



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

In: KSC-CC-2025-29

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

Registrar: Dr Fidelma Donlon

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Prosecution submissions on referral of Salih MUSTAFA (KSC-CC-2025-29/F00001)

with public Annex 1

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I. INTRODUCTION

1. Pursuant to the Decision,¹ the Specialist Prosecutor's Office ('SPO') hereby provides submissions on the Second Referral,² which consists of a single ground asserting violations of MUSTAFA's³ constitutional rights under Article 33(3) of the Constitution. The Second Referral is inadmissible and should be dismissed, as it seeks to relitigate issues already adjudicated by this Chamber, is untimely, and fails to establish even the appearance of a constitutional violation.

II. PROCEDURAL HISTORY

2. On 16 December 2022, the Trial Panel rendered the Trial Judgment, convicting MUSTAFA of the war crimes of arbitrary detention, torture, and murder, and imposed a single sentence of 26 years of imprisonment.⁴ In sentencing MUSTAFA, the Trial Panel underscored, *inter alia*, the 'superior position and central role of the Accused in a system of illegal detentions and tortures', the high gravity of the crimes, the particular cruelty with which the crimes were committed, and that the victims, including the Murder Victim, were vulnerable and defenceless.⁵

3. On 14 December 2023, the Appeals Panel unanimously upheld MUSTAFA's convictions, while reducing his single sentence to 22 years of imprisonment, which it found reflected 'the totality of [MUSTAFA's] criminal conduct in this case'.⁶

¹ Decision on the Working Language and Further Proceedings, KSC-CC-2025-29/F0004, 16 May 2025 ('Decision'), p.3. Annex 1 includes a table of authorities with full citations, including assigned short-names used in this submission.

² 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, KSC-CC-2025-29/F00001, 24 April 2025 ('Second Referral').

³ The Applicant Salih MUSTAFA is referred to herein as 'MUSTAFA'.

⁴ Trial Judgment, KSC-BC-2020-05/F00494, para.831.

⁵ Trial Judgment, KSC-BC-2020-05/F00494, paras 794-826.

⁶ Appeal Judgment, KSC-CA-2023-02/F00038, paras 478-480.

4. Following the filing of the First Legality Request, on 29 July 2024, the Supreme Court Panel summarily dismissed MUSTAFA's arguments with respect to his conviction for the war crime of murder while directing the Appeals Panel to re-examine sentencing to account for the sentencing range identified by the Supreme Court following its *lex mitior* assessment of non-binding Article 44(2)(b) sentencing ranges under Kosovo law.⁷

5. On 10 September 2024, the Appeals Panel rendered its Sentencing Decision, whereby the Appeals Panel again 'endorse[d] the Trial Panel's assessment of the individual circumstances of the case for the purposes of determining MUSTAFA's sentences', but in light of the non-binding Article 44(2)(b) sentencing range identified by the Supreme Court, the jurisprudence analysed, and the specific circumstances of the case, reduced his single sentence to 15 years.⁸

6. On 14 March 2024, MUSTAFA filed the First Referral against the First Legality Decision, alleging violations of various constitutional provisions partially on the basis that the SFRY Code and subsequent amendments were not considered in his sentencing in violation of *lex mitior*.⁹

7. On 9 December 2024, MUSTAFA filed his Second Legality Request, alleging violations of Article 44(2)(a) and (5) of the Law and Article 33(3) of the Constitution with regard to the purported lack of proportionality in his sentence for the crime of murder.¹⁰ The Supreme Court Panel rejected MUSTAFA's Second Legality Request on 25 February 2025, finding that MUSTAFA 'merely disagree[d] with the findings . . . in an attempt to relitigate the same issue [*lex mitior*] that has already been decided upon'.¹¹

⁷ First Legality Decision, KSC-SC-2024-02/F00018, paras 49-57, 80-111.

⁸ Sentencing Decision, KSC-CA-2023-02/F00045, paras 19, 25-26.

⁹ First Referral, KSC-CC-2024-27/F00001, para.37.

¹⁰ Second Legality Request, KSC-SC-2024-03/F00001, para.26.

¹¹ Second Legality Decision, KSC-SC-2024-03/F00006, para.38.

8. On 17 April 2025, this Chamber issued its decision on MUSTAFA's First Referral whereby it found no violation of Article 33(2) and (4) of the Constitution and Article 7 of the European Convention on Human Rights ('ECHR'), concurred with the Appeals Panel that the *lex mitior* principle is only applicable to binding laws, and definitively ruled that 'the only law that *must* be applied to the sentencing of the Applicant is the Law'.¹²

9. On 24 April 2025, MUSTAFA filed the Second Referral before this Chamber alleging a violation of Article 33(3) of the Constitution.¹³ MUSTAFA submits that the Second Referral does not concern the sentencing range applied in the Sentencing Decision, which was the subject of the First Referral, but instead solely relates to the proportionality of his sentence.¹⁴ The Second Referral is based on two interconnected arguments: (i) that the Supreme Court failed to 'set a standard' for the 'degree of punishment' and proportionality under Article 33(3) of the Constitution, and thereby exceeded its authority;¹⁵ (ii) that, in sentencing MUSTAFA, the Appeals Panel should have been guided by Kosovo caselaw 'dating from the time period when the crime occurred, or alternatively [...] that treated cases within the same armed conflict and for the same crime'.¹⁶

III. REFERRAL ADMISSIBILITY REQUIREMENTS

10. Prior to examining a referral on its merits, this Chamber must first ensure the admissibility of a referral.¹⁷ Applicants must exhaust remedies before filing referrals,¹⁸ and must file their referrals within two months of the 'final ruling' challenged.¹⁹

¹² Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, paras 119, 122.

¹³ Second Referral, KSC-CC-2025-29/F00001, para.22.

¹⁴ Second Referral, KSC-CC-2025-29/F00001, para.5.

¹⁵ Second Referral, KSC-CC-2025-29/F00001, paras 24, 40, 61-65, 69, 71, 73-75.

¹⁶ Second Referral, KSC-CC-2025-29/F00001, paras 38, 41, 44-45, 48, 51, 71-72.

¹⁷ Veseli/Krasniqi SCCC Decision, KSC-CC-2022-13/F00010, para.36.

¹⁸ Law, Art. 49(3).

¹⁹ SCCC Rules, Rules 14(d), 20.

Referrals may be entirely or partially time-barred if an Applicant fails to challenge a determination in a timely fashion.²⁰

11. This Chamber is mandated with examining referrals alleging violations of the individual rights and freedoms guaranteed by the Constitution or ECHR.²¹ Alleged constitutional violations must be clearly identified and presented with substantively relevant and sufficiently reasoned arguments.²² It is outside of this Chamber's role to 'decide whether the findings of the criminal chambers were correct in terms of facts or law', as to hold otherwise would render it an appeals chamber, thus 'disregard[ing] the limits imposed' by Articles 113 and 162(3) of the Constitution.²³ Instead, this Chamber may only question a legal or factual finding if it is so flagrantly and manifestly arbitrary that it gives rise, in itself, to a violation of constitutional rights.²⁴ A referral or a specific complaint in a referral is inadmissible if nothing therein gives rise to the appearance of a constitutional violation.²⁵

IV. SUBMISSIONS

12. The Second Referral is inadmissible on multiple grounds: (i) it pertains exclusively to a substantially similar and already adjudicated constitutional referral put forward by MUSTAFA; (ii) it advances untimely challenges and raises new arguments not before the criminal chambers; and (iii) nothing in the Referral gives rise to the appearance of a constitutional violation. It should therefore be summarily dismissed.

²⁰ Shala 2022 SCCC Decision, KSC-CC-2022-19/F00004, para.25.

²¹ Haradinaj SCCC Decision, KSC-CC-2023-22/F00011, 31 May 2024, paras 66-67.

²² SCCC Rules, Rule 14(f); Thaçi SCCC Decision, KSC-CC-2022-15/F00010, para.114.

²³ Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, para.60.

²⁴ Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, paras 61, 90.

²⁵ SCCC Rules, Rule 14(f); Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, para.87.

A. THE SECOND REFERRAL PERTAINS TO ALREADY ADJUDICATED MATTERS.

13. Under SCCC Rule 14(b), a referral should be summarily dismissed if it pertains to a matter this Chamber has already decided upon and contains ‘no relevant new information’.²⁶ Such relief is warranted in this instance. While MUSTAFA takes pains to characterise his Second Referral as distinct from his First Referral, even a superficial comparison reveals the similarity in arguments put forward by MUSTAFA seeking the imposition of sentencing ranges – drawn from the SFRY Code – this Chamber has already ruled upon.²⁷

14. In the First Referral, MUSTAFA sought to reduce his sentence by arguing that, on the basis of *lex mitior*, portions of the SFRY Code should apply to his sentence.²⁸ However, this Chamber definitively ruled against MUSTAFA’s interpretation and instead underscored the ‘non-binding nature of the sentencing range for the crime provided under Kosovo laws’, further emphasising that ‘the legislator did not intend . . . to bind the criminal chambers to the sentencing ranges in Kosovo law’.²⁹ Moreover, while not persuaded by the Supreme Court Panel’s findings excluding the SFRY Code and its amendments from the Article 44(2) analysis, this Chamber concluded that MUSTAFA could not claim a violation of the Constitution on this basis. In so finding, the Chamber considered that: (i) its function is not to decide whether the criminal chambers’ findings were correct in fact or law; (ii) the SFRY Code and any subsequent Kosovo laws are non-binding; and (iii) constitutional rights and freedoms apply in

²⁶ SCCC Rules, Rule 14(b). Caselaw before the ECtHR similarly underscores the summary dismissal of complaints that pertain to a ‘substantially similar’ matter. *I.J.L.* Admissibility Decision (rejecting a complaint from an applicant as the applicant’s prior petition concerned the ‘same factual basis’, and included only one new legal argument); *Kafkaris* Admissibility Decision, paras 58-63 (finding a complaint challenging a sentence of life imprisonment ‘manifestly ill founded’ as it concerned a previously submitted complaint pertaining to the lawfulness of the applicant’s detention).

²⁷ Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, para.117.

²⁸ First Referral, KSC-CC-2024-27/F00001, paras 37-43.

²⁹ Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, paras 116-117.

relation to the autonomous legal framework of the KSC, not non-binding Kosovo laws.³⁰

15. The present Second Referral again seeks the application of the SFRY Code and related sentencing practice by vaguely calling for the application of a ‘standard’ from ‘the same time period’ that is ‘within sentencing practice that was in place’ to ensure the proportionality of a sentence.³¹ MUSTAFA’s thinly veiled attempt to seek the re-examination of adjudicated matters is readily apparent when considering the Second Referral relies upon domestic caselaw – including caselaw submitted as part of the First Referral³² – whereby each case cited appears³³ to pertain to the application of the sentencing ranges in the SFRY Code and its amendments.³⁴

16. As the Second Referral concerns matters already adjudicated before this Chamber, it should be summarily rejected.³⁵

B. THE SECOND REFERRAL RAISES UNTIMELY ARGUMENTS.

17. The Second Referral also raises untimely arguments and fails to demonstrate that available remedies before the criminal chambers have been exhausted.³⁶

18. While MUSTAFA attempts to construe his Second Referral as related to the Second Legality Decision, it is based on the relevance and applicability of Kosovo

³⁰ Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, para.117.

³¹ Second Referral, KSC-CC-2025-29/F00001, para.40.

³² Compare e.g. Second Referral Annex, KSC-CC-2025-29/F00001/A01, p.2 (discussing the *Stanišić* decision) with First Referral Annex 7, KSC-CC-2025-27/F00001/A07, p.1 (discussing the *Stanišić* decision).

³³ The SPO draws the Chamber’s attention to deficiencies with the Annex: not only are some of the provided cases inaccessible or lacking links (see, e.g., *Bajrović*, Second Referral Annex, KSC-CC-2025-29/F00001/A01, p.1), but the vast majority of cited cases are not available in English (see Second Referral Annex, KSC-CC-2025-29/F00001/A01, pp.3-9). Furthermore, MUSTAFA fails to specifically explain how any of these cases relate to the determination of proportionality in sentencing in this case.

³⁴ The summaries provided by MUSTAFA indicate that every single cited case relies upon the SFRY Code in determining sentencing. See Second Referral Annex, KSC-CC-2025-29/F00001/A01, pp.1-9.

³⁵ See, similarly, Second Legality Decision, KSC-SC-2024-03/F00006, para.38.

³⁶ SCCC Rules, Rule 20(1)(a); Haradinaj SCCC Decision, KSC-CC-2023-22/F00011, paras 87-95.

caselaw applying the SFRY Code, which was addressed in the First Legality Decision.³⁷ Any challenge on this basis should have been – and as noted above, effectively was – raised in the First Referral, which concerned the First Legality Decision.

19. Further, the Second Referral's assertion that no proportionality or 'degree of punishment' standard had been set or applied³⁸ pertains to the findings made not only by the Supreme Court in the First Legality Decision,³⁹ but also by the Trial Panel – as upheld by the Appeals Panel⁴⁰ and consistent with applicable standards and framework set out in Article 33(3) of the Constitution, Article 44(5) of the Law, and KSC Rule 163 – regarding the factors and individualised and factual assessment undertaken in determining a proportionate sentence. The complaints in the Second Referral should therefore have been raised as part of his First Legality Request and/or First Referral, and are improperly raised now.

20. Finally, further underscoring his failure to exhaust remedies and timely raise his complaints, MUSTAFA's arguments in the Second Referral concerning the applicable standards for proportionality and the 'degree of punishment' were not raised before the Supreme Court Panel.⁴¹

³⁷ First Legality Decision, KSC-SC-2024-02/F00018, fn.159 (indicating that Kosovo cases reached under the SFRY Code are irrelevant in light of the Supreme Court Panel's finding that it was inapplicable).

³⁸ Second Referral, KSC-CC-2025-29/F00001, paras 24, 40, 61-63, 65, 69, 71, 73-75.

³⁹ First Legality Decision, KSC-SC-2024-02/F00018, paras 110-111 (concerning the wide range of factors to be considered in determining a sentence).

⁴⁰ *See, e.g.*, Appeal Judgment, KSC-CA-2023-02/F00038, paras 451, 453 (upholding the Trial Panel's factual determinations, as 'the gravity of the offence is the primary consideration in imposing a sentence' that is 'proportionate to the gravity of the criminal conduct' to ensure sufficient retribution and deterrence, and that trial panels are thus afforded 'broad discretion' in order to select sentences that reflect 'the gravity of the crimes, the extent of the accused's involvement in the offences and his or her individual circumstances').

⁴¹ The Second Legality Request relied exclusively on arguments that the Appeals Panel failed to appropriately weigh the circumstances of the case and his participation in the crimes, and noted that the 'vast majority of jurisprudence in Kosovo, regarding the same crimes, is far more lenient', referring to sentences reached under the SFRY Code. No submissions were made about the need to articulate a

21. Overall, MUSTAFA's failure to raise his arguments or challenge findings of the criminal chambers at the appropriate time renders them inadmissible at this late stage.⁴²

C. THERE IS NO APPEARANCE OF ANY CONSTITUTIONAL VIOLATION.

22. The Second Referral is also inadmissible under SCCC Rule 14(f) as nothing therein gives rise to the appearance of a constitutional violation. For the same reasons, even if found admissible, the Referral necessarily fails on its merits.⁴³

23. MUSTAFA's Second Referral is devoid of any clear articulation of *how* his constitutional rights have been impacted by the Second Legality Decision. Instead, the Second Referral claims – without offering any support, factual, legal, or otherwise⁴⁴ – that his 15-year sentence (reduced from the 22 years and 26 years that the Appeals Panel and Trial Panel, respectively, previously found reflected the totality of MUSTAFA's criminal conduct⁴⁵) was disproportionate. MUSTAFA 'submits that the degree of punishment needs a standard',⁴⁶ seemingly directing this Chamber to legislate on his behalf while ignoring the applicable legal framework and well-settled case law pertaining to sentencing determinations.

24. As with the First Referral, MUSTAFA's Second Referral in essence complains about 'the outcome of the criminal proceedings' and 'the findings and conclusions of

(further) standard or what that standard might be. *See* Second Legality Request, KSC-SC-2024-03/F00001, paras 26-42.

⁴² Haradinaj SCCC Decision, KSC-CC-2023-22/F00011, paras 79-83.

⁴³ Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, para.87 ('[I]n accordance with Rule 14(f) of the SCCC Rules, [the Chamber] may still declare inadmissible a referral . . . for reasons related to the examination of the merits', in particular, where there is no appearance of a constitutional violation).

⁴⁴ *See* Appeal Judgment, KSC-CA-2023-02/F00038, para.29 (noting a court 'cannot be expected to consider a party's submissions if they are obscure, contradictory, vague, unsubstantiated or suffer from other formal and obvious insufficiencies').

⁴⁵ Trial Judgment, KSC-BC-2020-05/F00494, para.831; Appeal Judgment, KSC-CA-2023-02/F00038, paras 478-480.

⁴⁶ Second Referral, KSC-CC-2025-29/F00001, para.69.

the appeal and trial panels with respect to his conviction for the war crime of murder' in connection with the factual sentencing determinations.⁴⁷ Examination of the merits of a factual or legal finding, including on sentencing matters, by this Chamber is only warranted where it is 'flagrantly and manifestly arbitrary'.⁴⁸ Yet, MUSTAFA does not acknowledge, let alone attempt to meet, this burden.

25. Despite his request that this Chamber adopt a standard, at no point in the Second Referral does MUSTAFA advance a clear definition of 'proportionality' in sentencing or engage with the existing framework, and instead puts forward unsubstantiated arguments seeking to characterise proportionality in sentencing as somehow distinct from 'traditional factors' like 'gravity of a crime' or 'aggravating and mitigating circumstances'.⁴⁹ Such arguments contradict the plain language of Article 33(3) of the Constitution, which provides that the degree of punishment must not be disproportional to the criminal offence, and the sentencing framework at the KSC.

26. Contrary to MUSTAFA's unsubstantiated and at times incoherent⁵⁰ arguments, Article 33(3) of the Constitution, Article 44(5) of the Law, KSC Rule 163, and relevant

⁴⁷ In the Second Referral, MUSTAFA again implicitly challenges factors relevant to sentencing, including aggravating and mitigating factors, that have long since been adjudicated and final. *See, similarly*, Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, para.90. *Compare e.g.* Second Referral, KSC-CC-2025-29/F00001, para. 70 (submitting that 'in this case the murder of 1 individual in which there was no personal involvement of the perpetrator'), *with Čelebići Case Appeal Judgment*, para.737 ('...absence of such active participation [of a superior] is not a mitigating circumstance').

⁴⁸ Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, paras 61, 121. In the sentencing context, the ECtHR has found that, in principle, matters of appropriate sentencing fall outside the scope of the ECHR, as it is not the ECtHR's role to decide what is the appropriate term of detention for a particular offence, the exception being for grossly or manifestly disproportionate sentences. *See, e.g., Khamtokhu and Aksenchik Judgment*, para.55. The ICTY Appeals Chamber has acknowledged that trial panels are afforded broad discretion in identifying a proper sentence in light of the individual circumstances of each case, and appellate intervention is warranted only where the determination was manifestly ill founded or disproportionate. *See Čelebići Case Appeal Judgment*, para.755; *Aleksovski Appeal Judgment*, paras 187-190.

⁴⁹ Second Referral, KSC-CC-2025-29/F00001, paras 29-30.

⁵⁰ Second Referral, KSC-CC-2025-29/F00001, paras 26-32, 41 (arguing that proportionality is distinct from 'punishment in general' and does not involve the weighing of 'traditional factors' like aggravating and mitigating circumstances, but nevertheless requires the weighing of 'the specific crime . . . with regard to the degree of punishment').

jurisprudence all underscore that the principle of proportionality in sentencing is the weighing of the unique circumstances of each case to identify a sentence that accurately reflects the gravity of an offence and an Accused's culpable conduct.⁵¹ As sentencing determinations are highly dependent on the individual circumstances of each case, 'the comparison [of one case with another] is often of limited assistance'.⁵²

27. Nowhere in MUSTAFA's Second Referral does he allege that the factual determinations relied upon, including factors such as MUSTAFA's superior role and personal involvement in particularly cruel and grave crimes,⁵³ were manifestly ill-founded and thus warrant the extraordinary remedy of re-examination of the merits.⁵⁴ Further, as also noted above, constitutional rights and freedoms apply in relation to the autonomous legal framework of the KSC, not the non-binding SFRY Code and related caselaw relied upon by MUSTAFA without further explanation.⁵⁵

28. Thus, even a cursory examination of the merits reveals that MUSTAFA's intention is not to allege a constitutional violation – as none has been articulated with any degree of clarity or specificity – but is instead an attempt to undermine clear legislative intent in adopting the Law and more generally, providing the criminal chambers wide discretion in sentencing. Accordingly, the Second Referral fails to give rise to the appearance of any constitutional violation.

V. RELIEF REQUESTED

29. The Chamber should summarily dismiss the Second Referral.

⁵¹ *Nikolić* Judgment on Sentencing Appeal, para.21.

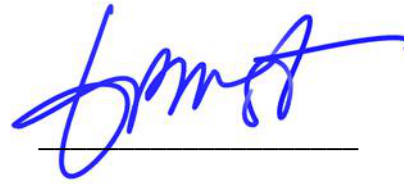
⁵² *Čelebići* Case Appeal Judgment, para.719.

⁵³ *See, e.g.*, Trial Judgment, KSC-BC-2020-05/F00494, paras 808, 813 (stressing the 'superior position and central role of the Accused in a system of illegal detentions and tortures', and the commission of crimes with particular cruelty and against vulnerable and defenceless victims, including the Murder Victim).

⁵⁴ *See, similarly*, Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, para.61.

⁵⁵ *See, similarly*, Judgment on Constitutional Referral, KSC-CC-2024-27/F00011, para.117.

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