

**In:** KSC-CC-2024-27  
**Before:** Constitutional Court Panel  
Judge Vidar Stensland  
Judge Roumen Nenkov  
Judge Romina Incutti  
**Registrar:** Dr Fidelma Donlon  
**Filed by:** Dr Anni Pues, Victims' Counsel  
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**Victims' Counsel's Submission on Mustafa's Constitutional Court Referral**

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## I. PROCEDURAL BACKGROUND

1. On 27 September 2024, Mr Mustafa ('Applicant') filed the Referral<sup>1</sup> to the Constitutional Court Panel (SCCC) (hereafter: the Referral) concerning the violations of Mr Salih Mustafa's fundamental rights. Subsequently, the Prosecutor filed its request for authorisation to respond to the referral.<sup>2</sup> Equally, Victims' Counsel requested leave to make submissions on Mustafa's Constitutional Court referral.<sup>3</sup> The assigned SCCC Panel issued its decision on the Working Language and Further Proceedings on 17 October 2024 with which the Panel granted leave for Victims' to file written submissions insofar as it relates to the rights of victims to participate.<sup>4</sup>

## II. SUBMISSIONS

2. The Referral claims a violation of article 102 (3) of the Constitution of Kosovo through the Supreme Court Decision . '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.'<sup>5</sup> The Referral further contends that the alleged violation of article 102 (3) would also constitute a violation of the right to a fair trial.

*No violation of article 102 (3) of the Constitution through victim participation*

3. Article 22 of the Law clearly provides for victim participation in proceedings before the Specialist Chambers. This participation is not limited to specific stages

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<sup>1</sup> 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, KSC-CC-2024-27/F00001, 27 September 2024 ('Referral').

<sup>2</sup> Prosecution request for authorisation to respond to referral KSC-CC-2024-27/F00001, KSC-CC-2024-27/F00003, 3 October 2024.

<sup>3</sup> Victims' Counsel's request for leave to make submission to Mustafa's Constitutional Court Referral, KSC-CC-2024-27/F00005, 9 October 2024.

<sup>4</sup> Decision on the Working Language and Further Proceedings, KSC-CC-2024-27/F00007, 17 October 2024, para 10.

<sup>5</sup> 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, KSC-CC-2024-27/F00001, 27 September 2024, paras 18-19 (hereafter: the Referral).

of the proceedings only but includes all proceedings before the KSC. This understanding is supported by a literal interpretation of Article 22 as well as a systematic review of the Law and the Rules of Procedure and Evidence.

4. Article 22 (1) of the Law stipulates that '(p)articipation by a Victim by the Specialist Chambers shall not be a bar to providing testimony as a witness before the Specialist Chambers', clearly envisioning victim participation in general in proceedings before the KSC. Article 22 (2) affirms this understanding, although framed in the negative. This provision states that 'If a victim does not apply *to participate in proceedings before the Specialist Chambers, ...*, this shall not limit his or her rights under other laws or through other reparation mechanisms in Kosovo.'<sup>6</sup> Both of these foundational provisions refer to *proceedings before the Specialist Chambers* without limiting this to specific stages.
5. The provision in article 22 (6) of the Law does not hinder this understanding of allowing victim participation at all stages of the proceedings. Article 22 (6) includes specific provisions for the pre-trial and trial stages when the 'Specialist Chambers may permit *representations*<sup>7</sup> by Victims' Counsel on behalf of Victims during the pre-trial and trial proceedings.' In legal terms, representations relate to statements of fact.<sup>8</sup> This provides a chance for victims not only to state matters of law but to provide additional factual information relevant for the determination of the charges and the criminal responsibility of the accused for such charges.
6. A close reading of the Rules of Procedure and Evidence (hereafter: Rules) supports a distinction between representations and submissions. Rule 23, for example, provides the Registry with the possibility to make representations, clearly in this context linked to factual circumstances. Other rules, in contrast, permit submissions limited to legal grounds.<sup>9</sup>

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<sup>6</sup> Emphasis added by author.

<sup>7</sup> Emphasis added by author.

<sup>8</sup> See for a definition here: <https://www.lexisnexis.co.uk/legal/glossary/representations>.

<sup>9</sup> See for example Rule 182.

7. The interpretation offered here is further supported through Chapter 5 of the Rules, which addresses 'Provisions Related to Various Stages of the Proceedings'. Rule 67 allows *amicus curiae* observations at any stage of the proceedings and an option for Victims' Counsel to respond. If *amicus curiae* are potentially permitted at different stages with an option for Victims' Counsel to respond, this shows that victim participation is not limited to the pre-trial and trial stage only.
8. Article 22 of the Law, viewed in this broader context, clearly envisaged victim participation at all stages, as they are also afforded the right to appeal a trial judgment based on article 46 (9) of the Law. Flowing from this is that the only coherent conclusion on this point is that the Law also permits victim participation for extraordinary legal remedies such as protection of legality requests.<sup>10</sup>
9. In sum, the silence of the law on how victim participation is shaped beyond the fact-finding stages of the pre-trial and trial stages is not a rule of law issue.

*No violations of the right to a fair trial*

10. Mustafa argues in the referral that victim participation violated '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... 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.' The violation flowed from the fact that Mustafa needed 'to respond to all kinds of third parties that are allowed to participate in the proceedings.'<sup>11</sup>
11. Article 31 of the Constitution provides that '1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts'. However, the Referral fails to demonstrate how this provision was breached. The key question here is whether it is unfair and would violate the right to a fair trial in article 31 (2) of the

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<sup>10</sup> See also Rules 187 (3), 191 (3).

<sup>11</sup> Mustafa Referral, KSC-CC-2024-27/F00001, paras 31-32.

Constitution, if victims of the crimes for which Mustafa was convicted can raise issues that affect their interests.

12. It is important to recall that the Supreme Court Panel strictly limited submissions to issues that affected the personal interests – as delineated through article 22 (3) of the Law - and where ‘their response is not prejudicial to or inconsistent with the rights of the accused’. The latter is a formula that has emerged in international criminal law to balance the fair trial guarantees for an accused with other rights.<sup>12</sup> Through this, the Panel reinforced its role as a guardian of a fair trial. The legal source for this role is two-fold: the constitutional and international human rights obligation of a fair trial and the responsibility of judges to render decisions on the management of the proceedings before them.<sup>13</sup>
13. Considering that article 53 of the Constitution commands that human rights and fundamental freedoms constitutional guaranteed ‘shall be interpreted consistent with the court decisions of the European Court of Human Rights<sup>14</sup>’, an examination of the ECtHR’s case law on fair trial guarantees is pivotal at this point.

*The principle of legal certainty*

14. The principle of legal certainty is integral to a fair trial and has been invoked in the referral. However, different to what the Referral suggests<sup>15</sup>, the principle of legal certainty protects the foreseeability of consequences. The ECtHR found in this context that ‘all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail.’<sup>16</sup> What matters is the increased predictability of the outcome of

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<sup>12</sup> See for example Article 68 (3) of the Rome Statute.

<sup>13</sup> Rule 15 (4) of the Rules.

<sup>14</sup> Hereafter ECtHR.

<sup>15</sup> Mustafa Referral, KSC-CC-2024-27/F00001, para 32.

<sup>16</sup> ECtHR, *Medvedyev and Others v France* (GC), 3394/03, 29 March 2010, para 80.

proceedings.<sup>17</sup> Considering that victim participation is an integral component of the KSC, the opportunity for Victims' Counsel to provide limited observations on some matters of law in the proceedings concerning the protection of legality did not impact the foreseeability of the outcome of any such proceedings.

#### *Equality of arms*

15. The Referral claims the need to respond to 'all kinds of third parties', which could be understood as raising an equality of arms issue. The latter is a key component of the right to a fair trial, understood as the procedural equality of the accused in a criminal trial with the public prosecutor.<sup>18</sup> In essence, this right is an obligation on the court to ensure that neither party is put in a disadvantageous position when presenting its case.<sup>19</sup> The claim in the referral is wrong, as only Victims' Counsel was allowed to submit observations tightly linked to the interests of victims, for which Mustafa was provided with sufficient time and opportunity to respond.<sup>20</sup>

#### *The principles of effectiveness and proportionality*

16. Any interpretation of the legal framework of the KSC and the right to a fair trial has to take account of the effective realisation of all the protected human rights at stake. The Preamble of the ECHR makes clear that its primary aim is the effective protection and realisation of human rights. Intertwined with the principle of proportionality, both aim at striking a fair balance between different and

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<sup>17</sup> See in the context of international criminal law ICC, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of Comoros'", ICC-01/13-34, 18 Jan 2019, para 48.

<sup>18</sup> *Pataki and Dunshirn v Austria* App. No. 596/59 and 789/60, report of 28 March 1963, *Yearbook*, vol. 6, p.732.

<sup>19</sup> M Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia 2012) with further references.

<sup>20</sup> F00017, Reply to Victims' Counsel Response to Defence Request for Protection of Legality, 3 May 2024.

contrasting protected rights.<sup>21</sup> The human rights of participating victims in the Mustafa case would have been negatively curtailed, if they had not been given the chance to make representations in the Protection of Legality proceedings. It was therefore not only permissible but necessary and proportionate for the effective realisation of their rights to give them the chance to be heard as far as their interests were concerned.

*Fair trial protection for victims*

17. The participating victims have claimed and been awarded reparations in the proceedings against Mustafa. While the reparations proceedings as such have concluded with the reparations order, this order depends on a conviction.<sup>22</sup> For the family members of the murder victim, any reparations order would have lost its legal foundation if the judgment would have been modified as far as the conviction for murder was concerned.
18. In as far as these victims are reparations claimants, they are parties to civil proceedings embedded in the criminal law process. The case *Perez v France*<sup>23</sup>, decided by the Grand Chamber of the ECtHR, is instructive here, as it discusses civil party claims brought within a public prosecution. The Court confirmed in *Perez* that a determination on a civil right in the meaning of article 6 (1) of the ECHR must be determined by its substantive content and effects.<sup>24</sup> Thus, the reparations claim, for which the Law provides the opportunity of referral to civil litigation in Kosovo<sup>25</sup>, is without doubt a civil claim that triggers the victims' right to a fair trial under article 6 (1) of the ECHR.

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<sup>21</sup> Serghides, Georgios A., Judge ECtHR. "The Principle of Effectiveness in the European Convention on Human Rights, in Particular its Relationship to the other Convention Principles". *Hague Yearbook of International Law*. Leiden, The Netherlands: Brill | Nijhoff, 2019, pp 1, 19.

<sup>22</sup> Art 22 (8): In the event that a Trial Panel or Court of Appeals Panel of the Specialist Chambers *adjudges an accused guilty of a crime*, it may make an order directly against that accused specifying appropriate reparation to, or in respect of, Victims collectively or individually. (Emphasis added by author.)

<sup>23</sup> *Perez v France*, Application no. 47287/99, 12 February 2004.

<sup>24</sup> *Ibid*, para 57.

<sup>25</sup> Art 22 (9) of the Law.

19. If these victims as claimants would not have had a chance to be heard in proceedings, that could have had a detrimental effect on their civil claim constituting a violation of their right to be heard. Although the reparations proceedings were formally completed, the effects of a successful challenge to the murder conviction would have meant that the reparations order would not have been enforceable any longer. Again, the *Perez* case offers guidance. In the case at hand, the ECtHR concluded that the protective scope of article 6 (1) even extended to preliminary investigations, before any claim can be brought.<sup>26</sup> This, in turn, supports the conclusion that the protective effect must extend to preliminary and post-proceeding stages.
20. The Supreme Court Panel effectively balanced the the need to ensure fairness for both sides.
21. The ECtHR concluded in this context:

*Such an approach is consistent with the need to safeguard victims' rights and their proper place in criminal proceedings. Simply because the requirements inherent in the concept of a "fair trial" are not necessarily the same in disputes about civil rights and obligations as they are in cases involving criminal trials, as evidenced by the fact that for civil disputes there are no detailed provisions similar to those in Article 6 §§ 2 and 3 (see *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, p. 19, § 32) does not mean that the Court can ignore the plight of victims and downgrade their rights.<sup>27</sup>*

*Procedural obligations derived from article 2 of the ECHR*

22. An additional rights dimension that justifies the consideration of victims' interests is the right to life protection afforded in the ECHR. The ECtHR has clarified in its case law that the state has a positive obligation flowing from the right to life which leads to obligations vis-à-vis the victims in a case. It requires effective investigations and proceedings to sanction murder or any death that may qualify as such. It is established case law of the ECtHR, as confirmed by the Grand

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<sup>26</sup> *Perez v France*, Application no. 47287/99, 12 February 2004, para 66 with references to further case law.

<sup>27</sup> *Ibid*, para 72.



Chamber of the ECtHR in the *Al Skeini* case that in cases concerning the right to life 'the victim's next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'.<sup>28</sup>

23. It was the legitimate interest of victims to have the death of their family member acknowledged appropriately as murder. Mustafa aimed to overturn his conviction for murder through the Protection of Legality request. Therefore, the involvement of victims in these proceedings flowed from the positive obligation based on article 2(1) of the ECHR.

*Adequacy of the penalties*

24. Effective human rights protection, specifically the protection of the right to life and the prohibition of torture, furthermore requires that any penalty as a criminal sanction must be adequate and proportionate to the gravity of the acts of torture and murder. While victims do not have a right to specific sentencing, they have a right derived from the positive obligations of article 2(1) and article (3) that penalties are adequate. For acts of torture, the ECtHR found in the case of *Myummyun v Bulgaria* a violation of article 3, because the penalties in that case

*were manifestly disproportionate to the seriousness of the officers' act. They did not appropriately reflect the gravity of acts of torture and could not be regarded as having the necessary dissuasive effect on State agents who feel they can abuse the rights of those under their control with impunity.*<sup>29</sup>

25. The victims in this case did not ask for a specified sentence, placing their trust in the Trial Panel to determine a just sentence. Having said this, it is their interest stemming from the positive obligations developed for an effective protection of the right to life and the prohibition of torture that any penalty would be based on the correct sentencing range. For that reason, it was in the victims' interest to address any mistakes made in this context in the Protection of Legality proceedings.

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<sup>28</sup> *Al Skeini and Others v The United Kingdom*, Application no. 55721/07, 7 July 2011, para 167 (with further references).

<sup>29</sup> *Myummyun v Bulgaria*, Application no. 67258/13, 3 November 2015, para 75.

### **III. RELIEF REQUESTED**

26. Victims Counsel requests that

Ground 1 of the Referral is dismissed.

**Word count:** 2806



**Anni Pues**  
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Friday, 8 November 2024

At The Hague, the Netherlands