



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-CC-2024-27

Before: **Specialist Chamber of the Constitutional Court**
Judge Vidar Stensland, Presiding
Judge Roumen Nenkov
Judge Romina Incutti

Registrar: Dr Fidelma Donlon

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Prosecution submissions on referral of Salih MUSTAFA (KSC-CC-2024-27/F00001)

with public Annex 1

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I. INTRODUCTION

1. Pursuant to the Decision,¹ the Specialist Prosecutor's Office ('SPO') hereby provides submissions on the Referral,² which consists of three grounds asserting violations of the Applicant's constitutional rights. Nothing in Grounds 1 and 3 gives rise to the appearance of an incompatibility with or violation of the Constitution. Grounds 1 and 3 are therefore inadmissible and should be summarily dismissed.

2. In relation to Ground 2, the SPO agrees with the Applicant that the SCC Decision³ failed to provide effective safeguards against arbitrary punishment, as required by Article 33 of the Constitution⁴ and ECHR Article 7.⁵ However, the submissions in the Referral miss the mark. As set out in more detail below, the Supreme Court disregarded the plain language of and clear sentencing framework set out in the Law.⁶ In doing so, the Supreme Court committed a number of manifestly unreasonable errors which were bound to – and indeed, did – lead to an arbitrary punitive framework in this case and ultimately, an arbitrary and unjust sentence. The SCC Decision – if not corrected by this Chamber – would undermine fundamental rights and the ability of the Kosovo Specialist Chambers ('KSC') and SPO to discharge their respective mandates and fulfil their obligations under international law.

¹ Decision on the Working Language and Further Proceedings, KSC-CC-2024-27/F00007, 17 October 2024 ('Decision'), p.4. Annex 1 includes a table of authorities with full citations, including assigned short-names used in these submissions.

² 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').

³ Decision on Salih Mustafa's Request for Protection of Legality, KSC-SC-2024-02/F00018, 29 July 2024 ('SCC Decision').

⁴ Kosovo, Constitution of the Republic of Kosovo, 15 June 2008, Art.33.

⁵ All references herein to 'ECHR Article' are to the European Convention on Human Rights ('ECHR'). Considering that Article 33 of the Constitution must be interpreted in a manner consistent with ECHR Article 7, the remainder of these submissions refer only to ECHR Article 7. *See e.g.* Krasniqi and Veseli Decision, KSC-CC-2022-14/F00009, paras 49-53.

⁶ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'KSC Article' are to the Law.

II. SUBMISSIONS

3. After addressing admissibility, the facts relevant to the only admissible ground (Ground 2), and the standard and scope of review, these submissions set out the multi-layered and fundamental flaws in both the Referral and SCC Decision. On the basis of any of these flaws, the Chamber should dismiss the arguments in the Referral, but nonetheless, provide an appropriate remedy for the Supreme Court's arbitrary and manifestly unreasonable interpretation and application of KSC Article 44(2).

A. ADMISSIBILITY

4. Before considering the Referral on its merits, the Chamber must first determine whether it is admissible.⁷

1. Grounds 1 and 3 are inadmissible

5. *Ground 1.* Contrary to Defence submissions,⁸ the Supreme Court – like any other KSC Panel – has discretion to manage proceedings before it and authorise any submissions that would assist in its determination.⁹ The victims have rights in criminal proceedings to notification, acknowledgement, and reparations,¹⁰ and represented by Victims' Counsel, participated in pre-trial, trial, and appeal proceedings in this case.¹¹ Accordingly, the Supreme Court correctly considered Victims' Counsel's submissions relating to those same proceedings and their outcome where: (i) the victims' personal interests and rights were affected; and (ii) their participation was not prejudicial to or inconsistent with the rights of the Applicant.¹² Beyond reciting provisions of the Constitution and related commentary, the Applicant broadly asserts unsubstantiated

⁷ Haradinaj Judgment, KSC-CC-2023-22/F00011, para.70; Shala Decision, KSC-CC-2022-16/F00004, para.42; Krasniqi and Veseli Decision, KSC-CC-2022-14/F00009, para.36.

⁸ Referral, KSC-CC-2024-27/F00001, paras 14-36.

⁹ See e.g. KSC Rule 67(1). All references are to 'KSC Rule' are to the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

¹⁰ KSC Article 22(3).

¹¹ Decision on Victims' Procedural Rights During Trial, KSC-BC-2020-05/F00152; Decision on Modalities of Victim Participation in Appellate Proceedings, KSC-CA-2023-02/F00011. See also KSC Article 22(6).

¹² SCC Decision, KSC-SC-2024-02/F00018, para.27.

violations and disagrees with the SCC Decision without any concrete explanation of how his rights were affected. Considering that the Supreme Court was mindful of the Applicant's rights when authorising victim participation,¹³ and that he had the opportunity to comment on Victims' Counsel's submissions, there is no appearance of any constitutional violation.¹⁴

6. *Ground 3.* The Applicant asserts a violation of his right to a reasoned opinion,¹⁵ but – once again¹⁶ – effectively seeks to relitigate factual matters relating to the cause of the murder victim's death.¹⁷ Such matters are beyond the competence of this Chamber.¹⁸ Further, the Applicant fails to demonstrate – as he is required to do¹⁹ – that the reasoning in the SCC Decision or Appeal Judgment was so deficient or arbitrary that it resulted in a denial of justice. To the contrary, the cause of the murder victim's death – including arguments raised by the Applicant before the Supreme Court and in the Referral – were addressed in detail and as part of fully reasoned decisions by the Trial Panel²⁰ and Court of Appeals.²¹ The Court of Appeals undertook its analysis in the light most favourable to the Applicant in order to assess whether any third-party intervention would have broken the chain of causation,²² and concluded that it would not.²³ Thus, the Applicant's factual arguments concerning any hypothetical third-party intervention could not have changed the outcome of this case.²⁴

¹³ SCC Decision, KSC-SC-2024-02/F00018, paras 30, 32.

¹⁴ Rules of Procedure for the Specialist Chamber of the Constitutional Court, KSC-BD-03/Rev3/2020, 2 June 2020, Part II ('SCCC Rules'), Rule 14(f).

¹⁵ Referral, KSC-CC-2024-27/F00001, para.113.

¹⁶ SCC Decision, KSC-SC-2024-02/F00018, para.49.

¹⁷ Referral, KSC-CC-2024-27/F00001, paras 115-117, 123, 125.

¹⁸ Haradinaj Judgment, KSC-CC-2023-22/F00011, para.68.

¹⁹ Haradinaj Judgment, KSC-CC-2023-22/F00011, para.69.

²⁰ Trial Judgment, KSC-BC-2020-05/F00494, paras 589-639, 689-695.

²¹ Appeal Judgment, KSC-CA-2023-02/F00038, paras 327-398.

²² SCC Decision, KSC-SC-2024-02/F00018, para.55 *citing* Appeal Judgment, KSC-CA-2023-02/F00038, para.347.

²³ SCC Decision, KSC-SC-2024-02/F00018, para.56 *citing, inter alia*, Appeal Judgment, KSC-CA-2023-02/F00038, paras 348, 350-351, 353, 394. *See also* SCC Decision, KSC-SC-2024-02/F00018, para.57.

²⁴ SCC Decision, KSC-SC-2024-02/F00018, para.57.

7. The Supreme Court, having reviewed the reasoning in the Appeal Judgment, summarily dismissed the Applicant's arguments because: (i) they were based on a factual disagreement and therefore outside the permissible scope of a protection of legality request; and (ii) the Applicant had failed to demonstrate any material effect on his conviction.²⁵ Having failed to meet these requirements,²⁶ the Applicant cannot recycle the same unfounded and inadmissible arguments before this Chamber.²⁷

2. Ground 2 is admissible

8. Ground 2 challenges the Supreme Court's final interpretation and application of KSC Article 44(2)(a)-(b) in this case, alleges a violation of ECHR Article 7, and all effective remedies provided by law have been exhausted.²⁸ Ground 2 also raises an issue of fundamental importance to the functioning of the KSC, which is of a special and temporary nature. Accordingly, even if the Chamber were to find that any of the formal requirements have not been met,²⁹ the Chamber should still address Ground 2 together with the submissions below to avoid a denial of justice.³⁰ In these specific circumstances and considering the Chamber's heightened powers of review under ECHR Article 7,³¹ Ground 2 is admissible.

B. FACTS RELEVANT TO GROUND 2

9. Ground 2 challenges the SCC Decision's application of the *lex mitior* principle, the sentencing range applied, and the guidance provided to the Court of Appeals for

²⁵ SCC Decision, KSC-SC-2024-02/F00018, para.57.

²⁶ KSC Article 48(7); KSC Rule 193(3).

²⁷ Haradinaj Judgment, KSC-CC-2023-22/F00011, para.84 (considering that the exhaustion rule normally requires that complaints brought before the Chamber should have been made to the relevant courts, *inter alia*, in compliance with formal requirements), 123-124 (noting that the Supreme Court had summarily dismissed the applicant's arguments, in part, because they were factual, rather than legal in nature, the Chamber found the Applicant's failure to properly raise his claim before the Supreme Court deprived it of the opportunity to consider and potentially redress the alleged breach).

²⁸ KSC Article 49(1)-(3); SCCC Rules, Rule 20(1).

²⁹ See e.g. SCCC Rules, Rule 14.

³⁰ Shala Decision, KSC-CC-2022-16/F00004, para.53; Krasniqi and Veseli Decision, KSC-CC-2022-14/F00009, para.58. See also ECtHR, *Finger v. Bulgaria*, paras 72-73; ICTR, *Akayesu* AJ, paras 21-22.

³¹ See para.22, fn.63 below.

its determination of a new sentence.³² The facts underlying these challenges – not the legal arguments in the Referral – define the scope of this Chamber’s review.³³

1. Trial Judgment

10. On 16 December 2022, Trial Panel I convicted the Applicant of war crimes under customary international law, namely, serious violations of Common Article 3.³⁴

11. Applying modes of liability under customary international law,³⁵ the Trial Panel found that the Accused, the overall and only commander of the BIA unit,³⁶ with full control over the Zllash/Zlaš detention compound: (i) personally tortured two victims, interrogating them, beating them, and subjecting one to a mock execution and threatening to kill him;³⁷ (ii) as part of a joint criminal enterprise, arbitrarily detained and tortured at least six victims who – ‘through an institutionalised detention and mistreatment’ between approximately 1 April 1999 and 19 April 1999 – were detained ‘in barns only suitable for animals’ in inhumane conditions and systematically tortured in a variety of ways (including with electric shocks, hot irons, bats, and knives);³⁸ and (iii) as part of a joint criminal enterprise, murdered a victim subjected to ‘tortuous acts’ involving ‘protracted pain and unthinkable agony, which can only be characterised as vicious and brutal’. Despite the victim’s near-to-death state, the Applicant denied him medical aid and decided not to release or evacuate the murder victim. A combination of these factors substantially contributed to his death.³⁹

³² Referral, KSC-CC-2024-27/F00001, para.43; SCC Decision, KSC-SC-2024-02/F00018, paras 74-111.

³³ See para.22 below.

³⁴ Law, Art.14(1)(c). See Trial Judgment, KSC-BC-2020-05/F00494, para.831.

³⁵ Law, Arts 12, 16(1).

³⁶ Trial Judgment, KSC-BC-2020-05/F00494, paras 334-336, 338-339, 720 (defining the BIA as ‘a guerrilla unit of the KLA within the Llap OZ’ and finding that the perpetrators of the crimes belonged to this unit and were the Accused’s subordinates).

³⁷ Trial Judgment, KSC-BC-2020-05/F00494, paras 729-733.

³⁸ See, *inter alia*, Trial Judgment, KSC-BC-2020-05/F00494, paras 61, 494, 528-530, 535, 539, 586-588, 674-675, 745-746.

³⁹ Trial Judgment, KSC-BC-2020-05/F00494, paras 621, 624-626, 638, 808. The other factor contributing to his death was gunshot wounds from an unconfirmed source.

12. In sentencing the Applicant, Trial Panel I considered that, pursuant to KSC Article 44(1), it could impose a maximum sentence of life imprisonment.⁴⁰ Consistent with its obligations under Article 44(2), it took into account sentencing ranges under the SFRY Code, PKCC, and 2012 KCC and concluded that ‘the most serious crimes, such as war crimes, attracted the most severe sentences’.⁴¹

13. With this conclusion in mind, Trial Panel I proceeded to assess the factors set out in KSC Article 44(5) and KSC Rule 163(1), finding that: (i) the gravity of the crimes was high; (ii) the crimes caused significant and long-lasting consequences, both physical and psychological, to the detained victims and psychological, to the family members of the murder victim; (iii) the acts of torture – which in the case of the murder victim substantially contributed to his death – were committed with particular cruelty, an aggravating factor; (iv) the crimes were committed against particularly vulnerable or defenceless victims, an aggravating factor; (v) the degree of the Applicant’s personal participation in the crimes and intent was very high; and (vi) there were no mitigating factors.⁴²

14. Having weighed and balanced all relevant considerations, the Panel sentenced the Applicant to 10-years of imprisonment for the war crime of arbitrary detention, 22-years of imprisonment for the war crime of torture, and 25-years of imprisonment for the war crime of murder.⁴³ It imposed a single sentence of 26-years of imprisonment, reflecting the totality of the criminal conduct of and multiple crimes committed by the Applicant.⁴⁴

2. Appeal Judgment

15. On 14 December 2023, the Court of Appeals – noting the broad discretion afforded a trial panel in determining an appropriate sentence⁴⁵ – found that life

⁴⁰ Trial Judgment, KSC-BC-2020-05/F00494, para.779.

⁴¹ Trial Judgment, KSC-BC-2020-05/F00494, para.781.

⁴² Trial Judgment, KSC-BC-2020-05/F00494, paras 796-800, 804-826.

⁴³ Trial Judgment, KSC-BC-2020-05/F00494, para.828.

⁴⁴ Trial Judgment, KSC-BC-2020-05/F00494, para.829.

⁴⁵ Appeal Judgment, KSC-CA-2023-02/F00038, para.453.

imprisonment was the maximum sentence before the KSC.⁴⁶ The Court of Appeals then conducted its own review of relevant sentencing ranges under the SFRY Code, PKCC, 2012 KCC, and 2019 KCC, and confirmed the Trial Panel's conclusion that 'the most serious crimes, such as war crimes, attracted the most severe sentences'.⁴⁷

16. After analysing sentencing practices in Kosovo and at international courts, the Court of Appeals considered that the Applicant's sentence should be reduced and imposed eight-years of imprisonment for the war crime of arbitrary detention, 20-years of imprisonment for the war crime of torture, and 22-years of imprisonment for the war crime of murder, and a single sentence of 22-years of imprisonment, which reflected 'the totality of [the Applicant's] criminal conduct in this case'.⁴⁸

3. SCC Decision

17. On 29 July 2024, the Supreme Court found that the Court of Appeals erred when it concluded that in the context of KSC Article 44(2), for the purposes of compliance with the *lex mitior* principle, the KSC is not required to consider various, non-binding Kosovo laws on war crimes.⁴⁹ The Supreme Court reviewed the SFRY Code, PKCC, 2012 KCC, and 2019 KCC to determine the most lenient sentencing range under KSC Article 44(2).⁵⁰

18. The Supreme Court concluded that: (i) due to distinctions in the Law between war crimes under customary international law and domestic crimes, the SFRY Code was not applicable; and (ii) in any event, Article 142 of the SFRY Code provided for the death penalty and would not be the *lex mitior*.⁵¹ The Supreme Court proceeded to find that the PKCC was the lowest (five to 40 years) because it does not provide for life imprisonment, and by contrast, the 2012 KCC and 2019 KCC provide lower ranges

⁴⁶ Appeal Judgment, KSC-CA-2023-02/F00038, paras 449-450.

⁴⁷ Appeal Judgment, KSC-CA-2023-02/F00038, para.475.

⁴⁸ Appeal Judgment, KSC-CA-2023-02/F00038, paras 478-480.

⁴⁹ SCC Decision, KSC-SC-2024-02/F00018, paras 87-88, 92.

⁵⁰ SCC Decision, KSC-SC-2024-02/F00018, paras 92-102.

⁵¹ SCC Decision, KSC-SC-2024-02/F00018, paras 93-98, fn.150.

(five to 25 years), but at their highest, include a possibility of life imprisonment.⁵² Considering that the Applicant was sentenced to 22-years' imprisonment, not life,⁵³ the Supreme Court found that the most lenient sentencing range was five to 25-years.⁵⁴

19. The Supreme Court turned to sentencing practices, discounting Kosovo sentences under the SFRY Code, reviewing no other Kosovo sentences, and analysing only certain individualised ICTY sentences.⁵⁵ The Supreme Court concluded that there was a disparity between the Applicant's sentences and the sentences analysed, and that the Court of Appeals may have come to a different determination of the Applicant's sentence if it had identified the five to 25-year range.⁵⁶ The Supreme Court annulled the Appeal Judgment insofar as it related to the Applicant's sentence.⁵⁷

20. On 10 September 2024, the Court of Appeals, following the Supreme Court's guidance and the identified sentencing range, found that a 'significant reduction' was warranted in the sentences for torture (reduced to 13 years) and murder (reduced to 15 years), and in the single sentence (reduced to 15 years).⁵⁸

C. STANDARD AND SCOPE OF REVIEW

21. This Chamber has a supervisory function as regards the work of the KSC and SPO insofar as fundamental rights and freedoms guaranteed by the Constitution are concerned.⁵⁹ Generally, it is not the Chamber's role to decide whether the criminal chambers' findings were correct in fact or law.⁶⁰ However, where arbitrary and

⁵² SCC Decision, KSC-SC-2024-02/F00018, para.101.

⁵³ SCC Decision, KSC-SC-2024-02/F00018, para.101.

⁵⁴ SCC Decision, KSC-SC-2024-02/F00018, para.102.

⁵⁵ SCC Decision, KSC-SC-2024-02/F00018, paras 104-105.

⁵⁶ SCC Decision, KSC-SC-2024-02/F00018, paras 104-105, 107.

⁵⁷ SCC Decision, KSC-SC-2024-02/F00018, paras 109-111.

⁵⁸ New Decision on Sentence, KSC-CA-2023-02/F00045, paras 24-26. The Court of Appeals maintained the eight-year sentence for arbitrary detention. Before determining the new sentence, the Court of Appeals did not provide the Parties and participants an opportunity to make submissions, in light of the novel interpretation and application of KSC Article 44(2)(b) in the SCC Decision.

⁵⁹ Haradinaj Judgment, KSC-CC-2023-22/F00011, para.65; Hasani Decision, KSC-CC-2019-05/F00012, para.24.

⁶⁰ Shala Decision, KSC-CC-2022-16/F00004, para.54; Haradinaj Judgment, KSC-CC-2023-22/F00011, para.69.

manifestly unreasonable findings infringe fundamental rights and freedoms guaranteed by the Constitution, the Chamber should intervene.⁶¹

22. The Chamber's powers of review must be greater when the right itself, such as ECHR Article 7, requires that there was a legal basis for a conviction and sentence.⁶² The Chamber must satisfy itself that the findings of the criminal chambers were compatible with ECHR Article 7, even if there are differences between the legal approach and reasoning of this Chamber and the criminal chambers.⁶³ To accord a lesser power of review would render ECHR Article 7 devoid of purpose.⁶⁴

23. ECHR Article 7 should be construed and applied in a manner that provides effective safeguards against arbitrary punishment.⁶⁵ Arbitrariness negates the rule of law.⁶⁶ An ECHR Article 7 assessment is only concerned with laws applicable to a given case (*i.e.* binding law).⁶⁷ Legislative intent forms an important part of this assessment.⁶⁸

24. An assessment under ECHR Article 7 must also take into account other fundamental rights, freedoms, and obligations⁶⁹ implicated by the facts under review, including to effectively investigate and if appropriate, prosecute and punish serious violations of, *inter alia*, ECHR Articles 2, 3, and 5, and war crimes protecting the same values under customary international law.⁷⁰ The applicable penal framework and the

⁶¹ ECtHR, *Kononov v. Latvia*, para.189; Haradinaj Judgment, KSC-CC-2023-22/F00011, para.69.

⁶² ECtHR, *Kononov v. Latvia*, para.198; Haradinaj Judgment, KSC-CC-2023-22/F00011, paras 98, 140.

⁶³ ECtHR, *Kononov v. Latvia*, para.198; Haradinaj Judgment, KSC-CC-2023-22/F00011, para.140. *See also* ECtHR, *Streletz, Kessler and Krenz v. Germany*, para.66. Further, the Chamber is the master of characterisation to be given in law to the facts of the case before it. *See* Shala Decision, KSC-CC-2022-16/F00004, para.41; Krasniqi and Veseli Decision, KSC-CC-2022-14/F00009, para.35.

⁶⁴ ECtHR, *Kononov v. Latvia*, para.189; Haradinaj Judgment, KSC-CC-2023-22/F00011, paras 140, 198.

⁶⁵ ECtHR, *Korbely v. Hungary*, para.69; ECtHR, *Vasiliauskas v. Lithuania*, para.153.

⁶⁶ ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, para.145; ECtHR, *Legillon v. France*, para.53.

⁶⁷ Constitution, Art.33(4) (referring to 'subsequent applicable law'). *See also* ICTY, *Dragan Nikolić SJ*, para.81; ECtHR, *Scoppola v. Italy (No. 2)*, paras 41, 105-109 (referring to, *inter alia*, the *Dragan Nikolić SJ* when finding that a consensus has emerged in Europe and internationally concerning the application of subsequent *lex mitior* before a final decision in a case).

⁶⁸ ECtHR, *Scoppola v. Italy (No. 2)*, para.108.

⁶⁹ *See e.g.* ECtHR, *Streletz, Kessler and Krenz v. Germany*, paras 72-73, 85-89, 94. *See also* Krasniqi and Veseli Decision, KSC-CC-2022-14/F00009, paras 45, 67.

⁷⁰ *See e.g.* ICRC, *Customary International Humanitarian Law*, pp.607-621.

courts' interpretation thereof must ultimately provide flexibility, enabling courts to impose proportionate sentences tailored to the specific circumstances of a given case.⁷¹

1. ECHR Articles 2, 3, and 5

25. States have positive obligations to secure rights to life⁷² and against torture⁷³ and arbitrary detention⁷⁴ by putting into place effective provisions that deter the commission of these offences, backed by 'law enforcement machinery' for the prevention, suppression, and sanctioning of breaches.⁷⁵ Penalties and in turn, punitive frameworks for serious violations of fundamental rights and freedoms must reflect their grave nature.⁷⁶ In this context, the Chamber must review whether and to what extent the criminal chambers carefully scrutinised the case, so that the deterrent effect of the judicial system in place and the role it was required to play are not undermined.⁷⁷ An arbitrary and/or manifestly unreasonable interpretation of the Law does not serve these purposes and is not compatible with ECHR Article 7.

2. Mandate of the KSC and SPO

26. The significance of the Referral and SCC Decision for the fundamental rights and freedoms outlined above may only be determined by considering the context and purpose of the KSC and SPO, and the specific features of their legal regime.⁷⁸

⁷¹ Constitution, Article 33(3). *See also* Čelebići AJ, paras 716-718.

⁷² ECHR Art.2; Constitution, Art.25.

⁷³ ECHR Art.3; Constitution, Art.27.

⁷⁴ ECHR Art.5; Constitution, Art.29.

⁷⁵ ECtHR, *Streletz, Kessler and Krenz v. Germany*, para.86 (in relation to the right to life); ECtHR, *Sabalić v. Croatia*, para.97 (concerning torture); ECtHR, *Storck v. Germany*, para.102 (concerning arbitrary detention). *See also* ECtHR, *A. v. The United Kingdom*, para.22; ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey*, para.171; Kosovo, Constitutional Court, *Gëzim et al. Constitutional Court Judgment*, para.59; Kosovo, Constitutional Court, *Constitutional Court Judgment on actions and inactions*, para.143; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, para.157.

⁷⁶ *See e.g.* Convention against Torture, Art.4(2); UNCAT, *Kepa Urria Guridi v. Spain*, para.6.6. *See also* ECtHR, *Streletz, Kessler and Krenz v. Germany*, paras 72-73, 85-89, 94 (noting that the right to life is 'the supreme value in the hierarchy of human rights'); ECtHR, *Myumyun v. Bulgaria*, para.67; ECtHR, *Sabalić v. Croatia*, para.97; ECtHR, *Armani Da Silva v. The United Kingdom*, para.285.

⁷⁷ ECtHR, *Sabalić v. Croatia*, para.97.

⁷⁸ *See, similarly*, Judgment on Constitutional Amendments, KSC-CC-2020-11/F00015, para.53.

27. The establishment of the KSC was required for the Republic of Kosovo to comply with international obligations⁷⁹ stemming from the Council of Europe Report. This report outlined systemic weaknesses in Kosovo's ability to ensure accountability for certain grave trans-boundary and international crimes. Consistent with KSC Article 1(2), 'the *raison d'être* of the KSC and SPO and hence their legal regime is to realise, in their own specific context, the respective fundamental rights and freedoms in relation to allegations contained in the [Council of Europe Report]'.⁸⁰ With a view to the proper administration of justice, the KSC and SPO function in an autonomous manner, 'a corollary of which is their own established legal framework'.⁸¹ This framework consists of the Constitution, the Law as *lex specialis*, and customary international law 'as given superiority over domestic laws'.⁸²

3. KSC Article 44(1)-(2)

28. The legislator fixed the penalty (a maximum of life imprisonment) in KSC Article 44(1) for, *inter alia*, war crimes under customary international law. No other provision in the KSC legal framework can be interpreted or applied in a manner that would limit KSC Article 44(1), or deprive it of meaning and purpose.

29. In this respect, KSC Article 44(2)(a)-(b) provides that a panel 'shall take into account', but is not bound by, sentencing ranges for the crimes under other Kosovo laws.⁸³ Consistent with this court's mandate and international obligations, KSC Article 44(2)(c) requires a Panel to consider the extent to which any relevant sentencing ranges under KSC Article 44(2)(a)-(b) would prejudice the punishment of international crimes. The KSC Article 44(2) considerations are part of a broader range of factors⁸⁴ that a panel must holistically evaluate and weigh. Ultimately, it is entitled to impose,

⁷⁹ *Constitutional Court Judgment on Amendment to the Constitution*, paras 50-51.

⁸⁰ Judgment on Constitutional Amendments, KSC-CC-2020-11/F00015, para.56.

⁸¹ Judgment on Constitutional Amendments, KSC-CC-2020-11/F00015, para.63.

⁸² KSC Articles 3(2), 12.

⁸³ SCC Decision, KSC-SC-2024-02/F00018, para.62.

⁸⁴ Law, Art.44(5) (similarly using the phrase 'shall take into account').

within the limits of KSC Article 44(1), either a greater or lesser sentence than would have been imposed under any other punitive regime in Kosovo.⁸⁵

D. THE SCC DECISION INFRINGED CONSTITUTIONAL RIGHTS (GROUND 2)

30. The SCC Decision disregarded the plain language and underlying purposes of the Law, failed to properly consider and apply constitutional rights, made manifest errors of reasoning, and did not adequately account for the special and autonomous framework in which the KSC functions. The SCC Decision created an arbitrary regime, threatening foreseeability, accessibility, and constitutional compliance.

31. At the outset, it is noted that arguments in the Referral revolve around whether customary international law applied under the SFRY Code.⁸⁶ Considering that it fixes and qualifies sentencing ranges on the basis of, *inter alia*, domestic modes of liability, the SFRY Code and its UNMIK amendments do not provide a sentencing range for the international crimes, including modes of liability,⁸⁷ underlying the Applicant's conviction.⁸⁸ Notwithstanding these fundamental distinctions, and noting that KSC Article 44(2)(a)-(b) is inherently an exercise in taking into account other non-binding, but potentially informative, sentencing ranges provided in Kosovo law, the SPO

⁸⁵ See, similarly, ICTY, *Krstić* AJ, para.262.

⁸⁶ Referral, KSC-CC-2024-07/F00001, paras 56-63.

⁸⁷ When previously addressing 'offences' under customary international law in the context of ECHR Article 7, the Chamber considered war crimes and crimes against humanity, 'including related modes of liability'. See *Shala* Decision, KSC-CC-2022-16/F00004, para.63; *Krasniqi and Veseli* Decision, KSC-CC-2022-14/F00009, paras 70-72, 78.

⁸⁸ In analysing cases implicating Article 142 of the SFRY Code, the ECtHR distinguished between imposing penalties for crimes under customary international law which were subsequently criminalised under domestic law (where *lex mitior* was found not to apply) and imposing penalties for crimes falling under Article 142 of the SFRY Code and a later domestic law (where *lex mitior* was found to apply). The present case falls under the first scenario, as Article 142 of the SFRY Code does not apply customary international law, as is done in KSC Articles 12-14 and 16(1). Compare ECtHR, *Šimšić v. Bosnia and Herzegovina*, paras 23, 25, with ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, paras 55, 67-76. Notably, the scope of offences cannot be extended to include offences that were not criminal under the original law. See *Haradinaj* Judgment, KSC-CC-2023-22/F00011, para.136. The Kosovo Supreme Court previously found that, under the SFRY Code, resort to customary international law to define prohibited conduct and individual responsibility was not 'legitimate'. See e.g. *Kolasinac* Supreme Court Judgment, pp.23-24.

addresses the provisions of the SFY Code below, including *arguendo* in the context of a *lex mitior* assessment being applied to KSC Article 44(2)(b).

1. The SCC Decision arbitrarily and unreasonably applied the *lex mitior* principle to KSC Article 44(2)

32. Contrary to assertions in the Referral⁸⁹ and the findings in the SCC Decision,⁹⁰ there is no reasonable interpretation of KSC Article 44(2) that would have required a determination of the single ‘most lenient’ Kosovo law. Notably, the SCC Decision confirmed that the KSC Article 44(2) elements should be ascribed their ordinary meaning and are factors to be taken into account, but are not binding.⁹¹ While respecting the ordinary meaning and legislative intent of one part of KSC Article 44(2), it proceeded to ignore it in other parts, importing the *lex mitior* principle where it clearly was not intended to apply.

33. Considering that the *lex mitior* principle only applies to binding laws⁹² and on the plain language of KSC Article 44(2)(a)-(b), a panel must take into account, but is not bound by, the sentencing ranges both for the crimes under Kosovo law at the time of commission and any and all subsequent more lenient sentencing ranges. This is consistent with the approach in the Trial Judgment and Appeal Judgment.⁹³ Had the legislator intended a *lex mitior* assessment under KSC Article 44(2), it would have expressly required it. It did not.

34. Even if *arguendo* the principle of *lex mitior* was applicable internally to KSC Article 44(2)(b), the selective and piecemeal assessments carried out in the SCC Decision and in the Referral do not globally consider each punitive regime in its entirety, violate the plain language, fail to account for the internal rationale of the

⁸⁹ Referral, KSC-CC-2024-27/F00001, para.104.

⁹⁰ SCC Decision, KSC-SC-2024-02/F00018, paras 86-88, 102.

⁹¹ SCC Decision, KSC-SC-2024-02/F00018, para.62.

⁹² See para.23 above.

⁹³ See paras 12, 15 above.

relevant laws, and would exceed judicial authority by creating a regime not enacted by the legislature.⁹⁴

(a) The SFRY Code provided for the death penalty

35. Compared with other Kosovo laws addressed below, Article 142 of the SFRY Code provided for the same minimum (five years) and higher maximum (death) penalties for the crimes in this case, which categorically disqualifies it from consideration as the *lex mitior*,⁹⁵ even if it would not disqualify it from a discretionary assessment under Article 44(2)(a).

36. The Referral incorrectly relies on the 1995 Dayton Agreement,⁹⁶ claiming that it abolished the death penalty in Kosovo.⁹⁷ However, the Dayton Agreement primarily concerned Bosnia and Herzegovina. The abolition of the death penalty in Kosovo, pursuant to UNMIK regulations, did not occur until 12 December 1999.⁹⁸ Further, contrary to arguments in the Referral,⁹⁹ the cited commentary in fact confirms that 20-years' imprisonment was available for the most serious offenses, where it was specifically provided or as a discretionary alternative to death.¹⁰⁰ Regardless, the five to 15 and 20-year terms of imprisonment under the SFRY Code must be read together with the full sentencing range available (namely, death).¹⁰¹

⁹⁴ ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, Concurring Opinion of Judges Albuquerque and Vučinić, para.8.

⁹⁵ See SCC Decision, KSC-SC-2024-02/F00018, fn.150. Life imprisonment is more lenient than the death penalty. See ECtHR, *Öcalan v. Turkey* (No. 2), para.177; ECtHR, *Ruban v. Ukraine*, para.46.

⁹⁶ Republic of Bosnia and Herzegovina, Republic of Croatia and the Federal Republic of Yugoslavia, Dayton Agreement, Annexes 1-11.

⁹⁷ Referral, KSC-CC-2024-27/F00001, para.72.

⁹⁸ UNMIK Regulation 1999/24, Sections 1.5, 3. See also UNMIK Regulation 2000/59, Sections 1.5, 3.

⁹⁹ Referral, KSC-CC-2024-27/F00001, paras 57, 74.

¹⁰⁰ Commentary, pp.184-185.

¹⁰¹ In this respect, the ECtHR has indicated that – where an individual is not sentenced to the minimum punishment (as in *Maktouf*) – the global range should be taken into account, and not subsidiary ranges if the maximum is not imposed. See e.g. ECtHR, *Ruban v. Ukraine*, paras 20, 23, 46 (while both the old code and new code provided for ranges of imprisonment that were different, the court only considered the maximum penalties).

37. Finally, the Referral's reliance on *Maktouf* is misplaced. That decision, when finding the SFRY Code to be more lenient, considered: (i) the minimum sentence available under the SFRY Code, which was lower than the minimum penalty in the subsequent law; (ii) the domestic court's decision that the *Maktouf* applicants should be sentenced to the minimum or close to minimum penalty available; and (iii) the absence of convictions for the most serious war crimes, including those resulting in loss of life, which were eligible for the death penalty under the SFRY Code.¹⁰² This reasoning does not apply to this case: (i) other Kosovo laws provide for the same minimum and lower maximum penalties; (ii) neither the Trial Panel, nor Court of Appeals, considered that the Applicant deserves the minimum or close to minimum punishment available; and (iii) Mustafa was convicted of serious international crimes, involving loss of life.

(b) UNMIK Regulation No. 1999/24 did not replace the death penalty with a five to 15-year sentencing range

38. The Applicant's claim that UNMIK Regulation No. 1999/24 is a more lenient law¹⁰³ is not supported by legal principles, historical context, or legislative intent. The non-simultaneous loss of force of the SFRY Code's death penalty provisions pursuant to UNMIK Regulation 1999/24, and the entry into force of a new type of punishment (namely, a maximum of 40 years imprisonment) under UNMIK Regulation 2000/59 less than a year later was, considering all circumstances, unintentional.¹⁰⁴ Given the complex socio-political landscape – including the introduction of a new international administration (UNMIK) – in post-conflict Kosovo, any inference of intent to drastically mitigate punishments for serious crimes cannot be substantiated, particularly in the absence of contrary evidence and considering UNMIK's mandate.¹⁰⁵

¹⁰² ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, paras 13-14, 22, 69.

¹⁰³ Referral, KSC-CC-2024-27/F00001, para.83.

¹⁰⁴ See, similarly, ECtHR, *Ruban v. Ukraine*, paras 45-46. See also HRC, *Tofanyuk v. Ukraine*, para.11.3.

¹⁰⁵ UNMIK Regulation 1999/24. See also UNMIK Regulation 2000/59.

39. Regardless, even if the five to 15-year range was to be taken into account under KSC Article 44(2)(b), KSC Article 44(2)(c) would rule out its application considering that the sentencing ranges under the SFRY Code at the time the crimes were committed and subsequently, including under UNMIK Regulation 2000/59, demonstrate legislative intent that the most severe penalties should be available for the serious war crimes in this case and murder in any circumstances.¹⁰⁶

(c) The Supreme Court arbitrarily assessed relevant Kosovo laws

40. Even if the SCC Decision properly undertook a *lex mitior* assessment of other non-binding Kosovo laws under KSC Article 44(2)(b)¹⁰⁷ – which it did not – this assessment was selective, and failed to consider such laws concretely, on their plain terms, and globally, thereby ensuring that the underlying rationale and legislative intent is not undermined.

41. The SCC Decision inexplicably used the sentence imposed in the Appeal Judgment as its starting point,¹⁰⁸ despite its (incorrect) conclusion that the framework as interpreted and applied by the Court of Appeals was wrong.¹⁰⁹ In any context, using the sentence ultimately imposed to determine what the applicable ranges are for the purposes of KSC Article 44(2) is manifestly wrong, and bound to result in arbitrariness. The entire purpose of KSC Article 44(2) is to identify factors to take into account in order to help decide upon what sentence to impose. The SCC Decision did the opposite.

42. Further, the SCC Decision failed to adequately consider maximum and minimum sentences:

¹⁰⁶ See, similarly, ECtHR, *Ruban v. Ukraine*, paras 45-46.

¹⁰⁷ The below assessment concerns the PKCC, 2012 KCC, and 2019 KCC. Considering that the SFRY Code, UNMIK Regulation 1999/24, and UNMIK Regulation 2000/59 did not provide punishments for international crimes, including modes of liability, in this case, they are not addressed here. Regardless, many of the same considerations apply equally to the SFRY Code and the UNMIK Regulations.

¹⁰⁸ SCC Decision, KSC-SC-2024-02/F00018, paras 101, 105-107, 110.

¹⁰⁹ SCC Decision, KSC-SC-2024-02/F00018, paras 108-111.

- i. *Maximum penalties.* The 2012 KCC and 2019 KCC provide for a maximum sentence of life imprisonment.¹¹⁰ Considering the gravity of the crimes and the aggravating circumstances,¹¹¹ the Applicant would have been eligible for life imprisonment under either of these laws.¹¹² The SCC Decision – which is internally inconsistent as to maximum punishments¹¹³ – thus arbitrarily removed parts of the 2019 KCC when excluding life imprisonment and the alternative 26-35 years¹¹⁴ from the range to be considered.¹¹⁵
- ii. *Minimum penalties.* The PKCC, 2012 KCC, and 2019 KCC provide minimum sentences of five years for serious violations of Common Article 3.¹¹⁶ While these laws provide the same sentencing range for such crimes,¹¹⁷ holistic consideration of these laws indicates that the legislature intended for, in particular, torture and murder as international crimes¹¹⁸ and/or aggravated forms of murder in any circumstances¹¹⁹ to be punished by no less than 10 or

¹¹⁰ 2012 KCC, Arts 43, 44, 152(1); 2019 KCC, Arts 40, 41, 146(1). While the Supreme Court found that the 5-40-year range in the PKCC was more lenient than life imprisonment (*see* SCC Decision, KSC-SC-2024-02/F00018, para.101), it failed to consider the below factors. In any event, consideration of a 40-year maximum range could not reasonably have led to a lower sentence in the circumstances of this case.

¹¹¹ *See* Appeal Judgment, KSC-CA-2023-02/F00038, paras 451, 459, 478; Trial Judgment, KSC-BC-2020-05/F00494, paras 787, 805-812.

¹¹² 2012 KCC, Arts 43, 44, 152; 2019 KCC, Arts 40, 41, 146(1).

¹¹³ For example, in relation to the SFRY Code and PKCC, the Supreme Court concluded that they were not *lex mitior* in this case based exclusively on the global sentencing ranges and applicable maximum penalties, without reference to available imprisonment ranges beneath the maximum. *See* SCC Decision, KSC-SC-2024-02/F00018, paras 97-102. It did the opposite with the 2012 KCC and 2019 KCC.

¹¹⁴ 2019 KCC, Arts 42(2), 146(1); SCC Decision, KSC-SC-2024-02/F00018, paras 100-101.

¹¹⁵ SCC Decision, KSC-SC-2024-02/F00018, para.101.

¹¹⁶ *See* 2019 KCC, Art.146(1); 2012 KCC, Art.152(1); PKCC, Art.120; SFRY Code, Arts 142-144.

¹¹⁷ This cannot be reasonably interpreted to mean that the legislator viewed such crimes as of the same severity; rather, it reflects the unique structure of Common Article 3, which combines acts of various gravity together, as opposed to other provisions that draw distinctions between each individual crime.

¹¹⁸ 2019 KCC, Arts 143(1), 144(1), 145(1)(1.2), 147(1)(1.2); 2012 KCC, Arts 149(1), 151(1)(1.2), 153(1)(1.2), 152(2)(1); PKCC, Arts 118(1), 119(1), 121(1).

¹¹⁹ *See e.g.* 2019 KCC, Art.173; 2012 KCC, art.179; PKCC, art.147. *See also* 2012 KCC, Arts 271(5), 283(3), 329(5), 334(4). There is no reasonable explanation as to why the legislator would view these crimes as of lesser gravity and deserving of lesser punishment. *See also* ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, para.69.

15 years' imprisonment. Moreover, under the PKCC, the crimes would have been eligible for long-term imprisonment, with a 21-year minimum.¹²⁰

43. Accordingly, the Supreme Court erred in finding that one, subsidiary part of the 2019 KCC punitive regime was the most lenient Kosovo law. Globally and properly considered, the sentencing range under the 2019 KCC was, at least, five years to life imprisonment. Notably, KSC Article 44(2) provides a lower minimum sentence and the same maximum.

2. The SCC Decision arbitrarily and unreasonably annulled the sentence imposed by the Court of Appeals

44. In addition to the errors set out above, the SCC Decision further undermined the legal basis for the Applicant's sentence when it arbitrarily and unreasonably annulled the sentencing part of Appeal Judgment after a review of five individualised sentences imposed at the ICTY¹²¹ and the identified sentencing range.¹²²

45. Contrary to the Supreme Court's conclusion that '[b]ecause no sentencing range was determined, it was impossible to know the maximum sentence the Appeals Panel had in mind',¹²³ the Appeal Judgment correctly identified life imprisonment as the maximum sentence before the KSC.¹²⁴ Further, the Court of Appeals did, in fact, take into account the five to 25-year range, along with the maximum penalties under the 2019 KCC and other sentencing ranges,¹²⁵ before finding that a 22-year sentence reflected the totality of the Applicant's criminal conduct.¹²⁶

46. Insofar as the SCC Decision turned, in part, on its *proprio motu* review of five individualised sentences imposed between 2004 and 2008 at the ICTY, the Supreme

¹²⁰ PKCC, Arts 37(2), 118.

¹²¹ SCC Decision, KSC-SC-2024-02/F00018, paras 104-105. These were the only sentences considered beyond those already reviewed in the Appeal Judgment.

¹²² SCC Decision, KSC-SC-2024-02/F00018, para.107.

¹²³ SCC Decision, KSC-SC-2024-02/F00018, para.103.

¹²⁴ Appeal Judgment, KSC-CA-2023-02/F00038, paras 449-450.

¹²⁵ Appeal Judgment, KSC-CA-2023-02/F00038, para.476, fn.1284.

¹²⁶ Appeal Judgment, KSC-CA-2023-02/F00038, para.480.

Court did not review any sentencing practices under the identified five to 25-year range in Kosovo.¹²⁷ For example, under the Kosovo Supreme Court Sentencing Guidelines, crimes punishable in that range and with two or more factors of increased culpability or harm and no mitigation should generally be punished by a sentence between 21 and 25 years.¹²⁸ In practice, Kosovo courts have imposed sentences of 21-years to life for a single murder with two or more aggravating factors.¹²⁹

47. Finally, notwithstanding its questionable finding that individualised sentences at the ICTY could be considered under KSC Article 3(3) as a source of customary international law,¹³⁰ the Supreme Court's review of five ICTY sentences it considered comparable ignored that the 'plethora of case-specific factors in sentencing' cannot be easily quantified and make the transposition of sentences from one case to another impossible.¹³¹ The sentences identified by the Supreme Court, if properly analysed, could not reasonably have been considered to be part of a 'line of sentences imposed in similar circumstances for similar offences' when compared to this case, let alone demonstrate any disproportion.¹³² For example – in addition to the many distinct, case-specific factors – there were significant mitigating factors in several of the cases referred to in the SCC Decision, including two guilty pleas.¹³³ Importantly, the Court

¹²⁷ See SCC Decision, KSC-SC-2024-02/F00018, para.107.

¹²⁸ Kosovo Supreme Court Sentencing Guidelines, pp.141-143 (setting out the factors to be taken into account when determining 'increased culpability' and 'increased harm'), 153 (setting out the factors underlying Category 9 in the sentencing table, namely, 'two or more factors of increased culpability or harm with no mitigation', 'significant aggravation with no mitigation', or 'total aggravation significantly in excess of mitigation'), 200 (Section VI(e): establishing for a crime punishable by at least five years under Category 9 as deserving of between 21 and 25 years).

¹²⁹ See e.g. Sentencing Policy in Kosovo, pp.115-116, 119-123, 126-128 (reviewing sentences imposed in cases involving aggravated murder). See also pp.128-130 (criticising a sentence of 20 years for an aggravated murder as more lenient than the applicable range).

¹³⁰ SCC Decision, KSC-SC-2024-02/F00018, para.103. For the definition of customary international law, see e.g. ICJ Statute, Article 38(1)(b) (referring to 'international custom, as evidence of a general practice accepted as law').

¹³¹ Appeal Judgment, KSC-CA-2023-02/F00038, para.478, fn.1295 (and sources cited therein).

¹³² *Contra* SCC Decision, KSC-SC-2024-02/F00018, para.105.

¹³³ Tarčulovski was a 'relatively junior person [...] carrying out orders', 'was not the actual perpetrator', and the court found mitigating, but no aggravating circumstances. See ICTY, *Boškoski and Tarčulovski* TJ, paras 594, 600-601. Rajić and Zelenović pleaded guilty (a significant mitigating circumstance in both cases) and the imposed sentences were in the range recommended by the prosecution, in Rajić's case,

of Appeals had already considered a broader sample of sentences at multiple international and Kosovo courts when reaching the 22-year sentence.¹³⁴

48. Overall – whether considered alone or together – the multi-layered errors set out above demonstrate that the SCC Decision was arbitrary and manifestly unreasonable, violating ECHR Article 7.

E. THE CHAMBER SHOULD CORRECT AND REMEDY THE CONSTITUTIONAL VIOLATIONS

49. Considering the nature of the violations, resulting in an arbitrary punishment framework, and the fundamental rights concerned, and consistent with its heightened powers when verifying compliance with ECHR Article 7,¹³⁵ the Panel should: (i) confirm the correct interpretation and application of KSC Article 44(2); (ii) annul the relevant part of the SCC Decision; and/or (iii) if considered necessary, return the case to Trial Panel I to determine a new sentence within the confines of the Law and Constitution.¹³⁶ Trial Panel I, which is still composed of the same Judges that decided the Applicant's case, is intimately familiar with the record and best-suited. Returning the case to the Trial Panel for this limited purpose would also be consistent with the Applicant's rights, ensuring that the matter is dealt with expeditiously, but also providing him adequate opportunities to have his new sentence reviewed, as appropriate, by the Court of Appeals and Supreme Court.

III. RELIEF REQUESTED

50. For the foregoing reasons, the Chamber should: (i) summarily dismiss Grounds 1 and 3 of the Referral; (ii) dismiss the arguments in the Referral under Ground 2, but nonetheless find that the SCC Decision violated constitutional rights; and (iii) provide an appropriate remedy, as requested in paragraph 49 above.

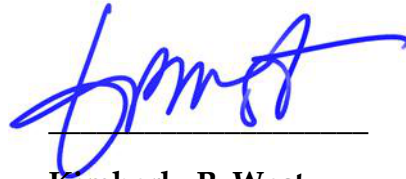
the court found three additional mitigating factors, and in Zelenović's case, the court found no aggravating factors. *See* ICTY, *Rajić* SJ, paras 18, 164-165, 181; ICTY, *Zelenović* SJ, paras 64, 68, 70.

¹³⁴ Appeal Judgment, KSC-CA-2023-02/F00038, para 478.

¹³⁵ *See* para. 22 above.

¹³⁶ SCCC Rules, Rule 30. *See, similarly*, Kosovo, *Rakipi* Constitutional Court Judgement, pp. 40, 41; Kosovo, *Berisha et al.* Constitutional Court Judgement, p. 11.

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Specialist Prosecutor

Friday, 8 November 2024

At The Hague, the Netherlands.