



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

In: KSC-CC-2022-14

Before: **The Specialist Chamber of the Constitutional Court**
Judge Vidar Stensland, Presiding
Judge Roumen Nenkov
Judge Romina Incutti

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 29 March 2022

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Concerning Decision of the Appeals Panel on Challenges to the
Jurisdiction of the Specialist Chambers

Classification: Public

Prosecution Response to Decision on Further Submissions in Relation to Veseli
Referral (KSC-CC-2022-14/F00005)
with public annex 1

Specialist Prosecutor's Office

Jack Smith

Applicant

Kadri Veseli

I. INTRODUCTION

1. Pursuant to Article 49(3) of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ('Law'),¹ Rules 14 and 20 of the Rules,² and Article 113(7) of the Constitution of Kosovo ('Constitution'), the Specialist Prosecutor's Office ('SPO') hereby responds to the questions contained in the Decision³ issued by the Specialist Chambers Constitutional Court ('SCCC') concerning Veseli's Referral.⁴

2. As explained below, the Referral is wholly inadmissible for at least two, independent reasons. First, Veseli has failed to exhaust all other remedies prior to bringing his claims to the SCCC, as is required. Second, each of Veseli's claims (identified as Grounds 1-5 in the Referral, and referenced as such in this filing for clarity) fail, for one reason or another (and some on multiple grounds), to substantiate a *prima facie* violation of a constitutional right, and therefore must be dismissed as inadmissible.

II. PROCEDURAL HISTORY

3. On 15 March 2021, Veseli filed his Preliminary Motion on Jurisdiction,⁵ which was followed by the SPO responses on 23 April 2021,⁶ the Defence Replies on 17 May

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ('Law').

² Rules of Procedure for the Specialist Chamber of the Constitutional Court ('Rules'). All references to 'Rule' or 'Rules' refer to these rules unless otherwise noted.

³ Decision on Further Submissions, KSC-CC-2022-14/F00005, 15 March 2022 ('Decision').

⁴ Constitutional Referral by Kadri Veseli Against 'Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers"', KSC-CC-2022-14/F00001, 28 February 2022 ('Referral').

⁵ Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC, KSC-BC-2020-06/F00223, 15 March 2021 ('Preliminary Motion').

⁶ Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00263, 23 April 2021; Prosecution Response to Preliminary Motion concerning Applicability of Customary International Law, KSC-BC-2020-06/F00262, 23 April 2021.

2021,⁷ the SPO sur-reply on 1 June 2021,⁸ and the further Defence submissions on 4 June 2021.⁹ On 22 July 2021, the Pre-Trial Judge ('PTJ') rendered his Decision on Jurisdiction, rejecting the Preliminary Motion.¹⁰

4. On 27 August 2021, Veseli and the SPO filed appeals against the PTJ's Decision.¹¹ On 30 September 2021, the SPO filed its response to Veseli's appeal, and Veseli responded to the SPO appeal.¹² On 18 October 2021, Veseli replied to the SPO response, and the SPO replied to the Veseli response to the SPO appeal.¹³ On 23 December 2021, a Panel of the Court of Appeals Chamber ('Court of Appeals Panel') issued the Decision on Appeals.¹⁴

5. On 28 February 2022, Veseli filed the Referral. On 15 March 2022, the SCCC issued the Decision.

⁷ Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00310, 17 May 2021; Veseli Defence Reply to Prosecution Response to Preliminary Motion of Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC (Customary International Law), KSC-BC-2020-06/F00311, 17 May 2021.

⁸ Prosecution Sur-Reply, KSC-BC-2020-06/F00333, 1 June 2021.

⁹ Veseli Defence Response to Prosecution Sur-Reply, KSC-BC-2020-06/F00342, 28 May 2021.

¹⁰ Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021 ('PTJ's Decision').

¹¹ Veseli Defence Appeal against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/IA009/F00010, 27 August 2021 ('Veseli Appeal'). Prosecution Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers' pursuant to Rule 97(3), KSC-BC-2020-06/IA009/F00014, 27 August 2021.

¹² Prosecution response to Veseli Defence appeal against the 'Decision on Motions challenging the jurisdiction of the Specialist Chambers', KSC-BC-2020-06/IA009/F00020, 30 September 2021. Veseli Defence Response to SPO Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers', KSC-BC-2020-06/IA009/F00018, 30 September 2021.

¹³ Veseli Defence Reply to SPO Response (KSC-BC-2020-06/IA009/F00020), KSC-BC-2020-06/IA009/F00026, 18 October 2021. Prosecution Reply to Veseli Response to IA009/F00014, KSC-BC-2020-06/IA009/F00028, 18 October 2021.

¹⁴ Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", KSC-BC-2020-06/IA009/F00030, 23 December 2021 ('Decision on Appeals').

III. SUBMISSIONS

a. The Referral is Inadmissible Because Veseli Has Failed to Exhaust All Remedies (Decision paras 1(a) & (c))

6. The Decision invited submissions on both: 1) whether the Referral is admissible pursuant to, *inter alia*, Constitution Article 113(7), Law Article 49(3), and Rule 20¹⁵; and, 2) whether, given the ongoing proceedings in the case, Veseli was required to exhaust further remedies before the trial panel, Court of Appeals panel, and/or Supreme Court panel, as applicable, before lodging the Referral.¹⁶

7. Constitution Article 113(7) and Article 49(3) of the Law both state that applicants are only permitted to refer purported violations of constitutional rights to the SCCC 'after exhaustion of all legal remedies provided by law.' Rule 20(1)(a) expresses the same principle by stating that an applicant may bring a referral to the SCCC only if 'all effective remedies provided by law against the alleged violations have been exhausted.'

8. The Referral is inadmissible because Veseli has failed to exhaust all available and effective remedies for the claims that he brings. Leaving aside opportunities Veseli may have to raise parts of his claims before the trial panel and any Court of Appeals panels, at the very least he will have the opportunity to present any constitutional claims he wishes to the Supreme Court Chamber pursuant to Article 48(8) of the Law and Rule 193 of the Rules of Procedure and Evidence of before the Kosovo Specialist Chambers.

9. Law Article 48(8) states:

¹⁵ Decision, KSC-CC-2022-14/F00005, para. 1(a).

¹⁶ Decision, KSC-CC-2022-14/F00005, para. 1(c).

A request for an extra-ordinary legal remedy under this Article may be filed on the basis of rights available under this law which are protected under the Constitution or the European Convention on Human Rights and Fundamental Freedoms.

10. Article 48(8) of the Law therefore clearly encompasses the ostensible constitutional and ECHR-based claims Veseli makes in the Referral, if they are actually constitutional issues. Pursuant to Article 48(6) of the Law, Veseli will be able to make such a request 'within three (3) months of the final judgment or final ruling against which protection of legality is sought.' As a result, Veseli will have at least one other opportunity to seek to resolve the claims in the Referral, and therefore he has not exhausted all available remedies. The Referral is thus inadmissible.

11. The SCCC has previously dismissed a referral as inadmissible on the basis that 'the Applicant will have a possibility to raise to the competent panels' the claims raised in the referral.¹⁷ The SCCC then noted 'that, after the final ruling in the criminal proceedings, if any, is given, the Applicant may re-submit his complaints to this Chamber if he still considers himself a victim of the alleged violation.'¹⁸ The same applies here. The Article 48(8) procedure is available to Veseli both in theory and in practice, and, to the extent his claims are constitutional as he avers, provides a possibility for full redress at the appropriate time.

12. The Kosovo Constitutional Court ('KCC') has similarly drawn a bright-line rule regarding the application of the exhaustion doctrine: 'if the proceedings are ongoing before the regular courts, then the Applicants' Referral is considered premature.'¹⁹

13. This requirement to fully exhaust claims in the regular courts (here, the regular courts are the PTJ, Trial Panel, Court of Appeals, and the Supreme Court) prior to

¹⁷ Decision on the Referral of Driton Lajci Concerning Interview Procedure by the Specialist Prosecutor's Office, KSC-CC-2019-07/F00013, 13 January 2020, para.24 ('Lajci Referral').

¹⁸ Lajci Referral, KSC-CC-2019-07/F00013, para.24.

¹⁹ KCC, Resolution on Inadmissibility, Case No. KI 102/16, 2 March 2017, para.39; *see also* KCC, Resolution on Inadmissibility, Case No. KI 07/13, 5 July 2013, para.25; KCC, Resolution on Inadmissibility, KI 113/12, 25 January 2013, para.32; KCC, Resolution on Inadmissibility, KI 94/17, 27 April 2018, paras 38-39; KCC, Resolution on Inadmissibility, KI 226/19, 24 September 2020, paras 47-49.

bringing them to the SCCC upholds important structural principles of subsidiarity.²⁰ As the Kosovo Constitutional Court ('KCC') explained in *Malush Sopa, et al. v. Unknown Public Authority* when rejecting an application where the applicants had failed to follow the 'successive and step by step nature of the exhaustion rule':²¹

The purpose of the exhaustion rule is allowing the opportunity to the public authorities, including the regular courts, of preventing or settling alleged violations of the Constitution. The exhaustion rule is operatively intertwined with the subsidiary character of the constitutional justice procedural frame work.

The principle of subsidiarity requires that the Applicants exhaust all procedural possibilities in the regular proceedings, either administrative or judicial, in order to prevent the violation of the constitution or, if any, to remedy such violation of a fundamental right. Thus, Applicants are liable to have their case declared inadmissible by the Constitutional Court, when failing to avail themselves of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings.²²

14. Were the SCCC to step-in and adjudicate disputes over-early, it would not only warp the proper order of proceedings, but would also infringe on the powers of the regular courts, which are 'independent in exercise of their judicial power' and have a 'constitutional duty and prerogative to construe questions of fact and questions of law pertinent to the cases before them.'²³

15. The Referral as a whole should therefore be dismissed as inadmissible on this basis.

16. In addition, Veseli's Ground 3 with respect to his treatment compared to other persons in Kosovo should further be dismissed because Veseli failed to exhaust this argument in the courts below.²⁴ As the Court of Appeals Panel noted, this argument was not raised before the PTJ, but instead was raised for the first time on appeal.²⁵ The

²⁰ KCC, Resolution on Inadmissibility, Case No. KI136/19, 17 May 2021, paras 94-95 (the exhaustion requirement is 'an important aspect of the subsidiary character of the constitutional justice machinery').

²¹ KCC, Resolution on Inadmissibility, Case No. KI 08-11, 24 April 2012, para.48.

²² KCC, Resolution on Inadmissibility, Case No. KI 08-11, 24 April 2012, paras 46-47 (internal citations omitted); *see also* KCC, Resolution on Inadmissibility, Case No. KI 113/12, 25 January 2013, para.34.

²³ KCC, Resolution on Inadmissibility, Case No. KI 113/12, 25 January 2013, para.33.

²⁴ See KCC, Resolution on Inadmissibility, Case No. KI 136/19, 17 May 2021, paras 94-95; KCC, Resolution on Inadmissibility, Case No. KI 39/13, 8 July 2013, paras 40-42.

²⁵ Decision on Appeals, KSC-BC-2020-06/IA009/F00030, para.46.

Court of Appeals Panel stated that the failure to raise these arguments before the PTJ was sufficient to summarily dismiss it, while nonetheless noting that even if the PTJ had considered this issue, ‘any difference in treatment [...] is objectively and reasonably justified and therefore does not constitute discrimination’.²⁶

17. Nevertheless, Veseli’s failure to raise this argument before the PTJ deprived the Appeals Panel of the PTJ’s reasoning on the issue, and demonstrably led to an abbreviated ruling by the Court of Appeals. Should the SCCC consider this issue now, it would therefore be disadvantaged by the lack of full reasoning of the regular courts that is solely attributable to Veseli’s failure to raise this argument at the outset.²⁷ In effect, this approach improperly turns the SCCC into a court of first review on these claims, instead of its proper role as a court of final review of constitutional violations.

b. Grounds 2, 4, and 5 are Premature (Decision paras 1(a) & (b))

18. The Decision invited submissions on the following question: ‘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?’²⁸ The Decision also invited submissions on the admissibility of the Referral pursuant to Rule 14.²⁹ Rule 14(f) states that a referral shall be summarily dismissed as inadmissible if ‘upon a *prima facie* review, the Panel considers ... that nothing in the referral gives rise to the appearance of an incompatibility with the Constitution or a violation of a constitutional right.’

19. Veseli bases Grounds 2, 4, and 5 of the Referral on alleged violations of Constitution Article 33(1), ECHR Article 7(1), and/or ICCPR Article 15(1). At the

²⁶ Decision on Appeals, KSC-BC-2020-06/IA009/F00030, para.46.

²⁷ See KCC, Resolution on Inadmissibility, Case No. KI 08-11, 24 April 2012, para.47.

²⁸ Decision, KSC-CC-2022-14/F00005, para.1(b).

²⁹ Decision, KSC-CC-2022-14/F00005, para.1(a).

current stage in the proceedings, Veseli may not claim to be a victim of a violation of these provisions, and therefore these Grounds should be dismissed because they fail *prima facie* to give rise to an appearance of a violation of a constitutional right.

20. The plain language of ECHR Article 7(1) makes clear that the *nullum crimen sine lege* principle that it promotes is a right against being 'held guilty of any criminal offense.'³⁰ At this point, Veseli has not been held guilty by the KSC of any offense whatsoever, and so he cannot claim to be a victim of an ECHR Article 7(1) violation. The language of ICCPR Article 15(1) is identical to ECHR Article 7(1) in operative part, and must be interpreted consistently with the jurisprudence of the ECtHR.³¹

21. Constitution Article 33(1) uses slightly different language to convey the same *nullum crimen sine lege* principle, stating that 'no one shall be charged or punished' for any act that was not an offense at the time committed. Although Article 33(1) references being 'charged', as explained below consistency with ECHR Article 7—which it was clearly meant to reflect—as well as with Constitution Article 53 and with jurisprudence of the KCC, counsels that Article 33(1) is likewise applied on a finding of guilt. Veseli's claim to be a victim of a violation of Article 33(1) is therefore also not ripe at the present stage of the litigation.

22. ECHR Article 7(1)'s triggering only on a finding of guilt was explained in *Lukanov v. Bulgaria*, where the EComHR rejected an Article 7 claim that came before conviction:

Under Article 7 (Art. 7) of the Convention the applicant complains that criminal proceedings were instituted against him on the basis of acts which did not constitute a criminal offence at the time when they were committed.

The Commission notes that the proceedings instituted against the applicant have not yet been terminated. He has not, therefore, been 'held guilty of any criminal offence' as set out in Article 7 para. 1 (Art. 7-1) of the Convention.

³⁰ Emphasis added.

³¹ Constitution Article 53.

The applicant cannot, therefore, be regarded as a victim of a violation of Article 7 (Art. 7) of the Convention. This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.³²

23. As further explained by the EComHR in another case, until a final judgment is entered 'it cannot be said that the applicant has been "held guilty of a criminal offence" within the meaning of Article 7 para. 1 (Art. 7-1) of the Convention.'³³ Thus, prior to entry of a final judgment, an Article 7(1) claim is 'premature'.³⁴

24. As regards Constitution Article 33(1), the SCCC has recognised, relying on KCC jurisprudence, that pursuant to Constitution Article 53 'human rights and fundamental freedoms guaranteed by the Constitution shall be interpreted consistent with the court decisions of the [ECtHR]'.³⁵

25. Indeed, the KCC practice is to assess both Constitution Article 33(1) and Article 7(1) in tandem, and both through the lens of ECtHR jurisprudence.³⁶ In this regard, the KCC has found that Article 33 'means that no one can be found guilty of an offense'

³² ECtHR, *Lukanov v. Bulgaria*, 21915/93, Decision, Commission (Plenary), 12 January 1995, para.6; see also ECtHR, *X v. the Netherlands*, 7512/76, Decision, 6 July 1976 (finding similarly that steps that precede a possible conviction are not covered by Article 7: 'The concept of "guilty" in Article 7, although autonomous, cannot cover the decision on extradition which may lead to a conviction.').

³³ ECtHR, *Klamecki v. Poland*, 31583/96, Decision (Partial), Commission (Plenary), 20/10/1997, para.4; see also ECtHR, *Tomasi v. France*, 13853/88, Decision, Commission, 10 March 1989; ECtHR, *Parlanti v. Germany*, 45097/04, Decision, Court (Third Section), 26 May 2005, para.6.

³⁴ See ECtHR, *Piskorski v. Poland*, 80959/17, Decision, Court (First Section Committee), 22 October 2019, para.61 ('the applicant's trial on charges of taking part in the operations of a foreign intelligence against Poland is currently on-going before the first-instance court. The Article 7 complaint is therefore premature. '); ECtHR, *Hanuliak and Others v. Slovakia*, 63859/00, Decision, Court (Fourth Section), 18 September 2007, para.3.

³⁵ Decision on the Referral of Mahir Hasani, KSC-CC-2019-05/F00012, 20 February 2019, para.25 (The Constitutional Court of Kosovo has consistently recognised the application of Article 53 in its review of constitutional referrals. It has also stated that 'the Constitutional Court is bound to interpret human rights and fundamental freedoms consistent with the court decisions of the [ECtHR]) (internal citations omitted); see also KCC, Case No. KI 207/19, Judgment, 5 January 2021, para.109; KCC, Case No. KI 41/12, Judgment, 26 February 2013, para.58; KCC, Case No. KI 43/16, Resolution on Inadmissibility, 16 May 2016, para.50; KCC, Case No. KI 34/18, Resolution on Inadmissibility, 11 June 2018, para.41; KCC, Case No. KI 37/18, Resolution on Inadmissibility, 11 June 2018, para.37; KCC, Case No. KI 62/17, Judgment, 11 June 2018, para.43.

³⁶ KCC, Case No. KI 11/21, Resolution on Inadmissibility, 31 May 2021, para.78 (discussing 'the guarantee enshrined in Article 33 of the Constitution and Article 7 of the ECHR').

that was not present in the law at the time of commission.³⁷ As a result, Article 33(1) should also be read as becoming ripe on a finding of guilt.

26. Because Veseli alleges to be a victim of constitutional rights violations that are not yet ripe, Grounds 2, 4, and 5 fail *prima facie* to present a violation of a constitutional right and should be dismissed.

c. The KSC May Apply Customary International Law (Decision para.1(a) & (d))

27. As part of the same query concerning whether Veseli's CIL arguments give rise to the appearance of a Constitutional violation pursuant to Constitution Article 33(1) and ECHR Article 7, the Decision also queried: 'May the Specialist Chambers apply customary international law?'³⁸ The SPO will address this question, and its interactions with Veseli's claims, in the limited space and restricted admissibility parameters established by the Decision, but requests the opportunity to provide further substantive submissions at an appropriate time should that be required. The SPO submits that the propriety of the KSC applying CIL is manifest, and that therefore Grounds 1-3 should be dismissed pursuant to Rule 14(d), as further explained in the following section.

28. The KSC may apply customary international law ('CIL'). The Law was duly enacted and is *lex specialis* for the KSC.³⁹ By adopting the Law, the Kosovo legislature has provided the domestic law necessary to apply CIL at the KSC, and thus Veseli's submission that the KSC lacks corresponding domestic legislation is misplaced. Law Article 3(2)(d) explicitly identifies CIL as applicable, and notes that it is given superiority over domestic law by Constitution Article 19(2). Article 12 of the Law states that the KSC 'shall apply customary international law ... as applicable at the

³⁷ KCC, Case No. KI 11/21, Resolution on Inadmissibility, 31 May 2021, para.75.

³⁸ Decision, KSC-CC-2022-14/F00005, para.1(d).

³⁹ Constitution Article 162(1); Law Article 3(2)(b).

time the crimes were committed.’ Articles 13 and 14 of the Law identify the crimes against humanity and war crimes, respectively, that are applicable under CIL, and Article 16 of the Law provides the relevant modes of liability. These provisions leave no doubt that the Law, as the applicable domestic legislation, applies CIL to the crimes and modes of liability charged in the indictment. Other domestic Kosovo substantive law is applicable insofar as it is consistent with CIL,⁴⁰ but Veseli has not been charged with domestic crimes under Article 15 of the Law.

29. Article 33(1) states that ‘[n]o one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed’. Importantly, the provision includes an exception for ‘acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.’ This unambiguous exception leaves no room for interpretation: the retroactive incorporation of CIL crimes does not violate the Constitution, provided that the charge or punishment concerns acts that at the time they were committed constituted crimes under international law. Furthermore, in light of the express exception for CIL crimes under Article 33(1), Veseli’s submission that the term ‘law’ (in the preceding part of that provision) refers exclusively to a legislative act of the assembly is of no consequence.⁴¹

30. Veseli, referring to ECtHR case law interpreting Article 7(2) ECHR, submits that the exception in Article 33(1) for CIL crimes is unconstitutional and is of no effect.⁴² However, Article 7(2) ECHR refers to ‘the general principles of law recognised by civilised nations’, which is a different source of law to the CIL crimes mentioned in Article 33(1).⁴³ Article 7(1) ECHR refers to criminal offences under both national and

⁴⁰ Law Article 12.

⁴¹ Referral, KSC-CC-2022-14/F00001, paras 46(a)&(b).

⁴² Referral, KSC-CC-2022-14/F00001, paras 36(b), 46(d).

⁴³ Article 38(1)(c) of the ICJ Statute. Decision on Appeals, KSC-BC-2020-06/IA009/F00030, para.39.

international law. Thus, even if Article 7(2) is ‘defunct’, this would have no bearing on the interpretation of Constitution Article 33(1), which reflects ECHR Article 7(1).

31. The ECtHR has consistently upheld instances of domestic jurisdictions incorporating CIL offences into their domestic legal orders through statutory schemes such as the Law. The ECtHR has ruled that prosecutions pursuant to such laws are permissible for conduct that preceded the promulgation of the domestic legislation, provided the conduct was criminalised under CIL at the relevant time.⁴⁴ Under Article 53 of the Constitution, any interpretation of Article 33(1) must be consistent with the court decisions of the ECtHR.

32. The application of CIL at the KSC is also consistent with well-established jurisprudence of other tribunals. The ICTY, ICTR, ECCC, and SCSL are all examples of courts created to prosecute CIL offences committed in the past. All did so without offending the non-retroactivity principle because the offences within their jurisdiction fell under CIL at the time of their commission.⁴⁵

33. ECCC chambers, in particular, have exhaustively addressed submissions similar to those raised in the Referral. For instance, the Pre-Trial Chamber in Case 002 held that ‘the international principle of legality does not require that international crimes and modes of liability be implemented by domestic statutes’.⁴⁶ Through the

⁴⁴ Examples include Latvia (European Court of Human Rights (‘ECtHR’), Grand Chamber, *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010) and Hungary (ECtHR, Grand Chamber, *Korbely v. Hungary*, 9174/02, Judgment, 19 September 2008, though finding a violation in how this law was applied in the specific case).

⁴⁵ ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment, 24 March 2000, para.126; ECCC, *Case against Kaing*, 001/18-07-2007/ECCC/SC, Appeal Judgment, 3 February 2012, para.99 and fn 188; SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgment, 26 September 2013, para.352; ICTR, *Nahimana, Barayagwiza and Ngeze v. Prosecutor*, ICTR-99-52-A, Judgment, 28 November 2007, para.985, fn 2255; see, generally, ECtHR, Grand Chamber, *Kononov v. Latvia*, 36376/04, Judgment, 17 May 2010, Joint Concurring Opinion of Judges Rozakis, Tulkens, Spielmann, and Jebens, para.6 (‘no one can speak of retrospective application of substantive law, when a person is convicted, even belatedly, on the basis of rules existing at the time of the commission of the act’).

⁴⁶ ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary’s Appeal Against the Closing Order, 11 April 2011, para.213.

specific law establishing the court, the legislature granted jurisdiction over crimes defined in international law to the ECCC.⁴⁷ This was so regardless of whether the Cambodian legal system is characterised as monist or dualist.⁴⁸

34. Likewise, the Trial Chamber in Case 002/01 rejected challenges to the ECCC's jurisdiction over crimes under CIL:

As a matter of principle, an accused is not relieved of criminal responsibility under international law merely because an international crime is not proscribed by national law. Where national law does not provide the specific characteristics of an international crime, a court may rely on international law without violating the principle of legality. It is clear that, in accordance with the Agreement, the Cambodian lawmakers intended to grant the ECCC jurisdiction over crimes against humanity as defined in international law and that such definition was considered directly applicable before the Chamber.⁴⁹

35. These considerations apply equally to the way the principle of legality is defined in the Constitution. Veseli seeks to distinguish this jurisprudence on the basis that the ECCC is an international court.⁵⁰ However, the ECCC Pre-Trial Chamber considered the nature of the ECCC as an international or domestic court immaterial to the issue of whether it can apply CIL.⁵¹

36. Veseli contends that Article 19(1) and Article 22 of the Constitution limit the direct effect of international norms to those of a self-executing nature, which "requires that their content is sufficiently specific and creates rights for an individual".⁵² The

⁴⁷ ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, paras 208-214.

⁴⁸ ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para.213.

⁴⁹ ECCC, *Case against Nuon and Khieu*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 August 2014, para.18. ECCC, *Case against Kaing*, 001/18-07-2007/ECCC/SC, Appeal Judgement, 3 February 2012, para.99 and fn 188.

⁵⁰ Referral, para.30.

⁵¹ ECCC, *Case against Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para.212.

⁵² Referral, KSC-CC-2022-14/F00001, para.17.

Referral sheds no further light on this claim and cites no authorities in support, other than a reference to the Preliminary Motion and Appeal Brief.⁵³

37. Article 19(1) regulates the application of international agreements ratified by the Republic of Kosovo. Nothing in Article 19(1) could give rise to a broad prohibition on the direct effect of international law other than ratified international agreements and those included in Article 22. Moreover, Veseli's argument is inconsistent with the plain language of Article 19(2), which gives superiority to 'legally binding norms of international law' over the laws of the Republic of Kosovo. As held by the Court of Appeals Panel, this includes CIL, which is binding on all states.⁵⁴ The question of whether, as a general principle, domestic courts of national jurisdictions can apply international law norms directly is therefore immaterial in light of the direct application of CIL under Article 19(2).

38. Veseli submits that it is only constitutional to prosecute international crimes when they have domestic analogues ('duality test').⁵⁵ All cases cited for this proposition concern the application of Article 142 of the SFRY Code, the 1974 SFRY Constitution, and UNMIK Regulation 1999/24. These cases pre-date the adoption of the Constitution of Kosovo in 2008 and thus concern a different constitutional framework, which is not binding on the KSC. As the Court of Appeals panel held, the 'findings of these decisions are, therefore, irrelevant for the Specialist Chambers'.⁵⁶

39. Likewise, Veseli cites irrelevant authorities in support of the submission that the SFRY Constitution⁵⁷ and SFRY Criminal Code apply to proceedings at the KSC. The two cases cited come from the Constitutional Court of Serbia and the Appellate

⁵³ Referral, KSC-CC-2022-14/F00001, para.17, fn 7, citing the Preliminary Motion, para.43 & Veseli Appeal, para.20. The Appeal merely refers back to the Preliminary Motion: Veseli Appeal, para.20. The Preliminary Motion similarly argues that self-executing international norms require specificity and the creation of individual rights, again without citing authority: Preliminary motion, para.43(a).

⁵⁴ Decision on Appeals, KSC-BC-2020-06/IA009/F00030, paras 23-24.

⁵⁵ Referral, KSC-CC-2022-14/F00001, para.20.

⁵⁶ Decision on Appeals, KSC-BC-2020-06/IA009/F00030, para.27.

⁵⁷ Socialist Federal Republic of Yugoslavia Constitution, 1974 ('SFRY Constitution').

Court of Montenegro.⁵⁸ Self-evidently, these jurisdictions are not subject to the Constitution of the Republic of Kosovo.⁵⁹ Leaving aside the correctness of the conclusions reached in the decisions, they cannot displace the unambiguous wording of Article 33(1) of the Constitution, which explicitly exempts CIL crimes.⁶⁰

40. Veseli also submits that any doubt as to which body of law should apply must be resolved in favour of the accused in accordance with the principle of *in dubio pro reo*.⁶¹ The principle of *in dubio pro reo* is an evidentiary principle requiring a court to exercise any evidentiary doubt in favour of the accused.⁶² Even if it were to apply to statutory interpretation, it would do so only after other means of interpretation have resulted in ambiguity.⁶³ There is no ambiguity in the application of CIL crimes at the KSC and thus no need to revert to the principle of *in dubio pro reo*.

41. Finally, Veseli argues that the prosecution of the accused for CIL crimes violates the principle of equality before the law without discrimination under Constitution Article 24, ICCPR Article 26, and ECHR Article 14, because Veseli's counterparts in Serbia and in the ordinary courts of Kosovo are prosecuted under only the domestic law in force at the relevant time.⁶⁴

⁵⁸ Referral, KSC-CC-2022-14/F00001, para.40, citing Constitutional Court of Serbia, Case no Uz-11470/2017; Appellate Court of Montenegro, case Kž-S 1/2012, Judgment, 22 March 2012 ("*Bukovica case*").

⁵⁹ See Referral, KSC-CC-2022-14/F00001, paras 39-40.

⁶⁰ Decision on Appeals, KSC-BC-2020-06/IA009/F00030, para. 28.

⁶¹ Referral, KSC-CC-2022-14/F00001, para.44(c).

⁶² ICTY, *Prosecutor v. Stakić*, IT-97-24-T, Judgment, 31 July 2003, para.416; ICTY, *Prosecutor v. Limaj, Bala and Musliu*, IT-03- 66-A, Judgment, 27 September 2007, para.21; ICTY, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21-T, Judgment, 16 November 1998, para.601.

⁶³ ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para.53; STL, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, STL-11-01/T/TC, Judgment, 18 August 2020, para.5928; ECCC, *Co-Prosecutors v. Khieu Samphan*, 002/19-09-2007-ECCC—TC/SC(04), Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, para.31; ECCC, *Prosecutor v. Im Chaem*, 004/1/07-09-2009-ECCC-OCIJ, Closing Order (Reasons), 10 July 2017, para.26.

⁶⁴ Referral, KSC-CC-2022-14/F00001, paras 58-64. The SPO notes that ECHR Article 14—and by analogy Constitution Article 24 and ICCPR Article 26—address equality and non-discrimination as regards rights in the respective texts. In this way, equality and non-discrimination claims are pendant to claims invoking other rights. The KCC has observed that ECHR Article 14 'does not act independently as it has effect only in relation to the enjoyments of rights and freedoms protected by other provisions.' KCC,

42. The individual rights and freedoms guaranteed in these instruments do not create 'retrospective obligations'.⁶⁵ As the Court of Appeals Panel noted with reference to Constitution Article 24 and ICCPR Article 26: 'the protection enshrined in both the ICCPR and the Constitution of Kosovo concerns the treatment of individuals within the same national jurisdiction'.⁶⁶ It follows that the prosecution of individuals on the basis of different laws before courts of different national jurisdictions does not constitute discrimination.⁶⁷

43. Equally, the KSC does not discriminate against individuals by exercising its jurisdiction under the Law to prosecute CIL crimes, regardless of whether others are prosecuted in domestic courts of Kosovo under a different law.⁶⁸ There is an objective and reasonably justified basis for distinguishing between persons tried in the two courts, and thus no issue of equality before the law arises.⁶⁹

**d. The Referral Fails to Raise Constitutional Claims *Prima Facie*
(Decision para. 1(a) & (d))**

44. The Decision invited submissions on whether Veseli'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'.⁷⁰ The Decision also invited submissions regarding Rule 14.⁷¹ Rule 14(f) states that matters

Case No. KI 45/20 and KI 46/20, Judgment, 29 March 2021, para.80. Likewise, the KCC has held that 'there can be no room for its implementation, as long as the facts of the case do not fall within any of those [other] provisions'. KCC, Case No. KO 157/18, Judgment, 28 March 2019, para.76 (internal brackets omitted). As explained above, Veseli's ECHR Article 7 and Constitution Article 33 claims are premature, and thus the equality claims based on them are as well.

⁶⁵ *Contra*, Referral, KSC-CC-2022-14/F00001, para. 52(c).

⁶⁶ Decision on Appeals, KSC-BC-2020-06/IA009/F00030, para.45. *Contra*, Referral, KSC-CC-2022-14/F00001, para. 53.

⁶⁷ See ECtHR, *Magee v. UK*, 28135/95, Judgment, Court (Third Section), 6 June 2000, para.50.

⁶⁸ Decision on Appeals, KSC-BC-2020-06/IA009/F00030, para.46.

⁶⁹ See ECtHR, *Molla Sali v. Greece*, 20452/14, Judgment, Grand Chamber, 19 December 2018, para.135; ECtHR, *Fabris v. France*, 16574/08, Judgment, Grand Chamber, 7 February 2013, para.56.

⁷⁰ Decision, KSC-CC-2022-14/F00005, para.1(d).

⁷¹ Decision, KSC-CC-2022-14/F00005, para.1(a).

referred to the SCCC are inadmissible if ‘upon a *prima facie* review, the Panel considers that ... nothing in the referral gives rise to the appearance of an incompatibility with the Constitution or a violation of a constitutional right.’

45. For the same reasons as outlined above—including the clear and unambiguous language of the Law, and the settled jurisprudence of the ECtHR⁷²—Grounds 1-3 should be dismissed for failing to raise any appearance of a violation of the Constitution.⁷³ Amongst other courts, the ECtHR Grand Chamber has considered and rejected similar claims, including of retrospective application, based on domestic codes which entered into force after the date of the offences in question.⁷⁴ As such, the applicable principles are already firmly established and the Veseli Defence has failed to displace them, or to raise any appearance of violation in relation to them.

46. Veseli’s cursory submissions on JCE III in Ground 5⁷⁵ similarly do no more than express disagreement with the finding of the Court of Appeals Panel, and invite the SCCC to investigate the matter *de novo* without raising any appearance of violation. Because Veseli merely disputes whether the regular courts correctly interpreted the law, the ‘referral is manifestly ill-founded with respect to a violation of any of his constitutional or human rights, and consequently is inadmissible.’⁷⁶

47. In Ground 4, Veseli asks the SCCC to undertake inquiries that are beyond its proper role in the division of authority between the regular courts and the SCCC. Specifically, it asks the SCCC to assess whether the Court of Appeals Panel correctly interpreted the KSC Law regarding the crimes and modes of liability it encompasses.⁷⁷ However, the jurisprudence of the SCCC and KCC makes clear that analysis and

⁷² Paras 27-43 above.

⁷³ ECtHR, *Galev & Ors v Bulgaria*, 18324/04, 29 September 2009 (finding certain complaints manifestly unfounded in the face of, *inter alia*, existing settled case law).

⁷⁴ Paras 31-35 above.

⁷⁵ Referral, KSC-CC-2022-14/F00001, paras 73-74.

⁷⁶ KCC, Case No. KI 79/10, Resolution on Inadmissibility, 15 January 2013, para.22; *see also* KCC, Case No. KI 114/17, Resolution on Inadmissibility, 18 April 2018, para.45.

⁷⁷ Referral, KSC-CC-2022-14/F00001, paras 65-72.

interpretation of the content of the law is exclusively within the purview of the regular courts, except for rare exceptions not applicable here.⁷⁸ 'The Court has repeatedly stated that, as a general rule, the allegations concerning the manner of administration of facts, erroneous interpretation and application of the provisions of substantive or procedural law, allegedly committed by the regular courts, relate to the scope of legality and as such, are not within the jurisdiction of the Constitutional Court, and therefore, in principle, they cannot be reviewed by the Court.'⁷⁹ The KCC and ECtHR have also affirmed this position, and stated explicitly that it applies equally to domestic incorporation of international law:

[I]t is not the task of the Constitutional Court to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention and the Constitution.⁸⁰

⁷⁸ See Decision on the Referral of [REDACTED] Further to a Decision of the Single Judge, KSC-CC-2020-08/F00020, 20 April 2020, paras 35-36; see also ECtHR, *Navalnyye v. Russia*, 101/15, 17 October 2017, Judgment (Merits and Just Satisfaction), Court (Third Section), para.57 ('according to its general approach, the Court does not question the interpretation and application of national law by national courts unless there has been a flagrant non-observance or arbitrariness in the application of that law'); ECtHR, *Poletan and Azirovik v. 'The Former Yugoslav Republic of Macedonia'*, 26711/07, 12 May 2016, Judgment (Merits and Just Satisfaction), Court (First Section), para.109 ('it is not the Court's function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention and unless that domestic assessment is manifestly arbitrary'); KCC, Case No. KI 37/18, Resolution on Inadmissibility, 11 June 2018, para.43 ('The Court further recalls that it is beyond its jurisdiction to assess the quality of the conclusions of the regular courts, unless it is manifestly arbitrary.');

⁷⁹ KCC, Case No. KI 146/20, Resolution on Inadmissibility, 25 June 2021, para.37; see also KCC, Case No. KI 144/18, Resolution on Inadmissibility, 5 January 2021, para.63; KCC, Case No. KI 08/19, Resolution on Inadmissibility, 5 January 2021, para.41.

⁸⁰ KCC, Case No. KI 11/21, Resolution on Inadmissibility, 31 May 2021, para.81; see also ECtHR, *Korbely v. Hungary*, 9174/02, Judgment (Merits and Just Satisfaction, Court (Grand Chamber), 19 September 2008, para.72; ECtHR, *Waite and Kennedy v. Germany*, 26083/94, Judgment (Merits), Court (Grand Chamber), 18 February 1999, para.54; ECtHR, *Neulinger and Shuruk v. Switzerland*, 41615/07, Judgment, Court (Grand Chamber), para.100; ECtHR, *Selahattin Demirtaş v. Turkey*, 14305/17, Judgment, Court (Grand Chamber), 22 December 2020, para.249.

48. Deviation from this rule is allowed only where an error rises to the level of ‘flagrantly and manifestly arbitrary’.⁸¹ Under this standard, mere disagreement of the SCCC with the regular courts’ conclusions regarding the interpretation of a law would not be sufficient to prompt intervention. Instead, the SCCC would have to hold that the regular courts’ reasoning was not only entirely arbitrary, but ‘flagrantly and manifestly’ so. It is patently apparent that the Court of Appeals’ thoroughly reasoned and logical decision does not even begin to approach this standard.⁸² Moreover, Veseli does not allege in the Referral that any of the purported errors rise to this level.⁸³ In respect of Ground 4, Veseli raises a question purely of interpretation of the Law and, without support,⁸⁴ attempts to manufacture a constitutional issue from it.

e. Ground 1 Does Not Invoke an Individual Right (Decision para.1(a))

49. The Decision invited submissions in regards to Constitution Article 113(7), Law Article 49(3), Rule 14(f), and Rule 20.⁸⁵ All of these provisions except for Rule 14 refer explicitly to the submission of claimed violations of ‘individual rights and freedoms

⁸¹ Decision on the Referral of [REDACTED] Further to a Decision of the Single Judge, KSC-CC-2020-08/F00020, 20 April 2020, para.36; *see also* ECtHR, *Navalnyye v. Russia*, 101/15, 17 October 2017, Judgment (Merits and Just Satisfaction), Court (Third Section), para.57 (‘according to its general approach, the Court does not question the interpretation and application of national law by national courts unless there has been a flagrant non-observance or arbitrariness in the application of that law’); ECtHR, *Poletan and Azirovik v. ‘The Former Yugoslav Republic of Macedonia’*, 26711/07, 12 May 2016, Judgement (Merits and Just Satisfaction), Court (First Section), para.109 (‘it is not the Court’s function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention and unless that domestic assessment is manifestly arbitrary’); KCC, Case No. KI 37/18, Resolution on Inadmissibility, 11 June 2018, para.43 (‘The Court further recalls that it is beyond its jurisdiction to assess the quality of the conclusions of the regular courts, unless it is manifestly arbitrary.’); KCC, Case No. KI 144/18, Resolution on Inadmissibility, 5 January 2021, para.52; KCC, Case No. KI 146/20, Resolution on Inadmissibility, 25 June 2021, para.41; KCC, Case No. KI 06/17, Resolution on Inadmissibility, 18 December 2017, paras 39-41.

⁸² *See* KCC, Case No. KI 06/17, Resolution on Inadmissibility, 18 December 2017, para.45 (decision of the regular courts not manifestly erroneous or arbitrary where ‘the relevant provisions of the law have been applied and the regular courts have provided clear and complete reasons for their decisions’).

⁸³ *See* KCC, Case No. KI 144/20, Resolution on Inadmissibility, 5 January 2021, paras 41-42.

⁸⁴ Referral, KSC-CC-2022-14/F00001, fn.46 (citing only to Veseli’s own, unsupported, prior submissions).

⁸⁵ Referral, KSC-CC-2022-14/F00001, para.1(a).

guaranteed by the Constitution.’⁸⁶ Rule 14(f) mandates the dismissal as inadmissible of claims that do not indicate *prima facie* a violation of a constitutional right.

50. Veseli’s Ground 1 is premised on an alleged violation of Constitution Article 19.⁸⁷ It should be dismissed as inadmissible for the simple reason that Constitution Article 19 is not an article of the Constitution that confers any individual rights that Veseli can seek to enforce, and thus it cannot form the basis of an SCCC referral under Law Article 49(3). Article 19 does not fall within the Constitution’s Chapter II concerning ‘Fundamental Rights and Freedoms’ but instead is lodged in Chapter I, concerning ‘Basic Provisions.’ Nothing in its language states or implies that it is conferring rights on individuals. Ground 1 therefore fails to present a *prima facie* showing of a violation of a constitutional right.

IV. RELIEF REQUESTED

51. For the foregoing reasons, the SPO respectfully requests that the Referral be dismissed.



Jack Smith

Specialist Prosecutor

Tuesday, 29 March 2022

At The Hague, the Netherlands.

⁸⁶ Rule 20(1) is slightly more verbose, stating ‘individual rights and freedoms as guaranteed under the Constitution.’

⁸⁷ Referral, KSC-CC-2022-14/F00001, paras 14-31.