In: **KSC-CC-2024-27**

The Specialist Prosecutor v. Mr. Salih Mustafa

Before: **The President of the Kosovo Specialist Chambers**

Judge Ekaterina Trendafilova,

Registrar: Fidelma Donlon

Filing Participant: Specialist Counsel for Salih Mustafa

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The Specialist Prosecutor v. Salih Mustafa

Referral to the Constitutional Court Panel concerning the violations of Mr. Salih Mustafa's fundamental rights guaranteed under Articles 22, 31 and 33 of the Constitution of the Republic of Kosovo and Articles 6 and 7 of the European Convention on Human Rights with public Annexes 1 to 7

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I. INTRODUCTION

1. Pursuant to Articles 31, 32, 54 and 113 (7) of the Constitution of the Republic of Kosovo (Kosovo Constitution), Articles 49 (3) of the Law no.05/L053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") and Rules 4 (c) and 20 (1) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court ("RPSCCC"), the Defence for Salih Mustafa (hereinafter; "Defence", "Accused" or Mustafa) files this Referral to the Specialist Chamber of the Constitutional Court ("SCCC").

2. The complaints formulated in this Referral are about violations of Mustafa's rights and freedoms as guaranteed by the Constitution, in particular the Articles 22 (2), 31 (1) and 33 (2) and (4) of the Kosovo Constitution as well as Articles 6 and 7 of the European Convention on Human Rights and Fundamental Freedoms and its Protocols ("ECHR"), equally protected under the Constitution.

3. In the Decision of the Supreme Court of Specialist Chambers [1] ("KSCSC"), the Supreme Court rejected Mustafa's submitted Grounds 2 and 5, summarily dismissed Ground 4 and granted Ground 1 and 3. In addition, the Supreme Court of the Specialist Chambers (KSCSC) ruled on a preliminary matter concerning the participatory status of the victims in Mustafa's Request for Protection of Legality. [2] The decisions enumerated above violate the constitutional rights of Mustafa, and the Supreme Court's interpretation and application of articles of the Law as given in the decision is incompatible with Articles of the Constitution. The alleged violations of the constitutional rights of Mustafa will be elaborated in the present Referral. Mustafa's submitted Grounds 2 and 5 to the Supreme Court as in his Request, will not be addressed further in this Referral.

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[1] KSC-SC-2024-02/F00018, Decision on Salih Mustafa's Request for Protection of Legality, 29 July 2024. All further references to filings in this Referral concern case number KSC-SC-2024-02 unless otherwise indicated

[2] F00011, Defence Request for Protection of Legality with confidential Annex 1 and 2, pursuant to Article 49 (6) to (8) of the Law, and Rule 193 of the Rules, 14 March 2024.

II. ADMISIBILITY

4. In accordance with Article 113 (7) of the Constitution, Mustafa, as accused at the KSC, is authorized to make this Referral to Specialist Chamber of the Constitutional Court (hereinafter as SCCC). Mustafa alleges violations of his individual rights and freedoms guaranteed by the Constitution. As the SCCC is the only authority for the interpretation of the Constitution, the Accused refers these complaints to SCCC.

5. In its Decision, the Supreme Court granted Ground 1 and 3 of Mustafa's Request and returned it to the Appeals Panel for a new determination of Mustafa's sentence. The Defence submits that Supreme Court in its Decision definitively decided on the Grounds submitted by the Defence in the Request.[3]

6. Even though the Appeal Panel in a recent Decision[4] made a new determination of Mustafa's sentence, the Defence submits that the time limit for Mustafa to appeal the Supreme Court's Decision had not yet expired. The expiration date to appeal the Decision of the Supreme Court is 2 months after that Decision.

7. The Defence submits that Mustafa has the right to appeal those decisions of the Supreme Court which are final. Mustafa has exhausted all effective legal remedies provided by law regarding these violations, and the decisions of the Supreme Court challenged in this Referral are final.[5] At this point there are no other legal options for Mustafa to challenge these issues that were decided by the Supreme Court, and Mustafa is authorized to file this Referral.[6]

[3] F00011, Defence Request for Protection of Legality with confidential Annex 1 and 2, pursuant to Article 49 (6) to (8) of the Law, and Rule 193 of the Rules, 14 March 2024.

[4] KSC-CA-2023-02, F00045, Decision on the New Determination of Salih Mustafa's Sentence, 10 September 2024

[5] Article 49 (3) of the Law provides which individuals are authorized to make referrals to the SCCC.

[6] Article 49 (3) of the KSC Law and Rule 20 (1) of the RPSCCC provide a criterion for referrals by authorized individuals.

8. This Referral is filed to SCCC within 2 months of the decisions of the Supreme Court, the content of which, as far for the alleged violation in this Referral, must be viewed as final. The alleged violations will be set out in the present Referral.

III. PROCEDURAL BACKGROUND

9. Salih Mustafa was initially convicted by a Judgment of the KSC Trial Panel 1.[7] He was found guilty on arbitrary detention, torture and murder and was sentences to 26 years of imprisonment with the credit for time served in detention on remand. Defence for Salih Mustafa appealed the Judgment of the Trial Panel 1. The KSC Appeals Panel reduced his sentence to 22 years of imprisonment.[8] Defence for Salih Mustafa filed a Request for Protection of Legality to the KSC Supreme Court.[9] The Supreme Court partially granted the Request. Salih Mustafa's case is with this Referral still not final and therefore still has the status of an Accused.

10. In its "Decision on Mustafa's Request on Protection of Legality ("Request"),[10] the Supreme Court Panel found that (i) as a preliminary matter the victims have standing to make submissions to the request, (ii) dismissed Ground 5, (iii) summarily dismissed Ground 4, (iv) rejected Ground 2 and (v) granted Ground 1 and 3 which were treated combined. Ground 5 and 2 of the Defence's Request are not further challenged in the present Referral.

11. The Supreme Court furthermore annulled the Appeals Judgment only insofar as it relates to Mustafa's sentence:

    (i) ANNULS the Appeal Judgment only insofar as it relates to Mustafa's sentence;
    (ii) RETURNS the Appeal Judgment to the Appeals Panel for a new determination of Mustafa's sentence pursuant to Rule 194 (1) (b) of the Rules; and
    (ii) ORDERS the continued detention of Mustafa while a new determination of his sentence is considered by the Court of Appeals Panel.

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[7] KSC-BC-2020-05/F00494/Judgment of the KSC Basic Court, Trial Panel 1, 16 December 2022.
[8] KSC-CA-2023-02/F00038 /Judgment of the KSC Court of Appeals, 14 December 2023.
[9] KSC-SC-2024-02/F00011, 14 March 2024/ Defence Request for Protection of Legality with confidential Anex 1 and 2 pursuant to Article 48 (6) 2 (8) of the Law and the Rule 193 of the Rules.
[10] Ibid.

12. The Panel of the Court of Appeals Chamber of the KSC, further acting pursuant to the decision on Mustafa's Request for Protection of Legality, issued on 10 September 2024, a new decision regarding Mustafa's Sentence (Decision on New Determination of Salih Mustafa's Sentence).[11] The Appeals Panel arrived at this decision following the guidance of the Supreme Court. This recent Appeals' Court Decision is of 10th of September 2024.

13. As stated above, this Referral challenges the definitive decisions of the Supreme Court of 29 July 2024. Each of these challenges, which are the merits of this Referral, will be named as a "Ground" and will be discussed hereunder.

IV. GROUNDS CHALLENGING THE SUPREME COURT DECISION OF 29 JULY 2024

GROUND 1

Violation of Mustafa's constitutional rights under Article 102 (3) and Article 31 (1) (2) of the Constitution and Article 6 of the ECHR.

14. The Supreme Court violated the constitutional rights of Mustafa, in particular Article 102 (3) of the Constitution and in the furtherance of it, Article 31 (1) and (2) of the Constitution.[12]

15. The Defence challenges the Decision of the Supreme Court of 29 July 2024, were it allowed the Victims' Counsel to file submissions regarding Mustafa's Request for Protection of Legality. The Supreme Court addressed this issue as a preliminary matter in para. 25 to 33 of its Decision. At the time of the Defence's Request, the Victims' Counsel responded to the

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11 KSC-CA-2023-02/F00045 /Decision on new Determination of Salih Mustafa's Sentence of the KSC Court of Appeals, 10 September of 2024

12 Constitution of the Republic of Kosovo/Official Gazette of the Republic of Kosovo/ https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=3702

Request.[13] The Defence in a sperate Reply[14] to Victims' Counsel Response argued that victims have no standing in the proceedings regarding the Request for Protection of Legality.

16. In para. 27 of the Decision, the Supreme Court acknowledges that both the Law and the Rules are silent on whether the Victims' Counsel can respond to a Request for Protection of Legality. The Panel is of the view that victims who have been granted participatory status in proceedings before the Specialist Chamber, may, via their Victims' Counsel respond to parties' submissions, including to a Request for Protection of Legality of an Appeal Judgment where their personal interests are affected and their response is not prejudicial to or inconsistent with the rights of the Accused.[15] These submissions shall be confined to the grounds raised in the request for the protection of legality and must set forth how the participating victims' personal interests are impacted thereby.

17. The Defence submits that the view of the Supreme Court regarding this matter, violates or is incompatible with the Constitution of Kosovo, in particular the Article 102 (3) of the Constitution.

18. Article 102 (3) of the Constitution of Kosovo stipulates that Courts shall adjudicate based on the Constitution and the Law.[16] In the absence of a prescribed law a right, including a participatory status, cannot be invented. Neither can it be awarded or granted without a prescribed law.

19. The Article, with the wording "*shall*", clearly indicates a binding obligation on the Kosovo Courts, including the Supreme Court, to adjudicate based on the Constitution and the Law. Article 102 of the Constitution does not allow the Supreme Court to grant a right including a participatory status without a prescribed law.

13 F00013, VC Response to the Request for protection of Legality, 12 April 2024.
14 F00017, Reply to Victims' Counsel Response to Defence Request for Protection of Legality, 20th of May 2024.
15 Paragraph 27 of the Decision of the Supreme Court
16 Article 102 (3) of the Constitution of the Republic of Kosovo

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20. The Commentary of the Constitution of the Republic of Kosovo[17] in relation to this article of the Constitution reads as follow: quote:

    "In legal terms, the power of the courts to adjudicate stems out from the Constitution and laws, and there can be no waiving from this principle. As such, this article sets out three things:

    a) the source of judicial power,

    b) the limits of judicial power; and

    c) the nature of the legitimacy of the courts and their decisions".

    (end of quote).

21. The Commentary in addition states:

    "*Restricting courts from having power outside the limits set by the Constitution and laws is the standard of protection from the arbitrariness of judicial power, on the one hand, and on the other hand, the basic standard of democracy expressed as constitutionality and legality*".[18]

22. And the Commentary further states that:

    "*Despite being implicitly stated, this constitutional paragraph obliges or allows the regular courts of Kosovo to resolve concrete cases by not only limiting themselves to the limits of the laws, but also by interpreting constitutional norms*".[19]

23. The issue is paramount for any legal system, that the law is the very foundation upon which any decision of the courts can be based. The Law of the Specialist Chambers is a *Lex Specialis*, and does not grant explicitly, nor implicitly, that the Victims' Counsel may respond to issues raised by an Accused in the context of a Request to for Protection of Legality.

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[17] The Commentary of the Constitution of the Republic of Kosovo/ Prof. Dr. Enver Hasani / Prof. Dr. Ivan Čukalović/ First Edition/2013/ Enver Hasani, Ivan Čukalović and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH. [Available only in Albanian and Serbian Language]/ http://jus.igjk.rks-gov.net/506/1/Komentari_Kushtetuta_11_Shqip.pdf,http://jus.igjk.rks-gov.net/487/2/Komentari_Kushtetuta-serbisht.pdf

[18] The Commentary of the Constitution of the Republic of Kosovo/ Prof. Dr. Enver Hasani / Prof. Dr. Ivan Čukalović/ First Edition/2013 (see Annex 2 of the present Referral).

[19] Ibid

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24. Hence, the Supreme Court erred where, while it acknowledged the fact that both the law and the Rules of the Specialist Chambers are silent on this issue, it granted the Victims' Counsel a participatory status in the proceedings and to respond to the Request of Mustafa.

25. Furthermore, by granting Victims' Counsel standing in the procedure of the case at hand, the Supreme Court ventured beyond the limits of its authority prescribed in the Constitution. In addition, by introducing the criterion of "*where their personal interests are affected*" it instituted a new criterion outside the Law or the Rules. Granting participatory status for any third party in the proceedings can only be done when the law prescribes such position. It cannot be granted on any other bases. It is the exclusive right of the Legislator to make the law. The Legislator is defined in Article 63 of the Constitution and its' competencies are stipulated in Article 65.

26. As Article 22 (3) of the Law limits the victims right to notification, acknowledgement and reparation, and none of these rights concern issues that were raised by Mustafa in his Request for Protection of Legality.

27. Where the Supreme Court stated that the victims have, via their counsel, in a Request for protection of legality, a participatory status where "their personal interest are affected" the Supreme Court. It introduced a criterion, which ventures outside the scope of the Law. It also interfered with the competency of the Legislator.

28. By introducing this new criterion and by granting the participatory status for Victims' Counsel, the Supreme Court violated Article 102 (3) of the Constitution, since it is incompatible with it.

29. It is important to note, as the Supreme Court underlined, that Victims' Counsel did not make previously any submissions on legal questions related to Mustafa's sentence of imprisonment. Victims' Counsel failed to demonstrate how it derived from the rights in Article 22 of the Law

(notification, acknowledgement and reparation) any participatory status. Victims' Counsel even admitted that "*their interests were not squarely affected*".[20] Neither did Victims' Counsel even demonstrate in any manner on how the rights laid down in Article 22 of the Law impact any decision of the Supreme Court. In sum, there is no legal bases for a participatory status of victims in the matters of Mustafa's Request for Protection of Legality.

30. By interpreting or explaining the correct application of an article of the Law, the general justice is served, regardless of any consequence that might result from it. The same counts for the question whether there is a substantial violation of procedure[21] in accordance with Article 48 (7) (b) of the Law. (The Defence challenged the correct application of the Rule 159 (3) and 183 of the Rules; a violation that concerns whether the Judgment was properly reasoned).

31. The consequence of granting the victims a participatory status in Mustafa's Request for Protection of Legality, also violates Mustafa's constitutional right to a fair trial as enshrined in Article 31 (1) and (2) of the Constitution and Article 6 of the ECHR, and is incompatible with it. That article grants Mustafa equal protection of rights in the proceedings. Where any other parties are admitted in the proceedings, it impacts the rights of Mustafa in the proceedings in a negative manner, in particular where a new criterion is introduced that ventures outside the Law.

32. The rights of Mustafa were not observed due to the fact that he needs to respond to all kinds of third parties that are allowed to participate in the proceedings. In particular his right to equal protection of his rights in the proceedings. People, including an Accused have a right of certainty of the law (*lex certa)* and therefore must be able to rely on the concept that rights can only be invoked on the bases of prescribed law.

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[20] KSC-SC-2024-02/F00013/Victims' Counsel Response, paragraph 4
[21] Gucati and Haradinaj Decision, KSC-SC-2023-01/ F00021, paras 13 and 14

33. In addition, that the criterion that has been introduced is outside a prescribed law, it is also a very open norm. Whether the victim's "may have a personal interest"[22] or "personal interests could be affected"[23] creates a norm so broad that virtually any kind of submission can be construed in order to have it fall under such norm. It is a norm that anticipates or implies a purported potential interest without any factual ground being demonstrated for it.

34. For the purpose of a fair trial, as enshrined in Article 31 (1) (2) of the Constitution, Mustafa must be guaranteed that the norm of Article 22 of the Law is strictly applied in the sense that no further right other than explicated in Article 22 (3), (notification, acknowledgement and reparation) is granted to the victims. Anything beyond those rights fall outside the boundaries of the Law. Therefore, the Supreme Court's decision violated articles 31 (1) (2) of the Constitution, equally enshrined in Article 6 of the ECHR.

35. In sum Mustafa's constitutional rights under articles 102 (3), 31 (1) (2) as well as his rights under Article 6 of the ECHR, are violated.

36. The Decision of the Supreme Court therefore needs to be annulled on that point.

GROUND 2

Violation of the constitutional rights of the Accused under Article 33 (2) (4) (*lex mitior*) of the Constitution. As well as rights protected by the Article 7 of the ECHR. Misapplication of the Article 44 (2) (a) (b) (c) of the Law (*lex mitior*).

37. The Supreme Court violated these articles as it ruled that Article 142 of the 1976 of the Criminal Code of Socialist Federative Republic of Yugoslavia (hereinafter CCSFRY) [24] is not

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22 Paragraph 29 of the Decision of the SC

23 Paragraph 30 of the Decision of the SC

24 Criminal Code of the Socialist Federal Republic of Yugoslavia of 1976, Yugoslavia: Criminal Code of the Socialist Federal Republic of Yugoslavia | Refworld

applicable. By doing so it violated the articles mentioned above. The Supreme Court failed to correctly apply the *lex mitior* as enshrined in the Kosovo Constitution and the ECHR. Mustafa's rights as protected under the Constitution and the European Convention on Human rights have therefore been violated.

38. Mustafa seeks the correct application of the *lex mitior*. The Constitutional Court is the single authority to interpret the meaning and application of rights granted in the Constitution, among them the *lex mitior*.

39. The 1976 SFRY Criminal Code is indeed a domestic law. This being said it does not mean that it only codifies domestic crimes. The Defence will demonstrate that it equally codified crimes under Customary International Law. The Code, in the time of SFRY, applied equally throughout the territory of SFRY, including Bosnia and Herzegovina and Kosovo. The entire case of Mr. Mustafa concerns the period of 1999, in which Kosovo was part of SFRY.

40. The 1976 SFRY Criminal Code codified (the crimes under) Customary International Law and the principles of law recognized by civilized nations.[25]

41. Mustafa was adjudged guilty of Article 14 (1) (c) (i). That article corresponds with Article 142 of the 1976 SFRY Criminal Code.

42. Moreover, (former) Yugoslavia codified with the articles 142, 143 and 144 under Chapter 16 of the 1976 SFRY Criminal Code, war crimes under Customary International Law as well as the norms according to the general principles of law recognized by civilized nations.[26] SFRY

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25 See Commentary of the Criminal Code of the Socialist Federative Republic of Yugoslavia, Dr. Franjo Bacic et.al, included as Annex to this Referral, in particular the introduction of the Chapter Sixteen dealing about crimes against humanity and international Law, page 487 until 495. Hereinafter referred to as the Commentary of the CCSFRY.

26 Ibid: Commentary to the 1976 CCSFRY, pages 491-495, in particular page 495, quote: "there is no doubt that all the crimes against humanity and international law, compiles in the chapter of the criminal code are considered as criminal offences and in accordance to the general legal principles recognized by international community" end of quote

codified thus war crimes as within the meaning of Article 14 of the Law of the Specialists Chambers.

43. In para. 92-98 the Supreme Court explains why it deemed that the 1976 SFRY Code is not applicable in this case. In paragraph 97 it concludes to the non-applicability of 1976 SFRY Code and any amendments thereto.[27] It further sets forth the applicable law and sentencing range to be taken into account in the present circumstances.[28]

A. Incorrect general comparison by the Supreme Court

44. At the outset, it must be understood for which crime Mustafa has been adjudged guilty. That is, according to the Supreme Court, guilty of War Crimes under Customary International Law, more specific of Article 14 (1) (c) (i) of the Law.[29] Further it must be understood that the war crime for which Mustafa was adjudged guilty were within a non-international armed conflict. Therefore, he was adjudged guilty of Article 14 (1) (c) (i) of the Law.

45. In para. 93 the Supreme Court recalls that the Law makes a distinction between "War Crimes under International Law" (Article 14) and "other crimes under Kosovo Law" (Article 15).[30] Within this distinction, the Supreme Court made an incorrect, wrong, comparison.

46. The Supreme Court Panel found that there is a material distinction in the substantive crimes provided for in Article 14 and 15 (1) of the Law.[31] In para. 94 the Supreme Court says that this distinction is further evident by the additional substantive crimes found in Article 14 of the

[27] Paragraph 97 of the KSC-2024-02/F00018, Specialist Chamber's Supreme Court, Decision on Salih Mustafa's Request for Protection of Legality, dated 29/07/2024

[28] KSC-2024-02/F00018, Specialist Chamber's Supreme Court, Decision on Salih Mustafa's Request for Protection of Legality, dated 29/07/2024

[29] Ibid, paragraph 97

[30] Ibid. paragraph 93

[31] Paragraph 93 and 84 of the Supreme Court Decision

Law compared to the substantive crimes listed in article 142 of the 1976 SFRY Criminal Code[32]. It concludes in this para. 94 that the 1976 SFRY Criminal Code would only be applicable *to some, but not all* the crimes[33] found in Article 14 of the Law.

47. The Defence submits that this is incorrect. The Supreme Court limited its comparison of (apparently the entire) Article 14 of the Law **only** with Article 142 of the 1976 CCSFRY, where it should have compared Article 14 (1) (c) of the Law with the articles 142, 143 and 144 of the 1976 CCSFRY.

48. But even so, the comparison of the (entire) Article 14 of the Law with Article 142 of the 1976 CCSFRY is irrelevant, since Mustafa was only adjudged guilty of one (1) of the crimes enumerated in Article 14 of the Law, namely Article 14 (1) (c) (i) of the Law. To make any other comparison is therefore irrelevant.

49. Moreover, the Supreme Court should have compared the specific crime for which Mustafa was adjudged guilty, namely Article 14 (1) (c) (i) of the Law with articles 142, 143 and 144 of the 1976 CCSFRY. That will be further elaborated below.

B. Incorrect specific comparison by the Supreme Court

50. As already stated above, is wrong to compare, as the Supreme Court did, the 1976 SFRY Criminal Code with the entire Article 14 of the Law. For a more precise comparison it is necessary to compare the specific crime for which Mustaf is found guilty. The proper comparison must be to compare Article 14 (1) (c) (i) of the Law with the SFRY Criminal Code.

51. It is important to stress once again the specific crime for which Mustafa is found guilty. If one reads the Article 14 (1) (c) (i), in particular to the group of protected people envisaged in this

32 Paragraph 94 Decision of the Supreme Court
33 Ibid paragraph 94

specific Article as well as the crimes listed under that Article 14 (1) (c) (i), then one must conclude that substantive law of both Article 14 (1) (c) (i) and Article 142, 143 and 144 of the SFRY Criminal Code of 1976 protect the same interests for the very same group(s) of people. Article 14 (1) (c) encompasses several groups (wounded and sick etc.) and each of these are codified, therefore protected under Article 142, 143 and 144 of the 1976 CCSFRY.

52. In addition, the specific crimes for which Mustafa was found guilty can be in these three articles of the 1976 CCSFRY.

53. Therefore, the Supreme Court erred when it ruled that the 1976 SFRY Code was not applicable, or only applies *to some but not all crimes* listed in Article 14 of the Law.[34] It is based on the wrong comparison and irrelevant for Mustafa's case.

54. The Supreme Court should have compared the specific crimes for which Mustafa was adjudged guilty, which is Article 14 (1) (c) (i) of the Law, with the substantive Article 142 of the 1976 CCSFRY.

55. The only thing that is relevant is whether the substance that is codified in article 142 of 1976 CCSFRY is the same as the substance of the crime for which Mustafa was adjudged guilty (which is Article 14 (1) (c) (i) of the Law). In the view of the Defense, this is the case, and therefore the Article 142 of the 1976 CCSFRY is applicable.

C. The 1976 SFRY Criminal Code codified Customary International Law and general principles of recognized by civilized nations.

56. As mentioned above the 1976 CCSFRY codified the crimes under Customary International Law.[35]

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[34] Ibid paragraph 94

[35] The Commentary of the 1979 CCSFRY, page 491:" In 1949 on the initiative of the International Red

57. The Defense will demonstrate this with citations of the Commentary of the 1976 CCSFRY, in particular what the commentary states about the war crimes listed under Chapter Sixteen of the CCSFRY. In the very introduction of that part of the Commentary the following excerpts clarify what the intention was of the drafters of the 1976 CCSFRY when it listed the war crimes under Article 142, 143 and 144 of the 1976 CCSFRY. The Defence has included the entire commentary of the introduction to Chapter 16 of the 1976 CCSFRY, as Annex to this Referral.

58. The crime codified in Article 142 of the 1976 SFRY criminal code is the codification[36] of a war crime under Customary International Law. The Commentary to the 1976 1976 CCSFRY demonstrates this.

59. The commentary stipulates that in the preamble of the Chapter Sixteen of the 1976 CCSFRY: Quote:

"In its international relations Yugoslavia is abided by the UN Charter, by fulfilling its international obligations and actively participating in the activities of international organizations to which it belongs. In order to achieve these principles, our country, among other things, advocates for

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Cross, four Geneva Conventions for Protection of War Victims were made, which represented a new codification of those provisions from the Hague Regulations of 1907 related to the humanization of war. They are: a) The Convention on amelioration of the position of wounded and sick terrestrial armed forces; b) The Convention on amelioration of the wounded, sick and shipwrecked members of the naval armed forces; c) The Convention on treatment of prisoners of war and d) The Convention on the Protection of Civilian Persons in Time of War. These Conventions are containing a number of rules of International Law on War, and the state members are committing themselves to foreseen in their legislation a criminal sanction for serious violations of these rules"; Read in conjunction with historic development of it as explained in page 487 until 491. (see the Annex 1 to the present Referral).

36 See page 13 of the Appeals Court of Kosovo, Judgment in the case no APS 37 2020, case Darko Tasic vs Prosecutor, Appeal Judgment of 30 November 2020, quote, *" as such undertaken actions fall within the criminal offense under Article 142 of the CCSFRY, to which the Geneva Conventions and Additional Protocols are applicable, more specifically at the time of commission of criminal offense in former SFRY, these Conventions had been adopted more precisely the Geneva Conventions dated 12 August 1949, were ratified by (former SFRY) on 21 April 1950 and entered into force on 21 October 1950, while the Additional Protocols entered into force on 26 December 1978, and the former SFRY became part of the same Protocols on 11 June 1979, which consists that in accordance with Article 141 where the criminal offense was criminalized, provision that were applicable in Kosovo at the time of commission the criminal offense, but also the Convention and Protocols were applicable in Kosovo."*

establishment and development of all forms of international cooperation that serves for consolidation of peace, for rejecting the use of force or threat of force in international relations, for achieving general and complete disarmament, for the right of peoples to self-determination and national independence, and the right to the attainment of these objectives to lead liberation struggle, for respect of generally accepted norms of international law, and so on. The Constitution emphasizes that all organs and organizations, and individuals are required to adhere these principles in the international relations, and to advocate for their implementation (SFRY Constitution, Basic Principles, VII)". [37]

60. The Commentary goes on by stating:

"(…) *Yugoslavia has - by active participating in initiating, preparing and concluding many international treaties and other agreements - undertook to criminalize certain activities as criminal offenses. To this obligation, our country has fully responded and establishes as criminal offenses range of behaviours that International Law declared as forbidden and punishable. By specifying these crimes, our country, protecting its vital interests, concurrently express the solidarity of the international community by putting efforts to stamp out activities that violate fundamental rights and freedoms of the people, threatens world peace or violates other important values, which are recognized and protected by international law.*" [38]

And:

"The legal characteristics of the criminal offenses from this chapter have been taken from the international conventions, with necessary amendments and refinements. Thereby, the legal descriptions of most offences are referring to the rules of International Law, which contains detailed provisions on the illegality of certain activities; so that it is only by these rules we get complete description of the underlying criminal offence. Such blank provision, which is usually expressed by the wording: "Whoever violates the rules of the international law....", allows to without alterations of the law, recognize any further development of International Law in relation to these crimes, and thus ensure constant compliance of our criminal law with the international criminal law. By itself,

[37] Page 492 of the Commentary of the 1976 CCSFRY

[38] Page 493 of the Commentary of the 1976 CCSFRY

it is understood, that under the rules of International Law in the provisions of our law it includes rules laid down in international instruments which our country accepted (ratified)."[39]

61. And lastly:

"There is no doubt that all the crimes against humanity and International Law, compiled in this chapter of the Criminal Code, are considered as criminal offenses and in accordance to the general legal principles recognized by the international community".[40]

62. The title of Chapter Sixteen of the 1976 CCSFRY reads: Criminal Acts Against Humanity and International Law. The title of Article 142 reads: "War Crimes Against Civilian Population". This is clearly the codification of the treaties and international instruments in which the War Crimes under Customary International Law as well as the general principles of law recognized by civilized nations, to which Yugoslavia was party.

63. Therefore, the Supreme Court erred when it determined that the 1976 CCSFRY is not applicable. It erred because it overlooked the fact that the domestic SFRY Law in fact codified war crimes under Customary International Law.

D. The substance of Article 14 (1) (c) (i) of the Law of the Kosovo Specialist Chambers

64. The general title of Article 14 of the Law reads "War Crimes Under International Law". In the article is specified what is meant with a war crime under Customary International Law. It lists it under the subparagraph 1 under (a) (b), (c) and (d).

65. A substantive analysis of the substance of Article 142 of the 1976 SFRY Criminal Code should have been made, rather than to qualify it as crimes under domestic Kosovo law. The Supreme Court failed to make a correct substantive comparison between these two laws.

[39] Page 494 of the Commentary of the 1976 CCSFRY
[40] Page 495 of the Commentary of the 1976 CCSFRY

66. The Defense submits that the Article 142 of the 1976 SFRY Criminal Code is indeed the codification of a specific war crime under Customary International Law, and is therefore identical to the crime for which Mustafa was adjudged guilty. SFRY made these crimes, and in particular the crimes for which Musta was adjudged guilty, part of their domestic criminal law.

67. Therefore, the Supreme Court erred where it concluded that the 1976 SFRY Criminal Code would not be applicable.

68. In essence, the content of the crimes as well as the protected interests and the protected groups of people of the articles 142, 143, and 144 of the 1976 CCSFRY are the same as in Article 14 (1) (c). The above CCSFRY articles list all the groups that are protected under Article 14 (1) (c) of the Law.

69. It is noteworthy to mention that all the crimes for which Mustafa, as commander of the BIA, was adjudged guilty were committed against civilians only, and as part of an armed conflict not of international character.

70. The Defense concludes that the Supreme Court erred where it concluded that the CCSFRY of 1976 would be only applicable *to some but not all* of the crimes found in Article 14 of the Law. As earlier demonstrated, it made an incorrect comparison. As a result of it, the Supreme Court erroneously concluded that the Article 142 of the CCSFRY was not applicable in Mustafa case.

E. The type of sentence that was imposed on Mustafa: a range - based sentence.

71. Both the Trial Panel and subsequently the Appeals Panel imposed a range-based sentence. In any event, life (long) imprisonment was ruled out and was not even considered by both instances as a sentence for the offenses of which Mustafa was adjudged guilty.

72. The Supreme Court should have applied the 1976 CCSFRY. In a footnote the Supreme Court said that the 1976 CCSFRY would even not be applicable as at its highest the death penalty was a punishment for this crime.[41] The death penalty however had been already abolished during the time that the events in 1999 for which Mustafa was found guilty. When the Dayton Accords of 1995 entered into force the death penalty could no longer be imposed.[42]

73. The Supreme Court is therefore wrong. Even though Article 38 of the 1976 CCSFRY at the time stated that the death penalty could be the punishment for such crime, that punishment was abolished by subsequent laws and regulations. UNMIK Regulations were put into place in 1999.

74. Therefore, only a range-based sentence could be imposed for the crimes under Article 142, 143 and 144 of the 1976 CCSFRY. That sentence is within the range of 5 to 15 years.

75. The Commentary of article 38 of the 1976 CCSFRY states that a prison sentence of 20 years could only be imposed in three cases:

- firstly, for a specific criminal offence.
- secondly for certain types of criminal offences, a qualified form of certain serious criminal offences,
- and thirdly where the imposed death penalty was substituted for a range-based sentence when it was alternatively prescribed

76. Even though the 1976 CCSFRY stipulates that the prison term is between 5 and 20 years, the commentary to it once again makes it clear that a sentence higher than 15 years could not be imposed.

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[41] Decision of the Supreme Court, footnote 150, quote: "*in any event, Article 142 of the 1976 SFRY Criminal code provided at its highest, for the death penalty, accordingly this article would not be considered lex mitior*."

[42] ECtHR, Maktoufand & Demjanovic v Bosnia and Herzegovina, Judgment of 18th of July 2013, paragraph 27.

77. The commentary specifies the following:

"According to the Code, it is not possible to impose a prison sentence of more than fifteen and less than twenty years. Even in the case when the punishment e (death sentence or twenty years of imprisonment) is substituted by a less severe punishment by means of amnesty or pardon, the substitution of the imposed punishment with a prison sentence for a term between fifteen and twenty years would not be allowed, because the prison sentence in that range does not exist in our penal system."[43]

The Commentary further explains in the following passage that an imposition of a prison term of 20 years is not possible:

"As mentioned, the Code does not allow the imposition of prison sentences ranging from fifteen to twenty years. This position was taken for two basic reasons. The general maximum of a prison sentence is fifteen years and breaking that limit to twenty years would, in effect, increase the general maximum of this sentence. In addition, there is no sufficient justification for imposing a prison sentence in a given term of five years, since a prison sentence for a term of twenty years is foreseen for very serious cases of certain criminal offences, and if such a case does not exist, it will be justified to impose a prison sentence for a term of fifteen years or a shorter term.

A prison sentence for a term of twenty years is not a special punishment. It is a prison sentence for which corresponding provisions relating to this sentence apply."[44]

78. Moreover, it is important to note that the institution to replace the death penalty with 20 years penalty was abandoned. The commentary specifies regarding this substitution the following:

"The institution of replacing the death penalty with a twenty years prison sentence was abandoned. The conditions under which a twenty-year prison sentence can be imposed for crimes for which it is expressly provided are specified in the sense that this punishment can be prescribed, i.e. imposed, only for qualified forms of criminal offences committed with intent carrying a prescribed prison sentence of up to fifteen years. In so doing the wording of Article 28, paragraph 2 of the previous CC, was

[43] The Commentary of the 1976 CCSFRY / Commentary on Article 38, page 184,

[44] Ibid.

abandoned, where the possibility of imposing an effective prison sentence for a term of twenty years was linked to particularly aggravating circumstances or to particularly severe consequences."[45] (emphases added).

79. On this issue the ECtHR, in its Judgment in the case of *Maktouf and Damjanovic vs. Bosnia and Herzegovina*, analysed the application of the Article 38, of the SFRY Criminal Code and established the following in paragraph 27 of its judgment:[46]

80. In paragraph 75 it follows: "*The death penalty could no longer be imposed after the entry into force of the Dayton Agreement on 14 December 1995.*[47] *In particular, pursuant to Annexes 4 and 6 thereto, Bosnia and Herzegovina and its Entities must secure to all persons within their jurisdiction the rights and freedoms provided in the Convention and its Protocols (including Protocol No. 6 on the Abolition of the Death Penalty) and in the other human rights agreements listed therein (including the Second Optional Protocol to the International Covenant on Civil and Political Rights on the death penalty). The domestic authorities have always taken those provisions to mean that no one may be condemned to the death penalty or executed in peacetime, even in respect of criminal offences committed during the 1992-95 war*".

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45 The Commentary of the CCSFRY of 1976 / Commentary on Article 38, page 185,

46 ECtHR Judgment of 18 July 2013, application numbers 2312/08 and 34179/08 Maktouf and Damjanovic vs. Bosnia and Herzegovina, para 27, the ECtHR establishes the relevant domestic law and practice and relevant international materials from para 24 up to para 29. In addition, ECtHR notes International Humanitarian Law in paragraph 42, in which pursuant to the 149 Geneva Conventions, that the High Contracting Parties must enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of those conventions. Both Applicants complained under Article 7 of the Convention that a more stringent criminal law had been applied to them than that which had been applicable at the time of their commission of criminal offences; para 61 in which it is noted by the Applicants that the 2003 Criminal Code, being more severe than the 1976 Code, with regard to the minimum sentences for war crime should not have been applied in their case; paragraph 76, page 32. (see also Annex 5 of the present Referral).
https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-7636%22]}.
https://trialinternational.org/wp-content/uploads/2016/05/ECHR-case-of-Maktouf-and-Damjanovic.pdf

47 Ibid, the same case paragraph 27

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As the ECtHR therefore already established that in 1995 the death penalty could no longer be imposed and the conflict in Kosovo took place in 1999, it follows that the highest penalty for these crimes (i.e. the death penalty as in Article 38) no longer existed.

F. The Supreme Courts' guidance regarding the sentencing range is wrong; it applied the wrong standard in order to comply with the *lex mitior*.

81. With respect to Mustafa's case, neither the Trial Panel nor Appeals Panel ever considered the highest sentencing maximum for the crimes for which he was adjudged guilty. He was imposed a range-based imprisonment term. Therefore, the standard to be applied in the case of Mustafa should be a range-based standard.

82. The standard that was to be applied, according to the Supreme Court, was article 146 (1) in conjunction with Article 12 (1) (2) of the 2019 Kosovo Criminal Code, which, according to the Supreme Court, sets forth in Mustafa's case the most lenient sentencing range in compliance with the *lex mitior.* [48] The Defence submits that this is wrong.

83. The Defense submits that the most lenient sentencing range is that of the Article 142 in conjunction with article 38 of the 1976 CCSFRY, in conjunction with the UNMIK Regulation 1999/ 24,[49] in which the death penalty was abolished, and no substitute punishment was instituted.

84. The institution of replacing the death penalty with a twenty years prison sentence was already abandoned in 1976 CCSFRY.[50] Therefore, the maximum sentence became 15 years. In recent

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[48] Paragraphs 99 to 102 of the Supreme Court Decision

[49] UNMIK Regulation 1999/24, UNMIK Official Gazette; Annex 6 of the present Referral. https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_24.htm#:~:text=Taking%20into%20account%20United%20Nations%20Interim%20Administration%20Mission%20in%20Kosovo

[50] Commentary to the 176 CCFRY, bottom paragraph on page185. (Annex 1 to the present Referral).

decisions in Kosovo Courts, namely the Appeals Court[51], Supreme Court [52] and in addition the Constitutional Court of Republic of Kosovo[53], all have consistently reached conclusions that the most favourable law on sentencing (applying *lex mitior*) to be imposed upon a person for war crimes is 5 to 15 years of imprisonment based on 1976 CCFRY.

85. The following is the exact quote from the Decision of the Kosovo Constitutional Court.[54]

"Regarding the aforementioned allegation concerning the issue of the maximum sentence, the Court recalls the finding made by the Supreme Court in its Judgment as follows:

"The provisions of Article 38.1 of the Criminal Law of SFRY stipulate that the imprisonment sentence cannot be shorter than 15 days or longer than 15 years. In paragraph 2 of the same Article, it is stipulated that only for criminal offenses for which the death penalty is foreseen, the court can impose an imprisonment sentence of 20 years.

By UNMIK Regulation No. 24 dated 12.12.1999, which entered into force on 10.06.1999, the death penalty was abolished (Article 1.5), and instead, a prison sentence of 40 years has not been provided. With the amendments in the above-mentioned Regulation, by Regulation No. 2000/59 dated 27 October 2000, the death penalty was abolished under Article 15. Consequently, item 6 of the same Article stipulates that for any criminal offense for which the death penalty may have been imposed according to the law applicable in Kosovo on as of 22 March 1989, the sentence shall be imprisonment, ranging from a minimum provided by the law for that criminal offense to a maximum of 40 years. However, Article 40 of the transitional provisions stipulates that this Regulation shall enter into force on 27 October 2000 and that Article 1.6 shall apply only to those criminal offenses committed after that date*. Given the principle of the non-retroactive effect of the criminal code and*

[51] Kosovo Court of Appeals-Special Department, Prosecutor vs. Darko Tasic, APS nr. 37/200, dated on 30.11.2020, see Annex 3 of present Referral

[52] Decision of the Kosovo Supreme Court/ Prosecutor vs Goran Stanisic, Pml.nr.26/2023, dated on 20.03.2023; see Annex 3 of present Referral and original Judgment in Albanian at https://supreme.gjyqesori-rks.org/wp-content/uploads/verdicts/SUP_PML_2020-017884_SQ.pdf; Decision of the Kosovo Supreme Court / Prosecutor vs. Darko Tasic, Pml.nr. 138/2021, dated on 05.05.2021. see Annex 3 of present Referral and original Judgment in Albanian at https://hlc-kosovo.org/storage/app/media/Darko%20Tasiq/Darko-Tasiq-Aktgjykim-Supreme-05.05.2021.pdf

[53] Constitutional Court of Kosovo; Decision No. KI 210/21 Constitutional Court/ Prishtina, on 31 March 2022/ Nr. Ref.: RK1971/22; https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=57231

[54] Decision No. KI 210/21 Constitutional Court/ Prishtina, on 31 March 2022/ Nr. Ref.: RK1971/22

the fact that there is no legal basis for imposing the maximum prison sentence, as well as the principle of applying the more favorable law, the Supreme Court finds that for all war crimes and other criminal offenses committed until 27 October 2000, for which the Criminal Law of SFRY is applicable, the maximum imprisonment sentence is 15 years."[55] (emphases added).

86. Therefore, the Supreme Court erred where it considered that: *"(accordingly), article 146 (1) in conjunction with Article 42 (1) (2) of the 2019 Kosovo Criminal Code sets forth in Mustafa's case the most lenient sentencing range in compliance with lex mitior."*[56]

87. The Supreme Court Panel, erred were it found that: "*the more lenient sentencing range to be taken into account in accordance with Article 44 (2) (b) of the Law, and Article 146 (1) in conjunction with Article 42 (1) of the 2019 Criminal Code of Kosovo is 5 to 25 years of imprisonment*".[57] The correct sentencing range should be that of 1976 CCSFRY, being 5 to 15 years of imprisonment.

88. The Supreme Court erred in correct application of the *lex mitior* in the case of Mustafa, and therefore it violated constitutional rights of Mustafa under Article 33 (2) and (4) of the Constitution of the Republic of Kosovo.

89. The Supreme Court of the Specialist Chambers applied the wrong standard as to the applicable range-base of the sentence to be imposed. The Defense submits that the Supreme Court failed to apply the correct range-based sentence and therefore failed to properly apply the *Lex mitior.*

90. This violates the Constitutional right of Mustafa, as enshrined in article 33 (2) and (4) of the Constitution of Kosovo as well as the Article 7 of the ECHR.

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[55] Decision on Inadmissibility, No. KI 210/21 of the Constitutional Court of Kosovo on Prishtina, on 31 March 2022 Ref.no.: RK1971/22

[56] Paragraph 102 of the Supreme Court Decision.

[57] Paragraph 102 of the Supreme Court Decision.

91. In sum, the Supreme Court erred where it applied the range-based sentence of the 2019 Kosovo Criminal Code. It should have applied the range-based sentence as set forth by the 1976 SFRY Criminal Code as amended under the UNMIK Regulations and in line with the jurisprudence of the Supreme Court Decisions of 20.03.2023.[58]

G. Violation of Article 7 (1) of the European Convention of Human rights; Submissions on the correct applicable sentencing range.

92. The Supreme Court gave guidance to the Appeals Panel in paragraph 111 of its Decision. [59] In it, it identified 5 indicators to be considered regarding the sentencing. Under factor 2 it identified that the sentencing range is 5 to 25 years in Mustafa's case.

93. The Defense submits that this is wrong as demonstrated in the above paragraphs; however, it wishes to reiterate the following things.

94. The Supreme Court concluded that the 1976 CCSFRY and any amendments thereto are not applicable[60], it also concluded that the case of *Maktouf and Demjanovic vs Bosnia and Hercegovina*, on which Mustafa relied, was not instructive[61] for his case because the 1976 Code was simply not applicable. This is equally wrong.

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[58] Decision of the Kosovo Supreme Court/ Prosecutor vs Goran Stanisic, Pml.nr.26/2023, dated on 20.03.2023; see Annex 3 of the present Referral, and original Judgment in Albanian at https://supreme.gjyqesori-rks.org/wp-content/uploads/verdicts/SUP_PML_2020-017884_SQ.pdf; Decision of the Kosovo Supreme Court / Prosecutor vs. Darko Tasic,Pml.nr. 138/2021, dated on 05.05.2021. see Annex 3 of the Present referral, and original Judgment in Albanian at https://hlc-kosovo.org/storage/app/media/Darko%20Tasiq/Darko-Tasiq-Aktgjykim-Supreme-05.05.2021.pdf

[59] Supreme Court Decision, paragraph 111.

[60] Supreme Court Decision, paragraph 97

[61] Supreme Court Decision, paragraph 98

95. The Defence wishes to reiterate that in the case of *Scopolia vs Italy*[62] the ECtHR equally protects the human rights under the Article 7 of the ECHR the constitutional rights upon which, among others, Mustafa bases this Ground in the present Referral.

96. The ECtHR considered the principle of nonretroactivity in the case of *Scoppola vs. Italy* in paragraph 108-109 of its decision, citation as follows:

"In the light of the foregoing considerations, the Court takes the view that it is necessary to depart from the case-law established by the Commission in the case of X v. Germany and affirm that Article 7 § 1 of the Convention guarantees not only the principle of <u>non-retrospectiveness</u> of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant".[63] (emphases added).

97. The principle of application of the most favourable law is also provided for in Article 3 of the Criminal Code of the Republic of Kosovo (Code 06/L-074), in the Article 3 of the Criminal Code of the Republic of Kosovo (Code 04/L-082) as well as in Article 2 of the Provisional Criminal Code of Kosovo.[64]

98. According to the European Court of Human Rights the court in the case of *Maktouf and Damjanovic vs. Bosnia and Herzegovina,*[65]_ ECtHR "considers *that there has been a violation of*

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62 Case of Scoppola v. Italy (no.2) (application no. 10249/03). Judgement. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-94135%22]}

63 Case of Scoppola v. Italy (no. 2) (application no. 10249/03). See paragraph 108 and 109 of the Judgement. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-94135%22]}

64 Provisional Code of Kosovo-UNMIK/REG/2003/25 of 6 July 2003; Code 04/L-082 the Kosovo Criminal Code of Republic of Kosovo, of 13 July 2012; Code 06/L-074, Criminal Code of the Republic of Kosovo of 14 January 2019.

65 ECtHR Judgment of 18 July 2013, application numbers 2312/08 and 34179/08 Maktouf and Damjanovic vs. Bosnia and Herzegovina, the case is also about war crimes and the 1976 Code of

Article 7 of the Convention in the particular circumstances of the present case. This conclusion should not be taken to indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied in the Applicants' cases".[66] The very same criminal code which is involved in the case of Mustafa (the 1976 CCSFRY).

99. Therefore, the Defense submits that the case of *Maktouf and Damjanovic vs. Bosnia and Herzegovi*na is very well instructive for the correct application of the 1976 CCSFRY. The Supreme Court should not have set aside this Judgment or find it not instructive for Mustafa's case.[67] The Supreme Court arrived to an incorrect conclusion as to this jurisprudence and consequently formulated an incorrect sentencing range to be applied by the Appeals Panel in Mustafa's case.

100. Mustafa's rights are violated as an incorrect sentencing range was given. Had the Appeal Panel been given the correct sentencing range, the framework within which the crimes were to be assessed, in combination with Kosovo jurisprudence and the other factor of the Supreme Court would potentially have reduced sentence imposed on him.

101. The Appeals Pannel would have had a narrower framework from within it should have assessed Mustafa's sentence. Mustafa therefore did not benefit from the more favorable sentencing range within which a new determination was to be made. In *Maktouf and Damjanovic vs. Bosnia and Herzegovina* case the ECtHR specifically addressed this issue in

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the CCSFRY was the issue on this case para 54, both Applicants complained under Article 7 of the Convention that a more stringent criminal law had been applied to them than that which had been applicable at the time of their commission of criminal offences; para 61 in which it is noted by the Applicants that the 2003 Criminal Code, being more severe than the 1976 Code, with regard to the minimum sentences for war crime should not have been applied in their case; paragraph 76, page 32.ECHR-case-of-Maktouf-and Damjanovic.https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-7636%22]}.https://trialinternational.org/wp-content/uploads/2016/05/ECHR-case-of-Maktouf-and-Damjanovic.pdf

[66] Maktouf and Damjanovic vs. Bosnia and Herzegovina, paragraph 76 (under the conclusion of the applicant's complaint about the violation of Article 7 of the ECHR

[67] Paragraph 98 of the Supreme Court Decision.

paragraph 68, where it considered *"that the two criminal codes provide for different sentencing framework regarding war crimes."* [68]

102. The ECtHR also stated that it is irrelevant whether the sentence that was imposed on the individual was within the range that was applied. As will be shown hereunder the ECtHR made a specific consideration about that.[69] (emphases added).

103. The Supreme Court concluded that the range-based standard of 2019 was to be applied (apparently retro-actively), while the sentencing range of the 1976 SFRY Criminal Code was more lenient. By doing so the Supreme Court violated the principle of non-retroactivity as enshrined in article 7 (1) of the European Convention on Human rights. ECtHR considered in Maktouf case [70]:

"Admittedly, the applicants' sentences in the instant case were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code. It thus cannot be said with any certainty that either applicant would have received lower sentences had the former Code been applied. What is crucial, however, is that the applicants could have received lower sentences had that Code been applied in their cases.

*"As already observed in paragraph 68 above, the State Court held, when imposing Mr Maktouf's sentence, that it should be reduced to the lowest possible level permitted by the 2003 Code. Similarly, Mr Damjanović received a sentence that was close to the minimum level"***.**

"It should further be noted that, according to the approach followed in some more recent war crimes cases referred to in paragraph 29 above, the appeals chambers of the State Court had opted for the 1976 Code rather than the 2003 Code, specifically with a view to applying the most lenient sentencing rules."

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[68] Maktouf and Damjanovic vs. Bosnia and Herzegovina, paragraph 68

[69] Maktouf and Damjanovic vs. Bosnia and Herzegovina, paragraph 68

[70] Maktouf and Damjanovic vs. Bosnia and Herzegovina, paragraph 70: And in paragraph 74 it suffices to note the rule of non-retroactivity of crimes and punishments also appears in the Geneva Conventions and Additional Protocols. Moreover, as the Applicants' sentences were within the compass of both the 1976 and 2003 Criminal Codes, the government's argument that the Applicants could not have been adequately punished under the former code is clearly unfounded.

(…..) Accordingly, since there exists a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerns sentencing, it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 of the Convention."[71] (emphases added)

104. In light of the above, the sentencing range that was to be applied according to the Supreme Court violates Article 7 of the Convention, which is through Article 22 of the Constitution directly applicable. Mustafa derives his protection under this article of the Convention, as Article 22 of the Constitution states that, in case of conflict, these provisions have priority of the laws and other acts of public institutions. Therefore, the Defense submits that with the guidance given by the Supreme Court to the Appeal Panel, it did not in fact apply the most lenient sentencing guidelines as provided for in the applicable (1976) law. Hence, Mustafa's constitutional rights as well as those which are protected under the Article 7 of the European Convention were violated.

105. By retro-actively applying the 2019 Code, it violated the Article 7 (1) of the European Convention, as the ECtHR considered in para 72 of the Maktouf Judgment:

"*72. Furthermore, the Court is unable to agree with the Government's argument that if an act was criminal under "the general principles of law recognized by civilized nations" within the meaning of Article 7 § 2 of the Convention at the time when it was committed then the rule of nonretroactivity of crimes and punishments did not apply. This argument is inconsistent with the travaux préparatoires which imply that Article 7 § 1 can be considered to contain the general rule of non-retroactivity and that Article 7 § 2 is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war (see Kononov, cited*

71 Ibid, paragraph 70.

above, § 186). It is thus clear that the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity."[72] (emphases added).

106. Were the Supreme Court applied the 2019 Criminal Code of Kosovo was therefore not in compliance with the *lex mitior* provided under the Kosovo Constitution, and also violated the principle of non-retroactivity as enshrined in Article (1) of the ECHR.

107. As Mustafa's constitutional rights were violated, the Supreme Court Decision regarding application of the *lex mitior* and sentencing range within which the case should be decided must be annulled and replaced with the correct application of the *lex mitior* as well as the correct sentencing range that is to be applied.

GROUND 3

Violation of Article 6 (1) of the ECHR, directly applicable through Article 22 of the Constitution as well as Article 31 (1) of the Constitution.

108. The standards of the right to a Fair Trial represent one of the basic criteria for assessing whether and to what extent the ideals of the rule of law have been realized in a certain state. It is understandable that in addition to the rights expressly stated in the provisions of Article 6 of the ECHR and Article 31 paragraph 1 of the Constitution, the implicit rights that are related to the requirements of good distribution of justice are also of great importance.

109. One of such rights is the right to a reasoned court decision. With its existence, it contributes to the transparency of judicial decision-making. That is particularly important, as these guarantees are linked to the realization of basic freedoms and rights.

[72] Maktouf and Damjanovic vs. Bosnia and Herzegovina, paragraph 72

110. Only by giving a reasoned decision there can be public scrutiny of the administration of justice. Article 6 (1) of the Convention accordingly obliges courts to give reasons for their findings and judgments.[73]

111. The ECtHR has developed over the years a consistent body of jurisprudence reflecting a principle that judgments of courts and tribunals should adequately state the reasons on which they are based.[74]

112. The concept of a "reasoned" decision has been addressed by the ECtHR. Article 6 (1) of the ECHR, is directly applicable through Article 22 of the Kosovo Constitution. The ECtHR found a violation of article 6 (1) of the Convention when "*the applicant's request was shot down with little or no motivation whatsoever*"[75] or when obvious discrepancies were "*not at all or not sufficiently addressed.*" [76]

113. The Supreme Court summarily dismissed Ground 4 of the Defence in its Decision. Ground 4 related to the alleged violation of article 14 (1) (c) of the Law and Rule 159 (3) and 183 (3) of the Rules. As the Appeal Panel's Judgment lacked proper legal reasoning, as prescribed in the Rules 159 (3) and 183 (3) of the Rules. As a result of it a proper finding on the guilt regarding Article 14 (1) (c) (i) (in particular the murder) could not have been made.

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73 ECtHR Hirvisaari vs Finland, Application no. 49684/99, Judgment 27 September 2001/paragraph 30/.https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-5599&filename=HIRVISAARI%20v.%20FINLAND.docx&logEvent=False

74 Judgments should adequately state the reasons on which they are based
ECtHR Suominen vs. Finland, Application no. 37801/1997/Judgment 1st of July 2003/paragraph 34.
https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-61178&filename=CASE%20OF%20SUOMINEN%20v.%20FINLAND.docx&logEvent=False

75 Violation of Article 6 (1) when the Applicant's request were shut done with little or no motivation whatsoever. ECtHR Carmel Saliba vs Malta, Application no.24221/13, Judgement 29 November 2016/ paragraph 79 and 80;
https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-169057&filename=CASE%20OF%20CARMEL%20SALIBA%20v.%20MALTA.pdf&logEvent=False

76 Parties must have been heard (46); discrepancies not at all or not sufficiently addressed.
ECtHR Ajdaric vs. Croatia, Application no.20883/09/ Judgment of 12 December 2011, Paragraph 51/ https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-3779749-4324081&filename=Chamber%20judgment%20Ajdaric%20v.%20Croatia,%2013.12.2011.pdf

114. In para 56 of the decision the Supreme Court concluded:

" The Panel notes that, in any event, the Appeals Panel found that the Trial Panel reasonably concluded that there may have been more than one cause leading to the death of a victim and that ill-treatment and denial of medical care may also result in the death of a person.[77]*; In other words, Mr Mustafa's challenges in relation to the origin of the bullet(s) found in the murder victim's body are irrelevant, as the Trial and Appeals Panels concluded that the victim* ***would have died****, even without the gunshot wounds, as a result of the ill-treatment inflicted upon him by BIA forces under Mr Mustafa's command, or by "putting [the victim] in a position to be fired at by the advancing Serbian forces – by abandoning him without protection in a near-to death state", and the denial of medical treatment for this victim.*[78] (emphases added).

115. In the above paragraph the Supreme Court found that the Appeals Panel found that the Trial Pannel reasonably concluded that there could have been more than one cause leading to the victim's death. The Defence challenged the reasoning as done by the Appeal Panel. By confirming that this reasoning was "a reasonable conclusion", the Supreme Court equally erred. The Defence submits that this is not a factual disagreement. The Judgment of the Supreme Court is therefore not correct on this issue. Therefore, the said reasoning is not comprehensible.

116. The issue is not so much whether the victim would have died, but simply is what the cause of his death was. The expression of such a probability ("would have") is simply not enough to find one guilty of murder. It expresses a probability where no legal reasoning was given for it. In addition, this assumption was not based on any evidence. (emphasis added).

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[77] Decision of the Supreme Court, paragraph 56, referring to *Appeal Judgment para 350-351*

[78] Decision of the Supreme Court, paragraph 56, Trial Judgment para 638; Appeal Judgment paras. 348, 350-351, 353, 394.) emphasis added.

117. The Defence submits that this reasoning has no foundation in any kind of evidence that was produced to corroborate it. Therefore, the Defence challenged the reasoning of the Trial Panel in the Appeal phase, and the Appeals Panel's reasoning in the Supreme Court phase.

118. As the Supreme Court confirmed the legal reasoning of the Appeal Panel, the Defence submits that the current reasoning is and remains inadequate to hold Mustafa guilty for murder, or attribute it to him.

119. The Supreme Court went on to summarily dismiss the challenged decision of the Appeal Panel, and regarded is as a factual disagreement. It then went on to dismiss the ground as an issue that is not in conformity with the admissibility rules of the Rules of Procedure and Evidence.

120. In paragraph 45-57 of its Decision the Supreme Court assessed the submitted Ground 4 and ultimately concluded that the Ground 4 should be summarily dismissed.

121. The reason for the Supreme Court for summarily dismissal of the challenged decision of the Appeal Panel, can be found in para 57 of the decision.

122. The Supreme Court considered this matter in para 57:
"*Given the above, the Panel concludes that even though mr. Mustafa submits that the AP judgment lacks legal reasoning, in essence mr. Mustafa's argument is based on a factual disagreement. The Panel recalls that Rule 193 (3) of the Rules and the standard of review provide that a request for protection of legality shall not be filed based on an erroneous or incomplete determination of the facts of the case*".[79]

[79] Paragraph 57 of the Supreme Court Decision

123. The Defence reiterates that it is surely not a factual disagreement, but that the reasons to come to the conclusion were simply without any factual basis. It is the reasoning that is challenged. That was and is an assumption for which no evidence was produced. A reasoning cannot be based on an assumption.

124. Lastly, also in its last para 57 the Supreme Court considered that:

"The Panel notes that even if a finding were to have been made on the origin of the bullet(s) and the consequence of the gunshot wound(s) found in the murder victim, this would not have changed the outcome of the Trial or Appeals Panels' findings in relation to Mr Mustafa's criminal responsibility. In particular, the Trial Panel found, and the Appeals Panel agreed, that the severe mistreatment of the murder victim and denial of medical aid to that victim were "solely attributable" to Mr Mustafa and his BIA subordinates and <u>that these were the substantial causes</u> of the victim's death.[80] The Trial and Appeals Panels determined that even if a finding had been made in relation to a third-party intervention, this would have not broken the chain of causation leading to the death of the victim".[81] (emphases added).

125. The Defence submits that once again the substantial causes of death are based on an assumption, as no evidence was ever produced. There is a lack of legal reasoning where there is no factual evidence upon which the legal reasoning can be based. Hence, there is a substantial violation of Article 159 (3) and 183 (3) of the Rules.

126. If a proper legal reasoning is absent, then this is in violation of the constitutional fair trial right of Mustafa of his fair trial rights protected under the ECHR Article 6 (1) of the Convention, codified in article 22 of the Constitution of Kosovo.

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80 Decision Supreme Court, para 57, referring to the Appeal Judgment para 625

81 Decision Supreme Court, para 57, referring to the Trial Judgment para 638, and Appeal Judgment para 348)

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127. Article 22 of the Constitution stipulates that fundamental human rights as mentioned in this article are directly applicable in the Republic of Kosovo, and, in case of conflict, have the priority of the provisions of laws and other acts of public institutions.

128. The Defence submits that the legal reasoning of both the Trial panel 1 and the Appeals Panel, which was upheld by the Supreme Court violates Article 6 (1) of the ECHR.

V. CONCLUSION

129. In the virtue of foregoing reasons Mustafa request to grant each of the grounds in this Referral, and request the Constitutional Court:

To DECLARE the Referral admissible;

To GRANT the Defence Grounds in the present Referral

To REMAND the case to the appropriate Panel for retrial in accordance with the Judgment of this Court.

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At The Hague, the Netherlands

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