



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

File number: KSC-CC-2022-14

Before: **The Specialist Chamber of the Constitutional Court**

Judge Vidar Stensland, Presiding

Judge Roumen Nenkov

Judge Romina Incutti

Registrar: Fidelma Donlon

Date: 15 March 2022

Language: English

File name: Referral by Kadri Veseli to the Constitutional Court Panel Concerning Decision of the Appeals Panel on Challenges to the Jurisdiction of the Specialist Chambers

Classification: Public

Decision on Further Submissions

Applicant

Kadri Veseli

Specialist Prosecutor

Jack Smith

I. REFERRAL

1. On 28 February 2022, Mr Kadri Veseli (the “Applicant”) lodged with the Specialist Chamber of the Constitutional Court a referral, dated 28 February 2022 (the “Referral”),¹ under Article 113(7) of the Constitution of the Republic of Kosovo (the “Constitution”) and Article 49(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (the “Law”). The Applicant is represented by Mr Ben Emmerson and Mr Andrew Strong.

2. In the Referral, the Applicant raises several constitutional complaints in relation to the criminal proceedings against him, taking place before the Specialist Chambers.

3. Firstly, the Applicant complains that, based on the Law adopted in 2015, he is charged with crimes under customary international law (the “CIL”). The Applicant submits that such direct application of CIL violates his rights guaranteed by: (i) Article 19 of the Constitution, which, the Applicant argues, excludes, as a matter of general principle, the possibility to apply crimes under CIL;² (ii) Article 33(1) of the Constitution, Article 7 of the European Convention on Human Rights (the “Convention”), and Article 15 of the International Covenant on Civil and Political Rights (the “ICCPR”), prohibiting retroactive application of the criminal law;³ and (iii) in combination with Article 7 of the Convention, – Article 24 of the Constitution, Article 14 of the Convention, and Article 26 ICCPR.⁴ In this regard, the Applicant requests the Chamber to declare the respective provisions of the Law that and insofar as provide for the direct application of CIL as unconstitutional and thus invalid.⁵

¹ KSC-CC-2022-14, F00001, Constitutional Referral by Kadri Veseli Against “Decision on Appeals Against ‘Decision on Motions Challenging the Jurisdiction of the Specialist Chambers’”, public, 28 February 2022, with Annex 1, public.

² Referral, paras 7(a), 19, 22, 31(a), 91(a).

³ Referral, paras 7(b), 33, 48(a), 91(b).

⁴ Referral, paras 7(c), 64(a), 91(c).

⁵ Referral, paras 24, 31(b), 48(b), 64(b), 91(d).

4. Secondly, the Applicant complains that he is being prosecuted on the basis of the joint criminal enterprise (the "JCE") and unlawful or arbitrary detention, where neither is expressly set out in the Law. Therefore, his prosecution based on the JCE and/or unlawful or arbitrary detention is in breach of Articles 33 and 55 of the Constitution.⁶

5. Lastly, the Applicant submits that his prosecution based on the JCE extended form, unlawful or arbitrary detention, and/or enforced disappearance is in breach of the *nullum crimen sine lege* principle under Article 33 of the Constitution, Article 7 of the Convention, and Article 15 ICCPR, as they did not constitute crimes under CIL during 1998.⁷

6. In relation to the aforementioned constitutional complaints, it emerges from the Referral that, on 15 March 2021, the Applicant filed a preliminary motion, challenging the jurisdiction of the Specialist Chambers as regards the criminal charges at issue.⁸ On 22 July 2021, the pre-trial judge dismissed the Applicant's preliminary motion.⁹ On 27 August 2021, the Applicant appealed against the pre-trial judge's decision.¹⁰ On 23 December 2021, the Court of Appeals panel denied the Applicant's appeal.¹¹ In this respect, the Applicant submits that there is no further effective remedy available to him.¹²

⁶ Referral, paras 7(d), 66, 70-72, 91(e).

⁷ Referral, paras 7(e), 88, 91(f).

⁸ See, for example, Referral, paras 17, 65, 74, referring to KSC-BC-2020-06, F00223, Preliminary Motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC, public, 15 March 2021.

⁹ KSC-BC-2020-06, F00412, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, public, 22 July 2021.

¹⁰ Referral, para. 8, referring to KSC-BC-2020-06, IA009, F00010, Veseli Defence Appeal Against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, public, 27 August 2021, with Annexes 1-5, public.

¹¹ Referral, para. 8, referring to KSC-BC-2020-06, IA009, F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", public, 23 December 2021.

¹² Referral, para. 13.

II. FURTHER SUBMISSIONS

7. As regards its examination of the Referral, the Chamber notes that, pursuant to Rule 15(2) of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (the “Rules”), the Panel may request additional information or submissions, as deemed necessary, in relation to the Referral. Pursuant to Rule 15(3), any responding submissions directed by the Panel shall be filed within the time limits set by the Panel. Also, under Article 35(2)(i) of the Law, where the referral concerns pursuance of an indictment filed by the Specialist Prosecutor’s Office (the “SPO”), the SPO has the authority to respond to the referral.

8. In that light, the Chamber finds it appropriate to invite the SPO and the Applicant to file written submissions, should they wish so to do, in relation to the Referral. Pursuant to Rule 15(2) of the Rules, the Chamber deems it necessary that the written submissions address specific questions as set out in this decision. After the SPO files its written submissions, the Applicant may file his written submissions on the questions specified in this decision and/or comment on the SPO’s written submissions. In this connection, the Chamber notes that it will disregard any unsolicited submissions.

9. The Chamber reiterates that this decision, including the specific questions put to the SPO and the Applicant, are without prejudice to its determination of the Referral, including to any findings it may make as regards its admissibility or merits.

FOR THESE REASONS,

The Constitutional Court Panel

1. *Invites* the SPO and the Applicant to file written submissions, should they wish so to do, in relation to the Referral, addressing the following questions:
 - a. Is the Referral admissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rules 14 and 20 of the Rules?
 - b. May the Applicant, at the present stage of the criminal proceedings against him and absent conviction, claim to be a victim of the alleged violation of Article 33(1) of the Constitution, Article 7 of the Convention, and Article 15 ICCPR?
 - c. Given that the criminal proceedings against the Applicant are still ongoing, is it still open to the Applicant to raise his complaints, formulated under Articles 19, 24 and 33(1) of the Constitution, Articles 7 and 14 of the Convention, and Articles 15 and 26 of the ICCPR, before the trial panel, and, subsequently, as the case may be, before the Court of Appeals panel, under Article 46 of the Law, and the Supreme Court panel, under Article 47 or Article 48(6)-(8) of the Law? Are these remedies to be exhausted for the purposes of Article 113(7) of the Constitution and Article 49(3) of the Law?
 - d. May the Specialist Chambers apply customary international law? Do the Applicant's complaints as regards the application of customary international law give rise to the appearance of a violation of Article 33(1) of the Constitution and Article 7 of the Convention?
2. *Directs* that, in case the SPO wishes to file written submissions on the above questions, it shall do so by **29 March 2022**; and in case the Applicant wishes to

file written submissions on the above questions and/or comment on the SPO's written submissions, if any, he shall do so by **5 April 2022**;

3. *Directs* that the SPO's written submissions shall not exceed 20 pages; and the Applicant's written submissions shall not exceed 15 pages.



Vidar Stensland
Presiding Judge

Done in English on Tuesday, 15 March 2022
At The Hague, the Netherlands