

## SUMMARY OF THE APPEAL JUDGMENT

*Specialist Prosecutor v. Salih Mustafa, Case No. KSC-CA-2023-02*

Please find below the summary of the Appeal Judgment delivered by a Panel of the Court of Appeals Chamber, as read out by the Presiding Judge.

**A Panel of the Court of Appeals Chamber** is sitting today to pronounce the Appeal Judgment in the case of the *Specialist Prosecutor v. Salih Mustafa*. This Appeal Judgment is pronounced in public, in the name of the people of Kosovo, and in the presence of the Accused.

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

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

This Appeal Judgment marks an important milestone for the Specialist Chambers, as it constitutes the first appeal judgment in a war crimes case at this tribunal. It is a significant step towards providing justice to victims and ensuring accountability.

This Judgment addresses the appeal against the Trial Panel's findings regarding the responsibility of Mr Mustafa, the commander of the BIA Guerrilla unit – a unit of the Kosovo Liberation Army, or the KLA – for crimes committed at a compound in Zllash/Zlaš, Kosovo, referred to as the Zllash/Zlaš Detention Compound, between on or around 19 April 1999 and around the end of April 1999.

On 16 December 2022, the Trial Panel delivered the Trial Judgment, convicting Mr Mustafa on three counts of war crimes. He was found guilty for the war crimes of arbitrary detention, torture and murder (Counts 1, 3 and 4) and not guilty for the war crime of cruel treatment (Count 2). The Trial Panel sentenced Mr Mustafa to a single sentence of 26 years of imprisonment, with credit for time served. When imposing the sentence, the Trial Panel stressed that Mr Mustafa was on trial for his own individual responsibility and that at no point in time was the Kosovo Liberation Army on trial.

The Trial Panel found that, between approximately 1 April 1999 and on or around 19 April 1999, at the Zllash/Zlaš Detention Compound, which was the base of the BIA Guerrilla unit in Zllash/Zlaš, at least six persons were deprived of their liberty by BIA members under the control and authority of the BIA commander, Mr Mustafa. The Trial Panel found that this occurred in the context of a non-international armed conflict between the KLA and Serbian forces. The Trial Panel further found that, during the same timeframe, Mr Mustafa and other BIA members under his authority held the detainees at the Zllash/Zlaš Detention Compound in inhumane and degrading conditions and routinely assaulted them, both physically and psychologically, for the purpose of obtaining information or a confession from them, and/or to punish, intimidate, coerce and/or discriminate against them on political grounds. Lastly, the Trial Panel found that a person referred to as the Murder Victim was killed “between on or around 19 April 1999 and around the end of April 1999”, as a result of acts and omissions attributable to Mr Mustafa and his BIA subordinates.

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

Mr Mustafa requested that the Appeals Panel reverse the convictions and enter a judgment of acquittal or, alternatively, return the case to the Trial Panel, or reduce the imposed sentence.

Mr Mustafa did not appeal the Reparation Order issued by the Trial Panel on 6 April 2023, awarding reparations to eight victims participating in the proceedings.

The Appeals Panel heard oral submissions from the Parties and the participants on 26 and 27 October 2023.

In his appeal, comprised of 9 grounds, divided into 51 sub-grounds, Mr Mustafa raised arguments on alleged errors of law, fact and sentencing by the Trial Panel.

The Appeals Panel first recalls the standard of review for appeals against trial judgments under Article 46 of the Law. The Appeals Panel may affirm, reverse or revise the Trial Judgment, and take any other appropriate action, on the following grounds: (i) “an error on a question of law invalidating the judgement”; (ii) “an error of fact which has occasioned a miscarriage of justice”; or (iii) “an error in sentencing”. For reasons further developed in the Appeal Judgment, the Panel recalls the broad discretion afforded to the trial panel in assessing the evidence and in determining an appropriate sentence. In this regard, the Panel notes that it will not lightly overturn a trial panel’s factual findings, as the trial panel is best placed to hear, assess and weigh the evidence presented at trial, unless its evaluation is wholly erroneous. Furthermore, the Appeals Panel will not interfere with a trial panel’s sentence unless it has committed a discernible error in the exercise of its discretion or failed to follow the applicable law.

Before turning to a summary of its findings, the Panel wishes to highlight that, in several grounds of appeal, Mr Mustafa failed to substantiate his arguments with

relevant jurisprudence, did not identify the Trial Panel's specific findings which he challenged, nor reference relevant paragraphs of the Trial Judgment, among other deficiencies. While, in principle, such deficiencies warranted summary dismissal of the relevant ground of appeal, the Appeals Panel has, in some instances, decided to exceptionally consider them out of fairness to the Accused and in the interests of justice. In other instances, the Appeal Panel has summarily dismissed such arguments. The Appeals Panel's assessment of such instances is developed further in the Appeal Judgment.

The Panel will now summarise the main findings related to Grounds 1 and 2 of Mr Mustafa's appeal. First, the Panel will address an alleged error of law with respect to the Trial Panel's characterisation of the conflict in Kosovo at the relevant time, and will then turn to the alleged errors of fact with respect to: (1) the Trial Panel's admission and reliance on certain evidence; (2) the Trial Panel's findings on the location of the crimes; (3) the Trial Panel's assessment of witnesses; and (4) the Trial Panel's findings on Mr Mustafa's alibi claim.

#### **Alleged Errors Related to the Trial Panel's Characterisation of the Conflict**

First, under Ground 1A, Mr Mustafa challenged the Trial Panel's characterisation of the conflict in Kosovo during the timeframe of the charges as a non-international armed conflict. He submitted that this mischaracterisation invalidated the Trial Judgment insofar as his convictions for war crimes were based on Article 14(1)(c) of the Law.

The Appeals Panel finds that the Trial Panel applied the correct criteria to assess the existence of a non-international armed conflict, and that Mr Mustafa has failed to demonstrate that the Trial Panel erred in finding that, as of May 1998, the KLA possessed sufficient characteristics of an organised armed group to be able to engage in a non-international armed conflict.

In light of the above, the Appeals Panel finds that Mr Mustafa has failed to demonstrate an error, and accordingly dismisses Ground 1A.

### **Alleged Errors Related to the Trial Panel's Admission of and Reliance on Items of Evidence**

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

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

The Appeals Panel finds that the Suspect Statement was obtained in accordance with Article 38(3)(a) and(b) of the Law and Rule 43 of the Rules, which govern the rights of suspects before the Specialist Chambers. The Appeals Panel considers that Mr Mustafa was adequately advised of his rights as a suspect, and that the information Mr Mustafa received satisfies the requirements of Article 38(3)(a) and (b) of the Law.

The Panel further finds that, for the reasons developed in the Appeal Judgment, Mr Mustafa has failed to demonstrate that the admission of the Suspect Statement violated his privilege against self-incrimination, protected under Article 31(1) and (2) of the Kosovo Constitution and Article 6(1) of the European Convention on Human Rights, or that the Trial Panel erred in relying on it.

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

Second, under Ground 1C, Mr Mustafa challenged the Trial Panel's admission into evidence and reliance on the in-court identification of him by Witness W01679,

asserting that the identification was improperly obtained and accordingly should have been excluded pursuant to Rule 138 of the Rules.

The Appeals Panel finds that Mr Mustafa has waived his right to challenge the admissibility of the identification on appeal, as he did not raise this objection during the trial or demonstrate special circumstances justifying consideration of his submissions for the first time on appeal. The Panel further finds no error in the Trial Panel's reliance on the witness's identification of Mr Mustafa, and accordingly dismisses Ground 1C.

Turning to Mr Mustafa's challenge under Ground 1D, the Appeals Panel finds that he has failed to demonstrate an error in the Trial Panel's admission of, or reliance on, the exhibit called the List of Prisoners. The Panel considers that the Trial Panel found sufficient indicia of authenticity to support the document's reliability. The Panel further finds, for the reasons set out in the Appeal Judgment, that the Trial Panel relied on the document merely as corroboration for the other evidence supporting its finding regarding Mr Mustafa's presence at the Zllash/Zlaš Detention Compound. Therefore, the Panel dismisses Mr Mustafa's challenges under Ground 1D.

Next, the Appeals Panel addresses Mr Mustafa's challenge, under Ground 1E, to the Trial Panel's admission of and reliance on the written statements of certain witnesses pursuant to Rules 153(1) and 155(1) of the Rules, and the hearsay statements of another person.

The Appeals Panel finds that Mr Mustafa has failed to demonstrate an error in the Trial Panel's reliance on Witness W04648's statement, in light of the fact that the Trial Panel did not rely on any part of the challenged statement in its findings. The Panel further finds that Mr Mustafa has failed to demonstrate an error in the Trial Panel's admission and assessment of Witness W04712's statement, on which it relied to the extent that it was corroborated by other credible and reliable evidence. With respect to the hearsay

statements, as detailed further in the Appeal Judgment, the Appeals Panel finds no error in the Trial Panel's assessment and reliance on these statements. The Appeals Panel also finds that the Trial Panel did not afford undue weight to these statements, but rather relied on them as corroborative of other testimonial evidence.

In conclusion, the Appeals Panel dismisses Mr Mustafa's challenges to the Trial Panel's findings under Ground 1E.

Finally, under Ground 1N, Mr Mustafa challenged the admission into evidence of expert medical reports concerning Victims 08/05 and 09/05 under Rule 132 of the Rules.

The Appeals Panel finds that Mr Mustafa has waived his right to challenge the issue on appeal, as he did not raise this objection during the trial or demonstrate any special circumstances justifying consideration of his submissions for the first time on appeal, and accordingly dismisses this challenge.

### **Alleged Errors Related to the Trial Panel's Findings on the Location of the Crimes**

Under Grounds 2A in part, 2B, 2C, 2D, 2E in part, 2F, and 2H in part, Mr Mustafa raised several alleged factual errors concerning the Trial Panel's findings that the charged crimes occurred at the Zllash/Zlaš Detention Compound.

First, with regard to Mr Mustafa's argument that the Trial Panel prematurely labelled the compound of houses in Zllash/Zlaš as a detention compound, the Panel finds that trial panels have discretion to organise their judgments as they see fit and that Mr Mustafa did not demonstrate any error in the Trial Panel's exercise of its discretion in this regard.

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

With respect to Mr Mustafa's argument that the Trial Panel erred in finding that the BIA "controlled" the Zllash/Zlaš Detention Compound, the Panel finds that Mr Mustafa has failed to demonstrate any error in the Trial Panel's assessment of the evidence on which it based its finding.

Mr Mustafa also alleged that the Trial Panel erred in dismissing his claim that the SPO deceived the Defence by shifting its case with regard to the specific building(s) in which victims were allegedly detained. The Panel finds no merit in Mr Mustafa's arguments, given that the Indictment charges him with four counts of war crimes committed at the Zllash/Zlaš Detention Compound, without specifying in which of the buildings on the compound the alleged crimes occurred.

The Panel turns next to Mr Mustafa's argument that the Trial Panel erred in finding that certain SPO witnesses were able to identify the specific detention location. The Panel finds that Mr Mustafa, in several instances, misrepresented the witnesses' testimony. The Appeals Panel also finds, as further elaborated in the Appeal Judgment, that Mr Mustafa has failed to show that no reasonable trier of fact could have accepted the evidence of the witnesses identifying the detention location or that the Trial Panel's findings are wholly erroneous.

With respect to Mr Mustafa's argument that the SPO was suggestive in its presentation of photographs of the Zllash/Zlaš Detention Compound to the witnesses, the Appeals Panel finds that Mr Mustafa failed to raise a formal objection during trial and has not demonstrated any special circumstances justifying consideration of his submissions for the first time on appeal. Accordingly, the Appeals Panel finds that Mr Mustafa has waived his right to raise the issue, and dismisses his submissions in this regard.

In conclusion, the Appeals Panel dismisses Mr Mustafa's challenges, under Grounds 2A in part, 2B, 2C, 2D, 2E in part, 2F, and 2H in part, to the Trial Panel's findings in relation to the location of the crimes.



### **Alleged Errors Related to the Trial Panel's Assessment of Witnesses**

The Appeals Panel will now turn to Mr Mustafa's challenges to the Trial Panel's approach regarding the assessment of witnesses. These relate to Grounds 1J, 2A in part, 2E in part, 2G, 2H in part, 2I, 2J, 2K, 2L, 2M in part, and 2N.

As a preliminary matter, the Panel observes that the majority of Mr Mustafa's submissions under Grounds 1J, 2G, 2I, 2J, 2K, 2L and 2M in part did not satisfy the formal requirements for an appeal. The Panel finds that, in particular under Grounds 2K, 2L and with respect to one argument under 2M in part, Mr Mustafa's submissions in the Appeal Brief departed significantly from the relevant grounds outlined in the Notice of Appeal, and accordingly summarily dismisses these grounds. In addition, with respect to Mr Mustafa's challenge regarding the Trial Panel's assessment of Defence witnesses under Ground 1J, the Appeals Panel finds that he failed to identify specific witnesses or provide precise references to the Trial Judgment, and, for reasons further elaborated in the Appeal Judgment, dismisses his submissions in this regard.

The Panel will now turn to Mr Mustafa's substantive argument that the Trial Panel failed to fairly and impartially evaluate the testimony of Defence witnesses against the same standard as the testimony of SPO witnesses. The Panel finds that the Trial Panel correctly articulated its approach to assessing evidence in this case, in particular with respect to evaluating the credibility of witnesses and the reliability of their testimony, before relying on their evidence. As developed further in the Appeal Judgment, the Panel finds that the Trial Panel carefully assessed the credibility of witnesses, noting any inconsistencies in a witness's testimony and the reasons for accepting or rejecting the testimony, in whole or in part, in light of those discrepancies.

Next, with regard to Mr Mustafa's argument that the Trial Panel erred in presuming that certain witnesses would have an "inclination" to provide evidence favourable to the Accused, and unfavourable to the SPO, the Panel finds that Mr Mustafa has failed

to point to any evidence which would support this general assertion of bias or which would indicate that the Trial Panel failed to objectively and properly consider the testimony of witnesses who provided evidence favourable to the Defence.

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

First, the Panel observes that, contrary to Mr Mustafa's claim, when assessing the witnesses' credibility, the Trial Panel did consider their testimony on the facts and events on which they were called to testify. Second, the Panel finds that the other factors considered by the Trial Panel, such as close ties to the KLA and/or the Accused, bias expressed against the Specialist Chambers or the SPO, indications of collusion, or memory lapses, are relevant to the credibility of witnesses and reliance on those factors is supported by jurisprudence. The Panel therefore dismisses Mr Mustafa's challenges in this regard.

The Panel also dismisses Mr Mustafa's argument that the only relevant factor to assessing credibility is "whether [the] witness is telling the truth". In this respect, the Panel finds that the Trial Panel retains full discretionary power over the appropriate weight and credibility to be accorded to a witness.

In light of the above, and the further reasoning contained in the Appeal Judgment, the Panel finds that Mr Mustafa has failed to demonstrate any error in the Trial Panel's assessment of the credibility of witnesses who provided evidence favourable to the Defence and the reliability of their testimony, and accordingly dismisses Mr Mustafa's related challenges under the remainder of Grounds 1J, 2A, 2E, 2G, 2H, 2I, 2J, 2N, and under 2M in part.

Mr Mustafa also raised several grounds of appeal challenging the Trial Panel's assessment of the credibility of specific witnesses and the reliability of their testimony. These are Grounds 1F, 1G, 1H, 1I and 2P. For reasons developed in the Appeal

Judgment, the Appeals Panel dismisses Mr Mustafa's challenges under these grounds on the basis that: (i) the arguments fall outside of the scope of the Notice of Appeal; (ii) Mr Mustafa has waived the right to challenge the issue on appeal; or (iii) Mr Mustafa has failed to demonstrate any error in the Trial Panel's reliance on or assessment of these witnesses.

The Appeals Panel now turns to Mr Mustafa's challenge under Ground 1K regarding the Trial Panel's assessment of the credibility of a specific witness, asserting that it erred in failing to consider the witness's financial motive for testifying, and by not allowing the Defence to question the witness in that regard, violating his right to equality of arms.

For the reasons set out in the Appeal Judgment, the Panel considers that Mr Mustafa has failed to demonstrate an error, as the Trial Panel evaluated in detail the credibility of the witness and the reliability of that witness's testimony in light of relevant factors. The Panel further finds that the Trial Panel did not prevent Mr Mustafa from challenging the witness's credibility, but rather imposed appropriate limitations on the scope of cross-examination.

In conclusion, the Appeals Panel dismisses Mr Mustafa's challenges in this regard.

Finally, under Ground 2P, Mr Mustafa challenged the Trial Panel's assessment of and reliance on a specific witness's testimony in its findings regarding the Murder Victim's detention location and Mr Mustafa's presence at the Zllash/Zlaš Detention Compound at the relevant time.

The Appeals Panel finds that Mr Mustafa has failed to establish an error in the Trial Panel's assessment, as its findings accurately reflected the witness's testimony and, moreover, the Trial Panel carefully noted any inconsistencies in the witness's testimony, and relied on it only to the extent that it was corroborated by other testimony. The Appeals Panel therefore dismisses Ground 2P.

### **Alleged Errors Related to the Trial Panel's Consideration of the Alibi Claim**

Under Grounds 1L, 1M, the remainder of 2M and 2O, Mr Mustafa challenged the Trial Panel's rejection of his alibi claim, concerning his presence at the scene of the crimes at the relevant time.

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

Turning to Mr Mustafa's factual challenges to the Trial Panel's findings, the Appeals Panel finds that, as explained in further detail in the Appeal Judgment, the Trial Panel did not err in its factual findings on Mr Mustafa's alibi.

In light of the above, the Appeals Panel dismisses Mr Mustafa's challenges to the Trial Panel's findings concerning his alibi claim under Grounds 1L, 1M and 2O, and the remainder of Ground 2M.

### **Alleged Errors Related to the Trial Panel's Findings on the War Crime of Murder (Count 4)**

The Panel will next summarise its findings on Mr Mustafa's challenges under Grounds 3, 4 and 5.

Mr Mustafa challenged the Trial Panel's findings concerning the *actus reus* and *mens rea* of the war crime of murder under Article 14(1)(c)(i) of the Law, underpinning his conviction under Count 4 of the Indictment, for the murder of the Murder Victim, between on or around 19 April 1999 and around the end of April 1999.

The Panel will first address the alleged errors on the *actus reus* of murder under Grounds 3 and 4.

Starting with Mr Mustafa's legal challenges relating to the issue of causation for murder, the Panel recalls that the Trial Panel was unable to isolate a single factual cause of the Murder Victim's death. It found that it was the result of the combination of the severe mistreatment inflicted by BIA members who detained him at the Zllash/Zlaš Detention Compound, causing serious bodily harm, the denial of medical aid by BIA members who detained him, and gunshot wounds.

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

The Trial Panel found that the causal factors of severe mistreatment and denial of medical aid were "solely attributable" to Mr Mustafa and his BIA subordinates, and that these were substantial causes of the Murder Victim's death. As to the bullet holes in the Murder Victim's body, the Trial Panel found that there was reasonable doubt as to whether they could be attributed to BIA members or to Serbian forces. The Appeals Panel finds that, in light of this uncertainty, and applying the principle of *in dubio pro reo*, the Trial Panel properly assumed the factual scenario most favourable to Mr Mustafa – namely that Serb forces shot the Murder Victim. As a consequence, and with a view to fairly attributing responsibility for the Murder Victim's death, the Appeals Panel finds that the Trial Panel was also required to assess whether the gunshots which were assumed to have originated from Serb forces constituted a relevant third party intervention so as to break the chain of causation.

The Panel gleaned key insights on the proper application of the *novus actus interveniens* principle which describes the effect of such third party interventions on legal causation from a survey of select (common and civil law) jurisdictions. It concludes that such a *novus actus* is only relevant in terms of breaking the chain of causation under very narrow circumstances, namely where it is not be foreseeable, or does not form part of the original sphere of risk belonging to the accused and creates a wholly new risk that

is so potent as to render the original risk insignificant. The Appeals Panel considers that, while the Trial Panel did not explicitly address the *novus actus interveniens* principle, it did so implicitly, and therefore did not relevantly err. For, in the Appeals Panel's view, the Trial Panel's findings support the conclusion that the gunshots which were assumed to have originated from Serb forces do not constitute a relevant *novus actus* in the above-mentioned sense of interrupting the causal link between Mr Mustafa's conduct and the death of the Murder Victim.

The Appeal Panel also dismisses Mr Mustafa's argument that death due to ill-treatment or denial of medical care may not amount to murder. The Panel considers that it is well-established in the jurisprudence of international courts and tribunals that death may result from either an act or an omission, thus qualifying as murder, and that ill-treatment and denial of medical care do not differ from any other act or omission in this respect. The Appeals Panel further dismisses Mr Mustafa's contention that a finding as to the time of death of the Murder Victim was necessary. The Panel finds, for the reasons given in the Appeal Judgment, that while a precise determination of the time of death may be necessary in certain factual circumstances in order to attribute responsibility to an accused, in the present case a more precise determination of the time of death than the one given was not required.

Concerning Mr Mustafa's argument regarding an exhumation and post-mortem examination of the grave believed to be that of the Murder Victim, the Appeals Panel finds that Mr Mustafa failed to raise this issue at trial, and accordingly has waived his right to challenge it on appeal. The Appeals Panel therefore dismisses this argument.

The Panel now turns to Mr Mustafa's allegations of factual errors for the *actus reus* of murder.

First, the Panel finds that Mr Mustafa failed to demonstrate that the Trial Panel did not find beyond reasonable doubt that the Murder Victim was unable to stand when last seen by his fellow detainees. The Panel further finds that Mr Mustafa failed to

demonstrate that such a finding was indispensable to his conviction and therefore had to be found to have been proven beyond reasonable doubt. Mr Mustafa has also not demonstrated that there were any deficiencies in the evidence on which the Trial Panel relied to this end.

Second, the Panel considers that Mr Mustafa ignored the detailed evidentiary references in the Trial Judgment which support the Trial Panel's conclusions that the Murder Victim: (i) died from mistreatment and denial of medical aid by BIA members; (ii) was not evacuated; and (iii) was shot with bullets.

Third, as further elaborated in the Appeal Judgment, the Panel finds that the Trial Panel's conclusion that the decision to neither release nor evacuate the Murder Victim from the Zllash Detention Compound when the Serb forces advanced could only have been made by the Accused was supported by the evidence, and rejects Mr Mustafa's allegations of error in that respect.

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

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

As a preliminary matter, the Panel recalls that the Trial Panel found that Mr Mustafa "intended to kill" the Murder Victim. As set out in greater detail in the Appeal Judgment, while the Trial Panel could have more clearly indicated which type of intent it considered that Mr Mustafa possessed, as well as the precise definition of that intent, the Appeals Panel understands the Trial Panel to have found that Mr Mustafa possessed direct intent for murder.

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

The Panel turns next to Mr Mustafa's arguments that the Trial Panel erred in concluding that the decision to neither release nor evacuate the Murder Victim from the Zilash Detention Compound when the Serb forces advanced effectively equalled a decision to kill him, as it was not established that he knew about the condition of the Murder Victim. The Panel observes that the Trial Panel did not make an explicit finding that Mr Mustafa knew about the condition of the Murder Victim. However, the Panel considers that such knowledge and intent can be reasonably inferred from relevant facts and circumstances established by the Trial Panel, which are detailed in the Appeal Judgment. The Panel finds that Mr Mustafa has failed to show that, absent such an explicit finding, no reasonable trial panel could have reached the Trial Panel's conclusion that the decision to neither release nor evacuate the Murder Victim effectively equalled a decision to kill him.

Accordingly, and in light of further reasons elaborated in the Appeal Judgment, the Appeals Panel finds that Mr Mustafa has failed to demonstrate an error in the Trial Panel's findings on the *mens rea* of the war crime of murder and accordingly dismisses Mr Mustafa's Ground 5 and the challenges to the Trial Panel's findings in relation to Count 4.

### **Alleged Errors Related to the Trial Panel's Findings on the War Crime of Torture (Count 3)**

In Grounds 6 and 7, Mr Mustafa challenged the Trial Panel's findings concerning the *actus reus* and the *mens rea* of the war crime of torture under Article 14(1)(c)(i) of the Law and argued that he was wrongly convicted for the torture of at least six persons,



while the Trial Panel only established that he personally participated in the torture of two persons.

The Panel will first address Mr Mustafa's argument that the *actus reus* elements of torture had not been established because the evidence of witnesses about their physical assault had not been corroborated by other witnesses. The Panel finds that Mr Mustafa misconstrues the Trial Judgment and ignores the fact that all witnesses who had allegedly been individually assaulted also testified about the mistreatment suffered by others, including in their presence. Mr Mustafa further overlooks the fact that the Trial Panel found that physical mistreatment was not the only form of torture that detainees were subjected to, but that they had also been subjected to psychological assault and kept in inhumane conditions throughout the entire duration of their detention at the Zilash/Zlaš Detention Compound. The Panel therefore dismisses Mr Mustafa's arguments.

The Panel next turns to Mr Mustafa's argument on the *mens rea* of the war crime of torture, namely that the Trial Panel did not establish, but only "presumed", the requisite purpose of the mistreatment. The Appeals Panel finds that the Trial Panel's conclusion that the specific purpose of the mistreatment had been established is supported by evidence from several eye-witnesses and was sufficiently reasoned.

Finally, the Panel will address Mr Mustafa's argument under Ground 7 that the Trial Panel erred when it convicted him for the torture of at least six persons, while it only established that he personally participated in the torture of two persons. The Panel finds that he has failed to demonstrate any error in the Trial Panel's findings with respect to his conviction for the war crime of torture under Joint Criminal Enterprise I (JCE I).

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

### **Alleged Errors Related to the Trial Panel's Findings on the War Crime of Arbitrary Detention (Count 1)**

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

The Panel observes that Mr Mustafa in fact challenged two previous Court of Appeals Chamber's decisions on which the Trial Panel based its findings, and finds that Mr Mustafa has failed to demonstrate any legal error in the Court of Appeals Chamber's decisions and thereby failed to show the existence of any cogent reasons, in the interests of justice, to depart from those decisions.

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

In conclusion, the Appeals Panel finds that Mr Mustafa has failed to establish that the Trial Panel erred with respect to the legal basis of the war crime of arbitrary detention and dismisses Ground 8 and Mr Mustafa's challenges to the Trial Panel's findings in relation to Count 1

### **Alleged Errors Related to the Trial Panel's Findings on Sentencing**

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

First, the Appeals Panel finds no error in the Trial Panel balancing Mr Mustafa's individual circumstances against the nature and gravity of, and his contributions to, the crimes for which he was convicted. In fact, the Trial Panel is required to do so under the Specialist Chambers' legal framework. Furthermore, the Appeals Panel finds that, contrary to Mr Mustafa's contentions, the Trial Panel neither considered the absence of mitigating circumstances as being an aggravating factor, nor used the

gravity of the crimes as an aggravating circumstance. In this regard, given the Trial Panel's broad discretion in sentencing, the Appeals Panel sees no error in it declining to give significant weight to his individual circumstances.

The Appeals Panel also dismisses Mr Mustafa's argument that he could not have raised his individual circumstances at trial, as he was given ample opportunity and instruction to do so, and, in any event, considers that the Trial Panel took these into account *proprio motu*. The Appeals Panel also dismisses the contention that the Trial Panel erred in imposing a sentence of imprisonment which Mr Mustafa claims may exceed his life expectancy, as this contention is contradicted by the Specialist Chambers' legal framework, which allows it to impose a sentence of up to life-long imprisonment, and by international jurisprudence.

Finally, the Appeals Panel will address Mr Mustafa's arguments concerning the application of the *lex mitior* principle, and what he submits is the imposition of an excessively long sentence. In this regard, the Appeals Panel first finds that the Trial Panel correctly held that it was not bound to apply sentencing ranges applicable in Kosovo law at the time of the commission of the crimes and any subsequent more lenient sentencing range, but rather was required to take these into account under the Specialist Chamber's legal framework. For reasons further explained in the Appeal Judgment, the Appeals Panel finds that the principle of *lex mitior* is not applicable vis-à-vis these domestic sentencing ranges and that there is no conflict between the Specialist Chamber's legal framework and the Constitution of Kosovo. Accordingly, the Appeals Panel also dismisses Mr Mustafa's request for a referral of the issue to the Specialist Chamber of the Constitutional Court, since the Appeals Panel is not "uncertain as to the compatibility of the contested law with the Constitution".

That being said, the Appeals Panel finds that the Trial Panel's analysis of the domestic sentencing regime is insufficient to meet its obligation to take the domestic sentencing ranges into account. To this end, as well as in relation to Mr Mustafa's argument that

his sentence is excessive, the Appeals Panel has analysed both international and Kosovo jurisprudence concerning war crimes comparable to those for which Mr Mustafa was sentenced. In so doing, the Appeals Panel was cognisant of the fact that sentences cannot be easily transposed from one case to another given the case-specific factors in sentencing.

The Appeals Panel finds that in cases before both international tribunals and Kosovo courts (the latter interpreted in the context of the available sentencing ranges) concerning war crimes comparable to those for which Mr Mustafa was sentenced, shorter sentences were imposed than those imposed on Mr Mustafa. While fully cognisant of the Trial Panel's broad discretion in sentencing, the Panel finds that the disparity between Mr Mustafa's sentences and the sentences it analysed, shows that the Trial Panel ventured outside of its discretionary bounds in this instance. The Appeals Panel therefore considers that, by imposing sentences on Mr Mustafa which are out of reasonable proportion with a line of sentences imposed in similar circumstances for similar offences, the Trial Panel committed a discernible error in sentencing.

For the reasons developed in the Appeal Judgment, the Appeals Panel therefore finds it appropriate to reduce the individual sentences imposed on Mr Mustafa by the Trial Panel to the following sentences: (i) eight years of imprisonment for Count 1, the war crime of arbitrary detention committed against at least six persons; (ii) 20 years of imprisonment for Count 3, the war crime of torture, committed against at least six persons; and (iii) 22 years of imprisonment for Count 4, the war crime of murder, committed against one person. Accordingly, the Appeals Panel must also now determine, pursuant to Rule 163(4) of the Rules, "a single sentence reflecting the totality of the criminal conduct of the Accused" which "shall not be less than the highest individual sentence determined in respect of each charge". In this regard, the Appeals Panel considers that a single sentence of 22 years of imprisonment, with credit

for the time served since his arrest on 24 September 2020, reflects the totality of Mr Mustafa's criminal conduct in this case.

The Appeals Panel notes that its findings on Mr Mustafa's sentence do not affect the Trial Panel's findings in the Reparation Order against Mr Mustafa, and emphasises that this reduction in Mr Mustafa's sentences in no way suggests that the crimes for which he has been convicted and sentenced are not grave.

In light of the above, the Appeals Panel grants in part Mr Mustafa's challenges to the Trial Panel's findings on sentencing, and dismisses the remainder of Ground 9.

Finally, the Appeals Panel stresses that it has confirmed Mr Mustafa's convictions for the war crimes of arbitrary detention, torture and murder (Counts 1, 3 and 4) for which he was found to be individually criminally responsible. The Specialist Chambers only have jurisdiction over individuals, not groups or organisations. In that vein, the Appeals Panel emphasises again that neither the KLA nor the Kosovo people were the subject of these proceedings, and they have not been found responsible for or convicted of these crimes.

### **Disposition**

For these reasons, having considered all the arguments made by the Parties and the Participants, the Court of Appeals Panel, pursuant to Article 46 of the Law and Rules 182 and 183 of the Rules:

**GRANTS** Mr Mustafa's Grounds 9F in part, 9H in part and 9K in part;

**DISMISSES** Mr Mustafa's appeal in all other respects;

**AFFIRMS** Mr Mustafa's conviction for the War Crime of Arbitrary Detention pursuant to Articles 14(1)(c)(i) and 16(1)(a) of the Law under Count 1 of the Indictment, the War Crime of Torture pursuant to Articles 14(1)(c)(i) and 16(1)(a) of the Law under Count 3 of the Indictment, and the War Crime of

Murder pursuant to Articles 14(1)(c)(i) and 16(1)(a) of the Law under Count 4 of the Indictment;

**SETS ASIDE** the sentence of ten years of imprisonment imposed with respect to Count 1 and **IMPOSES** a sentence of eight years of imprisonment;

**SETS ASIDE** the sentence of 22 years of imprisonment imposed with respect to Count 3 and **IMPOSES** a sentence of 20 years of imprisonment;

**SETS ASIDE** the sentence of 25 years of imprisonment imposed with respect to Count 4 and **IMPOSES** a sentence of 22 years of imprisonment;

**SETS ASIDE** the single sentence of 26 years of imprisonment imposed on Mr Mustafa and **IMPOSES** a single sentence of 22 years of imprisonment on Mr Mustafa, with credit for the time served;

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

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