REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 7 August 2023
Ref. no.: AGJ 2241/23

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

Case No. KI161/21

Applicant

Suzana Zogëjani-Sekiraqa

Constitutional review of Judgment
Pml. no. 310/2020 of the Supreme Court of Kosovo of 28 April 2021

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge
Nexhmi Rexhepi, Judge and
Enver Peci, Judge

Applicant

1. The Referral has been submitted by Suzana Zogëjani-Sekiraqa, who is currently serving a sentence at the Correctional Center in Lipjan and is represented before the Court by Kosovare Kelmendi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [Pml. no. 310/2020] of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 28 April 2021. Through the challenged Judgment, her request for protection of legality submitted against the Judgment [PKR. no. 37/2019] of the Basic Court in Prishtina (hereinafter: the Basic Court) of 24 January 2020 and Judgment [PAKR. no. 133/2020] of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) of 3 July 2020 was rejected as unfounded.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violated the Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to a Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraph 7 of Article 113 [Jurisdiction of Parties] of the Constitution, Articles 22 (Processing Referrals), 27 (Interim Measures) and 47 (Individual Requests] of the Law No. 03/L-121 on Constitutional Court 03/L-121 (hereinafter: the Law) and Rules 32 [Filing of Referrals and Replies] and 56 [Request for Interim Measures] of the [Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 27 August 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: Court) by post, which was registered in the Court on 30 August 2021.

6. On 1 September 2021, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Safet Hoxha and Nexhmi Rexhepi (members).

7. On 8 September 2021, the Court notified the Applicant of the registration of the Referral. On the same day, the Court notified the Supreme Court of the registration of the Referral.

8. On 19 October 2021, the Applicant submitted to the Court additional information regarding the case by (i) clarifying the allegations she presented in the initial Referral; and (ii) submitting documents (minutes compiled by the French authorities and other documents) which were also submitted in the initial Referral.

9. On 29 October 2021, the Applicant submitted to the Court again additional information regarding the case.

10. On 19 January 2022, the Review Panel reviewed the proposal of the Judge Rapporteur and decided that the case will be reviewed at a future session after additional supplements have been provided.

11. On 15 February 2022, the Review Panel reviewed the proposed recommendation of the Judge Rapporteur to declare the Applicant's Referral as inadmissible, but by a majority vote/decision, it assessed that the Referral is admissible. The Judge Rapporteur, based on paragraph (4) of Rule 58 (Deliberations and Voting) of the Rules of Procedure, asked the President of the Court to appoint another judge from the majority, to prepare the draft Judgment according to the proposal of the majority of judges. Based on the above-mentioned Rule, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi, as one of the members of the Review Panel, to prepare the draft Judgment, according to deliberation and voting of the majority.

12. On 10 March 2022, the Applicant submitted to the Court again additional information regarding the case.

13. On 22 March 2022, the Court notified the Basic Court of the registration of the case and requested the same to submit the complete case file to the Court.

14. On 30 March 2022, the Basic Court in Prishtina submitted to the Court the complete case file.

15. On 16 December 2022, Judge Enver Peci took the oath before the President of the Republic of Kosovo, thus commencing his term at the Court.

16. On 5 June 2023, the Court requested that the Basic Court inform the Court if the Applicant has exercised any other extraordinary legal remedy regarding the challenged Judgment in addition to the Referral submitted to the Court.

17. On 6 June 2023, the Basic Court notified the Court that on 4 April 2023, the Applicant filed a request for the review of the criminal proceedings against the Judgment [PKR. no. 37/19] of the Basic Court of 24 January 2020

18. On 6 July 2023, Judge Selvete Gërxhaliu-Krasniqi presented the draft Judgment before the Court.

19. On the same day, the Court decided by a majority: (i) to declare the Referral admissible; (ii) to hold that Judgment [Pml. no. 310/2020] of the Supreme Court of Kosovo of 28 April 2021; Judgment [PAKR. no. 133/2020] of the Court of Appeals of 3 July 2020 and the Judgment [PKR. no. 37/2019] of the Basic Court in Prishtina of 24 January 2020 are not in compliance with paragraphs 1 and 4 of Article 31 of the Constitution and point (d) of paragraph 3 of Article 6 of the European Convention on Human Rights; (iii) to declare the Judgment [Pml. no. 310/2020] of the Supreme Court of Kosovo of 28 April 2021; Judgment [PAKR. no. 133/2020] of the Court of Appeals of 3 July 2020 and the Judgment [PKR. no. 37/2019] of the Basic Court in Prishtina of 24 January 2020 invalid; and (iv) to remand the case for reconsideration to the Basic Court in Prishtina, in accordance with the findings of this Judgment.

20. In accordance with Rule 61 (Dissenting Opinions) of the Rules of Procedure of the Court, Judge Radomir Laban has prepared a dissenting opinion, which will be published together with this Judgment.

Summary of facts

21. From the case files, it appears that the Applicant and the late A.S. had been married since 2007.

22. According to the case files and based on the Data System (hereinafter: KPIS), on 20 October 2007, in the Regional Directorate of Police in Prishtina *"the case number 2007-AC-1653 Domestic Violence has been initiated",* with the Applicant being a victim of domestic violence. On 1 November 2007, the applicant filed a criminal charge to the Basic Prosecution Office in Prishtina against A.S.

23. It also appears that in 2010, the Applicant went to live in the Republic of France. After a while her husband, the late A.S., went there as well. Referring to the case files, the Court notes that on 2 December 2013; 16 December 2013; 24 December 2013 and 31 December 2013, respectively, the Applicant approached various French authorities and organizations several times to report *"[...] physical, psychological, economic violence [...]*", that her husband, the late AS, exercised against her.

24. Also according to the case files, from 16 December 2013 to 31 March 2014, the Applicant was sheltered by a non-governmental organization "*Solidarité des Femmes*" of Besançon in France, due to the continuous reporting by the Applicant of domestic violence such as: "[...] *insults, constant criticism, frequent control and follow-up, humiliation, denigration, threats, extortion, destruction of personal belongings and documents, brutal beatings, dragging and pulling hair, slapping and punching [...],"* she even specified how: "*... their child was a witness to all such violations".*

25. From the case files, the Court notes that on 30 July 2014, the *"National Child Protection Service of Venissieux"* emphasized , in a report prepared regarding the Applicant that: *"The gentleman started to exercise violence against the lady and X.X. In the context of our specificity and expertise regarding these phenomena of domestic violence, particularly spousal abuse, the situation described during the period when Mrs. SEKIRAQA, maiden name ZOGEJANI, appeared to us to be particularly concerned about her safety and that of her son. "The resumption of the matrimonial life, responding to a characteristic scheme of domestic violence situations, has made us to alert child protection services."*

26. On 26 June 2018, the Court of Appeals in Lyon issued a decision against A. S., *inter alia*, with the reasoning*: "Because on 13 May 2018, in Venissieux, in the national territory, continuously for five days and nights, he subjected his spouse to deliberate violence, not working properly and taking care of her and the children, and mainly hitting Mrs. Suzana SEKIRAQA, his wife, he violated the law under Article 22-13, paragraph 1.6, Article 132-80 of the Criminal Code...* Court Note: This quote is taken from the official French language translation of the decision, which is found in the case files]".

27. On 7 August 2018, following a report made by the Applicant against her husband A. S., the Court of Lyon sentenced A.S. to 3 months in prison, with a suspended sentence of 2 years, as a result of domestic violence perpetrated against the Applicant.

28. On 21 September 2018, it turns out that the Applicant's husband, the deceased A. S., was deprived of life. On the same day, the Applicant along with her children departed from the Republic of France to the Republic of Kosovo. According to the report compiled by "*Direction Generale de la Police Nacionale, Direction de Cooperation Internationale" "of 2 October 2018 addressed to the Ambassade de France au Kosovo",* it is stated: *[...] "In fact, the initial elements of the investigation make us understand that the spouse of the late, along with their two children, hastily left the family residence between 20-21 September 2018." The date of parting or departure of the woman coincides with that of the death of the husband and the family context*

seems to be very tense, which makes us suspect that the woman may have had a strong active role in committing the murder".

29. On 3 October 2018, the forensic autopsy report was released, which described all the forensic specifications related to the event that had occurred.

30. On 4 October 2018, the French authorities issued two international arrest warrants in pursuit of the Applicant: (i) "*International Arrest Warrant" ... since the factual elements in the procedure make us understand that Suzana ZOGEJANI had been a victim of physical violence by her husband in the past...";* and (ii) *European Arrest Warrant, because "The factual elements in the procedure show that Suzana ZOGEJANI had been abused by her husband in the past and that she is now suspected of having committed the act or participated in the act [...]",*

31. On 4 October 2018, it was found that the Applicant had submitted a request at the Embassy of the Republic of France in Prishtina and on the same day, she was arrested by the authorities of the Republic of Kosovo.

Summary of facts related to the criminal proceedings against the Applicant

32. The Court notes that the Applicant was arrested by the Kosovo authorities on 4 October 2018, on suspicion of having committed the criminal offence of "*Aggravated Murder*" against her husband A.S

33. On 8 February 2019, the Basic Prosecution Office in Prishtina-Serious Crimes Department (hereinafter: the Basic Prosecution Office), filed an Indictment (PP. no. 261/18) against the Applicant on the suspicion that she committed the criminal offence of "*Aggravated Murder*" under article 179, paragraph 1, points 1.3 and 1.4, of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK).

34. On 24 January 2020, after holding several hearings, the Basic Court in Prishtina-Serious Crimes Department (hereinafter: the Basic Court), issued the Judgment [PKR. no. 37/19], whereby it found the Applicant guilty, of committing the criminal offence of "*Aggravated Murder*" against her husband A.S. under Article 179, paragraph 1, points 1.3 and 1.4 of the CCRK, imposing a prison sentence of 25 (twenty-five) years, which also includes the time spent in custody from 5 October 2018 onwards. Also, through the above-mentioned Judgment, the Applicant is obliged to pay the costs of the criminal proceedings.

35. In the reasoning of the Basic Court Judgment, it is emphasized, inter alia, that during the main trial, the Basic Court "[...] *has proceeded and administered all personal and material evidence proposed by the parties to the proceedings, and that of the victim-witness [H.S., E.H., A.S and X.X.*]". Witnesses proposed by the State Prosecution Office, as well as numerous exhibits of evidence have been processed and administered, which are mentioned in a detailed manner in the reasoning of the aforementioned Judgment, such as reading the testimonies of some witnesses [J.Ch., A.D., H.S., F.L., B.P. and L.S.] received from the French authorities, hearing some witnesses during the main trial, reading the records compiled before the French authorities (taking into account that the criminal offence occurred in the Republic of France where the Applicant and the late A.S. lived), the forensic report prepared by the Institute of Forensic Medicine, as well as the death certificate of the deceased issued on 29 September 2018.

36. Furthermore, in the reasoning of the Basic Court Judgment, it is emphasized, inter alia, that "[...] *based on the manner this criminal offence was committed by the accused Suzana Zogëjani-Sekiraqa, there was a direct intention and persistence to commit the criminal offence of Aggravated Murder, a murder committed under two qualifying circumstances, such as depriving a family member of life, in this case, the late husband [A.S.] and the murder was carried out cunningly so that the deprivation of life occurred while the deceased was sleeping [...]. Based on such a state of facts, after analyzing and assessing all the evidence and exhibits administered during the main trial, the witnesses' testimonies and the contradictory and unfounded defense of the accused Suzana Zogejani-Sekiraqa, summarizing all these established circumstances during the main trial, realizing that the accused left her home very relaxed with her children and travelled for hours without expressing any concern about her actions [...]".*

37. During the main trial before the Basic Court in Prishtina, the Applicant requested, a psychiatric examination related to the moment of committing the criminal offence. The Trial Panel of the Basic Court rejected this specific request of the Applicant. The Applicant had also alleged that the testimonies of the witnesses, which were only read during the main trial and which the Applicant did not have the opportunity to confront, violated the provisions of the Criminal Procedure Code of the Republic of Kosovo. The Applicant had requested that testimonies be taken into account which would prove that she had been a victim of domestic violence. The Applicant's defense asked to be allowed to confront the witnesses, whose testimonies were only read in the main trial and which, according to the Applicant, unfairly portrayed her character and character of the matrimonial relationship with her husband.

38. Concerning the specific request of the Applicant for a psychiatric examination, the Court recalls the reasoning of the Basic Court, which had rejected the request, emphasizing that: *"The Court so far did not have any convincing or reliable evidence before it that the accused has exhibited any behaviour that would question her ability to act. On the contrary, the actions taken precisely prove the opposite, i.e. the actions taken on a critical night, and her behaviour and ability to drive on such a long journey without any problem or complaint, hiding any possible emotional state for these actions from her children, is not mentioned in the case files or any medical report even for a routine psychiatric check, and even after this event, she was not visited by any psychiatrist. All of these circumstances exclude the absolute possibility of questioning her ability to understand her actions and her direct intentions to cause the specific consequence".*

39. Furthermore, the Basic Court in its Judgment emphasized that: *"[...]the allegation of the accused Suzana that she acted in a state of severe mental shock, from the other point of view, i.e. perhaps the abuse of the deceased [...], is absolutely inconsistent, since such a state of facts has not been proven by any personal and material evidence, and where even by the minor himself, who, during his testimony, among other things, emphasized that he was sleeping, he did not hear anything, due to the fact that he is a heavy sleeper, while the accused herself confesses a scenario of an event that was not familiar with the abuse of minors, and that even Hickok would be envious of the same for building such an imaginary scenario*".

40. In the reasoning of the Judgment, the Basic Court also emphasized that the Applicant did not act under conditions of necessary defense, taking into account the circumstances in which the criminal offence was committed and that when imposing the type and severity of punishment as aggravating circumstances, it took into account the circumstances of the commission of the criminal offence, the persistence of the

Applicant to commit the criminal offence, and her behavior after the commission of the criminal offence. Regarding mitigating circumstances, the Basic Court emphasized that *"no mitigating circumstances were found in the specific case"*.

41. On an unspecified date, the Basic Prosecutor's Office submitted an appeal to the Court of Appeals against the aforementioned Judgment of the Basic Court, with the proposal that the latter be changed and that the applicant be sentenced to a harsher prison sentence than the sentence imposed.

42. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the aforementioned Judgment of the Basic Court for remand and retrial, alleging essential violations of the provisions of criminal proceedings, erroneous determination of the factual situation, violation of criminal law, and the decision on sentencing. In her appeal, the Applicant, inter alia, (i) once again requested a psychiatric examination for the period during which the criminal offence was committed; (ii) reiterated her allegation that the testimonies of witnesses, which were only read during the trial and wherewith the Applicant had no opportunity to confront, were administered in violation of the provisions of the Criminal Procedure Code of the Republic of Kosovo; and (iii) asserted that witness X.X., namely her son, was examined without the presence of a psychologist during his testimony.

43. On 29 April 2020, the Appellate Prosecution Office, through the submission (PPA/I. no. 140/20), motioned to have the appeal of the Basic Prosecution Office in Prishtina granted as founded.

44. On 3 July 2020, the Court of Appeals, through its Judgment [PAKR. no. 133/2020], decided as follows:

I. Partially granted the Applicant's appeal regarding the qualification of the criminal offence, but also *ex officio*, amending the Judgment [Case No. PKR. 37/2019] of the Basic Court dated 24 January 2020, solely with respect to the legal qualification of the criminal offence for which the Applicant was found guilty by qualifying it as an *"Aggravated Murder"* under Article 179, paragraph 1, subparagraph 3 of the CCRK, upholding the sentencing decision, namely the Judgment [PKR. no. 37/2019] of the Basic Court of 24 January 2020, whereby the Applicant was sentenced to 25 years in prison.

II. The appeals of the Basic Prosecution Office in Prishtina - Serious Crimes Department, as well as other appeals from the Applicant, were rejected as unfounded, and the aforementioned Judgment of the Basic Court was upheld.

45. The Judgment of the Court of Appeals stipulates, inter alia, that: "The first instance court assessed the evidence in accordance with the provisions of Article 361, *paragraph 2 of CPCK, while for contradictory evidence, it has acted in accordance with the provisions of Article 370, paragraph 7 of the CPCK, providing a comprehensive presentation of which facts and for what reasons it considers them proven or unproven. The court has assessed contradictory evidence, thus conducting an analysis of all the evidence presented during the main trial, including forensic expertise, as well as the statements of witnesses given during the main trial, which also do not differ in terms of establishing the essential facts, especially regarding the determination of the facts and circumstances leading to the late [A.S]'s deprivation of life, facts and circumstances that are not contested by the accused herself."*

46. As a result, the Court of Appeals considered that the approach of the first instance court towards the essential facts was correct and lawful. The Court of Appeals

emphasized that the first instance court had taken into account and presented a significant number of pieces of evidence, including material evidence proposed by the Appellant, to be provided by the State of France. Furthermore, the Court of Appeals highlighted that the Basic Court considered the data concerning the Applicant's background as well as that of the late A.S., which indicated that the late husband exhibited violent behavior, and this conclusion is based on the testimonies of witnesses [J.Ch., A.D, H.S., F.L., B.P., and L.S.], witnesses whom the Applicant continuously requested to confront, but which request was denied by the Court of Appeals. In the light of the above, the Court of Appeals, in its Judgment, referred to the testimonies of witnesses that were only read during the main trial, and which the Applicant had requested to confront. "[...] *as the aforementioned witnesses have also confirmed the aggressive behaviour of the accused towards the deceased, it is evident that she had a history of violent conduct, therefore, the first instance court rightly rejected the proposal for obtaining additional material evidence from the State of France in relation to the facts and circumstances concerned.*

47. The Court of Appeals further supported the Basic Court's refusal to conduct a psychiatric examination of the Applicant on the grounds that: "[...] *it does not appear that the accused was under the influence of abnormal behaviour that would cast doubt on her mental capacity, especially considering that she committed the criminal offence calmly, taking her children and departing for Kosovo.*

48. Furthermore, the Court of Appeals rejected the Applicant's allegation that the Judgment of the Basic Court relies on inadmissible evidence, referring to the testimony of the minor X.X. as unfounded, because according to this court: "[...] *the same was heard in the presence of social workers of the CSW [Center for Social Work] in Prishtina".*

49. Meanwhile, referring to the evidence provided by the Republic of France, the Court of Appeals emphasized that the same were processed in accordance with the legal provisions of the State of France, adding that: "[...] according to the provisions of the *Law on International Legal Cooperation of Kosovo, all evidence provided by another State must be processed in accordance with the provisions of the Law of such State".*

50. Furthermore, the Court of Appeals found the Applicant's allegation regarding the violation of criminal law regarding the qualification of the criminal offence to be founded. In relation to the latter, the Court of Appeals assessed that: *"[...] in the present case, the Criminal Law has been violated to the detriment of the accused when the court found the accused guilty of the criminal offense of Aggravated Murder under Article 179, paragraph 1, subparagraphs 3 and 4 of the CCK, for the qualifying form of the criminal offense provided for in paragraph 1, subparagraph 4 of Article 179 of the CCK [...] to qualify the incriminating actions of the accused, described in the enacting clause of the first instance judgment, as a criminal offense of Aggravated Murder under Article 179, paragraph 1, subparagraph 3 of the CCK, and it therefore decided to amend the first instance judgment so that the incriminating actions of the accused, described as in the enacting clause of the first instance judgment, would be qualified as a criminal offense under Article 179, paragraph 1, subparagraph 3 of the CCK. This is because subparagraph 4 of the provision concerned includes the qualifying form of the criminal offense of murder, when the murder is committed with elements of cruelty and cunning [...]".*

51. On 28 October 2020, the Applicant filed a request for protection of legality with the Supreme Court against two aforementioned judgments of the lower instance courts,

alleging essential violations of the provisions of criminal proceedings and violations of criminal law. The Applicant argued, *inter alia*, that:

i) both the lower instance judgments were based on inadmissible evidence and specified that she was found guilty primarily based on the testimonies of several witnesses given before the French authorities, which were read during the main trial and which she and her defense team had no opportunity to challenge, despite their continuous requests. According to her, these testimonies would clarify the crucial fact of "*who was the assailant or aggressor";*
ii) her case before the regular courts was not regarded as a domestic violence case because, in her view, this would explain the state of emotion as a result of *"her constant abuse [...]";*
iii) the first instance judgment relied on evidence which, according to her, did not meet the legally defined standards to be considered as evidence;
iv) the lower instance courts did not individually and interrelatedly provide reasons for a range of material evidence, such as the criminal record of the deceased, the fact that the deceased was reported by the Applicant for domestic violence in Kosovo and during their stay in the Republic of France.
v) the first instance court, during the examination of witness X.X., who was a minor, committed a violation of criminal law because during the testimony of the minor, there was no presence of a psychologist, only a social worker.
vi) violation of the criminal law occurred when her request for a psychiatric examination at the time of committing the criminal offence was rejected.
vii) the lack of seriousness of the second-instance judgment is also evident from the fact that on page 3 of the same judgment, it refers to facts from another case.

52. On 28 April 2021, the Supreme Court, through its Judgment [PML. no. 310/2020], rejected the Applicant's request for legal protection as unfounded.

53. The Supreme Court, in its Judgment concerning the Applicant's allegations, emphasized inter alia as follows:

i) Regarding the Applicant's allegation that she was found guilty primarily based on the testimonies of witnesses taken in France, which she had no opportunity to confront, the Supreme Court emphasized that considering the murder took place in France, and the fact that the Applicant had come to Kosovo and was arrested after committing the criminal offence, it is evident that a range of evidence was obtained by the French authorities, including the testimonies of several witnesses that were only read during the main trial, without giving her a chance to confront them.

The Supreme Court added that the lower instance court did not consider these pieces of evidence crucial, emphasizing that: "[...] *since they are not eyewitnesses to the critical event to testify about how the critical event occurred, nor did the court assess them as such evidence";*

ii) Regarding the Applicant's allegations that the first instance judgment also relied on evidence that did not meet the legally defined standards to be considered admissible evidence, the Supreme Court highlighted the following: "[...] *from the case files, it is evident that the evidence provided by the French authorities was obtained in accordance with the provisions of the criminal proceedings in France, and as such, they were handed*

over to the local authorities. In fact, the defense only quotes the legal provisions of the Criminal Procedure Code (Article 219, paragraph 6 of the CPCK), but does not specify their unlawfulness thereof;

iii) Regarding the Applicant's specific allegation that the regular courts failed to provide reasons *"one by one and in conjunction with each other"* for a range of material evidence, such as the criminal record of the deceased, the fact that the deceased was reported for domestic violence both in Kosovo and France, the Supreme Court emphasized that: "[...] *from the case files, it is evident that the deceased was identified by the police as a suspect in many criminal offences, but this fact is not relevant to the criminal offence committed against him [...]";*

iv) Regarding the Applicant's allegation that during the testimony of the minor X.X., the first instance court committed a violation of criminal law by not having a psychologist present, but only a social worker, the Supreme Court assessed that in this case, Article 130, paragraph 5 of the Criminal Procedure Code was not violated since this provision emphasizes that when examining a person who has not reached the age of eighteen (18), especially when they are the victim of a criminal offence, caution is exercised. From this provision, according to the Supreme Court: "[...] *it turns out that examining through a psychologist is not a mandatory requirement of the court but rather at the court's discretion, in case it deems it necessary [...]* In this specific case, the court has assessed that it is not necessary, and X.X. was examined in the presence of the representative of the social worker";

v) Regarding the Applicant's allegation of violation of criminal law concerning the rejection of her request for a psychiatric examination at the time of committing the criminal offence, the Supreme Court emphasized that the first instance court rightfully rejected the request, providing clear reasons for such rejection. Furthermore, regarding this allegation, the Supreme Court added that there is no evidence supporting the argument that the Applicant was not capable of being accountable for her actions at the time of committing the criminal offence; and

vi) Finally, regarding the allegation that on the third page of the Judgment of the Court of Appeals, the latter refers to another case, the Supreme Court stated in the reasoning of its Judgment that: *"[...] this court assesses that in the specific case, we are dealing with a technical error that occurred during the process of issuing the judgment, more precisely during photocopying, which does not make the judgment unintelligible [...]."*

Applicant's allegations

54. The Applicant alleges that the challenged decisions of the regular courts have been issued in violation of her fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the ECHR.

55. Firstly, the Applicant emphasizes that the violation of paragraph 4 of Article 31 of the Constitution has occurred as a consequence of violations of the provisions of the Criminal Procedure Code (CPC), namely: (i) paragraph 2 of Article 7 (General Duty to Establish a Full and Accurate Facts); ii) paragraph 2 of Article 9 (Equality of Parties); iii)

paragraph 6 of Article 219 (Taking of Evidence during Investigation);

(iv) paragraph 5 of Article 130 (General Requirements of Pretrial Interviews, Pretrial Testimony or Special Investigative Opportunity); (v) paragraphs 2 and 3 of Article 257 (General Rules for Evidence); and

(vi) Article 262 (Evidence as a Basis of Guilt) of the Criminal Procedure Code (CPC). Essentially, according to the Applicant, the fact that they were not given the opportunity to challenge the testimonies of witnesses or confront relevant evidence has resulted in a violation of paragraph 4 of Article 31 of the Constitution.

56. In her Referral, the Applicant emphasizes that during the main trial *"[...] the presentation of evidence submitted by her defense, related to multiple bodily injuries on the neck, face and hands that she sustained on the critical night by the deceased, presented through numerous pictures which were submitted to the court, were not considered at all by the court and were ignored as if they did not exist at all"*. The Applicant alleges that even the material evidence presented by the Applicant's defense has been ignored.

57. The Applicant alleges that no evidence has been admitted in any court instance, which according to her would go in favour of the defense, "[...] *regarding the permanent violence that the victim has exercised against the Applicant, for which he was sentenced to prison by the judicial authorities of France"*.

58. The Applicant further highlights that paragraph 4 of Article 31 of the Constitution has been violated as a result of her inability to cross-examine witnesses and experts, whose testimonies were only read during the main trial and which she was not able to confront despite her continuous requests, which testimonies influenced the court's decision to find her guilty and sentence her to twenty-five (25) years of imprisonment.

59. Furthermore, the Applicant alleges that, without reasonable justification and despite her requests before all court instances, her request for a psychiatric examination was also denied. She believes that this examination would have proven her mental state at the time of committing the criminal act, adding that she was a victim of domestic violence by the late A.S. at the time of the offence.

60. The Applicant further states that during the pre-trial examination before the Basic Court, the eyewitness X.X., who was a minor at the time, gave his testimony before the social worker only and not before the psychologist.

61. The Applicant alleges that the judgments of all court instances were based on inadmissible evidence, adding that: "[...] *the courts have disregarded the legal obligation from Article 290, paragraph 6 of the Criminal Procedure Code (CPC), which stipulates that evidence obtained through informal channels by foreign governments, as it was the case of obtaining testimonies and other material evidence, crime scene inspection reports, and forensic examination reports sent by France, are inadmissible if they are not accompanied by a Declaration from the French government or law enforcement authorities stating that such evidence was obtained and collected in accordance with the laws of that State.*

62. Finally, the Applicant requests the Court to grant her Referral as admissible and to annul the judgments of the regular courts, in order to *"create conditions for a fair and impartial trial"*.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 22
[Direct Applicability of International Agreements and Instruments]

Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in case of conflict, have priority over provisions of laws and other acts of public institutions:

(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
(7) Convention on the Rights of the Child;

Amendment no. 26 [approved by the Assembly of the Republic of Kosovo on 25 September 2020, published in the Official Gazette of the Republic of Kosovo on 30 September 2020];

In Article 22, the following paragraph (9) is added after paragraph (8):
(9) Council of Europe Convention on preventing and combating violence against women and domestic violence

Article 31
[Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

Article 50
[Rights of Children]

1. Children enjoy the right to protection and care necessary for their wellbeing.

[...]
3. Every child enjoys the right to be protected from violence, maltreatment and exploitation.

4. All actions undertaken by public or private authorities concerning children shall be in the best interest of the children.
5. Every child enjoys the right to regular personal relations and direct contact with parents, unless a competent institution determines that this is in contradiction with the best interest of the child.

European Convention on Human Rights

Article 6
(Right to a fair trial)

1. "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice

2. *Any person accused of a criminal offense shall presumed innocent until proven guilty by law.*

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence [approved on 7 April 2011 by the Council of Europe and enshrined in the list of Conventions and international legal instruments in Article 22 of the Constitution through Amendment no. 26, of 28 September 2020]

Chapter I
Purposes, definitions, equality and non-discrimination, general obligations

Article 3
Definitions

(b) *"domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;*

Chapter IV
Defense and support

Article 18
General obligations

[...]
3 Parties shall ensure that measures taken pursuant to this chapter shall: – be based on a gendered understanding of violence against women and domestic violence and shall focus on the human rights and safety of the victim; – be based

on an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment; – aim at avoiding secondary victimisation; – aim at the empowerment and economic independence of women victims of violence; – allow, where appropriate, for a range of protection and support services to be located on the same premises; – address the specific needs of vulnerable persons, including child victims, and be made available to them.
4 The provision of services shall not depend on the victim's willingness to press charges or testify against any perpetrator.
5 Parties shall take the appropriate measures to provide consular and other protection and support to their nationals and other victims entitled to such protection in accordance with their obligations under international law.

CONVENTION ON THE RIGHTS OF THE CHILD

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

LAW NO. 02/L-17 ON SOCIAL AND FAMILY SERVICES

Article 7
Role of the Centre for Social Work

[…]
7.1. Each Municipality establish and maintain a Centre for Social Work which will be a public institution and have one or more branch offices, hereafter referred to as the CSW. This is a centre, staffed by appropriately trained and qualified professionals' social service officers as according to the article 1.3 p. (i), responsible for exercising the powers set out by this Law on behalf of the Ministry and providing social and family services on behalf of the Ministry. 7.2. The Centre for Social Work will constitute the Guardianship Authority and perform the duties required of this function as set out in the in the relevant Kosovo statutes.

[…]

Article 9
Services to children and Families

9.1. In all matters concerning the provision of services to children and to families the best interests of the child shall be the first and paramount consideration.

9.3. Centre for Social Work will ensure the provision of social care and, or, counseling in circumstances where a child is in need of Social and Family Services because:
a. she or he is without parental care;
g. she or he is suffering as a consequence of family conflict;

CRIMINAL CODE 04/L-082 OF THE REPUBLIC OF KOSOVO

Article 179
Aggravated Murder

1. A punishment of imprisonment of not less than ten (10) years or of life long imprisonment shall be imposed on any person who:
[…]
1.3. deprives a family member of his or her life;

1.4. deprives another person of his or her life in a cruel or deceitful way;
[…]

CRIMINAL NO.04 L-123 PROCEDURE CODE

Article 7
General Duty to Establish a Full and Accurate Record

[…]

2. Subject to the provisions contained in this Code, the court, the state prosecutor and the police participating in the criminal proceedings have a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in his favor, and to make available to the defense all the facts and pieces of evidence, which are in favor of the defendant, before the beginning of and during the proceedings.

Article 9
Equality of Parties

[…]

2. The defendant has the right and shall be allowed to make a statement on all the facts and evidence which incriminate him and to state all facts and evidence favorable to him. He has the right to request the state prosecutor to summon witnesses on his behalf. He has the right to examine or to have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Article 130

General Requirements of Pretrial Interviews, Pretrial Testimony or Special Investigative

Opportunity

[…]

5. A person who has not reached the age of eighteen (18) years, especially if that person has suffered damage from the criminal offence, shall be examined considerately to avoid producing a harmful effect on his or her state of mind. If necessary, a child psychologist or child counselor or some other expert should be called to assist in the examination of such person.

Article 219
International Requests

[…]
6. Evidence obtained informally from foreign governments, law enforcement agencies, prosecutors or courts shall be admissible if accompanied by a statement from that foreign government, law enforcement agency, prosecutor or court which demonstrates that the evidence is reliable and was obtained in accordance with the law of that foreign state. Such evidence may not form the sole or decisive basis for a finding of guilt. Such information shall be accompanied at the main trial by a notice of corroboration under Article 263 of this Code.

Article 257
General Rules of Evidence

1. *The rules of evidence set forth in the present Article shall apply in all criminal proceedings before the court and, in cases provided for by the present Code, to proceedings before a state prosecutor and the police.*

2. *Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe.*

3. The court cannot base a decision on inadmissible evidence.

Article 262
Evidence as a Basis of Guilt

1. *The court shall not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings.*

2. *The court shall not find the accused guilty based solely, or to a decisive extent, upon statements given by the defendant to the police or the state prosecutor.*

3. *The court shall not find the accused guilty based solely, or to a decisive extent, on testimony given by a single witness whose identity is anonymous to the defence counsel and the accused.*

4. *The court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.*

Article 508
Conduct of Psychiatric Examination

1. At any time during the proceedings including during the main trial, if there is a suspicion that the defendant was in a state of mental incompetence or diminished mental capacity at the time of the commission of the criminal offence or that he or she has a mental disorder, a court may, ex officio or upon the motion of a state prosecutor or defence counsel, appoint an expert under Article 146 of the present Code to conduct a psychiatric examination of a defendant in order to determine whether:
1.1. at the time of the commission of the criminal offence, the defendant was in a state of mental incompetence or diminished mental capacity; or
1.2. the defendant is incompetent to stand trial.
[…]

LAW NO. 03/L-182 ON PROTECTION AGAINST DOMESTIC VIOLENCE [published in the Official Gazette on 10 August 2010]

Article 1
Purpose of the Law

1. This Law aims to prevent domestic violence, in all its forms, through appropriate legal measures, of the family members, that are victims of the domestic violence, by paying special attention to the children, elders and disabled persons.

2. This Law, also aims, treatment for perpetrators of domestic violence and mitigation of consequences.

Article 2
Definitions

1.2. Domestic Violence - one or more intentional acts or omissions when committed by a person against another person with whom he or she is or has been in a domestic relationship, but not limited to
[…]
1.5. Perpetrator - a person who is has committed an act or acts of domestic violence and against whom a protection order, an emergency protection or temporary protection order is sought.
1.6. Victim - a person who was subjected to domestic violence.

Article 4
Protection Measure of Psycho-Social Treatment

1. The protection measure for psycho-social treatment may be issued to a perpetrator of domestic violence in combination with any other preventing

measure with the aim of eluding violent behaviors of the perpetrator or if there is a risk to repeat the domestic violence.
2. The measure from paragraph 1 of this Article continues until the causes on basis of which it was issued, but may not continue more than six months.

LAW NO. 04/L-213 ON INTERNATIONAL LEGAL COOPERATION IN CRIMINAL MATTERS

CHAPTER VI
MUTUAL LEGAL ASSISTANCE

Article 80
Principles

1. *Upon the request of a judicial authority of another state, national judicial authorities shall provide assistance to that state for criminal proceedings conducted for offences whose punishment, at the time.*
2. Legal assistance within the meaning of paragraph 1 of this Article shall be any type of support given to foreign authorities regardless of whether the foreign proceedings are conducted by a court or by a prosecution office or if the legal assistance is to be provided by a court or by a prosecution office.
3. Legal assistance under this Chapter may also be provided or requested for the taking of provisional measures for the purpose of preserving evidence, maintaining an existing situation or protecting endangered legal interests,
4. Local judicial bodies give priority to the execution of requests for mutual legal assistance and take into consideration the procedural deadlines and other conditions expressly mentioned by the requesting state.

NATIONAL REQUESTS FOR MUTUAL LEGAL ASSISTANCE ADDRESSED TO ANOTHER STATE

Article 82
Authority to submit requests for legal assistance

1. *During pre-trial proceedings and until the filing of the indictment, requests for mutual legal assistance shall be submitted by the state prosecutor conducting the proceedings for which the assistance is requested. In cases where the act or measure requested, if it were to be performed in the Republic of Kosovo, would require, pursuant to the Criminal Procedure Code, an order of the court, the request shall be submitted by the court upon the application of the state prosecutor.*

2. After the filing of the indictment, requests for legal assistance shall be submitted by the court conducting the proceedings for which the assistance is requested.

3. Requests for mutual legal assistance shall be submitted to the Ministry and the Ministry shall review these requests and transmit them together with any supporting documents to the competent authority of the requested state

Article 83
Content of the request

1. The request for assistance shall be made in writing and shall include the following information:

1.1. the name of the authority conducting the criminal proceedings relating to the request; 1.2. a description of the facts of the case, including the time and place of commission of the criminal offence and any damage caused, as well as the legal classification of the offence;
1.3. extract of applicable legal provisions, including provisions regarding the statute of limitation and those on the sentence which may be imposed;
1.4. the identification of the persons against whom the criminal proceedings for which the assistance is requested are being conducted; 1.5. a description of the requested activities and an explanation of how they link to the facts of the case;
1.6. where applicable, the identification of the time limit within which the request should be executed and justification of the urgency;
1.7. where applicable, the identification of the persons to be authorised to be present at the enforcement of the request;
1.8. where applicable, identification of the allowances and reimbursements to which the person who is summoned to appear for the purpose of taking evidence is entitled;
1.9. where applicable, technical information necessary for taking evidence via videoconference.
2. The request for assistance, to the extent necessary and insofar as possible, shall also include the following:
2.1. information on the identity of the person concerned by the request and on his or her whereabouts;
2.2. information on the identity and residence of the person on which service is to be effected and his or her status with respect to the proceedings, as well as the manner in which service is to be made;
2.3. information on the identity and residence of the person who has to give testimony or make statements;
2.4. the location and description of the place or item to be inspected or examined;
2.5. the location and description of the place to be searched and indication of the items to be seized or confiscated;
2.6. the indication of any special procedure sought for executing the request and the relevant reasons for it;
2.7. the indication of any requirement for confidentiality;
2.8. any other information which may facilitate the execution of the request.

Admissibility of the Referral

63. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and provided under the Rules of Procedure.

64. In this respect, the Court initially refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

65. The Court further examines whether the Applicant fulfilled the admissibility requirements required under Article 47 (Individual Requests) and Article 48 (Accuracy of the Referral) and Article 49 (Deadlines) of the Law, which establish:

Article 47
(Individual Requests)

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.

Article 48
(Accuracy of the Referral)

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
(Deadlines)

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision[...]."

66. The Court also examines whether the Applicant has met the admissibility criteria set out in Rule 39 [Admissibility Criteria) of the Rules of Procedure. Paragraph (2) of Rule 39 of the Rules of Procedure sets out the criteria based on which the Court may consider the Referral, including the criterion that the request is not clearly unfounded. More specifically, Rule 39 (2) provides that:

"The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

67. Retarding the fulfilment of the above requirements, the Court finds that the Applicant is an authorized party, who challenges an act of a public authority, namely the Judgment [Pml. no. 310/2020] of the Supreme Court of 28 April 2021 in conjunction with two lower instances judgments, after the exhaustion of all legal remedies prescribed by law. The Applicant has also clarified her allegations regarding the rights and freedoms that she alleges have been violated, as provided for in Article 48 of the Law, and filed the Referral within the deadline outlined in Article 49 of the Law.

68. In light of the facts and arguments presented with this Referral, the Court considers that her request raises serious constitutional issues requiring examination of the merits of the Referral. Furthermore, the Applicant's Referral cannot be considered

clearly unfounded within the meaning of Rule 39 of the Rules of Procedure, and there is no other basis to declare it inadmissible.

Merits of the case

69. From the case files, it appears that the Applicant and her late husband, A.S., had lived in matrimony from 2007 until 2018. Furthermore, according to the case files, it is evident that from 2007 to 2018, the Applicant had reported domestic violence, initially to the Kosovo authorities and later to the relevant authorities in the Republic of France. Based on several documents in the case files, it is observed that during their time living in the Republic of France, the Applicant requested assistance and shelter for herself and her two children from the French authorities on several occasions. Moreover, from the case files, it turns out that her late husband, A.S., had been convicted by the French courts, namely the Court of Lyon (August 2018), for the violence he exerted against the Applicant and was later released on bail.

70. Based on the case files, it turns out that the husband of the Applicant, namely A.S., passed away on 21 September 2018. On the same day, the Applicant, along with her children, left the Republic of France and returned to the Republic of Kosovo. Upon her return to Kosovo, the Applicant reported to the Embassy of the Republic of France in Prishtina and was subsequently arrested by the authorities of the Republic of Kosovo.

71. More precisely, the Applicant was arrested by the authorities of the Republic of Kosovo on 4 October 2018, while the Basic Prosecution Office filed an indictment against the Applicant on the suspicion that she committed the criminal offence of *"Aggravated Murder"* under Article 179, paragraph 1, subparagraphs 1.3 and 1.4 of the Criminal Code of Kosovo, which stipulates that: *"1. A punishment of imprisonment of not less than ten (10) years or of life-long imprisonment shall be imposed on any person who: [...] 1.3. deprives a family member of his or her life; and 1.4. deprives another person of his or her life cruelly or deceitfully."* The Basic Court, through Judgment [PKR. 37/2019] found the Applicant guilty of committing the criminal offence charged, and punished her by imprisonment of 25 (twenty-five) years. Later on, the Applicant submitted an appeal to the Court of Appeals against the Judgment of the Basic Court, by which she was found guilty, alleging violations of the provisions of the criminal proceedings and erroneous determination of the factual situation. In her appeal to the Court of Appeals, the Applicant had specific claims concerning the principle of equality of arms, including: (i) her right to confront the witnesses [J.Ch., A.D., H.S., F.L., B.P., and L.S.], whose testimonies were only read during the main trial; (ii) the fact that her request for a psychiatric examination was not taken into consideration, which she believed would best demonstrate her mental state at the time of committing the criminal offence; and (iii) the fact that her son, the minor X.X., was examined as a witness without the presence of a psychologist. The Basic Prosecution Office filed an appeal against the Judgment of the Basic Court to the Court of Appeals, requesting a severer sentence against the Applicant. The Court of Appeals partially granted the appeal of the Applicant and modified the Judgment of the Basic Court only in terms of the legal qualification of the criminal offence, so the Court of Appeals legally qualified the criminal offence for which the Applicant was found guilty as an *"Aggravated Murder*" under Article 179, paragraph 1, subparagraph 3 of the Criminal Code of Kosovo. However, the Court of Appeals rejected the appeal of the Basic Prosecution office and the Applicant's other appeals as unfounded, upholding the decision of the Basic Court. Subsequently, the Applicant submitted a request to the Supreme Court for the protection of legality against the lower instance judgments. In her request for protection of legality, she reiterated, inter alia, her allegations related to the principle of equality of arms, including: (i) her continuous requests summited to

lower instance courts to confront the witnesses, whose testimonies were only read during the main trial; (ii) her appeal that her case was not treated as a domestic violence case, where she believed she was a victim of domestic violence; (iii) her request for a psychiatric examination, which was rejected by the lower instance courts; and (iv) her allegation that her son, the minor X.X., as a witness in the Basic Court, was examined without the presence of a psychologist.
The Supreme Court, through the Judgment [Pml. No. 310/2020], entirely rejected as unfounded the request for protection of legality submitted by the Applicant, thus upholding the decisions of the lower instance courts.

72. The Applicant challenges the aforementioned decisions of the lower instance courts before the Supreme Court, specifically the Judgment [PKR. no. 37/2019] of the Basic Court in Prishtina of 24 January 2020; the Judgment [PAKR. no. 133/2020] of the Court of Appeals of 3 July 2020; and the Judgment [Pml. no. 310/2020] of the Supreme Court of 28 April 2021, alleging violations of her constitutional rights. More precisely, the Applicant raised before the Court the allegations that can be summarized as follows:

i) The Applicant alleges that the regular courts did not take into account the material evidence presented by her defense, which, according to her, would have been favourable to the defense and relate to *"the permanent violence exerted by [A.S.] against the Applicant, for which he was sentenced to prison by the French judicial authorities"*, further adding that the Basic Court did not consider the circumstances that preceded the incident, including the fact that she was a victim of domestic violence and the criminal record of the deceased A.S..

ii) Regarding the principle of equality of arms, the Applicant specifies that, in her case, paragraph 4 of Article 31 of the Constitution was violated, as a result of her inability to cross-examine the witnesses at any stage of the proceedings against her, whose testimonies had an impact in finding the Applicant guilty.

iii) With a view to the principle of equality of arms, the Applicant alleges that the regular courts also rejected her request for a psychiatric examination, which, according to her, would prove her mental state at the time of committing the criminal offence.

iv) The Applicant further alleges that during the examination of her child [X.X.], who was a minor, he was examined only in the presence of a social worker and not a psychologist.

v) According to the Applicant's allegations, the regular courts' judgments were based on inadmissible evidence, stating that they ignored legal obligations which specify that the *"evidence obtained through informal channels by foreign governments, as it was the case of obtaining testimonies and other material evidence, crime scene inspection reports, and forensic examination reports sent by France, are inadmissible evidence if they are not accompanied by a Declaration from the French Government or law enforcement authorities stating that such evidence was obtained and collected in accordance with the laws of that State."*

73. Based on the case files, the Court observes that the trial conducted before the regular courts was based on the indictment of the Basic Prosecution Office, filed against the Applicant on suspicion of committing the criminal offence of *"Aggravated Murder"*

under Article 179, paragraph 1, subparagraphs 1.3 and 1.4 of the Criminal Code of Kosovo.

74. The Court also notes that the Applicant did not contest the act of deprivation of life of her husband, namely the deceased A.S.

75. The Court, based on the aforementioned explanations and within the scope of the Applicant's Referral submitted to the Court, will examine her allegations regarding the constitutional guarantees related to the principle of equality of arms and the right to a reasoned judicial decision, guaranteed under Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

76. However, regarding the Applicant's allegation related to the examination of the minor X.X., as a witness, the Court notes that this allegation, besides Article 31 of the Constitution, also raises constitutional matters defined in paragraph 3 of Article 50 [Rights of Children] of the Constitution, paragraph 1 of Article 3 of the Convention on the Rights of the Child, as well as paragraph 3 of Article 18 (General Obligations) of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (hereinafter: the Istanbul Convention).

77. In the context of the explanations provided, the above-mentioned allegations will be addressed by the Court with reference to the case law of the European Court of Human Rights (hereinafter: ECtHR), based on which the Court, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

I. Regarding the Applicant's allegation of violating the principle of equality of arms and adversarial principle under Article 31 of the Constitution and Article 6 of the ECHR,

78. The Court first recalls that the Applicant alleges that in the specific case, the principle of equality of arms and adversarial principle have been violated, as a result of: (i) her inability to confront witnesses, whose testimonies were only read during the main trial, despite her continuous request to confront them before the regular courts; (ii) the rejection of her request for a psychiatric examination by the regular courts, which, according to the Applicant, would provide a clearer picture of her motives and state of mind at the time of committing the criminal offence; and (iii) the allegation that the regular courts did not consider the evidence presented by the Applicant, which she believes demonstrated that she was a victim of domestic violence and as a result, she was unable to present the evidence proposed by the defense.

79. In this aspect, the Court will first examine the Applicant's allegation for violation of Article 31 of the Constitution in the context of the principle of equality of arms and the adversarial principle as an integral part of the right to a fair and impartial trial. For this purpose, the Court will further initially (i) elaborate on the general principles regarding equality of arms and the adversarial principle as guaranteed by the aforementioned provisions of the Constitution and ECHR; and then, (ii) apply them to the specific circumstances of the case.

(i) With a view to the general principles based on the Court case law and the ECHR case law concerning the principle of equality of arms and the adversarial principle,

80. the Court, referring also to its own case law and the ECHR case law, first emphasizes that the principle of *"equality of arms"* is an element of a broader concept of a fair trial (see Court case KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 97). Compliance with the requirements of a fair trial must be examined in each case, considering the conduct of the proceedings as a whole and not based on an isolated examination of a particular aspect or a specific incident, although it cannot be excluded that a specific factor may be so decisive as to allow the fairness of the trial to be assessed at an earlier stage of the proceedings (see ECHR case of *Beuze v. Belgium*, application no. 71409/10, Judgment of 9 November 2018, paragraph 121).

81. In accordance with the principle of equality of arms, as one of the features of the broader concept of a fair trial, each party must be given a reasonable opportunity to present their case under conditions that do not put them at a disadvantage compared to the opposing party. In this context, importance is given to presentations and increased sensitivity for a fair administration of justice (see, among other authorities, *Öcalan v. Turkey*, no. 46221/99, Judgment of 12 May 2005, paragraph 140; see also *Bulut v. Austria*, application no. 17358/90, Judgment of 22 February 1996, paragraph 47; *Yvon v. France*, Judgment of 24 July 2003, paragraph 31; and *Dombo Beheer B.V. v. Netherlands*, Judgment of 27 October 1993, paragraph 33; see Court cases KI230/19, cited above, paragraph 98; and KI103/10, Applicant Shaban Mustafa, Judgment of 20 March 2012, paragraph 40). Furthermore, the principle governing criminal proceedings must be prescribed by law is a general principle of law. It stands alongside the requirement that the rules of substantive criminal law must also be prescribed by law, which is enshrined in the maxim *"nullum judicium sine lege*". According to the ECtHR, the law establishes specific requirements regarding the conduct of proceedings aimed at guaranteeing a fair trial, which includes respect for the principle of equality of arms. The key purpose of procedural rules is to protect the accused from any abuse of authority, and for this reason, the protection lies with those who are most likely to suffer from the deficiencies and lack of clarity in these rules (see, ECtHR case *Coëme and Others v. Belgium*, no. 32492/96 *and 4 others*, Judgment of 22 June 2000, paragraph 102).

82. Furthermore, the Court also emphasizes that a fair trial includes the right to be heard in accordance with the "adversarial principle", a principle that is linked to the principle of "equality of arms" (see ECtHR case KI230/19, cited above, paragraph 99). In the course of the criminal proceedings, the ECtHR underlined that *"[i]t is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to the very procedure itself, should be in compliance with the adversarial principle and that there should be equality of arms between the prosecution and the defense" (see ECtHR case Leas v. Estonia,* application no. 59577/08, Judgment of 6 March 2012, paragraph 77). Therefore, concerning the adversarial principle, the ECtHR underlined that, in criminal proceedings both the prosecution and the defense must have the opportunity to be aware of and comment on all observations and evidence presented by the other party (see ECHR case *Brandstetter v. Austria*, cited above, paragraph 67).

83. Within the general principles concerning equality of arms and in relation to the allegation raised by the Applicant regarding her request for a psychiatric examination, the Court will refer to the ECtHR case *Gaggl v. Austria*, Judgment of 8 November 2022. In the aforementioned case, the matter pertains to the criminal proceedings conducted against the Applicant and the conviction for the criminal offence of attempted murder against her husband. More specifically, in January 2018, the Applicant repeatedly stabbed and attempted to kill her husband with whom she was married. She later confessed that she intended to kill him and then commit suicide.

Relying on Article 6 (Right to a fair trial) and 5 (Right to liberty and security) of the ECHR, the Applicant filed an appeal to the ECtHR, alleging that her criminal conviction was unjust and her detention was unlawful. In particular, she complained that she was not given the opportunity to understand the reasons on which the jury based its conviction, since the opinions of the two experts on her mental state at the time of the criminal act were diametrically opposed and the local courts rejected her request, which was also supported by the public prosecutor, to obtain third and decisive expert.

84. Also concerning the matter of psychiatric examination in the context of theequality of arms, the case of *Gaggl v. Austria* emphasized, *inter alia*, the following: "*The appointment of experts is important to assess whether the principle of equality of arms has been complied with. The very fact that the experts concerned are engaged by one of the parties does not suffice to make the procedures unfair. Although this fact may give way to the fear of the neutrality of experts, such a fear, although important, is not decisive. However, what is crucial is the stance that the experts have taken throughout the proceeding, how they have performed their functions, and how the judges have assessed the expert's opinions*. During the assessment of the procedural stance of the experts and their role in the proceedings, it should not be forgotten that the opinion given by each expert appointed by the court is likely to carry significant weight in the court's assessment of matters within such expert's competency (see *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, application no. 26711/07 and 2 others, paragraph 94, 12 May 2016; and *Shulepova v. Russia*, application no. 34449/03, paragraph 62, 11 December 2008)".Subsequently, the ECtHR in the same case specified that: *"... the request for a fair trial does not burden the court with the obligation to order an expert opinion or any other investigative measure solely because a party has requested it* (see ECHR case *Hodžić v. Croatia,* application no. 28932/14, § 61, 4 April 2019; and *H. v. France,* 24 October 1989, paragraph 60; and 61, Series A no. 162-A). *When the defense insists that the court hears a witness or obtains other evidence (such as an expert report), it is up to local courts to decide whether it is necessary or advisable to admit such evidence for consideration at trial* (see ECtHR cases Khodorkovskiy *and Lebedev v. Russia,* applications no. 11082/06 and 13772/05, paragraphs 718 and 721, 25 July 2013*;* and *Huseyn and others v. Azerbaijan*, application no. /05, Judgment, 26 July 2011, paragraph 196*)".*

85. In the context of the specific circumstances of the present case, referring to the European Court of Human Rights (ECtHR) case law, the Court quotes the relevant part of the aforementioned judgment, namely the case *Gaggl v. Austria*, as follows: *"Her complaint that the trial had not been accompanied by sufficient guarantees that would allow her to understand the reasons for the judgment is closely related to the question of whether she was mentally capable, at the time of the offence, to be held criminally liable, and thus also to her request for the appointment of a third and final expert opinion on her mental state at that time, in order to obtain new evidence" (paragraph 56 of the Judgment in the case Gaggl v. Austria).*

86. Therefore, the Court, in dealing with the Applicant's allegations, shall adhere to the aforementioned principles developed through the case law of the ECtHR and the Court itself as far as they may be applicable in the circumstances of the present case.

(ii) Application of these principles in the present case

87. The Court recalls that the Applicant specifically relates her allegation of violation of the principle of equality of arms and the adversarial principle to the fact that,

throughout the court proceedings, she: (i) was unable to question the witnesses in the court review, whose testimonies were only read during the trial; (ii) her request for a psychiatric examination was denied; and (iii) it was impossible for her to present the evidence proposed by the defense which, according to her, would prove that she was also a victim of domestic violence, supporting the theory presented by her defense.

88. Bearing in mind the aforementioned principles, the Court will further assess their application in the present case to determine whether the Applicant's allegations have resulted in a violation of the principle of equality of arms; respectively, of her right to fair and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

89. The Court once again recalls that the Applicant did not dispute the commission of the act for which she was accused. Her appeal that the trial was not accompanied by sufficient guarantees that would allow the Applicant to create a conviction of a fair trial, including the determination of the length of her sentence, is closely related to the following issues: (i) the impossibility of confronting the witnesses proposed by the Prosecution, whose testimonies have only been read and which were taken as a basis by the regular courts; (ii) whether the eventual acceptance of the request for a psychiatric examination could prove her mental state, taking into account the fact that the Applicant reported for a long time to relevant institutions both in Kosovo and in France that she was a victim of domestic violence (as presented in detail in the summary of facts); and (iii) the allegation that the Applicant was not allowed to present evidence which, according to her, would go in favor of the defense.

90. In the following, the Court will address these three allegations of the Applicant within the framework of the principle of equality of arms separately, starting with her allegation about her inability to confront the witnesses then continuing with the other two allegations mentioned above.

(a) *regarding the impossibility of confronting the witnesses proposed by the Prosecution, whose testimonies were only read and which were taken as a basis of fact? by the regular courts*

91. The Court initially notes that the Applicant had specifically raised this allegation before all judicial instances. The Applicant challenged all the testimonies that were read during the court hearing, as it was impossible for the Applicant to object to the testimonies taken by the French authorities where the criminal offense was committed. The Applicant objected to the evidence precisely because of the impossibility of confronting witnesses, a claim that she raised before the Court. This is evidence that, according to her, was used by the regular courts as a basis for determining the marital relationship between the Applicant and her husband A.S., as well asdetermining the factual circumstances which preceded the commission of the criminal offense. The Court recalls that based on the case file and the fulfillment of her request regarding the right to equality of arms, the Applicant never had the opportunity to interrogate or confront the aforementioned witnesses.

92. Addressing this allegation, the Court firstly refers to the Judgment of the Basic Court, where it emphasized that the determination of the Applicant's guilt came after the administration of a large amount of evidence, starting from the non-disputing of the deprivation of life by the Applicant of the deceased A.S., including and not limited to, among others, the statements of the witnesses [J.Ch., A.D., H.S. ., F.L., B.P. and L.S.], which were read during the court hearing and which evidence the Applicant never had the opportunity to contradict.

93. With regard to the above-mentioned testimonies which were only read in the court hearing, the Court notes that they testified to the ongoing marital relations between the Applicant and the deceased A.S..This evidence, based on the case file according to the Applicant, portrayed the 'unstable' character of the Applicant). It also turns out that some of these witnesses (based on the case file) were their neighbors, whose statements/evidence were taken as a basis for determining the character of the Applicant. The Applicant never had the opportunity to confront these witnesses.

94. Furthermore, the Basic Court in the reasoning of its Judgment emphasized the fact that the aforementioned testimonies, read during the court hearing, were not decisive for determining the motive for committing the criminal offense, since the latter were not eyewitnesses to the event. However, the Court notes that the same evidence was administered by the Basic Court and was referred to latter in order to prove the fact of how the critical event came about, respectively and among other things, determining the motive that led the Applicant to commit the act**.**

95. The Court recalls that the Applicant's inability to question the witnesses against her were raised as claims by her appeal submitted to the Court of Appeals and in her request for protection of legality, submitted to the Supreme Court. Having said that, it follows that her claims raised by these two respective submissions were examined by the Court of Appeals, as well as by the Supreme Court.

96. The Court, in the context of fulfilling the request for equality of arms in connection with the Applicant's allegation to interrogate the witnesses against her, also recalls the Judgment of the Court of Appeals, which upheld the Judgment of the Basic Court on this point, emphasizing, among other things, that: " *... it has analyzed all the evidence processed during the court hearing, including the forensic expertise, then, the statements of the witnesses given in the court hearing, which even so do not change in terms of proving the basic facts, especially with regard to proving the facts and circumstances of how the now deceased A.S. was deprived of his life. The facts and circumstances, which the accused herself does not dispute, but who claims that at the critical moment she was attacked by the now deceased [...], however, from the case file and from other material evidence, it is proven that, the court of first instance has taken into account the evidence in question, especially the data related to the past of the accused and the now deceased, in terms of married life, then from the statements of the witnesses - neighbors of the accused, it has also confirmed the behavior of the accused towards the now deceased; the behaviors, therefore, were not of such a level that it would be possible to conclude that only now the deceased had violent behavior, because even for the accused the witnesses in question have confirmed the aggressive behavior of the accused in relation to the deceased. Therefore, the first instance court has rightly refused to provide other material evidence from the state of France, in relation to the facts and circumstances in question".*

97. From the citation of the Judgment of the Court of Appeals, "[...]*, for the accused the witnesses in question have confirmed the aggressive behavior of the accused in relation to the deceased, therefore, the first instance court has rightly refused to provide other material evidence from the state of France, in relation to the facts and circumstances in question".* The Court notes that the testimonies of the witnesses weretaken into account in determining the personality of the Applicant and determining the motive of the criminal offense, as well as in determining the length of the relevant punishment.

98. In terms of this allegation, the Court also refers to the part of the reasoning given in the Judgment of the Supreme Court, where the latter, based on Article 262 of the

CPCK, states that: "*In this criminal legal case, taking into account the fact that the murder was committed in France, and after committing the murder the convict came to Kosovo where she was arrested, it is evident that a lot of evidence was provided by the authorities of the competent bodies of France, among them the testimonies of the witnesses J.C., A. D. and H. S. mentioned in the requests and these testimonies the convict was not able to oppose in the court hearing through questioning, but from this fact it cannot be claimed that they are inadmissible as alleged in the request, because the provision of Article 262 stipulates that this evidence does not determine guilt and that in the present case they have not determined because it is about the testimonies of the witnesses who have shown their relationships with the deceased and the convict. Then they are not crucial evidence to prove the most important fact if on the critical night there was a conversation and a physical conflict between the convict and the deceased as claimed by the defense, because there are no eyewitnesses to the event (in this case there is no eyewitness to the event to show how the critical event unfolded) and the court has not even assessed it as such evidence".*

99. The Court notes that, as the regular courts have found trhough their reasoning related to this claim, the relevant procedural provisions enable the acceptance of the testimonies of witnesses in the court hearing if the appearance of these witnesses before the court is impossible. However, based on the above elaboration of the general principles related to the adversarial principleestablished through case law of the ECtHR, the Court recalls that a fundamental aspect of the right to a fair trial is that in criminal proceedings, including the elements of such a procedure that relate to the procedure itself, the issue of the admission and administration of evidence must be in accordance with the adversarial principle and that there must be equality of arms between the prosecution on the one hand and the defense on the other.

100. Furthermore, the Court also notes that the reasoning in the Judgment of the Basic Court on this position was first accepted by the Court of Appeals, and then also by the Supreme Court. Regarding evidence which the Applicant challenges in the framework of the principle of equality of arms, the same evidence was used by these courts themselves, even though the latter courts did not assess and consider the same evidence as crucial for determining her guilt (emphasizing among other things that these witnesses were not eyewitnesses of the event). This is because the same evidence, always according to the assessment of the regular courts, may have contributed to the creation of an overview of the conduct of the Applicant and the attributes of her "*aggressive*" character and personality, resulting, among other things, in specifying the motive of the criminal offense and determining the length of the relevant punishment.

101. The Court does not dispute the fact that the regular courts have also administered a large number of material evidence which have been elaborated in this Judgment, including the non-challenging of the criminal act committed by the Applicant, as well as the various crime scene reports and the autopsy reports of the French authorities.

102. From the above, as well as from the reading of the case file and the reasoning of the decisions of the regular courts, the Court considers that the testimonies read during the court hearing could not be confronted by the Applicant and they were not considered as crucial evidence to prove the most important fact about her guilt. However, the Court notes that the regular courts had given considerable weight to these testimonies which the Applicant had no opportunity to oppose, as required by the procedural guarantees of the right to fair and impartial trial established in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, resulted in a

characterization of the 'aggressive' elements of her character and personality and have also resulted in the determination of the length of her punishment,

103. Furthermore, taking into account the fact that these testimonies refer to the Applicant's personality or behavior and the fact that the Applicant throughout the criminal proceedings against her requested to be allowed to confront them, the Court assesses that in the present case during the proceedings before the regular courts the principle of equality of arms and the adversarial principle have been violated. This allegation was not taken as a basis, even at the level of considering her appeal with Court of Appeals nor during the examination of her request for the protection of legality by the Supreme Court.

104. In the aforementioned context, the Court emphasizes the fact that the ECtHR has also reiterated that given the importance of the right to a fair administration of justice in a democratic society, any measures restricting the rights of the defense should be limited to the strictly necessary. If a less restrictive measure can suffice, then that measure is to be applied (see, the ECtHR case, *Van Mechelen and Others v. the Netherlands*, Judgment of 23 April 1997, paragraph 58). The possibility for the accused to confront witnesses in the presence of a judge is an inherent element of a fair trial (See, the case of Court KI14/18, cited above, paragraph 48; see, *inter alia*, the ECtHR case, *Tarău v. Romania*, Judgment of 24 February 2009, paragraph 74).

105. Considering the importance of the right of the accused to question the witnesses against her, considerable case law of the ECtHR has focused on cases where the witnesses did not participate in the court hearing, thus making it impossible for the accused and his defense to question them and challenge the relevant arguments. Among other things, in the ECtHR cases *AI-Khawaja and Tahery v. United Kingdom* and *Schatschaschwili v. Germany*, have established the general principles applicable in such cases, and the test, known as the Al-*Khawaja and Tahery test*, which must be applied by the courts in all cases where the witnesses did not participate in the court hearing.

106. In terms of the general principles established by the aforementioned case law of the ECtHR, the latter has emphasized that in such cases, (i) the relevant court must first examine the preliminary question, namely whether there were compelling reasons for admitting the testimony of an absent witness, given that, as a general rule, witnesses must give evidence during the main trial and that every reasonable effort must be made to ensure their participation; 35 (ii) where the witness has not been questioned at any earlier stage of the proceedings, the admission of a witness statement instead of direct evidence at trial should be the last resort; (iii) admitting as evidence the statements of witnesses *in absentia* results in a potential disadvantage for the accused, who, in principle, must have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the veracity and reliability of the evidence given by witnesses, by ensuring that they are questioned in his presence, either at the time the witness gives his statement or at a later stage during the proceedings; (iv) under the "*sole or decisive rule*" if the accused's conviction is based solely or mainly on evidence provided by witnesses whom the accused has not been able to cross-examine at any stage of the proceedings, his rights of defense are unjustly restricted; (v) however, given that item (d) of paragraph 3 of Article 6 of the ECHR must be interpreted in the light of the general regularity of the proceedings - the "*sole or decisive rule*" must not be applied in an inflexible manner.

107. The case law of the ECtHR recognizes various cases where the appearance of a witness in the court hearing cannot be accomplished. But insofar as it is relevant to the

circumstances of the present case, in the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence in the court (see, ECtHR cases, *Karpenko v. Russia*, Judgment of 13 March 2012, paragraph 62; *Damir Sibgatullin v. Russia*, Judgment of 24 April 2012, paragraph 51; *Pella v. Estonia*, Judgment of 12 April 2007, paragraph 35; *Bonev v. Bulgaria*, Judgment of 8 June 2006, paragraph 43; *Tseber v. the Czech Republic*, Judgment of 22 November 2012, paragraph 48; *Schatschaschwili v. Germany*, cited above, paragraph 119 and *Vronchenko v. Estonia*, Judgment of 18 July 2013, paragraph 58). The fact that a court was not able to locate the relevant witness or the fact that this witness was not in the state in which the proceedings are conducted is not a sufficient reason to satisfy the requirements of item d paragraph 3 of Article 6 of the ECHR. (See, in this regard, the ECtHR cases, *Gabrielyan v. Armenia*, cited above, paragraph 81; *Lucie v. Croatia*, Judgment of February 2014; *Schatschaschwili v. Germany*, cited above, paragraph 120; *Seton v. the United Kingdom*, cited above, paragraph 61; *Tseber v. the Czech Republic*, cited above, paragraphs 48; and *Kostecki v. Poland*, Judgment of 4 June 2013, paragraphs 65 and 66).

108. According to the case law of the ECtHR, it is not for the latter to compile a list of specific measures which the domestic courts must have taken in order to secure the attendance of a relevant witness. However, it is clear that the relevant authorities must have actively searched for the witness with the help of domestic authorities including the police and must have resorted to international legal assistance where a witness resided abroad. Moreover, the need for all reasonable efforts on the part of the authorities to secure the witness's attendance at trial further implies careful scrutiny by domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness. (See the ECtHR case, *Schatschaschwili v. Germany*, cited above, paragraphs 120 and 121).

109. Furthermore, in case *Schatschaschwili u. Germany*, the ECtHR identified certain elements that may be relevant in this context: (i) whether the domestic courts approached the untested evidence of an absent witness with caution, having regard to the fact that such evidence carries less weight, and whether they provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available; (ii) existence of a video recording of the absent witness's questioning at the investigation stage, so that the court, prosecution and defense create relevant impressions on the credibility of the testimony; (iii) availability at trial of corroborative evidence supporting the out of the court witness statement, such as statements made at trial by persons to whom the absent witness reported the events immediately after their occurrence; (iv) further factual evidence, forensic evidence and expert reports; (v) description of events by other witnesses, in particular if such witnesses are cross-examined at trial; (vi) the possibility for the defense to put its own questions to the witness indirectly, for instance in writing, in the course of the trial, or, where appropriate, in the pre-trial stage of the proceedings; and/or (vii) possibility for the accused or defense counsel to question the witness during the investigation stage.

110. In the circumstances of the present case, the Court reiterates that, based on the specific reasoning of the regular courts, in particular in the reasoning of the Judgment of the Court of Appeals and the Supreme Court that are related to the claim of the impossibility of confronting the above-mentioned witnesses in the court hearing, the Court, based also on the above-mentioned clarifications that are related to case law of the ECtHR, assesses that there is no stable and logical reason given by the regular courts that would justify the absence of witnesses in the court hearing.

111. Moreover, the Court, as a result of all that was said above, does not notice any effort of the regular courts throughout the entire conduct of the court proceedings to: (i) ensure the presence of witnesses in any way and (ii) it does not appear that the regular courts have attempted in any way to summon the witnesses to the court hearing, either through a video link mechanism or another suitable method, so that the Applicant would be able to confront them.

112. In the light of all that was said above, the Court emphasizes that within the framework of the principle of equality of arms, no procedural action has been undertaken so that the Applicant can be heard and have the possibility of confronting the witnesses or their testimonies.

113. Therefore, the Court finds that as a result of the impossibility for the Applicant to confront the witnesses, the procedural guarantees embodied in paragraph 4 of Article 31 of the Constitution in conjunction with point d) of paragraph 3 of Article 6 of the ECHR have not been respected in the criminal proceedings before the regular courts.

(b) regarding the rejection of her request for a psychiatric examination

114. In this regard, the Court once again recalls the Applicant's allegations regarding the rejection by the courts of her request for a psychiatric examination, which the applicant continuously raised throughout the entire criminal proceedings against her. More specifically, the Applicant first raised her request for a psychiatric examination during the court hearing in the Basic Court, and then her allegation of violation of the principle of equality of arms as a result of the rejection of her request. She also raised the issue in her appeal to the Court of Appeals and finally in her request for protection of legality before the Supreme Court.

115. In connection with this Applicant's allegation, the Court first recalls the essence of the Applicant's allegation, which states before the Court that the psychiatric examination in her case would prove her motive and mental state at the time of committing the criminal offense.

116. The Court recalls that the Applicant, in connection with the aforementioned allegations among other things, states that: "*...ignoring the right of the defense party to propose evidence related to proving exculpatory facts for the accused, such as the proposal for her psychiatric examination to prove her mental state at the time of the commission of the criminal offense, the observation of the existence of accumulated affect as a result of her continuous mistreatment [...]*".

117. The Court also reiterates that, based on the case file, the Applicant does not challenge the fact that she had committed the criminal offense which she was accused of. However, during the criminal proceedings against her, the Applicant requested that she be allowed a psychiatric examination, by which she hoped to show her mental state and the motive that pushed her to commit the criminal offense.

118. Related to this specific request of the Applicant, based on the case file and the decisions of the regular courts, it turns out that the latter rejected this request of the Applicant for a psychiatric examination on the grounds that there was no reason to approve the request for a psychiatric examination. Subsequently, the regular courts assessed that from the evidence that was administered, it does not show that the Applicant showed any distress after committing the criminal offense. In relation to the latter, the Basic Court mainly referred to the fact that after having committed the

criminal offense the Applicant took the children and, according to the above-mentioned court, very quietly came from France to Kosovo, not showing any signs that would question her mental state.

119. The Court in the following will refer to the reasoning given by all court instances in response to the specific request of the Applicant for a psychiatric examination.

120. First, the Basic Court rejected the Applicant's request for a psychiatric examination on the grounds that "[...] *there was no convincing evidence that the Applicant had manifested any behavior that would call into question the competence of her actions".* However, the Basic Court itself in that part of the reasoning treats the Applicant's actions from the perspective of psychoanalysis, stating, among other things, that: "[...] *while the accused herself narrates a scenario of non-existing event having to do with the alleged abuse of a minor, and that even Hitchcock would be envious of the latter for constructing such an imaginary scenario*".

121. In addition, the Basic Court added in the reasoning that the Applicant did not act under conditions of the necessary defense, emphasizing the circumstances in which the criminal offense was committed. Additionally this reasoning was used when determining the type and length of punishment as an aggravating circumstance, the latter took into account the commission of the criminal offense, the persistence of the Applicant to commit the criminal offense and her behavior after the commission of the criminal offense. The Basic Court had emphasized that in determining the length of her sentence, it had not found and therefore assessed any mitigating circumstances.

122. The Court also notes that within the framework of the principle of equality of arms, the Applicant raised the issue of psychiatric examination by her appeal, submitted to the Court of Appeals. The reasoning and position given in this point of the Judgment of the Basic Court was fully upheld by the Court of Appeals and the Supreme Court.

123. The Supreme Court in its Judgment related to the Applicant's request for a psychiatric examination, added that the first instance court rightly rejected the request, giving clear reasons for this rejection. Further, regarding this allegation, the Supreme Court specified that no evidence supports the fact that the Applicant at this point was not capable of responding for her actions. More specifically, the Supreme Court, among other things, reasons that: " *in relation to the violation of the criminal law as it appears from the content of the request, the defender claims that in the present case the criminal law was violated because according to the defense of the convict and the material evidence, the convict acted in necessary defence as a result of the sexual abuse of the deceased with the minor and the ill-treatment or violence used by the deceased towards the convict on the critical night, the circumstances of which speak of murder committed in defense required by Article 179, par. 1 point 3 in conjunction with Article 12 par. 1 and 4 respectively of CCRK. However, this court assesses these claims as unfounded. First, in this criminal legal matter, the fact that the marital relations between the convict and the deceased were not good and that the deceased used violence against the convict, but regarding the critical moment, there is no eyewitness to the event, is not disputed. ...] regarding the defense's proposal for psychiatric expertise to prove the mental state of the convict at the time of the commission of the criminal offense, this court assesses that the first instance court has rightly rejected such a proposal and in this regard has given clear reasons which this court also approves as correct. The convict first lived with the deceased family, then they went to France and lived there for a while alone and according to her request, the deceased also went to France to live with her [...] Then, from the case file there is no evidence that argues the fact that the convict on the critical night had*

suffered injuries from the deceased,. Therefore the claims in this regard are unfounded and to this court, it is not clear on what the defense bases this claim. In fact, it turns out that the court rejected to administer the medical reports before the critical event, but in the case files there is no evidence that substantiates the fact that the convict had suffered injuries from the deceased on the critical night".

124. Based on the principles mentioned above in terms of the right to a fair and impartial trial, it follows that the regular courts are not obliged to order a psychiatric examination simply because the Applicant has requested such a thing. However, the Court emphasizes, among other things, that based on Article 508 of the CPCK, it is foreseen that: "*At any time during the proceedings including during the main trial, if there is a suspicion that the defendant was in a state of mental incompetence or diminished mental capacity at the time of the commission of the criminal offence or that he or she has a mental disorder, a court may, ex officio or upon the motion of a state prosecutor or defense counsel, appoint an expert under Article 146 of the present Code to conduct a psychiatric examination of a defendant".*

125. Following the elaboration of the aforementioned principles established by the case law of the ECtHR and the reasoning given by the regular courts, the Court emphasizes that this Applicant's allegation must be examined and assessed in terms of the guarantee of criminal procedural rules, which guarantees specifically relate to the principle of equality of arms. The Court recalls the position of the ECtHR in the case of *Gaggl v. Austria* in which the Austrian courts, in a case related to the attempted murder of the Applicant's husband, approved the request for a psychiatric examination twice in a row. However, the ECtHR in this case found a violation in terms of the principle of equality of arms because the Austrian courts had not approved the request for a psychiatric examination by the third expert, among other things, taking into account that the two preliminary expertise were contradictory.

126. In this regard, the Court recalls the reasoning of the Judgment of the ECtHR in the case of *Gaggl v. Austria*, namely in paragraph 60 of this Judgment, where, among other things, related to the circumstances of the attempted murder of the husband, the ECtHR emphasized that: *"[…]both experts concurred in their diagnosis of the applicant's mental illness but came to different conclusions regarding the impact thereof on her mental state at the time of the commission of the offence […] the appointment of experts is relevant in assessing whether the principle of equality of arms has been complied with. The very fact that the experts concerned are engaged by one of the parties does not suffice to make the procedures unfair. Although this fact may give rise to apprehension as to the neutrality of the experts, such apprehension, while having a certain importance, is not decisive".*

127. Further, the ECtHR in the case of *Gaggl v. Austria*, y in paragraph 65, found among other things that:*"[…] In other words, she was deprived of the opportunity to challenge the evidence effectively, as her application to commission a third and decisive expert opinion had been rejected (compare Matytsina, cited above, § 169, and Stoimenov, cited above, §§ 38 et seq.). Although formally the applicant was in the same position as the prosecution whose application for a third and decisive expert opinion had also been rejected, the Court nonetheless considers that the impact of that rejection significantly impaired the applicant's rights of defense, thereby undermining the overall fairness of the trial against her within the meaning of the Convention*".

128. In the circumstances of the present case as stated above, the appointment of expertise by the courts at the request of the defendant is also provided for in the provisions of

the Criminal Procedure Code. In this sense, the respect of such a procedural criterion during the conduct of the criminal proceedings is aimed at guaranteeing a fair trial, which includes respect for the principle of equality of arms. Therefore, the Court considers that such a continuous request as in the present case, presented consistently by the Applicant throughout the entire development of the criminal procedure, should have been taken into consideration and assessed in such a way that the courts would be able to ascertain whether the principle of equality of arms has been respected in relation to the Applicant, as required by the well-established principles and criteria in the case law of the ECtHR.

129. The Court assesses that the reasoning of the regular courts for rejecting the request for a psychiatric examination, specifically that of the Basic Court later upheld by the Court of Appeals and the Supreme Court, is based on their assessment, that the Applicant did not show any signs of mental instability that would call into question her mental state at the time of the commission of the criminal offense. However, the Court, based on the case file, does not notice that any expert report was compiled in order to reach such an assessment. The Court assesses that due to the nature, circumstances, weight of the offense and the serious effect on the family, the regular courts, by not allowing the psychiatric examination as provided by the Criminal Procedure Code, have failed to give an individual treatment to the request in question. In the specific circumstances of such a case, the free assessment of the regular courts that the Applicant has not shown any signs of mental instability, in fact requires special professional administration within the framework of fair and impartial trial and such an assessment and finding belongs only to the assessment of an expert in the relevant field.

130. The Court emphasizes that the Applicant's request for a psychiatric examination, submitted throughout the conduct of the criminal proceedings against her, falls within the scope of the principle of equality of arms as established by the ECtHR in the case of *Gaggl v. Austria*. This is, among other things, due to the fact that the possibility to approve such a request of the parties to the procedure is also determined by the provisions of the Criminal Procedure Code. The respect of such a guarantee during the conduct of the criminal proceedings in conjunction with other procedural guarantees, would also result in the guarantee of a fair and impartial trial, in the sense of paragraph 1 and 4 of Article 31 of the Constitution in conjunction with Article 6 of ECHR.

131. In the following, the Court also refers to the reasoning given by the Basic Court, in the circumstances of this case, respectively: *[...] while the accused [the Applicant] herself narrates a scenario of non-existing event having to do with the alleged abuse of a minor, and that even Hitchcock would be envious of the latter for constructing such an imaginary scenario*". Referring to the language used above, the Court notes that while the Basic Court had rejected the applicant's request for a psychiatric examination, it had taken the liberty of self-assessment of the mental state of the applicant, using prejudicial language as it reflects, among others, the example of the aforementioned language.

132. The Court assesses that in the specific circumstances of this case, and taking into account the language used in the reasoning of the Basic Court, the latter should have considered the Applicant's request for a psychiatric examination, which request was not approved by either the Court of Appeals or the Supreme Court.

133. In the light of the foregoing, the Court emphasizes that, in terms of the principle of equality of arms, the Applicant should have been given a reasonable opportunity by

the regular courts for approval of her request for a psychiatric examination so that she would not be placed in an unfavorable position in relation to the prosecution.

134. In the context of these circumstances and based on the above: (i) taking into account the fact that the Applicant did not challenge the criminal offense; (ii) the specific circumstances in which the event occurred; (iii) the Applicant's relationship with the deceased A.S.; (iv) her claim that she had been a victim of violence by the deceased A.S. for several years; and (v) her continuous request to undergo a psychiatric examination; the Court assesses that in the circumstances of the present case, approving the request for her psychiatric examination would, in addition to conveying the conviction to the Applicant that in relation to her request she has been heard by the regular courts, and also considering the implications of the fact that she has not had the opportunity to confront the witnesses against her result in a court procedure, which in its entiretywould be fair and impartial and in the context of the principle of equality of arms.

135. Finally, the Court, in terms of the principle of equality of arms, finds that the rejection of the Applicant's request for a psychiatric examination resulted in the violation of the principle of equality of arms, namely the Applicant's right to a fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

(c) regarding the impossibility to present the evidence proposed by the defense

136. Regarding this allegation, the Applicant before the Court emphasizes that: "[...] *she was not allowed to present the evidence presented by her defense, related to numerous bodily injuries [...] submitted by the defense through numerous photographs that were presented to the court but were not assessed at all by the court but were ignored as if they did not exist at all".* In connection with this, the Applicant adds that no judicial instance accepted to administer the evidence proving that she was a victim of domestic violence and which, according to her, would go in favor of her defense.

137. In addressing this allegation, the Court refers to the specific part of the Judgment of the Court of Appeals, which is related to the Applicant's allegation that the evidence proving that she was a victim of domestic violence was not administered and which was proposed by the defense of the Applicant. Regarding this allegation, the Court of Appeal adds that the first instance court in this case took into account the material evidence proposed by the defense of the Applicant provided by the French authorities: "*...however, from the case file and from other material evidence, it is proven that the court of first instance has taken into account the evidence in question, especially the data related to the past of the accused and the now deceased, in terms of married life, then from the statements of the witnesses - neighbors of the accused, it has also confirmed the behavior of the accused towards the now deceased, the behaviors, therefore, were not of such a level that it would be possible to conclude that only now the deceased had violent behavior, because even for the accused the witnesses in question have confirmed the aggressive behavior of the accused in relation to the deceased, therefore, the first instance court has rightly refused to provide other material evidence from the state of France, in relation to the facts and circumstances in question".*

138. Further addressing this allegation, the Court also recalls the reasoning of the Judgment [PML. no. 310/2020] of the Supreme Court, of 28 April 2021, by which the request for protection of legality was rejected as ungrounded, and which reasons, among other things, as follows: *"In relation to the violation of the criminal law as it*

appears from the content of the request, the defender claims that in the present case the criminal law was violated, because according to the defense of the convict and the material evidence, the convict acted in necessary defense as a result of the sexual abuse of the deceased with the minor and the ill-treatment or violence used by the deceased towards the convict on the critical night, the circumstances which speak of the murder committed in defense required by Article 179, par. 1 point 3 in conjunction with Article 12 par. 1 and 4 respectively of CCRK. However, this court assesses these claims as unfounded. First, in this criminal legal matter, the fact that the marital relations between the convict and the deceased were not good and that the deceased used violence against the convict, but regarding the critical moment, there is no eyewitness to the event, is not disputed. ...] regarding the defense's proposal for psychiatric expertise to prove the mental state of the convict at the time of the commission of the criminal offense, this court assesses that the first instance court has rightly rejected such a proposal and in this regard has given clear reasons which this court also approves as correct. The convict first lived with the deceased's family, then they went to France and lived there for a while alone and according to her request, the deceased also went to France to live with her [...] Then, from the case file there is no evidence that argues the fact that the convict on the critical night had suffered injuries from the deceased, therefore the claims in this regard are unfounded and to this court, it is not clear on what the defense bases this claim. In fact, it turns out that the court rejected to administer the medical reports before the critical event, but in the case files there is no evidence that substantiates the fact that the convict had suffered injuries from the deceased on the critical night".

139. In this regard, the Court, based on the aforementioned reasons, notes that the reasoning given by the regular courts to the specific allegations raised by the Applicant are generalized and have not specifically addressed and justified her claims in relation to the evidence, which she has continuously proposed and which according to her would go in favor of the defense, proving, among other things, that the Applicant was continuously a victim of domestic violence.

140. Following this, the Court points out that in terms of the principle of equality of arms and the adversarial principle, the courts have failed to guarantee the respect of these principles, as a result of not addressing and specific reasoning, which has resulted in the non-acceptance of this evidence and which in the circumstances of the present case would be decisive, not necessarily for the determination of the Applicant's guilt, but for the clarification of the circumstances of the case, the motive and the determination of the corresponding punishment. This is because the issue of addressing the proposal for the administration of evidence, proposed by the defense, must be subject to the guarantees defined in terms of the principle of equality of arms, by which it is possible to prove that the defense in the procedure is also treated equally in relation to the prosecution.

141. In the light of the above, the Court assesses that the criminal procedure in its entirety was not conducted in a fair manner in terms of the procedural guarantees established in Article 31 of the Constitution in conjunction with Article 6 of the ECHR. As a result, there was a violation of the principle of equality of arms, because in the specific circumstances of the present case, throughout the court proceedings, the prosecution and the defense were not treated equally, among other things, as a result of (i) the Applicant's inability to confront with the witnesses against her; (ii) the rejection to administer evidence that could prove that the Applicant was a victim of domestic violence; and (iii) the continued rejection of the request for a psychiatric examination, despite the fact that the Basic Court's reasoning reflects prejudicial language towards the Applicant in this context.

II. Regarding the Applicant's allegation related to the testimony of the minor witness [X.X.]

142. The Court first recalls that the Applicant, in relation to this allegation in her referral, among other things, emphasized that: "[...] *regarding the non-respect of the defendant's right to a fair trial, Article 130, par. 5 of the CPC [Criminal Procedure Code], because in the case of the questioning of the minor [X.X.] as the only eyewitness who was the victim of [...] was questioned in the court hearing without the presence of the child psychologist, although the latter one due to his age and the fact that he was a victim [...], however, the court was satisfied with the finding that a social worker participated in his questioning".*

143. The Court, in examining this allegation raised within the framework of a fair and impartial trial, first highlights the specific circumstances related to the child witness X.X., who is the son of the Applicant and the deceased A.S. Child X.X. as an eyewitness (the only eyewitness of the event), gave his testimony before the Basic Court only before "*the social worker and not before the psychologist*."

144. The Applicant claims that taking the testimony of the minor X.X., without the presence of a psychologist, taking into account the circumstances and the sensitivity of the present case, constitutes a violation of the procedural guarantees established in Article 31 of the Constitution.

145. In terms of the constitutional principles and those defined by the relevant international instruments, the Court initially points out that in the treatment of cases where child witnesses/victims who have experienced acts of domestic violence either directly, or when such acts are present between the parents as well as in the case of witness X.X., public authorities *ex officio* bear the positive obligation to protect the best interest of the child and provide constitutional guarantees according to which every child enjoys the right to be protected from violence and victimization. Such an obligation is also provided by the constitutional provisions and international instruments for the protection of the rights of the child.

146. The Court recalls that in Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, the international agreements and instruments that have direct application in the Republic of Kosovo are listed, among them the Convention on the Rights of the Child and the Istanbul Convention. The obligations arising from these international instruments may affect, among other things, the respect of procedural guarantees during the development of a criminal procedure, such as the circumstances in the present case.

147. Returning to the present case, the Court recalls that from the case file it appears that the witness X.X., as one of the Applicant's children, was exposed to a very serious history of domestic violence and was the only eyewitness to a very serious act affecting the family. The latter was summoned as a witness in the court hearings held before the Basic Court. Having said that, from the case file it appears that the Applicant, namely his mother, as the accused, in the court hearing posed to him questions only in the presence of the social worker.

148. In this regard, the Court notes from the case file the role of the Center for Social Work as a guardianship body. In the circumstances of the present case, the social worker in the absence of both parents, in relation to the witness X.X., was present in the capacity of the authorized representative of the guardianship body. First, the presence of the

social worker in the absence of the parents is a formal criterion that every public authority is obliged to apply. The case file also shows that apart from the official/formal presence of the social worker, there is no evidence or report of the assessment of the child's mental state or the provision of professional/psychological support during his interrogation in criminal proceedings. The Court assesses that in such a case, the provision of professional/psychological support is particularly important in situations where the child is without parental care and he has suffered the consequences of domestic violence and family conflict that have as an epilogue a very serious act, namely the killing of one of his parents.

149. The Court emphasizes that in terms of the positive obligations established in the Constitution and international instruments, including the relevant case law of the ECtHR, the best interest of the child should be the first and most important consideration for all public authorities. This is due to the fact that even in the sense of the proper administration of justice, the best interest of the child is the primary obligation of all public authorities, including the justice system and all mechanisms for the protection and support of witnesses/victims of domestic violence.

150. Furthermore, the Court points out that there cannot be adequate administration and fair assessment of the testimony of a child--especially the only eyewitness of the relevant event-- without professional support, for the purposes of the criminal procedure, in a procedure in which the case of his father's murder was tried and his mother was accused. In this regard, the Court notes a failure of the regular courts to adequately treat a child witness in such a specific context, as in the circumstances of the present case when the witness X.X. is a witness of domestic violence and is in state care due to inability to be under parental care.

151. In light of the above and in terms of *ex officio* obligations to protect the best interest of the child in each case, the Court refers to the provisions of the Constitution, the Convention on the Rights of the Child and the Istanbul Convention.

152. In this respect, the Court first recalls Article 50 [Rights of Children] of the Constitution, which provides as follows:

> *1. Children enjoy the right to protection and care necessary for their wellbeing.*
>
> *[...].*
> *3. Every child enjoys the right to be protected from violence, maltreatment and exploitation.*

153. Based on Article 50 of the Constitution, the Court notes that children in the proceedings must enjoy the right to defense and that their highest interest during the proceedings must be the primary consideration of each public authority. Therefore, following this, the Court considers that such protection should be guaranteed to the child whenever the state authorities take a decision regarding a child as the situation is in the circumstances of the present case.

154. The Court also refers to the Convention on the Rights of the Child, which defines the basic principles and standards for the protection of the best interests of the child. More specifically, Article 3 of this Convention stipulates that:

> *1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

155. The Court also refers to paragraph 3 of Article 18 of the Istanbul Convention according to which member states of the Convention have positive obligations that the measures taken by state authorities "[...] *shall focus on the human rights and safety of the victim; – be based on an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment; – aim at avoiding secondary victimisation; – aim at the empowerment and economic independence of women victims of violence; – allow, where appropriate, for a range of protection and support services to be located on the same premises; – address the specific needs of vulnerable persons, including child victims, and be made available to them".*

156. The Court, referring to the positive obligations within the general principles of protection and support for children who experience domestic violence, recalls that all actors are obliged to take into account: *"[...] consider adequately the devastating effects of violence and the length of the recovery process or that treat victims insensitively run the risk of re-victimising service users .[...]" (see Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence* (11 May 2011) paragraph 116).

157. As far as the respect for procedural guarantees during the criminal procedure is concerned, the Court also refers to paragraph 5 of Article 130 of the Criminal Procedure Code, which stipulates that: *"A person who has not reached the age of eighteen (18) years, especially if that person has suffered damage from the criminal offence, shall be examined considerately to avoid producing a harmful effect on his or her state of mind".* Based on this provision of the CPCK, the Court notes that it guarantees the protection of the child or the obligation to consider the child's best interest in the circumstances of the examination.

158. The Court, in the following, recalls that the Basic Court, in the procedure of administration of evidence, partially gave trust in the testimony of the minor [X.X.] on the grounds that: "[...] *it is clear that these statements were made under the influence of the now accused [the Applicant*]", noting that it takes the statements of the minor as a basis only in relation to the bad relations and ongoing problems between the Applicant and the deceased A.S., while his testimony about the event that preceded the critical moment is not trusted, considered the latter contradictory and in function of the alibi of the defense of the Applicant, namely his mother.

159. Furthermore, the Court recalls that the Applicant, in her request for protection of legality submitted to the Supreme Court, raised the issue of giving testimony by X.X. In addressing this allegation, the Supreme Court reasoned that: "[...] *the provision of Article 130, paragraph 5 of the CPCK was not violated either. In fact, according to this provision, when examining a person who has not reached the age of eighteen (18), especially when he is injured by a criminal offense, care is taken so that the question does not harmfully affect his mental state. When necessary, he is questioned*

with the help of a child psychologist, or a child pedagogue, or other professional expert. So, from this provision, it appears that questioning through a psychologist is not an obligation of the court, but in case the court deems it necessary, it is at the discretion of the court to assess that the person who has not reached the age of 18 should be heard through a psychologist or other professional persons. In the present case, the Court has assessed that it is not necessary, but X.X. was interrogated in the presence of the representative of the social worker and he acted with special care because, as it appears from the case file, the defense posed all the questions through the convict".

160. The Court recalls that it is within the competence of regular courts to decide whether they will trust the testimony of witness X.X. or not. However, within the framework of the aforementioned positive obligations for the protection of the best interest of the child, an obligation which is also embodied in the provisions of the criminal procedure itself, the protection of the best interest of the child must be a primary consideration, especially in the context of the family situation of the witness X.X., of the factual situation related to the testimony about the criminal act and the emotional and psychological effect on the child/witness in the specific circumstances of the present case.

161. In the light of the aforementioned provisions, the Court also refers to the case law of the ECtHR, which has emphasized that criminal proceedings related to children must be organized in such a way as to respect the principle of the best interest of the child (see ECtHR cases *Adamkiewicz v. Poland*, no. 54729/00, Judgment of 2 March 2010, paragraph 20; *Panovits v. Cyprus*, no. 4268/04, Judgment of 11 December 2008, paragraph 67; and *V. v. United Kingdom* [GC], no. 24888/94, Judgment of 16 December 1999, paragraph 86). In support of this, the ECtHR also emphasizes that: "*In cases where children are part of the proceedings and face decision-making in such a sensitive area, local authorities and courts face an extremely difficult task".*

162. The Court reiterates the obligation of all public and private authorities to respect the right: *"Every child enjoys the right to be protected from violence"*. This obligation is also applicable in the justice system, in any procedure, including criminal proceedings when minors are part of the judicial process, as in the specific case of X.X. as a witness, in a complicated criminal situation and with a history of domestic violence.

163. Having said this, the Court emphasizes that beyond the standard defined by Article 50 of the Constitution, Article 3 of the Convention on the Rights of the Child, Article 18 of the Istanbul Convention andthe above-mentioned case law of the ECtHR, the possibility of the assistance of psychologist during the conduct of the criminal proceedings is also guaranteed by the provisions of the CPCK. The Court assesses that the very content of paragraph 5 of Article 130 of the CPCK in terms of the obligation to guarantee the best interest of the child during the procedure of questioning him, clearly determines that the latter is questioned with the help of the psychologist or the appropriate expert. From this, it follows that in the process of questioning the child, with an emphasis on a criminal procedure that includes specifics such as the circumstances of the present case, the highest interest of the child must be guaranteed by the presence of a professional who takes care that the well-being and dignity of the child is not violated.

164. Therefore, the Court considers that based on the definition of Article 50 of the Constitution and Article 3 of the Convention on the Rights of the Child as well as Article 18 of the Istanbul Convention, the consideration of the best interest of the child directly creates an obligation to state authorities for respecting the child's right to

protection from violence, and such an obligation must also be applied in the court proceedings, during which the child may also be a witness.

165. Therefore, in the application of the aforementioned principles established in the Constitution; Convention on the Rights of the Child; Istanbul Convention; the case law of the ECtHR as well as the requirements defined by paragraph 5 of Article 130 of the KPCK, which in the circumstances of the present case are related to the obligation to protect the best interest of the child in criminal proceedings, the Court notes that the child X.X. during the testimony or examination by the Applicant, despite the sensitivity that characterized the case and the fact that he himself was the victim of a very difficult family relationships, was not offered help and support by the relevant expert in the field.

166. Therefore, based on the sensitivity of the event and the fact that the child in the criminal proceedings has testified about the relations of the parents, as the only eyewitness of the event and the nature of his testimony, the Court assesses that the regular courts have violated the principle of protecting the best interest of the child, which has resulted in a violation of the constitutional guarantees that a child is protected from the effects of violence, especially the destructive effects of violence in the family, by not offering him professional support during interrogation in criminal proceedings.

167. As a result of this, the Court considers that the regular courts have failed to fulfill the aforementioned obligation to protect the best interest of the child. Having said this, the Court considers that the proper treatment of the minor witness in the court proceedings is also an integral part of the recovery process of victims of domestic violence. Therefore, the questioning of the witness X.X., without adequate and psychological support, also risked his re-victimization during the conduct of the criminal proceedings. In this sense, the Court considers that such an obligation in the first place is of a substantive aspect, which in case of non-fulfillment may result or affect the violation of procedural guarantees during the conduct of the criminal proceedings.

168. In the light of these findings, the Court concludes that the examination procedure of X.X., conducted by the Basic Court, upheld by the Court of Appeals and then by the Supreme Court, was conducted in violation of the guarantees established by Article 50 of the Constitution in conjunction with Article 3 of the Convention on the Rights of the Child and paragraph 3 of Article 18 of the Istanbul Convention and the case law of the ECtHR, and that the violation of these positive obligations have also resulted in violations of procedural guarantees during the examination and administration of this evidence by the regular courts within the meaning of a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

III. Regarding other allegations of the Applicant

169. The Court also recalls that the Applicant also claims that the judgments of the lower instances were based on evidence which, according to her, does not meet the standards set by law to be considered as evidence.

170. The Court at this point recalls the reasoning of the Judgment [PAKR. no. 133/2020] of the Court of Appeals, which in addressing this claim adds that all the evidence provided by the State of France was processed in accordance with the legal provisions of the latter, "*...which means that according to the provisions of the Law on International Legal Cooperation of Kosovo, all the evidence provided by the other*

State must be processed in accordance with the provisions of that State, which is what happened in the present case".

171. Further, the Court cites the Judgment of the Supreme Court, where in connection with this allegation it is added that "*...the allegations that this evidence was not obtained legally are unfounded, because the case file show that the evidence obtained by the French authorities was obtained in accordance with the provisions of the criminal procedure code of France and as such were handed over to the local authorities. In fact, the defender only cites the legal provisions of the Criminal Procedure Code (Article 209 par. 6 of the Criminal Procedure Code) but does not specify the fact of what their illegality consists of, and in addition, they are not the only or decisive evidence for finding of guilt, as it was said above, because the convict has accepted the fact that she committed the murder, but under the pretext that she was attacked* [...]".

172. 172. At this point, the Court also recalls the provisions of Law No. 04/L-213 on International Legal Cooperation in criminal matters, respectively paragraph 1 of Article 80, which provides:

> *Upon the request of a judicial authority of another state, national judicial authorities shall provide assistance to that state for criminal proceedings conducted for offences whose punishment, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting state.*
>
> [...]
>
> 4. *National judicial authorities shall give priority to the execution of requests for mutual legal assistance and take into account any procedural deadlines and any other terms indicated by the requesting state.*

173. Further, from the case file, the Court notes that in the present case two international arrest warrants were issued, respectively the International Arrest Warrant and the European Arrest Warrant issued by the French authorities.

174. In light of this, the Court once again recalls that the Applicant has never challenged the commission of the criminal offense and since the Court has already found a violation of the principle of equality of arms within the framework of Article 31 of the Constitution and Article 6 of ECHR, remanding this criminal case for a retrial, it will not further enter assessment of this Applicant's allegation.

Conclusions

175. Finally and in the context of the special circumstances of the criminal proceedings in the case of the Applicant which has ended by the challenged Judgment of the Supreme Court, the Court finds that, the combination of circumstances as follows, namely: (i) the rejection of the Applicant's request to confront the witnesses; (ii) the rejection of her request for a psychiatric examination; (iii) the rejection and lack of justification for the administration of evidence, respectively, the evidence proposed by the defense and according to which, among other things, it results that the Applicant was a victim of domestic violence; and (iv) the lack of professional support for the minor involved in the procedure and who was also the only eyewitness in this criminal proceedings; have resulted in unequal treatment between the prosecution and the defense. This led to a violation of the principle of equality of arms and the violation of the procedural

guarantees embodied in paragraph 1 and 4 of Article 31 of the Constitution in conjunction with point d) of paragraph 3 of Article 6 of the ECHR.

176. The Court also reiterates that the procedure of questioning the child within the framework of the criminal proceedings was conducted in violation of the obligations and guarantees defined by paragraph 3 of Article 50 of the Constitution in conjunction with paragraph 1 of Article 3 of the Convention on the Rights of the Child, paragraph 3 of Article 18 of the Istanbul Convention and the case law of the ECtHR. Therefore, the violation of these positive substantive obligations has resulted in the violation of procedural guarantees during the examination and administration of this evidence by the regular courts, in the sense of the fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

177. The Court emphasizes that despite the findings of this Judgment, its effects in relation to witness X.X. are principled in nature. Having said this, the Court assesses that it is very important to establish a standard in the case law in the Republic of Kosovo in terms of the protection of child victims/witnesses of domestic violence. The regular courts, in the future, will have to act in accordance with the principles and standards embodied in the constitutional provisions, the European Convention on Human Rights, the Convention on the Rights of the Child, the Istanbul Convention and the case law of the ECtHR. In this context, acknowledging that children are victims of domestic violence, including cases where they are witnesses of domestic violence, while respecting the principle of independence of regular courts, the Court reiterates the importance of avoiding the re-victimization of witness X.X., in the retrial procedure.

178. Finally, the Court emphasizes the fact that the effects of this Judgment are only related to findings in terms of the procedural guarantees embodied in Article 31 of the Constitution and Article 6 of the ECHR, regarding the violation of the principle of equality of arms in the context of the conducted criminal procedure. The Court does not in any way prejudge the guilt or the course of the criminal proceedings in retrial. The Court also emphasizes that the manner of handling the indictment brought against the Applicant in relation to the criminal offense of aggravated murder which she is accused of, including the relevant decision-making regarding the extension of detention, is within the full competence of the Basic Court in Prishtina, as established in the relevant provisions of the Criminal Code and the Criminal Procedure Code of the Republic of Kosovo.

Non-disclosure of identity

179. Finally, the Court notes that the Applicant has not submitted a request for non-disclosure of her or her son's identity. However, in the circumstances of the present case, the Court refers to Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure, which stipulates that: *"[...] The Court by majority vote authorizes non-disclosure of identity or grants it without a request from a party. When non-disclosure of identity is granted by the Court, the party should be identified only through initials or abbreviations or a single letter".*

180. The Court also refers to Article 8 (1) of the Convention on the Rights of the Child, which establishes:

> *"States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference".*

181. In this context, the Court, based on the case file and taking into account the sensitivity of the case, assesses that in order to protect the identity of the minor child as a witness, the non-disclosure of his identity is considered to be necessary. Therefore, the Court referred to the identity of the minor child in a capacity of the witness in this Judgment as X.X.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution and Rule 59 (2) of the Rules of Procedure, on 6 July 2023, by majority

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that Judgment [Pml. no. 310/2020] of 28 April 2021 of the Supreme Court of Kosovo; Judgment [PAKR. no. 133/2020] of 3 July 2020 of the Court of Appeals and Judgment [PKR. no. 37/2019] of 24 January 2020 of the Basic Court in Prishtina are not in compliance with paragraphs 1 and 4 of Article 31 of the Constitution and point (d) of paragraph 3 of Article 6 of the European Convention on Human Rights;

III. TO DECLARE INVALID Judgment [Pml. no. 310/2020] of 28 April 2021 of the Supreme Court of Kosovo; Judgment [PAKR. no. 133/2020] of 3 July 2020 of the Court of Appeals and Judgment [PKR. no. 37/2019] of 24 January 2020 of the Basic Court in Prishtina;

IV. TO REMAND the case to the Basic Court in Prishtina for retrial, in accordance with the findings of this Judgment;

V. TO ORDER the Basic Court in Prishtina to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 29 February 2024, about the measures taken to implement the Judgment of the Court;

VI. TO NOTIFY this Judgment to the parties;

VII. TO HOLD that the Judgment is effective on the date of publication in the Official Gazette, in accordance with paragraph 5 of Article 20 of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Gresa Caka-Nimani

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