



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**File number:** KSC-CC-2024-27

**Before:** The Specialist Chamber of the Constitutional Court

Judge Vidar Stensland, Presiding

Judge Roumen Nenkov

Judge Romina Incutti

**Registrar:** Fidelma Donlon

**Date:** 17 April 2025

**Language:** English

**File name:** Referral to the Constitutional Court Panel concerning the violations of Mr Salih Mustafa's fundamental rights guaranteed by 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

**Classification:** Public

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**Judgment on the Referral of Salih Mustafa Concerning Fundamental Rights  
Guaranteed by Articles 31 and 33 of the Kosovo Constitution and Articles 6 and 7  
of the European Convention on Human Rights**

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**Applicant**

Salih Mustafa

**Specialist Prosecutor**

Kimberly P. West

**Victims' Counsel**

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## The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge

Roumen Nenkov, Judge

Romina Incutti, Judge

Having deliberated remotely delivers the following Judgment

### I. PROCEDURE

#### A. REFERRAL AND RELATED REQUESTS

1. On 27 September 2024, Mr Salih Mustafa ("Applicant") made a referral to the Specialist Chamber of the Constitutional Court ("Chamber") under Article 113(7) of the Constitution of the Republic of Kosovo ("Constitution") and Article 49(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), as well as Rules 4(c) and 20(1) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court ("SCCC Rules" and "Referral", respectively).<sup>1</sup> The Applicant was represented by Mr Julius von Bóné.

2. In the Referral, the Applicant complained about violations of his fundamental rights under Articles 31(1) and (2), 33(2) and (4), and 102(3) of the Constitution, and Articles 6 and 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention") in relation to criminal proceedings against him, which took place before the Specialist Chambers ("SC").<sup>2</sup>

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<sup>1</sup> KSC-CC-2024-27, F00001, 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, public, 27 September 2024, with Annexes 1-7, public.

<sup>2</sup> Referral, paras 2-3, 14-128.

3. On 3 October 2024, the President of the SC, pursuant to Article 33(3) of the Law, assigned the above Panel to rule on the Referral.<sup>3</sup>

4. On 17 October 2024, the Chamber decided, pursuant to Article 20 of the Law and Rule 5 of the SCCC Rules, that the official language of the present proceedings shall be English, with official translation or interpretation provided by the Registry into the two other official languages of the SC, namely Albanian and Serbian.<sup>4</sup> Among others, the Chamber also found it appropriate to grant, on an exceptional basis, the requests of the Specialist Prosecutor's Office ("SPO") and of the Victims' Counsel to file written submissions in response to the Referral (the latter on the scope of victims' participation only), and to invite the Applicant, should he wish to do so, to file written submissions in reply.<sup>5</sup>

#### B. WRITTEN SUBMISSIONS

5. On 8 November 2024, both the SPO and the Victims' Counsel filed their written submissions on the Referral.<sup>6</sup>

6. On 29 November 2024, the Applicant filed his written submissions in reply to the SPO and the Victims' Counsel submissions.<sup>7</sup>

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<sup>3</sup> KSC-CC-2024-27, F00002, Decision to assign judges to a Constitutional Court Panel, public, 3 October 2024. As regards the venue of the proceedings, see KSC-CC-2019-06, F00001, Invocation of change of venue for referrals made pursuant to Article 49 of the Law, public, 18 January 2019; F00002, Decision on the location of proceedings before the Specialist Chamber of the Constitutional Court, public, 22 January 2019.

<sup>4</sup> KSC-CC-2024-27, F00003, Decision on the working language and further proceedings, public, 17 October 2024 ("Decision on working language and further proceedings"), para. 7 and Disposition, para. 1.

<sup>5</sup> Decision on working language and further proceedings, paras 9-10 and Disposition, paras 2-6.

<sup>6</sup> KSC-CC-2024-27, F00009, Prosecution submissions on referral of Salih Mustafa (KSC-CC-2024-27/F00001), public, 8 November 2024, with Annex 1, public ("SPO submissions"); F00008, Victims' Counsel's submission on Mustafa's Constitutional Court Referral, public, 8 November 2024 ("Victims' Counsel submissions").

<sup>7</sup> KSC-CC-2024-27, F00010, Mustafa's joint response to the SPO and VC submissions to the Mustafa's Constitutional Court Referral, public, 29 November 2024 ("Applicant submissions"), with Annex 1, public.

### C. EXAMINATION OF THE REFERRAL

7. The Chamber now turns to the examination of the Referral, based on the Referral and the written submissions of the SPO, the Victims' Counsel, and the Applicant. This judgment refers to the facts of the case and the aforementioned submissions insofar as relevant for the Chamber's assessment of the Referral.

## II. THE FACTS

### A. CHARGES LEADING TO THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

8. On 19 June 2020, the SPO submitted the indictment against the Applicant, as confirmed by the pre-trial judge.<sup>8</sup> The confirmed indictment charged the Applicant with four counts of war crimes under Article 14(1)(c) of the Law, namely arbitrary detention, cruel treatment, torture, and murder.<sup>9</sup>

9. More specifically, the SPO alleged that the Applicant was the commander of the BIA Guerrilla unit ("BIA"), a unit within the Llap Operational Zone of the Kosovo Liberation Army ("KLA").<sup>10</sup> According to the SPO, all of the crimes charged in the indictment were committed in the context of and associated with an armed conflict between, on the one side, the KLA and, on the other, forces of the Federal Republic of Yugoslavia and the Republic of Serbia,<sup>11</sup> and against persons detained at a compound in Zllash/Zlaš, Kosovo, referred to as the Zllash Detention Compound (ZDC), which was used by BIA as a safe house and a detention and interrogation site.<sup>12</sup> Furthermore, the SPO alleged that the Applicant was individually criminally responsible for the arbitrary detention, cruel treatment, and torture of at least six persons at the ZDC,

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<sup>8</sup> KSC-BC-2020-05, F00011/A02/RED, Public redacted version of Indictment, public, 2 October 2020 (original filed on 19 June 2020) ("Confirmed indictment"); F00008/RED, Public redacted version of decision on the confirmation of the indictment against Salih Mustafa, public, 5 October 2020 (original filed on 12 June 2020).

<sup>9</sup> Confirmed indictment, para. 35.

<sup>10</sup> Confirmed indictment, para. 2.

<sup>11</sup> Confirmed indictment, paras 3-4.

<sup>12</sup> Confirmed indictment, para. 5.

between approximately 1 April and 19 April 1999,<sup>13</sup> and the murder of one person, between approximately 19 April and the end of April 1999.<sup>14</sup> In this regard, the SPO pleaded direct commission, commission pursuant to a basic form of joint criminal enterprise (“JCE I”) or an extended form of joint criminal enterprise (the latter limited to the charge of murder as a war crime), as well as ordering, instigating, aiding and abetting, and superior responsibility as forms of criminal responsibility.<sup>15</sup>

10. On 24 September 2020, pursuant to an arrest warrant and transfer order issued by the pre-trial judge,<sup>16</sup> the Applicant was arrested in Kosovo,<sup>17</sup> and transferred to the SC Detention Facilities in The Hague.<sup>18</sup>

11. On 28 October 2020, after having originally declined to enter a plea at his initial appearance before the pre-trial judge on 28 September 2020,<sup>19</sup> the Applicant pleaded not guilty to the crimes charged in the confirmed indictment.<sup>20</sup>

12. On 7 May 2021, finding that all the necessary procedural steps had been taken to consider the Applicant’s case file complete, the pre-trial judge transmitted it to a trial panel.<sup>21</sup>

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<sup>13</sup> Confirmed indictment, paras 18-30, 35.

<sup>14</sup> Confirmed indictment, paras 31-33, 35.

<sup>15</sup> Confirmed indictment, paras 7-17, 34-35.

<sup>16</sup> KSC-BC-2020-05, F00009/A01/RED, Public redacted version of arrest warrant for Mr Salih Mustafa, public, 24 September 2020 (original filed on 12 June 2020); F00009/A02/RED, Public redacted version of order for transfer to detention facilities of the Specialist Chambers, public, 24 September 2020 (original filed on 12 June 2020).

<sup>17</sup> KSC-BC-2020-05, F00013, Notification of arrest pursuant to Rule 55(4), public, 24 September 2020, para. 4.

<sup>18</sup> KSC-BC-2020-05, F00014, Notification of reception in the detention facilities of the Specialist Chambers, public, 24 September 2020, para. 2.

<sup>19</sup> KSC-BC-2020-05, Transcript, public, 28 September 2020, p. 11, lines 24-25.

<sup>20</sup> KSC-BC-2020-05, Transcript, public, 28 October 2020, p. 60, lines 2-13.

<sup>21</sup> KSC-BC-2020-05, F00119, Decision transmitting the case file to trial panel I, public, 7 May 2021, paras 8, 10.

## B. TRIAL PROCEEDINGS

13. The trial commenced on 15 September 2021 and closed on 15 September 2022.<sup>22</sup> During the proceedings, the trial panel received evidence from thirty (30) witnesses, and also heard the views and concerns of one victim participating in the proceedings.<sup>23</sup> The trial panel admitted into evidence, *inter alia*, oral evidence of *viva voce* witnesses, written statements of witnesses and of the Applicant, as well as documentary evidence and expert reports.<sup>24</sup>

14. At trial, the Applicant maintained that the alleged crimes could not have been committed by him, as for a large part of the indictment period he had been at other locations, far from Zllash/Zlaš.<sup>25</sup> He therefore sought to be acquitted on all the charges in the confirmed indictment.<sup>26</sup>

15. On 16 December 2022, the trial panel delivered the trial judgment, whereby it found the Applicant guilty of having directly committed the war crime of torture, and of having committed, as part of JCE I, the war crimes of arbitrary detention, torture, and murder, in the context of the non-international armed conflict between the KLA and Serbian forces.<sup>27</sup> As regards the charge of cruel treatment as a war crime, the trial panel held that it was “fully consumed” by the charge of the war crime of torture and, in consequence, it found the Applicant not guilty of the war crime of cruel treatment.<sup>28</sup> The Applicant was eventually sentenced to a single-sentence of twenty-six (26) years

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<sup>22</sup> KSC-BC-2020-05, F00494/RED3/COR, Further redacted version of corrected version of public redacted version of trial judgment, public, 8 June 2023 (original filed on 16 December 2022) (“Trial judgment”), paras 8, 19.

<sup>23</sup> Trial judgment, paras 9, 11, 13, 30.

<sup>24</sup> Trial judgment, para. 30.

<sup>25</sup> KSC-BC-2020-05, F00457/COR/A01, Corrected version of Annex 1 to Defense final trial brief, public, 21 July 2022 (“Defence final trial brief”), p. 84.

<sup>26</sup> See Defence final trial brief, p. 84. See also KSC-BC-2020-05, Transcript, public, 15 September 2022 (“Closing statements”), p. 4798, lines 17-18.

<sup>27</sup> Trial judgment, paras 758-760, 831.

<sup>28</sup> Trial judgment, paras 667, 831.



of imprisonment, with credit for time served.<sup>29</sup>

16. On 6 April 2023, the trial panel issued an order against the Applicant, awarding 207,000 Euros in reparations to eight (8) victims participating in the proceedings.<sup>30</sup>

### **1. Murder conviction**

17. As regards the charge for the war crime of murder, during the trial proceedings, the Applicant maintained that the SPO had failed to provide any material evidence proving that the alleged murder victim had been killed, or the cause of death of the victim.<sup>31</sup> However, on the basis of the evidence before it, the trial panel found that the only reasonable conclusion for the death of the victim was that he was killed between on or around 19 April and around the end of April 1999, as a result of a combination of: (i) the severe mistreatment inflicted by BIA members who detained him, causing serious bodily harm, (ii) the denial of medical aid by BIA members; and (iii) gunshot wounds caused by bullets,<sup>32</sup> in respect of which the trial panel found that there existed a reasonable doubt as to their attribution to the BIA members or to Serbian forces.<sup>33</sup> Nevertheless, the trial panel concluded that, even if the gunshot wounds were solely attributable to the Serbian forces, the extreme mistreatment against the murder victim and the lack of medical aid constituted substantial causes of the victim's death,<sup>34</sup> and were exclusively attributable to the Applicant's acts and omissions, in his capacity as BIA commander.<sup>35</sup>

18. Therefore, the trial panel concluded that the material element (*actus reus*) of the war crime of murder was satisfied.<sup>36</sup> Ultimately, the trial panel found the Applicant

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<sup>29</sup> Trial judgment, paras 829-830.

<sup>30</sup> KSC-BC-2020-05, F00517/RED/COR, Corrected version of public redacted version of reparation order against Salih Mustafa, public, 14 April 2023 (original filed on 6 April 2023), para. 283.

<sup>31</sup> Closing statements, p. 4768, lines 1-5.

<sup>32</sup> Trial judgment, para. 624.

<sup>33</sup> Trial judgment, paras 627-637.

<sup>34</sup> Trial judgment, paras 626, 638.

<sup>35</sup> Trial judgment, paras 625, 638-639.

<sup>36</sup> Trial judgment, paras 689-690.

guilty for having committed murder as a war crime pursuant to Article 14(1)(c)(i) of the Law.<sup>37</sup>

## 2. Sentencing

19. During the trial proceedings, the Applicant argued, *inter alia*, that the wording “shall take into account” in Article 44(2) of the Law has an imperative character, and that the trial panel was duty bound to apply any more lenient sentencing for the crime provided in Kosovo Law.<sup>38</sup> He likewise claimed that the trial panel should apply the Criminal Code of the Socialist Federal Republic of Yugoslavia of 1976 (“1976 SFRY Criminal Code”) as the law applicable to the charged crimes at the time of their alleged commission,<sup>39</sup> and that, when determining the sentence, the trial panel must also take into account the principles provided in Article 44(2)(a)-(c) of the Law.<sup>40</sup>

20. At the outset, the trial panel observed that, pursuant to Article 44(1) of the Law, it may impose a maximum sentence of life imprisonment.<sup>41</sup> The trial panel then found that the wording “shall take into account” in Article 44(2) of the Law required it, for the purpose of determining the sentence, to take into consideration the punishments provided for crimes under the applicable law in Kosovo at the time of the commission of the relevant crimes and, in particular, any subsequent more lenient punishment.<sup>42</sup> However, the trial panel held that it was not bound by such considerations.<sup>43</sup> In this regard, it found that the 1976 SFRY Criminal Code was the relevant applicable law in Kosovo at the time of the commission of the crimes and took note that Article 142 of the 1976 SFRY Criminal Code, entitled “War crime against the civilian population”, provided for either “imprisonment for not less than five years or [...] the death

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<sup>37</sup> Trial judgment, paras 760, 831.

<sup>38</sup> Closing statements, p. 4792, lines 15-22.

<sup>39</sup> Closing statements, p. 4793, lines 16-23.

<sup>40</sup> Closing statements, p. 4796, line 6 to p. 4597, line 23.

<sup>41</sup> Trial judgment, para. 779.

<sup>42</sup> Trial judgment, para. 780.

<sup>43</sup> Trial judgment, para. 780.

penalty” and that Article 38 thereof, entitled “Imprisonment”, provided that the “punishment of imprisonment may not be longer than 15 years” but that “a term of 20 years [may be imposed] for criminal acts eligible for the death penalty.”<sup>44</sup> Lastly on this matter, the trial panel noted that the sentencing ranges applicable under the 1976 SFRY Criminal Code demonstrate that, at the time, the most serious crimes, such as war crimes, attracted the most severe sentences.<sup>45</sup>

21. The trial panel then proceeded to identify the relevant factors to determine the Applicant’s sentence pursuant to Article 44(5) of the Law and Rule 163(1) of the Rules, and to weigh and balance all such factors.<sup>46</sup> On this basis, the trial panel held that the punishment of imprisonment of a considerable duration was a justified reaction, and sentenced the Applicant to terms of: (i) ten (10) years of imprisonment for the war crime of arbitrary detention; (ii) twenty-two (22) years of imprisonment for the war crime of torture; and (iii) twenty-five (25) years of imprisonment for the war crime of murder, and imposed a single-sentence of twenty-six (26) years reflecting the totality of the criminal conduct of the Applicant, deducting from the sentence the time he had spent in detention since his arrest on 24 September 2020.<sup>47</sup>

### C. APPEAL PROCEEDINGS

22. On 2 February 2023, the Applicant filed an appeal against the trial judgment, in which he requested a Court of Appeals panel to: (i) reverse the convictions issued by the trial panel and (a) either acquit him on all counts, or (b) return the case to the trial panel; or (ii) in case all or any convictions would be affirmed, to reduce the sentence imposed on the Applicant.<sup>48</sup>

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<sup>44</sup> Trial judgment, para. 781.

<sup>45</sup> Trial judgment, para. 781.

<sup>46</sup> Trial judgment, paras 782-826.

<sup>47</sup> Trial judgment, paras 827-831.

<sup>48</sup> KSC-CA-2023-02, F00006/RED2, Public redacted version of Defence notice of appeal pursuant to Rule 176 (of Rules of Procedure and Evidence) against the judgment of the trial panel I of 16 December 2022, public, 13 February 2023 (original filed on 2 February 2023) (“Notice of appeal”), para. 2. See also F00021/COR/RED3, Second further public redacted version of corrected version of defense appeal brief

23. On 14 December 2023, the appeals panel affirmed the convictions issued against the Applicant, including for the war crime of murder, and granted, in part, his appeal against the sentence imposed on him by the trial panel.<sup>49</sup>

### 1. Murder conviction

24. In his appeal, the Applicant challenged, *inter alia*, the trial panel's findings on the *actus reus* underpinning his conviction for murder under Article 14(1)(c)(i) of the Law. Specifically, he argued that the trial panel had erred in law by failing to consider the principle of *novus actus interveniens*, namely whether, in the circumstances prevailing at the time the Serbian forces launched an offensive in the area, the deliberate killing of the murder victim by another person using a gun, was an intervening event which operated to break the chain of causation, relieving the Applicant of any culpability for the ultimate result.<sup>50</sup>

25. At the outset, the appeals panel recalled the findings of the trial panel on factual and legal causation and, as regards the latter, it held that the trial panel had correctly applied the "substantial contribution" test which was not, as such, challenged by the Applicant.<sup>51</sup> However, the appeals panel considered that, having acknowledged the existence of a reasonable doubt, and with a view to a fair attribution of responsibility for the murder victim's death, the trial panel was also required to address whether the assumed gunshots by Serbian forces constituted a third-party intervention that would have broken the chain of causation.<sup>52</sup> The appeals panel then determined, pursuant to a comparative analysis of a number of jurisdictions, that "to have any impact on the chain of causation set in motion by the original conduct, a new supervening event

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pursuant to Rule 179(1) of Rules of Procedure and Evidence ("Rules"), public, 15 September 2023 (original filed on 24 April 2023) ("Appeal brief"), paras 3, 446.

<sup>49</sup> KSC-CA-2023-02, F00038/RED, Public redacted version of appeal judgment, public, 14 December 2023 (original filed on the same day) ("Appeal judgment"), para. 484.

<sup>50</sup> Notice of appeal, para. 7; Appeal brief, paras 358-362. See also KSC-CA-2023-02, Transcript, public, 26 October 2023 ("Appeal hearing"), p. 56, line 7 to p. 57, line 18.

<sup>51</sup> Appeal judgment, paras 343-344.

<sup>52</sup> Appeal judgment, para. 345.

must not be foreseeable, or not form part of the original sphere of risk belonging to the accused and create a wholly new risk that is so potent as to render the original risk insignificant”.<sup>53</sup> In the view of the appeals panel, the trial panel’s findings supported the conclusion that the risk to the murder victim’s life posed by the advancing Serbian forces was: (i) foreseeable; (ii) part of the original sphere of risk stemming from the Applicant’s conduct, and (iii) not so potent as to render the original risk to the murder victim’s life insignificant.<sup>54</sup>

26. Therefore, the appeals panel held that, although the trial panel had not explicitly addressed the principle of *novus actus interveniens*, the Applicant failed to demonstrate that no reasonable trial panel could have determined that he satisfied the *actus reus* of murder, and dismissed his argument accordingly.<sup>55</sup>

## 2. Sentencing

27. In his appeal, the Applicant maintained, *inter alia*, that the trial panel erred by incorrectly or not at all applying the *lex mitior* principle when finding that it was not bound by the punishments provided for in laws applicable in Kosovo at the time the crimes were committed, or by any subsequent more lenient laws under Article 44(2) of the Law.<sup>56</sup> In this regard, he further argued that, in determining his punishment, the trial panel should have applied the 1976 SFRY Criminal Code in force at the time of commission, as amended by the United Nations Interim Administration Mission in Kosovo Regulation No. 1999/24 (“UNMIK Regulation No. 1999/24”).<sup>57</sup>

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<sup>53</sup> Appeal judgment, paras 346-347.

<sup>54</sup> Appeal judgment, para. 348.

<sup>55</sup> Appeal judgment, para. 349.

<sup>56</sup> Notice of appeal, para. 12; Appeal brief, paras 408, 410-416, 429-431; KSC-CA-2023-02, F00028/RED, Public redacted version of the Defence brief in reply to the Prosecution’s brief in response to Defence appeal and Victims’ Counsel response to defence appeal brief F00021 with one public annex pursuant to Rule 179(1) of the Rules of Procedure and Evidence (“Rules”), public, 3 July 2023 (original filed on 16 June 2023) (“Reply brief”), paras 104, 106-108. See also Appeal hearing, p. 58, line 23 to p. 61, line 18.

<sup>57</sup> Notice of appeal, para. 12; Appeal brief, paras 412-413, 419-427; Reply brief, para. 105.

28. As regards the wording “shall take into account” in Article 44(2) of the Law, the appeals panel found that it required the trial panel to consider the listed factors, but did not make them binding on it.<sup>58</sup> For the appeals panel, while the wording “shall” indicates an imperative, this refers to an obligation to “take into account” the factors, rather than to apply them as binding sources of law.<sup>59</sup> Accordingly, the appeals panel held that the principle of *lex mitior* is not engaged vis-à-vis these domestic provisions and, as such, found no error in the trial panel not conducting a *lex mitior* analysis.<sup>60</sup> In this regard, it further held that the *lex mitior* principle, as enshrined in Articles 33(2) and (4) of the Constitution, is only applicable if a law binding the SC is subsequently changed to a more favourable law by which the SC are also bound.<sup>61</sup>

29. However, the appeals panel found that the trial panel’s analysis of the domestic sentencing regime was insufficient to satisfy its obligation under Article 44(2) of the Law, namely to “take [these] into account”.<sup>62</sup> Specifically, it held that the analysis of the trial panel under Article 44(2)(b) of the Law failed to indicate with sufficient clarity its understanding of the sentencing ranges that came into effect subsequent to the time of commission of the crimes,<sup>63</sup> but ultimately found that this deficiency had no effect on the conclusions the trial panel drew with regard to the applicable sentencing ranges it had to take into account.<sup>64</sup> Furthermore, the appeals panel was of the view that the trial panel’s analysis under Article 44(2) of the Law should have encompassed judicial practice on the relevant sentencing ranges,<sup>65</sup> and, having conducted its own analysis thereof, it found that both international and Kosovo jurisprudence imposed shorter sentences than those imposed on the Applicant.<sup>66</sup> The appeals panel concluded that

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<sup>58</sup> Appeal judgment, para. 466.

<sup>59</sup> Appeal judgment, para. 466.

<sup>60</sup> Appeal judgment, para. 467.

<sup>61</sup> Appeal judgment, para. 468.

<sup>62</sup> Appeal judgment, para. 472.

<sup>63</sup> Appeal judgment, para. 472.

<sup>64</sup> Appeal judgment, paras 473-475.

<sup>65</sup> Appeal judgment, paras 472, 477.

<sup>66</sup> Appeal judgment, paras 478-479.

the trial panel had ventured outside of its discretionary bounds by imposing on the Applicant sentences that were out of reasonable proportion with a line of sentences imposed in similar circumstances for similar offences, thus committing a discernible error in sentencing.<sup>67</sup>

30. The appeals panel thus found it appropriate to reduce the individual sentences imposed on the Applicant by the trial panel to: (i) eight (8) years of imprisonment for the war crime of arbitrary detention; (ii) twenty (20) years of imprisonment for the war crime of torture; and (iii) twenty-two (22) years of imprisonment for the war crime of murder, and imposed a single-sentence of twenty-two (22) years reflecting the totality of the criminal conduct of the Applicant, deducting from the sentence the time he had spent in detention since his arrest on 24 September 2020.<sup>68</sup>

#### D. REQUEST FOR PROTECTION OF LEGALITY

31. On 14 March 2024, the Applicant filed a request for protection of legality before a Supreme Court panel seeking, *inter alia*: (i) annulment of the trial/appeal judgment(s) in relation to his conviction for the war crime of murder and return of the case to the competent panel for a new decision or retrial on grounds of alleged lack of reasoning, and (ii) modification of the appeal judgment in relation to sentencing on grounds of alleged failure to adhere to the *lex mitior* principle, or its annulment and return of the case for a new decision or retrial to the competent panel on the same grounds.<sup>69</sup>

32. On 15 March 2024, the Supreme Court panel ordered the SPO and the Victims' Counsel to file their responses to the Applicant's request for protection of legality, if

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<sup>67</sup> Appeal judgment, para. 479.

<sup>68</sup> Appeal judgment, paras 480, 484. The appeals panel considered that its findings on the Applicant's sentence did not affect the trial panel's findings in relation to the reparation order against the Applicant since: (i) he had not appealed the order, and (ii) the appeals panel confirmed all of the convictions that formed the basis thereof (see Appeal judgment, para. 481).

<sup>69</sup> KSC-SC-2024-02, F00011, Defence request for protection of legality with confidential Annex 1 and 2 pursuant to Article 48(6) to (8) of the Law and Rule 193 of the Rules, public, 14 March 2024 ("Request for protection of legality"), paras 3, 23-49, 67-87, 88-110, 117.



any, by 15 April 2024, and the Applicant to file a reply thereto, if any, within twenty-one (21) days of notification of the response(s).<sup>70</sup>

33. On 12 and 15 April 2024, the Victims' Counsel and the SPO, respectively, filed their responses to the request.<sup>71</sup> On 3 May 2024, the Applicant filed his replies to the responses by the SPO and the Victims' Counsel, respectively.<sup>72</sup>

34. On 29 July 2024, the Supreme Court panel issued its decision on the request for protection of legality.<sup>73</sup> Among other things, it summarily dismissed the Applicant's allegations with respect to his conviction for the war crime of murder, and granted the Applicant's request pertaining to sentencing, annulling the appeal judgment insofar as it related to the Applicant's sentence, and returning it to the appeals panel for a new determination of the sentence pursuant to Rule 194(1)(b) of the Rules.<sup>74</sup> The Supreme Court panel also ordered the continued detention of the Applicant pending the new determination of his sentence by the appeals panel.<sup>75</sup>

### **1. Participating victims' standing to make submissions**

35. As a preliminary matter, the Applicant submitted that the Victims' Counsel did not have standing to make submissions in the protection of legality proceedings, as none of the issues raised by the Applicant in the request affected the rights of the

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<sup>70</sup> KSC-SC-2024-02, F00012, Order on time-limits for submissions, public, 15 March 2024, para. 7.

<sup>71</sup> KSC-SC-2024-02, F00013, VC response to the request on the protection of legality, public, 12 April 2024; F00014, Prosecution response to request for protection of legality, public, 15 April 2024, with Annex 1, public.

<sup>72</sup> KSC-SC-2024-02, F00016, Reply to Prosecution's response to Defence request for protection of legality, public, 3 May 2024 ("Reply to Prosecution response to protection of legality"); F00017, Reply to Victims' Counsel response to Defence request for protection of legality, public, 3 May 2024 ("Reply to Victims' Counsel response to protection of legality").

<sup>73</sup> KSC-SC-2024-02, F00018, Decision on Salih Mustafa's request for protection of legality, public, 29 July 2024 ("Decision on protection of legality").

<sup>74</sup> Decision on protection of legality, paras 57, 108, 110, 112(b)-(e).

<sup>75</sup> Decision on protection of legality, para. 112(f).



victims.<sup>76</sup> Thus, in his reply, he did not address the content of the Victims' Counsel's response, and maintained that the latter should be dismissed.<sup>77</sup>

36. At the outset, the Supreme Court panel observed that the Law and the Rules are silent on whether Victims' Counsel can respond to a request for protection of legality.<sup>78</sup> Nevertheless, the Supreme Court panel was of the view that victims who have been granted participatory status in proceedings before the SC may, through their Victims' Counsel, respond to parties' submissions, including to a protection of legality request of an appeal judgment, where their personal interests are affected and their response is not prejudicial to or inconsistent with the rights of the accused, i.e. the Applicant in this case.<sup>79</sup> The Supreme Court panel further specified that any such submissions shall be confined to the grounds raised in the request for protection of legality and must set forth how the participating victims' personal interests are impacted as a result.<sup>80</sup> It also clarified that it will determine on a case-by-case basis whether it shall consider the submissions of the Victims' Counsel.<sup>81</sup>

37. In this particular case, the Supreme Court panel considered that the participating victims had standing, via their Victims' Counsel, to respond to the Applicant's request since their personal interests could be affected by its findings on sentencing and the Applicant's conviction for the war crime of murder.<sup>82</sup> The Supreme Court panel was likewise satisfied that victims' participation on these grounds was neither prejudicial to nor inconsistent with the rights of the Applicant.<sup>83</sup> As such, it decided to consider the Victims' Counsel's submissions on these grounds.<sup>84</sup>

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<sup>76</sup> Reply to Victims' Counsel response to protection of legality, paras 10-13.

<sup>77</sup> Reply to Victims' Counsel response to protection of legality, para. 14.

<sup>78</sup> Decision on protection of legality, para. 27.

<sup>79</sup> Decision on protection of legality, para. 27.

<sup>80</sup> Decision on protection of legality, para. 27.

<sup>81</sup> Decision on protection of legality, para. 27.

<sup>82</sup> Decision on protection of legality, paras 29-32.

<sup>83</sup> Decision on protection of legality, paras 30-32.

<sup>84</sup> Decision on protection of legality, paras 30-32.

## 2. Murder conviction

38. In his request for protection of legality, the Applicant also claimed that the war crime of murder, as defined under Article 14(1)(c)(i) of the Law, was not appropriately adjudicated in his case, and that this amounted to a substantial violation of the Rules.<sup>85</sup> The Applicant alleged that, contrary to Rules 159(3), 164(2) and 183(3) of the Rules, the trial and appeal judgments failed to give sufficiently clear and consistent reasons and to address key evidence in relation to his conviction for the war crime of murder.<sup>86</sup> In particular, he argued that the trial and appeals panels failed to properly substantiate the elements required to establish his responsibility for the death of the murder victim in view of the third-party intervention, i.e. the assumed gunshots by Serbian forces.<sup>87</sup>

39. At the outset, the Supreme Court panel observed that the Applicant's arguments centred on the assumption that a finding of a third-party intervention by the trial or appeals panel in relation to the Serbian forces and the origin of the gunshot wounds found in the murder victim would have altered the outcome of the proceedings with respect to the Applicant's criminal responsibility for the victim's death.<sup>88</sup> The Supreme Court panel then proceeded to recall the findings of the trial panel, as also confirmed by the appeals panel,<sup>89</sup> and noted the latter's lengthy analysis to ascertain whether the assumed gunshots by Serbian forces constituted a third-party intervention that would have broken the chain of causation and relieved the Applicant of his responsibility for the death of the murder victim.<sup>90</sup> The Supreme Court panel further held that, though the Applicant had alleged a lack of legal reasoning in this regard, his arguments were factual in nature, as he essentially disagreed with the inferences drawn by the trial

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<sup>85</sup> Request for protection of legality, paras 88-89; Reply to Prosecution response to protection of legality, para. 42.

<sup>86</sup> Request for protection of legality, para. 90.

<sup>87</sup> Request for protection of legality, paras 91-109. See also Reply to Prosecution response to protection of legality, paras 43-45.

<sup>88</sup> Decision on protection of legality, para. 50.

<sup>89</sup> Decision on protection of legality, paras 51-52.

<sup>90</sup> Decision on protection of legality, paras 52-53.

panel and later upheld by the appeals panel as regards the attribution of the death of the murder victim to BIA members as opposed to Serbian forces.<sup>91</sup> In this respect, the Supreme Court panel noted that, even if a finding beyond reasonable doubt had been made in relation to a third-party intervention by the Serbian forces, it would not have altered the trial or appeals panel's reasoning on the Applicant's criminal responsibility for the death of the murder victim.<sup>92</sup> As such, it summarily dismissed the Applicant's complaint.<sup>93</sup>

### 3. Sentencing

40. As regards sentencing, the Applicant submitted that, pursuant to Article 44(2)(a) and (b) of the Law, considered in conjunction with Article 33(2) of the Constitution, the SC is bound by the sentencing ranges provided for the crime in Kosovo law.<sup>94</sup> In this regard, the Applicant also claimed that the SC is not an international tribunal, but a domestic court of Kosovo.<sup>95</sup> The Applicant maintained that the appeals panel failed to acknowledge that Article 44(2)(a) of the Law enshrines the principle of *lex mitior*, as provided for in Article 33(2) and (4) of the Constitution, Article 7 of the Convention, and Article 3 of the 2019 Kosovo Criminal Code, Code No. 06/L-074 ("2019 KCC"), as well as, previously, Article 3 of the 2012 Kosovo Criminal Code, Code No. 04/L-082 ("2012 KCC") and Article 2 of the 2003 Provisional Criminal Code of Kosovo, UNMIK Regulation No. 2003/25 ("2003 KCC").<sup>96</sup> He contended that Articles 38 and 142 of the 1976 SFRY Criminal Code applied in his case, resulting in a sentencing range of five (5) to fifteen (15) years of imprisonment for war crimes after the capital punishment was

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<sup>91</sup> Decision on protection of legality, para. 54.

<sup>92</sup> Decision on protection of legality, paras 55-57.

<sup>93</sup> Decision on protection of legality, para. 57.

<sup>94</sup> Request for protection of legality, paras 28, 31, 33-34, 47.

<sup>95</sup> Request for protection of legality, para. 30; Reply to Prosecution response to protection of legality, para. 22.

<sup>96</sup> Request for protection of legality, paras 34, 39, 41, 47; Reply to Prosecution response to protection of legality, para. 14.

abolished by UNMIK Regulation No. 1999/24.<sup>97</sup> The Applicant asserted that the non-application of the principle of *lex mitior* had led in his case to a violation of Articles 22 and 33(2) and (4) of the Constitution and Article 7 of the Convention, as interpreted by the European Court of Human Rights ("ECtHR").<sup>98</sup>

41. In addition, the Applicant submitted that, even if the sentencing ranges provided for in Kosovo law were to be considered only as "factors", they were still not taken into account by the appeals panel when it determined the sentencing range for his war crimes' conviction, in violation of Article 33(2) and (4) of the Constitution.<sup>99</sup> According to him, the appeals panel should have relied on jurisprudence emanating from Kosovo rather than international courts, as the former related to war crimes committed within the same conflict and/or time period as those the Applicant was found guilty of, and often applied the 1976 SFRY Criminal Code, in conjunction with UNMIK Regulation No. 1999/24.<sup>100</sup>

42. At the outset, the Supreme Court panel rejected the Applicant's submissions as to the nature of the SC, noting in this regard that it is not the categorisation of the SC as a particular type of court that determines the applicable law, but the law itself.<sup>101</sup> It then turned to the Applicant's allegations regarding the principle of *lex mitior* and its application to his punishment in the context of Article 44(2) of the Law and, relying on Articles 33(2) and (4) and 162(2) of the Constitution, together with Articles 3(2)(a) and 44(2)(b) of the Law, and Article 7(1) of the Convention, which binds the SC by virtue of Article 3(2)(e) of the Law and Articles 22(2), 53 and 162(2) of the Constitution, it found that the principle of *lex mitior* is applicable before the SC.<sup>102</sup> Accordingly, the Supreme Court panel found that the appeals panel had erred when it concluded that

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<sup>97</sup> Request for protection of legality, paras 38, 44, 71.

<sup>98</sup> Request for protection of legality, paras 34, 40-45, 48.

<sup>99</sup> Request for protection of legality, paras 69-70, 82-86.

<sup>100</sup> Request for protection of legality, paras 76, 81; Reply to Prosecution response to protection of legality, paras 36-38.

<sup>101</sup> Decision on protection of legality, paras 76-79.

<sup>102</sup> Decision on protection of legality, paras 80-83.

the SC are not required to consider the various domestic laws on war crimes to comply with the principle of *lex mitior*.<sup>103</sup> On the contrary, the Supreme Court panel held that the SC are bound to consider which of the relevant sentencing ranges under Kosovo law contains the most lenient sentencing range in accordance with the principle of *lex mitior*, and thereafter take this range into account when determining the punishment to be imposed.<sup>104</sup> Thus, it found that the appeals erred in the Applicant's case by not identifying a definitive sentencing range first before determining the sentence.<sup>105</sup>

43. The Supreme Court panel then proceeded to set forth the applicable law and the sentencing range to be taken into account in the Applicant's case.<sup>106</sup> In this regard, the Supreme Court panel emphasised the distinction made by the Law between Article 14 (war crimes under international law) and Article 15 (other crimes under Kosovo law) noting, specifically, that the latter refers to the 1976 SFRY Criminal Code, as amended by "UNMIK [R]egulation [No.] 2000/59", as well as other provisions of Kosovo laws, whereas the former, on the basis of which the Applicant was convicted, only refers to customary international law.<sup>107</sup> It thus found that there is a material distinction in the substantive crimes provided for in Article 14 and Article 15(1) of the Law.<sup>108</sup> For the Supreme Court panel, said distinction is further found in Article 16 of the Law, which sets out different modes of individual criminal responsibility for international crimes under Article 16(1) of the Law versus domestic crimes pursuant to Article 16(2) of the Law, as well as in Article 44(2) of the Law, which sets forth the sentencing regime for persons found guilty of an international crime, as opposed to Article 44(3) of the Law, which is concerned with the punishment to be imposed on persons found guilty of a domestic crime.<sup>109</sup> Relatedly, the Supreme Court panel noted that Article 14 of the Law

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<sup>103</sup> Decision on protection of legality, para. 87.

<sup>104</sup> Decision on protection of legality, paras 87-88.

<sup>105</sup> Decision on protection of legality, paras 89-92.

<sup>106</sup> Decision on protection of legality, paras 92-102.

<sup>107</sup> Decision on protection of legality, para. 93.

<sup>108</sup> Decision on protection of legality, para. 93.

<sup>109</sup> Decision on protection of legality, paras 95-96.

lists additional substantive crimes compared to Article 142 of the 1976 SFRY Criminal Code, and observed that, if it were to accept that the sentencing range provided by the latter should be taken into account pursuant to Article 44(2)(a) of the Law, this would mean that it would apply only to some, but not all of the crimes listed in Article 14 of the Law, thereby leading to the determination of different sentencing ranges pursuant to Article 44(2)(a) and (b) of the Law, depending on whether the war crimes charged under Article 14 of the Law are also reflected in the 1976 SFRY Criminal.<sup>110</sup>

44. For the above reasons, and also considering that the Applicant was convicted of war crimes under customary international law pursuant to Article 14 of the Law, the Supreme Court panel found that the 1976 SFRY Criminal Code and any amendments thereto were not applicable when determining the sentencing ranges to be taken into account pursuant to Article 44(2)(a) and (b) of the Law.<sup>111</sup> It also observed that, in any event, since Article 142 of the 1976 SFRY Criminal Code provided, at its highest, for the death penalty, it would not be considered as the more lenient sentencing range.<sup>112</sup> Lastly in this regard, the Supreme Court panel observed that the ECtHR's *Maktouf and Damjanović v. Bosnia and Herzegovina* judgment, on which the Applicant had relied in his request, was not instructive to his case, as it was based on the 1976 SFRY Criminal Code, as amended by UNMIK Regulation No. 1999/24.<sup>113</sup>

45. Noting that customary international law does not provide for sentencing ranges for war crimes, the Supreme Court panel then turned to review the relevant Kosovo laws which it deemed to correspond most closely to war crimes under Article 14(1)(c) of the Law, namely the 2003 KCC, the 2012 KCC, and the 2019 KCC, to determine the more lenient sentencing range.<sup>114</sup> Upon comparison, it ultimately found that the more

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<sup>110</sup> Decision on protection of legality, para. 94.

<sup>111</sup> Decision on protection of legality, para. 97.

<sup>112</sup> Decision on protection of legality, footnote 150.

<sup>113</sup> Decision on protection of legality, para. 98, referring to ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos 2312/08 and 34179/08, 18 July 2013.

<sup>114</sup> Decision on protection of legality, paras 99-102.

lenient sentencing range to be taken into account in the Applicant's case in accordance with Article 44(2)(b) of the Law and Article 146(1) in conjunction with Article 42(1) of the 2019 KCC was five (5) to twenty-five (25) years of imprisonment.<sup>115</sup>

46. As regards the assessment of the appeals panel under Article 44(2)(a) and (b) of the Law, the Supreme Court panel observed that, while it shared the view that the trial panel had imposed a disproportionate sentence on the Applicant, the appeals panel failed to explain how it arrived at a four (4)-year reduction thereof in the absence of a prior determination of the sentencing range to be taken into account.<sup>116</sup> In this regard, it also noted that, while the appeals panel had analysed and compared international jurisprudence with the circumstances of the Applicant's case, in situations akin to his in terms of scope, crimes charged, as well as number of victims, sentences significantly lower than twenty-two (22) years of imprisonment were imposed.<sup>117</sup> Recognising that the sentence imposed by the appeals panel was still within the identified sentencing range of five (5) to twenty-five (25) years, as well as the broad discretion of the appeals and trial panels in determining a sentence of imprisonment, the Supreme Court panel nevertheless held that the appeals panel may have come to a different determination regarding the Applicant's sentence if it had first identified the correct sentencing range to be taken into account.<sup>118</sup>

47. In light of the above, the Supreme Court panel concluded that the appeals panel had violated the criminal law within the meaning of Article 48(7) of the Law<sup>119</sup> and, as mentioned in paragraph 34 above, it annulled the appeal judgment insofar as it related to the sentence imposed on the Applicant, returning it to the appeals panel for a new determination thereof pursuant to Rule 194(1)(b) of the Rules.<sup>120</sup> In this regard, it also

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<sup>115</sup> Decision on protection of legality, paras 101-102.

<sup>116</sup> Decision on protection of legality, paras 103-105.

<sup>117</sup> Decision on protection of legality, paras 104-105.

<sup>118</sup> Decision on protection of legality, paras 106-107.

<sup>119</sup> Decision on protection of legality, paras 75, 108.

<sup>120</sup> Decision on protection of legality, paras 109-110, 112(c)-(e).



indicated that the appeals panel should, *inter alia*, be guided by the sentencing range identified by the Supreme Court panel.<sup>121</sup>

#### E. SUBSEQUENT DEVELOPMENTS

##### 1. Decision on the new determination of sentence by the appeals panel

48. On 10 September 2024, the appeals panel issued a decision whereby it made a new determination of the sentence of the Applicant.<sup>122</sup> In light of the Supreme Court panel's guidance and the sentencing range to be taken into account, the appeals panel re-examined international jurisprudence concerning war crimes comparable to those for which the Applicant was sentenced, and concurred with the Supreme Court panel that, in the analysed cases, sentences significantly lower than twenty-two (22) years of imprisonment were imposed.<sup>123</sup> Accordingly, the appeals panel found it appropriate to significantly reduce the individual sentences imposed on the Applicant in relation to the war crime of torture (i.e. thirteen (13) years of imprisonment) and the war crime of murder (i.e. fifteen (15) years of imprisonment), and to maintain the sentence for the war crime of arbitrary detention (i.e. eight (8) years of imprisonment).<sup>124</sup> Noting that the single-sentence of twenty-two (22) years of imprisonment imposed by it was out of reasonable proportion in light of the identified sentencing range, the analysed jurisprudence, as well as the specific circumstances of the Applicant's case, the appeals panel ultimately imposed a single-sentence of fifteen (15) years of imprisonment, with credit for time served since the Applicant's arrest on 24 September 2020.<sup>125</sup>

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<sup>121</sup> Decision on protection of legality, para. 111.

<sup>122</sup> KSC-CA-2023-02, F00045, Decision on the new determination of Salih Mustafa's sentence, public, 10 September 2024 ("Decision on the new determination of sentence").

<sup>123</sup> Decision on the new determination of sentence, paras 16-22.

<sup>124</sup> Decision on the new determination of sentence, paras 24-25.

<sup>125</sup> Decision on the new determination of sentence, paras 26, 28.



## **2. Requests for protection of legality against the decision on the new determination of sentence by the appeals panel**

49. On 9 December 2024, the Applicant filed a request for protection of legality in relation to the appeals panel's decision on the new determination of his sentence.<sup>126</sup> The Applicant sought, in particular, that his sentence for the war crime of murder be reduced, resulting in an overall reduction of the single-sentence of fifteen (15) years of imprisonment imposed on him.<sup>127</sup> In this regard, he submitted that Article 44(2)(a) and (5) of the Law was not applied correctly or, alternatively, that the appeals panel did not apply said provision in accordance with Article 33(3) of the Constitution, which was not considered in the determination of the new sentence.<sup>128</sup> He further claimed that the fifteen (15)-year prison sentence imposed on him for the war crime of murder was disproportionate within the meaning of Article 33(3) of the Constitution.<sup>129</sup> In the Applicant's view, the appeals panel's failure to consider Kosovo jurisprudence, where lower sentences had been imposed in comparable cases, resulted in him being treated differently from individuals tried in Kosovo, in contravention of Article 33(3) of the Constitution.<sup>130</sup>

50. On 10 December 2024, the SPO also filed a request for protection of legality in relation to the appeals panel's decision on the new determination of sentence.<sup>131</sup> The

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<sup>126</sup> KSC-SC-2024-03, F00001, Defence request for protection of legality pursuant to Article 48(6) to (8) of the Law and Rule 193 of the Rules, public, 9 December 2024 ("Mustafa request for protection of legality re new determination of sentence"), with Annex 1, public.

<sup>127</sup> Mustafa request for protection of legality re new determination of sentence, paras 4-5, 25-26, 40-41, 43.

<sup>128</sup> Mustafa request for protection of legality re new determination of sentence, paras 26, 30-35. See also KSC-SC-2024-03, F00005, Defense reply to the Prosecution's response to the Defense request for protection of legality, public, 17 February 2025 ("Reply to Prosecution response to Mustafa request"), para. 25.

<sup>129</sup> Mustafa request for protection of legality re new determination of sentence, paras 27-28, 38-39. See also Reply to Prosecution response to Mustafa request, para. 25.

<sup>130</sup> Mustafa request for protection of legality re new determination of sentence, paras 36-37. See also Reply to Prosecution response to Mustafa request, paras 23-25.

<sup>131</sup> KSC-SC-2024-04, F00001, Prosecution request for protection of legality against 'Decision on new determination of Salih Mustafa's sentence', public, 10 December 2024 ("SPO request for protection of legality re new determination of sentence") with Annex 1, public.

SPO alleged a violation of Article 44(1), 44(2)(b) and (c) of the Law, asserting that the appeals panel (i) failed to consider that Article 44(1) of the Law is the only sentencing range that is binding on the SC and to refer to Article 44(2)(c) of the Law in deciding on the Applicant's new sentence;<sup>132</sup> and (ii) incorrectly applied the five (5) to twenty-five (25) years sentencing range by failing to holistically consider the provisions of the 2019 KCC, and Kosovo's sentencing practices in relation thereto.<sup>133</sup> It further claimed that the appeals panel failed to (i) provide a reasoned opinion in connection to the new determination of sentence, and (ii) hear the parties and participants, which resulted in an arbitrary decision and a denial of justice.<sup>134</sup> Lastly, the SPO argued that the alleged substantial procedural violations demonstrated that the appeals panel had exceeded its authority under Articles 44 and 46 of the Law.<sup>135</sup> It thereby requested the Supreme Court panel to annul the decision on the new determination of sentence in its entirety, and return the case to the appeals panel for the limited purpose of determining a new sentence that complies with the Law and the Rules.<sup>136</sup>

51. On 25 February 2025, the Supreme Court panel seised of the aforesaid requests for protection of legality issued a decision addressing both.<sup>137</sup> While the requests were considered jointly, the Supreme Court panel underlined that each was adjudicated on its own merits in accordance with the applicable legal standards.<sup>138</sup> With respect to the request by the Applicant, the Supreme Court panel found that it amounted merely to

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<sup>132</sup> SPO request for protection of legality re new determination of sentence, paras 22-28. See also KSC-SC-2024-04, F00005, Prosecution reply relating to its protection of legality request, public, 17 February 2025 ("Reply to Mustafa response to SPO request"), para. 4, with Annex 1, public.

<sup>133</sup> SPO request for protection of legality re new determination of sentence, paras 29-33. See also Reply to Mustafa response to SPO request, para. 2.

<sup>134</sup> SPO request for protection of legality re new determination of sentence, paras 34-40. See also Reply to Mustafa response to SPO request, paras 2-3.

<sup>135</sup> SPO request for protection of legality re new determination of sentence, para. 41. See also Reply to Mustafa response to SPO request, para. 2.

<sup>136</sup> SPO request for protection of legality re new determination of sentence, paras 42-45.

<sup>137</sup> KSC-SC-2024-03, F00006; KSC-SC-2024-04, F00006, Decision on Mustafa's and Specialist Prosecutor's requests for protection of legality, public, 25 February 2025 ("Decision on Mustafa and SPO protection of legality").

<sup>138</sup> Decision on Mustafa and SPO protection of legality, para. 1.

a disagreement with (i) the appeals panel's exercise of discretion in the determination of the new sentence, and (ii) its own findings as to the applicable sentencing range and the application of the *lex mitior* principle.<sup>139</sup> Concluding that the Applicant was seeking to relitigate matters already decided upon, it dismissed the request in entirety.<sup>140</sup>

52. As regards the request by the SPO, the Supreme Court panel similarly held that the latter was merely disagreeing with the law as settled by the panel, and attempting to relitigate matters that had already been adjudicated by it.<sup>141</sup> It also found that no prejudice had resulted from the appeals panel's decision to proceed without hearing the SPO anew.<sup>142</sup> Accordingly, it summarily dismissed the SPO's arguments regarding the alleged substantial procedural violations.<sup>143</sup> Further finding that the SPO's claim that the appeals panel had exceeded its authority under Articles 44 and 46 of the Law had been rendered moot and should be dismissed accordingly,<sup>144</sup> the Supreme Court panel rejected the SPO's request in entirety.<sup>145</sup>

### III. ALLEGED VIOLATIONS

53. The Applicant complained before the Chamber that the Supreme Court panel's decision to grant Victims' Counsel standing to respond to his request for protection of legality by way of written submissions violated Article 102(3) of the Constitution and, as a consequence, also breached his right to a fair trial under Articles 31(1) and (2) of the Constitution and Article 6 of the Convention.<sup>146</sup>

54. Further, the Applicant complained that the Supreme Court panel had incorrectly applied the principle of *lex mitior* when it excluded the applicability of the 1976 SFRY

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<sup>139</sup> Decision on Mustafa and SPO protection of legality, paras 35-38.

<sup>140</sup> Decision on Mustafa and SPO protection of legality, paras 38, 64.

<sup>141</sup> Decision on Mustafa and SPO protection of legality, paras 48, 57-58.

<sup>142</sup> Decision on Mustafa and SPO protection of legality, para. 59.

<sup>143</sup> Decision on Mustafa and SPO protection of legality, paras 48, 59.

<sup>144</sup> Decision on Mustafa and SPO protection of legality, para. 63.

<sup>145</sup> Decision on Mustafa and SPO protection of legality, para. 64.

<sup>146</sup> Referral, paras 2-3, 14-35. See also Applicant submissions, paras 6-17, 53, 55-74.

Criminal Code in the determination of the relevant sentencing ranges to be taken into account for the purpose of his punishment, and identified the 2019 KCC as providing the most lenient range.<sup>147</sup> He asserted that the retroactive application of the 2019 KCC violated Articles 33(2) and (4) of the Constitution and Article 7 of the Convention.<sup>148</sup>

55. Lastly, the Applicant complained that the legal reasoning of the trial and appeals panels in connection to his conviction for murder under Article 14(1)(c) of the Law, as likewise upheld by the Supreme Court panel, violated his right to a fair trial under Article 31(1) of the Constitution and Article 6(1) of the Convention.<sup>149</sup>

#### IV. JURISDICTION

56. The Chamber observes that the Applicant filed the Referral under Article 113(7) of the Constitution and raised complaints in connection with the criminal proceedings against him, which took place before the SC. The Referral therefore relates to the SC and the SPO, as required by Article 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law. It follows that the Chamber has jurisdiction to rule on the Referral.

#### V. SCOPE OF REVIEW

57. The Chamber recalls, at the outset, its supervisory function as regards the work of the SC and the SPO insofar as fundamental rights and freedoms guaranteed by the Constitution are concerned.<sup>150</sup> Pursuant to Article 49(1) of the Law, the Chamber shall

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<sup>147</sup> Referral, paras 37-87, 89, 91-106. See also Applicant submissions, paras 20, 32-33.

<sup>148</sup> Referral, paras 2-3, 88, 90, 105-106.

<sup>149</sup> Referral, paras 108-128. See also Applicant submissions paras 48-49, 51.

<sup>150</sup> KSC-CC-2024-28, F00003, Judgment on the Referral of Haxhi Shala to the Specialist Chamber of the Constitutional Court, public, 6 March 2025 (*"Judgment on H. Shala referral concerning detention"*), para. 28; KSC-CC-2024-25, F00006/RED, Public redacted version of decision on the referral to the Constitutional Court Panel on the violation of Mr Hashim Thaçi's fundamental rights, public, 24 December 2024, (original issued on 15 November 2024) (*"Decision on H. Thaçi referral concerning special investigative measures"*), para. 27; KSC-CC-2023-22, F00011, Judgment on the referral by Nasim Haradinaj to the Specialist Chamber of the Constitutional Court, public, 31 May 2024 (*"Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression"*), para. 65. See also KSC-CC-2019-05, F00012, Decision on the referral of Mahir Hasani concerning prosecution order of 20 December 2018, public, 20 February 2019 (*"Decision on M. Hasani referral concerning SPO order"*), para. 24.

be the final authority on the interpretation of the Constitution as it relates to the subject matter jurisdiction and work of the SC and the SPO.

58. As regards the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, the Chamber notes that, by virtue of Article 22(2) of the Constitution, the guarantees set forth in the Convention apply at the constitutional level.<sup>151</sup> Indeed, the Kosovo Constitutional Court has reiterated that the rights and freedoms guaranteed by the international instruments enumerated in Article 22 of the Constitution “have the status of norms of constitutional rank and are an integral part of the Constitution, in the same way as all other provisions contained in the Constitution”.<sup>152</sup> The Chamber recalls in this regard that the Applicant’s complaints relate to Articles 31(1) and (2), 33(2) and (4), and 102(3) of the Constitution, and Articles 6 and 7 of the Convention. However, the Chamber observes that Article 102 of the Constitution is concerned with the general principles that govern the organisation and functioning of the Kosovo judicial system, and not with “individual rights and freedoms guaranteed by the Constitution”, as required by Article 113(7) of the Constitution and Article 49(3) of the Law. Accordingly, the Chamber determines that the Referral falls to be considered only under Articles 31(1), 33(2) and (4) of the Constitution, and Articles 6 and 7 of the Convention.<sup>153</sup>

59. Concerning the assessment of the Referral, the Chamber notes that, pursuant to Article 53 of the Constitution, human rights and fundamental freedoms guaranteed

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<sup>151</sup> See, for example, KSC-CC-2022-13, F00010; KSC-CC-2022-14, F00009, Decision on the referral of Jakup Krasniqi concerning the legality of charging joint criminal enterprise and the referral of Kadri Veseli concerning decision of the appeals panel on challenges to the jurisdiction of the Specialist Chambers, public, 13 June 2022 (“*Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*”), para. 34, with further references to case law.

<sup>152</sup> Kosovo, Constitutional Court, *Constitutional review of judgments [A.A.U.ZH. no. 20/2019 of 30 October 2019; and A.A.U.ZH. no. 21/2019, of 5 November 2019] of the Supreme Court of the Republic of Kosovo*, KI 207/19, Judgment, 10 December 2020 (5 January 2021), para. 111.

<sup>153</sup> See, similarly, *Judgment on H. Shala referral concerning detention*, para. 29; *Decision on H. Thaçi referral concerning special investigative measures*, para. 28; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 66; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, paras 34-35.

by the Constitution “shall be interpreted consistent with the court decisions of the [ECtHR]”. Further, the Kosovo Constitutional Court has consistently recognised the application of Article 53 of the Constitution in its review of constitutional referrals.<sup>154</sup> It has also stated that “the Constitutional Court *is bound* to interpret human rights and fundamental freedoms consistent with the court decisions of the [ECtHR]”.<sup>155</sup> In that light, and given Articles 22(2) and 53 of the Constitution, this Chamber has particular regard to the jurisprudence of the ECtHR in its review of the Applicant’s Referral.<sup>156</sup>

60. Lastly, the Chamber recalls that its task, under Article 113(7) of the Constitution and Article 49(1) and (3) of the Law, is to assess whether the irregularities complained of by the Applicant violated his individual rights and freedoms guaranteed by the Constitution.<sup>157</sup> Accordingly, the Chamber does not decide on the Applicant’s guilt or innocence.<sup>158</sup> Likewise, it is not the Chamber’s role to decide whether the findings of

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<sup>154</sup> See, for example, Kosovo, Constitutional Court, *Request for constitutional review of judgment Pml no. 225/2017 of the Supreme Court of 18 December 2017*, KI 37/18, Resolution on inadmissibility, 30 May 2018 (11 June 2018), para. 37; *Constitutional review of decision Pn II no. 1/17 of the Supreme Court of Kosovo of 30 January 2017 related to the decision Pml no. 300/16 of the Supreme Court of 12 December 2016*, KI 62/17, Judgment, 29 May 2018 (11 June 2018), para. 43; *Request for constitutional review of judgment Pml no. 225/2017 of the Supreme Court of 18 December 2017*, KI 34/18, Resolution on inadmissibility, 23 May 2018 (11 June 2018), para. 41.

<sup>155</sup> Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 181/15 of the Supreme Court of the Republic of Kosovo of 6 November 2015*, KI 43/16, Resolution on inadmissibility, 14 April 2016 (16 May 2016), para. 50 (emphasis added).

<sup>156</sup> See, similarly, *Judgment on H. Shala referral concerning detention*, para. 30; *Decision on H. Thaçi referral concerning special investigative measures*, para. 29; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 67; *Decision on M. Hasani referral concerning SPO order*, para. 26.

<sup>157</sup> *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 68; *Decision on H. Thaçi referral concerning special investigative measures*, para. 30; KSC-CC-2022-15, F00010, *Decision on the referral of Hashim Thaçi concerning the right to an independent and impartial tribunal established by law and to a reasoned opinion, public*, 13 June 2022 (“*Decision on H. Thaçi referral concerning jurisdictional challenge*”), para. 41. See also Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 19/2022 of the Supreme Court of 15 February 2022*, KI 74/22, Judgment, 7 November 2023 (5 December 2023), para. 72.

<sup>158</sup> *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 68; *Decision on H. Thaçi referral concerning special investigative measures*, para. 30; *Decision on H. Thaçi referral concerning jurisdictional challenge*, para. 41. See also Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 224/220 of the Supreme Court of Kosovo of 17 September 2020*, KI 31/21, Resolution on inadmissibility, 5 May 2021 (21 May 2021), para. 35.



the criminal chambers were correct in terms of facts or law.<sup>159</sup> Otherwise, it would be acting as an appeal chamber, which would be to disregard the limits imposed on its jurisdiction pursuant to Articles 113 and 162(3) of the Constitution.<sup>160</sup>

61. The Chamber may only question such findings where they are flagrantly and manifestly arbitrary, in a manner that gives rise in itself to a violation of fundamental rights and freedoms guaranteed by the Constitution.<sup>161</sup> For instance, but not limited to, this may occur in situations of manifest errors of assessment that no reasonable court could have ever made,<sup>162</sup> unreasonable conclusions regarding the facts that are so striking and palpable on the face of it that a court's findings could be seen as grossly arbitrary,<sup>163</sup> or manifestly erroneous interpretation and application of the relevant law or reasoning that has no legal foundation or is so palpably incorrect that it may be construed as grossly arbitrary or as amounting to a denial of justice.<sup>164</sup>

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<sup>159</sup> *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 68; *Decision on H. Thaçi referral concerning special investigative measures*, para. 30; KSC-CC-2020-08, F00020/RED, Public redacted version of decision on the referral of [REDACTED] further to a decision of the Single Judge, public, 12 June 2020 (original issued on 22 April 2020) ("*Decision concerning single judge decision*"), para. 36. See also Kosovo, Constitutional Court, KI 31/21, cited above, paras 35-36.

<sup>160</sup> *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 68; *Decision on H. Thaçi referral concerning special investigative measures*, para. 30; *Decision concerning single judge decision*, para. 36; Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 41/2017 of the Supreme Court of the Republic of Kosovo of 3 July 2017*, KI 119/17, *Resolution on inadmissibility*, 3 April 2019 (3 May 2019), para. 87. See also ECtHR, *Kemmache v. France (no. 3)*, no. 17621/91, 24 November 1994, para. 44.

<sup>161</sup> *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 69; *Decision on H. Thaçi referral concerning special investigative measures*, para. 31; *Decision concerning single judge decision*, para. 36. See also ECtHR, *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017, para. 170; Kosovo, Constitutional Court, KI 37/18, cited above, para. 41.

<sup>162</sup> ECtHR, *Dulaurans v. France*, no. 34553/97, 21 March 2000, paras 33-39. See also ECtHR, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, 5 February 2015, para. 62.

<sup>163</sup> ECtHR, *Khamidov v. Russia*, no. 72118/08, 15 November 2007, paras 170-175.

<sup>164</sup> ECtHR, *Anđelković v. Serbia*, no. 1401/08, 9 April 2013, paras 24-29; *Bochan v. Ukraine (no. 2)* [GC], cited above, paras 60-65.

## VI. ADMISSIBILITY

62. At the outset, the Chamber must ascertain whether the various complaints raised by the Applicant are admissible.<sup>165</sup> This follows from Article 113(1) of the Constitution, which stipulates that the Chamber decides only on matters “referred to [it] in a legal manner by authorised parties”.<sup>166</sup> Likewise, pursuant to Rule 15(1) of the SCCC Rules, the Chamber shall decide on “the admissibility and/or the merits of a referral made under Article 49 of the Law”. The foregoing provisions provide for the Chamber’s responsibility to first determine, *ex officio*, whether the Referral is admissible or not.<sup>167</sup>

63. The Chamber therefore turns to the question of admissibility in light of certain admissibility requirements provided for in the Constitution, the Law, and the SCCC Rules, which arise in the present proceedings. Considering that the Applicant raised several complaints in the Referral, the admissibility is examined for each complaint separately.

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<sup>165</sup> See, for example, *Judgment on H. Shala referral concerning detention*, para. 31; *Decision on H. Thaçi referral concerning special investigative measures*, para. 37; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 70; KSC-CC-2023-21, F00006, *Decision on the referral of Pjetër Shala to the Constitutional Court Panel concerning the violation of Mr Shala’s fundamental rights guaranteed by Articles 31, 32, and 54 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights*, public, 29 August 2023 (“*Decision on P. Shala referral concerning admissibility of prior statements*”), para. 19; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 36.

<sup>166</sup> *Judgment on H. Shala referral concerning detention*, para. 31; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 70; *Decision on P. Shala referral concerning admissibility of prior statements*, para. 19; KSC-CC-2022-19, F00004/RED, Public redacted version of the decision on the referral of Pjetër Shala concerning fundamental rights guaranteed by Articles 31 and 32 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, public, 15 December 2022 (“*Decision on P. Shala referral concerning disqualification request*”), para. 14. See also Kosovo, Constitutional Court, *Constitutional review of decision Ae no. 287/18 of the Court of Appeals of 27 May 2019 and decision I.EK. no. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 2019*, KI 195/19, *Judgment*, 5 May 2021 (31 May 2021), paras 68-69; *Constitutional review of decision Pml no. 313/2018 of the Supreme Court of 10 December 2018*, KI 12/19, *Resolution on inadmissibility*, 10 April 2019 (3 May 2019), paras 30-31.

<sup>167</sup> *Judgment on H. Shala referral concerning detention*, para. 31; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 70; *Decision on P. Shala referral concerning admissibility of prior statements*, para. 19; *Decision on P. Shala referral concerning disqualification request*, para. 14; *Decision on H. Thaçi referral concerning jurisdictional challenge*, para. 43.



A. ALLEGED VIOLATION OF ARTICLES 102(3), 31(1) AND (2) OF THE CONSTITUTION AND ARTICLE 6 OF THE CONVENTION

**1. Submissions**

64. The Applicant maintained that, since neither the Law nor the Rules grant victims participatory status in the protection of legality proceedings, the Supreme Court panel erred when it authorised the Victims' Counsel to make submissions in response to his request.<sup>168</sup> In particular, he argued that, pursuant to Article 102(3) of the Constitution, in the absence of a prescribed law, a right, including participatory status, can neither be invented nor granted.<sup>169</sup> He likewise contended that, in recognising a participatory status for victims in protection of legality proceedings "where their personal interests are affected", the Supreme Court panel instituted a new criterion outside the Law and the Rules, and thereby ventured beyond the limits of its authority as prescribed in the Constitution.<sup>170</sup> In the Applicant's view, this led to a violation of Article 102(3) of the Constitution.<sup>171</sup> The Applicant also claimed that his fair trial rights under Article 31(1) and (2) of the Constitution and Article 6 of the Convention, particularly with regard to the "equal protection of rights in the proceedings", had been violated as a result of granting victims participatory rights in the protection of legality proceedings "due to the fact that he need[ed] to respond to all kinds of third parties that are allowed to participate in proceedings".<sup>172</sup>

65. In response, the SPO submitted that there was no appearance of a violation, and that the Applicant's complaint was consequently inadmissible.<sup>173</sup> Specifically, the SPO argued that: (i) the Supreme Court panel, like any other SC panel, has discretion to manage proceedings before it and authorise submissions, (ii) the Supreme Court panel

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<sup>168</sup> Referral, paras 15-17, 23-24.

<sup>169</sup> Referral, paras 18-23.

<sup>170</sup> Referral, paras 25-29, 33. The Applicant also recalled that Article 22(3) of the Law limits the victims' rights to notification, acknowledgement and reparation (see Referral, paras 26, 29).

<sup>171</sup> Referral, paras 14, 17, 28, 35.

<sup>172</sup> Referral, paras 14, 31-32, 34-35.

<sup>173</sup> SPO submissions, paras 5, 50.

correctly considered that victims participating in proceedings may, via their Victims' Counsel, respond to parties' submissions, including to a protection of legality request of an appeal judgment, where their personal interests or rights were affected and their participation was not prejudicial to the rights of the accused; and (iii) the Applicant did not substantiate his allegations, but merely disagreed with the Supreme Court panel's decision, without a concrete explanation as to how his rights were affected.<sup>174</sup>

66. Responding to the Applicant's complaint in the Referral, the Victims' Counsel also requested that it be dismissed.<sup>175</sup> In this regard, the Victims' Counsel submitted that: (i) a literal interpretation of Article 22 of the Law and a systematic review of the Law and the Rules supports the understanding that victims' participation includes all stages of proceedings before the SC;<sup>176</sup> (ii) the Applicant failed to demonstrate how Article 31(1) and 2 of the Constitution and Article 6 of the Convention were breached, in particular since the Supreme Court panel had limited the submissions by victims to issues that affected their personal interests, as delineated in Article 22(3) of the Law, and where any such submissions were not prejudicial to the rights of the accused;<sup>177</sup> (iii) the opportunity to provide limited observations on certain matters of law in the protection of legality proceedings did not breach the principle of legal certainty or the equality of arms, as interpreted by the ECtHR;<sup>178</sup> and (iv) granting victims the right to make submissions in these proceedings was necessary for the effective realisation of their rights, including their right to be heard as reparation claimants, and their rights pursuant to the positive obligations enshrined in Articles 2(1) and 3 of the Convention, to have the death of their family member appropriately acknowledged as murder, and

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<sup>174</sup> SPO submissions, para. 5.

<sup>175</sup> Victims' Counsel submissions, para. 26.

<sup>176</sup> Victims' Counsel submissions, paras 3-9.

<sup>177</sup> Victims' Counsel submissions, paras 10-12.

<sup>178</sup> Victims' Counsel submissions, paras 13-15.

that the penalties imposed are adequate and proportionate to the gravity of the acts of torture and murder.<sup>179</sup>

67. In his reply to the SPO submissions, the Applicant reiterated that the Supreme Court panel's interpretation of Article 22(3) of the Law was erroneous, as the victims' personal interests and rights in criminal proceedings before the SC are strictly limited to notification, acknowledgment, and reparation.<sup>180</sup> In his view, since the Law and the Rules are silent on the question of victims' participatory status in protection of legality proceedings, no participatory status can be deducted from an inexistent rule.<sup>181</sup> He further reasserted that, by granting victims the right to make submissions in relation to his protection of legality request, the Supreme Court panel breached Article 102(3) of the Constitution, and violated his constitutional rights under Articles 31(1) and (2) of the Constitution and Article 6 of the Convention.<sup>182</sup>

68. In addition, in his reply to the Victims' Counsel, the Applicant submitted that proceedings before the Supreme Court related to a request for protection of legality are not adversarial in nature or a third instance appeal, nor have parties, but amount to an extraordinary legal remedy.<sup>183</sup> The Applicant also reiterated that, in the absence of provisions explicitly granting participatory status to victims in protection of legality proceedings, there could be no right to make submissions in such proceedings.<sup>184</sup> He further reasserted that his fair trial rights had been violated as a result of having to "respond to all kinds of submissions of third parties that are allowed to participate in the proceedings" and argued that, given their nature, proceedings related to a request for protection of legality "should be kept simple and not [made to be unnecessarily] complex" by, for instance, granting participatory status to several victims' groups.<sup>185</sup>

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<sup>179</sup> Victims' Counsel submissions, paras 16-25.

<sup>180</sup> Applicant submissions, paras 9-10.

<sup>181</sup> Applicant submissions, paras 11-12.

<sup>182</sup> Applicant submissions, paras 13-16.

<sup>183</sup> Applicant submissions, paras 58-60, 72.

<sup>184</sup> Applicant submissions, paras 57, 61, 63-68.

<sup>185</sup> Applicant submissions, paras 69-71.

In this regard, he maintained that his constitutional rights under Article 31(1) and (2) of the Constitution and Article 6 of the Convention had been breached following the Supreme Court panel's decision to allow the Victims' Counsel to make submissions in relation to his request for protection of legality.<sup>186</sup>

## 2. Chamber's Assessment

69. At the outset, the Chamber recalls its earlier finding that, though the Applicant's complaint was formulated under Articles 102(3), 31(1) and (2) of the Constitution and Article 6 of the Convention, it falls to be considered only under Article 31(1) and (2) of the Constitution and Article 6 of the Convention.<sup>187</sup> In this regard, the Chamber notes that the Applicant essentially complained that, by authorising the Victims' Counsel to make submissions in relation to his request for protection of legality, the Supreme Court panel had acted in violation of his right to a fair trial under Article 31(1) and (2) of the Constitution and Article 6 of the Convention.<sup>188</sup>

70. However, the Applicant appears to have failed to raise this argument before the Supreme Court panel. Thus, the question arises whether the Applicant has exhausted all effective remedies provided for by law in relation to this complaint. The Chamber recalls in this respect that, pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules, an individual may make a referral to the Chamber only after exhausting all effective remedies provided for by law against the alleged violation. This is meant to afford the relevant authorities the opportunity to prevent or put right the alleged violations of the Constitution and/or Convention.<sup>189</sup>

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<sup>186</sup> Applicant submissions, para. 73.

<sup>187</sup> See above, para. 58.

<sup>188</sup> See above, paras 64, 67-68.

<sup>189</sup> See, for example, Kosovo, Constitutional Court, *Constitutional review of decision [KPK/no. 475/2022] on proposal of Mr Blerim Isufaj for the position of the Chief State Prosecutor of 6 April 2022 of Kosovo Prosecutorial Council and decision [KPK/no. 474/2022] on rejection of the Report of 6 April 2022 of the Review Commission of the Kosovo Prosecutorial Council*, KI 57/22 and KI 79/22, Resolution on inadmissibility, 4 July 2022 (25 July 2022), para. 70; *Request for constitutional review of decision no. 64/04 of the Civil Registration Agency of 13 June 2018*, KI 108/18, Resolution on inadmissibility, 5 September 2019 (30 September 2019),

71. The Chamber observes that the matter complained of arose in the context of the proceedings relating to the Applicant's request for protection of legality. Specifically, the Chamber recalls that, following the filing of the request, the Supreme Court panel ordered the SPO and the Victims' Counsel, if they wished to do so, to submit responses thereto by a certain date, which they both did.<sup>190</sup> The Chamber also recalls that, in his reply to the Victims' Counsel submissions, the Applicant mainly argued that the latter did not have standing to make submissions in the protection of legality proceedings, as none of the issues he had raised in the request affected the rights of the victims.<sup>191</sup>

72. The Chamber considers that, while the Applicant was not necessarily required to invoke the provisions of the Constitution or the Convention,<sup>192</sup> to properly exhaust remedies, he should have complained, expressly or in substance, about a violation of the Constitution and/or Convention, in a manner which left no doubt that the same complaint which was submitted to the Chamber had indeed been previously raised before the relevant authorities, namely the Supreme Court panel in the instant case.<sup>193</sup> This means that the Applicant should have raised legal arguments to the same or like effect on the basis of the applicable law, in order to give the Supreme Court panel the

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para. 153; *Constitutional review of decision PA-II-KZ-II-7/15 of the Supreme Court of Kosovo of 26 November 2015*, KI 15/16, Resolution on inadmissibility, 16 March 2016 (5 April 2016), para. 41. Similarly, see ECtHR, *Gherghina v. Romania* (dec.) [GC], no. 42219/07, 9 July 2015, paras 83-84, with further references to case law. See also *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 80.

<sup>190</sup> See above, paras 31-33.

<sup>191</sup> See above, para. 35.

<sup>192</sup> See, for example, *Vučković and Others v. Serbia* (preliminary objection) [GC], no. 17153/11, 25 March 2014, paras 72, 79, 81-82.

<sup>193</sup> See ECtHR, *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020, para. 55; *Nicklinson and Lamb v. the United Kingdom* (dec.), nos 2478/15 and 1787/15, 23 June 2015, para. 90; *Merot d.o.o and Storitve Tir d.o.o v. Croatia* (dec.), nos 29426/08 and 29737/08, 10 December 2013, para. 36. See also Kosovo, Constitutional Court, KI 119/17, cited above, paras 72-73; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 83.

opportunity to redress the alleged breach.<sup>194</sup> For the Chamber, this requires taking into account not only the facts, but also the Applicant's legal arguments.<sup>195</sup>

73. Before the Chamber, the Applicant complained of a breach of his fair trial rights under Article 31(1) of the Constitution and Article 6 of the Convention, specifically the "equal protection of rights in the proceedings", on grounds that victims were granted participatory status to make submissions in relation to his request for protection of legality.<sup>196</sup> However, it is clear to the Chamber that, before the Supreme Court panel, the Applicant had solely raised arguments on the standing of the Victims' Counsel to make submissions in the protection of legality proceedings.<sup>197</sup> The Chamber also notes in this respect that the Supreme Court panel did not examine the matter of its own motion.<sup>198</sup>

74. In these circumstances, the Chamber is of the view that the complaint presented before it has not been put, either explicitly or in substance, before the Supreme Court panel, despite ample time and opportunity to do so in the context of the Applicant's reply to the Victims' Counsel's submissions. It thus concludes that the Applicant failed to provide the Supreme Court panel with the chance to address, and thereby prevent or correct, the particular Constitution and Convention violation alleged against it.<sup>199</sup>

75. In light of the foregoing, the Chamber finds that the complaint must be rejected as inadmissible for failure to exhaust remedies in accordance with Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.

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<sup>194</sup> See, for example, ECtHR, *Novak v. Croatia* (dec.), no. 20737/15, 16 March 2021, para. 24. See also *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 84.

<sup>195</sup> ECtHR, *Radomilja and Others v. Croatia* [GC], nos 37685/10 and 22768/12, 20 March 2018, para. 117; *Novak v. Croatia* (dec.), cited above, para. 24. See also *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 84.

<sup>196</sup> See above, paras 64, 67-68.

<sup>197</sup> See above, paras 35, 71.

<sup>198</sup> See above, paras 36-37.

<sup>199</sup> See, similarly, ECtHR, *Nicklinson and Lamb v. the United Kingdom* (dec.), cited above, paras 89-95.

76. In any event, the Chamber is of the view that, even if the Applicant had met the requirement to exhaust remedies, the complaint would still be inadmissible pursuant to Rule 14(f) of the SCCC Rules, as it does not give rise to the appearance of a violation of the Applicant's fair trial rights pursuant to Article 31(1) and (2) of the Constitution and Article 6 of the Convention.<sup>200</sup> Indeed, insofar as the Applicant complained about the Supreme Court panel's interpretation of the Law and the Rules when it granted a participatory status to victims in the protection of legality proceedings, the Chamber recalls that it may not, as a general rule, question the interpretation and application of the Law and the Rules by the criminal chambers, but that its role is limited to assessing whether the irregularities the Applicant complained of violated his individual rights and freedoms guaranteed by the Constitution.<sup>201</sup> In the Chamber's view, neither has the Applicant demonstrated that the Supreme Court panel's interpretation of the Law and the Rules was so flagrantly and manifestly arbitrary that it could give rise, in itself, to a violation of his constitutional rights.<sup>202</sup>

77. Specifically, to the extent that the Applicant alleged a violation of his fair trial rights under Article 31(1) and (2) of the Constitution and Article 6 of the Convention as regards, in particular, the "equal protection of rights in the proceedings" as a result of the Supreme Court panel's interpretation of the Law and the Rules, the Chamber observes that the Applicant was able to adduce all the arguments that he considered relevant to his request for protection of legality,<sup>203</sup> had the opportunity to effectively challenge Victims' Counsel's standing to make submissions in response to his request for protection of legality,<sup>204</sup> as well as the arguments adduced by the Victims' Counsel

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<sup>200</sup> See, similarly, *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 105.

<sup>201</sup> See above, para. 60, with further references to case law.

<sup>202</sup> See above, para. 61, with further references to case law.

<sup>203</sup> See above, paras 31, 38, 40-41. See also Request for protection of legality.

<sup>204</sup> See above, para. 35. See also Reply to Victims' Counsel response to protection of legality.



and the SPO in their responses,<sup>205</sup> and that all of his arguments were duly heard and examined by the Supreme Court panel.<sup>206</sup> Since the Supreme Court panel's decision to allow the Victims' Counsel to make submissions in response to the Applicant's request for protection of legality did not place him at a disadvantage in defending his interests in the proceedings, the Chamber is of the view that the fairness of the protection of legality proceedings was not prejudiced.<sup>207</sup>

78. Thus, even if the Applicant had exhausted remedies pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules, the Chamber considers that, in the absence of any appearance of a violation of his fair trial rights under Article 31(1) and (2) of the Constitution and Article 6 of the Convention, the complaint remains inadmissible pursuant to Rule 14(f) of the SCCC Rules.

#### B. ALLEGED VIOLATION OF ARTICLE 33(2) AND (4) OF THE CONSTITUTION AND ARTICLE 7 OF THE CONVENTION

##### 1. Submissions

79. The Applicant contended that the Supreme Court panel had definitively decided on the complaints submitted by him in relation to his sentencing and that, accordingly, he was authorised to make the Referral as he had exhausted all effective legal remedies provided by law regarding this alleged violation.<sup>208</sup> In this regard, he also submitted that he had validly made the Referral within two (2) months from the final ruling in his case, namely the decision of the Supreme Court panel on his request for protection of legality.<sup>209</sup>

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<sup>205</sup> See above, paras 32-33. See also Reply to Prosecution response to protection of legality; Reply to Victims' Counsel response to protection of legality.

<sup>206</sup> See above, paras 34, 36-37, 39, 42-47. See also Decision on protection of legality, paras 25-33, 36-111.

<sup>207</sup> See ECtHR, *Regner v. The Czech Republic* [GC], no. 35289/11, 19 September 2017, para. 146; ECtHR, *Avotiņš v. Latvia* [GC], no. 17502/07, 23 May 2016, para. 119. See also, *mutatis mutandis*, ECtHR, *Farbers and Harlanova v. Latvia* (dec.), no. 57313/00, 6 September 2001, p. 10.

<sup>208</sup> Referral, paras 5, 7.

<sup>209</sup> Referral, paras 6, 8.



80. The SPO responded that, since all effective remedies provided by law had been exhausted, the complaint was admissible.<sup>210</sup> It also submitted that the complaint raised an issue of fundamental importance to the functioning of the SC, which is of a special and temporary nature and that, even if falling short of the formal legal requirements in Rule 14 of the SCCC Rules, it should be addressed in substance to avoid a denial of justice.<sup>211</sup>

81. In his reply, the Applicant maintained the submissions made in the Referral.<sup>212</sup>

## **2. Chamber's Assessment**

82. The Chamber observes, at the outset, that this complaint fulfils the admissibility requirements provided for in the Constitution, the Law, and the SCCC Rules. Since no grounds for inadmissibility can be established, the Chamber finds that the complaint must be declared admissible, and examined on the merits.

83. Accordingly, the submissions made by the Applicant and the SPO in this regard are further summarised below, in the relevant section of this judgment.<sup>213</sup>

### **C. ALLEGED VIOLATION OF ARTICLE 31(1) OF THE CONSTITUTION AND ARTICLE 6(1) OF THE CONVENTION**

#### **1. Submissions**

84. Referring to the right to a reasoned decision, guaranteed by Article 31(1) of the Constitution and Article 6(1) of the Convention, as interpreted by the ECtHR,<sup>214</sup> the Applicant complained that, insofar as his conviction for the war crime of murder was concerned, the trial and appeal judgments lacked proper legal reasoning.<sup>215</sup> In his view, when the trial and appeals panels held that the murder victim would have died

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<sup>210</sup> SPO submissions, para. 8.

<sup>211</sup> SPO submissions, para. 8.

<sup>212</sup> Applicant submissions, para. 75.

<sup>213</sup> See below, paras 97-102.

<sup>214</sup> Referral, paras 108-112.

<sup>215</sup> Referral, paras 113, 117, 126, 128.

even without the gunshot wounds, they made an assumption without providing any evidence to support such a conclusion.<sup>216</sup> Likewise, the Applicant submitted that the trial and appeals panels' findings on the substantial causes of the death of the murder victim, which were determined to be the severe mistreatment of the victim and denial of medical aid, were also based on an assumption, as no evidence was produced in support thereof.<sup>217</sup> He claimed that, in the absence of factual evidence upon which the legal reasoning can be based, there is a lack of legal reasoning,<sup>218</sup> and that the Supreme Court panel had therefore erred in qualifying his arguments in this regard as a "factual disagreement", and summarily dismissing them as a result.<sup>219</sup> The Applicant argued that there had been a violation of his fair trial rights as a result.<sup>220</sup>

85. In response, the SPO averred that the Applicant's complaint was inadmissible.<sup>221</sup> In particular, the SPO submitted that the Applicant was seeking to relitigate factual matters relating to the cause of the murder victim's death.<sup>222</sup> The SPO argued that such matters fall beyond the competence of the Chamber, and that the Applicant failed to demonstrate that the reasoning of the criminal chambers was so deficient or arbitrary that it amounted to a denial of justice.<sup>223</sup> In any event, the SPO contended, the cause of the murder victim's death, including the arguments raised by the Applicant, had been addressed in detail, and as part of fully reasoned trial and appeal judgments, which were also upheld by the Supreme Court panel.<sup>224</sup> Lastly, the SPO argued that, having failed to meet the requirements set out in Article 48(7) of the Law and Rules 193(3) of

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<sup>216</sup> Referral, paras 116-117, 123.

<sup>217</sup> Referral, para. 125.

<sup>218</sup> Referral, paras 117, 125.

<sup>219</sup> Referral, paras 115, 117-123

<sup>220</sup> Referral, paras 126, 128.

<sup>221</sup> SPO submissions, para. 6.

<sup>222</sup> SPO submissions, para. 6.

<sup>223</sup> SPO submissions, para. 6.

<sup>224</sup> SPO submissions, para. 6.

the Rules before the Supreme Court panel, the Applicant should not be allowed to recycle the same inadmissible arguments before the Chamber.<sup>225</sup>

86. In his reply to the SPO's submissions, the Applicant reiterated that his claim did not constitute a factual disagreement, but that, in his view, the reasons to arrive at the conclusion of both the trial and appeals panels regarding the attribution of the death of the murder victim to him were without a factual legal basis.<sup>226</sup> He maintained that the absence of such reasoning constituted a violation of Article 6(1) of the Convention, as interpreted by the ECtHR.<sup>227</sup>

## 2. Chamber's Assessment

87. At the outset, the Chamber notes that, while the Supreme Court panel summarily rejected the Applicant's complaint regarding the alleged lack of reasoning of the trial and appeal judgments in connection to his conviction for the war crime of murder, it nevertheless addressed the Applicant's arguments on the merits.<sup>228</sup> Accordingly, the Chamber is of the view that the Applicant cannot be said to have failed to exhaust the remedies provided for by law against the alleged violation pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.<sup>229</sup> However, the Chamber recalls that, in accordance with Rule 14(f) of the SCCC Rules, it may still declare inadmissible a referral, or specific parts thereof, for reasons related to the examination of the merits. In particular, a referral, or a specific complaint in the referral, may be deemed inadmissible if nothing therein gives rise to the appearance of a violation of a constitutional right.<sup>230</sup>

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<sup>225</sup> SPO submissions, para. 7.

<sup>226</sup> Applicant submissions, para. 48.

<sup>227</sup> Applicant submissions, paras 49, 51.

<sup>228</sup> See above, para. 39.

<sup>229</sup> See, similarly, ECtHR, *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, 30 June 2009, paras 43-45. See also *Judgment on H. Shala referral concerning detention*, para. 32; *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 85.

<sup>230</sup> *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 105. See also above, paras 76-78.

88. Turning to the present complaint, the Chamber notes that the Applicant claimed a violation of his right to a reasoned decision under Article 31(1) of the Constitution and Article 6(1) of the Convention on the basis that the reasoning advanced in the trial and appeal judgments in relation to his conviction for the war crime of murder, as also upheld by the Supreme Court panel, was not based on any factual evidence.<sup>231</sup> In this connection, the Chamber observes that, while the Applicant relied on Article 31(1) of the Constitution, the substance of his complaint in fact falls under Article 31(2) of the Constitution, which is in essence the corollary of Article 6(1) of the Convention. Thus, as the master of the characterisation to be given in law to the facts of the case before it, the Chamber considers that this complaint falls to be examined under Article 31(2) of the Constitution, in conjunction with Article 6(1) of the Convention.<sup>232</sup>

89. The Chamber first recalls that, in accordance with established ECtHR case law, judgments of courts and tribunals should adequately state the reasons on which they are based.<sup>233</sup> The extent of the obligation to give reasons varies according to the nature of the decision, and must be determined in light of the circumstances of the case.<sup>234</sup> While courts are not obliged to give a detailed answer to every argument raised, the ECtHR has held that it must be clear from the decision that the essential issues of the case have been addressed, and that a specific and explicit reply has been given to the arguments which are decisive for the outcome of the case.<sup>235</sup> As regards in particular

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<sup>231</sup> See above, paras 84, 86.

<sup>232</sup> *Decision on H. Thaçi referral concerning special investigative measures*, paras 33-34; *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 35. See also ECtHR, *Margaretić v. Croatia*, no. 16115/13, 5 June 2014, para. 75; Kosovo, Constitutional Court, *Constitutional review of the judgment of the Supreme Court of the Republic of Kosovo*, Rev. 308/2007, dated 10 June 2010, KI 120/10, Judgment, 29 January 2013 (8 March 2013), para. 50.

<sup>233</sup> ECtHR, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, 11 July 2017, para. 84. See also ECtHR, *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010, para. 91.

<sup>234</sup> See, for example, ECtHR, *Moreira Ferreira v. Portugal (no. 2)* [GC], cited above, para. 84; *Ruiz Torija v. Spain*, no. 18390/91, 9 December 1994, para. 29.

<sup>235</sup> See, for example, ECtHR, *Lobzhanidze and Peradze v. Georgia*, nos 21447/11 and 35839/11, 27 February 2020, para. 66; *Moreira Ferreira v. Portugal (no. 2)* [GC], cited above, para. 84; *Taxquet v. Belgium* [GC], cited above, para. 91.

the manner in which judicial decisions are reasoned, the ECtHR has held that they can only be qualified as arbitrary to the point of prejudicing the fairness of the proceedings if no reasons are provided for a decision or if the reasons given are based on a manifest factual or legal error committed by the court, resulting in a denial of justice.<sup>236</sup>

90. Further to the above, the Chamber observes that, while the Applicant formally invoked a violation of his right to a reasoned decision in accordance with Article 31(2) of the Constitution and Article 6(1) of the Convention, he in effect complained about the outcome of the criminal proceedings, namely the findings and conclusions of the appeal and trial panels with respect to his conviction for the war crime of murder.<sup>237</sup> However, as the Chamber has already stated, its powers are limited to verifying the criminal chambers' compliance with human rights obligations under the Constitution – it is not the Chamber's role to decide whether the findings of the criminal chambers were correct in terms of facts or law.<sup>238</sup> The Chamber may only question such findings where they are flagrantly and manifestly arbitrary, in a manner that gives rise in itself to a violation of the fundamental rights and freedoms guaranteed by the Constitution, such as outlined in paragraph 61 above. Nevertheless, the Chamber is of the view that this was not the case here.

91. Indeed, the Chamber notes that the Applicant was able, at the various stages of the criminal proceedings, to adduce the arguments that he considered relevant to the charge of the war crime of murder under Article 14(1)(c)(i) of the Law,<sup>239</sup> and that all

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<sup>236</sup> ECtHR, *Yüksel Yalçinkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023, para. 304, with further references to case law.

<sup>237</sup> See, Referral, paras 113 ("as a result of [the appeal judgment lacking proper legal reasoning], a proper finding on the guilt regarding Article 14(1)(c)(i) (in particular the murder) could not have been made"), 115 ("the Supreme Court [panel's decision] is [...] not correct on this issue. Therefore, the said reasoning is not comprehensible"), 116 ("this assumption was not based on any evidence"), 117 ("this reasoning has no foundation in any kind of evidence"), 118 ("the current reasoning is and remains inadequate to hold [the Applicant] guilty for murder, or attribute it to him"), 125 ("the substantial causes of [the] death [of the victim] are based on an assumption, as no evidence was ever produced. There is a lack of reasoning where there is no factual evidence upon which the legal reasoning can be based").

<sup>238</sup> See above, para. 60, with further references to case law. See also above, para. 76.

<sup>239</sup> See above, paras 17, 24, 38.

his arguments which, viewed objectively, were relevant to the resolution of his case insofar as this charge was concerned, were duly heard and examined by the criminal chambers.<sup>240</sup> In the same vein, the Chamber observes that the factual and legal reasons for the impugned findings of guilt for the war crime of murder were set out at length by the trial and appeals panels.<sup>241</sup> In this regard, the Chamber is mindful, in particular, that the “substantial contribution” test, employed by the trial panel to fairly attribute criminal responsibility to the Applicant for his conduct in relation to the death of the murder victim, is a well-established one in the jurisprudence of international courts and tribunals,<sup>242</sup> and that the appeals panel conducted a lengthy comparative analysis of a number of jurisdictions, in the light of the factual scenario most favourable to the Applicant, to determine whether the assumed gunshots by Serbian forces constituted a third-party intervention that would have broken the chain of causation, absolving the Applicant of responsibility for the murder victim’s death.<sup>243</sup>

92. Likewise, the Chamber observes that, despite stating the grounds for summarily rejecting the Applicant’s complaint, the Supreme Court panel nevertheless examined the merits thereof, and implicitly upheld the reasoning of the trial and appeals panels in this regard.<sup>244</sup> It is therefore the Chamber’s view that neither the trial nor the appeals panel made any manifest factual or legal errors in their reasoning for the attribution of criminal responsibility to the Applicant for the death of the murder victim, and their corresponding finding of guilt for the war crime of murder.<sup>245</sup>

93. In light of the above, the Chamber does not detect any appearance of a violation of the Applicant’s right to a reasoned decision under Article 31(2) of the Constitution and Article 6(1) of the Convention. It thus follows that this complaint must be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules.

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<sup>240</sup> See above, paras 17-18, 25-26, 39.

<sup>241</sup> See above, paras 17-18, 25-26, and references therein.

<sup>242</sup> Appeal judgment, para. 344, with further references to case law.

<sup>243</sup> Appeal judgment, paras 345-349.

<sup>244</sup> See above, paras 39, 87.

<sup>245</sup> Cf. ECtHR, *Baljak and Others v. Croatia*, no. 41295/19, 25 November 2021, paras 33-42.

## D. CONCLUSION

94. Based on the foregoing, the Chamber finds that the complaint of the Applicant under Article 31(1) and (2) of the Constitution and Article 6 of the Convention must be declared inadmissible for failure to exhaust remedies pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.

95. As to the Applicant's complaint under Article 33(2) and (4) of the Constitution and Article 7 of the Convention, the Chamber finds that it is admissible, and has to be examined on the merits.

96. Lastly, the Chamber finds that the Applicant's complaint under Article 31(2) of the Constitution and Article 6(1) of the Convention does not reveal an appearance of a violation of the Applicant's constitutional rights and must, accordingly, be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules.

## VII. MERITS

### A. ALLEGED VIOLATION OF ARTICLE 33(2) AND (4) OF THE CONSTITUTION AND ARTICLE 7 OF THE CONVENTION

#### 1. Submissions

97. The Applicant submitted that, in finding that the 1976 SFRY Criminal Code was not applicable to the determination of the sentence imposed in his case, the Supreme Court panel had failed to correctly apply the principle of *lex mitior*, in violation of his rights guaranteed under Article 33(2) and (4) of the Constitution and Article 7 of the Convention.<sup>246</sup> Specifically, the Applicant claimed that the Supreme Court panel had erred when it held that, should the sentencing range in the 1976 SFRY Criminal Code be taken into account pursuant to Article 44(2)(a) of the Law, this would mean that it would be applicable only to some but not all of the crimes listed in Article 14 of the

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<sup>246</sup> Referral, paras 37-38, 53, 70, 72, 88-90, 103-106.



Law.<sup>247</sup> The Applicant argued in this regard that, though the 1976 SFRY Criminal Code was a Kosovo law, it codified war crimes under customary international law and the general principles of law recognised by civilised nations.<sup>248</sup> In the Applicant's view, the Supreme Court panel should not have compared the entirety of Article 14 of the Law with Article 142 of the 1976 SFRY Criminal Code.<sup>249</sup> Rather, he maintained that the Supreme Court panel should have compared the specific war crimes for which the Applicant had been convicted, namely those under Article 14(1)(c)(i) of the Law, with Article 142 of the 1976 SFRY Criminal Code which, in his view, substantively codified the same war crimes as those he was adjudged guilty of.<sup>250</sup> Moreover, the Applicant contended that Articles 142, 143 and 144 of the 1976 SFRY Criminal Code protected the same interests for the same groups of people as Article 14(1)(c) of the Law, and argued that Articles 143 and 144 of the 1976 SFRY Criminal Code should have also been considered in the Supreme Court panel's comparison.<sup>251</sup>

98. The Applicant further took issue with the Supreme Court's finding that, in any event, since Article 142 of the 1976 SFRY Criminal Code provided, at its highest, for the death penalty, it would not have been considered the *lex mitior*.<sup>252</sup> Specifically, he argued that the death penalty was abolished in 1999, on the basis of the 1995 Dayton Accords and UNMIK Regulation No. 1999/24, and that only a range-based sentence of five (5) to fifteen (15) years of imprisonment could have been imposed for war crimes under Article 142 of the 1976 SFRY Criminal Code.<sup>253</sup> In the Applicant's view, the latter was the most lenient sentencing range for the crimes he had been found guilty of, as also supported by Kosovo jurisprudence.<sup>254</sup> Thus, he maintained that the Supreme

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<sup>247</sup> Referral, paras 46-47, 53, 70.

<sup>248</sup> Referral, paras 39-40, 42, 56-63

<sup>249</sup> Referral, paras 47, 50.

<sup>250</sup> Referral, paras 48-52, 54-55, 65-66, 68-69.

<sup>251</sup> Referral, paras 47, 49, 51-52, 68.

<sup>252</sup> Referral, paras 72-73

<sup>253</sup> Referral, paras 72-80, 83-84.

<sup>254</sup> Referral, paras 81, 83-85.

Court panel had erred in finding that Article 146(1) in conjunction with Article 42(1) of the 2019 KCC set forth the most lenient sentencing range, namely five (5) to twenty-five (25) years of imprisonment.<sup>255</sup> In the Applicant's view, the retroactive application of a more stringent law than the one applicable at the time the crimes were committed violated Article 7(1) of the Convention.<sup>256</sup> He also added in this regard that, contrary to the Supreme Court panel's findings, the ECtHR's judgment in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina* was instructive for the correct application of the *lex mitior*, as it concerned the application of the 1976 SFRY Criminal Code, which he claimed was the more lenient law in his case as well.<sup>257</sup>

99. The SPO submitted in response that the Chamber's assessment under Article 7 of the Convention should take into consideration several additional factors.<sup>258</sup> For the SPO, these include: (i) other fundamental rights and freedoms implicated by the facts under review in the Referral, such as those arising from the positive obligations under Articles 2, 3, and 5 of the Convention to effectively investigate, prosecute, and punish serious violations of the rights enshrined therein;<sup>259</sup> (ii) the specific features of the legal framework of the SC;<sup>260</sup> and (iii) the maximum punishment of life-long imprisonment that may be imposed by the SC pursuant to Article 41(1) of the Law.<sup>261</sup> According to the SPO, the Supreme Court panel failed to consider these aspects in the decision on the request for protection of legality.<sup>262</sup>

100. Specifically, the SPO argued that the Supreme Court panel had arbitrarily and unreasonably applied the *lex mitior* principle to Article 44(2) of the Law, in particular considering that the principle only applies to binding laws and that on a plain reading

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<sup>255</sup> Referral, paras 82, 86, 91, 93.

<sup>256</sup> Referral, paras 96, 105-106.

<sup>257</sup> Referral, paras 94, 98-105.

<sup>258</sup> SPO submissions, para. 24.

<sup>259</sup> SPO submissions, paras 24-25.

<sup>260</sup> SPO submissions, paras 26-27.

<sup>261</sup> SPO submissions, paras 28-29.

<sup>262</sup> SPO submissions, para. 30.

of the latter provision, the SC is not bound by the sentencing ranges provided for the crime under Kosovo law.<sup>263</sup> It further claimed that, even if, *arguendo*, the principle of *lex mitior* would be applicable to the SC's sentencing framework, the Supreme Court panel had carried out a selective and piecemeal assessment thereof.<sup>264</sup> While it agreed with the Supreme Court panel that Article 142 of the 1976 SFRY Criminal Code could not be considered the *lex mitior* since, at its highest, it provided for the death penalty<sup>265</sup> and the gap created by the abolition thereof by UNMIK Regulation No. 1999/24 until the entry into force of a new maximum penalty of forty (40) years imprisonment under UNMIK Regulation No. 2000/59 had been unintentional,<sup>266</sup> it criticised its assessment of the other relevant Kosovo laws for failure to adequately consider the maximum and minimum penalties provided therein.<sup>267</sup> In addition, the SPO argued that the Supreme Court panel had arbitrarily and unreasonably annulled the sentence imposed by the appeals panel after a review of five individualised sentences imposed between 2004 and 2008 by the International Criminal Tribunal for the former Yugoslavia ("ICTY"), and without reviewing any sentencing practices under the identified sentencing range pursuant to the 2019 KCC.<sup>268</sup>

101. The SPO submitted that, overall, the multi-layered errors made by the Supreme Court panel violated Article 7 of the Convention.<sup>269</sup> Accordingly, it requested that the Chamber (i) confirm the correct interpretation and application of Article 44(2) of the Law, (ii) annul the relevant parts of the Supreme Court panel's decision, and (iii) if

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<sup>263</sup> SPO submissions, paras 32-33.

<sup>264</sup> SPO submissions, para. 34.

<sup>265</sup> SPO submissions, paras 35-36.

<sup>266</sup> SPO submissions, para. 38, referring to ECtHR, *Ruban v. Ukraine*, no. 8927/11, 12 July 2016, paras 45-46.

<sup>267</sup> SPO submissions, paras 40-43.

<sup>268</sup> SPO submissions, paras 44-47.

<sup>269</sup> SPO submissions, para. 48.

considered necessary, return the case to the trial panel for the determination of a new sentence within the confines of the Law and the Constitution.<sup>270</sup>

102. In reply, the Applicant submitted that the SPO misinterpreted his complaint and had failed to respond to his arguments, thus venturing outside the Chamber's scope of review, which had only authorised submissions related to the Referral.<sup>271</sup> Still, in addressing some of the SPO's submissions, the Applicant reiterated the arguments he had set out in his Referral, notably that the Supreme Court panel's failure to apply the 1976 SFRY as the *lex mitior* had violated his constitutional rights and, in this regard, rejected the arguments made by the SPO in relation to the applicability of the *lex mitior* principle to binding laws only, and the applicability of the death penalty regardless of its abolition.<sup>272</sup>

## 2. Chamber's Assessment

103. At the outset, the Chamber recalls that the Applicant maintained a violation of Articles 33(2) and (4) of the Constitution and Article 7 of the Convention. In his view, by excluding the 1976 SFRY Criminal Code sentencing range from consideration in the determination of his punishment, identifying instead the 2019 KCC as providing the most lenient sentencing range, and finding that the latter law should be taken into account in his case retroactively, the Supreme Court panel misapplied the principle of *lex mitior*.

104. The Chamber recalls in this respect Article 33 of the Constitution, the relevant parts of which read as follows:

2. No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed.

[...]

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<sup>270</sup> SPO submissions, paras 49-50.

<sup>271</sup> Applicant submissions, paras 18-31, 46.

<sup>272</sup> Applicant submissions, paras 20, 32-45.

4. Punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent applicable law are more favourable to the perpetrator.

105. The Chamber further notes that Article 7 of the Convention, in its relevant parts, similarly provides that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

106. Further to the above, the Chamber reiterates that Article 33 of the Constitution and Article 7 of the Convention embody, in general terms, the principle of legality, namely that only the law can define a crime and prescribe a penalty (i.e. *nullum crimen, nulla poena sine lege*), as well as the principle that the criminal law cannot be extensively construed to the detriment of an accused, for instance by analogy.<sup>273</sup> It follows that offences and the relevant penalties must be clearly defined by law. As established in the case law of the ECtHR, this requirement will be satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it, and after taking appropriate legal advice, what acts and omissions will make him or her criminally liable and what penalty he or she faces on that account.<sup>274</sup> According to the ECtHR, the concept of law comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility

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<sup>273</sup> ECtHR, *Jidic v. Romania*, no. 45776/16, 18 February 2020, para. 77; ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], cited above, para. 66; *Del Río Prada v. Spain* [GC], no. 42750/09, 21 October 2013, para. 78; *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, para. 138; *Cantoni v. France* [GC], no. 17862/91, 15 November 1996, para. 29. See also *Judgment on N. Haradinaj referral concerning legality, entrapment, and freedom of expression*, para. 136.

<sup>274</sup> ECtHR, *Jidic v. Romania*, cited above, para. 78; *Del Río Prada v. Spain* [GC], cited above, para. 79; *Kafkaris v. Cyprus* [GC], cited above, para. 140.

and foreseeability.<sup>275</sup> These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.<sup>276</sup>

107. The Chamber further observes that Article 33 of the Constitution and Article 7 of the Convention guarantee the principle of non-retroactivity of more stringent criminal laws, which applies both to the provisions defining the offence,<sup>277</sup> and to those setting the penalties incurred.<sup>278</sup> The principle of retroactivity of more lenient criminal laws (i.e. *lex mitior*) is also guaranteed. In other words, as the ECtHR has held, where there are differences between the criminal law in force at the time of the commission of an offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant.<sup>279</sup> In this connection, the ECtHR has clarified that, in determining whether there has been any retroactive application of a penalty to an accused person's disadvantage, or which criminal law is more lenient or favourable to said person, regard must be had to the sentencing frameworks (i.e. minimum and maximum sentence), following a concrete assessment of the specific acts.<sup>280</sup>

108. Turning to the present case, the Chamber observes that the Applicant, convicted pursuant to Article 14(1)(c) of the Law, did not dispute that his acts had constituted criminal offences defined with sufficient accessibility and foreseeability at the time of their commission. Therefore, the legal basis of his conviction is not at issue in this case. Rather, the Applicant complained that the Supreme Court panel had not determined

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<sup>275</sup> ECtHR, *Vasiliauskas v. Lithuania* [GC], no. 35343/05, 20 October 2015, para. 154; *Kononov v. Latvia* [GC], no. 36376/04, 17 May 2010, para. 185; *Korbely v. Hungary* [GC], no. 9174/02, 19 September 2008, para. 70.

<sup>276</sup> ECtHR, *Jidic v. Romania*, cited above, para. 79; *Del Río Prada v. Spain* [GC], cited above, para. 91.

<sup>277</sup> See, for example, ECtHR, *Vasiliauskas v. Lithuania* [GC], cited above, paras 165-166.

<sup>278</sup> See, for example, ECtHR, *Gurguchiani v. Spain*, no. 16012/06, 15 December 2009, paras 32-44; *Jamil v. France*, no. 15917/89, 8 June 1995, paras 34-36.

<sup>279</sup> ECtHR, *Jidic v. Romania*, cited above, para. 80; *Ruban v. Ukraine*, cited above, para. 37; *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, 17 September 2009, para. 109.

<sup>280</sup> ECtHR, *Jidic v. Romania*, cited above, paras 85-98; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], cited above, paras 65-76.

the more lenient law in his case correctly. In relation to this, he relied, *inter alia*, on the ECtHR's judgment in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*.

109. At this juncture, the Chamber notes that, while the Applicant seems to be of the view that his case is, in some respects, similar to the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, particularly as regards the potential relevance of the 1976 SFRY Criminal Code as the more lenient law in relation to war crime offences, the two cases are notably different. Specifically, the Chamber is mindful that, unlike the applicants in the former case, who had been convicted and sentenced under the substantive laws of Bosnia and Herzegovina,<sup>281</sup> here, the Applicant was convicted by the SC pursuant to Article 14(1)(c) of the Law, which defines war crimes under customary international law, and sentenced pursuant to Article 44(1), (2) and (5) of the Law, which sets out the SC's sentencing regime for persons adjudged guilty of international crimes under the Law. As previously stated by the Chamber, the SC and the SPO are governed by their own autonomous legal framework.<sup>282</sup>

110. Indeed, the Chamber recalls that the SC and the SPO were established (i) in connection to the Council of Europe Parliamentary Assembly Report of 7 January 2011 ("Report"), which contains serious allegations of inhuman treatment and killing of people during and in the aftermath of the armed conflict in Kosovo,<sup>283</sup> and which were the subject of criminal investigation by the Special Investigative Task Force ("SITF") of the Special Prosecution Office of the Republic of Kosovo;<sup>284</sup> and (ii) pursuant to an exchange of letters between the President of Kosovo and the High Representative of

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<sup>281</sup> *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], cited above, paras 13-14, 22.

<sup>282</sup> KSC-CC-2020-11, F00015, Judgment on the referral of proposed amendments to the Constitution of Kosovo, public, 26 November 2020 ("*Judgment on proposed constitutional amendments no. 26 and no. 27*"), paras 56-58, 62-63.

<sup>283</sup> Council of Europe Parliamentary Assembly, Report Doc. 12462, Inhuman treatment of people and illicit trafficking in human organs in Kosovo, 7 January 2011, Section B. Explanatory memorandum, paras 7, 21, 25, 61, 68-69, 72, 74, 76, 104, 113-114, 172, 176.

<sup>284</sup> See Law No. 04/L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo.



the European Union for Foreign Affairs and Security Policy in 2014, which was ratified by the Assembly of Kosovo as an international agreement between Kosovo and the European Union.<sup>285</sup> Notably, the 2014 exchange of letters stated that the SC and the SPO “will be governed by their own statute and rules of procedure and evidence”.

111. The Chamber is further mindful that, following the 2014 exchange of letters, the Kosovo Assembly adopted Article 162 of the Constitution and the Law. According to Article 162(1) of the Constitution, “the organisation, functioning and jurisdiction of the [SC and the SPO] shall be regulated by this Article and by [the Law]”. Prior to the amendment of the Constitution, the Constitutional Court of Kosovo had confirmed that the establishment of the SC and the SPO within the justice system of Kosovo, and in particular its structure, scope of jurisdiction and method of functioning did not diminish the constitutional rights and freedoms guaranteed by Chapters II and III of the Constitution, as well as its letter and spirit.<sup>286</sup>

112. In the same vein, the Chamber notes that Article 1(1) of the Law provides that the Law “establishes and regulates the organisation, functions and jurisdiction of the [SC and the SPO]”. Article 1(2) of the Law further sets forth that the SC and the SPO “are necessary to fulfil the international obligations undertaken [by Kosovo in relation to the 2014 exchange of letters], to guarantee the protection of the fundamental rights and freedoms enshrined in the Constitution [...], and to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in [the Report], and which have been the subject of criminal investigation by the [SITF]”. Furthermore, Article 3(2) of the Law reads as set out below:

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<sup>285</sup> Law No. 04/L-274, cited above. See also Kosovo, Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by letter no. 05-433/DO-318*, KO 26/15, Judgment, 14 April 2015 (15 April 2015), paras 37-38.

<sup>286</sup> Kosovo, Constitutional Court, KO 26/15, cited above, paras 44, 59, 64, 66-67, 72, 76, 79, 81, 83, 86, 88, 90, 92, 95, 97, 100, 102, 104-105.

2. The Specialist Chambers shall adjudicate and function in accordance with:
- a. the Constitution of the Republic of Kosovo,
  - b. this Law as the *lex specialis*,
  - c. other provisions of Kosovo law as expressly incorporated and applied by this Law,
  - d. customary international law, as given superiority over domestic laws by Article 19(2) of the Constitution, and
  - e. international human rights law which sets criminal justice standards including the [Convention] and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution.

113. It thus follows that the SC and the SPO function in an autonomous manner, in accordance with their own established legal framework.<sup>287</sup> As such, it is the Chamber's view that the Applicant's complaint must be assessed with due regard to the specific context and purpose of the SC and the SPO and, in particular, the specific features of their legal regime.<sup>288</sup>

114. The Chamber further notes that, pursuant to Article 12 of the Law, the SC "shall apply customary international law and the substantive criminal law in Kosovo insofar as it is in compliance with customary international law, both as applicable at the time the crimes were committed". However, as also observed by the Supreme Court panel, while customary international law defines the war crimes for which the Applicant was adjudged guilty under Article 14(1)(c) of the Law, it does not provide for any specific sanctions for such offences.<sup>289</sup> In this context, the Chamber recalls that Article 44 of the Law sets forth the punishments that the SC may impose upon a convicted person and that, more specifically, paragraph (2) thereof lays down the punishment to be imposed on persons adjudged guilty of an international crime under the Law. Article 44 of the Law, insofar as relevant, reads as follows:

1. The [SC] may impose upon a convicted person imprisonment up to a maximum term of life-long imprisonment.

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<sup>287</sup> *Judgment on proposed constitutional amendments no. 26 and no. 27*, para. 63.

<sup>288</sup> See, similarly, *Judgment on proposed constitutional amendments no. 26 and no. 27*, para. 53.

<sup>289</sup> Decision on protection of legality, para. 99.

2. In considering the punishment to be imposed on a person adjudged guilty of an international crime under this Law, the [SC] shall take into account,

- a. the sentencing range for the crime provided under Kosovo Law at the time of commission,
- b. any subsequent more lenient sentencing range for the crime provided in Kosovo Law, and
- c. Article 7(2) of the [Convention] and Article 15(2) of the International Covenant for Civil and Political Rights as incorporated and protected by Article 22(2), 22(3) and 33(1) of the [Constitution], and the extent to which the punishment of any act or omission which was criminal according to general principles of law recognised by civilised nations would be prejudiced by the application of paragraph 2(a) and (b).

115. For the Chamber, it is clear from a plain reading of Article 44(2) of the Law that neither the contemporaneous sentencing range nor any other subsequent more lenient range for the crime provided under Kosovo laws is binding on the criminal chambers. Rather, a literal interpretation of the wording of the provision unequivocally indicates that, whereas the criminal chambers are bound to take these ranges into account when determining the punishment to be imposed on a person found guilty of a crime under international law, they are not bound to apply them.

116. The Chamber considers that the non-binding nature of the sentencing range for the crime provided under Kosovo laws is further evident from a systematic reading of Article 44(2), in the context of the Law as a whole. Notably, the Chamber contrasts the language of Article 44(2)(a) and (b) of the Law with that of Article 44(1) of the Law, which prescribes that the sentence that the SC may impose upon a convicted person is limited to a maximum term of life-long imprisonment. Similarly, the Chamber notes that Article 44(4) of the Law requires that the punishment imposed on a person found guilty of a crime under Article 15(2) of the Law “shall be in line” with the punishment for that crime under Kosovo laws.

117. In light of the foregoing, and bearing in mind the particular context and purpose of the SC, as well as the specific features of its legal regime, the Chamber is of the view that the legislator did not intend, under Article 44(2) of the Law, to bind the criminal chambers to the sentencing ranges in Kosovo laws. Rather, the legislator’s intent was

for these laws to be taken into account in the determination of the punishment to be imposed on a person adjudged guilty of international crimes under the Law, such as the Applicant. In this regard, the Chamber is also mindful of the fact that the ICTY, which had a sentencing regime comparable to the regime set forth in Article 44 of the Law,<sup>290</sup> consistently determined that it was not bound by the laws and the sentencing practices of the former Yugoslavia.<sup>291</sup> Notably, in *Prosecutor v. Dragan Nikolić*, the ICTY held that:

The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused had been amended, the less severe law should be applied. It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal concerned is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.<sup>292</sup>

118. Further to the above, while the Chamber agrees with the Supreme Court panel that Article 33 of the Constitution and Article 7 of the Convention apply before the SC,<sup>293</sup> it considers that Article 33 of the Constitution, as well as Article 22(2) thereof, which provides for the direct applicability in Kosovo of Article 7 of the Convention,

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<sup>290</sup> See Article 24(1) of the Statute of the ICTY, which reads as follows: “The penalty imposed by the [t]rial [c]hamber shall be limited to imprisonment. In determining the terms of imprisonment, the [t]rial [c]hambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia”. See also Statute of the International Residual Mechanism for Criminal Tribunals (“IRMCT”), Article 22(1) and (2).

<sup>291</sup> See ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Judgement, 24 March 2016 (“*Karadžić* trial judgement”), para. 6039; *Prosecutor v. Dragan Nikolić*, IT-94-2-A, Judgement on sentencing appeal, 4 February 2005 (“*Nikolić* appeal judgement on sentencing”), para. 84; *Prosecutor v. Duško Tadić*, IT-94-1-A and IT-94-1-Abis, Judgement in sentencing appeals, 26 January 2000, para. 21. The Chamber further notes in this regard that, according to the jurisprudence of the ICTY, should a trial chamber “depart from the sentencing practices in the former Yugoslavia, it must give reasons for such departure and must go beyond merely reciting the relevant code provisions” (see *Karadžić* trial judgement, para. 6038, with further references to case law). See also Article 22(1) and (2) of the IRMCT; IRMCT, *Prosecutor v. Ratko Mladić*, MICT-13-56-A, Judgement, 8 June 2021 (“*Mladić* appeal judgement”), para. 566

<sup>292</sup> *Nikolić* appeal judgement on sentencing, para. 81. See also *Mladić* appeal judgement, para. 562; ICTY, *Prosecutor v. Stanislav Galić*, IT-98-29-A, Judgement, 30 November 2006, para. 398; *Prosecutor v. Miroslav Deronjić*, IT-02-61-A, Judgement on sentencing appeal, 20 July 2005, paras 97-98.

<sup>293</sup> See Decision on protection of legality, paras 82-83.

must be interpreted in connection with the other norms of the Constitution, and not in isolation.<sup>294</sup> In this regard, the Chamber recalls that, pursuant to Article 162(1) of the Constitution, the SC and the SPO function in accordance with their own established legal framework within the justice system of Kosovo.<sup>295</sup> It is in this specific context that Article 162(2) of the Constitution stipulates that the SC and the SPO “shall uphold the protections enshrined within Chapter II of the Constitution, and in particular shall act in compliance with the international human rights standards guaranteed by Article 22 [of the Constitution] and subject to Article 55 [thereof]”. For the Chamber, this makes clear that the fundamental rights and freedoms guaranteed under Chapter II of the Constitution apply with reference to the autonomous legal framework of the SC and the SPO rather than other Kosovo laws that do not bind them. Had this not been the case, there would have been no need to expressly provide for it in Article 162(2) of the Constitution.

119. The Chamber thus concurs with the findings of the appeals panel when, in light of the jurisprudence of the ICTY, also cited in paragraph 117 above, it held that the *lex mitior* principle is “only applicable if a law that binds the [SC] is subsequently changed to a more favourable law by which the [SC] are also bound”.<sup>296</sup> Indeed, seeing that the Applicant was found guilty of war crimes as defined under customary international law pursuant to Article 14(1)(c) of the Law, and recalling that customary international law does not set forth any specific sentencing ranges for such offences,<sup>297</sup> the Chamber finds that the only law that *must* be applied to the sentencing of the Applicant is the Law.

120. Nevertheless, in light of the considerations it espoused in paragraphs 115-117 above, the Chamber takes the view that Article 44(2) of the Law, and in particular sub-

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<sup>294</sup> Kosovo, Constitutional Court, Constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo of 30 April 2020, KO 72/20, Judgment, 28 May 2020 (1 June 2020), para. 346. See also *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 47.

<sup>295</sup> See also above, para. 113.

<sup>296</sup> Appeal judgment, para. 468.

<sup>297</sup> See above, para. 114.

paragraphs (a) and (b) thereof, cannot be read as imposing on the criminal chambers an obligation to apply Kosovo laws, but rather to take these laws into account in the determination of the punishment to be imposed upon a person adjudged guilty of an international crime, in conjunction with the other factors stipulated in Article 44(5) of the Law, and with due regard to Article 44(1) of the Law, which specifies that the SC may impose a maximum term of life-long imprisonment.<sup>298</sup>

121. Although the Chamber is not persuaded by the Supreme Court panel's findings excluding the 1976 SFRY Criminal Code and its amendments from the analysis to be conducted pursuant to Article 44(2)(a) and (b) of the Law on the basis of the distinction between Articles 14 and 15 of the Law,<sup>299</sup> it reiterates that its function is not to decide whether the criminal chambers' findings were correct in terms of facts or law, but to determine whether the irregularities alleged by the Applicant violated his individual rights and freedoms under the Constitution.<sup>300</sup> Having found, however, that neither the 1976 SFRY Criminal Code nor any subsequent Kosovo laws apply as a matter of binding law to the legal regime of the SC, and that the rights and freedoms guaranteed in Chapter II of the Constitution apply in relation to the autonomous legal framework of the SC rather than other non-binding Kosovo laws, the Chamber concludes that the Applicant cannot successfully claim a violation of the principles of non-retroactivity and *lex mitior*, as guaranteed by Article 33(2) and (4) of the Constitution and Article 7 of the Convention.

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<sup>298</sup> See, similarly, *Nikolić* appeal judgement on sentencing, para. 82.

<sup>299</sup> See above, para. 43; Decision on protection of legality, paras 93-97. The Chamber also notes in this regard that, in determining a convicted person's sentence, the trial chambers at the ICTY consistently had recourse to the statutory provisions governing sentencing in the former Yugoslavia, as well as the sentencing practice of its courts. See, for example, ICTY, *Prosecutor v. Vlastimir Đorđević*, IT-05-87/1-T, Judgement, 23 February 2011, para. 2226; *Prosecutor v. Milan Milutinović, Nikola Šainović et al.*, IT-05-87-T, Judgement, 26 February 2009, paras 1154-1155; *Prosecutor v. Duško Tadić*, IT-94-1-T, Sentencing judgment, 14 July 1997, para. 8. See also ICTY, *Prosecutor v. Vlastimir Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014, paras 955-956; *Prosecutor v. Nikola Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, para. 1830; *Prosecutor v. Duško Tadić*, IT-94-1-A and IT-94-1-Abis, Judgement in sentencing appeals, 20 January 2000, paras 21, 23, 73-74.

<sup>300</sup> See above, para. 60, with further references to case law. See also above, paras 76, 90.

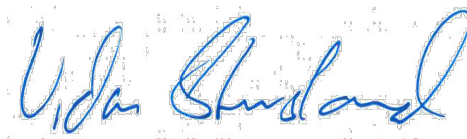
## B. CONCLUSION

122. In light of the foregoing, the Chamber finds that there has been no violation of Article 33(2) and (4) of the Constitution and Article 7 of the Convention.

## FOR THESE REASONS,

The Specialist Chamber of the Constitutional Court, deciding on the Referral made by Mr Salih Mustafa, unanimously,

1. *Declares* the Applicant's complaint under Article 33(2) and (4) of the Constitution and Article 7 of the Convention admissible;
2. *Dismisses* the remainder of the Referral as inadmissible; and
3. *Holds* that there has been no violation of Article 33(2) and (4) of the Constitution and Article 7 of the Convention.



**Judge Vidar Stensland**  
**Presiding Judge**

Done in English on Thursday, 17 April 2025

At The Hague, the Netherlands