

**In:** KSC-CC-2025-29  
The Specialist Prosecutor v. Mr. Salih Mustafa

**Before:** The President of the Kosovo Specialist Chambers  
Judge Ekaterina Trendafilova,

**Registrar:** Fidelma Donlon

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

**Date:** 24 April 2025

**Language:** English

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**The Specialist Prosecutor v. Salih Mustafa**

**Referral to the Constitutional Court Panel concerning the violations of Mr. Salih Mustafa's  
fundamental rights guaranteed under Article 33 (3) of the Constitution of the Republic of  
Kosovo with public Annex 1**

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## I. INTRODUCTION

1. Pursuant to Articles 31, 32, 33, 54 and 113 (7) of the Constitution of the Republic of Kosovo (Kosovo Constitution), Articles 49 (3) of the Law no.05/L053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") and Rules 4 (c) and 20 (1) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court ("RPSCCC"), the Defence for Salih Mustafa (hereinafter; "Defence", "Accused" or Mustafa) files this Referral to the Specialist Chamber of the Constitutional Court ("SCCC").
2. The complaints formulated in this Referral are about violations of Mustafa's rights and freedoms as guaranteed by the Constitution, in particular the Article 33 (3) of the Kosovo Constitution.
3. In the Decision of the Supreme Court of Specialist Chambers ("KSCSC")<sup>1</sup>, the Supreme Court rejected Mustafa's submitted Ground 1.
4. The Decision regarding Ground 1 violates the constitutional rights of Mr. Mustafa. The Supreme Court's interpretation and application (or in fact the non-application) in particular of Article 33 (3) of the Constitution as given in the Decision is violation of Mustafa's constitutional right that the degree of punishment cannot be disproportional to the criminal offence. The Supreme Court's Decision is therefore incompatible with this article of the Constitution. The alleged violation of the constitutional right of Mustafa will be elaborated in the present Referral.

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<sup>1</sup> KSC-SC-2024-04/ F00006, Decision on Mustafa's and Specialist Prosecutor's Requests for Protection of Legality, 25 February 2025. All further references to filings in this Referral concern case number KSC-SC-2024-04 unless otherwise indicated.

5. Mustafa submitted in an earlier Referral (Mustafa's 1<sup>st</sup> Referral) to the SCCC that an improper standard regarding the sentencing range that was applied in his case. In the present Referral the range regarding sentencing is not at issue. It is solely about the proportionality of the sentence that was ultimately imposed on Mustafa.

## II. ADMISIBILITY

6. In accordance with Article 113 (7) of the Constitution, Mustafa, as accused at the KSC, is authorized to make this Referral to Specialist Chamber of the Constitutional Court (hereinafter as SCCC). Mustafa alleges violations of his individual rights and freedoms guaranteed by the Constitution. As the SCCC is the only authority for the interpretation of the Constitution, the Accused refers these complaints to SCCC.
7. In its Decision, the Supreme Court rejected Ground 1 of Mustafa's Request for Protection of Legality. The Defence submits that Supreme Court in its Decision definitively decided on the Grounds submitted by the Defence in Mustafa's Request for Protection of Legality.<sup>2</sup>
8. The Defence submits that Mustafa has the right to appeal the decisions of the Supreme Court as it is final. Mustafa has exhausted all effective legal remedies provided by law. At this point there are no other legal options for Mustafa to challenge the issue that was decided by the Supreme Court, and Mustafa is authorized to file the present Referral.<sup>3</sup>
9. The present Referral is filed to SCCC within 2 months of the Decision of the Supreme Court, the content of which, as far for the alleged violation in this Referral, must be viewed as final. The alleged violations will be set out in the present Referral.

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<sup>2</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, with public Anex1, 9 December 2024.

<sup>3</sup> Article 49 (3) of the KSC Law and Rule 20 (1) of the RPSCCC provide a criterion for referrals by authorized individuals.

### III. PROCEDURAL BACKGROUND

10. On 16 December 2022, Trial Panel I rendered the “Trial Judgment”<sup>4</sup>, wherein it convicted Mr. Salih Mustafa of arbitrary detention, torture and murder as war crimes and acquitted him of the war crime of cruel treatment. The Trial Panel sentenced Mr. Mustafa to 26 years of imprisonment.<sup>5</sup>
11. On 14 December 2023, the Court of Appeals Panel issued the “Appeal Judgment”<sup>6</sup>, wherein it affirmed Mr Mustafa’s convictions for arbitrary detention, torture and murder as war crimes, but granted Mr Mustafa’s appeal, in part, against his sentence. To that end, the Court of Appeals Panel reduced Mr Mustafa’s sentence to 22 years of imprisonment, with credit for time served.<sup>7</sup>
12. On 29 July 2024, the Supreme Court Panel issued the Decision on Mustafa’s 1<sup>st</sup> Request for Protection of Legality, wherein it, inter alia, annulled the Appeal Judgment insofar as it relates to Mr Mustafa’s sentence and returned it for a new determination of his sentence pursuant to Rule 194(1)(b) of the Rules.<sup>8</sup>
13. On 10 September 2024, the Panel of the Court of Appeals Chamber of the KSC, further acting pursuant to the Decision on Mustafa’s 1<sup>st</sup> Request for Protection of Legality, rendered a New Decision regarding Mustafa’s Sentence (“Decision on New Determination of Salih Mustafa’s Sentence”).<sup>9</sup> The Appeals Panel arrived at this decision following the guidance of the Supreme Court. In its Decision the Appeals Court applied the standard as issued by the Supreme Court and reduced Mustafa’s Sentence.

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<sup>4</sup> KSC-BC-2020-05/F00494, Trial Judgment, 16 December 2022 (confidential), para. 831. A corrected version was filed on 24 January 2023 (KSC-BC-2020-05/F00494/COR) and a public redacted version on 8 June 2023 (KSC-BC-2020-05/F00494/RED3/COR).

<sup>5</sup> Ibid, para. 831.

<sup>6</sup> KSC-CA-2023-02/F00038, Appeal Judgment, 14 December 2023 (confidential), para. 484. A public redacted version of the Appeal Judgment was issued on the same day (KSC-CA-2023/02/F00038/RED).

<sup>7</sup> Ibid, para. 484.

<sup>8</sup> KSC-SC-2024-02/F00018, 29 July 2024, Decision on Salih Mustafa’s Request for Protection of Legality, para. 112.

<sup>9</sup> KSC-CA-2023-02/F00045 / Decision on New Determination of Salih Mustafa’s Sentence 10/09/2024.

14. On 9 December 2024 Mr. Mustafa filed a Request for Protection of Legality,<sup>10</sup> challenging the Appeals Panel Decision on the New Determination of Mustafa's Sentence.
15. On 25 February 2025 the Supreme Court rendered its Decision on Mustafa's Request for Protection of Legality.<sup>11</sup>
16. As stated above, the present Referral challenges the definitive decision of the Supreme Court of 25 February 2025. The challenges of present Referral, which are the merits will be named as a "Ground" and will be discussed hereunder.

#### IV. PRELIMINARY MATTER: EXPLANATORY CONSIDERATION BEFORE THE GROUND ON THE PRESENT REFERRAL IS MATERIALLY DISCUSSED

17. In the Supreme Court Decision that is challenged in the present Referral the Defence wants, as a preliminary matter, to clarify something. The Supreme Court considered: *"The Panel notes that the Appeals Panel specified that it focused on international jurisprudence only, rather than include Kosovo jurisprudence, in view of the inapplicability of the sentencing range set forth in the 1976 Criminal Code of the Former Federal Republic of Yugoslavia ("SFRY Code") in Mr. Mustafa's case. The Panel notes that Mr. Mustafa does not challenge this aspect of the Appeals Panel's analysis (...)"*. (Emphases added).<sup>12</sup>

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<sup>10</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, with public Anex1, 9 December 2024.

<sup>11</sup> KSC-SC-2024-04/F00006 Decision on Mustafa's and Specialist Prosecutor's Requests for Protection of Legality, 25 February 2025

<sup>12</sup> Para. 37 and 38 of the KSC-SC-2024-04/ F00006, Decision on Mustafa's and Specialist Prosecutor's Requests for Protection of Legality, 25 February 2025

18. Indeed, the Defence did not challenge the issue whether the 1976 SFRY Code was applicable or not. The reason for that is precisely because in an earlier Referral the Defence challenged that Decision, and the Constitutional Court handed down its Judgment on that Referral on 17 April 2025.<sup>13</sup>
19. In its 1<sup>st</sup> Referral the Defence challenged decision of the Supreme Court that 1976 SFRY Code would not be applicable. Therefore, the SC consideration that Mustafa “*does not challenge this aspect of the AP’s analyses*”, is misplaced.
20. The Defence therefore also disagrees with the notion of the SC that the Defence would have relitigated this issue.

## V. GROUND CHALLENGING THE SUPREME COURT DECISION OF 25 FEBRUARY 2025

### GROUND 1

#### **Violation of Mustafa’s constitutional rights under Article 33 (3) of the Constitution of the Republic of Kosovo.**

21. Article 33 (3) of the constitution reads: the degree of punishment cannot be disproportionate to the criminal offence.
22. The Defence submits that this constitutional Article was violated. The Defence shall clarify in the following how the said article was violated.

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<sup>13</sup> KSC-CC-2024-27/F00011/ 17 April 2025; 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 Right

23. When the AP rendered its new determination decision, it violated this constitutional provision which is meant to protect the Applicant.
24. Subsequently, as the Defence contested this decision of the AP, the Supreme Court did not correct the alleged error of the appeals chamber and rejected the Defence's challenge. The Supreme Court did not at all materially address the issue. The Supreme Court did not even set a standard as far as the degree of punishment is concerned as well as when a punishment is to be viewed as (dis)proportional.
25. The Defence submits that it is of a paramount importance that the Constitutional Court, as the institute that solely and definitively can determine the meaning of the Article and the application of the terminology used within Article 33. The Defence submits that the SCCC, when deliberating on the issue put forward in the present Referral, - whether it be granted or rejected - the Constitutional Court should give clear guidance regarding the interpretation of this article, and the meaning of the terminology used in it. At this point no such guidance exists in the Jurisprudence nor is it explained in any of the commentaries.
26. The Defence will first address the issue of "(dis)proportionality" and later in the present Referral will address the "degree of punishment", as enshrined in this constitutional provision.
27. The Defence will start out with the meaning of proportionality within the context of this provision. Proportionality must be distinguished from the concept of "punishment in general". Proportionality concerns the "degree of punishment" and not "punishment in general".
28. Within the context of the concept of "punishment in general", there is a number of traditional factors that are taken into account when considering punishment in the abstract when a case is to be determined by an adjudicating authority.



29. The traditional factors are inter alia the gravity of a crime, severity of a crime, culpability of the perpetrator, aggravating and mitigating circumstances regarding the perpetrator, deterrence, rehabilitation.
30. The proportionality of the sentence is not about the above-mentioned factors. Proportionality is to be determined at the time that a panel considers a particular sentence for a particular crime. Proportionality is therefore closely connected to the degree of punishment. The issue of proportionality therefore comes at the moment when an adjudicating authority envisages or contemplates to impose a specific sentence (the number of years). Proportionality therefore can be viewed as “a new or separate step” before the adjudicating authority ultimately imposes the specific sentence.
31. The above-mentioned issue then must be weighed *vis-à-vis* the specific crime in question. In addition, the *modus operandi* of the perpetrator, or whether the perpetrator personally acted in the crime must be weighted with regard to the degree of punishment, and the proportionality of it, that ultimately will be imposed. The ultimate degree of punishment must not be disproportionate, as dictated by the provision of the article of the Constitution.
32. The AP did not apply the proportionality issue when it made its new determination of Mustafa's sentence. Therefore, the Defence challenged the non-application of Article 33 (3) within this part of the decision. The Supreme Court, in its turn, simply rejected the argument of the Defence. It did not embark in any manner on the issue but only noted that the wording proportionality existed in the AP decision. It did not materially address the challenge put forward by the Defence in its Request for Protection of Legality.

## A. Judicial Practice

33. In order to determine whether a specific punishment *vis-à-vis* a specific crime is proportional many times sentencing guidelines are established. The sentencing guidelines are usually institutionalized and, even though this might not be binding, they give to an adjudicating authority a framework within which a particular punishment is applied for a particular crime. Most of the time the sources for such guidelines derive from case law.
34. Sometimes even prosecuting authorities develop guidelines in order to submit to the court a certain punishment for a certain crime that they deem appropriate. These guidelines provide prosecuting authorities with a framework within which punishments can be requested in relation to particular crimes.
35. When neither of these guidelines exists and the *travaux préparatoires*, that is the parliamentary discussions regarding the meaning, the object and purpose of the provision as well as the usage of particular terminology within the provision of a law, can be helpful in order to determine what the drafters of a particular provision of the law meant and intended when the law or a provision of the law was created.
36. Within the context of Article 33 (3) of the Constitution, none of the above sources exists regarding the word “disproportional”.
37. Even the commentary on the Constitution of Kosovo does not shed any light on the terminology proportional or disproportional when the Article 33 (3) was discussed in it.
38. In Kosovo, there are currently sentencing guidelines existing. These sentencing guidelines date from many years after the events that took place in 1999. Any sentencing guidelines that were in place at the time when the criminal offence was committed, do not exist. Given the fact that no sentencing guideline at the time of the criminal offence existed, the current

sentencing guidelines in Kosovo are irrelevant and cannot be used in any retroactive manner for the purpose of the case of the applicant. The Defence submits that the best guidance would be case the law dating from the time period when the crime occurred, or alternatively from Kosovo case law that treated cases within the same armed conflict and for the same crime.

## **B. The Defence Position**

39. In the absence of any guidance that can be drawn from the previous chapter, the Defence will explain its position on this issue.
40. The Defence submits that with “proportionality” is meant that the adjudication authority, when they envisage a particular (range of) punishment for a crime, it must take into consideration whether the envisaged punishment does not exceed the standard that should be applied for the crime at the time that it was committed. The degree of punishment may not exceed that standard of proportionality. Without applying a (any) standard, an adjudicating authority will exceed its authority, as an applicant has a right to legal certainty. Legal certainty must find its foundation in a certain standard. It cannot be a random standard. An adjudicating authority must give an insight in what it finds proportionate. That is why some standard or source must be given in order to clarify why that specific punishment is proportional. It makes the judgment on that issue also more transparent.
41. The standard that is ultimately to be applied must be founded on the bases of the time period within which the crime was committed and within sentencing practice that was in place in the same time period.
42. Proportionality of a sentence is important for the individual that it concerns. After all, the concept of proportionality is expressly recognized and therefore enshrined in the constitution. The Constitution ensures in this manner that an adjudicating authority in Kosovo, while having a certain discretion to impose the sanction of imprisonment, is prevented to impose an excessive and random imprisonment.

43. In this manner the Constitution of Kosovo ensures an individual that his sentence is neither arbitrary nor excessive. Even though an adjudicating authority has a discretion to apply a sentence, the Defence submits that for each individual application of a specific punishment for a specific crime, it must ensure that the applied sentence is not excessive.
44. In order to further avoid arbitrariness of a sentence an additional factor must be taken into account. That factor is what was viewed as a proportional sentence for that crime, as committed, in that time period.
45. The KSC, as an adjudicating authority, falling under the Kosovo Constitution, must acknowledge and recognize that in 1999 Kosovo was still part of FRY and must acknowledge and recognize the punishment practice for murder in the year 1999.
46. The Defence submits that the title of Article 33 of the Constitution reads: *"The principle of legality and proportionality in criminal cases"*. Even though the principle of proportionality is not as such defined in the constitution, and the commentary does not give any guidance on this term, the Defence submits that Article 33 of the Constitution solely protects the legitimate interests of an accused in a criminal case. Article 33 of the Constitution guarantees absolute protection for an accused and these protections are inviolable. Article 56 (2) of the Constitution even expressly stipulates this. The Article does not reflect in any manner that any other interest for any other party is protected under this Article.
47. Therefore, the interests of victims, national interests, opinions within society are not at all a part of this article of the Constitution. Adjudicating authorities therefore must indeed poses, as the commentary expressly notes, a certain courage to render justice in cases.<sup>14</sup>

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<sup>14</sup> Prof. Dr. Enver Hasani / Prof. Dr. Ivan Čukalović-*"Commentary of the Constitution of the Republic of Kosovo"*/First Edition (© 2013 Enver Hasani, Ivan Čukalović dhe Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH) / Article (33) 3 (1), page114 reads: *"Ensuring legal certainty for every individual is very important field of criminal law and heavily relies on constitutional*

48. Indeed, it is difficult for an adjudicating authority to consider 25 years after an event what was a proportional sentence 25 years earlier. Case law of that time-period might help a panel to determine what at that time-period was viewed as a proportional sentence for that crime.
49. An adjudication authority should not fall into a potential “trap” of using nowadays standards when applying a specific punishment for a specific crime. Nevertheless, it is difficult to completely disassociate oneself from today’s views regarding a crime.
50. Factors as deterrence, must also be seen as an inherent part of a decision regarding a punishment. Even though punishments 25 years ago were different, deterrence was always a factor. Deterrence however is to be viewed within the context that the crime was committed. An adjudicating authority must realise that the deterrent purpose of a punishment is severely nuanced when an armed conflict is not foreseen in the near future. Therefore, the risk that an accused will commit the same (war) crime again is to be assessed within the context in which the crime took place.
51. In the absence of any guidance regarding the degree of punishment being proportional or disproportional the Defence submits that jurisprudence of regular Kosovo courts can be used as a source from which guidance can be drawn.<sup>15</sup> This is in line with other international legal authorities that do not prevent in any manner to use domestic law as a source. The ICC does

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*guarantee (Article 33, paragraph 3) that the severity of punishment must not be disproportionate to the criminal offense, namely the proportionality must exist in criminal proceedings. This is an extremely important and very sensitive issue, therefore determining appropriate sentencing requires a high level of professionalism, knowledge, experience, and courage from the responsible individual. These qualities are essential to achieve the intended purpose of the punishment. Often, in addition to all the qualities mentioned, courage is paramount, as it involves considering all circumstances affecting the severity of the sentence, including mitigating and aggravating factors, understanding the offender’s mindset, and examining the reasons behind the offense, behaviour of the perpetrator up to the commission of the incriminated and similar offenses, and all this with the aim of imposing such a punishment (in terms of type, severity, etc.) that effectively serves its purpose. This is not an easy task at all, criminal procedures should involve the most skilled, experienced, and courageous professionals to ensure appropriate sentencing and avoid disproportionate punishments. (The source for this reference is included in the Annex1).*

<sup>15</sup> See Annex 1 of the Present Referral

not prevent in any manner to apply national law as guiding principles when implementing a particular sentence on a particular accused. Article 80 of the ICC Statute specifically addresses this issue.<sup>16</sup>

### **C. The non-application of the principle of proportionality by the Appeals Panel.**

52. In this part the Defence for the applicant will now address the issue of the non-application of the principle of proportionality. For the sake of clarity, the Defence will first address this issue as it was handled by the Appeal's Panel in its new determination of Mustafa's sentence. Subsequently, the Defence of the Applicant will address how the Supreme Court dismissed the defence's challenge regarding disproportionality of the sentence in Mustafa's case. Lastly the Defence will address why the Supreme Court Decision is erroneous, as it did not review properly whether the degree of punishment (the imposed sentence of 15 years) is compliant with Article 33 (3) of the Constitution.

53. The Defence recalls that the Appeal's panel in its New Determination reduced Mustafa's sentence from 22 years to 15 years of imprisonment. The AP considered: *"...that the single sentence of 22 years imprisonment imposed by the Appeals Panel is out of reasonable proportion in light of the identified sentencing range, the jurisprudence analysed, and the specific circumstances of Mustafa's case"*.

54. This newly imposed sentence, as can be seen from the above quotation, was derived *inter alia* in light of the identified sentencing range. That sentencing range was however the range of 5 to 25 years as identified in the first Supreme Court's Decision.

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<sup>16</sup> Article 80 of the Rome Statute of the International Criminal Court: *"Non-prejudice to national application of penalties and national laws"*. The Article reads: *"Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part"*.

**D. The Defence submits that the Supreme Court has erroneously left intact the decision of the Appeals Panel regarding the proportionality of the sentence imposed on Mustafa**

55. The Defence, in its Request for Protection of Legality, argued that the imposed sentence of 15 years, and therefore the degree of punishment, is not proportional and therefore is a violation of Mustafa's constitutional right as protected under Article 33 (3) of the Constitution.
56. The Supreme Court dismissed the Defence's challenge regarding this matter. As the Constitutional Court is the single authority that can definitively rule on the violation of constitutional rights, the Defence for the Applicant files the present Referral.
57. The Supreme Court, in considering that the violations of the criminal Law are confined to Article 385 (1) of the Kosovo Criminal Procedure Code, the Supreme Court considered the following: *"in rendering a decision on punishment, alternative punishment or judicial admonition, or in ordering a measure of mandatory rehabilitation treatment or the confiscation, the court exceeded its authority under a law".*<sup>17</sup>
58. In addition, the Supreme Court considered: *"Moreover, the Appeals Panel also discussed the proportionality of Mr. Mustafa's sentence within the meaning of Article 33(3) of the Constitution"*<sup>18</sup>. The SC cited in footnote 56 the paragraphs in which it found that the AP had discussed proportionality. The Defence submits that this is incorrect. The Supreme Court merely cited the paragraphs in which either the word proportional or the Article 33 (3) was mentioned in the AP's New Determination Decision. These paragraphs are: 17, 24, 26.

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<sup>17</sup> Para 23 of KSC-SC-2024-04/ F00006, Decision on Mustafa's and Specialist Prosecutor's Requests for Protection of Legality, 25 February 2025.

<sup>18</sup> Ibid, paragraph 37.

59. In none of these three paragraphs a genuine and effective explication of what would be proportional as to the ultimately imposed sentence of Mustafa, was given. Neither did the AP explain why this particular sentence was proportional vis-à-vis the criminal offence.
60. The Supreme Court did not correct the Appeals Panel Judgment. It should have acknowledged that the AP's New Determination Decision was not compliant with Article 33 (3) of the Constitution, and that the AP should have explained in its Decision why the imposed degree of punishment was not disproportionate.
61. When the Defence challenged the proportionality of the Decision the Supreme Court simply rejected that challenge and did not further elaborate materially as to why the AP's Decision was compliant to Article 33 (3) of the Constitution. Neither did the Supreme Court set any legal standard from which a proportional punishment can be derived. This is the essence of the error that the Supreme Court made when it handled the Mustafa's Request for Protection of Legality on that issue. The Supreme Court is in a position to rule on the matter and to give guidance regarding the degree of punishment. The Supreme Court should have ruled that the Court – that is the Appeal Panel - exceeded its authority under the Law.
62. The Defence for the Applicant submits that *"the court exceeded its authority under a law"*, as it did not fully implement the standard as set forth in article 33 (3) of the Constitution. In fact, no standard for the degree of punishment was used, which makes the decision as such arbitrary.
63. Any random decision on the imposition of a punishment must be legally founded on some (kind of) standard. Such standard is important for the legal certainty of the accused. Any such standard is absent in both the Appeals Panel's Decision as well as in the Supreme Court's Decision on Mustafa's Request for Protection of Legality.



64. The Defence submits that the degree of Mustafa's punishment (that is the imposed sentence) is not justified as it does not comply to the principle of proportionality within the meaning of Article 33 (3) of the Constitution.
65. The Supreme Court's Decision, where it rejected the Defence's challenge, is therefore wrong, and some legal standard should have been applied as to the degree of punishment and its proportionality.
66. As the Constitutional Court is the single authority that can definitively rule on the violation of constitutional rights, the Defence for the Applicant files the present Referral.

#### **E. The degree of sentencing to 15 years is disproportionate.**

67. In this part the Defence shall clarify why the degree of punishment to 15 years is disproportionate. The degree of punishment that forms the core of this part of the discussion regarding Article 33 (3) of the Constitution.
68. The term disproportionate in Article 33 (3) is completely connected and intertwined with the terminology in "the degree of punishment".
69. The Defence submits that the degree of punishment needs a standard. Otherwise, the punishment might become arbitrary and a lack of legal certainty will arise for any accused that wishes to make an application regarding this right, as protected under the Constitution.
70. Any punishment that goes beyond what is necessary to serve the purpose of justice for a criminal act that was committed, is disproportionate. The degree of punishment must be aligned with the specific Article 33 (3) of the Constitution. The proportionality of a punishment is a fundamental principle in both Kosovo Law and in an International Criminal

Law. The Defence submits that in order to impose a punishment for a criminal offence (in this case the murder of 1 individual in which there was no personal involvement of the perpetrator), the adjudicating authority is obliged to take into account, and to properly reason, from which source, and why, it ultimately chose the sentence it imposed on the accused.

71. The Defence has submitted, and submits again in this present Referral, the case law and therefore the State practice, in Kosovo courts where the same crime was involved and what ultimately was the outcome punishment-wise, of that crime.<sup>19</sup> This is not done in order to relitigate any factual issue, but simply to substantiate that source of law, as it can be instructive for any standard that is to be (can be) instituted for the degree of punishment.

72. The Defence submits that, apart from this jurisprudence, the time-period within which a crime was committed, and the sentencing practice regarding this crime within that time-period, is an important factor. In the instant case, the crime was committed within the context of an armed conflict. However, since 1999, Kosovo has not been involved in any armed conflict anymore and the Applicant lived his life since 1999 as a civil servant for Kosovo authorities. In a broader context, Kosovo gained its independence and has been recognized internationally since 2008 as an independent and sovereign State. Therefore, the purpose of the deterrent effect of the punishment should be nuanced as there is no real risk for any armed conflict in the near future, let alone the participation of the applicant, given his age, therein. In addition, the time-period that has lapsed between the crime and the moment that the Applicant was prosecuted, must play a role.

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<sup>19</sup> See Annex 1 of the Present Referral

73. None of the above factors were laid down in the AP new determination decision, and neither did the Supreme Court, when the Defence challenged the proportionality of the applied sentence, gave any standard to which the degree of punishment and its proportionality can be related.
74. The Defence submits that without providing any standard for a protected constitutional right, adjudication authorities can randomly “pick and choose” any punishment, without giving any legitimate justification for it. For the Applicant there is no legal certainty from which the degree of punishment is to be derived.
75. Therefore, the applied degree of punishment of 15 years, is disproportionate. Without a proper legal standard for the terminology used in Article 33 (3), the imposed 15 years of imprisonment sentence is arbitrary and as a result of it untenable.

## V. CONCLUSION

76. In the virtue of foregoing reasons Mustafa seeks to grant him the Ground in the present Referral, and that the Constitutional Court will decide:

To DECLARE the Referral admissible;

To GRANT the Defence’s Ground in the present Referral

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

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**24 April 2025**

**At The Hague, the Netherlands**



**Julius von Bóné**

**Specialist Defence Counsel**