

**In:** KSC-SC-2024-02  
**The Specialist Prosecutor v. Mr. Salih Mustafa**

**Before:** **A Panel of the Supreme Court Chamber**  
Judge Ekaterina Trendafilova, Presiding  
Judge Christine van den Wyngaert  
Judge Daniel Fransen

**Registrar:** Fidelma Donlon

**Filing Participant:** Defence of Salih Mustafa

**Date:** 3 May 2024

**Language:** English

**Classification:** Public

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**Reply to Prosecution's Response to Defence Request for Protection of Legality**

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**Counsel for Victims:**

Anni Pues

## I. INTRODUCTION

1. The Defence (hereinafter the Defence or Mustafa) has on behalf of Mr. Mustafa filed a Request for Protection of Legality (hereinafter Request).<sup>1</sup> The Request is based on Article 48 of the Law (hereinafter the Law) and Rule 193 of the Rules of Procedure and Evidence (hereinafter the Rules) of the Kosovo Specialist Chambers (KSC) and Specialist Prosecutor's Office (SPO).
2. The Prosecution (SPO) has responded to Mustafa's Request for Protection of Legality (Response)<sup>2</sup>. The relief that is being sought by the SPO is to reject the relief sought in the Request.
3. The present document contains the Reply of the Defence (Reply) to the submissions of the SPO.
4. The Request of Mr. Mustafa is in accordance with Article 48 (7) and (8) of the Law. Mr. Mustafa has identified with each Ground the specific alleged violations of the criminal law contained in the Law and of the substantial violation of the procedures set out in the Law and the Rules. Each Ground in the Request has been substantiated by arguments supporting the alleged violation.
5. Each Ground finds its basis in the Appeal Judgment of the case of Mr. Mustafa. The assertion of the SPO that the Request warrants summarily dismissal or attempts to appeal at third instance against the final Judgment of the Appeals Chamber, is baseless. The assertion that Mr. Mustafa's arguments fall outside these parameters and therefore warrant that it be summarily dismissed is unsubstantiated, and therefore baseless.<sup>3</sup>

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<sup>1</sup> The relief sought is listed in paragraph 117 of the Request/KSC-SC-2024-02/F00011.

<sup>2</sup> SPO Response/KSC-SC-2024-02/F00014.

<sup>3</sup> Page 1, paragraph 1 of the SPO Response/KSC-SC-2024-02/F00014.

6. The Defence maintains its position on all Grounds enumerated in the Request.
7. Further down some of the issues will be discussed that the SPO has put forward in its Response. The Defence sees no need to further elaborate on issues by the SPO that either have been wrongly read, misinterpreted or where the SPO apparently is unable or simply makes no substantial argument that contradicts alleged violations of the Law or Rules as submitted by Mustafa.

## II. PROCEDURAL BACKGROUND

8. An outline of procedural background of the case was provided with the Request.
9. The Request was filed on 14 March 2024.
10. The SPO responded on 15 April 2024.

## III. THE APPLICABLE LAW

11. The applicable law was thoroughly discussed in the Request.

## IV. ARGUMENTS PUT FORWARD BY THE SPO IN ITS RESPONSE

### A. Submissions of the SPO regarding Ground I of the Request

12. The Defence in Ground I alleges a violation of Article 44 (2) of the Law and consequently Article 33 (2) (4) of the Constitution of Kosovo as well as Article 22 of the Constitution of Kosovo.<sup>4</sup>

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<sup>4</sup> Page 5, heading of Ground I, above paragraph 23 of the Request/KSC-SC-2024-02/F00011

13. In paragraph 15 of the Response the SPO states that: “Mustafa irrelevantly submits that the *lex mitior* principle is guaranteed under the Kosovo Constitution and the European Convention of Human Rights (ECHR)”.<sup>5</sup>
14. The Defence cannot follow the SPO where it states that this would be irrelevant. As the *lex mitior* principle is a law and is enshrined in both the Law, the Constitution and even in the ECHR, it is clear that this principle is law, and therefore binding. Neither the Law, nor the Constitution, nor the ECHR limits the application of it in any manner or places modalities on its application.
15. The SPO labels the Appeals Panel’s ruling as a “central ruling”<sup>6</sup> that: “in light of the AP’s explicit acknowledgement that *lex mitior* generally applies in KSC proceedings, albeit only to binding laws, these references add nothing to ground I”.
16. The Appeals Panel limited the application of the *lex mitior* in the sense that it applies only to binding laws or places modalities on its application. The enumerated legal acts however, do not in any manner limit the application of the *lex mitior*. The Defence cannot agree that all these legal acts are irrelevant. They are legal documents protecting rights of an offender. Each of them simply substantiates the argument that is being made under Ground I.
17. If all the above legal documents prescribe the application of the *lex mitior*, and the words “shall take into account” are imperative, as the AP acknowledged, then the AP was bound to apply that law. *Lex mitior* is law, and it is a binding source of law.
18. SPO further seeks summarily dismissal of the infringement of the *nulla poena sine lege* principle, as it alleges it to be unsubstantiated.<sup>7</sup>

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<sup>5</sup> Paragraph 15 of the SPO Response/KSC-SC-2024-02/F00014.

<sup>6</sup> Ibid, paragraph 15

<sup>7</sup> Ibid, paragraph 16

19. The Defence cannot follow the SPO's reasoning here. The European Convention of Human Rights is directly applicable through Article 22 of the Kosovo Constitution. Where the European Court of Human Rights held that without applying the *lex mitior*, the legal basis for imposing a higher penalty becomes absent, and therefore violates that principle.
20. The Defence has substantiated its argument of Ground I with case law of the European Court of Human Rights.
21. The SPO's request of dismissal of the infringement of the *nulla poena sine lege* principle is apparently based on the wrong reading or the wrong interpretation of what follows from the text of the relevant paragraphs of the Request and is substantiated with the case law of the European Court of Human Rights.<sup>8</sup>
22. Lastly, the Defence only underlined that the KSC is a domestic court, and that therefore Kosovo Law applies. That makes the KSC different from International Tribunals and their Statutes. The Defence did not in any manner write, nor did it imply, (let alone that in the words of the SPO: "the defense misleading complains") that the Appeals Panel characterized the KSC as international tribunal. Those words and qualifications are therefore the responsibility of the SPO.

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<sup>8</sup> See Request paragraphs 43 to 45 and references/KSC-SC-2024-02/F00011.

B. Submissions of the SPO regarding Ground II of the Request

23. In Ground II the Defence alleges a violation of Article 44 (2) of the Law, Article 33 (2) of the Constitution of Kosovo as well as Article 7 of the European Convention on Human Rights.<sup>9</sup>
24. In its Response the SPO states that: “Mustafa largely repeats submissions raised under the first Ground, but additionally argues the Appeals Panel erred by referring to sentencing ranges as factors. Even if Mustafa’s semantic complaint had merit, that alone could not change the Appeal’s Panel’s determination that sentencing ranges under Kosovo law are not binding”.<sup>10</sup>
25. The SPO continues that: “*In particular, Mustafa’s argument that Kosovo Law cannot be viewed as a factor that would be applied on a random basis ignores that Article 44 (2) requires a Panel to “consider” rather than “apply”, sentencing ranges under Kosovo Law*”.<sup>11</sup>
26. The SPO has wrongly read the Article 44 of the Law since the Article 44 of the Law reads as follows: “In considering the punishment to be imposed (...), the Specialist Chambers shall take into account” (end of quote, emphasis added).
27. Therefore, the SPO’s claim that this requires a Panel to “consider” rather than “apply” sentencing ranges under Kosovo Law, misreads the Article 44.

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<sup>9</sup> Heading of Ground II, above paragraph 50 of the Request/KSC-SC-2024-02/F00011

<sup>10</sup> Paragraph 19 of the SPO Response/KSC-SC-2024-02/F00014

<sup>11</sup> Ibid, paragraph 19

28. A proper reading of this article, and the plain meaning of the order in which the Article is drafted leads to the conclusion that it (i.e. sub 2 under a, b, and c) is not a matter of consideration. No, when considering the punishment, the Panel “shall take into account”, the meaning of which, as has been extensively discussed by the Defence, and as acknowledged by the Appeals Panel, is imperative.
29. Apart from that, the Defence compared the wording of “factors” as applied by the Appeals Chamber (“the Panel finds that this refers to an obligation to take [the factors] into account rather than to apply them as binding sources of law”).<sup>12</sup>
30. In its comparison, in its Request <sup>13</sup>, the Defence pointed to the Article 44 (5) of the Law and gave a clear example of the (usage of) “factors” as arguments for a Panel for conviction and punishment. It is therefore not a semantic complaint.
31. Lastly, SPO makes a rather blunt statement that Mustafa’s submissions (regarding) jurisprudence from international tribunals “has little to no effect” because the SC is a domestic court of Kosovo stands in direct contradiction with Articles 3 and 14”.<sup>14</sup> (emphasis is added).
32. The SPO’s manner of reasoning on the issue, as to why and how the SPO finds that “(this) *stands in direct contradiction to Article 3 and 14*”, remains unclear for the Defence, and is unsubstantiated, and therefore needs not further to be addressed.

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<sup>12</sup> Paragraph 466, Appeal Judgment of 14 December 2023/KSC-CA-2023-02/F00038

<sup>13</sup> Paragraph 55 of the Request/KSC-SC-2024-02/F00011.

<sup>14</sup> Paragraph 20 of the Response/KSC-SC-2024-02/F00014.

C. Submissions of the SPO regarding Ground III of the Request.

33. The Defence under Ground III alleges a violation of Article 44 (2) (c) of the Law.

34. In paragraph 24 of the Response the SPO it appears that the SPO simply does not understand, or cannot read, what the submission is. It is actually quite simple.

35. The issue of Ground III was set out in paragraph 69 of the Request.

36. Further, the Defence explained that the wording “taking into account” implies that there is a requirement to really and meaningfully look at the domestic case law and a requirement to use it. Not just merely taking note of it and do nothing with it or disregard it.

37. Especially, as it has been argued in the submission, because the domestic case law is for 3 enumerated reasons<sup>15</sup> much closer related to the case of Mustafa. The cited jurisprudence simply substantiates the argument that was made. So, there is nothing inadmissible about it and there is nothing “*de novo*”.

38. As submitted in the Request, the jurisprudence of international tribunals relates to cases that are different in nature (different conflicts) and as the number of offenses and the number of victims are incomparable with the case of Mustafa (who was found guilty of three offenses with much less victims).

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<sup>15</sup> Paragraph 76 of the Request/KSC-SC-2024-02/F00011.



39. Where the Appeals Panel in paragraph 466 stated that “(it) is further tempered by the need to consider whether doing so would prejudice the extent of punishment under general principles of law recognized by civilized nations”.<sup>16</sup> The Defence even cited the jurisprudence of the ECtHR, who applies such general principles of law recognized by civilized nations. The cited domestic jurisprudence equally indicates that domestic courts applied these principles to the same extent.
40. The Defence is unable to follow the SPO where it says that no violation has been identified.<sup>17</sup> It was clearly enough identified, and indicates a misreading of what is written in Ground III.
41. As there are no further submissions raised by the SPO as to the content of Ground III of the Request, there is no need to further to address anything regarding the Response of the SPO to this Ground III.

D. Submissions of the SPO regarding Ground IV of the Request

42. The Defence under Ground IV alleges a violation of Article 14 (1) (c) of the Law, and a substantial violation of 159 (3) and 183 (3) of the Rules.
43. The Defence cited in the Request paragraph 348 of the Appeal Judgment. In it, 3 new elements were introduced by the Appeals Panel, as these elements were never in the Trial Panel’s Judgment. The elements were the result of conclusions of the Appeals Panel, as can be read in para 348 of the Appeal Judgment (as cited in para 93 of the Request). In the wording of the Appeals Panel these elements “support the conclusion of (...)”.

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<sup>16</sup> Paragraph 67 of the Request, citing Paragraph 466 of the Appeal Judgment of 14 December 2023/KSC-CA-2023-02/F00038

<sup>17</sup> Paragraph 27 of the Response/KSC-SC-2024-02/F00014.

44. These 3 newly formulated elements are simply challenged and discussed in the submission and lead to a clear conclusion cited in paragraphs 103-110 of the Request.
45. Finding someone guilty of Article 14 (1) (c) of the Law needs to be substantiated with the reasoning that is prescribed by rule 159 (3) of the Rules. The Defence identified here a substantial violation of the procedures.<sup>18</sup> In the absence of reasoning as prescribed in rule 159 (3) of the Rules, as the Defence alleges in this Ground that the conviction for that Article of the Law loses its foundation, and hence the conviction cannot stand and materially affects the judicial finding.
46. As there are no further submissions submitted by the SPO as to the content of Ground IV of the Request, there is no need to further to address anything regarding the Response of the SPO to this Ground IV. The used words and qualifications by the SPO in its Response are solely the responsibility of the SPO. The Defence sees no need to respond to it.

E. Submissions of the SPO regarding Ground V of the Request

47. The Defence in Ground V alleges a violation of the Constitutional rights of Mustafa under Article 30 (1) and (3), and Article 6 (3) (a) and (b) of the ECHR as this, through Article 22 (2) of the Constitution, is directly applicable.
48. The SPO submits that the Ground V has no legal basis and therefore should be summarily dismissed.
49. The Constitutional rights as enumerated in the Ground V by the Defence, are to protect the interest of an accused. That should not be forgotten, even though the SPO might have a different opinion about it.

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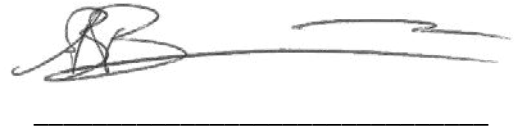
<sup>18</sup> See Request, paragraphs 95-108/KSC-SC-2024-02/F00011.

50. Regardless of the assistance that an accused has, be it counsel or be it an interpreter, it is a mere theoretical assumption and far from practical reality, that a document as extensive as the Appeal Judgment could reasonably be interpreted through an interpreter for the accused.
  
51. The fact alone that the draft translation was only available on the 12<sup>th</sup> of February 2024, means that with a professional staff it took KSC almost 2 months to translate the entire document. And Mustafa received it just one month before the filing of the Request was done. A final version only became available after the filing had been done, on the 2<sup>nd</sup> of April 2024.
  
52. The SPO completely overlooks the rights of an accused as enshrined in the Constitution of Kosovo. It seems as if these are of none-importance for the SPO.
  
53. The SPO failed to address at all the Constitutional Rights that the Defence has put forward in the Ground V. Therefore, the Defence has no issues to address with regards to SPO's Response to this.
  
54. The Defence maintains its position as put forward under Ground V of the Request.

V. CONCLUSION

55. The Defence maintains its position on each of the Grounds and the Conclusion as provided for in the Request for Protection of Legality.

**Word count: 2529**



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**3 May 2024**

**At The Hague, the Netherlands**

**Julius von Bóné**

**Defence Counsel**