



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

In: KSC-CC-2022-13

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

Language: English

File name: Referral by Jakup Krasniqi to the Constitutional Court Panel
Concerning the Legality of Charging Joint Criminal Enterprise

Classification: **Public**

Prosecution Response to Decision on Further Submissions in Relation to Krasniqi
Referral (KSC-CC-2022-13/F00005)
with one public annex

Specialist Prosecutor's Office

Jack Smith

Applicant

Jakup Krasniqi

I. INTRODUCTION

1. Pursuant to Article 49(3) of the 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 Krasniqi's Referral.⁴

2. As explained below, the Referral is wholly inadmissible for at least two, independent reasons. First, Krasniqi has failed to exhaust all other remedies prior to bringing his claims to the SCCC, as is required. Second, Krasniqi's arguments claim violations of two provisions—Constitution Article 33(1), and European Convention on Human Rights ('ECHR') Article 7(1)—that do not become ripe until after conviction, and thus are premature. In addition, two of Krasniqi's three claims in the Referral are inadmissible because they fail to present a *prima facie* claim of a constitutional violation. For all of these reasons, the Referral should be dismissed.

II. PROCEDURAL HISTORY

3. On 15 March 2021, Krasniqi filed his Preliminary Motion on Jurisdiction.⁵ On 23 April 2021, the SPO responded to the preliminary motions concerning Joint Criminal Enterprise ('JCE'),⁶ and Krasniqi replied on 14 May 2021.⁷

¹ 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-2022-13/F00005, 15 March 2022 ('Decision').

⁴ Krasniqi Defence Referral to the Constitutional Court Panel on the Legality of Charging Joint Criminal Enterprise with public Annex 1, KSC-CC-2022-13/F00001, 28 February 2022 ('Referral').

⁵ Krasniqi Defence Preliminary Motion on Jurisdiction, KSC-BC-2020-06/F00220, 15 March 2021.

⁶ Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00263, 23 April 2021.

⁷ Krasniqi Defence Reply to Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE), KSC-BC-2020-06/F00302, 14 May 2021.

4. On 22 July 2021, the Pre-Trial Judge ('PTJ') issued his Decision on Motions Challenging the Jurisdiction of the Specialist Chambers.⁸ As relevant here, the PTJ held that: JCE III formed part of customary international law at the time of the crimes alleged in the Indictment;⁹ that JCE III liability was both foreseeable and accessible to Krasniqi at the time of the alleged crimes;¹⁰ and, that Article 16(1)(A) of the Law encompasses JCE.¹¹

5. On 27 August 2021, Krasniqi filed his appeal from the Decision on Motions Challenging the Jurisdiction of the Specialist Chambers.¹² The SPO responded on 30 September 2021,¹³ and Krasniqi replied on 18 October 2021.¹⁴

6. On 23 December 2021, the Court of Appeals Panel issued its 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers.'¹⁵ As relevant here, it held: that JCE III formed part of customary international law at the time of the alleged crimes;¹⁶ that JCE III was foreseeable and accessible to Krasniqi;¹⁷ and that Article 16(1)(A) of the Law encompasses JCE.¹⁸

⁸ Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021.

⁹ Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021, para.186.

¹⁰ Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021, para.201.

¹¹ Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/F00412, 22 July 2021, para.204.

¹² Krasniqi Defence Appeal against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, KSC-BC-2020-06/IA009/F00013, 27 August 2021.

¹³ Prosecution response to Krasniqi Defence appeal against the 'Decision on Motions challenging the jurisdiction of the Specialist Chambers', KSC-BC-2020-06/IA009/F00019, 30 September 2021.

¹⁴ Krasniqi Defence Reply to Prosecution Response to Krasniqi Defence Appeal Against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers', KSC-BC-2020-06/IA009/F00027, 18 October 2021.

¹⁵ 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').

¹⁶ Decision on Appeals, KSC-BC-2020-06/IA009/F00030, paras 142, 194.

¹⁷ Decision on Appeals, KSC-BC-2020-06/IA009/F00030, paras 142, 224.

¹⁸ Decision on Appeals, KSC-BC-2020-06/IA009/F00030, para.139.

7. On 28 February 2022, Krasniqi filed the Referral. On 1 March 2022, the President of the Kosovo Specialist Chambers ('KSC') appointed the SCCC Panel.¹⁹
8. On 10 March 2022, the SCCC Panel issued the Decision on Working Language and Further Proceedings.²⁰ In it, the Panel held that the working language would be English. It also found that requesting further submissions was appropriate, and stated that it would issue a decision regarding the specifics of the additional submissions and time limits.
9. On 15 March 2022, the SCCC issued the Decision, which invited submissions on a number of issues relating to admissibility and set a deadline of 29 March 2022 for the SPO's submissions, and 5 April 2022 for Krasniqi's submissions. It also imposed a 20-page limit on the SPO's submissions.

III. SUBMISSIONS

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

10. 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 20;²¹ and, 2) whether, given the ongoing proceedings in the case, Krasniqi 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.²²
11. Article 113(7) of the Constitution and Article 49(3) of the Law both state that applicants are only permitted to refer purported violations of constitutional rights to

¹⁹ Decision to Assign Judges to a Constitutional Court Panel, KSC-CC-2022-13/F00002, 1 March 2022.

²⁰ Decision on the Working Language and Further Proceedings, KSC-CC-2022-13/F00004, 10 March 2022.

²¹ Decision, KSC-CC-2022-13/F00005, para.1(a).

²² Decision, KSC-CC-2022-13/F00005, para.1(c).

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 if 'all effective remedies provided by law against the alleged violations have been exhausted.'

12. The Referral is inadmissible because Krasniqi has failed to exhaust all available and effective remedies for the claims that he brings. Leaving aside opportunities Krasniqi 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.

13. Law Article 48(8) states:

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.

14. Article 48(8) of the Law therefore clearly encompasses the ostensible constitutional and ECHR-based claims Krasniqi makes in the Referral. Pursuant to Article 48(6) of the Law, Krasniqi 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, Krasniqi will have at least one other opportunity to seek to resolve the claims in the Referral, and therefore has not exhausted all available remedies. The Referral is thus inadmissible.

15. The SCCC has previously dismissed referrals as inadmissible on the basis that 'the Applicant will have a possibility to raise to the competent panels' the claims raised in the referral.²³ At the same time, the SCCC noted 'that, after the final ruling in the

²³ 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.

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.’²⁴ The same applies here. The Article 48(8) procedure is available to Krasniqi 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.

16. 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.’²⁵

17. This requirement to fully exhaust claims in the regular courts (here, the regular courts are the PTJ, Trial Panel, Court of Appeals, and Supreme Court Chamber) prior to bringing them to the SCCC upholds important structural principles of subsidiarity.²⁶ As the 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’:²⁷

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

²⁴ 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.

²⁵ KCC, Case no. KI102/16, Resolution on Inadmissibility, 2 March 2017, para.39; *see also* KCC, Case No. KI 07/13, Resolution on Inadmissibility, 5 July 2013, para.25; KCC, Case No. KI 113/12, Resolution on Inadmissibility, 25 January 2013, para.32; KCC, Case No. KI 94/17, Resolution on Inadmissibility, 27 April 2018, paras 38-39; KCC, Case No. KI 226/19, Resolution on Inadmissibility, 24 September 2020, paras 47-49.

²⁶ 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’).

²⁷ KCC, Case No. KI 08/11, Resolution on Inadmissibility, 24 April 2012, para.48.

failing to avail themselves of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings.²⁸

18. 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.’²⁹

19. The Referral should therefore be dismissed as inadmissible on this basis.

b. The Referral is Manifestly Ill-Founded Because Constitution Article 33(1) and ECHR Article 7(1) Claims are Premature (Decision paras 1(a) & (b))

20. 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 and Article 7 of the Convention?’³⁰ The Decision also invited submissions on the admissibility of the Referral pursuant to, *inter alia*, Rule 14.³¹ 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.’

21. Krasniqi bases all of his arguments in the Referral on alleged violations of Constitution Article 33(1) and ECHR Article 7(1). However, at the current stage in the proceedings, Krasniqi may not claim to be a victim of a violation of either Constitution

²⁸ KCC, Case No. KI 08/11, Resolution on Inadmissibility, 24 April 2012, paras 46-47 (internal citations omitted); *see also* KCC, Case No. KI 113/12, Resolution on Inadmissibility, 25 January 2013, para.34.

²⁹ KCC, Case No. KI 113/12, Resolution on Inadmissibility, 25 January 2013, para.33.

³⁰ Decision, KSC-CC-2022-13/F00005, para.1(b).

³¹ Decision, KSC-CC-2022-13/F00005, para.1(a).

Article 33(1), or ECHR Article 7. Therefore, the Referral should be dismissed because it fails *prima facie* to allege the violation of a constitutional right.

22. 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.³² At this point, Krasniqi has not been held guilty by the Kosovo Specialist Chambers ('KSC') of any offense whatsoever, and so he cannot claim to be a victim of an ECHR Article 7(1) violation.

23. 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. Krasniqi'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.

24. 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.

³² Emphasis added.

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.³³

25. 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.'³⁴ Thus, prior to entry of a final judgment, an Article 7(1) claim is 'premature'.³⁵

26. 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]'.³⁶

27. 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.³⁷ In this regard, the KCC has found that Article 33 'means that no one can be found guilty of an offense'

³³ 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.').

³⁴ 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.

³⁵ 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.

³⁶ 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.

³⁷ 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.³⁸ As a result, Article 33(1) should also be read as becoming ripe on a finding of guilt.

28. Because Krasniqi alleges to be a victim of violations of rights that are not yet activated, the Referral fails *prima facie* to present a violation of a constitutional right. The Referral should therefore be dismissed as inadmissible pursuant to Rule 14(f).

c. Two of Krasniqi's Claims Fail, *Prima Facie*, to Indicate a Violation of a Constitutional Right (Decision paras 1(a) & (d))

29. The Decision invited submissions on whether Krasniqi's 'complaint about the charges against him based on the JCE basic and extended forms give rise to the appearance of a violation of Article 33(1) of the Constitution and Article 7 of the Convention.'³⁹ The Decision also invited submissions regarding Rule 14.⁴⁰ Rule 14(f) states that matters 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.'

30. Krasniqi's first issue – premised on mere disagreement with longstanding and well-established jurisprudence from a wide variety of courts and tribunals – fails to raise any appearance of incompatibility or violation. The status of JCE as a mode of liability in customary international law has been affirmed by every modern international (or internationalised) court with comparable governing laws to those of the KSC. The ICTY, ICTR, SCSL, and STL have each consistently concluded that JCE, in all of its forms, was a mode of liability in existence at the time of the crimes in question.⁴¹ All three chambers of the ECCC and the Co-Investigative Judges have

³⁸ KCC, Case No. KI 11/21, Resolution on Inadmissibility, 31 May 2021, para.75.

³⁹ Decision, KSC-CC-2022-13/F00005, para.1(d).

⁴⁰ Decision, KSC-CC-2022-13/F00005, para.1(a).

⁴¹ ICTR, Appeals Chamber, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A Judgement, 13 December 2004, para.468; ICTR, Trial Chamber, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Nzirorera, Karemera, Rwamakuba and

recognised the existence of JCE I and II in Customary international law.⁴² Moreover, JCE III specifically has been affirmed by the ICTY,⁴³ the ICTR,⁴⁴ the IRMCT,⁴⁵ the SCSL,⁴⁶ the STL,⁴⁷ and other international or internationalised tribunals.⁴⁸ In addition to the extensive sources outlined above, these courts and tribunals have identified and relied upon numerous other cases and materials in which further elements supportive of JCE III liability are to be found.⁴⁹ Indeed, the Supreme Court of Kosovo itself has upheld JCE as a mode of liability, holding that JCE (i) is firmly established in customary international law, (ii) exists in three forms, and (iii) has been illuminated in decisions of the ICTY.⁵⁰

Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004, paras 25, 38; ICTR, Appeals Chamber, *Prosecutor v. Rwamakuba*, ICTR-98-44-AR72.4 'Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide', 22 October 2004, para.14; Special Tribunal for Lebanon ('STL'), STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, ('STL Decision on Applicable Law'), para.236, fn.354; SCSL, Trial Chamber II, *Prosecutor v. Brima et al.*, SCSL-04-16-T 'Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98', 31 March 2006, paras 308-311.

⁴² ECCC, OCIJ, 002/19-09-2007-ECCC-OCIJ 'Decision on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise', 8 December 2009, para.23; ECCC, Trial Chamber, *Co-Prosecutors v. Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC Judgement, 26 July 2010, paras. 511-512; PTC Decision on JCE', para. 49; ECCC, Trial Chamber, 0002/19-09-2007/ECCC/TC 'Decision on the Applicability of Joint Criminal Enterprise', 12 September 2011, paras. 15, 22; ECCC, PTC, 002/19-09-2007-ECCC/OCIJ (PTC38) 'Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)', 20 May 2010, para.69; ECCC, Supreme Court Chamber, *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016, para.807.

⁴³ See e.g. *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement – Volume II, 29 November 2017, para.590; *Kvočka et al.* AJ, paras 81-83, 86.

⁴⁴ See e.g. ICTR, *Prosecutor v. Karemera and Ngirumpatse*, ICTR-98-44-A, Judgement, 29 September 2014, paras 623, 627, 629.

⁴⁵ See e.g. IRMICT, Appeals Chamber, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019 ('*Karadžić* AJ'), para.433.

⁴⁶ SCSL, Trial Chamber II, *Prosecutor v. Brima et al.*, SCSL-04-16-T 'Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98', 31 March 2006, paras 308-326 and *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, para.84.

⁴⁷ STL Decision on Applicable Law, paras 239-247.

⁴⁸ Extraordinary African Chambers, Trial Chamber, *Ministere Public v. Hissene Habré* Judgment, 30 May 2016, para.1885.

⁴⁹ For example, see JCE III sources cited in STL Decision on Applicable Law, fn.355.

⁵⁰ See e.g. *See e.g. Kosovo, Supreme Court of Kosovo, L.G. et al.*, Judgement, Case PLm. Kzz. 18/2016, 13 May 2016, paras 69-74 (concurring with first Supreme Court Decision in the same case, noted herein, and holding that JCE liability exists in three forms and may be applied, as done by lower courts, to the

31. Krasniqi's third claim – which asks the SCCC to assess whether the Court of Appeals Panel correctly determined the content of Article 16(1)(a) of the Law⁵¹ – is also manifestly ill-founded. In particular, it asks the SCCC to undertake inquiries that are beyond its proper role in the well-defined division of authority between the regular courts and the SCCC. The jurisprudence of the SCCC and KCC makes clear that the interpretation of the law is exclusively within the purview of the regular courts, except for rare exceptions not applicable here. 'The Court has repeatedly stated that, as a general rule, the allegations concerning the manner of administration of facts, [and] 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.'⁵²

32. Deviation from this rule is allowed only where an error is so egregious that it rises to the level of 'flagrantly and manifestly arbitrary'.⁵³ Under this standard, mere disagreement of the SCCC with the regular courts' conclusions regarding the

accused in cases of unlawful detention and mistreatment); Kosovo, Supreme Court, *L.G. et al.*, Judgement AP.-KZ. 89/2010, 26 January 2011, paras 114-115 (holding that JCE is firmly established in CIL and exists in three forms); Kosovo, Supreme Court, *E.K. et al.*, Judgement, 7 August 2014, Case No. PA II 3/2014, para.xlii (adopting the law on JCE set out by the lower court and holding that 'ICTY jurisprudence is a legitimate source of precedent for cases prosecuted within the Republic of Kosovo, and any other part of the Former Yugoslavia, and finds that it is entirely appropriate and justified to refer to jurisprudence of the ICTY in dealing with cases of War Crimes at the domestic level. In that respect the Court finds it appropriate to note that the responsibility of a person for war crimes and other internationally recognized crimes is based on individual criminal responsibility. However the individual criminal responsibility may take the form of both commission of a crime in person, and by participation in a group committing crimes. Joint criminal enterprise is one of the possible ways of perpetration.') referring to Kosovo, Court of Appeals, *E.K. et al.*, Judgement, 30 January 2014, Case No. PAKR 271/13, paras 36-40 (holding that 'this form of criminal liability [JCE] is applicable in the Kosovo jurisdiction for the criminal offence of War Crimes Against the Civilian Population. As referred to by the ICTY it is a form of criminal liability established in international criminal law' which may also be inferred from domestic law).

⁵¹ Referral, KSC-CC-2022-13/F00001, paras 70-75.

⁵² KCC, Case No. KI 146/20, Resolution on Inadmissibility, 25 June 2021, paras 37-39 (internal citations omitted); *see also* KCC, Case No. KI 144/18, Resolution on Inadmissibility, para.63; KCC, Case No. KI 08/19, Resolution on Inadmissibility, 5 January 2021, para.41.

⁵³ Public Redacted Version of Decision on the Referral of [REDACTED] Further to a Decision of the Single Judge, KSC-CC-2020-08/F00020, 20 April 2020, para.36.

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 apparent that the Court of Appeals' thoroughly reasoned and logical decision does not even begin to approach this standard.⁵⁴ Moreover, Krasniqi himself does not even allege in the Referral that any of the purported errors rise to this level.⁵⁵ Because Krasniqi 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.'⁵⁶

33. The SCCC has been clear that as a result of its limited role bounded by the terms of Article 49 of the Law, it is not its function to re-evaluate decisions of law or facts by the regular courts, unless such decisions 'are flagrantly and manifestly arbitrary, in a manner that gives rise in itself to a violation of the fundamental rights and freedoms guaranteed by the Constitution.'⁵⁷ More fully, the SCCC has explained:

⁵⁴ 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').

⁵⁵ See KCC, Case No. KI 144/20, Resolution on Inadmissibility, 5 January 2021, paras 41-42.

⁵⁶ KCC, Case No. KI 79/10, Resolution on Inadmissibility, 15 January 2013, paras 21-22; see also KCC, Case No. KI 114/17, Resolution on Inadmissibility, 18 April 2018, para.45; KCC, Case No. KI 89/12, Resolution on Inadmissibility, 6 February 2013, paras 28-30; KCC, Case No. KI 19/13, Resolution on Inadmissibility, 12 March 2013, para.52 ('the Constitutional Court considers that the facts of the case do not allow a compelling conclusion on that the grounds of appeal ... meet the test of the European Court. Therefore, there is no need to further consider the matter in the circumstances of the case.').

⁵⁷ Public Redacted Version of 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, Judgment, Court (Third Section), 17 October 2017, 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, 32786/10 and 34278/10, Judgment, Court (First Section), 12 May 2016, 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, para.52; KCC, Case No. KI 146/20, Resolution on Inadmissibility, 25 June 2021, para.41 (emphasis in original); KCC, Case No.

[T]he Chamber reiterates that, pursuant to Article 49(1) and (3) of the Law, the task of this Chamber is to assess whether the irregularities complained of by the Applicant violated its individual rights and freedoms guaranteed by the Constitution. It is not the Chamber's function to deal with errors of fact or law allegedly made in the course of criminal proceedings unless and in so far as such errors may have infringed the fundamental rights and freedoms protected by the Constitution.

It follows that it is not the Chamber's role to decide on whether the findings of the [regular courts] were correct in terms of fact or law. Otherwise, the Chamber would be acting as an appeal chamber, which would be to disregard the limits imposed on its jurisdiction pursuant to Articles 113 and 162(3) of the Constitution. The Chamber may exceptionally question the findings in question where they are flagrantly and manifestly arbitrary, in a manner that gives rise in itself to a violation of the fundamental rights and freedoms guaranteed by the Constitution.⁵⁸

34. This Court, in laying out these parameters, cited to the ECtHR case of *Sisojeva and Others v. Latvia*.⁵⁹ In *Sisojeva*, the applicants made a claim that a law had been incorrectly applied in their case, but the Grand Chamber reminded the applicants that 'the Court cannot question the assessment of the domestic authorities unless there is clear evidence of arbitrariness.'⁶⁰

35. The KCC has recognized that it is not a constitutional court's 'duty to deal with errors of facts or erroneous interpretation and erroneous applications of law allegedly committed by a regular court, unless and insofar such errors may violate the rights and freedoms protected by the Constitution and/or the ECHR.'⁶¹ The KCC and ECtHR

KI 06/17, Resolution on Inadmissibility, 18 December 2017, paras 39-41; cf. KCC, Case No. KI 154/17 and KI 05/18, Resolution on Inadmissibility, 13 August 2019, para.64.

⁵⁸ Public Redacted Version of 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 (internal citations omitted); see also sources cited therein; 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.18; KCC, Case No. KI 146/20, Resolution on Inadmissibility, 25 June 2021, paras 37-39 (internal citations omitted); KCC, Case No. KI 144/18, Resolution on Inadmissibility, para.63; KCC, Case No. KI 08/19, Resolution on Inadmissibility, 5 January 2021, para.41.

⁵⁹ Public Redacted Version of Decision on the Referral of [REDACTED] Further to a Decision of the Single Judge, KSC-CC-2020-08/F00020, 20 April 2020, fn.43.

⁶⁰ ECtHR, *Sisojeva and Others v. Latvia (striking out)* [GC], 60654/00, Judgment, Grand Chamber, 15 January 2007, para.89.

⁶¹ KCC, Case No. KI 144/20, Resolution on Inadmissibility, 5 January 2021, para.38.

have also stated explicitly that the principle 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.⁶²

36. As a result, 'the interpretation of the law are matters only for the regular courts, the assessments and conclusions of which in this regard are binding on the [constitutional] Court.'⁶³ The constitutional court 'may not itself assess the law which has led a regular court to adopt one decision rather than another,'⁶⁴ nor can 'abstract assessments ... be made as to why a regular court has decided in one way rather than in another.'⁶⁵ Respect for this division of functions between the regular courts on the one hand, and the SCCC on the other, is therefore no mere technicality, but a central feature of the judicial structure established by the Constitution and the Law, and a

⁶² ECtHR, *Korbely v. Hungary*, 9174/02, Judgment, Grand Chamber, 19 September 2008, para.72; *see also* ECtHR, *Waite and Kennedy v. Germany*, 26083/94, Judgment, Court, 18 February 1999, para.54; ECtHR, *Neulinger and Shuruk v. Switzerland*, 41615/07, Judgment, Grand Chamber, 6 July 2010, para.100; ECtHR, *Selahattin Demirtaş v. Turkey*, 14305/17, Judgment, Grand Chamber, 22 December 2020, para.249; KCC, Case No. KI 11/21, Resolution on Inadmissibility, 31 May 2021, para.81; KCC Case No. KI 72/18, Resolution on Inadmissibility, 14 December 2018, para.40 (it is the 'the role of regular courts is to interpret and apply the relevant rules of procedural and substantive law'); KCC, Case No. KI 85/12, Resolution on Inadmissibility, 22 January 2013, paras 27-28; KCC, Case No. KI 55/09, Judgment, 6 April 2011, para.21 ('It is not the task of the Constitutional Court to assess the legality and accurateness of decisions made by competent judicial institutions, unless there is clear evidence that such decisions have been rendered in an obviously unfair and inaccurate manner. '); ECtHR, *Perez v. France*, 47287/99, Judgment, Court, 12 February 2004, para.82 ('it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of national legislation').

⁶³ KCC, Case No. KI 144/18, Resolution on Inadmissibility, para.52; *see also* KCC, Case No. KI 96/17, Resolution on Inadmissibility, 30 April 2018, para.59.

⁶⁴ KCC, Case No. KI 06/17, Resolution on Inadmissibility, 18 December 2017, paras 37-38; *see also* KCC, Case No. KI 140/18, Resolution on Inadmissibility, 16 January 2020, para.71.

⁶⁵ KCC, Case No. KI 222/19, Resolution on Inadmissibility, 16 April 2020, para.32.

necessary corollary of the subsidiary nature of the constitutional court whereby it does not act as a further court of appeal.⁶⁶

37. The already settled nature of Krasniqi's first claim, and the patent incompatibility of the Referral's third claim with the functions of the SCCC, renders them both *prima facie* inadmissible.⁶⁷

IV. RELIEF REQUESTED

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



⁶⁶ See KCC, Case No. KI 28/19, Resolution on Inadmissibility, 3 January 2020, para.36 (the constitutional court 'may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law.');

KCC, Case No. KI 06/17, Resolution on Inadmissibility, 18 December 2017, paras 37-38; KCC, Case No. KI 140/18, Resolution on Inadmissibility, 16 January 2020, para.71; KCC, Case No. KI 97/13, Resolution on Inadmissibility, 20 December 2013, para.32; KCC, Case No. KI 114/17, Resolution on Inadmissibility, 18 April 2018, para.32.

⁶⁷ KCC, Case No. KI 144/20, Resolution on Inadmissibility, 5 January 2021, para.30; KCC, Case No. KI 79/10, Resolution on Inadmissibility, 15 January 2013, paras 21-22; KCC, Case No. KI 89/12, Resolution on Inadmissibility, 6 February 2013, para.30; KCC, Case No. KI 19/13, Resolution on Inadmissibility, 12 March 2013, para.52 ('the Constitutional Court considers that the facts of the case do not allow a compelling conclusion on that the grounds of appeal ... meet the test of the European Court. Therefore, there is no need to further consider the matter in the circumstances of the case.');

KCC, Case No. KI 96/17, Resolution on Inadmissibility, 30 April 2018, paras 60-62; KCC, Case No. KI 08/19, Resolution on Inadmissibility, 5 January 2021, para.46; ECtHR, *Gratzinger and Gratzingerova v. the Czech Republic*, 39794/98, Decision, Grand Chamber, 10 July 2002, paras 81-86; ECtHR, *Mentzen v. Latvia*, 71074/01, Decision, Court (Fourth Section), 7 December 2004, page 31 ('the Latvian authorities have not overstepped the margin of appreciation they are afforded in this sphere. It follows that the application must be rejected as manifestly ill-founded'); KCC, Case No. KI 154/17 and KI 05/18, Resolution on Inadmissibility, 13 August 2019, paras 76-77 (dismissing legal claims in a referral as 'manifestly ill-founded on constitutional basis'); KCC, Case No. KI 144/20, Resolution on Inadmissibility, 5 January 2021, para.42.

Jack Smith

Specialist Prosecutor

Tuesday, 29 March 2022

At The Hague, the Netherlands.