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

In:	**KSC-BC-2020-05**
	Specialist Prosecutor v. Salih Mustafa
Before:	**Trial Panel I**
	Judge Mappie Veldt-Foglia, Presiding
	Judge Roland Dekkers
	Judge Gilbert Bitti
	Judge Vladimir Mikula, Reserve
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor
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Public redacted version of 'Prosecution submissions pursuant to Decision F00468 setting the agenda for the hearing on the closing statements and related matters' [F00471, dated 8 September 2022]

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I. INTRODUCTION

1. Pursuant to the Decision,[1] the Specialist Prosecutor's Office ('SPO') hereby files the following submissions in reply to the questions posed by the Panel.

2. These submissions are filed as confidential pursuant to Rule 82(4), and to protect the confidentiality of protected information in the case. A public redacted version will be filed.

II. SUBMISSIONS

A. ARBITRARY DETENTION (COUNT 1)

3. The Panel asked the SPO to clarify "[w]hich of the specific buildings located in what the SPO names Zllash/Zlaš Detention Compound, were allegedly used to detain, interrogate and/or mistreat individuals during the timeframe of the charges".[2]

4. Most Victims, including W01679, W03593, W03594, [REDACTED], [REDACTED], and the young man [REDACTED] known to the detainees as 'Burmak', were detained in the building marked with 4A in the following photo [REG00-015], and in the basement of the building next to it, marked with a red circle in the photo below.[3] They were also frequently mistreated in both of these places.[4]

[PHOTO REDACTED]

[1] Public redacted version of Decision setting the agenda for the hearing on the closing statements and related matters, KSC-BC-2020-05/F00468/RED, 31 August 2022 ('Decision'), paras 10-14, 21.
[2] Decision, para.10.
[3] *See e.g.* W01679, 4 October 2021, T.895, 919-925; SPOE00128386-00128420, p.3 (SPOE00128388), p.7 (SPOE00128392); 100801-100806 RED1, p.3 (100803), p.5 (100805), p.6 (10806); W03593, 21 September 2021, T.512-517; SPOE00128388; 100966-100969, p.3 (100968); SITF00072231-00072231; W03594, 12 October 2021, T.1039-1040. *See also* DSM00031-DSM00031 RED.
[4] W01679, 4 October 2021, T.883-886, 901; W03593, 20 September 2021, T.441-442, and 22 September 2021, T.575-578; W03594, 12 October 2021, T.1067-1072; 061016-TR-ET Part 4 RED1, pp.2, 6-7.

5. Victims were also interrogated, tortured and abused in the tallest building next to the building marked 4A, and this occurred in the upstairs part.[5] The door to the upstairs room is marked with a red vertical line in the photo above [REG00-015].

6. Moreover, the building with the grey/black roof, marked on the photo above [REG00-015] with number 5, was also used to detain people. W04669 was detained in this building number 5, together with two other unidentified detainees.[6]

[PHOTO REDACTED]

7. Viewed from above, in the aerial picture of the compound marked by Defence witness Selatin KRASNIQI,[7] the buildings where most Victims were detained and mistreated correspond to buildings 11 and 12, whereas W04669 was held in building number 10. Victims were interrogated and mistreated in the "upstairs" part of the building marked on this photo with number 12:

[PHOTO REDACTED]

B. DETERMINATION OF THE SENTENCE, IF ANY

8. The questions posed by the Panel in relation to sentencing all revolve around the *lex mitior* principle and applicable sentencing regime(s) before the Specialist Chambers ('SC').

9. The *lex mitior* principle is only applicable if a law that binds the SC is subsequently changed to a law more favourable to the Accused. As found by a Panel of the Court of Appeals, "the applicability of the principle of *lex mitior* […] concerns […] the proper identification, in case of conflict, of which law should be resorted to by

[5] W01679, 4 October 2021, T.895, 901, 915-925; W03593, 20 September 2021, T.419-420, 476-477; 21 September 2021, T.512-517.
[6] W04669, 10 November 2021, T.1470-1472; Photo of the compound marked by W04669: 082020-082023 RED1, p.3 (082022).
[7] KSC-BC-2020-05 REG00-013.

a panel as the more favourable to the Accused."[8] An accused can only benefit from a more lenient sentence if the relevant law is binding, since they only have a protected legal position when the sentencing range must be applied to them.[9]

10. Before the SC, the Panel is obliged to adjudicate and function in accordance with, *inter alia*, (i) the Law, which functions as *lex specialis*;[10] and (ii) Kosovo law, but only as expressly incorporated and applied in the Law. As set out in more detail below, based on the plain language of the Law, sentencing ranges in relevant Kosovo law have not been expressly incorporated, except as non-binding considerations. The Law provides for sentences of up to life imprisonment for the crimes charged and there is no more lenient sentencing range provided for in customary international law or, indeed, relevant Kosovo law, even if it were applicable. In this respect, war crimes – like those charged in this case – are serious violations of international humanitarian law and it has long been recognised by the international community that such crimes are punishable by the most severe penalties, including sentences up to life imprisonment.[11]

QUESTION 1: Under Article 44(2)(b) of the Law, is the Panel duty bound to apply "any subsequent more lenient sentencing range for the crime provided in Kosovo Law"? Or does the wording "shall take into account" in paragraph (2) of Article 44 of the Law suggest that the Panel should only be guided by such subsequent more lenient sentencing range, if any?

11. The plain language of the Law[12] indicates that the Panel is not duty bound under Article 44(2)(b) to apply "any subsequent more lenient sentencing range for the crime provided in Kosovo Law", but should only "take into account" any such sentencing range. The letter of the Law is clear: "to take into account" means "to

[8] Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", KSC-BC-2020-06/IA009/F00030, Public, 23 December 2021 ('Appeals Decision'), para.53.
[9] ICTY, *Prosecutor v. Nikolić*, IT-94-02-A, Judgement on Sentencing Appeal, 4 February 2005, para.81 ('It is an inherent element of this principle that the relevant law must be binding upon the court').
[10] Article 3(2)(b). *See also* Article 3(2)(c) (Kosovo law only applies as expressly incorporated and applied by the Law).
[11] *See* ICTY, *Prosecutor v. Delalić*, IT-96-21-A, Judgement, 20 February 2001, para.817, fns 1398, 1401, and the sources cited therein.
[12] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

consider" the sentencing ranges mentioned in letters a. and b. of Article 44, subparagraph 2. If the legislator had intended to impose a mandatory requirement, an obligation for the SC to apply such factors, the language of the Law would have been different and would have used terms such as "must apply" or "shall apply".

12. Article 44(2) is akin to Rule 101(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ('ICTY') in prescribing recourse to a number of factors in sentencing.[13] In particular, when assessing recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia, the ICTY repeatedly interpreted the "shall take into account" to mean that such practice should be used for guidance, but it was not binding.[14] The same approach has been followed at the SCSL[15] and ICTR.[16]

13. Accordingly, the Panel, having considered all relevant factors (including sentencing ranges in Kosovo law), may ultimately impose a greater or lesser sentence than that which may be imposed under Kosovo law.

QUESTION 2: Article 44(2)(b) of the Law refers to any subsequent more lenient sentencing range for "the crime" provided in Kosovo law. In case "the crime" of which the Accused is adjudged guilty is not provided in Kosovo law but only under customary international law –

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[13] *Cf* Rule 101(B) Penalties (*emphasis added*): (B) In determining the sentence, the Trial Chamber *shall take into account* the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
(i) any aggravating circumstances;
(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

[14] *Cf* ICTY, *Prosecutor v. Delalić et al*. Appeals Judgement, IT-96-21-A, paras 813-816: "The question of whether or not this "recourse" should be of a binding nature has been consistently and uniformly interpreted by the Tribunal. It is now settled practice that, although a Trial Chamber should "have recourse to" and should "take into account" this general practice regarding prison sentences in the courts of the former Yugoslavia, this "does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice" (para.813). *See also* ICTY, *Prosecutor v. Tadić* Judgement in Sentencing Appeal, IT-94-1-A and IT-94-1-*A bis*, 26 January 2000, para.21; *Prosecutor v. Limaj et al.,* Trial Judgment, IT-03-66-T, para.734; *Prosecutor v. Haradinaj et al.,* Trial Judgment, IT-04-84-T, paras 482-483, 497; *Prosecutor v. Tadić*, Sentencing Judgement, IT-94-1-T bis-R117, paras 11-12.

[15] *See e.g.* SCSL, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Judgment, 28 May 2008, paras 475-476.

[16] *See e.g.* ICTR, *Prosecutor v. Serushago*, Appeals Judgment, *Reasons for Judgement*, ICTR-98-39-A, 6 April 2000, para.30; ICTR, *Prosecutor v. Semanza*, ICTR-97-20-A, Judgement, 20 May 2005, para.377.

and thus does not correspond to any potentially more lenient sentencing range under Kosovo legislation – what other body of applicable law, if any, should the Panel consider to determine if there is a subsequent more lenient sentencing range for such crime?

14. There is no other body of law that the Panel should consider to determine whether any possible subsequent more lenient sentencing range existed. Article 44(2) only refers to Kosovo law as a relevant, but non-binding consideration; there is no obligation on the Panel to refer to or consider any other legislation.[17] In fact, for the specific case put by the Panel where a crime is only provided for under customary international law and not under Kosovo law, customary international law is the only relevant body of law – also in light of Article 3 and Article 12 of the Law.[18] Thus, the Panel should only consider whether customary international law, as the only potentially subsequent applicable source of law, has evolved to the benefit of the Accused.[19] It has not.[20]

QUESTION 3: Based on Article 44(2)(c) of the Law, in what circumstances "the punishment of an act or omission which was criminal according to general principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2(a) and (b)" of the Article 44 of the Law?

15. Pursuant to Article 44(2)(c) of the Law, "[i]n considering the punishment to be imposed on a person adjudged guilty of an international crime under this Law, the SC shall take into account:

> c. Article 7(2) of the European Convention for Human Rights and Fundamental Freedoms and Article 15(2) of International Covenant for Civil and Political Rights as incorporated and protected by Articles 22(2), 22(3) and 33(1) of the Constitution of the Republic of Kosovo, and the extent to which the punishment of any act or omission which was criminal according to general

[17] *See, similarly*, ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, 5 July 2001, paras 114-115 (considering that the court was not obliged to consider any domestic law not referenced in the Statute).
[18] *See, similarly*, SCSL, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Judgment, 28 May 2008, paras 475-477 (considering that the relevant international crimes were not criminalised in Sierra Leone as such and, accordingly, there was no specifically relevant domestic sentencing practice for a chamber to refer to).
[19] Appeals Decision, para.53.
[20] Life imprisonment is an available penalty at most international and hybrid courts, including the ICC, ICTY, ICTR, IRMCT, and ECCC. *See also* ICTY, *Prosecutor v. Delalić*, IT-96-21-A, Judgement, 20 February 2001, para.817, fns 1398, 1401, and the sources cited therein.

principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2 (a) and (b).

16. One case where the application of Article 44(2)(a)-(b) would prejudice the *punishment* of an act or omission which was criminal at the time of its commission is represented by the case where its application would have the effect of depriving such punishment of the strength and significance it had at the time of the commission of the crime, making it too lenient when compared to the intended penalty prescribed by the legislator at the time. To give an example: if the Panel, applying Article 44(2)(a)-(b), were to find that – for crimes punished with imprisonment – it should impose a maximum of 15 or 20 years (consistent with Article 38, paras.1-2, of the 1976 SFRY Code), this would frustrate the punishment of the very serious crimes proscribed by the Law.

QUESTION 4: If the Panel is bound by Article 44(2)(b) of the Law, is Article 38 of the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY Code) applicable and, if so, which paragraphs of this provision are applicable?

17. If – despite its plain language – the factors in Article 44(2)(b) were to be interpreted as binding (that is, the Specialist Chambers "*shall apply*" rather than "*shall take into account*"), Article 38 of the SFRY Code would not be applicable as it does not represent a *subsequent* or more lenient sentencing range. In this regard, to the extent the SFRY Code applied during the Indictment period, it is a non-binding consideration falling under Article 44(2)(a).

18. Nevertheless, in respect to the hypothetical posed by the Panel – if the regime prescribed by the SFRY Code should be considered as applicable – the Panel should conduct a global comparison of the punitive regimes under the Law and the SFRY Code. The Panel should not undertake a rule-by-rule comparison, picking the most favourable rule of each of the compared penal laws.[21] Based on a global consideration

[21] ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34279/08, Judgment, 18 July 2013, Concurring Opinion of Judges Albuquerque and Vučinić, para.8 ('Two reasons are traditionally given for this global method of comparison: firstly, each punitive regime has its own rationale, and the judge cannot upset that rationale by mixing different rules from different successive penal laws;

of the SFRY Code, at the time of the commission of the crimes charged, war crimes under the SFRY Code were punishable by imprisonment for not less than five years or the death penalty,[22] thereby reflecting the severity of such crimes.[23] In the Law, war crimes are punishable by a term of imprisonment up to life,[24] which is more lenient than the death penalty.[25] Accordingly, based on a global comparison, the Law is the more lenient and – even if the SFRY Code was binding, which it is not – the sentencing range in the Law would still apply.

19. Insofar as the SFRY Code provides for prison terms of no more than 20 years for acts eligible for the death penalty, this provision was discretionary[26] and, in any event, cannot be read in isolation without regard to the full sentencing range available, including the death penalty. To consider otherwise, would undermine legislative intent – in relation to both the SFRY Code and the Law – to ensure that the most severe punishments would be available for grave crimes, including war crimes.

20. Likewise, the Panel should consider that, as also set out above, interpreting the applicability of Article 38(1) and (2) as mandatory – thus dictating a maximum penalty of 15 (pursuant to para.1) or 20 years imprisonment (pursuant to para.2) for

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secondly, the judge cannot exceed the legislature's function and create a new *ad hoc* punitive regime composed of a miscellany of rules deriving from different successive penal laws. Hence, [Article 7(1)] of the ECHR presupposes a concrete and global finding of *lex mitior*.'); Supreme Court of Kosovo, *Prosecutor v. J.D. et al.*, PA II 11/2016, 3 July 2017, para.55 (the identification of the more favourable law must be done by comparing and applying the law in its entirety).

[22] SFRY Code, Articles 34, 37(4), 142.

[23] SFRY Code, Article 37(2) (the death penalty may be imposed for the most serious criminal acts).

[24] Article 44(1).

[25] ECtHR, *Ruban v. Ukraine*, 8927/11, Judgment, 12 July 2016, para.46 (finding that 'the domestic courts, having sentenced the applicant to life imprisonment, which was an applicable penalty at the time of conviction, and to not to the death penalty, which was a relevant penalty at the time he had committed the crime, did apply the more lenient punishment. It follows that there was no violation of Article 7 of the Convention.'). *See also* ICTY, *Prosecutor v. Stakić*, Trial Judgment, IT-97-24-T, para.890 (noting that the death penalty could no longer be imposed in the states of the former Yugoslavia and had been replaced by the maximum penalty of life imprisonment (except where a lower maximum was specified). This meant that, "if the SFRY CC were applied today, the maximum penalty would be life imprisonment"); ECtHR, *Karmo v. Bulgaria*, 76965/01, Decision as to the admissibility, 9 February 2006, section C (considering whether it was contrary to ECHR Article 7 to commute the death penalty to life imprisonment following the abolition of the death penalty in 1998, the Court considered that it was not and rejected the applicant's complaint under Article 7 as manifestly ill-founded).

[26] SFRY Code, Article 38(2).

the very serious crimes under the jurisdiction of the SC – would frustrate the sentencing purposes of retribution and deterrence, and thus the punishment of those crimes. Such a rigid interpretation would *de facto* amount to a case where the application of Article 44(2)(a)-(b) would prejudice the punishment of acts or omissions which were criminal at the time of their commission. A *default* lenient sentencing regime whereby any SC Panel would be mandated to apply maximum sentences of 15 or 20 years imprisonment would be at odds with such purposes and in violation of the Law.

21. In conclusion, in terms of applicable sentencing ranges, a Panel of the SC may impose a sentence of imprisonment up to a maximum term of life.

Word count: 2,915

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Jack Smith

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Friday, 9 September 2022

At The Hague, the Netherlands.