

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

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

Registrar: Fidelma Donlon

Filing Participant: Specialist Counsel for Salih Mustafa

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**Mustafa's Reply to the SPO Submissions to
Mustafa's Constitutional Court Referral**

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I. INTRODUCTION

1. The present document is Mustafa's (the "Applicant") reply ("Reply") to the SPO submission on Mustafa's Constitutional Court Referral ("Response").¹

II. PROCEDURAL BACKGROUND

2. On 24 of April 2025, Mustafa filed a referral ("Mustafa's Referral") to the Specialist Chamber of the Constitutional Court ("SCCC").² Mustafa did so after his Request for Protection of Legality (RPL) was rejected by the Supreme Court (SC).³
3. On 2nd May 2025 the SPO filed its Request for authorization to respond to referral KSC-CC-2025-29/F00001.⁴
4. On 16 May 2025, the Panel of the Specialist Chamber of the Constitutional Court issued a Decision on the Working Language and Further Proceedings.⁵ In the Decision the Constitutional Court laid down the respective timelines for SPO to file its response and the Applicant (also referred to as Mustafa, Accused or Defence) to file his reply to it.
5. On 30 May 2025 the SPO filed its submissions on referral of Salih MUSTAFA (KSC-CC-2025-29/F00001) with public Annex 1.⁶
6. The present document is a Reply to the Response of the SPO.

¹ KSC-CC-2025-29/F00005, 30 May 2025, Prosecution Submissions on Referral of Salim Mustafa (KSC-CC-2025-29/F00001 with public Annex 1).

² KSC-CC-2025-29/F00001/24 April /2025; 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 ("Referral").

³ KSC-SC-2024-03/F00001, 9 December 2024, Defense Request for Protection of Legality pursuant to Article 48 (6) to (8) of the Law and Rule 193 of the Rules with Public Annex 1; The request was rejected on 25 February 2025, KSC-SC-2024-04/F00006 Decision on Mustafa's and Specialist Prosecutor's Requests for Protection of Legality (the Supreme Court Second Legality Decision)

⁴ KSC-CC-2025-29/F00003/ 2nd may 2025; Prosecution request for authorisation to respond to referral KSC-CC-2025-29/F00001.

⁵ KSC-CC-2025-29/F00004/16 May 2025; Decision on the Working Language and Further Proceedings.

⁶ KSC-CC-2025-29/F00005/ 30 May 2025. The SPO submissions on referral of Salih MUSTAFA (KSC-CC-2025-29/F00001) with public Annex 1.

III. REPLY TO SPO'S SUBMISSIONS IN ITS RESPONSE ON THE ISSUES OF ADMISSIBILITY

I -

7. The SPO in paragraph 12 of its Response submits that the Referral is inadmissible on multiple grounds as it (i) 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; (iii) that nothing in their Referral gives rise to the appearance of a constitutional violation. The SPO submits that the Referral should be summarily dismissed.⁷
8. In paragraph 11 of its Response the SPO states: "...must be clearly identified and presented with substantively relevant and sufficiently reasoned arguments"; The SPO is citing here in footnote 22 the SC decision in *Thaçi* case⁸. However, this citation is completely irrelevant. In *Thaçi* case, in the said paragraph 114, the Constitutional Court discusses the issue of the assignment of judges, an allegation that was apparently unsubstantiated. In Mustafa's present referral, he clearly identified the alleged constitutional violation and substantiated it with arguments.
9. In the present Referral, the Applicant is not, as in the first Referral, debating the explanation or interpretation of the legal principle *lex mitior*.
10. The SPO erroneously submits that Mustafa's Referral is substantially similar to and already adjudicated in Mustafa's earlier referral. To the contrary, Mustafa's present Referral is founded on an entirely different constitutional violation that was raised in Mustafa's first Referral. The present Referral stems from a new Decision of the Appeals Panel (AP), in which the AP made a new determination on Mustafa's sentence.⁹ The SPO's claim that the issue in the present referral was already adjudicated, is wrong, and lacks factual foundation.

⁷ Ibid, para.12

⁸ KSC-CC-2022-15/F00010, 13 June 2022, para 114, Decision on the Referral of Hashim *Thaçi* Concerning the Right to an Independent and Impartial Tribunal Established by Law and to a Reasoned Opinion.

⁹ KSC-CA-2023-02/F00045/10 September 2024/ Decision on New Determination of Salih Mustafa's Sentence.

11.The present Referral concerns an entirely different constitutional violation. The degree of punishment as imposed to Mustafa in the new determination decision is a separate issue and must be distinguished from the earlier referral that Mustafa filed before the Constitutional Court. The SPO appears either not to understand, or is unwilling to acknowledge the clear and obvious distinction between the current Article 33 (3) provision and the entirely different provisions that were at issue and challenged in Mustafa's first Referral. It would be a misrepresentation if Mustafa's legitimate right to challenge the proportionality of the degree of punishment would be characterized as being the same as the issues in his earlier Referral. Mustafa submits that this is an erroneous reading of the present Referral.

12.The *lex mitior* issue of the first Referral stems out from an entirely different constitutional provision than the proportionality of the degree of punishment vis-à-vis a criminal offence of the present Referral. The legislator provided separate constitutional guarantees for an individual in order to protect and safeguard his rights. Therefore, the legislator purposely separated these two issues into different provisions of the Constitution as apparently it had a reason to do so.

13.Mustafa is entitled to rely on the constitutional provision that the degree of a punishment cannot be disproportional to the criminal offence. It is obvious that such disproportional punishment impacts directly the individual concerned. It is Mustafa, and Mustafa alone, who is impacted when a punishment is imposed upon him. As a result of a disproportional punishment, he is deprived for a very extensive time of his freedom. Where any sentencing guidelines or any sentencing guidance are absent, the imposition of a prison sentence becomes extremely arbitrary, in particular where no substantive argument is given as to why the ultimate penalty is being viewed as proportional vis-à-vis criminal offence.

II-

14.The SPO claims that Mustafa's challenges are untimely. This is equally wrong.

15.The SC initially referred the case back to the Appeals Chamber for the new determination of sentence. The AP made a new determination of Mustafa's sentence. There was no

opportunity for the Defense to argue the proportionality of sentence that was to be imposed on Mustafa. This is simply due to the fact that the AP did not allow any observations of the parties before making its new determination on Mustafa's sentence. Once the new determination of the sentence was rendered by the AP, then Mustafa challenged the proportionality of that specific sentence. Mustafa legitimately does so. The SC rejected his argument. Therefore, Mustafa exhausted the options available to him regarding this new sentence. Therefore, there is nothing untimely to challenge that decision. Mustafa's Referral is therefore admissible.

16. Mustafa challenged the degree of punishment imposed on him by the AP in an RPL before the SC. The SC rejected his argument. Mustafa not only disagrees with the rejection of his argument, but also strongly disagrees with some of the SC considerations. As an example, paragraph 38 of the SC Decision reads: *"Mr. Mustafa merely disagrees with the findings of the Supreme Court Panel regarding the sentencing range identified"*.¹⁰ This is simply not true. Mustafa submits that this is an incomprehensible consideration of the Supreme Court. It erroneously represents the Ground as put forward in his RPL. Mustafa's entire RPL was and remains to be that the imposed 15 years sentence is disproportionate and therefore constitutes violation of the Article 33 (3) of the Kosovo Constitution. Even the Supreme Court itself quotes the Applicant on this issue in paragraph 37, which reads: *"The Panel notes that Mr. Mustafa does not challenge this aspect of the Appeals Panel's analysis, but focuses only on the alleged disproportionate nature of his sentence for murder as a war crime."*¹¹ These two considerations contradict each other. It is crystal clear which constitutional provision, according to Mustafa, was violated. It is incomprehensible that Mustafa's argument would be about a disagreement over the sentencing range (as the SC considers in paragraph 38 of its Decision). The focus of Mustafa's RPL was indeed about disproportionate nature of his sentence, however it also envisaged the lack of a proper analyses as to how the AP concluded in transparent manner that its decision was not disproportionate and therefore compatible with Article 33 (3) of the Constitution.

¹⁰ Paragraph 38 of the Supreme Court second Legality Decision

¹¹ Paragraph 37 of the Supreme Court second Legality Decision

17. When the AP rendered its new determination decision, it imposed 15 years sentence. Mustafa challenges the AP decision of imposing 15 years of imprisonment, constitutes a violation of his constitutional rights. Mustafa submits that he is not to be subjected to a degree of punishment that would be disproportional to the criminal offence. As Article 33 (3) of the Constitution protects the individual rights of the Applicant, Mustafa is entitled to file this Referral as he submits that his individual rights and freedoms guaranteed by the Constitution are violated by the imposition of this specific sentence. In his Referral Mustafa does not in any manner challenge the finding of his guilt, and it is therefore incorrect to view the present Referral as a re-litigation of any finding.

18. Mustafa argues that no standard exists as to what is viewed as a punishment being proportional vis-à-vis the criminal offence for which he has been sentenced. Neither the Appeals Chamber nor the Supreme Court said anything about why the imposed sentence was proportional. Mustafa finds the imposition of 15 years imprisonment disproportionate vis-à-vis the criminal offence and substantiated his arguments with factual jurisprudence of Kosovo courts regarding the same offence, within the same armed conflict, within the same time period. He further substantiated his argument that Kosovo at the time was part of the FRY and the applicable criminal code at the time had maximum of 15 years, meaning that his current sentence is at the very upper end of the sentence prescribed by that criminal code. Mustafa does not in any manner re-litigates anything. That is simply not the case. He simply points to this to substantiate his Ground.

19. Neither the *travaux préparatoires* nor the commentaries on the specific provision of the Constitution provides any guidance as to when and by what standard the degree of punishment must be measured as proportional vis-à-vis the criminal offence. The issue clearly and directly impacts Mustafa. The SC did not really decide anything substantive on this constitutional violation. Mustaf therefore referred this issue to the Constitutional Court.

III-

20. The SPO's submission that nothing in the present Referral gives rise to appearance of constitutional violation¹², is incorrect. The SPO appears either unwilling or unable to distinguish the actual issues raised in Mustafa's respective Referrals.

21. As earlier stated, nowhere in any clarification of the Constitution nor in any commentary or doctrine can be found any support to Kosovo courts, including KSC, from which these institutions can derive any guidance of Article 33 (3) of the Constitution.

22. The SPO asserts that there is well settled case law pertaining to sentencing determinations. The Applicant does not see any of this in the SPO's Response. The existing well settled case law pertaining to sentencing determinations has been provided for by Mustafa in the Annex to the present Referral.

23. The SPO submits that Article 33 (3) of the Constitution, Article 44 (5) of the Law, KSC Rule 163, and relevant 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 offense and an Accused's culpable conduct". This citation stems from the Nikolic case in which the Appeal Chamber considered: *"[a] sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender"*.¹³

24. However, this is not a useful definition or formula. Abiding solely on this definition implies that this standard of proportionality would not change over time. Yet, the law and its interpretation, including the above cited consideration, is however not a mathematical formula. The *"predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender"* is in itself extremely limited. It would encompass only these 2 factors, and this narrow approach is inadequate.

¹² Paragraph 22 of the SPO Response: KSC-CC-2025-29/F00005/ 30 May 2025.

¹³ Paragraph 21, Case No.IT-94-2-A, 4 February 2005, Judgement on Sentencing Appeal, Prosecutor v. Dragan Nikolić,

- 25.If the standard of proportionality were static, it would imply that it could never change over time and preclude any evolution. At the very least, the standard adapts over time, as views on proportionality evolve. What is deemed proportional in one era may be considered disproportionate in another. Similarly, the factors used to assess proportionality may change—some remaining relevant, others becoming obsolete, and new ones emerging. All of these are absent in the Appels Panel’s decision and the Appeals Panel gave no insight into how its decision is compatible with Article 33 (3).
- 26.In imposing a sentence, it is of a paramount importance that an individual understands the basis upon which factors the court reached its decision and how it weighed them in relation to the criminal offence committed. This was also absent in the Appeals Panel’s new determination decision.
- 27.In the absence of any clear guiding principles regarding disproportionality of the degree of punishment, the court can seek guidance from other sources, for example (i) what was viewed as a proportionate sentence during the time that the crime was committed and (ii) the jurisprudence of Kosovo courts relating to the same offences within the same conflict, can provide assistance.
- 28.Mustafa only pointed at different prison sentences as imposed upon people for the same crime, in the same armed conflict and in the same time period as the criminal offence for which Mustafa was sentenced for. Those sentences clearly demonstrate different sentences which are more lenient. These can serve as indicative guidance.
- 29.Kosovo courts, when adjudicating war crimes arising from the same armed conflict, have equally considered the constitutional requirement under Article 33(3) that a sentence must not be disproportionate to the offense. Thus, an evaluation of these cases supports the conclusion that the imposition of a 15-year sentence for a single offense is disproportionate.

30. It must be stipulated that the ICTY only in one (1) case ever imposed sentence on a KLA member in same the armed conflict as in the present case.¹⁴ In that case it even concerned the murder of 9 individuals. The punishment was in total 13 years.
31. The degree of punishment in the AP decision, imposing of 15 years of imprisonment, is disproportionate vis-à-vis criminal offence and violates Article 33 (3) of the Constitution. Nowhere in that decision one can find upon which guiding principles on proportionality Mustafa's imposed sentence is based. Therefore, the sentence is an arbitrary and random decision. Mustafa is unable to deduct the sources that were used by the AP when it imposed its final punishment. Certainly, vis-à-vis the criminal offence committed and relevant jurisprudence to which Mustafa pointed, the degree of punishment is disproportionate.
32. This present Referral concerns the degree of punishment being disproportionate vis-à-vis criminal offence. While it may be difficult to draw a clear dividing line between proportionate and disproportionate punishment, any such determination must be reasoned and the Judgment must serve as the source for that determination. The Judgment failed to provide a transparent insight as to from which source a chamber got its guidance when it made its new determination. The ultimately imposed sentence is disproportionate.

V. CONCLUSION

33. For the reasons given above, Mustafa maintains the Ground as in his present Referral. The SPO's submissions on the Referral of Mr. Mustafa should be REJECTED.

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At The Hague, the Netherlands



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¹⁴ The single case in which an individual was, as a KLA member tried and convicted by the ICTY, was Haradin Bala who was convicted for torture (count 4), Cruel Treatment (count 6), and murder (count 10). He was sentenced to 13 years imprisonment. Trial Chamber Judgment Limaj case: IT-03-66-T 30 November 2005, page 295. The sentence was upheld in Appeal's Judgement (Appeal Judgment IT-Case No.: IT-03-66-A. 27 September 2007).