

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: Defence Counsel for Jakup Krasniqi

Date: 8 April 2022

Language: English

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

Classification: Public

Krasniqi Defence Further Submissions

in Relation to the Referral to the Constitutional Court Panel

on the Legality of Charging Joint Criminal Enterprise

Specialist Prosecutor

Jack Smith

Applicant

Jakup Krasniqi

I. INTRODUCTION

1. Mr. Jakup Krasniqi (“Applicant”) hereby files further submissions in relation to his Referral to the Constitutional Court Panel on the Legality of Charging Joint Criminal Enterprise¹ lodged with the Specialist Chamber of the Constitutional Court (“CC”) as invited by the Constitutional Court Panel in its Decision on Further Submissions.² The Applicant is represented by Ms. Venkateswari Alagendra and Mr. Aidan Ellis.

2. The Applicant submits that his Referral is admissible because: (i) the Constitution of the Republic of Kosovo (“Constitution”) and Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) direct the CC to decide on the jurisdictional challenges arising from the Referral before the start of the trial; (ii) deferring a decision on the Referral until the Applicant can file a complaint before the Trial Panel, Court of Appeals Panel (“Appeals Panel”) or the Supreme Court Panel or until after the final judgment would deny the right of the Applicant to a fair and expeditious trial; and (iii) the opportunity for the Applicant to submit his complaint before the Trial Panel and, subsequently, before the Appeals Panel and the Supreme Court Panel do not constitute a valid reason for dismissing the Referral as premature at this stage of the proceedings.

3. On 28 February 2022, the Applicant filed his Referral to the CC in which he argued, under Article 49(3) of the Law, Rule 20 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (“Rules”), and Articles 33(1) and 113(7) of the Constitution, that the Specialist Prosecutor’s Office (“SPO”) has violated

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

² KSC-CC-2022-13, F00005, Constitutional Court, *Decision on Further Submissions* (“Constitutional Court Decision”), 15 March 2022, public, pp. 4-5.

his individual rights guaranteed by the Constitution by charging him with the basic and extended forms of joint criminal enterprise (“JCE”).³

4. The Applicant incorporates by reference the relevant sections of the procedural background from the Referral.⁴

5. On 15 March 2022, the CC invited the SPO and the Applicant to file written submissions in relation to the Referral, addressing the following questions:

- a. Is the Referral admissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rules 14 and 20 of the Rules?
- b. May the Applicant, at the present stage of the criminal proceedings against him and absent conviction, claim to be a victim of the alleged violation of Article 33(1) of the Constitution and Article 7 of the Convention?
- c. Given that the criminal proceedings against the Applicant are still ongoing, is it still open to the Applicant to raise his complaint, under Article 33(1) of the Constitution and Article 7 of the Convention, as regards the JCE basic and extended forms, before the trial panel, and, subsequently, as the case may be, before the Court of Appeals panel, under Article 46 of the Law, and the Supreme Court panel, under Article 47 or Article 48(6)-(8) of the Law? Are these remedies to be exhausted for the purposes of Article 113(7) of the Constitution and Article 49(3) of the Law?
- d. Does the Applicant’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?⁵

6. On 30 March 2022, the Defence was notified of the SPO Further Submissions.⁶

³ KSC-BC-2020-06, F00455/RED/A01, Specialist Prosecutor, *Annex 1 to Public Redacted Version of ‘Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)’*, KSC-BC-2020-06/F00455, dated 3 September 2021 (“Indictment”), 8 September 2021, public, paras 32-52, 172.

⁴ Referral, paras 4-13.

⁵ Constitutional Court Decision, pp. 4-5.

⁶ KSC-CC-2022-13, F00006, Specialist Prosecutor, *Prosecution Response to Decision on Further Submissions in Relation to Krasniqi Referral (KSC-CC-2022-13/F00005)* (“SPO Further Submissions”), 30 March 2022, public, with Annex 1, public.

7. On 1 April 2022, the CC issued the Decision on the Time Limit for the Submissions by the Applicant granting the Applicant's request⁷ and extending the time limit for the Applicant to file written submissions to 8 April 2022.⁸

II. SUBMISSIONS

8. The Applicant has submitted, in the Referral, that he is a victim of a violation of the fundamental right *nullum crimen sine lege*, which is protected by Article 33(1) of the Constitution and Article 7(1) of the European Convention on Human Rights ("ECHR") because (i) the extended form of joint criminal enterprise ("JCE III") was not part of customary international law ("CIL") at the beginning of and during the indictment period; or (ii) JCE III was not foreseeable or accessible to Mr. Krasniqi during the indictment period; or (iii) JCE (alternatively JCE III) do not fall within Article 16(1)(a) of the Law.

1. QUESTIONS (A) AND (D)

9. The Applicant submits that he has partly addressed question (a) at paragraphs 14-19 of the Referral and, respectively, question (d), at paragraphs 20-75 of the Referral. The Applicant will expand his answers to these two questions in the submissions below.

10. With respect to the first issue raised in the Referral, namely that JCE III was not part of CIL during the indictment period, the SPO merely re-argues its position on the

⁷ KSC-CC-2022-13, F00007, Krasniqi Defence, *Krasniqi Defence Request for a Variation of the Time to Submit Written Submissions*, 31 March 2022, public, para. 9.

⁸ KSC-CC-2022-13, F00008, Constitutional Court, *Decision on the Time Limit for the Submissions by the Applicant*, 1 April 2022, public, p. 3.

merits,⁹ which it has articulated in its earlier submissions.¹⁰ The detailed argument in the Referral plainly raises an appearance of violation of Mr. Krasniqi's rights and hence the first issue is admissible.

11. In respect of to the third issue in the Referral, namely that JCE does not fall within Article 16(1)(a) of the Law, the decision of the CC of 20 April 2020,¹¹ on which the SPO repeatedly relies to argue that this issue is inadmissible because it does not rise to the "flagrantly and manifestly arbitrary" standard, is distinguishable from other decisions of the CC discussing the admissibility test. In that case, the CC observed that the Applicant merely re-stated its arguments in the Referral in the same manner as in its earlier application to the Single Judge for leave to appeal.¹² It was only in this context that the Court held that it may only 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.¹³

12. However, a considerable number of CC decisions do not require the Applicant to show that an error necessarily rises to the "flagrantly and manifestly arbitrary" level. The Court has consistently held that its function is not 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 and that pursuant to Article 49(1) and (3) of the Law, the task of this

⁹ SPO Further Submissions, para. 30.

¹⁰ KSC-BC-2020-06, IA009/F00019, Specialist Prosecutor, *Prosecution Response to Krasniqi Defence Appeal Against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers'*, 30 September 2021, public, paras 16, 25-62.

¹¹ KSC-CC-2020-08, F00020/RED, Constitutional Court, *Public Redacted Version of Decision on the Referral of [REDACTED] Further to a Decision of the Single Judge ("Decision on the Referral")*, 20 April 2020, public, cited in footnotes 53, 57-59 of the SPO Further Submissions.

¹² Decision on the Referral, para. 34.

¹³ *Ibid.*, paras 34, 36.

Chamber is to assess whether the irregularities complained of by the Applicant violated its individual rights and freedoms guaranteed by the Constitution.¹⁴

13. The Applicant maintains that the manner in which the Appeals Panel construed Article 16(1)(a) of the Law to include JCE or, alternatively, JCE III, amounts to an irregularity which violates the Applicant's rights under Article 33(1) of the Constitution and Article 7(1) of the ECHR. It is admissible because it goes beyond challenging the Appeals Panel's interpretation of the Law and instead challenges the violation of Mr. Krasniqi's rights resulting from that interpretation.

2. QUESTION (B)

14. As correctly observed by the SPO,¹⁵ the text of Article 33(1) of the Constitution, which safeguards the principle of legality and prohibits the retroactive effect of any criminal law, uses the term "charged or punished".¹⁶ The wording of this provision clearly shows that the different stages of the proceedings, namely the charging and punishment, are connected by the conjunction "or" and not "and", and therefore only need to exist in the alternative to render Article 33(1) directly applicable to the current pre-trial stage of the proceedings. Pursuant to the clear wording of Article 33(1), a person is a victim of a relevant violation as soon as they are charged with a retroactive offence. The statutory regime which safeguards the principle of legality at the Kosovo Specialist Chambers ("KSC") is thus stricter and accords more protection to the accused than the similar provisions of Article 7(1) of the ECHR.

¹⁴ KSC-CC-2019-07, F00013, Constitutional Court, *Decision on the Referral of Driton Lajci Concerning Interview Procedure by the Specialist Prosecutor's Office*, 13 January 2020, public, para. 18; KSC-CC-2019-05, F00012, Constitutional Court, *Decision on the Referral of Mahir Hasani Concerning Prosecution Order of 20 December 2018 ("Hasani Decision")*, 20 February 2019, public, para. 50. See also Kosovo, Constitutional Court, *Constitutional Review of the Decision No. 2407/2006 of the Supreme Court of Kosovo, dated 30 September 2009*, KI55/09, Judgment, 6 April 2011, para. 18.

¹⁵ SPO Further Submissions, para. 23.

¹⁶ See further the equivalent provision in Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR").

15. The express wording of Article 33(1) of the Constitution provides a complete answer to this issue. It is impermissible to rely on the different wording of Article 7(1) of the ECHR¹⁷ in order to dilute or weaken the protection of human rights guaranteed by the Constitution. Article 53 of the ECHR makes this point expressly by stating that nothing in the ECHR “shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party”.¹⁸ Article 33(1) of the Constitution expressly provides that *charging* a person with a retroactive offence is a violation of fundamental rights; consistent interpretation with the ECHR cannot be used as a tool to limit or derogate from the right clearly stated in Article 33(1).

16. In any event, a complete reading of the European Court of Human Rights (“ECtHR”) jurisprudence reveals that interpreting Article 33(1) consistent with this jurisprudence would not require the CC to adopt the narrow definition of the prohibition on retroactivity propounded by the SPO. Article 53 of the Constitution provides that, the prohibition on retroactivity under Article 33(1) “shall be interpreted consistent with the court decisions of the European Court of Human Rights”.¹⁹ The Applicant acknowledges that there is certain jurisprudence of the ECtHR where the term “held guilty of any criminal offence” in Article 7(1) of the ECHR renders this provision applicable to persons against whom the criminal proceedings have been concluded with a guilty verdict.²⁰

¹⁷ *Contra* SPO Further Submissions, paras 22-27.

¹⁸ A similar point is expressed in Article 5(2) of the ICCPR.

¹⁹ SPO Further Submissions, paras 23, 26-27.

²⁰ *See, for instance, ECtHR, Kononov v. Latvia*, no. 36376/04, *Judgment (Merits and Just Satisfaction) (“Kononov”)*, 17 May 2010; *Kokkinakis v. Greece*, no. 14307/88, *Judgment (Merits and Just Satisfaction)*, 25 May 1993.

17. However, it would be inconceivable that the protection system of the ECHR would merely limit the application of Article 7(1) to the post-conviction phase. The ECtHR has consistently emphasised that Article 7(1) requires a broader interpretation, namely that this provision 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,²¹ which clearly shows that, in interpreting and applying this provision, the ECtHR does not distinguish between pre- and post-conviction stages.²²

18. This jurisprudence reveals that, in order to effectively safeguard against arbitrary prosecution, conviction and punishment, the applicability of Article 7(1) of the ECHR is not limited to the post-conviction stage, but extends and applies to all stages, namely investigations, prosecution, conviction and punishment. The SPO correctly points to the Kosovo Constitutional Court's ("KCC's") practice of assessing Article 33(1) of the Constitution and Article 7(1) of the ECHR through the lens of the ECtHR jurisprudence. In the very decision of the KCC, which the SPO cites in the Further Submissions, it has been confirmed that Article 7(1) should be construed and applied to provide effective safeguards against arbitrary prosecution, conviction and punishment.²³ The SPO conveniently neglects to acknowledge the rest of this solid body of ECtHR jurisprudence, by suitably limiting its argument to the segment of

²¹ ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, *Judgment (Merits and Just Satisfaction)*, 20 October 2015, para. 153; *Del Río Prada v. Spain*, no. 42750/09, *Judgment (Merits and Just Satisfaction)*, 21 October 2013, para. 77; *S.W. v. the United Kingdom*, no. 20166/92, *Judgment (Merits and Just Satisfaction)*, 22 November 1995, para. 34; *Seychell v. Malta*, no. 43328/14, *Judgment (Merits and Just Satisfaction)*, 28 November 2018, para. 41; *Camilleri v. Malta*, no. 42931/10, *Judgment (Merits and Just Satisfaction)*, 27 May 2013, para. 34; *Kononov*, para. 185.

²² *Contra* SPO Further Submissions, paras 22-25.

²³ SPO Further Submissions, para. 27, referring to Kosovo, Constitutional Court, *Request for Constitutional Review of Judgment PML. No. 325/2020 of the Supreme Court of 16 December 2020*, KI11/21, Resolution on Inadmissibility, 31 May 2021, para. 78, citing ECtHR, *Korbely v. Hungary*, no. 9174/02, *Judgment (Merits and Just Satisfaction)*, 19 September 2008, para. 69.

Article 7(1) jurisprudence which merely states that this provision is only triggered by a finding of guilt.²⁴

19. Moreover, the CC itself – in its decision considering Mr. Mahir Hasani’s Referral – which raised the question of whether the guarantees provided in Article 30 of the Constitution and Article 6 of the ECHR during the investigative stage – has recalled that, according to ECtHR jurisprudence, the question of whether an applicant can claim to be a victim of an alleged violation of the ECHR is relevant at all stages of the proceedings.²⁵

20. An analogy can be drawn to the findings of the CC on the temporal scope of Article 6 of the ECHR in the same decision on the Referral of Mr. Mahir Hasani. In that decision, the CC has recalled the ECtHR jurisprudence that Article 6 of the ECHR may be relevant in pre-trial proceedings “*if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial [pre-trial] failure to comply with [...] provisions [of Article 6]*”.²⁶

21. The exception to the prohibition on retroactivity provided in Article 7(2) is, in accordance with the settled jurisprudence of the ECtHR, defunct²⁷ and merely provides a contextual clarification of the prohibition on retroactive application, so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of crimes committed during the war.²⁸

²⁴ SPO Further Submissions, paras 20-28.

²⁵ *Hasani* Decision, paras 28, 55, referring to ECtHR, *Tănase v. Moldova*, no. 7/08, *Judgment (Merits and Just Satisfaction)*, 27 April 2010, para. 105.

²⁶ *Hasani* Decision, para. 39, referring to ECtHR, *Salduz v. Turkey*, no. 36391/02, *Judgment (Merits and Just Satisfaction)*, 27 November 2008, para. 50 (emphasis added).

²⁷ ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina*, nos. 2312/08 and 34179/08, *Judgment (Merits and Just Satisfaction)*, 18 July 2013, para. 72.

²⁸ KSC-CC-2022-14, F00001, Veseli Defence, *Constitutional Referral by Kadri Veseli Against “Decision on Appeals Against ‘Decision on Motions Challenging the Jurisdiction of the Specialist Chambers’”*, 28 February 2022, public, paras 36(b), 46(d).

22. The Applicant therefore submits that the Referral is admissible as the Applicant is a victim of the alleged violation of Article 33(1) of the Constitution and Article 7(1) of the ECHR at the present stage of the criminal proceedings against him and absent conviction.

3. QUESTION (C)

23. The Specialist Chambers (“SC”) legal framework, including Article 113(7) of the Constitution and Article 49(3) of the Law, clearly stipulates that, in addition to two instances of appellate review, constitutional referrals are a legal remedy which provide the Applicant with an opportunity to challenge before the CC not only conviction but also other decisions by a SC Panel by alleging a violation by the SC of his individual rights and freedoms as guaranteed by the Constitution, which necessarily include any decision on the preliminary motions challenging the SC jurisdiction.

24. Article 33(1) of the Constitution and the analogue Article 7 of the ECHR safeguard the principle of legality which applies to all offences and punishments and prohibits the retroactive effect of any criminal law. It is beyond doubt that the protection of Article 33(1) extends to modes of responsibility as well as to offences. Article 33(1) is defined by reference to an “act which did not constitute a penal offense under law at the time” and the acts of the accused relate to both the modes of responsibility and the underlying offence.²⁹ It necessarily follows from Article 49(1) of the Law, which provides that the CC shall be the final authority for the interpretation of the Constitution as it relates to the subject matter jurisdiction of the SC, that the Referral is indeed admissible. The fact that the Referral directly and necessarily

²⁹ Referral, para. 22.

derives from and is based on the Applicant's preliminary motion challenging the SC jurisdiction equates to a duty for the CC to decide before the commencement of trial whether the SPO has violated his individual rights guaranteed by the Constitution by charging him with the basic and extended forms of JCE.

25. The Referral addresses the modes of responsibility pleaded in the Indictment by the SPO, confirmed by the Pre-Trial Judge and upheld in the Jurisdiction Decision and Jurisdiction Appeal Decision. The Applicant has exhausted all remedies provided by law, under Article 49(3) of Law and 113(7) of the Constitution, by having submitted his Referral before the CC after he has challenged the SC's jurisdiction over JCE I and JCE III in his preliminary motion and appealed the Jurisdiction Decision to the Appeals Panel, which has denied this appeal. The Law provides for no further appeals on the issue of jurisdiction.

26. Importantly, the Law accords a distinct status to jurisdictional challenges and expressly provides that jurisdictional issues must be resolved before trial. It is beyond doubt that the Referral concerns a jurisdictional challenge which must be decided before the commencement of trial. The combined reading of Articles 33(1)(b) and 40(1) of the Law puts the admissibility of the Referral and the Applicant's standing beyond doubt by providing that the President of the SC shall assign a Trial Panel as soon as any preliminary motions, including challenges to the form of the indictment and jurisdiction, have been decided and the case has been assessed by the Pre-Trial Judge as being ready for transmission to trial.

27. The Trial Panel in the *Mustafa* case has confirmed that a case file may only be transmitted to the Trial Panel once any final decision on preliminary motions has been taken.³⁰ The Trial Panel relevantly added with regard to preliminary motions

³⁰ KSC-BC-2020-05, F00155, Trial Panel I, *Decision Dismissing "Salih Mustafa's Preliminary Defence Motion to Oppose KSC Jurisdiction"* ("*Mustafa Decision*"), 15 July 2021, public, para. 7.

challenging the SC jurisdiction that the Law and the Rules establish a legal framework where issues related to the SC jurisdiction must be resolved, including at the appellate level, in principle, before the case is transmitted to the Panel, in order to ensure that the case is prepared properly for trial and such issues do not arise during the trial phase.³¹

28. The principle that jurisdictional challenges must be decided before or at the commencement of the trial is firmly entrenched in the legal texts and jurisprudence of other international courts and *ad hoc* tribunals, such as Article 19(4) of the Rome Statute and Rule 72(A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”).

29. The Pre-Trial Chamber in *Mbarushimana* and the Trial Chamber in *Ntaganda* have confirmed that, pursuant to Article 19(4) of the Rome Statute, a challenge to the Court’s jurisdiction shall, in the absence of exceptional circumstances, only be made once and made prior to or at the commencement of the trial.³² The Appeals Chamber in *Ntaganda* has observed that the combined reading of Articles 19(6) and 82(1)(a)³³ “underline the importance of questions of jurisdiction being settled as early as possible in the proceedings”.³⁴ The Appeals Chamber in *Tadić* has relevantly pointed out that “[s]uch a fundamental matter as the jurisdiction of the International Tribunal should

³¹ *Mustafa* Decision, para. 8.

³² ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-451, Pre-Trial Chamber I, *Decision on the “Defence Challenge to the Jurisdiction of the Court”*, 26 October 2011, para. 11; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1707, Trial Chamber VI, *Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9*, 4 January 2017, paras 16-19. See also ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Trial Chamber III, *Decision on the Admissibility and Abuse of Process Challenges*, 24 June 2010, paras 205; *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1213-tENG, Trial Chamber II, *Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)*, 16 June 2009, paras 29-50.

³³ Article 82(1)(a) of the Rome Statute provides that either party may appeal a decision with respect to jurisdiction or admissibility.

³⁴ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1225, Appeals Chamber, *Judgment on the Appeal of Mr Bosco Ntaganda Against the “Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9”*, 22 March 2016, para. 18.

not be kept for decision at the end of a potentially lengthy, emotional and expensive trial".³⁵

30. Returning to Articles 33(1)(b) and 40(1) of the Law, the combined reading of these provisions instructs the Judges of this Court in unequivocal terms to determine their competence to adjudicate a case at the outset of proceedings. The Court shall satisfy itself that it has jurisdiction in any case before it and the Court must be certain and satisfied that the jurisdictional parameters set out in the Law and Rules have been met.³⁶ It necessarily follows that the question of whether the Court has such jurisdiction cannot be deferred to the Trial Panel or later, but must be ruled upon definitively *ab initio*. Jurisdictional challenges, as those arising from the Referral, warrant an immediate resolution without delving into and prejudging the merits of the case. At the same time, this approach is entirely consistent with that principle; to defer the CC's ruling on jurisdiction until after the trial judgment and relevant appeals would expose the Court to time-consuming and expensive proceedings, and Mr. Krasniqi to years of litigation, in circumstances where the CC could ultimately determine that the KSC lacked jurisdiction from the beginning.

31. The wording of question (c) suggests that, given that the criminal proceedings against the Applicant are still ongoing, it is still open to the Applicant to raise his complaint, under Article 33(1) of the Constitution and Article 7 of the ECHR, as regards the JCE basic and extended forms, before the Trial Panel, and, subsequently, as the case may be, before the Appeals Panel, under Article 46 of the Law, and the Supreme Court Panel, under Article 47 of the Law.

³⁵ ICTY, *Prosecutor v. Tadić*, IT-94-1, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 6.

³⁶ See, by analogy, ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009, para. 23; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-1, Pre-Trial Chamber II, *Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 8 March 2011, para. 8.

32. The Applicant, however, considers that any opportunity open to him to submit his complaint under Article 33(1) of the Constitution and Article 7 of the ECHR before the Trial Panel, and, subsequently, before the Appeals Panel and the Supreme Court Panel are not a valid reason for dismissing the Referral as premature. If the CC were to dismiss the Referral as premature or on the grounds that it is not a proper jurisdictional challenge, potentially valid questions as to the Court's jurisdiction could be left unresolved until the end of trial or the appellate proceedings without any possibility for appellate intervention. In such circumstances, a Panel could erroneously continue to assume jurisdiction in relation to the JCE basic and extended forms and the underlying crimes, despite the fact that a proper jurisdictional challenge had been raised and not determined. It is vital that the CC conducts its appellate scrutiny in relation to the jurisdictional challenge arising from the Referral before the commencement of the trial and that this approach is consonant with the spirit of the Constitution, the Law and the Rules, as described above.

33. Furthermore, as noted in the Referral, the protection of Article 33(1) extends to jurisdictional matters, including modes of responsibility as well as to the underlying offences.³⁷ The ICTY and the ECtHR have both expressly accepted that the principle of legality applies to modes of responsibility in cases concerning command responsibility.³⁸ The Applicant submits that delaying a judicial determination on whether the SPO has violated the Applicant's fundamental right *nullum crimen sine lege*, until he has the opportunity to submit his complaint before the Trial Panel, the Appeals Panel or the Supreme Court Panel or until after a final verdict on the guilt or

³⁷ Referral, para. 22.

³⁸ ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Appeals Chamber, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, paras 33-34; *Kononov*, para. 211.

innocence of the Applicant, would equate to a denial of Mr. Krasniqi's right to a fair and expeditious trial without undue delay, and would not be in the interest of justice.

34. The SPO misconceives and overlooks the jurisdictional nature of the claims the Applicant raises in the Referral when it argues that the Applicant has to wait until he can file his complaint under Article 33(1) before the CC.³⁹ Following this logic, however, a fundamental matter related to the SC jurisdiction arising from the Referral will be kept for decision at the end of a potentially lengthy and resource-intensive trial.

35. Finally, contrary to the SPO's argument in relation to Article 48(6)-(8) of the Law,⁴⁰ the Applicant cannot, at this stage of the proceedings file a request for protection of legality from the Supreme Court because criminal proceedings have not been completed in final form and the Jurisdiction Appeal Decision is not a final decision "ordering or extending detention on remand". As stated above, the opportunity for the Applicant to submit his complaint under Article 33(1) of the Constitution and Article 7 of the ECHR before the Trial Panel and, subsequently, before the Appeals Panel and the Supreme Court Panel do not constitute a valid reason for dismissing the Referral as premature.

III. CONCLUSION

36. In light of the foregoing as well as paragraphs 14-19 of the Referral, the Applicant submits that the Referral is admissible because: (i) the Constitution and the Law direct the CC to decide on the jurisdictional challenges arising from the Referral before the commencement of the trial; (ii) deferring a decision on the Referral until the appellate proceedings before the Appeals Panel or the Supreme Court Panel or until after a final

³⁹ SPO Further Submissions, paras 15-18.

⁴⁰ *Ibid.*, paras 12-15.

verdict on the guilt or innocence of the Applicant would deny the Applicant's right to a fair and expeditious trial without undue delay, and such a deferral would not be in the interest of justice; and (iii) the opportunity for the Applicant to submit his complaint before the Trial Panel and, subsequently, before the Appeals Panel and the Supreme Court Panel do not constitute a valid reason for dismissing the Referral as premature.

37. The Applicant reiterates his request that the CC should conclude that: (i) JCE III was not part of CIL at the beginning of and during the indictment period; or (ii) JCE III was not foreseeable or accessible to Mr. Krasniqi during the indictment period; or (iii) JCE (alternatively JCE III) do not fall within Article 16(1)(a) of the Law; and order the SPO to amend the Indictment to remove these allegations.

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