

1 Thursday, 14 December 2023

2 [Open session]

3 [Appeal Judgment]

4 [The appellant entered the courtroom]

5 --- Upon commencing at 9.31 a.m.

6 PRESIDING JUDGE PICARD: Good morning and welcome, everyone.

7 Mr. Court Officer, could you please call the case.

8 THE COURT OFFICER: Good morning, Your Honours. This is the

9 case KSC-CA-2023-02, The Specialist Prosecutor versus

10 Mr. Salih Mustafa. Thank you, Your Honours.

11 PRESIDING JUDGE PICARD: Thank you, Mr. Court Officer.

12 I note that Mr. Mustafa is present in the courtroom.

13 Mr. Mustafa, can you follow the proceedings in a language you

14 understand?

15 THE APPELLANT: Yes.

16 PRESIDING JUDGE PICARD: Thank you.

17 I will kindly ask the parties and Victims' Counsel to introduce

18 themselves, starting with counsel for Mr. Mustafa.

19 MR. VON BONE: Thank you very much, Your Honour. Good morning.

20 The Defence is represented today by myself, Julius von Bone, lead

21 counsel; by Mr. Fatmir Pelaj, investigator; and in the courtroom

22 today is also Mr. Mustafa. Thank you very much.

23 PRESIDING JUDGE PICARD: Thank you.

24 Now, the Specialist Prosecutor's Office.

25 MR. MICHALCZUK: Good morning, Your Honours. Good morning,

1 everyone in and outside of this courtroom. The SPO is represented
2 today by Kimberly West, the Specialist Prosecutor; Jaden Harding, who
3 is our SPO intern; Julie Mann, who is our Case Manager; Nico
4 Baarlink, Associate Prosecutor; and myself, Cezary Michalczuk,
5 SPO Prosecutor.

6 PRESIDING JUDGE PICARD: Thank you.

7 I now turn to the Victims' Counsel.

8 MS. PUES: Good morning, Your Honours. Good morning, everybody
9 and outside the courtroom. The participating victims are today
10 represented by Brechtje Vossenbergh as co-counsel, and myself,
11 Anni Pues, as counsel. Thank you.

12 PRESIDING JUDGE PICARD: Thank you.

13 I now turn to the Registry.

14 MS. DONLON: Good morning, Your Honours. Fidelma Donlon,
15 Registrar.

16 PRESIDING JUDGE PICARD: Thank you.

17 I understood that there was a photographer who wished to take
18 photos. Is the photographer here? Okay. So is it okay? You took
19 the pictures? It's done?

20 [Appeals Panel and Court Officer confers]

21 PRESIDING JUDGE PICARD: So do you need my authorisation to take
22 the pictures? Okay. I authorise you to take the pictures.

23 Thank you.

24 For the record, I am Michele Picard, Presiding Judge in this
25 case, and my colleague Judges are, on my right, Kai Ambos, and on my

1 left, Nina Jorgensen.

2 A Panel of the Court of Appeals Chamber is sitting today to
3 pronounce the appeals judgment in the case of the
4 Specialist Prosecutor versus Salih Mustafa. This appeals judgment is
5 pronounced in public in the name of the people of Kosovo and in the
6 presence of the accused.

7 This summary contains the essential issues on appeal and the
8 central findings of the Appeals Panel and does not constitute any
9 part of the official and authoritative appeal judgment. The written
10 judgment is the only authoritative account of the Appeals Panel's
11 findings. The appeal judgment will be made available in electronic
12 form following this hearing. A certified copy of the English version
13 of the appeal judgment will be provided to Mr. Mustafa today, and the
14 Albanian version will be provided when it is ready.

15 The Specialist Chambers were created in connection with serious
16 allegations of inhumane treatment, killing of persons, and other
17 serious crimes during and in the aftermath of the armed conflict in
18 Kosovo between January 1, 1998, and 31 December 2000.

19 This appeals judgment marks an important milestone for the
20 Specialist Chambers as it constitutes the first appeal judgment in a
21 war crime case at this Tribunal. It is a significant step towards
22 providing justice to victims and ensuring accountability.

23 This judgment addresses the appeal against the Trial Panel's
24 findings regarding the responsibility of Mr. Mustafa, the commander
25 of the BIA guerilla unit, a unit of the Kosovo Liberation Army, or

1 the KLA, for crimes committed at a compound in Zllash, Kosovo,
2 referred to as the Zllash detention compound, between on or around
3 19 April 1999 and around the end of April 1999.

4 On 16 December 2022, the Trial Panel delivered the trial
5 judgment convicting Mr. Mustafa on three counts of war crimes. He
6 was found guilty for the war crimes of arbitrary detention, torture,
7 and murder, under Counts 1, 3, and 4; and not guilty for the war
8 crime of cruel treatment, under Count 2. The Trial Panel sentenced
9 Mr. Mustafa to a single sentence of 26 years of imprisonment with
10 credit for time served.

11 When imposing the sentence, the Trial Panel stressed that
12 Mr. Mustafa was on trial for his own individual responsibility and
13 that at no point in time was the KLA on trial.

14 The Trial Panel found that between approximately 1 April 1999
15 and on or around 19 April 1999 at the Zllash detention compound,
16 which was the base of the BIA guerilla unit in Zllash, at least six
17 persons were deprived of their liberty by BIA members under the
18 control and authority of the BIA commander, Mr. Mustafa. The
19 Trial Panel found that this occurred in the context of a
20 non-international armed conflict between the KLA and Serbian forces.

21 The Trial Panel further found that during the same timeframe,
22 Mr. Mustafa and other BIA members under his authority held the
23 detainees at the Zllash detention compound in inhumane and degrading
24 condition and routinely assaulted them, both physically and
25 psychologically, for the purpose of obtaining information or

1 confession from them, or to punish, intimidate, coerce, or
2 discriminate against them on political grounds.

3 Lastly, the Trial Panel found that the person known as the
4 murder victim was killed "between on or around 19 April 1999 and
5 around the end of April 1999" as a result of acts and omissions by
6 Mr. Mustafa and his BIA subordinates.

7 Mr. Mustafa filed an appeal challenging his convictions under
8 Counts 1, 3, and 4 of the indictment and a number of related findings
9 made by the Trial Panel.

10 Mr. Mustafa requests that the Appeals Panel reverse the
11 convictions and enter a judgment of acquittal or, alternatively,
12 return the case to the Trial Panel, or reduce the imposed sentence.
13 Mr. Mustafa did not appeal the reparation order issued by the
14 Trial Panel on 6 April 2023, awarding reparation to eight victims
15 participating in the proceedings.

16 The Appeals Panel heard oral submissions from the parties and
17 Victims' Counsel on 26 and 27 October 2023. Mr. Mustafa's appeal was
18 comprised of nine grounds divided into 51 subgrounds. In these
19 grounds, Mr. Mustafa alleges errors of law, fact, and sentencing by
20 the Trial Panel.

21 The Appeals Panel first recalls the standard of review for
22 appeals against trial judgments under Article 46 of the Law. The
23 Appeals Panel may affirm, reverse, or revise the trial judgment, and
24 take any other appropriate action on the following grounds: An error
25 on the question of law invalidating the judgment, an error of fact

1 which has occasioned a miscarriage of justice, or an error in
2 sentencing.

3 For reasons further developed in the appeals judgment, the Panel
4 recalls the broad discretion afforded to the Trial Panel in assessing
5 the evidence and in determining an appropriate sentence. In this
6 regard, the Panel notes that it will not likely overturn a
7 Trial Panel's factual findings as the Trial Panel is best placed to
8 hear, assess, and weigh the evidence presented at trial unless its
9 evolution is wholly erroneous.

10 Furthermore, the Appeals Panel will not interfere with a
11 Trial Panel's sentence unless it has committed a discernible error in
12 the exercise of its discretion or failed to follow the applicable
13 law.

14 Before turning to a summary of its own appellate findings, the
15 Panel wishes to highlight that, in several grounds of appeal,
16 Mr. Mustafa failed to substantiate his arguments with relevant
17 jurisprudence, did not identify which of the Trial Panel's specific
18 findings he challenged, nor referenced relevant paragraphs of the
19 trial judgment, among other deficiencies.

20 While, in principle, such deficiencies warranted summary
21 dismissal of the relevant ground of appeal, the Appeals Panel has, in
22 some instances, decided to exceptionally consider them out of
23 fairness to the accused and in the interests of justice. In other
24 instances, the Appeals Panel has summarily dismissed such arguments
25 without considering their substance.

1 The Appeals Panel's assessment of these instances is developed
2 further in the appeal judgment.

3 The Panel will now summarise the main findings related to
4 Ground 1 and 2 of Mr. Mustafa's appeal.

5 First, the Panel will address an alleged error of law with
6 respect to the Trial Panel's characterisation of the conflict in
7 Kosovo at the relevant time and will turn to the alleged error of
8 fact with respect to, first, the Trial Panel's admission and reliance
9 on certain evidence; two, the Trial Panel's findings on the location
10 of the crime; three, the Trial Panel's assessment of witnesses; and,
11 four, the Trial Panel's finding on Mr. Mustafa's alibi claim.

12 First, under Ground 1A, Mr. Mustafa challenged the Trial Panel's
13 characterisation of the conflict in Kosovo during the timeframe of
14 the charges as non-international armed conflict. It submitted that
15 this mischaracterisation invalidated the trial judgment insofar as
16 his conviction for war crimes were based on Article 14(1)(c) of the
17 Law.

18 The Appeals Panel finds that the Trial Panel applied the correct
19 criteria to assess the existence of a non-international armed
20 conflict in Kosovo at the relevant time. Mr. Mustafa has failed to
21 demonstrate that the Trial Panel erred in finding that, as of May
22 1998, the KLA possessed sufficient characteristics of an organised
23 armed group to be able to engage in a non-international armed
24 conflict.

25 The Appeals Panel therefore finds that Mr. Mustafa has failed to

1 demonstrate an error and accordingly dismisses Ground 1A.

2 Mr. Mustafa next raised several grounds of appeal challenging
3 the Trial Panel's findings on the admissibility of various items of
4 evidence and its reliance on them in the trial judgment. These
5 challenges are included under Grounds 1B, 1C, 1D, 1E, and 1N.

6 First, under Ground 1B, Mr. Mustafa challenged the Trial Panel's
7 admission of and reliance on his statement to the Specialist
8 Prosecutor's Office, or SPO, asserting a violation of Article 3 of
9 the Law and Rule 138(2) of the Rules, and of his right against
10 self-incrimination.

11 The Appeals Panel finds that the suspect statement was obtained
12 in accordance with the relevant provisions of the Law and the rules
13 which govern the rights of the suspect before the Specialist
14 Chambers. The Appeals Panel considers that Mr. Mustafa was
15 adequately advised of his rights as a suspect and that the
16 information Mr. Mustafa received satisfies the requirement of
17 Article 38 of the Law.

18 The Panel further finds that, for the reasons developed in the
19 appeals judgment, Mr. Mustafa has failed to demonstrate that the
20 admission of his suspect statement to the SPO violated his privilege
21 against self-incrimination protected under Article 31 of the Kosovo
22 Constitution and Article 6 of the European Convention on Human Rights
23 and that the Trial Panel erred in relying on it.

24 The Appeals Panel therefore finds that Mr. Mustafa has failed to
25 demonstrate any error and accordingly dismisses Ground 1B.

1 Second, under Ground 1C, Mr. Mustafa challenged the
2 Trial Panel's admission into evidence and reliance on the in-court
3 identification of him by Witness W01679. Mr. Mustafa asserted that
4 the identification was improperly obtained and should have been
5 excluded pursuant to Rule 138 of the rules.

6 The Appeals Panel finds that Mr. Mustafa has waived his right to
7 challenge the admissibility of this identification on appeal as he
8 did not raise this objection during the trial or demonstrate special
9 circumstances justifying consideration of his submission for the
10 first time on appeal.

11 The Panel further finds no error in the Trial Panel's reliance
12 on this witness identification of Mr. Mustafa and accordingly
13 dismisses Ground 1C.

14 Turning to Mr. Mustafa's challenge under Ground 1D, the
15 Appeals Panel finds that Mr. Mustafa has failed to demonstrate an
16 error in the Trial Panel's admission of or reliance on the exhibit
17 called the list of prisoners. The Appeals Panel considers that the
18 Trial Panel found sufficient indicia of authenticity to support this
19 document's reliability.

20 The Panel further finds, for the reasons set out in the appeal
21 judgment, that the Trial Panel relied on the document merely as
22 corroboration of the other evidence supporting its finding regarding
23 Mr. Mustafa's presence at the Zllash detention compound. Therefore,
24 the Panel dismisses Mr. Mustafa's challenge under Ground 1D.

25 Next, the Appeals Panel addresses Mr. Mustafa's challenge under

1 Ground 1E to the Trial Panel's admission of and reliance on the
2 written statements of certain witnesses pursuant to Rule 153 and
3 Rule 155 of the rules, instead of oral testimony, and its admission
4 of and reliance on the hearsay statements of another person.

5 The Appeals Panel finds that, with respect to Witness W04648's
6 statement, Mr. Mustafa has failed to demonstrate an error since the
7 Trial Panel did not rely on any part of the challenged statement in
8 its findings.

9 The Panel further finds that Mr. Mustafa has failed to
10 demonstrate an error in the Trial Panel's admission and assessment of
11 Witness W04712's statement on which it relied to the extent that it
12 was corroborated by other credible and reliable evidence.

13 With respect to the hearsay statements, as detailed further in
14 the appeal judgment, the Appeals Panel finds no error in the
15 Trial Panel's assessment of and reliance on these statements. The
16 Appeals Panel also finds that the Trial Panel did not afford undue
17 weight to these statements, but rather relied on them as
18 corroboration for other testimonial evidence.

19 Therefore, the Appeals Panel dismisses Mr. Mustafa's challenges
20 to the Trial Panel's findings under Ground 1E.

21 Finally, under Ground 1N, Mr. Mustafa challenged the admission
22 into evidence of expert medical reports concerning Victim 08/05 and
23 09/05 under Rule 132 of the rules.

24 The Appeals Panel finds that Mr. Mustafa has waived his right to
25 challenge the issue on appeal as he did not raise this objection

1 during the trial or demonstrate any special circumstances justifying
2 consideration of his submissions for the first time on appeal, and
3 accordingly dismisses this challenge.

4 Next, under Grounds 2A, 2B, 2C, 2D, 2E, 2F, and 2H, Mr. Mustafa
5 raised several alleged factual errors concerning the Trial Panel's
6 findings on the location of the crimes and that the charged crimes
7 occurred at the Zllash detention compound.

8 First, with regard to Mr. Mustafa's argument that the
9 Trial Panel prematurely labelled the compound of houses in Zllash as
10 a detention compound, the Panel finds that Trial Panels have
11 discretion to organise their judgments as they see fit, and that
12 Mr. Mustafa did not demonstrate any error in the Trial Panel's
13 exercise of its discretion in this regard.

14 Second, with regard to the Trial Panel's findings on BIA's
15 occupation of the compound, the Panel finds that, contrary to
16 Mr. Mustafa's claim, the Trial Panel accurately recalled the
17 substance of his statements about the presence of BIA unit soldiers,
18 including himself, on the compound during the relevant period.

19 With respect to Mr. Mustafa's argument that the Trial Panel
20 erred in finding that the BIA unit controlled the Zllash detention
21 compound, the Panel finds that Mr. Mustafa has failed to demonstrate
22 any error in the Trial Panel's assessment of the evidence on which it
23 based its finding.

24 Mr. Mustafa also alleged that the Trial Panel erred in
25 dismissing his claim that the SPO deceived the Defence by shifting

1 its case with regard to the specific building or buildings in which
2 victims were allegedly detained.

3 The Panel finds no merit in Mr. Mustafa's arguments given that
4 the indictment charges him with four counts of war crimes committed
5 at the Zllash detention compound without specifying in which of the
6 buildings on the compound the alleged crimes occurred.

7 The Panel turns next to Mr. Mustafa's argument that the
8 Trial Panel erred in finding that certain Prosecution witnesses were
9 able to identify the specific detention location. The Panel finds
10 that Mr. Mustafa, in several instances, misrepresented these
11 witnesses' testimony. The Appeals Panel also finds that Mr. Mustafa
12 has failed to show that no reasonable Trial Panel could have accepted
13 the evidence of the witnesses identifying the detention location or
14 that the Trial Panel's findings are wholly erroneous.

15 With respect to Mr. Mustafa's argument that the SPO was
16 suggestive in its presentation of photographs of the Zllash detention
17 compound to these witnesses, the Appeals Panel finds that Mr. Mustafa
18 failed to raise the formal objection during trial. Accordingly, the
19 Appeals Panel finds that Mr. Mustafa has waived his rights to raise
20 the issue and dismisses his submission in this regard.

21 In conclusion, the Appeals Panel dismisses Mr. Mustafa's
22 challenge to the Trial Panel's findings in relation to the location
23 of the crimes under Ground 2A in part, 2B, 2C, 2D, 2E in part, 2F,
24 and 2H in part.

25 The Appeals Panel will now turn to Mr. Mustafa's challenges to

1 the Trial Panel's approach regarding the assessment of witnesses.
2 This relates to Ground 1J, 2A, 2E, 2G, 2H, 2I, 2J, 2K, 2L, 2M, and
3 2N.

4 As a preliminary matter, the Panel observes that the majority of
5 Mr. Mustafa's submissions under Grounds 1J, 2G, 2I, 2J, 2K, 2L, and
6 2M did not satisfy the formal requirements for an appeal. The Panel
7 finds that, in particular, under Ground 2K, 2L, and one argument
8 under 2M, Mr. Mustafa's submission in the appeal brief departed
9 significantly from his Notice of Appeal and accordingly summarily
10 dismisses these grounds.

11 In addition, with respect to Mr. Mustafa's challenge of the
12 Trial Panel's assessment of Defence witnesses under Ground 1J, the
13 Appeals Panel finds that he failed to identify specific witnesses or
14 provide precise references to the trial judgment and, for reasons
15 further elaborated in the appeal judgment, dismisses his submissions
16 in this regard.

17 The Panel will now turn to Mr. Mustafa's challenges with respect
18 to the Trial Panel's assessment of Defence witnesses and witnesses
19 favourable to the Defence.

20 First, it will address Mr. Mustafa's argument that the
21 Trial Panel failed to fairly and impartially evaluate the testimony
22 of Defence witnesses against the same standard as the testimony of
23 Prosecution witnesses.

24 The Appeals Panel finds that the Trial Panel correctly
25 articulated its approach to assessing the evidence in this case, in

1 particular with respect to evaluating the credibility of witnesses
2 and the reliability of their testimony before relying on their
3 evidence. As developed further in the appeals judgment, the Panel
4 finds that the Trial Panel carefully assessed the credibility of
5 witnesses, noting any inconsistencies in a witness's testimony and
6 the reasons for accepting or rejecting the testimony, in whole or in
7 part, in light of those discrepancies.

8 Next, the Appeals Panel will address Mr. Mustafa's argument that
9 the Trial Panel erred in presuming that certain witnesses would have
10 a so-called inclination to provide evidence favourable to the accused
11 and unfavourable to the Prosecution.

12 The Panel finds that Mr. Mustafa has failed to point to any
13 evidence which would support this general assertion of bias or which
14 would indicate that the Trial Panel failed to objectively and
15 properly consider the testimony of these witnesses who provided
16 evidence favourable to the Defence.

17 The Panel will now address Mr. Mustafa's argument that the
18 Trial Panel erred in dismissing the testimony of witnesses favourable
19 to the Defence on irrelevant grounds.

20 First, the Panel observes that, contrary to Mr. Mustafa's claim,
21 when assessing the witnesses' credibility, the Trial Panel did
22 consider their testimony on the facts and events on which they were
23 called to testify.

24 Second, the Panel finds that the other factors considered by the
25 Trial Panel, such as close ties to the KLA or the accused, bias

1 expressed against the Specialist Chambers, or the SPO, indication of
2 collusion, or memory lapses, are relevant to the credibility of
3 witnesses, and reliance on those factors is supported by
4 jurisprudence. The Panel therefore dismisses Mr. Mustafa's
5 challenges in this regard.

6 The Panel also dismisses Mr. Mustafa's argument that the only
7 relevant factor to assess credibility is "whether the witness is
8 telling the truth." In this respect, the Appeals Panel finds that
9 the Trial Panel has broad discretion over the appropriate weight and
10 credibility to be accorded to a witness.

11 Thus, the Panel finds that Mr. Mustafa has failed to demonstrate
12 any error in the Trial Panel's assessment of the credibility of
13 witnesses who provided evidence favourable to the Defence and the
14 reliability of their testimony, and accordingly dismisses
15 Mr. Mustafa's related challenges under the remainder of Grounds 1J,
16 2A, 2E, 2G, 2H, 2I, 2J, 2N, and under Ground 2M in part.

17 Mr. Mustafa also raised several grounds of appeal challenging
18 the Trial Panel's assessment of the credibility of specific witnesses
19 and the reliability of their testimony. These are Grounds 1F, 1G,
20 1H, 1I, and 2P. For reasons further developed in the appeal
21 judgment, the Panel dismisses Mr. Mustafa's challenges under these
22 grounds on the basis that the arguments fall outside of the scope of
23 his Notice of Appeal, or Mr. Mustafa has waived the right to
24 challenge the issue on appeal by not raising it first at trial, or
25 Mr. Mustafa has failed to demonstrate any error in the Trial Panel's

1 reliance on or assessment of these witnesses.

2 The Appeals Panel now turns to Mr. Mustafa's challenge under
3 Ground 1K, regarding the Trial Panel's assessment of the credibility
4 of a specific witness.

5 Mr. Mustafa asserted that it erred in failing to consider the
6 witness's alleged financial motive for testifying, and by not
7 allowing the Defence to question the witness in that regard, thus
8 violating his right to equality of arms.

9 The Appeals Panel considers that Mr. Mustafa has failed to
10 demonstrate an error as the Trial Panel evaluated in detail the
11 credibility of this witness and the reliability of the testimony in
12 light of relevant factors.

13 The Panel further finds that the Trial Panel did not prevent
14 Mr. Mustafa from challenging the witness's credibility, but rather
15 imposed appropriate limitation on the scope of his cross-examination.
16 Therefore, the Appeals Panel dismisses Mr. Mustafa's challenges in
17 this regard.

18 Finally, under Ground 2P, Mr. Mustafa challenged the
19 Trial Panel's assessment thereof and reliance on a specific witness's
20 testimony in its finding regarding the murder victim's detention
21 location and Mr. Mustafa's presence at the Zllash detention compound
22 at the relevant time.

23 The Appeals Panel finds that Mr. Mustafa has failed to establish
24 an error in the Trial Panel's assessment as its findings accurately
25 reflected that witness's testimony, and, moreover, the Trial Panel

1 carefully noted any inconsistencies in the witness's testimony and
2 relied on it only to the extent that it was corroborated by other
3 testimony. The Appeals Panel therefore dismisses Ground 2P.

4 I will now turn to Mr. Mustafa's alibi claim. Under Ground 1L,
5 1M, 2M, and 2O, Mr. Mustafa challenged the Trial Panel's rejection of
6 his alibi claim concerning his presence at the scene of the crimes at
7 the relevant time.

8 First, the Appeals Panel finds no legal error in the standard
9 for the assessment of an alibi claim as set out by the Trial Panel,
10 which is well supported by jurisprudence. Specifically, the
11 Trial Panel emphasised that the accused did not need to prove an
12 alibi beyond reasonable doubt, and correctly considered whether the
13 alibi evidence was capable of accounting *prima facie* for
14 Mr. Mustafa's position elsewhere than Zllash, thus creating a
15 reasonable doubt in the SPO's case.

16 Turning to Mr. Mustafa's factual challenges to the Trial Panel's
17 findings, the Appeals Panel finds that, as explained in further
18 detail in the appeal judgment, the Trial Panel did not err in its
19 factual findings on Mr. Mustafa's alibi claim. The Appeals Panel
20 therefore dismisses Ground 1L, 1M, and 2O, and the remainder of
21 Ground 2M.

22 The Panel will next summarise its finding on Mr. Mustafa's
23 challenges under Grounds 3, 4, and 5 of his appeal regarding his
24 conviction for the war crime of murder.

25 Mr. Mustafa challenged the Trial Panel's findings concerning the

1 *actus reus*, or objective elements, and *mens rea*, or subjective
2 elements, of the war crime of murder under Article 14(1)(c) of the
3 Law. These underpin his conviction under Count 4 of the indictment
4 for the murder of the murder victim between on or around 19 April
5 1999 and around the end of April 1999.

6 The Panel will first address the alleged error on the *actus reus*
7 of murder under Grounds 3 and 4. It will address both the legal and
8 factual errors alleged by Mr. Mustafa.

9 Starting with Mr. Mustafa's legal challenges relating to the
10 issue of causation for murder, the Panel recalls that the Trial Panel
11 was unable to isolate a single factual cause of the murder victim's
12 death. It found that it was the result of the combination of the
13 severe mistreatment inflicted by the BIA unit members who detained
14 him at the Zllash detention compound causing serious bodily harm, the
15 denial of medical aid by the BIA unit members who detained him, and
16 gunshot wounds.

17 With respect to legal causation, the Appeals Panel finds that
18 the Trial Panel correctly applied the substantial contribution test,
19 which is well-established in the jurisprudence of international
20 courts and tribunals and is not, as such, challenged by Mr. Mustafa.

21 The Trial Panel found that the causal factors of severe
22 mistreatment and denial of medical aid were solely attributable to
23 Mr. Mustafa and his BIA unit subordinates, and that these were
24 substantial causes of the murder victim's death.

25 As to the bullet holes in the murder victim's body, the

1 Trial Panel found that there was reasonable doubt as to whether they
2 could be attributed to BIA unit members or to Serbian forces. The
3 Appeals Panel finds that in light of this uncertainty and applying
4 the principle of *in dubio pro reo*, or when in doubt, rule in favour
5 of the accused, the Trial Panel properly assumed the factual scenario
6 more favourable to Mr. Mustafa - namely, that Serb forces shot the
7 murder victim.

8 As a consequence, and with a view to fairly attributing
9 responsibility for the murder victim's death, the Appeals Panel finds
10 that the Trial Panel was also required to assess whether the
11 gunshots, which were assumed to have originated from Serb forces,
12 constituted a relevant third-party intervention so as to break the
13 chain of causation between Mr. Mustafa's conduct and the death of the
14 murder victim.

15 The Appeals Panel gleaned the key insights on the proper
16 application of the *novus actus interveniens*, or new intervening act,
17 principle which describes the effect of such third-party
18 interventions on legal causation from a survey of select common and
19 civil law jurisdictions. The Panel concludes that such a *novus actus*
20 is only relevant to breaking the chain of causation under very narrow
21 circumstances; namely, where it is not foreseeable or does not form
22 part of the original sphere of risk belonging to the accused and
23 creates a wholly new risk that so potent as to render the original
24 risk insignificant.

25 The Appeals Panel considers that, while the Trial Panel did not

1 explicitly address the *novus actus interveniens* principle, it did so
2 implicitly, and therefore did not relevantly err.

3 In the Appeals Panel's view, the Trial Panel's findings support
4 the conclusion that the gunshots, which were assumed to have
5 originated from Serb forces, do not constitute a relevant *novus actus*
6 interrupting the causal link between Mr. Mustafa's conduct and the
7 death of the murder victim.

8 The Appeals Panel also dismisses Mr. Mustafa's argument that
9 death due to ill-treatment or denial of medical care may not amount
10 to murder.

11 The Panel considers that it is well-established in the
12 jurisprudence of international courts and tribunals that death may
13 result from either an act or an omission, thus qualifying as murder,
14 and that ill-treatment and denial of medical care do not differ from
15 any other act or omission in this respect.

16 The Appeals Panel further dismisses Mr. Mustafa's contention
17 that a finding as to the time of death of the murder victim was
18 necessary. The Panel finds, for the reasons given in the appeal
19 judgment, that a precise determination of the time of death may be
20 necessary in certain factual circumstances in order to attribute
21 responsibility to an accused. In the present case, though, a more
22 precise determination of the time of death than the one given in the
23 trial judgment was not required.

24 Moving to Mr. Mustafa's argument regarding an exhumation and
25 post-mortem examination of the grave believed to be that of the

1 murder victim, the Appeals Panel finds that Mr. Mustafa failed to
2 raise this issue at trial and accordingly has waived his right to
3 challenge it on appeal. The Appeals Panel therefore dismisses this
4 argument.

5 The Panel now turns to Mr. Mustafa's allegation of factual
6 errors in the Trial Panel's finding on the *actus reus* of murder.

7 First, the Panel finds that Mr. Mustafa failed to demonstrate
8 that the Trial Panel did not find beyond reasonable doubt that the
9 murder victim was unable to stand when last seen by his fellow
10 detainees.

11 The Panel further finds that Mr. Mustafa failed to demonstrate
12 that such a finding was indispensable to his conviction and,
13 therefore, had to be found to have been proven beyond reasonable
14 doubt. Mr. Mustafa has also not demonstrated that there were any
15 deficiencies in the evidence on which the Trial Panel relied to this
16 end.

17 Second, the Panel considers that Mr. Mustafa ignored the
18 detailed evidentiary references in the trial judgment which supports
19 the Trial Panel's conclusion that the murder victim died from
20 mistreatment and denial of medical aid by BIA unit members, was not
21 evacuated, and was shot with bullets.

22 Third, as further elaborated in the appeal judgment, the Panel
23 finds that the Trial Panel conclusion that the decision to neither
24 release nor evacuate the murder victim from Zllash detention compound
25 when the Serb forces advanced could only have been made by the

1 accused was supported by the evidence and rejects Mr. Mustafa's
2 allegation of error of fact in that respect.

3 In conclusion, the Appeals Panel finds that Mr. Mustafa has
4 failed to demonstrate that the Trial Panel erred in law or in fact in
5 finding that his conduct satisfied the *actus reus* of murder and
6 dismisses Mr. Mustafa's Grounds 3 and 4.

7 The Panel will now turn to the alleged errors in the
8 Trial Panel's finding on the *mens rea* of murder under Ground 5.

9 As a preliminary matter, the Panel recalls that the Trial Panel
10 found that Mr. Mustafa "intended to kill" the murder victim.

11 As set out in greater detail in the appeal judgment, while the
12 Trial Panel could have more clearly indicated which type of intent it
13 considered that Mr. Mustafa possessed, as well as the precise
14 definition of that intent, the Appeals Panel understands the
15 Trial Panel to have found that Mr. Mustafa possessed direct intent
16 for murder.

17 With respect to Mr. Mustafa's argument that the Trial Panel
18 applied the wrong *mens rea* standard for the war crime of murder, the
19 Panel considers that the applicable *mens rea* is the same regardless
20 of whether the crime is committed through an act or an omission.

21 The Panel turns next to Mr. Mustafa's arguments that the
22 Trial Panel erred in concluding that the decision to neither release
23 nor evacuate the murder victim from the Zllash detention compound
24 when the Serb forces advanced effectively equalled a decision to kill
25 him as it was not established that Mr. Mustafa knew about the

1 condition of the murder victim.

2 The Appeals Panel observes that the Trial Panel did not make an
3 explicit finding that Mr. Mustafa knew about the condition of the
4 murder victim. However, the Panel considers that such knowledge and
5 intent can be reasonably inferred from the relevant facts and
6 circumstances established by the Trial Panel, which are detailed in
7 the appeal judgment. The Panel finds that Mr. Mustafa has failed to
8 show that, absent such an explicit finding, no reasonable Trial Panel
9 could have reached the Trial Panel's conclusion that the decision to
10 neither release nor evacuate the murder victim effectively equalled a
11 decision to kill him.

12 Accordingly, and in light of further reasons elaborated in the
13 appeal judgment, the Appeals Panel finds that Mr. Mustafa has failed
14 to demonstrate an error in the Trial Panel's finding on the *mens rea*
15 of the war crime of murder and accordingly dismisses Mr. Mustafa's
16 challenges to the Trial Panel's findings in relation to Count 4 and
17 dismisses Ground 5.

18 In Grounds 6 and 7 of his appeal, Mr. Mustafa challenged the
19 Trial Panel's finding concerning the *actus reus* and the *mens rea* of
20 the war crime of torture under Article 14(1)(c)(i) of the Law, and
21 argued that he was wrongly convicted for the torture of at least six
22 persons, while the Trial Panel only established that he personally
23 participated in the torture of two persons.

24 The Panel will first address Mr. Mustafa's argument that the
25 *actus reus* elements of torture had not been established because the

1 evidence of witnesses about their physical assault had not been
2 corroborated by other witnesses.

3 The Panel finds that Mr. Mustafa misconstrues the trial judgment
4 and he ignores the fact that all witnesses who allegedly had been
5 individually assaulted also testified about the mistreatment suffered
6 by others, including in their presence. Mr. Mustafa further
7 overlooks the fact that the Trial Panel found that physical
8 mistreatment was not the only form of torture that detainees were
9 subjected to, but that they had also been subjected to psychological
10 assault and kept in inhumane conditions throughout the entire
11 duration of their detention at the Zllash detention compound. The
12 Panel therefore dismisses Mr. Mustafa's arguments.

13 The Panel next turns to Mr. Mustafa's argument on the *mens rea*
14 of the war crime of torture; namely, that the Trial Panel did not
15 establish but only presumed the requisite purpose of the
16 mistreatment.

17 The Appeals Panel finds that the Trial Panel's conclusion that
18 the specific purpose of the mistreatment had been established in
19 support and is -- had been established is supported by evidence from
20 several eyewitnesses and was sufficiently reasoned.

21 Finally, the Trial Panel will address Mr. Mustafa's argument
22 under Ground 7 that the Trial Panel erred when it convicted him for
23 the torture of at least six persons, while it only established that
24 he personally participated in the torture of two persons. The Panel
25 finds that Mr. Mustafa has failed to demonstrate any error in the

1 Trial Panel's finding with respect to his conviction for the war
2 crime of torture under joint criminal enterprise.

3 In conclusion, the Appeals Panel dismisses Mr. Mustafa's
4 challenges to the Trial Panel's finding in relation to Count 3 and
5 dismisses Grounds 6 and 7.

6 Under Ground 8, Mr. Mustafa challenged the Trial Panel's finding
7 that arbitrary detention committed in a non-international armed
8 conflict constitutes a war crime pursuant to Article 14(1)(c) of the
9 Law.

10 The Panel observes that Mr. Mustafa, in fact, challenged two
11 previous Court of Appeal Chamber decisions on which the Trial Panel
12 based its finding. The Panel finds that Mr. Mustafa has failed to
13 demonstrate any legal error in the Court of Appeals Chamber decisions
14 and thereby failed to show the existence of any cogent reasons, in
15 the interests of justice, to depart from those decisions.

16 The Panel also dismisses Mr. Mustafa's request to refer this
17 question to the Specialist Chamber of the Constitutional Court.

18 In conclusion, the Appeals Panel finds that Mr. Mustafa has
19 failed to establish that the Trial Panel erred in respect of the
20 legal basis of the war crime of arbitrary detention and dismisses
21 Mr. Mustafa's challenges to the Trial Panel's finding in relation to
22 Count 1 and dismisses Ground 8.

23 Finally, under Ground 9, Mr. Mustafa challenged the
24 Trial Panel's finding relating to the imposition of a sentence of
25 26 years of imprisonment for the three counts on which he was

1 convicted.

2 First, the Appeals Panel finds no error in the Trial Panel
3 balancing Mr. Mustafa's individual circumstances against the nature
4 and gravity of, and his contribution to, the crimes for which he was
5 convicted. In fact, the Trial Panel is required to do so under the
6 Specialist Chambers' legal framework.

7 Furthermore, the Appeals Panel finds that, contrary to
8 Mr. Mustafa's contentions, the Trial Panel did not consider the
9 absence of mitigating circumstances as being an aggravating factor
10 and did not use the gravity of the crimes as an aggravating
11 circumstance. In this regard, given the Trial Panel's broad
12 discretion in sentencing, the Appeals Panel sees no error in the
13 Trial Panel declining to give significant weight to his individual
14 circumstances.

15 The Appeals Panel also dismisses Mr. Mustafa's argument that he
16 could not have raised these individual circumstances at trial as he
17 was given ample opportunity and instruction to do so, and, in any
18 event, considers that the Trial Panel took these into account *proprio*
19 *motu*, or on its own initiative. The Appeals Panel also dismisses the
20 contention that the Trial Panel erred in imposing a sentence of
21 imprisonment which Mr. Mustafa claims exceeds his life expectancy.
22 This contention is contradicted by the Specialist Chambers' legal
23 framework, which allows it to impose a sentence of up to lifelong
24 imprisonment, and by international jurisprudence.

25 Finally, the Appeals Panel will address Mr. Mustafa's arguments

1 concerning the application of the *lex mitior*, or more lenient law,
2 principle, and what he submits is the imposition of an excessively
3 long sentence.

4 In this regard, the Appeals Panel first finds that the
5 Trial Panel correctly held that it was not bound to apply sentencing
6 ranges applicable in Kosovo law at the time of the commission of the
7 crimes and any subsequent more lenient sentencing range. Rather, the
8 Trial Panel was required to take these into account under the
9 Specialist Chambers' legal framework.

10 For reasons further explained in the appeal judgment, the
11 Appeals Panel finds that the principle of *lex mitior* is not
12 applicable vis-à-vis these domestic sentencing ranges and that there
13 is no conflict between the Specialist Chambers' legal framework and
14 the Constitution of Kosovo. Accordingly, the Appeals Panel also
15 dismisses Mr. Mustafa's request for a referral of this issue to the
16 Specialist Chamber of the Constitutional Court.

17 That being said, the Appeals Panel finds that the Trial Panel's
18 analysis of the domestic sentencing ranges is insufficient to meet
19 its obligation to take these ranges into account. To this end, as
20 well as in relation to Mr. Mustafa's argument that his sentence is
21 excessive, the Appeals Panel has analysed both international and
22 Kosovo jurisprudence concerning war crimes comparable to those for
23 which Mr. Mustafa was sentenced. In so doing, the Appeals Panel was
24 cognisant of the fact that sentences cannot be easily transposed from
25 one case to another given the case-specific factors in sentencing.

1 The Appeals Panel finds that in cases before both international
2 tribunals and Kosovo courts concerning war crimes comparable to those
3 for which Mr. Mustafa was sentenced, shorter sentences were imposed
4 than those imposed on Mr. Mustafa. In this regard, the Appeals Panel
5 interpreted the cases of Kosovo courts in the context of the
6 sentencing ranges available in its domestic laws. While fully
7 cognisant of the Trial Panel's broad discretion in sentencing, the
8 Panel finds that the disparity between Mr. Mustafa's sentences and
9 the sentences that the Appeals Panel analysed shows that the
10 Trial Panel ventured outside of his discretionary bounds in this
11 instance. The Appeals Panel therefore considers that, by imposing
12 sentences on Mr. Mustafa which are out of reasonable proportion with
13 a line of sentences imposed in similar circumstances for similar
14 offences, the Trial Panel committed a discernible error in
15 sentencing.

16 For the reasons developed in the appeal judgment, the
17 Appeals Panel therefore finds it appropriate to reduce the individual
18 sentences imposed on Mr. Mustafa by the Trial Panel to the following
19 sentences: Firstly, eight years of imprisonment for Count 1, the war
20 crime of arbitrary detention committed against at least six persons;
21 secondly, 20 years of imprisonment for Count 3, the war crime of
22 torture, committed against at least six persons; and, thirdly,
23 22 years of imprisonment for Count 4, the war crime of murder
24 committed against one person.

25 Accordingly, the Appeals Panel must also now determine, pursuant

1 to Rule 163(4) of the rules, a single sentence reflecting the
2 totality of the criminal conduct of the accused which shall not be
3 less than the highest individual sentence determined in respect of
4 each charge. In this regard, the Appeals Panel considers that a
5 single sentence of 22 years of imprisonment, with credit for the time
6 served since his arrest on 24 September 2020, reflects the totality
7 of Mr. Mustafa's criminal conduct in this case.

8 The Appeals Panel notes that its finding on Mr. Mustafa's
9 sentence do not affect the Trial Panel's finding on the reparation
10 order issued against Mr. Mustafa. The Panel also emphasises that
11 this reduction in Mr. Mustafa's sentences in no way suggests that the
12 crimes for which he has been convicted and sentenced are not grave.

13 The Appeals Panel therefore grants in part Mr. Mustafa's
14 challenges to the Trial Panel's finding on sentencing, and dismisses
15 the remainder of Ground 9.

16 Finally, the Appeals Panel stresses that it has confirmed
17 Mr. Mustafa's conviction for the war crimes of torture, arbitrary
18 detention, and murder for which he was found to be individually
19 criminally responsible. The Specialist Chambers only have
20 jurisdiction over individuals, not groups or organisations. In that
21 vein, the Appeals Panel emphasises again that neither the KLA nor the
22 Kosovo people were the subject of these proceedings, and they have
23 not been found responsible for or convicted of these crimes.

24 I would now like to ask Mr. Mustafa to stand while I, on behalf
25 of the Panel, read the full text of the disposition of the appeal

1 judgment.

2 The disposition reads as follows:

3 For these reasons, having considered all the arguments made by
4 the parties and the participants, the Court of Appeals Panel,
5 pursuant to Article 46 of the Law and Rules 182 and 183 of the rules:

6 Grants Mr. Mustafa's Ground 9F in part, 9H in part, and 9K in
7 part;

8 Dismisses Mr. Mustafa's appeal in all other respects;

9 Affirms Mr. Mustafa's conviction for the war crime of arbitrary
10 detention pursuant to Article 14(1)(c)(i) and Article 16(1)(a) of the
11 Law under Count 1 of the indictment, the war crime of torture
12 pursuant to Article 14(1)(c)(i) and Article 16(1)(a) of the Law under
13 Count 3 of the indictment ...

14 [Appeal Panel and Court Officer confers]

15 PRESIDING JUDGE PICARD: Sorry. So I continue. I don't know
16 where I was.

17 Okay. I start again.

18 You can hear me, Mr. Mustafa?

19 THE APPELLANT: [Interpretation] Yes, I can hear you.

20 PRESIDING JUDGE PICARD: Affirms Mr. Mustafa's conviction for
21 the war crime of arbitrary detention pursuant to Article 14(1)(c)(i)
22 and Article 16(1)(a) of the Law under Count 1 of the indictment, the
23 war crime of torture pursuant to Article 14(1)(c)(i) and Article
24 16(1)(a) of the Law under Count 3 of the indictment, and the war
25 crime of murder pursuant to Article 14(1)(c)(i) and Article 16(1)(a)

1 of the Law under Count 4 of the indictment;

2 Sets aside the sentence of ten years of imprisonment imposed
3 with respect to Count 1 and imposes a sentence of eight years of
4 imprisonment;

5 Sets aside the sentence of 22 years of imprisonment imposed with
6 respect to Count 3 and imposes a sentence of 20 years of
7 imprisonment;

8 Sets aside the sentence of 25 years of imprisonment imposed with
9 respect to Count 4 and imposes sentence of 22 years of imprisonment;

10 Sets aside the single sentence of 26 years of imprisonment
11 imposed on Mr. Mustafa and imposes a single sentence of 22 years of
12 imprisonment on Mr. Mustafa, with credit for the time served;

13 Rules that this judgment shall be enforced immediately pursuant
14 to Rule 185(1) of the rules; and

15 Orders that, in accordance with Article 50(1) of the Law and
16 Rule 166(3) of the rules, Mr. Mustafa shall remain in the custody of
17 the Specialist Chambers pending the finalisation of the arrangements
18 for his transfer to the state where his sentence will be served.

19 Mr. Mustafa, you may be seated.

20 The Registry shall now distribute the appeal judgment in
21 electronic form.

22 Mr. Court Officer, can you confirm it's distributed?

23 THE COURT OFFICER: Your Honours, on behalf of the Registrar, I
24 can confirm that F38, the confidential version, has been distributed
25 to the authorised parties and participants, and F38 RED has also been

1 distributed, which is the public redacted version, and has been
2 placed on our web site.

3 Thank you, Your Honours.

4 PRESIDING JUDGE PICARD: Thank you. This concludes the
5 appellate proceedings in this case.

6 Before we adjourn, I would like to take this moment to thank the
7 parties and participants and the Registry for their work on this case
8 and their attendance today. I would also like to express my
9 gratitude to the interpreters, stenographers, audio-visual
10 technicians, security personnel, and the Appeals Panel's legal
11 support team for the excellent assistance.

12 The hearing is adjourned.

13 --- Whereupon the hearing adjourned at 10.36 a.m.

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