

**In:** KSC-CC-2024-27  
**The Specialist Prosecutor v. Mr. Salih Mustafa**

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

**Registrar:** Fidelma Donlon

**Filing Participant:** Specialist Counsel for Salih Mustafa

**Date:** 29 November 2024

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**Mustafa's joint Response to the SPO and VC Submissions to the  
Mustafa's Constitutional Court Referral with public Annex 1**

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## I. INTRODUCTION

1. In the present document Mustafa (the “Applicant”) responds to the SPO and Victims’ Counsel’s submission on Mustafa’s Constitutional Court Referral.

## II. PROCEDURAL BACKGROUND

2. On 27 of September 2024, Mustafa filed a Referral to the Specialist Chamber of the Constitutional Court.<sup>1</sup> (“SCCC”).
3. On 17 of October 2024 the Panel of the Specialist Chamber of the Constitutional Court issued a Decision on the Working Language and Further Proceedings.<sup>2</sup> In the Decision the Constitutional Court laid down the respective timelines for SPO and Victims’ Counsel to file their Response and the Applicant (also referred to as Mustafa, Accused or Defence) to file his Reply to it.
4. On 8 November 2024 the SPO<sup>3</sup> and Victims’ Counsel<sup>4</sup> filed their respective responses to Mustafa’s Referral.
5. The present document is a consolidated Reply to the Responses of the SPO (in part A) and Victims’ Counsel (in part B).

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<sup>1</sup> KSC-CC-2024-27/ F00001; Referral to the Constitutional Court Panel concerning 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 (“Referral”).

<sup>2</sup> KSC-CC-2024-27/F00007; The Specialist Chamber of the Constitutional Court Decision the Working Language and Further Proceedings

<sup>3</sup> Victims’ Counsel’s submissions on Mustafa’s Constitutional Court referral, KSC-CC-2024-27/ F00008.

<sup>4</sup> Prosecution Submissions on Referral of Salih MUSTAFA (KSC-CC-2024-27/F00001) with public Annex 1-KSC-CC-2024-27/F00009

### III. PART A

#### REPLY TO SPO'S SUBMISSIONS

##### A. REPLY TO THE SPO'S SUBMISSION REGARDING GROUND 1

6. Mustafa submits in his Referral violation of his Constitutional Rights under Article 102 (3) and Article 31 (1) and (2) of the Constitution, as well as Article 6 of the ECHR. The matter is about the issue of whether, in an Accused 's Request for Protection of Legality, the victims have any standing in those proceedings. A participatory status was granted to the victims by the Supreme Court. In the Referral of the Accused there is nothing concerning the victims' personal interests and rights of: notification, acknowledgment, and reparations.
7. Defence disputed the participatory status of the victims, via their Victims' Counsel, in the Accused's Request for Protection of Legality. Nevertheless, a participatory status was granted by the Supreme Court.
8. The SPO refers to Article 22 (3) of the Law, and acknowledges victims' rights as it cites that the victims have rights in criminal proceedings to notification, acknowledgment and reparations (...).<sup>5</sup> The Supreme Court in its Decision (paragraph 27) cited the same Article.
9. Mustafa reiterates the correct reading and interpretation of Article 22 (3) of the Law. Mustafa submits that the first sentence of that Article 22 (3) precisely states the substance of the personal rights and interests of victims. It reads: "*a victim's personal interest and rights (...) are notification, acknowledgement and reparation*". (emphases added). It is nothing more and nothing less than these three things.

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<sup>5</sup> Paragraph 5 of Prosecution Submissions on Referral of Salih MUSTAFA (KSC-CC-2024-27/F00001) with public Annex 1-KSC-CC-2024-27/F00009.

10. Therefore, where the Supreme Court considered: *“(i) where the victim’s personal interest and rights were affected; and (ii) their participation was not prejudicial to or inconsistent with the rights of the accused”*,<sup>6</sup> is wrong as it introduces firstly a participatory status in an extraordinary legal remedy filed by an accused and secondly introduces extra modalities that are not prescribed in Article 22 (3). The victims’ personal interest and rights in the criminal proceedings are simply limited to notification, acknowledgment and reparation. They do not venture beyond these three personal interests and rights.
11. The Supreme Court acknowledged that both the Law and the Rules are silent on whether the Victims’ Counsel can respond to a Request for Protection of Legality.
12. Mustafa submits violations of his constitutional rights under Article 102 (3). The Article 102 of the Constitution addresses the fundamental issues of the justice system and its general principles and reads: *“Courts shall adjudicate based on Constitution and the Law”*. The above-mentioned article is of an imperative nature and directed towards the courts. Where both the Constitution and the Law (and even the Rules of Procedure) are silent on the issue of a participatory status in proceedings before the Supreme Court, no “new” law or rule can be “awarded, invented, or granted”. No participatory status can be deducted from an inexistent rule.
13. Mustafa submits that it is of paramount importance that the articles of the Constitution are upheld. It is the foundation upon which the entire judicial system is build. It gives certainty to the people and the institutions of Kosovo. Mustafa derives a constitutional right and protection from it. Any individual, including an accused, as well as any institution must be assured that courts shall apply the said article and that people can rely on it. Courts, including the SC Supreme Court, are bound by it

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<sup>6</sup> Paragraph 27 of the Decision of the Supreme Court, KSC-SC-2024-02/F00018, 29 July 2024

14. In sum, where no victim's participation is prescribed by any law or rule, the participatory status as granted by the Supreme Court, is wrong and incompatible with the Article 102 (3) of the Constitution. As stated above, it diverts from the rights prescribed in Article 22 (3) of the Law.
15. Mustafa disputes the SPO submission that there is no appearance of any constitutional violation as it apparently misreads the object and purpose of this article that clearly instructs all the courts. It is in everyone's interest that prescribed laws are upheld and applied. Where laws or rules do not exist or at least are unwritten, sudden "new" application of some "new" rules can result in random and unexpected application of rules that ultimately amount to legal uncertainty.
16. As a result of the above-mentioned Decision on this issue, Mustafa's equally protected constitutional rights under Article 31 (1) and (2), as explained in the Referral were violated. These two Articles of the Constitution have also been enshrined in Article 6 of the ECHR.
17. As there is no further substantive argument brought forward by the SPO on this matter, Mustafa maintains Ground 1 of his Referral, its admissibility and the substance as elaborated in his Referral.

## B. REPLY TO THE SPO'S SUBMISSION REGARDING GROUND 2

18. In its submissions the SPO states the following: *"In relation to Ground 2, the SPO agrees with the Applicant that the SCC Decision failed to provide effective safeguards against arbitrary punishment, as required by Article 33 of the Constitution and ECHR Article 7."*<sup>7</sup>

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<sup>7</sup> Paragraph 2 of Prosecution Submissions on Referral of Salih MUSTAFA (KSC-CC-2024-27/F00001) with public Annex 1-KSC-CC-2024-27/F00009

19. Nowhere in Mustafa's Referral such statement as: *"failed to provide effective safeguards against arbitrary punishment"* appears. Nor can Mustafa's referral be interpreted in that manner. Mustafa disputes the characterization made by the SPO regarding his Referral. Either the SPO failed to understand Ground 2 of the Referral or the SPO is mischaracterizing Ground 2 of Mustafa's Referral.
20. For the benefit of the clarity Mustafa repeats the core of Ground 2 of his Referral. Mustafa has put in clear terms what he seeks as formulated in paragraph 38 of the Referral: *"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."* Mustafa disagrees with the Decision of the Supreme Court as, even though it applied the *lex mitior*, it nevertheless applied the incorrect legal standard for the *lex mitior* in his specific case.
21. Similarly, in the SPO submissions, the SPO contents that: *"Ground 2 also raises an issue of fundamental importance to the functioning of the KSC, which is of a special and temporary nature."*<sup>8</sup>
22. This is completely a misinterpretation of Mustafa's Ground 2 of the Referral. Mustafa disputes that any such thing is being raised in his Referral. The Rule 15 (2) of the Rules of Procedure specifies that any submissions must be in relation to the Referral. Mustafa submits that the above submission and many other submissions of the SPO bare no relations to Mustafa's Referral whatsoever. The SPO raises in its submissions irrelevant issues that simply do not relate to the point that Mustafa made and venture outside the scope of review of the SC Constitutional Court.

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<sup>8</sup> Ibid, paragraph 8

23. The Constitutional Court in its Decision on the Working Language and Further Proceedings decided on an exceptional bases, to receive submissions on the Referral <sup>9</sup>, not on any other issues.
24. The SPO states that Ground 2 of Mustafa's Referral is admissible. The vast majority of the submissions of the SPO with regard to Ground 2 do not relate, discuss, argue or materially refute the point for which Mustafa made his referral regarding Ground 2.
25. SPO submissions are not a substantive reaction to Mustafa's referral. Mustafa maintains his complaint regarding the incorrect application of the *lex mitior* by the Supreme Court, by failing to apply the 1976 SFRY Code for the specific case of Mustafa.
26. Mustafa will thus only address the submissions of the SPO insofar in those submissions anything can be found that directly relates to, or substantively challenges the argument made by Mustafa in his Referral.
27. Mustafa submits that the scope of the review of the SCCC is that Mustafa, as an accused, my lodge a Referral alleging violation of his individual rights and freedoms as guaranteed under the Constitution. Mustafa, as an applicant, in his Referral, submits that such violations have occurred.<sup>10</sup>
28. The Constitutional Court, in its Decision, emphasized that: *"the proceedings before the SCCC are not adversarial in nature and only concern alleged violations of an individual's human rights. To that end there are no parties to the proceedings as such and there is no inherent right to make submissions or respond to a referral by an applicant"*.<sup>11</sup> (emphases added).

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<sup>9</sup> Paragraph 9 of Mustafa's Referral to SCCC; KSC-CC-2024-27/F00007.

<sup>10</sup> Rule 20 of the Rules of Procedure for the Specialist Chamber of Constitutional Court

<sup>11</sup> Paragraph 9 of the Decision on Working Language and Further proceedings: KSC-CC-2024-27/F00007, 17 October 2024.



29. The facts of Mustafa 's case have been dealt with in the earlier proceedings at the KSC. Therefore, issues regarding the Trial Judgment and the Appeal Judgment that appear in SPO's submissions, are irrelevant for the scope of review by the Constitutional Court. The single issue of Ground 2 has been explicated above (and in paragraph 38 of Mustafa's Referral). It is only a legal issue and nothing else.
30. Mustafa submits that the above factual issues put forward by the SPO fall outside the scope of review of the constitutional right that Mustafa submits to have been violated by the Supreme Court.
31. Similarly, the SPO submissions as to: the function of Constitutional Court, Article 2, 3 and 5 of the ECHR, mandate of the KSC and SPO, courts mandate, historical context or the legislative intent of UNMIK Regulations and many other issues that have been put forward by the SPO in paragraphs 9 to 40, are irrelevant issues that simply do not relate in a substantive manner to Ground 2 of Mustafa's Referral.
32. Mustafa simply alleges violation of his constitutional rights under among others Article 33 (2) (4). Having said this, Mustafa will address some issues that appear in the SPO submissions.
33. The title above paragraph 32 of SPO submissions reads that the Supreme Court "*arbitrarily and unreasonably applied the lex mitior principle*". The SPO acknowledges apparently that the *lex mitior* must be applied. The only point that the SPO is making is that the *lex mitior* was *arbitrarily* and *unreasonably* applied, however, the manner of application is not the subject matter of this proceeding. It is of an entirely different nature and is not in any manner submitted by Mustafa. Mustafa submitted that for the correct application of the *lex mitior* the Supreme Court should have applied the 1976 SFRY Criminal Code as the correct legal standard.

34. Mustafa submits that the SPO cannot ignore the codification of the *lex mitior* in both the Constitution and the Law. Therefore, there is no place to discuss whether some law was applied arbitrarily or unreasonably. There is also no place to discuss whether the *lex mitior* principle only applies to binding laws.<sup>12</sup> And the Kosovo Constitution is certainly a binding law.
35. The SPO cannot ignore the consistent jurisprudence by the Kosovo Supreme Court and the Kosovo Constitutional Court regarding the applicability of the *lex mitior* over many years since the courts in Kosovo have been dealing with war crimes against civilian population within the context of the armed conflict at hand. The jurisprudence is detailed in the Annex 1 of this Reply. In addition, the SPO cannot ignore the jurisprudence of international tribunals in which a far more lenient sentences were imposed for similar crimes as to which Mustafa was adjudged guilty.<sup>13</sup>
36. With regards to the SFRY 1976 Criminal Code, the SPO submits the following:  
*“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, underlying the Applicant’s conviction.”*<sup>14</sup>
37. The SPO ignores the fact that Article 142 of the SFRY Criminal Code codifies international crimes under Customary International Law and general principles recognized by international community.<sup>15</sup> Moreover, it is incorrect that the SFRY does

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<sup>12</sup> Para 33: of SPO Submission on Referral of Salih Mustafa (KSC-CC-2024-27/ F00009).

<sup>13</sup> See the Annex 1 with this Reply

<sup>14</sup> Paragraph 31 of SPO Submission on Referral of Salih Mustafa (KSC-CC-2024-27/ F00009).

<sup>15</sup> Commentary of the 1976 CCFRY, page 495 (page 16 of the Annex 1 of the Referral) which reads: *“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”*. Also pages 487 to 491 of the Commentary (pages 8 until 12 of the Annex 1 of the Referral).

not include modes of liability such as for which Mustafa has been adjudged guilty, as Article 22 of the SFRY 1976 Criminal Code lists several forms of liability such as co-perpetration or committing the act in some other way.<sup>16</sup>

38. The SFRY 1976 Criminal Code specifies under Article 11, 22, 23 and 24 the modes of liability. The Article 142 of the SFRY Criminal Code itself includes the mode of liability of “ordering” as well as the people belonging to a party to a conflict.<sup>17</sup>
39. The SPO claims that Mustafa incorrectly relies on the Dayton Agreement and that it would primarily concern Bosnia and Herzegovina.<sup>18</sup> However, the signatory to the treaty is the federal Republic of Yugoslavia, of which at that time, Kosovo was part of its territory. As the ECtHR in the case of *Maktouf & Demjanovic vs Bosnia and Herzegovina* considered in paragraph 75 that the death penalty could no longer be imposed after the entry into force of the Dayton Agreement on 14<sup>th</sup> of December 1995. The SPO’s claim that Mustafa’s Referral is relying on *Maktouf* is misplaced is simply wrong. As the SPO overlooked the relevant paragraphs in that decision regarding the application of SFRY 1976 Criminal Code as well as the abolition of death penalty in the SFRY.<sup>19</sup> Even Victims’ Counsel came to this conclusion in its Reply to Mustafa’s Request for Protection of Legality.<sup>20</sup>

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<sup>16</sup> See Decision of Kosovo Constitutional Court, Ref.no.RK1971/22, of case number KI210/21 Application by Darko Tasic for Constitutional Review of the Judgment of the Kosovo Supreme Court, 31 March 2022, page 9 as included in Annex 3 of the present Referral of Salih Mustafa.

<sup>17</sup> See Annex 1- Commentary to Article 142 of the SFRY Code of 1976, under 4 in page 22. See also: Court of Appeals of Kosovo-Special Department APS. No. 37/2020, 30 November 2020, page 2. The Applicant Tasic was found guilty of war crimes against civilian population by the Court of Appeals of Kosovo-Special Department, pursuant to the Articles 22, 33, 34, 38, 41, 50 and Article 142 of 1976 SFRY Criminal Code. The Decision of the Court of Appeals is the third document in the Annex 3 of the Referral.

<sup>18</sup> Paragraph 56 of SPO Submission on Referral of Salih Mustafa (KSC-CC-2024-27/ F00009).

<sup>19</sup> ECtHR Judgment of 18 July 2013, application numbers 2312/08 and 34179/08 *Maktouf and Damjanovic vs. Bosnia and Herzegovina*, para 27 and 75.  
<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22002-7636%22%5D%7D>

<sup>20</sup> Paragraph 11 of the VC Response to the Request on the Protection of Legality, KSC-SC-2024-02/F00013 dated 12 April 2023

40. In paragraph 36 of the SPO submissions the SPO incorrectly states that the abolition of death penalty pursuant to UNMIK Regulations did not occur until 12 December 1999, in a footnote the SPO refers to UNMIK Regulation 1999/24, Sections 1.5 and 3. This is incorrect as UNMIK Regulation 1999/24 under Section 3 specifies that: *“The present regulation shall be deemed to have entered into force as of 10 June 1999”*.<sup>21</sup>
41. In the same paragraph 36 of the SPO submissions under the same footnote the SPO erroneously refers to the UNMIK Regulation 2000/59, since the SPO ignored the Section 4 of the transitional provisions of this UNMIK Regulation which reads: *“The present regulation shall enter into force on 27 October 2000. The new section 1.6 shall apply only to crimes committed after that date”*.<sup>22</sup> (emphases added).
42. This has also been decided in the jurisprudence. The Supreme Court of Kosovo considered in its Decision in the Tasic case regarding this Regulation that: *“based on Article 1.6 of the amended Regulation, which clearly stipulates that long term imprisonment applies only to crimes committed after 27 October 2000, considering the principle of non-retroactive effect of criminal law and the fact that there is no legal bases for imposing long-term imprisonment during this period”*.<sup>23</sup>

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<sup>21</sup> [https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999\\_24.htm](https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_24.htm)

<sup>22</sup> UNMIK Regulation 2000/59

[https://unmik.unmissions.org/sites/default/files/regulations/02english/E2000regs/RE2000\\_59.htm](https://unmik.unmissions.org/sites/default/files/regulations/02english/E2000regs/RE2000_59.htm)

Paragraph 85 on page 24 of Mustafa's Referral mistakenly stated: *“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.”* Instead, it should have read: *“Article/Section 4 of the transitional provisions”*. The Regulation which it referred to is UNMIK Regulation No. 2000/59, dated 27 October 2000;

<sup>23</sup> See Annex 3 of the Referral which includes both the Kosovo Constitutional Court and Kosovo Supreme Court Decisions. The Supreme Court Decision is the second document in the Annex 3 of the Referral, Pml.nr.138/2021 of 5 May 2021. The core considerations can be found on pages 3 and 4 of the Decision of the Supreme Court in the Darko Tasic case.

43. The clearest explanation, also cited above, regarding the abolition of the death penalty and the law that was still in place regarding the punishment of war crimes, can be found in the Decision of the Supreme Court of Kosovo in the case of Darko Tasic case no.PML.nr.138/2021 on 5th of May 2021, where it exactly addressed the issue on page 3 and 4. The Supreme Court considered: *“Moreover the principle of applying the most favorable law leads the Supreme Court to conclude that for all war crimes and other offences committed until 27 October 2000, for which the Criminal Law of Yugoslavia is applicable, the maximum sentence that can be imposed is 15 years. Therefore, it is emphasized in the request for protection of legality that the maximum prison sentence that could have been imposed on the conflict in this case was 15 years of imprisonment.”*<sup>24</sup>
44. The Decision Kosovo Supreme Court in the case of Tasic stands not alone on this issue. It was confirmed once again by the Supreme Court of Kosovo in its Decision in Goran Stanisic case on 20 March 2023.<sup>25</sup> It is important to note that both Tasic and Stanisic were convicted for war crimes against civilian population and acted within the same conflict and were even committed in the exact same time period as Mustafa.
45. The Decision of the Supreme Court of Kosovo in the case of Darko Tasic was confirmed by the Constitutional Court of Kosovo on 31 March 2022 on Paragraphs 48 to 52.<sup>26</sup>
46. There are no other issues that need to be addresses in the SPO submissions as they do not substantially dispute Mustafa’s Referral.

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<sup>24</sup> See Annex 3 of the Referral. The Supreme Court Decision is the second document in the Annex 3 of the Referral, Pml.nr.138/2021 of 5 May 2021. The core considerations can be found on pages 3 and 4 of the Decision of the Supreme Court in the Darko Tasic case. The Applicant Tasic was found guilty of war crimes against civilian population by the Court of Appeals of Kosovo-Special Department, pursuant to the Articles 22, 33, 34, 38, 41, 50 and Article 142 of 1976 SFRY Criminal Code. The Decision of the Court of Appeals is the third document in the Annex 3 of the Referral.

<sup>25</sup> See Annex 3 of the Referral, the Supreme Court Decision in Goran Stanisic Case is the fourth document in the Annex 3 of the Referral. The case is listed under: file no. 2020: 017884 Date: 20.03.2023, case no. Pml.no.26/2023.

<sup>26</sup> The Decision of the Constitutional Court/ Decision No. KI210/21/ is the first document in the Annex 3 of the Referral.

## C. REPLY TO THE SPO'S SUBMISSION REGARDING GROUND 3

47. The SPO contends that the Applicant seeks to re-litigate factual matters relating to the cause of the murder victim's death. Mustafa disputes this characterization.
48. Mustafa reiterates that there is no factual disagreement, but that the reasons to arrive at the conclusion of both the Trial and Appeals Panels were without a factual basis. The cause of death was never determined as the victim was found three months after the date when he was last seen alive. Neither did anybody ever witness the victim's death. Therefore, the mistreatment and the denial of medical aid were assumed causes of death. Moreover, a reasoned opinion as to why the victim's death was nevertheless attributed to Mustafa or his BIA subordinates, was absent in both judgments of Trial Chamber and Appeals Panel.
49. The essence of the Ground 3 raised in the Referral is that the absence of such reasoning caused a substantial violation of Rule 159 (3) and Rule 183 (3) of the Rules. And in the furtherance of it, violation of Article 6 (1) of the ECHR, equally enshrined in Article 22 of the Constitution of the Republic of Kosovo.
50. The SPO merely repeats what both the Court of Appeals and Supreme Court considered but does not substantively address the issues raised by Mustafa. As there are no substantive issues that are within the SPO submissions, nothing further needs to be addressed.
51. Mustafa maintains his position *regarding* the violation of Article 6 (1) of the ECHR and reiterates that the ECtHR found a violation to that effect where it considered in a case that: *"the applicants request was shot down with little or no motivation whatsoever"* or when obvious discrepancies were *"not at all or not sufficiently addressed."*<sup>27</sup>

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<sup>27</sup> Parties must have been heard (46); discrepancies not at all or not sufficiently addressed. ECtHR

52. The Supreme Court erred where it summarily dismissed Ground 4 in Mustafa's Request for Protection of Legality.<sup>28</sup>

#### IV. PART B

##### REPLY TO VICTIMS' COUNSEL SUBMISSIONS

53. At the outset in replying to the Victims' Counsel submissions, Mustafa wishes to repeat the submissions that he made in paragraph 9 until 14 of the present documents. This is simply in order to become too repetitive in this part. Apart from the position taken in the above-mentioned paragraphs Mustafa will address now the matters that are raised by the Victims' Counsel regarding Ground 1 of Mustafa's Referral.
54. Mustafa noted that the Victims' Counsel did not make any submissions regarding the admissibility of Mustafa's Ground 1 of his Referral.
55. Victims' Counsel apparently agrees that neither the Law nor the Rules explicitly give any rule regarding making any submissions in proceedings before the Supreme Court. At least Victims' Counsel does not rely on any explicit provision within the Law or the Rules in her submissions.
56. This is in line with the Supreme Court who acknowledged that both the Law and the Rules are silent on whether Victims' Counsel can respond to a Request for Protection of Legality.<sup>29</sup>

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Ajdacic 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%20Ajdacic%20v.%20Croatia,%2013.12.2011.pdf>

<sup>28</sup> KSC-SC-2024-02/F00018. Paragraph 57 of the Decision on Request for protection of legality, in which Mustafa's Ground 4 was summarily dismissed.

<sup>29</sup> Paragraph 27 of the Decision of the Supreme Court, KSC-SC-2024-02/F00018, 29 July 2024



57. Where there is no prescribed provision in the Law or the Rules it follows that there can be no right to make submissions in such proceedings.
58. It is line with the Decision of the Specialist Chamber of the Constitutional Court in which it was *“emphasized that proceedings before the SCCC are not adversarial in nature and only concern alleged violations of an individual’s human rights. To that end there are no parties to the proceedings as such and there is no inherent right to make submissions or respond to a referral by an Applicant”*.<sup>30</sup> (emphases added).
59. Chapter 8 of the Rules of Procedure and Evidence even define the modalities of participation in proceedings. Rule 114 (1) limits the modality of participation of victims. The modalities expressly refer to Article 22 (6) and 46 (9) of the Law. Article 22 (6) limits Pre-Trial and Trial Proceedings. Article 46 (9) is tailored to the victims itself regarding a decision on Victim Status or a decision regarding a Reparation Order. Thus, as neither of these articles and their provisions are applicable in case where an Accused seeks Protection of Legality, an extraordinary legal remedy, no participatory status can be deducted from these two articles. Any other provision on the Law or in the Rules regarding participatory status of victims is inexistent.
60. Mustafa submits that proceedings before the Supreme Court where an accused seeks in a Request for Protection of Legality the review of some decisions of an Appellate Court, are not adversarial in nature as well (and neither are there any parties). In this perspective it needs to be noted that a request for Protection of Legality is and extraordinary legal remedy are distinct from trial proceedings. The Supreme Court recalled that a Request for Protection of Legality is not a third instance appeal.<sup>31</sup>

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<sup>30</sup> Paragraph 8 of Decision on the Working Language and Further Proceedings, KSC-CC-2024-27/F00007, 17 October 2024.

<sup>31</sup> Paragraph 27 of the Supreme Court Decision, KSC-SC-2024-02/F00018 of 29 July 2024



61. Therefore, it is logic that neither the Law nor the Rules of Procedure and Evidence provide a right, let alone an inherent right, of a participatory status of victims in case where an accused seeks protection of legality through such request.
62. Moreover, Victims' Counsel even stated in its Response to Mustafa's Request for Protection of Legality that: "*Victims' Counsel has to date not made any submissions linked to questions of law as far as sentencing was concerned, as victims' interests were not squarely affected*".<sup>32</sup> Against this background it even more peculiar that the Supreme Court granted a participatory status to victims in the sense that victims, via their counsel, could respond to Mustafa's Request for Protection of Legality.
63. Irrespective of the position of Victims' Counsel, Mustafa submits that where he seeks protection of legality, the victims cannot be granted participatory status because the personal interests and rights of victims are defined and dictated by the Article 22 (3) of the Law which defines those personal interests and rights only as notification, acknowledgment and reparation.
64. Victims' Counsel is relying on Article 22 of the Law and several subparagraphs within the same article. However, Article 22 (3) explicitly states that the Specialist Chambers Rules of procedure and Evidence (...) shall also determine the content and procedure for submission and acceptance of any application to participate in the proceedings and declaration of damage. It is a clear example about whether and when victims can make submissions.
65. Mustafa submits that the above makes it clear that only if there are provisions explicitly granting participation they must be provided for within the Law and the Rules.

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<sup>32</sup> Paragraph 4 of the VC Response to the Request on the Protection of Legality/ KSC-SC-2024-02/F00013/ 12 April 2024

66. Victims' Counsel's reliance in Article 22 (6) of the Law is wrong. As this article clearly states "*may permit*" one cannot deduct an inherent right from it. The wording of this provision as well as the limitations given within the provision, victims cannot deduct any inherent right from it. In addition, the proceedings to which this article is tailored are very distinct from the extraordinary legal remedies used by Mustafa.
67. Victims' Counsel's reliance on Rule 23 of the Rules is incorrect as all the subparagraphs within that rule simply concern the Registry within the framework of judicial support functions of the Registrar. Victims' Counsel cannot deduct any inherent or implicit right for victims from it.
68. Victims' Counsel's reliance on Rule 67 of the Rules is incorrect as all the subparagraphs within that rule simply concern the *Amicus Curiae*. Victims' Counsel cannot deduct any inherent or implicit right for victims from provisions made for an entirely different entity.
69. Indeed, Mustafa's constitutional right to a fair trial are violated when he needs to respond to all kinds of submissions of third parties that are allowed to participate into proceedings. If, like in the present case, none of the grounds in the Request for Protection of Legality concern anything regarding the victims' rights (as even acknowledged by the Victims' Counsel), then indeed Mustafa's fair trial rights, as guaranteed by Article 6 of the ECHR, are violated when (several) victims (groups) are granted a participatory status, particularly in cases where they are allowed to make submissions.
70. As Rule 113 (8) enables the Panel to divide victims into groups and enable those groups to participate in proceedings, a situation will occur in which an accused will need to address submissions of SPO as well as, for example, three or four individual groups of victims. This simply cannot be the object and purpose of extraordinary legal remedies as provided for in the Law. In other words, an accused in such proceedings would need to

respond to submissions made by several groups of victims, where any of them (or even an individual victim) can make submissions about some topic via their respective victims' counsels. Even within one group victims can exist with each of them claiming some individual right being affected and making, via their counsel, various submissions. Mustafa submits that by granting participatory status to victims would create a *Mikado like* complex litigation at the Supreme Court level, in which each alleged personal interest claim needs to be dissected. In an extraordinary legal remedy, the scope of review for the Supreme Court is not that it first would need to disentangle a *Gordian Knot* of alleged affected personal interests of victims. Nor should it be demanded of an accused to address each of those. In sum, the proceedings with the Supreme Court should be kept simple and not make them unnecessary complex.

71. Therefore, the present Supreme Court Decision granting a participatory status with the criterion "where their personal interests are affected", violates not only the correct interpretation of Article 22 (3) of the Law. It also violates the principle that without a prescribed law, one will nevertheless be able to rely on an acclaimed right. Legal rights can only originate from custom, statutes, laws or legislative acts. Lastly, granting a participatory status will institute a regime in which each of the victims (or group of victims) can claim that any of his/her personal interests are affected by a Request of an accused. Proceedings at the level of Supreme Court cannot entail the review of whether any interest of an individual victim is affected. Where an accused simply seeks review of a decision that violated an accused's right through an extraordinary legal remedy, such review needs to remain limited in terms of those who can participate in it.
  
72. In short, the Supreme Court review is only about an assessment of whether there was an error of law in a decision regarding the accused (as enumerated in Article 48 (7) of the Law). Mustafa underlines that the only one eligible to file a Request for Protection of Legality is a *party*. The only parties in a KSC criminal case are the SPO and an accused.

The victims have a separate status but are not considered a party within a meaning of Article 48 of the Law. Their entire position is differentiated in the Law and the Rules.

73. Mustafa maintains that where a law or rule is inexistent and a new rule is suddenly instituted, then by default, his constitutional rights under Article 31(1) (2) as well as Article 6 of the ECHR are violated.

74. Mustafa's Request for Protection of Legality had nothing to do with the Victims, a Reparation Order or with anything else regarding the Victims of the present case. Fair trial protection for victims, as advanced by Victims' Counsel in its submissions, is therefore not an issue that needs to be addressed.

## V. CONCLUSION

75. For the reasons given above, Mustafa maintains the Grounds as he made in his Referral and submits that the SPO and Victims' Counsel's Submissions on the Referral of Mustafa should be REJECTED.

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**At The Hague, the Netherlands**



**Julius von Bóné**

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