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:	Counsel for Kadri Veseli
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Veseli Defence Submissions to Decision on Further Submissions in Relation to Veseli Referral (KSC-CC-2022-14-F00005) with Public Annex 1

Applicant

Kadri Veseli

Specialist Prosecutor's Office

Jack Smith

I. INTRODUCTION

1. The Defence for Mr Kadri Veseli ("Defence") hereby presents its answers to the questions posed by the Specialist Chamber of the Constitutional Court ("Court" or "SCCC") on 15 March 2022[1] and its response to the SPO submissions of 29 March 2022.[2]

II. SUBMISSIONS

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?"*

2. Article 113 (7) of the Constitution and Article 49(3) of the Law authorise referrals to the SCCC by an individual where: there is an alleged violation of their rights or freedoms under the Constitution ("Justiciability Condition"); and where all remedies in relation to such a violation which are provided by law have been exhausted ("Exhaustion Condition"). The Exhaustion Condition is also expressed in Rule 20(1)(a).

3. Although the Court asks no specific question with respect to the Justiciability Condition, the SPO raises a technical point that the Applicant's Ground 1 should be dismissed as inadmissible on the basis that Article 19 is contained in Chapter I of the Constitution, concerning 'Basic Provisions', as opposed to Chapter II, concerning 'Fundamental Rights and Freedoms'.[3] The Defence responds that this is an unduly formalistic approach. The direct application of customary international law ("CIL") to Mr Veseli is incompatible with Article 19. Such incompatibility results in violations of

[1] F00005, Decision on Further Submissions, 15 March 2022.
[2] F00006, Prosecution Response to Decision on Further Submissions in Relation to Veseli Referral (KSC-CC-2022-14/F00005) with public annex 1, 29 March 2022 ("Response").
[3] Response, paras 49 *et seq.*

the individual rights protected under Articles 24, 33 and 55 of the Constitution (and corresponding international human rights law ("IHRL")). The complaints must be read as a whole. There is authority from the Kosovo Constitutional Court ("KCC") for this approach. In case KI 55/17,[4] it found a violation of Articles 24(1), 31(1) (in Chapter II) as well as 108(1) and (4) (in Chapter VII relating to the Justice System). Similarly, in case KI25/10,[5] the KCC found a violation of Articles 31 and 102 of the Constitution (the latter of which also falls in Chapter VII) and Article 6(1) ECHR. Accordingly, there is no reason to dismiss Ground 1 as inadmissible and the Justiciability Condition is satisfied, both with respect to Ground 1 and the other Grounds in the Referral.[6]

4. The Exhaustion Condition is satisfied for the reasons set out in response to the Court's Question C (paras 18 *et seq*). The constitutional violations matured on the date that Mr Veseli was charged, and Mr Veseli duly made submissions to the Pre-Trial Judge and Court of Appeals Panel. During the pendency of criminal proceedings, he is barred from appealing the same issues to the Supreme Court by the express terms of Articles 47 and 48 of the Law. He has therefore exhausted all available domestic remedies. The SPO's contention that he must wait until a finding of guilt before resubmitting the same challenges so as ultimately to be able to seize the Supreme Court is ill-founded in law. Furthermore, given what is at stake for Mr Veseli, the protracted nature of the proceedings and the fact that he remains in pre-trial detention, it is an inflexible and unduly formalistic approach which would result in substantial injustice to the accused.

5. Rules 14 and 20 set out certain additional admissibility criteria. The SPO raises issues as to the admissibility of the referral under Rule 14(f), submitting that, on a

[4] Constitutional Court of Kosovo, Judgment in Case KI55/17, 17 July 2017, p. 19. The Court found that the "the KJC has not complied with its Constitutional obligations to ensure the independence and impartiality of the judicial system, and to adopt proposals for appointments in the judicial system based on merits, as required by Article 108 (1) and (4) of the Constitution", para. 91.
[5] Constitutional Court of Kosovo, Judgment in Case KI25/10, 31 March 2011, p. 12.
[6] F00001, Constitutional Referral by Kadri Veseli Against "Decision on Appeals Against 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers'", 28 February 2022, ("Referral").

prima facie review, nothing in the Referral gives rise to the appearance of incompatibility with the Constitution or a violation of a constitutional right (the "Merits Condition"). For the reasons set out in response to the Court's Question D (*see* paras 29 *et seq.)* and the Referral, the Defence submits that the Merits Condition is clearly satisfied.

6. Further, the Court asks whether the Applicant, at the present stage in proceedings, can claim to be a victim of the alleged violations of Articles 33(1) of the Constitution, 7 of the Convention and 15 ICCPR ("Standing Condition"). As set out in response to the Court's Question B, there is no issue as to standing for the purposes of Article 33(1); Mr Veseli became a victim at the point he was charged. The SPO's response is ill-conceived and rests upon a cynical misreading of the plain text of Article 33(1).

7. Accordingly, the Defence submits that Mr Veseli has satisfied all of the relevant admissibility conditions and invites the SCCC to declare the Referral admissible in its entirety.

B. ***The Standing Condition – "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?"***

8. Article 33(1) of the Constitution provides that (emphasis added):

> No one shall be **charged or punished** for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.

9. Accordingly, in Kosovo, the constitutional protection against retroactive application of the criminal law is engaged at the point in time when an individual is charged. It is not contingent on conviction.

10. In determining when an individual is 'charged', the SCCC has adopted the approach set out in the jurisprudence of the ECtHR on Article 6, according to which:

> a criminal charge' exists from the moment that a person is officially notified by the competent authority of an allegation that he or she has committed a criminal offence, or from the point at which his or her situation has been substantially affected by actions taken by the authorities on foot of a suspicion against him or her.[7]

11. On 5 November 2020, Mr Veseli was served with an indictment containing charges based on offences and modes of liability under CIL which had no counterpart in the domestic law in force at the relevant time. Accordingly, the Defence submits that this is the date on which he was, for the purposes of Article 33(1), 'charged' and became a victim of a violation of the constitutional prohibition against retroactivity (and related constitutional violations). Since that date, he has suffered the public ignominy of standing accused of the gravest crimes known to mankind and subjected to pre-trial detention on the basis of these, wrongful and unconstitutional, charges. On any view, it is plain that he is a victim of the alleged violations.

12. Nevertheless, the SPO submits that Mr Veseli cannot yet claim to be a victim of a violation of the prohibition on retroactivity and that Referral Grounds 2, 4 and 5 are premature.[8] This submission rests on the proposition that the prohibition against retroactivity in Article 33(1) of the Constitution should be read down to conform with the corresponding prohibitions under articles 7(1) ECHR and 15 ICCPR. According to the plain wording of these provisions, the SPO says, an individual can only claim to be a victim of a violation of the prohibition on retroactivity upon a finding of guilt by the domestic courts.

13. The Defence responds that the Court must start with the plain wording of the relevant provision of the Constitution of Kosovo. Under Article 33(1), the prohibition on retroactivity is first triggered on the date that an individual is 'charged'. The

[7] KSC-CC-2019-05/F00012, Decision on the Referral of Mahir Hasani Concerning Prosecution Order of 20 December 2018, 20 February 2019, para. 30.
[8] Response, paras 18-26.

wording is entirely unambiguous and incapable of being strained to afford the meaning ascribed to it by the SPO.[9]

14. Where IHRL provides additional protection to an individual, the Court must give effect to this. However, a plain reading of Articles 7 ECHR and 15 ICCPR shows that they offer less protection than the Constitution of Kosovo as the prohibition against retroactivity under these instruments is not triggered until a finding of guilt. Put another way, Article 33(1) of the Constitution "gold-plates" the international prohibition on retroactivity and it is the Court's role to give effect to such additional protection. It would be perverse (and contrary to Article 55 of the Constitution, Articles 17 and 18 ECHR and Article 15 ICCPR) for the Court to endorse the SPO's approach and apply IHRL in such a way as to diminish an individual right protected under the Constitution.[10]

15. Case No. KI 08-11 is inapposite to the SPO's contention that the term 'charges' under Article 33 should be disregarded. That case concerned abuse of process,[11] the applicant was not even under investigation,[12] and the matter did not even rise to the minimum threshold to be considered a legal matter.[13] As with the other authorities cited by the SPO, the question of the prohibition against retroactivity being engaged upon the charging of the accused did not arise.

16. This is a complete answer to the SPO's submissions on the Standing Issue. Accordingly, it is not necessary for the Court to consider the SPO's arguments on the correct interpretation of Article 7(1) ECHR. However, the Defence notes that the SPO fails to acknowledge a line of authority, including recent authority from the Grand

[9] Response, para. 21.
[10] For the avoidance of doubt, it is the Defence's position that, once the prohibition on retroactivity is engaged under Article 33(1), an individual's rights thereunder must be interpreted in harmony with international human rights law and, where international human rights law affords a higher level of protection to an individual, effect must be given thereto.
[11] KCC, Case No. KI 08/11, Resolution on Inadmissibility, 24 April 2012, para. 56.
[12] KCC, Case No. KI 08/11, Resolution on Inadmissibility, 24 April 2012, para. 34.
[13] KCC, Case No. KI 08/11, Resolution on Inadmissibility, 24 April 2012, para. 55.

Chamber, in which the Court has adopted a wide interpretation of Article 7, noting that (emphasis added):

> The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention protection system […] It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary **prosecution**, conviction and punishment.[14]

17. The SPO's restrictive interpretation of the prohibition on retroactivity is inconsistent with this broad interpretation of the same prohibition by the ECtHR and incompatible with both the object and purpose of Article 7(1), as articulated by the ECtHR and the right to an effective remedy under Article 13. This is not so much rule of law, as it is rule by law, that is, an attempt to instrumentalise the Law to achieve ends which the constitution does not permit.

C. ***The Exhaustion Condition – "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?"***

18. The Defence recalls that the violations of Articles 19, 24 and 33(1) of the Constitution, Articles 7 and 14 ECHR and Articles 15 and 26 ICCPR must be read in conjunction. These violations crystallised when Mr Veseli was charged. The Defence duly ventilated its constitutional challenges before the Pre-Trial Judge and the Court of Appeals Panel, which rendered its decision, dismissing the challenges, on 23 December 2021.

[14] *Varvara v. Italy*, App. No. 17475/09, [GC], Judgment, 29 October 2013, para. 52. *See* also *Norman v. UK*, App. No. 41387/17, [GC], Judgment, 6 July 2021, para. 59; ECtHR, *Vasiliauskas v. Lithuania*, App. No. 35343/05, [GC], Judgment, 20 October 2015, para. 153; ECHR, *Del Rio Prada v. Spain*, App. No. 42750/09, [GC], Judgment, 21 October 2013, para. 77.

19. Mr Veseli is precluded from appealing the same issues to the Supreme Court by Article 48(6) of the Law, which limits the right of appeal "during criminal proceedings which have not been completed in final form" to final decisions ordering or extending detention on remand. It is also precluded from commencing Third Instance Appellate Proceedings under Article 47 as none of the relevant criteria apply. There is no other way for Mr Veseli to seize the Supreme Court with his constitutional challenges vis-à-vis the charges. Accordingly, it is the Defence's primary position that all domestic remedies with respect to the constitutionality of the charges have been exhausted.

20. The SPO contends that Mr Veseli must wait until a final determination of criminal liability before resubmitting his complaints and seizing the Supreme Court. Until such time, it contends that Mr Veseli has failed to exhaust the necessary domestic remedies and that a referral to the SCCC is inadmissible.[15] The Defence submits that this submission is wrong.

21. First, as set out at paras 18-20, Mr Veseli's challenge matured on the date that he was charged. Nothing in the Constitution, the Law or the Rules require that he wait until a final determination of his liability by the trial panel before ventilating these complaints. Should further confirmation that this is correct be required, the Defence notes that Article 35(2)(i) of the Law provides for the possibility that the SPO pursues an indictment "through all stages before the Specialist Chambers, including responding to any applications at the Specialist Chamber of the Constitutional Court". The provision clearly envisages constitutional challenges to the charges contained in an indictment.

22. Second, the Defence submits that the SCCC should take consideration of the ECtHR's approach to its rule on exhaustion, noting authority to the effect that, in order to ensure the effective protection of human rights (an objective common to both

[15] Response, paras 6-17.

courts), the equivalent rule: "must be applied with some degree of flexibility and without excessive formalism"; and that "it is neither absolute nor capable of being applied automatically".[16]

23. According to the SPO, Mr Veseli must wait for the conclusion of his trial and any appeal proceedings before his constitutional challenge matures. At the current rate of progress, this could entail waiting as much as a decade[17] before he has the opportunity to resubmit the complaints. Such complaints: (a) would likely be substantially the same, if not identical to the complaints which Mr Veseli has already submitted; and (b) raise purely legal issues which are capable of determination on a preliminary basis, without waiting for the completion of the trial.

24. As the SPO would have it, Mr Veseli would be required to await the end of trial and raise the matter before the Trial Panel – and, if unsuccessful, the Appeals Court Panel – before he can request protection of legality at the Supreme Court under Article 48. As the Appeals Court Panel has already ruled on the merits of his constitutional challenges, such a process would be wholly ineffective. Indeed, both the Trial Panel and Appeals Court Panel may determine that they are barred from determining the challenges.

25. Assuming, many years in the future, Mr Veseli is successful in his challenge, the consequence is likely to be a retrial on the basis of those laws and modes of participation which formed part of the applicable domestic law at the relevant time. This would entail many, further years of uncertainty, potentially further years of pre-conviction detention, not to mention many millions of Euros in further wasted costs.

26. To subject Mr Veseli to this, entirely unnecessary, ordeal would be the quintessence of inflexibility and excessive formalism. Furthermore, particularly in circumstances where Mr Veseli remains in pre-trial detention, it would be deeply

[16] ECtHR, *Kozacıoğlu v. Turkey*, App. No. 2334/03, [GC], Judgment, 19 February 2009, para. 40.
[17] 10th Status conference, 4 February 2022, Defence submissions at page 945, lines 11-14.

unjust. It is an approach to the Exhaustion Condition which the SCCC must not entertain.

27. The *Lacji* case that the SPO cites lends no support to the appropriateness of such approach. In *Lacji*, the SCCC determined that the referral was premature because the applicant could seek a remedy for his challenge before either the Pre-Trial Judge or the Trial Panel. However, in Mr Veseli's case, the regular courts (i.e. the Pre-Trial Judge and Court of Appeal) have already determined his challenge and, as set out above, no other effective remedy is available in relation to constitutional violations which crystallised when he was charged.

28. The SPO raises an additional non-exhaustion point in relation to Referral Ground 3 as it applies to discrimination *vis-à-vis* other Kosovar citizens, submitting that the Defence failed to make the point before the Pre-Trial Judge and raised the issue for the first time on appeal. Irrespective of whether this is correct, the Defence responds that this point is not responsive to the Court's question on non-exhaustion, nor any of its other specific questions. Accordingly, it is unsolicited and should be dismissed summarily.

D. *The Merits Condition - "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?"*

29. Question D raises issues on the merits of the Referral. For the purposes of admissibility, it is not necessary for Mr Veseli definitively to demonstrate either that: the Specialist Chambers may not apply CIL; or that there was a violation of Article 33(1) of the Constitution and Article 7 of the Convention. Rather, the threshold which it must surmount for the purposes of admissibility is that there is, on a *prima facie* review, an "appearance of an incompatibility with the Constitution or a violation of a constitutional right" (Rule 14(f)). The Defence understands this threshold to be

equivalent to the threshold for establishing that a complaint is not "manifestly ill-founded" under Rule 39(2) and Article 35(3) ECHR.

30. Mr Veseli has made detailed submissions on the applicability of CIL and the constitutional violations which flow from the charges against him in his jurisdictional challenges and the Referral. Given the page limit for this submission, the Defence does not reproduce these arguments in full but rather summarises its position and addresses certain points raised in the SPO Response. Like the SPO, it requests the opportunity to make further submissions, as necessary, at the appropriate time.

31. As to the first question, Mr Veseli responds that the Specialist Chambers may only apply CIL to prosecute conduct occurring in Kosovo during 1998 and 1999 insofar as there was a corresponding offence and mode of liability under the domestic law in force at the time. The analysis underpinning this response is set out, *inter alia*, at paras 14 to 30 of the Referral.

32. In short, the Defence submitted therein that the Constitution permits the direct application of a norm of international law only where it is derived from either one of the international human rights treaties specifically listed in Article 22 or a ratified international agreement which is self-applicable and does not require the promulgation of a law (Article 19). No other exception exists.

33. Clearly, crimes under CIL fall into neither category. Accordingly, the direct application of CIL as a basis to charge, prosecute, convict or punish an individual is not permitted by the Constitution. In light of this and given the primacy afforded to the Constitution under Article 16, any provision of the KSC Law which purports to give direct effect to CIL is rendered invalid.

34. As to article 19(2), it is a hierarchy of norms provision which provides a mechanism for resolving any conflict between a norm of domestic law and an applicable norm of international law, duly incorporated into domestic law. Contrary

to the SPO's assertion,[18] the reference to "legally binding norms of international law" in this provision does not somehow provide a mechanism for the direct application of norms of CIL at the KSC, circumventing the strict rules on direct application of international law. In any event, the operation of this mechanism is subject to the overriding requirement that the prevailing norm is compatible with guarantees under IHRL, including the international prohibition against retroactivity (Article 22).

35. To the second question, Mr Veseli responds that his complaints regarding the direct application of CIL clearly give rise to a violation of his constitutional rights under Article 33(1) and Articles 7 ECHR, or, at the very least (and as required for the purposes of this submission), on a *prima facie* review, to an appearance of such. The analysis underpinning this response is set out, *inter alia*, at paras 32-48 of the Referral.

36. In short, the Defence submits that Article 33(1) protects individuals from the retroactive application of the criminal law. It provides materially the same protection to individuals as the equivalent prohibition under Article 7 ECHR (save insofar as it expressly extends such protection to the pre-trial phase of criminal proceedings (*see* para. 14 above)). Accordingly, Article 33(1) should be considered in light of Article 7 ECHR and the relevant ECtHR jurisprudence and, where this regime affords greater protection to an individual, the Court should interpret Article 33(1) accordingly.

37. The ECtHR confirms the purpose of Article 7 is to protect the individual from arbitrary prosecution, conviction and punishment by the State.[19] To the extent that there is any ambiguity in the wording of Article 7, it should be resolved by interpreting the provision: (i) in light of such purpose; and (ii) in favour of the accused in accordance with the maxim *in dubio pro reo*. The SPO is wrong to contend that this is

[18] Response, para. 37.
[19] *See* authorities cited above at para. 16, footnote 14.

only a rule of evidence and none of the authorities cited by it at note 62 of the Response support such a proposition.[20]

38. It is common ground that a significant number of the charges contained in the indictment rest on norms of CIL which had no counterpart in the domestic law applicable in the Federal Republic of Yugoslavia ("FRY") at the relevant time. Therefore, *prima facie*, the prohibition on retroactivity is engaged.

39. Article 33(1) purports to place a limitation on the prohibition on retroactive application of the criminal law in relation to genocide, war crimes and crimes against humanity. The SPO relies on such limitation to argue that there is no violation of the prohibition on retroactivity. However, such limitation corresponds with Article 7(2) of the Convention;[21] a provision which, according to the settled jurisprudence of the ECtHR, is defunct and no longer provides a stand-alone exception to the prohibition against retroactivity.[22] Accordingly, the limitation under Article 33(1) also falls away.

40. In any case, a limitation to the prohibition against retroactive application: (i) must be in accordance with the law (Article 55(1)); (ii) must be strictly construed, in accordance with the object and purpose of the protection and applied by the State only insofar as necessary and proportionate (Article 55(4)); and (iii) must not deny the essence of the prohibition against retroactivity (Article 55(5)).

41. The approach of the State, acting through the KSC and SPO, is to apply CIL in the absence of domestic law in force at the time and in violation of a constitutional

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[20] *See* for example the inclusion of the principle in Article 22(2) of the ICC Rome Statute and the Concurring Opinion of Judge Christine Van den Wyngaert in ICC, *Prosecutor v. Mathieu Ngudjolo Chui*, Concurring Opinion of Judge Christine Van den Wyngaert, Judgment, ICC-01/04/02/12-4, 18 December 2012, para. 19.

[21] Kosovo, Court of Appeals, *Prosecutor v. J.D. et al.*, PAKR No.455/15, Judgment, 15 September 2016, page 48 (last paragraph); Kosovo, Court of Appeals, *Prosecutor v. X.K.*, Case No.648/16, Judgment, 22 June 2017, para. 2.1.15-2.1.16; Kosovo, Basic Court of Mitrovica, *Prosecutor v. A.D. et al.*, P.58/14, Judgment, 27 May 2015, paras 208-210.

[22] ECtHR *Maktouf and Damjanović v. Bosnia and Herzegovina*, App. nos 2312/08 and 34179/08, [GC], Judgment, 13 July 2013, para. 72.

prohibition to the detriment of the accused. Not only does it seek to do so with respect to the substantive offences, it also does so with respect to modes of participation, applying an expansive (and, the Defence submits, incorrect) interpretation of CIL. It wrongly fails to construe any limitation to the prohibition against retroactivity in accordance with the applicable, restrictive principles of interpretation. Indeed, it seems to interpret Article 7 as somehow providing it with a licence to circumvent constitutional protections and directly apply CIL to the detriment of the accused.

42. The failure to give effect to Mr Veseli's rights under Articles 33 and 7 ECHR is made more egregious by the fact that courts of two other successor States to the FRY have concluded that they are barred, by the same (or substantially the same) constitutional protection against retroactivity, from giving direct effect to CIL. The KSC has, however, refused to consider the substance of these decisions, wrongly dismissing them as irrelevant.

43. Moreover, Article 33(1) requires that a criminal offence must be established by law ("ligj" in Albanian). The word "ligj" has a specific meaning, referring to a legislative act of the assembly. As a matter of construction, this requirement would apply to acts which constitute crimes under domestic or international law, thus prohibiting a charge on the basis of unwritten CIL. Accordingly, in addition to the prohibition on retroactivity, Article 33(1) provides the accused with a right to protection from the direct application of CIL which the KSC fails to uphold.

44. Finally, even if an exception to the prohibition on retroactivity exists and can somehow be interpreted as to apply in the present case, this would still be limited to crimes established by domestic law, *i.e.* crimes against humanity or command responsibility charged pursuant to the 2003 Provisional Criminal Code or the 2012 Criminal Code.[23]

[23] Noting that war crimes and genocide were already criminalised at the time of the relevant events in 1998 and 1999.

45. The SPO raises a number of points on the merits which do not go to the questions posed by the Court. The Defence does not purport to address all of these points in the present submission. However, this should not be read as an admission or waiver and the Defence reserves the right to address them at an appropriate point in time. Nevertheless, the Defence responds to the following specific points.

46. First, as explained above at paras 12-14, and contrary to the SPO's contention,[24] it is not open to the Court to read down a constitutional protection to accord with a lower level of protection under the ECHR regime. Even if the ECtHR jurisprudence on Article 7 did permit the retroactive application of CIL (which it does not), it would not be open to the Court to use this to override a constitutional prohibition under Articles 19(1) and 33. In any event, in suggesting that the point is already settled in ECtHR jurisprudence, the SPO applies a significant and misleading gloss to the case law. The cases cited by the SPO all apply to the retroactive application of domestic legislation in cases where the proscribed conduct was already criminalised under international law.[25] However, in the present case, the Law did not create criminal provisions or incorporate CIL into domestic law; rather, properly construed, it purported to provide the KSC with jurisdiction to directly apply CIL.

47. Second, citing the jurisprudence of other international tribunals on the issue of retroactivity[26] does not assist the SPO on the prohibition against retroactivity. None of these tribunals were subject to the Constitution of Kosovo and the domestic principle of legality thereunder.

48. Third, in relation to the points raised in the SPO Response about discrimination and equality before the law, the Defence considers that these fall outside the scope of the specific questions on the merits posed by the Court (which are expressly limited to Article 33(1) / Article 7 and are therefore unsolicited. If the Defence is wrong, it

[24] Response, para. 31.
[25] *See*, Referral, footnote 13.
[26] Response, paras 32 -33.

notes that the SPO raises no new points and repeats the position set out in the Referral.[27]

III. CONCLUSION

49. For the foregoing reasons, the complaints in the Referral satisfy the necessary conditions in relation to: justiciability; exhaustion; standing; and merits. There is no legal justification to defer consideration of the challenges and, in any event, to do so would be unduly formalistic and unjust. Accordingly, the Defence requests that the SCCC declare the Referral admissible in its entirety.

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[27] Referral, paras. 49 *et seq.*