied five to 25 years range is incorrect,⁷³ and recalls that it was the Supreme Court that recognized a five to 25 years sentencing range in line with *lex mitior* – the Appeals Panel was simply bound to consider it.⁷⁴ Therefore, Mr Mustafa contends that Ground 2 lacks factual foundation and must therefore be summarily dismissed or rejected.⁷⁵

46. The SPO replies that Mr Mustafa's characterisation of the Sentencing Decision as merely a direct application of the Supreme Court's guidance is inaccurate.⁷⁶ The SPO argues that its Request demonstrates substantial procedural and criminal law violations in the Appeals Panel's new sentencing assessment, which, *inter alia*, omitted and incorrectly applied required considerations, provided deficient reasoning, and exceeded the Appeals Panel's authority.⁷⁷ Further, the SPO argues that Mr Mustafa's restrictive interpretation of Article 44(2)(c) of the Law as being applicable only when 'a person could not be punished at all' due to application of Article 44(2)(a)-(b) of the Law is untenable and would deprive the provision's plain meaning and purpose.⁷⁸

⁶⁹ Mustafa Response, para. 66. See also Mustafa Response, para. 65.

⁷⁰ Mustafa Response, paras 44, 64.

⁷¹ Mustafa Response, paras 68-69. See also Mustafa Response, paras 67, 71.

⁷² Mustafa Response, paras 69-70.

⁷³ Mustafa Response, para. 80. See also Mustafa Response, para. 76.

⁷⁴ Mustafa Response, para. 72. See also Mustafa Response, paras 73-75, 77-79.

⁷⁵ Mustafa Response, para. 80.

⁷⁶ SPO Reply, para. 2.

⁷⁷ SPO Reply, para. 2.

⁷⁸ SPO Reply, para. 4.

For these reasons, the SPO reiterates its claim that the SPO Request is admissible and should be granted in full.⁷⁹

4. The Panel's assessment

47. The Panel notes that the SPO appears to be arguing that the Appeals Panel violated the criminal law with respect to its application of Article 44 of the Law.

48. The Panel recalls that the Appeals Panel applied the criminal law in accordance with the Supreme Court Decision.⁸⁰ Importantly, the Panel observes that the SPO does not argue that the Appeals Panel failed to apply the criminal law in accordance with the Supreme Court Decision. Instead, the SPO is merely disagreeing with the law as settled by the Supreme Court Panel, and is attempting to relitigate a matter that has already been settled by the Supreme Court Panel. The Panel recalls in this regard that mere disagreements with underlying decisions are insufficient to meet the high threshold for a request for protection of legality to succeed. Accordingly, the Panel hereby summarily dismisses Grounds 1 and 2.

C. ALLEGED FAILURE TO ISSUE A REASONED OPINION AND TO HEAR THE PARTIES AND PARTICIPANTS (GROUNDS 3 AND 4 OF THE SPO REFERRAL)

1. Submissions

49. The SPO submits that the Appeals Panel was “required to – but did not – provide a reasoned opinion containing the established facts, relevant legal provisions, and logical relationship between them”.⁸¹ According to the SPO, this failure resulted in an “arbitrary decision, which did not address the essential issues of the case, ensure that ‘each party and participant to the case is fully apprised of the outcome in a predictable manner’, and enable the Parties and participants to effectively seek

⁷⁹ SPO Reply, para. 5. See also SPO Reply, paras 1, 3.

⁸⁰ Supreme Court Decision, paras 35-37.

⁸¹ SPO Request, para. 34 (internal citations omitted). See also SPO Request, paras 35-36.

appropriate remedies”.⁸²

50. The SPO asserts that the Decision on New Determination of Sentence turned to a decisive extent on two cases of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), and acknowledged that the Appeals Panel stated that it had analysed these decisions and that they are “potentially relevant”.⁸³ Nevertheless, the SPO asserts that the Appeals Panel did not provide any analysis or explanation in relation to these two cases.⁸⁴

51. The SPO further submits that the parties and participants have a right to be heard on the decisive issue of sentencing, which is adversarial in nature, and the Appeals Panel failed to do so.⁸⁵ The SPO contends that the Appeals Panel’s decision to rely on the submissions on sentencing filed prior to the issuance of the Decision on New Determination of [Mr Salih Mustafa’s] Sentence resulted in an arbitrary decision and contributed to the violations identified by the SPO in Grounds 1 through 3.⁸⁶ The SPO asserts that the prior submissions were based on different considerations and did not account for the new legal basis set forth in the Supreme Court Decision, which contained “novel and fundamental issues”.⁸⁷

52. Mr Mustafa responds that a procedural violation based on “lack of reasoning” must be nearly a complete absence of a reasoned opinion, which is not the case here.⁸⁸ Therefore, Mr Mustafa argues that Ground 3 lacks factual bases, and, as the arguments are not substantiated, the ground is inadmissible.⁸⁹

53. Mr Mustafa contends that the Appeals Panel rendered a reasoned decision “in

⁸² SPO Request, para. 34 (internal citations omitted).

⁸³ SPO Request, para. 37.

⁸⁴ SPO Request, para. 37. See also SPO Request, para. 38.

⁸⁵ SPO Request, para. 39.

⁸⁶ SPO Request, para. 40.

⁸⁷ SPO Request, para. 40.

⁸⁸ Mustafa Response, para. 82. See also Mustafa Response, para. 83.

⁸⁹ Mustafa Response, para. 85. See also Mustafa Response, paras 86-88, 91, 96.

compliance with the Law and analysed the specific circumstances of the case as reflected in both the [Appeal] Judgment as well as in the Sentencing Decision”.⁹⁰ Mr Mustafa argued that a reasoned opinion for a judgment or a decision does not prescribe any imperative as to when the threshold of a reasoned opinion is met.⁹¹ Mr Mustafa further argues that the Appeals Panel looked at jurisprudence from other international tribunals and considered that there was a plethora of decisions on the same or similar criminal offences as the ones Mr Mustafa was found guilty for.⁹² Given the above, Mr Mustafa argues that Ground 3 must be summarily dismissed or rejected.⁹³

54. Mr Mustafa recalls that the Appeals Panel notified the parties and participants that no further written submissions were required due to the extensive prior filings.⁹⁴ As none of the parties objected at that time or requested an opportunity to present further submissions, Mr Mustafa submits that Ground 4 is inadmissible or should be summarily dismissed.⁹⁵

55. Mr Mustafa argues that the Appeals Panel was given guidance by the Supreme Court in order to make a new determination on sentence, identifying in its decision the applicable framework within which the new determination of the sentence was to be rendered.⁹⁶ Mr Mustafa submits that the Decision is not reached *proprio motu* or on indicated bases.⁹⁷ Mr Mustafa further argues that the Appeals Panel used the guidance and additional factors that are not novel, justifying its reliance on submissions made at an earlier stage.⁹⁸ Mr Mustafa submits that the SPO provided no further

⁹⁰ Mustafa Response, para. 92.

⁹¹ Mustafa Response, para. 94. See also Mustafa Response, para. 95.

⁹² Mustafa Response, para. 93.

⁹³ Mustafa Response, para. 98.

⁹⁴ Mustafa Response, para. 100.

⁹⁵ Mustafa Response, paras 101, 107. See also Mustafa Response, paras 102-105.

⁹⁶ Mustafa Response, para. 108.

⁹⁷ Mustafa Response, para. 111.

⁹⁸ Mustafa Response, para. 111. See also Mustafa Response, paras 109-110, 112-116, 118.

substantiation as to why the impugned decision would not be lawful.⁹⁹ For these reasons, Mr Mustafa submits that Ground 4 should be rejected.¹⁰⁰

56. The SPO replies that, as set out previously, the arguments in the SPO Request reasonably could not have been raised before because the Decision on New Determination of Sentence interpreted and applied the Supreme Court Decision without hearing any submissions from the Parties or participants whose rights and interests were affected.¹⁰¹

2. The Panel's assessment

57. The Panel understands the SPO to be alleging that the Appeals Panel substantially violated the procedures by failing to provide a reasoned opinion. The Panel recalls that the Appeals Panel was instructed by the Supreme Court Panel to re-examine Mr Mustafa's sentence in accordance with the guidance given to it by that Panel. The SPO does not demonstrate how the Appeals Panel failed to adhere to the Supreme Court Decision and observes that the Appeals Panel extensively reasoned its decision and referred to the guidance given to it in this respect.

58. The SPO is therefore merely disagreeing with the law as settled by the Supreme Court Panel. The Panel recalls that mere disagreements with the underlying decisions are insufficient to meet the threshold for a request for protection of legality to succeed.

59. With respect to the right to be heard, the Panel recalls that the SPO had an opportunity to submit its views on the applicable law and sentencing ranges before the Supreme Court Panel, as well as before the Trial Panel and the Appeals Panel.¹⁰² The Panel notes that the SPO was given an opportunity to submit its views on the application of Article 44 of the Law and the sentencing range applicable to

⁹⁹ Mustafa Response, para. 119. See also Mustafa Response, paras 117, 120.

¹⁰⁰ Mustafa Response, para. 121.

¹⁰¹ SPO Reply, para 3.

¹⁰² Trial Judgment, paras 763-766; Appeal Judgment, paras 442-446; Supreme Court Decision, paras 68-70.

Mr Mustafa's case.¹⁰³ The Panel observes in this regard that the SPO did not make any arguments in the alternative before either the Trial Panel, the Appeals Panel or this Panel when Mr Mustafa argued that the range of five to 15 years found in the SFRY Code should apply.¹⁰⁴ Indeed, the SPO's position in relation to Mr Mustafa's sentencing was abundantly clear and has been considered by the various panels throughout the criminal process. Specifically, the SPO has always been of the view that Mr Mustafa should be sentenced to 33 years of imprisonment for the conviction of murder as a war crime.¹⁰⁵ As the SPO had already made submissions before the Court of Appeal, and the Supreme Court Panel's decision merely clarified the applicable legal framework without disturbing the factual findings, there was no necessity for further argument. The Court of Appeal was required only to apply the corrected legal standard, which should have been applied *ab initio*, and no prejudice arose from proceeding without hearing the SPO anew. Accordingly, the Panel hereby summarily dismisses Grounds 3 and 4.

D. ALLEGED VIOLATION OF ARTICLES 44 AND 46 OF THE LAW (GROUND 5 OF THE SPO REFERRAL)

1. Submissions

60. The SPO submits that the "substantial procedural violations" set forth in Grounds 1 through 5 of the SPO Request, "materially affected all decisive aspects of 'the Decision on New Determination of Mr Salih Mustafa's Sentence', rendering it arbitrary and manifestly unreasonable".¹⁰⁶ According to the SPO, the arguments raised in Grounds 1 through 4 therefore demonstrate that the Appeals Panel exceeded its authority under Article 44 and 46 of the Law.¹⁰⁷ The SPO therefore requests that the

¹⁰³ See Supreme Court Decision, paras 59, 68-70.

¹⁰⁴ See Trial Judgment, paras 763-766; Appeal Judgment, paras 442-446; Supreme Court Decision, paras 68-70.

¹⁰⁵ See Trial Judgment, para. 766; Appeal Judgment, para. 442; Supreme Court Decision, paras 68-70.

¹⁰⁶ SPO Request, para. 41.

¹⁰⁷ SPO Request, para. 41. See also SPO Request, paras 43-44.

Panel: “(i) annul the Sentencing Decision in its entirety; and (ii) return the case to the Appeals Panel for the limited purpose of determining a new sentence that complies with the Law and Rules”.¹⁰⁸

61. Mr Mustafa responds that this ground contains no specific substance on the matter of exceeding authority and does not provide any content, making a response impossible.¹⁰⁹ Mr Mustafa submits that this ground is inadmissible as it lacks identifiable errors in the impugned decision. Alternatively, Mr Mustafa holds that it must be summarily dismissed or rejected.¹¹⁰

62. The SPO replies that the Prosecution Request demonstrates substantial procedural and criminal law violations in the Appeals Panel’s new sentencing assessment, which, *inter alia*, omitted and incorrectly applied required considerations, provided deficient reasoning, and exceeded the Appeals Panel’s authority.¹¹¹

2. The Panel’s assessment

63. The Panel recalls that it has dismissed Grounds 1 through 4 of the SPO Request. The Panel therefore finds that the SPO’s arguments have been rendered moot and hereby dismisses Ground 5.

¹⁰⁸ SPO Request, para. 42. See also SPO Request, paras 43-45.

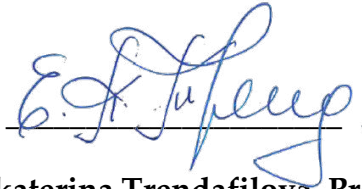
¹⁰⁹ Mustafa Response, paras 126-127. See also Mustafa Response, paras 122, 124-125.

¹¹⁰ Mustafa Response, para. 128.

¹¹¹ SPO Reply, para. 2.

VI. DISPOSITION

64. For these reasons, the Supreme Court Panel hereby **DISMISSES** Salih Mustafa's and the SPO's Requests in their entirety.

A handwritten signature in blue ink, appearing to read 'E. Trendafilova', written over a horizontal line.

Judge Ekaterina Trendafilova, Presiding

Dated this Tuesday, 25 February 2025

At The Hague, the Netherlands