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

Prishtina, on 5 Drcember 2023
Ref. no.: AGJ 2306/23

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

case no. KI74/22

Applicant

Zoran Đokić

Constitutional review of Judgment Pml. no. 19/2022 of the Supreme Court of 15 February 2022

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 was submitted by Zoran Đokić (hereinafter: the Applicant) represented by Ljubomir Pantovic, a lawyer from Mitrovica.

Challenged law

2. The Applicant challenges the constitutionality of Judgment [Pml. no. 19/2022] of the Supreme Court of the Republic of Kosovo of 15 February 2022 (hereinafter: the Supreme Court) in conjunction with the Judgment [APS. no. 22/2021] of the Court of Appeals of the Republic of Kosovo of 12 October 2021 (hereinafter: the Court of Appeals) and the Judgment of the Basic Court in Prishtina [ST. no. 15/19] of 11 February 2021 (hereinafter: the Basic Court).

Subject matter

3. The subject matter is the constitutional review of the Judgment of the Supreme Court whereby it is claimed that the Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction Article 6 (3) (a) and (d) (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR) and Article 9 (2) of the International Covenant on Civil and Politic Rights and its Protocols (hereinafter: ICCPR) have been violated.

Legal basis

4. The Referral is based on Article 113 (1) and (7) [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 (Processing Referrals) and 47 (Individual Requests) of Law no. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 25 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

5. On 7 July 2023, the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2023, were published in the Official Gazette of the Republic of Kosovo and entered into force fifteen (15) days after their publication. Consequently, during the examination of the Referral, the Constitutional Court refers to the provisions of the aforementioned Rules of Procedure. In this regard, in accordance with Rule 78 (Transitional Provisions) of the Rules of Procedure No. 01/2023, exceptionally, certain provisions of the Rules of Procedure No. 01/2018, will continue to be applied in cases registered in the Court before its abrogation, only if and to the extent that they are more favourable for the parties.

Proceedings before the Constitutional Court

6. On 31 May 2022, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 8 June 2022, the President of the Court by Decision GJR. No. KI74/22 appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha (members).

8. On 8 June 2022, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. 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.

10. On 7 November 2023, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral and review of its merits.

11. On the same date, the Court voted unanimously that the Referral is admissible; and by majority, that there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (3) (a) and (d) (Right to a fair trial) of the ECHR.

Summary of facts

12. On 31, May 2019, the Special Prosecutor's Office of the Republic of Kosovo (hereinafter: the Special Prosecutor's Office) filed indictment PPS. no. 23/2018 against the Applicant for the criminal offense of war crimes, which constitutes a serious violation of Article 3 of the Geneva Conventions, in accordance with Article 152 paragraph 1 of the Criminal Law of Kosovo and Article 142 of the Criminal Law of the SFRY, war crimes are serious violations of the laws and customs that are applied in armed conflicts that are not of an international character prosecuted on the basis of Article 153, paragraph 1 sub paragraph 2.1, 2.2, 2.5, 2.8, 2.13 and Article 3 of the Criminal Law of Kosovo.

13. The Basic Court had scheduled and held the initial session, where the indictment was read to the Applicant, after the presiding of the panel confirmed that the Applicant understood the content of the indictment, he was given the opportunity to plead guilty or not guilty.

14. The Applicant declared that he is not guilty of the criminal offense for which the indictment charges him.

15. On 8 January 2021, the Special Prosecutor's Office amended and expanded the PPS indictment. no. 23/2018 of 31 May 2019 giving reasons "*during the judicial review, the examined evidence proved that the factual situation presented in the indictment was changed, and on the other hand, with the application of the evidence during the judicial review, it was revealed that the accused Zoran Đokić also committed a criminal offense, based on the provisions of articles 350, paragraph 1 and 351, paragraph 1 of the CCK.*"

16. The modification in the indictment was related to the period March-April 1999, which charged the Applicant with the charge that, in co-perpetration with other persons, went to the "Kristal" neighborhood in Peja, and participated in the action which started for the killing and expulsion of the Albanian population from their homes.

17. The extension of the indictment for the period March-April 1999 charged the Applicant: "*During the months of March-April 1999, namely on 28.03.1999, in the neighborhood "Te Soliteri" which is now called "Rrokaqielli", in Peja, in collaboration with the organized criminal group of Serb nationality, among whom was the person named S and NN unidentified persons so far, in police, paramilitary and army uniforms, have caused great suffering or damage to bodily integrity or health, by applying measures of intimidation against the endangered civilian population, committed killing, looting a city or country, ordering the displacement of the civilian population for reasons related to the conflict intentionally directed against the civilian population or against certain civilian individuals who are not directly involved in the conflict. The accused, together with other persons, entered the houses of the Albanian population by force, looking for the person named L, who was not at his house that day, and then they went to the house of the victim AN, shooting with*

Kalashnikovs in the air and then violently ordering them to leave their house within 5 minutes, addressing them in Albanian language "Albanians must all be killed, go to Albania", thus forcing the injured A and the rest of the Albanian population to leave their homes, separating them in opposite directions, some family members in the direction of Albania, and others in the direction of Montenegro."

18. The Special Prosecution accused the Applicant of having committed criminal offences: "*War crimes in serious violation of common Article 3 of the Geneva Conventions, which are prosecuted under Article 152, paragraph 1, of the Criminal Code of Kosovo, and Article 142 of the Criminal Code of the RSFY, War Crimes in serious violation of the laws and customs that apply in armed conflicts which are not of an international character and which are prosecuted according to Article 153, paragraph 1 and sub-paragraph 2.1, 2.2, 2.5, 2.8, 2.13, 12.15 and Article 3 of the CCK, in the fictitious real union*."

19. On 11 February 2021, the Basic Court by the Judgment [ST. no. 15/19] decided: **(i)** The accused Zoran Đokić (the Applicant) is sentenced to imprisonment for a duration of 12 (twelve) years, in this sentence the time spent in detention on remand is also included; **(ii)** In accordance with Article 367 paragraph 2 of the CPCK, the Applicant's detention is extended until this judgment becomes final, but not longer than the time provided for in the enacting clause of this sentence; **(iii)** The Applicant is ordered to pay the amount of 700 (seven hundred) euro in the name of the expenses of the criminal procedure within 15 days from the entry into force of this judgment; **(iv)** the injured V.B., L.Z., M.Z., Sh.K., M.Xh., F.M., L.H., F.H., and A.N., have been instructed to exercise their rights in regular civil procedure.

20. The Basic Court found the Applicant guilty because he committed the criminal offense of War Crimes Against the Civilian Population under Article 142 in conjunction with Article 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia, in conjunction with Article 3 of the Geneva Convention of 12 August 1949 and Article 4 of Protocol 2 of 8 June 1977, annex to the Geneva Convention, judging him with an imprisonment sentence of 12 (twelve) years, in which sentence the time spent in detention on remand will be counted.

21. The Basic Court explained that the Applicant was accused that on 28 March 1999, in the neighborhood "Te Soliterat" which is now called "Rrokaqielli" (Skyscraper) in Peja, the Applicant in a co-perpetration with a group of Serbian armed forces (reserve police, soldiers and paramilitary forces) dressed in uniform, with the aim of causing great suffering and damage to health and bodily integrity, by applying measures of intimidation and terror to the defenseless and unarmed civilian population, have ordered the expulsion of the Albanian civilian population who was not directly involved in the conflict, the Applicant with other persons entered by force the houses of Albanian citizens and searched for the person named L, who was not at his house that day, then they entered the house of the injured A.N., shooting automatic rifles in the air and violently ordering them to leave the house within 5 minutes, and addressing them with humiliating words, so that A.N., and other Albanian citizens have forced them to leave their homes, separating them in opposite directions, some family members in the direction of Albania and others in the direction of Montenegro.

22. The Basic Court explained that against the Applicant there was an accusation that on 29 March 1999, in the neighborhood "Kristal" in Peja, the Applicant, in complicity with a group of Serbian armed forces (reserve police, soldiers and paramilitary forces) dressed in uniforms, in order to cause great suffering and damage to health and bodily integrity, to the unprotected civilian population of Albanian nationality, have committed murders, looting and have ordered the expulsion of the Albanian civilian

population from their homes, for reasons that related to the armed conflict, although the civilian population was defenseless and unarmed and did not participate in the fighting, so while the family of the injured L.H., precisely his brother B with his family and two children of L.H., were taken out violently from their house, after entering the orange-colored "Yugo 45 A" vehicle, they tried to stop them and directed them with the words "stop, stop", to kill them they shot in their direction, in which case the car was hit with four shots (bullets) in which there were also two minor children, the injured L.H., and the nine-year-old eldest boy holding his three-year-old brother by the hand to protect him and he was hit in the right hand, while the youngest son was shot in the back, causing bodily injuries.

23. The Basic Court, among other things, found: **(i)** based on the laws in force during the war in Kosovo and international conventions, it is concluded that war crimes against civilians can be committed during times of war, armed conflict or occupation; **(ii)** according to these local and international legal acts, victims or objects protected by law and international conventions are mainly civilians, but members of the armed forces who have surrendered their weapons and surrendered, as well as persons of injured or sick; **(iii)** war crimes against the civilian population according to Articles 22 and 142 of the Criminal Code of the RSFY, in violation of Article 3 of the Geneva Convention of 12 August 1949 and in violation of Article 4 of Protocol no. 2 of 8 June 1977, can be committed by anyone who violates the rules and customs of war, so the perpetrator is not necessarily required to belong to a specific military or paramilitary formation or any other formation; **(iv)** it is not disputed that the now deceased victims H.Z., S.Z., B.B., and R.M., were found in a mass grave in Batajnica, Republic of Serbia; **(v)** as to the critical day, first on 28 March 1999 in the "Soliteri" Neighborhood, now called "Rrokaqielli" in Peja, and then on 29 March 1999, in the "Kristal" Neighborhood in Peja, based on the testimonies of the witnesses it has been proven that after the bombing of the targets of the Serbian army and police, as well as paramilitary forces by the NATO military alliance, which began on 24 March 1999, in the city of Peja, more precisely in these two settlements, the campaign of ethnic cleansing began, which the witnesses described, because all these witnesses were forcibly expelled from their homes and apartments because of their Albanian ethnicity, ending up mainly as refugees in Montenegro; **(vi)** M.Z., who was a direct witness of the war crimes that took place, among other things, has testified that on the critical day she saw V.B., crying loudly, which, together with other evidence, is important for the criminal offense, but also for the identification of the Applicant as one of the perpetrators; **(vii)** the statement of M.Z. is also of equal importance that he had heard the name of the Applicant as a participant in the crime among the forcibly displaced population; **(viii)** the testimony of the injured witness L.Z. is in full agreement with the testimony of the witness M.Z., the court confirmed the decisive facts regarding the critical day, from the shelter in the basement, the separation of men from women and children, the looting of their property, the violent displacement from their homes, their deportation to Montenegro, receiving information from a person that her husband had been killed, while she was displaced in Ulcinj, who also mentioned the Applicant's name to her; **(ix)** the testimony of the witness V.B., is of great importance for recognizing the Applicant as a participant in war crimes while she was communicating with him, begging him not to kidnap her brother, seeing the Applicant's face well, who is remembered based on his face, eyes and hair; **(x)** the testimony of the witness is completely consistent with the dynamics of the crime on the critical day, which was described by almost all the witnesses, because they were all residents of the same neighborhood; **(xi)** for the court, the testimony of the witness F.H. is important because of one element, because the witness, while hiding at the roof of his house, from where the backyard could be seen, managed to see the Applicant in the yard, in which case has also described his physical characteristics; **(xii)** the testimony of F.H., additionally confirms the fact that this witness was able to listen to

the radio communication of these armed and uniformed persons, that is, he was at a distance from where he could hear the person saying "*Zoki is there something there*" , and that for the court it is very clear that Zoki is the abbreviation or nickname of the Applicant; **(xiii)** witness A.N., described in detail the critical day, testifying that after 12:00 hours, the Applicant, together with a person named S, whose last name he did not know, a taxi driver and a fourth person whom he did not know, armed with Kalashnikovs and wearing military camouflage uniforms, fired automatic weapons into the air and gave them five minutes to leave; **(xiv)** witness A.N. stated that he knew the Applicant and that they both went to the same school "Ramiz Sadiku", he stated that for a short time the Applicant was called "Zoki; **(xv)** the statement of the witness A.N., apart from being important for the event in "Soliteri", the court based on the latter has found some other relevant issues, which are; that the Applicant at the time of committing the crime was in the city of Peja, not in Belgrade, as he said in his alibi.

24. During all stages of the development of the criminal procedure, the Applicant presented an alibi, claiming that at the time of committing these crimes he was in Belgrade, Republic of Serbia, in order to study. In relation to this very important circumstance of criminal procedure, the Basic Court heard several witnesses, such as those proposed by the Prosecution, as well as those proposed by the Applicant's defense counsel.

25. Regarding the Applicant's alibi, the Basic Court, among other things, found: **(i)** from the testimony of witnesses F.Sh. and S.T., the court found the fact that the Applicant worked as a security guard in the facilities OSCE Verification Mission in Kosovo at that time and according to the words of his direct leader F.Sh., he worked there from the middle of January 1999 until the evacuation of the mission on 20 March 1999; **(ii)** that the Applicant worked for the OSCE Verification Mission is also proven by the copy of the Personnel Card of the OSCE Verification Mission during 1998-1999, which was presented as material evidence in the court hearing; **(iii)** the witness B.M., who at that time lived in the same building as the Applicant, also confirmed that the Applicant together with his family were in their apartment and that she had seen him three to four days before the Albanian population of these facilities was forcibly evicted from there; **(iv)** on the other hand, the defense witnesses of the Applicant S.M., and I.Ç., testified in favor of the alibi of the accused during the time when the criminal offenses that are the subject of this criminal case were committed, that he was in Belgrade; **(v)** the witness S.M., then described the situation when she and the Applicant's sister, J, went to the Peja Patriarchate to call the Applicant in Belgrade, because due to the bombings, the telephone lines in the house were not working ; **(vi)** the Applicant's defense witness I. Ç. also testified in favor of the Applicant's alibi, emphasizing that he and the Applicant studied at "Braca Karic" University, which moved to Belgrade as result of the war in Kosovo, and described the meetings with him in the city of Belgrade; **(vii)** the court confirmed beyond any doubt the fact that the Applicant has entered into employment relationship with the OSCE Verification Mission, as evidenced by the material evidence - his employment identification card, and that according to the statements of his supervisors he was not absent from work until the evacuation of this mission, which was sometime between 20 and 22 March 1999; **(viii)** these evidences are convincing evidence for the court that prove the opposite of the Applicant's alibi, which was presented at the moment of arrest, but also during the criminal proceedings; **(ix)** the Applicant has changed the dates of his possible departure to Belgrade, and he did so by being forced by the testimonies of the prosecution witnesses, which were convincing, well-argued and logical evidence of how he, as an employed person, who had obligations at work would act; **(x)** the Applicant's attempts to link his trip to Belgrade with the fact that he did so to avoid the responsibility for mobilization as a member of the reserve police are not credible

to the court due to the fact that the Serbian Ministry of Internal Affairs carried out checks in both Serbia and Kosovo in 1999, and in the circumstances of the time of going to Belgrade, did not present a circumstance on the basis of which it could be argued that he could avoid the obligation to mobilize; **(xi)** the Applicant's defense regarding his alibi, firstly, is not correct in terms of time span, namely there have been changes over time, it is illogical, it is not based on material evidence, while the testimonies of witnesses S.M., and I.Ç., are not reliable for the court because they have no support in any other evidence, but they contradict the testimonies of the witnesses F.Sh., S.T., and B.M., and they also contradict the testimonies of the witnesses A.N., and all the witnesses who have identified the accused as a participant in the crime; **(xii)** the court fully agrees with the claim of the Applicant, that the burden of proof falls on the prosecution and in this case the prosecution, with the evidence proposed and administered in the main hearing, managed to prove the opposite of the alibi of the Applicant; **(xiii)** it is understood that only the false testimony of an alibi regarding the location (residence) in most cases is not enough to declare a person responsible, it is not enough in this case either, but the Applicant's guilt has also been proven with other direct evidence; **(xiv)** the theory of defense of the Applicant also went in the direction of denying or trying to declare invalid some material evidence, such as the statement of the witness Sh.K., given on 5 June 2000, in KMLDNJ, questioning the place of giving the testimony, for which the court has no doubt that the same date was given in Peja on the mentioned day, and not in Ulcinj as it was mentioned, because the city of Ulcinj is mentioned in the column (section) as the city in which the witness was displaced during the war; **(xv)** regarding the material evidence, in the copy of the list dated 3 June 1999, issued by the Ministry of Internal Affairs-Secretariat in Peja, by the Commander of the Police Station, Major M.S., the name of the Applicant appears under the number one as a member of the reserve units of the Ministry of Internal Affairs of Serbia and for all these members only the first and last names are recorded without any other data; **(xvi)** also based on this document it is stated that the Applicant was engaged on 21.04.1999; **(xvii)** the defense theory that in this case we are dealing with another person named Zoran Xhokic does not stand and contradicts the material evidence read in the court hearing; evidence provided by open sources of the Ministry of the Interior that in 1999 published on its website; **(xviii)** therefore, for the court it is clear that the other policeman named Zoran Xhokic was killed at the time of this indictment, while the source from which this information was obtained belongs to open sources and is very reliable because it is about the website of the government of Serbia, and these investigative techniques in accordance with the legislation of the Republic of Kosovo and beyond are known and acceptable; **(xix)** the court found that he was given a Kalashnikov assault rifle much earlier and that the issue of the date presented in the document is for administrative purposes and there is no doubt that the Applicant was engaged in the field, from the beginning of the NATO bombings against Serbian targets, since he himself has admitted that the territorial defense gave him automatic rifles; **(xx)** war crimes are specific crimes, which in some cases are discovered after many, many years, that is why they do not expire, so these crimes do not belong to the group of ordinary crimes, for which there is forensic and ballistic evidence; **(xxi)** therefore, the Applicant during this period was careful in his movement and simply assumed that he remained unnoticed in the group of military forces that committed the crimes; **(xxii)** the legal classification of the criminal offense is also related to the operation of the law at that time, therefore, the court applied the law which was in force at the time the criminal offense was committed against the Applicant.

26. Regarding the identification of the accused- the Applicant, the Basic Court, among other things, found: **(i)** the witness A.N., in the session of 07.09.2020, during his testimony, after giving many information about the Applicant, testifying that they attended the same school and that he had known her for a long time, giving details

about the cafeterias where the Applicant worked as a waiter, in the courtroom he identified the Applicant as a participant in the crimes of 28 March 1999 in "Soliteri" Neighborhood; **(ii)** also the witness F.H., during his testimony in the court hearing on 18.06.2020, stated that after hearing about the arrest of the Applicant, he searched for his name on Facebook and among several people with the same name identified the Applicant as the person who shot him and his uncle with an automatic rifle; **(iii)** witnesses such as V.B. and M.Xh. have identified the Applicant through photographs in the manner provided by law; **(iv)** the witnesses V.B., and M.Xh., did not have any doubts during the identification, they accurately described the physical characteristics of the Applicant, giving explanations about the circumstances in which they met and the communication they had with the accused on the day of the crime; **(v)** also, the witnesses A.N. and F.H. have clearly identified the Applicant and have shown him on the basis of which characteristics they distinguished him, such as hair and eyes, which physical characteristics of this accused are distinguishable and noticeable, which makes the coloring of the face in certain parts irrelevant; **(vi)** also the witness M.Xh., who on the critical day had contact with the Applicant, identified and described him as the person who participated in the action of deportation and terrorizing the Albanian civilian population; **(vii)** that the Applicant was a member of the reserve police, evidenced by the material evidence, the copy of the list dated 03.06.1999 which was issued by the Ministry of Internal Affairs - Secretariat in Peja, by the Commander of the main Police Station - M.S. ; **(viii)** while the fact that it is not about another person with the same name and surname is proven by the material evidence provided by open sources, that the Ministry of Internal Affairs in 1999 published the list of killed Kosovo policemen in 1998; **(ix)** that the Applicant was a member of these forces which, as a sign of revenge against the bombing of Serbian military targets by NATO, committed these crimes in the city of Peja, the witness A.N., who was also a victim of violence, also stated that on 28 March 1999, in the neighborhood " Soliteri", and who correctly identified the Applicant as a member of these forces; **(x)** also in the "Kristal" neighborhood, a day later, where the witness F.H., has accurately heard the radio communication between the soldiers who mentioned the name "Zoki", from which he understood that the Applicant was the person who fired at him and his uncle, who was looking for them and entered the yard of his house, that the Applicant's short name was "Zoki"; and; **(xi)** witness F.H. was able to see the Applicant through the gaps in the roof of his house.

27. Regarding the Applicant's allegation that his defense counsel be present during the identification of this person through the photograph, the Basic Court clarified: "*In relation to the identification of the person through the photograph, the court found that this identification was made in accordance with the provision of Article 120 of the CPCK, which is a special provision that regulates the identification of a person or thing (item) and in none of the paragraphs of the mentioned article presence of the defender is required and is necessary. The defendant's defense mistakenly refers to the provision of Article 61, paragraph 3, which provides: The defense counsel has the right to be notified in advance of the venue and time for undertaking any investigative actions and to participate in them and to inspect the records and evidence of the case in accordance with the provisions of the present Code. So, this is a general provision, which in the last part states that this right is in accordance with the provisions of the code, which means that only in cases where this is explicitly defined by a concrete provision, the defender has this right, e.g. as defined in the provision of article 132, paragraph 5, of the CPCRK, in the case of receiving the statement in the preliminary procedure, while article 120 of the CPCRK, does not foresee such an obligation.*"

28. Regarding the proportionality of the judgment of conviction, the Basic Court reasoned: "*When deciding on the amount of the length of sentence, the court took into*

account all the circumstances provided for in Article 41 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY), which affect the determination of the type and length of sentence, where in this case as a mitigating circumstance, the court has taken the fact that there is no evidence that the accused Zoran Đokić has committed criminal offenses in the past, while as an aggravating circumstance in determining the type and level of punishment, the court has taken into account the high degree of his participation accused Zoran Đokić in the commission of the criminal offense and the high degree of violation of the protected right. Based on these circumstances, the court assessed the degree of criminal liability of the accused, and the specific risk of the criminal offense, convinced that with the punishment as in the provision of this sentencing judgment, the purpose of the punishment will be achieved in terms of special prevention, and that this sentence will affect the defendant, to refrain from repeating criminal offenses in the future, as well as the purpose of the sentence will be achieved in terms of general prevention, so that the sentence will also prevent other persons from committing criminal offenses, to offer compensation to the injured for the damage caused by the criminal offense, but also expresses the harsh punishment from the crime society, for raising morale and strengthening the obligation to obey the law."

29. On 4 June 2021, the Applicant submitted an appeal to the Court of Appeals against the Judgment of conviction of the Basic Court, alleging a fundamental violation of the provisions of the criminal procedure, erroneous determination of factual situation, violation of the criminal law and the decision on the punishment and costs of the proceedings. The Applicant proposed that the appeal be approved as grounded and the appealed judgment be modified in such a way that the Applicant be acquitted of indictment because it has not been proven that he committed the criminal offense for which he is accused or that this judgment be quash and the case be remanded to the court of first instance for retrial.

30. Whereas the Special Prosecutor's Office of the Republic of Kosovo requested that, due to the essential violations of the provisions of the criminal procedure, erroneous determination of the factual situation and the violation of the criminal law, with the proposal that the appeal be approved in its entirety, while the appealed judgment be modified so that a higher sentence is imposed or the case is remanded to the same court for reconsideration and retrial.

31. On 12 October 2021, the Court of Appeals by the Judgment [APS. no. 22/2021] decided: **(i)** The appeals of the Special Prosecutor's Office of the Republic of Kosovo and of the Applicant are **REJECTED** as ungrounded; whereas, (ii) the Judgment of the Basic Court [ST. no. 15/19] of 02.04.2021 is **UPHELD**.

32. The Court of Appeals concluded that the conclusions of the first instance court are clear and in accordance with the administered evidence, assessed that the judgment of the first instance court does not contain essential violations of the provisions of the criminal procedure stated by the parties which the Court of Appeals officially takes care of, no erroneous and incomplete determination of the factual situation is found, and no erroneous application of the criminal law is found. Consequently, the complaints of the Special Prosecution and of the applicant are unfounded.

33. The Court of Appeals, among other things, concluded: **(i)** the judgment does not contain essential violations of the provisions of Article 384 of the CPCRK for which the parties claim, and for which the court takes care *ex-officio*, namely the judgment contains sufficient and convincing reasons for proving the decisive facts on which the correct application of the criminal law provisions depends; **(ii)** the appealing allegation that there has been a violation of the provision of Article 288 par.2 of the

CPCRK, is ungrounded, since paragraph 1 of the cited provision allows the parties, the defense counsel and the injured party, even after scheduling the main hearing, to call new witnesses and experts or collect new evidence in the main hearing; **(iii)** moreover, it is a fact that the provision of Article 288 par. 2 of the CPCRK takes special care of the right of the accused to a fair trial, so that in case of rejection of the proposed evidence this right is not violated, but it does not mean that the proposals from the parties and the injured party for the hearing of new witnesses and evidence should only be in favor of the accused-applicant; **(iv)** the Panel considers that the failure to inform the Applicant's defense counsel to participate in the investigative actions does not a priori make the evidence inadmissible, since the defense had the opportunity to challenge the legality and question the evidence obtained during the actions of the certain investigation during the further stages of the criminal procedure, such violation must be assessed in the context of the impact on the regularity and legality of the court decision and such a causal link must be proven and not assumed, therefore, such a violation in the light of the circumstances of the present case is not considered a fundamental violation of the provisions of the criminal procedure; **(v)** the Panel assesses that this situation refers to the amendment and expansion of the indictment, which is made within the meaning of Article 351 of the Criminal Code, as a result of the evidence and facts resulting in the main hearing, emphasizing that the imperative provisions of Article 241 par.1.1.7 of the CPCRK have been violated, which require that the indictments contain the reasoning is ungrounded; **(vi)** in this case, according to the prosecutor's point of view, new facts have been derived that have conditioned the amendment and expansion of the charge, at the same time the prosecutor has provided the Applicant, in time, and with clarity, information that details the factual basis on which are amended and expanded the charges against him are amended and expanded; **(vii)** there is a difference when amending and expanding the charge in this procedural moment, in contrast to the initial indictment, in this respect the indictment can be amended and expanded orally in the minutes or the suspension for the preparation of the new indictment can be proposed; **(viii)** however, in any situation, it is the duty of the court to offer the defense the opportunity and time to prepare, from the minutes of the main hearing it is established that such an opportunity was given to the defense of the Applicant; **(ix)** to determine if there was an excess of the charge, the actions of the Applicant which he is charged with, according to the judgment must be viewed in the context of the entire incriminating actions of the event described in the amended indictment, and not by separating only this fragment as isolated from the event and its course in relation to the victim B.B. **(x)** the fact that the court in the judgment has established such a fact based on the testimony of the injured V.B., is not considered to exceed the indictment for the reason that: **a)** the legal qualification of the criminal offense is not changed (qualification for a more serious criminal offense, or a criminal offense of a different nature and outside the chapter for which he is accused); **b)** his role in the commission of the criminal offense is not changed, according to the indictment and the judgment, since the accused is accused as a co-perpetrator with other persons and remained so even according to the judgment; **c)** the change consists in the same criminal event that took place and in accordance with the evidentiary result which the trial panel found certain incriminating actions as proven.

34. Regarding the truthfulness and credibility of the witnesses, the Court of Appeals, among other things, assessed: "*Various witnesses mentioned above, in certain situations of the events, were present, confronted and observed the accused. Furthermore, witness statements are specific in relation to the features and typical characteristics of the accused, such as eye color, face, hair, body height. These circumstances taken separately indicate the fact of the participation of the accused in the criminal events, these evidence related in their unity complement each other, give a complete overview and prove beyond a doubt the participation, role and*

contribution of the accused in committing the criminal offenses for which he is accused. Consequently, the identification by a number of witnesses with specific descriptions of the accused's features, in the various circumstances of the incriminating events, indicates a real and certain identification. Therefore, it can be concluded that the total amount of facts and direct information provided represents sufficient evidentiary and identifying material, as such it can serve for a clear and accurate conclusion about the criminal liability of the accused as a result of participation in the form of complicity with other persons in the commission of criminal offenses as described in the judgment for which he was found guilty."

35. On 10 January 2022, the Applicant submitted a request for protection of legality to the Supreme Court, alleging essential violations of the provisions of the criminal procedure and violation of the criminal law, with the proposal that the Supreme Court of Kosovo approves the request as grounded and render a judgment by which it will modify the challenged judgments, so that the Applicant is acquitted of the charge or to annul the judgments and the case be remanded to the first instance court for retrial.

36. On 20 January 2022, the State Prosecutor by the letter [KMLP. II. no. 13/2022] proposed to the Supreme Court that the request for the protection of legality of the Applicant's defense counsel be rejected as ungrounded.

37. On 5 February 2022, the Supreme Court by the Judgment [Pml. no. 19/2022] decided: The request for the protection of legality of the Applicant, filed against the Judgment of the Basic Court [PS. no. 15/2019] of 11.02.2021 and the Judgment of the Court of Appeals [APS. no. 22/2021] of 12.10.2021 is **REJECTED** as ungrounded.

38. The Supreme Court reasoned: **(i)** as it results from the documents of the case file, the contested judgments as a whole, and the enacting clauses of the latter are clear, comprehensible and do not contradict themselves or the reasons presented; **(ii)** regarding the Applicant's allegation that the first instance court exceeded the charge, the Supreme Court explained that his role in the commission of the criminal offense does not change, according to the indictment and the judgment, since the accused is accused as a co-perpetrator with other persons and remained so even according to the judgment; **(iii)** the modification of the indictment consists in the framework of the same criminal event that occurred, and in accordance with the evidentiary result; **(iv)** the first instance court in the judgment found a version of the event that is more favorable to the Applicant, namely that the victim was shot by a member of the armed group, therefore in its entirety the Applicant's situation was not aggravated in relation to the incriminating volume that he was charged with according to the amended and expanded indictment; **(v)** it appears from the case file and contested judgments that the courts have given the Applicant the opportunity and time to prepare, and this is concluded from the minutes of the main hearing that such an opportunity was given to the Applicant; **(vi)** Article 288 par.1 of the Criminal Procedure Code, allows the parties, the defense counsel and the injured party, even after the main hearing has been scheduled, to request that new witnesses and experts be called or new evidence be collected in the main hearing, and not as the Applicant unfairly claims that in this particular case this would apply only to the Applicant and the not at all to the injured party; **(vii)** the Applicant's allegation of not informing the defense to participate in investigative actions a priori did not make the evidence inadmissible, since the defense had the opportunity to challenge the legality and question the evidence provided during certain investigative actions in the further stages of the criminal procedure; **(viii)** such violation must be assessed in the context of the impact on the regularity and legality of the court decision and in the present case this does not represent an essential violation of the provisions of the criminal procedure; **(ix)** the Applicant's allegation that the criminal law has been violated to his detriment, is ungrounded, due

to the fact that the lower instance courts have applied the criminal law on such a situation of proven facts, and **(x)** therefore, there has been no violation of the criminal law, because the actions of the convicted person contain all the objective and subjective elements of the criminal offense for which he was found guilty.

Applicant's allegations

39. The Applicant alleges that his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (3) a) and d) of the ECHR and Article 9 (2) of the ICCPR have been violated.

40. Regarding the hearing of the witnesses, the Applicant claims: "*During the investigation conducted by the Special Prosecutor's Office of the Republic of Kosovo against Zoran Đokić, 17 witnesses were questioned. In the indictment, this prosecutor has proposed to hear only 9 (nine) witnesses. Without any justification, the questioning of 8 (eight) witnesses was skipped. However, the reason why this was done was more than clear: the eight witnesses whom the prosecution did not want to hear in the main hearing testified in favor of Zoran Đokić during the investigations, or their testimonies were neutral. It is only proposed to hear the witnesses who have accused Zoran Đokić. The courts ignored this fact.*"

41. Regarding the admission of witnesses after scheduling of the main hearing, the Applicant alleges: (i) in the indictment against the Applicant, the prosecution has proposed hearing a certain number of witnesses in the main hearing; **(ii)** the Applicant's defense, within the legal deadline, between the first and second initial examination, submitted its list of witnesses both to the court and to the prosecution; **(iii)** much later, not earlier than in the main hearing, the authorized representative of the injured party proposed to hear new witnesses; **(iv)** the Applicant's defense counsel objected to this, referring to Article 288, paragraph 2 of the CPCRK, because the proposal of new witnesses can only be accepted if the proposed witnesses were not known at the time of the second initial hearing; **(v)** these witnesses were known at the time, because during the contested event, as well as later, they lived in the "Kristal" neighborhood in Peja, which is an indisputable fact; **(vi)** despite this, the first instance court accepted the hearing of these witnesses and exclusively on the basis of their testimony, declared him guilty and sentenced the Applicant.

42. Regarding the amendment and expansion of the indictment, the Applicant claims: **(i)** he was never, in any way, given the opportunity to learn the reasons on which the prosecution expanded, amended and hardened the indictment against him; **(ii)** even the regular courts did not give this opportunity, but nevertheless they accepted such an indictment and found the Applicant guilty and sentenced to many years in prison; **(iii)** also, the Applicant was not given the opportunity to plead to the amended and expanded indictment against him.

43. The Applicant claims that in addition to the violation of Article 31 of the Constitution and Article 6 (3) a) and d) of the ECHR, to his detriment, the provisions of the ICCPR were also violated, which were of essential importance that the judgment is not fair and impartial.

44. Regarding the right to be present during investigative actions, the Applicant claims: "*Invoking Article 61, paragraph 3, immediately after the arrest of the accused Đokić, the defense counsel of the accused Đokić asked the prosecution to allow him to participate in all investigative activities, and to be notified in advance of the time and place of their development. The prosecution informed the defense counsel only about the two investigative actions - the questioning of the accused Djokić (which*

could not be done even without the presence of the defense counsel) as well as about the search of the apartment where the defendant lived until March 1999. All other investigative actions - questioning of witnesses, injured parties, identification of the accused, and other actions, were carried out without the presence of the defense counsel, which he expressly requested in writing."

45. In the end, the Applicant requests the Court: (i) to find that the lower instance courts have made concessions that violated the rights and freedoms of the Applicant, which rights and freedoms are protected by the Constitution of the Republic of Kosovo; (ii) to hold that the contested judgments violated the Applicant's right to fair and impartial trial and; (iii) due to violations of the right to fair and impartial trial, the three judgments mentioned in this referral should be annulled.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

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.

6. Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.

7. Judicial proceedings involving minors shall be regulated by law respecting special rules and procedures for juveniles."

Article 53
[Interpretation of Human Rights Provisions]

"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

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.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or 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;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

International Covenant on Civil and Political Rights and its Protocols

Article 9
(No title)

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any

other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

Geneva Conventions of 12 August 1949 and Additional Protocols of 1977 and 2005

Article 3
(Conflicts not of an international character)

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons;
b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

Protocol II

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 8 June 1977

Part II – Humane treatment

Article 4
(Fundamental guarantees)

"1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being."

CODE NO. 04/L-082
CRIMINAL CODE OF THE REPUBLIC OF KOSOVO (published in the Official Gazette on 13 July 2012, while it was repealed with the entry into force of the Criminal Code No. 06/074)

Article 3
Application of the most favorable law

"1. The law in effect at the time a criminal offense was committed shall be applied to the perpetrator.

2. In the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply.

3. When a new law no longer criminalizes an act but a perpetrator has been convicted by a final decision in accordance with the prior law, the enforcement of the criminal sanction shall not commence or, if it has commenced, shall cease.

4. A law, which was expressly in force only for a determined time, shall be applicable to criminal offenses committed while it was in force, even if it is no longer in force, unless the law itself expressly provides otherwise."

Article 152
War crimes in serious violation of Article 3 common to the Geneva conventions

"*1. Whoever commits a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 shall be punished by imprisonment of not less than five (5) years or by life long imprisonment.*

2. Aserious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 means one or more of the following acts committed in the context of an armed conflict not of an international character against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

2.1. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2.2. committing outrages upon personal dignity, in particular humiliating and degrading treatment;

2.3. taking of hostages;

2.4. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

3. This Article shall apply to armed conflicts not of an international character and does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."

Article 153

War crimes in serious violation of laws and customs applicable in armed conflict not of an international character

1. Whoever commits a serious violation of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, shall be punished by:

1.1. imprisonment of not less than five (5) years or by life long imprisonment, in the case of the offense provided for in subparagraphs 2.4, 2.5, 2.7, 2.12, 2.23 or 2.24 of paragraph 2 of this Article;

1.2. imprisonment of not less than ten (10) years or by life long imprisonment, in the case of the offenses provided for in subparagraphs 2.1, 2.2, 2.3, 2.6, 2.8, 2.9, 2.10, 2.11, 2.13, 2.14, 2.15, 2.16, 2.17, 2.18, 2.19, 2.20, 2.21 or 2.22 of paragraph 2 of this Article.

2. Aserious violation of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, means one or more of the following acts:

2.1. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

2.2. intentionally directing attacks against buildings, material, medical units and transport, religious personnel and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

2.3. intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

2.4. intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

2.5. pillaging a town or place, even when taken by assault;

2.6. committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

2.7. conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

2.8. ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

2.9. killing or treacherously wounding a combatant adversary;

2.10. declaring that no quarter will be given;

2.11. subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her or her interest, and which cause death to or seriously endanger the health of such person or persons;

2.12. destroying or seizing the property of an adversary unless such destruction or seizure is absolutely required by the necessities of the conflict;

2.13. attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

CODE NO. 06/L-074
CRIMINAL CODE OF THE REPUBLIC OF KOSOVO

Article 3
Application of the most favorable law

"1. The law in effect at the time a criminal offense was committed shall be applied to the perpetrator.

2. In the event of a change in the law applicable to a given case prior to a final decision, the law most favorable to the perpetrator shall apply.

3. When a new law no longer criminalizes an act but a perpetrator has been convicted by a final decision in accordance with the prior law, the enforcement of the criminal sanction shall not commence or, if it has commenced, shall cease.

4. A law, which was expressly in force only for a determined time, shall be applicable to criminal offenses committed while it was in force, even if it is no longer in force, unless the law itself expressly provides otherwise."

Article 146
War crimes in serious violation of Article 3 common to the Geneva conventions

"*1. Whoever commits*

a serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 shall be punished by imprisonment of not less than five (5) years or by life long imprisonment.

2.A serious violation of Article 3 common to the four Geneva Conventions of 12 August 1949 means one or more of the following acts committed in the context of an armed conflict not of an international character against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

2.1. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2.2. committing outrages upon personal dignity, in particular humiliating and degrading treatment;

2.3. taking of hostages;

2.4. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

3. This Article shall apply to armed conflicts not of an international character and does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."

Article 147
War crimes in serious violation of laws and customs applicable in armed conflict not of an international character

"1. Whoever commits a serious violation of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, shall be punished by:

1.1. imprisonment of not less than five (5) years or by life long imprisonment, in the case of the offense provided for in sub-paragraphs 2.4, 2.5, 2.7, 2.12, 2.23 or 2.24 of paragraph 2. of this Article;

1.2.imprisonment of not less than ten (10) years or by life long imprisonment, in the case of the offenses provided for in sub-paragraphs 2.1, 2.2, 2.3, 2.6, 2.8, 2.9, 2.10, 2.11, 2.13, 2.14, 2.15, 2.16, 2.17, 2.18, 2.19, 2.20, 2.21 or 2.22 of paragraph

2. of this Article. 2.A serious violation of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, means one or more of the following acts:

2.1. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

2.2. intentionally directing attacks against buildings, material, medical units and transport, religious personnel and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

2.3. intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

2.4. intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

2.5. pillaging a town or place, even when taken by assault;

2.6. committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

2.7. conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

2.8. ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

2.9. killing or treacherously wounding a combatant adversary;

2.10. declaring that no quarter will be given;

2.11. subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her or her interest, and which cause death to or seriously endanger the health of such person or persons;

2.12. destroying or seizing the property of an adversary unless such destruction or seizure is absolutely required by the necessities of the conflict;

2.13. attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives."

CODE No. 04/L-123 OF CRIMINAL PROCEDURE (published in the Official Gazette on 28 December 2012)

Article 61
Rights of Defense Counsel as Representative of Defendant

"1. The defense counsel has the same rights that the defendant has under the law, except those explicitly reserved to the defendant personally.

2. The defense counsel has the right to freely communicate with the defendant orally and in writing under conditions which guarantee confidentiality.

3. The defense counsel has the right to be notified in advance of the venue and time for undertaking any investigative actions and to participate in them and to inspect the records and evidence of the case in accordance with the provisions of the present Code."

Article 120
Identification of Persons or Objects

"1. Where there is a need to establish whether a witness can recognize a person or an object, such witness shall first be asked to provide a description of and indicate the distinctive features of such person or object.

2. The witness shall then be shown the person with other persons unknown to the witness, or their photographs, or the object with other objects of the same kind, or their photographs.

3. The witness shall be instructed that he or she is under no obligation to select any person or object or photograph, and that it is just as important to state that he or she does not recognize a person, object or photograph as to state that he or she does.

4. A record shall be kept of the description obtained under Paragraph 1 of this Article, the time and date of that description, and those present when the description was given. A record shall also be kept of the identification made under Paragraph 2 of this Article, including the time and date of that identification and photographs of those other persons or objects.

5. The identification of a person or object under this Article may be overseen by the police or by the state prosecutor. The record made under Paragraph 3 of this Article shall be entered into the case file."

Article 132
Pretrial Testimony

"1. During the investigative stage, the state prosecutor shall summon witnesses, victims, experts and the defendant or defendants to provide pre-trial testimony relevant to the criminal proceedings.

2. During the investigative stage, the state prosecutor shall interview protected witnesses and cooperative witnesses while ensuring the appropriate safety and security for the protected or cooperative witnesses.

3. A witness shall be summoned by serving a written summons which shall indicate: the name and surname and occupation of the witness, when and where he or she is to appear, the criminal case in connection with which he or she is summoned, an indication that he or she is summoned as a witness and the consequences of unjustifiable non-compliance with the summons.

4. A person under the age of sixteen (16) years shall be summoned as a witness through his or her parents or legal representative, except where that is not possible for reasons of urgency or other circumstances.

5. A witness who by reason of old age, illness or serious disability is unable to comply with the summons may be examined out of court.

6. The state prosecutor shall give five (5) days written notice to the defendant, defence counsel, injured party and victim advocate of the date, time and location of the pre-trial testimony. A copy of the notice shall be placed into the file.

7. Failure of the defendant, defence counsel, injured party or victim advocate to participate in a session of pretrial testimony after receiving notice under Paragraph 6 of this Article, without justification, shall prevent that same defendant, defence counsel, injured party or victim advocate from objecting to the admissibility of the testimony at a later stage of the criminal proceeding. These consequences shall be given in the notice provided in Paragraph 6 of this Article."

Article 288
Requests after Main Trial Scheduled

"1. The parties, defence counsel and the injured party may request even after the main trial has been scheduled that new witnesses or expert witnesses be summoned to the main trial or that new evidence be collected. The request must be supported by reasoning and must indicate which facts are to be proven and by which of the items of evidence proposed.

2. The single trial judge or presiding trial judge shall grant a request under paragraph 1 of this Article if the new witness, new expert witness or new evidence was unknown at the time of the second hearing, does not substantially duplicate another witness, expert witness or evidence, and the defendant's right to a fair trial could be harmed by rejecting the request.

3. If the single trial judge or presiding trial judge rejects the motion for new evidence to be collected, such rejection may be appealed within fourty-eight (48) hours of the receipt of the order denying the request.

4. The parties and defence counsel shall be informed of the order to collect new evidence prior to the opening of the main trial."

Article 350
Modification of Indictment at Main Trial

"1. If the state prosecutor finds in the course of the main trial that the evidence presented indicates that the factual situation as described in the indictment has changed, he or she may modify the 160 indictment orally during the main trial and may also make a motion to recess the main trial in order to prepare a new indictment.

2. If the trial panel grants the recess of the main trial in order for a new indictment to be prepared, it shall determine the time in which the state prosecutor shall be obliged to file a new indictment. A copy of the new indictment shall be served on the accused. If the state prosecutor fails to file a new indictment within the prescribed period of time, the court shall resume the main trial on the basis of the previous indictment.

3. When the indictment has been modified, the accused or the defence counsel may make a motion to recess the main trial in order to prepare the defence. The trial panel shall recess the main trial to allow for the preparation of defence, if the indictment has been substantially modified or extended."

Article 351
Extension of indictment at the main trial

"1. If the accused commits a criminal offence during a hearing in the course of the main trial or if a previous criminal offence committed by the accused is discovered in the course of the main trial, the trial panel shall, in acting upon a charge by the state prosecutor which may also be submitted orally, extend the main trial to include this new offence as well.

2. In such case, the court may recess the main trial to give the defence time to prepare, and after hearing the parties it may decide that the accused be tried separately for the offence under paragraph 1 of the present Article.

3. If another department within the basic court is competent to adjudicate a matter under paragraph 1 of the present Article, the panel shall after hearing the parties decide whether it shall refer the matter about which it is conducting the main trial to the competent higher court for adjudication."

Article 384
Substantial Violation of the Provisions of Criminal Procedure

"1. There is a substantial violation of the provisions of criminal procedure if:

1.1. the court was not properly constituted or the participants in the rendering of the judgment included a judge who did not attend the main trial or was excluded from adjudication under a final decision;

1.2. a judge who should be excluded from participation in the main trial participated therein;

1.3. the main trial was conducted in the absence of persons whose presence at the main trial is required by law or the accused or defence counsel was, notwithstanding his or her request, denied the right to use his or her own language in the main trial and to follow the course of the main trial in his or her language;

1.4. the public was excluded from the main trial in violation of the law;

1.5. the court violated the provisions of the criminal procedure relating to the issue of whether there exists a charge by an authorized state prosecutor, a motion of the injured party or the approval of the competent public entity;

1.6. the judgment was rendered by a court which lacked subject matter jurisdiction to hear the case;

1.7. the court in its judgment did not fully adjudicate the substance of the charge;

1.8. the judgment was based on inadmissible evidence;

1.9. the accused, when asked to enter his or her plea, pleaded not guilty on all or certain counts of the charge and was examined before the presentation of evidence was completed;

1.10. the judgment exceeded the scope of the charge;

1.11. the judgment was rendered in violation of Article 395 of the present Code; or

1.12. the judgment was not drawn up in accordance with Article 370 of the present Code.

2. Substantial violation of provisions of criminal procedure shall be considered if during the course of criminal proceedings, including pretrial proceedings, the court, the state prosecutor or the police:

2.1. omitted to apply a provision of the present Code or applied it incorrectly; or

2.2. violated the rights of the defense; and this influenced or might have influenced the rendering of a lawful and fair judgment."

Admissibility of the Referral

46. 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.

47. 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".*

48. The Court further examines whether the Applicant fulfilled the admissibility requirements as established in Law. In this regard, the Court firs refers to Articles 47 (Individual Requests), 48 (Accuracy and of the Referral) and 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...".*

49. In assessing the fulfillment of the admissibility criteria as mentioned above, the Court notes that the Applicant has specified that he challenges an act of a public authority, namely the Judgment of the Supreme Court [Pml. no. 19/2022] of 5 February 2022, after exhausting all legal remedies established by law. The Applicant has also clarified the rights and freedoms that he claims to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the referral in accordance with the deadline established in Article 49 of the Law.

50. As mentioned in the introduction to this decision, the Court reiterates that in the proceedings against the Applicant, three decisions of the Basic Court, the Court of Appeals and the Supreme Court were rendered - which are challenged by the Applicant - and which will also be subject to constitutional review by this Court: Judgment of the Basic Court [ST. no. 15/19] of 11 February 2021, the Judgment of the

Court of Appeals [APS. no. 22/2021] of 12 October 2021 and the Judgment of the Supreme Court [Pml. no. 19/2022] of 5 February 2022.

51. The Court also considers that the referral cannot be considered as manifestly ill-founded on constitutional basis, as provided by paragraph (2) of Rule 34 of the Rules of Procedure, and consequently, the referral is declared admissible for review on the merits (see also the ECtHR case: *Alimuçaj v. Albania*, no. 20134/05, Judgment, of 9 July 2012, paragraph 144, and see cases of the Court KI75/21, Applicants "*Abrazen LLC", "Energy Development Group Kosova LLC", "Alsi&Co. Kosovo LLC" and "Building Construction LLC",* Judgment of 19 January 2022, paragraph 64; KI27/20, Applicant *VETËVENDOSJE! Movement* Judgment, of 22 July 2020, paragraph43).

Merits of the Referral

52. The Court recalls that the Applicant alleges that his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (3) a) and d) of the ECHR and Article 9 (2) of the ICCPR have been violated.

53. The Court emphasizes that the essence of the case is related to the indictment that the Special Prosecutor's Office of the Republic of Kosovo filed against the Applicant due to the criminal offense of War Crime, which constitutes a serious violation of Article 3 of the Geneva Conventions, in accordance with Article 152 paragraph 1 of CCK and Article 142 of the Criminal Law of the RSFY, war crimes that constitute a serious violation of the laws and customs that apply in armed conflicts that are not of an international character are prosecuted based on the relevant provisions of the CCK. The Basic Court found the Applicant guilty because he committed the criminal offense of War Crimes Against the Civilian Population from article 142 in conjunction with Article 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia, in conjunction with Article 3 of the Geneva Convention of 12 August 1949 and Article 4 of Protocol 2 of 8 June 1977, Annex to the Geneva Convention, sentencing him to a prison sentence of 12 (twelve) years, which sentence also includes the time spent in detention on remand. The Applicant submitted an appeal to the Court of Appeals against the judgment of conviction of the Basic Court, claiming essential violations of the provisions of the criminal procedure, erroneous determination of factual situation, violation of the criminal law and the decision on the punishment and costs of the proceedings. The Court of Appeals rejected the appeal as ungrounded and upheld the contested Judgment of the Basic Court. The Court of Appeals concluded that the conclusions of the first instance court are clear and in accordance with the administered evidence, it assessed that the judgment of the first instance court does not contain essential violations of the provisions of the criminal procedure stressed by the Applicant Court of Appeal takes care *ex-officio*, no erroneous and incomplete determination of the factual situation is found, and no erroneous application of the criminal law is found. The Applicant filed a request for protection of legality with the Supreme Court claiming essential violations of the provisions of the criminal procedure and violation of the criminal law, with a proposal that the Supreme Court of Kosovo approves the request as grounded and render a judgment that will modify the contested judgments, so that the Applicant is acquitted of the charge or the judgments be annulled and the case be remanded to the first instance court for retrial. The Supreme Court rejected as ungrounded the request for protection of legality filed by the Applicant against the Judgment of the Basic Court and the Judgment of the Court of Appeals.

54. The Court notes that the Applicant raises allegations regarding the violation of Article 31 of the Constitution in conjunction with Article 6 (3) a) and d) of the ECHR: **(i)**

violation of Article 31 of the Constitution and Article 6 (3) (a) of the ECHR because the prosecutor's office and the regular courts did not give the Applicant the opportunity to plead about the amended and expanded indictment against him; **(ii)** violation of Article 31 of the Constitution and Article 6 (3) (a) of the ECHR and referring to Article 61, paragraph 3 [Rights of Defense Counsel as Representative of Defendant] because investigative actions - questioning of witnesses, of injured parties, identification of the accused - Applicant, were carried out without the presence of the Applicant's lawyer; **(iii)** violation of Article 31 of the Constitution and Article 6 (3) d) of the ECHR referring to Article 288, paragraph 2 of the CPCRK, because the proposal of new witnesses can only be accepted if the proposed witnesses were not recognized at the time of holding the second initial review; **(iv)** violation of Article 31 of the Constitution and Article 6 (3) d) of the ECHR because the courts have not heard the witnesses who would have testified in favor of the Applicant or at least their testimony would have been neutral.

55. In assessing the merits of the case under consideration, the Court will apply the standards of the case law of the ECtHR, which based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret fundamental rights and freedoms guaranteed by the Constitution in accordance with the court decisions of the ECtHR.

General principles related to Article 6 (3) (a) and (d) of the ECHR

56. The scope of Article 6 § 3 (a) must be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (see cases of ECtHR, *Pélissier and Sassi v. France*, no. 25444/94, Judgment of 25 March 1999, para. 52; *Sejdovic v. Italy* , no. 56581/00, Judgment of 1 March 2006, para. 90).

57. Sub-paragraphs (a) and (b) of Article 6 par. 3 are connected in that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence. (see cases of ECtHR, *Pélissier and Sassi v. France*, cited above, paragraph 54; and *Dallos v. Hungary,* no. 29082/95, Judgment of 1 March 2001, paragraph 47).

58. Article 6 § 3 (a) points to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (see cases of ECtHR, *Pélissier and Sassi v. France*, cited above, 51; and *Kamasinski v. Austria*, no.9783/82, Judgment of 19 December 1989, paragraph 79).

59. Article 6 par. 3 (a) affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the "nature" of the accusation, that is, the legal characterisation given to those acts (see cases of ECtHR, *Mattoccia v. Italy*, no. 23969/94, Judgment of 25 July 2000, paragraph 59; and *Penev v. Bulgaria*, no. 20494/04, Judgment of 7 January 2010, paragraphs 33 and 42).

60. Article 6 (3) (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (see cases of ECtHR, *Pélissier and Sassi v. France*, cited above, paragraph 53; and *Drassich v. Italy,* no. 25575/04, Judgment of 1 December 2007, paragraph 34). In this

connection, an indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him or her (see case of ECtHR *Kamasinski v. Austria*, cited above, paragraph 79).

61. The accused must be duly and fully informed of any changes in the accusation, including changes in its "cause", and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation (see cases of ECtHR, *Mattoccia v. Italy*, cited above, paragraph 61; and *Varela Geis v. Spain*, no. 61005/09, Judgment of 5 March 2013, paragraph 54).

62. In the case of reclassification of facts during the course of the proceedings, the accused must be afforded the possibility of exercising his defence rights in a practical and effective manner, and in good time (see cases of ECtHR, *Pélissier and Sassi v. France*, cited above, paragraph 62; *Block v. Hungary*, no. 56282/09, Judgment of 2011, paragraph 24; and *Haxhia v. Albania*, no. 29861/03, Judgment of 8 October 2013, paragraphs 137-138).

63. Defects in the notification of the charge could be cured in the appeal proceedings if the accused has the opportunity to advance before the higher courts his defence in respect of the reformulated charge and to contest his conviction in respect of all relevant legal and factual aspects (see ECtHR cases, *Dallos v. Hungary,* cited above, paragraphs 49-52; *Sipavičius v. Lithuania*, no. 49093/99, Judgment of 21 February 2002, paragraphs 30-33; *Zhupnik v. Ukraine,* no. 20792/05, Judgment of 9 December 2010, paragraphs 39-43; and *Gelenidze v. Georgia,* no. 72916/10, Judgment of 7 November 2019, paragraph 30).

64. Given that the admissibility of evidence is a matter for regulation by national law and the national courts, the Court's only concern under Article 6 (1) and 3 (d) of the ECHR is to examine whether the proceedings have been conducted fairly (see case of ECtHR, *Al-Khawaja and Tahery v. the United Kingdom*, no. 26766/05 and 22228/06, Judgment of 15 December 2011, paragraph 118).

65. Pursuant to Article 6 (3) (d) of the ECHR, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings. (see ECtHR cases, *Al-Khawaja and Tahery v. the United Kingdom* cited above, paragraph 118; *Hümmer v. Germany*, no. 26171/07, Judgment of 19 July 2012, paragraph 38; and *Lucà v. Italy*, no. 33354/96, Judgment of 27 February 2001, paragraph 39).

66. Considering the importance of the right to a fair administration of justice in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice, then that measure should be applied (see ECtHR case, *Van Mechelen and others v. the Netherlands,* no. 21363/93 21364/93 21427/93 and 22056/93, Judgment of 30 October 1997, paragraph 58). Possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial (see ECtHR cases, *Tarău v. Rumania*, no. 3584/02, Judgment of 24 February 2009, paragraph 74; and *Graviano v. Italy*, no. 10075/02, Judgment of 10 February 2005, paragraph 38).

67. As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3(d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses. It does not require the attendance and examination of every witness on the accused's behalf; its essential aim, as is indicated by the words "under the same conditions", is full "equality of arms" in the matter (see ECtHR cases, *Perna v. Italy*, no. 48898/99, Judgment of 2003, paragraph 29; *Murtazaliyeva v. Russia*, no. 36658/05, Judgment of 18 December 2018, paragraph 139; and *Solakov v. ithe former Yugoslav Republic of Macedonia*, no. 47023/99, Judgment of 31 October 2001, paragraph 57).

68. Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the domestic courts to decide whether it is necessary or advisable to examine a witness (see ECtHR case, *S.N. v. Sweden*, no. 34209/96, Judgment of 2 July 2002, paragraph 44). However, when a trial court grants a request to call a defence witness, it is obliged to take effective measures to ensure the witnesses' presence at the hearing (see ECtHR case, *Polufakin and Chernyshev v. Russia*, no. 30997/02, Judgment of 25 September 2008, paragraph 207), by way of, at the very least, issuing a summons or by ordering the police to compel a witness to appear in court (see ECtHR case, *Murtazaliyeva v. Russia*, cited above, paragraph 147).

69. It is not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth and the rights of the defence (see ECtHR cases, *Perna v. Italy*, cited above, paragraph 29; and *Băcanu and SC «R» S.A. v. Rumania*, no. 4411/04, Judgment of 3 March 2009, paragraph 75). If the statement of witnesses the applicant wished to call could not influence the outcome of his or her trial, no issue arises under Articles 6 §§ 1 and 3 (d) if a request to hear such witnesses is refused by the domestic courts (see ECtHR case, *Kapustyak v. Ukraine*, no. 26230/11, Judgment of 3 March 2016, paragraphs 94-95).

70. When a request by a defendant to examine witnesses is not vexatious, is sufficiently reasoned, is relevant to the subject matter of the accusation and could arguably have strengthened the position of the defence or even led to his or her acquittal, the domestic authorities must provide relevant reasons for dismissing such a request (see ECtHR cases, *Vidal v. Belgium*, no. 12351/96, Judgment of 28 October 1992, paragraph 34; *Sergey Afanasyev v. Ukraine*, no. 48057/06, Judgment of 2012, paragraph 70; and *Topić v. Croatia*, no. 51355/10, Judgment of 10 October 2013, paragraph 42).

Application of general principles in the circumstances of the present case

71. The Court reiterates that it is not its duty to replace regular courts, which are in a better position to assess the evidence at their disposal, establish the facts and interpret local law (see, for example, the ECtHR case, *Khamidov v. Russia*, no. 72118/01, Judgment of 15 November 2007, paragraph 170); the Court emphasizes that when it comes to establishing the facts and interpreting the law, it is "sensitive" of the subsidiary nature of its role and that it should be careful in assuming the role of the court of fact, except when such a thing is made unavoidable by the circumstances of the case (see, for example, the ECtHR case, *Bărbulescu v. Rumania*, no. 61496/08, Judgment of 2017, paragraph 129).

72. The court emphasizes that in its case law in many cases it has established that questions of fact and questions of interpretation and application of the law are within the scope of regular courts and other public authorities, within the meaning of Article 113.7 of the Constitution and as such are matters of legality, unless and insofar such matters result in the violation of fundamental human rights and freedoms or create an unconstitutional situation. Regardless of the margin of appreciation of the regular courts, the final decision regarding compliance with the criteria of the Constitution and the ECHR remains with the Constitutional Court.

(i) *Regarding the allegation for amendment and expansion of the indictment (Article 31 of the Constitution, Article 6-3 of the ECHR)*

73. Regarding the Applicants allegation of violation of Article 31 of the Constitution and Article 6 (3) a) of the ECHR, because the prosecution and regular courts did not give the Applicant the opportunity to testify about the amended and expanded indictment against him, the Court notes that the Court of Appeals has explained: **(i)** The Panel of the Court of Appeals assesses that this situation refers to the amendment and expansion of the indictment which is made in the sense of Article 351 of the CPCRK, as a result of the evidence and facts resulting in the main hearing, the assertion that the imperative provisions of Article 241 par.1.1.7 of the CPCRK, which require that the indictments contain the reasoning, is ungrounded; **(ii)** in this case, according to the prosecutor's point of view, new facts have been derived that have conditioned the amendment and expansion of the charge, at the same time the prosecutor has provided the Applicant, in time, and with clarity, information that details the factual basis on which are amended and expanded the charges against him are amended and expanded; **(iii)** there is a difference when amending and expanding the charge in this procedural moment, in contrast to the initial indictment, in this respect the indictment can be amended and expanded orally in the minutes or the suspension for the preparation of the new indictment can be proposed; **(iv)** however, in any situation, it is the duty of the court to offer the defense the opportunity and time to prepare, from the minutes of the main hearing it is established that such an opportunity was given to the defense of the Applicant; **(v)** to determine if there was an excess of the charge, the actions of the Applicant which he is charged with, according to the judgment must be viewed in the context of the entire incriminating actions of the event described in the amended indictment, and not by separating only this fragment as isolated from the event and its course in relation to the victim B.B. **(vi)** the fact that the court in the judgment has established such a fact based on the testimony of the injured V.B., is not considered to exceed the indictment for the reason that: **a)** the legal qualification of the criminal offense is not changed (qualification for a more serious criminal offense, or a criminal offense of a different nature and outside the chapter for which he is accused); **b)** his role in the commission of the criminal offense is not changed, according to the indictment and the judgment, since the accused is accused as a co-perpetrator with other persons and remained so even according to the judgment; **c)** the change consists in the same criminal event that took place and in accordance with the evidentiary result which the trial panel found certain incriminating actions as proven.

74. From the above, the Court refers to the legal basis, namely Article 350.1 [Modification of Indictment at Main Trial] and 351.1 [Extension of indictment at the main trial] of the CPCRK that the prosecution and the courts have referred to regarding the amendment and expansion of indictment: "*350.1. If the state prosecutor finds in the course of the main trial that the evidence presented indicates that the factual situation as described in the indictment has changed, he or she may modify the indictment orally during the main trial and may also make a motion to recess the main trial in order to prepare a new indictment.* "*351.1. If the accused commits a*

criminal offence during a hearing in the course of the main trial or if a previous criminal offence committed by the accused is discovered in the course of the main trial, the trial panel shall, in acting upon a charge by the state prosecutor which may also be submitted orally, extend the main trial to include this new offence as well."

75. Regarding the allegation for expansion of the indictment, the Court highlights the relevant reasoning of the Court of Appeals: "*The Panel assesses that this situation refers to the amendment and expansion of the indictment, which is made within the meaning of Article 351 of the CPCRK, as a result of the evidence and facts resulting in the main hearing, emphasizing that the imperative provisions of Article 241 par.1.1.7 of the CPCRK have been violated, which require that the indictments contain the reasoning is ungrounded. Such a provision deals with the initial indictment filed, but not the issue of its amendment and expansion in the main trial, therefore, the concrete procedural situation raised is outside the domain of regulation of this provision. In the present case, according to the prosecutor's point of view, new facts have been derived that have conditioned the amendment and expansion of the charge, at the same time the prosecutor has provided the Applicant, in time, and with clarity, information that details the factual basis on which the charges against him are amended and expanded. There is a difference when amending and expanding the charge in this procedural moment, in contrast to the initial indictment, in this respect the indictment can be amended and expanded orally in the minutes or the suspension for the preparation of the new indictment can be proposed. However, in any situation, it is the duty of the court to offer the defense the opportunity and time to prepare, from the minutes of the main hearing it is established that such an opportunity was given to the defense.*"

76. In addition, regarding the position of the Applicant after the expansion of the indictment, the Court also notes that the Court of Appeals emphasized: "*a) the legal qualification of the criminal offense is not changed (qualification for a more serious criminal offense, or a criminal offense of a different nature and outside the chapter for which he is accused); b) his role in the commission of the criminal offense is not changed, according to the indictment and the judgment, since the accused is accused as a co-perpetrator with other persons and remained so even according to the judgment; and c) the change consists in the same criminal event that took place and in accordance with the evidentiary result which the trial panel found certain incriminating actions as proven.*"

77. From the above, the Court assesses that the Court of Appeals has explained that: (i) the prosecutor in time notified the defense of the Applicant regarding the expansion of the indictment, which was established during the judicial process by the Court of Appeals that the possibility of exercising practical and effective defense against the expansion of the indictment was given to the defense of the Applicant (see ECtHR cases, *Pélissier and Sassi v. France*, cited above, paragraph 62; *Block v. Hungary*, cited above, paragraph 24; *Haxhia v. Albania*, cited above, paragraphs 137-138); **(ii)** whatever alleged defect there may have been in relation to the expansion of the indictment was rectified at a later stage in the appeal procedure (see ECtHR cases, *Dallos v. Hungary,* cited above, paragraphs 49-52; *Sipavičius v. Lithuania*, cited above, paragraphs 30-33; *Zhupnik v. Ukraine,* cited above, paragraphs 39-43; and *Gelenidze v. Georgia* , cited above, paragraph 30); **(iii)** the expansion of the indictment against the Applicant did not change the qualification of the criminal offense and did not change the role of the applicant in the commission of the criminal offense and was therefore sufficiently predictable for the Applicant because it constitutes an intrinsic element of the indictment (see ECtHR cases, *De Salvador Torres v. Spain*, nr. 21525/93, Judgment of 1996, paragraph 33; and *Sadak and*

others v. Turkey (no.1), no. 29900/96 29901/96 29902/96 29903/96, Judgment of 17 July 2001, and 52 and 56).

78. In this context, the Court reiterates the reasoning of the Supreme Court: "*the modification of the indictment consists in the framework of the same criminal event that occurred, and in accordance with the evidentiary result, the first instance court in the judgment found a version of the event that is more favorable to the Applicant, namely that the victim was shot by a member of the armed group, therefore in its entirety the Applicant's situation was not aggravated in relation to the incriminating volume that he was charged with according to the amended and expanded indictment. From the case file and contested judgments it resulted that the courts have given the Applicant the opportunity and time to prepare, and this is concluded from the minutes of the main hearing that such an opportunity was given to the accused.*"

79. The Court assesses that the Applicant's allegation of procedural violation because the prosecution and the regular courts did not give his defense counsel the opportunity to testify about the amended and expanded indictment against him, does not constitute a violation of Article 31 of the Constitution in conjunction with Article 6 (3) (a) of the ECHR.

(ii) Regarding the allegation of violation of the rights of Applicant's defense (Article 31 of the Constitution, Article 6-3-a of the ECHR, Article 61.3 of the CPCRK)

80. Regarding the Applicant's allegation of violation of Article 31 of the Constitution and Article 6 (3) (a) of the ECHR and referring to Article 61, paragraph 3 [Rights of Defense Counsel as Representative of Defendant] of the CPCRK because the investigative actions - the questioning of witnesses, the injured parties, the identification of the accused - the Applicant, were carried out without the presence of the Applicant's counsel, the Court notes that the Basic Court clarified: "*In relation to the identification of the person through the photograph, the court found that this identification was made in accordance with the provision of Article 120 of the CPCK, which is a special provision that regulates the identification of a person or thing (item) and in none of the paragraphs of the mentioned article presence of the defense is required and is necessary. The defendant's defense mistakenly refers to the provision of Article 61, paragraph 3, which provides: The defense counsel has the right to be notified in advance of the venue and time for undertaking any investigative actions and to participate in them and to inspect the records and evidence of the case in accordance with the provisions of the present Code. So, this is a general provision, which in the last part states that this right is in accordance with the provisions of the code, which means that only in cases where this is explicitly defined by a concrete provision, the defense has this right, e.g. as defined in the provision of article 132, paragraph 5, of the CPCRK, in the case of receiving the statement in the preliminary procedure, while article 120 of the CPCRK, does not foresee such an obligation.*"

81. The Court also notes regarding the testimonies of the witnesses for the identification of the Applicant, the Court of Appeals reasoned: "*Various witnesses mentioned above, in certain situations of the events, were present, confronted and observed the accused. Furthermore, witness statements are specific in relation to the features and typical characteristics of the accused, such as eye color, face, hair, body height. These circumstances taken separately indicate the fact of the participation of the accused in the criminal events, these evidence related in their unity complement each other, give a complete overview and prove beyond a doubt the participation, role and contribution of the accused in committing the criminal offenses for which he is*

accused. Consequently, the identification by a number of witnesses with the specific descriptions of the accused's features, in the various circumstances of the incriminating events, indicates a real and certain identification. Therefore, it can be concluded that the total amount of facts and direct information provided represents sufficient evidentiary and identifying material, as such it can serve for a clear and accurate conclusion about the criminal liability of the accused as a result of participation in the form of complicity with other persons in the commission of criminal offenses as described in the judgment for which he was found guilty."

82. The Court also notes that the Supreme Court, regarding the identification of the Applicant and the participation of the defense in the investigative actions, reasoned: "*In this aspect, the first instance court regarding the event clarified and specified the incriminating actions undertaken based on the evidence which it has assessed as reliable without affecting the essence of the charge. Therefore, in this aspect, the first instance court, when determining the accuracy, truthfulness and reliability of the testimony of the witnesses, has given sufficient and convincing reasons which this court also accepts. When assessing the testimony of this witness, the court analyzed in detail how it was possible to identify the convict. In this context, the epilogue of the final finding according to the judgment is important, the accused according to the indictment was charged with having fired a Kalashnikov weapon killing the deceased B, for which the trial panel does not accept this version of the event, and in the judgment it found a version of the event that is more favorable to the convict, namely that the deceased was shot by a member of the armed group, therefore in its entirety the situation was not aggravated in relation to the incriminating volume that he was charged with according to the amended and expanded indictment. The Supreme Court assesses that the claim in the request for not informing the defense to participate in investigative actions a priori did not make the evidence inadmissible, since the defense had the opportunity to challenge the legality and question the evidence provided during certain investigative actions in further stages of the criminal procedure, such a violation must be assessed in the context of the impact on the regularity and legality of the court decision and in the present case this does not represent an essential violation of the provisions of the criminal procedure*."

83. From the above, the Court assesses that this Applicant's allegation in terms of Article 61.3 of the CPCRK is more his disagreement with the interpretation given by the regular courts and as such is a matter of legality.

84. The Court assesses that the Applicant's allegation related to Article 61.3 of the CPCRK is a matter of legality and does not present a violation of Article 31 of the Constitution in conjunction with Article 6 (3) (a) of the ECHR.

(iii) *Regarding the allegation for hearing new witnesses (Article 31 of the Constitution, Article 6-3-d of the ECHR, Article 288.2 of the CPCRK) – confrontation as a concept*

85. Regarding the Applicant's allegation of violation of Article 31 of the Constitution and Article 6 (3) d) of the ECHR referring to Article 288, paragraph 2 of the CPCRK, because the proposal of new witnesses can only be accepted if the proposed witnesses were not known at the time of the second initial hearing, the Court notes that the Court of Appeals clarified*: "**(i)** the appealing allegation that there has been a violation of the provision of Article 288 par.2 of the CPCRK, is ungrounded, since paragraph 1 of the cited provision allows the parties, the defense counsel and the injured party, even after scheduling the main hearing, to call new witnesses and experts or collect new evidence in the main hearing; **(ii)** moreover, it is a fact that the provision of Article 288 par. 2 of the CPCRK takes special care of the right of the*

accused to a fair trial, so that in case of rejection of the proposed evidence this right is not violated, but it does not mean that the proposals from the parties and the injured party for the hearing of new witnesses and evidence should only be in favor of the accused-applicant.";

86. The Court also notes that for the same allegation, the Supreme Court reiterated: "*Article 288 par.1 of the Criminal Procedure Code, allows the parties, the defense counsel and the injured party, even after the main hearing has been scheduled, to request that new witnesses and experts be called or new evidence be collected in the main hearing, and not as the Applicant unfairly claims that in this particular case this would apply only to the Applicant and the not at all to the injured party. The Supreme Court notes that the Applicant's allegation of not informing the defense to participate in investigative actions a priori did not make the evidence inadmissible, since the defense had the opportunity to challenge the legality and question the evidence provided during certain investigative actions in the further stages of the criminal procedure, such violation must be assessed in the context of the impact on the regularity and legality of the court decision and in the present case this does not represent an essential violation of the provisions of the criminal procedure.*"

87. The Court assesses that the Applicant's allegation of the interpretation and implementation of Article 288.1 of the CPCRK is more his disagreement with the way the regular courts have interpreted and implemented the article in question and as such it is a question of legality. In addition, the Court reiterates that the admissibility of evidence is a matter regulated by domestic law and regular courts and that the Court's sole concern under Article 31 of the Constitution in conjunction with Article 6 (1) and 3 (d) of the ECHR is to examine whether the proceedings were administered correctly (see the case of the ECHR, *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118).

88. In this context, the Court assesses that the regular courts have not denied the Applicant's right to propose new witnesses, but they emphasized that the proposal of witnesses also applies to the injured parties, which is in accordance with full equality of arms of the parties in criminal cases, as guaranteed by Article 31 of the Constitution in conjunction with Article 6-3-d of the ECHR (see ECtHR cases, *Perna v. Italy*, cited above, paragraph 29; *Murtazaliyeva v. Russia* , cited above, paragraph 139; and *Solakov v. former Yugoslav Republic of Macedonia*, cited above, paragraph 57).

89. From the above, the Court assesses that it does not result that the procedures were not administered correctly and that their conduct does not disclose a violation of Article 31 of the Constitution in conjunction with Article 6 (3) d) of the ECHR.

(iv) *Regarding the allegation for hearing witnesses in favor of the Applicant (Article 31 of the Constitution, Article 6-3-d of the ECHR) – Equality of arms*

90. Regarding the Applicant's allegation of violation of Article 31 of the Constitution and Article 6 (3) d) of the ECHR because the courts did not hear the witnesses who would have testified in favor of the Applicant or at least their testimony would be neutral, the Court notes that the Basic Court heard the testimonies of witnesses S.M. and I. Ç, who stated in favor of the Applicant's alibi that on the critical day of the commission of the criminal offenses, the Applicant was in Belgrade and not in Peja, namely, in the place where the crimes that the indictment charged the Applicant took place.

91. In this context, the Court assesses that as far as the fair administration of justice is concerned, it is very significant that the courts have also heard the witnesses in favor of the Applicant, while the weight given to the testimony of those witnesses is a matter

of jurisdiction and the scope of regular courts, which the Court - based on the principle of subsidiarity - cannot replace with its own assessment.

92. The Court reiterates that Article 31 of the Constitution in conjunction with Article 6 (3) (d) of the ECHR does not grant the Applicant the unlimited right to secure the appearance of witnesses in court. It is normally for regular courts to decide whether it is necessary or advisable to hear a witness (see ECtHR case, *S.N. v. Sweden*, cited above, paragraph 44).

93. Regarding the evidential power of the witnesses called in favor of the Applicant, the Basic Court had concluded: "T*he Applicant's defense regarding his alibi, firstly, is not correct in terms of time span, namely there have been changes over time, it is illogical, it is not based on material evidence, while the testimonies of witnesses S.M., and I.Ç., are not reliable for the court because they have no support in any other evidence, but they contradict the testimonies of the witnesses F.Sh., S.T., and B.M., and they also contradict the testimonies of the witnesses A.N., and all the witnesses who have identified the accused as a participant in the crime*."

94. In this context, the Court of Appeals confirmed: "*Witness S.T. and witness F. Sh., confirm the presence of the accused on the days the events took place, they knew the accused after they had worked together as personnel of the OSCE verification mission in Peja. The presence of the defendant in Peja at that time is also confirmed by his neighbor B.M., which evidence together refutes the alibi of the accused that at the time when these crimes were committed, he was in Belgrade, Republic of Serbia for studies. That the accused was a member of the reserve police is evidenced by the copy of the list of 03.06.1999, issued by the Ministry of Internal Affairs - Secretariat in Peja by the Commander of the Police Station Major - M. Stojanović. While we are not dealing with another person with the same first and last name, material evidence proves the testimony provided by open sources that the Ministry of Internal Affairs in 1999 had published a police officers killed in 1998 in Kosovo*."

95. The Supreme Court also confirmed: "*As it results from the documents of the case file, the contested judgments as a whole, and the enacting clauses of the latter are clear, comprehensible and do not contradict themselves or the reasons presented. The first instance court has given sufficient reasons for the decisive facts by assessing the accuracy of the conflicting evidence as well as the reasons on which it was based in the case of establishing this criminal-legal case, and especially in the case of proving the existence of the criminal offense. The first instance court assessed the evidence in accordance with the legal provisions, clearly presenting what facts and for what reasons it takes them as proven or unproven, and also gave clear reasons for the place, time, the way of committing the criminal offense. So, both judgments of the lower instance courts do not contain essential violations of the provisions of the criminal procedure, are legally grounded, the circumstances presented in the judgments are clear and in accordance with the legal provisions that are precisely subject to the criminal offense for which the convict was found guilty. In this respect, the first instance court within the event has clarified and specified the incriminating actions undertaken based on the evidence which it has as reliable without affecting the essence of the accusation. So, in this respect, the of first instance court, when determining the accuracy, truthfulness, and reliability of the testimony of the witnesses, has given sufficient and convincing reasons which tare also accepted by this court*."

96. From the above, the Court assesses that the Applicant's allegation of violation of procedural guarantees because the courts did not hear the witnesses who would have

testified in favor of the Applicant, does not show a violation of Article 31 of the Constitution in conjunction with Article 6 (3) (d) of the ECHR.

Conclusion

97. As a conclusion of the above analysis and in the overall assessment of the criminal process against the Applicant, the Court assesses that the regular courts: **(i)** have explained that with the expansion of the indictment, the criminal offense was not re-qualified nor the position of the Applicant as accused was aggravated; **(ii)** have respected the rights of defense during the development of the criminal process; **(iii)** have addressed the Applicant's allegation for the hearing of new witnesses; and, **(iv)** have respected the principle of equality of arms by hearing the witnesses for and against the Applicant.

98. The Court assesses that the specific guarantees of Article 6 (3) illustrate the notion of a fair trial regarding the typical procedural situations that appear in criminal cases, but that their essential purpose is to contribute to ensuring the justice of the criminal procedure as a whole. Therefore, the guarantees embodied in Article 6 (3) are not an end in themselves, and must be interpreted taking into account the function they have in the context of the development of the proceedings as a whole (see ECHR cases, *Ibrahim and others v. the United Kingdom*, no. 50541/08 50571/08 50573/08 40351/09, Judgment of 13 September 2016, paragraph 251; and *Mayzit v. Russia*, no. 63378/00 Judgment of 20 January 2005, paragraph 77).

99. From the above, the Court finds that the conduct of this criminal procedure as a whole does not disclose a violation of Article 31 of the Constitution in conjunction with Article 6 (3) (a) and (d) of the ECHR.

100. The Court also considers that the allegation of violation of Article 9 (2) of the ICCPR cannot be the subject of constitutional review, because it does not raise any new issue that has not been examined within the framework of Article 31 of the Constitution in conjunction with Article 6 (3) (a) and (d) of the ECHR (see, *mutatis mutandis*, Court cases no. KI65/15, Applicant *Tatjana Davila, Ljubiša Marić, Zorica Kršenković, Zlatoj Jevtić,* Judgment of 14 September 2016; and no. KI193/18, Applicant *Agron Vula*, Judgment of 22 April 2020).

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113 (1) and (7) of the Constitution, Articles 20 and 47 of the Law and Rule 48 (1) (a) of the Rules of Procedure, in the session held on 7 November 2023,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, with seven (7) votes for and one (1) against, that the Judgment of the Supreme Court [Pml. no. 19/2022] of 5 February 2022, Judgment of the Court of Appeals [APS. no. 22/2021] of 12 October 2021; Judgment of the Basic Court [ST. no. 15/19] of 11 February 2021, in this criminal case, are not contrary to paragraphs 1, 2 and 4 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo and Article 6 (3) (a), (b) and (d) (Right to a fair trial) of the European Convention on Human Rights;

III. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, publish it in the Official Gazette;

IV. TO HOLD that this Judgment enters into force on the day of its publication in the Official Gazette of the Republic of Kosovo, in accordance with Article 20 (5) of the Law.

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

This translation is unofficial and serves for informational purposes only.